



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

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

ឯកសារដើម
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: RANN RADA

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: PUBLIC

DECISION ON THE ADMISSION INTO EVIDENCE OF THE CHOEUNG EK STUDY DOCUMENTS

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1. INTRODUCTION

1. On 21 April 2016, the NUON Chea Defence sent an email to the Trial Chamber's Senior Legal Officer and the Parties, seeking the admission of a Phnom Penh Post article ("Article") for use in the questioning of Mr. TAY Teng (2-TCW-865). On the same day, prior to the testimony of Mr. TAY Teng (2-TCW-865), the Chamber heard oral submissions by the Parties in relation to this request. In addition to its initial request, the NUON Chea Defence also sought the admission of a study on the bones of human skeleton remains found at Choeng Ek that is referred to in the Article ("Choeng Ek Study").¹ The other Parties did not object to the admission of the Article and the Co-Prosecutors supported the request to obtain and admit the Choeng Ek Study.² The Chamber admitted the Article pursuant to Rule 87(4) and granted the request to try to obtain the Choeng Ek Study while deferring the decision on its admissibility.³

2. On 2 May 2016 the Trial Chamber issued a memorandum inviting submissions on the admission into evidence of the 32-volume Choeng Ek Study, considering its length and availability only in Khmer. The Chamber also invited submissions on the admissibility of an "External Program Evaluation Report," available in English and Khmer, which summarises the findings of the Choeng Ek Study ("Evaluation").⁴ On 12 May 2016 the Co-Prosecutors, the NUON Chea Defence and the KHIEU Samphan Defence filed their written submissions.⁵

3. On 23 May 2016 the Chamber issued a decision,⁶ with written reasons to follow, admitting into evidence the following documents related to the Choeng Ek Study: i) the Evaluation;⁷ ii) the preface common to each volume of the Choeng Ek Study, submitted by the NUON Chea Defence;⁸ iii) the example of an osteological analysis examination,

¹ T. 21 April 2016, pp. 63-65. The Chamber notes that the Choeng Ek Study was initially believed to be a "forensic report" as per the submissions of the NUON Chea Defence.

² T. 21 April 2016, pp. 66-68.

³ T. 21 April 2016, pp. 70-71.

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

⁵ Co-Prosecutors' Rule 87(4) Submission Regarding Choeng Ek Project Documents, E404/1 with annexes, 12 May 2016 ("Co-Prosecutors' Submission"); NUON Chea's Observations on the Admissibility of the Choeng Ek Bone Study and Its External Evaluation, E404/2 with annexes, 12 May 2016 ("NUON Chea's Submissions"); *Conclusions de la Défense de M. KHIEU Samphan sur l'admission en preuve d'une étude et d'une évaluation sur Choeng Ek*, E404/3, 12 May 2016 ("KHIEU Samphan's Submissions"), respectively.

⁶ Decision on the Admission into Evidence of the Choeng Ek Study Documents, E404/4, 23 May 2016.

⁷ ERNs 01235378-01235427 EN and 01235428-01235506 KH.

⁸ E404/2.1.3.

submitted by the NUON Chea Defence;⁹ iv) the photographs of implements found at Choeng Ek, submitted by the Co-Prosecutors;¹⁰ and v) the charts summarising the findings of the human remains analysed in each volume, submitted by the Co-Prosecutors.¹¹ The Chamber also granted the NUON Chea Defence request to call 2-TCE-1062 (VOEUN Vuthy) in order to allow the Parties to question him on the methodology and processes used in preparing the Choeng Ek Study.¹² The Chamber hereby provides reasons for its decision.

4. The Chamber notes that on 4 November 2016, it designated 2-TCE-1062 (VOEUN Vuthy) as an expert in the field of Osteology who may be questioned on all matters within his knowledge or expertise relevant to the Choeng Ek Study and related materials and falling within the scope of Case 002/02.¹³

