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Under The Doctrines Of Joint Criminal Enterprise And Command Responsibility, What Is Deputy Secretary Nuon Chea's Potential Criminal Liability For Ordering And Failing To Prevent, Halt, And Punish Violations Of International Humanitarian Law?

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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE
EXTRAORDINARY CHAMBERS
IN THE COURTS OF CAMBODIA

UNDER THE DOCTRINES OF JOINT CRIMINAL ENTERPRISE AND COMMAND RESPONSIBILITY, WHAT
IS DEPUTY SECRETARY NUON CHEA'S POTENTIAL CRIMINAL LIABILITY FOR ORDERING AND
FAILING TO PREVENT, HALT, AND PUNISH VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW?

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J.D. Candidate, May 2008
Spring Semester, 2007

TABLE OF CONTENTS

***INDEX OF AUTHORITIES*..... iii**

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS1

A. Issue1

B. Summary of Conclusions1

1. Nuon Chea may be held liable under joint criminal enterprise, category 1.....1

2. Nuon Chea may be held liable under joint criminal enterprise, category 2.....1

3. Nuon Chea may be held liable under joint criminal enterprise, category 3.....2

4. Nuon Chea may be held liable as both a military commander and as a civilian superior under the doctrine of command responsibility2

a. Nuon Chea may be held liable under direct command responsibility3

b. Nuon Chea may be held liable under indirect command responsibility3

5. Nuon Chea’s possible defenses to charges brought against him will fail.....4

II. FACTUAL BACKGROUND.....5

A. The Khmer Rouge.....5

B. Nuon Chea.....7

III. LEGAL DISCUSSION9

A. Charges that may be brought against Nuon Chea9

B. The conflict in Cambodia was an armed conflict such that international humanitarian law is applicable.....10

C. Joint Criminal Enterprise12

1. Modern Historical Development15

2. Applying Joint Criminal Enterprise Liability to Nuon Chea17

a. Category 1.....17

b. Category 2.....	19
c. Category 3.....	22
D. Command Responsibility	24
1. Modern Historical Development	27
2. Applying Command Responsibility.....	31
a. Military vs. Civilian Command Responsibility	32
b. Direct Command Responsibility	34
c. Indirect Command Responsibility.....	37
E. Nuon Chea’s Possible Defenses Will Fail	42
1. Tu Quoque.....	42
2. Factual Defense – Lack of Knowledge	44
3. Factual Defense – Lack of <i>De Jure</i> or <i>De Facto</i> Authority	45
4. Evidentiary Challenges.....	46
5. Challenge Command Responsibility Element of Effective Control	47
6. Legitimacy of Force	48
IV. <u>CONCLUSION</u>	48

INDEX OF AUTHORITIES

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue*

Nuon Chea is the most senior surviving member of the notorious Khmer Rouge regime that reigned from 1975-1979 in Cambodia.¹ In order to ensure that the victims of the Khmer Rouge leadership's reign of terror, and their families, receive justice and international judicial acknowledgement of their horrific plight three decades ago, it is essential that the prosecution prove Nuon Chea's part in the tragedy. This memorandum addresses whether Nuon Chea can be held accountable under the three categories of joint criminal enterprise liability and whether he can be held accountable under the doctrines of direct and indirect command responsibility, both as a military commander and as a civilian superior.

B. Summary of Conclusions

1. Nuon Chea may be held liable under joint criminal enterprise, category 1.

The tribunal should find Nuon Chea guilty under joint criminal enterprise, category 1 because he voluntarily participated in a common design to interrogate, torture, and kill, and he intended that such violations result.²

2. Nuon Chea may be held liable under joint criminal enterprise, category 2.

The tribunal should find Nuon Chea guilty under joint criminal enterprise, category 2 because Tuol Sleng and other prisons around the country can be considered a form of a

* Original phrasing of issue: One of the likely defendants before the ECCC (Mr. Nuon Chea, Pol Pot's chief lieutenant) has been quoted as saying, "I have responsibility for what happened, not for the killing but for not being able to protect my own people." Analyze his potential criminal liability for failure to prevent and punish under the doctrine of command responsibility.

¹ Phil Rees, *Brother Number Two Enjoys Retirement* BBC NEWS (2002), <http://news.bbc.co.uk/2/hi/programmes/correspondent/1874949.stm> (last visited Feb. 26, 2007) [hereinafter Phil Rees, *Brother Number Two*] [reproduced in accompanying notebook at tab 77].

² Stephen Heder & Brian D. Tittlemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, 62 (War Crimes Research Office, Washington College of Law, American University & Coalition for International Justice, 2001) [reproduced in accompanying notebook at tab 85]; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶¶ 119-120 (Dec. 10, 1998) [reproduced in accompanying notebook at tab 23].

concentration camp – it was a systematic way of interrogating, torturing, and killing the so-called enemies of the Pol Pot regime.³ Nuon Chea actively participated in this system of repression, which is especially demonstrated by his position of authority,⁴ and he intended the ill treatment and killings of those taken to Tuol Sleng.

3. Nuon Chea may be held liable under joint criminal enterprise, category 3.

The tribunal should find Nuon Chea guilty under joint criminal enterprise, category 3 because he intended to contribute to a common criminal plan of implementing policies of uniformity, expulsion, extermination, and general discrimination.⁵ He took the chance that at least one of his subordinate co-perpetrators would commit an international humanitarian law (IHL) violation outside of the common plan. That they would commit extensive atrocities not pursuant to direct orders was a natural and foreseeable risk.⁶

4. Nuon Chea may be held liable as both a military commander and as a civilian superior under the doctrine of command responsibility.

The tribunal should find Nuon Chea guilty as a military commander under the command responsibility theory of liability because he knew and had reason to know that atrocities were

³ Prosecutor v. Kvočka et al. Case No. IT-98-30/1-T, Judgment, ¶ 320 (Nov. 2, 2001) [reproduced in accompanying notebook at tab 29], *as cited by* WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* 312 (Cambridge University Press 2006) [reproduced in accompanying notebook at tab 64]; *Review Exclusive: Duch Implicates Living Khmer Rouge Leaders in Killings*, FAR EASTERN ECONOMIC REVIEW (1999), http://www.feer.com/breaking_news/duch2.html (last visited Jan. 27, 2007) [hereinafter *Review Exclusive: Duch Implicates*] [reproduced in accompanying notebook at tab 82].

⁴ Prosecutor v. Limaj et al. Case No. IT-03-66-T, Judgment, ¶ 511 (Nov. 30, 2005) [reproduced in accompanying notebook at tab 31].

⁵ Liai Duong, *Racial Discrimination in the Cambodian Genocide*, 4-5 (Genocide Studies Program, MacMillan Center for International and Area Studies, Yale University, GSP Working Paper No. 34, 2006) [reproduced in accompanying notebook at tab 75].

⁶ Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 83 (Feb. 28, 2005) [reproduced in accompanying notebook at tab 30].

being committed at Tuol Sleng, often upon his direct orders.⁷ The tribunal should also find Nuon Chea guilty as a civilian superior under the superior responsibility theory of liability because he at least knew and consciously disregarded the information showing that torture, interrogations, and killings were taking place.⁸ Since he held positions of both military and civilian authority, Nuon Chea should be charged under both standards.⁹

a. Nuon Chea may be held liable under direct command responsibility.

The tribunal should find Nuon Chea guilty under direct command responsibility because there is extensive evidence that he explicitly ordered interrogations, tortures, summary executions, and purges within his own party, and against the former Lon Nol regime members, intellectuals, Chams, Vietnamese, and Chinese.¹⁰

b. Nuon Chea may be held liable under indirect command responsibility.

The tribunal should find Nuon Chea guilty under indirect command responsibility because there is conclusive evidence that he should have known of at least the atrocities being

⁷ Rome Statute of the International Criminal Court, art. 28(a)(i), Jul. 17, 1998 [hereinafter Rome Statute] [reproduced in accompanying notebook at tab 11].

⁸ *Id.* at art. 28(b)(i).

⁹ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 53, 65 [reproduced in accompanying notebook at tab 85]; JOHN D. CIORCIARI WITH YOUK CHHANG, *Documenting the Crimes of Democratic Kampuchea*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 253-254 (Jaya Ramji & Beth Van Schaack, eds., The Edwin Mellen Press 2005) [reproduced in accompanying notebook at tab 61].

¹⁰ *Nuon Chea Secretly Orders Duch to Kill People in Tuol Sleng Prison*, 13 MONEAKSEKAR KHMER 3024 (2006), http://www.krtrial.org/showarticle.php?language=english&action=shownews&art_id=1339&needback=1&PHPSES SID=4684f42824e3113326b01a52bb6c7efa (last visited Feb. 1, 2007) [hereinafter *Nuon Chea Secretly Orders Duch*] [reproduced in accompanying notebook at tab 76]; BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79*, 58, 101 (2d ed. Yale University Press 2002) [hereinafter BEN KIERNAN, *THE POL POT REGIME*] [reproduced in accompanying notebook at tab 58]; Stephen Heder & Brian D. Tittmore, *supra* note 2, at 52 [reproduced in accompanying notebook at tab 85]; *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82]; *see generally* Liai Duong, *supra* note 5 [reproduced in accompanying notebook at tab 75].

committed in the East Zone and at Tuol Sleng.¹¹ He was put on notice by the innumerable documents sent to the various committees he belonged to, as well as addressed specifically to him. That he did not bother to investigate and pursue violations of IHL that he was on notice of does not relieve him of indirect command responsibility liability.¹²

7. Nuon Chea's possible defenses to charges brought against him will fail.

Nuon Chea may try to raise the defense of *tu quoque* and factual defenses to challenge the elements of liability. He may challenge the evidence before the tribunal, and claim that the use of force against the Cambodian people was warranted. *Tu quoque* fails, however, because it has specifically been rejected as a legitimate defense because IHL imposes absolute obligations on state and private actors, which are not based on the idea of reciprocity.¹³ Nuon Chea's other defenses fail because the evidence shows that not only did he directly order the IHL violations, including interrogation, torture, and summary executions, but he also had reason to know that such were taking place, as his name was on reports and at least one report was directly delivered to him.¹⁴ Duch's statements corroborate that Nuon Chea was in charge, that there was a superior-subordinate relationship, and that Nuon Chea had effective control of Duch and others. Any denial of knowledge is wholly implausible, as documentary evidence and interviews with survivors and former leaders demonstrate that the leadership was fully aware of what occurred

¹¹ See Stephen Heder & Brian D. Tittmore, *supra* note 2, at 51-65 [reproduced in accompanying notebook at tab 85].

¹² See *id.* at 58, 65.

¹³ Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment, ¶¶ 515-520 (Jan. 14, 2000) [reproduced in accompanying notebook at tab 28].

¹⁴ See generally Stephen Heder & Brian D. Tittmore, *supra* note 2, at 51-65 [reproduced in accompanying notebook at tab 85].

beneath them.¹⁵

II. FACTUAL BACKGROUND

A. The Khmer Rouge

From 1975 to 1979, during the reign of the Khmer Rouge, Cambodia was reformed into a classless agrarian society where everyone was forced to agricultural labor to the point of overwork, disease, and starvation.¹⁶ Pol Pot's regime sought to return Cambodia back to Year Zero, and in order to accomplish this, instituted policies eliminating both professional classes and any kind of technology.¹⁷ One author has referred to the purges of the Pol Pot regime as making "Stalin's elimination of all imagined rivals seem like a civilized political process."¹⁸

The atrocities began when the Khmer Rouge shot their way into the capital city of Phnom Penh¹⁹ with the intent of ridding Cambodia of all those "thoroughly tainted by imperialism."²⁰ This plan was formulated in February of 1975, and put into action on April 17, 1975.²¹ It was

¹⁵ Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 332 (March 3, 2000) [reproduced in accompanying notebook at tab 19], *as cited in* YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT 105 (Routledge 2004) [reproduced in accompanying notebook at tab 65].

¹⁶ Phil Rees, *Brother Number Two*, *supra* note 1 [reproduced in accompanying notebook at tab 77]; Rajiv Chandrasekaran, *Cambodians Chart the Khmer Rouge Paper Trail*, WASHINGTON POST FOREIGN SERVICE A01 (2001), <http://www.genocidewatch.org/Cambodiandoccenter1.htm> (last visited Jan. 28, 2007) [reproduced in accompanying notebook at tab 81].

¹⁷ 'Killing Fields' Executioner Keen to Testify, CNN.COM (2001), <http://archives.cnn.com/2001/WORLD/asiapcf/southeast/08/08/cambodia.khmer/index.html> (last visited Jan. 28, 2007) [reproduced in accompanying notebook at tab 74] & Mann Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense?*, 74 CAL. L. REV. 1581, 1581 (2001) [reproduced in accompanying notebook at tab 52].

¹⁸ HENRY KAMM, CAMBODIA: REPORT FROM A STRICKEN LAND 131 (Arcade Publishing 1998) [reproduced in accompanying notebook at tab 60].

¹⁹ Roger Normand, *At the Khmer Rouge School: The Teachings of Chairman Pot*, THE NATION, 198 (1990) [reproduced in accompanying notebook at tab 83].

²⁰ *Id.* at 200.

