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Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines

Stella Cernak

University of Michigan School of Law

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SEXUAL ASSAULT AND RAPE IN THE MILITARY:
THE INVISIBLE VICTIMS OF INTERNATIONAL
GENDER CRIMES AT THE FRONT LINES

*Stella Cernak**

ABSTRACT

In the past several years in particular, intra-military sexual assault and rape in the U.S. armed forces have been the focus of frequent media attention and intense congressional debate. Despite reforms, the rate of intra-military sexual crimes continues to remain high, as does soldiers' wariness to report instances of sexual violence to military commanders. These problems and others have invigorated the position taken by some that outside judicial review of intra-military sexual crimes is necessary to provide justice to victims and lower the rate of intra-military sexual assault and rape. This Note argues that one of the primary contributors to intra-military sexual assault and rape is the gendered nature of the military itself. Given the nature of these acts, intra-military sexual assault and rape can be properly qualified as "gender crimes." This Note also points out that this problem is not unique to the United States, as other militaries around the world struggle with intra-military sexual violence. Due to this widespread occurrence and international human rights laws prohibiting rape and gender-based violence more generally, this Note argues that intra-military sexual assault and rape should be viewed as international gender crimes in violation of international customary law. It is theorized that recognizing intra-military sexual assault and rape in this manner can bring greater attention to these crimes and help push for independent judicial review of intra-military sexual crimes on the domestic level worldwide.

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INTRODUCTION

Over the course of the past two decades, rape and sexual assault¹ within the U.S. armed forces have gained increasing recognition as serious concerns warranting the attention of military officials, legislators, and the American public. Some have even referred to the problem as the military's sexual assault "epidemic."² In the past 10 years, the military has taken steps to tackle this problem through measures such as greater transparency in reporting and by providing better training on sexual assault prevention to officers and soldiers.³

Yet reports of pervasive military sexual violence continue. In 2013, a total of 2,870 men and women filed reports of service member on service member incidents of sexual assault or rape in the U.S. military.⁴ These reports represent only approximately 10 percent of actual incidents of sexual

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1. Unless explicitly stated, this Note uses the term "sexual assault" to refer to both the acts of sexual assault and rape.
 2. See, e.g., Amy Goodman & Denis Moynihan, *Addressing the Epidemic of Military Sexual Assault*, DEMOCRACY NOW (May 9, 2013), http://www.democracynow.org/blog/2013/5/9/addressing_the_epidemic_of_military_sexual_assault; Molly O'Toole, *Military Sexual Assault Epidemic Continues to Claim Victims as Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html.
 3. See DEP'T OF DEF., *Mission & History*, SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, <http://www.sapr.mil/index.php/about/mission-and-history> (last visited Mar. 26, 2015) [hereinafter SAPRO, *Mission & History*] (detailing initiative for greater transparency regarding the military's sexual assault policy and statistics taken in 2004).
 4. See 2013 DEP'T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN THE MILITARY 1, 122, 125 [hereinafter DEP'T OF DEF.], available at http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf (unrestricted and restricted reports). In 2013, 2,310 unrestricted reports of service member on service member sexual assault were filed. *Id.* at 122. There were 560 restricted reports of service member on service member sexual assault that year. *Id.* at 125. All forms of sexual assault that fit standard modern definitions of the term and rape are both included in this Department of Defense report. Rape, however, is defined as "penetrative" sex in the report. *Id.* at 46. Sodomy was also included as one of the acts of sexual misconduct reported in the survey and is included in the statistics addressed in this Note. *Id.* Approximately 24 percent of overall sexual crimes, including crimes perpetrated by unknown offenders or known offenders who were not in the military, were qualified as "rape." See *id.* at 74.

violence that occur within the military.⁵ For the crimes that are reported, the decision whether to pursue a sexual assault accusation has historically been left largely to the discretion of a suspected perpetrator's commanding officer.⁶

If the available evidence substantiates a finding of sexual assault, a commanding officer may bring a military suspect before a military tribunal; impose a less severe "non-judicial" punishment, adverse administrative action or administrative discharge.⁷ Congressional reforms to the Uniform Code of Military Justice (UCMJ) passed in 2014 and 2015 have imposed more stringent disciplinary minimums and oversight requirements for disposition of military sexual assault cases.⁸ Still, many are concerned that reform within the military may not be enough without complete independent review, bringing sexual assault cases outside of the military itself.⁹

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5. Even though the Department of Defense 2013 report claims that the percentage of crimes reported is on par with the civilian population, this appears unlikely according to the numbers alone. *Compare id.* at 64 ("Civilian reporting behavior is mirrored in the U.S. Armed Forces. . . . [T]he Department estimates that fewer than 20 percent of military sexual assault victims report the matter to a military authority."), *with id.* at 71 (showing that, in the year 2012, survey results suggested that nearly 26,000 members of the U.S. military experienced unwanted sexual contact, while only 2,828 service members actually reported such crimes, meaning that 10 percent of victims reported their crimes). As "sexual contact" encompasses a broader category of sexual misconduct than sexual assault, it is possible that reporting rates may differ slightly for sexual assault in particular. Regardless, it is likely that the military experiences a lower reporting rate for sexual incidents than the civilian population as there are special factors at play in the military that deter victims from reporting. *Cf.* COMM'N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 15–16, 28–29 (2013), http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf (discussing "mixed messages" in military leadership concerning rape, high concentration of males in supervisory positions, confidentiality concerns, fear of negative consequences, lack of confidence in military justice system, and fear of retaliation as deterrents to reporting).
 6. *See* COMM'N ON CIVIL RIGHTS, *supra* note 5, at 64–66.
 7. *See* DEP'T OF DEF., *supra* note 4, at 78.
 8. *See* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. §§ 531–38 (2014) (enacted); National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. §§ 1701–53 (2013) (enacted). These statutes are referred to in this Note as NDAA FY 2015 and NDAA FY 2014, respectively. The 2013 Department of Defense statistics and much of the scholarship on U.S. inter-military sexual assault were compiled before these reforms passed. As such, it is not clear what effect these reforms will have on intra-military sexual assault in the U.S.
 9. *See, e.g.*, Helen Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0 (echoing sentiment among some members of Congress and advocacy groups that independent review of military

Efforts to bring intra-military sexual assault cases outside of the military itself have largely failed. Constitutional separation of powers principles articulated in the 1950 U.S. Supreme Court case *Feres v. United States*¹⁰ prevent intra-military sexual assault victims from bringing tort claims against commanding officers for inadequate handling of their cases and sexual assault in the military more generally.¹¹ Meanwhile, congressional efforts in 2013 to provide independent oversight for military sexual assault cases failed to garner enough support in Congress to pass.¹²

Accordingly, intra-military sexual assault victims have begun to look outside of the U.S. for relief. In March 2014, victims of military sexual misconduct requested that the Inter-American Commission on Human Rights investigate the practices of the U.S. government regarding the handling of sexual misconduct cases.¹³ As in the U.S., intra-military sexual assault victims in several countries around the world have increasingly grown frustrated with their respective governments' inability to adequately address sexual crimes committed by their own soldiers.¹⁴ Efforts taken by victims of intra-military sexual assault in the U.S. and the U.K.,¹⁵ and struggles with

sexual assault cases is necessary); *see also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 66–68 (discussing the flaws of the U.S. military's disciplinary procedures).

10. *See Feres v. United States*, 340 U.S. 135, 144 (1950).
11. *See, e.g., Cioca v. Rumsfeld*, 720 F.3d 505, 512 (4th Cir. 2013) (rejecting military sexual misconduct victims' tort claims against former secretaries of defense regarding military sexual assault policy as these claims would involve judicial questioning of military policy); *Klay v. Panetta*, 758 F.3d 369, 376–77 (D.C. Cir. 2014); *see also* Ann-Marie Woods, *A More Searching Judicial Inquiry: The Justiciability of Intra-Military Sexual Assault Claims*, 5 B.C. L. REV. 1329 (2014) (discussing *Feres*' effect on military sexual assault victims' ability to bring tort claims in civilian courts). For further discussion, *see infra* Part III, Section B.
12. *See* Military Justice Improvement Act, S. 1752, 113th Cong. (2013). For a discussion of the bill's filibuster, *see* Cooper, *supra* note 9.
13. *See* Int'l Human Rights Clinic, *Petition Before the Inter-Am. Comm'n H.R.*, CORNELL U. L. SCH. (Mar. 2014), <http://www.lawschool.cornell.edu/academics/clinical-program/int-human-rights/upload/IACHR-US-Military-Submission-FINAL.pdf>.
14. *See, e.g.,* Emily L. Hauser, *Opening Up About Sexual Assault in Israel*, DAILY BEAST (June 20, 2013), <http://www.thedailybeast.com/articles/2013/06/20/opening-up-about-sexual-assault-in-israel.html>; John Lichfield, *France Battles Sexual Abuse in the Military*, INDEPENDENT (Apr. 20, 2014), www.independent.co.uk/news/world/europe/france-battles-sexual-abuse-in-the-military-9271383.html (pointing to internal process in France); Sarah Rainey, *Military Rape is Like Being Abused by Your Family*, DAILY TELEGRAPH (Feb. 7, 2014), www.telegraph.co.uk/news/uknews/defence/10624398/Military-rape-is-like-being-abused-by-your-family.html (detailing intra-military sexual assault problem in the U.K. and one victim's plan to bring her case before the European Court of Human Rights).
15. Rainey, *supra* note 14.

the issue in several other militaries, exemplify intra-military assault's importance as an *international* issue.¹⁶

This Note argues that intra-military sexual assault is a widespread gender-based human rights issue of international importance. As such, this Note suggests that customary international law may provide intra-military sexual assault victims with protection from wrongdoings committed against them. By strengthening the prohibition against intra-military sexual assault through the use of international human rights bodies, intra-military sexual assault victims may be able to effect policy changes on a domestic level in their respective countries. Hopefully, this change will take the form of recognition equal to that received by civilian sexual assault victims, allowing intra-military sexual assault victims to bring perpetrators before an independent, civilian court.

Part I of this Note presents intra-military sexual assault as a serious gender-based human rights issue in the United States and other countries around the world. Part II provides background information on the current international legal climate regarding military sexual crimes. Despite near-universal recognition of sexual assault as a violation of international law, this Part shows that the international legal system itself cannot adequately address intra-military sexual crimes as it currently stands.

