



**AFTER TWO DAYS OF QUESTIONABLE WITNESS TESTIMONY, DUCH LECTURED HIS FORMER SUBORDINATE: “JUST TELL THE TRUTH!”**

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**Prosecution and Civil Parties Challenge the Veracity of Mam Nai’s Testimony**

Yesterday, judges and lawyers implied not so subtly with their words and their tone that former Tuol Sleng prison (S-21) interrogator Mam Nai was not telling the Trial Chamber the whole truth. While the rights to silence and against self-incrimination have been the focus of much discussion and debate in Mam’s presence, he was also reminded of his obligation to tell the truth and told there were consequences for not doing so. Today, falsehoods were not implied. Rather, they were demonstrated with hundreds of pages of documents in Mam’s handwriting – and there was nothing subtle about it.

In brief, yesterday Mam testified that he interrogated prisoners and elicited their confessions in a house near the S-21 complex by “playing politics,” asking questions repeatedly, and giving prisoners time to “reflect” on their mistakes. He said he did not use torture, was never instructed to use torture, and did not know if others used torture. He claimed that prisoners appeared to be in good health and that he was unaware of their detention conditions or their fates after he wrote out their confessions. He claimed not to have knowledge of major aspects of S-21, such as its staff size and structure, because he pretended to be “blind and deaf” to stay out of trouble and spent his time in his interrogation house alone.

Upon further examination, many of these assertions were successfully discredited. While Mam has maintained that he did not personally torture the prisoners he interrogated, at a February 2008 S-21 re-enactment he took part in along with the ECCC investigating judges and the Accused Person, Kaing Guek Eav (alias Duch), Mam stated that he had used “whips and electric wire” in his interrogations. When reminded of this today, Mam exercised his right to remain silent.

Yesterday, with the Chamber’s permission, international co-prosecutor William Smith provided Mam with a 300-plus page notebook to review for today’s discussion. Mam confirmed the document contained his writing and included his dictations of several lectures Duch gave during staff study sessions. While yesterday Mam said he was not aware if torture was used or if Duch instructed that it be used, Smith described the

notebook as “full of references to torture” at S-21. Smith asked Mam if it was correct that he was in fact aware of torture at S-21 because Mam and others were instructed to carry it out as evidenced by the notebook. Mam replied that he was never personally instructed to use torture and was not aware of what others practiced.

Yesterday, Mam maintained that he had no knowledge regarding how his interrogation unit was organized, how many people were in it, and what those people practiced since the unit did not meet or discuss practices. Today, Smith displayed an S-21 “work plan” and Mam confirmed the multi-page document was written by his hand. Smith summarized the document which apparently detailed the unit’s organization, the division of the workload, and the responsibilities of various individuals. The work plan also set out a specific regime of meetings, with some meetings occurring every three days. When asked if Mam agreed that, at the time, he completely knew the organization of the interrogation unit and was one of its main coordinators, Mam replied “I do not agree with you” and then failed to provide a coherent explanation.

Mam testified that he interrogated 20 to 30 Vietnamese combatants and one or two Vietnamese civilian spies. Smith cited a statement from Duch that Mam was responsible for interrogating all the Vietnamese prisoners at S-21 because of his language skills. Mam agreed. Smith then cited the S-21 prisoner list documenting 122 Vietnamese combatants and 144 Vietnamese spies. When asked if he in fact interrogated all of them, Mam chose to remain silent.

After completing this line of questioning, Smith asked Mam if he was “minimizing [his] role” at S-21 to distance himself from the crimes. Mam replied, “I have never had such an idea.”

For dramatic effect, international defense counsel Francois Roux stood to point out that the prosecution had summoned this witness. Later, after the defense finished questioning Mam, Roux thanked the prosecution for calling the witness and said if the prosecution had any further witnesses like this one they should not hesitate to call them. While Roux is a far better defense counsel than his occasional stand-in, I am mainly glad he returned this week from his personal leave because of entertaining comments like these. Smith corrected that the Chamber had summoned the witness, to which Roux replied that while the Chamber sends the summons, the prosecution had included Mam on its list of proposed witnesses.

