PRESENTATION AND COMMENTS ON
THE DRAFT LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA
BY HIS EXCELLENCY SOK AN, SENIOR MINISTER, MINISTER IN CHARGE OF THE OFFICE OF THE COUNCIL OF MINISTERS, PRESIDENT OF THE TASK FORCE FOR COOPERATION WITH FOREIGN LEGAL EXPERTS AND PREPARATION OF THE PROCEEDINGS FOR THE TRIAL OF SENIOR KHMER ROUGE LEADERS

5TH SESSION OF THE 2ND LEGISLATURE, NATIONAL ASSEMBLY
29 December 2000 and 2 January 2001

His Royal Highness the President of the National Assembly
Samdech First Deputy President and Your Excellency Second Deputy President
Honourable Members of the National Assembly
Your Excellencies Diplomatic Representatives in Attendance

Today, the 29th of December 2000, I recall that exactly two years ago on 29th December 1998, the last senior leaders of the Khmer Rouge arrived in Phnom Penh to surrender to the Royal Government of Cambodia. So, today has great significance for the history of Democratic Kampuchea.

Another point to be made as a preliminary remark is that yesterday His Excellency Sam Rainsy asked me if the contents of the Draft Law were exactly the same as the agreement reached with the United Nations. If so, he would support it. I responded by saying that this was a process of negotiation and in negotiations both sides do not hold exactly the same position. If they have 100% the same position, then it is not a negotiation but rather a carbon copy or a following of orders. This has been a real process of negotiation, and what has made us happy is that we have reached consensus on a number of important principles, which I shall outline in this introduction to the Draft Law.

In the presentation I wish to cover the following five main points:

1. to relate to the members of the National Assembly the history of international tribunals and what is known as the International Criminal Court;
2. to convey the fundamental concepts and principles of the Draft Law;
3. to review the process that has taken place from 1997 until today in realizing the Draft Law which the National Assembly now has before it;
4. to discuss the series of major compromises that have been reached between ourselves and the United Nations on fundamental principles in giving rise to this Draft Law;

and, as the debate unfolds,

5. to comment on the important points in each of the Chapters.

Allow me to begin with the first point by describing the history of various national tribunals. The notion of "the state" was born hundreds of years ago -- and we are proud of the recent excavations in Takeo province revealing the first city of Cambodia, which researchers have found is the first state of Southeast Asia. To return to the subject in hand, when there is a state one of its most fundamental principles is that of respect for national sovereignty. This is among the founding principles upheld by the Charter of the United Nations, one which must be unconditionally respected.

Therefore, respect for national sovereignty is a fundamental underpinning in organizing a tribunal -- that is, judges in any one country settle cases in that country, respecting territorial integrity. Each country is the master of trial proceedings relating to its own people, or those who violate its law. This is the implementation of law, which has gradually developed into the theory of the rule of law, which today we hold high and promote in the Kingdom of Cambodia.

Before the period of the Second World War, in respect of the principle of national sovereignty, national courts would always try people of their own country, and no problems arose regarding judges from one country trying people in another country. But historical evolution has changed this notion into a new reality. Between the First and Second World Wars, and especially since the Second World War, efforts have been made to create what is known as the International Criminal Court (ICC). Despite these efforts, made since 1937, such a permanent international criminal court has not yet come into being, due to the reluctance of certain countries to sign the necessary treaty.

After World War II, when Germany and Japan lost the war, International Military Tribunals were set up to prosecute their leaders. In Germany the first International Military Tribunal was held between 1945-46 at Nuremberg, but it was planned even before the end of the war, in the London Agreement of 8 August 1945. This tribunal was organized by the victorious Allied Powers (United States, Great Britain, the Soviet Union and the provisional government of France), and so was quite different from our tribunal. I will later expand on this point. It was held to try the German Nazi leaders for committing crimes against peace, crimes against humanity and war crimes. The Nuremberg Tribunal tried 24 people of whom three were acquitted; four were sentenced to terms of imprisonment ranging from 10 to 20 years; three were sentenced to life imprisonment; and twelve were sentenced to death.

