

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CMBODIA****FILING DETAILS****Case No.** 002/19-09-2007-ECCC/SC**Party Filing:** Mr. KHIEU Samphân**Filed to:** Supreme Court Chamber**Original Language:** French**Date of document:** 8 October 2019**CLASSIFICATION****Classification of the document suggested by the Filing Party:** Public**Classification by the Chamber:** សាធារណៈ/Public**Classification status:****Review of Interim Classification:****Records Officer's Name:****Signature:**

KHIEU Samphân's Request for Admission of Additional Evidence

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MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 16 November 2018, the Trial Chamber ("Chamber") found KHIEU Samphân guilty of genocide against Vietnamese), crimes against humanity, serious violations of the Geneva Conventions and sentenced him to life imprisonment ("Judgement ").¹ The Chamber stated that the full written Judgement would be made available "in due course".²
2. On 19 November 2018, the KHIEU Samphân Defence ("Defence") appealed the judgement and requested the Supreme Court Chamber (the "Supreme Court") to annul it for procedural defects and lack of reasoning.³ On 13 February 2019, the Supreme Court ruled the appeal inadmissible.⁴
3. On 28 March 2019, the parties were notified of the full written reasons for the Judgement dated 16 November ("written Judgement").⁵
4. On 1 July 2019, the Defence filed its notice of appeal in which it identified at least 1,824 errors committed by the Chamber.⁶
5. In these submissions, the Defence requests the Supreme Court to admit into evidence the written records of interview of Witnesses EK Hen and CHUON Thy, who appeared before the Chamber. The said written records of interview are found in Case Files 003 and 004. Given the many discrepancies noted in the past between witness statements to investigators and those contained in the written records of interview, the Defence also seeks disclosure of the corresponding audio recordings of the written records of interview of EK Hen and CHUON Thy. To avoid making a second request, the Defence also seeks to have them admitted into evidence.
6. Pursuant to the applicable law (I), the evidence was not available at trial (II), it could have been a decisive factor in reaching the decision at trial (III) and it is not subject to general provisions of Rule 87(3) of the Internal Rules (IV).

¹ Transcript of Hearing on the Substance in Case 002, T. 16 November 2018, E1/529.1, p. 53-58, between 11h25 and 11h40.

² T. 16 November 2018, E1/529.1, p. 3, around 9.35.

³ KHIEU Samphân's Urgent Appeal against the Judgement pronounced on 16 November 2018, 19 November 2018, E463/1.

⁴ Decision on Khieu Samphân's urgent appeal against the summary of judgement pronounced on 16 November 2018, 13 February 2019, E463/1/3.

⁵ Trial Chamber Judgement Case 002/02, 16 November 2018 (notified on 28 March 2019), E465.

⁶ KHIEU Samphân's notice of appeal, (002/02), 1 July 2019, E465/4/1.

I. APPLICABLE LAW

7. Within the legal framework of the ECCC, the admission of new evidence at the appellate stage is governed by Rules 104(1) and 108(7) of the Internal Rules. Pursuant to Rule 104(1), the Supreme Court Chamber may itself examine evidence and call new evidence". Rule 108(7) provides as follows:

"Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed."

8. In its Judgement in Case 002/01, the Supreme Court Chamber specified that:

"in order to show that a proposed piece of additional evidence could have been a decisive factor, the party proposing the evidence must demonstrate a realistic possibility that the evidence, had it been put before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part. In making this assessment, the proposed additional evidence must be assessed in the context of the evidence that was put before the Trial Chamber in relation to a factual finding that was crucial or instrumental to the conviction or sentence. It is for the party proposing the additional evidence to demonstrate this impact of the proposed additional evidence."⁷

II. THE EVIDENCE WAS UNAVAILABLE AT TRIAL

9. The hearings on the substance in Case 002/02 ended on 11 January 2017. The parties filed their final submissions on 2 May 2017 and the closing statements were made on June 13 to 23 June 2017. On 3 September 2018, more than a year after the Chamber had retired to deliberate, the International Co-Prosecutor disclosed 8 documents from Case Files 003 and 004.⁸ These documents contained two written records of interview of EK Hen and CHUON Thy, dated 28 February and 6 March 2017 respectively.⁹
10. This delay demonstrates a blatant lack of diligence on the part of the International Co-Prosecutor. He should have disclosed the documents as soon as he became aware of them, especially since the documents concerned witnesses who had appeared before the Chamber.¹⁰

⁷ Appeal Judgement 002/01, 23 November 2016, F36, para. 30.

⁸ International co-prosecutor's proposed disclosure of documents from cases 003 and 004, 3 September 2018, E319/71.

⁹ Written record of interview of EK Hen, 6 March 2017, E319/71.2.7; written record of interview of CHUON Thy, 28 February 2017, E319/71.2.4.

¹⁰ International co-prosecutor's proposed disclosure of documents from Cases 003 and 004, 3 September 2018, E319/71, para. 1; See also International co-prosecutor's proposed disclosure of documents from Cases 003 and 004 – Annex A, 3 September 2018, E319/71.2.

Thus he failed to fulfil his obligation to disclose potentially exculpatory material¹¹ as soon as was practicable.

11. This failure is all the more unacceptable as the Co-Prosecutor has constantly overwhelmed the Defence by introducing throughout the trial new incriminating evidence from Cases 003 and 004.¹² On the other hand, when it comes to impugning the credibility of a prosecution witness such as EK Hen or to upholding that of a defence witness such as CHUON Thy, who was widely cited in the Prosecution's closing arguments,¹³ the Co-Prosecutor is unwilling to disclose the evidence to the parties. Had the International Co-Prosecutor been diligent, the Defence could have requested the admission of those documents before the close of the trial proceedings.
12. The Chamber also breached its obligations by not reopening the proceedings knowing that those documents came from witnesses and civil parties who had testified before the Chamber.¹⁴ The Chamber has, however, often recalled the practice that it is in the interests of justice to admit all prior and subsequent statements of witnesses who have testified.¹⁵ In its own words, this practice also applies "in order to permit the Chamber and parties to fully assess credibility based on the extent to which the witness's statements are consistent", "in the interests of ascertaining the truth".¹⁶
13. Contrary to its own jurisprudence, the Chamber merely asked the Co-Investigating Judges for leave to disclose the documents so that the parties could have access to them, knowing that they could not debate them. Pursuant to Rule 96(2) of the Internal Rules, the parties cannot make

¹¹ Rule 53(4) of the Internal Rules: "The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.". The Chamber specified that this Rule was also applicable before the Chamber: Decision on KHIEU Samphân's motion regarding co-prosecutor's disclosure obligations, 22 October 2015, **E363/3**, paras 16 & 20; See also, on disclosure obligations: Decision on Khieu Samphân defence motion regarding Co-Prosecutors' disclosure obligation, 22 October 2015, **E363/3**, para. 31; Decision on requests regarding Internal Rule 87(4) deadlines, 21 September 2016, **E421/4**, para. 9.

¹² *Conclusions finales de KHIEU Samphân* (002/02), 2 May 2017, **E457/6/4**, paras 660-665.

¹³ Co-prosecutors' closing brief in case 002/02, 2 May 2017, **E457/6/1** (EK Hen is cited in 16 different footnotes and CHUON Thy 8 times and only when giving Prosecution evidence).

¹⁴ Memo of the President of the Chamber to the International Co-Investigating Judge of 10 September 2018, **E319/71/1**.

