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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' RULE 87(4) SUBMISSION REGARDING CHOEUING EK
PROJECT DOCUMENTS**

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I. Introduction

1. Pursuant to Rules 87(3) and 87(4), and in response to the Trial Chamber's "Notice on Choeung Ek Bone Study and Warning Regarding Belated Internal Rule 87(4) Requests"¹ ("Notice"), the Co-Prosecutors submit this motion to have admitted into evidence the "Evaluation of the Choeung Ek Conservation of Victims at Killing Fields Project"² ("Evaluation"), and 35 pages (combined, "Choeung Ek Study Pages") of the Choeung Ek Bone Study identified in E404 ("Choeung Ek Study"). The Co-Prosecutors submit that it is not necessary to have the remainder of the Choeung Ek Study admitted at this time.

II. Procedural History

2. On the morning of 21 April 2016, the Nuon Chea Defence circulated an email to the Trial Chamber and Case 002 parties informing that they intended to make oral submissions that day concerning the admission into evidence of an article published in a local, English-language newspaper, the Phnom Penh Post.³ The article, titled "Skull by skull, team catalogues KR killings"⁴ ("Article") described a two-year investigation conducted at Choeung Ek by an archaeologist and a team of investigators "searching for data they could use to deduct the age, sex and manner of death of the victims."⁵ The Article further states that the investigation "examined 6,426 skulls", and identified 17 methods of killing at Choeung Ek, including various types of blunt force trauma to the head and neck of victims, as well as machete blows to the head and slitting of throats. The Article also contained a description of statements that Case 002/02 witness Him Huy made to the investigative team regarding operations at Choeung Ek. A PDF and a link to the article online were included in the email.⁶

¹ **E404** Notice on Choeung Ek Bone Study and Warning Regarding Belated Internal Rule 87(4) Requests, 2 May 2016 (hereinafter, "Notice").

² Evaluation of the Choeung Ek Conservation of Victims at Killing Fields Project, 2015, on SMD at ENG ERN 01235378-01235427, KH 01235428-01235506 (hereinafter, Evaluation).

³ Email from Nuon Chea Defence titled "Oral submissions today concerning admission and use of one document", 21 April 2016, 8:51 a.m. (Attached as Authority 1).

⁴ Crane, Brent, "Skull by skull, team catalogues KR killings", Phnom Penh Post, 6 February 2016, available at <http://www.phnompenhpost.com/post-weekend/skull-skull-team-catalogues-kr-killings> (last visited 5 May 2016).

⁵ Crane, Brent, "Skull by skull, team catalogues KR killings", Phnom Penh Post, 6 February 2016, available at <http://www.phnompenhpost.com/post-weekend/skull-skull-team-catalogues-kr-killings> (last visited 5 May 2016).

⁶ The Article does not appear to have been placed on Zylab yet.

3. In court that same morning, the Trial Chamber permitted the parties to make oral submissions regarding the admission of the Article.⁷ Nuon Chea submitted that the Article describes “what seems to be, a very extensive forensic investigation ... that has been going on at Choeng EK”, and in support of the Article’s admission described the qualifications of the head of the investigative team, as well as some of the findings reflected in the article.⁸ Nuon Chea further stated: “We believe that – of course, the ... complete forensic investigations will be very interesting ... to not only the Chamber, but to all parties.”⁹ He also mentioned that he had contacted the head of the investigative team identified in the Article, Vooun Vuthy, to see if he was able to get a copy of the forensic report produced from the investigation at Choeng Ek, and stated “we believe that the article but, subsequently, also the forensic report that the article refers to is a contribution to the ascertainment of the truth.”¹⁰
4. The Co-Prosecutors, in their oral submissions, agreed that the Article was “very relevant to these proceedings”¹¹ and did not object to it being placed into evidence.¹² The Co-Prosecutors also agreed with Nuon Chea that the complete report should be obtained and put into evidence.¹³ In response, Nuon Chea stated they were “very happy to hear that Prosecution finds the article, but even more importantly, the underlying report very relevant.”¹⁴
5. The Civil Party Lead Co-Lawyers, in their submissions, deferred to the wisdom of the Trial Chamber, and stated they had no objection to obtaining the report.¹⁵ Khieu Samphan, in his submissions, stated that he did not have any objection to Nuon Chea’s application.¹⁶
6. That afternoon, the Trial Chamber admitted the Article pursuant to Rule 87(4).¹⁷ The Trial Chamber, noting the request of Nuon Chea and the Co-Prosecutors to obtain the underlying

⁷ Draft Transcript, 21 April 2016, 11.33.38.

