

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**NUON CHEA'S OBSERVATIONS ON THE ADMISSIBILITY OF THE CHOEUING EK
BONE STUDY AND ITS EXTERNAL EVALUATION**

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I. INTRODUCTION

1. Pursuant to the Trial Chamber's order N. E404 of 2 May 2016¹ and Rule 87 of the Internal Rules, the Co-Lawyers for Mr Nuon Chea (hereinafter the "Defence") hereby provide their observations on the admissibility into evidence of the Choeung Ek Conservation of Victims at Killing Fields Project Study ("Study") and of the External Program Evaluation Report thereon ("Evaluation Report").

II. BACKGROUND

2. On 21 April 2016, the Defence requested leave to make oral submissions concerning the admission into evidence of an article published in the *Phnom Penh Post* on 6 February 2016, entitled *Skull by Skull, Team catalogues KR Killings* ("Article"), in order to use the document with witness TAY Teng.² The Article refers to an examination of the bones located at Choeung Ek in order to identify data to deduct the age, sex and manner of death of the victims. The parties made oral arguments on the same day.³ The Co-Prosecutors agreed that the document was "very relevant to the proceedings",⁴ and that the Study referred therein should be obtained and admitted into evidence.⁵ The Trial Chamber admitted the Article into evidence and granted the request to obtain the Study.⁶ It deferred its decision on the admission of the Study until its acquisition.⁷
3. On 2 May 2016, the Trial Chamber updated the parties on the progress made to obtain the study. In particular, it noted that the Study consisted of 32 volumes in Khmer.⁸ The Trial Chamber further indicated that it had been informed that 12 volumes were given to the ECCC in 2014, and that 11 of those were available at the ECCC library since January 2015.⁹ The Trial Chamber informed the parties that it had now obtained the remaining 21 volumes and that the whole Study was now available in the ECCC library for the parties to review.¹⁰

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

² Email from the Defence to the Trial Chamber and the Parties, entitled 'Oral Submissions Today Concerning Admission and Use of One Document', 21 Apr 2016.

³ T. 21 April 2016 (TAY Teng, Draft), at 11.33.38 to 11.43.43.

⁴ T. 21 April 2016 (TAY Teng, Draft), at 11.39.37.

⁵ T. 21 April 2016 (TAY Teng, Draft), at 11.40.43.

⁶ T. 21 April 2016 (TAY Teng, Draft), at 13.36.44.

⁷ T. 21 April 2016 (TAY Teng, Draft), at 13.36.44.

⁸ **E404**, para. 2.

⁹ **E404**, paras. 2-3.

¹⁰ **E404**, para. 3.

4. The Trial Chamber also brought to the attention of the parties the existence of an external evaluation report of the Study, which has now been put on the case file.¹¹ Finally, it stated that a similar study that was initiated in April 2016, with regards to the remains at Kraing Ta Chan, and was expected to be completed within two months.¹² The Trial Chamber indicated that it would seek a copy of this study, once completed.¹³
5. Finally, the Trial Chamber requested written submissions by the parties on first, whether the Choeung Ek Study should be admitted into evidence ‘considering its length and availability only in Khmer’, and second, whether the Evaluation Report should be admitted into evidence. It ordered that submissions of no more than 10 pages be filed within three days, by Friday 6 May.¹⁴ On 3 May 2016, the Trial Chamber extended the deadline to Thursday 12 May 2016.¹⁵

III. APPLICABLE LAW

6. All evidence is admissible, unless otherwise provided in the Internal Rules.¹⁶ The Chamber may reject a request for evidence where it finds that the evidence is irrelevant or repetitious; impossible to obtain within a reasonable time; unsuitable to prove the facts it purports to prove; not allowed under the law, or if it is intended to prolong proceedings or is frivolous.¹⁷ To satisfy the requirements of Rule 87(3), the proposed evidence needs to be *prima facie* relevant, reliable and authentic.¹⁸ Pursuant to Rule 87(4), at any stage during the trial a party may request the Chamber to “admit any new evidence which it deems conducive to ascertaining the truth”, subject to the general requirements of Rule 87(3).¹⁹ While Rule 87(4) states that the requested evidence must not have been available before the opening of the trial, the Trial Chamber has been

¹¹ E404, para. 4.