¹⁵ Admission of newly disclosed written records of interview from Cases 003 and 004 of witness heard in the course of the Case 002 trial proceedings, 25 April 2017, **E319/68/1**, para. 2 Admission of newly disclosed written records of interview from Case 004 of witness heard in the course of the Case 002 trial proceedings, 9 May 2017, **E319/69**, para. 2; Admission of newly disclosed written records of interview from Cases 003 and 004 of witnesses heard in the course of the Case 002 trial proceedings, 26 January 2017, **E319/67**, paras 2 and 4.

¹⁶ *Idem*; See also Decision on Khieu Samphân defence motion regarding co-prosecutors' disclosure obligation, 22 October 2015, **E363/3**, para. 25.

submissions during the deliberations of the Chamber, which alone is authorized to reopen the proceedings.¹⁷ Thus, by refraining from so doing, the Chamber prevented the Defence from discussing the contents of the exculpatory statements or the credibility of certain witnesses who testified against KHIEU Samphân.

14. The Defence cannot but think that the Chamber acted deliberately. At such an advanced stage of the deliberations and drafting of the Judgement, the Chamber knew quite well that it was going to use the testimony of these witnesses. It is apparent from the reasons for Judgement that EK Hen is a key witness used by the Chamber to convict KHIEU Samphân. CHUON Thy's exculpatory statements have either been ignored or partly used, solely to inculcate the defendant. Faced with the new evidence and its impact on the assessment of the credibility of the witnesses, any professional and impartial judge should have reopened the proceedings to hear the arguments of the parties and consider them in his deliberations. The Supreme Court Chamber, however, recalled that in "the material aspect, a court should reopen proceedings whenever it finds that matters relevant to the outcome of deliberations so require".¹⁸ In failing to do so, the Chamber thereby demonstrated its willingness to convict KHIEU Samphân at any cost. In light of the shortcomings of the International Co-Prosecutor and the Chamber, the Defence has no alternative but to seek at the appellate stage evidence which could have been a decisive factor in reaching the decision at trial.

III. THE ADDITIONAL EVIDENCE COULD HAVE BEEN A DECISIVE FACTOR IN REACHING THE DECISION AT TRIAL

15. Although EK Hen's new written record of interview confirms her lack of credibility, the Chamber still used her evidence on numerous occasions to convict KHIEU Samphân (A). On the other hand, CHUON Thy's written record of interview corroborates the credibility of his exculpatory evidence which the Chamber deliberately ignored (B).

A. EK Hen's new written record of interview

16. The Trial Chamber considers EK Hen as a credible and important witness. Her testimony is cited at least nine times in the reasons for Judgement about alleged political training sessions

¹⁷ Rule 96(2) of the Internal Rules of the ECCC: "At this stage, no further applications may be submitted to the Chamber, and no further submissions may be made. During the course of the deliberations, the judges may reopen the proceedings."

¹⁸ Decision on Co-Prosecutors' request for clarification, 26 June 2013, E284/2/1/2, para. 8.

that KHIEU Samphân attended and lectured at Borei Keila.¹⁹ This factual element was decisive in the conviction of KHIEU Samphân, the Chamber having reached findings on his criminal responsibility (1), design and implementation of a common purpose (2) as well as on the alleged role of the Appellant (3). However, in view of the significant discrepancies in the witness's statements, already raised in Case 002/01²⁰ and confirmed by the new written record of interview, it is obvious that the Chamber could not rely on them.²¹

1. Importance of EK Hen's statements on the determination of KHIEU Samphân's criminal responsibility

17. The Chamber relied on EK Hen's testimony to make findings on KHIEU Samphân's intent to commit the crimes at the security centres and execution sites (a), his participation in a joint criminal enterprise (b) and his knowledge arising after the commission of the crimes (c).

a. KHIEU Samphân's intent to commit crimes at the security centres and execution sites

18. In order to find that KHIEU Samphân intended to commit crimes against humanity at the S21 security centres at Kraing Ta Chan, Au Kanseng and Phnom Kraol, the Chamber relied on facts which, in its view, demonstrated that KHIEU Samphân "knew of and supported the arrests of prominent Party leaders".²²

19. It should first be noted that KHIEU Samphân's alleged knowledge of these arrests in no way proves his knowledge of the crimes. In particular, it does not explain how or in what way he would have intended to commit the crimes of murder, extermination, enslavement, imprisonment, torture, political persecution and other inhumane acts constituting attacks on human dignity and facts characterized as enforced disappearances committed in the security centres and execution sites considered in Case 002/02. Indeed, to find that the purges were "inextricably intertwined with the policy to establish and operate security centres and execution sites"²³ does not preclude the Chamber from characterizing KHIEU Samphân's direct intent to

¹⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 607 (Section 8: Roles and functions - KHIEU Samphân), para. 3216 (Section 13: Treatment of targeted groups – Treatment of the Cham), paras 3390 and 3404 (Section 13: Treatment of targeted groups – Treatment of the Vietnamese), paras 3739 and 3916 (Section 16: Common purpose), paras 4253, 4271 and 4272 (Section 18: The criminal responsibility of KHIEU Samphân).

²⁰ Mr KHIEU Samphân's Defence Appeal Brief against Judgement in Case 002/01, 29 December 2014, **F17**, para. 532.

²¹ See Annex: EK Hen's statements on political training given by NUON Chea and KHIEU Samphân at Borei Keila ("Annex").

²² Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4284.

²³ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4284.

commit these crimes. Therefore inferring, for example, from the mere knowledge or purported approval of Pang's arrest, the intent to commit a crime is not a reasonable finding, especially when the evidence to support that finding is weak.

20. Indeed, the Chamber should not have simply found, solely on the basis of EK Hen's statements, that KHIEU Samphân was aware of and supported Pang's arrest.²⁴ In paragraph 4272 of the Judgement, the Chamber states:

"In mid-1978, KHIEU Samphân presided over a political education meeting at Borei Keila, where he announced before 400 to 500 participants that Office S-71 Chairman CHHIM Sam Aok alias Pang had been arrested and taken away "because he was a traitor collaborating with the Yuon" and instructed that cadres "should not follow what Pang did"".

21. According to the Chamber, the evidence given at the hearing by EK Hen was corroborated by her written record of interview of 5 March 2008.²⁵ Although it is true that on examination by the Prosecution EK Hen confirmed a major part of the contents of her written record of interview, she nonetheless placed the training given by KHIEU Samphân's in ... 1976 and not in mid-1978.²⁶ However, in 1976, KHIEU Samphân could not have spoken of Pang's arrest, the latter having been arrested in April 1978 according to the Chamber's own findings.²⁷ The Chamber did not consider this initial discrepancy borne out by the witness's statements in the excerpts cited by the Chamber. In addition, based on an overall consideration, EK Hen's statements confirm that she generally lacks credibility.

22. Indeed, although in the written record of interview of 5 March 2008 and at the beginning of her in-court examination, EK Hen mentioned a first political training which allegedly took place in 1976 in Borei Keila with KHIEU Samphân²⁸ and a second in 1978 with NUON Chea,²⁹ the witness substantially changed her statements on cross-examination by the Defence. At first, she confirmed that the first political training at Borei Keila was given by KHIEU Samphân "in late

²⁴ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para.4284, footnote 13986 "see above, para. 4272."; Errors pointed out in KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 32, errors 18.205, 18.206, 18.207 and 18.208.

²⁵ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, footnote 13946.

²⁶ T. 3 July 2013, **E1/217.1**, pp.39-48 and 45 to 48; written record of interview of EK Hen, 5 March 2008, **E3/474**, ERN 00205049-00205050.

