THE RULE OF LAW AND THE LEGACY OF CONFLICT

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PRESENTATION BY

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Your Excellencies, Diplomatic Representatives and Participants
Allow me first of all to thank all those who organised this Meeting, and made it possible for the Cambodian delegation to participate, giving us the valuable chance to meet and exchange views with leaders, scholars, diplomats and legal experts from around the world. The prestigious organisers, including Harvard University, the United Nations Association – USA, and the University of Botswana have rendered great service by deciding to hold such a gathering, and we are privileged to be invited to attend in order to learn from others' experiences and to share our own.

As we stand at the beginning of the 21st century the issues encompassed in the title of this meeting "The rule of law and the legacy of conflict" are seen to be posing great challenges to us in many countries of the world as we come to terms with our own past. Unfortunately, however, conflicts are not confined to the past, and those of today are undoubtedly themselves sowing the seeds for future legacies of pain and bitterness.

In sharing with you the Cambodian situation, we must look both backwards to the situation we faced in 1979 immediately after overthrowing the genocidal Pol Pot regime of Democratic Kampuchea, and to the present period since July 1997, when the Royal Government of Cambodia requested assistance and involvement by the United Nations. It is necessary to take this bi-polar view because the questions our conference organisers have posed for us yield different answers if our focus is 1979 or 2003.

Unfortunately very few members of the international community helped us to rebuild our country after the overthrow of the Khmer Rouge in January 1979, due to the prevailing cold-war geopolitical situation and the lingering after-effect of what is commonly known as "the Vietnam War". I wish today to reaffirm our eternal gratitude to those who did assist our efforts, but to our great amazement and distress, those who had carried out horrendous crimes continued to be accorded the right to represent Cambodia in the United Nations General Assembly throughout the 1980s, and were given political, economic and even military assistance in their efforts to overthrow the actual government of the country.

Immediately the Khmer Rouge was driven out, important efforts began to uncover and document the truth of what happened under their rule, when several million people – over a quarter of our population

– perished. But in addition to documenting and memorialising, we knew we had to take action to determine the accountability of those who had committed such crimes. The political importance of some kind of tribunal was understood, and so scarce resources were allocated to collect evidence and establish the legal framework for a trial. The importance the government of the day placed on this process is shown by the fact that it was Decree Law No. 1, passed on 15 July 1979, that laid the basis for the People's Revolutionary Tribunal "to try the Pol Pot – Ieng Sary Clique for the Crime of Genocide". The scope for the trials was limited to two individuals, regarded as the "ringleaders", and the Decree Law, stipulated a "policy of leniency towards those people who participated in the armed forces or the administration of the Pol Pot – Ieng Sary Clique but are sincerely repentant".

Warrants were issued for Pol Pot and Ieng Sary, together with a call for them to surrender to the authorities, but they failed to appear and the trial went ahead without them. The "People's Revolutionary Tribunal held in Phnom Penh for the trial of the genocide crime of the Pol Pot – Ieng Sary clique" was held from 15-19 August 1979, in the symbolic centre of the capital -- Chaktomuk Hall at the junction of the Mekong and Tonle Sap rivers. The tribunal found the two accused guilty of the crime of genocide and sentenced them to death and confiscation of all property.

We must recall that our People's Revolutionary Tribunal of August 1979 was the very first time anywhere in the world that individuals were placed on trial (and convicted) for the crime of genocide, but it took place with scarcely a mention in the foreign press, and its proceedings were not published in full until the year 2000.