2. SUBMISSIONS

5. The Co-Prosecutors submit that, while admitting the entire study is unnecessary, 35 pages of the Choeng Ek Study and the Evaluation ought to be admitted into evidence because they are relevant, reliable, authentic, conducive to ascertaining the truth, and they were unavailable prior to the opening of the trial.¹⁴ Specifically, the Co-Prosecutors request that the following documents be admitted: i) the Evaluation; ii) the 32 charts summarising the findings of the human remains analysed in each volume of the Choeng Ek Study;¹⁵ iii) the photographs of different implements found at the site and allegedly used to kill or restrain the victims;¹⁶ and iv) one page of the osteological analysis of a cranium as a sample of the information contained in the Choeng Ek Study.¹⁷ The Co-Prosecutors assert that these documents are relevant as they relate to the Choeng Ek execution and burial site, which forms part of the charges in Case 002/02 regarding the S-21 security centre.¹⁸ They also relate directly to other evidence already on the Case File, particularly the Article and the related testimonies of Mr. TAY Teng (2-TCW-865) and Mr. HIM Huy (2-TCW-906).¹⁹ Finally, the Co-Prosecutors submit that the Evaluation and the Choeng Ek Study were published after

⁹ E404/2.1.4.

¹⁰ E404/1.3.

¹¹ E404/1.4.

¹² E404/4, para.7.

¹³ Decision on Designation of 2-TCE-1062, E404/8, 4 November 2016.

¹⁴ Co-Prosecutors' Submission, paras 1, 10, 25.

¹⁵ Co-Prosecutors' Submission, paras 17, 26; E404/1.4.

¹⁶ Co-Prosecutors' Submission, paras 15, 26; E404/1.3.

¹⁷ Co-Prosecutors' Submission, para. 13; E404/1.2.

¹⁸ Co-Prosecutors' Submission, para. 19.

¹⁹ Co-Prosecutors' Submission, paras 19-20.

the opening of the trial and that they are authentic and reliable as they were prepared by qualified professionals.²⁰

6. The NUON Chea Defence objects to the admission of the Choeung Ek Study on the grounds that it fails to meet the requirements of relevance and reliability set out in Internal Rule 87(3). Although the NUON Chea Defence limited its review of the Choeung Ek Study to the preface common to each volume and to the individual crania examination reports,²¹ it submits that the study is of limited relevance.²² The NUON Chea Defence takes issue with the Choeung Ek Study not being a “forensic study prepared for legal proceedings,” and with the study’s third phase being “currently underway”.²³ Furthermore, the NUON Chea Defence submits that the Choeung Ek Study is not *prima facie* reliable due to a lack of information regarding the methodology used and the chain of custody of the crania and bones, as well as a lack of scientific justification for certain findings.²⁴ As for the Evaluation, the NUON Chea Defence asserts that, although it bears *prima facie* indicia of reliability and authenticity, it should not be admitted because it is interrelated to the Choeung Ek Study.²⁵ In the alternative, should the Chamber admit the Choeung Ek Study, the NUON Chea Defence requests that the Evaluation also be admitted and that 2-TCE-1062 (VOEUN Vuthy) be called to testify.²⁶

7. The KHIEU Samphan Defence submits that the Choeung Ek Study should not be admitted because its length and complexity render it impractical for legal proceedings and it would be unrealistic to expect a full translation of the study. The KHIEU Samphan Defence further submits that it has no objections to admitting the Evaluation into evidence.²⁷

3. APPLICABLE LAW

8. 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 under Rule 87(3). The Chamber will determine 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

²⁰ Co-Prosecutors’ Submission, paras 21-24.

²¹ NUON Chea’s Submissions, para. 8; see E404/2.1.3 and E404/2.1.4.

²² NUON Chea’s Submissions, para. 14.

²³ NUON Chea’s Submissions, para. 13.

²⁴ NUON Chea’s Submissions, paras 15-17.

²⁵ NUON Chea’s Submissions, para. 22.

²⁶ NUON Chea’s Submissions, para. 24.

²⁷ KHIEU Samphan’s Submissions.

