

2017

The Catch-22 of Females Reporting Sexual Assault in the Military: A Cause for Holistic International Intervention

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Comment*

The Catch-22 of Females Reporting Sexual Assault in the Military: A Cause for Holistic International Intervention

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* Kelsey E.B. Knoer, J.D. candidate, 2017, University of Nebraska College of Law. The author wishes to thank all of the fantastic members of the NEBRASKA LAW REVIEW, particularly Executive Editor Jen Ralph, for their tireless efforts to publish exceptional work. A special thank you to my family, friends, and especially my husband for their love and support throughout law school.

There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.¹

I. INTRODUCTION

In May of 2012, Sarah,² a female airman in the United States Air Force, was stationed at Aviano Air Base in Italy. One evening, she fell asleep in Staff Sergeant Jones's home.³ She awoke to Staff Sergeant Jones raping her, telling her that if she told anyone about it, he would kill her and ruin her career.⁴ On February 28, 2015, at a general court-martial, Staff Sergeant Jones was found guilty of one count of unlawful communication of a threat but was acquitted of rape.⁵

Sarah's case is one of many. For example, the U.S. Department of Defense (DoD) estimates that 18,900 sexual assaults occurred in the military in 2014.⁶ Between 2012 and 2014, there was a 64% increase in victim reports of sexual assaults in the United States military.⁷ In fact, a deployed female military member is more likely to be raped by her comrade than killed by an enemy combatant in Iraq.⁸ Both Con-

1. JOSEPH HELLER, *CATCH-22*, at 33 (1955).

2. This example is based on a real incident. See THE JUDGE ADVOCATE GENERAL'S CORPS: U.S. AIR FORCE, AIR FORCE SEXUAL ASSAULT COURT-MARTIAL SUMMARIES: 2010–MARCH 2015 11 (2015) [hereinafter AIR FORCE REPORTS]. The woman is described as "a female Airman." *Id.* An alias is used to aid understanding when integrated into an example in this paper.

3. The Air Force includes the names of the defendants in the summaries "for deterrence purposes." *Id.* at 2.

4. *Id.* at 11.

5. *Id.* Staff Sergeant Jones was also acquitted of a second count of unlawful communication of a threat. *Id.*

6. U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, at 8 (2015) [hereinafter SAPRO REPORT]. This number is down from the 26,000 Service member victims estimated in 2012. *Id.*

7. *Id.* at 6.

8. Cpt. Megan N. Schmid, *Combating a Different Enemy: Proposals to Change The Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 475 (2010) (citing *Sexual Assault in the Military: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. On Oversight and Gov't Reform*, 110th Cong. 1 (2008) (statement of Jane Harman, Cong. Rep.)); see also HELEN BENEDICT, *THE LONELY SOLDIER* 167–68 (2009) (reporting deployed female soldiers carried knives

gress and the DoD have spoken out against what is now commonly referred to as an “epidemic”⁹ and have enacted numerous reforms in an effort to combat the issue.¹⁰ Many of these reforms have largely fallen short, leaving military victims without domestic legal recourse.¹¹

The brief court-martial summaries released by the United States Air Force do not provide much insight.¹² The stories they tell start and end in a court-martial, but there are a number of underlying issues that keep military sexual assault cases out of the courtroom. Reliance on gender roles when determining the truthfulness of a report as well as the heightened dependence on command in military life are just two examples. For these same reasons, the sexual assault problem is not limited to the United States; it is cross-cultural. This Comment delves deeper into the sexual assault problem by examining the legal system of the United States as well as its involvement in the international legal community. Then, this Comment will provide recommendations for improvement in the United States’ domestic legal system and provide insight into the United States’ role in enacting change on an international scale.

In short, women in the military face a Catch-22 when reporting their sexual assault. A woman is expected to be masculine in the world of the military in order to fit in with comrades and to gain rank, yet reporting instances of sexual assault is inconsistent with either female or male gender “norms.” Females do not report because they are expected to be quiet, which allows their sexual agency to be overtaken by a male. At the same time, men do not report sexual assault for fear of being perceived as feminine, unable to protect themselves, or wanting sexual contact with another male. Thus, whether women step into a traditional feminine role or into the masculine role they are expected to take on in the military, they are not believed. Further, if a female soldier acts feminine, she is no longer perceived as belonging in the masculine world of the military. Thus, Joseph Heller’s *Catch-22* presents itself in a new light:

There was only one catch and that was Catch-22, which specified that a concern for one’s safety in the face of dangers that were real and immediate was the process of a rational mind. She was crazy for being a woman in the mas-

not for protection against the enemy, but for protection against rape by men in their own units).

9. See, e.g., Stella Cernak, *Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines*, 22 MICH. J. GENDER & L. 207, 209 (2015); Alexandra Lohman, *Silence of the Lambs: Giving Voice to the Problem of Rape and Sexual Assault in the United States Armed Forces*, 10 NW J. L. & SOC. POL’Y 230, 255 (2015) (“The growing number of allegations at Lackland [Air Force Base] defines the new wave of the sexual assault epidemic.”).

10. See *infra* subsection IV.A.1.

11. See *infra* subsection IV.A.1.

12. See generally AIR FORCE REPORTS, *supra* note 2.

culine world of the military. All she had to do was act like a lady to be protected; and as soon as she did, she was an outsider who didn't belong in the military. She would be crazy to act like a lady, but if she didn't she was subject to abuse. If she acted like a lady, she was crazy and didn't have to put up with the abuse; but if she acted like a man she was sane and had to put up with the abuse.¹³

This paper addresses that Catch-22, beginning in Part II with a brief look at women in the armed forces of the United States and the prevalence of sexual assault in the military. Part III examines military culture and the underlying sociological and psychological issues of sexual assault cases in general that both contribute to the prevalence of sexual assault in the military as well as the failure to report the crime. Part IV analyzes the laws of the United States domestic military and civilian spheres as well as international law provisions currently in place that are intended to protect against sexual assault. Due to the cross-cultural nature of intramilitary sexual assault and because domestic laws have largely fallen short in preventing the problem or providing relief, the issue presents a perfect opportunity for the intervention of international law. However, international law has yet to recognize a cause of action for intramilitary sexual assault. Further, the failure of countries, particularly the United States, to ratify international conventions and protocols that would potentially provide for relief based on gender discrimination poses additional complications for victims. Finally, Part V provides suggestions for the United States Government to improve its position in the international legal sphere in order to protect its service members from intramilitary sexual assault. However, this paper concludes that even adherence to international laws already in place will not be enough to combat the sexual assault problem in the military and calls for a more holistic approach.

II. WOMEN IN THE MILITARY

A. General Background

Women have participated in war in some fashion since the beginning of time. Some have even participated as fighters, though these women have historically been the exception to the rule.¹⁴ In her first major symposium, widely known anthropologist Margaret Mead called for scholars to pay particular attention “to the need of young males to validate their strength and courage, and to . . . the conspicu-

13. This quote was created by this author, inspired by Joseph Heller's *Catch-22*, *supra* note 1, but put in the context of this Comment.

14. Joshua S. Goldstein, *War and Gender*, in *ENCYCLOPEDIA OF SEX AND GENDER: MEN AND WOMEN IN THE WORLD'S CULTURES* 107 (Carol R. Ember & Melvin Ember eds., 2003) (“Exceptions to this rule are numerous and informative . . . but these exceptions together amount to fewer than 1% of all warriors in history.”).

ous unwillingness of most human societies to arm women.”¹⁵ “In only six of the world’s nearly 200 states do women make up more than 5% of the armed forces, and most of these women occupy traditional women’s roles such as typists and nurses.”¹⁶ The disparities remain high “despite the world’s predominant military forces carrying out the largest-scale military gender integration in history.”¹⁷

Over the past couple of decades, combat roles have been opened up to women in at least 16 countries.¹⁸ Though the United States has also lifted its ban on women in combat and recently celebrated the graduation of two women from Army Ranger School, not all positions are currently open to women.¹⁹ Following the United States’ decision, the UK also announced its hope to lift the ban on women serving in frontline infantry roles.²⁰ However, to suggest that these bans kept women out of combat altogether would be ignorant. Despite bans on combat, women from the Soviet Union, Great Britain, Germany, and the United States all served in combat roles during WWII.²¹ Likewise, combat bans do not reflect the realities on the ground in modern war. “In wars like those in Iraq and Afghanistan, there is no ‘forward area’ on the battlefield. Today’s battlefield is non-linear and occurs in a 360-degree radius around the troops. Despite the ground combat exclusion policy, women are serving in real ground combat every

15. *Id.*

16. *Id.*

17. *Id.*

18. Ashley Fantz, *Women in Combat: More than a Dozen Nations Already Doing It*, CNN (Aug. 20, 2015, 7:35 AM), <http://www.cnn.com/2015/08/20/us/women-in-combat-globally> [https://perma.unl.edu/3WHH-TTHY]; see also Anna Mulrine, *8 Other Nations That Send Women to Combat*, NAT’L GEOGRAPHIC NEWS (January 25, 2013), <http://news.nationalgeographic.com/news/2013/13/130125-women-combat-world-australia-israel-canada-norway/> [https://perma.unl.edu/63EL-ESA3] (noting that in 2011 Australia opened up the remaining seven percent of positions previously closed to women). See generally PAUL CAWKILL ET AL., MINISTRY OF DEFENCE, *WOMEN IN GROUND CLOSE COMBAT ROLES: THE EXPERIENCES OF OTHER NATIONS AND A REVIEW OF THE ACADEMIC LITERATURE* (2009) (assessing experiences of other nations in opening close combat roles to women).

