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What is the evidentiary threshold of the terms “widespread” and “systematic” when proving crimes against humanity in the Cambodian context?

Samir Hadeed

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE:

WHAT IS THE EVIDENTIARY THRESHOLD OF THE TERMS "WIDESPREAD" AND "SYSTEMATIC" WHEN PROVING CRIMES AGAINST HUMANITY IN THE CAMBODIAN CONTEXT?

Prepared by Samir Hadeed
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I. Introduction and Summary of Conclusions

A. What is the evidentiary threshold of the terms 'widespread' and 'systematic' when proving crimes against humanity in the Cambodian context?

Various members of the Khmer Rouge have come under scrutiny for the atrocities committed in Cambodia during the period of 1975-1979, which resulted in an estimated 1.7 million deaths. To be convicted of crimes against humanity, the statute of the ECCC requires that the attack upon a civilian population must be "part of a widespread or systematic attack." In this paper, I will address what is the threshold of the terms "widespread" and "systematic."

B. Summary of Conclusions

1. To be considered a 'widespread' attack, the act should be committed on a large scale and involve the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."

2. The number of victims and the scale of the acts is also taken into consideration, although the number of victims is not conclusive of whether an act is "widespread".

3. Although "widespread" may be defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims," courts have held that one single act, if it

is *part of* the widespread attack, satisfies the threshold for a widespread attack.

4. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis the civilian population.

5. Where numerous civilians were killed, public and private property was plundered, and unlawful attacks on civilians occurred, the nature of the attacks were sufficient to constitute a widespread attack since they "took many forms."

6. An attack triggered the "widespread" threshold where the attacks spread to three different municipalities leading to thousands of people affected by the attacks.

7. An attack can trigger the threshold of a widespread attack where there is evidence of daily attacks leading to thousands of people affected by the attacks.

8. In the Cambodian context, the acts committed by various members of the Khmer Rouge would satisfy the requirement for a widespread attack since they made up part of a broader attack upon the population.

9. To be considered a 'systematic' attack, it requires "an organized nature of the acts and the improbability of their random occurrence." Furthermore, "patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of [a] systematic occurrence."

10. The systematic threshold was also triggered where the media promoted ethnic hatred and weapons were brought into the country for the purpose of eradicating a group of people.

11. Where an attack "took many forms," the systematic threshold has been triggered.

12. The systematic threshold was triggered where the objective of the attackers was clear, evidenced by chants of, "Lets exterminate them!"

13. In the Cambodian context, overwhelming evidence suggests that the acts were systematic or part of a systematic attack upon the population.

II. Factual Background

Between 1975-1979, as many as two million people were executed by the Khmer Rouge.[1] Undoubtedly, this was one of the worst tragedies of the twentieth century. The time has come to prosecute those most responsible for these atrocities. This memo will address the roles of various high-ranking officials of the Khmer Rouge and evaluate the threshold of the terms 'widespread' and 'systematic' and whether their conduct fit into these terms.

The leader of the Khmer Rouge, Pol Pot, with his attempts to create a classless society[2] died in 1998 before receiving a trial for his crimes.[3] However, Nuon Chea, Ieng Sary, Khieu Samphan, and Kae Pok are some individuals who have come under a lot of scrutiny for their leading roles during the 1975-1979 executions[4]. They had policies in place to target members of three groups: people associated with the former Khmer Republic, non-Communist members of the Cambodian population, and party members within the Communist Party of Kampuchea (CPK) suspected of being traitors.[5] After reviewing evidence against these individuals, it is clear that these individuals "are criminally responsible for planning or implementing these policies." [6] More

[1]Stephen Heder and Brian D. Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, Documentation Series No. 4, Documentation Centre of Cambodia, 7 (2001) [Reproduced in notebook at Tab 1]. However, some estimates have been 1.5-1.7 million people executed during the period of 1975-1979. *See also*: Patrick Dilger, *Back to the "Killing Fields,"* Yale Alumni Magazine, http://www.yalealumnimagazine.com/issues/96_04/cambodia.htm (1996). [Reproduced in notebook at Tab 2]; Katheryn M. Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 Nw. U. J. Int'l Hum. Rts. 549, (2006) [Reproduced in notebook at Tab 3].

[2] Dilger, *supra*. note 1.

[3] Klein, *supra* note 1, at 549.
[4] Heder, *supra.* note 1, at 5.
[5] *Id.*
[6] *Id.*

specifically, the evidence shows at least three policies of mass execution adopted by some or all of these high-ranking officials.[7]

First, Pol Pot along with Nuon Chea and Son Sen decided to implement a policy to kill all Khmer Republic military officers and senior civil servants.[8] Second, another policy to execute "those allegedly guilty of serious crimes against the revolution" was implemented by Zone, Sector, District and cooperative forces.[9] Finally, another decision made by Pol Pot, Nuon Chea, and Son Sen was to execute all cadre members who could be forced to confess to being traitors of the Khmer Rouge.[10] As to this last policy, a lot of cadre officials were tortured into confessing that they were traitors of the Khmer Rouge.[11]

With this background, this memo will go into more factual detail of the atrocities committed by these individuals as it becomes necessary in order to evaluate their actions and whether they constitute a widespread and/or systematic attack on the civilian population.

III. Widespread

"Widespread" is a term that is used by various international statutes when proving crimes against humanity. The word appears in the 1998 Rome Statute for the International Criminal Court.[12] The word also appears in the same context in many other statutes from other

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[7] *Id.* at 26. *See also*: Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge*, 1975-1979, 2nd Edition, Yale University Press, 1996 [Reproduced in notebook at Tab 4].
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 27. See also: Ker Munthit, *Khmer Rouge Official to Reveal Crimes*, The Associated Press, *available at* http://cambodiana.org/cambodianaorg.aspx. August 1, 2007, article # 38[Reproduced in notebook at Tab 5].
[12] Rome Statute of the International Criminal Court art. 7, July 17, 1998, 37 I.L.M . 999 [hereinafter ICC Statute], *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf. " 'Crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a). Murder; b). Extermination; c). Enslavement; d). Deportation or forcible transfer of population; e). Imprisonment . . . f). Torture; g). Rape . . . h). Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . .i). Enforced

international tribunals[13] and even where it was not mentioned in a statute, courts have required that in order to prove crimes against humanity, the perpetrator must commit the enumerated crimes as "part of a widespread or systematic attack."[14]

Various U.N. Tribunals have interpreted the word to mean virtually the same thing. In the ICTY, "widespread" refers to an act "committed on a large scale by the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.'" [15] Also, "the widespread characteristic refers to the scale of the acts perpetrated and to the number of victims."[16] In addition, courts have taken the view that "a single act has comprised a crime against humanity when it occurred within the necessary context. An isolated act, however—i.e. an atrocity which did not occur within such a context—cannot." [17] However, a "single isolated act by a perpetrator, if linked to a widespread or systematic attack, could

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disappearance of persons; j). The crime of apartheid; k). Other inhumane acts . . ." [Reproduced in notebook at Tabs 6-8].

[13] All of the following statutes have the exact language, "as part of a widespread or systematic attack." *See*: Statute of the International Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]; East Timor Regulation No. 2000/15, art. 3, s.5; Statute of the Extraordinary Chambers in the Courts of Cambodia, art.5 [hereinafter ECCC Statute] [All reproduced in notebook at Tabs 6-8].

[14] Statute of the International Criminal Tribunal for Yugoslavia art. 5, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute] [Reproduced in notebook at Tabs 6-8]. Article 5 does not mention "widespread," however, many cases require it. *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31, Trial Chamber, Judgment, 31 March 2003, para. 236: "The attack must be either widespread or systematic in nature." [Reproduced in notebook at Tab 37]. *See also*: Simon Chesterman, 10 Duke J. Comp. & Int'l L. 307, 313 (2000) [Reproduced in notebook at Tab 9] *citing Prosecutor v. Tadic* IT-94-1-T, Trial Chamber I, Judgment, 7 May 1997, para. 648. "The words 'widespread or systematic' do not appear in the ICTY Statute [Reproduced in notebook at Tab 10].

[15] *Prosecutor v. Kordic and Cerkez* IT-95-14/2, Trial Chamber, Judgment, 26 February 2001, para. 179. [Reproduced in notebook at Tab 11].

[16] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 206. [Reproduced in notebook at Tab 12].

[17] *Prosecutor v. Kupreskic*, IT-95-16, Trial Chamber, Judgment, 14 January 2000, para. 550. [Reproduced in notebook at Tab 13].

constitute a crime against humanity."[18] The attack against the civilian population is what must be widespread, and "not the individual acts of the accused."[19]

In the ICTR, "widespread" is defined as, "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[20] In order to be 'part of' a widespread attack, the prosecutor must show that the accused knew his acts were part of a widespread attack. In other words, the accused must know the broader picture in which his/her actions took place.[21] This knowledge requirement can be proved from circumstantial evidence such as a perpetrator's voluntary assumption of an important role within the frameworks of a broader criminal campaign, his participation in the illegal acts, the scale of the illegal acts, public knowledge, or media coverage to name a few.[22] Furthermore, even though

[18] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Chamber, Judgment, 26 February 2001, at para. 178 [Reproduced in notebook at Tab 11]. *See also*: Mohamed Elewa Badar, 5 San Diego Int'l L.J. 73, 89 (2004) [Reproduced in notebook at Tab 14] *citing* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (2d rev. ed., 1999).

[19] *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeals Chamber, Judgment, IT-96-23/1-A, 12 June 2002, para. 96. [Reproduced in notebook at Tab 15]. *See also*: *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Chamber, Judgment, 26 February 2001, at para. 94 [Reproduced in notebook at Tab 11]; *Prosecutor v. Blaskic* IT-95-12-A, Judgment, 29 July 2004, para. 101 [Reproduced in notebook at Tab 12].