President Heng Samrin said in the closing reception: "the tribunal of history, the tribunal of mankind's conscience…will join with the Kampuchean people in pronouncing its verdict". But a quarter of a century later this has not yet come to pass. Western media paid scant attention to the trial and the genocide verdicts, and most western governments peremptorily dismissed the tribunal as a mere "show trial" without making the slightest effort to study the evidence or monitor the proceedings. Incredibly, those convicted of genocide continued to be accorded wide international recognition and assistance. Our situation then was similar to that faced by many of our brothers and sisters in the African countries who are present here today. Of the hundreds of Cambodian lawyers, judges and para-legal workers from the pre-1975 period, only nine were known to have survived, and so we sought help from abroad. Fourteen foreign lawyers were invited to participate as individuals. They came from Algeria, Cuba, India, Japan, Laos, Syria, USSR, the USA and Vietnam, and in addition, the following international organisations observed the proceedings: World Council of Peace; Afro-Asian People's Solidarity Organisation; Solidarity Organisation of the People of Asia, Africa and Latin America; Asian Church Council.

It is incumbent upon me now to acknowledge the deficiencies in the 1979 process, which was conducted hastily and in a tense post-conflict atmosphere, with which you here will be all too familiar. In particular, the defence offered by the court-appointed lawyers was extremely weak, even though in all fairness it would have been an extraordinary defence that could succeed in exonerating the defendants. How tragic it was that in 1979 the international community did not assemble the level of expertise and financial support required to carry out a trial that met internationally accepted standards. We must remember that at that time the large body of people who are today committed to advancing international humanitarian law did not yet exist.

As a result of this continuing support to the Khmer Rouge, hundreds of thousands of Cambodian people lost their lives and suffered from mine accidents despite the fact they had been liberated from the genocidal regime. Ideology and interests of certain powerful countries caused the international community to forget truth, justice and human rights and to ignore the tragedy and the deaths of millions of Cambodians. Instead of justice, the prize awarded to Cambodia was more than 10 years in a situation swinging between peace and civil war, of stunted economic development and the laying of millions of land mines that still threaten our poor people in the remote rural areas.

The Paris Peace Agreements of 1991 accorded political legitimacy to the Khmer Rouge and, when UNTAC (United Nations Transitional Authority in Cambodia) left Cambodia in 1993, the new coalition government had to cope with the Khmer Rouge continuing policy of civil war and destabilisation.

We then launched a multi-faceted strategy involving political, legal, economic and military campaigns. In 1994 our National Assembly passed legislation to Outlaw the Khmer Rouge, and efforts to encourage its members to defect and split. The legislation included a six-month period of suspension to encourage surrenders, and many Khmer Rouge rank and file soldiers and indeed whole units came over to the government during this period, although no top military commanders or political leaders took advantage of this opportunity.

Prime Minister Hun Sen then embarked upon what he has described as a "win-win" policy involving five facets: "divide, isolate, finish, integrate and develop" in which the Khmer Rouge political and military structure was ended, including by military assaults, but those Khmer Rouge who defected and surrendered were assured of their physical safety and survival, the right to work and to carry out their professions, and the security of their property.

By the end of December 1998 we had managed to put an end to the Khmer Rouge political and military structure, and were faced with the twin tasks of national reconciliation and justice. Cambodia can perhaps offer the lessons of our experience in the long and complex process of reconciliation. Today former Khmer Rouge have put down their guns and have recommenced their lives within the general community, and the former factions have taken up the challenge of working together to develop the country.

In Cambodia reconciliation has not meant amnesia. The Cambodian government continued through the 1980s to collect evidence and testimony, and to call for an internationally recognised trial.

We must acknowledge, however, that Cambodia's achievements in the fields of truth and reconciliation have not been paralleled by advances in the matter of achieving justice for the victims of that genocidal regime. Now as we once again throw our efforts into this quest for justice, we keep in our minds firmly that this must not damage the process of reconciliation that I have described above. In Cambodia we seek restorative justice to heal the wounds in our society as a whole, while still wishing those who planned and ordered, and were ultimately responsible for the crimes to be made accountable.

In June 1997 the then Cambodian Co-Prime Ministers requested the United Nations for assistance in organizing the process for Khmer Rouge trial. Regrettably, more than five years later, we are still in the process of working through the form and content of such international assistance and

involvement. However, I am happy to be able to tell you that we hope we are now entering the final phase of preparation, before proceeding on the task of actually establishing the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea on the basis of the Law passed by both houses of our legislature and promulgated on 10 August 2001 -- a Law that was itself a product of the negotiations with the United Nations.

