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Command Responsibility—A Legal Obligation to Deter Sexual Violence in the Military

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COMMAND RESPONSIBILITY—A LEGAL OBLIGATION TO DETER SEXUAL VIOLENCE IN THE MILITARY

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Abstract: The United States should adopt the international doctrine of command responsibility within the Uniform Code of Military Justice (UCMJ) as a solution to widespread reports of intra-military rape and sexual assault. Applying command responsibility to serious violations of the UCMJ, like rape, would establish a clear mandate for the military to prosecute any commander who fails to reasonably prevent, investigate, or punish serious UCMJ violations that he or she knew about, either via constructive or actual knowledge. Congress should limit the doctrine's scope to serious UCMJ violations that commanders are aware of and recklessly choose to ignore in order to prevent significant, rather than trivial harms. Although the Department of Defense recently articulated a duty to prosecute intra-military rape and sexual assault, establishing a duty achieves nothing without proper enforcement—command responsibility is one solution.

INTRODUCTION

On January 24, 2013, U. S. Defense Secretary Leon Panetta announced that the U.S. military would henceforth officially include women in combat positions.[1] This announcement followed the January 23rd hearing before the House Armed Services Committee concerning widespread reports of rape and sexual assault at Lackland Air Force Base in Texas.[2] Reports like these

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[1] *See* Memorandum from Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, & Leon E. Panetta, Sec'y of Def., to Sec'ys of the Military Dep'ts Acting Under Sec'y of Def. for Personnel and Readiness Chiefs of the Military Servs. (Jan. 24, 2013) (on file with Dep't of Def.); Jim Miklaszewski & Courtney Kube, *Defense Chief Panetta to Clear Women for Combat Roles*, NBC NEWS (Jan. 23, 2013), http://usnews.nbcnews.com/_news/2013/01/23/16664507-defense-chief-panetta-to-clear-women-for-combat-roles?lite (last visited Mar. 1, 2014).

[2] Michelle Bernard, *With Women in Combat, Will Military Finally Address Epidemic of Sexual Assault?*, WASH. POST (Jan. 24, 2013), http://www.washingtonpost.com/blogs/she-the-people/wp/2013/01/24/with-woman-in-combat-will-military-finally-address-epidemic-of-sexual-assault/ (last visited Mar. 1, 2014); *House Armed Services Committee Hold Congressional Hearing on Lakeland Sex Abuse Investigation*, SERVICE WOMEN'S ACTION NETWORK (Jan. 23, 2013), http://yubanet.com/usa/House-Armed-Services-Committee-Hold-Congressional-Hearing-on-Lakeland-Sex-Abuse-Investigation_printer.php (last visited Mar. 1, 2014).

underscore the urgent need to critically assess the Uniform Code of Military Justice's (UCMJ) capability to combat intra-military sexual violence in both the military and military academies.[3]

During the 2010 fiscal year alone, the military services received 2617 reports of sexual assault.[4] The significance of this figure is magnified by the high underreporting rates of sexual assault, both within the military and civilian life.[5] The Department of Defense (DOD) estimates that a mere 14 percent of service members who experience unwanted sexual conduct report these incidents to military authorities.[6] Consequently, the realistic number of sexual assaults perpetrated against military members in 2010 was probably closer to 19,000—a staggering figure that reflects harm not only to the victims, but also to the military.[7]

In the 2010 Annual Report of Sexual Assault in the Military, the DOD acknowledged that rape and sexual assault impair the military's readiness and impede mission accomplishment.[8] Intra-military sexual violence reduces individual potential, and it upsets unit cohesion by breaking apart the important bond of trust and confidence needed for service members to risk their lives for one another.[9] Moreover, the military's failure to redress serious crimes like rape and sexual assault incurs high financial costs stemming from the need to treat assault victims' resultant physical and mental health problems, and it leads to civil suits challenging the military's inadequate responses.[10] Commanders' failure to investigate and punish rape creates

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[3] *See* SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE (SAPRO), DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL 2011 2 (2012) [hereinafter 2011 ANNUAL REPORT], *available at* http://www.sapr.mil/media/pdf/reports/; Complaint for Plaintiffs, ¶¶ 179–180, Cioca v. Rumsfeld, No. 11-cv-00151, 2011 WL 4500606 (E.D. Va. 2011) [hereinafter Cioca Complaint]; Megan N. Schmid, Comment, *Combatting a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 487–90 (2010); Bernard, *supra* note 2.

[4] *See* 2011 ANNUAL REPORT, *supra* note 3, at 28.

[5] *See id.*

[6] *See id.*; Cioca Complaint, *supra* note 3, ¶ 181.

[7] SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE (SAPRO), DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2010, at 97 (2010) [hereinafter 2010 ANNUAL REPORT], *available at* http://www.sapr.mil/index.php/annual-reports. These figures were recorded during the fiscal year 2010, which spans October 1, 2009, through September 30, 2010. *Id.* at 1.

[8] *See id.* at C-1, C-3.

[9] *See, e.g.*, Cioca Complaint, *supra* note 3, ¶ 181.

[10] *See* 2011 ANNUAL REPORT, *supra* note 3, at 67; SERVICE WOMEN'S ACTION NETWORK, RAPE, SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE MILITARY 1–2 (2012). *See generally* Cioca Complaint, *supra* note 3. "The VA spends approximately $10,880 on healthcare costs per military sexual assault survivor." *Briefing Paper: Department of Defense (DOD) Annual Report on Sexual Assault in the Mlitary* [sic]*, Fiscal Year (FY) 2011*, SERVICE WOMEN'S ACTION NETWORK (2012), [hereinafter *Briefing Paper*] http://servicewomen.org/wp-content/uploads/2012/04/

distrust and concern that unit commanders will ignore their duties to investigate and prosecute UCMJ violations, thereby disrupting the order and discipline central to the military's successful operation.[11] Furthermore, commanders' failure to hold perpetrators accountable excuses non-compliance with the UCMJ and law of war.[12]

Although the DOD proclaims a zero tolerance policy against sexual assault, it has failed to effectively prevent, or arguably even reduce, the perpetration of these egregious harms.[13] Rather, the military continues to turn a blind eye to numerous reports of sexual assault each year.[14] For instance, although the DOD recorded 3192 reports of sexual assault in 2011, it sent only 489 suspects to courts-martial, of which only 240 actually proceeded to trial.[15] This catch and release of suspects was due in part to unit commanders' unfettered discretion to deny further investigation, dismiss charges, seek minor administrative action, or elect to pursue non-judicial punishment that amounts to a slap on the wrist.[16] Further, many victims describe a hyper-masculine, misogynistic military culture that trivializes and discredits allegations of sexual assault, thereby permitting superiors and peers alike to ignore these reports, or worse, to retaliate against the victims rather than the perpetrators.[17]

SAPRO-briefing-report-4_17_12.pdf (noting that low-level command discretion halts 68 percent of actionable cases from proceeding to courts-martial).

[11] *See* DEP'T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 5 (Apr. 2004); Victor Hansen, *What's Good for the Goose Is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 398 (2007).

[12] *See* Hansen, *supra* note 11, at 398–99; Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 299 (2009) (explaining how failing to punish subordinates' atrocities signals that violations are permitted, leading to future atrocities).

[13] *See* 2011 ANNUAL REPORT, *supra* note 3, at 1; Elizabeth L. Hillman, *Front and Center: Sexual Violence in the Military*, 37 POL. & SOC'Y 101, 113 (2009) (describing how current reform measures fail to adequately deter intra-military sexual violence).

[14] *See* 2011 ANNUAL REPORT, *supra* note 3, at 45; Hillman, *supra* note 13, at 113.

[15] *See* 2011 ANNUAL REPORT, *supra* note 3, at 45.

[16] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM], *available at* http://www.uscg.mil/legal/mj/MJ_Doc/mcm2012.pdf; Schmid, *supra* note 3, at 489–90. The MCM is an executive order that dictates the conduct of the courts-martial process within the United States, including the sources of jurisdiction, rules for courts-martial, elements and punishments of offenses, and guidelines for the imposition of non-judicial punishments. MCM, *supra*, Preface 1, pmbl., I-1.

[17] *See, e.g.*, Cioca Complaint, *supra* note 3, ¶¶ 3, 26 (describing how commanders retaliated against victims for reporting sexual assaults); Schmid, *supra* note 3, at 490; Valorie Vojdik, *Women and War: A Critical Discourse: Panel Two-Women Warriors*, 20 BERKELEY J. GENDER L. & JUST. 338, 346 (2005) ("[T]he hyper-masculine culture within the military that not only defines warriors as male and masculine, but that denigrates women and celebrates symbolically sexualized violence against women.").

This Note proposes that Congress assimilate the customary international law doctrine of command responsibility within the Uniform Code of Military Justice as a solution to the widespread incidents of rape and sexual assault in the military.[18] Command responsibility holds commanders criminally responsible for war crimes committed by their subordinates when they knew or should have known of such atrocities and failed to reasonably prevent or punish their occurrence.[19]

Part I of this Note provides a synopsis of the Uniform Code of Military Justice in the United States and its role in responding to reports of rape and sexual assault. This section also highlights other countries' solutions to intra-military sexual violence. Part II details the development of command responsibility, both within the United States and internationally, and analyzes several existing provisions of the UCMJ that support incorporation of the command responsibility doctrine. Part III advocates the adoption of command responsibility within the UCMJ and discusses the appropriate standards of actus reus, mens rea, and punishment in the context of sexual assault. Additionally, this section suggests that command responsibility would effectively combat sexual assault in the military. This Note concludes that applying command responsibility to violations of the UCMJ should significantly reduce sexual assaults in the military, primarily by eradicating any undercurrents of sexism and misogyny that pervade the military.

I. BACKGROUND

The DOD's Manual for Courts-Martial states, "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[20] Sexual assault and rape in the military contravene this objective by undermining mission accomplishment.[21] Reports of rape and sexual assault in the military are nonetheless widespread—from the infamous Tailhook scandal in 1991, where dozens of female service members were

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[18] *Cf.* Uniform Code of Military Justice (UCMJ), 10 U.S.C. Ch. 47 (2012) [hereinafter UCMJ]; Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (establishing a traditional doctrine of command responsibility); 2011 ANNUAL REPORT, *supra* note 3, at 28 (indicating the prevalent reports of rape and sexual assault in the military); Hansen, *supra* note 11, at 414 (proposing that the military adopt command responsibility within the UCMJ under a revised Article 92 in order to deter abuses like those committed at Abu Ghraib).

[19] *Cf.* Rome Statute, *supra* note 18, art. 28; Thomas O'Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles*, 20 AM. U. INT'L L. REV. 71, 74 (2004).

[20] *See* MCM, *supra* note 16, pmbl., I-1.

[21] *See* 2011 ANNUAL REPORT, *supra* note 3, at 67.

sexually assaulted by fellow Navy personnel at an annual convention, to the more recent class action suit, *Cioca et al. v. Rumsfeld et al.*, brought by several service members against the DOD in 2011.[22]

In *Cioca*, sixteen service members argued that the defendants, Secretaries of Defense Donald Rumsfeld and Robert Gates, failed to: 1) investigate reported rapes and sexual assaults; 2) prosecute the offenders; 3) afford an acceptable judicial response as dictated by the UCMJ; and 4) implement necessary military reforms to combat rape and sexual assault as required by Congress.[23] The suit addressed how command discretion is sometimes used to halt the investigation and prosecution of reported rapes, even where reports indicate a need for further investigation or courts-martial.[24]

Consider, for example, former Coast Guard Seaman (SN) Kori Cioca's complaint contained within the suit.[25] SN Cioca reported sexual harassment by her superior officer, but Coast Guard Command refused her request for transfer, and pleas for help.[26] Her superior officer subsequently assaulted her again, allegedly in retaliation for reporting the harassment, and later forcibly raped her.[27] In response, Command sentenced the perpetrator to minimal, non-judicial punishment for the attack, executing a small pay cut and restricting him to base for thirty days.[28] In contrast, SN Cioca was threatened with court-martial if she filed formal rape charges even though she suffered from severe post-traumatic stress disorder, major depression, facial nerve damage, and bilateral disk displacement.[29] Furthermore, service members like Cioca who were undeniably wronged, are barred from seek-

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[22] *See generally* Cioca Complaint, *supra* note 3; Schmid, *supra* note 3, at 480 (describing the various military sex scandals that permeate the news); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 347 (2005) (describing the sexual assaults of service members at the Tailhook Convention).