19. See Betsey Guzior, *As Army Moves to Open Ranger Program to Women, There’s More To Come*, BIZWOMEN (Sept. 3, 2015, 4:25 PM), <http://www.bizjournals.com/bizwomen/news/latest-news/2015/09/as-army-moves-to-open-ranger-program-to-women.html>.

20. Matthew Weaver, *Women Could Get Combat Roles in British Army by 2016*, GUARDIAN (December 19, 2014, 4:30 PM), <http://www.theguardian.com/uk-news/2014/dec/19/women-combat-roles-british-army-infantry-armoured-units> [https://perma.unl.edu/H6QS-QPXD].

21. See generally D’Ann Campbell, *Women in Combat: The World War II Experience in the United States, Great Britain, Germany, and the Soviet Union*, 57 J. MIL. HIST. 301 (1993) (noting the role of female soldiers in combat during World War II).

day.”²² In fact, more than 150 women have been killed and more than 800 wounded in the line of duty throughout the Iraq and Afghanistan wars.²³

The DoD reported that as of fiscal year 2013 the active force was composed of over 200,000 women, or 14.9% of United States enlisted personnel.²⁴ As of 2009, an additional 190,000 women were in the Reserves and National Guard.²⁵ Naturally, with the increase in female service members came an increase in the female veteran population. Almost half of all women veterans have served from August 1990 to the present.²⁶ In 2009, 1.5 million veterans in the United States and Puerto Rico were women, about 8% of the total population.²⁷ The Department of Veterans Affairs projects women will make up 15 percent of all living Veterans by 2035.²⁸

B. The Sexual Assault Problem: A Cross-Cultural Glance

In 2012, the documentary *The Invisible War*²⁹ was released, telling the story of numerous female sexual assault victims in the United States military and their yet unrealized fight for justice. The documentary shocked the world into a discussion about the U.S. military’s problem with sexual assault and the focus has mostly remained there. However, other countries have also looked into how sexual assault is treated in their own military justice systems. Though the numbers vary by country, the results are largely the same: women in the military all over the world disproportionately face an enemy in their own comrades.

Some veterans studies report as high as one in three women in the United States military are victimized,³⁰ a rate twice as high as that of civilians.³¹ Further, females are up to ten times more likely to experi-

22. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL’Y 1011, 1015. Some scholars argue that because war no longer has “front lines,” the debate over whether women should be allowed in combat has been rendered obsolete. *Id.* at 1015–16.

23. *Women In Combat: 5 Key Questions*, NPR (January 24, 2013, 2:20 PM), <http://www.npr.org/sections/thetwo-way/2013/01/24/170161752/women-in-combat-five-key-questions> [<https://perma.unl.edu/HB3F-SSZE>].

24. U.S. DEP’T. OF DEF., 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 16 (2015).

25. NAT’L CTR. FOR VETERAN’S ANALYSIS & STATISTICS, AMERICA’S WOMEN VETERANS: MILITARY SERVICE HISTORY AND VA BENEFIT UTILIZATION STATISTICS 6 (2011).

26. *Id.* at v (reporting data as of 2009).

27. *Id.*

28. *Id.*

29. THE INVISIBLE WAR (Cinedigm 2012).

30. Schmid, *supra* note 8, at 476 n.4.

31. *Id.* at 475.

ence sexual assault or harassment than their male counterparts.³² In 2014, the DoD received a total of 6,131 reports of sexual assault,³³ 4,104 reported by females and 1,180 by males.³⁴ Because sexual assault is a very underreported crime, the DoD estimated that about 1 in 4, or 25%, of victims reported the incident that occurred during military service.³⁵ Taking underreporting into account, the DoD found that approximately 18,900 sexual assaults occurred in the US military in fiscal year 2014.³⁶

Further, of those who do report, nearly two thirds face retaliation. In both 2012 and in 2014, 62 percent of women who filed a report indicated that they experienced professional retaliation (such as being denied a promotion or training), social retaliation (such as being ignored by coworkers), adverse administrative actions (such as being transferred to a different assignment), or punishments for violations associated with the sexual assault (such as underage drinking or fraternization).³⁷ Among these, the most common form of retaliation experienced by reporters of sexual assault was social retaliation at 53 percent.³⁸ Additionally, both male and female victims of sexual as-

32. Lisa Rapaport, *Two in Five Military Women Endure Sexual Trauma During Service*, REUTERS (Aug. 27, 2015, 12:19 PM), <http://www.reuters.com/article/us-health-rape-military-idUSKCN0QW24P20150827#iv5fbt2PBtBOFYIU.97> [https://perma.unl.edu/E5RW-ZWL6].

33. Department of Defense Directive 6495.01 defines sexual assault as intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. The crime of sexual assault includes a broad category of sexual offenses consisting of the following specific Uniform Code of Military Justice offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses. U.S. DEP'T OF DEF., 6495.01, JAN. 23, 2012, DIRECTIVE 21 (2012).

34. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-285, MILITARY PERSONNEL: ACTIONS NEEDED TO ADDRESS SEXUAL ASSAULTS OF MALE SERVICE MEMBERS 13 (2015).

35. SAPRO REPORT, *supra* note 6, at 8. By contrast, in 2014 an estimated 34% of rape or sexual assaults in the civilian world were reported to police. JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2014, at 7 (2015).

36. SAPRO REPORT, *supra* note 6, at 8. The DoD attributes this increase in number of reports to increased reporting. *Id.* (noting that the estimated number of reports only constituted 25% of the assaults that actually took place). Others argue that it is impossible to tell whether reporting increased or the number of sexual assaults did. *See, e.g.*, Helen Benedict, *The Pentagon's Annual Report on Sexual Assault in the Military, or, How to Lie with Statistics*, HUFFINGTON POST (Mar. 20, 2009), http://www.huffingtonpost.com/helen-benedict/the-pentagons-annual-repo_b_177563.html.

37. NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 20 (2014); SAPRO REPORT, *supra* note 6, at 10.

38. NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM

sault who report are 12 times as likely to experience retaliation for reporting than to see the attacker convicted of a sex offense.³⁹ Certainly while the U.S. is making progress in getting victims to report, that progress cannot be expected to continue as long as retaliation for making a report goes unpunished.

Finally, the prevalence of Military Sexual Trauma (“MST”) is appalling. MST refers to the trauma experienced by sexual assault or repeated threatening acts of sexual harassment.⁴⁰ One in 5 women and 1 in 500 men have experienced some form of MST while on active duty in the military.⁴¹ Sufferers of MST are at an increased risk of Post Traumatic Stress Disorder (PTSD). In fact, victims of sexual assault are nine times more likely to suffer from PTSD caused by MST compared to PTSD caused by experiences on the battlefield.⁴² Further, female veterans who are sexually assaulted while in the military are nine times more likely to suffer from PTSD than women who are not.⁴³

Certainly, the United States military is not alone with strikingly high sexual harassment and assault prevalence rates. For example, 1 in 13 women in the Canadian military are sexually assaulted, according to a 2013 study.⁴⁴ Figures in Israel, where women are ordered to partake in mandatory military service alongside men, range from 1 in 3 women experiencing sexual assault and 80% report sexual harassment in 2003, to 1 in 7 females experiencing sexual harassment in 2009.⁴⁵ Still, reports of and indictments for sex offenses have increased in the IDF the last couple years.⁴⁶ A 2006 survey of women in the UK military found that almost all service women who responded

THE 2014 RAND MILITARY WORKPLACE STUDY 21 (2014); SAPRO REPORT, *supra* note 6, at 10.

