CHAPTER 7

NUREMBERG PRINCIPLES AND UNIVERSAL JURISDICTION

7.1 The relevance and importance of nuremberg preinciples

Of late, there has been a sort of proliferation in writings on International Criminal Jurisprudence. A perusal of the voluminous literature shows, however, that though much has been written on the subject, still some problems remain understudied if no neglected. The subject under consideration is a case in point.

The standards of accountability set in Nuremberg would apply evenly to all, because as you recall, in Nuremberg, one of the major criticisms was that, that was the victor's justice and that was the victor's tribunal and the victors were the ones who were setting the standards, and they were not applying those standards themselves, but they were simply applying those standards to the vanquished. Today the need is evident: those standards be applied to all, that there be effective mechanisms so that those standards are met and implemented.

Contextually, the most important question: "What is Nuremberg's legacy in terms of the principles ? What is their input ? What is their impact ? When there is an explosion of human rights norms and instruments today, it is no longer just fashionable to talk about human rights, to invoke human rights, but it has become a common place to consider human rights as a common language of humanity. We do that, then you can just see that Nuremberg is the one that began that process. There were many obvious reasons for what happened in the post-Second World War and the explosion of human rights norms, but I think we can go back to Nuremberg to say that that is where it all began. Killing fields of Cambodia, horrors and tragedies of Rwanda, Bosnia, Sierra Leone, the Congo and there are many. I would not go into them.
But at least at the present time, we need to look at what the International Law Commission did. The International Law Commission adopted the principles in 1950. The General Assembly had directed the Charter of the Nuremberg Tribunal; and in the judgment of the Tribunal, it had said that the Commission could formulate the principles of international law recognized in those - the charter and the judgment. It was obviously the first international modern criminal tribunal, which tried those people who had committed was crimes. It obviously is the singular achievement that there was a trial and not just summary executions. Churchill among others had said that there ought to be simply those executions. He had sought those, but in 1945, after the Conference, we do have one stirring example of how people at Nuremberg looked at it. The Chief Prosecutor at Nuremberg Justice Robert Jackson eloquently articulated the sentiment and many of us have heard it, but let me repeat it. 'There were four great nations flushed with victory, but strangled with injury.' I will skip some of it. 'The stay we had, of vengeance and voluntarily submit their captive enemies to the judgment of the law, he said, this is one of the most significant tributes that power has ever pair to reason.' That is how it all began.

You remember that those principles, if I can just simply summarize them and not to go through all of the, the first one would be that there is individual accountability for individual international crimes; the second is the superior orders is not going to be a defence anymore. I will very briefly summarize them. I would look at the crimes under international law and made complexity in those crimes, that is the common plan and conspiracy charge an international crime. You recall them - let me simply mention them again to you to remind you, crimes against peace. It is planning, preparation all of that, but waging a war of aggression, war crimes, they are violation of laws or customs of war, crimes against humanity, murder, inhuman acts against civilians on political, racial or religious grounds carried on in execution or connection with any crime against peace or any war crime.

There principles constitute a watershed. Indeed, a paradigm shift in international law, a transition from the state centered system of unbridled state sovereignty,
established in the peace treaty of West, and to an evolving international system, based on the foundation of the Nuremberg Principles. Basically that was, maintenance, restoration of international peace and security, constraints on the use of force, criminal individual responsibility, primacy of human rights and international humanitarian law.

We must recall that Westphalia, state centered system was a transformation from the one that preceded it. The one which was before 1648, the Pope and Emperor had jurisdiction over the local sovereign, claiming spiritual, temporal authority. After Westphalia, what happened? That it was the rein of state sovereignty, with almost unlimited powers to wage wars, even wars of aggression. The words are classic: war is nothing more than a continuation of political relations with addition of other means, Even Appar Heigm in the early 20th Century had said, international law cannot object to states going to war, but does oblige them to follow certain basic rules of conduct. Thus, there was no attempt to criminalize, resort to war before Nuremberg.

Under customary international law, there was no conventional law, no recognized category of such crime; only aliens were protected; you recall that there were atrocities by foreign governments and how a nation treated its own citizens, was nobody else's concern, not an international concern, but simply a nation state could do what it wanted to. The example of the Swiss government that tried to safe Swiss Zeus from camps, but did not talk about the German nationals at all. The London Charter, limited prosecutions of crimes against humanity to those 'in execution of or in connection with any crime within the jurisdiction of the tribunal'. That is, they must be connected with wars and war crimes, and crimes against peace. You remember that it has been changed. Even after that, there was a change, not for Nuremberg, but for the latter trials that the US did conduct itself.

