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war crimes: punishing international criminal tribunals

CRISIS CARE COMMITMENT
As we start the New Year I would like to warmly welcome you to this edition of the *International Humanitarian Law Magazine* which is timely with its focus upon international criminal prosecutions.

The last two decades have seen more developments in the area of the prosecution of those accused of war crimes and other international crimes, than any other decade in history. We have witnessed a wide range of international and domestic tribunals and courts created to deal with the concern that those accused of atrocities should not be granted immunity. From the two ad hoc tribunals created by the United Nations for the Former Yugoslavia and Rwanda, to the hybrid enforcement mechanisms for Sierra Leone and Cambodia, to the domestic courts of Iraq and to the creation of the International Criminal Court, there is a growing interest in the various ways war crimes prosecutions can be undertaken.

This edition aims to provide you with a variety of articles relating to international criminal prosecutions in the 21st century. Some pieces examine the effectiveness of this area of international law whilst others deal with personal reflections and key themes such as the prosecution of gender crimes. The historical development of the International Criminal Court, as well as the particular role of humanitarian organisations in gathering evidence for such trials, are also topics which are included and aim to encourage a broader debate on this area.

I would like to acknowledge all who have contributed to this magazine and in particular I would like to thank Mallesons Stephen Jaques for its support of the *International Humanitarian Law Magazine* series. Australian Red Cross deeply values the support it receives to continue to educate the public on crucial matters relating to the laws of war and we look forward to engaging with you throughout this coming year.

Robert Tickner
Chief Executive

**Australian Red Cross**

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the importance of 

effective international 
enforcement 
of international humanitarian law

Tim McCormack tracks the evolution of attempts to prosecute violations of the law of war.

‘... it would be quite harmless for our government to sign the [Geneva] Convention as it now stands. It amounts to nothing more than a declaration that humanity to the wounded is a good thing. ... People who keep a vow would do the thing without the vow. And if people will not do it without the vow, they will not do it with.’

Florence Nightingale, 31 August 1864.

Just days after the opening for signature of the world’s first multilateral treaty for the legal regulation of the conduct of war, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Florence Nightingale articulated what has since become a popular view of international humanitarian law (IHL). In the absence of effective enforcement measures, IHL is seen to constitute little more than aspirational rhetoric – that humanity in war is to be applauded. I disagree with those who argue that IHL is ineffective. In citing Florence Nightingale’s 19th century reflections, I do accept that IHL has long been subjected to the dismissive criticism that it is honoured more in the breach than in the observance – often for want of effective enforcement measures.

The establishment of the International Criminal Court (ICC) in 2002 has the profound potential to increase respect for IHL. The creation of the ICC occurred in the context of a broader international criminal justice experiment that has prompted a spectacular increase in the awareness of IHL. This recent phenomenon came after decades of ineffective national enforcement of IHL. Whilst a truly effective IHL enforcement regime must involve national trials, international tribunals act as a fundamentally important catalyst for States to take the national enforcement of IHL much more seriously.

Gustave Moynier, one of Henry Dunant’s co-founders of the ICRC, published the first known draft statute for an international criminal court in 1872. Early in the history of the Red Cross Movement, Moynier at least recognised that respect for the newly emerging law of war could only be maximised with the establishment of institutions and processes for its effective enforcement. It is well known, of course, that the international community took 130 years to respond to Moynier’s call, with the entry into force of the Rome Statute for the International Criminal Court (Rome Statute) on 1 July 2002. Throughout much of that period of time, and despite the significance of major law-making achievements, including the adoption of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, the reality has been regular violations of a law all too rarely prosecuted.

In his excellent exposé of Moynier’s 1872 draft statute, Christopher Hall explains that Moynier did not originally support the idea of a permanent international criminal court. Hall cites Moynier’s 1870 commentary on the 1864 Geneva Convention in which Moynier dismissed the need for an international court to try individual violators of the law on the basis that the pressure of public opinion was the best guarantee of respect for the law. Further, Moynier argued that in the unlikely event of an indifferent response to that opinion, States Party to the Convention would impose their
own domestic penal sanctions for violations of the law.

With the benefit of hindsight, Moynier's optimism about the deterrent effect of public opinion seems naive. He was encouraged by the breakthrough of the 1864 Geneva Convention and was an integral founding member of the new ICRC – an organisation still only seven years old at the time of the publication of Moynier's commentary on the Convention. However as Hall explains, the conduct of the Franco-Prussian War – a conflict which broke out within months of the publication of Moynier's commentary – forced him to realise the limitations of his approach. Public opinion in that war was instrumental in the escalation of violations of the 1864 Geneva Convention – many of those violations constituting atrocities – and certainly failed to provide the moral constraint Moynier had anticipated. Neither side in the conflict enacted penal legislation criminalising violations of the Convention. In fact, neither side made any attempt to punish those responsible for alleged violations. Hall quotes Moynier's own acknowledgement that "a purely moral sanction" was inadequate "to check unbridled passions".

So it was that Gustave Moynier drafted his statute for an international criminal court and became a leading advocate for the need to supplement a national approach to the enforcement of the law of war. His recognition of the dependency of increased respect for the law on the existence of effective international enforcement mechanisms, has proved to be correct – even though it has taken 130 years. Moynier's call for an international court did not simply wither and die, although it may have felt like that to him at the time. Moynier planted a seed that took a long time to germinate and his contribution ought not to be overlooked.

In the aftermath of World War I, the victors planned for Allied criminal tribunals to try defendants from the defeated Northern Powers responsible for egregious violations of the law of war. For political reasons those tribunals never materialised. Instead the Germans and the Turks were permitted to conduct their own national trials – at Leipzig and Constantinople respectively. Ultimately, few defendants actually faced trial and those who were convicted received relatively lenient sentences. These trials were considered farcical by many in Allied countries – particularly those subjected to German occupation during the Great War. Although the proposed Allied trials never transpired, the notion of individual responsibility for war crimes was widely accepted – even demanded – and the inadequacy of the national trial processes hardened Allied resolve during World War II. The Nuremberg and Tokyo war crimes trials may never have occurred without these post-World War I developments.

