PART IV - INDIVIDUAL CRIMINAL RESPONSIBILITY

A. INTRODUCTION: RELEVANT PROVISIONS

673. Under Article 3 of the Charter, an accused can be found criminally responsible if he or she:

- individually “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” within the jurisdiction of the Tribunal; or

- as a superior or military leader, “knew, 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 or repress their commission or submit the matter to the competent authorities for investigation and prosecution.”

674. Thus, consistent with domestic and international application of the law, an accused can be found criminally liable for a crime, in this case rape and sexual slavery, even if he or she did not physically commit the crime. Indeed, in the present case, none of the accused is alleged to have physically perpetrated the crimes charged in the Common Indictment. Article 3(1) of the Charter establishes individual criminal liability for one’s own acts or omissions that contribute to or participant in the criminal conduct, whereas Article 3(2) establishes a superior’s criminal liability for failing to prevent or punish crimes committed by subordinates. \(^{482}\) The principle of superior responsibility enshrined in Article 3(2) is also known in contemporary terms as “command responsibility” or “superior authority.” While the doctrine of “superior responsibility” is a more recent articulation designed to cover both civil and military leaders, similar terms were used during the post-World War II Trials, including the IMTFE, as discussed below.

675. In keeping with the duty of this Tribunal to apply the law as it existed at the time the acts were committed, we have had to determine whether the elements of contemporary formulations of criminal responsibility were part of international law during the time the crimes were committed. Below, we examine the development of the law applicable to holding individuals and superiors criminally responsible for international crimes, particularly war crimes and crimes against humanity. We ultimately conclude that the two strands of responsibility identified in Article 3(1) and (2) of the Charter reflect, albeit in somewhat different terminology, the bases of criminal responsibility recognised and applied by the IMTFE, and that these formed part of international law as it existed at the time of the commission of the offences.

676. Just as the IMTFE brought charges only against high level government or military leaders, here too each of the accused is a person holding a high level position. Because all accused held positions of significant authority within the Japanese military or government hierarchy, we have decided to consider superior responsibility under Article 3(2) before considering individual responsibility under Article 3(1).

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\(^{482}\) These terms are also found in Article 6 of the ICTR Statute, Article 7 of the ICTY Statute, and Article 25 of the ICC Statute. See also Articles 5-6 of the IMTFE Charter, Articles 6-7 of the IMT Charter, and Article II of CCL10.
B. **ARTICLE 3(2) – RESPONSIBILITY OF A COMMANDER OR OTHER SUPERIOR**

677. Article 3(2) of this Tribunal’s Charter recognises that in certain circumstances superiors can be held liable for failing to prevent or punish acts committed by subordinates. Superior responsibility is based on recognising the utility of requiring commanders to enforce the rules of war and the reality that war crimes are often committed by soldiers acting under the authority or with the support or acquiescence, explicit or implicit, of their commanders. Not only would it be unjust in such circumstances for the commander to evade responsibility for actions he or she authorised or permitted, it would also undermine the goal of deterrence to immunise commanders from criminal liability for the acts of persons subject to their authority and control. It further imposes greater incentive on superiors to properly train their troops and to educate them about the laws and customs of war.

678. The historical origins of command or superior responsibility pre-date the Second World War. The Lieber Code, promulgated by the Union government during the United States’ Civil War and recognised as a source of humanitarian rules later adopted by international agreement and custom, required commanders to suppress illegal acts committed by their subordinates and to punish the offenders. In the 1907 Hague Convention IV, Article 43 of the Regulations requires the appropriate military authority to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The 1919 post-WWI War Crimes Commission Report further confirmed the principle of command or superior responsibility by recommending the establishment of a tribunal to prosecute alleged Axis war criminals who “ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.”

679. Hence, the laws and customs of war increasingly acknowledged that commanders and other superiors had a duty to exercise adequate control over their subordinates, and recognised that under certain circumstances, the superior should be held criminally responsible for failing to prevent or halt crimes committed by subordinates or failing to punish the perpetrators thereof.

680. Distinct standards of responsibility were applied by and reflected in the jurisprudence of post-World War II Tribunals. Article 5 of the IMTFE Charter empowered the Tribunal to hold responsible “leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy” to commit crimes against humanity or other crimes within the jurisdiction of the Tribunal. Such persons were liable “for all acts performed by any person in execution of such plan.” Pursuant to Article 5, the IMTFE considered the responsibility of the accused under various counts of the Indictment, and it found some of the accused guilty of crimes charged under Count 54 of the Indictment for “ordering, authorizing, and permitting the commission of” crimes.

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484 General Order No. 100 was issued in 1863. It is commonly called the Lieber Code. See Article 71. Article 71 does not explicitly provide for criminal liability for failing to prevent these crimes.


It also convicted some of the accused under Count 55 of the Indictment for failing “to take adequate steps to secure the observance and prevent breaches of conventions and law of war in respect of prisoners of war and civilian internees.” Thus, without expressly articulating the distinctions, Count 54 imports individual responsibility, and Count 55 imports superior responsibility.

681. The IMTFE did not always delineate its reasons for assigning guilt based on one count as opposed to the other, nor did it consistently differentiate between these two distinct theories of responsibility. Nevertheless, the IMTFE Judgement did demonstrate that two standards of responsibility were applied: one for crimes involving individual responsibility (i.e., Count 54 of the IMTFE Indictment), akin to Article 3(1) of this Tribunal’s Charter, and the other for crimes involving superior responsibility (i.e. Count 55 of the IMTFE Indictment), akin to Article 3(2) of the present Charter.

682. The theories of criminal responsibility developed by and applied in the post-World War II trials were reinforced through subsequent conventions, protocols, and draft codes which extracted the primary principles from the Tribunals’ decisions. More recently, the ICTR and ICTY have analysed and applied them vis-à-vis their own Statutes. The contemporary jurisprudence and formulations will be referred to insofar as it clarifies and is consistent with the law as it existed at the time of the Nuremberg and Tokyo Trials.

1. General Standard

683. Although the concept of superior responsibility existed as far back as 500 B.C., the extent and nature of that responsibility was not clearly delineated.487 One of the major accomplishments of the Nuremberg and IMTFE trials and related procedures was that they provided more precision concerning the scope of the duty that superiors had over subordinates, and when and to what extent a superior incurred criminal responsibility for crimes committed by persons under their authority or control.488 The Yamashita, High Command, and Hostages Judgements in particular are considered leading authorities on command responsibility. The Judges note, however, that these Tribunals did not apply the standards with complete consistency.489

684. In examining the laws and customs of war prior to World War II, as well as the case law of the Nuremberg and Tokyo Trials, we conclude that the basic elements to be proved before it is possible to find a commander or other superior criminally responsible for crimes committed by a subordinate consist of the following elements:

- A superior-subordinate relationship existed such that the superior had a duty, whether formal or informal, to exercise authority or control over his or her subordinates;


489 While the High Command and Hostage cases were Control Council Law No. 10 cases held in Nuremberg under Ordinance No. 7 within the American Zone of Occupation, Yamashita was a post-WWII trial held by the United States Military Commission in the Asia-Pacific.
b. The superior knew or had reason to know that crimes were being, were about to be, or had been committed by subordinates; and

c. The superior failed to take appropriate measures within his or her power to prevent or suppress the crimes or to punish the offender(s) thereof.