[23] Cioca Complaint, *supra* note 3, at ¶ 2.

[24] *See id.* ¶¶ 3, 158; *Briefing Paper*, *supra* note 10 (noting that low-level command discretion halts 68 percent of actionable cases from proceeding to courts-martial).

[25] *See* Cioca Complaint, *supra* note 3, ¶¶ 7–28.

[26] *See id.* ¶ 13.

[27] *See id.* ¶¶ 17–22. According to her complaint, SN Cioca's superior officer repeatedly assaulted and sexually harassed her. *Id.* She reported these initial incidents to Command, but Command denied her request for transfer. *Id.* ¶ 13. In November 2005, the superior sexually assaulted her. *Id.* ¶ 17. She similarly reported the incident to Command, but no action was taken, and Command informed her superior of the report. *Id.* ¶ 13. The superior subsequently threatened to stab SN Cioca. *Id.* ¶ 14. In December 2005, the superior assaulted and raped SN Cioca. *Id.* ¶ 20. When she reported this to Command, she was told to wait and subsequently threatened with court-martial for lying if she pressed forward with the rape report. *Id.* ¶¶ 21–22.

[28] *See id.* ¶ 23.

[29] *See id.* ¶¶ 22, 28.

ing civil damages for their pain and suffering because courts deem rape a risk inherent in military service under the *Feres* doctrine.[30]

Although the DOD has adopted reforms, such as creating the Sexual Assault Prevention and Response Office (SAPRO), and ordering mandatory reporting of sexual assault to higher commanders, reports of sexual assault continue unabated.[31] Military service members seeking to file or prosecute claims of sexual assault are bound by the UCMJ's provisions, which define the act of sexual assault, and the available sanctions.[32] Therefore, an analysis of the UCMJ is critical to understanding the unique avenues through which criminal acts, like rape, are addressed within the military.[33]

A. General Overview of the Uniform Code of Military Justice

The Uniform Code of Military Justice, established in 1951, is the criminal penal code for military service members.[34] The UCMJ proscribes jurisdiction, determines the court-martial process, and establishes criminal of-

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[30] *See* Feres v. U.S., 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."); Order, Judge Liam O'Grady, *Cioca*, 2011 WL 4500606 [hereinafter Cioca Order] (dismissing the complaint as a military discipline matter and for reasons stated in open court); Jesse Ellison, *Judge Dismisses 'Epidemic' of Rape in Military Case*, DAILY BEAST (Dec. 13, 2011), http://www.thedailybeast.com/articles/2011/12/13/judge-dismisses-epidemic-of-rape-in-military-case.html (last visited Mar. 1, 2014) (describing how the defense argued that the alleged harms were incident to her military service); *see also* Gonzalez v. U.S. Air Force, 88 Fed. Appx. 371, 375–77 (10th Cir. 2004) (holding that *Feres* barred plaintiff's negligence suit against the Air Force because her attendance and intoxication were a direct consequence of her military status, leading to the sexual assault); Corey v. U.S., No. 96-6409, 1997 WL 474521, *1, *3–5 (10th Cir. 1997) (holding that *Feres* barred plaintiff's suit against the Air Force because her attendance at the on-base party where she was sexually assaulted was a consequence of her military status).

[31] *See* 2011 ANNUAL REPORT, *supra* note 3, at 2 (showing high reports of sexual assault in the military); Schmid, *supra* note 3, at 481 (discussing the creation of SAPRO to combat sexual assault in the military); Lisa Daniel, *Panetta, Dempsey Announce Initiatives to Stop Sexual Assault*, AM. FORCES PRESS SERV. (Apr. 16, 2012), http://www.defense.gov/news/newsarticle.aspx?id=67954 (last visited Mar. 1, 2014).

[32] *See generally* UCMJ arts. 2 (Persons subject to this chapter), 120 (Rape and sexual assault generally); DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES (2008) art. 120 (listing the available sanctions for rape, sexual assault, and other sexual misconduct, ranging from death or lengthy confinement to dishonorable discharge or forfeiture of all pay and allowances).

[33] *Cf.* UCMJ arts. 77–134 (Punitive articles); Press Release, Kirsten Gillibrand, N.Y. Senator and Chair of Senate Armed Servs. Subcomm. on Pers., on Hearing Examining Sexual Assault in the Military (Mar. 13, 2013), *available at* http://www.gillibrand.senate.gov/newsroom/press/release/senator-gillibrands-opening-statement-at-armed-services-subcommittee-hearing-examining-sexual-assaults-in-the-military (stating that Congress should reevaluate the military justice system, especially regarding the chain of command, in order to combat sexual assault in the military).

[34] *See* James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 683 (2006).

fenses.[35] Service members who commit any criminal offense enumerated in the punitive articles (Articles 77–134) may be tried by military court-martial.[36] Punitive Article 120 governs the offense of rape, sexual assault, and other sexual misconduct.[37]

In order to implement the UCMJ, the President issues the Manual for Courts-Martial (MCM), which, in part, analyses the punitive articles by providing UCMJ text, elements of each offense, discussion of these elements, lesser included offenses, maximum permissible punishments, and sample specifications.[38] The MCM is critical to understanding the rules, procedures and crimes articulated by the UCMJ.[39]

B. UCMJ's Role in Reporting and Prosecuting Rape and Sexual Assault

Traditionally, service members had to report rape or sexual assault directly to unit commanding officers.[40] Unit commanders were responsible for orchestrating a preliminary inquiry into the charges, and determining whether sufficient evidence existed to reprimand the alleged perpetrator.[41] They had discretion to fully dispose of the charges, take administrative action (i.e. letter of reprimand), seek discharge of the service member, resort to non-judicial punishment under Article 15 (i.e. reduction in rank, forfeiture of pay, restriction to base, extra duties), or initiate the court-martial process to pursue criminal charges.[42] If the charges were serious, such as an

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[35] MCM, *supra* note 16, pmbl. I-1, pt. IV-1.

[36] *Id.* arts. 77–134.

[37] UCMJ art. 120.

[38] *See* MCM, *supra* note 16, Preface 1, pt. IV.

[39] *See id.* pmbl., I-1, R.C.M. 101–103.

[40] *See* Mitsie Smith, Comment, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER L. & SOC. POL'Y 147, 155–57, 160–62 (2011). Military policy changed in 2005 to permit two ways to report sexual assault: unrestricted and restricted reporting. *Id.* Unrestricted reporting is the only avenue, however, to initiate an investigation and subsequent prosecution. *Id.* To do so, the victim can report to law enforcement, commanders, Veterans Affairs, or Sexual Assault Response Coordinators. *Id.*; James Risen, *Attacked at 19 by Air Force Trainer, and Giving Voice to Scandal*, N.Y. TIMES, Feb. 27, 2013, at A1 (describing one service members hesitancy to report in 2011 because the person she had to report to was the perpetrator); Jesse Ellison, *Leon Panetta Lays Out New Rules to Combat Sexual Assault in the U.S. Military*, DAILY BEAST (Apr. 18, 2012), http://www.thedailybeast.com/articles/2012/04/18/leon-panetta-lays-out-new-rules-to-combat-sexual-assault-in-u-s-military.html (last visited Mar. 1, 2014) (describing how the policy change is designed to remove the investigation and charging discretion from less experienced unit commanders to more experienced, impartial commanders).

[41] *See* MCM, *supra* note 16, R.C.M. 303 (Preliminary inquiry into reported offenses); Smith, *supra* note 34, at 684.

[42] *See* UCMJ art. 32(a) (Investigation); MCM, *supra* note 16, R.C.M. 401 (Forwarding and disposition of charges in general); Smith, *supra* note 40, at 160–62; Smith, *supra* note 34, at 684–87. An Article 32 investigation is comparable to a pre-trial hearing in civilian courts to determine

Article 120 rape or sexual assault violation, then they were referred to a more thorough and impartial investigation under Article 32.[43] Nevertheless, at the conclusion of this Article 32 investigation, the commander could still dismiss the charges.[44]

This process left justice for the victim largely in the hands of his or her unit commander.[45] Unit commanders, however, are often biased in light of their working or personal relationships with the accused.[46] They also typically lack the legal experience to handle these cases, and are operationally focused, with little time and attention available to investigate sex crimes.[47] Consequently, an estimated 68 percent of "actionable" cases were not prosecuted due to lower level command discretion in fiscal 2011.[48]

In response to the problem of sexual assault in the military, Secretary of Defense Leon Panetta announced changes to military policy on April 16, 2012.[49] The new policy provides that unit commanders must report allegations of completed or attempted rape, and sexual assault, to an elevated commander—typically a colonel or captain.[50] Secretary Panetta also recommended establishing "special victims' units" within each service with specially trained investigators to collect evidence, interview, and work with victims.[51] While these policy changes are designed to remove unit commander discretion to investigate and prosecute sexual assault cases, the unit commander is not actually removed from the chain of command.[52] Rather, he or she is charged with a duty to report any serious sexual assaults to a higher authority for a more impartial investigation similar to the Article 32 investigation already in place.[53]

Thus, while the policy seeks to prevent sexual assault claims from being "swept under the rug," its effectiveness depends on the military's enforcement of unit commanders' duty to report to higher commanders and of those commanders' election to prosecute, rather than seek lesser punish-

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whether a crime was committed and if there is reasonable cause to believe the accused committed the crime. *See* Smith, *supra* note 40, at 160–61; Smith, *supra* note 34, at 690–91. Article 32 states, "[n]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." UCMJ art. 32(a).

[43] *See* UCMJ art. 32(a); Smith, *supra* note 40, at 161.

[44] *See* MCM, *supra* note 16, R.C.M. 401; Smith, *supra* note 40, at 161–62.

[45] *See Briefing Paper*, *supra* note 10 at *2–3.

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See* Daniel, *supra* note 31.

[50] *See id.*

[51] *See id.*

[52] *See* Risen, *supra* note 40, at A1; Daniel, *supra* note 31.

[53] *See* UCMJ art. 32(a); Smith, *supra* note 40, at 161; Daniel, *supra* note 31.

ments like discharge or non-judicial punishments.[54] As Secretary Panetta said,

> [W]hat is required is that everyone, from the secretary to the chair of the Joint Chiefs all the way down at every command level, be sensitive to this issue, and be aware that they bear the responsibility to take action on these cases. The most important thing we can do is prosecuting the offenders.[55]

The DOD has clearly articulated a duty upon commanders to take action and prosecute viable rape and sexual assault cases.[56] The question becomes: what measures are in place to enforce this duty?[57] The doctrine of command responsibility provides a potential answer.[58]

C. Other Countries' Responses to Intra-Military Sexual Assault

Several other countries, including the United Kingdom, Canada, Australia, Germany, and Israel, address the problem of intra-military rape and command discretion by removing the prosecution of perpetrators to an independent authority.[59] In the United Kingdom, for instance, military commanders handle minor offenses and may confer with prosecutors on criminal cases, but they may not prosecute serious criminal violations.[60] Rather, the Service Prosecuting Authority tries all military service branch crimes.[61] Canada adopted a similar system in 1992 to ensure an impartial trial free of command discretion.[62]

Similarly, Australia and Germany refer all serious crimes to civilian authorities, thereby completely removing prosecution from the military justice system.[63] Israel also eliminated command discretion, but by conferring

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[54] *See* Memorandum from Martin E. Dempsey & Leon E. Panetta, *supra* note 1, at 1; Laura Bassett, L*eon Panetta: Military's Handling of Rape is 'An Outrage*,*'* HUFFINGTON POST (Sept. 27, 2012), http://www.huffingtonpost.com/2012/09/27/leon-panetta-military-rape_n_1919393.html (last visited Mar. 1, 2014); Daniel, *supra* note 31; Ellison, *supra* note 40.

[55] *See* Ellison, *supra* note 40.

[56] *See id.*

[57] *Cf.* Smith, *supra* note 40, at 148–50 (describing how UCMJ measures to combat sexual assault are inadequate).

[58] *Cf.* Rome Statute, *supra* note 18, art. 28 (incorporating a traditional definition of international command responsibility); Smith, *supra* note 40, at 148–50.

[59] *See* Alex Seitz-Wald, *Answer to Military's Sexual Assault Problem May Be Overseas*, SALON (June 5, 2013), http://www.salon.com/2013/06/05/answer_to_militarys_sexual_assault_problem_may_be_overseas/ (last visited Mar. 1, 2014).