The significance of the Nuremberg and Tokyo trials to the subsequent development of international criminal law cannot be overstated. For all the criticisms of the trials – particularly the allegation of "victor's justice" – Nuremberg and Tokyo constitute historic precedents for the now unassailable principle of individual criminal responsibility for violations of IHL. Even though Nuremberg and Tokyo were temporally-restricted, ad hoc tribunals, they demonstrated the feasibility of Moynier's call for a permanent court. It could no longer be argued that this concept was unrealistic, unattainable or delusive.
The Nuremberg Trial commenced in 1945 and the Tokyo Trial concluded in 1948. Given that timing, it is perhaps not surprising that the four Geneva Conventions of 1949 all contain obligations on States Parties to criminalise grave breaches and to either try or extradite for trial those alleged to have perpetrated war crimes. The Geneva Conventions were the first multilateral treaties to establish an enforcement regime on the basis of universal jurisdiction. In so doing, their inception initiated a trend for subsequent treaty regimes.

In 1993 and 1994, with the establishment of the international criminal tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) respectively, the UN Security Council built on past foundations whilst also kick-starting a now irrepressible phenomenon. Around the world there is an increasing rejection of impunity for international crimes with a commensurate expectation of accountability. The international community has initiated a proliferation of international criminal courts and tribunals – for Sierra Leone, Kosovo, Cambodia, Lebanon all in addition to the ICC itself – and individual States are taking more seriously the national enforcement of international criminal law.

Despite recent successes, this is no time for delusion that all IHL violations will be prosecuted. There are major limitations to the jurisdiction of the ICC. For every ad hoc international criminal tribunal in existence there are 10 or 20 countries deserving of a similar judicial mechanism. The single most serious challenge to global justice is the prevailing lack of systematic application of the law: this is the goal that all those committed to justice must constantly strive to attain. There has been spectacular progress since the establishment of the ICTY and it is right to celebrate such breakthroughs. We must however, also remind ourselves that this entire endeavour is only necessary because of the inhumanity of fellow human beings. That lamentable reality ought to have a sobering effect – not to dampen celebrations, but rather to put them in proper perspective.

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opportunities: humanitarian organisations and international criminal prosecutions
Since the early 1990s, the spectacular developments in international criminal law have raised the profile of the requirement to prosecute those accused of war crimes. The creation of the International Criminal Court (ICC), and its ad hoc predecessors focused on the Former Yugoslavia and Rwanda (ICTY and ICTR), has resulted in a broader section of the general public becoming aware that ‘even wars have laws’ and the need to enforce these laws at an international level if States are unwilling or unable to do so domestically. It may only be of widespread interest when a super-model, such as Naomi Campbell, is called to give evidence about war lords and diamonds; however the prosecution of Saddam Hussein, Slobodan Milosevic and the indictment of the current President of Sudan, Omar al-Bashir, has generated attention around war crimes in an unprecedented manner.

However, such wider public expectation and interest in the enforcement of IHL present both challenges and opportunities for the humanitarian sector. This is especially pertinent for organisations involved in activities in the field where evidence for prosecutions is being gathered. Like similar provisions in the ICTY and ICTR, article 15(2) of the ICC Statute allows the Prosecutor to receive written and oral testimony from inter-governmental and non-governmental organisations (NGOs). Thus, above and beyond the informal provision of evidence of war crimes, crimes against humanity or genocide, non-state actors have the opportunity to play a formal role in prosecutions.

For many humanitarian organisations the decision whether or not to provide evidence at any type of war crime trial creates dilemmas. For those organisations with a focus upon public advocacy (such as Amnesty International and Lawyers Committee for Human Rights) the issues are not so problematic. With the aim of raising awareness about international justice, rather than carrying out humanitarian activities in the field, some NGOs have a strong and necessary role to play in not only providing evidence but in the submission of technical briefs to war crimes trials. Yet for those organisations which work in the field providing assistance and protection, the issues are complex. There can be security risks for workers on the ground as well as limitations in gaining access to those in need of humanitarian assistance if organisations are seen to be providing information that could lead to arrests or prosecutions of those in power. This was demonstrated by the attacks on humanitarian workers in Uganda after the ICC issued arrest warrants for five LRA leaders. Following the indictment of President Omar al-Bashir, the Sudanese government evicted many UN and other agencies, claiming that these organisations were ‘using humanitarian aid as a cover to achieve a political agenda’.

Concerns regarding the operational impact of providing evidence at war crimes trials has been a matter of interest to the whole International Red Cross and Red Crescent Movement for many years, in particular the International Committee of the Red Cross (ICRC). The Simic decision by the ICTY in 1999 recognised that the ICRC cannot be compelled to testify at such trials. This privilege...
Providing evidence for one side or another during a war crimes trial could be perceived as ‘taking a side’ in what would inevitably be a very emotive and political endeavour. A more detailed reflection on this topic is necessary as war crimes trials become more prolific.

What is important to understand is that the International Red Cross and Red Crescent Movement’s privilege in not testifying at a war crimes trial does not in any way undermine IHL enforcement. On the contrary, by ensuring respect for neutrality and confidentiality it is hoped that the Movement will be able to carry out its activities to enhance respect for IHL, complementing the efforts made by the ICC and other enforcing agents.

For other humanitarian organisations wanting to both work in the field as well as play a role in matters of international justice, reflection is needed to ensure all benefits and disadvantages of engaging in judicial cooperation are carefully considered. Ensuring respect for the limitations placed on behaviour during times of armed conflict can be done directly, by providing evidence, or with a focus upon prevention, such as disseminating IHL and assisting governments to set up the legal framework to try those accused of breaches. The need for each member of the humanitarian sector to understand their own institutional roles, responsibilities and capacities strengthens the quest to end impunity and allows for organisations to complement each others’ activities in progressing international peace and security.

Dr Helen Durham is the Strategic Adviser, International Law and Special Projects for Australian Red Cross.
The annual Humanitarian Law Perspectives Project (HLP Project) has been running as a joint initiative of Australian Red Cross and Mallesons Stephen Jaques law firm (Mallesons) since 2007. The purpose of the HLP Project is to assist Australian Red Cross with disseminating information about international humanitarian law (IHL) and international criminal law to legal practitioners, academics and law students.