39. *US: Military Whistleblowers At Risk: Retaliation for Reporting Sexual Assault*, HUMAN RIGHTS WATCH (May 18, 2015), <https://www.hrw.org/news/2015/05/18/us-military-whistleblowers-risk> [<https://perma.unl.edu/TE49-Z4G9>].
40. *Military Sexual Trauma*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.mentalhealth.va.gov/msthome.asp> [<https://perma.unl.edu/3W92-KGPS>].
41. Ann W. Burgess et al., *Military Sexual Trauma: A Silent Syndrome*, 51 J. PSYCHOL. NURSING 20, 20 (2013).
42. Lohman, *supra* note 9, at 255–256.
43. Schmid, *supra* note 8, at 476.
44. *One in 13 Women Sexually Assaulted in Canadian Military: StatsCan*, METRONews (Aug. 15, 2014) <http://www.metronews.ca/news/canada/2014/08/15/one-in-13-women-sexually-assaulted-in-canadian-military-statscan-survey-says.html> [<https://perma.unl.edu/W6DP-H77J>].
45. LISA M. SCHENCK, FACT SHEET ON ISRAELI MILITARY JUSTICE 4 (2013). The author did, however, note that without knowing the details of the methodologies of the studies, she could not assess the reliability of the extrapolations. *Id.*
46. *International Prevalence of Sexual Assault in the Military*, THE ADVOCATES FOR HUMAN RIGHTS (Aug. 2013), http://www.stopvaw.org/international_prevalence_of_sexual_assault_in_the_military#Footnote%201 and <http://www.haaretz.com/israel-news/1.529845> [<https://perma.unl.edu/Q4HL-T6H6>].

had been in a situation that involved sexualized behaviors, with almost seventy percent responding that they had encountered sexual behavior directed at them that was unwelcome.⁴⁷ Thirteen percent reported that they had been sexually assaulted, but only five percent of these made a formal written complaint.⁴⁸

Finally, in Germany, where all criminal offenses are tried in civilian courts, one in two of Germany's female soldiers have faced some form of sexual abuse or harassment while in the military.⁴⁹

Fifty-five percent of women in the Bundeswehr reported some kind of sexual mistreatment on the job, with 47 percent citing verbal abuse, 25 percent saying they had been confronted with pornographic images and 24 percent telling researchers they had experienced "unwanted sexually motivated physical contact[.]" Three percent said they had suffered sexual assault.⁵⁰

In contrast, twelve percent of the male soldiers reported experiencing sexual harassment.⁵¹ Though rates of overall harassment appear to be similar to those in the United States, the rate of sexual assault of women in the military is significantly lower in Germany. During the period of August 2007 through August 2012, "some four hundred suspected sexual offenses allegedly perpetrated by military personnel were under investigation."⁵² Of those, thirty offenses were allegedly committed by soldiers against soldiers.⁵³

III. THE UNDERLYING ISSUES: HOSTILE AND BENEVOLENT SEXISM ACROSS CULTURES

A. Ambivalent Sexism and Sexual Agency

The theory of ambivalent sexism distinguishes between hostile sexism and benevolent sexism. Hostile sexism can be demonstrated by negative attitudes and stereotypes about women.⁵⁴ On the other hand, benevolent sexism is "a subjectively positive orientation of protection, idealization, and affection directed toward women . . ."⁵⁵ While these ideologies seem diametrically opposed, the theory of ambivalent sexism asserts that they are inextricably connected and that

47. THE LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CENTER, MILITARY JUSTICE: ADJUDICATION OF SEXUAL OFFENSES 61 (2013).

48. *Id.*

49. THE LAW LIBRARY OF CONGRESS, *supra* note 47, at 37; *One in Two German Female Soldiers Report Sexual Abuse*, RAWSTORY (Jan. 24, 2014) <http://www.rawstory.com/2014/01/one-in-two-german-female-soldiers-report-sexual-abuse/> [<https://perma.unl.edu/8MMX-UTZ5>].

50. *Id.*

51. *Id.*

52. THE LAW LIBRARY OF CONGRESS, *supra* note 47, at 41.

53. *Id.*

54. Peter Glick et al., *Beyond Prejudice as Simple Antipathy: Hostile and Benevolent Sexism Across Cultures*, 79 J. PERSONALITY & SOC. PSYCHOL. 763, 764 (2000).

55. *Id.* at 763.

the legitimacy of hostile sexism depends on benevolent sexism.⁵⁶ These theories of systemic gender inequality stem from three interrelated sources: gender differentiation, heterosexuality, and paternalism.⁵⁷

Gender differentiation posits that men and women are inherently different and must stay within certain bounds of stereotypical behavior.⁵⁸ Men and women are rewarded for their adherence to, and punished for their nonconformance with, socially prescribed behavior for their gender—gender norms.⁵⁹ Heterosexuality relies on the process of gender differentiation; traditionally, women have been turned over to men as “prizes to be treasured” under benevolent sexism, and as “chattel to be used” under hostile sexism.⁶⁰ Finally, paternalism urges the protection of women, as a father would his daughter, and further justifies male domination as women must be protected by their fathers until they are turned over to their husbands.⁶¹ Thus, a woman who steps out of her assigned role—and into the masculine world of the military, for example—is met with skepticism. Because she no longer qualifies as traditionally feminine, benevolent sexism suggests she is no longer worthy of protection and hostile sexism suggests that, for stepping away from tradition, she must be punished.

Rape as a tool of war is an example of the interplay between hostile and benevolent sexism. Even today benevolent language is written into the Department of Defense Manual on the Law of War. Specifically, it provides: “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”⁶² Rape of an enemy country’s civilians can be described as a message to the enemy that their women need protection and that they failed to provide it themselves.⁶³ In other words, it is a “cross-cultural language” of domination of males, by males, through their women.⁶⁴

56. Courtney Fraser, Comment, *From “Ladies First” to “Asking For It”: Benevolent Sexism in the Maintenance of Rape Culture*, 103 CAL. L. REV. 141, 147 (2015).

57. Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491, 493 (1996).

58. Fraser, *supra* note 56, at 147–49.

59. *Id.* at 149.

60. *Id.*

61. *See, e.g., id.*

62. OFFICE OF GEN. COUNSEL DEP’T OF DEFENSE, DEP’T OF DEF. LAW OF WAR MANUAL 656 (2015). This section is modeled after Article 27 of the Geneva Convention, which uses the same language. *Id.*

63. *See, e.g.,* Claudia Card, *Rape as a Weapon of War*, 11 HYPATIA 1, 7 (1996).

64. *Id.*

B. Gender Roles and Non-Conformance

Social psychological research shows that men are most often associated with agentic qualities, such as leadership, while women are perceived as communal and supportive.⁶⁵ As long as women act within their prescribed gender norms, benevolent sexism allows these women to be protected. Presumably this protection extends to the court system in cases of female victimization. However, women charging rape or harassment often see their cases harmed by evidence that they were exhibiting behavior that is not traditionally feminine.⁶⁶ Society teaches women to be silent and demure and to avoid communicating their desires to either have or refrain from sex. But in the context of rape, this social expectation punishes women who adhere to gender normative behavior. If a woman acts in accordance with the expectation that she is quiet and demure, her agency must be assumed by a man who knows what is best for her.⁶⁷ When, in response to a sexual assault, she continues to comport herself with “ladylike” behavior and remains quiet, not telling anyone about the encounter or waiting to file a complaint, this is seen as evidence that she either consented to the assault or it did not happen.⁶⁸

Further, it is particularly easy for a woman in the military to act outside of traditional feminine norms. Indeed, her very presence in the military challenges the organization’s masculine nature. The military asks that she comport herself to masculine traits and serve as a leader, sacrificing for her country, but this subjects her to punishment under the theory of ambivalent sexism. Because she is no longer conforming to gender norms, she is no longer worthy of protection, either by her comrades or the court system.

However, if she were to react to a sexual assault in a way that aligns with masculine norms, she would arguably not have reported the incident at all. Men who are victimized by rape or sexual assault contradict ideas of masculinity and, more specifically, male sexuality.⁶⁹ Gender norms require men to want sex (with women) and to exert dominance and control.⁷⁰ The fear of being perceived as “womanly” or even gay may prompt men to either exert dominance over a woman or to fail to report their own victimization at the hands of a male or female.⁷¹ Thus, speaking out at all may be interpreted as a

65. Fraser, *supra* note 56, at 150.

66. *Id.* at 158–59.

67. *Id.* at 152.

68. *Id.* at 159–62.

69. Karen G. Weiss, *Male Sexual Victimization: Examining Men’s Experiences of Rape and Sexual Assault*, 12 MEN & MASCULINITIES 275, 277 (2010).