²⁷ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3390 footnote 11437.

²⁸ T. 3 July 2013, **E1/217.1**, around [11.15.00]; written record of interview of EK Hen, 5 March 2008, **E3/474**, ERN 00205049-00205050.

²⁹ T. 3 July 2013, **E1/217.1**, at [11.37.15]; Written record of interview of EK Hen, 5 March 2008, **E3/474**, ERN00205049-00205050.

1976", after the liberation of 17 April 1975.³⁰ However, she then stated and maintained throughout her testimony that it was NUON Chea who chaired the first study meeting in 1976 and KHIEU Samphân the second in 1978.³¹

23. Any reasonable trier of fact should have taken into account this change of testimony. Asked about the discrepancies, EK Hen explained on 8 occasions that she was confused and that her memory was not as good as before, which information the Chamber completely ignored:

"I believe that perhaps my response was not right to the order of the questions, and I can say that my memory is not as good as it used to be because this happened a long time ago. And the fact is there; two of them would be chairing these events. I - and I attended the sessions when they lectured";³²

"It was a long time ago, so my recollection may not be precise";³³

"These questions are rather confusing and I may be confused myself because it happened a very long time ago";³⁴

"I perhaps have problem recognizing who would be chairing a particular session ";³⁵

"I respond to parts that I still remember and I would not respond to other parts that I don't remember. So these things happened a very long time ago, it is no doubt that I may forget";³⁶

"I think you may be right, because something that happened a very long time ago and I was young at that time. And now I am getting older and my memory is also not as very good as it used to be. So I can't remember things precisely as it happened immediately";³⁷

"What I am saying is that it is difficult to remember things that happened a very long time ago. Things that happened recently, we may remember better than things that happened a very long time ago";³⁸

"Yes, my memory back then was clear and now I think my memory [is not] that good, because I am getting very old and I can't even read the writings properly these days."³⁹

24. These memory problems are confirmed in the new written record of interview being sought as evidence. In fact, there are new contradictions in the said record. This time around, EK Hen

³⁰ T. 3 July 2013, E1/217.1, between [14.04.37] and [14.08.50].

³¹ T. 3 July 2013, E1/217.1, between [14.10.55] and [14.16.13] and from [15.05.40] to [15.09.22].

³² T. 3 July 2013, E1/217.1, at [14.15.01].

³³ T. 3 July 2013, E1/217.1, before [14.43.13].

³⁴ T. 3 July 2013, E1/217.1, at [15.04.08].

³⁵ T. 3 July 2013, E1/217.1, before [15.07.44].

³⁶ T. 3 July 2013, E1/217.1, after [15.18.30].

³⁷ T. 3 July 2013, E1/217.1, before [15.26.07].

³⁸ T. 3 July 2013, E1/217.1, after [15.26.07].

³⁹ T. 3 July 2013, E1/217.1, before [15.28.00].

states that KHIEU Samphân chaired the first political education session in 1978,⁴⁰ and that NUON Chea also chaired the second session in 1978.⁴¹ Faced with this change of statement, the investigator asked her on the basis of her prior written record of interview, while ignoring the discrepancies in the transcript of the hearing, whether it was not instead in 1976 that KHIEU Samphân gave this training. But EK Hen replied that it was in 1978, shortly before the Vietnamese invasion.⁴² Thus, in the new statement, EK Hen substituted KHIEU Samphân as the speaker during the first training, but this time in 1978. This would mean that the second training with NUON Chea came shortly after that of KHIEU Samphân: yet another version of facts that once more impugn the credibility of her statements.

25. The new 2017 written record of interview mainly confirms that EK Hen seems unable to remember the dates of the training sessions she witnessed or who was the speaker at the first or second training session. The same holds true for the content of the training sessions. Indeed, the confusion as to the dates and political training sessions makes it impossible to know which issues KHIEU Samphân and NUON Chea would have addressed.
26. In her DC-Cam interview, issues such as encouragement to work, moral conduct and "traitors" in the East Zone were addressed, but there is no suggestion as to whether it was KHIEU Samphân or NUON Chea who addressed such issues.⁴³ In her statement of 5 March 2008, EK Hen indicated that during her training in 1976, KHIEU Samphân only supported her to persevere in her work and mentioned the arrest of Pang, which is impossible given the date as seen *supra*.⁴⁴ On the contrary, according to the audio recording of her 2008 written record of interview, there was no mention of traitors during the first training session:⁴⁵ NUON Chea rather spoke of traitors in the North Zone and of KOY Thuon at the second training session. He also asked for the territory to be defended against Vietnamese invasions.⁴⁶
27. During her appearance on 3 July 2013, EK Hen confirmed that NUON Chea came to speak about defending the territory against Vietnamese invasion and mentioned the treason of KOY

⁴⁰ Written record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/A 43, 44, 56 and 58.

⁴¹ Written record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/A 55 and 56.

⁴² Written record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/A 44.

⁴³ DC-Cam interview of EK Hen, 6 July 2003, **E3/4635**, ERN 00662014-00662015, 00662019-00662021.

⁴⁴ Written record of interview of EK Hen, 5 March 2008, **E3/474**, ERN 00205049-00205050; see also para. 21 des of these submissions.

⁴⁵ Audio of EK Hen's written record of interview (E3/474), 5 March 2008, **D94/8R** after [00.35.42].

⁴⁶ Written record of interview of EK Hen, 5 March 2008, **E3/474**, ERN 00205049-00205050.

Thuon and of the North Zone.⁴⁷ She confirmed that KHIEU Samphân spoke only about work, striving to work and keeping up with the plans, knowing how to conserve, and helping each other in the workplace in order to "build the country, as the war had just ended".⁴⁸ She also maintained that KHIEU Samphân spoke of Pang's arrest despite the temporal incompatibility.⁴⁹ On the contrary, when EK Hen changed her statements in the course of her testimony, she insisted that during the first study meeting, chaired in this version by NUON Chea, only work was mentioned. There was no mention of traitors. In this revisited version at the hearing, the issue of traitors was discussed during the second meeting, this time supposedly chaired by KHIEU Samphân.⁵⁰ Faced with these numerous contradictions, it is obvious that the Chamber chose from these versions of the testimony of EK Hen the most incriminating against KHIEU Samphân.⁵¹ However, this version which is endorsed in the reasons for Judgement still contradicts her most recent statements.

28. Indeed, in the new written record of interview, EK Hen restates that KHIEU Samphân encouraged the workers to work hard but in solidarity to build the nation.⁵² He also talked about the traitors at Office 870 of which Pang was a member.⁵³ But whereas she had never said it before, she added that KHIEU Samphân also evoked the treason of the North Zone cadres.⁵⁴ However, according to her testimony of 3 July 2013, this issue was raised only during the second meeting. As for NUON Chea, according to the 2017 version of the written record of interview, he allegedly spoke of the chaotic situation in the country, border attacks and the treason of the North Zone and the East Zone cadres during the second meeting he also chaired in 1978.⁵⁵

29. It is even more obvious that EK Hen is confused in the narration of events she claims to have witnessed. Had the Chamber considered the discrepancies in all her statements, including her last written record of interview, it could not reasonably have relied on her testimony to find that KHIEU Samphân had held a political training session in mid-1978 during which he announced

⁴⁷ T. 3 July 2013, **E1/217.1**, from [11.10.24] to [11.16.44] and from [11.37.13] à [11.43.46].