²¹ BEN KIERNAN, THE POL POT REGIME, *supra* note 10, at 33 [reproduced in accompanying notebook at tab 58].

the beginning of a “substantial destruction of a people by their own leaders.”²² This resulted from the radical policies implemented by the leaders of the Khmer Rouge, including a blanket ban on religion and any kind of religious observance, the forced communalization of people (which brought about the destruction of family units), and the cultural destruction of Cambodia, including the destruction of Buddhist pagodas, libraries, and statues.²³ The Khmer Rouge abolished both money and markets. Most importantly, they worked to create a unified national race based on communist ideals.²⁴

It is estimated that approximately 1.7 million people died as a direct and indirect result of Khmer Rouge policies.²⁵ The Khmer Rouge implemented policies targeting certain groups. Of the Khmer national group, as well as those members of other minority groups, the Khmer Rouge sought out and killed anyone with ties to the old Lon Nol regime – Khmer Rouge cadres would either club these people to death or shoot them. They beat babies to death on trees. They killed anyone wearing glasses, because they were considered to be “intellectuals,” and as such were a considered a threat to their new “radical Maoist experiment.”²⁶

The leadership particularly targeted minority groups, especially the Vietnamese, Chams, and Chinese.²⁷ In their efforts to attain national uniformity and economic equality, the Khmer

²² DAVID R. HAWK, *International Human Rights Law and Democratic Kampuchea*, in *THE CAMBODIAN AGONY*, 118 (David A. Ablin & Marlowe Hood, eds., M.E. Sharpe, Inc. 1990) [reproduced in accompanying notebook at tab 59].

²³ *Id.* at 120-121.

²⁴ Mann Bunyanunda, *supra* note 17, at 1581 [reproduced in accompanying notebook at tab 52].

²⁵ *Id.*; Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

²⁶ William Shawcross, *Persecutions on Political, Racial, or Religious Grounds*, *CRIMES OF WAR PROJECT: THE BOOK*, <http://www.crimesofwar.org/thebook/persecutions-on.html> (last visited Feb. 7, 2007) [reproduced in accompanying notebook at tab 86].

²⁷ While proving that the Khmer Rouge leadership had the specific intent to target protected groups under the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] [reproduced in accompanying notebook at tab 4] is outside the scope of this memorandum, it

Rouge established policies of imposing uniformity, expulsion, extermination, and general discrimination, the effects of which manifested most strongly on minorities. Through “forced Khmerization” the leadership made all minorities give up identifying cultural and religious symbols, practices, and languages.²⁸

B. Nuon Chea

Nuon Chea was half of “the Organization,” also known as “Angkar,” which consisted of himself and Pol Pot.²⁹ In other words, he and Pol Pot together formed the core leadership of the Khmer Rouge. Known as “Brother Number Two,” Nuon Chea served as Pol Pot’s chief lieutenant and was the Deputy General Secretary of the Communist Party of Kampuchea (CPK).³⁰ He was responsible for state security, and has been implicated by Ieng Sary, another Khmer Rouge leader, in knowing exactly what went on at Tuol Sleng (also called S-21), the infamous concentration camp-like prison where prisoners were tortured and killed.³¹ It is estimated that as many as 16,000 people were executed at this former high school.³²

As Deputy Secretary, Nuon Chea had duties including responsibility for propaganda,

is important to note that racial discrimination did arise as a result of Khmer Rouge policies between 1975-1979, and manifested within politics, culture, and economics. “Motive is irrelevant to whether racial discrimination (or genocide) exists because even if the motive of a policy is not racialist, the predictable effects of a policy can be racial... racial discrimination can be opportunistic or even inadvertent.” Liai Duong, *supra* note 5, at 3, 33 [reproduced in accompanying notebook at tab 75].

²⁸ *Id.* at 4-5.

²⁹ BEN KIERNAN, THE POL POT REGIME, *supra* note 10, at 33 [reproduced in accompanying notebook at tab 58].

³⁰ Phil Rees, *Brother Number Two*, *supra* note 1 [reproduced in accompanying notebook at tab 77]; *Khmer Rouge Leader Nuon Chea “Very Ill”*, BANGKOK POST (2006), Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC): The Official Website of the Khmer Rough Trial Task Force, http://publicinternationallaw.org/warcrimeswatch/archives/wcpw_vol01issue14.html (last visited Jan. 31, 2007) [reproduced in accompanying notebook at tab 73].

³¹ HENRY KAMM, *supra* note 18, at 141 [reproduced in accompanying notebook at tab 60].

³² Phil Rees, *Cambodia – Brother No. 2*, FOREIGN CORRESPONDENT (2002), <http://www.abc.net.au/foreign/stories/s563078.htm> (last visited Feb. 1, 2007) [hereinafter Phil Rees, *Cambodia*] [reproduced in accompanying notebook at tab 78].

Party work, social welfare, culture, and formal education.³³ He was the President of the Cambodian People's Representative Assembly,³⁴ helped to oversee the national security police, and from time to time served as the prime minister of the Democratic Kampuchea government.³⁵

The Documentation Center has enormous amounts of evidence in the forms of documents, reports, tortured confessions, and interviews with survivors, implicating Nuon Chea both directly and indirectly in co-authoring and applying the murderous Khmer Rouge policies.³⁶ The Director of the Documentation Center of Cambodia, Youk Chhang, stated that the documentary evidence is strongest against Nuon Chea and Duch.³⁷ It appears that Nuon Chea played a central role in formulating and promulgating CPK execution policies, especially via orders to his subordinates.³⁸ "Documentary evidence can prove that he exercised the highest level of command authority during the DK regime; his *de facto* (and possibly *de jure*) authority extended to almost every subordinate member of the CPK ranks."³⁹ He was, in essence, "in direct command of the movement's killing machine during its 1975-1979 reign of terror."⁴⁰

³³ BEN KIERNAN, *THE POL POT REGIME*, *supra* note 10, at 100 [reproduced in accompanying notebook at tab 58].

³⁴ *Id.* at 326.

³⁵ Samantha Brown, *Reclusive But Free, Cambodia's Khmer Rouge Leaders Wait for Trial*, CURRENT AFFAIRS: FINGER ON THE PULSE, http://www.fourelephants.com/current_affairs.php?sid=288 (last visited Feb. 6, 2007) [reproduced in accompanying notebook at tab 84].

³⁶ *See generally* Stephen Heder & Brian D. Tittmore, *supra* note 2, at 51-65 [reproduced in accompanying notebook at tab 85].

³⁷ Duch was the head of Tuol Sleng. Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

³⁸ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 52 [reproduced in accompanying notebook at tab 85].

³⁹ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 254 [reproduced in accompanying notebook at tab 61].

⁴⁰ *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

III. LEGAL DISCUSSION

A. Charges that may be brought against Nuon Chea

Nuon Chea may be charged under all three categories of joint criminal enterprise (JCE) and under both direct and indirect command responsibility (CR), as both a civilian superior and as military commander. These charges are not mutually exclusive⁴¹ – Nuon Chea can and should be charged and convicted under both JCE and CR. The Prosecutor must take care to make both charges apparent in the indictment, however.⁴² As for JCE, the indictment must also make clear that “committed” does not necessarily mean that Nuon Chea personally or physically committed the crimes alleged, but rather, contributed to their co-perpetration.⁴³ Finally, where a concurrent conviction under both direct individual responsibility (i.e. JCE) and CR are probable, then the trial chamber should convict the accused under an individual responsibility theory of liability, taking into account the accused’s superior position as an aggravating factor for sentencing.⁴⁴

If Nuon Chea is charged with murder, it must be shown that the victims took no active part in the hostilities.⁴⁵ As the evidence demonstrates that many of the Khmer Rouge’s victims did not take part in hostilities, aside from those military cadres that were killed during party

⁴¹ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 254 [reproduced in accompanying notebook at tab 61]; Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgment, ¶¶ 210, 554-555 (May 21, 1999) [reproduced in accompanying notebook at tab 24]; Prosecutor v. Mucic et al., Case No. IT-96-21-A, Judgment, ¶ 745 (Feb. 20, 2001) [reproduced in accompanying notebook at tab 33].

⁴² ARCHBOLD INTERNATIONAL CRIMINAL COURTS, 525 (Karim Khan & Rodney Dixon, eds., 2d ed. 2005) [reproduced in accompanying notebook at tab 57].

⁴³ *Id.* at 526, *citing* Prosecutor v. Brdjanin, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, (June 26, 2001) & Prosecutor v. Brdjanin, Decision Varying Decision on Form of Further Amended Indictment, (July 2, 2001) [reproduced in accompanying notebook at tab 57].

⁴⁴ Prosecutor v. Kordic, Case No. IT-95-14/2-A, Judgment, ¶ 34 (Dec. 17, 2004) [reproduced in accompanying notebook at tab 27].

⁴⁵ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 236 (Jan. 31, 2005) [reproduced in accompanying notebook at tab 34].

purges, their deaths constitute murder under article 3 of the ICTY Statute. To prove Nuon Chea's *mens rea* for murder, he must have known that his act or omission would probably, and not possibly, cause death.⁴⁶ If Nuon Chea is charged with crimes against humanity, then a widespread and systematic attack against a civilian population must be proven.⁴⁷ The attacks, not Nuon Chea's specific acts, must be widespread and systematic,⁴⁸ although he must knowingly take part.⁴⁹

B. The conflict in Cambodia was an armed conflict such that international humanitarian law is applicable.

Given the very low threshold requisite for a conflict to be characterized as an armed conflict such that IHL will apply,⁵⁰ it is apparent here that Khmer Rouge policies against certain ethnic and religious groups, the new people, and intellectuals arose to the status of an armed conflict. In *Juan Carlos Abella v. Argentina*, the Inter-American Commission took the stand that a confrontation between attackers and the Argentine armed forces, which lasted for a mere thirty-six hours, was an armed conflict.⁵¹ As an armed conflict, Common Article 3 of the Geneva Conventions, as well as other rules relevant to internal hostilities, applied,⁵² and the Khmer Rouge therefore had a duty to follow such law/rules.

⁴⁶ *Id.* at ¶¶ 235-236.

⁴⁷ Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶ 98 (July 29, 2004) [reproduced in accompanying notebook at tab 20].

⁴⁸ *Id.* at ¶ 101.

⁴⁹ *Id.* at ¶ 126.

⁵⁰ Lindsay Moir, *Law and the Inter-American Human Rights System*, 25 HUM. RTS. Q. 182, 189 (2003) [reproduced in accompanying notebook at tab 49].

⁵¹ *Id.* citing *Juan Carlos Abella v. Argentina*, Report No. 555/97, Case 11.137, Inter-Am C.H.R. 271, OEA ser.L/VII.98, doc. 6 rev. (1998) [reproduced in accompanying notebook at tab 49].

⁵² *Id.*

International humanitarian law ‘does not require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory.’ The Commission found the confrontation at the La Tablada barracks to qualify as an armed conflict because it involved a carefully planned, coordinated and executed armed attack against a quintessential military objective – a military base, notwithstanding the small number of attackers involved and the short time frame of the fighting.⁵³

There were several incidents of rebellion throughout the duration of the Khmer Rouge’s reign, especially by Chams, ethnic Khmer, and CPK mutinying as a result of the party purges.⁵⁴ Many Chams in particular rebelled against the CPK leadership. One example of such a rebellion was an instance where the Khmer Rouge tried to close a village mosque; subsequently, the Chams resisted this effort and fought back, killing five Khmer Rouge soldiers.⁵⁵ In response, the Khmer Rouge massacred the Chams, took families away, and destroyed the entire village.⁵⁶ Other examples of rebellions include the 1975 uprising of the Chams and the 1978 uprising of ethnic Khmers in the Eastern Zone. Such rebellions against Khmer Rouge policies and practice demonstrate the existence of an armed conflict such that the rules of IHL apply.⁵⁷

Further, these rebellions satisfy the two requirements necessary to establish the existence of an armed conflict of a non-international character: 1) that open hostilities between armed forces exist, and 2) that situations exist where hostilities might break out between armed forces

⁵³ Michael Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT’L L (2004), citing Juan Carlos Abella v. Argentina, Report No. 555/97, Case 11.137, Inter-Am C.H.R. 271, OEA ser.L/VII.98, doc. 6 rev., ¶¶ 155-156 (1998) [reproduced in accompanying notebook at tab 50].

⁵⁴ Ben Kiernan, *Introduction: Conflict in Cambodia, 1945-2002*, 34(4) CRITICAL ASIAN STUDIES 483, 486-487 (2002) [hereinafter Ben Kiernan, *Introduction: Conflict in Cambodia*] [reproduced in accompanying notebook at tab 67].

⁵⁵ Liai Duong, *supra* note 5, at 15 [reproduced in accompanying notebook at tab 75].

⁵⁶ *Id.* at 16.