70. *Id.*

71. *Id.*

feminine response and “feminine traits” are regarded as ill-suited for the military.

Consequently, a woman reporting an intramilitary sexual assault faces the ultimate Catch-22 in that there is no correct response for her to ensure that she has her day in court and is free of retaliation. If she speaks up, she has failed to act in a way that is feminine and therefore benevolent sexism asserts that she is no longer worthy of protection. At the same time, by speaking up, she has failed to act in a way that is masculine, as required by her position in the military, because men are dominant and seek out sex. However, if she does not speak up, in accordance with feminine norms, a court may see this as evidence that she consented to the assault or that it did not happen. In either situation, she challenges the structure of the masculinized military and can be seen by those who already stand against gender integration in the military as evidence that women do not belong, either because she was a distraction from the operation or because she is too weak to handle the military.⁷²

IV. APPLICABLE LAW

A. No Relief on the Home Front

1. *The Uniform Code of Military Justice*

The history of the United States’ use of a separate court system for the military is as old as the country itself. On June 14, 1775, the Second Continental Congress voted to create the Continental Army, now known as the United States Army.⁷³ By the end of that same month, “a draft of Rules and regulations for the government of the army” was approved in the Articles of War.⁷⁴ There are two standard reasons given for the immediate necessity of a separate justice system for the military. The first cites a need for military discipline and the other a concern for mobility.⁷⁵ Remnants of that original system exist today in the Uniform Code of Military Justice (UCMJ), enacted in 1950 for

72. Of the men in the German military, 56% said women made the military worse. *One in Two German Female Soldiers Report Sexual Abuse*, *supra* note 49. The percentage of men who thought men could work well together with women in the military dropped from 83% to 77% and over half of the men stated women are not suited to physically challenging activities. Bettina Marx, *German Army Losing Luster for Female Members*, DEUTSCHE WELLE (Jan. 26, 2014), <http://www.dw.com/en/german-army-losing-luster-for-female-members/a-17387214> [https://perma.unl.edu/UWY4-7SC8].

73. GREGORY E. MAGGS & LISA SCHENCK, *MODERN MILITARY JUSTICE: CASES AND MATERIALS* 1 (2012).

74. *Id.*

75. *Id.* at 2.

the purpose of creating a single, comprehensive military justice system for all of the branches to adhere to.⁷⁶

Article 120 of the UCMJ, “Rape and sexual assault generally,” defines four offenses: rape, sexual assault, aggravated sexual contact, and abusive sexual contact.⁷⁷ While the definition of rape under the UCMJ requires an element of force, the three other offenses do not. Despite recent changes in the definition of these crimes as well as the evidentiary requirements of consent, studies of jurors reveal that they are statistically no more likely to convict offenders for these crimes under the new statute than they were under the old versions.⁷⁸

The area of greatest concern to scholars and legislators in recent times has been the role of the chain of command in the court process. “Traditionally, service members had to report rape or sexual assault directly to unit commanding officers.”⁷⁹ These officers had full discretion to determine whether sufficient evidence existed to warrant reprimand.⁸⁰ “Unit commanders are often biased in light of their personal or working relationship with the accused,” lack legal experience to handle these cases, and have little time and attention available to investigate as they are more operationally focused.⁸¹ In 2005, military policy allowed for two avenues of reporting sexual assault: unrestricted and restricted reporting.⁸² Restricted reports allow victims to seek medical care and advocacy services without triggering an investigation.⁸³ Unrestricted reports trigger an investigation and potential prosecution and are made to law enforcement, commanders, Veterans Affairs, Sexual Assault Response Coordinators (SARCs), Sexual Assault Program Response (SAPR) Victim Advocates, or health care personnel.⁸⁴ Even with this reporting system in place, “an

76. *Id.* at 4.

77. 10 U.S.C. § 920 (2012).

78. Mark D. Sameit, *When a Convicted Rape is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV. 77, 78 (2013).

79. Lindsay Hoyle, *Command Responsibility—A Legal Obligation to Deter Sexual Violence in the Military*, 37 B.C. INT’L & COMP. L. REV. 353, 359 (2014).

80. *Id.*

81. *Id.* at 360.

82. *Id.* at 359 n.40.

83. SAPRO REPORT, *supra* note 6, at 7 n.10.

84. *Id.* at 7 n.9; *Sexual Assault Prevention and Response*, DEP’T OF DEF., <http://www.sapr.mil/index.php/unrestricted-reporting> [https://perma.unl.edu/3WXE-BSES]. In 2014, victims made 4,660 unrestricted reports and 1,840 initial restricted reports of sexual assault. SAPRO REPORT, *supra* note 6, at 7. At the end of the year, 1,471 reports remained restricted. *Id.* The percentage of victims who convert their restricted reports to unrestricted reports in recent years has remained relatively stable with an average of 15%. *Id.* In 2014, however, the conversion rate increased to 20%. *Id.*

estimated 68 percent of ‘actionable’ cases were not prosecuted due to lower level command discretion in 2011.”⁸⁵

In 2012, the military again changed policy with regard to the reporting procedures and charged lower level commanders with a duty to report allegations of rape to an elevated commander—typically a colonel or captain.⁸⁶ The enforcement of this duty is questionable and merely puts the discretion in the hands of a higher-ranking officer within that chain of command who may share the same biases as those of unit commanders.

After an investigation is complete, the accused’s commander consults with legal counsel and decides the initial case disposition of alleged criminal offenses. The commander’s options are: (1) taking no action; (2) taking administrative action, such as admonition or reprimand; (3) imposing a nonjudicial punishment including fines, forfeitures, reduction in grade, or even administrative discharge; or (4) referring the case to court-martial.⁸⁷ In 2014, of the 6,131 reports made to the DoD, 2,625 were recommended for any form of disciplinary action, 998 of which had court-martial charges initiated against them.⁸⁸ Of those charges, 588 cases proceeded to trial and 434 subjects were “convicted of at least one charge at court-martial,” though it is unclear if that charge was a sexual assault charge or something lesser.⁸⁹ Consequently, roughly 7% of sexual assault reports resulted in a conviction in military court.

Reforms enacted in 2014 and 2015 created a system that allowed for a convening authority in situations where a sexual assault offense is not recommended to court-martial—such decisions are reviewed by a “superior competent authority.”⁹⁰ Where the convening authority and his or her staff judge advocate disagree about the referral decision, the case is then referred to a service secretary for review.⁹¹ When both the convening authority and the staff judge advocate agree not to refer, the case is referred on to the next higher convening authority or the chief prosecutor of the service may request that a service secretary review the case.⁹² While these reforms allow for further re-

85. Hoyle, *supra* note 79, at 360.

86. *Id.*

87. U.S. COMM’N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY: 2013 STATUTORY ENFORCEMENT REPORT 59–60 (2013).

88. SAPRO REPORT, *supra* note 6, at 22 app. A.

89. *Id.* at 26.

90. 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/ [<https://perma.unl.edu/5NGF-U4JM>].

91. *Id.*

92. *Id.*

views, it remains to be seen whether additional reviews will control for administrative bias in the hierarchical system of the military.⁹³

The problem is further confounded by the ability of the accused's commander to testify on the behalf of the accused's good character under the UCMJ evidentiary rules.⁹⁴ Admitting such evidence shifts the trial focus from the misconduct at issue to the accused's exemplary military service record, which is arguably better the higher up in rank the military official is in the hierarchy. This could further result in a type of jury nullification that could result in the accused's acquittal, despite evidence of guilt.⁹⁵

The involvement of the chain of command in the process is troubling in consideration of the profile of many of the perpetrators of intramilitary sexual assault. In 2012, "25 percent of female victims and 27 percent of male victims who experienced unwanted sexual contact said that they were victimized by someone in their chain of command."⁹⁶ Further, "38 percent of female victims and 17 percent of male victims said they were victimized by someone of higher rank."⁹⁷ Indeed, frequently cited reasons victims of intramilitary sexual assault give for not reporting is that the person they must report to was their assailant or the assailant was within their chain of command.⁹⁸ Further, the masculine culture of the military and its hierarchical nature make retaliation very likely, no matter who the initial report is made to.

2. Civilian Law

Though the UCMJ grants military courts jurisdiction over criminal offenses, two cases have taken claims through the civilian federal court system under other theories of redress. Only one case has reached a conclusion thus far, but the results have not been promising. In *Cioca v. Rumsfeld*, twenty-five women and three men serving in the Army, Navy, Marine Corps, and Coast Guard sued two recent Secretaries of Defense—Donald Rumsfeld and Robert Gates—in Feb-

93. Allegations in *Baldwin v. Dep't of Defense* suggest that they have not. See *infra* note 103 and accompanying discussion.

94. Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 441 (2014).

95. *Id.* While the Victim Protection Act, enacted in 2015, prohibits the admission at trial of evidence of general military character to raise reasonable doubt as to the accused's guilt, it remains admissible when it is relevant to an element of an offense. RESPONSE SYS. TO ADULT SEXUAL ASSAULT CRIMES PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 50–51, 170 (June 2014) [hereinafter RSP REPORT].

96. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 87, at 7 n.34.

97. *Id.*

98. RSP REPORT, *supra* note 95, at 61–62.

ruary of 2011.⁹⁹ The plaintiffs alleged that the defendants had violated their constitutional rights by “fail[ing] to (1) investigate rapes and sexual assaults, (2) prosecute perpetrators, (3) provide an adequate judicial 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.”¹⁰⁰ The plaintiffs further asserted that Rumsfeld had “expressed scorn and derision” toward Congressional efforts to address rape in the military and “did not make any efforts to eliminate retaliation against service members who reported being raped.”¹⁰¹ As a remedy, the plaintiffs invoked *Bivens*, in which the Supreme Court held that “violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages,’ despite the absence of any federal statute creating liability.”¹⁰² Though the court recognized the seriousness of the allegations, it nonetheless asserted that judicial deference to Congress and the President in military matters was required by the Constitution. Therefore, a *Bivens* claim was not applicable and the plaintiffs’ case was dismissed.

On March 31, 2015, four women filed a complaint in Federal District Court for the Eastern District of Virginia against the Department of Defense asserting new legal theories. Specifically, the plaintiffs assert:

Plaintiffs’ substantive and procedural due process, equal protection and First Amendment rights have been violated by the Department’s practice of permitting persons known to be involved in creating sexually hostile environments to be appointed as “convening authorities” in rape and sexual assault cases

. . . .
Plaintiffs seek to exercise their rights under all federal statutes and regulations, including but not limited to the Administrative Procedure Act, Title VII, Title X and implementing regulations, that penalize the creation of a sexually hostile environment, require a full and impartial investigation of such environments, and prevent vesting adjudicatory “convening authority” power in the hands of participating.¹⁰³

Considering past precedent and the court’s tendency to stay out of “military matters,” it is likely this case will reach a similar end as that of *Cioca v. Rumsfeld*.

Further, the process of proving a sexual harassment claim demonstrates just how difficult it is for a female victim to overcome “the gen-

99. 720 F.3d 505 (4th Cir. 2013).

100. *Id.* at 507.

101. *Id.*

102. *Id.* at 508 (quoting *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971)).

103. Complaint at 19–20, *Baldwin v. Dep’t of Def.*, No. 1:15-cv-00424-GBL-TCB (E.D. Va. Mar. 31, 2015).

eral presumption that women are receptive to this type of conduct.”¹⁰⁴ To prove a hostile work environment claim of sexual harassment under Title VII, a plaintiff must show not only that the harassment was (1) because of sex and (2) sufficiently severe or pervasive as to create a working environment that was both objectively and subjectively abusive, but he or she must also show that (3) the harassing conduct was “unwelcome.”¹⁰⁵ Consequently, instead of putting the burden on the plaintiff to prove that his conduct was welcomed, sexual harassment law presumes that women (and other victims of sexual harassment) are receptive to even violently aggressive conduct.¹⁰⁶ Because of this presumption, courts look both to the victim’s actions before the conduct as well as his or her responses to the harassing conduct to determine whether the harassment was “welcomed.”

This requirement might be particularly burdensome for women in the military, as certain conduct can resemble condoning harassment to the court—such as hesitation or failure to file a complaint.¹⁰⁷ This view ignores the many legitimate reasons why a plaintiff, especially a woman in the military, might delay in initiating an investigation. The masculinized culture of the military may make a woman feel as if participating in sexualized jokes was the only way to be accepted amongst her “brothers.”¹⁰⁸ A female service member may also fail to initiate an investigation right away for fear of retaliation, a very well-founded fear in the military. This again demonstrates the Catch-22 of female intramilitary sexual assault victims.

B. (In)Applicability of International Law

1. *A History of the Prohibition of Rape and Gender-Based Crimes as a Peremptory Norm*

Due to the inability of the United States to recognize its failures with regards to sexual assault victims in the military, it is necessary to explore potential remedies provided by international law. Indeed, other countries, including Germany, have removed the prosecution of sexual assault from the chain of command, but poor attitudes regarding women in the military remain, confounding the problem by mak-

104. Fraser, *supra* note 56, at 160.

105. *Id.* (citing 42 U.S.C. § 2000e-2(a)(1) (2012); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); Mary Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 505 (1994)).

106. *Id.* at 161.

107. *Id.*

108. In *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991), a female police officer failed to prove unwelcomeness because the court found evidence of her “enthusiastic receptiveness to sexually suggestive jokes and activities.” *Id.* at 491. She asserted, however, that she felt participating in these jokes was the only way she could be accepted at work. *Id.* at 492.

ing it less likely for women to report their abuse in the first place. With these cross-cultural issues in mind, it is crucial to consider the ways in which an international body may provide recourse.

Before analyzing how international law can be applied to the issue of intramilitary rape, it is essential to understand the history of the application international law to rape during times of both war and peace. Though rape and war have been thought synonymous since the beginning of time, the application of international law to rape has a short history. The movement to define rape as a war crime has been criticized as “surprisingly slow and unsuccessful,”¹⁰⁹ as well as “extremely ineffective or . . . nonexistent.”¹¹⁰ Until recent years, sexual assault during wartime was accepted or even ignored, but lately the world has seen unprecedented developments in the effort to prosecute rape as an international crime.

The applicable areas of current international law can be divided into three categories: international humanitarian law, international criminal law, and international human rights law. These bodies of law are not entirely distinct as there is significant overlap in their protections of individuals, including women and children. International humanitarian law is only invoked during times of international or non-international armed conflict, whereas crimes against humanity and other human rights violations need not be connected to war in order to be prosecuted.¹¹¹ International humanitarian law, commonly referred to as the law of war, attempts to diminish the destruction of armed conflict for both combatants and noncombatants.¹¹² This is done through establishing mandatory rules that regulate the means

109. Melissa Goldenberg Goldstoff, *Security Council Resolution 1820: An Imperfect but Necessary Resolution to Protect Civilians From Rape in War Zones*, 16 *CARDOZO J.L. & GENDER* 491, 492 (2010).

110. Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 *GEO. L.J.* 2557, 2558 (2001).

111. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 *BERKELEY J. INT'L L.* 288, 291–92.

International human rights and international humanitarian law prohibit torture and slavery, yet redress efforts depend upon which body of law is applied. For example, international human rights law requires state action or acquiescence, whereas international humanitarian law requires a connection to an armed conflict. Slavery and torture also form part of international criminal law, and indeed, there is growing recognition that the most serious human rights or humanitarian law violations may constitute international crimes. Moreover, certain treaties, such as the Genocide Convention, explicitly impose criminal sanction for violation.

Id. at 291.

112. *Id.* at 289.

and methods of war, the conduct of hostilities, and the treatment of prisoners of war and civilians.¹¹³

International humanitarian law as it is known today began with the 1907 Hague Conventions and Regulations and the introduction of the 1929 Geneva Convention and currently stands as governed by the current Geneva Convention (IV) of 1949.¹¹⁴ These agreements show promise, as the first outlawed the sexual exploitation of females serving in the military as nurses or other aids as well as outlawed the unfair treatment due to a woman's sex¹¹⁵ and the last explicitly recognizes a rape victim's individual right to be free of rape.¹¹⁶ However, these agreements generally regulated how combatants were to treat individuals not engaged in combat, such as prisoners of war, medical personnel, and civilians.

International humanitarian law can be boiled down to one fundamental principle: civilians are to be spared from harm.¹¹⁷ This general principal renders this body of law largely inapplicable to claims of intramilitary sexual assault.¹¹⁸ However, international humanitarian law began to establish a preemptory norm of prohibiting unfair treatment of women on the basis of sex as well as a right to be free of rape and the importance of this cannot be overstated as it allowed for greater recognition of such prohibitions in forthcoming treaties, declarations, and conventions. Thus, the Geneva Convention began the quest to prohibit sexual assault in times of war and in peace, whether extra- or intra-militarily.