I want to stress that this tribunal was organized by the judges of the victorious powers in order to try the leaders of the defeated country. The losers had no one to protect their interests and it was a tribunal imposed from without to bring to justice the criminal Nazi leaders of Germany who caused World War II.

A second tribunal was held soon after Nuremberg. It was the International Military Tribunal for the Far East, held in Tokyo between 1946-1949, in which 28 military and civilian leaders of Japan were charged with 55 counts relating to war crimes. This court was likewise organized by the victorious powers.

It was not until some considerable years later, in the 1990s, when two further international tribunals, also organized by foreign jurists, were established, under Chapter 7 of UN Charter – mandatory powers to preserve the peace. The International Criminal Tribunal for Former Yugoslavia (ICTY) was established in February 1993 in The Hague, and has so far resulted in the conviction of six people, with 41 people currently under trial, from a total of 94 public indictments. The International Criminal Tribunal for Former Yugoslavia now costs $100 million a year, and has a staff of around 1,000 people.

The Rwanda tribunal has two parts – the International Criminal Tribunal for Rwanda (International Criminal Tribunal for Rwanda) established outside Rwanda in Arusha, Tanzania to bring to trial 45 senior leaders; and a separate national tribunal inside Rwanda to try the masses of lower level perpetrators, with over 120,000 people placed under detention. Bringing such numbers to trial under regular procedures is an impossible task, and so this has required a modification of procedure, for example the introduction of traditional *gacaca* justice with open village trials by local councils of elders, and payment of monetary reparations.

Another type of criminal tribunal was that organized in Cambodia in 1979 to judge the genocide crimes committed by the Khmer Rouge, in which two Khmer Rouge leaders were brought to trial by the People's Revolutionary Tribunal, in which Cambodian judges sat alongside invited foreign judges.

And finally, let me refer to the permanent international criminal court, envisaged in 1937. This was finally defined in the Statute of Rome on 17 July 1998 It will come into being after ratification by 60 states and will be a permanent International Criminal Court in The Hague, unlike ad hoc tribunals such as those in Nuremberg, Tokyo, Rwanda and the former Yugoslavia. Cambodia has already signed the statute.

To recapitulate, ad hoc tribunals have been established to try "the crime of crimes" covering crimes against humanity, genocide, and crimes against peace. These tribunals, however, are different from what we are doing. The ones we described above, with the exception of Cambodia, were imposed from without to bring to justice people or leaders of one country, while what we are creating has new characteristics, no precedent in the world and the international level, because it is a tribunal organized with agreement from the country concerned. If the National Assembly adopts the Draft Law, and it goes through the Senate and the Constitutional Council in accordance with existing procedures, it will be considered an agreement between the country concerned – Cambodia -- and the outsiders—the United Nations. The Draft Law is one with new characteristics and principles that international or foreign jurists have never seen, heard, or known—a unique case of Cambodia. According to a number of reliable sources of information, the Security Council started talking about the "Cambodia Tribunal Model", even though our draft law has not yet finally been adopted and the court not yet organized. But, our discussions have led to agreement on fundamental principles, which are considered usable and acceptable as a model, and are already under consideration in Sierra Leone.

This is the first part of my presentation. Now, let me proceed to the second part.

Part II- here I would like to highlight the main concepts and principles of the Draft Law, which was organized on the basis of three fundamental principles.

The first is the respect for and search for justice. H.E. Senior Minister Keat Chhon [in his preceding speech] has expressed a number of views concerning the issue of "judging the past". Judging the past sometimes leads to controversy among researchers, legal experts and politicians, and sometimes they reach consensus. But regarding the past that we are now talking about, I agree with H.E. Senior Minister Keat Chhon. We can easily understand each other, because the tragedy of our past drastically affected all of us, including young and old, men and women, politicians, legal experts, researchers and students alike. We condemn these crimes as crimes of genocide. This first fundamental principle is that our efforts should provide justice for the victims, and for the entire Cambodian people, and also should contribute to the development of international humanitarian principles, condemning genocidal crimes and seeking to prevent their reoccurrence. The establishment of this trial represents a real step towards providing justice, and also demonstrates that our memory is strong, because memory plays an important part in preventing the renewal of genocide in Cambodia, in particular, and also in other countries of the world. Even though our contributions are not 100 per cent perfect, I think that a significant contribution is being made by the Cambodian Model, which legal experts, politicians and researchers are studying. This is the first principle, relating to providing justice and closing the black chapter of Cambodia's history.