[20] *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 580 [Reproduced in notebook at Tab 16]. *See also*: *Prosecutor v. Rutaganda*, ICTR-96-3, Trial Chamber, Judgment, 6 December 1999, para. 69 [Reproduced in notebook at Tab 17]; *Prosecutor v. Kayishema*, ICTR-95-1, Trial Chamber, Judgment, 21 May 1999 para. 123. "A widespread attack is one that is directed against a multiplicity of victims." [Reproduced in notebook at Tab 18].

[21] Chesterman, *supra* note 14, at 318. [Reproduced in notebook at Tab 9] *citing Tadic*, IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 649 [Reproduced in notebook at Tab 10]. "Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict." *See also*: Badar, *supra* note 18, at 98.

[22] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 259 [Reproduced in notebook at Tab 12].

"widespread" refers to the number of victims and massive, large-scale actions, it is not necessary that the action in question involve many victims.[23]

It is important to note that there is no "conclusive authority on how many murders constitute [crimes against humanity]," according to the Court in the *Kamuhanda* case.[24] They also emphasized that a widespread attack does not "suggest a numeric minimum."[25] Therefore, one can infer from this ruling that triggering the 'widespread' threshold depends on a case by case analysis.

In addition, it is also important to note that in proving crimes against humanity, it is not necessary to prove that the acts were both, widespread and systematic. Rather, as the various statutes indicate, they are disjunctive rather than conjunctive.[26] Furthermore, various cases in the ICTR and the ICTY have also supported this conclusion that the requirements are disjunctive (See footnote).[27]

A. Case law in East Timor

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[23] Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L.J. 237, 251 (2002) [Reproduced in notebook at Tab 19] *citing Tadic*, IT-94-1 at para. 649. [Reproduced in notebook at Tab 10].

[24] *Prosecutor v. Kamuhanda*, ICTR-95-54A-T, Trial Chamber II, Judgment, 22 January 2004, para. 692. [Reproduced in notebook at Tab 20].

[25] *Id.*

[26] ECCC Statute, art. 5. ". . .any acts committed as part of a widespread *or* systematic attack." [Reproduced in notebook at Tabs 6-8]. See also: ICTR Statute, Art. 3; ICTY Statute, Art. 5; ICC Statute, Art. 7 [Reproduced in notebook at Tabs 6-8].

[27] *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, Judgment, 1 September 2004 para. 135 [Reproduced in notebook at Tab 21]; *Prosecutor v.Stakic*, IT-97-24, Trial Chamber, Judgment, 31 July 2003, para. 628. [Reproduced in notebook at Tab 22], *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 579 [Reproduced in notebook at Tab 16], *Prosecutor v. Kayishema*, ICTR-95-1, Trial Chamber, Judgment, 21 May 1999 para. 123 [Reproduced in notebook at Tab 18]
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In East Timor, following a vote for independence by the East Timorese, roughly 200,000 people were forcibly transferred from their homes into West Timor and as many as 2,000 people were killed during the altercation.[28] In the *Prosecutor v. Marques*, Joni Marques and Gilberto Fernandes were charged with the torture and murder of Evaristo Lopes, an independence supporter.[29] The Court, in determining that the acts were part of a widespread attack, noted: "[The] conduct of the accuseds [was] part of the activities of Team Alfa, a militia group, which was committed to, attacks upon the civilian population, and in particular, members of the population who supported independence."[30] The Court also noted that all the accused "committed the crimes with full knowledge of Team Alfa's purpose."[31] That purpose was to attack the people who were pro-independence supporters.[32] "The perpetrator must only be aware of the risk that an attack exists and the risk that certain circumstances of the attack mean that his conduct adds to the atmosphere for other crimes. The knowledge of details is not required."[33] The Court also took the approach of the cases of the ICTR and the ICTY discussed below in ascertaining what constitutes a "widespread" attack.[34] Therefore, even one act of murder can constitute a crime against humanity if it is committed as part of a broader attack.

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[28] Information Release from the Serious Crimes Unit, *available at* http://www.etan.org/et2003/february/23-28/28info.htm. [Reproduced in notebook at Tab 23].

[29] *Prosecutor v. Marques et. al.*, Special Panel for Serious Crimes, Case No. 09/2000, Dili District Court, p. 13, 11 December 2001. Available at: http://www.jsmp.minihub.org/judgmentspdf/LPEnglish.pdf. [Reproduced in notebook at Tab 24].

[30] *Id.* at 12.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 21.
[34] *Id.* at p. 17. "With regard to the alternative context, a widespread attack, most of the decisions of the ad hoc tribunals simply focus on the scale of the attack or the number of victims. At the ICTY, the *Tadic* Trial Chamber, defined the widespread attack as referring "to the [large] number of victims'. *(Tadic Trial Judgement, para. 648.)* Similarly, at the ICTR, the tribunal in *Kayishema* held that a widespread attack must be 'directed against a multiplicity of victims*(Kayishema Trial Judgement,para. 123.).*' At the ICTY, the Court in *Blaskic* went further by saying that: 'A crime may be widespread or committed on a large-scale by 'the cumulative effect of a series of

B. Cases in the ICTR

With estimates as high as 1 million Tutsi in Rwanda massacred in 1994, this approximated roughly 75% of the Tutsi population in Rwanda.[35]

In one of the leading case in the ICTR, Jean Paul Akayesu was convicted of crimes against humanity where he was responsible for the deaths of 2,000 people in his commune.[36] Akayesu had the responsibility to maintain law and order in his commune, however, he failed to do so which resulted in the 2,000 deaths.[37] According to the indictment, Akayesu was responsible for the deaths of about 2,000 Tutsis while he was still in power.[38] The Court relied on testimony from a couple different experts to arrive at the conclusion that the acts were "widespread".[39] The experts stated that:

> Dr. Zachariah witnessed attacks on civilian populations, and killings of civilians. He recounted visiting Kibeho Church on 16 April 1994, where two to four thousand Tutsi civilians were apparently killed, and Butare on 17 April 1994, where a Burundian Tutsi was apparently beaten to death at a checkpoint, and where his purchase officer reported seeing the bodies of 5-10 dead civilians at every checkpoint on the road from Kigali . . . Dr. Zachariah testified that he saw a group of 60 to 80 civilians fleeing towards the Burundian border, from men armed with machetes. He stated that most of these civilians were hacked to death before they reached the border . . .[Lindsey Hilston] estimated that the pile [of bodies] outside the morgue contained about five hundred bodies, with more bodies being brought in all the time by pickup trucks . . . Mr. Cox saw and filmed corpses floating by at the rate of several corpses per minute . . . he saw some 800 Tutsi civilians

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inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'. *Blaskic Trial Judgement para. 206.* Thus, it may be concluded that a widespread attack requires simply a large number of vi ctims."

[35] Diane Johnson Memo, New England School of Law, Rwanda Genocide Prosecution Project, December 9, 1997 [Reproduced in notebook at Tab 25]; *citing* Virginia Morris and Michael Scharf, Insider's Guide to the International Criminal Tribunal for Rwanda,Transnational Publishers, p. 159, 1998 [Reproduced in notebook at Tab 26] *See also*: United Human Rights Council, Rwanda, *available at* http://www.unitedhumanrights.org/Genocide/genocide_in_rwanda.htm. [Reproduced in notebook at Tab 27].

[36] *Prosecutor v. Akeyesu*, ICTR-96-4-I, Amended Indictment, para. 12 [Reproduced in notebook at Tab 16].
[37] *Id.* at para. 12A.
[38] *Id.* at para. 12.
[39] *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 173 [Reproduced in notebook at Tab 16].

> 'in a desperate, desperate state', many apparently starving and with severe machete and bullet wounds, and with a great many corpses strewn all over the hills.[40]

After reviewing this information, the Court decided whether these acts constituted a widespread attack pursuant to Article 3 of the ICTR Statute, stating:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed *as part of a widespread or systematic attack* against any civilian population on national, political, ethnic, racial or religious grounds:
>
> a) Murder;
> b) Extermination;
> c) Enslavement;
> d) Deportation;
> e) Imprisonment;
> f) Torture;
> g) Rape;
> h) Persecutions on political, racial and religious grounds;
> i) Other inhumane acts.[41]

The Court found that it was established beyond a reasonable doubt that at least 2,000 people were killed in Taba.[42] The Court, in applying this statute to the facts in the case stated that:

> The scale of the attack was extraordinary. Defence counsel called the events which took place in Rwanda in 1994 'the greatest human tragedy' at the end of this century. Around the country, a massive number of killings took place within a very short time frame. Tutsi were clearly the target of the attack - at roadblocks, in shelters, and in their own homes. Hutu sympathetic to or supportive of Tutsi were also massacred . . . For these reasons, the Chamber finds beyond a reasonable doubt that a widespread and systematic attack began in April 1994 in Rwanda[43]

Akayesu acknowledged that he knew that the Tutsi were being killed.[44] Accordingly, Akayesu was convicted of crimes against humanity where he ordered the killing of Simon Mutijima, Thaddee Uwanyiligra, and Jean Chrysostome.[45] The Court held that this was part of a

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[40] *Id.* at paras. 158-162.
[41] ICTR Statute art. 3 [Reproduced in notebook at Tabs 6-8].
[42] Prosecutor v. Akayesu, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 181 [Reproduced in notebook at Tab 16].
[43] *Id.* at para. 173.
[44] *Id.* at para. 182.
[45] *Id.* at para. 653.

widespread attack. Therefore, we have a case where the killing of three people constituted *part of* a widespread attack on the civilian population and where 2,000 people constituted a widespread attack.