2. **Superior-Subordinate Relationship**

685. To be held criminally responsible for the acts or omissions of one’s subordinates, the commander or other superior must have been in a formal or informal position of authority or control over the offender, had the duty to prevent or halt their commission of crimes or to punish the offenders, and subsequently failed in this duty.

686. The mandate to ensure proper control and treatment in a systematic way applies to all commanders and other superiors. Both civilian and military leaders have the duty to prevent crimes, halt their commission, and punish the perpetrators, so long as they possess sufficient authority or power. Indeed the IMTFE convicted not only military commanders and officers, such as generals and chiefs of staff, for superior or command responsibility, but it also convicted civilian government officials, such as prime ministers and foreign ministers, for failing to take reasonable measures to maintain order and safety, as their superior position of authority required.491

687. The duty is contingent on the commander or superior having sufficient power or authority to exercise adequate control over the perpetrators of the crime. Such power can be either informal or formal, *de facto* as well as *de jure*.492 Because the authority need not be formally prescribed, a commander may be held responsible for crimes committed by troops who are not under his or her immediate command, but who act under his or her authority.493 In the *Hostages* case, for example, the Court stated that the responsibility of a “commanding general of occupied territory” is co-extensive with his area of command, which prevents him or her from “say[ing] that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility.”494 It explained the scope of the duty of commanders in occupied territory as thus:

> [I]n his capacity as commanding general of occupied territory, [the accused] was charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants

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490 The *Celebici* Appeals Chamber defines a superior as “one who possesses the power or authority in either a *dejure* or *defacto* form to prevent a subordinate’s crime and to punish the perpetrators of the crime after the crime is committed.” *Celebici* Appeals Chamber Judgement, para. 192.

491 IMTFE Judgement, defendants HATA, p. 446, Kimura, p. 452, Muto, p. 455, Koiso, p. 453, Hirota, pp. 447-48, Shigemitsu, p. 458. A ICTY decision asserts that civilian superiors can be held responsible under the doctrine only to the extent that their degree of authority over their subordinates is akin to that of military commanders. *Celebici* Appeals Chamber Judgement, para. 378.

492 See, e.g., *Celebici* Trial Chamber Judgement, para. 354.

493 See, e.g., *Celebici* Appeals Chamber Judgement, para. 198; *Kordic* Trial Chamber Judgement, para. 406.

in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups.\textsuperscript{495}

688. The IMTFE also found that, whether military or civilian, those who have a duty to prevent ill-treatment of those in their custody must establish and secure a “continuous and efficient” system appropriate for such purposes. Such persons become responsible for ill-treatment of prisoners and breach their duty if they fail to establish an appropriate system, or if, having established such a system, they do not ensure it is effectively implemented. Superiors must continue to take steps within their power to prevent crimes.\textsuperscript{496} The IMTFE Judgement held that a civilian or military leader has “a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application.”\textsuperscript{497}

689. The High Command case compared the duty of preventing and punishing a crime in an occupied territory to the duty with regard to treatment of prisoners of war, emphasising the positive and preventative nature of this duty. The Judgement stated that “[t]he situation is somewhat analogous to the accepted principle of international law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.”\textsuperscript{498}

690. In the Yamashita case, the U.S. Military Commission held that as the Japanese commander of the Philippines during the invasion of Manila, YAMASHITA failed in his duty to exercise adequate control over his troops, who had committed widespread rape, murder, and pillage in Manila. He failed in this duty by not halting the crimes. The Court held:

\begin{quote}
[A]ssignment to command military troops is accompanied by broad authority and heavy responsibility. . . . It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.\textsuperscript{499}
\end{quote}

691. Where the system of authority is rigidly hierarchical, an accused will not generally be held responsible as a superior if he or she does not have the ability to countermand superiors. At the same time, the superior’s title does not necessarily determine responsibility: more indicative is the nature and scope of his or her power. Hence, chiefs of staff on occasion have been found to have sufficient authority to be held liable for the actions of soldiers, while other chiefs of staff have not, depending on their functions or place within the chain of command.\textsuperscript{500} For instance, the IMTFE declined to convict defendant Muto of certain charges when he was a staff officer subordinate to General

\textsuperscript{495} Hostages case, p. 1255.
\textsuperscript{496} IMTFE Judgement (Roling), p. 30.
\textsuperscript{497} IMTFE Judgement (Roling), pp. 29-32.
\textsuperscript{498} See High Command case, pp.542-547 (Aristarchus version).
\textsuperscript{499} Yamashita case, p. 486.
\textsuperscript{500} Hostages case, pp. 1974-1978.
MATSUI, on the basis that he did not exercise sufficient authority to have countermanded the General’s course of conduct. By contrast, it did convict Muto in his position as chief of staff to General YAMASHITA, after finding that position allowed him the ability to “influence policy.” It held that Muto “shared responsibility” for the “campaign of massacre, torture and other atrocities” which occurred during his tenure as chief of staff. In referring to the conviction of Muto, and emphasising that the “influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure”, the Rwanda Tribunal noted that the “Tokyo Tribunal reasoned that influential power, which is not power of formal command, was [a] sufficient basis for charging one with superior responsibility.”

692. The High Command case, on the other hand, rejected the application of command responsibility to chief of staff Foertsch because he lacked “authority in the field”, and to chief of staff von Geitner because of his “want of authority...to prevent the execution of unlawful acts.” The War Crimes Commission, in its Law Reports of Trials of War Criminals, stated that “[a]n examination of the relevant facts...shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged” than did Foertsch and von Geitner. Thus, the different findings of responsibility as to the chiefs of staff affirm that it is a person’s power of control or authority, whether de jure or de facto, and not the leader’s title, that determines responsibility.

693. The scope of a superior’s duty depends also on the nature of his responsibilities. For example, in the Milch case, the Tribunal found that the Under State Secretary of Reich

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501 IMTFE Judgement (Roling), p. 455.
504 The High Command case, (Aristarchus version). Von Geitner was acquitted even though he signed or initialed his commander’s orders as an indication of their correctness as to form because this was deemed insufficient to establish criminal liability. Among the reasons command responsibility was not applied to Foertsch was his attempt to “procure rescission of certain unlawful orders and the mitigation of others.”
505 The High Command case, p. 82, emphasised, particularly in relation to chiefs-of-staff:

The rank and care with which staff officers were selected show in itself the wide scope of their responsibilities which could, and in, many instances undoubtedly did, result in the chief of staff assuming many command and executive responsibilities which he exercised in the name of his commander.