In the wake of World War II, international criminal law developed to hold individuals accountable for egregious violations of international humanitarian and human rights law. Under the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East at Tokya (IMTFE), war criminals were prosecuted for war crimes, crimes against the peace, and crimes against

113. *Id.*

114. *Id.* at 290; *see also* Cernak, *supra* note 9, at 221 (discussing the modern humanitarian law regime beginning with the Geneva Convention (IV)). In fact, the earliest prohibition of rape during wartime was The Lieber Code, published in 1863 following the American Civil War. Goldstoft, *supra* note 109, at 494. The Code was thought to merely codify what was already considered international custom and usage and provided specifically that "all rape . . . is prohibited under the penalty of death." *Id.* (citing Francis Lieber, *Instructions for the Government of Armies of the United States in the Field, Art. 45*, in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 9* (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 2004)).

115. Cernak, *supra* note 9, at 221.

116. *Id.*

117. Askin, *supra* note 111, at 289.

118. *Id.*

humanity.¹¹⁹ Though war crimes had traditionally been tried in military tribunals, crimes against the peace and crimes against humanity had never before been prosecuted.¹²⁰ Despite the prevalence of rape and sexual assault during World War II, the IMT failed to prosecute these crimes.¹²¹ The IMTFE, on the other hand, included rape amongst the charges against Japanese officials and successfully prosecuted them in conjunction with other crimes under the general prohibitions against “inhumane treatment,” “ill-treatment,” and “failure to respect family honour and rights.”¹²² Further, Japanese officials were found guilty of rape due to their failure to “carry out their duty to ensure that their subordinates complied with international law.”¹²³ Though rape itself was not recognized as a prosecutable violation and was only considered after the defendant had been charged with other war crimes, for the first time, state actors were brought in front of an international body for commissions of wrongs against their own citizens.¹²⁴

The 1990s and early 2000s brought about key decisions recognizing the prohibition against rape as a peremptory norm of international law. The United Nations Special Rapporteur on Human Rights highlighted the role of rape in the former Yugoslavia “both as an attack on the individual victim and as a method of ‘ethnic cleansing’ intended to

119. Campanaro, *supra* note 110, at 2560. Article 6(a) of the IMT Charter defined crimes against peace to include the “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. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, *concluded* Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, <http://Avalon.law.yale.edu/imt/imt-const.asp>. Crimes against humanity were defined by the Charter in Article 6(c) as including “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or as persecutions on political, racial, or religious grounds . . .” *Id.* Article 6(b) defined 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.” *Id.* art. 6. Crimes against humanity, war crimes, and crimes against the peace are all defined similarly in the IMTFE Charter. *See* Charter of the International Military Tribunal for the Far East, art. 5(a)–(c), Jan. 19, 1946, T.I.A.S. 1589.

120. Campanaro, *supra* note 110, at 2560.

121. *Id.*

122. *Id.* at 2563–64.

123. *Id.*

124. *Id.* at 2561; *see also* Cernak, *supra* note 9, at 222 (discussing rape charges made against state actors at Tokyo tribunals).

humiliate, shame, degrade and terrify the entire ethnic group.”¹²⁵ The horrifying scale of abuse against tens of thousands of women from 1992–1994 “shock[ed] the international community into rethinking the prohibition of rape as a crime under the laws of war.”¹²⁶ The International Criminal Tribunal of Rwanda (ICTR) and the International Criminal Tribunal of Yugoslavia (ICTY) were the first to successfully prosecute governmental actors for sexual crimes as separate offenses.¹²⁷ Specifically, the ICTR acknowledged that rape is a crime against humanity¹²⁸ and the ICTY acknowledged that rape is not only a crime against humanity, but a war crime as well.¹²⁹

One year after the monumental ICTY decision, the Rome Statute entered into force, establishing the International Criminal Court (ICC).¹³⁰ The Rome Statute granted the ICC jurisdiction over four major areas of crimes: genocide, war crimes, crimes against humanity, and aggression. Further, the Statute was the first international criminal law treaty to define and use the term “gender,” thus allowing for further protection of the rights of women by prosecuting gender based crimes.¹³¹ Rape is explicitly listed in Article 7 as a crime against humanity, along with “other form[s] of sexual violence of comparable gravity.”¹³² Sexual violence is further recognized as a “[g]rave breach of the Geneva Conventions” and thus a war crime under Article 8 of the Statute.¹³³ Consequently, the ICC prosecutor is able to prosecute rape or other gender-based crimes as war crimes or crimes against humanity.¹³⁴ Though the court is one of last resort, to be used only when national courts are inadequate or unwilling to prosecute a crime, the Rome Statute, combined with the other war tribunals held post-World War II and beyond, had the effect of establishing two essential customs of international law. First, the formation of war tribunals established that individuals will be held accountable for

125. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993); see also Campanaro, *supra* note 110, at 2570 (discussing female rape victims in Yugoslavia).

126. Meron, *supra* note 125, at 425.

127. Campanaro, *supra* note 110, at 2564.

128. Cernak, *supra* note 9 at 223; see also Prosecutor v. Akayesu. Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <http://unictr.unmict.org/en/cases/ictr-96-4> [<https://perma.unl.edu/3AC5-FDNA>].

129. Cernak, *supra* note 9, at 223; see also Prosecutor v. Kunarac, Case No. IT-96-23-I, First Amended Indictment (Int'l Crim. Trib. for Former Yugoslavia July 13, 1998), <http://www.icty.org/case/kunarac/4> [<https://perma.unl.edu/Y2LW-YFBN>].

130. Cernak, *supra* note 9. Notably, 120 nations voted in favor of the statute, 21 abstained, and 7 states voted against—the United States, Israel, China, Iraq, Libya, Qatar, and Yemen. *Id.*

131. Goldstoff, *supra* note 109, at 503. The Rome Statute defined gender as “the two sexes, male and female, within the context of society.” *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 503–04.

violations of war and human rights.¹³⁵ Second, the prohibition of rape was recognized as a peremptory norm—“a fundamental principle of international law from which no derogation is ever permitted.”¹³⁶

2. *Applying Current Treaties and Conventions to Intramilitary Sexual Assault Around the World*

Both within and outside the context of war, international human rights law and its instruments can provide protections. More importantly, they can further enhance the status of certain prohibitions to customary international law that applies regardless of participation in a treaty. International human rights law is created through a body of treaties and organizations that demand fair and equal treatment of all persons.¹³⁷ This principle of nondiscrimination, including “sex” discrimination, is recognized as the most fundamental principle of human rights law.¹³⁸ Therefore, even in human rights instruments that do not specifically address women’s rights, the instruments may not be interpreted or applied in a manner that is discriminatory to women.¹³⁹

International Law

From its inception in 1945, the United Nations has explicitly recognized gender equality. The Preamble to the U.N. Charter states the U.N.’s purpose to reaffirm faith “in the equal rights of men and women.”¹⁴⁰ This purpose is restated in the preamble to the Universal Declaration of Human Rights (UDHR).¹⁴¹ Further, Article 2 of the UDHR states that everyone is entitled to all rights and freedoms set forth in the Declaration, without distinction as to sex.¹⁴²

A number of treaties, declarations, and covenants have restated the U.N.’s purpose to reaffirm equal rights of men and women, but three are of particular importance in the context of women and armed conflict. First, in 1976, the International Covenant on Civil and Political Rights (ICCPR)¹⁴³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁴⁴ entered into force.¹⁴⁵ The ICCPR, considered by some human rights scholars to be the first gen-

135. Campanaro, *supra* note 110, at 2560.

136. Cernak, *supra* note 9, at 224.

137. *Id.*

138. Askin, *supra* note 111, at 292.

139. *Id.*

140. U.N. Charter pmb.

141. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

142. *Id.*

143. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

144. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

eration of human rights, provides for civil rights such as equality, due process, free speech, freedom of religion, and political rights, such as the right to vote or stand for election.¹⁴⁶ On the other hand, the ICESCR, the second-generation of human rights, addresses issues such as poverty, lack of adequate food and housing, access to clean water, and land ownership rights.¹⁴⁷ Scholars suggest that the ICESCR is more applicable to women's most serious concerns in the developing world while the ICCPR is noted as having more application to a sphere mostly dominated by men.¹⁴⁸ Despite their differences, the two covenants are equally authoritative legal instruments and both provide opportunities for the advancement of women's issues in the military.¹⁴⁹

Both covenants utilize committees that monitor state-parties' compliance through a reporting process.¹⁵⁰ Each body issues General Comments, which provide detailed guidance on the meaning of treaty articles, recommendation for further action, and guidelines for preparing state reports.¹⁵¹ The reporting mechanism requires State Parties to file periodic reports with the monitoring body describing the measures they have adopted and the progress made in achieving Covenant rights.¹⁵² The Committee then reviews the report and meets with the state representative for discussion, clarification, and questions.¹⁵³ Finally, the Committee issues Concluding Observations, which provide "positive aspects, factors and difficulties impeding implementation, principle subjects of concern, and suggestions and recommendations for the future."¹⁵⁴

There is one remaining significant difference between the two covenants and that is in the complaint mechanism. Namely, while the ICCPR Optional Protocol provides for an individual complaint mechanism, the ICESCR does not have such a procedure, though efforts are under way to establish one.¹⁵⁵ Before filing a complaint with the Human Rights Committee under the ICCPR, however, three requirements must be met. First, the state must be a party to the ICCPR

145. *Id.* (entering into force on Jan. 3, 1976); International Covenant on Civil and Political Rights, *supra* note 143 (entering into force on Mar. 23, 1976).