In these negotiations we have been guided by three fundamental principles.

The first is the respect for and search for justice. We condemn the crimes of the Khmer Rouge as crimes of genocide and crimes against humanity. We seek justice for their victims, and for the entire Cambodian people, and we wish also to contribute to the development of international humanitarian principles, condemning genocidal crimes and seeking to prevent their recurrence. The Cambodian people express their deep thanks to the international community for joining this justice-seeking process over the last few years, although they had turned their heads away during the Pol Pot regime and immediately afterwards.

The second principle is maintaining peace, political stability and national unity, which Cambodia has only just achieved, ushering in an unprecedented atmosphere of optimism and relative absence of violence -- in stark contrast to our previous situation, even though we have not yet ensured 100% social law and order, and 100% security. That would be impossible in the light of the recent traumatic past. We however are proud of moving forward in the process of strengthening political stability, peace and security in Cambodia, and this is a valuable achievement for our beloved motherland. Whatever we do must not damage our peace and stability, and throughout the process over the past four years of designing the Khmer Rouge trials we have always sought to gain consensus, based on respect for the highest national interests.

Some have criticized the slow pace of the process, but to achieve national consensus is a difficult task, one whose success was demonstrated by the unanimous vote achieved in both houses of our legislature. The Law was promulgated almost exactly two years after the first draft was placed on the negotiating table –- by no means a long time to develop unprecedented legislation on such a sensitive and important issue.

Some months elapsed for the Constitutional Council to review the Law, finding that it was insufficiently clear that the maximum penalty was life imprisonment, and therefore could be in conflict with our Constitution, which explicitly outlaws the death penalty. As a result, the government amended the draft and re-submitted it for debate in the National Assembly and the Senate. It is important for us to recognise that our country is now undergoing a process of democratisation and that the Constitutional Council is one of the recently established institutions whose authority and decisions should be respected as part of this process.

Further, we seek justice that contributes to the reconstruction and democratisation of our society as a whole. To embark on a process of prosecuting crimes for genocide and other crimes against humanity is not without risk, and so we have devoted enormous efforts to gaining the support of our people for this effort. The unanimous votes in the National Assembly and Senate for this legislation were unprecedented, and testify to the results of this effort to reinforce and not jeopardise our fragile peace. Any estimation of time taken is of course subjective, but the past three years of negotiation must be viewed as part of this 24-year historic process, and can be compared

with other countries which have taken more than years or even decades to attempt to deal with crimes of this nature.

The third principle is respect for national sovereignty, enshrined as a fundamental principle in the Charter of the United Nations. Our raising the principle of respect for our national sovereignty is reasonable; and we have struggled hard for this principle. The Royal Government of Cambodia did not accept the recommendation of the 1999 report of the UN's Group of Experts, which proposed a trial held entirely outside the country, with no Cambodians participating, except as defendants or spectators. As our Prime Minister Hun Sen remarked at the time, the only jobs the Secretary-General would like to give to Cambodians would be to "go into the jungle to capture the tiger", and to be "the watchdog for the UN".

It has been our consistent view that Cambodia has the primary obligation to prosecute under Article 6 of the Genocide Convention, and could proceed with a trial within the domestic courts. Let me remind critics of this approach that the principle of complementarity is fundamental to the International Criminal Court, of which Cambodia is proud to have been one of the 60th member states to ratify and bring into reality last year.

However, despite the fact that we were fully entitled to prosecute the Khmer Rouge in a national court, we sought international involvement in the process, preferably through the United Nations. Why? On the one hand because we were all too acutely aware of the weaknesses in our judiciary, and we wanted help to make certain this trial was able to meet internationally accepted standards. On the other hand, and let me be frank here, we felt that it was important for the international community to share in carrying out this task in order to clear its own record on previous support for the Khmer Rouge. This was our reasoning when in 1997 we asked for assistance, in 1999 when we reached an in principle understanding with the UN to hold a national trial with international participation, and it is still our reasoning today, even in face of the February 2002 unilateral decision of the UN Secretariat to withdraw from the negotiations.