⁵⁷ Ben Kiernan, *Introduction: Conflict in Cambodia, supra* note 54, at 486 [reproduced in accompanying notebook at tab 67].

or armed resistance groups within a single state's territory.⁵⁸ Different rules apply based on whether an armed conflict is international or internal in nature. However, many would call for a change in this distinction, in order to apply the law of armed conflict to those situations that do not fall neatly within these current distinctions.⁵⁹ Most conflicts in modern times are not specifically international or internal in character. More and more do not fall into neat categories, as they are often between a state and a nonstate actor, or between insurgent groups, etc.⁶⁰ "A new law of armed conflict should recognize that when the same organization (state or nonstate) is behind repeated and serious acts of politically motivated violence that are nonetheless discontinuous in time and space, any party to the conflict may invoke the law of armed conflict."⁶¹ Such a definition would account for the atrocities that occurred under the Khmer Rouge without a back bending analysis of whether the law of armed conflict is applicable to the Cambodian conflict.

C. Joint Criminal Enterprise

Those persons that contribute to the commission of a JCE are subject to potential individual criminal liability, because each person's contribution is often crucial to carrying out the crime in question.⁶² The accused's knowledge of the actual perpetrator's intent is not a

⁵⁸ Alex Obote Odora, *Prosecution of War Crimes by the International Criminal Tribunal for Rwanda*, 10 U. MIAMI INT'L & COMP. L. REV. 43 (2001-2002) *citing* Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgment, ¶ 248 (Jan. 27, 2000) [reproduced in accompanying notebook at tab 39].

⁵⁹ Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 755 (2004) [reproduced in accompanying notebook at tab 54].

⁶⁰ *Id.* at 755-756.

⁶¹ *Id.* at 756.

⁶² Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 191 (July 15, 1999) [reproduced in accompanying notebook at tab 35].

necessary prerequisite to a finding of JCE liability.⁶³ However, both the accused and the person actually carrying out the crime must be shown to have had the same state of mind.⁶⁴

The objective elements of JCE are that there must be a plurality of persons involved, a common plan or purpose must exist, and the accused's level of participation can range from actually committing the crime to assisting in or contributing to its commission.⁶⁵ The common plan or purpose need not be formal, however,⁶⁶ and may be express or implied.⁶⁷

The accused's contribution also need not be substantial.⁶⁸ In some instances where it is not clear whether the accused should be characterized as an aider or abettor, or as a participant in a JCE, it is important to look at the element of time: the longer participation in the plan lasts, the more likely the accused is a co-perpetrator in a JCE.⁶⁹ Other factors to be considered include the nature of the JCE, the persons involved, and how the accused participated in the JCE.⁷⁰ In essence, JCE's usefulness lies in its broad scope of application because there is "no minimum quantum of contribution an individual must make to a JCE."⁷¹

⁶³ WILLIAM A. SCHABAS, *supra* note 3, at 309 [reproduced in accompanying notebook at tab 64].

⁶⁴ Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶¶ 63-69 (Nov. 29, 2002) [reproduced in accompanying notebook at tab 36].

⁶⁵ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 227 [reproduced in accompanying notebook at tab 35].

⁶⁶ See Vasiljevic, Case No. IT-98-32-T, *supra* note 64, at ¶¶ 63-69 [reproduced in accompanying notebook at tab 36].

⁶⁷ *Id.*

⁶⁸ Kvocka et al., Case No. IT-98-30/1-A, *supra* note 6, at ¶ 97 [reproduced in accompanying notebook at tab 30].

⁶⁹ *Id.* at ¶ 88.

⁷⁰ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 526 [reproduced in accompanying notebook at tab 57].

⁷¹ Allison Marston Danner, *Joint Criminal Enterprise and Contemporary International Criminal Law*, 98 AM. SOC'Y INT'L L. PROC. 186, 188 (2004) [hereinafter Allison Marston Danner, *Joint Criminal Enterprise*] [reproduced in accompanying notebook at tab 40].

Category 1 JCE (JCE 1) involves cases where the accused was a co-perpetrator in the crimes alleged. The requisite elements are that “(i) the accused must voluntarily participate in one aspect of the common design... and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.”⁷² There must be a shared intent to commit the certain crime pursuant to the perpetrators’ common plan.⁷³

Category 2 JCE (JCE 2) involves cases where there is a systemic form of repression being perpetrated. Most often, it is “the existence of an organized criminal system, in particular in the case of concentration and detention camps.”⁷⁴ The requisite elements for JCE 2 are the accused’s “active participation in the enforcement of a system of repression, [together with]... (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.”⁷⁵ What is important to note in JCE 2 cases is that both the physical act and mental intent may be inferred from the accused’s position of authority.⁷⁶

Finally, Category 3 JCE (JCE 3) involves those instances where an act occurs outside the common criminal design, but the act, in itself, is a natural and foreseeable consequence of the common design.⁷⁷ To establish liability, it must be shown that the accused had the intention to contribute to a JCE, and that he/she knew that the crime that actually occurred might be committed by one of the other members of the group, and so took that chance by continuing to

⁷² Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 228 [reproduced in accompanying notebook at tab 35].

⁷³ *Id.*

⁷⁴ Kvocka et al., Case No. IT-98-30/1-A, *supra* note 6, at ¶ 82 [reproduced in accompanying notebook at tab 30].

⁷⁵ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 203 [reproduced in accompanying notebook at tab 35].

⁷⁶ *Id.*

⁷⁷ See ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 512-513 [reproduced in accompanying notebook at tab 57].

participate in the JCE.⁷⁸ The crime must be a natural and foreseeable consequence of the common plan.⁷⁹

1. Modern Historical Development

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has detailed JCE extensively.⁸⁰ JCE was first looked at by the ICTY in *Furundzija*, where it discussed the trial of those who ran the Dachau Concentration Camp, a case in which all involved were found guilty of running the camp pursuant to a common plan.⁸¹ In *Tadic*, the Appeals Chamber found JCE implicitly in the ICTY Statute based on a victim-centered ideology.⁸² Under article 7(1) of the ICTY Statute, an accused is individually criminal responsible for participation in a JCE for the crimes outlined in articles 2 through 5.⁸³ Failing to hold those accountable that directly participated but did not actually commit the enumerated crimes would go against the object and purpose of the Statute.⁸⁴

A similar line of reasoning also applies to article 6(1) of the International Criminal Tribunal for Rwanda (ICTR) Statute.⁸⁵ When interpreting article 6(1) of the ICTR Statute, the

⁷⁸ Kvocka et al., Case No. IT-98-30/1-A, *supra* note 6, at ¶ 83 [reproduced in accompanying notebook at tab 30].

⁷⁹ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 204 [reproduced in accompanying notebook at tab 35].

⁸⁰ Allison Marston Danner, *Joint Criminal Enterprise*, *supra* note 71, at 187 [reproduced in accompanying notebook at tab 40].

⁸¹ Furundzija, Case No. IT-95-17/1-T, *supra* note 2, at ¶¶ 211-213 [reproduced in accompanying notebook at tab 23].

⁸² JCE is a way to find accountability for the crimes within ICTY's jurisdiction. Allison Marston Danner, *Joint Criminal Enterprise*, *supra* note 71, at 188 [reproduced in accompanying notebook at tab 40].

⁸³ Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), 1993, U.N. S.C. Res. 827 [hereinafter ICTY Statute] [reproduced in accompanying notebook at tab 12].

⁸⁴ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶¶ 188-189 [reproduced in accompanying notebook at tab 35].

⁸⁵ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 511 [reproduced in accompanying notebook at tab 57]; Statute of the International Criminal Tribunal for Rwanda, art. 6(1), Nov. 8, 1994, U.N. S.C. Res. 955 [hereinafter ICTR Statute] [reproduced in accompanying notebook at tab 13].

jurisprudence of the ICTY ought to be relied on.⁸⁶ The Special Court for Sierra Leone (SCSL) has also employed JCE as a theory of liability,⁸⁷ under article 6 of its Statute.⁸⁸ Further, JCE has been recognized as part of customary international law since at least 1992⁸⁹ because it is encompassed within the theory of accomplice liability.⁹⁰ The elements of JCE, however, comprise a judge-made concept that was articulated in order to hold liable members of groups where criminal intent of the individual members is difficult to prove.⁹¹

JCE has been incorporated into the Rome Statute of the newly formed International Criminal Court (ICC). Individual criminal responsibility attaches when a person “contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”⁹² JCE has also been used recently to try terrorists in US military commissions, where the *actus reus* is alleged to be conspiracy to commit terrorist acts, and the *mens rea* is willfully and knowingly participating in a JCE.⁹³

⁸⁶ WILLIAM A. SCHABAS, *supra* note 3, at 311, *citing* Prosecutor v. Ntakirutimana et al. ICTR-96-10-A & ICTR 96-17-A, Judgment, ¶¶ 467-484 (Dec. 13, 2004) [reproduced in accompanying notebook at tab 64].

⁸⁷ *Id.* at 311.

⁸⁸ Statute of the Special Court for Sierra Leone, art. 6(1), S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000) [hereinafter SCSL Statute] [reproduced in accompanying notebook at tab 14].

⁸⁹ WILLIAM A. SCHABAS, *supra* note 3, at 309 [reproduced in accompanying notebook at tab 64].

⁹⁰ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 220 [reproduced in accompanying notebook at tab 35].

⁹¹ WILLIAM A. SCHABAS, *supra* note 3, at 309 [reproduced in accompanying notebook at tab 64], *citing* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 102-112, 131-146 (2005) [hereinafter Allison Marston Danner & Jenny S. Martinez] [reproduced in accompanying notebook at tab 41].

⁹² Rome Statute, *supra* note 7, at art. 25(3)(c) [reproduced in accompanying notebook at tab 11].

⁹³ Allison Marston Danner, *Joint Criminal Enterprise*, *supra* note 71, at 189, *citing* U.S. v. Ibrahim Ahmed Mahmoud al Qosi, Charge: Conspiracy ¶ 18 (Feb. 24, 2004), *available at* <http://www.defenselink.mil/news/Feb2004/d20040224A1Qosi.pdf> & U.S. v. Ali Hamza Ahmad Sulayman al Bahlul, Charge: Conspiracy ¶ 14 (Feb. 24, 2004), *available at* <http://www.defenselink.mil/news/Feb2004/d20040224A1Bahlul.pdf> [reproduced in accompanying notebook at tab 40].

2. Applying Joint Criminal Enterprise Liability to Nuon Chea

a. Category 1

At a conference in the Western Zone in 1977, Nuon Chea noted that local traitors and dangerous party members had begun to be systematically wiped out. He iterated the need to conduct reviews of still more party members and officials. Following this conference, a security chief and military commander were taken to Tuol Sleng.⁹⁴ At a meeting of the Standing Committee, at which Nuon Chea was present, it was decided to “continue the purge, pursue the enemy and carry out normal tasks.”⁹⁵ As the Standing Committee was considered a “super-secret committee,” Nuon Chea’s membership in and attendance at these meetings is significant in implicating him as a co-author of execution policies.⁹⁶ These statements and Nuon Chea’s presence at meetings clearly show his substantial and voluntary contribution to Khmer Rouge policy formulation, and hence satisfy the element that participation in a JCE requires some level of participation in the common plan or design.⁹⁷ Further, they demonstrate his intent that policies concerning the purges continue.

As in *Tadic*, where the JCE 1 shared intent was “to rid the Prijedor region of the non-Serb population, by committing inhumane acts,”⁹⁸ here, it is evident that the CPK leadership wanted to rid Cambodia of all those determined to be against, or possibly against, CPK policies. Such a

⁹⁴ BEN KIERNAN, *THE POL POT REGIME*, *supra* note 10, at 347 [reproduced in accompanying notebook at tab 58].

⁹⁵ *Id.* at 351.

⁹⁶ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 62 [reproduced in accompanying notebook at tab 85].

⁹⁷ *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶¶ 308, 311 (Aug. 2, 2001) [reproduced in accompanying notebook at tab 25].

⁹⁸ *Tadic*, Case No. IT-94-1-A, *supra* note 62, at ¶ 231 [reproduced in accompanying notebook at tab 35], *as cited by* WILLIAM A. SCHABAS, *supra* note 3, at 312 [reproduced in accompanying notebook at tab 64].

stance also specifically targeted intellectuals, Khmer nationals,⁹⁹ and various minority groups, including the Cham, the Vietnamese, the Chinese,¹⁰⁰ and the Buddhist monks.¹⁰¹ Additionally, as in *Milosevic*, where it was observed that Milosevic’s intention was to remove certain populations from Croatian land,¹⁰² here, Nuon Chea’s intention, like the rest of the Khmer Rouge leadership, was to remove and/or “smash”¹⁰³ certain designated groups of people, including the Vietnamese, Chinese, Chams,¹⁰⁴ Buddhist monks,¹⁰⁵ and certain segments of the Khmer population that opposed the Khmer Rouge leadership or were intellectuals.¹⁰⁶

As a co-perpetrator, Nuon Chea is responsible not only for orders that he issued that violated IHL and international human rights law (IHRL), but also for what occurred pursuant to the policies he helped to formulate along with Pol Pot and Son Sen, other top Khmer Rouge leaders.¹⁰⁷ As there is much evidence against him as a co-author of and participator in implementing these policies, including Duch’s specific claim that Nuon Chea played a

⁹⁹ STEVE HEDER, *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 384 (Jaya Ramji & Beth Van Schaack, eds., The Edwin Mellen Press 2005) [hereinafter STEVE HEDER, *Reassessing the Role of Senior Leaders*] [reproduced in accompanying notebook at tab 63].