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See id.*

sole authority to the Military Advocate General (MAG), an independent body, to pursue criminal charges.[64] The MAG is required only to notify the commander about charges against subordinates.[65]

While these avenues of removing command discretion have seen success in other countries, the United States remains resistant to relinquishing military control over the prosecution of military-related crimes.[66] Thus, adopting command responsibility within the UCMJ is one way to ensure that commanders prosecute service members who commit rape and sexual assault without usurping jurisdiction from the military.[67]

II. DISCUSSION

To invoke the international doctrine of command responsibility—holding commanders criminally liable for the atrocities of their subordinates—three general elements must exist regardless of the forum.[68] First, a superior-subordinate relationship must exist, which is clearly present in the military command context but sometimes extends to civilian leaders as well.[69] Second, the command or superior must either have actual or constructive knowledge of the subordinate's past or impending crimes.[70] The definition of this mens rea prong is highly contested because some international tribunals require actual knowledge while others maintain a negligence or reckless standard of imputed knowledge.[71] Third, the commander

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[64] *See id.*

[65] *See id.*

[66] *See id.*; Risen, *supra* note 40, at A1; Daniel, *supra* note 31.

[67] *Cf.* Rome Statute, *supra* note 18, art. 28; Smith, *supra* note 40, at 148–50; Seitz-Wald, *supra* note 59.

[68] *See, e.g.*, Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 455 (2001); Hansen, *supra* note 11, at 414 (proposing that the military adopt command responsibility within the UCMJ under a revised Article 92 in order to deter abuses like those committed at Abu Ghraib); O'Reilly, *supra* note 19, at 91; Sherrie L. Russell-Brown, *The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict*, 22 WIS. INT'L L.J. 125, 160 (2004).

[69] *See* Damaska, *supra* note 68, at 455; O'Reilly, *supra* note 19, at 91; Brian Seth Parker, *Applying the Doctrine of Command Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 5–6 (2012) (extending command responsibility to corporate actors with the power to prevent and remedy human rights violations); Yael Ronen, *Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings*, 43 VAND. J. TRANSNAT'L L. 313, 336–37 (2010) (describing command responsibility's superior-subordinate relationship requirement); Russell-Brown, *supra* note 68, at 160.

[70] *See* Damaska, *supra* note 68, at 455; Hansen, *supra* note 12, at 404; Parker, *supra* note 69, at 25; Russell-Brown, *supra* note 68, at 160.

[71] *See* Rome Statute, *supra* note 18, art. 28 (depicting a should have known negligence standard for command responsibility); U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 76 (U.N. War Crimes Comm'n 1948) (*High Command Case*); U.S. v. List, VIII L. Rep. of Trials of

must have failed to take reasonable measures to prevent or punish the crimes.[72]

Command responsibility is an ancient doctrine, with its origins dating back to the trial of Peter Van Hagenbach in the 15th Century.[73] This doctrine did not fully crystalize in international law, however, until the World War II Tribunals, chiefly the Tokyo Tribunals and the famous trial of General Tomoyuki Yamashita.[74] An analysis of command responsibility's development, especially interpretations of the mens rea element, is critical to determine the applicability of the doctrine to the Uniform Code of Military Justice (UCMJ).[75]

A. Development of Command Responsibility in International Law

1. Post World War II Military Tribunals Adopt Command Responsibility

On August 8, 1945, immediately following the conclusion of WWII, the Allies established the International Military Tribunal at Nuremberg to prosecute war criminals.[76] The agreement giving rise to the Tribunal, the London Charter, enabled the prosecution of superior officers "participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes," regardless of whether they actually executed such plans.[77] The Allies enacted and enforced similar regulations to address

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War Criminals 1, 34 (U.N. War Crimes Comm'n 1948) (*Hostage Case*); Hansen, *supra* note 11, at 369, 400, 404, 406.

[72] *See* Rome Statute, *supra* note 18, art. 28; Hansen, *supra* note 12, at 386, 408–09; Ronen, *supra* note 69, at 316; Russell-Brown, *supra* note 68, at 160.

[73] *See* O'Reilly, *supra* note 19, at 74–75; Michael L. Smidt, Yamashita*,* Medina*, and Beyond: Command Responsibility in Contemporary Military Operations*, 164, MIL. L. REV. 155, 169–70 (2000). In 1474, the Holy Roman Empire tried Peter von Hagenbach for his subordinates' atrocities committed during the occupation of Breisach, found him guilty of war crimes, and sentenced him to beheading. *See* Gregory S. Gordon, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law*, *in* THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 13, 13, 15–20 (Kevin Heller & Gerry Simpson eds., 2013).

[74] *See* O'Reilly, *supra* note 19, at 74–75.

[75] *Cf.* Hansen, *supra* note 11, at 344–45, 359, 364–65, 368–69, 370–71, 372, 376–77, 380–83, 385–86 (summarizing command responsibility's development in international law, with particular focus on the mens rea element, prior to suggesting its incorporation within the UCMJ); O'Reilly, *supra* note 19, at 72 (arguing that command responsibility's combination of a negligent mens rea with an omission as actus reus is contrary to retributive goals).

[76] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 7, Aug. 8, 1945, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288 [hereinafter London Charter]; Hansen, *supra* note 11, at 353; Smidt, *supra* note 73, at 174.

[77] *See* London Charter, *supra* note 76, art. 6; Hansen, *supra* note 11, at 353; O'Reilly, *supra* note 19, at 74–75; Smidt, *supra* note 73, at 175.

war crimes committed throughout Asia during WWII.[78] The trial of General Tomoyuki Yamashita in 1945 is one of the first cases to extend commanders' criminal liability beyond affirmative defenses and include the failure to effectively command.[79]

The tribunal found General Yamashita guilty of his subordinates' war crimes, including the rape and sexual assault of hundreds of women in Manila, because he failed to adequately supervise them.[80] Although prosecutors were not able to prove that Yamashita ordered or even knew about his subordinates' atrocities, the Military Commission determined that the "crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by [Yamashita], or secretly ordered by [him]."[81] This case illustrates that, under command responsibility, commanders can be held criminally liable for subordinates' acts absent *actual* knowledge of their occurrence.[82] The Court in *Yamashita* failed, however, to articulate the degree of mental culpability, whether negligence or a higher standard, required for command liability.[83]

In the wake of WWII, numerous other war crime trials occurred throughout Europe—chief among these were *United States v. Wilhelm von Leeb* (*High Command Case*) and *United States v. Wilhelm List* (*Hostage Case*), both of which transpired from 1947 to 1948.[84] The *Hostage Case* established a "knew or ought to have known" standard similar to *Yamashita*, permitting proof by constructive knowledge.[85] In contrast, the *High Command Case* required further proof of "personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acqui-

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[78] *See* London Charter, *supra* note 76, art. 6; O'Reilly, *supra* note 19, at 74–75 (describing the emergence of command responsibility in the Tokyo Tribunals); Smidt, *supra* note 73, at 175.

[79] *See* U.S. v. Yamashita, IV L. Rep. of Trials of War Criminals 1, 1 (U.N. War Crimes Comm'n 1948) (*Yamashita*); O'Reilly, *supra* note 19, at 75.

[80] *See Yamashita*, IV L. Rep. of Trials of War Criminals at 34; RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 83–84 (1982); Hansen, *supra* note 11, 354–56.

[81] *See Yamashita*, IV L. Rep. of Trials of War Criminals at 34; Hansen, *supra* note 11, at 356.

[82] *See Yamashita*, IV L. Rep. of Trials of War Criminals at 34 (noting that the commission stated that even though actual knowledge of the atrocities was not proven, the evidence depicted criminal neglect by failing to provide food and medical supplies and to prevent the commission of cruel and inhuman treatment); O'Reilly, *supra* note 19, at 76–77.

[83] *See* Hansen, *supra* note 11, at 357–58.

[84] *See id.* at 353, 366; U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 76 (U.N. War Crimes Comm'n 1948) (*High Command Case*); U.S. v. List, VIII L. Rep. of Trials of War Criminals 1, 34 (U.N. War Crimes Comm'n 1948) (*Hostage Case*).

[85] *See Hostage Case*, VIII L. Rep. of Trials of War Criminals at 89; *Yamashita*, IV L. Rep. of Trials of War Criminals at 68; Hansen, *supra* note 11, at 364–65.

escence."[86] Thus, the latter Court called for a heightened reckless or willful blindness standard of mens rea.[87]

2. Subsequent Codification of Command Responsibility

The adoption in 1977, of Article 86 of the Additional Protocol to the Geneva Convention of 1949 (Article 86) was the first treaty-based codification of command responsibility in international law.[88] Article 86 pertinently states that commanders shall be liable for subordinates' breaches of the Convention or Protocol

> if they knew, or had information which should have enabled them to conclude in the circumstances at the time that [the subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[89]

Thus, Article 86 punishes a commanding officer's failure to prevent violations of international law, thereby punishing commanders not only for affirmative acts or direct participation, but also for omissions.[90] The drafters rejected proposals to incorporate a lesser negligence mens rea and instead adopted a heightened reckless or willful blindness standard.[91]

As a result of the wars in the former Yugoslavia, the international community established The International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, to prosecute superiors and perpetrators of crimes against humanity, including the rape, torture, and murder of Bosnian, Muslim, and Croatian prisoners.[92] Article 7(3) of the ICTY Statute held

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[86] *See* U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 76 (U.N. War Crimes Comm'n 1948) 76; Hansen, *supra* note 11, at 365.

[87] *See* U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 76; Hansen, *supra* note 11, at 369; O'Reilly, *supra* note 19, at 80 (equating a heightened mens rea to recklessness or willful blindness).

[88] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 16 I.L.M. 1391, 1428–29, 1125 U.N.T.S. 3 [hereinafter Article 86]; Smidt, *supra* note 73, at 201–02.

[89] *See* Article 86, *supra* note 88, ¶ 2; Smidt, *supra* note 73, at 202.

[90] *See* Article 86, *supra* note 88, ¶ 2; Smidt, *supra* note 73, at 202.

[91] *See* Article 86, *supra* note 88, ¶ 2 (establishing a mens rea of knew or had reason to conclude under the circumstances); CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1010, 1014 (Yves Sandoz et al. eds., 1987); Smidt, *supra* note 73, at 203–05.

[92] *See* Statute of the International Tribunal for the Former Yugoslavia art. 7(3), S.C. Res. 827, U.N. SCOR, 48th Sess, U.N. Doc. S/RES/827 (1993), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (last visited Mar. 16, 2014) [Hereinafter ICTY Statute]; Nicole Laviolette, *Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecu-*

commanders responsible if they "knew or had reason to know that the subordinate was either about to commit the crime or had already done so; and . . . failed to take the necessary and reasonable measures to prevent the crime or to punish the subordinate perpetrator after the event."[93] Hence, Article 7(3) clearly articulated the commander's duty to punish his subordinates' violations, the failure of which may result in prosecution of the commander as well as the subordinate.[94]

Though the ICTY statutory language facially establishes a negligence standard, the ICTY Trial Chamber ultimately adopted a heightened standard that required the prosecution to prove that the superior was on notice of his or her subordinate's crimes.[95] In 2000, in *Prosecutor v. Blaskic*, however, the ICTY Trial Chamber originally adhered to a negligence standard, stating that "ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge" of the commander's duties.[96]

Overruling this lower standard, the ICTY Appeals Chamber in 2001 subsequently concluded in *Prosecutor v. Delalic et al.*, commonly referred to as the *Celebici* case, that a commander would be held liable if he

> had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate . . . This is a reference to information, which, if at hand, would oblige the commander to obtain *more* information (i.e. conduct further inquiry), and he therefore 'had reason to know.'[97]

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tion of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 36 CAN. Y.B. INT'L L. 93, 113 (1998); Smidt, *supra* note 73, at 207.

[93] *See* ICTY Statute, *supra* note 92, art. 7(3).

[94] *See id.*

[95] *See id.* (establishing a facial had reason to know negligence standard); Prosecutor v. Delalic, Case No. IT- 96-21-T, Appeals Chamber, ¶ 233 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (*Celebici*) (interpreting the requirement in Article 86 that the commander have information as creating a heightened standard whereby a commander put on notice of an unlawful act has a duty to conduct further inquiry); Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 322 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Hansen, *supra* note 11, at 380–81; Russell-Brown, *supra* note 68, at 154–156.

[96] *See Blaskic*, Case No. IT-95-14-T, ¶ 332; Hansen, *supra* note 11, at 381.