Another case in the ICTR supports the *Akayesu* decision. In *Niyitegeka*, the Court ruled that if it is proven that the accused knew that his act was part of a widespread or systematic attack, then it is only necessary to show that the accused committed a crime against *one person*.[46] The Court found that there was a widespread attack in Kibuye Prefecture where:

> There is evidence of daily attacks in Bisesero against the Tutsi seeking shelter there, leading to ***thousands*** of Tutsi being killed, and of a large number of corpses in Kibuye town at the relevant time, the corpses being that of Tutsi refugees.[47]

Niyitegeka encouraged "the killing, decapitation and castration of Kabanda, and the piercing of his skull, and his association with the attackers who carried out these acts"[48] Thus, Niyitegeka was found responsible "for inhumane acts committed as part of a widespread and systematic attack on the civilian Tutsi population on ethnic grounds and as such [Niyitegeka's acts] constitute a crime against humanity."[49]

Thus, the previous cases illustrate that the commission of one single crime, if the perpetrator has knowledge that the crime is part of a widespread attack, can satisfy the "widespread" requirement. The killing of thousands of Tutsi in Kibuye Prefecture constituted the widespread attack of which Niyitegeka had knowledge. Thus, the commission of even one single crime, according to the ICTR, satisfied the requirement that the crime must be part of a widespread attack.

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[46] *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Chamber, Judgment, May 16, 2003, para. 456 [Reproduced in notebook at Tab 28].
[47] *Id.* at para. 440.
[48] *Id.* at para. 467.
[49] *Id.*

C. Cases in the ICTY

In 1992, the world came to realize that concentration camps similar to the ones during World War II in Germany were being utilized in the former Yugoslavia.[50] There, 250,000 civilians were murdered in the conflict, 20,000 women raped, and two million people driven from their homes.[51] When the ICTY was established, Dusko Tadic was among the first to be charged for these atrocities.[52]

Count nine of the indictment charged Tadic with crimes against humanity for the killings of four men from the village of Jaskici.[53] Tadic was also charged with crimes against humanity for the beating of Sefik Sivac.[54] In reaching the conclusion that the attacks were "widespread", the Court noted that:

> Between March and May 1992, there were several attacks and take-overs by the [Yugoslav People's Army (JNA)] of areas that constituted main entry points into Bosnia or were situated on major logistics or communications lines such as those in Bosanski Brod, Derventa and Bijeljina, Kupres, Foca and Avornik, Visegrad, Bosanski Samac, Vlasencia, Brcko and Prijedor. The first attack was in Bosanski Brod on 27 March 1992. At the same time, there were clashes at Derventa. On 2 April 1992 there was an incident at Bijeljina and around this time also at Kupres. These were immediately prior to the recognition of Bosnia and Herzegovina's independence on 7 April 1992 by the European Community, with a retroactive date of 6 March 1992. In Bosanski Samac, the 4th Detachment of the JNA entered the town, cut off telephones and fired shots in the town. There was some non-Serb resistance quickly squelched by the arrival of JNA tanks and armoured cars. On 22 April 1992 conflict began in Vlasencia with a police vehicle driving through the streets announcing through a loudspeaker that all armaments were to be surrendered. All vital functions of the town were taken over by JNA forces, including the town hall, bank, post office, police and Courthouse, and there were present very many uniformed men as well as some local Serbs with arms. On 29 April 1992 there was a

[50] Michael P. Scharf, Balkan Justice; The Story Behind the First International War Crimes Trial Since Nuremberg, Carolina Academic Press, p. xiv, 1993[Reproduced in notebook at Tab 29].
[51] *Id.*
[52] *Id.* at xv.
[53] *Prosecutor v. Tadic*, IT-94-1-I, Second Amendment to the Indictment, Count 9. [Reproduced in notebook at Tab 10].

[54] *Id.* at Count 14.

> bloodless take-over of the town of Prijedor, as noted elsewhere, and on 30 April 1992 two bridges were blown up by Serb forces in Brcko.[55]
>
> Thus, since the attacks occurred in numerous different regions, this factored into the Court's decision that the attacks were "widespread". The Court in *Tadic* found him guilty of crimes against humanity since they reasoned that the murders were part of a widespread attack.[56] Tadic had knowledge that widespread attacks were occurring[57] and the Court held that his acts were part of the widespread attack.[58] Therefore, we see again that only one single act can constitute a crime against humanity if there is a larger picture happening at the same time. The Court in *Tadic*, in reaching its decision, also cited the *Vukovar Hospital* Rule 61 Decision from the ICTY, stating:
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> Crimes against humanity. . .must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context . . .[59]

The threshold appears to be that one single act can constitute a crime against humanity if the act was done in furtherance of other attacks. Furthermore, it is also where all the vital functions of the town were taken over. To prove that the acts of the accused were done in furtherance of

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[55] *Prosecutor v. Tadic* IT-94-1-T, Trial Chamber II, Judgment, 7 May 1997, para. 125. [Reproduced in notebook at Tab 10]

[56] *Prosecutor v. Tadic*, IT-94-A, Appeals Chamber, Judgment, 15 July 99, para. 233, [Reproduced in notebook at Tab 10]. The Appeals Chamber reversed the trial chamber decision and found Tadic guilty for crimes against humanity (murder), and at the trial level, the trial chamber found Tadic guilty for crimes against humanity (inhumane acts).

[57] *Id.* at para. 474, 477 "[Tadic] had knowledge of and supported the plan for a Greater Serbia." [He] was aware of the policy of and discrimination against non-Serbs.

[58] *Id.* at para. 738.

[59] *The Prosecutor v. Mile Mrksic et al.*, IT-95-13-R61, 3 April 1996, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, page 509 [Reproduced in notebook at Tab 30].

other attacks (part of a widespread attack), then the accused must have either actual knowledge or constructive knowledge that other illegal acts were occurring on a widespread basis. The Appeals Chamber in Tadic states:

> The perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons *unrelated to the armed conflict*.[60]

Tadic's actions, the beating of Sivac, the murder of four men, and many others were deemed to be part of this widespread attack. Even the beating of Sivac, irrespective of the other charges, could satisfy the requirement of being part of a widespread attack.

In the *Kunarac* case, the Court ruled that the motives of the accused are irrelevant in determining whether a crime against humanity has been committed.[61] In addition, the Court came up with a guideline in determining whether an act was "widespread".[62] The indictment alleged that Kunarac raped several women while they were detained in an abandoned house.[63] Kunarac was the commander of a special reconnaissance unit during the armed conflict between the Bosnian Serbs and Bosnian Muslims in the spring of 1992.[64] Serbian forces arrested Muslim inhabitants of the towns and villages. The Muslim women were detained in houses and detention centers and many were raped and sexually assaulted.[65] The Court found Kunarac guilty of crimes against humanity. In reaching its decision, the Court noted:

> [T]he motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons." Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely

[60] *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 252. [Reproduced in notebook at Tab 10].
[61] *Prosecutor v. Kunarac, Kovac, and Vukovic*, IT-96-23 Appeals Chamber Judgment, 12 June 2002, para. 103 [Reproduced in notebook at Tab 15].
[62] *Id.* at para. 95.
[63] *Id.*
[64] *Id.*
[65] *Id.*

> against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[66]

This Court is further explaining the excerpt from the *Tadic* decision, saying that an act can be committed for purely personal reasons but as long as the act is related to the conflict, then one can be liable for crimes against humanity.

In addition, *Kunarac* establishes that a single act could be deemed to be part of a widespread attack if the accused knew that his acts were against the targeted population. In assessing whether there was a widespread attack, the *Kunarac* Court also noted:

> The assessment of what constitutes a 'widespread ' or 'systematic' attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. The Court must therefore 'first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic ". The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population.[67]

The Court held that there was a widespread attack where the Serb forces "target[ed] the Muslim civilian population [and] encompass[ed] the municipalities of Foca, Gacko, and Kalinovik . . .Muslim houses and apartments were systematically ransacked or burnt down, Muslim villagers were rounded up or captured and sometimes beaten or killed in the process. Men and women were separated, with many of the men detained in the . . .prison."[68] Thus, the extensive nature of

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[66] *Prosecutor v. Kunarac, Kovac, and Vukovic*, IT-96-23 Appeals Chamber Judgment, 12 June 2002, para. 103 [Reproduced in notebook at Tab 15].
[67] *Id.* at para. 95.
[68] *Prosecutor v. Kunarac et. al*., IT-96-23,Trial Chamber, Judgment, February 2001, paras. 570-573. [Reproduced in notebook at Tab 15].

these attacks triggered the "widespread" threshold even where the total number of victims was not mentioned.

In the *Stakic* case, an attack triggered the "widespread" threshold where the attack occurred "throughout the municipality of Prijedor, initially in Hambarine and Kozarac, and then spread to the whole of the Brdo region."[69] In addition, "thousands of citizens of Prijedor municipality passed through one or more of the three main detention camps . . .established in the towns of Omarska, Prijedor, and Trnopolije."[70] The attack resulted in "hundreds of non-Serbs killed and many more arrested and detained by the Serb authorities, *inter alia* in detention facilities."[71] The "whole of the Brdo region" was sufficiently broad and large-scaled for the Court to hold that the attacks occurring there constituted a widespread attack even though only hundreds of non-Serbs were killed.

In the *Krstic* case, 25,000 Bosnian Muslim civilians were forcibly bussed outside of Srebrenica and the women, children and elderly were transferred from Potocari to Kladanj.[72] Krstic was found to be responsible for these forcible transportations and thus, convicted of crimes against humanity partly because this satisfied the "widespread" requirement.[73] The Court in this case also addressed the massacre of 7,000 Bosnian Muslims and determined this to be a "substantial part" of a group.[74] Accordingly, the Court deemed this attack to trigger the threshold of a "widespread" attack.[75]

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[69] *Prosecutor v. Stakic*, IT-97-24, Trial Chamber, Judgment, July 31, 2003, para. 630. [Reproduced in notebook at Tab 22].
[70] *Id.*
[71] *Id.* at para. 629.
[72] *Prosecutor v. Krstic*, IT-98-33-T, Trial Chamber, Judgment, August 2, 2001, para. 519 [Reproduced in notebook at Tab 31].

[73] Prosecutor v. Krstic, IT-98-33, Appeals Chamber Judgment, 19 April 2004, para. 232. [Reproduced in notebook at Tab 31].
[74] *Id.* at para. 634.
[75] *Id.*, Trial Chamber, para. 536.