⁴⁸ T. 3 July 2013, **E1/217.1**, from [11.18.47] to [11.23.50].

⁴⁹ T. 3 July 2013, **E1/217.1**, from [11.26.06] to [11.11.25.12].

⁵⁰ T. 3 July 2013, **E1/217.1**, from [14.08.03] to [14.12.11].

⁵¹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4272.

⁵² Written record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/A 42.

⁵³ Written record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/A 43.

⁵⁴ Written record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/R 43.

⁵⁵ Written Record of interview of EK Hen, 6 March 2017, **E319/71.2.7**, Q/A 55 and 56.

Pang's arrest. Yet, this is one of the factors that led the Chamber to find that KHIEU Samphân had the intent to commit the crimes at the security centres and execution sites in Case 002/02.

b. KHIEU Samphân's participation in a joint criminal enterprise

30. In the reasons for Judgement, the Chamber stated that it was satisfied that KHIEU Samphân participated in a common purpose by concluding that he "not only shared support for the common purpose, but that he actively instructed on its implementation through the various policies."⁵⁶ To reach this finding, the Chamber again relied solely on statements by EK Hen on the study meeting chaired by KHIEU Samphân at Borei Keila in mid-1978.⁵⁷ For the same reasons given *supra*,⁵⁸ the Chamber should have reasonably dismissed this testimony for lack of credibility in its umpteenth version and should not have relied on it to find that KHIEU Samphân participated in a common purpose.
31. Also, the Chamber should not have relied on EK Hen's statements to find that during the same political education session, KHIEU Samphân, specified that the "Khmer had to be united" and that the "Khmer shall be free of [the] Vietnamese".⁵⁹ It should be noted that the Chamber employs these words "After the shift in the CPK's policy toward the Vietnamese in 1977" to find that KHIEU Samphân supported this policy.⁶⁰ In reaching this finding, challenged on appeal,⁶¹ the Chamber also relied on the transcript of an interview by NEOU Sarem with *VOA* which supposedly confirmed Khieu Samphân's remarks.⁶² In knowingly concealing the discrepancies in EK Hen's testimony,⁶³ the Chamber wanted to artificially corroborate her testimony with this second source. However, it could not reasonably rely on any of these two pieces of evidence.

⁵⁶ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4274.

⁵⁷ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4272 (finding challenged in KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 32, errors 18.163, 18.169 and 18.173).

⁵⁸ See *supra* submissions on the discrepancies of EK Hen's at paras 21-29 and in the Annex.

⁵⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E/465**, para. 4271 (here the Chamber refers to para. 3390 of the Trial Chamber Judgement in Case 002/02 which directly cites the statements of EK Hen in footnote 11437).

⁶⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4271.

⁶¹ KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 32, errors 18.162 and 18.173.

⁶² Judgement Trial Chamber Case 002/02, 16 November 2018, **E465**, para. 4271 cross-referencing paras. 3390 and footnote 11437 (Transcript of NEOU Sarem's Interview by VOA Khmer Service, **E3/6934**, pp. 7, 11 and 113, ERN (En) 01003407-01003411-01003513).

⁶³ See *supra* submissions on the discrepancies of EK Hen in paras 21-29, and in the Annex.

32. Indeed, NEOU Sarem's interview with *Voice of America* raises two issues. First, it is a statement given outside the framework of a judicial process and is therefore of very low probative value. Second, it is essentially a statement that cannot be used as evidence of the actions and conduct of the accused, pursuant to the Chamber's (and the Supreme Court's) jurisprudence.⁶⁴ Nonetheless, the Chamber acted as such in violation of the rules of evidence recalled in the reasons for Judgement.⁶⁵ In expressly refusing the appearance of NEOU Sarem as requested by the Civil Parties,⁶⁶ and thus any examination and cross-examination by the parties, the Chamber could not use her statement on the remarks allegedly made by KHIEU Samphân.
33. Moreover, apart from the issue of the credibility and reliability of the sources cited, they cannot establish what the Chamber intended to find. Although the Chamber recalled the applicable rules of evidence enunciated by the Supreme Court Chamber,⁶⁷ it hastened to reach an adverse finding against KHIEU Samphân without considering whether there were other plausible interpretations on the basis of evidence produced at the hearing. This is why the Chamber sought at all costs to place the remarks attributed by EK Hen to KHIEU Samphân after Pang's arrest in 1978. This was the only way for the Chamber to establish a nexus with the would-be policy of the CPK to destroy the Vietnamese group from 1977.⁶⁸ However, the transcripts of EK Hen cited by the Chamber mention a political education lecture allegedly given by KHIEU Samphân in 1976 and not in 1978! This date is not only incompatible with the date of Pang's

⁶⁴ Decision on objections to the admissibility of witness, victim and civil party statements and case 001 transcripts proposed by the co-prosecutors and civil party lead co-lawyers, 15 August 2013, E299, paras 17 and 28; Decision on co-prosecutors' rule 92 submission regarding the admission of witness statements and other documents before the trial chamber, 20 June 2012, E96/7, paras 21 and 22; Response to the Khieu Samphân defence request for clarification in relation to the Trial Chamber decision E319/52/4, 6 December 2016, E319/52/5; Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 70; the Supreme Court Chamber upheld this reasoning in Case 002/01 Appeal Judgement, 23 November 2016, F36, paras 284-294.

⁶⁵ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, paras 69-73.

⁶⁶ Decision on witnesses, civil parties and experts proposed to be heard during case 002/02, 18 July 2017, E459, paras. 181-184 (the Chamber denied the appearance of NEOU Sarem because "the in-court statement of NEOU Sarem (2-TCCP-268) in case 002/02 is likely to be substantially repetitive of the evidence heard on the Role of the Accused in Case 002/02 from, inter alia, BEIT Boeurn (BIT Na), alias BIT Beuan (2-TCW-953), NORNG Net (NONG Net) (2-TCW-913), SON Em (2-TCCP-223) and SENG Lytheng, alias Theng (2-TCW-897) who also testified about the involvement of the Accused in education or study session.").

⁶⁷ Trial Chamber Judgement 002/02, 16 November 2018, E465, para. 65, cross-referencing Case 002/01 Appeal Judgement, 23 November 2016, F36, para. 970.

⁶⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 4271, see also para. 3390, footnote 11437 "The Chamber notes that EK Hen testified that there were "only Cambodians and no Yuons" in the country at the time. The Chamber also recalls that this training occurred after Pang was denounced (he was arrested in or about April 1978).".

arrest but also with the policy of destruction of the Vietnamese group as found by the Chamber. Other interpretations were not only possible but were, above all, more plausible.