⁸ Draft Transcript, 21 April 2016, 11.34.55-11.35.46.

⁹ Draft Transcript, 21 April 2016, 11.35.46.

¹⁰ Draft Transcript, 21 April 2016, 11.35.46.

¹¹ Draft Transcript, 21 April 2016, 11.38.16.

¹² Draft Transcript, 21 April 2016, 11.39.37.

¹³ Draft Transcript, 21 April 2016, 11.39.37.

¹⁴ Draft Transcript, 21 April 2016, 11.40.43.

¹⁵ Draft Transcript, 21 April 2016, 11.41.41.

¹⁶ Draft Transcript, 21 April 2016, 11.42.25.

report, granted the request and stated it would inform the parties of its efforts to obtain the report. It deferred a decision on the admissibility of the report until it was obtained.¹⁸

7. On 2 May 2016 the Trial Chamber issued the Notice.¹⁹ The Trial Chamber conveyed that it had contacted Vooun Vuthy, Julie Fleischman (a PhD student in Physical Anthropology who had participated in the study and was also identified in the Article), and Ros Sophearavy, a Vice President of the Choeng Ek Genocidal Center, and had ascertained the following as relevant to these submissions: 1) eleven of the 32 volumes of the Choeng Ek Study have been available in the ECCC Library in Khmer since 27 January 2015; 2) the remaining volumes have now been made available in the ECCC library in Khmer; 3) the Choeng Ek Study is not a “forensic report” but is “an osteological (bone) study with an emphasis on skeletal trauma”; and, 4) an “External Program Evaluation Report” of the Choeng Ek Study in English and Khmer, which summarises the findings of the Choeng Ek Study, has been available in the ECCC Library since February 2016 and has now been placed on the Shared Materials Drive.²⁰
8. In the Notice, the Trial Chamber invited written submissions of no more than 10 pages from the parties as to whether the Choeng Ek Study and/or the Evaluation should be admitted into evidence.²¹ The parties were given until 12 May 2016 to do so.²²

III. Submissions

9. This Chamber has recently re-iterated the applicable law concerning the admission of new evidence:

The Chamber recalls that according to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability, and authenticity required

¹⁷ Draft Transcript, 21 April 2016, 11.42.25.

¹⁸ Draft Transcript, 21 April 2016, 13.36.44.

¹⁹ E404 Notice.

²⁰ E404 Notice, at para. 2-4.

²¹ E404 Notice, at para. 5.

²² The Trial Chamber originally provided a deadline of 6 May 2016. E404 Notice, para. 5. That deadline was extended until 12 May 2016 by email from the Trial Chamber Senior Legal Officer. Email from Trial Chamber Senior Legal Officer, 3 May 2016, 3:42 p.m. (Attached as Authority 2).

under Rule 87(3). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to material already before the Chamber and where the interests of justice require the sources to be evaluated together...²³

10. The Co-Prosecutors submit that for the reasons explained below the Evaluation, and the Choeung Ek Study Pages are relevant, reliable, authentic, were not available prior to trial, and would be conducive to ascertaining the truth. Therefore, the Co-Prosecutors request that they be admitted pursuant to Rules 87(3) and 87(4).
11. The Evaluation is a 46-page report the purpose of which is to provide “a final evaluation of the Choeung Ek Conservation of Victims at Killing Fields project”²⁴ (“Choeung Ek Project”)—the same project that provided the data for the Choeung Ek Study. According to the Evaluation, it assesses “the quality and production of the Project.”²⁵ The Choeung Ek Project, which took place from August 2013 to December 2015, consisted of an analysis and preservation of the various crania and other “skeletal elements”²⁶ that were contained in the Choeung Ek Memorial Stupa, as well as an analysis of the construction of a new stupa that will better preserve the items contained therein.²⁷ The Evaluation asserts that the bones contained in the Choeung Ek Memorial Stupa were obtained from 86 mass graves excavated at the Choeung Ek site between 1981 and 1983.²⁸ These remains were originally put in a wooden stupa, and moved to the Choeung Ek Memorial Stupa in the late 1980’s.²⁹

²³ **E390/2** Decision on Nuon Chea’s First Rule 87(4) Request to Call One Additional Witness and to Admit One Interview for the Case 002/02 Trial Segment on the Phnom Kraol Security Centre, 4 May 2016, para. 3.