Part III describes the U.S.'s handling of intra-military sexual assault and why U.S. military tribunals and domestic courts are currently inadequate at handling these offenses. Finally, Part IV presents intra-military sexual assault as conduct prohibited by international customary law, thus requiring greater government action. To advance intra-military sexual assault's status under customary international law, intra-military sexual assault victims can bring claims before international human rights bodies. Although international bodies are unable to effectuate significant changes on their own, their recognition of the problem of intra-military sexual assault can potentially lead to reforms on a domestic level.

16. See Timothy K. Kuhner, Note, *The Status of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95, 97–98 (2004):

The existence of an international crime presupposes that the criminalized act affects more than one nation . . . Under ordinary circumstances, a single murder is not an international crime, but widespread and systematic murder is an international crime. Concern for victims of international crimes transcends the same concern on the domestic level in terms of its societal relevance.

THE ADVOCATES FOR HUMAN RIGHTS, *International Prevalence of Sexual Assault in the Military*, STOP VIOLENCE AGAINST WOMEN, http://www.stopvaw.org/international_prevalence_of_sexual_assault_in_the_military (last updated Aug. 2013).

I. INTRA-MILITARY SEXUAL ASSAULT AND RAPE CONSTITUTE GENDER-BASED CRIMES OF INTERNATIONAL PROPORTIONS

In the U.S. alone, intra-military sexual crimes affect thousands of soldiers, both male and female, each year.¹⁷ Admittedly, data regarding the occurrence of these crimes in other countries is sparse. However, anecdotal reports of intra-military sexual assault and militaries' failures in dealing with this problem have become commonplace. Despite its prevalence as an international issue, intra-military sexual assault has historically been treated by the international community as one of domestic concern, to be taken care of by states themselves. As is the case in the U.S., intra-military sexual assault cases in other countries have traditionally been reviewed only by the military itself, rather than by civilian courts or the civilian criminal justice system.¹⁸ This use of military tribunals, particularly in the U.S. as discussed in Part III, *infra*, has largely been inadequate to address the needs of victims of intra-military sexual crimes.¹⁹

17. See DEP'T OF DEF., *supra* note 4 (demonstrating number of *reported* sexual crimes and estimated number of actual crimes that took place).

18. See, e.g., Sandra Laville, *UK Military Allowed to Investigate Sexual Assaults Without Involving Police*, GUARDIAN, Mar. 7, 2014, <http://www.theguardian.com/uk-news/2014/mar/07/uk-military-sexual-assaults-cases-police>. However, some countries have begun allowing military victims of sexual abuse to bring their complaints before independent tribunals. See *No Hope of Justice*, N.Y. DAILY NEWS (Mar. 17, 2014), <http://www.nydailynews.com/opinion/no-hope-justice-article-1.1722347> (pointing to decisions of Canada, Israel, and Germany to remove sexual crime cases from the military chain of command); see also Jackie Speier, *Victims of Military Rape Deserve Justice*, CNN (Feb. 8, 2012), <http://www.cnn.com/2012/02/07/opinion/speier-military-rape/> (describing how Canada, Australia, and the United Kingdom have made it a priority to eliminate the possibility that the military's chain of command structure stifles the potential for prosecution).

19. First, there are flaws regarding the disciplinary process, particularly commander discretion. See COMM'N ON CIVIL RIGHTS, *supra* note 5, at 66–68 (discussing concerns with the amount of discretion inherent in the system). Admittedly, Congress' reforms enacted in 2013 and 2014 do remove some discretion from officers in the court martial process and place stricter sentencing guidelines in the UCMJ. See Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. §§ 531, 533 (2014) (enacted); National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. §§ 1701–53 (2013) (enacted); David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, U.S. ARMY (Jan. 7, 2015), http://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual_assault/ [hereinafter Vergun, *Legislation Changes UCMJ*] (discussing changes made by the NDAA FY 2015); David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, DEP'T OF DEF. (Jan. 8, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=121444> [hereinafter Vergun, *New Law Brings Changes*] (discussing the ways that the NDAA FY 2014 changed procedures). Keeping intra-military sexual assault cases within the military is still problematic due to opportunities for mishandling given the fact that officers

A. Rape and Sexual Assault Take Place on a Large Scale Within the U.S. Military and Other Militaries Worldwide

Given the vast number of sexual assaults that go unreported in the U.S. military, the actual number of intra-military sexual crimes that took place in 2013 was probably close to 25,000.²⁰ This number is disconcerting and indicates a higher risk of sexual assault for members of the military than members of the U.S. civilian population.²¹ Also notable is the fact that ap-

still play a role in disposition of cases and are not required to bring offenders before a court. *See, e.g.*, H.R. COMM. ON ARMED SERVS., 113TH CONG., LEGISLATIVE REPORT ON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014, 717 (Comm. Print 2013) (demonstrating that officers *should* bring sexual assault cases before court-martial but are not required to do so). Also, officers may still choose not to implement a sentence imposed by court martial, although to a more limited extent than was previously the case. *See* H.R. 3304 at 284–85 (“Elimination of Unlimited Command Prerogative and Discretion; Imposition of Additional Limitations”). Even without direct commander control over disposition of cases, issues of bias in dealing with sexual assault cases can come into play if intra-military sexual assault cases are handled by the military. *See* LINDSAY ROSENTHAL & LAWRENCE KORB, CTR. FOR AM. PROGRESS, TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY’S SEXUAL ASSAULT PROBLEM 21 (2013) (exhorting the military to ensure complete independence of all military persons who review sexual assault cases). Also, victims of sexual assault in the military still perceive and experience roadblocks that deter them from reporting crimes. *See id.* at 14, fig. 4; Jane C. Timm, *Report Sexual Assault in the Military? Expect Retaliation*, MSNBC (Dec. 4, 2014), <http://www.msnbc.com/msnbc/pentagon-report-sexual-assault-military-expect-retaliation>. For further discussion of these issues, see generally *Will Military Sexual Assault Survivors Find Justice?*, NAT’L ORG. FOR WOMEN (Mar. 19, 2014), <http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory/>.

20. *See* DEP’T OF DEF., *supra* note 4.

21. In 2011, approximately 1.4 million active-duty and 856,000 non-active soldiers served in the U.S. military. DEP’T OF DEF., *2011 Demographics* i, vii (updated Nov. 2012) available at http://www.militaryonesource.mil/12038/MOS/Reports/2011_Demographics_Report.pdf. From October 2011 through September 2012 (fiscal year 2012), the Department of Defense estimates that there were approximately 26,000 unreported and around 2,800 reported sexual crimes, some of which involved non-military perpetrators. *See* DEP’T OF DEF., *supra* note 4 at 71. In the general U.S. population of 2011, less than 1 out of every 1,000 persons, or 244,000 people, were victim to a sexual assault or rape. BUREAU OF LABOR STATISTICS, DEP’T OF JUST., NCJ 239437, CRIMINAL VICTIMIZATION, 2011 2–3, 9 (2012), available at <http://www.bjs.gov/content/pub/pdf/cv11.pdf>. The population was at approximately 310 million in 2011. Robert Schlesinger, *U.S. Population, 2011: 310 Million and Growing*, U.S. NEWS (Dec. 30, 2010, 2:53 PM), <http://www.usnews.com/opinion/blogs/robert-schlesinger/2010/12/30/us-population-2011-310-million-and-growing>; see also Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 662–65 (1996) (showing that “forcible” rapes occurred more often in the U.S. military population than in the civilian population during wartime, and that this rate diminished less in the military than the rate of other crimes when compared to civilian crime rates during peacetime). *But see*

proximately 85 percent of victims of reported intra-military sexual crimes in 2013 were women, while the percentage of reported male victims was approximately 15 percent.²² This disproportionate distribution is worth noting because as of 2011, women only made up approximately 14.5 percent of active duty U.S. armed forces.²³ However, the gap between the number of intra-military sexual assaults that males versus females report may also be affected by differences in reporting between the genders.²⁴

The effect that intra-military sexual crimes have on victims and the military as a whole is enormous in terms of financial and non-financial costs. Sexual crimes are among the most expensive non-fatal crimes the armed forces incur each year, and they have a serious impact on the proper functioning of the military.²⁵ As for the victims of sexual violence, the consequences are even graver.

Military victims of rape and sexual assault are often forced to live and work alongside their attackers. The severe distress a victim experiences when

Rowan Scarborough, *Doubts on Military's Sex Assault Stats as Numbers Far Exceed Those for the U.S.*, WASH. TIMES (Apr. 6, 2014), www.washingtontimes.com/news/2014/apr/6/doubts-on-militarys-sex-assault-stats-as-numbers-f/#ixzz3AD8Rp5ti (reporting on critical responses to the Department of Defense's findings and methodologies).

22. See DEP'T OF DEF., *supra* note 4, at 122, 125 (unrestricted and restricted reports).
23. *By the Numbers: Women in the U.S. Military*, CNN (Jan. 24, 2013 5:27 PM), <http://www.cnn.com/2013/01/24/us/military-women-glance/>.
24. See, e.g., Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253, 255–56 (2007) (discussing underreporting by men due to cultural stigma). It does not appear, however, that men in the military are less likely than women to report their crimes due to fear of lack of confidentiality. See COMM'N ON CIVIL RIGHTS, *supra* note 5, at 28 (“60 percent of women and 36 percent of men who experienced unwanted sexual contact and did not report . . . stated they [did so] because they believed the report would not be kept confidential.”).
25. See Lindsay Hoyle, *Command Responsibility—A Legal Obligation to Deter Sexual Violence in the Military*, 37 B.C. INT'L & COMP. L. REV. 353, 354 (2014); see also Christine Hansen & Kate B. Summers, *A Considerable Sacrifice: The Costs of Sexual Violence in the U.S. Armed Forces*, 1 YALE MANIFESTA, no. 1, 2005, at 38, 42–43 (detailing health effects and other ramifications of intra-military sexual assault); Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98–109 (2010) (rape's cost to society); Rosenthal, *supra* note 19, at 10 (“Our profession is built on a bedrock of trust—the trust must inherently exist among soldiers . . . and their leaders to accomplish their mission Recent incidents of sexual assault and sexual harassment demonstrate that we have violated that trust.”) (quoting Gen. Ray Odierno before the Senate Armed Services Committee in June 2013).

she²⁶ has to face her attacker at work every day is compounded in the military. For a soldier, the level of trust and cohesion among those who serve together puts coworkers on a level akin to family.²⁷ It is not surprising therefore, that victims of intra-military rape and sexual assault are likely to suffer severe psychological trauma such as post-traumatic stress disorder (PTSD), severe depression, or suicidal thoughts.²⁸ Another effect of intra-military sexual crimes is that female victims who are stationed abroad often do not have adequate access to abortions if they become pregnant as a result of rape.²⁹

Intra-military rape and sexual assault are not unique to the United States.³⁰ This is unsurprising, as the factors that compound the U.S.'s intra-military sexual assault problem are present in other militaries around the world. First, approximately 23 countries currently allow women to serve as soldiers in their national militaries.³¹ As discussed *infra*, the presence of women in the military has been linked to a greater prevalence of gender discrimination in the armed forces and intra-military sexual assault. Research also suggests that traditional attitudes about gender that help drive such offenses in the U.S. military are shared by other countries.³² These attitudes have also been shown to discourage reporting of sexual crimes and have an effect on how sexual crimes are handled.³³

26. Female-specific and male-specific pronouns are used interchangeably throughout this Note.

27. Morris, *supra* note 21, at 693 (“[C]ohesion in military units is fostered by the cementing of affective ties within the group, by separation of members from outside emotional ties, by the presence of membership requirements and initiation ties, and by the presence of an ideology or cause to which the group is committed.”).