¹⁰⁰ See generally Liai Duong, *supra* note 5 [reproduced in accompanying notebook at tab 75].

¹⁰¹ DAVID R. HAWK, *supra* note 22, at 130 [reproduced in accompanying notebook at tab 59].

¹⁰² Prosecutor v. Milosevic, Case No. IT-02-54-T, First Amended Indictment, ¶ 6 (Oct. 23, 2002) [reproduced in accompanying notebook at tab 32].

¹⁰³ “Smash” was a term used by the CPK leadership, that when applied to humans, meant to kill. One example of its use is a prisoner list from Tuol Sleng that named “smashed” victims. JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 242 [reproduced in accompanying notebook at tab 61].

¹⁰⁴ See generally Liai Duong, *supra* note 5 [reproduced in accompanying notebook at tab 75].

¹⁰⁵ DAVID R. HAWK, *supra* note 22, at 130 [reproduced in accompanying notebook at tab 59].

¹⁰⁶ STEVE HEDER, *Reassessing the Role of Senior Leaders*, *supra* note 99, at 384 [reproduced in accompanying notebook at tab 63].

¹⁰⁷ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 62 [reproduced in accompanying notebook at tab 85].

significant role in planning the 1978 Eastern Zone purge,¹⁰⁸ a formal common criminal plan is expressly evident,¹⁰⁹ and an analysis of whether a criminal plan can be inferred from the facts need not be conducted.¹¹⁰

Nuon Chea actually directed the search for enemies within the party,¹¹¹ demonstrating his substantial contribution to the Khmer Rouge's common plan to rid the country of all those opposing them and their policies. Several confessions incriminate Nuon Chea in directing the party purges; confessions were addressed to him and had notes from the interrogators asking him for further direction as to what to do with their prisoners.¹¹² However, what most clearly shows Nuon Chea's criminal intent in the JCE is his demand for proof that the executions were carried out. Duch stated that Nuon Chea ordered him to bring to him photographs of those he had ordered executed so that he could confirm that they were indeed dead.¹¹³ This evidence is all demonstrative of Nuon Chea's criminal intent shared with those carrying out the arrest and execution policies and his contribution to implementing those policies, thus satisfying the elements of JCE 1.

b. Category 2

During the period of 1975-1979, Cambodia was "one giant concentration camp."¹¹⁴ The United Nations Human Rights Commission's Subcommission on the Prevention of

¹⁰⁸ *Id.*

¹⁰⁹ Furundzija, Case No. IT-95-17/1-T, *supra* note 2, at ¶¶ 119-120 [reproduced in accompanying notebook at tab 23].

¹¹⁰ Vasiljevic, Case No. IT-98-32-T, *supra* note 64, at ¶¶ 63-69 [reproduced in accompanying notebook at tab 36].

¹¹¹ Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 62 [reproduced in accompanying notebook at tab 85].

¹¹² *Id.* at 63.

¹¹³ *Id.*

¹¹⁴ 'Killing Fields' Executioner Keen to Testify, *supra* note 17 [reproduced in accompanying notebook at tab 74].

Discrimination and the Protection of Minorities reported that the Khmer Rouge launched a systematic program aimed at physically eliminating anyone who either belonged to the previous Lon Nol regime or was of a higher social or educational class.¹¹⁵ The Subcommittee referred to this as “a systematic campaign of extermination.”¹¹⁶ Further, the Khmer Rouge’s concerted goal was to end all religious, family, economic, and social values and reeducate the population, particularly those who were forcibly deported from the cities and resettled in the rural countryside.¹¹⁷

What followed next for the Cambodian people was a horrifying experience of forced labor, where they were executed for the slightest complaints, denied adequate rest, food, and medical care, and lived in a constant state of fear – fear of becoming one of the “numerous persons... subjected to summary execution through cruel and barbaric methods including disembowelment, pole axing, and beating to death, [or becoming one of the] prisoners...kept bound and chained for long periods or tortured.”¹¹⁸ One surviving victim’s horrific story entails being tortured at Tuol Sleng by being repeatedly subjected to electric shock and having his toenails ripped out.¹¹⁹

As in *Kvocka*, where JCE 2 was found in a shared “intent to persecute and subjugate non-Serb detainees,”¹²⁰ here, Nuon Chea clearly had a shared intent with other CPK leaders and those

¹¹⁵ DAVID R. HAWK, *supra* note 22, at 121 [reproduced in accompanying notebook at tab 59].

¹¹⁶ *Id.* at 122.

¹¹⁷ *Id.* at 121.

¹¹⁸ *Id.* at 122-123.

¹¹⁹ Chum Mai suffered at S-21 after his wife was killed at gunpoint and his children were taken away. Phil Rees, *Brother Number Two*, *supra* note 1 [reproduced in accompanying notebook at tab 77].

¹²⁰ *Kvocka et al.* Case No. IT-98-30/1-T, *supra* note 3, ¶ 320 [reproduced in accompanying notebook at tab 29], *as cited by* WILLIAM A. SCHABAS, *supra* note 3, at 312 [reproduced in accompanying notebook at tab 64].

carrying out his orders, including Duch, to perpetrate a system of interrogation, torture, and inevitable execution, due in part to cruel, ill-thought-out policies, and an overwhelming sense of paranoia in the final years of the Khmer Rouge period.¹²¹ Duch has made statements that it was leaders Pol Pot, Nuon Chea, and Ta Mok who devised the policies of “organized killings.”¹²² Such policies can only be termed systematic. Further, Nuon Chea was at the forefront in implementing these policies. In October 1975, Nuon Chea was given general responsibility for the CPK work, which made him “the principal man for the killings.”¹²³ Duch has stated that Pol Pot left direction of Tuol Sleng to Nuon Chea, who then turned it into a military stockade where the Military and Central Committees’ purge policies were carried out.¹²⁴ Therefore, “the entire operation at S-21 can be considered systematic and large-scale in nature.”¹²⁵

As intent of the accused can be inferred from the accused’s knowledge of the continued perpetration of ill-treatment at the camp, as well as the accused’s participation in the continuance of the camp, and most importantly, the accused’s position of authority,¹²⁶ it is evident that Nuon Chea had the intent to continue a JCE 2. His various leadership roles, his issuance of orders to his subordinates at Tuol Sleng, and his knowledge of the nature of the conditions at Tuol Sleng and other prisons all culminate in proving his intent to continue a systemic form of ill-treatment.

¹²¹ *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

¹²² JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 255 [reproduced in accompanying notebook at tab 61].

¹²³ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 55 [reproduced in accompanying notebook at tab 85].

¹²⁴ *Id.*

¹²⁵ Mann Bunyanunda, *supra* note 17, at 1594 [reproduced in accompanying notebook at tab 52].

¹²⁶ Limaj et al. Case No. IT-03-66-T, *supra* note 4, at ¶ 511 [reproduced in accompanying notebook at tab 31].

c. Category 3

The accused in *Tadic* was held accountable pursuant to JCE 3.¹²⁷ There, the Appeals Chamber found that the group's intention was to forcibly remove non-Serbs from the Prijedor region, and that the accused knew that killings frequently occurred during the forcible removal, even though it was not part of the common plan. Nevertheless, he was found liable for participating in "purging the areas in question of their non-Serb population by carrying out 'inhuman acts' pursuant to the common criminal purpose."¹²⁸ Other examples of JCE 3 include the forced removal of an ethnic group from an area where some were killed, because it was foreseeable that forcible removal would result in at least some deaths,¹²⁹ and forcing civilians from their homes by burning the homes, as it was foreseeable that some of the civilians would perish as a result of this forcible eviction.¹³⁰

This is similar to the forced evacuations of the cities committed on the orders of the Khmer Rouge leadership, including Nuon Chea, which resulted in the removal of people from the cities to the rural countryside.¹³¹ Also similar is the forced removal and eventual extermination of the Vietnamese population.¹³² Additionally, the systematic attempt to rid

¹²⁷ Elies van Sliedregt, *Criminal Responsibility in International Law: Liability Shaped by Policy Goals and Moral Outrage*, 14(1) EUR. J. CRIME, CRIM. L. & CRIM. JUST. 81, 90 (2006) [reproduced in accompanying notebook at tab 46].

¹²⁸ Shane Darcy, *An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia*, 20 AM. U. INT'L L. REV. 153, 168 (2004-2005) [reproduced in accompanying notebook at tab 55].

¹²⁹ GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 399 (Human Rights Watch 2006) [hereinafter Human Rights Watch] [reproduced in accompanying notebook at tab 71]; Shane Darcy, *supra* note 128, at 163 [reproduced in accompanying notebook at tab 55].

¹³⁰ Human Rights Watch, *supra* note 129, at 399 [reproduced in accompanying notebook at tab 71].

¹³¹ DAVID R. HAWK, *supra* note 22, at 121 [reproduced in accompanying notebook at tab 59].

¹³² Liai Duong, *supra* note 5, at 8-9 [reproduced in accompanying notebook at tab 75].

Cambodia of anyone associated with the former Lon Nol regime is also analogous.¹³³

The *mens rea* that must be shown under JCE 3 is that the accused had the intent to participate in the common criminal design, and the accused must knowingly take the risk that crimes not originally a part of the common criminal design, but which were a natural and foreseeable consequence of the plan, might occur as a result of the implementation of the plan.¹³⁴ By participating in the Khmer Rouge policies, by means of co-authoring, implementing, and giving orders based thereon, Nuon Chea showed intent to participate in the common criminal plan. By doing so, he also knowingly took the risk that his subordinates might carry out crimes not enumerated in the common plan, such as discretionary killing deliberately left up to lower-ranking cadres and not specifically ordered by the leadership.¹³⁵

All participants in the common plan will be held criminally responsible where the natural and foreseeable consequence that occurs was predictable, and “the accused was either reckless or indifferent to that risk.”¹³⁶ Where the Khmer Rouge leadership’s orders were vague or provided a wide degree of discretion to those lower-ranking leaders or cadres that carried out orders pursuant to proffered guidelines,¹³⁷ criminal responsibility may nonetheless be imputed to the leadership, including Nuon Chea, because discretionary and excessive killing by those lower-ranking was a predictable consequence. Also, the leadership may not escape liability by providing vague orders, because issuing such vague guidelines shows that the leadership was

¹³³ DAVID R. HAWK, *supra* note 22, at 122 [reproduced in accompanying notebook at tab 59].

¹³⁴ Kvocka et al., Case No. IT-98-30/1-A, *supra* note 6, at ¶ 83 [reproduced in accompanying notebook at tab 30].

¹³⁵ STEVE HEDER, *Reassessing the Role of Senior Leaders*, *supra* note 99, at 382 [reproduced in accompanying notebook at tab 63].

¹³⁶ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 204 [reproduced in accompanying notebook at tab 35].

¹³⁷ STEVE HEDER, *Reassessing the Role of Senior Leaders*, *supra* note 99, at 382 [reproduced in accompanying notebook at tab 63].

both reckless and indifferent to how their promulgated policies were actually carried out. Therefore, Nuon Chea and the rest of the leadership took the risk that their subordinates would carry the Khmer Rouge policies further than was perhaps intended.

D. Command Responsibility

The doctrine of CR is predicated on the duty of commanders to control their subordinates.¹³⁸ Commanders and civilian superiors alike may be held individually criminally responsible for their subordinates' violations of IHL either committed pursuant to their orders or not, in both international and non-international armed conflicts.¹³⁹ The substantive elements of CR include the existence of a superior-subordinate relationship, knowledge that crimes had been or were about to be committed (the general standard being knew or had reason to know), and failure to prevent the commission of the crimes(s) or punish those subordinates that are responsible.¹⁴⁰ Causality need not be established, as it is not an element of the doctrine.¹⁴¹

CR is a form of liability based on the commander's power to control his subordinates. He/she has a duty to prevent and punish crimes by his/her subordinates.¹⁴² In order to effect his/her duty, a superior-subordinate relationship and the commander's effective control over his/her subordinates must be shown. This includes the commander's material ability to prevent subordinates from committing IHL violations, and the material ability to punish the perpetrators

¹³⁸ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 518 [reproduced in accompanying notebook at tab 57].

¹³⁹ *Id.*, *citing* CUSTOMARY INTERNATIONAL LAW 558 (ICRC 2005).

¹⁴⁰ Blaskic, Case No. IT-95-14-T, *supra* note 15, at ¶ 294 [reproduced in accompanying notebook at tab 19].

¹⁴¹ WILLIAM A. SCHABAS, *supra* note 3, at 318, *citing* Prosecutor v. Naletilic et al., Case No. IT-98-34-T, Judgment, ¶ 72 (Mar. 31, 2003) [reproduced in accompanying notebook at tab 64].