The second principle is maintaining peace, political stability and national unity, which Cambodia has only just achieved. I think that all milieus in the Kingdom of Cambodia welcome the peace, political stability and social law and order which we are trying to realize, 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. 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. If we compare Cambodia with its neighbours 30 or 40 years ago, we note that the Kingdom of Cambodia enjoyed the same level of development as Thailand, Singapore, Malaysia, Indonesia, Taiwan and Korea. But now, we cannot be compared with them. We lag too far behind them, and we are classified as one of the Least Developed Countries (LDC). This was caused by a number of factors. But one of the most important we all know, was our civil war, lack of political stability and lack of peace. All these factors made us poorer, while our neighbours became richer. I know that we all highly value peace, stability, security, and social law and order, which we have tried our best to obtain. Therefore, maintenance of peace and security is the highest task of all Cambodian institutions, and all Cambodian people. This is considered vital. Whatever we do must not damage our peace and stability.

H.E. Chhour Leang Hout [in his preceding speech] said that some have criticized the slow pace of the process. It has indeed taken a long time because it is a difficult task that we have taken seriously in order to reach consensus, based on respect for the highest national interests. Therefore, this second point, I think, is highly appreciated and supported by the honorable members of the National Assembly and by all the people, who need political stability and peace.

The third principle is the respect for the national sovereignty. As I mentioned above, the Charter of the United Nations set forth fundamental principles of national sovereignty, alongside national independence and territorial integrity. Therefore, our raising the principle of respect for our national sovereignty is reasonable; and we have struggled hard for this principle. What part of the draft law reflects this principle of respect for the national sovereignty? I already mentioned that in the negotiation process we have had to respect a number of interests of the other side, just as they have had to respect ours.

Respect for the principle of national sovereignty by the negotiators is shown in the following three points:

1- *Appointment of judges:* we dwell on national sovereignty, so you may ask why do we allow foreign judges to participate in Cambodian courts? This is a sensitive point and I would like to comment as follows. We accept foreign judges in the trial because we need the support of the United Nations. The United Nations raised the principle of credibility. In order to trust the proceedings, they say that the Khmer Rouge trial needs to embody certain ideas, principles and concepts. They preferred an international tribunal, but we wanted to proceed in our national courts. A compromise was reached— national courts with participation by foreign judges. Another point worth noting is that the foreign judges shall be appointed by the Cambodian Supreme Council of the Magistracy. The draft law stipulates that the Secretary-General of the United Nations shall nominate foreign judges to be appointed as trial judges by the Supreme Council of the Magistracy. This point, I think, reflects a respect for Cambodia's national sovereignty.

2- *Composition of the trial chambers* -- we wanted the majority of the judges to be Cambodian, while the United Nations wanted the majority to be foreign judges. How to reach a compromise? We argued that in order to ensure respect for Cambodia's national sovereignty, the trial chambers must be composed of Cambodian judges in the majority. If there are 5 judges, 3 should be Cambodian; if 7, 4 Cambodian; and if 9, 5 Cambodian. This means that the majority of judges would rest with Cambodian side. But the United Nations stated that in order to build credibility, foreign judges needed to be in the majority. This led to a deadlock, which was later broken by a compromise—Cambodian judges in the majority, and foreign judges in the minority, but decisions would be made based on an unprecedented formula of the "Super Majority" or qualified majority, which requires, for instance, 4 votes out of 5 to make a decision.

3- *Initiation from within* – As I related above, the history of international criminal tribunals shows they were organized by foreign judges and initiated and imposed

from without. But our mechanism, known as the Extraordinary Chambers, is organized within the structure of the Cambodian courts. This is a significant compromise between Cambodia and the United Nations. We wanted them to recognize and understand our problem, and we wanted to gain the trust of the international community. This led to a common project because we need them and they also want to work with us.