Roux’s comments came on the back of his examination of Mam who seemed particularly cold and evasive. When asked what Mam thought of the Khmer Rouge period now, Mam almost seemed to remember it fondly, stating that conditions were tough at the time due to the war and insufficient food, but Cambodia’s independence and self-mastery were positive aspects in line with the Buddhist ideal of self-reliance. When asked if Mam knew how many people died at S-21, he said, “I did not have a duty or position to know this matter.” When asked how many people died during the Khmer Rouge period in Cambodia, he simply stated that he did not know. Roux inquired if Mam had any regrets

and he stated he regretted the “small group of good people” that were killed. Mam was not regretful for the “bad people.”

### **Duch Pleads with Mam Nai to Tell the Truth and Acknowledge His Crimes**

After the parties finished questioning Mam, President Nil Nonn gave the floor to Duch for his observations. Oddly, Duch explained to the Chamber that he was closer to other men at S-21 and never really liked Mam all that much. Then things got interesting. Duch said the 300-plus page notebook mentioned earlier, detailing torture, reflected their “actual work.” With passion and intense arm gestures, Duch told Mam not to be afraid of death and to “just tell the truth!” Duch explained that he has acknowledged his own crimes and told Mam, “I want you to do this same.”

Duch explained that over a million people perished at the hands of the Communist Party of Kampuchea (CPK) and reminded Mam that they were both CPK members. “We” are emotionally responsible for the crimes committed and cannot blame the party line, Duch explained. Cambodia, the whole world, and the civil parties are seeking the truth. Duch reminded Mam that the wife and daughter of their former professor, Phung Ton, were there watching as civil parties and wanted to know where the professor’s ashes are. “Please be ready to tell the truth.”

Given that the husband and father of her clients was raised, civil party lawyer Silke Studzinsky asked the Chamber to allow Mam an opportunity to provide further information. Mam said he had none to provide, but expressed his “regretfulness to the family of Professor Phung” and broke down in tears for the first time.

Mam had been questioned earlier by Studzinsky about Phung and, although Mam had recognized Phung’s photograph and acknowledged his handwriting on Phung’s confession, Mam said he did not recall if he actually interrogated him and had no knowledge of his fate. Later, under questioning from the defense, Mam recalled interrogating Phung and said his confession was not forced: “he spoke from his heart.”

When Studzinsky initially put Phung’s mug shot up on the screen, his wife and daughter could be seen and heard sobbing loudly, despite the bullet-proof glass separating them from the public gallery. These women are among the few civil parties who attend the proceedings every day.

### **Joint Criminal Enterprise and Self-Incrimination Debated for Third Day in a Row**

First thing this morning, the national co-prosecutor reminded Mam of his right against self-incrimination provided by Internal Rule 28, but encouraged him to give full testimony even if it might be incriminating. He stated that under ECCC law, only high leaders and those “most responsible” can be prosecuted. Further, he assured the witness that, since it has been over thirty years, the statute of limitations has lapsed so people who do not fall into those two categories will not be prosecuted. I looked over at Roux expecting him to object at any second, but surprisingly he did not.

Roux waited until it was his turn to question Mam and then provided a rebuttal of sorts to the prosecution's assurances. Roux reminded Mam of his rights and obligations. He then advised Mam not to believe the prosecution when they tell him he cannot be prosecuted, noting that during the lunch break Roux read a submission from the prosecution that, as a party to the Convention Against Torture, Cambodia is responsible for prosecuting all those who have committed torture. Smith interrupted to raise the same argument as yesterday – "delicate matters" regarding self-incrimination should be raised *in camera* per Rule 28.

The President, clearly annoyed with Roux, stated that Roux had the floor to question the witness, not to make such comments. Further, it is the Chamber's job to inform the witness of his rights and the defense should not advise the witness because he has his own lawyer for that purpose. Roux correctly pointed out that the prosecution made such comments first. In essence, the President told him to start asking Mam questions or sit down.