¹² E404, para. 2.

¹³ E404, para. 5.

¹⁴ E404, para. 5.

¹⁵ Email from the Legal Officer to the Parties, ‘Re: Notice on Choeung Ek Bone Study and Warning regarding Belated Internal Rule 87(4) Requests (E404)’, 3 May 2016.

¹⁶ Rule 87(1) of the Internal Rules.

¹⁷ Rule 87(3) of the Internal Rules.

¹⁸ E185/2, ‘Third Decision on Objections to Documents Proposed for Admission Before the Trial Chamber’, 12 Aug 2013, para. 20; D288/6.5/10/2, ‘Decision on Admissibility of New Materials and Direction to the Parties’, 10 Mar 2009, para. 6; E294/1, ‘Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob Lemkin’, 24 Jul 2013, para. 10; E289/2, ‘Decision on Civil Party Lead Co-Lawyers’ Internal Rule 87(4) Request to Put Before the Chamber New Evidence (E289) and KHIEU Samphan’s Response (E289/1)’, 14 Jun 2013 (“Decision on Rule 87(4) Requests”), para. 26.

¹⁹ A year into the Case 002/02 trial, the TC held that the parties must submit Rule 87 (4) Requests for documents which were on the case file but which had not been included in the list of documents admitted by the Trial Chamber, even if those had been disclosed by the Prosecution subsequently to the initial documents filings, *see* T. 26 Jan 2016 (PRUM Sarat, E1/382.1), p. 24, lns. 8-13.

interpreted it as also encompassing evidence which was available before the opening of the trial but which could not have been discovered earlier with the exercise of due diligence can be admitted.²⁰

7. In certain situations, evidence which did not “strictly speaking” satisfy this criterion has been admitted: where the evidence was closely related to material already before the Chamber and where the interests of justice required the sources to be evaluated together; where the proposed evidence is exculpatory and requires evaluation to avoid a miscarriage of justice, or where the other parties do not object to the evidence.²¹

IV. ARGUMENTS

A. Introduction

8. As stated above, the study is entitled *Cheung Ek Genocidal Center: the Inventory of the Skeletons of the Victims*, and contains 32 volumes. While it is impossible for the Defence to review the totality of the 32 volumes in the time imparted by the Trial Chamber, it reviewed the preface (which is the same in each volume), and reviewed the structure and information contained in the individual crania examination reports, which all follow the same structure throughout the volumes. The original Khmer versions and official English translations of the preface and of an example of individual crania analysis can be found in ***Public Attachments III and IV***.
9. The preface states that the Study took place in three stages: first, from August 2013 to August 2014, when a conservation for severely damaged skeletons was undertaken; second, from August 2014 to August 2015, when a conservation for moderately damaged skeletons was done; and, third, from August 2015 to August 2016, during which a conservation for lightly damaged skeletons is underway. It further appears that the group which undertook the conservation also examined the skeletons for “signs of torture or killing by various materials”.²²

²⁰ **E313**, ‘Case 002/01 Judgement’, 7 Aug 2014, para. 25; **E289/2**, Decision on Rule 87(4) Requests, para. 3.

²¹ **E289/2**, Decision on Rule 87(4) Requests, para. 3.

²² See Public Attachment III.

B. Preliminary Observations on the Timing of the Request

10. The Defence notes the Trial Chamber's comments regarding the alleged lateness of the Defence in bringing the Study to the attention of the Chamber.²³ The Trial Chamber found that parts of the Study were available at the ECCC library since 2014, that another part was made available in 2015. All are only in hard copy. While the Defence wishes it would be able to review every hard copy of documents available at the library, this task is simply impossible with the resources available. The Defence also emphasises that there is no electronic system available permitting the parties to search within the contents of material available at the library. Finally, the Trial Chamber itself noted that 21 of the 32 volumes were not available in the library until recently.²⁴
11. Moreover, the Defence wishes to underline that neither the OCIJ, the OCP, nor the Trial Chamber have mentioned the study before, and that it appears that the OCP itself was not aware of the study, despite it carrying the burden of proof.²⁵ It further notes that while the Trial Chamber appears to have been aware of its existence through the ECCC Press Clippings,²⁶ and despite its duty to seek the truth and its ability to admit evidence which it deems conducive to ascertaining the truth pursuant to Rule 87(4) of the IR, the Trial Chamber failed to discuss the existence of the Study with the parties.