28. ROSENTHAL, *supra* note 19, at 9–10.

29. In the U.S., the military currently does not pay for a female soldier’s abortion unless she can prove she was raped. Meteor Blades, *Pregnant From a Rape? That’s Double Tough Luck if You’re a Servicewoman Seeking an Abortion*, DAILY KOS (June 13, 2012, 10:55 AM), <http://www.dailykos.com/story/2012/06/13/1099668/-Pregnant-from-a-rape-That-s-double-tough-luck-if-you-re-a-servicewoman-seeking-an-abortion#>.

Even if a soldier could afford such services, she may be stationed in a country that lacks the appropriate facilities. *Id.*

30. See THE ADVOCATES FOR HUMAN RIGHTS, *supra* note 16. Admittedly, hard data on the frequency of sexual assault in other countries is sparse. However, there are anecdotal reports that clearly signify the existence of such a problem in other countries. See, e.g., Hauser, *supra* note 14; Lichfield, *supra* note 14; Rainey, *supra* note 14.

31. *Women in the Military*, NEW WORLD ENCYCLOPEDIA, <http://newworldencyclopedia.org/> (last visited Mar. 26, 2015).

32. Discussed in further detail in Part III. See Joshua S. Goldstein, *War and Gender*, ENCYCL. OF SEX & GENDER 107, 108 (Carol R. Ember & Melvin Ember eds., 2003) (recognizing role of masculinity in armed forces around the world).

33. See *infra* Part III, Section A.

B. Gender Discrimination is a Primary Contributor to Intra-Military Sexual Crimes, Which Constitutes Gender-Based Crimes

1. The Problem

The inherent gender discrimination which helps drive intra-military sexual assault makes these acts not only criminal offenses, but also gender crimes.³⁴ Intra-military sexual assault also constitutes a gender crime because sexual violence has been recognized as a form of gender discrimination in itself.³⁵ Therefore, intra-military sexual assault should be of concern to all within the international community dedicated to eradicating gender inequality and gender-based violence.

First, both men and women experience great pressure to conform to certain masculine norms in the military.³⁶ These attitudes contribute to higher rates of sexual crimes within the armed forces, deter reporting of these crimes, and lead to a general feeling in the military that women, and even some men, do not belong as members of its ranks.³⁷

For instance, in France, controller-general Brigitte Debernady found that women “are reluctant to complain because they don’t want to seem

34. See Prosecutor of the International Criminal Court [I.C.C.], Keynote Address to the Interdisciplinary Colloquium, I.C.C. Ctr. on Law and Globalization, *Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence*, at 2–3 (June 16, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/EF46BCB9-9400-450C-B329-FFA96FD1B6A4/280530/220609seminarstateofsexualcrimes.pdf>:

“[G]ender crimes” is a concept that is firmly established in the Rome Statute [of the International Criminal Court] . . . The term “gender” is defined for the purpose of the Statute as referring to “the two sexes, male and female, within the context of society.” Various provisions of the Statute also proscribe what can be characterised as gender crimes, such as rape, sexual slavery, enforced prostitution, forced pregnancy as a war crime and/or crime against humanity.

35. Comm. on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 19, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter Recommendation No. 28] (stating that gender-based violence is a form of discrimination).

36. See Goldstein, *supra* note 32, at 108 (recognizing role of masculinity in armed forces around the world); Mady Wechsler Segal, *Women’s Military Roles Cross-Nationally: Past, Present, and Future*, 9 GENDER & SOC’Y 757, 757–75 (1995) (connecting conceptions of gender with the role of female soldiers in the military internationally); Jennifer M. Silva, *A New Generation of Women? How Female ROTC Cadets Negotiate the Tension Between Masculine Military Culture and Traditional Femininity*, 87 SOCIAL FORCES 937 (2008) (concluding from her study that experiencing pressure to conform to notions of masculinity is shared among U.S. ROTC cadets).

37. See, e.g., Lichfield, *supra* note 14; see Morris, *supra* note 21, at 690, 707–09; Sivakumaran, *supra* note 24, at 271.

fragile. They say to themselves, ‘we have entered a masculine environment. We must conform.’”³⁸ Speaking on the topic of intra-military rape in Britain, a member of the British campaign group “Women Against Rape” stated, “There’s no oversight; no public accountability . . . If you report it, it’s like you’re breaking ranks . . . this is a systemic problem.”³⁹ Similarly, a former British soldier who was abused recalled that she “trusted [her fellow soldiers] like brothers . . . [Reporting the crime] would be like going up to the parents of the person who’d abused me and asking them to discipline their child. I haven’t done anything wrong; all I’ve done is spoken out.”⁴⁰

The foregoing examples are, in part, a direct consequence of antiquated gender norms that are an accepted part of both military culture and the fundamentals of war embraced by the armed forces.⁴¹ These ideas not only discourage reporting of intra-military sexual assaults, but they also help contribute to the assaults themselves. Studies suggest that the combination of encouragement of the masculine and discouragement of the feminine has been identified as positively correlating with an increased incidence of sexual crimes.⁴²

In the military, soldiers are often lauded for displaying stereotypically “masculine” characteristics, such as aggression and strength, because society associates war with male-ness and violence.⁴³ Equating violent behavior with what it means to be a “man” has led to the popularization of the “macho man” within the military: a set of personality characteristics that have been found to positively correlate with the display of aggressive sexual behavior.⁴⁴ Additionally, the military encourages soldiers to display conventionally

38. Lichfield, *supra* note 14.

39. Rainey, *supra* note 14.

40. *Id.*

41. See Morris, *supra* note 21, at 708–10; Silva, *supra* note 36, at 947 (claiming that men and women in an ROTC study “drew upon traditional understandings of masculinity and femininity in order to delineate between men’s work and women’s work, linking masculinity and soldiering in a fundamental and inextricable way that is always in juxtaposition to femininity.”); see also Goldstein, *supra* note 32, at 107–08 (noting that although norms of masculinity differ cross-culturally, masculinity and gender play a role in wars of all societies).

42. Morris, *supra* note 21, at 701–02.

43. See *id.* at 708–10; see also Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT’L L. 326, 328–29 (1994) (discussing how inequality is linked to the occurrence of sexual crimes in armed conflict).

44. Morris, *supra* note 21, at 705; see also Donald L. Mosher & Ronald D. Anderson, *Macho Personality, Sexual Aggression, and Reactions to Guided Imagery of Realistic Rape*, 20 J. RES. PERSONALITY 77, 83–91 (1986) (demonstrating results of a study that revealed a men with higher scores on a “hyper-masculinity” inventory had lower negative emotional responses when imagining they were committing a rape, when compared to men with lower scores on the hyper-masculinity inventory).

“masculine” characteristics such as dominance, assertiveness, independence, and willingness to take risks.⁴⁵ Conversely, the military has historically discouraged “feminine” qualities, such as compassion and compromise.⁴⁶

Other forms of gender discrimination prevalent in the military also lead to an increased incidence of sexual violence. For instance, there are widespread attitudes towards sexuality that are linked to an increased incidence of sexual violence in the armed forces:⁴⁷ “rape myth acceptance,” including the belief that women want to be raped;⁴⁸ acceptance of violence towards women;⁴⁹ and acceptance of hostility towards women.⁵⁰

The discrimination inherent in military culture fosters gender-based sexual violence that harms both men and women.⁵¹ Male soldiers may be more likely than women to remain silent about the fact that they have fallen victim to a sexual crime.⁵² This is because the very same notions of masculinity that contribute to sexual assault produce stigma and feelings of shame in many male victims, prevent them from reporting sexual crimes.⁵³ Female soldiers, often suffer in silence as well, but are more likely to be victimized by sexual crimes and are less likely to feel that if they report their allegation to a superior, their allegation will be taken seriously.⁵⁴

45. Morris, *supra* note 21, at 701.

46. See Silva, *supra* note 36, at 941 (“The military . . . categorically rejects prevailing models of femininity. Indeed, self-control, assertiveness and determination combine to form a concept of soldier that is distinctly different from our cultural understandings of femininity as caring, connection and compromise.”).

47. Morris, *supra* note 21, at 701.

48. *Id.* at 702–03.

49. *Id.*

50. *Id.* at 703.

51. See Sivakumaran, *supra* note 24, at 260, 270 (finding that gender stereotypes play a role in sexual violence in armed conflict against men and women).

52. See *id.* at 255.

53. See *id.*:

It is generally accepted that there is an under-reporting of rape and sexual violence in general, and male rape and male sexual violence in particular . . . due to . . . shame, confusion, guilt, fear and stigma. Men also may be loath to talk about being victimized, considering this incompatible with their masculinity . . . [T]here is nothing to suggest that [this finding] does not also pertain to male sexual violence committed in time of conflict. Indeed, it may be argued that it would apply *a fortiori* in an armed conflict, where men tend to self-identify with masculine stereotypes more strongly.