In the *Limaj* case, the Court ruled that there was not a widespread attack where between 100-140 Serbs were abducted.[76] Limaj was charged with crimes allegedly committed by him and other members of the Kosovo Liberation Army ("KLA") from May to around 26 July 1998 against Serbian civilians and Kosovo Albanian civilians who were perceived as Serbian collaborators in the Llapushnik/Lapusnik area in central Kosovo.[77] The Court found that,

> [E]ven if it be accepted that those civilians of whatever ethnicity believed to have been abducted by the KLA in and around the relevant period were in truth so abducted, then, nevertheless, in the context of the population of Kosovo as a whole the abductions were relatively few in number and could not be said to amount to a "widespread" occurrence for the purposes of Article 5 of the Statute.[78]

The Court ruled that there was no evidence that this was a widespread attack, although, they did find evidence that it was systematic.[79] More importantly, the abductions were not linked to the attacks in Yugoslavia occurring at the time[80] and, therefore, this was the reason the abductions were not suffice as a single act committed as part of a widespread attack.

In the *Brdjanin* case, the Court held that there was a widespread attack against the Bosnian Muslim and Bosnian Croat civilian population in the Bosnian Krajina where the attack "took many forms."[81] The Court noted that:

> By the end of 1992, nearly all Bosnian Muslims and Bosnian Croats had been dismissed from their jobs in, amongst others, the media, the army, the police, the judiciary and public companies. Numerous crimes were committed against Bosnian Muslims and Bosnian Croats, including murder, torture, beatings, rape, plunder and the destruction of property. Villages were shelled, houses were torched and looted. In the spring of 1992, a number of detention camps where Bosnian Muslim and Bosnian Croat civilians were arrested and detained *en masse* were established throughout the ARK. In several instances, mass killings of civilians took place.[82]

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[76] *Prosecutor v. Limaj*, IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 209. [Reproduced in notebook at Tab 32].
[77] *Id.* at para. 1.
[78] *Id.* at para. 210.
[79] *Id.*
[80] *Id.*
[81] *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, Judgment, 1 September 2004, para. 159 [Reproduced in notebook at Tab 21].
[82] *Id.*

Thus, the sheer large-scale of the attacks in the Bosnian Krajina in the *Brdjanin* case were enough to satisfy the "widespread" threshold.

IV. Systematic

This part of the analysis is geared towards analyzing the behavior of the perpetrators. In the ICTY, systematic refers to "patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of [a] systematic occurrence."[83] It also involves the "organized nature of the acts and the improbability of their random occurrence."[84] The term 'systematic' "covers acts committed with deliberation or planning . . .[it] addresses the organizational quality of the attack and the deliberate recurrence of similar criminal conduct."[85] Moreover, the *Blaskic* Court tried to express a systematic attack as requiring four elements:

> [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; [3] the preparation and use of significant public or private resources, whether military or other; [4]the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[86]

These requirements have not been adhered to in the sense of requiring all four to be present, however they can all be used as evidence toward a finding that a systematic attack existed. For

[83] *Prosecutor v. Kunarac et. al*., Trial Chamber, Judgment, IT-96-23, 22 February 2001, para. 94 [Reproduced in notebook at Tab 15].
[84] *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31, Trial Chamber, Judgment, March 2003, para. 236 [Reproduced in notebook at Tab 37].
[85] Dr. David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 Stan. J. Int'l L. 221, 235 (2007}. [Reproduced in notebook at Tab 33].
[86] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 203. [Reproduced in notebook at Tab 12].

example, the existence of a plan or policy would be relevant and assist in the determination of whether there was a systematic attack, but it is not mandatory.[87] In addition, the plan "need not necessarily be declared expressly or even stated clearly and precisely."[88] Deciding whether an attack is systematic can be determined by a variety of factors such as:

> [a] the general historical circumstances and the overall political background against which the criminal acts are set; [b] the establishment and implementation of autonomous political structures at any level of authority in a given territory; [c] the general content of a political programme, as it appears in the writings and speeches of its authors; [d] media propaganda; [e] the establishment and implementation of autonomous military structures; [f] the mobilization of armed forces; [g] temporally and geographically repeated and coordinated military offensives; [h] links between the military hierarchy and the political structure and its political programme; [i] alterations to the 'ethnic' composition of populations; [j] discriminatory measures . . .[k]the scale of the acts of violence perpetrated—in particular murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.[89]

The ICTR has interpreted the term "systematic" in the same manner as the ICTY. It includes an attack carried out pursuant to a preconceived plan or policy.[90] Systematic refers to an organized pattern of conduct, not a mere random occurrence, according to the Court in *Akayesu*.[91] Furthermore, the total number of victims may be small (and thus, fails to constitute a widespread

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[87] *Prosecutor v. Kunarac et. al*., Trial Chamber, Judgment, IT-96-23, 22 February 2001, para. 98.[Reproduced in notebook at Tab 15].

[88] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 204. [Reproduced in notebook at Tab 12]. *See also*: Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 Fordham Int'l L.J. 457, 484 (1998) [Reproduced in notebook at Tab 34]. A policy does not have to be explicit but it can be inferred, *citing* Tadic IT-94-1-T, Trial Chamber, Judgment, para. 653 [Reproduced in notebook at Tab 10].

[89] *Id.*

[90] *Prosecutor v. Kayishema*, ICTR-95-1, Trial Chamber, Judgment, 21 May 1999 para. 123 [Reproduced in notebook at Tab 18]. *See also*; *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 580 [Reproduced in notebook at Tab 16]. "The concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy."

[91] *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, paras. 579-580 [Reproduced in notebook at Tab 16]. *See also*; *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Chamber, Judgment, May 16, 2003, para. 439 [Reproduced in notebook at Tab 27].

attack), however, as long as the defendant acted in a preconceived manner, this may be sufficient to constitute a systematic attack.[92] For example, it is suggested that killing a political or religious leader could constitute a systematic attack even though the murder is not on a widespread manner.[93] The sections below will discuss how courts have interpreted the threshold of a systematic attack.

A. East Timor

In the *Prosecutor v. Marques*, the Court held that there was a systematic attack in the East Timor context where a policy of targeting a class of persons was clearly identifiable. In reaching its decision, the Court stated that:

> The facts on this Indictment show a systematic attack. It was directed against Evaristo Lopes (FALINTIL supporter). [It was directed against] the houses of villagers around Leuro (CNRT members), upon Alexio Oliveira (CNRT supporter), Alfredo Araújo (FALINTIL supporter), Kalistu Rodrigues (CNRT member and clandestine member of FALINTIL), and the clergy (who were considered by Team Alfa to be supporters of independence and disruptive to the campaign of autonomy). Over the six months, which these facts cover, Team Alfa identified and chose its targets, systematically attacking pro-independence supporters within the civilian population.[94]

The Court in this case looked to the ICTR and the ICTY for guidance in the definitions and applications of the systematic principle.[95] The policy of targeting supporters of independence was clear and manifested by killing various independence supporters. As a result, the Court held that this constituted a systematic attack.

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[92] Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 32 Rutgers L.J. 1, 36 (2002). [Reproduced in notebook at Tab 35].
[93] *Id.*
[94] *Prosecutor v. Marques et. al.*, Special Panel for Serious Crimes, Case No. 09/2000, Dili District Court, p. 12, 11 December 2001. Available at: http://www.jsmp.minihub.org/judgmentspdf/LPEnglish.pdf. [Reproduced in notebook at Tab 24].
[95] *Id.* at p. 17. The Court recited various cases from the ICTR and ICTY for the definitions of systematic which have already been or will be discussed in this memo.

B. Cases in the ICTR

Referring to the facts set forth from the *Akayesu* case in section III (C) of this memo, the Court held that there was a systematic attack in that instance. The Court found that the systematic attack was evidenced by the "unusually large shipments of machetes into the country shortly before it occurred . . .the structured manner in which the attack took place; . . .[the fact that] "teachers and intellectuals were targeted first; . . .and the fact that through the media and other propaganda, Hutu were encouraged systematically to attack Tutsi."[96] The methodical nature of the attacks justified the Court in determining it was "systematic" because of the evidence that this was pursuant to a plan or policy to kill the Tutsi.

In the *Kayishema* case, the Court held that there was a systematic attack where radio broadcasts promoted ethnic hatred, a civil defense program in Rwanda distributed 50,000 machetes for the purpose of exterminating the Tutsis, roadblocks were set up to weed out the Tutsis, and top level Hutu "meticulously planned" the attacks on the Tutsi.[97] In this case, a state actor was involved, although it was not necessary. The roadblocks, radio broadcasts, and the program which distributed the machetes used to kill Tutsis were also sufficient to trigger the systematic threshold.

In the *Musema* case, a systematic attack has been held where the attackers were chanting, "Let's exterminate them," directed at the Tutsis.[98] This, according to the Court, clearly

[96] *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 173 [Reproduced in notebook at Tab 16].
[97] *Prosecutor v. Kayishema*, ICTR-95-1, Trial Chamber, Judgment, 21 May 1999 paras. 280-289 [Reproduced in notebook at Tab 18].
[98] *Prosecutor v. Musema*, ICTR-96-13, Trial Chamber, Judgment, January 27, 2000 para. 932 [Reproduced in notebook at Tab 36].

demonstrated that the objective of the attackers was to destroy the Tutsis. Musema was the Director of the Gisovu Tea Factory, was an educated man with political influence, ordered the commission of crimes against members of the Tutsi group, and abetted in the crimes by participating personally in them.[99] The Court also noted that, "These attacks were pointedly aimed at causing harm to and destroying the Tutsis. The victims, namely men, women and children, were deliberately and systematically targeted on the basis of their membership in the Tutsi ethnic group. Certain degrading acts were purposely intended to humiliate them for being Tutsis."[100] Thus, the Court held that these acts collectively constituted a systematic attack.

