



FORMER S-21 INTERROGATOR SPENT YEARS ELICITING PRISONER CONFESSIONS BUT APPEARS UNWILLING TO CONFESS TO ANYTHING HIMSELF

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Mam Nai (back row, far left) and Duch (back row, second from right) at an unknown location in Phnom Penh. Date is unknown.

Courtesy of Documentation Center of Cambodia

Preliminary Issues: Joint Criminal Enterprise, Self-Incrimination, and Seating Assignments

Yesterday, the Trial Chamber adjourned the proceedings early after discovering that testifying witness Mam Nai, a former interrogator at Tuol Sleng prison (S-21), was not represented by legal counsel and desired counsel but could not afford it. This disturbing discovery came about when international defense counsel Francois Roux raised his

concern that the witness was at great risk of self-incrimination given the prosecution's recent submission to the Chamber that Joint Criminal Enterprise (JCE) be applied as a mode of liability in the trial of Kaing Guek Eav (alias Duch).

JCE is a controversial form of criminal liability that extends equal legal responsibility to all actors in a common criminal plan. The prosecution previously represented it would not prosecute Mam at the ECCC, but this does not guarantee against prosecution in national courts, which co-prosecutor William Smith called an "extremely remote possibility." The Chamber announced recently it will rule on the application of JCE at the same time it rules on the merits of Duch's case; thus, it is still an open issue.

Given that JCE is a possibility and Mam was Duch's subordinate, Roux argued that the Chamber should ensure Mam has an adequate understanding of his right to remain silent and right against self-incrimination. Realizing Mam was unrepresented, the Chamber contacted unspecified ECCC units to get a lawyer for Mam and requested he return today.

Yesterday, it appeared as though Roux truly had Mam's interest at heart. In comments this morning, it was clear that his true allegiance was to his client and Roux was using Mam to illustrate for the judges why JCE should not be applied to Duch. Smith had argued that JCE did not change the landscape for Mam with regard to self-incrimination as the prosecution could have used aiding and abetting liability, for example, to reach him previously had it so intended. Roux used these words against Smith stating that this proved JCE was "not necessary" and asked him to withdraw the JCE application.

Smith accused Roux of violating the Internal Rules and unnecessarily alarming the public and the witness yesterday by raising the self-incrimination issue publicly at the last minute. Under Rule 28.8, if a party is aware that witness testimony may raise a self-incrimination issue, that party is required to request an *in camera* hearing and advise the judges in advance of the testimony.

The judges did not address the war of words over JCE. However, at the outset of Mam's testimony, the President did ask the witness a series of questions to ensure Mam was represented and informed. The President confirmed with Mam that he had a lawyer present in the courtroom, he had consulted with that lawyer, and he was now able to answer questions. The President also announced the new lawyer, explaining the Witness and Expert Support Unit and "other ECCC units" made the decision to seek this lawyer's assistance. As reported yesterday, victims, experts, civil parties, and accused persons seem to be well-supported by the court's various units, while Mam, a witness implicated in the trial, appears to have fallen through the cracks.

On a separate issue, Roux raised his concern this morning that Mam's newly-appointed counsel was seated on the defense side of the courtroom. Roux argued this was akin to announcing Mam was an accused person and suggested the lawyer be seated next to Mam instead. In an unusual step, one of the civil party lawyers stood to announce her

agreement with the defense. For the prosecution, Smith argued that Roux had unnecessarily created a negative impression of the seating assignment with his remarks.

The President briefly addressed the issue of the new lawyer's seating assignment. The President explained that the lawyer's proximity to the defense was merely coincidental as that seat allowed the lawyer space to work and a close view of his client.

From Professor to Interrogator

After hearing Duch state time and again that his subordinates carried out the dirty work at S-21 while he worked with pen and paper in his removed office, I was anticipating that Mam would provide groundbreaking testimony detailing the operations at S-21 and demonstrating that Duch had direct knowledge of atrocities and in fact ordered that such activities take place. I was completely wrong. Rather, under several hours of examination from four of five Chamber judges, 76 year old Mam painted an even rosier picture of S-21 than Duch, maintaining that he was not aware of any torture at S-21 and prisoners appeared in good health.

Mam is a well-educated man. He speaks Khmer fluently and has a decent handle on English, French, and Vietnamese. He graduated at the top of his class from college before becoming a professor. After being arrested and imprisoned, Mam and Duch shared a cell for almost two years before being released by the Lon Nol regime. After a rally in 1973 during which Lon Nol soldiers opened fire, Mam fled into the jungle where he studied revolutionary ideas with Duch and others. Duch later recruited Mam to work with him at the M-13 security office, which Duch chaired. At first, Mam was not given important tasks at M-13, but after a while he learned how to interrogate "people who hated the revolution" by observing Duch in action.

Perhaps a month after the Khmer Rouge "liberated" Phnom Penh in April 1975, Mam left M-13 with Duch to join the newly-established S-21 prison. At S-21, Mam was assigned to interrogate prisoners deemed "not important," mostly combatants and low-ranking cadre. He was also assigned to interrogate Vietnamese soldiers and a few Vietnamese civilians arrested on the battlefield given his limited Vietnamese language skills. Detainees were brought handcuffed and blindfolded to an interrogation house just outside the S-21 compound where Mam worked alone. Guards waited outside the house during interrogation but did not dare interfere.