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.²⁸ 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, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice.²⁹

4. FINDINGS

9. The Chamber notes that the Choeung Ek Study and the Evaluation include information relating to the number of prisoners who may have been executed at Choeung Ek, their age, their sex and evidence of violent trauma.³⁰ The Chamber finds that both the Choeung Ek Study and the Evaluation are relevant and closely relate to other material already on the Case File, notably the Article and the related testimonies of Mr. TAY Teng (2-TCW-865) and Mr. HIM Huy (2-TCW-906). While the NUON Chea Defence objects to the admission of the Choeung Ek Study and the Evaluation, the Chamber notes the Defence's acknowledgement that "the subject-matter of the Study appears relevant to the present case, as it relates to the alleged executions at Choeung Ek" and to "evidence on the case file".³¹ Similarly, the NUON Chea Defence acknowledged the relevance of the Choeung Ek Study in its oral submissions on the Article, stating that "the forensic report that [it] refers to is a contribution to the ascertainment of the truth."³²

10. The Chamber also finds that both the Choeung Ek Study and the Evaluation were produced by reliable sources. The Choeung Ek Study was conducted under the supervision of 2-TCE-1062 (VOEUN Vuthy),³³ who will be called to testify as an expert in Case 002/02. The Evaluation was prepared by Dr. Nancy BEAVAN who holds a PhD in Isotopic Analysis,

²⁸ Decision on KHIEU Samphan Defence Motion Regarding Co-Prosecutors' Disclosure Obligations, E363/3, 22 October 2015, paras. 28-29.

²⁹ Decision on NUON Chea's Rule 87(4) Requests for Admission of 29 Documents Relevant to the Testimony of 2-TCE-95, E367/8, 5 May 2016, para. 11; *see also* Response to the Internal Rule 87(4) Requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1), E276/2, 10 April 2013, para. 2.

³⁰ Evaluation at 01235393-01235394.

³¹ NUON Chea's Submissions, para. 12.

³² T. 21 April 2016, p. 64.

³³ Evaluation at 01235402.

a Master of Science in Evaluation and a Bachelor of Science in Physical Geography.³⁴ In addition to her academic credentials, Dr. BEAVAN has extensive professional experience, including in conducting program reviews and project management.³⁵ The Chamber notes that the KHIEU Samphan Defence does not object to the Evaluation being admitted as a summary of the findings in the Choeung Ek Study.³⁶ Meanwhile, the NUON Chea Defence does not oppose the admission of the Evaluation if the Chamber decides to admit the Choeung Ek Study.³⁷ In fact, the NUON Chea Defence acknowledges that the Evaluation “was prepared by an individual with experience in evaluation of projects, and the methods used to assess the study are clearly indicated, and therefore bears *prima facie* indicia of reliability and authenticity.”³⁸ The Evaluation concludes that the Choeung Ek Study was both effective and successful,³⁹ which adds to the latter’s reliability.

11. Finally, the Chamber notes the submissions by the Co-Prosecutors and the KHIEU Samphan Defence as to the impracticality of using the full version of the Choeung Ek Study during the proceedings, including for reasons related to translation. Having found that the document is relevant, reliable and authentic, the Chamber notes that its length, complexity and availability only in Khmer make the admission of the entire Choeung Ek Study impractical at this late stage of the case. The Chamber therefore limits the admission of evidence to the Evaluation and the other documents listed at paragraph 3 of this decision. The Chamber considers that admitting these documents will allow for a more complete assessment of the evidence relating to Choeung Ek and is conducive to the ascertainment of the truth.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

ADMITS the following documents:

- a. The Evaluation, and assigns it Document Number E3/10643;
- b. The preface common to each volume of the Choeung Ek Study, submitted by the NUON Chea Defence, and assigns it Document Number E3/10645;

³⁴ Evaluation at 01235395.

³⁵ Evaluation at 01235395.

³⁶ KHIEU Samphan’s Submissions.

³⁷ NUON Chea’s Submissions, para. 22.

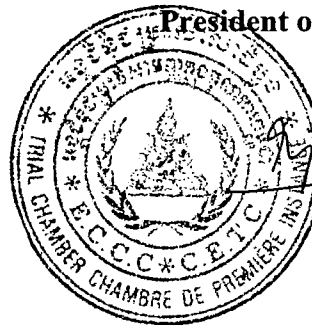
³⁸ NUON Chea’s Submissions, para. 22.

³⁹ Evaluation at 01235425.

- c. The example of an osteological analysis examination, submitted by the NUON Chea Defence, and assigns it Document Number E3/10646;
- d. The photographs of implements found at Choeung Ek, submitted by the Co-Prosecutors, and assigns them Document Number E3/10647; and
- e. The charts summarising the findings of the human remains analysed in each volume, submitted by the Co-Prosecutors, and assigns them Document Number E3/10648.

Phnom Penh, 4 November 2016

President of the Trial Chamber



Nil Nonn