34. Thus, EK Hen's statements would have been more compatible with a potential repatriation of the Vietnamese prior to or at the beginning of the regime. The content of the transcript of NEOU Sarem's interview with *Voice of America*⁶⁹ is more in support of this approach because, according to him, during his political education at the Khmer-Soviet Institute, KHIEU Samphân explained that Vietnamese who could not do farming would be sent back to Vietnam.⁷⁰ Obviously, in this context, the remarks refer to the repatriation of Vietnamese present on Cambodian soil to Vietnam which occurred well before 1978. In any case, true or false, this reference does not corroborate what the Chamber had hoped to find regarding EK Hen's statements on KHIEU Samphân's alleged support for a policy aimed at destroying the Vietnamese group. The Chamber could certainly not do so because in the very new written record of interview, which is sought in evidence, EK Hen claims that KHIEU Samphân encouraged them to "love each other, live in solidarity and not to betray each other" and does not at all mention his use of the word '*yuon*'.⁷¹

35. Thus, the Chamber could certainly not rely on EK Hen's statements to make those factual findings on KHIEU Samphân, nor on the transcript of NEOU Sarem's interview with *Voice of America*. The baselessness of such findings should have led the Chamber to reach a wholly or partly different verdict, in light of the findings it reached on KHIEU Samphân's participation in a joint criminal enterprise.

c. KHIEU Samphân's knowledge arising after the commission of the crimes

36. The Chamber also relied on EK Hen's testimony to conclude that KHIEU Samphân had "attended and lectured at study sessions and mass rallies at which criminal conduct toward CPK enemies was discussed, encouraged and incited, including against the Vietnamese, former Khmer Republic officials, New People and other detractors of the revolutions".⁷²

⁶⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4271 cross-referencing para. 3390, footnote 11437, Transcript of NEOU Sarem's Interview by VOA Khmer Service, Doc. No. E3/6934, pp. 7, 11 and 113, ERN (En) 01003407-01003411-01003513.

⁷⁰ Trial Chamber Judgement 002/02, 16 November 2018, **E465**, para. 4271 cross-referencing para. 3390, footnote 11437.

⁷¹ Written Record of interview of EK, 6 March 2017, **E319/71.2.7**, Q/A 50 and 51.

⁷² Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4253.

37. This finding of fact, which is challenged on appeal,⁷³ is so broad and general that the sources are difficult to identify. Indeed, the Chamber makes many references that do not allow the Defence to determine the precise references on which it relies. In this case, the Chamber merely refers to paragraphs 4271 to 4273 which themselves refer to other paragraphs in different parts of the reasons for Judgement, which paragraphs still refer to other paragraphs! At the end of the chain of these multiple references, the source no longer mentions KHIEU Samphân.⁷⁴ There is also a case where the footnote refers to the same paragraph referred to by the footnote, thereby preventing the identification of the source used.⁷⁵ In addition, the Chamber often refers to entire sections without referring to specific paragraphs. Consequently, it is all the more difficult to know the sources on which the Chamber relied to reach its findings.⁷⁶

38. However, it is clear that EK Hen is one of the main sources corroborating this assertion.⁷⁷ For the reasons explained *supra* regarding the discrepancies in her statements,⁷⁸ the Chamber should not have relied on this witness to reach a factual finding that was crucial to the Chamber's reasoning. Indeed, the Chamber used her testimony to find that KHIEU Samphân's knew of the crimes after their commission.⁷⁹

2. Impact on the common purpose

39. The statements of EK Hen were also used to link KHIEU Samphân not only to the implementation of the common purpose (a) but also to the design of the common purpose (b).

a. Design of a common purpose through various policies

⁷³ KHIEU Samphân's notice of appeal (002/02), 1 July 2019, E465/4/1, para. 32, error 18.115.

⁷⁴ For example, para. 4253 in question cross-references paras 4271-4273 (footnote 13940) which cross-references para. 4054 which cross-references para. 3736, which also cross-references many paragraphs and sections: paras 3942 and 3943, to section 10.1.9, to para. 4038 and to sections 10.1.6.3, 13.3.5 and 13.2. However, para. 4038, for example, does not at all mention KHIEU Samphân, but SON Sen.

⁷⁵ For example, para. 4253 in question cross-references para. 4272, whose footnote 13941 cross-references the very same para. 4272.

⁷⁶ Same example as above: para. 4253 in question cross-references paras 4271-4273 (footnote 13940) which cross-references para. 4054 which cross-references paras 3736, which cross-references many paragraphs and sections: paras 3942 and 3943, section 10.1.9, and para. 4038 and sections 10.1.6.3, 13.3.5 and 13.2.

⁷⁷ Trial Judgement Case 002/02, 16 November 2018, E465, para. 4253 (cross-references paras 4271-4273 which mentions EK Hen statements on the lectures that KHIEU Samphân allegedly gave at Borei Keila in mi-1978: see footnote 13938 (cross-referencing 3390 footnote 11437), 13939 (cross-referencing 3517 and then cross-referencing para. 3390 footnote 11436), 13944 (cross-referencing para. 620), 13947 (cross-referencing para. 3916 footnote 13072)).

⁷⁸ See *supra* submissions on the discrepancies of EK Hen in paras 21-29 and in the Annex.

⁷⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 4254.

40. The Chamber found that there were several policies involving the commission of crimes in the implementation of the common purpose in which KHIEU Samphân participated. EK Hen's statements are found in the Chamber's reasoning to support the finding that there was a policy of creating and operating cooperatives and worksites, and of targeting the Vietnamese and the Cham.

Reliance on EK Hen's testimony to support the policy to establish and operate cooperatives and worksites

41. According to the Chamber, the policy "to establish and operate cooperative and worksites"⁸⁰ was intended in particular to achieve "economic and ideological goals".⁸¹ In particular, the Chamber relied on the testimony of EK Hen to find that "NUON Chea and KHIEU Samphân lectured cadres on meeting economic and production targets"⁸² This factual finding is challenged on appeal.⁸³ Only the statements of EK Hen refer to KHIEU Samphân, while the other cited sources refer only to NUON Chea. However, upon reading her 2017 written record of interview, EK Hen's lack of credibility is so blatant that it should have prevented the Chamber from reaching such a finding on KHIEU Samphân.

Reliance on EK Hen's testimony to support a policy targeting the Vietnamese

42. The Chamber also reached a finding that there was "a centrally-devised policy targeting the Vietnamese".⁸⁴ In so doing, it relied in particular on the testimony of EK Hen to make several factual findings disputed by the Defence. According to the Chamber:

"The Chamber heard testimony from a number of witness who indicated that, from 1976 through 1978, Pol Pot, Nuon Chea, Khieu Samphân and other senior CPK leaders lectured at or attended political training sessions at which the Vietnamese or Vietnamese "agents" were labelled as enemies."⁸⁵

43. EK Hen is the only witness on who the Chamber could rely to find that KHIEU Samphân spoke about the Vietnamese at political education meetings. Indeed, PEAN Khean and MOM Vun, the other two witnesses who place KHIEU Samphân at the political

⁸⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 3918.

⁸¹ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 3916.

⁸² Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 3916, footnote 13072.

⁸³ KHIEU Samphân's notice of appeal (002/02), 1 July 2019, E465/4/1, para. 31, errors 16.158 and 16.159.

⁸⁴ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 3417.

⁸⁵ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 3390 (finding challenged in KHIEU Samphân's notice of appeal (002/02), 1 July 2019, E465/4/1, para. 28, errors 13.126 and 13.127).

education meetings,⁸⁶ solely assert that he could have attended the meetings without taking the floor. The other witnesses do not mention KHIEU Samphân. Thus, although the reference to paragraph 607 includes multiple sources, only EK Hen's statements make reference to KHIEU Samphân on the issue of Vietnamese.⁸⁷ As to the references to some paragraphs in the section on the S-21 security centre, they do not refer to KHIEU Samphân either. The Chamber's finding on KHIEU Samphân's targeting of Vietnamese could not be reasonably inferred from EK Hen's testimony, given her lack of credibility.