These three points – appointment of judges, composition of the chambers, and initiation of the mechanism – show respect for the principle of national sovereignty and are reflected in the title of the document you have before you "The establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea".

Let me make some brief points on the key elements in the title. The terms "Extraordinary Chambers" and "Court of Cambodia" result from the process of compromise that I described above. For this case of trying the Khmer Rouge leaders, we use a further term "the prosecution of crimes committed during the period of Democratic Kampuchea". We want to prosecute crimes committed during the entire period of 1975 to 1979. But research reveals that Democratic Kampuchea was not born on 17 April 1975 and did not die on 6 January 1979. 1975 was still the period of the National Front, as Democratic Kampuchea was not formed until 1976, and it continued after 1979 through the time of the Tripartite Coalition. So one may ask whether the title restricts the temporal jurisdiction of the chambers? This is spelled out clearly in Articles 1 and 2 of the Draft Law, and in other articles, which define the temporal jurisdiction to the period 17 April 1975 to 6 January 1979 and leave no cause for misinterpretation. The title gives the overview, but the precise scope of the Chambers is defined within the articles of the Draft Law.

Part III – I would like now to proceed to review the process that has taken place from 1997 until today in realizing the Draft Law which the National Assembly now has before it. What did we do in 1997? In 1998? and especially in 1999 and 2000? It has so far taken more than three years - almost four-- to organize this process for the Khmer Rouge trial.

June **1997** The request by the then Cambodian Co-Prime Ministers to the United Nations for assistance in organizing the process for Khmer Rouge trial, leading to the adoption of a resolution in the General Assembly in December and later the establishment by the Secretary-General Kofi Annan of the Group of Experts to conduct a feasibility study of this process

1998 Known as the Year of Transition

In this year, our recent national elections were held, described as the "Miracle on the Mekong" and the new legislature was organized. And, we thought that it was now time to close this black chapter of our history. A number of events occurred in this process, especially the exchange of views concerning the establishment of either an international tribunal or a pure national tribunal, which led to the compromise of "the principle of proceedings with international characteristics." They stopped insisting on an international tribunal, and started talking about a national trial with international characteristics.

The year also saw the death of Pol Pot, and closed with the surrender of Khieu Samphan and Nuon Chea, the two remaining senior leaders of the Khmer Rouge, and the reintegration of their armed forces. Some months later two major Suspects for human rights crimes during the period of Democratic Kampuchea were arrested (Ta Mok and Duch).

April **1999** Meeting between Senator John Kerry and Samdech Prime Minister, in which were laid down the principles of a national court with participation by foreign judges.

May We requested a team of legal experts from France to help this issue, and France sent to Cambodia a team of high-level legal experts.

August The Royal Government created its "Task Force", of which I was appointed the chairman.

The Task Force commenced its work by drafting the law. The first draft law was produced in August 1999 and presented to a United Nations delegation led by H.E. Ralph Zacklin, deputy of Hans Corell who is in charge of legal affairs of the United Nations and holding the rank of Under Secretary-General. The first draft law does not belong to others, but belongs to us, to Cambodian legal experts, drafted after discussion with other experts.

I also would like to inform the Assembly that there were legal and other technical contributions from experts from France, India, Russia and Australia, as well as the United States. The United States has played a critical coordinating role between us and the United Nations. There were many discussions and negotiations. I would like to reiterate that we were the one who prepared the first draft, and presented it to Zacklin's delegation for comment. The United Nations sent its delegations three times to Cambodia, all led by high-level legal experts of the United Nations. Each visit took about one week for a team of up to 7 to 8 members, who were strong legal experts. The first delegation, sent in August 1999, studied our first draft law. At that time there was no consensus. One major difference was that Zacklin wanted foreign judges to hold the majority, while we claimed that Cambodian judges must be in the majority.