Finally, in the *Rutaganda* case, an attack was found to trigger the systematic threshold where meetings were held to organize and encourage the killings of Tutsis.[101] The Tutsi were targeted because they were considered to be opponents of the regime.[102] An expert witness for the prosecution testified of a plan formulated before 1994 which, according to the Court, was convinced that the attacks where pre-planned.[103] In concluding that the attack was systematic, the Court noted the following evidence:

> The Chamber finds that there is sufficient evidence of meetings held to organise and encourage the targeting and killings of the Tutsi civilian population. The Chamber also finds that this organisation and encouragement took the form of radio broadcasts calling for the apprehension of Tutsi, the use of mobile announcement units to spread propaganda messages about the *Inkontanyi*, the distribution of weapons to the *Interahamwe* militia, the erection of roadblocks manned by soldiers and members of the *Interahamwe* to facilitate the identification, separation and subsequent killing of Tutsi civilians and, the house to house searches conducted

[99] *Id.*
[100] *Id.*
[101] *Prosecutor v. Rutaganda*, ICTR-96-3, Judgment, December 6 1999, paras. 358-360 [Reproduced in notebook at Tab 37].
[102] *Id.* "According to Expert Witness Nsanzuwera, the Tutsi were systematically targeted as such, because they were considered to be opponents of the regime. Mr Nsanzuwera testified that, the militia, including the *Interahamwe*, killed Tutsis and Hutus who opposed the Hutu Regime, the victims of these massacres being civilians. Mr Nsanzuwera also confirmed that the *Interahamwe*'s involvement in the killing of Tutsis was not spontaneous but well planned."
[103] *Id.* at para. 359.

to apprehend Tutsis, clearly suggest that a systematic attack on the Tutsi civilian population existed throughout Rwanda in 1994.[104]

C. Cases in the ICTY

The threshold of a systematic attack is very similar in the ICTY as it is in the ICTR. Courts in the ICTY look at the improbability of the attack's random occurrence. In the *Prosecutor v. Kordic and Cerkez*, murder, unlawful attacks on civilians and civilian property, wanton destruction not justified by military necessity, and plunder of public and private property all occurred within at least eight different towns.[105] The Court held that due to the improbability of this random occurrence, then these attacks must be characterized as systematic.[106] The Court went on to say that, "Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence."[107]

In the *Brdjanin* case, the Court held there to be a systematic attack where there was a plan to gain control over certain areas and create a separate Bosnian Serb state by removing most of the people who were non-Serbs.[108] To implement this plan, Bosnian Muslims and Bosnian Croats were removed from their jobs, murdered, tortured, beaten, raped, and their property plundered.[109] "Tens of thousands of Bosnian Muslims and Bosnian Croats were forcibly

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[104] *Id.* at para. 360.
[105] *Prosecutor v. Kordic and Cerkez*, Appeals Chamber, Judgment, 17 December 2004 at paras. 667-668 [Reproduced in notebook at Tab 11].
[106] *Id.* at para. 669.
[107] *Id.* at para. 666.
[108] *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, September 1, 2004, para. 65 [Reproduced in notebook at Tab 21]. This plan was known as the "Strategic Plan" whereby Bosnian Serb leadership and members of the Serbian Democratic Party would gain control over certain areas to create their separate Bosnian Serb state.
[109] *Id.* at para. 157.

expelled."[110] The existence of this plan, therefore, was enough to satisfy the threshold of systematic within the Yugoslavian context.

In the *Stakic* case, a plan to remove non-Serbs from an area/region also constituted a systematic attack according to the Court.[111] Where attacks on non-Serbs occurred within an area, killing hundreds and arresting many others, the Court held that this was pursuant to a plan prepared on January 7, 1992 by the Assembly of the Serbian People in Prijedor.[112] Specifically, the plan to remove non-Serbs was "activated by the takeover of power by Serbs on April 30, 1992. Thereafter the attack directed against the civilian population intensified, according to the plan."[113] Thus, the Court was satisfied that the attack against the non-Serbs was sufficiently systematic.

Furthermore, the Court in the *Prosecutor v. Kunarac* et. al. held there to be a systematic attack where abuses occurred in three municipalities.[114] Within the municipalities:

> Muslim civilians were removed from their social and professional lives . . .most Muslim men were disarmed . . .complete ostracism soon followed with their freedom to move about and to gather critically curtailed . . .outbursts of violence and house-burning [became] more frequent . . .women were kept in various detention centres where they [were subjected] to . . .unhygienic conditions . . .being raped repeatedly.[115]

In addition, the men were detained for no reason and also subjected to the inhumane living conditions. The Court held that it was satisfied that there was a systematic attack on the Muslim civilian population in the municipalities of Foca, Gacko and Kalinovik.[116] The threshold within this context appears to be that a systematic attack occurred due to the improbability of a random

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[110] *Id.* at para. 158.
[111] *Prosecutor v.Stakic*, IT-97-24, Trial Chamber, Judgment, 31 July 2003, paras. 629-630 [Reproduced in notebook at Tab 22].
[112] *Id.*
[113] *Id.*
[114] *Prosecutor v. Kunarac et. al.*, Trial Chamber, Judgment, IT-96-23, 22 February 2001, paras. 571-578 [Reproduced in notebook at Tab 15].

[115] *Id.*
[116] *Id.* at para. 578.

occurrence in three different municipalities and that the attack was only directed against the Muslim civilian population. This led the Appeals Chamber to uphold that there were "patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis," which ultimately is a "common expression" of a systematic attack.[117]

In *Naletilic*, the Court held there to be a systematic attack where the attack "took many forms."[118] The attack in Mostar, Sovici, and Doljani took many forms which is why the Court held that this constituted a systematic attack. The Court noted that:

> It started with the collection and detention of Muslim civilians after the fierce fighting around Sovici and Doljani and their subsequent transfer to detention centres . . . The Muslim houses in the area were burnt to make sure that there would be no return of the Muslim population. Muslim religious sites, like the mosques in the area, were systematically destroyed. Detention facilities for the Muslim part of the population were established all over the area. Detained Muslim civilians and Muslim soldiers *hors de combat* were often subjected to humiliating and brutal mistreatment by soldiers who had unfettered access to the detention facilities.[119]

Because of all the different "forms" of the attacks, the Court ruled that it was not so likely that this could have been done by accident. Therefore, the organized nature of these acts and the fact that this was highly improbable[120] led the Court to hold that these sufficiently constituted a systematic attack against the Muslim civilian population.[121]

In the *Blaskic* decision, the Court held there to be a systematic attack where the military units responded in a "perfectly co-ordinated manner presuppos[ing] [the] fact that those troops

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[117] *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeals Chamber, Judgment, IT-96-23/1-A, 12 June 2002, para. 94. [Reproduced in notebook at Tab 15].
[118] *Prosecutor v. Naletilic*, IT-98-34, Trial Chamber, Judgment, 31 March 2003, para. 238 [Reproduced in notebook at Tab 37].
[119] *Id.*
[120] *Id.* at para. 236.
[121] *Id.* at para. 238.

were responding to a single command."[122] In that case, the Court adopted the view of a professional soldier who gave his opinion on the matter:

> I believe that one or two minor cases may have been committed by small, uncontrolled groups, but the large-scale and systematic manner in which these events took place, entire villages being burned, and other villages, we saw that it was the Muslim houses that were systematically selected, and we saw that the same type of events were taking place at the same time period in different locations, and it would be impossible, in my opinion, for this to have been carried out by uncontrolled groups.[123]

The Court noted that this opinion was also the opinion of Blaskic himself.[124] The main purpose of some of the orders was to incite racial hatred while other orders invoked the prompt action of the soldiers.[125] In addition, victim testimony demonstrated that civilians were killed in response to orders.[126] Therefore, in this context, the Court was satisfied that it was highly improbable that this was a random occurrence or an accident.

V. Analysis of "Widespread" and "Systematic" in the Cambodian Context

A. Widespread

1. Nuon Chea

Nuon Chea, also known as Brother Number Two, had a leading role within the Khmer

[122] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 467. [Reproduced in notebook at Tab 12].

[123] *Id.*

[124] *Id.* at para. 468.

[125] *Id.* at para. 469-470. "Order D267, for instance, alleges that extremist Muslim forces intended to carry out 'ethnic cleansing' on the Croats in the region. Order D269 refers to the intention of the Muslim forces to destroy everything Croation." Also, the orders "recommend[ed] the modes of combat that were actually used on the ground on 16 April. In this way, order D268 stresses co-ordination among the different units. It also asks the forces to take care to ensure that they have total control over fuel consumption, which was one of the main weapons used by the Croatian forces during the attack on 16 April."

[126] *Id.* at para. 472. "Witness Abdullah Ahmic testified that he saw a soldier say to another soldier who refused to kill a man: 'Do as you are ordered.'" In witness F's testimony, he stated that, "The Dzokeri and the Vitezovi said that they had been given orders to kill all the Muslims so that Muslims would never ever live there again."

Rouge.[127] There is overwhelming evidence that he had a leading role in developing and implementing the execution policies of the CPK.[128] Chea ordered Duch to kill roughly 300 Khmer Rouge soldiers.[129] In addition, Chea ordered Duch to kill the remaining prisoners a few days before the Vietnamese arrived.[130] Not only was Chea mainly responsible for the purges and ordering executions, the evidence suggests that Chea at least had knowledge of what was happening.[131] Chea made various telegrams which "solicited instructions or authorization to detain or execute suspected traitors."[132] While Pol Pot directed the search for "enemies within the Party," Nuon Chea was the one who "did the work" by arresting a massive amount of CPK members and ordering their killings.[133] Not only did Chea order the killings of CPK members, he demanded proof of the bodies of the people that were killed.[134]

It is possible that Chea's ordering the execution of 300 Khmer Rouge soldiers could constitute a widespread attack. Overall, up to two million people were executed during 1975-1979 in Cambodia in what was known as the "killing fields.''[135] Chea supervised, authorized, and instructed the killing of hundreds of people. As evidenced from the cases in the different tribunals, courts have held there to be a widespread attack where there has been substantially less

[127] Jaya Ramji and Beth VanSchaack, *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts*, p. 254, (2005) [Reproduced in notebook at Tab 39]. Nuon Chea served as a Deputy to Pol Pot on the Military Committee of the Standing Committee. Heder and Tittemore, *supra* note 1, at 53.