44. For the same reasons, the Chamber should not have reached the following finding:

"Witness EK Hen, who was a worker in a garment unit under the authority of Office 870, testified that she attended, together with 400 to 500 participants, a training session conducted by Khieu Samphân, where he explained that "Khmer had to be united [and love each other] and Khmer shall be free of Vietnamese or *Yvon*."".⁸⁸

45. Lastly, the Chamber should neither have stated that:

"Throughout 1978 and early 1979, Pol Pot and Khieu Samphân continued stressing the importance of protecting and preserving the success of the revolution and the "Kampuchean race" from Vietnamese "expansionists" and "annexationists".".⁸⁹

46. While relying mainly on KHIEU Samphân's speeches, most of which were taken from SWB and FBIS case files and which are of low probative value⁹⁰, the Chamber also cites EK Hen in the same largely recycled excerpt.⁹¹ As seen *supra*, the Chamber should not have relied on the

⁸⁶ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3390, footnote 11436 T., 3 May 2012 (PEAN Khean), Doc. No. E1/72.1, pp. 20-25 (Pang lectured on enemies as those "[who were [...]] agents of the KGB, the Vietnamese - the 'Yvon'"); T., 17 May 2012 (PEAN Khean), Doc. No. E1/73.1, pp. 21-26 (NUON Chea and KHIEU Samphân attended meetings at Borei Keila, which Pang lectured at); T., 16 September 2016 (MOM Vun), Doc. No. E1/475.1, pp. 67, 68, 76 and 77 (in 1976, during a meeting at Mount Kulen attended by NUON Chea, KHIEU Samphân and IENG Sary, the first person stated that "[t]he enemy of the revolution were the 'Yvon'").

⁸⁷ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 607, footnote 1904.

⁸⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3390 (finding challenged in KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 28, error 13.128). The Chamber also used this part of EK Hen's testimony in the section on the criminal responsibility of KHIEU Samphân that we have already raised and challenged, demonstrating the major role played by this piece of evidence in the conviction of KHIEU Samphân: see submissions *supra*, paras 31-35.

⁸⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3406 (finding challenged in KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 28, error 13.144).

⁹⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465** para. 3406, footnote 11484.

⁹¹ See *supra*, para. 43.

testimony of EK Hen, which is peppered with discrepancies, particularly concerning the alleged political education lecture given by KHIEU Samphân which she placed in 1976.

Reliance on EK Hen's testimony to support a policy targeting the Cham

47. To reach the finding that there was a policy which “targeted the Cham as an ethnic and religious distinct group throughout the DK period”,⁹² the Chamber uses the same reasoning as it did regarding the Vietnamese in finding that the CPK supported the “preponderance of the “Khmer race” in Cambodia” and that “KHIEU Samphân also stressed the importance of protecting and preserving “forever the fruits of the revolution and the Kampuchean race” during his speeches”.⁹³ Not surprisingly, and in support of this finding, which is also challenged on appeal,⁹⁴ the Chamber makes exact references to the same sources as it did regarding the finding on the Vietnamese.⁹⁵ Similarly, the Chamber again cites the same statements by EK Hen.⁹⁶
48. As argued *supra*,⁹⁷ the Chamber should not have relied on the testimony of this witness to reach such significant findings to convict KHIEU Samphân. The same statements by EK Hen are systematically cited by the Chamber to prove different things. This is a blatant example of the Chamber's systematic recycling and repetition of the same questionable evidence in an attempt to conceal the lack of real and direct evidence and to convict KHIEU Samphân.

b. Design of a common purpose

49. The Chamber found that there was a common purpose of “rapidly implementing socialist revolution in Cambodia through a “great leap forward” designed to build the country, defend it from enemies and radically transform the population into a homogenous Khmer society of worker-peasants.”.⁹⁸ In reaching this finding, another determining factor in KHIEU Samphân's conviction, the Chamber states, *inter alia*, that:

⁹² Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3228; See also para. 3998 (findings of the Chamber on the criminality of the policy, inextricably linked to the common purpose.

⁹³ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3216.

⁹⁴ KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 28, errors 13.26 and 13.27.

⁹⁵ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para.3216, footnote 10825 cross-referencing section 13.3: Targeting the Vietnamese.”, same speeches of KHIEU Samphân and footnote 11484.

⁹⁶ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3216, footnote 10825: “He [Khieu Samphân] said Khmer had to be united and Khmer shall be free of Vietnamese, or the ‘Yuong’, and that we had to love one another.”.

⁹⁷ See *supra* submissions on the discrepancies of EK Hen in paras 21-29, and in the Annex.

⁹⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3743.

“Pol Pot, Nuon Chea, Khieu Samphân and other senior leaders further lectured cadres at mass study sessions on the need to work harder, “eat less” and “rest less” and fulfil the Party’s goals “at all costs”.”.⁹⁹

50. In support of this finding, the Chamber again relies on EK Hen as a source and cites her as follows:

“study session “started with [Khieu Samphân] explaining and instructing the workers to strive harder in our work in order to assist our country. [...] He did not want us to argue [with] each other, but rather to consolidate and strive to work hard to build the country, as the war had just ended”.”.¹⁰⁰

51. By this very quotation, the Chamber highlights the discrepancies in the witness’s statements without mentioning them. Indeed, EK Hen relates the remarks KHIEU Samphân made at Borei Keila in the following terms: “build the country, as the war had just ended”. On cross-examination by the Defence, she explained that she meant the war with the Lon Nol regime.¹⁰¹ According to this quotation, KHIEU Samphân’s remarks were made rather in 1976 and not in “mid-1978” as indicated elsewhere by the Chamber in the reasons for Judgement.¹⁰² Once again, any reasonable trier of fact should have noted such major discrepancies, drawn the logical inferences and discarded the testimony of EK Hen.

3. Impact on the role and functions of KHIEU Samphân

52. Lastly, the Chamber relied on the testimony of EK Hen on the alleged political education lectures given by KHIEU Samphân at Borei Keila to demonstrate the importance of his role under the DK in order to reach the following finding:

“Participants ranging from combatants to CPK cadres and returnees from overseas, numbering in the tens to the thousands, were variously instructed on revolutionary principles, cooperatives, agricultural techniques and economic matters, with Khieu Samphân lecturing on identifying “enemies” and uncovering “traitors”.”.¹⁰³

53. The Chamber explains that the witness “recall[s] two lectures in 1976 or 1977, and 1978, at which Khieu Samphân lectured between 400 to 500 participants about work quotas, including

⁹⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para 3739 (finding challenged in KHIEU Samphân’s notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 31 errors 16.5 and 16.12).

¹⁰⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3739, footnote 12473.

¹⁰¹ T. 3 July 2013, **E1/217.1**, from [14.06.06] to [14.08.03].

¹⁰² Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3390, 3406, 4271 and 4272.

¹⁰³ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 607 (finding challenged in KHIEU Samphân’ notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 23, errors 8.37, 8.38, 8.39, 8.40 and 8.41).

the production of three tons of rice per hectare, and Vietnamese collaboration”.¹⁰⁴ Contrary to the other findings reached on the testimony of EK Hen, the Chamber is deliberately vague in not specifying during which meeting KHIEU Samphân made those remarks. The statements made by EK Hen are no more credible, and the Chamber should not have relied on them. However, this factual finding was a determining factor in “the assessment of Khieu Samphân’s criminal responsibility”,¹⁰⁵ given the importance attached by the Chamber to his alleged role.

54. **Conclusion-** As she is one of the few witnesses permitting the Chamber to ascribe closely - or rather remotely - some criminal responsibility to KHIEU Samphân for the crimes charged, the Chamber deliberately ignored the major inconsistencies and memory problems that clearly impugned the credibility of the witness. The new written record of interview of EK Hen only confirms this finding and this is why it is essential to have it admitted on appeal. The factual findings based on EK Hen's statements played a determining role in the conviction of KHIEU Samphân. The Defence is justified in thinking that had the new written record of interview been tendered into evidence, the Chamber - in any event, a reasonable Chamber - would have delivered a different verdict.