Application of international law norms in this area, especially in these kinds of offences. You find that today; there are those changes. And I will touch very briefly on them. But regarding was crimes, you have to mention that both the
Conventions and laws - The Hague Conventions, Geneva Conventions, customary international law, it was better developed.

So, briefly outlining and not going into the details, what is the legacy? How are these principles important today? On the aggressive wars, UN charter, Article 2(4), Article 51, Chapter VII, 'constraints on the use of force'. Security Council to have responsibility - responsibility for the maintenance of international peace and security.

Very certainly you can say that there is aggression, but still there is lack of consensus on it. Now, there are specifics, collective security you have seen, this last September, at the UN Summit, did not resolve much; it did talk about the obligation to protect. Canada had taken the lead on it. The Secretary General has asked the General Assembly that there ought to be a way to see that Rwanda’s do not happen; he had asked that when the US has unilaterally gone into Iraq, using force, talking about not simply preemption, but prevention as a basis for its own unilateral use of force. He said that the time has come that we ought to consider is the UN Charter and all those Nuremberg Principles being reflected in it, adequate effective today in order to see that there are effective constraints on the use of force. September meeting did not result in very specific concrete changes, developments that you and I can touch upon and say that the Security Council today is representative; India is not there, Japan is not there, Germany is not there, Brazil is not there, African countries are not there and there is no consensus as to how at the present time, to re-constitute the Security Council.

On the use of force, not much has happened. The Human Rights, instead of that body to have a Human Rights Council, it is lean and mean, not much has happened there even. So at the present time, we are still struggling, searching, seeking, and striving in order to bring about those changes that the principles had brought on the use of force.
I can simply mention the Geneva Convention of 1949 and its two Additional Protocols of 1977, fill the gaps that at the present time we find are filled and they were at the time of Nuremberg, in international military law, especially on taking of hostages and reprisals. Crimes against humanity, no longer, just there is reliance on customary international law, because there is codification. Today you do find that crimes against humanity as modified and controlled Council law number 10. No longer just these was crimes are crimes against peace, but they became the core of what we see as the genocide convention today. All these Ad hoc tribunals are there; I was going to touch upon some.

The International Criminal Court is there; now there is code of crimes against the security of mankind, but still all of that is in a very abstract kind of fashion, not in very concrete terms, before us. Nuremberg trials had their own difficulties on fairness, on due process, on loose evidence or hearsay evidence; many of those problems were there. Justice Jackson did note also at the time wrongs; he said 'which we seek to condemn and punish have been so-calculated, so malignant, so-devastating that civilization cannot tolerate; they are being ignored because it cannot survive their being repeated'. These principles provided a blueprint for a better world, a vision for a better future that is yet to be realized.

At the present time, we can say that they lay the foundation stones of this huge structure that has been built on it. The one we see and study, the foundation stones are hidden, but provide the buildings strength; they provide the buildings integrity; they are constant reminders that individuals and states in this global system are responsible; they are accountable and accountable internationally; there are standards that ought to be applied universally; they must be fair; they must be given due process in these trials to defend them. There must be effective mechanisms for enforcement.

To conclude by saying that it is a pity that even after 60 years of the Nuremberg, little attention has been paid to the subject is deals with. Could it be that we have taken for granted all these developments in international human rights and the institutions established to implement them or in our psyche could there be that
twinge, that perhaps nothing substantial has changed, that genocide, torture, massacres, ethnic cleansing, gross human rights violations are still with us very much a part of the landscape of humanity? That is, human rights laws lack effective implementation, which the political will is still lacking to ensure the dignity of the individual. And I further say; whichever scenario, one prefers the conclusion is inescapable - as a civilization, we have miles to go.

7.2 Reflections on international criminal justice

It is intended to reflect here on the international criminal justice. I will be general in my observations. Unfortunately, it so happens that there is dark cloud over the landscape of human affairs, even in this so-called civilized age, the 21st century; and we should be looking towards the platform of peace and justice, which all the nations can enjoy.