One of his main duties was to relieve his commander of certain responsibilities so that such commander could confine himself to those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well accepted function of chiefs of staff and of all staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.

As stated heretofore, the responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist, however, is apparent from the testimony of the various defendants who held staff positions and in their testimony have pointed out various cases in which they modified the specific desires of their superiors in the interests of legality and humanity. If they were able to do this, the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.

507 Invoking this principle as to commanders, the 1977 Additional Protocol I to the 1949 Geneva Conventions finally codified the duty of superiors to take measures in exercising authority over subordinates. Article 87, “Duty of Commanders”, stipulates:
Air Ministry, who dealt primarily with aircraft production, could not be expected to concern himself with matters relating to medical experimentation. Yet, in the Medical case, Karl Brandt, a leading physician, could be held culpable because “[o]ccupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.”

The ICTY Celebici case stresses that power, even when not accompanied by a formal position of command, can be a sufficient basis for imposing command responsibility. The Tribunal states that “the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s de facto, as well as de jure, position as a commander.” The Celebici formulation is to assign superior responsibility when it has been shown that the accused had “effective control” over subordinates. Such control has been defined as “a material ability to prevent or punish criminal conduct, however that control is exercised.” We find this consistent with the post-World War Tribunal’s approach.

3. The Accused “Knew or Had Reason to Know” that Crimes Were Being Committed

After determining that an accused had a duty to control or punish subordinates and possessed power or authority to do so, it must be assessed whether the accused possessed the requisite mens rea to be held criminally responsibility for acts committed by subordinates.

Consistent with international law, Article 3(2) of the Charter requires that the accused knew or had reason to know of crimes committed by subordinates before criminal liability can attach. In the case before the Tribunal, it would need to be proven that the accused knew or had reason to know that crimes of sexual slavery and rape were being committed and that these crimes formed part of a widespread or systematic attack directed against a civilian population.

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations . . .

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach . . . to initiate such steps as are necessary to prevent such violations . . . and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Additional Protocol I, art. 87.

508 Milch case, pp. 1781-1785.
510 Celebici Appeals Chamber Judgement, para. 370.
511 See, e.g., Celebici Appeals Chamber Judgement, para. 196; Blaskic Trial Chamber Judgement, para. 302.
512 Celebici Appeals Chamber Judgement, para. 256.
697. The IMTFE convicted superiors for crimes committed by their subordinates if the evidence confirmed that the accused knew or should have known the crimes were being committed or were about to be committed and the superior did not take necessary and reasonable steps to suppress the crimes.513

698. We note that different standards as to the mens rea are discernible in the case law following World War II. For example, in the Yamashita case, a U.S. Military Tribunal found that the commander’s failure to prevent or punish the crimes was a violation of the laws or customs of war, despite the fact that the accused was relatively far from the theatre of action and out of direct communication with his troops. Some scholars and jurists have interpreted this as applying strict liability, while others consider that the facts of the case satisfy a “knew or should have known” standard.514 In contrast, although Admiral Toyoda was charged with violations of the laws or customs of war for tolerating crimes, including rape crimes, committed by his troops, the U.S. Military Commission held that because it was not established conclusively that Toyoda knew the crimes were being committed, he could not be convicted of command responsibility.515 In the Nuremberg Tribunal, the High Command case found criminal responsibility where the commander had knowledge of the offences and acquiesced or “criminally neglected” to interfere with the commission of crimes.

699. In Krstic, the ICTY emphasised that “the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he knew or had reason to know of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability.”516

700. Negligence in failing to acquire information is another way the Tribunals have expressed the “knew or had reason to know” standard. Although the defendant in Toyoda was acquitted of superior responsibility charges, the Commission articulated the standard quoted recently by the ICTY in the Tadic case:

In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to


514 See, e.g., Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 Mil. L. Rev. (2000), pp. 155, 181 (stating that the evidence indicates that Yamashita was not held to a strict liability standard.); Andrew D. Mitchell, Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes, 22 Sydney L. Rev. (2000), pp. 381, 390 (stating the standard applied in Yamashita was unclear); William H. Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. (1973), pp. 1, 37 (stating that strict liability was not imposed); Richard L. Lael, The Yamashita Precedent: War Crimes and Command Responsibility (1982), p. 123 (concluding that Yamashita was held to a strict liability standard.) According to the US Supreme Court: “While this standard does not impose a threshold requirement of knowledge or reasonable anticipation of atrocities prior to the existence of a duty, some limitation on liability is found in the duty ‘to take such measures as were within his power and appropriate under the circumstances.’” In re Yamashita, 327 U.S. 1, 16 (1946).

515 Toyoda case, p. 5006.

516 Krstic Trial Chamber Judgement, para. 369.
continue, he has failed in his performance of his duty as a commander and must be punished.

The Tribunal found that a superior is criminally responsible for breaching the “power of command” if he “fails to take such appropriate measures as are within his power...to prevent acts which are violations to the laws of war”.517

701. In the High Command case, the Court explicitly found that failure to properly exercise “command authority” to prevent atrocities constituted a violation of the commander’s duty under the laws of war.518 Further, in the Hostages case, the Court found that “under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law.”519

702. In the majority of cases, the post World War II tribunals found the accused liable for crimes committed by their subordinates if, based on their position, their power, and the circumstances existing at the time, they knew of or were put on notice about the actual or potential commission of the crimes but they nevertheless failed to take action to determine if crimes were about to be committed or were being committed, and if so, to take measures to halt the crimes.

(a) Actual Knowledge

703. If the Tribunal finds the accused to possess actual knowledge of the crimes, then the mens rea requirement is fulfilled. Proof of actual knowledge can be direct or imputed after being inferred from the circumstances.

704. The World War II trials found a superior had actual knowledge of the crimes if he witnessed their commission, received superior orders relating to them, or was present at meetings in which the crimes were discussed.520 With regard to the latter, the IMTFE found that TOJO Hideki had knowledge of atrocities, in part because he presided at meetings where “protests against the behavior of Japan’s troops” and “[s]tatistics relative to the high death rate” were discussed.521 Koiso, as Prime Minister, was also found by the IMTFE to have actual knowledge, and part of the evidence against him was his presence at meetings in which war crimes were discussed.522 Likewise, in the Pohl case, the Tribunal found a defendant to have knowledge of the commission of crimes based, in part, on his presence at a meeting discussing the logistics of a concentration camp routine.