[97] *Celebici*, Case No. IT-96-21-T, ¶ 233; *see* Hansen, *supra* note 11, at 380–81. In the *Celebici* case, the Tribunal charged three commanders, Zejnil Delalic, Zdravko Mucic and Hazim Delic, with subordinates' violations at the Celebici Camp, including killings, beatings and forcible sexual intercourse of detainees. *See* Laviolette, *supra* note 92, at 114, 140, 144, 146. The Trial Chamber subsequently convicted Defendant Mucic of the charge of superior responsibility for rape and sentenced him to seven years' imprisonment. *See id.*

Thus, the *Celebici* standard—had reason to know—is one of willful blindness, not ordinary negligence.[98]

Similar to its response following the Yugoslavia atrocities, the international community enacted a statute to prosecute leaders and subordinates in the Rwandan crisis who committed human rights and genocide violations, including widespread sexual violence.[99] Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) codified command responsibility almost identically to the ICTY, and held superiors liable for subordinates' acts that they knew or should have known of and failed to prevent or punish.[100] Although the ICTR Trial Chamber also has conflicting interpretations of the mens rea standard, it adopted a lower "had reason to know" negligence standard in the more recent case, *Prosecutor v. Bagilishema*, in 2001.[101] The ICTR Trial Chamber identified three ways in which this standard could be met: 1) actual knowledge of the subordinate's crimes; 2) information putting the commander "on notice of the risk of such offenses by indicating the need for additional investigation. . ."; or 3) failure to learn about the offenses that "under the circumstances he or she should have known."[102]

Ultimately, Article 28 of the Rome Statute of the International Criminal Court (ICC) codifies the doctrine of command responsibility as a provision of international criminal law.[103] The statute recognizes the commander's international duty "to take all necessary and reasonable measures within his or her power to prevent or repress [the subordinate's] commission [of crimes within the jurisdiction of the Court] or to submit the matter to the

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[98] *See Celebici*, Case No. IT- 96-21-T, ¶ 233; Hansen, *supra* note 11, at 380–81.

[99] *See* Statute of the International Criminal Tribunal for Rwanda art. 6(3), S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), amended by U.N. Doc. S/RES/1512 (2003), *available at* http://www.unictr.org/Portals/0/English/Legal/Resolutions/English/s-res-1512e.pdf (last visited Mar. 16, 2014) [hereinafter ICTR Statute]; Laviolette, *supra* note 92, at 113; Smidt, *supra* note 73, at 208–09; General Information, Int'l Crim. Trib. for Rwanda, http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx (last visited Feb. 17, 2014) (explaining that the Tribunal tries perpetrators of genocide and violations of international humanitarian law allegedly committed in Rwanda in 1994).

[100] *Compare* ICTR Statute, *supra* note 99, art. 6(3) ("[K]new or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof . . . ."), *with* ICTY Statute, *supra* note 92, art. 7(3) ("[K]new or had reason to know that the subordinate was either about to commit the crime or had done so; and . . . failed to take the necessary and reasonable measures to prevent the crime or to punish the subordinate perpetrator after the event . . . ."); s*ee also* Smidt, *supra* note 73, at 208–09.

[101] *See* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 46 (June 7, 2001); Hansen, *supra* note 11, at 381–83.

[102] *See Bagilishema*, Case No. ICTR-95-1A-T, ¶ 46; Hansen, *supra* note 11, at 382–83.

[103] *See* Rome Statute, *supra* note 18, art. 28; Hansen, *supra* note 11, at 384.

competent authorities for investigation and prosecution."[104] Additionally, the Rome Statute distinguishes between civilian and military superiors, assigning a negligence standard to the former but a heightened recklessness standard to the latter.[105]

In summation, while different bodies of international law require varying degrees of mental culpability to hold commanders criminally liable for their subordinates' acts, both customary and codified international law clearly recognize the doctrine of command responsibility.[106]

B. Domestic Law's Assimilation of Command Responsibility

1. Historical Incorporation of Command Responsibility into U.S. Military Law

U.S military law has, at various times, enforced command responsibility for a failure to investigate or punish, either as a matter of dereliction of duty, or liability for the subordinate's substantive offense.[107] Superior officers' duty to punish their subordinates' crimes dates back to the Revolutionary War.[108]

In 1775, in anticipation of the Revolutionary War, the Provisional Congress adopted the Massachusetts Articles of War, Article 11, which dictated a commander's duty to "keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command . . . ."[109] Further, the Article provided for punishment of any commander who "refuse[d] or omit[ted] to see justice done on the offender or offenders . . . as if he himself had committed the crimes or disorders complained of."[110] Thus, military law could hold superior officers criminally liable for their subordinates' crimes, unless they

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[104] *See* Rome Statute, *supra* note 18, art. 28; Hansen, *supra* note 11, at 384.

[105] *See* Rome Statute, *supra* note 18, art. 28 (establishing a negligence standard for commanders in article 28(a) and a heightened standard for other non-military superiors in part (b)); Hansen, *supra* note 11, at 384–85.

[106] *See, e.g.*, Rome Statute, *supra* note 18, art. 28 (articulating both negligence and recklessness standards for military commanders and other non-military superiors respectively); Article 86, *supra* note 88, ¶ 2 (adopting a heightened recklessness or willful blindness standard); *Bagilishema*, Case No. ICTR-95-1A-T, ¶ 45 (interpreting the ICTR Statute to create negligence standard of had reason to know).

[107] *See, e.g.*, PROVISIONAL CONGRESS OF MASS. BAY, ARTICLES OF WAR, 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 111 (Government Printing Office, 1904) [hereinafter ARTICLES OF WAR 1775]; William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 5 (1973).

[108] *See* ARTICLES OF WAR 1775 *supra* note 107, art. 11; Parks, *supra* note 107, at 5; Sepinwall, *supra* note 12, at 273.

[109] *See* ARTICLES OF WAR 1775, *supra* note 107, art. 11; Sepinwall, *supra* note 12, at 273.

[110] *See* ARTICLES OF WAR 1775, *supra* note 107, art. 11; Sepinwall, *supra* note 12, at 273.

punished the subordinates.[111] Congress later enacted an identical provision in Section IX of the American Articles of War of 1776.[112]

2. Current Fusion of Command Responsibility with U.S. Military Doctrine

Today, the United States holds enemy commanders liable as principals for acts committed by their subordinates in certain situations.[113] Specifically, the Military Commission Act of 2006 punishes an adversary commander as a principal if he or she "knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and [the superior] failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof."[114]

Dereliction of duty, however, is the preferred form of liability for U.S. commanders who fail to punish their troops' crimes.[115] During the Vietnam War, for instance, fourteen officers were charged with dereliction of duty for failure to report and investigate after the U.S. military shot, killed, and sexually abused approximately 500 unarmed Vietnamese civilians, mostly women, children, and old men, in retaliation for the deaths of U.S. soldiers by guerrilla warfare in 1968.[116] Despite Lieutenant General William Peers' confirmation that "at least two rapes were committed by the 2nd Platoon, and in one case the rapist is reported to have then shoved the muzzle of his M-16 rifle into the vagina of the victim and pulled the trigger," the military nonetheless dropped the three formal rape charges initially filed.[117]

Similarly, in 2005, after U.S. Marines shot and killed twenty-four Iraqi civilians in the town of Haditha, four officers were charged with dereliction,

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[111] *See* ARTICLES OF WAR 1775, *supra* note 107, art. 11; Sepinwall, *supra* note 12, at 273.

[112] *Compare* PROVISIONAL CONGRESS OF MASS. BAY, ARTICLES OF WAR SECTION IX, 5 JOURNALS OF THE CONTINENTAL CONGRESS 788 (Government Printing Office 1906) [hereinafter ARTICLES OF WAR 1776] ("[R]efuse or omit to see justice done on the offender or offenders . . . shall, upon proof thereof, be punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of . . . ."), *with* ARTICLES OF WAR 1775, *supra* note 107, art. 11 ("[R]efuse or omit to see justice done on the offender or offenders . . . as if he himself had committed the crimes or disorders complained of . . . ."). *See* Parks, *supra* note 107, at 5; Sepinwall, *supra* note 12, at 273.

[113] *See* Sepinwall, *supra* note 12, at 274.

[114] *See* Military Commissions Act of 2006, 10 U.S.C. § 948q (2012); Sepinwall, *supra* note 12, at 274.

[115] *See* UCMJ art. 92(c) (Dereliction of duty); Sepinwall, *supra* note 12, at 275. Dereliction of duty punishes commanders for failure to obey an order or regulation. UCMJ art. 92(c).

[116] *See, e.g.*, W.R. PEERS, MAI LAI INQUIRY 227 (1979); Sepinwall, *supra* note 12, at 281–84 (describing the My Lai massacre); Seymour M. Hersh, Opinion, *My Lai, and Its Omens*, N.Y. TIMES, Mar. 16, 1998, *available at* http://www.nytimes.com/1998/03/16/opinion/my-lai-and-its-omens.html (last visited Mar. 1, 2014).

[117] PEERS, *supra* note 116, at 227.

for failure to report the incident and failure to initiate an investigation.[118] These cases illustrate the United States' willingness to prosecute commanders for their subordinates' atrocities, but as derelictions of duty rather than substantive war crimes.[119]

3. U.S. Courts' Imposition of Superior Responsibility on Individual Civilians for Human Rights Abuses

U.S. courts, however, have been willing to apply superior responsibility, which originated from command responsibility, to individuals responsible for international human rights abuses.[120] Thus, based on ICTY and ICTR precedent, U.S. courts have expanded the traditional scope of command responsibility from the commission of military war crimes to civilian human rights abuses, like torture, during peacetime.[121] Superior responsibility claims can arise in U.S. courts under the Torture Victims Protection Act (TVPA), and the Alien Tort Statute (ATS), to address crimes of torture, genocide, or extrajudicial killings.[122] The TVPA's legislative history acknowledges that the Senate intended liability to extend to "anyone with higher authority who authorized, tolerated or knowingly ignored those acts . . . ."[123]

As a result, in 2004 the U.S. District Court for the Northern District Court of California determined in *Doe v. Qi* that the TVPA is not limited to military commanders' responsibility for war crimes, but also extends to civilian responsibility for torture and extrajudicial killings.[124] Thus, in *Doe*, Mayor Qi of Beijing was held civilly liable for the detention, torture, beating and sexual assault committed by the Beijing police, because he had the authority to supervise and discipline police forces but failed to do so.[125]

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[118] *See* Sepinwall, *supra* note 12, at 275–76 (describing the Haditha massacre).

[119] *See id.* at 275–76, 281–84.

[120] *See, e.g.*, Doe v. Qi, 349 F. Supp. 2d 1258, 1328–31 (N.D. Cal. 2004) (holding the former Beijing mayor civilly liable for the human rights atrocities committed by city police); Parker, *supra* note 69, at 5–6; Ronen, *supra* note 69, at 313.

[121] *See* Parker, *supra* note 69, at 11–12 ("The shift away from a strictly wartime doctrine broadens the range of superior responsibility and further supports the use of superior responsibility against corporate officers . . . .").

[122] *See* Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7112 (2012); Alien Tort Statute, 28 U.S.C. § 1350 (2012); Parker, *supra* note 69, at 15–16.

[123] *See* Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996); S. REP. NO. 102–249, at 9 (1991) (noting the legislature's intent to include complicity liability in the TVPA); Parker, *supra* note 69, at 15.

[124] *See Doe*, 349 F. Supp. 2d at 1328–31; Parker, *supra* note 69, at 16.

[125] *See Doe*, 349 F. Supp. 2d at 1328–31; Parker, *supra* note 69, at 13, 22–23; *Doe v. Liu Qi: Case Summary*, CENTER FOR JUST. & ACCOUNTABILITY, http://cja.live2.radicaldesigns.org/article.php?list=type&type=36 (last visited Mar. 1, 2014).

