



ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង  
Trial Chamber  
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ  
Case File/Dossier No. 002/19-09-2007/ECCC/TC

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	04 / 11 / 2016
ម៉ោង (Time/Heure):	14:50
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	SANN RAO

**Before:** Judge NIL Nonn, President  
Judge Jean-Marc LAVERGNE  
Judge YA Sokhan  
Judge Claudia FENZ  
Judge YOU Ottara

**Date:** 4 November 2016  
**Original language(s):** Khmer/English/French  
**Classification:** CONFIDENTIAL

**DECISION ON DESIGNATION OF 2-TCE-1062**

**Co-Prosecutors**

CHEA Leang  
Nicolas KOUMJIAN

**Accused**

NUON Chea  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**

PICH Ang  
Marie GUIRAUD

**Lawyers for the Defence**

SON Arun  
Victor KOPPE  
KONG Sam Onn  
Anta GUISSSE

## **1. INTRODUCTION**

1. On 23 May 2016, the Trial Chamber granted the NUON Chea Defence's request to call 2-TCE-1062 (VOEUN Vuthy) in order to allow the Parties to question him on the methodology and processes used in the preparation of the Choeung Ek Study.<sup>1</sup> On 23 August 2016, the Chamber notified the Parties that it was considering hearing 2-TCE-1062 (VOEUN Vuthy) as an expert in Case 002/02 and invited the Parties to make submissions as to his qualifications.<sup>2</sup> On 25 August 2016 and 1 September 2016, the Co-Prosecutors and the NUON Chea Defence, respectively, filed their submissions regarding the possible expert status of 2-TCE-1062 (VOEUN Vuthy).<sup>3</sup> The other Parties did not file submissions.

## **2. SUBMISSIONS**

2. The Co-Prosecutors submit that 2-TCE-1062 (VOEUN Vuthy) "is qualified to testify as an expert in regards to the methodology, contents, and findings of the Choeung Ek Study."<sup>4</sup> They submit that 2-TCE-1062 (VOEUN Vuthy) will be able to assist the Chamber in understanding the evidence in the Choeung Ek Study and related report by virtue of his specialized knowledge and experience on the matter, as well as by virtue of his training and professional positions in the field.<sup>5</sup>

3. The NUON Chea Defence submits that 2-TCE-1062 (VOEUN Vuthy) has "undeniable expertise" in the field of osteology, however, he is not suited to provide expert evidence regarding the Choeung Ek Study.<sup>6</sup> The NUON Chea Defence submits that 2-TCE-1062 (VOEUN Vuthy) should instead testify as a witness of fact in relation to his personal knowledge as to the methods and results of the Choeung Ek Study.<sup>7</sup> The Defence considers that 2-TCE-1062 (VOEUN Vuthy) is not suited to provide expert evidence because the majority of his experience relates to the study of fish bones and remains, archaeology and anthropology, and because he has no experience in the forensic analysis of bones, particularly

<sup>1</sup> Decision on the Admission into Evidence of the Choeung Ek Study Documents, E404/4, 23 May 2016, para.7.

<sup>2</sup> Mr. VOEUN Vuthy, E404/5, 23 August 2016.

<sup>3</sup> Co-Prosecutors' Submission Regarding Possible Expert Status of VOEUN Vuthy, E404/6, 25 August 2016 ("Co-Prosecutors' Submission"); NUON Chea's Submissions on the Possible Expert Status of VOEUN Vuthy [E404/5], E404/7, 1 September 2016 ("NUON Chea's Submissions"). The Chamber notes that the NUON Chea Defence's Submission was initially filed under the wrong case number and was therefore received by the Chamber on 2 September 2016.

<sup>4</sup> Co-Prosecutors' Submission, para. 4.

<sup>5</sup> Co-Prosecutors' Submission, para. 5.

<sup>6</sup> NUON Chea's Submissions, para. 18.

<sup>7</sup> NUON Chea's Submissions, para. 21.

the identification of trauma or cause of death for legal purposes (“forensic pathology”).<sup>8</sup> Additionally, the NUON Chea Defence submits that 2-TCE-1062 (VOEUN Vuthy) has no investigative training and it is unclear whether the interviews he conducted to complement his forensic work took place “prior, during or after reaching his conclusions on the exhumation.”<sup>9</sup> Finally, the NUON Chea Defence considers that the forensic process and the investigative process “must be completely separated in order to ensure the neutrality and objectivity of the forensic work.”<sup>10</sup>