The HLP Project consists of two elements. Firstly, solicitors and law clerks assist in monitoring developments in IHL. Teams then prepare substantive research papers (HLP Papers) on topics which have been identified as being of particular importance. Once finalised, the HLP Papers are published on the Australian Red Cross website and circulated to academics nationwide.

Secondly, the HLP Project produces a signature seminar series (HLP Seminar Series) which runs across each of the Australian cities in which Mallesons has an office (being Sydney, Melbourne, Canberra, Brisbane and Perth). The seminars target legal professionals and law students, and aim to raise awareness of IHL and international criminal law. In Adelaide the HLP Papers are utilised by Australian Red Cross to inspire a similarly reflective series of seminars.

In 2010, the HLP Seminar Series once again attracted high calibre expert speakers such as Sir Kenneth Keith (International Court of Justice Judge), Professor Gillian Triggs (Dean of the Faculty of Law, University of Sydney), Mr Rowan Downing QC (International Judge at the Extraordinary Chambers in the Courts of Cambodia or ECCC) and Professor Tim McCormack (Professor of Law, University of Melbourne Law School) amongst others. Three of the five seminars focused on developments arising as a result of the International Criminal Court review conference held in Uganda in June. The final two seminars examined the role of victims in proceedings before the ECCC and the doctrine of universal jurisdiction. Reports of these last two seminars are provided in the following two articles within this publication. What has not been reported is the lively discussion following each seminar and the growing numbers of attendees which attests to the commitment of Australian Red Cross and Mallesons to raise awareness of IHL in the legal community – work which will continue in the years to come.

Nancy Lim is a solicitor with Mallesons Stephen Jaques.
Universal jurisdiction, or the universality principle, refers to the ability of an investigating judge or prosecutor to investigate or prosecute persons for crimes committed outside a state’s territory. Such investigation need not be connected to that state in a way that would ordinarily establish jurisdiction over the crime or person. The traditional bases for a state to claim connection to a crime and thus assert jurisdiction over its prosecution are:

- Territoriality (i.e. where the crime occurs);
- The nationality of the suspect;
- The nationality of the victim;
- Harm to a direct interest of the prosecuting state.

Universal jurisdiction is an exceptional basis for jurisdiction. Under this principle, crimes infringing upon the interests of all states (such as piracy) or offending certain fundamental principles (of human rights or IHL, for example) which have attained the status of jus cogens, may be prosecuted by any state.

The universality principle was the theme of the recent ‘Humanitarian Law Perspectives’ (HLP) seminar presented by Australian Red Cross and Mallesons Stephen Jaques in Sydney. The HLP seminars are designed to update the Australian legal community on current developments in international humanitarian and criminal law. Dean of Sydney Law School, Professor Gillian Triggs, and current Justice of the International Court of Justice (ICJ), Sir Kenneth Keith, spoke about the challenges of exercising universal jurisdiction at national and international levels.

Quang Trinh, a Senior Associate at Mallesons, set the scene for the audience outlining some of the concerns surrounding universal jurisdiction. In particular, Mr Trinh noted that the exercise of universal jurisdiction by the prosecuting state may infringe upon the jurisdiction, and thus upon the sovereignty, of states which have a more direct connection with the crime. He also outlined other issues concerning the legitimacy, accountability, practicality, and political ramifications of a state exercising universal jurisdiction when it has no direct interest in a crime.

Professor Triggs opened the discussion with the idea enunciated by the 1945 Nuremburg Tribunal that ‘crimes against international law are committed by men, not abstract entities’. Professor Triggs focused on the issue of immunity from prosecution giving particular attention to the traditional sanctity provided to leaders by the doctrine of head of state immunity. She explained that immunity is only relevant once jurisdiction to prosecute has been established, and even when it applies, it should not allow an individual to abrogate responsibility for the commission of heinous crimes.
Through case studies, Professor Triggs provided insight into contrasting experiences of various national courts in exercising universal jurisdiction. A notable example was that of the Pinochet No 3 Case, in which the UK House of Lords found that the former Chilean dictator Augusto Pinochet could not claim head of state immunity for committing acts of torture, as torture could not be said to be an official act of the State. By contrast, a US District Court last year granted the Israeli Defence Minister and Deputy Prime Minister, Ehud Barak, immunity from prosecution for alleged war crimes as a serving minister.

Finally, Sir Kenneth surveyed numerous issues involved in exercising universal jurisdiction at the international level. He explored various case studies such as the Arrest Warrant Case brought in the ICJ by the Democratic Republic of the Congo against Belgium. This case related to an arrest warrant issued in 2000 under Belgium’s ‘law of universal jurisdiction’ against the then serving Congolese foreign minister, Abdoulaye Yerodia Ndombasi. A majority of the ICJ held that while there was no established practice of universal jurisdiction, its exercise was not prohibited under customary international law. Rather, the ICJ found that the doctrine did exist in absentia with respect to piracy. The majority of the Court upheld the immunity of the foreign minister for charges of war crimes and crimes against humanity inciting racial hatred. However, the Court stressed that national courts should, in appropriate circumstances, deny immunity to state officials.

In addition, Sir Kenneth discussed the imperative for national and international judicial bodies to accord procedural fairness and natural justice. He also described the extent to which pursuing justice by exercising jurisdiction may in fact work against underlying peace processes. Sir Kenneth highlighted that while the creation of the International Criminal Court (ICC) in 2002 reduced the perceived need to create laws establishing universal jurisdiction, universal jurisdiction is exercised by states and not by international courts, tribunals or organisations. The ICC’s authority is founded in the provisions of the Rome Statute of the ICC, and although its purview sometimes resembles the universal jurisdiction asserted by states, the Court itself cannot exercise universal jurisdiction.

Sir Kenneth then examined the relationship between universal jurisdiction and the principle of a state’s ‘responsibility to protect’. The latter principle focuses on the prevention of particular international crimes typically committed through state apparatus: genocide, war crimes, ethnic cleansing and crimes against humanity. The responsibility to protect and the universality principle have therefore, become closely aligned at the diplomatic level. The prosecution of persons accused of committing international crimes through the exercise of universal jurisdiction may be seen to facilitate a state’s implementation of its responsibility to protect, even if the former principle is much narrower in scope.