From 1999 to 2000 Cambodia and the United Nations negotiated the "Cambodia model". We moved from the initial UN proposal (which closely resembles that adopted for the Special Court for Sierra Leone) to a carefully balanced formula: Cambodian judges have the majority in each chamber, but any decision requires a super-majority (which would thereby necessitate the positive vote of at least one international judge, there will be Co-Prosecutors and Co-Investigating Judges (one each Cambodian and international) with a Pre-Trial Chamber to settle any differences between them. This formula does not give control to one or other side, but rather seeks to lay the ground for a shared enterprise.

When the Group of Experts report was delivered in 1999 our two positions were far apart., with the UN calling for a totally international tribunal, and Cambodia for a national process. It would be unthinkable now to return to these positions and abandon our hard-won gains. We are confident that the "Cambodian model" is not only credible, but represents a historic milestone in international humanitarian law, now moving away from externally imposed and run International Criminal Tribunals as have been seen over half a century in Nuremberg and Tokyo and more recently The Hague and Arusha towards complementarity, encouraging each country to exercise justice at the national level in a manner that meets international standards, and accords with our responsibility under the principal instruments, especially the Genocide Convention.

The problems that Cambodia faced in 1979 and again in 2002 with regard to the international community's position on accountability for the Khmer Rouge show that post-conflict situations are complex, and the weaknesses are not only on one side. Cambodia readily acknowledges "deficiencies in local institutional capabilities … and resources", which formed one reason that led us to seek international assistance "to deal with the evils of the period just past". But in the Cambodian case, at least, "deficiencies in … political will" have lain, I dare to say, principally not on our side.

In fact, the international community's delay in dealing with the issue of judicial accountability in Cambodia is one distinguishing feature of our country's situation compared to the others we have heard of around the table during this conference. The temporal jurisdiction for the trials is 1975-1979 – that is the crimes were committed almost a generation ago. Our society has achieved peace and stability and the trials are not an integral part of the ending of the internal fighting. Yes, we are in a post-conflict situation but not in the immediate aftermath of the crimes and in the shadow of their perpetrators and threats to repeat the crimes. In this sense perhaps Cambodia is in a stronger position in asserting its right and responsibility to play a real role, its "ownership" of the process, while inviting and truly desiring the international community to join with us in this task.

Our delegation has just spent the past week in New York working with the Under-Secretary for Legal Affairs, commencing what we hope will be the final phase of preparation for the Extraordinary Chambers. This phase was ushered in by the vote in the UN General Assembly on 18 December 2002 welcoming the Law on the Extraordinary Chambers and requesting the Secretary-General to resume negotiations with Cambodia. I would like to acknowledge with gratitude the support of many countries last year, during the difficult effort to get the UN to come back, and especially of France and Japan, which placed the recent resolution on the agenda paper of the General Assembly, as well as the 150 countries that voted in favour.

We are hopeful that the "Cambodian model" of national trials with international participation will become a reality in the near future, albeit a quarter of a century after the crimes were committed. The "Cambodian model" may indeed be appropriate in other cases, since the role of the international community ideally is to support national jurisdictions, helping them carry out their international obligations according to international standards of justice, fairness and due process of the law.

The Royal Government of Cambodia remains committed to seeking justice for the crimes perpetrated by the Khmer Rouge on behalf of the Cambodian people and of humanity as a whole. Our seriousness in this effort can be measured by the large amounts of time and energy we have expended over the past three and a half years since the Prime Minister established the high-level Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, of which I have the honour to be Chairman. I should point out that this is time and energy that has been diverted from the many pressing tasks of our national reconstruction, but we are ready to make such a sacrifice in the interests of achieving justice. The Law promulgated on 10 August 2001 emerged from serious negotiations and compromises between the United Nations and Cambodia benefiting from expert input from a number of countries. It provides a sound foundation and we hope that the United Nations will, in the end, join with us in its implementation.

Thank you.