54. See DEP’T OF DEF., *supra* note 4, at 53–54 (showing that male soldiers both had a more favorable perception of leadership support for sexual assault programs and claimed fewer barriers to the reporting of sexual crimes when compared to female soldiers); see also COMM’N ON CIVIL RIGHTS, *supra* note 5, at 15–16, 28–29 (citing “mixed messages” in military leadership concerning rape, high concentration of males in supervisory positions, confidentiality concerns, fear of negative conse-

The problem of viewing women as the “other” is particularly cogent, because most countries that have both men and women in their armed forces do not allow women to participate in combat.⁵⁵ Militaries that do allow women to fight have only enabled women to serve in this capacity for the past few decades, or less.⁵⁶ Many men reject this fairly new presence of women as fellow combatants, in part, because it calls into question the normative gender paradigm long-embraced as part of military culture.⁵⁷

II. INTERNATIONAL LAW PROHIBITS GENDER-BASED SEXUAL CRIMES, BUT THE SYSTEM HAS NOT HISTORICALLY RECOGNIZED INTRA-MILITARY SEXUAL ASSAULT VICTIMS

A. *Background of the Current International Regime Vis-à-vis Sexual Assault, Rape, and Soldier Conduct*

The treatment of sexual assault, rape, and military crimes under international humanitarian, human rights, and criminal law provides a backdrop to an understanding of how intra-military sexual crimes are handled today. First, international humanitarian law failed to recognize an individual’s right to be free from rape until the middle of the 20th century.⁵⁸ Advances on that front have since emerged in the field of international human rights and criminal law, but largely for the protection of civilians, not military personnel or soldiers.⁵⁹ International humanitarian law, on the other hand, does recognize military victims, including victims of rape. Yet, the prohibition of sexual crimes in this context has not extended to victims of *intra-military* sexual crimes.

quences, lack of confidence in military justice system, and fear of retaliation as deterrents to reporting); Silva, *supra* note 36, at 945–47 (highlighting the critical nature in which female soldiers believe they are viewed due to gender); Sara Corbett, *The Women’s War*, N.Y. TIMES, (Mar. 18, 2007) (exemplifying the sense of futility military victims feel regarding reporting their assaults given gender-based stereotypes).

55. See Max Fisher, *Map: Which Countries Allow Women in Front-line Combat Roles?*, WASH. POST (Jan. 25, 2013), www.washingtonpost.com/blogs/worldviews/wp/2013/01/25/map-which-countries-allow-women-in-front-line-combat-roles/.

56. See *id.* In the U.S., it was revealed that women will be allowed to officially serve in front-line combat beginning in 2016, making this issue even more relevant. See Tom Vanden Brook, *Pentagon Opening Front-Line Combat Roles to Women*, USA TODAY (June 18, 2013, 5:06 PM).

57. Segal, *supra* note 36, at 758; Silva, *supra* note 36, at 940.

58. Patricia Visser Sellers, *The Cultural Value of Sexual Violence*, 93 AM. SOC’Y INT’L L. PROC. 312, 319–20 (1999).

59. Further discussed in this Section.

1. International Humanitarian Law

International humanitarian law is a body of rules that strive to protect non-participants in armed conflict from the effects of war.⁶⁰ Until the Middle Ages, the international community treated rape and unwanted sexual contact as acceptable consequences of armed conflict.⁶¹ Even after this period, when the prohibition of rape was accepted as a customary international norm, it was clear that this prohibition was strictly for the purpose of safeguarding civilians and preserving societal harmony.⁶² This notion, however, began to change in the 1920s with the introduction of the 1929 Geneva Convention,⁶³ which developed laws that governed soldiers' behavior when engaged in battle.⁶⁴ This agreement outlawed the sexual exploitation of females who served in the military as nurses and other aides, and outlawed unfair treatment due to a woman's sex.⁶⁵

The modern international humanitarian law regime began in 1949, with the introduction of the current Geneva Convention (IV).⁶⁶ Unlike earlier agreements that prohibited rape for the purpose of preserving civil society, the current Geneva Convention explicitly recognizes a (civilian) rape victim's individual right to be free of rape.⁶⁷

2. International Criminal Law

Developed more recently, international criminal law deals with sexual violence as well. International criminal law seeks to hold individuals accountable for wrongdoings the international community agrees are particularly egregious.⁶⁸ The beginnings of the international criminal law regime can be seen with the Nuremberg and Tokyo trials after World War II. As a result of these trials, international tribunals held individual state actors re-

60. *Advisory Service on International Humanitarian Law*, INT'L COMM. RED CROSS (July 2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

61. Sellers, *supra* note 58, at 315–16 (stating that rape was prohibited during this time but there were exceptions to this prohibition during “just wars”).

62. *Id.*

63. Geneva Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, 6 U.S.T. 3316, 75 U.N.T.S [hereinafter Geneva Convention (III)].

64. Sellers, *supra* note 58, at 319–20.

65. *See id.*

66. *See generally* Geneva Convention (III), *supra* note 63; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

67. *See* Geneva Convention (IV), *supra* note 66, art. 27.

68. *Criminal Justice*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited Mar. 14, 2015).

sponsible for various war crimes, crimes against peace, and crimes against humanity.⁶⁹

The Nuremberg and Tokyo tribunals did not acknowledge rape as a prosecutable violation.⁷⁰ However, the Tokyo tribunal did charge some defendants for rape, along with other crimes committed, as acts in violation of the customs of war.⁷¹ These trials were also significant because they represented the weakening of state sovereignty in the face of international respect for human rights. For the first time, state actors could not only be brought in front of an international body that could find them liable for wrongdoings, but also for commission of wrongs against their own civilians.⁷²

69. See Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2560–61, 2563–64 (2001). The Charter of the International Military Tribunal (IMT), applied in the Nuremberg trials, defines crimes against peace as: “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy” for the accomplishment of war crimes or crimes against humanity. See Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis [hereinafter IMT Charter], art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, available at <http://avalon.law.yale.edu/imt/imtconst.asp>. The Charter defines “war crimes” as:

violations of the laws or customs of war . . . [Including], but not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

See *id.* The Charter defines “crimes against humanity” as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

See *id.* The accused in the Tokyo trials were also prosecuted for crimes against peace, war crimes, and crimes against humanity under the Charter of the International Military Tribunal for the Far East (IMTFE). See Campanaro, *supra*, at 2563. See generally Charter of the International Military Tribunal for the Far East [hereinafter IMTFE], Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20 (amended Apr. 26, 1946, 4 Bevens 27). Crimes against humanity, war crimes, and crimes against peace are defined similarly in the IMTFE and the IMT Charter applied in the Nuremberg trials. See IMT Charter, *supra*, at art. 6.; IMTFE, *supra*, at art. 5(a)-(c).

70. Campanaro, *supra* note 69, at 2563.

71. THE TOKYO MAJOR WAR CRIMES TRIAL: THE TRANSCRIPTS OF THE COURT PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST § 12 116–17 (R. John Pritchard ed., 1998, vol. 104).

72. Campanaro, *supra* note 69, at 2561; Sellers, *supra* note 58, at 320.

In the 1990s and the early 2000s, key decisions made in the International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal of Yugoslavia (ICTY) advanced the recognition of sexual crimes against civilians.⁷³ Although the tribunals' decisions are only binding on parties to the respective treaties, they are significant in this field of law for their persuasive force. In each of these tribunals, governmental actors were held directly accountable for the commission of sexual crimes.⁷⁴ Two important cases emerged that are relevant to this discussion. In 1998, the ICTR decided *Prosecutor v. Akayesu*,⁷⁵ where the ICTR acknowledged that rape is a crime against humanity.⁷⁶ In 2001, the ICTY issued another important decision, *Prosecutor v. Kunarac*, where it acknowledged that rape is a war crime, as well as a crime against humanity.⁷⁷

In 2002, the modern international criminal regime emerged when the Rome Statute entered into force, establishing the International Criminal Court (ICC).⁷⁸ The ICC has jurisdiction over the "most serious crimes of concern to the international community as a whole," including genocide, crimes against humanity, war crimes, and the crime of aggression.⁷⁹ The formation of a permanent international court, along with the statutes set out in the Rome Statute, provided for greater recognition of the transboundary nature of the world's gravest crimes. The Rome Statute also strengthened the role of international law in holding perpetrators of crimes accountable. However, the Rome Statute only provides the ICC with juris-

73. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998); *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001). The *Akayesu* case involved the ICTR's prosecution of former Rwandan leader Jean-Paul Akayesu for genocide, crimes against humanity, rape, and other violations of the Geneva Convention committed against the Tutsi people under his command in 1994. See *Akayesu*, ICTR 96-4-T, paras. 686-96. The *Kunarac* case involved the ICTY's prosecution of former Bosnian Serbian army leader Dragoljub Kunarac for crimes against humanity, rape, and other violations of the Geneva Convention during the "Foca massacres" committed against Bosnian citizens from 1992 to 1994. See *Kunarac*, IT-96-23-T & IT-96-23/1-T, paras. 217-84.

74. See, e.g., *Akayesu*, ICTR 96-4-T, paras. 686-96; *Kunarac*, IT-96-23-T & IT-96-23/1-T, paras. 217-84.

75. *Akayesu*, ICTR 96-4-T.

76. See *Akayesu*, ICTR 96-4-T, para. 23. The Chamber also acknowledged that rape can constitute torture "when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." See *id.*, para. 597.

77. See *Kunarac*, IT-96-23-T & IT-96-23/1-T, paras. 436-37.

78. See *History of the ICC*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=icchistory> (last visited Feb. 9, 2015).

79. Rome Statute of the Int'l Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

diction over offenses involving states party to the Statute, or via reference by the U.N. Security Council or the Prosecutor of the ICC.⁸⁰ It is used as a court of “last resort,” when national courts are inadequate, or unwilling to prosecute a crime.⁸¹

Importantly, the Rome Statute provides greater legitimacy to sexual crimes under international law. Rape is explicitly listed in Article 7 of the Rome Statute as a crime against humanity, along with “other form[s] of sexual violence of comparable gravity.”⁸² Rape and other sexual violence constitute “a grave breach of the Geneva Convention” and are also recognized as “war crimes” under Article 8 of the Statute.⁸³ Additionally, in 2013, a G8 Conference held in the U.K. found that rape amounted to a “grave breach” of the Geneva Convention.⁸⁴ This had the effect of establishing the prohibition of rape as a “peremptory norm,” which is a fundamental principle of international law “from which no derogation is ever permitted.”⁸⁵

3. International Human Rights Law

International human rights law has also played an important role in the international treatment of sexual crimes. International human rights law is created through a body of treaties and organizations that promote customs of behavior that demand fair and equal treatment of all persons.⁸⁶ International human rights law has often overlapped with international criminal and humanitarian law, as they each share a common goal of eradicating wrongdoings committed against innocent persons. Subtle differences separate international human rights and humanitarian law, such as humani-

80. *Id.* art. 4(2).