Professor Triggs and Sir Kenneth both emphasised that the concept of universal jurisdiction has remained controversial since its inception. However in recent years the apparent willingness of the international community to tackle the challenges involved in exercising universal jurisdiction has increased.

Universal jurisdiction was again on the agenda of the 2010 United Nations General Assembly meeting, held between September to December 2010. Member States were asked to consider data on the scope and application of universal jurisdiction with the view to reporting back early in 2011 in an endeavour to pass a resolution of substance to clarify the role of universal jurisdiction in promoting and protecting human rights.

Charles Deutscher is a solicitor with Mallesons Stephen Jaques.
Pip Ross examines the first successful prosecution by the Extraordinary Chambers of the Courts of Cambodia.

Approximately 1.6 million Cambodians died during the Khmer Rouge regime of 1975-1979, a figure roughly equivalent to a quarter of the total Cambodian population at the time. Until recently, the leaders of the Khmer Rouge remained unpunished with many receiving official pardons or amnesty from subsequent governments which have retained strong links with the Khmer Rouge.

Established in 2007, the Extraordinary Chambers of the Courts of Cambodia (ECCC) is a hybrid tribunal, administered jointly by the Cambodian government and the United Nations. Its mandate is to try those deemed to be responsible for the crimes committed during this brutal period in Cambodia’s history. The ECCC has recently handed down its first sentence, in respect of the crimes committed by Kaing Guek Eav (Duch), head of the notorious Tuol Sleng prison in Phnom Penh. Sentenced to 35 years imprisonment, many Cambodians felt this to be inadequate for the man responsible for the torture and deaths of over 17,000 people.

Duch was born in the central Cambodian province of Kampong Thom in the early 1940s. He excelled at mathematics at school and qualified as a high school teacher, then joined the Communist Party in the 1960s. During this period he was arrested and tortured for his political activities. After the Khmer Rouge took power he was appointed head of the security police and given control of the Tuol Sleng Prison, also known as S21. Tuol Sleng, situated in a former high school in central Phnom-Penh, was the Khmer Rouge’s primary interrogation and torture centre. Prisoners sent there had already been condemned to death – they were housed in Tuol Sleng for the purpose of extracting confessions following which they would be executed. Duch, as head of the prison, presided over the deaths of approximately 17,000 men, women and children. Prisoners were subjected to waterboarding, electric shocks, suffocation and beatings; torture techniques used to extract details of their alleged crimes. The prisoners'
“confessions” were meticulously recorded and occasionally annotated by Duch himself. The prisoners would then be taken to Choeung Ek (one of the best known sites in the Killing Fields) and beaten to death.

Duch fled Cambodia following the fall of the Khmer Rouge, and spent some time living in a refugee camp in Thailand. He taught himself English, worked with several aid organisations and converted to Christianity. In 1999 Duch was discovered in Battambang in north-west Cambodia by a photo-journalist working for the *Far Eastern Economic Review*. Duch turned himself in to the authorities shortly after his whereabouts became known. His arrest and the arrests in 2007 of several senior Khmer Rouge figures, including Nuon Chea, Khieu Sampan, Ieng Sary and Ieng Thirith, were the first steps in the long process of achieving justice for the Cambodian people.

Due to successful outreach efforts on the part of the tribunal, the victim participation process has expanded beyond recognition. In the trials currently in process, 4,121 victims have sought to be joined as parties and it is anticipated that they will be represented by more than 30 lawyers.

Mr Downing spoke frankly about the organisational problems experienced by the ECCC in implementing victim participation. In the trial of Duch 90 victims were added as parties and represented by 17 lawyers. Mr Downing observed that because parties could question witnesses, up to five variants of the same question were often asked. He estimated that victim participation extended the length of Duch’s trial by at least a third, leading him to question how well the process sits with the right of the accused to an expeditious trial, or more broadly, whether the needs of victims can be permitted to divert the court from the rights of the accused.

In addition, Mr Downing spoke candidly when questioned about whether an international criminal tribunal is the most appropriate venue for victims to be added as civil parties. The goals of such a tribunal are justice, punishment and deterrence. In contrast, victims often simply want an answer to the question “Why?” Sadly, this is not necessarily a question that an adversarial criminal court is well equipped to answer. Further, it is unclear the extent to which trials of this nature actually assist victims when they are required to relive horrific events that occurred over 30 years ago. Mr Downing suggested that, ultimately, victims’ questions might best be answered and their needs best met, by a properly funded truth and reconciliation commission run alongside a criminal tribunal.

The international community’s search for the most effective way to deal with crimes of the scale seen in Cambodia continues. Despite the inevitable teething problems inherent in such a radical overhaul in trial procedure, the move towards granting a greater voice for victims is an enlightened choice on the part of the judges of the ECCC. The hope of the international community is that the judges are successful in finding the appropriate balance between procedural fairness for the accused, and providing opportunities for victims to seek healing through participation in the judicial process.

On 12 August 2010, Rowan Downing QC, a judge of the ECCC and a member of the Victorian bar, spoke about his work in Cambodia as part of the HLP seminar series presented by Australian Red Cross in conjunction with Mallesons Stephen Jaques. Mr Downing was joined by Professor David Chandler, an expert on Cambodian history and a witness before the ECCC. Professor Chandler provided insight into Duch’s background and mindset, describing him as a meticulous and intelligent public servant. Mr Downing spoke about the successes and difficulties experienced by the ECCC in recognising victims’ rights. A victim is defined as someone who has suffered physical, material, or psychological damage that is directly related to the regime. The ECCC permits victims to participate in all stages of proceedings, an innovative feature of the court. Victims seek to assist the prosecution and call for collective and moral reparation; however there is no avenue for financial compensation through the ECCC.

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Pip Ross is the Victorian IHL Officer with Australian Red Cross.
1872
After the Franco-Prussian War in 1870-71, Gustave Moynier submitted (unsuccessfully) a proposal for the creation of an international arbitration court to penalise violations of IHL.