Unfortunately, we started the century by resorting to war. It should have been a century dedicated to the purpose of achieving peace. We still have this dark cloud and we have very important task before us to see how law can, to some extent, even mitigate this phenomenon in human affairs, mitigate war and at least pass a few rays of sunshine into this rather thin scence. Now, we can do so, through humanitarian law and humanitarian law is something which was not debated yesterday. It is something that comes down to us from distant antiquity. For thousands of years, human beings have been forced to go to war; so, at least we should mitigate the suffering and behave with some humanity.

ICRC launched a study on customary international humanitarian law. It is a tremendous study of about 3,000-4,000 pages where, over ten years of research, the ICRC has got together and looked into every scrap of material that they could in relation to customary international humanitarian law. So, works of scholarship of that nature are very important in developing international criminal justice and it is important that this information reached not only the statesmen- the Prime Ministers and the Presidents of the world- not only the generals, but also the public, also the schools, the diplomats, the judges, where there is so much unawareness of the basic principles of international law. That is why the leaders
of the world are able to violate principles of international law rather grossly in their dealings with other states. The people do not know are extent of these violations and therefore, they are unable to restrain them. International law, as we know, started mainly with the work of Grotius in 1625 and he quite rightly; for reasons of the wars of religion at that time, distanced himself from the teachings of religion and from religions as such. He tried to work out the international law, on the basis of human experience. We are no longer living in the time of Grotius.

There are no longer the possibilities of all these various religious conflicts. We have a common heritage of mankind from which we must draw the basic reservoir of principles which will guide us into the future where we can look forward, as I said, to a plateau of peace and justice, because if we take the other road, we go down. But this way, if we make the right choice, we can lead humanity upward towards justice, freedom and peace.

All those principles are there in the traditional systems, but in modern law, we tended to ignore them. From time to time, I keep reminding my colleagues that there is so much that we have not drawn upon. In fact, I made the proposal yesterday to the ICRC that as a sequel to the wonderful work that they have done, they should appoint a group to look into the customary rules of IHL in all the great cultures of the world, appoint teams of scholars to story at length the texts of Hinduism, the texts of Islam, the texts of Buddhism, the text of Christianity, the texts of Judaism; and you will find enormous sets of principles that you can evolve from those, which will guide us to the criminal law justice of the future which we have to evolve.

Let me give you a few examples. Take Islamic law, for example. It has developed so considerably ever since great renaissance of learning in Islam during the dark ages of knowledge in the West. Eight centuries before

Grotius wrote his treaties, on war and peace, they have treaties on international law in the Islamic world. For example, they have collections of teaching in regard to what weapons one can use, how do you treat POWs, what are the rules of
battle that you can engage in and so on and so forth. Here, we have Ten Commandments of Abu Baker, based on the Prophet's Teaching. 'Do not kill a woman or a child or an old man; do not cut down fruit-bearing trees; do not destroy inhabited areas; do not slaughter sheep, cows or camels; do not burn date-palms; do not embezzle; do not commit perfidy, etc.

All rules were worked out long years ago which everybody forgets. The Keliforma, for example, has given his commanders these commandments; do not commit perfidy, do not mutilate, do not kill children, do not kill the unarmed, etc. Then there are rules against misappropriating booty, non-combatants are not to be attacked; POWs are to be treated kindly. The tradition of the Prophet even says that treat the POWs with great kindness; give them cloths and food. Not only that, see that their correspondence is taken back to their homes, even across the line of battle. It is in advance of any of the moral conventions. But it is there in ancient teachings. So, we have got to show that all these things are traditions of the whole of humanity, which we can draw upon. Likewise, in the Ramayana and in Hindu Literature generally, there are most detailed rules in relation to conduct in time of war. It is unethical to fight and kill unarmed people, children, women, the aged, the person who is starved, which is equal to killing of a child, and there are the traditions that are there in ancient times.

Even when there was an invading army, the farmers in the field could continue to till their fields because they knew that under the laws of warfare, they could not be attacked because they are non-combatants. There has been so much thought given to these matters in ancient times. Also, it is thought like this - which has a great deal of imagination behind it - because for example, the kind of weaponry that they visualized is quite amazing to think that they visualized weaponry like this. For example, you find these passages: Vishwamitra for example, the teacher of Rama, had at one stage a whole set of missiles available to you, including the following; note the description. The soporific missile, which will put the enemy to sleep; the intoxicating missile, which will unhinge their minds, missiles that are unbearably hot; the missiles that dries up everything; missiles that tear things apart; missiles like the thunderbolt; missiles which shatters
everything; missiles that are as deadly as death itself. So, those ancient writers used their imaginations very vividly about how weapons could be devised and they also used their imaginations to counter them. That is why we have those passages, which said that weapons of hyper-destructive nature are totally banned.