81. *See ICC at a Glance*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx (last visited Feb. 9, 2015).

82. Rome Statute, *supra* note 79, art. 7(1)(g).

83. *See id.* art. 8(2)(b)(xxii) (recognizing sexual crimes as a violation of the “laws and customs applicable in international armed conflict, within the established framework of international law”).

84. G8, *Declaration on Preventing Sexual Violence in Conflict*, 1–2 (Apr. 11, 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_-_FINAL.pdf.

85. Legal Information Institute, *Jus cogens*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/jus_cogens (last visited Mar. 26, 2015).

86. *International Human Rights Law*, OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited March 11, 2015).

tarian law's traditional focus on wartime relations.⁸⁷ International human rights law is also distinct from international criminal law, which involves set standards applied by designated international bodies. Human rights law, on the other hand, encompasses a broader swath of actors and behaviors.

Most significant of these international actors is the U.N., which was created in the wake of World War II in 1945. Even though the decisions of the post-World War II criminal tribunals reflected the international community's commitment to the eradication of sexual crimes, the United Nations actually promoted this eradication firsthand. The emergence of the United Nations set the stage for later developments instrumental to the recognition of sexual crimes. Fundamentally, the U.N. explicitly recognizes gender equality in the Preamble to its Charter, in the U.N. Declaration of Human Rights (UDHR), and through the establishment of the U.N. Committee on the Elimination of Discrimination against Women (CEDAW).⁸⁸

In the 1970s, CEDAW created the Convention on the Elimination of All Forms of Discrimination against Women that, for the first time, outlawed all forms of discrimination against women,⁸⁹ thus presenting such discrimination as an *international* issue. Since the 1970s, CEDAW has issued recommendations that are binding on all parties to the Convention.⁹⁰ CEDAW has also made advances in this field by recognizing sexual violence as a form of gender discrimination.⁹¹

87. For a discussion of the differences between international human rights and international humanitarian law see Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT'L L. 299 (2011).

88. See U.N. Charter, pmbl, para. 1 (“[Pledging] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 1–2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *Committee on the Elimination of Discrimination against Women*, UNITED NATIONS, <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited Mar. 12, 2015).

89. See Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 (Dec. 18, 1978).

90. For relevant binding recommendations, see, e.g., Recommendation No. 28, *supra* note 35; Comm. on the Elimination of Discrimination against Women, General Recommendation No. 30, U.N. Doc. CEDAW/C/GC/30 2 (Oct. 18, 2013) [hereinafter Recommendation No. 30] (recognizing States parties' commitment to end conflict-related gender and sex-based violence).

91. See Recommendation No. 28, *supra* note 35.

*B. International Law Does not Explicitly Recognize
Intra-Military Sexual Crimes*

Despite significant advances in promotion of gender equality, as well as increased recognition of sexual crimes within the international humanitarian, human rights, and criminal regimes; intra-military sexual crimes and the gender discrimination that helps drive these offenses are not explicitly recognized under international law.⁹² This lack of explicit recognition is problematic when juxtaposed with the international community's efforts to advance gender equality and international law's unquestionable prohibition of sexual crimes generally.

As mentioned in Section A, *supra*, the international humanitarian law regime emerged to regulate soldiers' conduct vis-à-vis civilians, and it condemns wrongful conduct such as rape.⁹³ Meanwhile, humanitarian treaty provisions that protect soldiers from wrongful conduct only do so when such wrongs are committed at the hands of enemy soldiers.⁹⁴

As for international criminal law, the ICC is the most promising actor within that regime, given its power to enforce compliance with laws against individuals perpetrating sex crimes. The crimes under the Rome Statute – genocide, war crimes, and crimes against humanity, however, do not explicitly cover *intra-military* sexual violence.⁹⁵ “Genocide” requires intent to destroy a group, which does not properly cover the crimes at issue here.⁹⁶ “Crimes against humanity” can only be committed against civilians under the Statute and therefore also does not fit.⁹⁷ Similarly, “war crimes” primarily deal with grave breaches of the Geneva Convention, which only covers civilian victims.⁹⁸

92. Admittedly, the use of international criminal law via the ICC is reserved for rare occasions. The legal principles that the ICC's Rome Statute has set forth, however, have been useful for the role it has played within the international human rights regime and will be referred to for this purpose. Also, some failures of the international human rights system regarding these issues can be traced back to the flaws of international law more generally, such as comity and sovereignty concerns that make it difficult to hold actors accountable under international law. These problems, for the most part, are not addressed here.

93. See Geneva Convention (IV), *supra* note 66, art. 27.

94. See, e.g., Geneva Convention (III), *supra* note 63, art. 5 (“The present Convention shall apply to the persons . . . from the time they fall into the power of the enemy.”).

95. See Rome Statute, *supra* note 79, art. 5–9; see also *The Crime of Aggression*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=aggression> (last visited Mar. 26, 2015) (noting that the “crime of aggression” in the Rome Statute has yet to be defined and, as such, the Court has been unable to enforce it).

96. See Rome Statute, *supra* note 79, art. 6.

97. See *id.*, art. 7.

98. See *id.*, art. 8; Geneva Convention (IV), *supra* note 66, art. 4.

Meanwhile, international human rights law also fails to explicitly cover intra-military sexual violence. This is the case despite the fact that this area of law strives to promote equality for all persons and provides for treaties and declarations that outlaw rape and promote gender equality.⁹⁹

III. U.S. DOMESTIC LAW DOES NOT ADEQUATELY ADDRESS INTRA-MILITARY SEXUAL CRIMES

A. U.S. Domestic Law's Handling of Military Rape and Sexual Assault

Soldiers' conduct vis-à-vis their compatriots is primarily seen as a domestic issue to be dealt with by the soldiers' country directly. This is the case even when a soldier stationed abroad commits an offense and could therefore fall under the jurisdiction of another country, primarily due to the existence of status of forces agreements. Status of forces agreements set out which country has jurisdiction over criminal acts committed by foreign troops stationed on their soil.¹⁰⁰ Even if such agreements are not in place, intra-military crimes that take place on foreign soil are typically dealt with by the military's nation as a matter of comity, or legal reciprocity.¹⁰¹

In the U.S., intra-military crimes are governed by the military's own justice system. The rules that govern all military crimes are codified in the Uniform Code of Military Justice (UCMJ).¹⁰² Congress established the UCMJ in 1951 in accordance with its "military powers" under Article 1, Section 8 of the U.S. Constitution.¹⁰³ The UCMJ expressly prohibits rape

99. See, e.g., U.N. Charter, pmb., *supra* note 88 ("[Pledging] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); The Universal Declaration of Human Rights, *supra* note 88; Recommendation No. 30, *supra* note 90 (recognizing states' parties commitment to end conflict-related gender and sex-based violence); Recommendation No. 28, *supra* note 35, para. 19 (gender-based sexual violence as a form of gender discrimination); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *opened for signature* Dec. 10, 1984 (outlawing torture, which can be construed to cover acts of sexual violence).

100. Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, THE ARMY LAWYER, Aug. 2000, at 23, 23–24.

101. See Morris, *supra* note 21, at 685–87 (recognizing under-enforcement of international prohibitions of rape in general and against military personnel in particular).

102. Uniform Code of Military Justice, 10 U.S.C. §§ 801–941 (Westlaw through P.L. 113–296 (excluding P.L. 113–235, 113–287, and 113–291)).

103. U.S. CONST. art. 1, § 8 ("Congress shall have Power . . . [t]o make rules for the Government and Regulation of the land and naval Forces.").

and sexual assault.¹⁰⁴ Sexual assault and rape of women within its ranks are problems the military has been dealing with since women began working with the armed forces as military personnel.¹⁰⁵ Sexual assault of men predated this time period, but there is far less data available on these incidents.¹⁰⁶

Despite the media attention surrounding several scandals involving intra-military sexual assault in the 1990s and early 2000s,¹⁰⁷ the Department of Defense did not take substantial action to deal with the issue until 2004, following media attention regarding intra-military sexual assaults of soldiers in Iraq and Kuwait.¹⁰⁸ In light of these events, then-Secretary of Defense Donald Rumsfeld commanded the military to establish the Sexual Assault Prevention and Response Office (SAPRO).¹⁰⁹ SAPRO trains and educates military personnel on issues related to sexual assault and provides victims with non-legal assistance related to their assaults.¹¹⁰

When a military victim of sexual assault wants to bring a complaint alleging that a sexual crime took place, he can file an unrestricted or restricted report with SAPRO through the assistance of a Sexual Assault Re-

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104. See Uniform Code of Military Justice, 10 U.S.C. § 920 (Westlaw through P.L. 113–296 (excluding P.L. 113–235, 113–287, and 113–291)). However, Department of Defense directives for programs dealing with wrongful sexual conduct refer to both rape and sexual assault as “sexual assault.” See DEP’T OF DEF., DIRECTIVE NO. 6495.01 21 (amended Jan. 20, 2015), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>.
105. See Jenna Grassbaugh, *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution?*, 11 OHIO ST. J. CRIM. L. 319, 322–24 (2014).
106. See Sivakumaran, *supra* note 24, at 255.
107. Of note was the “Tailhook” incident that took place at an annual Tailhook Association meeting in Las Vegas in 1992. This incident involved the sexual assault of 83 women and 7 men by fellow service members followed by a military cover-up. See Rosenthal, *supra* note 19, at 7. Also, in 1996, the Aberdeen training base became the center of a scandal when “rampant sex and abuse of authority among male drill sergeants and the female soldiers whose lives they virtually controlled” was discovered. See Jackie Spinner, *In Wake of Sex Scandal, Caution is the Rule at Aberdeen*, WASH. POST (Nov. 7, 1997), <http://www.washingtonpost.com/wp-srv/local/long-term/library/aberdeen/caution.htm>. In 2004, the media focused attention on the many reports of sexual assault of female service members in Afghanistan and Iraq. See Ann Scott Tyson, *Reported Cases of Sexual Assault in Military Increase*, WASH. POST (May 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/06/AR2005050601355.html>.
108. See DEP’T OF DEF., MEMORANDUM FOR THE DEPUTY ASSISTANT SECRETARY OF DEFENSE (Feb. 10, 2004), available at <http://www.sapr.mil/public/docs/laws/d20040213satf.pdf>.
109. See SAPRO, *Mission & History*, *supra* note 3; Rosenthal, *supra* note 19, at 7.
110. See SAPRO, *Mission & History*, *supra* note 3.