### 3. APPLICABLE LAW

4. The Chamber recalls that Internal Rule 31 establishes that a Chamber may seek expert opinion “on any subject deemed necessary to [...] proceedings before the ECCC” (IR 31(1)) and shall appoint the expert by order setting out the exact assignment of the expert (IR 31(3)). Pursuant to Internal Rule 80*bis* (2): “Where the Chamber considers that the hearing of a proposed [...] expert would not be conducive to the good administration of justice, it shall reject that such person be summoned.” The Internal Rules do not provide a definition of expert or set out the minimum qualifications or experience an individual must possess in order to be appointed as expert before the ECCC.<sup>11</sup>

5. According to international jurisprudence, an expert is an individual that has specialised knowledge, experience or skills that could assist a Chamber in its understanding of specific issues in dispute requiring special knowledge in a specific field.<sup>12</sup> Experts provide clarification, context, or additional assistance for the purpose of a Chamber’s assessment of the evidence.<sup>13</sup> The Chamber has found that where an expert also has personal knowledge of

<sup>8</sup> NUON Chea’s Submissions, para. 19.

<sup>9</sup> NUON Chea’s Submissions, para. 20.

<sup>10</sup> NUON Chea’s Submissions, para. 20.

<sup>11</sup> Decision on Designation of 2-TCE-88, E388, 4 March 2016, para. 9 (Decision on Designation of 2-TCE-88); Decision on Designation of 2-TCE-95, E367, 18 September 2015, (Decision on Designation of 2-TCE-95), para. 6.

<sup>12</sup> See Decision on Designation of 2-TCE-88, para. 10; Decision on Designation of 2-TCE-95, para. 7; Decision on Assignment of Experts, E215, 5 July 2012, (Decision on Assignment of Experts), para. 16; *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, Decision on Defence Rule 94 *bis* notice regarding Prosecution Expert Witness Richard Butler, 19 September 2007, (Decision on Richard Butler ICTY), para. 23; *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, (*Nahimana* Appeal Judgement), para. 198.

<sup>13</sup> Decision on Designation of 2-TCE-88, para. 10; Decision on Designation of 2-TCE-95, para. 7; Decision on Assignment of Experts, para. 16.

facts relevant to the Democratic Kampuchea period, in addition to being called as expert, he or she may be questioned on those facts.<sup>14</sup>

6. It is for the Trial Chamber to decide whether an individual may be called to testify as an expert. The question before the Chamber is whether the proposed expert has relevant skill or knowledge that might assist the Chamber as finder of fact in understanding the evidence before it.<sup>15</sup> In determining whether the proposed expert possesses the relevant skill or knowledge of an expert, the Trial Chamber may consider the individual's curriculum vitae, articles, publications or other information, including the proposed expert's former and current positions.<sup>16</sup> Further, the fact that a proposed expert has had previous association with an external organisation or is currently employed by an office within the ECCC does not disqualify him or her from being called as an expert.<sup>17</sup>

#### 4. ANALYSIS

7. The Chamber notes that 2-TCE-1062 (VOEUN Vuthy) is the Director of Archaeology and the Prehistory Department at the Ministry of Culture and Fine Arts, and the Project Director of Osteological Conservation at Choeung Ek Laboratory.<sup>18</sup> Moreover, 2-TCE-1062 (VOEUN Vuthy) was the supervisor in charge of the Choeung Ek Study, large portions of which are already admitted into evidence in Case 002/02.<sup>19</sup>

8. 2-TCE-1062 (VOEUN Vuthy) received a Bachelor's degree in Archaeology from the Royal University of Fine Arts in Cambodia and a Master's degree from Università degli Studi di Ferrara in Italy, during which he submitted a thesis entitled "*Zooarchaeological Study from Phum Snay: A Prehistoric Cemetery in Northwestern Cambodia, Excavation 2007*". In

<sup>14</sup> Decision on Designation of 2-TCE-95, para. 7; Decision on Assignment of Experts, para. 18; Decision on Designation of TCE-33, E283, 26 April 2013, (Decision on Designation of TCE-33), para. 16.

<sup>15</sup> Decision on Designation of 2-TCE-88, para. 11; Decision on Designation of 2-TCE-95, para. 8; *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Decision on Protective Measures for Witnesses and Experts and on Parties' Requests to Hear Witnesses and Experts Reasons, E40/1, 10 April 2009, para. 26; *see also* Decision on Assignment of Experts, para. 16.

<sup>16</sup> Decision on Designation of 2-TCE-88, para. 11; Decision on Designation of 2-TCE-95, para. 8; Decision on Assignment of Experts, para. 15. *See also Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Admission of Expert Report of Ratko Skrbic with Separate Opinion of Judge Mindua and Dissenting Opinion of Judge Nyambe, 22 March 2012, para. 14; Decision on Richard Butler ICTY, paras 23-24; *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-T, Decision on expert status of Reynaud Theunens, 12 February 2008, (Decision Reynaud Theunens ICTY), para. 28.