Likewise, if you go to other philosophies like Buddhism, which is amazingly rich in its psychological insights on warfare. According to Buddhism, all warfare would be completely banned, but there is this idea that it is important to prevent the causes of war. It is very easy to talk of terrorism and countering terrorism. It is much more important to see what are the causes of terrorism. To counter those causes, this is what Buddhism teaches, violence begets violence, force begets force and anger begets anger. There is no such thing like conquest by force because every victor is a loser. He has incurred the hatred of the subjugated. What is important is to settle the disputes.

When I was in the International Court, I had the idea of getting a great sculptor in Sri Lanka to sculpt a huge bronze of the Buddha settling a dispute in Sri Lanka between two warring parties; and the leaders of the two parties break their weapons at his feet. That bronze now hangs outside the deliberation chamber of the Judges of the court, reminding them that that is the main duty of international law - the settlement of disputes and the avoidance of disputes rather than wars as a means of resolving disputes because wars never settle anything.

Likewise, the counsels of the church - in Christianity the Church was very concerned in early stages with the nature of weapons. For example, the Lateran Counsel in 1137 said that even the crossbow, which had then been invented, was too cruel an instrument to be used in warfare among Christian nations, and the church went into all these matters in great detail. So, today while everybody profess allegiance to one or other of these religions, they continue to do the very opposite. It is time to remind them that the teachings of religion must be studied and there is much of wisdom in that, which can be incorporated into modern law. That religion must not be kept away, as a source of inspiration, as Grotius tried to
do. But the time has come for us to look at all these religions and see about the traditional teachings, which emerge. There is so much of commonality about the teachings of these great religions.

One of the great things, which we have to do to salvage the world from the destruction that was threatens it with, is to see that all the cultures of the world are not clashing with each other. They are all congruent in regard to the basic principles that they teach, about the humanitarian conduct, about the rules of war, about justice, about international criminal justice, etc. Take African custom for example. How, when there are wars, there are certain principles about the war, how the war should be conducted, how people who have violated those rules are to be punished, and a great deal of detailed research must go into resurrecting those customs and finding out the concern there basic things.

Some while ago, when we were doing the Nauru Commission, we investigated the practices in the Pacific and we found that in the Pacific, there is a custom which dictates very strongly respect and reverence for environment. People like Marinouske looked into the customs of the Tobrian Islands and found out, how precise tribal rules were. So, this is one of these sources of inspiration, which we must bring into it in developing international customary law. In regard to criminal justice, there is a tremendous need to use international customary law to develop its basic principles.

I have had no time to deal with institutions of international criminal law where international criminal court is a wonderful achievement. Its jurisprudence has got to be developed; its relationship with the Security Council with the host State with the International Court of Justice, all of these are areas for development for the international criminal justice for the future. But my theme generally is that the great fertilizing source of international criminal justice will be the customs and traditions of humanity. These have to be researched; these cannot be neglected; and out of them, there will be rich reservoir of fundamentals, which all of us can agree on, which can be the basis of the world order of the future.
7.3 Law and politics in the global order: The problems and pitfalls of universal jurisdiction

I would like to begin this paper with a quote from the judgment of Judge Radha Binod Pal who was one of the judges of one of the Ad hoc Post World Was II Tribunals. I consider his contribution to the development of international criminal justice and to the doctrine of universal jurisdiction extremely important. There was a conspiracy of silence about him and his role in post World War II criminal justice ever since those years in the second half of the 1940s. Let me quote two sentences from his judgement, which in fact was a dissenting opinion at the post World War II Tribunal. He said in his judgement: "It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness. But the one thing the victor cannot give to the vanquished is justice." He further said in his judgement: "The name of justice shall not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation". A similar guiding principle has been advanced or formulated by the leading philosopher of law of the 20th century, namely, Hans Kelsen. He wrote just a year before these two post World War II Tribunals, established around a year before that. In his work, Peace through law, he said: "Only if the victors submit themselves to the same law, which they wish to impose on the vanquished states, will the idea of international justice be preserved." These were the statements of Justices.