Similarly, in *Ford v. Garcia* in 2002, the 11th Circuit U.S. Court of Appeals adopted the ICTY's *Celebici* standard, which extended civil responsibility for summary execution and disappearances to anyone in a position of higher authority who had "material ability to prevent or punish criminal conduct."[126] In *Ford*, two former Salvadoran Generals were charged under the TVPA for torture, sexual assault, and murder of four U.S. churchwomen by Salvadoran National Guardsmen.[127]

Likewise, in *Hilao v. Estate of Marcos* in 1996, the 9th Circuit applied command responsibility to human rights violations occurring during peacetime.[128] The trial court held that the former Philippines president could be civilly liable for the military's torture, summary execution, and disappearance of civilians under the ATS if he knew of the military's misconduct and failed to use his power to prevent it.[129] To support this transition from military war crimes to civilian international human rights abuses, the Court recognized that the goal "to protect civilian populations and prisoners . . . from brutality," transcends the law of war to international human rights law.[130] Consequently, U.S. courts appear willing to extend a strain of command responsibility to civilian leaders for subordinates' human rights abuses during peacetime.[131]

4. Current UCMJ Provisions Compatible with Command Responsibility

While command responsibility is not codified within the UCMJ, several of its provisions already impose an affirmative duty upon commanders to prevent, investigate, or punish UCMJ violations.[132] These include the preamble's jurisdiction discussion, Article 18 (Jurisdiction), Rule 303's duty

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[126] *See* Ford *ex rel.* Estate of Ford v. Garcia, 289 F.3d 1283, 1286, 1288–90 (11th Cir. 2002) (citing Prosecutor v. Delalic, Case No. IT- 96-21-T, Appeals Chamber, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (*Celebici*)); Cortney C. Hoecherl, *Command Responsibility Doctrine: Formulation Through* Ford v. Garcia *and* Romagoza v. Garcia, 5 J. INT'L L. & POL'Y 1, 5, 11, 15–17 (2007), *available at* https://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Hoecherl_Cortney.pdf; Parker, *supra* note 69, at 11.

[127] *See Ford*, 289 F.3d at 1283; Hoecherl, *supra* note 126, at 11. The district court applied the doctrine of command responsibility to the case, although they incorrectly instructed the jury about a proximate cause element, resulting in the acquittal of the defendants. *See* Hoecherl, *supra* note 126, at 10–14. The 11th Circuit affirmed the district court's decision due to invited error in the jury instructions. *See id.* at 16.

[128] *See Hilao*, 103 F.3d at 767, 771; Parker, *supra* note 69, at 11–12.

[129] *See Hilao*, 103 F.3d at 767, 771, 779 (resulting in a judgment for the plaintiffs).

[130] *Id.* at 777.

[131] *See id.*; Parker, *supra* note 69, at 5–6, 11–12.

[132] *See, e.g.*, UCMJ arts. 18 (Jurisdiction), 77 (Principals), 78 (Accessory after the fact), 92 (Discussion); MCM, *supra* note 16, pmbl., I-1 (Sources of military jurisdiction), R.C.M. 201 (Jurisdiction), R.C.M. 303; Sepinwall, *supra* note 12, at 274–75; Smidt, *supra* note 73, at 233.

to investigate, Article 77 (Principals), Article 78 (Accessory after the fact), and Article 92 (Dereliction of duty).[133] These provisions, however, have not yet been used to hold commanders responsible for their failure to prevent or respond to sexual assault reports.[134]

The preamble of the Manual for Courts-Martial (MCM) declares international law as one of the sources of military jurisdiction, including the law of war.[135] As command responsibility is an internationally recognized doctrine, both according to custom and treaty, it falls within the scope of U.S. military jurisdiction.[136] Furthermore, Article 18 articulates that courts-martial jurisdiction extends to "any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[137] Since the law of war recognizes commanders' substantive liability for subordinate's war crimes, and numerous UCMJ offenses (i.e., murder, manslaughter, and rape) are analogous to law of war violations, Article 18 on its face permits the imposition of command responsibility within the UCMJ for serious violations.[138]

Rule 303 articulates a commander's duty to investigate suspected violations of the UCMJ.[139] The rule specifically states, "[u]pon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."[140] The MCM further expounds that, "[t]he inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation."[141] The preliminary inquiry need not be formal, and typically consists of an investigative report or summary of evidence relating to the charges.[142]

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[133] *See, e.g.*, UCMJ arts. 18, 77, 78, 92; MCM, *supra* note 16, pmbl., I-1, R.CM. 201, 303; Hansen, *supra* note 11, at 388–89, 395–97 (articulating how UCMJ articles 77, 78, and 92 parallel command responsibility but fall short of fully incorporating the doctrine); Smidt, *supra* note 73, at 194–96 (describing how U.S. Captain Medina was charged with an Article 77 violation as principal for his subordinates' war crimes committed during the Vietnam War); *Briefing Paper*, *supra* note 10 (noting that low-level command discretion halts 68 percent of actionable cases from proceeding to courts-martial).

[134] *See* UCMJ arts. 18, 77, 78, 92; Hansen, *supra* note 11, at 388–89, 395–97.

[135] MCM, *supra* note 16, pmbl., I-1.

[136] *See id.*; O'Reilly, *supra* note 19, at 78–79, 85, 87–88 (explaining the customary and doctrinal incorporation of command responsibility in international law).

[137] UCMJ art. 18; MCM, *supra* note 16, pmbl., I-1.

[138] UCMJ art. 18, Hansen, *supra* note 11, at 337, 389 (defining command responsibility and comparing serious UCMJ violations to law of war violations).

[139] *See* MCM, *supra* note 16, R.C.M. 303.

[140] *See id.*

[141] *See id.*

[142] *See id.*

Thus, commanders bear a duty to investigate any suspected offenses, and this duty requires them to search for any "reasonably available" evidence.[143] Consequently, a commander who ignores a rape allegation breaches his duty to investigate any suspected offenses.[144]

The UCMJ also incorporates the common law doctrines of accomplice and accessory liability (Articles 77 and 78 respectively), which, though too narrow to encompass command responsibility, approach holding commanders' liable for failure to investigate and prosecute crimes.[145] For example, Article 77 limits principal liability to one who "aids, abets, counsels, commands, or procures its commission; or . . . causes an act to be done . . . ."[146] Article 77 also establishes that "a person need not personally perform the acts necessary to constitute an offense to be guilty of it," which is the underlying premise of command responsibility.[147] Additionally, the UCMJ does not require the principal's presence at the scene of the crime in order to hold the party liable for the perpetrator's violations, similar to command responsibility.[148]

Article 78's crime of accessory after the fact also approaches the doctrine of command responsibility, by imposing liability on anyone "who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."[149] To prove an Article 78 violation, the prosecutor must establish that: 1) an offense punishable by the code was committed; 2) of which the accused was aware; and 3) the accused received, comforted, or assisted the offender; 4) for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.[150]

With respect to the second element, the MCM requires proof of actual knowledge of the original violation, either via direct or circumstantial evidence.[151] Additionally, the MCM explains that merely failing to report an of-

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[143] *See id.*

[144] *See* UCMJ art. 120; MCM, *supra* note 16, R.C.M. 303.

[145] *See* UCMJ arts. 77, 78; Hansen, *supra* note 11, at 388–89.

[146] *See* UCMJ arts. 77, 78; MCM, *supra* note 16, R.C.M. 303; Hansen, *supra* note 11, at 388–89 (articulating how the UCMJ's punitive articles fall short of fully encompassing command responsibility).

[147] *See* Rome Statute, *supra* note 18, art. 28 (incorporating a traditional definition of command responsibility); MCM, *supra* note 16, art. 77.

[148] *Compare* Rome Statute, *supra* note 18, art. 28 ("[C]ommitted by forces under his or her effective command and control . . . ."), *with* MCM, *supra* note 16, art. 77 ("[A]ids, abets, counsels, commands, or procures its commission . . . .").

[149] *See* UCMJ art. 78; MCM, *supra* note 16, art. 78; Hansen, *supra* note 11, at 388–89.

[150] *See* MCM, *supra* note 16, art. 78.

[151] *See id.*

fense is not sufficient to satisfy the offense.[152] If a commander nonetheless is aware that an alleged rape or sexual assault occurred, and yet makes no effort to investigate the rape further, to determine its validity or to punish the perpetrator, then she or he essentially assists the perpetrator by hindering his apprehension, trial, and punishment.[153] Additionally, someone found to be an Article 78 accessory after the fact is guilty of the primary offense, not a lesser-included offense, thus holding the accessory guilty of the substantive offense.[154] Consequently, Articles 77 and 78 are avenues through which commanders could be punished for failure to prevent, investigate or punish their subordinates' crimes, but low-level command discretion dismisses 68 percent of actionable sexual assault cases.[155]

Article 92's failure to obey an order or regulation provision provides for punishment of dereliction of duty similar to one application of command responsibility.[156] Subsection 3 of Article 92 holds individuals liable for being derelict in the performance of their duties.[157] To prove dereliction of duties, the prosecutor must show that: 1) the accused has certain duties; 2) that he or she knew of or reasonably should have known of; and 3) the accused was willfully, negligently or culpably inefficient, and therefore derelict in performing those duties.[158] Dereliction of duty is treated as a separate, lesser offense, and thus, the punishment is limited to forfeiture of pay, temporary confinement, and bad-conduct discharge.[159] In light of commanders' duties to investigate potential offenses under Rule 303, a Commander who fails to investigate an offense could be charged with dereliction of duty.[160] If convicted, however, the commander can serve up to six months in confinement, which is hardly appropriate to address "the inherent stigma deserving of a war crime."[161]

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[152] *See* MCM, *supra* note 16, pt. IV-3. Failing to report an offense may violate a general order or regulation though, which could satisfy an Article 92 violation or a misprision of a serious offense under Article 134. *Id.*

[153] *See* UCMJ art. 120.

[154] *See* MCM, *supra* note 16, art. 78.

[155] *See id.* arts. 77–78; Hansen, *supra* note 11, at 388–89, 395–97; *Briefing Paper*, *supra* note 10 (noting that low-level command discretion halts 68 percent of actionable cases from proceeding to courts-martial)

[156] *See* MCM, *supra* note 16, art. 92; Sepinwall, *supra* note 12, at 274–84 (describing the United States' use of command responsibility to try commanders with dereliction of duty for failing to prevent or punish their subordinates' Haditha and My Lai atrocities).

[157] MCM, *supra* note 16, art. 92.

[158] *Id.*

[159] *Id.*; Hansen, *supra* note 11, at 394–95.

[160] *See* MCM, *supra* note 16, R.C.M. 303, art. 92.

[161] *See id.* art. 92; Hansen, *supra* note 11, at 394–97; Sepinwall, *supra* note 12, at 275.

III. ANALYSIS

A. Incorporating an Appropriate Standard of Command Responsibility Within the UCMJ

Taken together, the aforementioned UCMJ provisions are compatible with command responsibility.[162] Further, these provisions are ineffective in preventing intra-military rape and sexual assault as evidenced by persistent and increased reports of military sexual violence.[163] Applying command responsibility to serious violations of the UCMJ would establish a clear mandate for the military to prosecute any commander who fails to reasonably prevent, investigate, or punish a serious violation of the UCMJ that he or she knew about, either via constructive or actual knowledge.[164] Generally, the U.S. military charges service members with UCMJ violations under the punitive articles, rather than the law of war violations.[165] Thus, service members' perpetrations of rape should be tried as UCMJ violations, not law of war violations.[166] Accordingly, in order to hold commanders responsible for failures to prevent, investigate, or punish subordinates' perpetrations of rape, Congress should incorporate command responsibility within the UCMJ.[167] Adopting command responsibility to hold commanders criminally liable for their subordinates' serious UCMJ violations is further supported

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[162] *See* UCMJ arts. 18, 77, 78, 92; MCM, *supra* note 16, R.C.M. 303, arts. 77, 78, 92; Hansen, *supra* note 11, at 388–89, 395–97.

[163] *Cf.* UCMJ arts. 18, 77, 78, 92; MCM, *supra* note 16, R.C.M. 303, arts. 77, 78, 92; 2011 ANNUAL REPORT, *supra* note 3, at 28 (estimating that 19,000 service members were sexually assaulted in 2010); Schmid, *supra* note 3, at 477 (describing the increased reporting of military sexual assaults despite Congressional reform measures); Smith, *supra* note 40, at 157 (discussing the upward trend in reporting intra-military sexual assaults).

[164] *See* Rome Statute, *supra* note 18, art. 28; Hansen, *supra* note 11, at 414 (proposing that the military adopt command responsibility within the UCMJ under a revised Article 92 in order to deter abuses like those committed at Abu Ghraib); Russell-Brown, *supra* note 68, at 130 (proposing the expansion of command responsibility in the ICC to hold commanders criminally liable for their subordinates' commission of gender crimes in armed conflict); Smidt, *supra* note 73, at 233 (proposing that domestic military courts-martial apply the international doctrine of command responsibility to UCMJ violations via Article 18).