B. CHUON Thy’s new written record of interview

55. As to Witness CHUON Thy, his exculpatory statements were ignored. A very familiar witness in Case File 002 who testified in Cases 002/01¹⁰⁶ and 002/02,¹⁰⁷ this former West Zone Battalion Commander testified on many factual facts relevant to marriage practices. He stated in particular that people were free to marry and explained what CPK’s real policy on marriage was. However, the Chamber convicted KHIEU Samphân, on the basis of his participation in a joint criminal enterprise, of crime against humanity of other inhumane acts through conduct characterized as forced marriage and rape in the context of forced marriage.¹⁰⁸

56. In particular, the Chamber found that there was a “policy to regulate marriage and family-building”, that the policy was “intrinsically linked to the common purpose” and that it “involved the commission of the crime against humanity of other inhumane acts through conduct

¹⁰⁴ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 607, footnote 1904.

¹⁰⁵ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 4203.

¹⁰⁶ T. 24 April 2013 (002/01), E1/183.1.

¹⁰⁷ T. 25-26 October 2016 (002/02), E1/489.1 and E1/490.1.

¹⁰⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, E465, para. 4308.

characterized as forced marriage and rape”.¹⁰⁹ To that end, many erroneous factual findings were made on the regulation of marriages. These were all determining factors in KHIEU Samphân's conviction.

57. The Defence notes that the Chamber deliberately ignored CHUON Thy's exculpatory testimony on the issue. On the other hand, the Chamber did not fail to cite him when it felt that his testimony was incriminating,¹¹⁰ thereby showing blatant bias in its assessment of the evidence. However, had the witness's statements been considered as a whole and had his new written record of interview been admitted into evidence, many factual findings by the Chamber would necessarily have been different.

Findings on matching couples of the same class

58. The Chamber found that “biographies of individuals were screened before matching them to get married”¹¹¹ and “that generally people with similar backgrounds were matched to marry; Base People were matched to marry Base People and not New People”.¹¹² It also found that “people with different backgrounds were also allowed to marry if the authorities considered that they were “good people””.¹¹³
59. Contrary to these findings which are challenged on appeal,¹¹⁴ CHUON Thy explains in his written record of interview that within the military there was no class categorization and that everyone was free to choose their spouse.¹¹⁵ He further states that in his battalion the men chose their wives from a women's unit near their base. He said that in this unit there were Base People women and New People women and that membership in one category or another mattered little in the choice of spouse. If a soldier loved a New People's wife then they were free to marry.¹¹⁶
60. These statements directly contradict the Chamber's factual findings on the matching of couples by class. Although some of the testimony cited by the Chamber is consistent with its findings, CHUON Thy's written record of interview contradicts the prosecution evidence endorsed by

¹⁰⁹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 4067.

¹¹⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3568 (on the reports he had to submit to the higher authorities, para. 3636 (on respecting Khmer marriage tradition) and para. 3639 (on the absence of his parents from his marriage).

¹¹¹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3576.

¹¹² Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3580.

¹¹³ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3580.

¹¹⁴ KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 29, errors 14.35 and 14.36.

¹¹⁵ Written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 123 and 124.

¹¹⁶ Written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 129-131.

the Chamber. For these reasons, the Chamber should not have found that there was a homogeneous practice throughout the country, let alone that there was a national policy adopted by the Party as described.¹¹⁷

Findings on disabled soldiers

61. As to disabled soldiers, the Defence challenges the Chamber's finding that "[...] marriage between disabled soldiers, considered as war heroes and trusted revolutionaries, and young women selected from among Base People, were implemented according to a policy promoted by the highest levels of the CPK. Based on such ideological values, females were expected to sacrifice themselves for "patriotic" reasons and for the benefit of the revolution".¹¹⁸

62. While CHUON Thy's statements confirmed the fact that marriages were organized for soldiers with disabilities and that women at that time were particularly devoted, he stated that they had the right to refuse without any repercussions.¹¹⁹ Thus, once again, it is clear from his statements that people were not forced to marry or that, at least, it was not the policy adopted by the "highest levels of the CPK" such as wrongly found by the Chamber.¹²⁰

Findings on authorization to marry

63. In the reasons for Judgement, the Chamber made several factual findings on the authorization to marry. It found that higher level authorities instructed lower level cadres to match the couples and provided lists to higher-level cadres for approval.¹²¹ Whether a marriage was proposed by persons or by the authorities, it would necessarily have required the approval of higher authorities.¹²²

64. CHUON Thy testified at length on how marriages were organized in his unit. But the Judges simply ignored his testimony that did not tally with their version of the facts. However, he was

¹¹⁷ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3543.

¹¹⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3590 (finding challenged in KHIEU Samphan's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 29, errors 14.39 and 14.41).

¹¹⁹ Written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 191-198.

¹²⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3670.

¹²¹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3594-3598, 3608 (finding challenged in KHIEU Samphan's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 29, errors 14.44 and 14.45).

¹²² Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3602 (finding challenged in KHIEU Samphan's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 29, error 14.45).

one of the few witnesses whose appearance was requested by the Defence ¹²³ and the Chamber did not even deign to assess his testimony. However, he explained at the hearing that in the event that the authorities offered a person a spouse to marry, they were free to refuse without any repercussions.¹²⁴ This statement is confirmed in his new written record of interview,¹²⁵ which should have led the Chamber to reach a more balanced finding, including a finding on the consent of the persons concerned.

Findings on the notification and consent of the individuals concerned

65. In the reasons for Judgement, the Chamber found that individuals “were usually not consulted about the marriage and received little to no notice that they were to be married”.¹²⁶ On consent, it found that “people could not refuse to marry without suffering consequences. The Chamber is further satisfied that the coercive environment throughout the country during the DK regime was such that genuine consent was impossible and, therefore, people had no choice other than to obey and marry in accordance with a coercive practice stemming from CPK directives on marriage”.¹²⁷ In the same vein, the Chamber found that when some cadres were able to choose their wives, the wives were forced to accept.¹²⁸
66. To reach these findings, which are also challenged like the others,¹²⁹ the Chamber mentions a number of witnesses who testified that they had either been forcibly married or did not consent thereto.¹³⁰ However, the Chamber was also compelled to identify a number of witnesses, former CPK cadres, who testified that according to the official policy of the CPK, and in practice, it was necessary to ensure that both parties consented to the marriage and nothing happened to those who refused.¹³¹ The Chamber did not draw the necessary inferences from these testimonies. However, this position is consistent with both CHUON Thy's testimony,

¹²³ *Témoins et experts proposés par la Défense de M. KHIEU Samphân pour le procès 002/02*, 9 May 2014, **E305/5**, with *annexes E305/5.1*, p. 1 and **E305/5.2**, p. 1.

¹²⁴ T. 26 October 2016 (002/02), **E1/490.1**, after [09.08.25] to [09.15.00] and from [09.15.48] to [09.21.23].

¹²⁵ Written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 193-198.

¹²⁶ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3616.

¹²⁷ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3625.

¹²⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3591 and 3623.

¹²⁹ KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 29, errors 14.42, 14.49, 14.53 and 14.54.

¹³⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3619-3624.