705. In addition, actual knowledge can be inferred from the circumstances. Factors that can indicate whether the accused had knowledge include, but are not limited to: the notoriety of the crimes; their widespread, massive, systematic, or prolonged occurrence; the

517 Toyoda case, pp. 5005-5006.
518 High Command case, p. 1261.
519 Hostages case, pp. 507-515 Aristarchus version.
520 The High Command case identified superior orders as a source of actual knowledge. pp. 1259-1264, Aristarchus version. The Toyoda case identified witnessing the commission and being informed thereof as sources of actual knowledge.
521 IMTFE Judgement (Roling), pp. 457-463. The defendant Sato was also found to have actual knowledge of the atrocities because he was present at meetings of Bureau Chiefs in the War Ministry. But he was not held criminally responsible because he did not have the power to take action to stop the crimes: “he could not initiate preventive action against the chief.” P. 457.
522 IMTFE Judgement (Roling), p. 453.
proximity of the accused to the crime scene; the military’s hierarchical structure; and the functioning of the military, including its training, methods of communication, reporting, and information gathering methods.

706. Depending on the facts of each case, many of the factors that support an inference of actual knowledge may also support a finding that the accused should have known or had reason to know of the crimes, and vice versa.

707. The notorious, widespread, massive, systematic, and prolonged occurrence of crimes is particularly indicative in inferring the accused’s knowledge.\textsuperscript{523} For example, in considering the culpability of HATA, the IMTFE found that the fact “[t]hat crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.”\textsuperscript{524} Additionally, it convicted defendant Koiso under Count 55 by inferring he had actual knowledge of the crimes:

> When Koiso became Prime Minister in 1944 atrocities and other war crimes being committed by the Japanese troops in every theatre of war had become so notorious that it is improbable that a man in Koiso’s position would not have been well informed either by reason of their notoriety or from interdepartmental communications.\textsuperscript{525}

708. The U.S. Military Tribunal, in the \textit{Toyoda} case, explicitly included the great number of offences as a factor in inferring knowledge. It defined “constructive knowledge” as consisting of:

> the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offences or of the existence of an understood and acknowledged routine for their commission.\textsuperscript{526}

709. Thus, the magnitude of the crimes has lead courts to conclude that an accused must have known they were occurring, and, therefore, to infer actual knowledge. Indeed, in \textit{Yamashita}, the Military Commission emphasised that “the crimes were so extensive and wide-spread, both as to time and area, that they must have been wilfully permitted by the Accused, or secretly ordered by the Accused.”\textsuperscript{527}

710. In the \textit{Hostages} case, the Tribunal noted that a commander’s job is to be informed of events occurring under his authority, and stated:

> It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such

\textsuperscript{523} We note that the ICTR Trial Chamber in \textit{Akayesu} found that both knowledge and intent could be inferred from the massive and/or systematic nature of the genocide.

\textsuperscript{524} IMTFE Judgement (Roling), p. 30.

\textsuperscript{525} IMTFE Judgement (Roling), p. 453.

\textsuperscript{526} Because it is arguable that the language “must have known” is a stricter standard than “had reason to know,” we use this definition as demonstrative of the acceptance of inference of knowledge based on the widespread occurrence factor and not as the actual standard we will apply.

\textsuperscript{527} The UN War Crimes Commission, Vol IV, pp. 34-35, quoting the Yamashita Commission.
occurrences result occasionally because of unexpected contingencies, but they are unusual.\(^{528}\)

711. In the same case, the Tribunal concluded that the defendant Dehner had actual knowledge of the unlawful shootings of hostages and prisoners because his headquarters called attention to the fact that an order authorizing such shootings was still in force.\(^{529}\)

712. The Tribunals also took into consideration proximity to the crimes or circumstances that logically put an accused on notice of the crimes. For instance, in the *Pohl* case, the Tribunal found an accused to have knowledge of the crimes committed in a labour camp under his jurisdiction because inmate workers, whose poor physical state was obvious, daily passed by the building in which he had his office.\(^{530}\)

713. The nature of the military hierarchy and the accused’s position therein can evince actual knowledge. As noted above, the high ranking positions of the defendant Koiso in the IMTFE and the defendants in the *Hostages* case were significant factors in making an inference of knowledge when the crimes were widespread and notorious.

714. An accused’s *de jure* or *de facto* position and his or her corresponding responsibilities can provide the basis for inferring knowledge. The Tribunal in the *High Command* case, after considering the nature of the relationship between a commander and his chief of staff, concluded that orders signed for the commanding officer by a chief of staff “are presumed to express the wishes of the commanding officer.”\(^{531}\) In addition, in the Batavia Judgement, because Defendant III’s position put him in charge of all “brothels,” it was determined that everything that happened there would have been reported to him.\(^{532}\)

715. The Tribunals also took into consideration the military’s effectiveness, capacity and breadth of communication, and intelligence-gathering in deciding whether to infer actual knowledge. For example, in the *Hostages* case, the Tribunal noted the efficiency of the Nazi army’s communications and intelligence-gathering systems in their conclusion that high-ranking officers received information promptly.\(^{533}\)

716. We also note that the standard applied in the post-war Tribunals has been adopted by the ICTY, which has emphasised that “the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he ‘knew or had reason to know’ of the offences and failed to act to prevent or punish their occurrence.”\(^{534}\)

    \((b)\) “Had Reason to Know”

717. Pursuant to Article 3(2) of this Tribunal’s Charter, even if it is not adequately established that the accused actually knew of the rape and the sexual slavery of the “comfort women” or, as to the Emperor HIROHITO and YAMASHITA, of the rapes in Mapanique, we

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\(^{528}\) *Hostages* case p. 1259-1264, Aristarchus version. See also the Tokyo Tribunal’s treatment of Muto, IMTFE Judgement (Roling), p. 455.


\(^{530}\) *Pohl* case, p. 2439.

\(^{531}\) *High Command* case.

\(^{532}\) *Batavia* case.

\(^{533}\) *Hostages* case, p. 644.

\(^{534}\) *Kordic* Trial Chamber Judgement, para. 369.
must consider the alternative principle, established under international law, that a superior “had reason to know” of these crimes.

718. Post-war jurisprudence applied the principle that a superior should have known of the crimes if something should have put him on notice to inquire further about possible crimes. In addition, the circumstances themselves may give rise to the duty to know.

719. With respect to the concept of inquiry notice, the information that puts the accused “on notice” need not prove by itself that crimes exist. It is enough that the information indicates the need to inquire further in order to ascertain whether subordinates are or were involved in criminal activity.