¹⁴² Mucic et al., Case No. IT-96-21-A, *supra* note 41, at ¶¶ 197, 239 [reproduced in accompanying notebook at tab 33].

thereof.¹⁴³ Showing a commander's effective control of his/her subordinates is more a matter of evidence than a matter of substantive law.¹⁴⁴

In addition, a superior's position *per se* is of particular importance in determining relevant knowledge of subordinates' crimes.¹⁴⁵ In order to determine a commander's relevant knowledge in regard to the acts of his subordinates, a tribunal may take the following factors into account:

the number, type, and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved and the location of the commander at that time.¹⁴⁶

The geographical location of the subordinates, and whether they are direct or indirect subordinates, does not limit the application of CR. A commander can be held liable even for those subordinates that are just temporarily under his/her control.¹⁴⁷

The issues to be determined in applying CR include "whether there is a duty of care or duty to control, whether the duty was deliberately failed or culpably or willfully disregarded in spite of knowledge, and whether serious consequences have resulted, or remained unpunished,

¹⁴³ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 519 [reproduced in accompanying notebook at tab 57], *citing* Mucic et al., Case No. IT-96-21-A, *supra* note 41, at ¶ 197 [reproduced in accompanying notebook at tab 33].

¹⁴⁴ *Id.* at 522.

¹⁴⁵ Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 78 (June 25, 1999) [reproduced in accompanying notebook at tab 18].

¹⁴⁶ WILLIAM A. SCHABAS, *supra* note 3, at 318, *citing* Prosecutor v. Naletilic et al., Case No. IT-98-34-T, Judgment, ¶ 72 (Mar. 31, 2003) [reproduced in accompanying notebook at tab 64].

¹⁴⁷ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 521 [reproduced in accompanying notebook at tab 57].

because of the breach.”¹⁴⁸ Actual knowledge of a commander can be established not only by direct evidence, but by circumstantial evidence as well.¹⁴⁹ Whether a commander “had reason to know”¹⁵⁰ of a subordinate’s IHL violation(s) is interpreted as “had information enabling them to conclude,” as set forth in Additional Protocol I.¹⁵¹

What is demonstrative of CR as a commander’s form of participation in a subordinate’s wrongdoing is that in most of the cases where the accused has been convicted pursuant to the CR doctrine, the accused was also convicted based on being a principal perpetrator or accomplice.¹⁵² This is because in most of these cases, the commander actually knew of his subordinates’ acts, and the prosecutor did not need to prove that the commander had reason to know.¹⁵³ By virtue of holding a command position, a commander assumes ultimate responsibility for what his/her subordinates do, because only he/she is in the best position to educate and protect against violations of IHL.¹⁵⁴ The only thing standing in the way of chaos and destruction and the commission of gross atrocities by uneducated, uncontrolled subordinates is a commander. Society thus places its utmost faith and trust in him/her and is entitled to expect protection in

¹⁴⁸ Bing Bing Jia, *The Doctrine of Command Responsibility Revisited*, 3 CHINESE J. INT’L L. 1,12 (2004) [reproduced in accompanying notebook at tab 43].

¹⁴⁹ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 521 [reproduced in accompanying notebook at tab 57].

¹⁵⁰ ICTY Statute, *supra* note 83, at art. 7(3) [reproduced in accompanying notebook at tab 12], ICTR Statute, *supra* note 85, at art. 6(3) [reproduced in accompanying notebook at tab 13].

¹⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims Non-International Armed Conflicts (Protocol I), art. 86(1), June 8, 1977 [hereinafter Protocol I] [reproduced in accompanying notebook at tab 10].

¹⁵² WILLIAM A. SCHABAS, *supra* note 3, at 316 n.134 [reproduced in accompanying notebook at tab 64].

¹⁵³ *Id.* at 316.

¹⁵⁴ Michael L. Smidt, Yamashita, Medina, and *Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 165 (2000) [reproduced in accompanying notebook at tab 51].

return.¹⁵⁵

1. Modern Historical Development

CR has been recognized throughout the 20th century,¹⁵⁶ and the customary international law and jurisprudence that developed throughout this time period was first formally codified in Additional Protocol I to the Geneva Conventions.¹⁵⁷ In *Hadzihasanovic*, the Appeals Chamber unanimously found that CR applies in non-international armed conflicts.¹⁵⁸ In so finding, the Chamber relied on customary international law as codified by the ICTY Statute, namely, that

¹⁵⁵ *Id.* at 167.

¹⁵⁶ A full analysis of the complete development of the doctrine of command responsibility is a memorandum in and of itself, and thus outside the scope of this memorandum. In essence, its modern origins are in the aftermath of World War I, as was demonstrated by the Leipzig trials at the German Supreme Court. Following World War II, the most well known cases from the Nuremberg Tribunal trying Nazi leaders for the Holocaust under a command responsibility theory were *United States v. Wilhelm von Leeb et al.*, [High Command Case] vol. XI, TWC, 462, 513-514 [hereinafter High Command Case] [reproduced in accompanying notebook at tab 38] and *United States v. Wilhelm List et al.*, [Hostage Case] vol. XI, TWC, 1230, 1286, 1288 [reproduced in accompanying notebook at tab 37]. Command responsibility was recognized in the Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement art. 7, Aug. 8, 1945, 82 U.N.T.S. 279 [reproduced in accompanying notebook at tab 2], the Allied Control Council Law No. 10 art. II(4)(a), Dec. 20, 1945, Control Council for Germany, Official Gazette 50 (Jan. 31, 1946) [reproduced in accompanying notebook at tab 1] and the Tokyo Charter for the International Military Tribunal for the Far East as amended by General Orders No. 20 art. 6, Apr. 26, 1946, T.I.A.S. No. 1589 [reproduced in accompanying notebook at tab 15]. The Tokyo Tribunal was established to try those leaders in the Far East for atrocities they and their subordinates committed during World War II. Perhaps the most famous case from this time period is the trial of General Tomoyuki Yamashita, who was in charge of the Imperial Japanese Army in the Philippines when his subordinates committed atrocities against thousands of civilians. He was tried for and convicted under the doctrine of command responsibility under a knew or should have known standard. *See generally In re Yamashita*, 327 U.S. 1 (1946) [reproduced in accompanying notebook at tab 17]. For a good discussion of the development of command responsibility, *see* Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commander's Duty to Punish Known Past Offenses*, 55 Case W. Res. 443 (2004) [reproduced in accompanying notebook at tab 44]; Allison Marston Danner & Jenny S. Martinez, *supra* note 91, at 120-131 [reproduced in accompanying notebook at tab 41]; L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 (1995) [reproduced in accompanying notebook at tab 48]; Bing Bing Jia, *supra* note 148 [reproduced in accompanying notebook at tab 43]; Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93(3) AM. J. INT'L L. 573, 573-595 (1999) [reproduced in accompanying notebook at tab 47]; Smidt, *supra* note 154 [reproduced in accompanying notebook at tab 51]; Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. 1 (2001) [reproduced in accompanying notebook at tab 53].

¹⁵⁷ Protocol I, *supra* note 151, at arts. 86-87 [reproduced in accompanying notebook at tab 10].

¹⁵⁸ Christopher Greenwood, *Command Responsibility and the Hadzihasanovic Decision*, 2 J. INT'L CRIM. JUST. 598, 600 (2004) *citing* Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003) [reproduced in accompanying notebook at tab 45].

state practice and *opinio juris* endorsed the view that CR applies regardless of the nature of the conflict.¹⁵⁹

There are two different types of CR.¹⁶⁰ Indirect CR has been codified in the ICTY, the ICTR, and the SCSL Statutes as holding a commander liable for acts of his/her subordinates where that commander knew or had reason to know that they had committed or were about to commit acts contrary to IHL and failed to prevent their commission or punish the perpetrators thereof.¹⁶¹ Indirect CR is characterized by omission(s) of the commander, by means of not taking the necessary steps to prevent or punish his/her subordinates' unlawful acts.¹⁶²

As the Rwandan conflict was of an internal nature, it presents a good basis for prosecuting the atrocities that occurred in Cambodia. ICTR case law demonstrates that IHL applies regardless of whether a conflict is international or non-international in character. Further, the ICTY has expressly stated that CR specifically applies regardless of whether it is an international or internal armed conflict in *Limaj*.¹⁶³

Direct CR is codified in article 7(1) and 6(1) of the ICTY and ICTR Statutes, respectively. The doctrine fits into the same category as JCE because of the commander's direct participation in IHL violations by means of giving illegal orders, or helping to plan and instigate the crimes of his/her subordinates.¹⁶⁴ Essentially, direct CR occurs where the superior commits a

¹⁵⁹ *Id. citing* Hadzihasanovic, Case No. IT-01-47-AR72, at ¶ 13.

¹⁶⁰ YUSUF AKSAR, *supra* note 15, at 99 [reproduced in accompanying notebook at tab 65].

¹⁶¹ ICTY Statute, *supra* note 83, at art. 7(3) [reproduced in accompanying notebook at tab 12]; ICTR Statute, *supra* note 85, at art. 6(3) [reproduced in accompanying notebook at tab 13]; SCSL Statute, *supra* note 88, at art. 6(3) [reproduced in accompanying notebook at tab 14].

¹⁶² YUSUF AKSAR, *supra* note 15, at 99 [reproduced in accompanying notebook at tab 65].

¹⁶³ Limaj et al. Case No. IT-03-66-T, *supra* note 4, ¶ 519 [reproduced in accompanying notebook at tab 31].

¹⁶⁴ Prosecutor v. Kordic et al., Case No. IT-95-14/2-T, Judgment ¶ 371 (Feb. 26, 2001) [reproduced in accompanying notebook at tab 26].

positive act.¹⁶⁵ Where direct CR is at issue, however, the prosecutor will often treat the case as one of complicity or co-perpetration.¹⁶⁶

The most recent codification of CR, which further demonstrates its status as part of customary international law,¹⁶⁷ is article 28 of the Rome Statute, which provides that:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁶⁸

Thus, by its distinction between (a) military “commander” and (b) “superior”, the Rome Statute lays the most solid distinction between the slightly varied standards of knowledge attributable to a commander based on whether he/she is acting in a military or civilian superior capacity.

Of particular importance to the victims of the Khmer Rouge is proving that genocide was

¹⁶⁵ YUSUF AKSAR, *supra* note 15, at 99 [reproduced in accompanying notebook at tab 65].

¹⁶⁶ WILLIAM A. SCHABAS, *supra* note 3, at 318 [reproduced in accompanying notebook at tab 64].

¹⁶⁷ *Id.*

¹⁶⁸ Rome Statute, *supra* note 7, at art. 28 [reproduced in accompanying notebook at tab 11].

in fact committed. This is because accountability for the crimes that occurred between 1975 and 1979 is a necessity for both the Cambodian people and the international community. By addressing the atrocities, the tribunal will ensure that victims' wounds are healed, that respect for human rights is fully established as an international norm, and that the Khmer Rouge is discredited, as well as other groups/institutions like it.¹⁶⁹ Accountability based on genocide will help to deter others and thus prevent future genocides.¹⁷⁰

Evidence demonstrating the likelihood of genocide includes more than 400 bone-covered killing fields as well as more than 20,000 mass graves around the country.¹⁷¹ Proving genocide is a difficult task, however, given the strictures of the Convention on the Prevention and Punishment of the Crime of Genocide. It requires that the perpetrator(s) have the specific intent to destroy in whole or in part the members of a certain protected group or groups.¹⁷² Whether Nuon Chea had that specific intent will be discussed below.¹⁷³ But, it is important to note that the jurisprudence of the ICTY and ICTR has regarded CR to extend to the crime of genocide.¹⁷⁴ Where the accused is being tried under the doctrine of CR, "the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) of the ICTY Statute is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had

¹⁶⁹ Jason S. Abrams & Steven R. Ratner, *Striving for Justice: Accountability and the Crimes of the Khmer Rouge*, 276 (United States Department of State under the Cambodian Genocide Justice Act, 1995) [reproduced in accompanying notebook at tab 72].

¹⁷⁰ *Id.*

¹⁷¹ Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

¹⁷² Genocide Convention, *supra* note 27, at art. II, [reproduced in accompanying notebook at tab 4].

¹⁷³ At note 196 and accompanying text.

¹⁷⁴ WILLIAM A. SCHABAS, *supra* note 3, at 320 [reproduced in accompanying notebook at tab 64].

committed genocide and (2) that the subordinates possessed the requisite specific intent.”¹⁷⁵

The charge of CR was also laid out in the accusation document against Saddam Hussein, which relied on the Iraqi High Tribunal Law number 10 of 2005. Saddam would not be relieved of individual criminal responsibility for acts committed by his subordinates if he knew or had reason to know that such IHL violations were being carried out or were about to be carried out, and he failed to prevent or punish them accordingly.¹⁷⁶

2. Applying Command Responsibility to Nuon Chea

The first step in proving Nuon Chea’s guilt under CR for the atrocities that occurred during the Pol Pot regime in Cambodia is to show that there was a superior-subordinate relationship, and that he had either *de jure* or *de facto* control over his subordinates.¹⁷⁷ In order to determine this, customary international law indicates that besides looking at an accused’s *de jure* control, one must assess “his ability, as demonstrated by his duties and competence, to exercise control.”¹⁷⁸ This is not a difficult evidentiary task, given the mountains of information demonstrating that Nuon Chea was clearly in *de jure* command, as well as having *de facto* control over his subordinates.¹⁷⁹ His position as Deputy Secretary of the Central Committee, his membership in the Standing Committee, and his membership in the Military Committee demonstrate Nuon Chea’s significant *de jure* authority. The Central Committee and Standing

¹⁷⁵ Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 721 (Sept. 1, 2004) [reproduced in accompanying notebook at 22], as cited in WILLIAM A. SCHABAS, *supra* note 3, at 321 [reproduced in accompanying notebook at tab 64].