Throughout the day, Mam was pressed on the interrogation methods he used and the instructions he received regarding interrogation. He said he received no instructions in general; however, on one occasion Duch told him to get information on the battlefields from Vietnamese soldiers within a month's time. Interrogators were not allowed to discuss their techniques. As for Mam's technique, he simply "played politics" with the detainees asking them questions repeatedly until they confessed. Sometimes, he would send detainees to "reflect" for a few days in their cell before calling them back. Mam claimed that eliciting detailed biographies and confessions from detainees was "not difficult at all" and no physical coercion was necessary. When asked what happened if he

received no response, Mam said he would report that to Duch. Mam could not recall what Duch would order, if anything, in such instances. Mam wrote out the confessions by hand.

While Duch and other witnesses have stated that biographies and photographs were taken upon arrival at S-21, Mam said detainees came to interrogation without any documents, so he started from scratch. When asked if he knew of S-21's policy that everyone detained was guilty and everyone was killed, he said he did not know about this. Later, however, he stated that all Cambodian detainees at S-21 had committed some offense whether "minor or serious" against the revolution. With regard to Vietnamese prisoners, he considered all of them guilty of invading Cambodia. Mam believed the confessions he elicited were partially true, but that the "quality of the truth was very minimal."

"I cannot recall anything related to this matter."

Variations on the above sentence seemed to be Mam's mantra throughout the day. In response to perhaps forty-percent of the judges' questions, Mam responded that he did not know, that such information was beyond his knowledge, or that he could not recall. Repeatedly, Mam emphasized that he was "just a plain and simple interrogating cadre" and was not allowed to "wander freely" at S-21. He said he focused solely on his tasks and pretended he was "blind and deaf." He said that if he had asked questions or "poked around," he would not be alive today. Mam could not describe how S-21 was organized, how many people worked there, where his prisoners were from, what techniques other interrogators used, how prisoners were detained, or what happened after they confessed. He could not recall ever hearing screams or interrogating women.

Despite the fact that his testimony differed drastically from any facts that have been presented, his justifications and limited understanding seemed somewhat plausible for a while. However, I lost total confidence in his testimony when he stated that from his observations prisoners were "neither skinny nor pale" and appeared to be in "normal physical condition." By all accounts, S-21 prisoners were some combination of starving, dehydrated, wounded, sick, and weak.

When Judge Cartwright started questioning Mam, it was clear she had little confidence in his testimony. She spent a solid ten minutes establishing his education and high marks before asking him if it was fair to say he was "well-educated," "clever," and probably one of the most intelligent men at S-21. She went on to examine several inconsistencies between Mam's statements to the co-investigating judges and his current testimony. Judge Cartwright's line of questioning seemed to suggest great skepticism that this very intelligent man could lack such basic knowledge of his immediate surroundings. After receiving a few unsatisfactory responses to his questions, Judge Lavergne asked Mam, "Do you have problems with your memory?" Mam explained that he recently became unconscious after taking a fall in his home and has had trouble with his memory ever since. In light of Mam's light testimony, Judge Lavergne summarized Duch's dark accounts of conditions and operations at M-13 and asked Mam somewhat sarcastically if he stayed at the same place as Duch. Mam explained that conditions throughout

Cambodia were miserable at the time, but confirmed that prisoners had less food and worse clothing than the average person.

After a day of silence, Mam's lawyer stood to make a practical request that the judges quickly accepted. He asked that a whole document be displayed, instead of only one portion thereof, in order to allow Mam to better understand and answer a set of questions. In subsequent comments, however, Mam's lawyer displayed a lack of understanding about the proceedings and how matters are handled in the courtroom. He said that the Chamber was putting repetitious and leading questions to the witness, that he was concerned about what topics the parties might raise, and asked that the Chamber adjourn to review what types of questions are appropriate. He stated that in this adversarial system, a particular format should be followed.

The President appeared to try his best not to be condescending while he explained that the Chamber was following Cambodian procedures which are based on the French civil law system. He explained that the Chamber is allowed to put exhaustive questions to the witness before each party is given an opportunity to question based on the time allocation and topic list already identified by the Chamber.

Perhaps in response to the Chamber's apparent frustration with Mam's responses, Roux then took the opportunity to raise the witness's Rule 28 rights again. Roux said it is good for the witness to be reminded of his right to remain silent in order not to incriminate himself. The President responded that the Chamber is well-advised and handling the proceedings appropriately. Civil party group 1 lawyer Alain Werner then stated that if the witness is to be reminded of his rights, perhaps he should also be reminded of his obligations under Rule 36. Under 36.1, the Chamber may remind the witness of his duty to tell the truth and explain the consequences of failure to do so. Under 36.2, if the Chamber has grounds to believe false testimony was knowingly and willfully provided, it can, among other options, refer the matter to Cambodian and UN authorities or investigate the matter further.

Tomorrow, Mam will take the stand again to be examined by the prosecution, civil party lawyers, and defense.