September Normally, the United Nations General Assembly is held in every September, and Samdech Prime Minister Hun Sen always leads a delegation to attend the meeting. At that time, Samdech Prime Minister met H.E. Secretary-General Kofi Annan, and he submitted a memorandum of three points, offering three options:

- Firstly: the United Nations can contribute to providing judges and experts to help modify the draft law to achieve what is known as credibility, in conformity with procedures trusted by the international community, and can also provide judges to work with Cambodian judges in the court;
- Secondly: the Secretary General may choose only to provide legal experts to help establish the draft law, and let Cambodian judges work alone at the trial stage;
- Thirdly: the United Nations may withdraw from the process, and let Cambodia establish the draft law and organize the trial by itself.

At that time, the Secretary-General did not respond directly to the memorandum, but asked for the continuation of negotiations. I was assigned as the representative of the Royal Government, while the Secretary General appointed Mr. Hans Corell, who is Under Secretary-General and The Legal Counsel. H.E. Hans Corell at that time told us that the three questions had not yet been responded to, and he needed to reach further understanding before giving his comments to the Secretary-General. He then asked me what would I do regarding this process on my return to Cambodia. I told him that, in Cambodia, I would continue to improve the draft law, submit it to the Royal Government for approval, and then send it to the National Assembly and the Senate for adoption in accordance with procedure. And because this draft law is an Organic Law, it must be submitted to the Constitutional Council. And finally, it

would be promulgated by His Majesty the King.

This is what I informed the Under Secretary-General, insisting on Cambodia's sovereign right to proceed unilaterally should the United Nations withdraw from the process. The Under Secretary-General said to me "Your Excellency, you may of course do as you outline, but before you present the Draft Law prepared by your Task Force to your government, please let me know, and I am now thinking what we can do."

I want to convey to you that this process of negotiation on drafting a law is not an easy one. Even high-level legal experts of the United Nations sometimes need to consult at length with other experts before responding to questions raised. We also do likewise. On some points we ourselves must have consultations before responding. The interests of all the parties -- the United Nations, the Secretary-General and the Royal Government of Cambodia -- must be respected. So you see that the process cannot be a quick one but takes considerable time. Therefore, in September 1999, we received a request for resumption of work between our Task Force and the international community, and for going into the phase of negotiations, because after we raised the three options, the process had slowed and none of these options was responded to. We accepted the request.

October We resumed our work with a senior official of the United States' State Department who has played an arbitrating and coordinating role between us and the United Nations. In November 1999, we received legal expert delegations from India and Russia on separate days in order to get their comments on how to proceed, in conformity with the legal principles they understood. So, over a period of months, Russian, French, Indian and

Australian experts made their own comments respectively. These countries were seriously concerned with the draft law, and France even set up a team of legal experts.

17 December — The Task Force completed its second draft law, and submitted it to the cabinet meeting for approval on 24 of December 1999. The draft law was discussed for the second time and adopted by the cabinet meeting on 6th January 2000 with some modifications.

10 Jan **2000** — Official visit of H.E. Obuchi, ex-prime minister of Japan, in which the Khmer Rouge issue was also discussed.

14 January — The Royal Government made further modification to the draft law, by allowing for co-investigating judges, as proposed by H.E. Obuchi. In the second draft adopted by the cabinet meeting, there was only one investigating judge, because they said that in the system favoured by the United Nations, there is no investigating judge, while our system— Romano-Germanic— has it. Thus, we suggested that if their system did not have investigating judges, there is no need for them to appoint investigating judges, and they should just let Cambodia do it itself. However, this issue was settled on 14 January, and on 18 January, we presented the updated draft law to His Royal Highness the President of the National Assembly.

8 February — The Secretary-General sent a letter making four points:

- the first asked to give guarantee for arrests and surrender of those indicted,
- the second asked for a guarantee of no amnesties or pardons,
- the third wanted an independent foreign prosecutor and investigating judge;
- the fourth asked for foreign judges in majority, and their appointment to be made by the Secretary-General

These four points were really tough.