[128] *Id. See also*; John D. Ciorciari, The Khmer Rouge Tribunal, Documentation Series No. 10, Documentation Center of Cambodia, p. 122, (2006) [Reproduced in notebook at Tab 40].
[129] Heder and Tittemore, *supra* note 1, at 54. *See also*: Ramji and VanSchaack, *supra* note 127, at 257.
[130] Heder and Tittemore, *supra* note 1, at 54. *See also*: Ramji and VanSchaack, *supra* note 127, at 257.

[131] Heder and Tittemore, *supra* note 1, at 56. Nheum Sim, battalion cadre member wrote a letter to Nuon Chea stating how he tortured a prisoner into confessing. Also, the confession of Kung Kien (alias Eung Vet) stated that he presented to Nuon Chea personally how he "smashed" a prisoner. "Smashed" meant kill.

[132] *Id.* at 58, *citing* Telegram 07, Band 545, "Be it Please Reported to Respected Brother, June 15, 1977."
[133] Ciorciari, *supra* note 128, at 122.
[134] *Id.* at 123.
[135] Heder and Tittemore, *supra* note 1, at 54

than two million deaths.[136] In the Cambodian context, a quarter of the population of Cambodia was exterminated.

As evidenced by the numerous telegrams from Chea authorizing, instructing, or receiving notice that people were being tortured and executed, this could be evidence that Chea knew of the attacks. Chea also knew of the attacks because he "exercised the highest level of command authority during the regime."[137] The argument, therefore, would be that the person with the highest level of command authority must know what is happening especially since almost two million people died under his authority. So, therefore, even if Chea's actions are not deemed to be "widespread", they are certainly part of a widespread attack. To borrow the language from the *Tadic* Court in the ICTY, "The perpetrator must know that there is an attack on the civilian population [and] know that his act fits in with the attack."[138] Chea, via his correspondence with his subordinates, most definitely knew that his acts were part of a broader widespread attack against the civilian population. Thus, even if Chea's numerous authorizations and participations of mass executions do not constitute a widespread attack, they are most definitely part of a widespread attack.

In addition, there is evidence of mass burial pits, prisons, and torture devices in at least sixteen of Cambodia's seventeen provinces and 170 districts.[139] This demonstrates the large-scale nature of these attacks. The scale of attacks in this instance is greater than in the *Stakic* case, where the large scale acts only occurred within three different municipalities and spread to

[136] *Prosecutor v. Stakic*, IT-97-24, Trial Chamber, Judgment, 31 July 2003, paras. 629-630 [Reproduced in notebook at Tab 22].
[137] Ramji and VanSchaack, *supra* note 127, at 254.
[138] *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 252. [Reproduced in notebook at Tab 10].

[139] Ramji and VanSchaack, *supra* note 127, at 273.

the Brdo region.[140] Here, the attacks occurred in virtually every province and in 170 districts, not just three. Thus, it would be extremely difficult to rule that there was not a widespread attack in the Cambodian context.

2. Ieng Sary

Sary was a member of the Communist Party of Kampuchea (CPK) Center and a Deputy Prime Minister in charge of foreign affairs.[141] He made public speeches and recorded comments to journalists supporting the arrests of the enemies and he personally admitted knowing that the arrests were made.[142] He publicly described the policies of executing the enemies to the Khmer Rouge, which, without question, helped incite further crimes.[143] He stated: "[We] have smashed all the enemies' tricks, crushed their spy network and succeeded in preserving our national independence, sovereignty, territorial integrity, and the sacred fruits of our revolution."[144] After Sary's speech to execute all the enemies, a "large-scale intra-party purge" occurred.[145] Many internal reports also described some of the atrocities committed, and Sary made statements either contemporaneously to those atrocities or after the fact.[146] Some of which, Sary praised the killings and arrests of certain civilians.[147] In addition, Sary played a personal role in arresting, torturing, and executing certain cadre officials.[148] A confession by San Pau stated that he was

[140] *Prosecutor v. Stakic*, IT-97-24, Trial Chamber, Judgment, July 31, 2003, para. 630. [Reproduced in notebook at Tab 22].
[141] Ramji and VanSchaack, *supra* note 127, at 255.
[142] Heder and Tittemore, *supra* note 1, at 67.
[143] *Id.* at 68.
[144] *Id.* The term "smash" refers to execution.
[145] *Id.* "This purge resulted in the arrest and subsequent execution of many cadres."
[146] *Id.* at 69.
[147] *Id.*
[148] *Id.* at 70.

arrested and sent to the S-21 to be executed.[149] Sary was involved in the arrest of many officials, fifty cadre, and other personnel who were later executed.[150] Finally, Sary was a part of the telegram communications between Nuon Chea and other senior officials reporting on the status of the arrests, executions, and tortures of the "enemies."[151]

The evidence stacked up against Sary may not necessarily suggest a widespread attack. Sary did not directly order thousands of people to be executed or tortured. Nonetheless, he ordered his subordinates to do so, thus satisfying the requirement that he at least have knowledge of the attacks. The numerous telegrams sent to him or by him referring to the executions of the officials directly also demonstrate Sary's knowledge of a widespread attack. In addition, he publicly gave statements to kill any traitors of the regime which would be further evidence of his knowledge of the attacks. In *Tadic*, he was found guilty of crimes against humanity where he murdered four people as part of a widespread attack.[152] Therefore, Sary's involvement of the arrests and executions of fifty cadres would be more than enough to constitute the "single act" committed as part of a widespread attack. As stated previously, a widespread attack occurred where almost two million people were killed in sixteen different provinces and in 170 districts.[153] By participating in the executions, Sary's actions were linked to the widespread attack in Cambodia. Thus, it would only take a single act from Sary in addition to his knowledge that a widespread attack was occurring. To conclude, Sary's actions will most likely be found to be committed as part of a widespread attack.

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[149] *Id.* at 71, *citing* Responses of San Pau, State Market Combatant: On the History of His Own Treasonous Activities, 2 August 1978 (BBKKh353).
[150] Heder and Tittemore, *supra* note 1, at 73.
[151] *Id.* at 75
[152] *Prosecutor v. Tadic* IT-94-1-T, Trial Chamber II, Judgment, 7 May 1997, para. 125. [Reproduced in notebook at Tab 10]
[153] Ramji and VanSchaack, *supra* note 127, at 273.

3. Khieu Samphan

Khieu Samphan was the former Chairman of the DK State Presidium who also occupied various CPK positions.[154] Proof that Samphan participated in various crimes is not very extensive; however, Samphan publicly endorsed the policies of executing the "enemy agents.''[155] He also confessed that he had knowledge of the arrests and executions but denies that there were any mass executions.[156] Samphan worked, via his role of Chairman of Office 870, with Nuon Chea to ensure that Samphan was carrying out the general purges that his superiors ordered.[157] Thus, Samphan never took any steps to prevent the execution policies that he knew were occurring, and in fact, he made public statements supporting those policies. In one speech, Samphan stated that he was not worried about the purges of cadre members because they could be replaced with better cadre.[158] Finally, another statement by Samphan's Office of the Vice President of Democratic Kampuchea for Foreign Affairs stated that, "at least 3,000 minor offenders or innocent civilians were wrongfully executed by the CPK regime,"[159] and another 8,000 people were executed for trying to overthrow DK.[160]

Certainly, 3,000 people "wrongfully" executed, which does not include the number of people executed because they were thought to be traitors, is a high number. This number alone could sufficiently constitute a widespread attack according to international jurisprudence. In one

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[154] Heder and Tittemore, *supra* note 1, at 80. Samphan was on the Central Committee as of 1971 and a full Central Committee member by 1976. By 1977, he was the Chairman of "Office 870", which his duties involved keeping track of various policy decisions made by the Standing Committee to arrest and execute people.
[155] *Id.* at 82.
[156] *Id.*
[157] *Id.*
[158] *Id.* at 85. These statements were made while the non-communist members were being executed and while members within the CPK were being purged.
[159] *Id.* at 86, *citing* Office of The Vice-President of Democratic Kampuchea in charge of Foreign Affairs, "What Are the Truth and Justice About the Accusations Against Democratic Kampuchea of Mass Killings from 1975-1978?" (July 15, 1987).
[160] *Id.* at 82.

of the leading cases in the ICTR, the Court held that there was a sufficient widespread attack where Akayesu was responsible for the deaths of 2,000 Tutsis.[161] In the case with Samphan, there were a total of 11,000 people executed for cause or for no reason at all. Since this number is higher than that of the *Akayesu* case, and the total number of victims in Cambodia is higher than that of Rwanda, this would appear to meet the threshold for a widespread attack.

4. Kae Pok

Pok was the former Secretary of the North/Central Zone and member of the Central Committee and played a huge role in the executions and arrests of traitors within his zone.[162] There are reports of hundreds of prisoners brought into Pok's zone who were detained and executed.[163] At least four confessions from cadre were directly addressed to Pok, which suggests that Pok knew about the executions and arrests. The evidence also suggests that Pok participated in some of the arrests which ultimately led to the executions.[164] One confession stated that all the members of a group who lived under cover in the Koki Thom sub-district were "smashed."[165] Thus, while there is no final number on the amount of people killed by Kae Pok or his authority, there certainly were multiple acts with which Pok was involved.

In the case at bar, Pok had more than adequate knowledge that there were widespread attacks occurring because of the amount of confessions he received. He was responsible for the

[161] *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 173 [Reproduced in notebook at Tab 16].
[162] *Id.* at 93.
[163] *Id.* at 94, *citing* notes from Chan to Duch dated August 13, 14, and 22, 1977; September 21 and 27, 1977; and October 4, 5, 19, and 27, 1977. At least 100 cadre and others were detained and executed. Many of whom were executed were Kae Pok's subordinates. This elucidates the point that Pok must have known about the arrests and execution of the cadre.
[164] *Id.* at 95-97. The confessions talk about the arresting, torturing, and executions of people from the village of Phnom Penh and other areas such as Baray District.
[165] *Id.* at 95.

lower-level cadre who carried out the executions at Pok's orders of people deemed to be traitors to the regime.[166] This would be strong evidence of Pok's knowledge of widespread attacks occurring throughout Cambodia. Thus, under international jurisprudence, even one act would be sufficient to satisfy the "widespread" requirement.