1919
Treaty of Versailles at end of World War I provided for prosecution of Kaiser Wilhelm II of Germany “for a supreme offence against international morality and the sanctity of treaties”. Queen Wilhelmina refused extradition requests from the Allies.

1945
International Military Tribunal “Nuremberg Tribunal” established under the London Agreement by the Allied powers, to try alleged Nazi war criminals.

1946
International Military Tribunal for the Far East “Tokyo Tribunal” established under a charter to try alleged Japanese war criminals.

1949
Four Geneva Conventions revised and extended the earlier Geneva Conventions consolidating the grave breaches regime across all four conventions.

1961
Trial of Adolf Eichmann by Supreme Court of Israel relied in part upon universal jurisdiction to convict Eichmann for crimes committed in Germany during World War II prior to the existence of the state of Israel.

1977
Additional Protocols I and II to the 1949 Geneva Conventions introduces further grave breaches.

1985
Spain introduces universal jurisdiction legislation (limited in scope in 2009).

1993
International Criminal Tribunal for the Former Yugoslavia (ICTY) established pursuant to a United Nations Security Council Resolution. Mandate of the ICTY to bring justice to those most responsible for serious violations of international humanitarian law committed in the former Yugoslavia from 1991.

1994
International Criminal Tribunal for Rwanda (ICTR) established pursuant to a United Nations Security Council Resolution. ICTR to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda, or by Rwandan citizens in neighbouring states, between 1 January and 31 December 1994.

1994
Four Geneva Conventions revised and extended the earlier Geneva Conventions consolidating the grave breaches regime across all four conventions.
1998
Adoption of the Rome Statute of the International Criminal Court.

2000
Creation of hybrid international tribunal, Special Panels of the Dili District Court (also called the East Timor Tribunal) by the United Nations Transitional Administration in East Timor, to try “serious criminal offences” which occurred in East Timor in 1999.

2003
Extraordinary Chambers in the Courts of Cambodia created following Agreement between the Royal Government of Cambodia and the United Nations. Enactment of the 2004 ECCC law leads to the Court establishment in 2006 to prosecute senior leaders of the Khmer Rouge for atrocities from 1975 to 1979.

2009
First arrest warrant issued in ICC against a sitting head of state, President Omar al-Bashir, President of Sudan, for crimes against humanity, war crimes and genocide.

2010

1999
UK House of Lords judgment in favour of General Pinochet’s extradition to Spain to stand trial for genocide, torture, and other crimes during former rule in the 1970s and 1980s.

2002
Special Court for Sierra Leone (SCSL) established.

2003
The Supreme Iraqi Criminal Tribunal (formerly Iraqi Special Tribunal for Crimes Against Humanity) established under Iraqi national law to try Iraqi nationals or residents accused of genocide, crimes against humanity, war crimes or other serious crimes committed between 1968 and 2003.

2006
Hybrid tribunal, Special Tribunal for Lebanon, established by an agreement between the UN and the Lebanese Republic pursuant to a Security Council resolution to investigate the assassination of Rafik Hariri.
Clair Duffy provides an insight into the troubled area of sexual violence in conflict.

‘... rape had always been regarded as one of the spoils of war.’

It is well documented that in times of armed conflict women and girls are subjected to rape and other forms of sexual violence on a widespread basis. The Rwandan genocide of 1994 is a poignant example of this. Throughout the Rwandan genocide, women and girls were raped, sexually mutilated, enslaved and brutalised. Often these horrific sexual assaults against women were accompanied by the slaughter of their children and other family members. Many women and girls were killed immediately after being sexually assaulted. Survivors often suffer devastating long term physical, mental, emotional and social consequences which affect both individuals and their communities. Many victims have subsequently died, or are dying, of HIV/AIDS related illnesses.

The United Nations International Criminal Tribunal for Rwanda (ICTR), seated in Arusha, Tanzania, has been operational for over 15 years. It was established to prosecute those responsible for genocide, crimes against humanity, and war crimes, committed in Rwanda and neighbouring countries in 1994.

The ICTR is approaching the completion of its mandate. A number of important trial judgments have yet to be delivered and it is already...
For example, Mikaeli Muhimana, who had been a local government official during the genocide, was convicted of rape as a crime against humanity for having physically raped numerous women, as well as for having “substantially contributed” to the rapes of others. This second crime related to Muhimana having physically raped women in the presence of local militia and soldiers who were simultaneously carrying out acts of rape.

The wealth of compelling evidence against Muhimana resulted in his conviction and life sentence, an important step in the fight against impunity for Rwandan women, and of course for his individual victims. However, this lone conviction fails to address the complicity of higher level authority figures who did not physically engage in such acts, but whose actions allowed them to proceed.

Tharcisse Renzaho, who was the prefect of Kigali-ville during the genocide, was convicted of the rape of three women. His involvement in the rapes of those women related to his physical presence at local administration offices, where he told militia and soldiers that the victims were ‘food for the militia’. However, although Renzaho was also charged with being criminally liable for the rapes of Tutsi women generally committed within his prefecture, on this point the evidence was found to be insufficient.

An ongoing question for the ICTR, and for other international criminal institutions, relates to how individuals who are further up the chain of command – for example, in a political or military structure – may be found to have committed gender crimes where there is overwhelming evidence of the pervasiveness of those crimes.

The case against Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzarora is still in its trial phase, with charges laid against senior MRND members including rape under an
“extended” joint criminal enterprise theory. This theory aims at attaching liability to the accused for having engaged in a meeting of minds about the commission of genocide, while the commission of rape was a natural and foreseeable consequence of this meeting of their minds. The judgment in this case is expected to be delivered in 2011.

However, caution must be exercised when speaking of the advances made to date. The recent judgment by the Appeals Chamber in the case against former Rwandan priest, Emmanuel Rukundo, is a striking example of a step backwards in the field of gender justice. The Appeals Chamber, by majority, overturned the Trial Chamber’s genocide conviction against Rukundo for his sexual assault of a Tutsi woman. The words invoked by the Appeals Chamber add a further obstacle in an already difficult field. The Court stated that the crime committed against the Tutsi woman was “unplanned and spontaneous”. The Court went on to say that the sexual assault may just have been “opportunistic”, despite evidence that Rukundo commented on the woman’s ethnicity in the moments prior to the assault. These comments go to the question of what forms genocidal intent.