¹⁷⁶ MICHAEL P. SCHARF & GREGORY S. MCNEAL, SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 4 (Carolina Academic Press 2006) [reproduced in accompanying notebook at tab 62].

¹⁷⁷ WILLIAM A. SCHABAS, *supra* note 3, at 321 [reproduced in accompanying notebook at tab 64].

¹⁷⁸ Aleksovski, Case No. IT-95-14/1-T, *supra* note 145, at ¶ 76 [reproduced in accompanying notebook at tab 18].

¹⁷⁹ See JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 221-306 [reproduced in accompanying notebook at tab 61]; Stephen Heder & Brian D. Tittmore, *supra* note 2, at 52 [reproduced in accompanying notebook at tab 85].

Committee were the bodies most responsible for formulating CPK policy.¹⁸⁰ Specifically, *de jure* authority rested with the Party Secretary (Pol Pot) and the Deputy Secretary (Nuon Chea) jointly, and they together issued party directives and presided over meetings of the Central Committee. Both Duch and Ieng Sary, who also played significant roles during the Khmer Rouge regime, have substantiated Pol Pot and Nuon Chea's roles as the leading officials of the entire regime.¹⁸¹

a. Military vs. Civilian Command Responsibility

Encompassed within the doctrine of CR is the idea that liability extends to those superiors that are not part of a military chain of command. While the doctrine formerly extended only to military commanders, it is now apparent that civilians are covered by the doctrine.¹⁸² Political and bureaucratic superiors may be held accountable under the doctrine.¹⁸³ The International Law Commission stated that a civilian is considered a superior if that civilian exercises control over subordinates similar to a military commander.¹⁸⁴ Further, if a civilian has *de jure* or *de facto* control over subordinates, in that he/she has the ability to issue orders and punish violations, then a civilian can be characterized as a superior under article 7(3) of the ICTY Statute¹⁸⁵

According to article 28 of the Rome Statute, there is a distinction between the *mens rea* requirement for a military commander and the *mens rea* requirement for a civilian superior.

Article 28(a)(i) provides “That military commander or person either knew or, owing to the

¹⁸⁰ Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 53 [reproduced in accompanying notebook at tab 85].

¹⁸¹ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 252 [reproduced in accompanying notebook at tab 61].

¹⁸² Aleksovski, Case No. IT-95-14/1-T, *supra* note 145, at ¶ 78 [reproduced in accompanying notebook at tab 18].

¹⁸³ YUSUF AKSAR, *supra* note 15, at 99 [reproduced in accompanying notebook at tab 65].

¹⁸⁴ Aleksovski, Case No. IT-95-14/1-T, *supra* note 145, at ¶ 78, *citing* ILC Draft Articles, p. 37 [reproduced in accompanying notebook at tab 18].

¹⁸⁵ *Id.* at ¶ 78.

circumstances at the time, should have known that the forces were committing or about to commit such crimes...” whereas under article 28(b)(i) a civilian superior “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” While there is as of yet no case law from the ICC interpreting this provision, using canons of statutory construction, its plain meaning is evident. A military commander is held to a higher standard than his/her civilian counterpart. It is essentially the difference between criminal negligence and willful blindness, respectively.¹⁸⁶

Based on the evidence gathered as to Nuon Chea’s position within the Khmer Rouge hierarchy, it is clear that he may be tried under a civilian superior mode of responsibility, as he was Deputy Secretary of the CPK¹⁸⁷ and President of the National Assembly. As president of the National Assembly, Nuon Chea was in charge of a vast number of civilian CPK officials.¹⁸⁸ He may also be tried under a military commander form of liability, given that he was Deputy of the military committee of the Standing Committee, along with Ta Mok,¹⁸⁹ was in charge of security, and issued direct orders to Duch, who was in charge of the interrogations, tortures, and killings at Tuol Sleng.¹⁹⁰ As a member of the military committee, Nuon Chea had daily control over the Khmer Rouge armed forces.¹⁹¹ Therefore, Nuon Chea should be charged under both military and civilian CR.

¹⁸⁶ See YUSUF AKSAR, *supra* note 15, at 104 [reproduced in accompanying notebook at tab 65].

¹⁸⁷ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 53 [reproduced in accompanying notebook at tab 85].

¹⁸⁸ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 254 [reproduced in accompanying notebook at tab 61].

¹⁸⁹ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 65 [reproduced in accompanying notebook at tab 85]; JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 254 [reproduced in accompanying notebook at tab 61].

¹⁹⁰ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 64 [reproduced in accompanying notebook at tab 85].

¹⁹¹ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 253 [reproduced in accompanying notebook at tab 61].

b. Direct Command Responsibility

In an interview with Professor/Historian Ben Kiernan, mid-level CPK secretary Chea Sim intimated that Nuon Chea gave explicit orders to kill in a speech Chea Sim recalled:

in order to achieve the construction of socialism progressively and advance all together in the set period, we must take care to carefully screen internal agents... in the party, in the armed forces, in the various organizations and ministries, in the government, and among the masses of the people. We have to carefully screen them, Nuon Chea said. He mentioned ‘the line of carefully screening internal agents to improve and purify, in order to implement the line of building socialism...’ This was a very important order to kill. Their careful screening was to take all measures so that people were pure... The line laid down must be followed at all costs...If people could not do it, they would be taken away and killed... The words ‘carefully screen’ were the killing principle.¹⁹²

In another interview, Heng Samrin, who studied military affairs under Son Sen, noted that between Nuon Chea and Pol Pot, Nuon Chea did most of the talking. It was Nuon Chea who explained the Organization’s party policies and how they were to be carried out, although Nuon Chea and Pol Pot’s views were the same, and the two were always together.¹⁹³ But Chea Sim noted some key differences between Nuon Chea and Pol Pot: “Nuon Chea’s behavior was somewhat coarse, different from Pol Pot’s.... People always say that Nuon Chea is somewhat cruel. His behavior is stronger.”¹⁹⁴ Heng Samrin added that Nuon Chea once said that “We cannot allow any Vietnamese minority [in Cambodia].”¹⁹⁵

At a stadium gathering for a political course in Phnom Penh at the end of 1975, Nuon Chea declared that two universities now existed in Cambodia as a result of their policies, one teaching productive labor, and another promoting “the fight against the Vietnamese enemy.”¹⁹⁶

¹⁹² BEN KIERNAN, *THE POL POT REGIME*, *supra* note 10, at 56-57 [reproduced in accompanying notebook at tab 58].

¹⁹³ *Id.* 57-58.

¹⁹⁴ *Id.* at 58.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 101.

It is clear from these accounts that there was indeed a specific genocidal intent on Nuon Chea's part to rid Cambodia of the Vietnamese, specifically because they were Vietnamese.

Duch, who has stated that Nuon Chea and Pol Pot coerced him into becoming chief of Tuol Sleng, also stated that Nuon Chea, among other leaders, "cheated" him into killing.¹⁹⁷ In a key interview, Duch confessed that in:

'the last days before the Vietnamese came I personally killed the remaining prisoners [at Tuol Sleng] ... I was called by Nuon Chea to his office and he ordered me to kill all the remaining prisoners. I asked Nuon Chea to allow me to keep one Vietnamese prisoner alive to use for propaganda on the radio and he replied, "Kill them all. We can always get more and more."' ¹⁹⁸

That Nuon Chea ordered Duch to commit various atrocities, including killing 14,000 people at Tuol Sleng, has been corroborated.¹⁹⁹ Additionally, Duch kept handwritten logs of what occurred at Tuol Sleng during his time there.²⁰⁰ He asserts that, pursuant to Nuon Chea's orders, Westerners were held at Tuol Sleng and tortured using electric shocks. After their deaths, Nuon Chea wanted their bodies burned so that no bones would be left.²⁰¹

What all of this documentary evidence indicates is that there was a superior-subordinate relationship between Nuon Chea and lower leaders/cadres, including Duch. Effective control is demonstrated by evidence showing that Nuon Chea's affirmative orders to subordinates were carried out. His having given orders to subordinates who were under his effective control to arrest and execute certain people demonstrates Nuon Chea's knowledge that IHL violations were

¹⁹⁷ *'Killing Fields' Executioner Keen to Testify*, *supra* note 17 [reproduced in accompanying notebook at tab 74].

¹⁹⁸ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 258 [reproduced in accompanying notebook at tab 61].

¹⁹⁹ *Nuon Chea Secretly Orders Duch*, *supra* note 10 [reproduced in accompanying notebook at tab 76]; Stephen Heder & Brian D. Tittmore, *supra* note 2, at 52 [reproduced in accompanying notebook at tab 85]; *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

²⁰⁰ Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

²⁰¹ *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

being carried out. Giving orders amounts to a positive act.²⁰² Further, having ordered these acts, Nuon Chea both failed to prevent and failed to punish the perpetrators thereof.

Duch has stated that Nuon Chea “ordered 300 [Khmer Rouge] soldiers arrested. He called to meet me and said, ‘Don’t bother to interrogate them –just kill them.’ And I did.”²⁰³ Nuon Chea’s ability to order and control his subordinates is clearly demonstrated by one Tuol Sleng interrogator’s notebook that details that a prisoner was detained on Nuon Chea’s command. Other documents asking for authorization or for further instructions were addressed to the Standing Committee, which Nuon Chea belonged to,²⁰⁴ which clearly put Nuon Chea on notice of what was being asked for or authorized. As the prosecution need only prove that information was provided to Nuon Chea, and not that he actually was familiar with the information available to him,²⁰⁵ the prosecution can clearly meet the requirement of showing that Nuon Chea either knew of the atrocities that subordinates committed pursuant to his orders or should have known. He committed a positive act²⁰⁶ of giving illegal orders that were carried out by subordinates under his effective command and control.²⁰⁷

Further, as in the German High Command case at Nuremberg, if the prosecutor can show that acts are directly traceable to the highest in command, that commander is liable and criminality attaches to him or her, as opposed to attaching to everyone in the chain of the

²⁰² YUSUF AKSAR, *supra* note 15, at 99 [reproduced in accompanying notebook at tab 65].

²⁰³ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 61-62 [reproduced in accompanying notebook at tab 85]; *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

²⁰⁴ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 65 [reproduced in accompanying notebook at tab 85].

²⁰⁵ *Id.*

²⁰⁶ YUSUF AKSAR, *supra* note 15, at 99 [reproduced in accompanying notebook at tab 65].

²⁰⁷ Kordic et al., Case No. IT-95-14/2-T, *supra* note 164, ¶ 37 [reproduced in accompanying notebook at tab 26].

command.²⁰⁸ Here, there is substantial evidence that can be directly traced back to Nuon Chea as the highest in command. For example, Duch has identified Nuon Chea as one of the main decision-makers in the 1978 purge of the East Zone,²⁰⁹ as well as other purges. Nuon Chea was instrumental for Pol Pot in carrying out CPK work in the form of the many arrests of CPK members in all of the zones. Nuon Chea also directly ordered Duch and Son Sen to carry out executions of certain people, including Party leaders. Some of the orders to kill certain people and groups were given to Duch by Nuon Chea in writing. Duch has made it clear that he was Nuon Chea's "waterboy" in this respect.²¹⁰ Nuon Chea insisted on seeing photographs of the dead bodies of those he ordered killed as well, in order for him to confirm that they were indeed executed pursuant to his orders and to assure compliance with his orders. In one instance, Nuon Chea ordered Duch "to exhume the body of Von Vet [a member of the Standing Committee] from the earth to take a picture of him dead because Nuon Chea wanted proof he was killed."²¹¹ Obviously, Nuon Chea "was the principal man for the killings. Pol Pot was [only] interested in military strategy."²¹²

c. Indirect Command Responsibility

Even if the evidence and testimony should fail to prove Nuon Chea's liability under a JCE theory or Direct CR, the evidence surely does not fail in proving indirect CR. As will be discussed below, the evidence clearly and explicitly establishes Nuon Chea's duty to investigate and prevent future atrocities and punish past atrocities that had occurred throughout the zones,

²⁰⁸ High Command Case, *supra* note 156, at 462, 513-514 [reproduced in accompanying notebook at tab 38].

²⁰⁹ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 53 [reproduced in accompanying notebook at tab 85].

²¹⁰ *Id.* at 54.

²¹¹ *Id.*

²¹² *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

and particularly at prisons like Tuol Sleng.²¹³ As in *Blaskic*, where the commander was found to have reason to know that crimes were about to be or had been committed because of his “particular position of command and the circumstances prevailing at the time,”²¹⁴ Nuon Chea should be held liable for the same reasons. It is evident that Nuon Chea’s leadership positions within the party contributed to his effective control over the lower ranking actual perpetrators of the torture and executions.²¹⁵

On appeal, the Chambers found that the accused had effective control of his subordinates because he had the material ability to report his subordinates’ acts to his superiors, but did not do so, which would have fulfilled his duty to punish the perpetrators.²¹⁶ This duty to punish arises based on article 87(1) and is also inferable from article 86(2) of Additional Protocol I.²¹⁷ Further, the Appeals Chamber rejected the accused’s contention that he was being held to a strict form of CR liability. Rather, the Appeals Chamber pointed out that the Trial Chamber had properly regarded the accused’s *de facto* position as a *per se* indication of the accused’s knowledge that his subordinates were committing crimes.²¹⁸ It was therefore reasonable to infer that the accused knew of the conditions at particular detention centers,²¹⁹ which the Appeals

²¹³ Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 52 [reproduced in accompanying notebook at tab 85].