<sup>17</sup> Decision on Designation of 2-TCE-95, para. 8; Decision on Assignment of Experts, para. 15; Decision on Designation of TCE-33, para. 13; *KAING Guek Eav alias Duch*, Case 001/18-07-2007/ECCC/TC, Decision on Protective Measures for Witnesses and Experts and on Parties' Requests to Hear Witnesses and Experts Summary, E40, 3 April 2009, p. 5; Decision Reynaud Theunens ICTY, para. 29.

<sup>18</sup> Curriculum Vitae of VOEUN Vuthy, E3/10678.

<sup>19</sup> *See* E404/4, para. 5.

addition, from 2010 to 2011, 2-TCE-1062 (VOEUN Vuthy) was trained in faunal remains analysis and human bone conservation at the Department of Anthropology of the University of Hawaii in the U.S.A.<sup>20</sup> From 1998 to 2009, he participated in numerous excavations, including at prehistoric sites in Cambodia.<sup>21</sup> 2-TCE-1062 (VOEUN Vuthy) has over a dozen publications related to the analysis of fish remains found at Cambodian archaeological sites, as well as publications on the Osteology of Cambodian freshwater fish and on the Archaeology and Archaeozoology of Phum Snay.<sup>22</sup> His most recent publications concern analyses of human remains uncovered at various sites related to the Democratic Kampuchea period, including an “*Inventory book of Victims at Choeung Ek Genocidal Center*” published in 2013-2015.<sup>23</sup>

9. With respect to the NUON Chea Defence’s objections based on 2-TCE-1062 (VOEUN Vuthy) not being a forensic expert,<sup>24</sup> the Chamber notes that the Choeung Ek Study has been explicitly distinguished from a “forensic report” and has instead been defined as “an osteological (bone) study with an emphasis on skeletal trauma.”<sup>25</sup> Furthermore, as the Chamber has already informed the Parties, 2-TCE-1062 (VOEUN Vuthy)’s field of expertise for the purposes of his expert designation is osteology,<sup>26</sup> and the NUON Chea Defence concedes that he has “undeniable expertise” in this field.<sup>27</sup> As requested by the NUON Chea Defence, 2-TCE-1062 (VOEUN Vuthy) is being called to provide information on the

<sup>20</sup> Curriculum Vitae of VOEUN Vuthy, E3/10678.

<sup>21</sup> Curriculum Vitae of VOEUN Vuthy, E3/10678, *see e.g.* July 2009 excavation at Laang Spean site “The oldest Prehistoric in Cambodia”; January-February 2007 excavations at Phum Snay site “Prehistoric Cemetery in Northwestern Cambodia”; February 1998 excavation of a Circular Earthwork in Krek 62/52, Kompong Cham province.

<sup>22</sup> Curriculum Vitae of VOEUN Vuthy, E3/10678, *see e.g.* VOEUN Vuthy, 2002, *Fish remains from Angkor Borei, Recent research on the prehistory of Cambodia*, In *Southeast Asian Archaeology*, p.289-294; VOEUN Vuthy and SO, Peang, 1999: *A comparative collection of fish bones for archaeology and the significance of some Angkorian fish reliefs*; VOEUN Vuthy and DRIESCH, Angela von den, 2003, *Preliminary report on the fishbone from Angkor Borei at the Mekong delta, Phnom Penh Cambodia*; VOEUN Vuthy, 2005, *Fish remains from kosh Tameas in Baray Occidental Site, Pok district, Siem Reap, Cambodia*; VOEUN Vuthy, 2005, *Fish remains from Prei Khmeng Site, Pok district, Siem Raep, Cambodia*; VOEUN Vuthy, 2005, *Fishbone analysis from Long Cang site, Vietnam*; VOEUN Vuthy, 2004, *Description of bas-relief carvings of fish at Angkor Wat and Bayon temples*. Student Bulletin, Faculty of Archaeology, No. 3, p.39-56; VOEUN Vuthy, 2006, *Fresh water fish of Cambodia, Comparative fishbone-collection at the Faculty of Archaeology, RUF A*; VOEUN Vuthy, 2006, *Fresh water fish of Cambodia, Comparative fishbone-collection at the Faculty of Archaeology, RUF A*; O’Reilly, D., Driesch, A., and VOEUN Vuthy, 2006, *Archaeology and Archaeozoology of Phum Snay: A Late Prehistoric Cemetery in Northwestern Cambodia*, *Asian Perspectives*, vol. 45.