720. The IMTFE found Foreign Minister Mamoru Shigemitsu criminally responsible for his failure to prevent crimes or punish the perpetrators because, having received reports of atrocities, “the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been.” 535 Although he “bore overhead responsibility for the welfare of the prisoners,” he failed to adequately investigate whether crimes were being committed, and indeed they were. 536

721. In the Hostages decision, the Tribunal found the defendant List liable for executions carried out by units under his authority but not tactically subordinate to him because reports of the executions were given to him, and this provided him with sufficient notice of the crimes. 537 Significantly, it held that a commander could not claim ignorance of such reports sent to headquarters: failure to appraise oneself of the substance of reports or to require additional reports if necessary constituted a dereliction of duty. 538 Further, the defendant Rendulic was held criminally responsible for failing to investigate after receiving reports lacking sufficient information about the treatment of hostages. The Tribunal held he should have made inquiries in order to ensure that the “hostage and reprisal practices [were] in conformity with the usages and practices of war.” 539 It thus found Rendulic guilty of acquiescing in the crimes because he failed in his duty to investigate as required under international law. 540 Sometimes the duty to investigate regardless of notice overlaps with inquiry notice. It appears in this case that the Tribunal was holding that, because of the situation at hand, the superior had a duty to remain informed of the treatment of hostages, and that this duty was breached further when he still failed to make inquiries after receiving insufficient information as to their treatment.

722. The large-scale or systematic commission of crimes can be considered sufficient “notice” to find that an accused “should have known” or should have taken steps to learn about the crimes. The IMTFE found the defendant HATA guilty of superior responsibility under Count 55 stating:

535 IMTFE Judgement (Rolling), p. 458.
536 IMTFE Judgement (Rolling), p. 458.
537 Hostages case, pp. 1961-1969. In the same case with regard to the defendant Kuntze, the Tribunal found that documentary evidence showed that he had notice of reports of shootings of Jews and Roma/gypsies by his subordinates. Because there was no evidence that the defendant acted to stop such unlawful practices, the Tribunal found that he had acquiesced in them. Hostages case, pp. 1969-1974.
538 Hostages case, pp. 1271-1276 (in Judgement against defendant List) [Aristarchus version].
HATA [was] in command of expeditionary forces in China [and] atrocities were committed on a large scale by the troops under his command and were spread over a long period of time. Either HATA knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provisions for learning whether [his] orders for the humane treatment of prisoners and civilians were being obeyed.541

By contrast, the IMTFE did not convict the accused Togo Shigenori under Count 55 because, “[a]t the time of his resignation atrocities committed by the Japanese troops had not become so notorious as to permit knowledge to be imputed to him.”542

723. In the Hostages case, the Court stated that the commanding General of an occupied territory, in order to fulfil his duty of “maintain[ing] peace and order” and “protect[ing] lives and property,” may need:

adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.543

724. In the Pohl case, the Tribunal described one defendant’s assertions that he lacked knowledge of crimes committed in labour camps under his jurisdiction as “assumed or criminal naivete” because “it was his duty to know.”544 Another defendant was acquitted because the crimes committed by subordinates were not of sufficient magnitude or duration to put him on notice.545

725. The post-World War II Tribunals found that a defendant had reason to know of criminal activity committed by subordinates where his command position gave him the duty to know or find out what was happening in his area of command. Thus, asserting lack of knowledge will not have success when the superior has a duty to know and fails in his duty to adequately supervise subordinates.

726. Criminal negligence was also applied by the Tribunals to defendants who failed in their duties to know about crimes committed by subordinates. As stated in the Roechling case, a CCL10 trial in the French Zone of Occupation of industrialists who had de facto power and influence to prevent the mistreatment of forced labourers by the Gestapo, “[n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.”546 The criminal negligence standard was also applied in the High Command case, in which the Tribunal held that for a superior to be held criminally responsible for acts of subordinates, there must be a “personal dereliction”,

541 IMTFE Judgement (Roling), p. 446 (emphasis added). The IMTFE noted in its separate verdict for defendant Muto, that “widespread” atrocities were committed by the troops under his command “for which MUTO shares responsibility.” p. 455.
542 IMTFE Judgement (Roling), p. 461.
543 Hostages case, p. 1271.
544 Pohl case, p. 64.
545 Pohl case, defendant Tschentscher, p. 63.
[t]hat can only occur where the act is directly traceable to him or where his
failure to properly supervise his subordinates constitutes criminal
negligence on his part. In the latter case, it must be a personal neglect
amounting to a wanton, immoral disregard of the action of his subordinates
amounting to acquiescence.547

727. We understand the ‘wanton, immoral disregard’ language to indicate that guilt can be
established where acquiescence results not only from knowing failure but also from a
‘willful blindness’ on the part of the commander.548

4. Failure to Take Necessary and Reasonable Measures

728. In sum, a commander or superior with the requisite power of control over subordinates
who knew or had reason to know of the commission of crimes is criminally responsible
for crimes under the doctrine of superior responsibility if – in the language of this
Tribunal’s Charter – he or she then “failed to take the necessary and reasonable measures
to prevent or repress their commission or submit the matter to the competent authorities
for investigation and prosecution.” Thus, to be found culpable, each accused here must
have failed to take necessary and reasonable measures available to prevent or repress rape
and sexual slavery, or punish perpetrators thereof.

729. While it is not required that the superior be successful in the prevention of crimes or the
repression of their commission, the duty is discharged only if he or she has made
adequate efforts under the circumstances of each situation. Token, limited, or insincere
efforts will generally not suffice. For instance, a commander cannot hide behind
assurances that crimes are not being committed or have ceased when other circumstances
should have alerted the commander to the fact that those assurances are false or
questionable. The IMTFE found Japanese Foreign Minister Hirota guilty of having
“disregarded his legal duty to take adequate steps to secure the observance and prevent
breaches of the laws of war.”549 After receiving reports of atrocities in Nanking, he
contacted the War Ministry, which assured him the atrocities would cease. However,
because reports of atrocities continued to come in for at least a month, the Tribunal found
that Hirota was “derelict in his duty in not insisting before the Cabinet that immediate
action be taken to put an end” to the crimes.550

730. A commander also fails to fulfil his or her duty to secure performance of the laws of war
when punitive or disciplinary measures are not sufficiently severe or effective in relation
to the seriousness of the crimes committed. In the Hostages case, the Tribunal found
that certain measures taken by the defendant Felmy against subordinates who had committed
crimes were inadequate. For example, he recommended that the officer in charge of a
regiment which had massacred two villages be subjected to “disciplinary action (the

547 High Command case, pp. 73-74. Considering the duties of a commander in overseeing occupied territory, the Tribunal
further stated to be held criminally responsible, the “occupying commander must have knowledge of these offenses and
acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be
patently criminal.” pp 76-77.
548 Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations,
549 IMTFE Judgement (Roling), p. 448.
550 IMTFE Judgement (Roling), p. 448.
method of trying minor offences)” and never followed up to see what action had been taken.  