²⁴ Evaluation at ENG 01235380.

²⁵ Evaluation at ENG 01235381.

²⁶ Identified as including “long bones, vertebrae, pelvis, etc.” Evaluation at ENG 01235382.

²⁷ Evaluation at ENG 01235425.

²⁸ Evaluation at ENG 01235398-99.

²⁹ Evaluation at ENG 01235397.

12. The Evaluation explains that the Choeung Ek Project “processed” 6426 crania from the Choeung Ek Memorial Stupa,³⁰ as well as 63,112 other skeletal remains.³¹ It conveys that the Choeung Ek Project found that amongst the crania examined were those of both males and females, children (including 13 five-year-olds³²), and adults.³³ It also imparts that the Choeung Ek Project identified human remains derived from at least 7706 separate persons in the Choeung Ek Memorial Stupa.³⁴
13. The Choeung Ek Study consists almost entirely of detailed osteological analysis of each cranium or other human remain that was analysed and preserved, including colour photographs of the remain, with one page dedicated to each item preserved. The Co-Prosecutors submit one page of such analysis for admission to the Case File as an indication of the information contained in the Choueng Ek Study generally.³⁵
14. The Evaluation reflects the suggestion that one explanation for the different number of crania reported at different times is that animals may have eaten some of the bones while they were in the original, wooden Stupa,³⁶ and also notes that even in the Choeung Ek Memorial Stupa that the remains were kept in since the late 1980s, “[i]nsects and rats could enter the shelves of the Stupa and eat the bones.”³⁷ This also potentially contributed to loss.
15. The Evaluation also states that the Choeung Ek Memorial Stupa contains “a collection of the many different kinds of killing tool that was found in the Killing Fields, such as axe handles, bamboo sticks, metal bars,” as well as “the twisted pieces of wire that tied the victims hands, and the leg irons the bound the victims as prisoners[.]”³⁸ Photographs of these, or similar, implements appear on two pages in the back of each of the volumes of the Choeung Ek Study, alongside photographs demonstrating indications of their use on crania and other illustrative photos (“Choeung Ek Study Photographs”). The captions of the

³⁰ Evaluation at ENG 01235384 (identifying the 6426 skulls conserved as emanating from the Choeung Ek Memorial Stupa).

³¹ Evaluation at ENG 01235394.

³² Evaluation at ENG 01235384 (Figure 1).

³³ Evaluation at ENG 01235383.

³⁴ Evaluation at 01235383 (7706 right humeri discovered).

³⁵ Choeung Ek Study identified in E404 Notice, Volume 30, p. 5983. (Attached as **Annex A**.)

³⁶ Evaluation at ENG 01235398-99.

³⁷ Evaluation at ENG 01235421.

³⁸ Evaluation at 01235422.

Choeung Ek Study Photographs are in both English and Khmer in the Choeung Ek Study. The Co-Prosecutors request that the Choeung Ek Study Photographs be admitted as evidence.³⁹

16. The Evaluation also notes that a 2004 study conducted by the Joint POW/MIA Accounting Command's Central Identification Laboratory (JPAC-CIL) alongside a group from the "Harris County Medical Examiner's Office", examined 85 randomly selected crania contained in the Choeung Ek Memorial Stupa. According to the Evaluation, those "researchers found many evidences [*sic*] of violent trauma that were the same as the stories told by witnesses such as Mr. Him Huy, a confessed executioner at the Killing Fields. The victims['] blunt force trauma was because of shooting, stabbing, throat-cutting, and suffocation refer [*sic*] to execution by beating with pick axe handles, poles, bamboo sticks, axes, ox-cart axles, or shovels[.]"⁴⁰
17. Each volume of the Choeung Ek Study also contains a chart summarizing the findings of the human remains analysed in that volume ("Choeung Ek Study Summary Charts"). The charts contain information regarding the number of scars on the remains imparted by different types of instruments, and the gender and age of the victims where determinable. The Co-Prosecutors submit these 32 charts to be admitted as evidence.⁴¹
18. The Evaluation itself identifies the import of the Choeung Ek Project (the data of which the Evaluation and Choeung Ek Study reflect), stating that it was "very important for the reason that, for the first time in the history of the exhumation of the Choeung Ek gravesites, a well-planned program of data collection was completed on the group of human remains in the Memorial Stupa."⁴²
19. The Evaluation and the Choeung Ek Study Pages are relevant to the charges in Case 002/02 as they relate to the Choeung Ek execution and burial site, which forms part of the charges