146. SUSAN DELLER ROSS, *WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK* 91-92 (2008).

147. *Id.* at 92.

148. *See id.* at 92-93.

149. *See* Jeanne M. Woods, *Emerging Paradigms of Protection for "Second-Generation" Human Rights*, 6 *LOY. J. PUB. INT. L.* 103 (2005), for a critique of the dichotomy between first and second generations rights.

150. Ross, *supra* note 146, at 91.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 92.

Optional Protocol and not just the original covenant. Then, the ICCPR Protocol requires that complainants first exhaust their domestic remedies.¹⁵⁶ Additionally, it is required that the “same matter is not being examined under another procedure of international investigation or settlement”¹⁵⁷ After holding closed meetings to examine the complaints and other written information submitted by the parties, the Committee forwards their “views” on to both.¹⁵⁸ Though the nature of these “views” is questioned, the Committee has increasingly acted like a court and asserts that its views are legally binding.¹⁵⁹

The next document of particular importance for women in the military is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶⁰ Though the ICCPR, ICESCR, and other U.N. documents “reflected the growing sophistication of the UN system with regard to the protection and promotion of women’s human rights, the approach they reflected was fragmentary, as they failed to deal with discrimination against women in a comprehensive way.”¹⁶¹ In fact, there was a growing concern that the general international human rights regime was not working as well as it should for women.¹⁶² Even before the ICCPR and ICESCR had entered into force, the Commission on the Status of Women (CSW), in 1974, decided to prepare a “single, comprehensive and internationally binding instrument to eliminate discrimination against women.”¹⁶³ In 1981, CEDAW entered into force, officially codifying international legal standards for women.¹⁶⁴ Since the 1970s, the Committee on the Elimination of Discrimination against Women has issued recommendations that are binding on all parties to the Convention, including recognizing sexual violence as a form of gender discrimination.¹⁶⁵

CEDAW defines discrimination against women as

any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

156. *Id.* at 56.

157. *Id.*

158. *Id.*

159. *Id.* at 56–57.

160. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW].

161. *Short History of CEDAW Convention*, U.N. WOMEN (2009), <http://www.un.org/womenwatch/daw/cedaw/history.htm> [<https://perma.unl.edu/T92Z-4VPL>].

162. *Id.*

163. *Id.*

164. *Id.*

165. Cernak, *supra* note 9, at 225 (citing Comm. on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of State 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)).

exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁶⁶

The principle obligation of state-parties is to “condemn discrimination against women in all its forms, [and] to pursue by all appropriate means and without delay a policy of elimination of discrimination against women.”¹⁶⁷ Further, Article 5 calls on States to “modify the social and cultural patterns of conduct of men and women” in order to eliminate traditional attitudes, prejudices, and practices concerning the status and role of women and men.¹⁶⁸ Like the ICCPR and ICESCR, CEDAW employs a committee to consider reports from State parties.¹⁶⁹ Also similar to the ICCPR, the Optional Protocol to CEDAW establishes an individual complaint mechanism through which complainants can be heard after exhausting their domestic remedies.¹⁷⁰

Regional Law

In addition to domestic and international law, there are also regional human rights systems. The American, African, and European States have all created regional human rights treaties that may be utilized to promote women’s rights. The Organization of American States was established by the Organization of American States Charter, which entered into force in 1951 and was ratified by all 34 American states.¹⁷¹ Around that same time, the American Declaration of the Rights and Duties of Man (ADRDM) was proclaimed.¹⁷² Like its companion, the UDHR, the Declaration is not binding. The binding treaty, the American Convention on Human Rights (ACHR), was adopted in 1969 and entered into force in 1978.¹⁷³ Twenty-five American States have ratified the treaty, but the United States is among the nine that have not.¹⁷⁴

The Convention provides for two enforcement bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.¹⁷⁵ The Commission can receive and act on

166. CEDAW, *supra* note 160, art. 1.

167. Elizabeth Evatt, *Finding a Voice for Women’s Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT’L L. REV. 515, 517 (2002).

168. CEDAW, *supra* note 160, art. 5.

169. Evatt, *supra* note 167, at 518.

170. Ross, *supra* note 146, at 15.

171. *Id.* at 153.

172. American Declaration of the Rights and Duties of Man, OEA/Ser.L.V.II.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./ii.82, doc. 6, rev. 1, at 17.

173. American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123.

174. Ross, *supra* note 146, at 153.

175. *Id.*

petitions from any person, group of persons, or nongovernmental organization (NGO), claiming their rights under the Convention have been violated.¹⁷⁶ As with the international human rights treaties examined above, the Commission requires that a complainant exhaust all domestic remedies and submit in a timely fashion.¹⁷⁷ If the Commission cannot help the parties to achieve a friendly settlement, it issues a report with its finding and recommendations.¹⁷⁸ Issues of non-compliance are forwarded to the Court.¹⁷⁹ This is the only way petitioners can enter the Inter-American Court of Human Rights as they are not granted direct access. The Court's decisions are considered binding and the Court may award money damages and issue declaratory judgments, which tell the states what remedies should be provided.¹⁸⁰ The provisions of the ADRDM and the ACHR are essentially a reiteration of the equality of women and men and provide another avenue by which victims of gender-based crimes can be heard.

3. *Testing the Boundaries of International Law*

While the ICTR acknowledged that rape is a crime against humanity, the ICTY acknowledged that rape is not only a crime against humanity, but a war crime as well. Though it is well-established that rape during times of war is prohibited as a customary international norm, it is not entirely clear how far this right extends. Given the ICC's power to enforce compliance with laws against individuals perpetrating sex crimes, the court presents a promising avenue for redress. However, the court only has jurisdiction over genocide, war crimes, and crimes against humanity and these crimes do not explicitly cover intramilitary sexual violence. Specifically, "crimes against humanity" can only be committed against civilians under the Rome Statute. Additionally, "war crimes" primarily deal with grave breaches of the Geneva Convention and those offenses address civilian victims.

Individuals have pleaded with the international bodies to get involved.¹⁸¹ However, when called upon by the United Nations to remove sexual assault cases from the chain of command, the U.S. response was dismal. Instead of taking the request into consideration, the United States asserted, "[the] DoD has established victim-representation programs for sexual assault victims eligible for legal assistance, consistent with the findings of an independent study concluding that removing proceedings from the chain of command was not needed

176. *Id.* at 153–54.

177. *Id.* at 154.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See, e.g.,* Cernak, *supra* note 9, at 211.

to improve the situation of victims.”¹⁸² The addendum referred to a study done by the Response Systems to Adult Sexual Assault Crimes Panel (RSP), established by the U.S. Secretary of Defense and called upon by the National Defense Authorization Act of 2013 to “conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.”¹⁸³ The report found: “The evidence does not support a conclusion that removing convening authority from senior commanders will reduce the incidence of sexual assault, increase reporting of sexual assaults, or improve the quality of investigations and prosecutions of sexual assault cases in the Armed Forces.”¹⁸⁴

The international human rights treaties—the ICCPR, ICESCR, and CEDAW—similarly appear to lack the teeth necessary to address the problem, at least insofar as the United States is concerned. The United States has signed and ratified the ICCPR, but not the Optional Protocol which grants individuals a mechanism by which their complaints can be heard. Further, the United States has signed but failed to ratify both the ICESCR and CEDAW.¹⁸⁵ However, under Article 18 of the Vienna Convention on the Law of Treaties (VCLT), a country who has signed a treaty, even if they have not yet ratified it, has an obligation to refrain from acts that would defeat the object and purpose of the agreement.¹⁸⁶ Sexual crimes are often rooted in gender discrimination, and the United States’ failure to address such discrimination, when the object and purpose of the ICESCR, and CEDAW more specifically, is to eliminate discrimination against women, could be in violation of Article 18 of the VCLT.