¹³¹ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3617.

deliberately ignored by the Chamber, and the statements in his last written record of interview. Indeed, the witness consistently maintained that marriages were not forced in his unit and that spouses were married according to their wishes.¹³² He even mentioned his own marriage which was organized on the basis of mutual consent.¹³³

67. As to receiving instructions, CHUON Thy testified that he had never heard about people being forced to marry.¹³⁴ On the contrary, at a meeting held in June 1978 in Kampong Chhnang, he testified that he had heard Pol Pot explain that it was necessary to organize marriages, but without forcing people. They had to express their consent.¹³⁵ This testimony is also consistent with other pieces of evidence such as the Party's two principles on marriage set out in the October 1978 issue of *Revolutionary Youth*:

“First, both parties agree. Second, the collective agrees, and then it is done. Why should this impact male-female morality?”.¹³⁶

68. These two principles derive from the sixth of the twelve moral principles spelt out by the Party in 1968: "do not behave in any way that violates females".¹³⁷

69. Again, these facts are in total contradiction with the Chamber's general finding on notification and consent and the CPK's policy on the regulation of marriages. In order to convict, the Chamber relied only on the prosecution evidence and discarded the many exculpatory testimonies under the erroneous pretext that these are former cadres who have “[the] tendency to minimise their own responsibility”.¹³⁸ Yet, another reasonable and plausible finding would be that the cadres are best placed to testify on CPK policy. The Chamber's finding is all the more erroneous because it is not only in contradiction with these testimonies but also, and especially, with the official texts and propaganda documents of the CPK.¹³⁹

¹³² T. 24 April 2013 (002/01), **E1/183.1**, from [09.57.12] to [10.03.02] ; T. 25 October 2016 (002/02), **E1/489.1**, after [15.56.18] ; T. 26 October 2016 (002/02), **E1/490.1** from [09.06.09] to [09.13.11]; Written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 33, 34, 104-109, 118, 123, 124, 130-133.

¹³³ T. 25 October 2016 (002/02), **E1/489.1**, from [15.54.32] to [15.56.58] and after [16.00.11].

¹³⁴ T. 26 October 2016 (002/02), **E1/490.1**, from [09.11.42] to [09.15.00].

¹³⁵ T. 26 October 2016 (002/02), **E1/490.1**, from [09.34.28] to [09.38.11], confirming his Written record of interview of 18 September 2015, **E3/10713**, Q/A 28 and 29. See also the new written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 33.

¹³⁶ *Revolutionary Youth*, October 1978, **E3/765**, ERN 00539994.

¹³⁷ *Revolutionary Youth*, October 1978, **E3/765**, ERN 00539992-00539994.

¹³⁸ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, para. 3623.

¹³⁹ All these arguments will obviously be developed in the Defence Appeal Brief.

70. Although it is true that witnesses claimed to have been forced into marriage, the Chamber should have made a distinction between, on the one hand, CPK official policy advocating prior consent of the future spouses and, on the other hand, the practice which, in light of the entire evidence, was far from reflecting the existence of a homogeneous national policy of forced marriages. CHUON Thy's corroborating testimony should therefore have been assessed objectively.

Findings on consummation of marriage

71. The Chamber held that it was satisfied that after marriage ceremonies, "couples were commonly monitored to ensure that they had consummated their marriage" and that there was such a general climate of fear that people had sex for fear of reprisals.¹⁴⁰ The Chamber assessed only the prosecution evidence and ignored CHUON Thy's evidence that in his unit "there was no process where those newlywed couples were monitored whether they consummated their marriage or not. It did not happen.". He further stated: "I did not hear the upper echelon to relay instructions to monitor whether the couples consummate their marriage or not."¹⁴¹

72. In the new written record of interview, when examined on the same subject, the witness replied that after the marriage he stayed for about two weeks with his wife but that no one came to ask him if he got on well with her. He explained that subsequently he and his wife returned to work in their respective units and that they saw each other every three or four days, because work did not allow them to see each other more often.¹⁴²

73. **Conclusion** - CHUON Thy's new written record of interview, which confirms and supplements his earlier statements, calls into question a large number of the Chamber's factual findings. However, these factual findings had a considerable impact on the Chamber's finding of guilt against KHIEU Samphân's. Indeed, the Chamber endorsed it as proof of the crime against humanity of other inhumane acts through conduct characterized as forced marriage and rape committed in the context of forced marriage.¹⁴³ The Chamber also used these factual findings to determine the existence of a policy aimed at regulating marriage¹⁴⁴ and, especially, to

¹⁴⁰ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3644-3647 (finding challenged in KHIEU Samphân's notice of appeal (002/02), 1 July 2019, **E465/4/1**, para. 29, errors 14.59 and 14.60).

¹⁴¹ T. 26 October 2016 (002/02), **E1/490.1**, from [09.13.05] to [09.18.04].

¹⁴² Written record of interview of CHUON Thy, 28 February 2017, **E319/71.2.4**, Q/A 117-120.

¹⁴³ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3690-3700.

¹⁴⁴ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 3539-3563.

characterize the criminality of the policy. This allowed the Chamber to include the crimes mentioned in the common purpose¹⁴⁵ resulting in KHIEU Samphân's conviction for his participation in a joint criminal enterprise.

IV. THE ADDITIONAL EVIDENCE REQUESTED IS NOT SUBJECT TO THE PROVISIONS OF RULE 87(3) OF THE INTERNAL RULES

74. Pursuant to Rule 108(7) of the Internal Rules, the present request is subject to the provisions of Rule 87(3) which provides as follows:

“The Chamber may reject a request for evidence where it finds that it is: a. irrelevant or repetitious; b. impossible to obtain within a reasonable time; c. unsuitable to prove the facts it purports to prove; d. not allowed under the law; or e. intended to prolong proceedings or is frivolous.”

75. The written records of interview of EK Hen and CHUON Thy which are being requested as evidence are particularly relevant given the Chamber's reliance on the testimony of these Prosecution witnesses in the reasons for Judgement. As witnesses who regularly testified before the Chamber, their subsequent declarations allow for a full assessment of their credibility and the unreasonableness of the Chamber's findings on KHIEU Samphân conviction. The audio recordings of the hearings are also likely to affect the credibility of the statements made by the witnesses. Besides, the written records of interview are not repetitive. EK Hen again gave a different version of her prior statements. CHUON Thy gave more important details on marriage regulation and discussed new issues such as marriages with disabled people.

76. The written records of interview of EK Hen and CHUON Thy have been readily available and accessible to the parties ever since the International Co-Prosecutor made his disclosure request. The audio recordings can be quickly accessed once they are diligently disclosed by the Co-Prosecutor. The said written records of interview were obtained within the framework of a judicial process by sworn investigators from the office of the Co-Investigating Judges and are, therefore, *prima facie* reliable and likely to prove what they intend to establish. They were not obtained by torture or other circumstances prohibited by law.

77. The parties should have had the opportunity to discuss these records before the Chamber when it became aware of them during its deliberations. The Defence therefore now wishes to repair

¹⁴⁵ Trial Chamber Judgement Case 002/02, 16 November 2018, **E465**, paras 4064-4067.

this injustice and to debate it on appeal as it could not do so at trial. This request is lawful, well-founded and in the interests of justice.

78. **FOR THESE REASONS**, the Defence requests the Supreme Court Chamber to ADMIT documents **E319/71.2.7** and **E319/71.2.4**, and the corresponding audio recordings as soon as they are disclosed by the Prosecution following an injunction by the Supreme Court Chamber.

	KONG Sam Onn	Phnom Penh	
	Anta GUISSÉ	Paris	