²¹⁴ *Blaskic*, Case No. IT-95-14-T, *supra* note 15, at ¶ 332 [reproduced in accompanying notebook at tab 19], *as cited in* YUSUF AKSAR, *supra* note 15, at 105 [reproduced in accompanying notebook at tab 65].

²¹⁵ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 254 [reproduced in accompanying notebook at tab 61].

²¹⁶ *Blaskic*, Case No. IT-95-14-A, *supra* note 47, at ¶ 511 [reproduced in accompanying notebook at tab 20].

²¹⁷ *Id.* at ¶ 68-69; Protocol I, *supra* note 151, at arts. 87(1) & 86(2) [reproduced in accompanying notebook at tab 10].

²¹⁸ *Blaskic*, Case No. IT-95-14-A, *supra* note 47, at ¶ 56-57 [reproduced in accompanying notebook at tab 20].

²¹⁹ *Id.* at ¶ 612-614.

Chamber held him liable for under CR.²²⁰ Additionally, the dissent recognized that the person giving orders need not be the sole decision-maker, as it is not an element of CR. He/she may act in concert with others, at different ranks in the chain of command, when exercising *de jure* or *de facto* authority and issuing orders.²²¹

Perhaps the clearest cut illustration of indirect CR is the case of General Strugar, before the ICTY.²²² There, Strugar, the accused, was held responsible for an attack on the Old Town of Dubrovnik, committed by his subordinates, but not pursuant to his orders. Although Strugar's explicit warnings to not attack the Old Town, these orders were ignored and Dubrovnik was indeed attacked. No action was ever taken against those responsible.²²³ What triggered indirect CR under article 7(3) of the ICTY Statute here was that red flags were raised when Strugar learned of a protest by the European Commission Monitoring Mission regarding the attack on the Old Town,²²⁴ which in turn gave rise to Strugar's duty investigate the situation and prevent further illegal action by his subordinates.²²⁵ Strugar's indirect CR liability was further confirmed by his failure to punish his subordinates for such blatant violations of IHL.²²⁶

As in *Strugar*, Nuon Chea was clearly on notice that his subordinates were committing systematic and widespread atrocities throughout the various zones. The chain of command

²²⁰ Human Rights Watch, *supra* note 129, at 2 [reproduced in accompanying notebook at tab 71].

²²¹ Prosecutor v. Blaskic, Case No. IT-95-14-A, Partial Dissenting Opinion of Judge Weinberg de Roca, ¶¶ 40-41 (July 29, 2004) [reproduced in accompanying notebook at tab 21].

²²² WILLIAM A. SCHABAS, *supra* note 3, at 317 [reproduced in accompanying notebook at tab 64].

²²³ Silva Hinek, *The Judgment of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Pavle Strugar*, 19 LEIDEN J. INT'L L. 477, 479 (2006) [reproduced in accompanying notebook at tab 56].

²²⁴ WILLIAM A. SCHABAS, *supra* note 3, at 317 [reproduced in accompanying notebook at tab 64].

²²⁵ Strugar, Case No. IT-01-42-T, *supra* note 45, ¶ 418 [reproduced in accompanying notebook at tab 34].

²²⁶ WILLIAM A. SCHABAS, *supra* note 3, at 317 [reproduced in accompanying notebook at tab 64].

ensured that all relevant information regarding implementation of party policy got to the Party Center. Nuon Chea's name was copied on many of the documents sent to Pol Pot,²²⁷ and there is even evidence that at least one document was handed to him personally.²²⁸ There is conclusive evidence that he should have known of the atrocities being committed in the East Zone and at Tuol Sleng.²²⁹ In his confessions, Duch has implicated Nuon Chea in a great deal of wrongdoing. He states that Nuon Chea personally ordered him to carry out interrogations, torture, and killings,²³⁰ and in some cases demanded proof from Duch that certain people had died, by means of photographs of the dead bodies. In one extraordinary case, Nuon Chea demanded Duch exhume a body, to absolutely ensure that this "no-good element" was indeed dead.²³¹

Thus, the available evidence demonstrates that in many instances, Nuon Chea was not only on notice of his subordinates' illegal activities, but in some cases had actual knowledge, and in fact ordered various atrocities to be carried out.²³² Further, Duch has stated that everyone in the CPK knew that anyone arrested would be and had to be killed. Knowledge of the killings can therefore be imputed to Nuon Chea.²³³ His liability is even more clear cut than General Strugar's, given that Strugar was convicted based on a one-time offense for failing to investigate

²²⁷ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 58 [reproduced in accompanying notebook at tab 85].

²²⁸ *Id.* at 65.

²²⁹ *See generally id.* at 51-65.

²³⁰ *Nuon Chea Secretly Orders Duch*, *supra* note 10 [reproduced in accompanying notebook at tab 76].

²³¹ Stephen Heder & Brian D. Tittmore, *supra* note 2, at 54 [reproduced in accompanying notebook at tab 85].

²³² *Id.* at 52.

²³³ *Review Exclusive: Duch Implicates*, *supra* note 3 [reproduced in accompanying notebook at tab 82].

and punish accordingly the actions of his subordinates,²³⁴ whereas Nuon Chea was aware of and indeed helped author the policy being continuously implemented by his subordinates.²³⁵ The scale on which the atrocities occurred under Nuon Chea was far greater than under General Strugar, rendering Nuon Chea's liability that much clearer.

Further, as in *Pohl*, where the accused was held responsible for the mistreatment of concentration camp prisoners because he had the ability to influence and control what was occurring at the camp (*de facto* control) and because of his position (*de jure* control),²³⁶ here, Nuon Chea should likewise be held accountable because he had the ability to influence and control what happened not only at Tuol Sleng, but at other prisons around the country, given both his ability to influence and control his subordinates (*de facto*), and his formal status (*de jure*) within the CPK hierarchy.²³⁷

As the duty to prevent atrocities and punish those subordinates perpetrating them arose in Nuon Chea's position, the element of failure to carry out these duties must be examined. Significantly, there has been no evidence found, to date, showing that Nuon Chea (or any other CPK leaders, for that matter) took steps to prevent the commission of atrocities, or punish the perpetrators thereof.²³⁸ Nuon Chea meets the *mens rea* requirement of knowledge, in that the entire CPK leadership was fully aware that those arrested were made to confess and then

²³⁴ Strugar, Case No. IT-01-42-T, *supra* note 45, ¶ 418 [reproduced in accompanying notebook at tab 34].

²³⁵ Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 52 [reproduced in accompanying notebook at tab 85].

²³⁶ Aleksovski, Case No. IT-95-14/1-T, *supra* note 145, at ¶ 77 [reproduced in accompanying notebook at tab 18].

²³⁷ *See generally* Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 51-65 [reproduced in accompanying notebook at tab 85].

²³⁸ *Id.* at 52.

summarily executed.²³⁹ Given that some memos were sent directly to Nuon Chea, with notes written by jail officials detailing specific instances of torture,²⁴⁰ it is improbable that Nuon Chea can establish he was without any knowledge of what was occurring. He had a clear duty to act and to protect the Cambodian people.

E. Nuon Chea's Possible Defenses Fail

“I have never stayed awake at night or shed any tears... I want to be clean, I want to show my people that I am a good man.”²⁴¹ Nuon Chea feels no responsibility, let alone remorse, for the system of conformation, torture, and mass murder beneath him and Pol Pot.

1. *Tu Quoque*

Tu quoque is based on the idea that because the nationals of the prosecuting state committed crimes similar to those committed by the accused, the prosecutors may not hold the accused accountable and be free from prosecution themselves.²⁴² Nuon Chea argues that Henry Kissinger, former U.S. Secretary of State, was more guilty of killing than he, as in 1970, Kissinger helped to orchestrate a bombing that killed hundreds of thousands of civilians in order to establish a Cambodian regime friendly to the US.²⁴³ In this sense, he puts forth the argument that, as at Nuremberg, a Khmer Rouge tribunal would be no more than a form of “victor’s justice.”

²³⁹ *Id.* at 52-53.

²⁴⁰ In one particular memo addressed to Nuon Chea, a jailer wrote “When he did not answer, I tortured him until he confessed.” Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

²⁴¹ Philip Rees, *Still Smiling After All Those Deaths*, NEW STATESMAN (2002), <http://www.globalpolicy.org/intljustice/tribunals/2002/0318.htm> (last visited Feb. 1, 2007) [hereinafter Philip Rees, *Still Smiling*] [reproduced in accompanying notebook at tab 79].

²⁴² ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 42, at 792 [reproduced in accompanying notebook at tab 57]; Anthony D’Amato, *Defenses to War Crimes: A Conceptual Overview*, 8 (Northwestern University School of Law and Legal Theory Series, Invited Paper No. 07-04, 2007) [reproduced in accompanying notebook at tab 66].

²⁴³ Philip Rees, *Still Smiling*, *supra* note 241 [reproduced in accompanying notebook at tab 79].

Nuon Chea's reasoning, whatever truth there may be in such an argument, is nonetheless faulty. We are far ahead of where we were in terms of an international system of criminal justice and working rules and laws. Nuremberg was the linchpin. While what may have developed since Nuremberg may be the result of "victor's justice," it has nevertheless been accepted by the so-called conquered, as is here demonstrated by Cambodia's signature to and ratification of numerous international instruments establishing treaty law governing international criminals and individual responsibility and the laws of war.²⁴⁴ This being the case, Nuon Chea cannot claim that such rules and laws are inapplicable to him and other Khmer Rouge leaders. Even more compelling is the fact that the principle of *tu quoque* has been expressly rejected as a defense to breaches of IHL by the ICTY.²⁴⁵ This is because IHL is based on the imposition of absolute obligations on parties, and these obligations are not conditioned on another party's failure to exercise them.²⁴⁶ Moreover, it is a fact that is extrinsic to the charges brought.²⁴⁷ Nuon Chea may not, therefore, point to whatever role the US, and Henry Kissinger in particular, played in

²⁴⁴ See Geneva Convention Relative to the Treatment of Prisoners of War (III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 reproduced in accompanying notebook at tab 5]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [reproduced in accompanying notebook at tab 6]; Rome Statute, *supra* note 7 [reproduced in accompanying notebook at tab 11]; Genocide Convention, *supra* note 27 [reproduced in accompanying notebook at tab 4]; Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217 (III 1948) [reproduced in accompanying notebook at tab 16]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. G.A. Res. 2200 [reproduced in accompanying notebook at tab 8]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, Annex to U.N. G.A. 2200 [reproduced in accompanying notebook at tab 9]; International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 7, 1966, 5 I.L.M. 352 (1966) [reproduced in accompanying notebook at tab 7]; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, as modified, 24 I.L.M. 535 (1985) [reproduced in accompanying notebook at tab 3].

²⁴⁵ Limaj et al. Case No. IT-03-66-T, *supra* note 4, ¶ 193 [reproduced in accompanying notebook at tab 31]; Kupreskic et al., Case No. IT-95-16-T, *supra* note 13, at ¶¶ 51, 515-520 [reproduced in accompanying notebook at tab 28].

²⁴⁶ Kupreskic et al., Case No. IT-95-16-T, *supra* note 13, at ¶¶ 515-520 [reproduced in accompanying notebook at tab 28].

²⁴⁷ Anthony D'Amato, *supra* note 242, at 8 [reproduced in accompanying notebook at tab 66].

Cambodia to exempt himself from liability for his wrongdoing.

2. Factual Defense – Lack of Knowledge

Nuon Chea maintains that there was not a genocide under his and Pol Pot's leadership, and that he is completely innocent of any wrongdoing,²⁴⁸ as the leaders "never guided or ordered" killings.²⁴⁹ He claims that he was not involved in the mass murder – that "'enemies' orchestrated from outside were behind the genocide."²⁵⁰ What is more, he asserts that he was "personally unaware of the mass killings until after his defection to the government" in 1996 and that he and Pol Pot were unaware of the existence of Tuol Sleng.²⁵¹ He seems to genuinely believe that what he and Pol Pot and the other leaders did was for the betterment of the Cambodian people; that the goals of the CPK were altruistic in nature. After all, he argues, "'Why should we have killed our own people? I do not see a reason... We wanted a clean, illuminating and peaceful regime.'"²⁵²

He will argue that the deaths were a byproduct of the social transformation, that they were mere casualties and unintended.²⁵³ This "ignorance of the holocaust,"²⁵⁴ is wholly

²⁴⁸ Phil Rees, *Cambodia*, *supra* note 32 [reproduced in accompanying notebook at tab 78].

²⁴⁹ Puy Kea, *Article: Khmer Rouge 'Brother No. 2' to Appear in Court if Called*, KYODO NEWS (2002), http://www.seamedia.org/print.php?story_id=196 (last visited Jan. 31, 2007) [reproduced in accompanying notebook at tab 80].