731. When the potential or actual gravity of the harm is high, the level of effort required to discharge this duty is correspondingly high. In the Hostages case, the Court dismissed defendant Lanz’s excuses that “as tactical commander he was too busy to give attention to the matter” and convicted him for failing to take any action on the illegal shooting of hostages and reprisals against prisoners. The Judgement noted that “the unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army.”

732. Moreover, preventing and punishing crimes under the direct command of others is the duty of the highest level government and military officials. For example, the IMTFE found that Prime Minister TOJO “knowingly and willingly refused to perform his duty to enforce performance of the laws of war” despite his attempted explanation that “a commander in the field is not subject to specific orders from Tokyo.” That Tribunal rejected his attempt to disconnect himself from any duty to stop the crimes.

733. The Judges are mindful that international law does not oblige a commander or superior to perform the impossible: he or she may only be held criminally responsible for failing to take such measures as are within his or her power or authority. At the same time, in some circumstances it may be necessary to take certain steps to prevent incurring criminal liability for acts of others, including superiors. For example, the IMTFE concluded that Foreign Minister Shigemitsu should have resigned rather than allow certain crimes to be committed in the territory under his command. Only by resigning could he “quit himself of responsibility which he suspected was not being discharged.”

734. The level of effort required to discharge one’s duty to prevent, repress, or punish crimes also depends on the nature of a superior’s responsibilities. As noted above, if a commander is responsible for the well-being of civilians, for example, in a prison camp, then the duty to prevent crimes against such civilians is heightened.

735. It is clear that commanders and other superiors have a duty to administer a system that prevents and punishes the commission of crimes against civilians, including in detention camps and in occupied or annexed territories that are under their command. There is an indisputable duty on military and civilian leaders to take necessary and reasonable measures to prevent crimes, including slavery and rape, committed by subordinates. This duty is even greater in situations where the leaders have created the situation that poses extraordinary risks upon persons entrusted to their care, such as persons in the “comfort stations.” This duty also requires that commanders and other superiors take all necessary measures to prevent the abduction or deceptive recruitment of girls and women into the “comfort stations” and their mistreatment, including rape and sexual slavery, while confined as prisoners therein.

554 IMTFE Judgement (Roling), p. 458.
555 IMTFE Judgement (Roling), p. 458.
556 IMTFE Judgement (Roling), p. 458.
736. In concluding this discussion of command and other superior responsibility under Article 3(2) of this Tribunal’s Charter, it is important to distinguish superior responsibility for omissions from the criminal responsibility of commanders and superiors as individuals. The ICTY clarifies that the liability of superiors attaches because of omission, not positive acts of the accused. At the same time, it makes clear that positive acts and certain omissions of the accused may also permit a finding of individual criminal culpability under Article 3(1) of the Charter, rather than or in addition to superior responsibility under Article 3(2) of the Charter. 557

737. The Kordic Trial Chamber distinguished the situations in which superiors should be charged with individual instead of superior responsibility, stating:

The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior …[exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1) [individual responsibility]. Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).558

738. Thus, it is only when a superior fails to prevent, suppress, or punish acts committed by subordinates that liability incurs under Article 3(2). For his or her own acts or omissions, the most appropriate charge is for individual responsibility under Article 3(1). The legal standards of individual responsibility will be examined below.

C. ARTICLE 3(1): INDIVIDUAL RESPONSIBILITY FOR PLANNING, INSTIGATING, ORDERING, AIDING OR ABETTING CRIMES

739. The accused in the present case have also been charged with planning, instigating, ordering, or aiding and abetting the rapes and sexual slavery, pursuant to Article 3(1) of the Charter. These are all recognised as forms of “participation” in the crimes. In addition to physical perpetrators, individuals can be held responsible for crimes which they did not commit physically, but to which they contributed directly (such as by ordering) or indirectly (such as by abetting).559

557 See, e.g., Kordic Trial Chamber Judgement, para. 369.
558 Kordic Trial Chamber Judgement, para. 371.
559 The ICTY in the Krstic Trial Chamber Judgement defined various forms of individual criminal responsibility, as covered in Article 7(1) for individual responsibility of its Statute:

- “Planning” means that one or more persons design the commission of a crime at both the preparatory and execution phases;
- “Instigating” means prompting another to commit an offence;
- “Ordering” entails a person in a position of authority using that position to convince another to commit an offence;
- “Committing” covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;
- “Aiding and abetting” means rendering a substantial contribution to the commission of a crime; and
- “Joint criminal enterprise” liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in [the Statute]. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.

Krstic Trial Chamber Judgement, para. 601 [citations omitted].
740. Article 5(c) of the IMTFE Charter, granting the Tribunal jurisdiction over crimes against humanity, imposed responsibility upon persons in the position of the accused as follows: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” Pursuant to Articles 5(b) and 5(c) of the IMTFE Charter, the Indictment charged many of the accused under Count 54 with “ordering, authorising and permitting” war crimes and crimes against humanity.

741. Article II of CCL10 also contains a provision for assessing individual responsibility, stipulating that a person “is deemed to have committed a crime” if that person “(b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.”

742. The legal authority for and criteria of the various forms of participation required to incur individual responsibility under the terms of the Charter will be discussed below.

1. Ordering, Planning, and Instigating

743. A superior is individually liable for crimes committed pursuant to his or her own orders. This is derived from basic principles of complicity, and makes particular sense in the context of a military hierarchy, which carries out its operations by means of command and discipline. A superior who issues orders that a crime be carried out is utilising the available structure of command to mobilise potentially huge numbers of subordinates, depending on the commander’s own position within the hierarchy, to participate in the commission of the crime.

744. Liability for issuing orders to commit crimes against humanity can be found in the Turkish court-martial trials of the Turkish leaders deemed responsible for the Armenian genocide. Established at British insistence, the Turkish Court tried the lieutenant governor and police commander of a district from which Armenians had been deported *en masse*. In finding them guilty, the Court found that the two accused had:

issued awesome orders to their subalterns at the time of the deportations of the Armenians. Acting under these orders, their underlings...without regard to ill-health, treating men, women and children alike, organised them into deportation caravans.

[I]llegal orders were handed down for the murder of the males...[T]hey were premeditatedly, with intent, murdered, after the men had had their hands tied behind their backs.... The officials then practiced all methods of murder...Nor did they make any attempt to prevent further killings...

All these facts are against humanity and civilization. They are never compatible in any manner to human considerations.560

745. Both the Nuremberg and Tokyo Tribunals, as well as the subsequent proceedings against alleged German and Japanese war criminals, held certain defendants criminally liable for having ordered crimes. Most defendants in those cases, as in the present one, were high

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560 Quoted in Bass, Stay the Hand of Vengeance, p. 125.
level civilian and military officials, rather than the soldiers who actually committed the atrocities by their own hands.