[165] *See* DEP'T OF THE ARMY, FM 27–10 DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE app. A-120, ¶ 507(b) (1956).

[166] *See* UCMJ art. 120.

[167] *See id.*; *cf.* Hansen, *supra* note 11, at 412–14 (proposing that the military adopt command responsibility within the UCMJ to deter law of war violations like those committed at Abu Ghraib, not UCMJ violations, under a revised dereliction of duty provision); Smidt, *supra* note 73, at 233–34 (suggesting the United States incorporate command responsibility within the UCMJ, but to deter subordinates' commission of war crimes, not intra-military UCMJ violations like rape and sexual assault).

by the fact that U.S. courts already hold civilian leaders civilly liable for their subordinates' human rights abuses during foreign internal conflicts.[168]

Incorporating command responsibility within the UCMJ is consistent with its goal of balancing commander control and disciplining of troops, with due process trial concerns.[169] The UCMJ recognizes that "discipline cannot be maintained without justice," and that commanders are integral figures in the administration of military justice.[170] The commander is "the individual that establishes the command climate—the unit's collective sense of right and wrong."[171] According to U.S. Army doctrine, a commander assumes responsibility for the "actions, accomplishments, or failures of a unit. He is responsible for the health, welfare, morale, and discipline of personnel . . . ."[172] Consequently, commanders play a critical role in ensuring that their subordinates abide by the UCMJ, in part by disciplining any subordinates' violations of the punitive articles.[173]

When commanders fail to reasonably punish subordinates' UCMJ violations, they effectively acquiesce to, or condone, the behavior, thereby undermining the UCMJ and the justice it strives to achieve.[174] When commanders turn a blind eye to intra-military rape and sexual assault, they implicitly acquiesce to the conduct, engendering a command climate accepting

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[168] *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996) (describing how the United States is willing to use command responsibility to hold civilian leaders liable for authorizing, tolerating, or knowingly ignoring abuses, like torture, summary execution, or disappearances); Parker, *supra* note 69, at 11–12 (describing how superior responsibility was used in *Hilao* to apply command responsibility to torture committed during peacetime).

[169] *See* Allen J. Dickerson, *Who's in Charge Here?—International Criminal Court Complementarity and the Commander's Role in Courts-Martial*, 54 NAVAL L. REV. 141, 159 (2007); Parks, *supra* note 107, at 76 (citing DOUGLAS MACARTHUR, REMINISCENCES 298 (1964)) (explaining that commanders can be held liable for their subordinates' abuses, and to hold otherwise would undermine the command function); Beth Hillman, *Chains of Command*, LEGAL AFFAIRS, May–June 2002, *available at* http://legalaffairs.org/issues/May-June-2002/review_hillman_mayjun2002.msp (last visited Mar. 1, 2014).

[170] John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8 (2000); *see* Dickerson, *supra* note 169, at 159; Smidt, *supra* note 73, at 159.

[171] Smidt, *supra* note 73, at 159.

[172] U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS, I-1 (1997); Smidt, *supra* note 73, at 165.

[173] *See* U.S. DEP'T OF ARMY, REG. 600-20 ARMY COMMAND POLICY ¶ 2-1b (Mar. 30, 1988); Smidt, *supra* note 73 at 165.

[174] *See* MCM, *supra* note 16, pmbl., I-1 (identifying two goals of military law: to promote justice and to assist in maintaining good order and discipline in the armed forces); Sepinwall, *supra* note 12, at 299 (arguing that a commander's failure to punish his subordinate's crime can not only lead to future crimes, but also be an expressive injury against the victim).

of sexual violence.[175] In order to combat this climate and ensure compliance with Punitive Article 120, which prohibits rape and sexual assault, the United States should hold commanders liable under command responsibility for their subordinates' violations.[176] The adoption of command responsibility would ensure better UCMJ compliance by deterring commanders' dereliction of their investigative and disciplinary responsibilities and holding them liable for any lapses that do occur.[177]

With respect to Article 120 rape and sexual assault violations, command responsibility would be applicable to commanders in two general scenarios—failure to prevent, and failure to investigate or punish.[178] In the former, the commander fails to reasonably respond to reports of sexual harassment or violence, which later escalate to sexual assault or rape.[179] Here, the commander's failure to respond to preliminary reports contributes, at least in part, to the resulting crime because his or her inaction amounted to acquiescence.[180] Had the commander taken efforts to investigate and reprimand the perpetrator, the later crime may not have occurred.[181] In the latter scenario, the commander fails to investigate or punish a reported rape or sexual assault, thereby impeding justice by letting the perpetrator off the hook, and contributing to a command climate that tolerates sexual violence.[182]

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[175] *See* Schmid, *supra* note 3, at 492–93, 505–06 (describing the misogynistic military culture that contributes to sexual violence and how military policies and leaders reinforce this culture); Sepinwall, *supra* note 12, at 299.

[176] *Cf.* UCMJ art. 120; Rome Statute, *supra* note 18, art. 28; Hansen, *supra* note 11, at 414 (proposing that the military adopt command responsibility within the UCMJ under a revised Article 92 in order to deter abuses like those committed at Abu Ghraib); Schmid, *supra* note 3, at 505–06 (arguing that executive, legislative and administrative action is needed to eradicate the misogynistic military culture that contributes to intra-military sexual violence); Sepinwall, *supra* note 12, at 299 (noting that commanders' failure to punish sexual assault signals that these violations will be tolerated).

[177] *See* Rome Statute, *supra* note 18, art. 28; Sepinwall, *supra* note 12, at 302 (proposing that commanders' failure to punish their subordinates' violations should be held criminally liable for the underlying atrocity); *Briefing Paper*, *supra* note 10 (noting that low-level command discretion halts 68 percent of actionable cases from proceeding to courts-martial).

[178] *See* UCMJ art. 120; *see also* Damaska, *supra* note 68, at 461 (articulating how command responsibility applies to both failures to prevent and failures to punish); Russell-Brown, *supra* note 68, at 143–44 (summarizing Professor Damaska's argument that failure to prevent and failure to punish are two variants of command responsibility).

[179] *See* Damaska, *supra* note 68, at 461; Russell-Brown, *supra* note 68, at 144.

[180] *See* Damaska, *supra* note 68, at 461–62 ("The first relates to those situations in which superiors 'know' that their subordinates are about to commit a crime, but fail to take appropriate measures to prevent them."); Russell-Brown, *supra* note 68, at 144.

[181] *See* Damaska, *supra* note 68, at 461–62; Russell-Brown, *supra* note 68, at 144.

[182] *See* Damaska, *supra* note 68, at 467–68; O'Reilly, *supra* note 19, at 72; Russell-Brown, *supra* note 68, at 144; Sepinwall, *supra* note 12, at 299 (arguing that a commander's failure to punish his subordinate's crime signals tolerance by the whole military).

An analysis of these two scenarios, paying particular attention to the role of causation and personal culpability, is essential in order to adopt a standard of command responsibility that is appropriately tailored to domestic violations of the UCMJ, rather than international war crimes.[183] In order to adopt command responsibility, Congress would first need to debate and define appropriate standards of actus reus, mens rea, and punishment.[184]

1. Actus Reus—A Duty to Prevent, Investigate and Punish Intra-Military Sexual Violence

To impose liability, criminal law mandates some guilty act or conduct, otherwise known as the actus reus requirement.[185] The actus reus is typically an affirmative act that results in social harm.[186] In certain limited situations where a legal duty exists, however, an omission, or failure to act, will suffice.[187] The traditional doctrine of command responsibility imposes liability on commanders for their failure to prevent or punish subordinates' war crimes.[188] Thus, in proving the commander's criminal liability, the actus reus rests in an omission—the commander's failure to take reasonable steps to prevent or punish the subordinate's crimes despite having a legal duty to do so.[189]

In 1948, the *Yamashita* Tribunal determined that commanders have a duty to "provide effective control" of their troops as "required by the cir-

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[183] *Cf.* Damaska, *supra* note 68, at 461 (identifying the failure to prevent and failure to punish variants of command responsibility, as well as how command responsibility's disregard of causation runs counter to accomplice liability); Hansen, *supra* note 11, at 411 (proposing that punishment should reflect the degree of culpability as evidenced by the commander's level of mens rea).

[184] *Cf.* Rome Statute, *supra* note 18, art. 28; Damaska, *supra* note 68, at 461, 470 (articulating how command responsibility applies to both failures to prevent and failures to punish and how these scenarios can create problems with the culpability principle); O'Reilly, *supra* note 19, at 93–95 (comparing the various command responsibility mens rea standards and how they interact with the culpability principle); Parker, *supra* note 69, at 7 (arguing that superior responsibility should require corporate officers to prevent or remedy human rights abuses to deter future crimes); Russell-Brown, *supra* note 68, at 143–44 (summarizing Professor Damaska's argument that failure to prevent and failure to punish are two variants of command responsibility); Sepinwall, *supra* note 12, at 298–99 (discussing the importance of causation and culpability in defining the scope of command responsibility).

[185] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.02(A) (3rd ed. 2001); O'Reilly, *supra* note 19, at 95–96.

[186] *See* DRESSLER, *supra* note 185, § 9.01(A) (noting that actus reus is an act that causes social harm).

[187] *See* O'Reilly, *supra* note 19, at 96.

[188] *See* Rome Statute, *supra* note 18, art. 28.

[189] *See id.*; *see also* O'Reilly, *supra* note 19, at 96–98 (describing how command responsibility imposes liability for commanders' omissions in the face of a legal duty).

cumstances."[190] This broad standard of command responsibility fails to clearly identify what actions or omissions rise to the level of criminal culpability for the subordinate's crime.[191] Later that year in the *High Command Case*, however, the Tribunal articulated that a commander has a duty to properly supervise his subordinates and prevent their commission of war crimes; any wanton or immoral disregard of this duty, amounting to acquiescence, satisfies the actus reus requirement.[192] The Tribunal further declared in the *Hostage Case* that military commanders have a "duty to maintain order, punish crime, and protect lives and property" in occupied territories.[193] Following the Post-World War II Tribunals, courts continued to refine the actus reus element of command responsibility, ultimately requiring commanders to take appropriate measures to prevent, suppress, and punish war crimes.[194] These appropriate measures vary, depending on whether the failure to prevent, or failure to investigate and punish strand of command responsibility applies.[195]

Inherent in their responsibilities to maintain order and discipline amongst their subordinates, and as articulated by Article 77's principal liability, Article 78's accessory liability, and Rule 303's duty to investigate, commanders have a duty to prevent, investigate, and punish subordinates' UCMJ violations—a duty that extends beyond war crimes to intra-military rape and sexual assault.[196] In the first scenario, where the commander fails to reasonably prevent the crime despite preliminary reports of abuse and harassment, the actus reus requirement is satisfied via the omission.[197] Simi-

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[190] U.S. v. Yamashita, IV L. Rep. of Trials of War Criminals 1, 35 (U.N. War Crimes Comm'n 1948) (stating that General Yamashita failed to effectively control his troops in a manner required by the circumstances); Hansen, *supra* note 11, at 359.

[191] *See* Hansen, *supra* note 11, at 359–60.

[192] *See* U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 69, 76 (U.N. War Crimes Comm'n 1948) (explaining that criminal liability attaches to the commander for failure to supervise subordinates when the commander wantonly disregards the subordinate's actions, amounting to acquiescence); Hansen, *supra* note 11, at 364 (explaining that the scope of the commander's responsibility is very broad under the *High Command Case* standard); O'Reilly, *supra* note 19, at 72, 96 (noting how command responsibility punishes an omission as actus reus).

[193] U.S. v. List, VIII L. Rep. of Trials of War Criminals 1, 69 (U.N. War Crimes Comm'n 1948) ("[I]t is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property . . . .").

[194] *See* Hansen, *supra* note 11, at 371–73.

[195] *See id.* at 372–73.

[196] *Cf.* UCMJ arts. 77, 78, 120; Rome Statute, *supra* note 18, art. 28; MCM, *supra* note 16, R.C.M. 303; U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 76 (*High Command Case*); U.S. v. List, VIII L. Rep. of Trials of War Criminals 1, 69 (U.N. War Crimes Comm'n 1948) (*Hostage Case*).