The post World War II exercise of universal jurisdiction failed in regard to those principles; and they failed very clearly and miserably. In order to avoid any misunderstanding, the achievement of the so-called Nuremberg Principles is definitely that is list of international crimes have been established; a definition has been made; of course, this list - as has been complimented in the light of the development - is a historical legacy, which has to be emphasized and which has to be preserved. But the way the principles of universal jurisdiction has been implemented, that is not an exemplary one and should not be followed. The question which interests me - which I have dealt with in more detailed in a book which just has been published now in India with the title 'Global Justice' or 'Global Revenge' - is, has the project of universal jurisdiction been advanced, has any
progress been made in the decades following the period after the Second World War.

For me, as a philosophical observer, who is interested in the theory of law and not in the politics of law, the crucial question is the following: Will the beauty of philosophical idea, namely the universal jurisdiction that there are beauties that exist vis-a-vis all obligations and that it is the responsibility of the entire international community to look after the implementation of these principles? Will the beauty of such a philosophical idea, which is similar to that idea, or to the notion of perpetual peace, which stands the tests of political reality, survive? Will this rather fragile idea survive or will it be practicable under the harsh conditions of power-driven international politics? That question is even more burning and pertinent today in a unipolar international environment in which there is no balance of power than it was in the decades until around 1989 when at least there was a kind of a bipolar balance.

My question is how can a concept that essentially requires a supra national organizational structure be implemented in an environment that is characterized by the interaction among the sovereign nation states? Has the notion of universal jurisdiction eventually arrived too early on the international scene? So far as I could see and I was myself observer appointed on the basis of a binding Security Council Resolution in one of the major international criminal trials in the case of international terrorism, so far, I would say universal jurisdiction has almost exclusively been implemented or rendered in the form of victors' justice.

As far as the title of my presentation is concerned, this is unfortunate and I cannot go into details because the space at my disposal does not allow that. The title namely, the problems or pitfalls of universal jurisdiction has partly been inspired by Henry Kissenger also, his motivation reflecting about universal jurisdiction was quite different from mine because he, as a former actor on the international scene does not only have an academic interest. But let me just clarify what I mean. I would clarify the concepts and I would not have time to go into the details. Firstly, as far as the problems of universal jurisdiction are
concerned, I would distinguish between two levels - one is that of international power politics namely, and excessive emphasis on state sovereignty and national interest. That has been the predicament of universal jurisdiction up to the present day, not only in the framework of the new Ad hoc Security Council Tribunals and also the framework of the Rome Statute of the ICC, about which I would like to speak, but I have no time. The second level as far as the problems of universal jurisdiction are concerned, is that of enforcement. There is now a supra national permanent structure, the ICC; but the judicial authorities asking questions and it has been stated earlier by the President of that entity; he stated the obvious, that they have to rely on the cooperation of the nation states; otherwise, they cannot achieve anything.

As far as the pitfalls are concerned - that was the term Henry Kishinger has introduced - I again see two levels or two connotations. First of all, I would use the term, 'in regard to the inconsistencies in the application of universal jurisdiction', there is a real credibility problem because of an almost unavoidable judicial policy of double standards and that policy of double standards which I could give dozens of examples for, is resulting from a lack of separation of powers in the international context. I do not blame the institutions themselves, whether the ad hoc courts or some of the new hybrid courts or the ICC, there are structural problems which they cannot do away with. There is a real danger that these courts are getting entangled in the wake of power politics and that they will be held accountable by the international public for something about which they can do nothing about.

Of course, there is another meaning of pitfall; that is exactly the one which Henry Kishinger meant and which motivated him to write that article in foreign affairs; that relates to the risks involved for leaders and officials of sovereign states; it involves particularly the negation of sovereign immunity; that is, one of the essential aspects of the idea of universal jurisdiction. Secondly, there is another aspect which is so often overlooked by the supporters of international criminal justice, namely the fact that judiciary within a trans-national context, particularly one outside the framework of the Security Council based on an international
treaty, is somehow beyond the political and that also means, democratic control as far as the nation states are concerned. That problem has not sufficiently been addressed so far, as I can see because time is so short which we have been here, and I only would like to add a few more remarks on the international criminal court.