746. A superior may also be responsible for orders issued under his authority, including those prepared by a staff officer. The *High Command* case states,

> While the commanding officer may not and frequently does not see these orders, in the normal process of command he is informed of them and they are presumed to represent his will unless repudiated by him.561

747. A chief of staff is also liable for orders which he issues under the commander’s authority if he drafts the order (directly or through subordinates) or takes personal action to see that it is executed, i.e. if he is “more than a mere transcriber” of the order.

748. Moreover, a commander is also liable for “ordering” a crime if the order is directed to him and he passes it down the chain of command, knowing its criminal nature. Then he or she is considered to have committed a morally culpable act which carries legal sanction. However, if the order is directed to a commander’s subordinates, and is merely passed through the commander’s headquarters, the commander may not be individually liable for “ordering” the crimes, although he or she may still be liable under a theory of “command responsibility” if he knew or should have known of the crimes and failed to take steps to prevent them.562

749. The ICTY Chambers have addressed some of the issues related to proof. The *Blaskic* Trial Chamber found that the existence of an order may be proved through circumstantial evidence; there is no requirement that an order be in writing.563 The *Kordic* Trial Chamber made clear that, for individual responsibility to attach, no superior-subordinate relationship needs to be established; it is sufficient if the accused possessed the authority to order and gave a criminal order.564

750. In the present case, the accused commanders and other superiors can be held individually liable for ordering a crime charged to the extent that they had the authority, *de jure* or *de facto*, to issue an order, that circumstantial evidence proves the existence of an order, or that staff officers subject to their authority issued an order that established or maintained the “comfort system” or otherwise resulted in the rape or sexual enslavement of “comfort women” or, for two of the accused, rapes at Mapanique.

2. **Aiding and Abetting**

751. The factual findings may also give rise to a conclusion that the accused aided or abetted the rapes and sexual slavery. When examining the case law of the Tribunals after the Second World War, the Judges are somewhat hampered by the imprecise and sometimes inconsistent use of terminology. The phrases “concerned in the killing” and “permitted the commission of Conventional War Crimes”565 have been used by the Tribunals to indicate aiding and abetting, although on occasion the terms are used to reflect co-perpetration. While the concepts of “aiding and abetting” are often fused, the discussion

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561 *High Command* case, p. 1261.
563 *Blaskic* Trial Chamber Judgement, para. 281.
564 *Kordic* Trial Chamber Judgement, para 388.
565 IMTFE Indictment, Count 54.
below distinguishes them for the purpose of more clearly identifying what constitutes a finding of responsibility under these categories. Following the useful discussion of these terms by the ICTR Trial Chamber in the *Akayesu* case, we concur that “aiding” means giving assistance to someone, while “abetting” involves facilitating the commission of an act by being sympathetic thereto.\(^566\)

\[(a) \quad \textit{Aiding: Actus Reus}\]

752. The post World War II Tribunals found criminal responsibility for aiding on the basis of the following actions: participating in the running of a prison camp that constituted a system of ill-treatment of prisoners; procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports at the Auschwitz concentration camp; standing by, as members of the German guard, while civilians injured and killed American pilots and paraded them through the streets; denouncing French citizens involved in the resistance movement and later arrested and tortured or deported; driving the lorry which carried victims to the woods for execution; digging the grave for the victims; accompanying superior officer to look for suitable sites for shooting; and lighting the oven of a concentration camp crematorium.

753. In each case, the actions of the accused had a material effect on the perpetration of the crime. Thus, in order for a person to be found to aid a crime, some level of assistance is necessary. This principle was confirmed by an ICTY Trial Chamber in the *Tadic* case, which concluded that the post-war Tribunals found criminal responsibility based on these actions because they had a material effect on those of the principals.\(^567\) Significantly, the acts did not have to be a necessary condition of the crime without which the crime would not have occurred. In other words, the act of the aider does not have to be a conditio sine qua non of the crime, but it does need to have contributed in some significant way to its commission.

754. In the *Dachau Concentration Camp* case, a U.S. Military Tribunal found that once the existence of a criminal system has been established, a person can be criminally liable for participating in this system.\(^568\) Participation was generally found if the accused held a high level position or if he physically committed crimes, such as beatings, torture, or execution.

755. While aiding crimes, which are not part of a “criminal system,” must have a material effect on the commission of the crime, any participation in a criminal enterprise is sufficient for finding of guilt.\(^569\) This seems to indicate that any participation in a criminal enterprise may, depending on the circumstances, be sufficient to have a material effect on a crime, although more current jurisprudence indicates the participation would need to have a “direct and substantial effect.”

\(^{566}\) *Akayesu* Trial Chamber Judgement, para. 484.

\(^{567}\) The ICTY states that the defendant’s actions must “make a significant difference to the commission of the criminal act by the principal.” *Tadic* Trial Chamber Judgement, para. 233. See also *Kunarac* Trial Chamber Judgement, para. 391, which required a “substantial effect.”

\(^{568}\) *Dachau Concentration Camp* case, pp. 1312-1314. See also *Kvočka* Trial Chamber Judgement, which held that Omarksa prison camp was a joint criminal enterprise, and anyone who knowingly participates in the enterprise is liable if the participation is significant.

\(^{569}\) We note that this conclusion was also reached by the *Furundžija* Trial Chamber Judgement, para. 213.
756. In *Tadic*, the accused, a low level actor who nonetheless wielded power through his bullying and violence, was found guilty of cruel treatment for aiding and abetting a crime when his presence at the scene was deemed to have had a “direct and substantial effect” on the commission of the crime, namely forcing a detainee to bite the testicles of another detainee.\(^{570}\) Also, in another ICTY case, the *Furundzija* Trial Chamber held that an accused who verbally interrogated a victim while another raped her aided and abetted the rape through his presence, acts, words, and omissions.\(^{571}\) The Rwanda Tribunal has made similar findings, for instance, by holding the accused Akayesu responsible for rape as a crime against humanity for aiding and abetting the crimes when his presence and words were found to have facilitated the rapes.\(^{572}\) In each case, the person was convicted of more than mere presence – his acts or omissions were found to have had a substantial effect on the crime’s commission.