sponse Coordinator (SARC), or a victim advocate.¹¹¹ An unrestricted report enables victims to initiate a criminal investigation through the Military Criminal Investigation Organizations (MCIO).¹¹² At this point, the victim can file a protective order, or request to be transferred to another unit and receive medical services.¹¹³ A restricted report, on the other hand, allows victims to access medical and mental health services confidentially.¹¹⁴ If the victim files a restricted report, no investigation is initiated and the perpetrator's name is not revealed to commanders.¹¹⁵ Victims who file either type of report are entitled to general legal counsel.¹¹⁶

Once an MCIO determines that there is sufficient evidence that an offense occurred, the alleged offender's superior commanders make an independent finding to determine if the evidence substantiates a sexual assault claim and subsequently decide how to proceed.¹¹⁷ An officer can choose to recommend the case to a court-martial (military court);¹¹⁸ or initiate a non-judicial punishment, an administrative discharge, or other administrative action.¹¹⁹ Common non-judicial punishments are reduction in rank, forfeiture, extra duty, restrictions, confinement or custodial custody, or reprimands.¹²⁰ If found guilty before a court-martial, discipline for sexual offenses typically range from one or more of: discharge, confinement, reduction in rank, or forfeiture of pay.¹²¹

111. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 18–19.

112. DEP'T OF DEF., *supra* note 4, at 28.

113. COMM'N ON CIVIL RIGHTS, *supra* note 5, at 18.

114. *Id.*

115. *Id.*

116. *Id.* at 26. However, the NDAA FY 2015 also makes a “special victims counsel” attorney available to each military sexual assault victim. See Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. §§ 531, 533 (2014) (enacted).

117. See DEP'T OF DEF., *supra* note 4, at 80; COMM'N ON CIVIL RIGHTS, *supra* note 5, at 59–66.

118. See MANUAL FOR COURTS-MARTIAL UNITED STATES (2012) II-31, R. 401 (“Forwarding and disposition of charges in general”), available at http://www.loc.gov/rf/frd/Military_Law/pdf/MCM-2012.pdf. But see National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong., at 283 (2013) (enacted) (requiring, “whenever practicable,” an impartial judge advocate rather than a commanding officer to determine whether there is probable cause to charge the accused with an offense before court-martial).

119. DEP'T OF DEF., *supra* note 4, at 78.

120. See *id.* at 83.

121. See *id.* at 81–82. The Department of Defense report shows that in fiscal year 2013, those subjects who were convicted by court-martial were subject to either: confinement, reduction in rank, fines/forfeitures, discharge, or dismissal. See *id.* at 81–83. Most of the individuals who were not brought before a court-martial where evidence supported a finding of sexual assault received a non-judicial punishment of reduction in rank, forfeiture of pay, a restriction of liberty for a period of time, and extra duty.

In 2013, “identified” service member on service member sexual assaults made up 61 percent of unrestricted reports of military sexual assault.¹²² Therefore, data representing the disposition of sexual assault cases as a whole may not represent the disposition of intra-military cases with exact precision. Regardless, of the 1,187 sexual assault cases¹²³ commanders determined were substantiated by sufficient evidence in 2013, 71 percent were brought before a court-martial.¹²⁴ Of the court-martial proceedings that were completed in 2013, 68 percent proceeded to trial, while the remainder were dismissed, resulted in an officer’s discharge or resignation, or were handled through non-judicial punishment.¹²⁵

Of the cases that proceeded to trial, 76 percent or 370 subjects, were convicted of a charge.¹²⁶ This number represents 11 percent of total unrestricted reports of sexual assault (intra-military or otherwise).¹²⁷ It also means that 23 percent of cases where the military had jurisdiction over an offense and an MCIO determined that evidence substantiated a sexual assault charge, resulted in a sentence by court-martial.¹²⁸ It is also worth noting that commanding officers are still not required to impose a court-

See id. at 85. Others received an administrative discharge or “other adverse administrative action.” *See id.* at 81–82.

122. *Id.* at 73.

123. The Department of Defense could not consider action in 1,085 of its 3,234 total (intra-military and otherwise) unrestricted reports of sexual assault. Approximately 60 percent of these cases could not proceed because of jurisdictional issues or other technical issues, e.g. when a civilian was accused of committing the offense. *Id.* at 77. The remainder of these cases (437) were not be pursued because an MCIO found them to be unsubstantiated. *Id.* The Department therefore considered 2,149 sexual assault cases for possible commander action in 2013. *Id.* at 78. Of these cases, evidence substantiated a finding of some misconduct in 1,569 (73 percent). *Id.* Evidence substantiated a finding of sexual assault in 1,187 of these cases. *Id.* 382 cases resulted instead in a finding of “other misconduct.” *Id.*

124. *Id.* at 78, 81. The percentage of sexual assault cases that were heard before a court-martial in 2013 was considerably higher than in previous years. *See id.* at 80 (showing an increase in the use of court-martial from 57 percent of all cases where misconduct, sexual or otherwise, was substantiated pursuant to a sexual assault investigation in 2009 to 73 percent of all such cases in 2013).

125. *Id.* at 83.

126. *Id.*

127. *See id.* at 77–83.

128. *See id.*

martial's sentence on a perpetrator,¹²⁹ although officers' discretion in this regard has been limited by the 2014 National Defense Authorization Act.¹³⁰

B. The U.S. Legal System Does Not Properly Deter or Acknowledge Intra-Military Sexual Assault and Rape

1. The Military Justice System

Although the military has improved how it reports and manages sexual crimes including increasing the overall support available for sexual assault victims,¹³¹ the military justice system is still an improper venue for the prosecution of intra-military sexual assault crimes. As demonstrated above, most sexual assault cases that *are* substantiated do not result in court-martial charges. This means that a great number of cases not only do not go to trial, but also result in lesser charges such as dismissal, reduction in rank, or fines.¹³² This is not surprising, as the military justice system itself is not

129. See National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong., at 284–85 (2013) (“Elimination of Unlimited Command Prerogative and Discretion; Imposition of Additional Limitations”) (enacted)

If a mandatory minimum sentence exists for a charge, the convening authority . . . may not modify an adjudged sentence . . . This limitation does not restrict the discretion of the convening authority . . . to modify, disapprove, commute, or suspend any portion of the adjudicated sentence that is in addition to the mandatory minimum sentence.

130. See National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong., at 284–85 (2013) (enacted).

131. As mentioned above, the Department of Defense has improved its services for military sexual assault victims over the past several years. Congress now requires the military to keep a reporting system of its sexual assault policies and disposition of sexual assault allegations. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong. § 1631(d) (2011) (enacted). SAPRO provides military sexual assault victims with a comprehensive system that helps them report their attacks and obtain health services. SAPRO, *Mission & History*, *supra* note 3. The NDAA FY 2014 in particular brings changes that remove some of commanding officers' discretion over disposition of sexual assault offenses. See National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. §§ 1701–53 (2013) (enacted); Vergun, *New Law Brings Changes*, *supra* note 19 (explaining these changes). The NDAA FY 2015 also makes a “special victims counsel” attorney available to each military sexual assault victim. See Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. § 533 (2014) (enacted).

132. See DEP’T OF DEF., *supra* note 4, at 81–82, 85 (demonstrating that most of the individuals convicted of sexual assault but not brought before court-martial were punished through administrative discharge, reduction in rank, forfeiture of pay, a restriction of liberty, and/or extra duty).

suited to take up sexual assault claims, particularly those involving intra-military sexual assault.

First, disposition of cases still heavily involves officers in the accused's chain of a command.¹³³ Yet, even if the control an accused's superiors have over the disposition of a sexual assault case is lessened or eliminated, conflicts of interest arise.¹³⁴ Also, the purpose behind providing the military with practically exclusive jurisdiction over many offenses committed by its members is because the military is best suited to handle these crimes.¹³⁵ This is not the case for intra-military sexual assaults.

For instance, when evaluating crimes committed by a soldier under the UCMJ, officers can take into consideration important, military-related factors that may impact a soldier's decision to commit an offense. The ability to evaluate the goals of a soldier's mission when an offense was committed is outside the realm of civilian expertise and potentially important to national and international security. These factors do not apply to cases of sexual assault, as no such offense could possibly be committed incident to

133. See COMM'N ON CIVIL RIGHTS, *supra* note 5, at 59–66 (detailing the involvement of the accused's commanding officers in the disposition of sexual assault cases); MANUAL FOR COURTS-MARTIAL, *supra* note 118, at II-25, R. 306 (“Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense.”); see also Jeremy W. Peters & Emmarie Huetteman, *Gillibrand Seeks Another Vote on Military's Handling of Sexual Assault Cases*, N.Y. TIMES (Dec. 2, 2014), <http://www.nytimes.com/2014/12/03/us/senators-renew-push-for-bill-on-sexual-assault-in-military.html> (detailing how some senators still find the chain of command's involvement in military sexual assault cases problematic).

134. See *Sexual Assault in the Military Part Three: Context and Causes, Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H.R. Comm. on Oversight and Gov't Reform*, 111th Cong. 3–4 (2009) (statement of Elizabeth Hillman, Ph.D., J.D., Law Professor at the University of California Hastings):

Although commanders must lead the way in changing military culture, they are neither essential nor well-suited for their current role in the legal process of criminal prosecution . . . [T]he Uniform Code of Military Justice continues to require that convening authorities exercise prosecutorial discretion. This mixture of roles, in which a convening authority must protect the overall well-being of a unit and ensure the unit's mission is accomplished as well as decide whether a specific factual context warrants prosecution, creates a conflict that cuts in different directions, all unhealthy.

See also NAT'L ORG. FOR WOMEN, *supra* note 19 (recognizing conflicts of interest as many officers overseeing sexual assault cases work with the accused).

135. See *Parker v. Levy*, 417 U.S. 733, 744 (1974) (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953)) (“Just as military society has been a society apart from civilian society, so (m)ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”).

service or for the “greater good” of a mission or security.¹³⁶ Also, the level of expertise that military officials have when dealing with crimes committed in the line of duty does not carry over to sexual assault cases.