12 February A meeting was held between the Secretary-General and Samdech Prime Minister in Bangkok, on the sidelines of the United Nation Conference on Trade and Development (UNCTAD). The meeting in Bangkok moved forward the process, in which the Secretary-General announced that there was optimism and he would again send a delegation to Phnom Penh, this time led by H.E. Hans Corell himself. Therefore, in March 2000 week-long negotiations were held a second time with our Task Force, in order to overcome the differences between us, particularly four points raised by the Secretary-General. While a number of points were resolved, one major issue remained outstanding – how to resolve any differences that might arise between the co-prosecutors.

April A further meeting was held between Prime Minister Hun Sen and the Secretary-General in Havana, Cuba, but the outstanding issue was not resolved, so the Prime Minister met again with Senator John Kerry, who then returned for another visit to Phnom Penh. This all led to another compromise concerning what to do in case of differences between the co-prosecutors and co-investigating judges.

May The Prime Minister and the Secretary-General Kofi Annan exchanged letters confirming the latest compromise reached through John Kerry.

July Under Secretary-General Hans Corell led a third and final delegation to Phnom Penh. In these negotiations various problems were settled. Although not quite 100% agreement was reached, the negotiations produced the basis of the draft you have before you today.

September The Government Task Force resumed work with the Legislation Committee of the National Assembly.

November Senator John Kerry made a final visit to seek confirmation of the position regarding the Draft Law: is the government still committed to moving

ahead? and is the National Assembly going to debate it soon?

28 Nov The Legislation Committee and the Task Force concluded their discussions on the Draft Law.

Before going to my conclusion, let me recapitulate the major compromises that were reached as a result of the efforts made by both sides during the course of the negotiations. There were four significant steps along the way:

1. when we held wide differences between the notions of an international tribunal and a trial in the national courts, then we made a step forward to agree on a national trial but held in extraordinary chambers of the existing court structure with participation by foreign judges. This was an unprecedented concept in the court system, and so our country would be able to provide experience to the international courts. Your Excellencies may wonder why this draft law does not comply with our existing national laws. This is because it is a new step in evolution and a unique case. Thus, existing laws cannot be applied. Let me repeat, the first compromise was the national court with extraordinary chambers and participation by foreign judges.
2. After we agreed on foreign participation another deadlock arose concerning which side should hold the majority among the judges. They wanted foreign judges to be in the majority, while we insisted that the chambers must be composed of Cambodian judges in the majority. This deadlock was broken by the second compromise—Cambodian judges in the majority, and foreign judges in the minority, but the minority would be a "blocking minority". Again we worked our way out of a deadlock by adopting another unprecedented formula.
3. The third compromise concerned the concept of co-prosecutors. The United Nations wanted to have an international prosecutor while we wanted the prosecutor to be a Cambodian national. So we compromised on co-prosecutors. This formula was followed also in regard to the investigating Judges. As I mentioned before, we told them that as the United Nations did not want this element, and has only prosecutors, so there is no need for you to get involved in this – let Cambodia do it

on its own. But they did not agree. So the third compromise also involved co-investigating Judges.

4. The fourth significant compromise related to the resolution of differences between the co-prosecutors regarding bringing down indictments. They wanted each prosecutor to work autonomously. We maintained that as we had agreed on the concept of "Co"-prosecutors, in principle they should cooperate in a common endeavour. But a problem arises if they cannot reach agreement. This too was settled by development of a new and unprecedented mechanism, known as the Pre-Trial Chamber, to resolve any differences between the co-prosecutors, and likewise between the co-investigating Judges.
5. The fifth compromise arose because the United Nations did not want to have any amnesty or pardon for those who may be indicted or convicted under this law. According to our 1993 Constitution the King has the right to give amnesty and pardon and we did not wish this law to contradict our constitution. As a compromise we agreed to state in the law that the Royal Government of Cambodia will not request any amnesty or pardon.

So I have related to you the course of our negotiations and the different compromises that we reached along the way. When we examine this Draft Law, we must take into account all aspects – political and historical as well as legal – that are intertwined. If we examine this law only in relation to our body of existing law, then it could not move forward. This Draft Law embodies new formulas, new concepts, and new and significant principles, as I have outlined above.

Let me here conclude my introduction to the Draft Law.