It is now in an operational phase at least officially since the year 2002 and we have already been able to identify some of the real difficulties as far as the implementation of the idea of universal jurisdiction is concerned. One of those difficulties as far as I can see is the relation of the ICC’s operation to the Security Council of the UN. That is a body which is in charge of measures for the preservation or restoration of international peace and security. It is not in itself a judicial body, but anyhow it has got certain things. In the Rome Statute of the International Criminal Court, it got assigned to it, a certain judicial function, namely, the one described in Articles 13 and 16 of the Rome Statute. There is a case which demonstrated the problematic nature of the influence of the Security Council, on the proceedings or the operation of the ICC in a very good manner and I mean, the referral of a situation namely that of Sudan to the ICC. Undisputedly, referral of a situation in which international crimes may have been committed, through the prosecutor of the ICC is a sufficient basis for exercise of jurisdiction by that court. However, in my analysis, it clearly follows from the wording Article 13(b) of the Rome Statute that any referral of a situation by the Security Council must be made without conditions as to categories of people to be investigated or prosecuted by the court and for that reason, I would say that in an inadmissible way, the Security Council has tied the referral of the situation in Sudan, according to Article 13(b) to a deferral of investigation or prosecution according to Article 16 because the Council in that Resolution has stipulated or has stated that this referral does not authorize the International Criminal Court to prosecute any persons from states that are not states parties to the Rome Statute. The Council has no such rights to insist on what we include such a kind of collective and preventive deferral into a decision on a referral.
The entire drafting or the text of this Resolution, in my view, is really a scandalous aspect of international law and the International Criminal Court should not have accepted it. However, the Court has now taken up investigations on that particular issue, by the way, as far as we know, as of today and I have studied the report of the International Court. There are only two other cases that are being handed at the moment. These are related to two other African states. No other case is officially being investigated or no other prosecution has been taken up. Of course, the report of the court to the UN has stated that they are dealing with certain other situations, but they are keeping this as a secret and they have not revealed anything about it.

My question now is, is a permanent structure such as that of the ICC which is based on an international, inter-governmental agreement, really strong enough and universal enough so as to practice universal jurisdiction in a credible manner and is the ICC strong enough and sure enough of its position to take up investigations and prosecutions when its prosecutor considers this appropriate because the prosecutor may also act properly. He has not done that so far. One question that many international observers ask is, why the ICC has not yet initiated an investigation of the situation in Iraq? Of course, there is no territorial jurisdiction, that is quite clear. And there is also, no jurisdiction as far as the crime of aggression is concerned; at least, not yet because that crime has not yet been defined. But there would be nationality jurisdiction as far as one of the countries that have waged an unauthorized war in Iraq, namely the UK. There is plenty of documentation of war crimes, crimes against humanity. Recently also, all those events that have been documented in the South of Iraq would be enough reason as far as I can see, to initiate an investigation because the judicial authorities of the country in question, namely the UK have not taken up any credible measures of criminal prosecution. They have been trying, on the contrary, to shield their own people, particularly soldiers and other people who were engaged in subversive actions in the South of Iraq. They had been trying to shield them from prosecution and they have tried to keep everything secret.

Another issue, as far as the ICC is concerned, of course, is that of its lack of representability. It is the figure or the number of states parties is quite impressive.
It is around 100 as of today. So, that is the majority of member-states of the UN. But the question is which States have ratified the Rome Statute and when we o through the list, we see that the majority of states with strong military capabilities or with strong armies, that have a strong influence on the internal make up of the respective political system have not ratified the Rome Statute or have not acceded to the Rome Statute. That means, whether the ICC writes it or not, it lacks certain credibility because the actors or those who are politically responsible in those states that have the strongest capacity to eventually commit breaches of international law and commit war crimes cannot be prosecuted because there is lack, either of territorial or of nationality jurisdiction because of the other factor of course, that the only other entity, the decision of which can lead to a prosecution in the Security Council; and what will you expect of such a body where power politics is the supreme principle, where you have the veto power of five permanent members. That means, whenever the Security Council makes a referral, it will have gone, so to speak, through the channels of power politics; it would have been filtered through those channels and really, grave cases of international crimes committed by personnel or politicians of permanent members of the Security Council or allies of those permanent members, will of course, never be referred to the ICC and if it here is a referral, even this, in my view, illegal precaution will be inserted into a Security Council Resolution according to which the ICC should have no jurisdiction over military personnel from non-state parties.