²⁵⁰ *Id.*; *Nuon Chea Secretly Orders Duch*, *supra* note 10 [reproduced in accompanying notebook at tab 76].

²⁵¹ Puy Kea, *supra* note 249 [reproduced in accompanying notebook at tab 80]; Phil Rees, *Brother Number Two*, *supra* note 1 [reproduced in accompanying notebook at tab 77].

²⁵² *Ex-Khmer Rouge Leader Denies Genocide*, FOXNEWS.COM (2007), <http://www.foxnews.com/wires/2007Jan12/0,4670,CambodiaKhmerRouge,00.html> (last visited Jan. 28, 2007) [hereinafter *Ex-Khmer Rouge Leader Denies Genocide*] [reproduced in accompanying notebook at tab 70].

²⁵³ Ben Kiernan, *Bringing the Khmer Rouge to Justice*, HUMAN RIGHTS REVIEW, 92-108 (2000) [reproduced in accompanying notebook at tab 42].

²⁵⁴ Dominic Faulder, *Trying Times in Cambodia*, 9(6) THE IRRAWADDY (2001), <http://www.crimesofwar.org/resources/links/irrawaddy1.html> (last visited Feb. 7, 2007) [reproduced in accompanying notebook at tab 69].

incredible, as there is overwhelming evidence of Nuon Chea's knowledge to the contrary.²⁵⁵ Further, even if it could be proven that Nuon Chea absolutely lacked knowledge of the crimes committed by his subordinates, "where the absence of knowledge is the result of negligence in the discharge of his duties,"²⁵⁶ that commander will be imputed with knowledge based on having reason to know of the atrocities committed.²⁵⁷ Here, Nuon Chea gave express orders to torture and kill, contributed significantly to Khmer Rouge policy-making, and was on notice of crimes committed, as is shown by his name on confessions and questions for further instruction in carrying out the policies of torture and executions.²⁵⁸

3. Factual Defense – Lack of *De Jure* or *De Facto* Authority

Contrary to the statements of Duch, Nuon Chea asserts that he had no power to issue orders or make decisions, and was merely in charge of education, ideology, and the National Assembly. Rather, he has urged, it was Pol Pot and Son Sen who gave orders and made decisions.²⁵⁹ It remains to be seen, however, what Duch's motives are for providing statements regarding party policy and hierarchy. More likely than Duch's ill intentions for providing such statements are that Nuon Chea, among others, is not providing the truth. Documentary evidence

²⁵⁵ Examples of the evidence are transcripts of messages between Nuon Chea and other leaders pertaining to arrests, torture, and killings. Ben Kiernan, *Implication and Accountability: Top Khmer Rouge Leaders Were Aware What Was Happening Under Pol Pot's Regime and Should Stand Trial for Genocide*, BANGKOK POST (1999), <http://www.yale.edu/gsp/publications/impaccount.html> (last visited Feb. 1, 2007) [reproduced in accompanying notebook at tab 68].

²⁵⁶ Blaskic, Case No. IT-95-14-T, *supra* note 15, at ¶ 332 [reproduced in accompanying notebook at tab 19], *as cited in* YUSUF AKSAR, *supra* note 15, at 105 [reproduced in accompanying notebook at tab 65].

²⁵⁷ *Id.*

²⁵⁸ *See generally* Stephen Heder & Brian D. Tittmore, *supra* note 2, at 51-65 [reproduced in accompanying notebook at tab 85].

²⁵⁹ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 255-256 [reproduced in accompanying notebook at tab 61], Puy Kea, *supra* note 249 [reproduced in accompanying notebook at tab 80]; Dominic Faulder, *supra* note 254 [reproduced in accompanying notebook at tab 69].

tends to corroborate Duch's statements far more strongly than Nuon Chea's statements.²⁶⁰ Even if it is shown that Pol Pot and Son Sen were also involved in giving orders and making decisions, more than one superior may be held accountable for IHL violations of subordinates.²⁶¹

4. Evidentiary Challenges

Another argument that Nuon Chea may raise is that most of the hard evidence implicating him were documents sent to him, not documents sent by him.²⁶² He may therefore try and argue that he never saw these documents; that just because his name was on them or that he was copied on them does not prove that he actually saw the documents. However, given his role at the top of the CPK hierarchy, and the kind of control that he and Pol Pot wielded, this is not a plausible defense. Failing that, he may argue that interpretations of the code words in the documents cannot be proven or corroborated and are too ambiguous to make a basis for conviction.²⁶³

Nuon Chea has also stated that any evidence compiled against him has been intentionally manipulated,²⁶⁴ and that the potential unreliability of ex post facto testimony by lower-ranking local cadres who may not have interpreted orders correctly or had a faulty recollection is not enough of a basis to indict and convict him.²⁶⁵ This is not a workable defense, however, because under JCE 3, the fact that lower-ranking cadres misinterpreted or interpreted orders too broadly does not relieve a commander of liability. Where it can be shown that crimes committed based

²⁶⁰ JOHN D. CIORCIARI WITH YOUK CHHANG, *supra* note 9, at 270 [reproduced in accompanying notebook at tab 61].

²⁶¹ WILLIAM A. SCHABAS, *supra* note 3, at 314-324 [reproduced in accompanying notebook at tab 64], *citing* Aleksovski, Case No. IT-95-14/1-T, *supra* note 145, at ¶ 106 [reproduced in accompanying notebook at tab 18].

²⁶² Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

²⁶³ *Id.*

²⁶⁴ *Ex-Khmer Rouge Leader Denies Genocide*, *supra* note 252 [reproduced in accompanying notebook at tab 70].

²⁶⁵ STEVE HEDER, *Reassessing the Role of Senior Leaders*, *supra* note 99, at 405 [reproduced in accompanying notebook at tab 63].

on this were a natural and foreseeable consequence, it will be presumed that the accused took this chance by continuing his/her participation in effectuating these policies.²⁶⁶

5. Challenge Command Responsibility Element of Effective Control

Nuon Chea may try to challenge the effective control prong under CR. He asserts that the mass murder committed was by enemies from within whom he could not control.²⁶⁷ This is not an effective defense. It is a commander's duty to establish and maintain effective control. Further, it is abundantly clear that Nuon Chea did have effective control, as is evidenced by the way he controlled Duch, and in so doing, controlled the atrocities that occurred at Tuol Sleng. Any assertion that a formal top-down approach to finding accountability would be ill suited to capture what truly occurred during the Pol Pot era²⁶⁸ is flawed. First, it assumes that those occupying the middle and lower-ranking echelons would or could be subject to prosecution; a possibility that has essentially been dismissed in coming to a compromise to go ahead with a Khmer Rouge Tribunal, because the once-lower-ranking echelons now occupy positions of authority in the current Cambodian government.²⁶⁹ Second, it fails to take account of commanders' duty to prevent and punish atrocities of which they are clearly on notice of, as Nuon Chea certainly was.

²⁶⁶ Tadic, Case No. IT-94-1-A, *supra* note 62, at ¶ 204 [reproduced in accompanying notebook at tab 35].

²⁶⁷ There was some discretionary killing by lower ranks within the Khmer Rouge hierarchy, a fact that Nuon Chea will likely rely on as part of his defense. See STEVE HEDER, *Reassessing the Role of Senior Leaders*, *supra* note 99, at 382 [reproduced in accompanying notebook at tab 63]; Puy Kea, *supra* note 249 [reproduced in accompanying notebook at tab 80].

²⁶⁸ For a full account of Steve Heder's analysis of how the Khmer Rouge's accountability should be tackled, whereby he compares the events occurring in Cambodia to scholar's varying interpretations of how Nazism and Stalinism truly worked and spiraled out of control due to the acts of low level officers, see STEVE HEDER, *Reassessing the Role of Senior Leaders*, *supra* note 99, at 405-409 [reproduced in accompanying notebook at tab 63].

²⁶⁹ *Id.* at 409-410.

6. Legitimacy of Force

Finally, Nuon Chea may even liken the situation to that of the Canadian Airborne Regiment's experience in Somalia,²⁷⁰ i.e. that the growing frustration and despair amongst the Khmer Rouge leadership that their idealistic system was not working out as planned led to paranoia and extreme measures to try and keep alive and carry out their ideals. There are notebooks evidencing the Khmer Rouge leaders' paranoia that CIA spies, church workers, and other enemies were infiltrating the Khmer ranks.²⁷¹ This, however, was not considered a defense during the trials of some of the officers involved in the Canadian/Somali situation, and further, the Canadian government went so far as to disband the regiment, demonstrating that even mistakes in the midst of frustration and desperation are no excuse for violating the laws and customs of war.²⁷²

IV. CONCLUSION

Nuon Chea should be found guilty of violations of IHL based on either the JCE theory of liability or under the doctrine of CR. Under JCE 1, it is apparent from the evidence that a common purpose existed in which the leaders of the Khmer Rouge all jointly participated. Even though Nuon Chea did not directly commit the atrocities, his role in voluntarily participating in and contributing significantly to the policy formulation regarding the atrocities, and his intent that that policy be carried out pursuant to his orders, establishes his guilt under JCE 1.²⁷³

²⁷⁰ See Smidt, *supra* note 154, at 160-161, citing John Dermont et al. *Bitter to the End: The Somalia Inquiry Takes its Best Shot – and Ottawa Fires Back*, MACLEAN'S, July 14, 1997 (citing a Canadian Government "Somalia Commission" report) [reproduced in accompanying notebook at tab 51].

²⁷¹ Rajiv Chandrasekaran, *supra* note 16 [reproduced in accompanying notebook at tab 81].

²⁷² Smidt, *supra* note 154, at 161 [reproduced in accompanying notebook at tab 51].

²⁷³ See Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 62-63 [reproduced in accompanying notebook at tab 85].

Under JCE 2, it is also apparent from the evidence that Nuon Chea perpetrated a system of interrogation, torture, and killings in conjunction with other Khmer Rouge leaders. His high rank and leadership especially demonstrate this – his ordering the atrocities, and being asked by subordinates for further direction, shows his participation in and knowledge of the system.²⁷⁴

Under JCE 3, the prosecution can establish Nuon Chea’s intent to contribute to the common criminal plan. He took the chance that at least one of the co-perpetrators would commit an IHL violation outside of the common plan of implementing policies of uniformity, expulsion, extermination, and general discrimination.²⁷⁵ That lower-ranking cadres would commit extensive atrocities not pursuant to direct orders was a natural and foreseeable risk.

Further, even if each element of all three categories of JCE cannot be proven beyond a reasonable doubt, Nuon Chea should still be held accountable for the atrocities he took part in under the doctrine of CR. In both his civilian and military roles, as Deputy General Secretary of the CPK and as a member of the military committee and Pol Pot’s Chief Lieutenant respectively,²⁷⁶ he satisfies the requisite elements. Not only is there conclusive evidence that Nuon Chea should have known of the atrocities being committed in the East Zone and at Tuol Sleng, therefore implicating him under indirect CR, there is even evidence that it was Nuon Chea himself who ordered the interrogations, tortures, killings, summary executions, and purges within his own party,²⁷⁷ which establishes his liability under direct CR. As Brother Number

²⁷⁴ See generally *id.* at 51-65.

²⁷⁵ Lhai Duong, *supra* note 5, at 4-5 [reproduced in accompanying notebook at tab 75].

²⁷⁶ *Id.*; Stephen Heder & Brian D. Tittmore, *supra* note 2, at 53 [reproduced in accompanying notebook at tab 85]

²⁷⁷ See generally Stephen Heder & Brian D. Tittmore, *supra* note 2, at 51-65 [reproduced in accompanying notebook at tab 85]

Two, he was Pol Pot's mouthpiece, and some argue, even crueler than Pol Pot himself.²⁷⁸ If it were established that Nuon Chea was only a civilian superior, he still must be held to the "knew, or consciously disregarded the information which clearly indicated" standard.²⁷⁹ Based on the available evidence, it is not difficult to prove that Nuon Chea not only knew, but could hardly have even consciously disregarded the information available to him, as reports of what occurred at Tuol Sleng were addressed to and handed personally to him.²⁸⁰

The elements that a superior-subordinate relationship must exist and that the superior had effective control of his/her subordinates are likewise conclusively established by hard evidence, and corroborated by the key statements of Duch, the man in charge of Tuol Sleng.²⁸¹ While the defense will likely call into question Duch's memory and motives, there is still hard documentation proving Nuon Chea's link to and role in the torture and killings. Additionally, there are surviving victims of Tuol Sleng whom the prosecution can and should call to testify.

When the hard evidence and victim, witness, and participator interviews are taken in sum, Nuon Chea will likely be convicted for violations of IHL under all three types of the JCE theory of liability and under direct and indirect CR as both a civilian superior and military commander.

²⁷⁸ BEN KIERNAN, *THE POL POT REGIME*, *supra* note 10, at 58 [reproduced in accompanying notebook at tab 58].

²⁷⁹ Rome Statute, *supra* note 7, at art. 28(b)(i) [reproduced in accompanying notebook at tab 11].

²⁸⁰ Stephen Heder & Brian D. Tittlemore, *supra* note 2, at 65 [reproduced in accompanying notebook at tab 85].

²⁸¹ *See generally id.* at 51-65.