C. Observations on the Choeung Ek Study

(i) *The Study is of Limited Relevance*

12. At first sight, the subject-matter of Study appears relevant to the present case, as it relates to the alleged executions at Choeung Ek, referred to in paragraphs 463 to 467 of the Closing Order.²⁷ It is also related to a number of evidence on the case file, including, *inter alia*: the evidence of TAY Teng and HIM Huy; E3/8767, Forensic Survey of Three Memorial Sites Containing Human Skeletal Remains in the Kingdom of Cambodia, by M. S. Pollanen, Forensic Pathology Consultant or the *Phnom Penh Post* article entitled *Skull by Skull, Team Catalogues KR Killings*, dated 6 February 2016, which was admitted into evidence on 21 April 2016.²⁸

²³ E404, para. 6.

²⁴ E404, para. 3.

²⁵ T. 21 Apr 2016 (TAY Teng, Draft), at 11.39.37.

²⁶ T. 21 Apr 2016 (TAY Teng, Draft), at 11.35.46

²⁷ D427, 'Closing Order', 15 Sept 2010.

²⁸ T. 21 Apr 2016 (TAY Teng, Draft), at 13h35.

13. The Defence however notes that the primary purpose of the Study appears to be the conservation of the crania and bones.²⁹ It is not a forensic study prepared for legal proceedings, but rather “an osteological bone study with an emphasis on skeletal trauma”.³⁰ Further, it seems that the Study is only based on the research undertaken in the context of the first and second phases of the Study, namely the study of severely and moderately damaged skeletons, since the third phase, which concerns the lightly damaged skeletons, appears to be currently underway and is scheduled to end in August 2016.³¹ The Study therefore fails to provide a complete picture of the bones at Choeng Ek.
14. As a result, the Defence submits that the relevance of the Study is very limited. The fact that the Study was not intended as a forensic study also weighs against its admission as it shows its lack of reliability for the purpose of legal proceedings.

(ii) The Study is not Prima Facie Reliable

15. While the Study does contain mention of alleged signs of trauma, the Defence wishes to highlight the apparent lack of information regarding the methodology used to determine the alleged “trauma”. Further, the Study contains a number of findings for which no scientific justification is provided, such as the conclusion that certain tools were used against the crania,³² or that certain persons were “brutally tortured before being killed”.³³
16. Finally, there is also no indication regarding the place where the crania and bones were taken from, nor is there information as to where or when they were exhumed, or on their chain of custody. Just as importantly, there is also no evidence that the said crania and bones were in any way related to S-21 or the Democratic Kampuchea regime, since the authors of the Study do not appear to have undertaken any scientific study to date the crania and bones. This is particularly important in light of the fact that Choeng Ek used to be a burial site prior to 1975, and that therefore, human remains were supposedly already contained underground.³⁴ Such information is also important in light of the fact

²⁹ See Public Attachment III.

³⁰ E404, para. 2.

³¹ See Public Attachment III.

³² See Public Attachment IV.

³³ See Public Attachment IV.

³⁴ See E3/7617, WRI of TAY Teng, 19 Feb 2008, ERN EN 00401879; E3/1684, *Voices from S-21*, Chandler, ERN EN 00192832; E3/7665, WRI of CHHUN Phal, ERN EN 00163815.

that the Study appears to contradict the evidence given by TAY Teng, who was in charge of the group in Choeung Ek, that a total of around 300 individuals were executed at Choeung Ek.³⁵

17. In light of the above, the Defence submits that the Study fails to meet the minimum *prima facie* requirements of reliability.