It is also possible that Pok's actions could alone constitute a widespread attack. Pok was responsible for hundreds of deaths and he ordered his subordinates to kill thousands more.[167] While there is no specific number of people alleged to be killed by Pok, the fact that it reached the "thousands" could satisfy the threshold of a widespread attack. In *Akayesu*, the Court was satisfied that a widespread attack occurred where he was responsible for 2,000 deaths. In this case, Pok was responsible for thousands of deaths so this would satisfy the threshold of a widespread attack even though the number is not known. Even if the number of victims alone does not satisfy the threshold, a court could also look at the "many forms" of the attacks that occurred under Pok's authority. In the *Brdjanin* case, the Court held that an attack satisfied the threshold of a widespread attack where the attack "took many forms."[168] Here, villagers were arrested, tortured, and executed, cadre officials were tortured and executed, people were forced into servitude, and religiously persecuted.[169] Therefore, one can make the argument that these attacks "took many forms," and, taken together with the thousands of people Pok was responsible for, these acts triggered the "widespread" threshold.

[166] *Id.* at 97.
[167] *Id.*
[168] *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, Judgment, 1 September 2004 para. 135 [Reproduced in notebook at Tab 21].
[169] Ramji and VanSchaack, *supra* note 127, at 268-274.

B. Systematic

1. Nuon Chea

Nuon Chea's involvement in the regime can most definitely be characterized as systematic. Not only did Chea have knowledge of a systematic attack, but he was one of the primary people responsible for the policies.[170] Chea was quoted as making a statement in the 1975 Party Congress saying, "We must get rid of former soldiers from the old regime; they will not change their ideas, so we have to smash them all."[171] A confession of a former West Zone Secretary said that in 1976, Chea told him to execute all former Khmer Republic Soldiers in his district "because it was not easy for them to abandon their old ideas."[172] Also, Chea demanded that evidence of the executions be brought to him so he could see pictures of the dead bodies.[173] Further evidence of a plan or policy is that Duch confessed to receiving direct orders from Chea himself to execute former officials and Chea was noted in various telegrams for authorizing executions and detentions.[174]

The broad extent to which Chea is documented as having implemented policies and plans indicates the systematic nature of the attacks. Chea was a high-ranking official, serving only to Pol Pot.[175] Since Chea ordered the killings of many former officials and people deemed to be traitors to the new regime, one can infer that Chea had knowledge of the systematic attacks. In addition, there were 19,733 mass graves and 196 prisons.[176] Chea had the responsibility of

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[170] Ciorciari, *supra* note 128, at 124. *See also*; Seven Candidates at p. 53.
[171] Ciorciari, *supra* note 128, at 124.
[172] *Id.*
[173] *Id.*, *See also*: Heder and Tittemore, *supra* note 1, at 54, *citing* Ramji and VanSchaack, *supra* note 125, at 269.
[174] Heder and Tittemore, *supra* note 1, at 54 and 58. "Nuon Chea was noted for distribution on reports that solicited instructions or authorization to detain or execute suspected traitors."
[175] *Id.* at p. 53. *See also*; Ramji and VanSchaack, *supra* note 125, at 257. Even though Pol Pot was known as "Brother Number One," Nuon Chea was the "principal man for the killings."
[176] Mapping of Cambodia Killing Fields (1975-1979) available at http://www.dccam.org/Projects/Maps/Mapping_1975-1979.htm. [Reproduced in notebook at Tab 41].

overseeing what occurred in those prisons.[177] The sheer volume of mass graves and prisons demonstrate the improbability of a random occurrence of deaths. This is not something that could have been by accident. The systematic threshold is triggered since Chea was in a position to know of the systematic nature of the killings because he was the person ordering the killings and he often times received the dead bodies as proof of their deaths. Also, since the threshold was triggered in the *Kunarac* case[178] where killings occurred in three different municipalities, and the attacks in Cambodia were in numerous cities and towns, then the systematic threshold will be triggered because it is highly improbable that this was a random occurrence.

2. Ieng Sary

Since Sary was the Deputy Prime Minister of Foreign Affairs, he used this position to make public speeches and on-the-record remarks to foreign journalists supporting the arrests of "enemy agents" in the Communist Party of Kampuchea and their executions.[179] Sary, by endorsing an execution policy, and by using his power of a senior official, encouraged others to perform other executions.[180] For example, Sary endorsed a policy made by Pol Pot, Nuon Chea, Son Sen, and Khieu Samphan to "conduct a massive purge of the East Zone."[181] In addition, Sary was copied on the various telegrams sent to Nuon Chea requesting executions of various former military personnel.[182]

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[177] Ramji and VanSchaack, *supra* note 127, at 257. In a confession with Duch, he stated that by 1978 his prison was full so Chea ordered, "Dont bother to interrogate them [300 soldiers]—just kill them." And Duch confessed that he did as he was ordered to do.
[178] *Prosecutor v. Kunarac, Kovac, and Vukovic*, IT-96-23 Appeals Chamber Judgment, 12 June 2002, para. 103 [Reproduced in notebook at Tab 15].
[179] Heder and Tittemore, *supra* note 1, at 67.
[180] *Id.* at p. 68.
[181] *Id.* at p. 69.
[182] *Id.* at p. 76.

The evidence also suggests that Sary was aware of the systematic nature of the attacks occurring around him. The telegrams which he was copied to, the public statements endorsing the executions and arrests of the enemies, and endorsements of the giant purging plan of the Eastern Zone made by Pol Pot and Nuon Chea indicate that this was highly unlikely to be a random occurrence. There was a definite plan or policy in place to exterminate those deemed to be enemies of the regime. By having Pol Pot and Nuon Chea come up with the plan, and then having Ieng Sary distribute this plan via public statements indicates that this was no accident or random occurrence. This would be most analogous to the *Stakic* case since the Court ruled that there was a systematic attack after a plan was adopted to eradicate non-Serbs and thereafter, the attacks intensified.[183] Similarly, in the case involving Ieng Sary, he adopted the plans of the top officials (Pol Pot and Nuon Chea) and publicly encouraged the executions of anybody deemed to be a traitor to the regime. Therefore, this intensifies the case against Ieng Sary in that the acts constituted a systematic attack to which he had knowledge.

3. Khieu Samphan

Khieu Samphan, like Ieng Sary, also made public statements supporting the efforts to execute the traitors.[184] Samphan also occupied various senior positions within the regime.[185] Samphan has conceded knowledge of the executions and arrests of various military and political

[183] *Prosecutor v. Stakic*, IT-97-24, Trial Chamber, Judgment, July 31, 2003, para. 630. [Reproduced in notebook at Tab 22]. .
[184] *Id.* at p. 84. Samphan exalted in the fact that the alleged traitors were already arrested for planning to overthrow the Communist Party of Kampuchea.
[185] *Id.* at p. 80-81. Samphan was a Central Committee member and "privy to the policies originating from that body, including the policy of arresting and executing persons suspected of being enemies of the regime." He also was Chairman of "Office 870" and his duties entailed keeping track of the implementation of policies adopted by the Standing Committee. He was also the "note taker" for Pol Pot, Nuon Chea, and Son Sen at a secret meeting where they agreed to execute the Eastern Zone military and political cadre.

cadre.[186] This makes it easier to prove his knowledge of a systematic attack. This would be analogous to the *Blaskic* decision in that Blaskic acknowledged the atrocities that were occurring.[187] Here, Samphan also acknowledges that he knew of various arrests and executions. Since Samphan was privy to Nuon Chea and Pol Pot, one can also infer that he knew of the degree of the executions occurring. Most especially, Samphan was the note taker of the secret meeting where Nuon Chea, Pol Pot, and Son Sen adopted a plan to exterminate the Eastern Zone from the military and political cadre. In this respect, it is similar to the *Rutaganda* case, where meetings were held to discuss the extermination of the Tutsi.[188] Samphan even stated on one occasion that he was not concerned with the purges depleting the ranks of the cadre because "they could be replaced with newer and better cadre."[189] This evidence makes it highly improbable that it was by mere chance that Samphan had the same policy as Nuon Chea and Pol Pot in executing people deemed to be enemies. It is also highly improbable that this policy was a mere random occurrence which happened to spread across the entire country. Thus, it is likely that the Court will hold that Samphan engaged in systematic attacks and that he knew he was acting as part of a systematic attack.