After Mam left the courtroom for the day, Roux stood to "express [his] continued concern" regarding self-incrimination. He said witnesses should be appropriately warned of the risks they face given the potential application of Joint Criminal Enterprise (JCE) liability in this trial and the prosecution's false assurances this morning.

The President accused the prosecution and the defense of "exploiting the proceedings" for their own gains and said if they have observations they should submit them in advance in writing per Rule 28. The President then made a somewhat disturbing observation that if the parties keep bringing up self-incrimination during the proceedings, witnesses will invoke silence more often and it will be more difficult for the Chamber to get to the truth.

Roux pressed on, stating that the prosecution made public comments in the morning, so he was responding publicly. Roux said he welcomed an *in camera* session to address the important question of JCE. Given that JCE extends equal criminal liability to all actors in a common criminal plan, Roux has argued repeatedly that perpetrator witnesses will face greater risk of prosecution if the Chamber decides to apply JCE liability in the Duch trial. For perhaps the fifth time this week, the prosecution repeated its view that JCE has nothing to do with self-incrimination.

After a short recess, the Chamber noted that both the prosecution's assurances in the morning and the defense's advice to the witness in the afternoon were inappropriate. The President warned sternly that they should not raise the issue again during the testimony of the next witness.

### **Mam Nai Was Assigned a Lawyer, But What Role Was That Lawyer Assigned?**

After Mam stated on Monday that he did not have a lawyer but would like one, the ECCC's Witness and Expert Support Unit (WESU) assigned Kong Sam Onn to be his

lawyer. Kong sat next to the defense during Mam's testimony and made some objections and comments. This much is clear.

However, it is not clear what Kong's mandate was or what role he was supposed to play in the courtroom. When Kong objected to a question put to Mam, the President "reminded" Kong that his assignment from WESU was to ensure the witness did not incriminate himself and that the types of questions asked were "none of [Kong's] concern." An ECCC spokesman explained that Kong does not represent Mam in court, but rather is there to advise Mam of his rights and answer his questions regarding issues of self-incrimination. From the way Kong acted during the proceedings, it did not seem like he was aware of this limited mandate. Moreover, the President seemed to selectively enforce it. For example, yesterday, Kong objected to documents being displayed only on the screen and requested that Mam be provided with hard copies. This objection was practical and accepted by the court; however, it has nothing to do with self-incrimination. In this instance, Kong acted like a defense counsel and was treated like one.

An ECCC spokesman confirmed today that Mam consulted a lawyer regarding self-incrimination during the investigation phase of the case. The details regarding the timing, substance, and duration of this consultation are unclear.

If, in fact, the advice given to Mam was only regarding self-incrimination, I think this is insufficient. In my opinion, Mam is now a solid candidate for investigation and legal sanctions for false testimony under Rules 35 and 36. Was his lawyer able to advise him on this during recesses when he was in clear need of a warning? Given that the lawyer was only assigned to Mam on Monday sometime after 4 p.m. and Mam started testifying Tuesday at 9 a.m., did the lawyer even have time to hear Mam's accounts? If the lawyer has not heard Mam's full accounts, is he really in a position to know when Mam might incriminate or perjure himself?

### **Him Huy's Testimony Delayed to Allow Consultation with Counsel**

Him Huy, a former S-21 guard, took the stand this afternoon. The President explained his rights and obligations, particularly his right under Rule 28.9 to request counsel if an issue of self-incrimination arises. Him informed the Chamber he was not prepared to speak and wanted to consult a lawyer. While the details were unclear, Him explained that he met with Kong – also Mam's lawyer – "very briefly." The President adjourned the proceedings early to allow Him to meet with Kong.

While I understand that under Rule 28.9 a witness shall be provided with a lawyer if the issue of self-incrimination arises in the course of the proceedings, is there a reason WESU cannot inquire into whether a witness requires counsel prior to the proceedings? After proceedings were stalled on Monday so Mam could consult a newly-assigned lawyer, I would think someone would have inquired into Him's situation to avoid interrupting proceedings twice in the same week for the same reason.