³⁹ Choeung Ek Study identified in E404 Notice, Volume 32, unpaginated. (Attached as **Annex B**.)

⁴⁰ Evaluation at ENG 01235400.

⁴¹ Choeung Ek Study identified in E404 Notice, Volumes 1-32, summary charts, unpaginated. (Combined in attached **Annex C**.)

⁴² Evaluation at ENG 01235394.

regarding S-21 in Case 002/02.⁴³ The Evaluation, and Choeung Ek Study Pages also relate to other evidence already on the Case File. They relate directly to the Article, which has already been admitted by this Chamber. They render certain evidence contained in the Article more reliable by describing and demonstrating the exacting procedures by which conclusions were arrived at, and they are consistent with evidence before this Chamber concerning executions at Choeung Ek.

20. For instance, the Article states that the Choeung Ek Project concluded that methods of killing included various types of blunt force trauma to the head, and the slitting of victims' throats. This is consistent with the execution implements in the Choeung Ek Study Photographs, the evidence of scarring in the Choeung Ek Study Summary Charts, as well as with testimony before this Chamber in Case 002/02. Witness 2-TCW-865, an eyewitness to executions at Choeung Ek, stated before this Chamber on 21 April 2016 that "the usual process of execution of people" at Choeung Ek was that "a water pipe [was used] to strike the base of their necks. When the prisoners fell over, they removed the handcuffs, then they used the knives to finish killing them..."⁴⁴ He also confirmed the veracity of a statement Witness Him Huy made that when victims "reached the pit, we told the prisoners to sit and then they were hit with a cart axle from behind. Then their throats were cut, the handcuffs were removed, and they were kicked into the pit..."⁴⁵ Likewise, on 4 May 2016, Witness Him Huy described for this Chamber being instructed that "a prisoner had to be struck at the nape of the neck, then the throat had to be slashed."⁴⁶ In addition, in the Evaluation's description of the 2004 JPAC-CIL study, it corroborates this evidence regarding the manner of killing, the instruments in the Choeung Ek Study Photographs, and the data in the Choeung Ek Study Summary Charts. More generally, the information in the Evaluation, the Choeung Ek Study Photographs, and the Choeung Ek Study Summary Charts regarding the identity and manner of death of some of the victims at Choeung Ek relates to all other evidence on the Case File concerning executions and burials at Choeung Ek.

⁴³ E301/9/1.1 List of Paragraphs and Portions of the Closing Order relevant to Case 002/02, 4 April 2014, para. 3(vi); D427 Case 002 Closing Order, 15 September 2010, para. 415 ("The S-21 security centre (S-21) was composed of a detention centre in Phnom Penh and an execution site (Choeung Ek) located some 15 kilometres to the south-west of Phnom Penh, in Kandal province.").

⁴⁴ Draft Transcript, 21 April 2016, at 15.39.44.

⁴⁵ Draft Transcript, 21 April 2016, at 15.53.01-15.45.03.

⁴⁶ Draft Transcript, 4 May 2016, 11.07.32.