That brings me to the final remarks of my presentation. Nonetheless, all these problems and pitfalls which I have described, even if the ICC transcends the Ad hoc arrangements that have so far characterized the practice of universal jurisdiction, the basic question remains whether such a court will be in a position to establish its authority, in this prevailing system of international law and whether they would be able to defend an essentially super-national ideal, vis-a-vis. the often conflicting interests of states parties. The litmus test in that regard will be whether the ICC will take up, as I said, suo motu high profile cases where it has jurisdiction on the basis of nationality or territoriality or whether it will wait for referrals, clear as they are through those channels of power politics from the
Security Council as in the case of Sudan or whether it will wait for referrals of situations in some poor African countries that have no influence in international affairs.

The fate of universal jurisdiction - I say this very deliberately because the court has no credibility if it is not so-encouraged and if it is only taking up cases in countries where it does not have or if its policy of investigation and prosecution is determined by a desire, not to alienate important state parties such as UK and not to alienate prospective future state parties. So, the fate of universal jurisdiction will finally depend on whether the ICC will be given a fair chance of taming international power politics by shielding judicial proceedings from state interference whether of unilateral or multilateral nature. Much will depend on the ratification of the Rome Statutes by major powers from all continents, but also on the goodwill of those states that has already ratified the Statutes.

Being the embodiment of supranational ideal of global justice, universal jurisdiction must face the realities of unipolar international order. The lack of a global balance of power has already seriously undermined the legitimacy of the UN organization and hampered its ability of multilateral action. This state of affairs may be considerably more detrimental to the nascent system of supranational law enforcement on the basis of this notion of universal jurisdiction.

I have called in another context that the direct relationship of power politics and law has proven to be the most intricate issue of the domestic rule of law. It is infinitely more complex and complicated when the norms of jus cogens of international law are eventually to be enforced against the most powerful international actors in this highly fragile framework of universal jurisdiction.

7.4 The limits of exercise of universal jurisdiction

The subject under discussion is one of the most controversial areas in international criminal jurisprudence. In an area of law where most principles are very heavily contested, it takes something to occupy the position of a concept, the very existence of which is still being debated by academicians and scholars; and I do not propose to enter into that debate; I think people have tried to do that
but which limited success. So, what I am going to do here is what is called the philosophers' trick and assume that universal jurisdiction can be exercised and that I am going to try and flush out its limits by focusing on a particularly controversial aspect of that, which is the exercise of absolute universal jurisdiction. The absolute universal jurisdiction, the way it has been defined is essentially the exercise of universal jurisdiction, which requires absolutely no link with the state that exercises the jurisdiction including the presence of the accused in the territory of the foreign state.

The entire concept has a fairly tortured history in terms of its understanding by academics and courts, which explains my current Endeavour to try and explain the concept and I immediately am sympathetic about it. So, being a lawyer and, therefore, being naturally obsessed with definitions, I am going to start off with trying to define what I think is absolutely universal jurisdiction and what it is about.

The confusion, which surrounds the concept itself, is this. I think, it is most heavily encapsulated in the separate opinion of the Judges Higgins, Koijma and Burgenthal, in the famous case, where they say, at what point of time, is the presence of the accused in the territory of the foreign state required, is it at the time of the commission of the offence, is it at the time of the issuance of arrest warrants, is it at the time of the trial itself, I think, this question reflects the amount of confusion that is inherent in understanding the concept of universal jurisdiction and the way it is exercised. Because most commentators tend to treat absolute universal jurisdiction as a separate category of universal jurisdiction. There is something called universal jurisdiction which is to exercise jurisdiction over a person who has no connection with the state, over crimes which have no connection with your state, your state has not have any particular interest in prosecuting the person, except the fact that this is an international crime and therefore, it mandates universal jurisdiction. Then, there is something called universal jurisdiction which is absolute, which does not even require his presence in your territory, when you are exercising that jurisdiction.
That is where the problem of confusing something like prescriptive jurisdiction in international law and enforcement jurisdiction in international law comes in because prescriptive jurisdiction in international law is simply the act of making the law of your state applicable to certain acts or events that have taken place and enforcement jurisdiction on the other hand is something that involves you actually making your law applicable to them in the sense of being able to make them subject to your state's criminal process and all the wonderful things that states do to actually bring people to justice.