4. Kae Pok

[190]Kae Pok also played a direct role in the executions of the cadre. Like the other individuals discussed above, Kae Pok implemented execution policies of former cadre and

[186] *Id.* at 82.
[187] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 206. [Reproduced in notebook at Tab 12].
[188] *Prosecutor v. Rutaganda*, ICTR-96-3, Trial Chamber, Judgment, 6 December 1999, para. 69 [Reproduced in notebook at Tab 17].
[189] Heder and Tittemore, *supra* note 1, at 83.
[190] *Id.* at 94.

military personnel.[191] Kae Pok oversaw the movement of prisoners from his region (North/Central Zone) to the S-21 killing fields.[192] Even many of Pok's own subordinates were arrested and executed.[193] This implies Pok's knowledge of the organized plan or policy designed to root out anybody deemed to be a traitor to the regime. Many confessions were sent to Pok which described the atrocities occurring which also demonstrate Pok's knowledge and involvement in the executions, arrests, and torture.[194] Pok sent a telegram targeting the Islamic Cham, ex-Khmer Republic soldiers and dissident cadre as people who were in opposition to the regime.[195] This is similar to the *Kunarac* case where the Court noted that only Muslims were the target of the attacks which demonstrates that it was systematic.[196] Here, there is evidence that Pok targeted two groups of people: Islamic Cham and ex-Khmer Republic soldiers. This is a prime example of a systematic attack where the plan or policy evidences a targeted attack against a specific group of people. The proof of a plan is easier to identify where the plan tries to eliminate a specific class. In this case, the plan was to eliminate people in opposition to the regime, and Pok specifically mentioned that the Islamic Cham and the ex-Khmer Republic soldiers were the ones in opposition to the regime.[197]

Furthermore, Pok asked the Central Committee to help him identify two people he personally arrested in March of 1978 which further exhibits Pok's participation in the systematic

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[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 95-96. At least four of the confessions were marked specifically to Kae Pok. These confessions implicate Pok in having knowledge of the atrocities committed within his zone. In one confession by Aem Min, alias Saen, he said that if anyone were to be found to be a traitor or an "officer" of the old regime, then they were to be "smashed." Smashed is the terminology they used to mean kill.
[195] *Id.* at 97.
[196] *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeals Chamber, Judgment, IT-96-23/1-A, 12 June 2002, para. 94. [Reproduced in notebook at Tab 15].
[197] Heder and Tittemore, *supra* note 1, at 97.

attacks.[198] He also sent a telegram to the Central Committee attesting to his direct involvement in the atrocities committed within his zone.[199] The telegram documents the arrests of cadre who "participat[ed] in opposition activities and promise[d] to take measures against any other 'undercover links' in the revolutionary ranks that his surveillance uncovered."[200] Pok's statement in this telegram is also similar to the *Musema* case where there were chants of, "Let's exterminate them!"[201] In that case, the Court held that there was a systematic attack since the objective was clearly determined to be to exterminate the Tutsi.[202] In the case against Pok, the evidence is also clear that the purpose of the telegram sent by Pok was to eliminate anybody in opposition to the regime. With this evidence, it is difficult for Pok to claim that the attacks were not systematic in nature. The telegram is direct proof of Pok communicating with Pol Pot and verifying the plan or policy to eliminate those in opposition to the regime. Therefore, not only were these acts very difficult, if not impossible to be random occurrences, but they were also the result of a very meticulous, well-thought out plan or policy to rid the regime of people who could potentially be traitors. Thus, in the case against Pok, it is likely that he triggered the threshold of a systematic attack.

VI. Conclusion

A. Widespread

[198] *Id.*
[199] *Id.*
[200] *Id.* at 98, citing "Telegram 94, Band 1100, With Respect to Beloved Brother Pol, 2 April 1976"
[201] *Prosecutor v. Musema*, ICTR-96-13, Trial Chamber, Judgment, January 27, 2000 para. 932 [Reproduced in notebook at Tab 34].
[202] *Id.*

To conclude, the applicable law does not dictate that there be a mandatory minimum number when assessing a widespread attack.[203] However, in the various tribunals examined, the Courts have held there to be a widespread attack when there have been thousands of deaths linked together. Where 2,000 deaths occurred in Rwanda, the Court held that this satisfied the threshold of a widespread attack.[204] Also, where one act of murder was committed within the context of a widespread attack, the threshold of a widespread attack was satisfied as long as the perpetrator knew his acts were part of a widespread attack.[205]

The "widespread" requirement must be committed on a large scale by the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[206] No tribunal has ever attempted to define 'extraordinary magnitude' or make a minimum number. Nonetheless, the *Limaj* case determined that 100-140 people affected is not sufficient within the context of Kosovo's population to be considered "widespread".[207] Yet, the *Stakic* case held that the "whole of the Brdo region" was sufficiently broad and large-scaled for the Court to hold that the attacks occurring there constituted a widespread attack even though only hundreds of non-Serbs were killed.[208] Therefore, we see that a court could hold that a

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[203] Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*. 21 Berkeley J. Int'l L. 111, 135, (2003). "No bright line can be drawn as to when an attack on a particular segment of a society has become sufficiently 'widespread or systematic'." [Reproduced in notebook at Tab 42].

[204] *Prosecutor v. Akayesu*, ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para. 173 [Reproduced in notebook at Tab 16].

[205] *Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 252. [Reproduced in notebook at Tab 10].

[206] *Prosecutor v. Kordic and Cerkez* IT-95-14/2, Trial Chamber, Judgment, 26 February 2001, para. 179. [Reproduced in notebook at Tab 11].

[207] *Prosecutor v. Limaj*, IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 209. [Reproduced in notebook at Tab 31].

[208] *Prosecutor v. Stakic*, IT-97-24, Trial Chamber, Judgment, July 31, 2003, para. 630. [Reproduced in notebook at Tab 22].

widespread attack exists where it is committed throughout various cities/regions and are all linked together even if the number of victims do not rise to the level of 'thousands.'

In the Cambodian context, substantial evidence of the number of victims, the frequency of the attacks, and the vast coverage of the acts indicate that various members of the Khmer Rouge have triggered the threshold of a "widespread" attack.

B. Systematic

It is problematic for the individuals discussed above to claim that there was not a systematic attack. As we saw, the plan to eliminate any potential traitors to the regime was manifest throughout all the different zones. It is too improbable that the same policy of torturing and executing people, which was implemented in at least sixteen of the seventeen provinces was the result of a mere accident or coincidence. Rather, there was a meticulous plan to gain control and rid Cambodia of the people thought to be traitors to the regime. Many people were forced into confessing that they were traitors, and as a result, many innocent people died. In all, almost two million civilians died during the period of 1975-1979.[209] The policy of ridding Cambodia of other civilians is further evidenced by a radio broadcasted speech by Pol Pot where he stated that "[each] of us must kill thirty Vietnamese . . .[this] would be more than enough because Vietnam has only fifty million inhabitants."[210] This message by "Brother Number One" sends a clear message: Kill the Vietnamese! Furthermore, religious groups were also targeted in addition to the Vietnamese and the people deemed to be in opposition to the regime.[211] Evidence also suggests that checkpoints were set up on each major road leading out of Phnom Penh in April

[209] Heder and Tittemore, *supra* note 1, at 6.
[210] Ramji and VanSchaack, *supra* note 127, at 262.
[211] *Id.* at 268. "It is beyond dispute that religious groups were intentionally targeted for persecution . . .Buddhist and Islamic practices were banned, and monks were defrocked or otherwise abused."

1975 in order to filter out former Lon Nol officials.[212] Finally, the clearest description of a systematic attack was in the "killing fields." Him Huy, a cadre member who admits to driving prisoners to Choeung Ek described the mass killings process.[213] He stated:

"Once a month, or every three weeks, two or three trucks" took prisoners from S-21 to Choeung Ek. Prisoners were assembled together, their names were checked off against execution lists prepared by Suos Thi of S-21's documentation branch. Then, prisoners were "ordered to kneel down at the edge of the hole [with] their hands tied before them. They were beaten on the back of the neck with an iron ox-cart axle. [A man named Ho] inspected the killings and I recorded the names."[214] Thus, the regularity of these offenses being at least once a month and the atrocious nature of the killings indicate that these attacks were pursuant to a policy or plan, and not the result of a random occurrence. Moreover, the individuals discussed above were all aware that there were systematic attacks occurring and they were acting pursuant to the plan to rid Cambodia of "traitors." Therefore, it is very likely that these individuals have all triggered the threshold of a systematic attack.

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[212] *Id.* at 273. Maen Meng discussed how the Communist Party of Kampuchea "successively captured [members of the former Lon Nol regime], especially certain high-ranking officers, from captain up, all of whom were . . .smashed."
[213] *Id.* at 275-276.
[214] *Id.* at 275-276.

APPENDIX --CHART

WIDESPREAD

Action	Analysis
One murder in the context of thousands dead.[215]	Found to be part of a widespread attack.
2,000 deaths.[216]	Widespread attack.
All vital functions of the town taken over[217]	Widespread attack.
Hundreds dead throughout three different municipalities and spreading to the "whole of the Brdo region."[218]	Widespread attack.
7,000 people massacred.[219]	Widespread attack
100-140 abductions.[220]	Not widespread. Not linked to the other attacks going on.

SYSTEMATIC

Shipping in extra weapons to the country; killing a specific type of people, media broadcasts encouraging killings.[221]	Systematic

[215] *Prosecutor v. Marques et. al*., Special Panel for Serious Crimes, Case No. 09/2000, Dili District Court, p. 13, 11 December 2001. Available at: http://www.jsmp.minihub.org/judgmentspdf/LPEnglish.pdf. *See also*: *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Chamber Judgment 16 May 2003.
[216] *Prosecutor v. Akayesu*, ICTR-96-4, Judgment of 2 September 1998.
[217]. *Prosecutor v. Tadic*, IT-94-1, Judgment of 15 July 1999.
[218] *Prosecutor v. Stakic*, IT-97-24, Trial Chamber Judgment, 31 July 2003.
[219] *Prosecutor v. Krstic*, IT-98-33, Appeals Chamber Judgment, 19 April 2004.
[220] *Prosecutor v. Limaj*, IT-03-66-T, Trial Chamber Judgment, November 30, 2005.
[221] *Prosecutor v. Akayesu*, ICTR-96-4, Judgment of 2 September 1998.

Clearly audible chants of "Let's exterminate them!"[222]	Systematic
Meetings of high-ranking officers, roadblocks, media broadcasts all of which encouraging the killings of specific civilians.[223]	Systematic
Plan to gain control evidenced by the citizens losing their jobs, getting beaten, murdered, raped, and the plundering of property.[224]	Systematic
Patterns of crimes occurring within three separate municipalities.[225]	Systematic
Military troops responding in a perfectly coordinated manner by killing thousands of civilians.[226]	Systematic

[222] *Prosecutor v. Musema*, ICTR-96-13, Trial Chamber, Judgment, January 27, 2000.
[223] *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber Judgment, September 1, 2004.
[224] *Prosecutor v. Rutaganda*, ICTR-96-3, Judgment of 6 December 1999.
[225] *Prosecutor v. Kunarac et. al.*, IT-96-23/1, Judgment of 12 June 2002.
[226] *Prosecutor v. Blaskic*, IT-95-14, Judgment of 3 March 2000.