[197] *See* MCM, *supra* note 16, R.C.M. 303; Damaska, *supra* note 68, at 461–62 (discussing the failure to prevent scenario generally); O'Reilly, *supra* note 19, at 96 (noting that an omission satisfies the actus reus requirement where a duty exists); Russell-Brown, *supra* note 68, at 144.

larly, in the second scenario, where the commander fails to reasonably investigate or punish the subordinate who has already committed rape or sexual assault, the commander has again breached a duty, thereby satisfying the actus reus element.[198]

2. Negotiating an Acceptable Mens Rea Standard for the Domestic UCMJ Setting

To impose punishment under criminal law, the actor must possess a guilty mind, or mens rea.[199] As previously discussed, courts have adopted a spectrum of mens rea standards for command responsibility, ranging from simple negligence to actual knowledge.[200] Consequently, courts differ on how aware the commander must be of his subordinate's impending or past violation.[201] The two most prevalent views suggest that the appropriate mens rea for command responsibility is either simple negligence, or heightened to recklessness.[202]

Under the simple negligence standard, commanders are held liable for their subordinates' crimes even without actual knowledge, so long as they had reason to know of the crime's commission.[203] For instance, Article 7(3) of the International Criminal Tribunal of Yugoslavia (ICTY) holds commanders responsible if they "knew or had reason to know that the subordinate was either about to commit the crime or had already done so; and . . . failed to take the necessary and reasonable measures to prevent the crime or

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[198] *See* MCM, *supra* note 16, R.C.M. 303; Damaska, *supra* note 68, at 467–68; O'Reilly, *supra* note 19, at 96 (noting that an omission satisfies the actus reus requirement where a duty exists); Russell-Brown, *supra* note 68, at 144; Sepinwall, *supra* note 12, at 299 (arguing that a commander's failure to punish his subordinate's crime signals tolerance by the whole military).

[199] *See* DRESSLER, *supra* note 185, § 10.01; O'Reilly, *supra* note 19, at 92.

[200] *Compare* Rome Statute, *supra* note 18, art. 28 (adopting both a negligence and recklessness mens rea for command responsibility and superior responsibility), *with High Command Case*, VIII L. Rep. of Trials of War Criminals at 76 (requiring a heightened recklessness or a mens rea of wanton, immoral disregard for command liability to attach), *and Hostage Case*, VIII L. Rep. of Trials of War Criminals at 89 (establishing a knew or ought to have known negligence standard for command responsibility).

[201] *Compare* Rome Statute, *supra* note 18, art. 28 (adopting both a negligence and recklessness mens rea for command responsibility and superior responsibility), *with High Command Case*, VIII L. Rep. of Trials of War Criminals at 76 (requiring a heightened recklessness or wanton, immoral disregard mens rea for command liability to attach), *and with Hostage Case*, VIII L. Rep. of Trials of War Criminals at 89 (establishing a knew or ought to have known negligence standard for command responsibility).

[202] *See, e.g.*, Rome Statute, *supra* note 18, art. 28 (adopting both a negligence and recklessness mens rea for command responsibility and superior responsibility respectively); Hansen, *supra* note 11, at 369, 400, 404, 406.

[203] *See* ICTY Statute, *supra* note 92, art. 7(3).

to punish the subordinate perpetrator after the event."[204] This lesser negligence standard ascribes liability if a commander reasonably should have known about his subordinate's misconduct, and yet failed to prevent or reprimand the subordinate.[205] Consequently, the negligence standard induces commanders to act with greater consideration when supervising their subordinates, thereby increasing deterrence of subordinates' war crimes.[206]

In contrast, the reckless or willful blindness standard recognized by the International Criminal Court, the Geneva Convention, and other international treaties and institutions, establishes a heightened standard of liability, requiring proof of wanton, immoral disregard of the subordinate's actions.[207] The *Celebici* case succinctly explained that, under a recklessness standard, commanders will be held liable if

> the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate. . . .This is a reference to information, which, if at hand, would oblige the commander to obtain *more* information (i.e. conduct further inquiry), and he therefore 'had reason to know.'[208]

Thus, the commander must consciously disregard a substantial risk that his or her subordinates are committing abuses, to render the commander criminally liable for failing to take action.[209] Although this heightened standard requires the commander's constructive knowledge of the subordinate's offenses, this knowledge may still be imputed from information indicating a need for further investigation, not necessitating actual knowledge of the crime itself.[210]

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[204] *Id.*

[205] *See id.*; O'Reilly, *supra* note 19, at 93.

[206] *See* Hansen, *supra* note 11, at 349, 372 (explaining that where commanders fail to become aware of their subordinates' criminal conduct, they breach a duty to act); O'Reilly, *supra* note 19, at 90–91, 93 (describing how a liberal negligence standard can deter future violations, and specifically, a negligence standard increases deterrence by forcing people to act with greater consideration); Sepinwall, *supra* note 12, at 287, 298 (arguing that commanders' punishment of subordinates' crimes signals that violations are unacceptable, thereby deterring future violations).

[207] *See, e.g.*, Rome Statute, *supra* note 18, art. 28; ; U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 76 (U.N. War Crimes Comm'n 1948) (*High Command Case*); Article 86, *supra* note 88, ¶ 2; O'Reilly, *supra* note 19, at 93 (describing how someone who acts recklessly consciously disregards a substantial risk).

[208] Prosecutor v. Delalic, Case No. IT-96-21-T, Appeals Chamber, ¶ 233 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

[209] *See id.*; O'Reilly, *supra* note 19, at 93.

[210] *See* Prosecutor v. Delalic, Case No. IT- 96-21-T, Appeals Chamber, ¶ 233 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (*Celebici*); O'Reilly, *supra* note 19, at 83.

In order to apply command responsibility to the domestic setting, Congress should limit the scope only to serious UCMJ violations, like rape and sexual assault.[211] This expands the doctrine's subject matter and jurisdiction, by shifting from deterring war crimes committed abroad, to domestic UCMJ violations perpetrated against U.S. service members.[212] Critics may argue that UCMJ violations, however, pale in comparison to international war crimes.[213] If the doctrine's application were limited to serious UCMJ violations, such as murder and rape, this concern would be mitigated.[214] After all, the forced rape of a service member in his or her barracks is arguably just as egregious as that of a foreign civilian during an armed conflict.[215] Similarly, the shift in context from armed conflict abroad to domestic UCMJ violations is justified to ensure the safety of U.S. service members, not only while fighting abroad, but also while training at home.[216] This change safeguards the UCMJ by enforcing its provisions in either setting.[217]

This incorporation of command responsibility in the domestic UCMJ setting is justified to reduce the commission of serious UCMJ violations, like rape and sexual assault, but Congress should counter this expansion by

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[211] *See* UCMJ art. 120; Rome Statute, *supra* note 18, art. 28 (imposing a traditional definition of command responsibility); Hillman, *supra* note 13, at 13 (describing how policy reforms are ineffective in combatting prevalent intra-military rape); O'Reilly, *supra* note 19, 90–91 (describing how command responsibility can be effective in deterring subordinates' commission of crime).

[212] *Cf.* UCMJ art. 120; Hansen, supra note 11, at 389, 414 (comparing law of war violations to serious UCMJ violations and proposing that Congress incorporate command responsibility within the UCMJ to deter war crimes); O'Reilly, *supra* note 19, at 74 (articulating how command responsibility traditionally applies to the commission of international war crimes or crimes against humanity).

[213] *See* UCMJ arts. 77–134; ICTY Statute, *supra* note 92, arts. 2–5 (limiting prosecutions to certain offenses, including grave breaches of the Geneva Conventions, violations of the law or customs of war, genocide, and crimes against humanity); O'Reilly, *supra* note 19, at 78–89, 85, 87–88 (explaining the customary and doctrinal incorporation of command responsibility in international law); Smidt, *supra* note 73, at 230 (discussing how command responsibility is rooted in the law of war, and therefore, may be limited to this context).

[214] *Cf.* Article 86, *supra* note 88, art. 28, ¶ 2 (depicting a traditional definition of international command responsibility); Hansen, *supra* note 11, at 389 (comparing several serious UCMJ violations to law of war violations).

[215] *See* ICTY Statute, *supra* note 92, arts. 2–5 (limiting prosecutions to serious offenses, including rape); Hansen, *supra* note 11, at 389 (comparing rape to a serious law of war violation). *See generally* Cioca Complaint, *supra* note 3 (describing the sixteen plaintiffs' accounts of rape and sexual assault, occurring both abroad and on U.S. soil).

[216] *See* Article 86, *supra* note 88, art. 28, ¶ 2; Cioca Complaint, *supra* note 3, ¶¶ 7–28 (describing how a commander raped and assaulted SN Cioca on U.S. soil); Hillman, *supra* note 13, at 113 (describing how current reform measures fail to adequately deter intra-military sexual violence).

[217] *See* UCMJ arts. 77–134; MCM, *supra* note 16, pmbl., I-1 (declaring that two purposes of military law are to promote justice and maintain good order and discipline).

requiring a heightened recklessness mens rea.[218] Consequently, commanders would be liable for their subordinates' UCMJ violations only where they were aware of a substantial risk that violations did or would occur, and failed to reasonably alleviate that risk via further investigation or disciplinary action.[219] This creates a duty for commanders to prevent, investigate, or punish serious violations reported to them, but would not extend to subordinates' trivial violations.[220]

Accordingly, the commander in SN Cioca's complaint, as detailed in Part I, would be liable under both scenarios of command responsibility: Duty to prevent; and duty to investigate or punish.[221] In terms of the duty to prevent, he failed to reasonably prevent his subordinate's later rape of SN Cioca after initially denying her preliminary reports of abuse and harassment.[222] With regards to the duty to investigate and punish, he failed to send the matter to an Article 32 investigation or subsequent courts-martial to determine guilt and appropriate punishment.[223] Applying command responsibility to UCMJ violations would address incidents like Cioca's by forcing commanders to treat reported crimes seriously and initiate investigations.[224]

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[218] *See* UCMJ art. 120; Article 86, *supra* note 88, art. 28, ¶ 2 (imposing command responsibility if commanders knew or had reason to know under the circumstances that a subordinate was going to commit a breach, and the commander failed to take all feasible measures to prevent or punish the breach); Hillman, *supra* note 13, at 13 (describing how current reform measures fail to adequately deter intra-military sexual violence); Sepinwall, *supra* note 12, at 231 (identifying critics preference for a heightened mens rea standard).

[219] *See* Article 86, *supra* note 88, art. 28, ¶ 2; MCM, *supra* note 16, R.C.M. 303 Prosecutor v. Delalic, Case No. IT- 96-21-T, Appeals Chamber, ¶ 233 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (*Celebici*); O'Reilly, *supra* note 19, at 93.

[220] *See* UCMJ art. 120; Article 86, *supra* note 88, art. 28, ¶ 2 (articulating a heightened recklessness standard); *Celebici*, Case No. IT- 96-21-T, ¶ 233; MCM, *supra* note 16, R.C.M. 303; Hansen, *supra* note 11, at 389 (comparing law of war violations to serious UCMJ violations); O'Reilly, *supra* note 19, at 93.

[221] *See* Article 86, *supra* note 88, art. 28, ¶ 2; Cioca Complaint, *supra* note 3, ¶¶ 7–28; Russell-Brown, *supra* note 68, at 143–44 (describing the failure to prevent and the failure to punish variants of command responsibility). In the complaint, SN Cioca details how Command ignored her initial reports of sexual harassment by her commanding officer and how she was later forcibly raped by said officer. Cioca Complaint, *supra* note 3, ¶¶ 13, 17, 21. When she reported the rape to Command, they threatened her with courts-martial, and ultimately, only ordered minor administrative punishment for her commander. *Id.* ¶¶ 21–23. For more details see *supra* Part II of this Note. *See supra* text accompanying notes 25–29.

[222] *See* Cioca Complaint, *supra* note 3, ¶¶ 11–13; Damaska, *supra* note 68, at 461 (identifying the failure to prevent variant); Russell-Brown, *supra* note 68, at 144 (discussing the failure to prevent scenario).

[223] *See* UCMJ arts. 32, 120; Cioca Complaint, *supra* note 3, ¶¶ 21–23; Damaska, *supra* note 68, at 467–68 (identifying the failure to punish variant); Russell-Brown, *supra* note 68, at 144 (discussing the failure to punish scenario).

