

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors  
**Filed to:** Supreme Court Chamber **Original Language:** English  
**Date of document:** 29 September 2014

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC



**Classification by Supreme Court Chamber:**

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

**CO-PROSECUTORS' NOTICE OF APPEAL  
OF A DECISION IN CASE 002/01**

**Filed by:**

**Co-Prosecutors**  
CHEA Leang  
Nicholas KOUMJIAN

**Distribute to:**

**Supreme Court Chamber**  
Judge KONG Srim, President  
Judge A. KLONOWIECKA-MILART  
Judge SOM Sereyvuth  
Judge C. N. JAYASINGHE  
Judge MONG Monichariya  
Judge YA Narin  
Judge Florence Ndepele MUMBA

**Accused**  
NUON Chea  
KHIEU Samphan

**Lawyers for the Defence**  
SON Arun  
Victor KOPPE  
KONG Sam Onn  
Anta GUISSÉ  
Arthur VERCKEN

**Copied to:**

**Civil Party Lead Co-Lawyers**  
PICH Ang  
Marie GUIRAUD

## I. INTRODUCTION

1. Pursuant to Internal Rule 105(3)<sup>1</sup> the Co-Prosecutors submit this notice of appeal (“Notice”) to the Supreme Court Chamber (“Chamber”) concerning the Trial Chamber’s Judgment in Case 002/01 (“Judgment”).<sup>2</sup>
2. The Co-Prosecutors file this appeal in the interests of the law (*dans l’intérêt de la loi*), on the sole ground that the decision of the Trial Chamber to exclude consideration of the third (or “extended”) form of the mode of liability of joint criminal enterprise (“JCE III”) is a legal issue of general significance to the ECCC’s jurisprudence warranting hearing on appeal. The Co-Prosecutors seek no change in the dispositive part of the Judgment.
3. The Co-Prosecutors will submit that (1) this Appeal is admissible, and (2) the Chamber should **declare** the availability of JCE III as a mode of liability during the period of temporal jurisdiction of the ECCC.
4. Internal Rule 107(4) provides that a notice of appeal from any party shall be filed within 30 days of pronouncement of the Judgment *or* its notification. Article 8.2 of the applicable Practice Direction<sup>3</sup> provides that “A Chamber may fix time limits for the filing of an application or pleadings”. On 29 August 2014, the Chamber granted, in part, a joint Defence Request to extend time limits for the filing of Notices of Appeal and ordered “that *all notices of appeal* must be filed no later than 30 days after the notification of the present decision”,<sup>4</sup> that is, no later than 29 September 2014 (“Decision on Time Limits”). The Co-Prosecutors submit that this Notice conforms to Article 8.2 and, being submitted within 30 days of notification, is timely.

## II. NOTICE OF POSITION ON ADMISSIBILITY

5. Procedural rules established at the international level confirm that declaratory relief is available through the appellate courts on legal issues of “general significance” or “considerable significance” to the jurisprudence.<sup>5</sup> This Chamber expressly adopted the same legal standard in the Case 001 Appeal Judgment.<sup>6</sup> This position is also well-established in French law through the extraordinary recourse of *pourvoi en cassation dans l’intérêt de la loi*.<sup>7</sup>

<sup>1</sup> Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 (“Rules”).  
<sup>2</sup> E313 Case 002/01 Judgment, 7 August 2014 (“Judgment”).

<sup>3</sup> Practice Direction ECCC/2007/1/Rev. 8, Filing of documents before the ECCC, 7 March 2012.

<sup>4</sup> F3/3 Decision on Defence motion for extension of time and page limits on notices of appeal and appeal briefs, 29 August 2014 at para. 11 [emphasis added].

<sup>5</sup> See, *inter alia*, Stakić Appeal Judgment at para 7; Kupreškić et al. Appeal Judgment at para. 22; Tadić Appeal Judgment at para. 247; Akayesu Appeal Judgment at para. 19.

<sup>6</sup> F28 Appeal Judgment at para. 15.

<sup>7</sup> Code of Criminal Procedure (France), Arts. 620-621.

### III. NOTICE OF QUESTION PRESENTED

6. At Paragraph 691 of the Judgment, the Trial Chamber states that it did not consider the third form of joint criminal enterprise as a mode of liability applicable to the criminal responsibility of the Co-Accused, noting its decision of 12 September 2011 holding that “JCE III did not exist in customary international law or Cambodian law by 1975.”<sup>8</sup>
7. The Co-Prosecutors will present the following legal question for determination by this Chamber:  
*Is the third (or “extended”) form of the mode of liability of joint criminal enterprise applicable before the ECCC as part of customary international law during the period of the temporal jurisdiction of the ECCC, subject only to the ordinary requirements of notice to the Accused?*
8. Definitive legal guidance from this Chamber is warranted for at least four inter-connected reasons, which the Co-Prosecutors will develop in their submissions on appeal:
  - 1) First, the applicability of JCE III has been judicially considered by the Pre-Trial Chamber<sup>9</sup> and the Trial Chamber,<sup>10</sup> but has not been settled definitively by this Chamber either in Case 001 or Case 002;
  - 2) Second, the Co-Accused are on notice as from further Initial Hearing of 30 July 2014 that the Co-Prosecutors will seek the application of JCE III in relation to the charges being heard in Case 002/02,<sup>11</sup> for which the Co-Prosecutors consider that liability under JCE III would be a factually-appropriate, *alternative* characterisation of the conduct of the Co-Accused;<sup>12</sup>
  - 3) Third, as the ICTR Appeals Chamber has stated unequivocally, “...there can be no question that third-category JCE liability is firmly accepted in customary international law.”<sup>13</sup> While this Chamber has considered *ad hoc* Tribunal jurisprudence to be “non-binding” and requiring “careful, reasoned review”,<sup>14</sup> the Co-Prosecutors can find no evidence of developments in customary international law between 1975 and 1992 that would support any modification in the state of international law on JCE III, whether characterised as a form of co-perpetration or accessorial liability. Were the Trial Chamber’s finding that JCE III was not part of customary law during the DK period to

<sup>8</sup> **E313** Judgment, *supra* note 2 at para. 691; citing **E100/6** Decision on the applicability of joint criminal enterprise, 12 September 2011.