(iii) Authenticity

18. The Defence does not challenge the *prima facie* authenticity of the Study, as it was prepared under the supervision of Mr Voeun Vuthy, who is currently the director of the Department of Archeology 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.³⁶

(iv) Observations on Length and Language

19. The Defence submits that the length of a document is irrelevant to its admissibility into evidence. While there are practical concerns regarding the question of translation, the Defence submits that those can easily be overcome through the selection of specific pages by the parties in order to produce partial translations of the evidence, as has been the case for a number of books which have been admitted into evidence³⁷ and indeed cited by the Chamber in the Case 002/01 Judgement.³⁸
20. The Defence further submits that there is no requirement that documents be translated into all the working languages of the Court before being admitted into evidence. Rule 87 of the IR, which governs the admission of evidence, makes no reference to such requirement. The Defence recalls that in Case 002/01, the Trial Chamber permitted the parties to use documents at trial even where translations were unavailable in all official

³⁵ TAY Teng testified that on average, they would dig 2-3 pits, which would be 3x2x2 meters, and which could fit 10 to 20 bodies, *see* T. 21 April 2016 (TAY Teng, Draft), at 15.14.52; *see also* **E3/7617**, WRI of TAY Teng, 19 Feb 2008, at ERN EN 00401877-78. In February 2008, he told the OCIJ that he estimated there were 20 to 30 pits in total at Choeung Ek, **E3/7617**, WRI of TAY Teng, 19 Feb 2008, at ERN EN 00401879.

³⁶ *See* Mr Vuthy Voeun's biography at <https://crowd.instrumentl.com/campaigns/preserving-evidence-khmer-rouge-genocide/>.

³⁷ *See e.g.* **E3/1664**, **E3/1683**, **E3/3304**, **E3/1813**.

³⁸ *See e.g.* **E3/88**, William Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia*, for which there is no French translation and only a partial Khmer translation; **E3/9**, Philip Short, *Pol Pot: The History of a Nightmare*, for which the Khmer translation is only partial; **E3/1815**, Ben Kiernan, *How Pol Pot Came to Power*, for which the French translation is only partial.

ECCC languages. Pending translations were required by the time of the filing of the closing briefs.³⁹

21. The Defence submits that the same approach should be adopted in the present case, and that the parties be permitted to submit documents only available in one of the working languages of the Court into evidence. Finding otherwise would impose an unfair burden on the parties, and particularly the Defence. Indeed, given that the resources of the Interpretation and Translation Unit of the Court and the Defence's internal translators are already overstretched, the Defence may not be able to provide translations in all three languages in a timely manner. It would therefore effectively be prevented from presenting evidence, thereby violating Mr Nuon Chea's right to present evidence.⁴⁰

D. Observations on the Evaluation Report

22. The Defence observes that the Evaluation Report is interrelated with the Study, and therefore should not be admitted into evidence. Alternatively, should the Trial Chamber admit the Study into evidence, the Defence would not oppose the admission into evidence of the Evaluation Report since it 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.

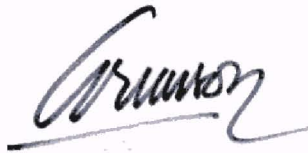
³⁹ E223/2/6/1, 'Decision on Co-Prosecutors' Request to Establish Procedure Regarding the Admission of Documents not Translated into All ECCC Languages (E223/2/6) and Lead Co-Lawyers' Response to Trial Chamber Directives on tendering Civil Party Statements and Other Documents (E223/2/7 and E223/2/7/1)', 17 Jun 2013, para. 7.

⁴⁰ Art. 35(e) New of the Law Establishing the ECCC.

V. RELIEF

23. In light of the above, the Defence submits that the Study should not be admitted into evidence as it fails to meet the minimum requirements of relevance and reliability as required by Rule 87(3) of the IR. As a result, the Evaluation Report should also not be admitted into evidence.
24. Alternatively, should the Trial Chamber decide to admit the Study into evidence, the Evaluation Report should also be admitted into evidence. In addition, the author of the study, Mr Voeun Vuthy, should be called to testify in order to provide evidence of the methodology and processes used in the preparation of the study.

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