21. The Evaluation and Choeung Ek Study are reliable. The Evaluation was performed by Dr. Nancy Beavan, who, according to her qualifications outlined in the report, has a PhD in Isotopic Analysis, a Masters of Science in Evaluation, and a Bachelor of Science in Physical Geography.⁴⁷ She has extensive professional experience as well, including 15 years as Manager of the Rafter Radiocarbon Laboratory at the Institute of Geological and Nuclear Sciences, New Zealand, involvement with relevant academic journals, and previous experience conducting project reviews.⁴⁸ Her analysis is based on her own research and on data produced by the team that led the Choeung Ek Project.⁴⁹ The data produced by the Choeung Ek Project that was contained within the Choeung Ek Study and which the Evaluation summarizes is reliable due to Dr. Beavan's conclusion that the Project was "an extremely effective program that was successful in all of its objectives and outputs"⁵⁰, and also by the qualifications of the persons conducting the Choeung Ek Project itself. The Evaluation explains that the Program Director of the Choeung Ek Project, Voeun Vuthy, has a Bachelor of Arts from the Faculty of Archaeology, and a Master of Arts in Zooarchaeology, and has participated in a number of other training courses in bone conservation methods.⁵¹ In addition to other professional experience, since 2013, Mr. Vuthy has been Head of Human Osteological Conservation Laboratory at the Choeung-Ek Genocidal Centre, and since 2014 he has been Director of Archaeology and Prehistory Department at the Ministry of Culture and Fine Arts.⁵²
22. The Authenticity of the Evaluation and the Choeung Ek Study are confirmed by the Trial Chamber's communications with Mr. Voeun Vuth, Ms. Julie Fleischman, and Mrs. Ros Sophearavy.⁵³
23. Rule 87(4) states that the party requesting to submit new evidence must satisfy the Chamber that the requested evidence was not available before the opening of the trial. The Trial

⁴⁷ Evaluation at ENG 01235395

⁴⁸ Evaluation at ENG 01235395.

⁴⁹ Evaluation at ENG 01235396.

⁵⁰ Evaluation at ENG 01235425.

⁵¹ Evaluation at ENG 01235402.

⁵² Evaluation at ENG 01235402.

⁵³ **E404** Notice, at para. 2.

Chamber has held that for Case 002/02, the opening of trial occurred in June 2011.⁵⁴ The Evaluation was published in 2015.⁵⁵ According to the information provided by the Trial Chamber, it has been available in the ECCC Library in English and Khmer since February 2016. It was placed on the Shared Materials Drive on 27 April 2016. Therefore, the Evaluation was not available prior to the start of trial in Case 002/02. Although the Evaluation has apparently been available in the ECCC library since February 2016, it seems that neither the Trial Chamber nor the parties were aware of its existence or location there.

24. The 32 volumes of the Choeung Ek Study were published between 2013 and 2015. According to the information obtained by the Trial Chamber, the first twelve volumes of the Choeung Ek Study were transferred to the ECCC “in 2014”, eleven of those volumes were available in the library in Khmer only since 27 January 2015, and the remainder of the volumes, in Khmer only, have been made available in the library at some point after 21 April 2016. Therefore, the Choeung Ek Study was not available prior to the start of trial in Case 002/02. Although some volumes have apparently been available in the ECCC library since sometime in 2014, it seems that neither the Trial Chamber nor the parties were aware of their existence or location there.
25. The Co-Prosecutors do not seek the admission of the remainder of the 32 volumes of the Choeung Ek Study (other than the Choeung Ek Study Pages) at this time. As the Trial Chamber noted, the majority of the Choeung Ek Study is currently available only in Khmer.⁵⁶ The Co-Prosecutors do not believe that it is necessary to have such detailed analysis of each human remain analysed in the Choeung Ek Study admitted to the Case File, in a single language, at this point in Case 002/02, especially because many of the most salient findings of the Choeung Ek Study have been summarized in the Evaluation, Choeung Ek Study Pages, and the Article. The Co-Prosecutors submit that should any party wish to challenge the representations of the Evaluation, Article, or Choeung Ek Study

⁵⁴ E307/1 Decision on Parties’ Joint Request for Clarification Regarding Application of Rule 87(4) (E307) and the Nuon Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3), 11 June 2014; E307/1/2 Decision on Joint Request for *de novo* Ruling on the application of Internal Rule 87(4), 21 October 2014, para. 10.

⁵⁵ Evaluation at ENG 01235379.



⁵⁶ E404 Notice, at para. 5.

Pages concerning the Choeung Ek Project, any additional relevant volume or volumes of the Choeung Ek Study could be requested to be admitted at that time.

IV. Relief Requested

26. Accordingly, the Co-Prosecutors respectfully request that the Trial Chamber admit the Evaluation, Choeung Ek Study Photographs, and Choeung Ek Study Summary Charts into evidence in Case 002 pursuant to Rule 87(4).

Respectfully submitted,

Date	Name	Place	Signature
12 May 2016	CHEA Leang Co-Prosecutor	 Phnom Penh	
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