Examining the progression of gender crime prosecution at the ICTR indicates that it has chartered significant territory in this burgeoning area of international law. However limitations to victim-justice remain. The ICTR’s legacy will provide valuable lessons for future international criminal justice institutions. Its work will generate dialogue on substantive legal issues, prosecutorial strategy and victims’ issues.

The ICTR’s legacy thus far in the prosecution of gender crime is a chequered one. Despite territory gained in its early pioneering of this field of law, there have been definite shortcomings in its impact on victim-justice. Yet from these shortcomings, the ICTR’s legacy can assist other fledgling institutions to do better. Making the prosecution of gender crimes an integral part of prosecutorial strategy from the outset of a trial is an important lesson.

Continuing to look for ways of proving that criminal responsibility attaches to those at the highest level of authority is imperative. As ICTY Judge Navanethem Pillay stated following the conclusion of the Akayesu case, ‘... rape had always been regarded as one of the spoils of war. Now it is a war crime, no longer a trophy’. Continually striving to paint the whole picture of the kinds of crimes experienced by women and girls in conflict is vital.

Clair Duffy is the former Appeals Counsel, Office of the Prosecutor, ICTR.
a brief history of the international criminal court

Geoff Skillen recounts his involvement in the foundation of the ICC.

I first became aware of the proposal to establish an international criminal court in early 1995, when I became the Director-General of Defence Force Legal Services. It was not difficult to imagine the significance of the proposal for the Defence Force. Military forces do not want to see their soldiers tried for war crimes by a foreign or international tribunal. The Australian Defence Force does however have a proud tradition of compliance with international humanitarian law. On this basis there seemed to be little to fear from an international court. The attraction for Australians of establishing a standing international war crimes tribunal was obvious. What government would not want to see the perpetrators of the most serious international crimes?

I soon joined an inter-departmental committee and met colleagues from the Department of Foreign Affairs and Trade, as well as from the Attorney-General’s Department. Together, we would work for the next three-and-a-half years on the Australian contribution to the initiative to establish what would become the International Criminal Court (ICC). The Australian government was at all times broadly supportive of the establishment of the court, provided of course that it could be done consistently with Australia’s national interests. The challenge would be to establish a viable international institution while simultaneously preserving the principle of state sovereignty that all nations hold dear.

The early negotiations took place at UN headquarters in New York. Together with other Australian government colleagues, I attended five sessions of the Preparatory Committee, the body that undertook the work of drafting what would become the Statute of the ICC. Not surprisingly, a wide range of views was evident among the member-states and observers that took part in the negotiations. Some were totally opposed to the court’s creation in any form. Others were prepared to countenance an international court, but only if it was under the control of the UN Security Council.

The strength of the opposition was such that a group of nations which was committed to the establishment of a viable institution decided to form a loose coalition. This coalition became known as the “like-minded group”. During the period of the negotiations in New York, the group was chaired by Canada. The group’s membership was largely drawn from Western Europe, but also included...
and lobbied tirelessly for their respective causes. The experience of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, (which had been established in 1993 and 1994), was also influential in guiding the negotiations.

In the course of the negotiations in New York, the government of Italy offered to host the diplomatic conference that would ultimately adopt the Court’s Statute. In June 1998, representatives of over 150 governments and some 800 NGOs assembled in Rome. A Canadian, Philippe Kirsch – who later became the first President of the ICC – chaired the Committee of the Whole. This committee was the major working-level body of the conference. Due to Ambassador Kirsch’s role, Canada decided that it could no longer chair the “like-minded group”. It was agreed that Australia would take over as chair. We performed this role for the duration of the Rome Conference. The Australian delegation included representatives from the key Commonwealth departments, as well as officers from the New South Wales and Queensland Governments. Academics Tim McCormack and Gerry Simpson were also in attendance. Tim and Gerry’s contributions were invaluable in what was a time of intense activity. Also at the Rome Conference was Helen Durham from Australian Red Cross, who had been invited to join the ICRC delegation.

Australia, New Zealand and a number of other countries from different regions. The “like-minded group” served as a forum for the exchange of ideas and for the development of proposals that were thought to have good prospects of attracting popular support.

The efforts of governments at this time were complemented by those of civil society and international institutions. The International Committee of the Red Cross (ICRC) was particularly active and influential. Non-governmental organisations (NGOs) formed their own coalition, and lobbying tirelessly for their respective causes. The experience of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, (which had been established in 1993 and 1994), was also influential in guiding the negotiations.

In addition to its role as chair of the “like-minded group”, the Australian delegation was influential in shaping parts of the ICC Statute. These included the definition of the crimes within the court’s jurisdiction, the principle of complementarity, the conditions for the exercise of jurisdiction by the court, the qualification and election of judges and the rules governing cooperation with the court by states. From my perspective as a defence representative, the question of complementarity was vital. The principle holds that the ICC’s jurisdiction is complementary to that of states, which retain both the right and responsibility to try the perpetrators of serious international crimes under their own domestic laws. The ICC Statute recognises this principle. The result is that the court is only able to act when national jurisdictions are either unable to do so or have failed to act genuinely.

The Rome Conference was an arduous five weeks, involving long and often difficult negotiations. It culminated with the adoption of the Statute at the final session of the conference on 17 July. There was great emotion in the room as the Statute was adopted by the Committee of the Whole. The Committee’s decision then needed to be ratified by the Conference itself, at which point the United States called for a vote. The result of this vote was 120 states in favour of adoption, seven against and 21 abstentions. The first permanent court to try serious international crimes had been established and history had been made.

The focus of activity then shifted to achieving the 60 ratifications of the Statute that would be needed to bring it into force. The Australian government conducted its own analysis of the compatibility of the Statute with our national interests. Part of this process involved a public inquiry by the Parliament’s Joint Standing Committee on Treaties. Shortly after the Rome Conference, I left the Department of Defence...
and joined the Attorney-General’s Department. In that capacity I worked on the processes involved in our ratification of the Statute.