While redress has not been explicitly granted to victims of intramilitary sexual assault, rape, no matter the perpetrator or victim, should be considered a violation of international law. Where a country fails to act upon that realization, it is upon the international legal system to hold that country accountable. Despite the obstacles enumerated in this section, international human rights bodies are beginning to address complaints from intramilitary sexual assault victims regarding the failure of their governments to address intramilitary sexual assault. For example, a victim in the UK has expressed a desire to bring claims of human rights violations to the European Court

182. Rep. of the Working Grp. on the Universal Periodic Review: U.S., at ¶ 15, U.N. Doc. A/HRC/30/12/Add.1 (2015).

183. SAPRO REPORT, *supra* note 6, at 18.

184. *Id.* at 32–33.

185. *Status of Ratification Interactive Dashboard*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://indicators.ohchr.org/> [<https://perma.unl.edu/9S9V-UHLM>].

186. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980).

of Human Rights.¹⁸⁷ Additionally United States victims have brought a petition before the Inter-American Commission on Human Rights (IACHR).¹⁸⁸

Though the United States has often argued that it is not under the jurisdiction of the IACHR, a recent landmark decision challenges this view. In a 2007 decision called *Jessica Gonzales v. United States*,¹⁸⁹ the IACHR asserted its competence to examine the human rights claims of a domestic violence survivor whose three children were killed when local police failed to enforce a restraining order against her estranged husband.¹⁹⁰ The petition concerning intramilitary sexual assault, along with other petitions by victims in other nations, will only help to strengthen the international recognition that gender-based crimes such as sexual assault will not be tolerated. Though international human rights bodies may not have the mechanisms in place to enforce that decision, such a finding may help further congressional efforts to eliminate military control of intramilitary sexual assault cases. However, nations such as Germany, who still struggle with high sexual assault prevalence and negative attitudes against women in the military despite trying such cases in civilian courts, demonstrate that legal reform may not be enough.

V. SUGGESTIONS FOR REFORM: A HOLISTIC APPROACH

A. Setting an Example

As a world power and permanent member of the United Nations Security Council, the United States plays an important role in international law by setting examples for other countries to follow. Due to the pervasiveness of the issue of intramilitary sexual assault across cultures, the United States must show the world that this gender-based violence is not to be tolerated. Not only does such violence affect the victim, but the military itself is compromised. Targets of sexual harassment or gender discrimination asserted that the event resulted

187. Sean Rayment, *Female Soldier 'Sexually Assaulted by SAS Troops' Taking Army to Court for 'Inhumane and Degrading' Treatment*, MIRROR (Mar. 21, 2014), <http://www.mirror.co.uk/news/uk-news/female-soldier-sexually-assaulted-sas-3248449> [<https://perma.unl.edu/76NB-B4D3>].

188. *See Petition Alleging Violations of the Human Rights of Mary Gallagher, et. al. by the United States of America and the United States Department of Defense, with Request for an Investigation and Hearing on the Merits*, CORNELL U. L. SCH., CORNELL INT'L HUMAN RIGHTS CLINIC, <http://www.lawschool.cornell.edu/academics/clinicalprogram/int-human-rights/upload/IACHR-US-Military-Submission-FINAL.pdf> [<https://perma.unl.edu/8DDQ-F9R7>].

189. No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L.V/II.128, doc. 19 (2007).

190. Caroline Bettenger-Lopez, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 183–84 (2008).

in damaged workplace cohesion, difficulty completing their work, and made the workplace less productive or compromised the unit's mission.¹⁹¹ Because the estimated active-component members who experience sexual harassment and gender discrimination—116,600 and 43,900, respectively—is so great, such negative effects disturb large portions of the force.¹⁹²

The best way for the United States to set an example in this area of law is to recognize the importance of ratifying CEDAW. Though international concerns for how victims of intramilitary sexual assault were noted under the state reporting procedure in place under the commission for the ICCPR, CEDAW provides a means by which women's rights are brought to the forefront. Though ratifying the Optional Protocols for both the ICCPR and CEDAW would set great precedent as well, of ultimate importance is ratifying CEDAW and affirming that women's rights are human rights and must be protected. As noted above, petitioning human rights bodies for recognition of intramilitary sexual assault as a customary international law can serve as a catalyst for reform at the domestic level, in both the United States and around the world.

B. Going Deeper than the Law

Social attitudes towards women's participation in the military present a problem for change in that it is often easier to change the law than it is to change a culture. Such attitudes contribute to hostile work environments and women who work in such environments are at six times the risk of being sexually assaulted.¹⁹³ Consequently, it is often upon the commander to put an end to a hostile environment at the earliest opportunity. When commanders make clear that hostile behaviors such as cat-calling, whistling, and the use of language that fosters both benevolent and hostile sexism will not be tolerated, they prevent the behavior from escalating. Removing language that fosters benevolent sexism must start at the highest level, by removing the language of "protecting attacks on a woman's honor" from the Department of Defense Manual on the Law of War. Such language suggests that a woman's "honor" is one and the same with her sexuality while at the same time the very presence of a man in the military is "honorable." Further, prevention through education regarding the negative consequences of perceiving an individual through the lens of gender

191. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 87, at 129–30.

192. RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: HIGHLIGHTS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 3, http://www.rand.org/content/dam/rand/pubs/research_briefs/RB9800/RB9841/RAND_RB9841.pdf [<https://perma.unl.edu/5WLJ-ABKF>].

193. Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AMERICAN J. INDUS. MED. 262-73, 268 (2003).

norms must be implemented, both at the level of commanding officers as well as enlisted members.

If commanders cannot ensure that they are fostering a work climate that does not tolerate hostility towards women, they cannot be trusted to remain neutral throughout the trial process. Senator Kirsten Gillibrand, a Democrat from New York, has presented the Military Justice Improvement Act (MJIA) before Congress, calling for the removal of serious offenses from military jurisdiction so that they may be investigated and tried in the civilian court system.¹⁹⁴ While advocates assert that the situation remains dire and cannot be resolved without serious efforts, opponents suggest that such a drastic reform would undermine the efficiency of the military court system as well as the hierarchical structure of the military which ensures group cohesion and the importance of the unit and the mission over the individual.¹⁹⁵ However, these arguments fail to recognize that allowing the system to persist as it currently stands undermines the structure of the military as well, leaving many soldiers, usually women, behind.

VI. CONCLUSION

Even in countries such as Germany, who have removed the prosecution of sexual assault from the chain of command, poor attitudes regarding women in the military remain, confounding the problem by making it less likely for women to report their abuse in the first place. Ultimately, female victims of intramilitary sexual assault are stuck in a Catch-22 that either discredits their report of sexual assault, asserts that they are not cut out for the military, or both. It will take education about the ill effects of hostile and benevolent sexism as well as the outdated justifications underlying paternalism and the protection of women to correct this. Due to the hierarchical nature of the military, this must start from the top down, from the Department of Defense to the commanders and then to the enlisted members. It is much easier to prevent the situation by cutting off hostile behaviors than in it is to remedy the effects of sexual assault after it happens.

“The laws we have reflect our intentions and expectations and are one of the levers [for change], but history shows us laws are not enough alone.”¹⁹⁶ When looking at intramilitary sexual assault as a

194. See Johanna Lee, *The Quest for Military Sexual Assault Reform*, HARV. POL. REV. (Apr. 26, 2014), <http://harvardpolitics.com/united-states/quest-military-sexual-assault-reform/> [https://perma.unl.edu/CS73-FD9C].

195. See Maj. Steven J. Smart, *Setting the Record Straight: The Military Justice System and Sexual Assault Prosecution*, JUDGE ADVOC. GEN. CORPS, U.S. AIR FORCE (2012), <http://www.afjag.af.mil/Portals/77/documents/AFD-120727-025.pdf> [https://perma.unl.edu/Q3H3-C8DJ].

196. Kate Jenkins, *Can the law change culture? Preventing Violence Against Women* VicHealth Conference, VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMM’N

cross-cultural issue, the law can make a difference in changing culture. However, legislative reform on its own, at the domestic or the international level, is not enough to change such a deeply rooted and complex phenomenon as the Catch-22 female victims of intramilitary sexual assault face. “[G]ender equality will only be achieved with the active involvement of all parts of our community, recognizing that the social stereotypes that have existed for many years do not serve any of us well for a healthy safe community for all.”¹⁹⁷

(July 2015), <http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/speeches/item/1275-prevention-policy-and-practice-preventing-violence-against-women-vic-health-conference-14-15-july-2015> [https://perma.unl.edu/MZ3V-QAEW].

197. *Id.*