[224] *See* UCMJ arts. 32, 77–134; Article 86, *supra* note 88, art. 28, ¶ 2 (imposing command responsibility if commanders knew or had reason to know under the circumstances that a subordinate was going to commit a breach, and the commander failed to take all feasible measures to

Absent an attentive response to reports of sexual violence, commanders would face criminal liability under command responsibility for ignoring a substantial risk that subordinates were committing rape and sexual assault.[225]

3. Promoting Mode of Liability to Punish Commanders for Their Subordinates' Serious UCMJ Violations

Where commanders fail to reasonably prevent, investigate, or punish a subordinate's serious UCMJ violation, they should be held criminally liable for their subordinates' principal offenses under a mode of liability theory of punishment.[226] Even though the commanders do not personally commit the crime, they are nonetheless morally culpable for consciously choosing to ignore a substantial risk that someone under their command did or soon would.[227] By ignoring this risk, commanders essentially acquiesce to the misbehavior that is very likely occurring under their noses.[228] This failure is not merely a dereliction of duties punishable as a separate offense, because the acquiescence, in turn, creates a command climate accepting of UCMJ violations.[229] Ultimately, this violation-tolerant command climate generates future violations, either by the initial perpetrator, as seen primarily in the failure to prevent scenario, or by other subordinates, especially in the failure to investigate and punish scenario.[230]

Some critics argue that the second scenario—the command climate fails to deter other subordinates from committing UCMJ violations—is too

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prevent or punish the breach); MCM, *supra* note 16, R.C.M. 303; Hansen, *supra* note 11, at 414 (proposing that the military adopt command responsibility under UCMJ article 92 to deter abuses like those committed at Abu Ghraib); O'Reilly, *supra* note 19, at 93–94 (explaining how a person is reckless if they consciously disregard a substantial risk).

[225] *See* UCMJ arts. 32, 77; Article 86, *supra* note 88, art. 28, ¶ 2; MCM, *supra* note 16, R.C.M. 303; O'Reilly, *supra* note 19, at 93–94; Sepinwall, *supra* note 12, at 256.

[226] *See* Article 86, *supra* note 88, art. 28, ¶ 2; MCM, *supra* note 16, R.C.M. 303 (identifying the commander's duty to investigate); Sepinwall, *supra* note 12, at 286, 295–98 (arguing that the failure to punish strand of command responsibility should warrant a mode of liability recourse rather than dereliction of duty because it more effectively deters commanders' willful ignorance and acknowledges expressive injury).

[227] *See* U.S. v. von Leeb, VIII L. Rep. of Trials of War Criminals 1, 76 (U.N. War Crimes Comm'n 1948) (*High Command Case*) (explaining that a commander is criminally liable for failure to properly supervise his subordinates when it rises to "personal neglect, equating to a wanton, immoral disregard of the action of his subordinates); Sepinwall, *supra* note 12, at 290, 296–301 (arguing that a commander's failure to punish his subordinates not only leads to a violation-tolerant command climate, but also wages an expressive injury against the victim).

[228] *See High Command Case*, VIII L. Rep. of Trials of War Criminals at 76; Sepinwall, *supra* note 12, at 299.

[229] Sepinwall, *supra* note 12, at 299.

[230] *See id.* at 298–99.

attenuated to impose liability on the commander due to insufficiencies in personal culpability and causation.[231] These scholars argue that reprimanding a commander for a single, isolated failure to investigate or punish is an obvious departure from the culpability principle.[232] The commander's dereliction of these duties, they assert, does not cause any new wrongdoing, and the initial wrongdoing was no fault of the commander's, but rather that of the perpetrator.[233] This contention, however, underestimates the role that a violation-tolerant command climate has in sanctioning future violations.[234]

Furthermore, other scholars note the importance of the expressive injury that the commander compounds upon the initial crime, by consciously choosing not to investigate or punish the subordinate's offense.[235] In other words, by acquiescing to the initial offense, a commander becomes a party to it because he or she denies the victim the justice and self-dignity that punishment is designed to restore.[236] This deprivation is an "additional dignitary assault waged by the commander," making the officer a party, at least to some extent, to the underlying crime.[237]

By punishing the commander for the subordinate's underlying crime, command responsibility serves both utilitarian and retributive aims.[238] First, under the utilitarian theory, command responsibility benefits society because holding commanders criminally liable for failures to prevent, investigate, and punish deters the commission of future crimes, regardless of the commander's own moral culpability in the crime committed.[239] Second, retributive goals are also met because commanders who fail to effectively

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[231] *See* Damaska, *supra* note 68, at 468.

[232] *See id.*

[233] *See id.*; Sepinwall, *supra* note 12, at 301 (summarizing other scholars' opinions that the failure to punish variant lacks causation).

[234] *See* Sepinwall, *supra* note 12, at 299–300.

[235] *See id.* at 293–95. The theory of expressivism commands that people are morally required to express others' equal moral worth. *See id.* Expressivists argue that punishment is critical because it chastises the offender and restores the victim's equal moral worth and dignity. *See id.* Accordingly, expressive injury is the affront to the individual's self worth that results when authorities fail to punish the crime, essentially affirming or acquiescing to it. *See id.*

[236] *See id.*

[237] *Id.* at 294–302.

[238] *See id.* at 299–300 (arguing that a commander's failure to punish contributes to future crimes by creating a violation-tolerant climate and compounds the victim's injury by refusing to acknowledge, and thereby acquiescing to, the wrongdoing); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (summarizing how utilitarian theory primarily seeks to deter future crimes while retributive theory seeks to punish past crimes as blameworthy acts).

[239] *See* Rome Statute, *supra* note 18, art. 28; Jeremy Bentham, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 396 (John Bowring ed., 1962); Russell-Brown, *supra* note 68, at 144–45; Robinson & Darley, *supra* note 238, at 454.

command their subordinates are morally blameworthy for consciously ignoring a substantial risk that crimes will be or have been committed.[240] Furthermore, the commander's choice to disregard this risk contributes to a command climate tolerant of violations and compounds the initial injury by inflicting expressive harm upon the victim.[241]

Any remaining concerns about weaknesses in causation or personal culpability can be addressed by limiting the scope of the doctrine's incorporation to serious UCMJ violations only.[242] Conversely, minor UCMJ violations could result in dereliction of duty charges against the commander, punishable by administrative reprimands.[243] Article 15 of the UCMJ governs the commander's power to reprimand subordinates' minor offenses with administrative and non-judicial punishment.[244] While Article 15 does not define minor offenses, the Manual for Courts-Martial (MCM) suggests that it generally includes an offense punishable by less than one-year confinement and not subject to dishonorable discharge.[245] The MCM considers a number of other factors, including the offender's age, rank, duty assignment, record and experience, as well as the circumstances surrounding the commission of the offense, such as the level of assumed risk or the foreseeable harm, when determining the seriousness of the offense.[246] Thus, disciplinary infractions resulting from simple neglect or laziness are best categorized as minor offenses, whereas crimes like rape, murder, and aggravated assaults are best categorized as serious offenses.[247] In light of Article 15, Congress should similarly define serious violations for command responsi-

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[240] *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 138 (Hackett Pub. Co. 1999) (1797); O'Reilly, *supra* note 19, at 89, 93 (noting that retributive theory punishes morally blameworthy acts); Sepinwall, *supra* note 12, at 299.

[241] *See* Sepinwall, *supra* note 12, at 299.

[242] *See* Article 86, *supra* note 88, art. 28, ¶ 2; Damaska, *supra* note 68, at 468 (explaining the concern that some applications of command responsibility fail to satisfy causation and culpability principles); Hansen, *supra* note 11, at 389 (comparing several serious UCMJ violations to law of war violations); Sepinwall, *supra* note 12, at 301 (discussing scholars' criticism that the failure to punish variant violates the principle of personal culpability).

[243] *See* UCMJ arts. 15 (Nonjudicial punishment), 92. Article 15 states that commanding officers are permitted to issue administrative and non-judicial punishments for subordinate's minor offenses. *See id.* As the UCMJ already distinguishes between serious and minor offenses, doing so within the context of command responsibility seems warranted. *See id*; Sepinwall, *supra* note 12, at 255–56 (describing how command responsibility can punish commanders under a separate dereliction of duty provision for the failure to perform one's duties rather than the subordinate's substantive crime).

[244] *See* UCMJ art. 15.

[245] *See id.*; MCM, *supra* note 16, pt. V, V-1, ¶ 1(e).

[246] *See* UCMJ art. 15; MCM, *supra* note 16, pt. V, V-1, ¶ 1(e).

[247] *Cf.* UCMJ arts. 15, 120; MCM, *supra* note 16, pt. V, V-1, ¶ 1(e); ARMY REGULATION 27-10, LEGAL SERVICES MILITARY JUSTICE 3 (3-3 Relationship of nonjudicial punishment to nonpunitive measures) (2005); Hansen, *supra* note 11, at 389 (comparing rape to law of war violations).

bility purposes as those crimes capable of more than one-year confinement or dishonorable discharge, which would almost certainly include violent crimes like rape and sexual assault.[248]

Additionally, Congress can provide for some leeway via sentencing guidelines that permit reduced sentences for commanders if mitigating circumstances are satisfied.[249] This slight sentencing discretion effectuates justice by holding commanders criminally liable for the subordinate's crime, but permitting a reduced (but meaningful) sentence only when they are less blameworthy for the underlying atrocity.[250]

CONCLUSION

Incorporating command responsibility within the domestic UCMJ appropriately responds to widespread reports of intra-military rape and sexual assault and commanders' frequent disregard thereof. Absent this recourse, commanders often ignore victims' reports, or even worse, retaliate against the victim, leading to a rape-tolerant command climate that condones future violence. The DOD recently articulated a duty to prosecute intra-military rape and sexual assault, but establishing a duty achieves nothing without proper enforcement—command responsibility is one solution. Applying

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[248] *See* UCMJ arts. 15, 120; MCM, *supra* note 16, pt. V, V-1, ¶ 1(e); Hansen, *supra* note 11, at 389 (comparing law of war violations to serious UCMJ violations).

[249] *See* UCMJ art. 78; MCM, *supra* note 16, pt. IV-1. The MCM articulates how an accessory after the fact is punished for the principal's substantive offense. *See id.* This substantive liability would be transposed to commanders for their subordinates' UCMJ violations, but with a range of sentences, that while all strict, still permit sentencing discretion. *See id.*; *Sentencing Guidelines*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 641, 642–83 (2005) (discussing U.S. Sentencing Guidelines followed by federal courts and the different factors judges may consider, including the defendant's role in the offense); John R. Steer, *Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit*, *in* 1 CORPORATE COMPLIANCE 2002, at 113, 113–17 (PLI Corporate Law & Practice Course, Handbook Series No. B-1317, 2002) (discussing how federal law sometimes holds organizations vicariously liable for their agents' criminal acts, but when mitigating circumstances exist to reduce their culpability, like prompt reporting of wrongdoing, disciplining employees, and instituting prevention programs, Federal Sentencing Guidelines permit reduced sentences).

[250] See Article 86, *supra* note 88, art. 28, ¶ 2 (command responsibility generally); MCM, *supra* note 16, pmbl., I-1 (identifying the UCMJ's goal of achieving justice); Damaska, *supra* note 68, at 468 (explaining the concern that some applications of command responsibility fail to satisfy causation and culpability principles); Robinson & Darley, *supra* note 238, at 454 (articulating the retributive aim to punish morally blameworthy conduct); *Sentencing Guidelines*, *supra* note 249, at 642–83; Sepinwall, *supra* note 12, at 299 (articulating how a failure to punish leads to the appearance of a command climate tolerant of future violations); Steer, *supra* note 249, at 1–4 (discussing how federal law sometimes holds organizations vicariously liable for their agents' criminal acts, but when mitigating circumstances exist to reduce their culpability, like prompt reporting of wrongdoing, disciplining employees, and instituting prevention programs, Federal Sentencing Guidelines permit reduced sentences).

command responsibility to serious violations of the UCMJ would establish a clear mandate for the military to prosecute any commander who fails to reasonably prevent, investigate, or punish serious UCMJ violations that he or she knew about, either via constructive or actual knowledge. Congress should limit the doctrine's scope to serious UCMJ violations that commanders are aware of and recklessly choose to ignore in order to focus their efforts on preventing significant, rather than trivial harms.

While this proposal departs from traditional command responsibility, which deals solely with international war crimes, it nonetheless achieves the customary goal of protecting individuals from brutality. After all, protecting our service members from violence should be a priority regardless of the setting or the perpetrator's identity. Intra-military violence also contravenes the UCMJ's goal to achieve justice and impedes mission readiness and accomplishment. Moreover, by ignoring the domestic perpetration of sexual violence, the military signals its acceptance of rape and sexual assault in international warfare, thereby risking the commission of war crimes.