Furthermore, the potential for abuses in intra-military sexual cases is great, as demonstrated by the military’s track record regarding these types of cases. Despite reforms, military victims of sexual assault still experience retaliation for reporting.¹³⁷ More fundamentally, the military environment remains poorly situated for handling intra-military sexual crimes given the prevalence of gender discrimination, discussed in Part III.¹³⁸

2. Civilian Courts

In response to these inadequacies, some victims of intra-military sexual assault and rape have looked to the civilian court system to address the pervasive problem of intra-military assault in the U.S.¹³⁹ Two such cases, *Cioca v. Rumsfeld*¹⁴⁰ and *Klay v. Panetta*,¹⁴¹ were brought in 2013 and 2014 by American military victims of sexual misconduct, including sexual assault. In *Cioca* and *Klay*, victims brought tort suits against military officials claiming violations of various constitutional rights. In particular, claimants alleged that the U.S. military’s mishandling of their sexual misconduct cases violated their Fifth Amendment due process and equal protection rights, their First Amendment rights to free speech, and their Seventh Amendment rights to trial by jury.¹⁴²

136. Arguments that the military’s handling of intra-military sexual assault cases is still a “military matter” have kept intra-military sexual assault plaintiffs out of civilian court. See *Cioca v. Rumsfeld*, 720 F.3d 505, 515–16 (4th Cir. 2013); *Klay v. Panetta*, 758 F.3d 369, 374–76 (D.C. Cir. 2014). Still, the Fourth Circuit’s conclusion in *Cioca* had little to do with the purposes behind having a separate justice system for civilians and the military. Instead, the holding rested the court’s reluctance to become involved in judgments of the merits of the United States’ “military decisions.” See *Cioca*, 720 F.3d at 516. The D.C. Circuit’s came to its conclusion in *Klay* based on similar grounds but also emphasized separation of powers concerns. See *Klay*, 758 F.3d at 374–76.

137. Timm, *supra* note 19.

138. See *supra* Part II, Section B.

139. For a discussion, see Woods, *supra* note 11.

140. *Cioca*, 720 F.3d 505.

141. *Klay*, 758 F.3d 369.

142. See *Cioca*, 720 F.3d at 507; *Klay*, 758 F.3d at 371. “[Plaintiffs claim] Fifth Amendment rights to bodily integrity, due process, and equal protection; a First Amendment right to speak about their assaults without retaliation; and a Seventh Amendment right to have juries try their assailants.” *Klay*, 758 F.3d at 372. In *Cioca*:

Plaintiffs . . . allege[d] in the Complaint that the Defendants violated their constitutional rights by, *inter alia*, “fail[ing] to (1) investigate rapes and sexual assaults, (2) prosecute perpetrators, (3) provide an adequate judicial

The *Cioca* and *Klay* plaintiffs requested damages by means of a *Bivens* action.¹⁴³ A *Bivens* action provides a cause of action for certain constitutional violations where there is no explicit cause of action provided by law.¹⁴⁴ *Bivens* suits against military personnel or government officials who oversee the military are constrained by the *Feres* Doctrine, articulated in the 1950 Supreme Court case *Feres v. U.S.*¹⁴⁵ The *Feres* Doctrine provides that individuals cannot bring federal tort claims under the Federal Tort Claims Act (FTCA) against the government for injuries arising out of or in the course of activity “incident to military service.”¹⁴⁶

The authority behind *Feres*’ military exception stems from constitutional separation of powers principles. *Feres* reminds courts that they should refrain from evaluating military tort claims in deference to congressional control of the military under Article I of the Constitution.¹⁴⁷ However, courts are not explicitly prohibited from deciding these cases.¹⁴⁸ Although *Feres* has a large number of critics, even on the Supreme Court, recent decisions have reinforced the doctrine and it is binding.¹⁴⁹ *Feres* now extends beyond FTCA claims to encompass tort claims for damages under *Bivens* as well.¹⁵⁰

The *Cioca* and *Klay* plaintiffs tried to get around *Feres* by arguing that the military’s failures in handling sexual misconduct cases were not related

system as required by the Uniform Military Justice Act, and (4) abide by Congressional deadlines to implement Congressionally-ordered institutional reforms to stop rapes and other sexual assaults.”

Cioca, 720 F.3d at 507 (quoting Plaintiffs’ original complaint).

143. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

144. *Federal Practice Manual*, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW <http://federalpracticemanual.org/node/30> (“Implied Constitutional Causes of Action for Damages”) (last updated 2013).

145. *Feres v. United States*, 340 U.S. 135 (1950).

146. *See Feres*, 340 U.S. 135 at 144.

147. *See United States v. Stanley*, 483 U.S. 669, 682–83 (1987) (interpreting *Feres*).

148. *See Stanley*, 483 U.S. at 681–82.

149. *See Francine Banner, Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 725–26 (2013):

Since the 1950s, *Feres* has been expansively interpreted to bar justiciability of claims by military personnel against superior officers not only for negligence and intentional torts, but also for blatant violations of constitutional rights. Despite the strong disapproval of several Supreme Court justices and countless district and appellate courts, the Court has denied certiorari in recent cases challenging application of the doctrine, thus further entrenching it.

150. *See Stanley*, 483 U.S. at 683–84.

to military matters. However, they were unsuccessful.¹⁵¹ Both of these cases failed on appeal in the Fourth and D.C. Circuits, respectively. The courts found that providing a damages remedy under these circumstances would violate *Feres*' "incident to military service" principle and would implicate separation of powers concerns by allowing the judiciary to interfere with Congress' military powers.¹⁵² Their efforts thus reinforce the futility of using civil tort claims to redress intra-military sexual assault in light of *Feres*.

IV. VICTIMS OF INTRA-MILITARY SEXUAL CRIMES CAN USE
CUSTOMARY INTERNATIONAL LAW IN DOMESTIC COURTS
AND IN CLAIMS BROUGHT BEFORE INTERNATIONAL
HUMAN RIGHTS BODIES

Gender discrimination, particularly gender role stereotyping, is a major impetus behind intra-military sexual assault committed against both men and women in the U.S., as well as in militaries around the world.¹⁵³ As discussed *supra*, both the military itself and the U.S. civilian court system are inadequate at handling intra-military sexual assault cases. The military provides a relatively small percentage of intra-military sexual assault victims with the opportunity to see offenders face severe penalties.¹⁵⁴ Meanwhile, by choosing not to take up intra-military sexual assault cases in civilian courts, the American legal system implicitly sends the message to military sexual assault victims that their injuries are not as severe as those of civilian sexual assault victims.

As sexual crimes are often rooted in gender discrimination,¹⁵⁵ the way sexual crimes are addressed can have the unintended consequence of condoning such discrimination. Also, as the presence of women in the military challenges stereotypical gender norms, the struggles female intra-military

151. *Cioca v. Rumsfeld*, 720 F.3d 505, 514–16 (4th Cir. 2013); *Klay v. Panetta*, 758 F.3d 369, 374–76 (D.C. Cir. 2014).

152. *See Cioca*, 720 F.3d at 515–16; *Klay*, 758 F.3d at 374–76 (D.C. Cir. 2014); *see also* Banner, *supra* note 149 (criticizing the *Feres* doctrine's application to intra-military sexual assault cases).

153. *See supra* Part I, Section B.

154. *See discussion supra* pp. 122–24. The statistics referred to on pages 122 to 124 are compounded by the fact that only approximately 10 percent of intra-military sexual assault victims report their sexual assaults in the first place. *See DEP'T OF DEF., supra* note 4, at 71 (showing that, in the year 2012, survey results suggested that nearly 26,000 members of the U.S. military experienced unwanted sexual contact, while only 2,828 service members actually reported such crimes, meaning that 10 percent of victims reported their crimes). For more detail on reporting of intra-military sexual assault in the U.S., *see COMM'N ON CIVIL RIGHTS, supra* note 5, at 17–43.

155. *See Recommendation No. 28, supra* note 35 (describing sexual violence as a form of gender discrimination).

sexual assault victims face in their pursuit of justice sends the message that breaking down gender normative barriers will result in adverse consequences. Additionally, the failure to properly handle these assaults infringes upon victims' right to be free of sexual assault, an undisputed human right.

The international system traditionally did not attempt to address intra-military sexual crimes.¹⁵⁶ Yet, this landscape is changing. Under treaty law, international human rights bodies are beginning to address complaints from intra-military sexual assault victims regarding their respective governments' inadequate responses to intra-military sexual assault.¹⁵⁷ Given sovereignty concerns and the structure of the international system, international bodies themselves are not effective for handling inter-military sexual assault cases directly.¹⁵⁸ However, international law as articulated by these bodies can be used as a catalyst for change on a domestic level by strengthening international customary law in this area.¹⁵⁹

Intra-military sexual assault victims, in the U.S. and around the globe, can petition international human rights bodies. Specifically, they can request acknowledgement of the failures of their government to properly manage and provide independent oversight of intra-military sexual assault in violation of customary international human rights law. In countries that still lack independent oversight of intra-military sexual assaults on par with that provided in civilian courts, this move may help strengthen acknowledgement of intra-military sexual crimes. Also, international recognition that the status quo regarding the treatment of intra-military sexual assault in the U.S. is in violation of international law may work to advance congressional efforts to eliminate military control of intra-military sexual assault cases entirely.

156. *See supra* Part II.

157. U.S. victims of intra-military sexual misconduct brought claims before the Inter-American Commission on Human Rights. *See Int'l Human Rights Clinic, supra* note 13. An intra-military sexual assault victim from the U.K. has expressed a desire to bring claims of human rights violations against the U.K. in the European Court. *See Rainey, supra* note 14.

158. *See Morris, supra* note 21, at 685; *see, e.g., S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 4 (Aug. 2) (establishing "territoriality principle" of international law, which allows sovereign states to act however they wish within their own territory, so long as it does not violate an explicit provision of international law); Kuhner, *supra* note 16, at 102, 107–17 (discussing political concerns in the international system and states' avoidance of the I.C.C.); Catharine A. MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 *NEW ENG. J. INT'L & COMP. L.* 211, 218–20 (2008) (discussing failures of the International Criminal Tribunal of Rwanda).

159. Rozzbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 *EU. J. OF INT'L L.* 173, 175 (2010).

A. *Customary International Law Prohibits the Injustices Intra-Military Sexual Assault Victims Experience*

Custom is defined as “an authentic expression of the needs and values of the community at any given time.”¹⁶⁰ Article 38(1)(b) of the International Court of Justice Statute defines customary international law as “evidence of a general practice accepted as law.”¹⁶¹ The acceptance of a particular legal concept as customary international law is traditionally exemplified in two ways. First, nation-states must behave in conformity with the law.¹⁶² Second, nations must do so under the belief that they are under obligation of law to act in this way, known as *opinio juris*.¹⁶³

The number of states who behave in accordance with the international custom generally has to be a large enough group of nation-states to constitute some sort of critical consensus.¹⁶⁴ This behavior must be consistent over a prolonged period of time.¹⁶⁵ Evidence of states’ behavior can be obtained through state officials’ explicit statements or deduced by means of a collection of sources such as resolutions and decisions of international bodies, national court decisions, treaties, and the general practice of international organizations.¹⁶⁶ Customary international law has its critics who question its effectiveness.¹⁶⁷ Yet, it is still a recognized and important form of international law.¹⁶⁸

Since the 1970s, scholars have begun to challenge strict adherence to states’ behavior and *opinio juris* as necessary to the formation of customary international law.¹⁶⁹ These scholars argue that customary international law, particularly on human rights issues, is increasingly established through the means of widely accepted treaties and the jurisprudence developed by inter-

160. MALCOLM N. SHAW, *INTERNATIONAL LAW* 73 (6th ed. 2008).

161. Statute of the International Court of Justice art. 38(1)(B), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

162. Shaw, *supra* note 160, at 74. Behavior may include omissions in some circumstances. Andre de la Rocha Ferreira et al., *Int’l L. Commission, Formation and Evidence of Customary International Law*, 1 UFRGS MODEL U.N. J., 2013, at 182, 189.

163. Shaw, *supra* note 160, at 74. Admittedly, there are not clear standards used to discern whether a state is truly behaving out of a sense of legal obligation. *See id.* at 86–87; *see also* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law* 1 (Univ. of Chi. John M. Olin L. & Econ., Working Paper No. 63, 1999) (observing the widespread lack of clarity in this area).

164. DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 172 (2010).

165. Shaw, *supra* note 160, at 76–77.

166. *See id.* at 82–83.

167. *Id.* at 73–74.

168. *See id.* at 74.

169. Baker, *supra* note 159, at 173–74.

national criminal tribunals.¹⁷⁰ This form of customary international law is seen as binding even on states who are not signatories to the requisite convention, or participants in a particular criminal tribunal's decision.¹⁷¹ U.N. Resolutions have also been seen by some as evidence of customary international law.¹⁷²

It can be argued that customary international law, through a collective of international treaties, decisions of international bodies, and U.N. resolutions, already prohibits intra-military sexual crimes. Through the sum of these sources, which were mentioned explicitly in Part II, *supra*,¹⁷³ as well as others, the prohibition of sexual violence in general is now widely accepted to be a matter of customary international human rights law.¹⁷⁴ Under the auspices of international customary law, the international community has increasingly been committed to punishing all who are responsible for sexual violence.¹⁷⁵ The prohibitions against sexual violence extend within the borders of sovereign nations and to military actors, both in times of peace and conflict.¹⁷⁶

Although most explicit prohibitions of sexual violence were created with civilians in mind,¹⁷⁷ the prohibition under customary law does not make any exception preventing its application to protect soldiers. Instead, all persons are to be protected by human rights law, and all nations are

170. *Id.* at 174–75, 178–83.

171. *See id.* at 174–75, 180–81.

172. *See id.* at 181.

173. *See, e.g.*, Geneva Convention (IV), *supra* note 66, art. 27 (“Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”); Rome Statute, *supra* note 79, art. 8(2)(b) (recognizing sexual crimes as a violation of the “laws and customs applicable in international armed conflict, within the established framework of international law”); G8 *supra* note 84, para. 1 (“Sexual violence in armed conflict represents one of the most serious forms of violation or abuse of international humanitarian law and international human rights law.”).

174. *Rule 93. Rape and Other Forms of Sexual Violence*, INT’L COMM. OF THE RED CROSS (https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93) (last visited Mar. 14, 2015).

175. *See id.*; J.-M. Henckaerts, *Annex. List of Customary Rules of International Humanitarian Law*, 87 INT’L REV. OF THE RED CROSS, no. 857, Mar. 2005, at 198, 211–12, available at <https://www.icrc.org/eng/assets/files/other/customary-law-rules.pdf>. As demonstrated earlier, individuals have been held accountable under particular treaties for commission and support of sexual crimes within their borders. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

176. *See id.* For further discussion, *see supra* Part II, Section A.

177. *See, e.g.*, Geneva Convention (IV), *supra* note 66, art. 4 (protected persons).

charged with following these laws.¹⁷⁸ Therefore, there is a strong argument in favor of finding governments in violation of international customary law for failure to properly control their intra-military sexual assault problems.

B. Changing the Way Intra-Military Sexual Assault is Handled Through Customary International Law

As mentioned before, some intra-military sexual assault victims are beginning to bring complaints regarding government handling of intra-military sexual assault before regional human rights groups, basing their complaints on regional human rights treaties. These victims should continue this practice, as it will increase international recognition of the mishandling of intra-military sexual assault cases across different regional human rights bodies. Victims can also bring complaints based on treaty law before the U.N. Human Rights Committee, which can issue recommendations to states party to the International Covenant on Civil and Political Rights.¹⁷⁹ Additionally, victims can raise the issue as one of gender discrimination before CEDAW.¹⁸⁰

Although these acts may not seem like much, these international claims can help add to the mass of treaties and other international acts that support the status of intra-military sexual crimes as a matter of customary international law. As customary international law applies to all states, even within their borders, it has the potential to be stronger than prohibition via treaty alone. States will hopefully pay greater attention to these issues as a result of international acknowledgement in this area. Ultimately, states should aim to allow an independent civilian body to handle intra-military sexual assault cases and should work to reform aspects of military culture that contribute to sexual assault.

In the U.S., positioning intra-military sexual assaults under international human rights law may help push Congress in the direction towards removing intra-military sexual assault cases from military control. Indeed, a number of bills challenging the military's control over these cases have been

178. See U.N. Charter, pmb., *supra* note 88, para. 1 (“[Pledging] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”); Universal Declaration of Human Rights, *supra* note 88, arts. 1–2.

179. See *Human Rights Committee*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. (<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>) (last visited Mar. 14, 2015).

180. See *generally* Recommendation No. 28, *supra* note 35 (finding that sexual violence is a form of gender discrimination).

proposed in different forms for the past two years.¹⁸¹ Meanwhile, Congress has instated modest reforms that lessened military control over these cases in its 2014 and 2015 National Defense Authorization acts.¹⁸² Some members of Congress who supported reforms of the military's handling of sexual assault cases even pointed to recent efforts by some countries to put in place independent civilian oversight for intra-military sexual assault cases.¹⁸³ Thus, it is not radical to assume that international influence may have some effect on congressional handling of the military's sexual assault problem.

If Congress is able to eliminate the military's control over the disposition of intra-military sexual assault cases to a greater degree or in its entirety, the Supreme Court may finally be able to re-consider the applicability of the *Feres* doctrine to intra-military sexual assault cases.¹⁸⁴ For support, the Court can look to customary international law as a means of re-thinking its interpretation of *Feres*' "incident to military service" principle.¹⁸⁵ Viewing intra-military sexual assault as a human rights issue should aid the Court in rejecting *Feres*' application to intra-military sexual assault cases, given its commitment to international human rights concerns when interpreting constitutional issues.¹⁸⁶

181. See, e.g., Military Justice Improvement Act, S. 1752, 113th Cong. (2013); STOP Act, H.R. 1593, 113th Cong. (2013).

182. See Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. §§ 531–38 (2014) (enacted); National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. §§ 1701–53 (2013) (enacted). For an explanation of these changes see Vergun, *New Law Brings Changes* and Vergun, *Legislation Changes UCMJ*, *supra* note 19.

183. See, e.g., Cooper, *supra* note 9; *Editorials and OpEds in Support of the Military Justice Improvement Act*, KIRSTEN GILLIBRAND, U.S. SENATOR FOR N.Y. (<http://www.gillibrand.senate.gov/mjia/editorials>) (last visited Mar. 26, 2015).

184. See *supra* Part III, Section B.

185. See *Feres v. United States*, 340 U.S. 135, 144 (1950). For a discussion on the use of customary international human rights law in U.S. courts, see Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395 (1999).

186. To look to customary international law when interpreting U.S. constitutional law is by no means unheard of. See Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 41, 89–90 (2012); see also, *Roper v. Simmons*, 543 U.S. 551, 604–05 (2005) (finding the juvenile death penalty unconstitutional in part due to widespread prohibition of capital punishment for juveniles as a matter of international customary law); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing worldwide disapproval of imposing the death penalty on "mentally retarded" perpetrators); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed . . . by other nations that share our Anglo-American heritage, and by leading members of the Western European

V. CONCLUSION

Intra-military sexual assault is a problem that harms thousands around the world each year. Historically, both international law and domestic law, particularly in the U.S., have failed to provide intra-military sexual assault victims with adequate recourse for their suffering. Indeed, despite reforms in the U.S., traditional notions of gender and gender discrimination still pervade military culture and continue to contribute to the frequency of these offenses. These gendered beliefs and other biases should evoke the concern of those in the international community committed to advancing gender equality. More fundamentally, the gender issues pervasive in the armed forces make the military an improper venue for the handling of intra-military sexual assault cases.

However, in the U.S. and in other countries as well, intra-military sexual assault cases are still investigated and tried by the military itself. For the most part, this results in a failure to provide intra-military sexual assault victims with independent investigation and review of these offenses on par with what civilian sexual assault victims receive. This unequal treatment still continues in the U.S. and elsewhere in the world. Hopefully, by categorizing the crime of intra-military sexual assault as an international human rights issue, intra-military sexual crimes will be afforded greater recognition, encouraging policy changes on a domestic level. ❀

community.”); *see also* AM. SOC’Y INT’L L., “A DECENT RESPECT TO THE OPINIONS OF MANKIND. . .” SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW 102 (Christopher J. Borgen ed., 2007) (quoting Associate Justice Stephen G. Breyer):

[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the ‘globalization’ of human rights, a phrase that refers to the ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights . . . and the related decision to enlist independent judiciaries as instruments to help make that protection effective in practice.