

## **"Towards an End to Impunity": The International Criminal Court Between New York and Rome**

Address by The Hon Alexander Downer, MP, Minister for Foreign Affairs, to to the Asia-Pacific Meeting for Government Representatives and International Experts, Canberra, 7 May 1998.

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### **Introduction**

With Pol Pot's recent death, the world was reminded in a powerful way of the horror of Cambodia's "killing fields" in the mid-1970s, and the unconscionable crimes perpetrated against millions of innocent Cambodians by the Khmer Rouge.

When the atrocities committed by Pol Pot and his regime first came to light, the shock felt throughout the world was accompanied by an equally strong sense of frustration that the perpetrators were able to commit these heinous crimes with impunity. The international community was left helpless in the face of the failure of a national criminal jurisdiction to protect its own people and bring Pol Pot and his cohorts to justice.

This century has seen remarkable progress in many fields of endeavour, but it has also brought immense human suffering caused by premeditated acts of almost unimaginable inhumanity. As we reflect on that history, and look ahead to the new millennium, we have a great and historic task before us - to establish a practical framework to deal with the most serious crimes of concern to the international community as a whole - through the creation of an International Criminal Court (ICC).

On International Human Rights Day in December 1996, I announced the early establishment of an International Criminal Court as one of Australia's key multilateral and human rights objectives. Almost eighteen months later, Australia is very pleased to be co-hosting this regional seminar with the International Committee of the Red Cross and the Australian Red Cross.

All twenty one countries represented at this seminar have an important role to play - along with others across the globe - in making a permanent contribution to ensuring that the most heinous crimes against humanity do not go unpunished.

The seminar provides a valuable forum to consider and reflect on issues fundamental to the establishment of an effective International Criminal Court - a Court which, unlike the International Court of Justice, will have jurisdiction over individuals rather than States, along the lines of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and which will operate only prospectively.

Australia's support for this seminar - and its active involvement in the UN negotiations - reflects the Government's strong backing for the establishment of the Court. And it underlines my strong personal conviction that the creation of a truly effective Court will be a landmark development for the international community.

### **Part One: Towards an International Criminal Court - A Window of Opportunity**

I know that many of you present here today have worked long hours in recent years to maintain the momentum of the UN negotiations on the establishment of a permanent ICC. The conclusion of these negotiations will be the culmination of two significant developments which have taken place this decade.

First, the creation by the UN Security Council of ad hoc criminal tribunals to investigate and prosecute the horrendous crimes committed in the former Yugoslavia and Rwanda in the early 1990s. As in Cambodia, not only had appalling crimes been committed, but victims had been deprived of any sense of justice due to the inability or unwillingness of their national criminal systems to prosecute and punish the perpetrators.

And, second, the recognition by the UN negotiations that - while the ad hoc tribunals were an important step in the right direction - they did not offer a completely effective way to suppress and prosecute crimes of international concern.

Clearly, crimes such as genocide, war crimes and crimes against humanity - including "ethnic cleansing" and systematic torture and rape - must be placed under a rigorous international spotlight. The gravity of these crimes is such that they are the concern of the world as a whole, and not just the country immediately affected.

That is why the international community must seize the historic opportunity presented by the Diplomatic Conference to be held in Rome in a few weeks time. We must ensure that a truly effective, credible and widely acceptable Criminal Court is established.

Pol Pot's death has brought the need for an effective Court into sharper international focus. How could the crimes committed by Pol Pot and his regime have gone unpunished, and why did the world not act to see justice done? The simple answer is that - at the time - the international community did not have the means available to investigate and prosecute these crimes.

For many decades - particularly in the period after the Nuremberg and Tokyo Tribunals were set up in the wake of World War Two - the international community debated the merits of establishing a permanent International Criminal Court. But - unfortunately - it took the end of the Cold War to give this long-standing global debate new urgency and vitality.

The United Nations should be proud of the pivotal role it has played in taking up this demanding challenge. It was at the UN's request that the International Law Commission (ILC) produced a draft Statute for an ICC in 1994 - drafted by a working group chaired by the Australian ILC member, Professor James Crawford.

Subsequently, the General Assembly established an Ad Hoc Committee and a Preparatory Committee to review the ILC draft Statute. The task was to draft a consolidated text of the Convention for the Court'.

I am pleased to say that - consistent with the global importance of the subject - the quality and level of official involvement and engagement in the negotiations has been very high. But it has not just been an exercise driven by national governments. Accredited international and non-governmental organisations, such as the International Committee of the Red Cross, were granted observer status and have played a constructive part in the process.

## **Part Two: Key Issues in the Negotiations - Maintaining a Genuine Spirit of Cooperation**

The result of this concentrated international endeavour is the draft Statute which will be forwarded to Rome. I believe that this text represents an extraordinary effort and commitment by all those involved in the negotiations, and could not have been achieved without the tireless labour and dedication of many people.

But - as you know better than I - many fundamental issues remain to be resolved at the Diplomatic Conference. A great deal of hard work lies ahead. We must continue to work together in a spirit of cooperation to achieve our shared goal. I want to spend a few minutes speaking about certain key issues, and some of the complex questions they raise.

My colleague, the Attorney-General Mr Williams, will address in more detail the issue of "complementarity" of domestic and international jurisdictions, and the issue of an appropriate mechanism to trigger the jurisdiction of the Court.

However, I will say at the general level that it is vital that states and other interested parties approach these issues with good faith and a realistic assessment as to which mechanisms can be expected to work within the prevailing international environment.

In particular, deep consideration will have to be given to how best to fashion a workable relationship between the Court and the Security Council, which for the foreseeable future will continue to be the principal organ of multilateral security.

The relationship between the Court and the Security Council raises significant questions. These include the referral of issues to the Court and the special geopolitical significance of Security Council decisions to either refer or prevent the consideration of matters by the Court. What should be the situation in relation to cases with which the Council is "dealing"? Clear understanding and agreement on the precise nature of the ICC-Security Council relationship is vital.

Finally, I understand that Ms Marie-Claude Roberge will be addressing "Crimes under the Jurisdiction of the ICC". Above all, agreement must be reached on the specific crimes which should be within the jurisdiction of the Court ; that is, those of most serious concern to the international community as a whole.

In that respect, I believe that the Statute must encompass - as core crimes - genocide, crimes against humanity and war crimes. While there is broad agreement on the definition of "genocide", I know that much more negotiation is required before the definitions of "crimes against humanity" and "war crimes" are fully agreed. Today's seminar provides a useful forum to discuss how these differences of view might be resolved.

More broadly, I am convinced that today's dialogue - including the general discussion to be chaired by Sir Ninian Stephen, a former Judge of the International Criminal Tribunals for the former Yugoslavia and Rwanda - will be of lasting value and significance. It will help us consider important aspects of the Statute and our preparations for the landmark Rome Conference.

### **Conclusion**

In conclusion, I want to return to my initial remarks on the important opportunity that exists to give the world a practical international instrument of lasting benefit to current and future generations.

I am convinced that we must act with determination and vision to transform this unprecedented opportunity into concrete results - the establishment of a Court with real teeth to bring to justice those who commit the gravest crimes against humanity.

This is the very least we owe to the many millions who have perished at the hands of regimes led by individuals such as Pol Pot. And we must prove to future generations that we are serious about the rights of victims - and the responsibility of the international community - to see justice done and to see potential perpetrators of international crimes deterred in the future.