<sup>23</sup> Curriculum Vitae of VOEUN Vuthy, E3/10678, *see also* VOEUN Vuthy, 2016, *Inventory book of Victims at Krang Ta Chan Genocidal Center in Takeo Province*; VOEUN Vuthy, 2015, *Inventory book of Victims during Pol Pot regime at Prah Theat Sour Sdey Pagoda in Takeo Province*; VOEUN Vuthy, 2014, *Inventory book of Victims during Pol Pot regime at Prasat Vortey Pagoda in Kampong Cham Province*.

<sup>24</sup> NUON Chea’s Submissions, para. 19.

<sup>25</sup> Notice on Choeung Ek Bone Study and Warning Regarding Belated Internal Rule 87(4) Requests, E404, 2 May 2016, para. 2.

<sup>26</sup> Email from the Trial Chamber to the Parties dated 25 August 2016, E404/7.1.2.

<sup>27</sup> NUON Chea’s Submissions, para. 18.

methodology and processes used in preparing the Choeung Ek Study.<sup>28</sup> The Chamber considers that the Study required a technical osteological examination of human bones found in this location and resulted in an exhaustive and detailed compilation of data including possible signs of trauma visible on the bones and this is entirely in the field of expertise of the author of the Study. The Chamber therefore finds that the Defence's submissions specific to 2-TCE-1062 (VOEUN Vuthy)'s lack of forensic experience are immaterial to his capacity to provide expert evidence regarding the Choeung Ek Study.

10. Similarly, the NUON Chea Defence's submission that there is an "absence" of Cambodian experts specialized in exhumations is inconsequential to the assessment of 2-TCE-1062 (VOEUN Vuthy)'s expertise in relation to the Choeung Ek Study.<sup>29</sup> In fact, in its earlier observations on the Choeung Ek Study, the NUON Chea Defence submitted that the study's *prima facie* authenticity could not be challenged "as it was prepared under the supervision of Mr Voeun Vuthy, who is currently the director of the Department of Archaeology and Prehistory at the Cambodia Ministry of Culture and Fine Arts as well as the Osteology and Conservation Lab Director at the Choeung Ek Genocidal Center in Phnom Penh."<sup>30</sup>

11. Having found that 2-TCE-1062 (VOEUN Vuthy) is not a forensic expert and the Choeung Ek Study is not a forensic report, the Chamber need not consider the NUON Chea Defence's submissions in relation to the "forensic process" and the "objectivity of the forensic work".<sup>31</sup>

12. In light of the extensive employment, training and research experience described above, the Chamber is satisfied that 2-TCE-1062 (VOEUN Vuthy) is qualified as an expert in the field of Osteology and that he possesses specialised knowledge and experience that may assist the Chamber for the purpose of its assessment of the evidence, notably in relation to the Choeung Ek Study and related materials. The Chamber notes that related materials include the documents admitted pursuant to E404/4 and the documents made available to the Parties pursuant to E404/4/3.<sup>32</sup> Finally, the Chamber finds that should the Kraing Ta Chan Study

<sup>28</sup> E404/4, para.7; *see also* NUON Chea's Observations on the Admissibility of the Choeung Ek Bone Study and Its External Evaluation, E404/2 with annexes, 12 May 2016 ("NUON Chea's Observations"), para.24.

<sup>29</sup> *Contra* Order Rejecting Request for a Second Expert Opinion (NUON Chea's Twenty-Sixth Request for Investigative Action), D356/1, 1 April 2010, para. 8 *with* NUON Chea's Submissions, para. 19.

<sup>30</sup> NUON Chea's Observations, para. 18.

<sup>31</sup> NUON Chea's Submissions, para. 20.

<sup>32</sup> Decision on the Co-Prosecutors' Request for Investigative Action in Relation to VOEUN Vuthy Pursuant to Rule 93, E404/4/3, 4 November 2016.

referred to in E404/4/3 be completed and made available to Parties prior to 2-TCE-1062 (VOEUN Vuthy)'s testimony, he may also answer questions on this document.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**DESIGNATES** 2-TCE-1062 (VOEUN Vuthy) as an expert in the field of Osteology and decides to call him to testify in court on all matters within his knowledge or expertise relevant to the Choeng Ek Study and related materials and falling within the scope of Case 002/02;

**ADMITS** 2-TCE-1062 (VOEUN Vuthy)'s curriculum vitae, and **ASSIGNS** it document reference number E3/10678; and

**DIRECTS** the NUON Chea Defence to lead the in-court questioning of 2-TCE-1062 (VOEUN Vuthy) pursuant to Internal Rules 91 and 91 *bis*.

**Phnom Penh, 4 November 2016**

**For President of the Trial Chamber**



**Nil Nonn**