It is well known that Australia’s decision to ratify was not easily taken with differing views evident in the decision-making process. Some of these emerged in the Parliamentary debate on the legislation and also in the Parliamentary inquiry. Australian Red Cross made an excellent submission to the inquiry, and gave evidence to it that powerfully advocated support for ratification. I have no doubt that Red Cross’s efforts were highly influential in urging the government to come to the decision that it ultimately did, in favour of ratification.

Australia joined the group of countries that were parties to the Statute at the point that it entered into force on 1 July 2002. Recognising that there would be pressure for amendments to the Statute in the future, the Statute provided for a Review Conference, seven years after its entry into force, at which amendments could be considered. This conference was held in Kampala, Uganda from 31 May to 11 June 2010. The major outcomes were the agreement to adopt an amendment to the statute allowing for inclusion of the crime of aggression within the court’s jurisdiction, and the extension to non-international armed conflicts of the war crime of using certain prohibited weapons.

Australia again sent a high level government delegation to the Kampala conference, which was influential in achieving some of the key outcomes of the conference.

The experience of Australia’s involvement in the establishment of the ICC and its evolution is one of constructive and positive engagement. It is one that all Australians can be proud of. I certainly feel privileged to have had the opportunity to play a small part.

Geoff Skillen, as Director-General of the Defence Force Legal Services, was part of the Australian Government delegation that attended the Rome Conference that adopted the Statute of the International Criminal Court in 1998. After joining the Attorney General’s office, he contributed to Australia’s ratification of the Statute in 2002. Currently Geoff is the Chair of Australian Red Cross’s National Advisory Committee on international humanitarian law.
Steven Freeland examines the yardsticks for “success” in enforcing international criminal law.

On 22 November 2010, the trial in the case of The Prosecutor v. Jean-Pierre Bemba Gombo commenced at the International Criminal Court (ICC). It is alleged that the accused is criminally responsible, as a person effectively acting as military commander within the meaning of article 28(a) of the Rome Statute, for two crimes against humanity (murder and rape) and three war crimes (murder, rape and pillaging). These alleged acts were committed in the territory of the Central African Republic between 26 October 2002 to 15 March 2003. This is the third trial that has begun at the ICC. Bemba represents the highest profile accused thus far, having acted at one time as Vice-President of the Democratic Republic of Congo (DRC) and a senator in the DRC Parliament. This trial breaks new ground at the ICC in that it is the first where evidence of sexual violence comprises a significant part of the Prosecution’s case and the first to charge an accused under command responsibility for rape.

At a press conference coinciding with the commencement of the trial, the rights of the parties and participants in the proceedings before the Court were stressed. The ICC Registrar, Silvana Arbia, stated that ‘only through a fair trial can the law play its proper role in establishing lasting peace and fighting effectively against impunity for crimes which are […] of concern to the international community as a whole, and which deeply shock the conscience of humanity’.

These reflections give rise to a number of fundamental issues, two of which are briefly addressed here. They both go to the core of the way in which criminal justice is and should be pursued, as well as examining the importance of the rule of law. They are also indicative of the emergence of an internationalised system of criminal justice, which will continue to evolve as the international community increasingly recognises the need to more comprehensively address areas of global concern.

The first issue is whether an alleged perpetrator of crimes against humanity or war crimes should be permitted a fair trial. This dilemma arises in light of the often systematic and brutal nature of crimes inflicted upon innocent victims. This question raises a fundamental element of human rights law as it is applied to this system.
of internationalised criminal justice. The rights granted to an accused brought before the mechanisms of international criminal justice reflect core principles set out in the main Human Rights Covenants. One of the primary justifications behind the system of internationalised criminal justice is the guarantee of a fair trial for all accused, even those accused of the most heinous of crimes. This guarantee ensures the credibility of the legal process, the outcome of a trial, as well as the historical record that arises from the evidence presented.

The requirement of a fair trial within the context of international tribunals is made more complex by the fact that they are comprised of judges, prosecutors, defence counsel and registrars from different legal cultures. Depending upon the national system from which these participants originate, such individuals may hold different expectations about their specific role in the trial, including their responsibilities to the court and the conduct of the trial process itself. Even notions such as “truth” and “justice” may have differing meanings in the minds of the various persons involved in a complex international trial. These problems have already shown themselves in the Lubanga trial also before the ICC.

Trials are made even more complex by the fact that under the terms of the Rome Statute, victims have a right to participate as parties in a trial with separate legal representation. In the Bemba trial, over 750 victims have already been authorised by the Trial Chamber to participate in the proceedings, with another 1200 applications still being considered. No doubt this contributes significantly to additional tensions as the court seeks to find the right balance between the interests of all of the parties.

With these complexities in mind, it is worthwhile reflecting on whether international criminal justice has been, is, or ever can be “effective”. How does one evaluate the “success” of international criminal justice and what does this tell us about the future effectiveness of the various international courts, particularly the ICC? At this very early stage in its life, perhaps there are four possible criteria whereby such an assessment might be attempted.

**an end to armed conflicts?**

If success in enforcing international law is to be regarded as a complete cessation of all conflicts and an end to gross violations of human rights throughout the world, then it is obvious that the system of international criminal justice can never be effective. Warfare and violence appears to be an inherent part of the human psyche – indeed there has never been a period in the recorded history of humankind that has seen a total absence of war.

This places an impossible burden on international criminal justice. Although a system based on the rule of law represents an important component in addressing violations of international law, the law cannot address the problem in a vacuum. If ending all wars is the goal – an honorable if unattainable aim – then justice only in terms of the cessation of wars.

**an end to war crimes?**

Some suggest that at the very least the establishment of a system of international criminal justice should lead to a reduction in the number of armed conflicts. At first glance this might be a realistic expectation, and perhaps an appropriate measure of success. However, once again it is too simplistic. The majority of wars now being fought are internal conflicts. In this context, it appears that more rather than less war crimes are being perpetrated, even in light
of the evolving nature of international criminal justice.

With some obvious exceptions, the nature of warfare has largely moved away from the traditional “state versus state” conflict. Historically, such conflicts were based on a reciprocal respect for some of the fundamental principles of international humanitarian law. The rise of internal conflicts, as well as the increasing involvement of non-state actors in war, complicates efforts to regulate the conduct of hostilities between combatants.