<sup>9</sup> [cite]

<sup>10</sup> [cite]

<sup>11</sup> [cite]

<sup>12</sup> Transcript, 30 July 2014 at 10:12:15.

<sup>13</sup> *Ibid.* at para. 13.

<sup>14</sup> **CF001-F28** Appeal Judgment, 3 February 2012 at para. 97.

be upheld and applied, this would strongly suggest that the Trial and Appeals Chambers of the ICTY were in error to enter convictions on the basis of JCE III for conduct occurring from 1992 onwards, and that convictions, *inter alia*, in the cases of *Tadić*,<sup>15</sup> *Krstić*<sup>16</sup> and *Stakić*<sup>17</sup> are consequently untenable. Such a finding would also renders suspect the definitive legal findings of the ICTR Appeals Chamber in *Karemera et al.*<sup>18</sup> and of the SCSL Appeals Chamber in *Brima et al.*<sup>19</sup>

- 4) Fourth, at present, the ECCC Pre-Trial and Trial Chambers' findings on JCE III stand alone among their sister international and internationalised criminal tribunals. The current state of ECCC jurisprudence directly contradicts the STL Appeals Chamber, which confirmed in a 2011 decision that JCE III was certainly established in international law after World War II, is fully justified by international public policy, does not offend the principle of culpability (*nullum crimen sine culpa*), and is not unfair to the convicted person, since distinctions between the blameworthiness of the primary and secondary offenders are appropriately made not by excluding criminal liability of the latter but by properly calibrating sentence.<sup>20</sup>
9. The intervention of this Chamber is necessary to provide legal guidance to the Trial Chamber which – given the particularly limited scope of interlocutory appeal during ECCC trial proceedings – would otherwise never be in a position to apply JCE III because of the factual impossibility of satisfying requirements of adequate notice to the Accused. The harmonisation and consistency of jurisprudence are also significant international legal policy objectives of the embryonic system of international criminal justice, which further the values of: (a) equal access

<sup>15</sup> *Tadić* Appeal Judgment at para. 232 [“The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.”]; see also paras. 233-234.

<sup>16</sup> *Krstić* Appeal Judgment at para. 151 [“The responsibility of Radislav Krstić for the crimes committed at Potočari arose from his individual participation in a joint criminal enterprise to forcibly transfer civilians. The opportunistic crimes were natural and foreseeable consequences of that joint criminal enterprise.”]

<sup>17</sup> *Stakić* Appeal Judgment at paras. 86-98 [para. 98: “...the Appeals Chamber concludes that the factual findings of the Trial Chamber demonstrate that the Appellant had the requisite *mens rea* to be found responsible under the third category of joint criminal enterprise for the crimes of murder (as a war crime and as a crime against humanity) and extermination.”]

<sup>18</sup> *Karemera et al.* Trial Judgment at para. 1482 [“...it is hard for the Chamber to believe that [Ngirumpatse] was not informed of and therefore aware that rapes and sexual assaults were occurring against Tutsi women throughout Rwanda ... [given] that rapes and sexual assaults on Tutsi women and girls were vast in scope and conducted in an open and notorious manner over a long period of time...”; *Karemera et al.* Appeal Judgment at para. 200 (overturning convictions on the basis of JCE III because of the absence of specific factual findings at trial, but upholding the applicable law).



<sup>19</sup> *Brima et al.* Appeal Judgment at para. 87 [“The Appeals Chamber has found that the Trial Chamber erred in law when it concluded that JCE was not properly pleaded in the Indictment. Consequently, the Prosecution’s Fourth Ground of Appeal succeeds, however we see no need to make further factual findings or to remit the case to the Trial Chamber for that purpose, having regard to the interest of justice.”]

<sup>20</sup> STL-11-01/I Interlocutory Decision on the Applicable Law: terrorism, conspiracy, homicide, perpetration, cumulative charging (Appeals Chamber), 16 February 2011 at para. 245.

to the protection of the law across the present patchwork of international jurisdictions; (b) legal certainty for persons charged and accused of core international crimes; (c) more effective deterrence of such crimes through uniform application of the law; and (d) providing a source of best practice for national systems of criminal justice,<sup>21</sup> an express legacy objective of the ECCC. The Co-Prosecutors submit that these additional factors further substantiate their request for intervention and legal guidance by the apex jurisdiction of the ECCC.

10. For further clarity, the Co-Prosecutor reaffirm that they do not intend to appeal the dispositive part of the Judgment or any factual or legal findings in that Judgment.

Respectfully submitted,

Date	Name	Place	Signature
29 September 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		

<sup>21</sup> See, in respect of point (d) only, B Swart 'Commentary' in A Klip and G Sluiter (eds), *Annotated Leading Cases of the International Criminal Tribunals, Vol II: The International Criminal Tribunal for Rwanda 1994-1999* (Antwerp: Intersentia, 2001) at 201; G Sluiter, H Friman, S Linton et al., *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013) at 377.