(b) *Abetting*: *Actus Reus*

757. As noted above, the *actus reus* of abetting involves facilitating the commission of a crime being sympathetic thereto. This can take the form of either an act or an omission. If the accused fails to take action to prevent a crime, he or she may be found criminally liable for facilitating that crime. For example, in the *Wagner* case, a conviction was rendered against a defendant found to have failed to grant the “privilege of mercy” to persons unlawfully condemned to death by the Nazi Special Courts despite the fact that he had the power to do so.\(^{573}\) While some cases rest almost entirely on the failure of the defendant to take action, in other cases, the defendant’s lack of action, combined with affirmative acts of assistance, forms the basis for a finding of guilt.\(^{574}\)

758. Where the post-World War II Tribunal decisions based a finding of guilt solely on failing to act, thus on omissions, the Courts tended to look at whether the accused was in a position to influence the crime or the outcome. The inaction of a person in an influential position may have the effect of facilitating the crime, particularly if he or she has the ability to prevent it. In some cases, the omission may be intended to give “silent approval” to the crime.\(^{575}\) For example, the IMTFE found Muto guilty under Count 54 for giving silent encouragement when he permitted atrocities to occur when he was in “a position to influence policy” as Yamashita’s chief of staff.\(^{576}\) In addition, that Tribunal found that Tojo Hideki “knew and did not disapprove of the attitude” that soldiers could ignore the rules of warfare and could mistreat prisoners of war.\(^{577}\)

759. Likewise, in the *Einsatzgruppen* case, the Tribunal found the defendant Fendler guilty based on inaction: although Fendler surmised that the procedure of condemning the Communist party functionaries to death was “too summary,” he did nothing about it, even though his objection would have been influential.\(^{578}\) Being present at a crime scene,

\(^{570}\) *Tadic* Trial Chamber Judgement, paras. 689, 726.
\(^{571}\) *Furundzija* Trial Chamber Judgement, para. 166.
\(^{572}\) *Akayesu* Trial Chamber Judgement, at paras. 461.
\(^{574}\) *Rohde* case, defendant Wochner, p. 54; IMT trial, defendant Frick.
\(^{575}\) *Einsatzgruppen* case, the defendant Fendler, p. 209, defendant Walter Haensch, p.184.
\(^{576}\) IMTFE Judgement (Roling), p. 455. While we have noted above that this verdict reflects an application of superior responsibility, we also understand it as an example of abetting as a matter of individual responsibility.
\(^{577}\) IMTFE Judgement (Roling), p. 463.
\(^{578}\) *Einsatzgruppen* case, the defendant Fendler, p. 209; see also Defendant Walter Haensch, p.184.
though not required for criminal responsibility to attach,\textsuperscript{579} can be sufficient to constitute abetting if the accused is in a position of influence and respect. In this situation, the approving spectator gives encouragement and moral support – which constitutes the \textit{actus reus} of the crime – if his or her omissions have a significant effect on the commission of the crime.\textsuperscript{580}

760. Whether as an approving spectator or supporter from afar, the accused’s position of influence and corresponding power is pertinent to the determination of whether abetting occurred. In contrast to the above examples, certain defendants were acquitted of individual responsibility because they were not in a position to “control, prevent, or modify” criminal activities of which they had knowledge.\textsuperscript{581} In the \textit{Einsatzgruppen} case, for example, some of the defendants were acquitted of individual responsibility if his low rank failed “to place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation.”\textsuperscript{582} As noted previously, the IMTFE acquitted Muto for his failure to stop the atrocities at Nanking because, as staff officer to General MATSUI, he was not in a position of sufficient influence to alter the outcome.

761. It follows then that abetting the commission of a crime does not require tangible or active assistance or facilitation, nor does it require active contribution or participation. Rather, encouragement and moral support alone, whether active or passive, through either action or inaction, can constitute the \textit{actus reus} of abetting where the person occupies a position of trust or influence.

\textbf{(c) Aiding and Abetting: Mens Rea}

762. It is also necessary to ascertain the level of knowledge or intent that is required for a person to be found guilty of aiding and abetting a crime against humanity.

763. The jurisprudence of the post World War II Tribunals demonstrates that, in order to be found guilty of aiding or abetting a crime, it is not necessary to share the intent of the direct perpetrator or principal. The \textit{Furundzija} Trial Chamber considered whether it was necessary for the accomplice to share the \textit{mens rea} of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime was sufficient to constitute \textit{mens rea} for aiding and abetting the crime. After surveying post World War II caselaw, the Chamber concluded:

\begin{quote}
[I]t is not necessary for an aider and abettor to meet all the requirements of \textit{mens rea} for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal’s criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in
\end{quote}

\textsuperscript{579} See Trial of Karl Adam Golkel and 13 Others, British Military Court Wuppertal, Germany, 15-21 May 1946; \textit{Rohde} case, p. 54.

\textsuperscript{580} See \textit{Auschwitz Concentration Camp} case, defendant Mulka. The ICTY discussed this in the \textit{Furundzija} Trial Chamber Judgement, para. 215.


\textsuperscript{582} \textit{Einsatzgruppen} case, defendants Ruehl and Graf, p. 243. Note however that the defendants were not acquitted of all crimes alleged against them.
itself be perfectly lawful; it becomes criminal only when combined with the principal’s unlawful conduct.\footnote{\textit{Furundzija} Trial Chamber Judgement, para. 243.}

764. In short, the aider or abettor need not share the \textit{mens rea} of the principal. However, he or she must know that his or her actions or omissions would assist the principal in the commission of the crime. For instance, in the \textit{Einsatzgruppen} case, the accused Klinghofer was found to have known that his locating, examining, and handing over of the lists of Communist functionaries to his Einsatz unit would assist them in executing those on the list of persons to be exterminated.\footnote{\textit{Einsatzgruppen} case, pp. 204-205; also see the \textit{Rohde} case, \textit{Schonfeld} case, and \textit{Zyklon B} case.}

765. The post-war jurisprudence supports a finding that, in certain circumstances, knowledge of the intended criminal conduct can be presumed, and thus, it can be inferred. We note that the ICTY interpreted the \textit{Justice} case in this way. The \textit{Tadic} Trial Chamber observed that, in the post-World War II trial, the Court had concluded that either actual or presumed knowledge must be shown:

\begin{quote}
[I]f an accused took part with another man with the knowledge that the other man was going to kill, then he was as guilty as the one doing the actual killing. Again, in the Trial of Joseph Altstötter and Others ("Justice case"), the fact that the accused had specific knowledge was treated as essential. The judgement repeatedly confirmed this, stating that the various people charged knew or had knowledge, or must be assumed to have had knowledge, of the Nacht und Nebel plan, of Hitler and his associates’ use of the German legal system, and of the plans or schemes for racial persecution. In several places, the judgement presumed knowledge on the part of an accused. \footnote{\textit{Tadic} Trial Chamber Judgement, para. 675 (emphasis added).}
\end{quote}

766. Thus, in applying the law to the facts of this case, it is necessary to examine whether the accused had direct or inferable knowledge that the “comfort women” were forced, sold, or deceived into slavery, forced to have sex against their free will, and/or that they were held and maintained under conditions constituting enslavement.

767. The Judges will next determine whether there is evidence before this Tribunal to hold the accused criminally responsible as individuals or as superiors for rape and sexual slavery, as charged in the Common Indictment.