This is due in part to the reluctance of states to agree to binding legal standards regulating what have traditionally been regarded as internal matters.

This is highlighted by the fact that, when the 1949 Geneva Conventions were “upgraded” by the two 1977 Additional Protocols, a disparity emerged in the range of rules that were specified. Whilst Protocol I consists of over 100 articles, some of them quite detailed and “radical” (at least for the time), Protocol II is far more modest entailing only 28 articles, 18 of which are substantive in content. While the number of provisions is not necessarily indicative of the quality of an instrument’s content, it is clear to anyone familiar with both documents that there are many areas relating to internal armed conflicts that were simply not addressed.

In light of these shortcomings international lawyers increasingly rely on the rule of customary international law to “fill in the gaps” in relation to this growing number of non-international conflicts. In addition, the Rome Statute specifies various crimes committed in non-international conflicts. The mechanisms of international criminal justice are now equipped to deal with at least some of these crimes – but once again there is a mindset and political will that stand in the way of greater effectiveness in this regard, at least in the short term.

increased international prosecutions?

It may be reasonable to determine the success of the international criminal justice system by reference to the number of prosecutions initiated by the various international courts. After all, isn’t that what these courts have been set up to do? The ICC was, for example, established with the “power to exercise jurisdiction over persons for the most serious crimes of international concern”. What is the point of empowering the ICC with this mandate if it does not proceed to prosecute those suspected of having committed such crimes?

As logical as this argument may sound, it is once again unrealistic. It must be recalled that these courts are, in general terms, intended to prosecute those ‘most responsible’ for the commission of such crimes. Of course this has not always been the case. Virtually any trial before an international court will be complex, detailed, lengthy and require large amounts of resources in terms of expertise, time and ultimately, money. As a consequence, international
criminal justice can only be, and always will be selective. It simply is not logistically possible to undertake a large number of international trials at the same time.

It is therefore important to understand the significance of funding and resources to the future operation of courts like the ICC and perhaps to ask a simple question – “how much international criminal justice are we prepared to pay for?” It is therefore impractical to expect that international criminal justice will directly lead to the prosecution of all, or indeed most, of those responsible for the commission of these crimes. This is not to say that there will be no trials – the ad hoc tribunals have successfully prosecuted over 100 persons. Yet, the total number of prosecutions should not be regarded as a correct measure of the effectiveness of the system.

**greater national accountability?**

The ICC has been established as a “complementary” tool to national criminal jurisdictions. As a result, the ICC has often been labelled as a “court of last resort”. While this label limits the ability of the ICC to prosecute specific crimes, it has the positive effect of ensuring that states have the primary responsibility to exercise their national criminal jurisdiction over those responsible for international crimes. Although uncertainties remain as to precisely how aspects of the complementarity principle may be applied, the principle does provide a safeguard to states that would otherwise be concerned by the prospect of their nationals facing an international trial.

One of the positive by-products which arises from a state’s acceptance of the ICC’s jurisdiction, is the incentive it provides for State Parties to implement appropriate domestic laws. The aspiration is that enacting such laws would ensure that domestic courts would have the jurisdiction to deal with alleged violations of international law.

As the international system of criminal justice evolves, national governments can no longer ignore the moral imperative to recognise these crimes within their own legal systems. In the period between 1945 and 1990, approximately 170 million people were killed in circumstances where war crimes took place. With very few exceptions, there was no accountability for such horrendous atrocities. The Cold War – and the consequent impotence of the United Nations Security Council to properly address these crimes – meant that no international courts were established to follow the lead set by the Nuremberg war trials. The realpolitik of that period also meant that individual states were not prepared politically to set up systems of accountability.

This has now changed, due largely to the evolution of international criminal justice. Ironically, it is the development of national laws that may represent the most important criteria by which the effectiveness of the system of international criminal justice can be measured. To this end, the Prosecutor of the ICC stated shortly after the establishment of the court that he would measure its success by the ability of domestic courts to prosecute alleged perpetrators, even if this rendered international forums obsolete.

The incorporation of international crimes into domestic law will generate greater pressure for domestic judicial accountability for the perpetrators of war crimes. This may accrue benefits that the system of international criminal justice could not possibly provide. These would include lower administrative costs, as well as increased “access to justice” and relevance for victims who could more frequently attend locally-held trials.

It is essential that the domestic processes established to prosecute violations of international law are public, transparent and fair. If achieved in this way, the development of international criminal justice will play a crucial role in moving towards the perhaps unattainable, but still vital goal of bringing an end to impunity.

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![Evidence of shooting in the Dom Kulture in Patica, near Srebrenica, Bosnia and Herzegovina.](Photo: Courtesy of the ICTY)
International Humanitarian Law (IHL) Program

Australian Red Cross is part of the International Red Cross and Red Crescent Movement, the largest humanitarian network in the world.

IHL is something Red Cross thinks everyone should be aware of. We run an IHL Program providing training and education highlighting IHL issues to key target groups identified as having a role to play in situations of armed conflict.

Red Cross has a mandate to promote an understanding of, and respect for, the law in times of armed conflict – International Humanitarian Law (IHL).

The IHL Program focuses on the following target groups:
- Australian Defence Force
- Australian Federal Police
- Non-government organisations
- Commonwealth Government agencies
- Key professions (law, medicine, journalism)
- Tertiary and secondary education sectors
- Wider community.

The IHL Program specifically offers training programs to sectors of the Australian Defence Force such as military medics and military police, in addition to being invited to participate in Australian Defence Force training exercises. More broadly, we run education seminars for members of the general community who have an interest in humanitarian issues and whose work is affected by the application of IHL.

For more information on the IHL Program please visit: www.redcross.org.au/ihl or email: redcrossihlinfo@redcross.org.au
In all activities our volunteers and staff are guided by the Fundamental Principles of the Red Cross and Red Crescent Movement.

**Humanity**
The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all people.

**Impartiality**
It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

**Neutrality**
In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

**Independence**
The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

**Voluntary Service**
It is a voluntary relief movement not prompted in any manner by desire for gain.

**Unity**
There can be only one Red Cross or Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

**Universality**
The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.
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