When you talk about universal jurisdiction it is, by definition, prescriptive jurisdiction, which is that you are making your state's law applicable to a person who has not connection with it to a crime, which has not happened in your state. There is absolutely no connection, except the nature of the crime. Then, where you choose to condition the exercise of that jurisdiction on something like having the presence of the accused in your territory while exercising the jurisdiction - it becomes a procedural matter. It has got nothing to do with the act of prescription. Whether you choose to have that as a procedural requirement, is a matter for your domestic law. It has got nothing really to do with whether universal jurisdiction in international law recognizes that or not.

So, to answer the question that is posed by the separate opinion, is the presence of the accused was required at the time of commission of the offence, it would be a case of exercising territorial jurisdiction because prescriptive jurisdiction by nature has to be exercised, when it is asserted and not when it is exercised in the sense of enforced. Is the presence of the accused was required at the time of issuing an arrest warrant, that will be again a question of procedure for the domestic law of your state, and not a question of international law. Is his presence was required at the time of the trial, then, that would be a matter for enforcement jurisdiction; then again, it is a matter for your state, whether it permits trials in absentia, or not, etc. and so, you could possibly exercise jurisdiction in the sense of have a trial in absentia.
So, once we recognize that there is this difference and the fact that universal jurisdiction prescriptive absolute universal jurisdiction to use his term, is permissible in international law, then the question about whether international law recognizes the exercise becomes little different. The separate opinion again says that international jurisdiction, universal jurisdiction in absentia is unknown to conventional international law. But it is not quite as simple as that. The question that needs to be answered is that assuming that we do recognize universal jurisdiction, can the exercise of it ever be conditional upon having the accused in your territory? Whether that has an impact on the act of prescription? The answer is no; it says, even if your enforcement jurisdiction is something that is territorial in nature and requires the consent of the other state, that has no bearing on the act of prescription which can be territorial in nature and that is proof by the more traditional way of exercising jurisdiction, such as nationality, personality, which have nothing to do with territoriality.

The distinction has been recognized though implicitly in several recent cases, in fact - it is recognized by the recently managed constitutional court's decision which came out in October on universal jurisdiction. The issue was relating to the Guatemalan civil war; the then Guatemalan regime had committed several acts of atrocities on people who were not connected with Spain and the question before the Spanish Constitutional Court was, can the court exercise jurisdiction over these people, even though they were not present on Spanish territory. The Spanish Constitutional Court answered in the affirmative. Based upon the reasoning that as far as universal jurisdiction is concerned, you can ask, while exercising the jurisdiction, you can ask for extradition procedures, you can get the accused on your territory. But all this has no bearing whether in the first place, your law by prescription can provide for universal jurisdiction to be exercised, regardless of any other hierarchical limits or procedural limits or subsidiary in the prescription of universal jurisdiction.

Germany is another state which is very proactive in this matter. The German International Court of Crimes again recognizes that the presence of the accused or any link is by definition unnecessary for the exercise of universal jurisdiction.
So, what are the reasons? We might still say that you must require the presence of the accused in the territory; there can be several pragmatic or political reasons, though not legal, theoretical reasons. The dramatic instrument of that is provided by Belgium. Belgium, initially in its law, did not require any link at all with the states when it was exercising jurisdiction; therefore, when they went ahead and issued arrest warrants against Sharon, issued arrest warrants against George Sharlagusthinia. The US was a little unhappy with the fact and so, they said that you must do something about your law, you cannot just go on issuing arrest warrants against these people.

So, Belgium amended its law under tremendous pressure from the US. The US was still not happy because the Generals were still being subjected to prosecution in Belgium. So, they said that we will shift the NATO headquarter out, if you do not do something about it. So, Belgium went ahead and it had to amend its laws and say that now we require the link of residence on nationality. You cannot just go ahead and exercise jurisdiction in absentia. These can be very practical and policy reasons, I guess, for a state, in order to limit its jurisdiction and say that we have required the presence of the accused in our territory.

These have really nothing to do with legal, theoretical basis of exercise of universal jurisdiction, which by definition would always be in absentia, till the point at which it is exercised. So, if we look at legal theoretical terms, there is nothing special, despite the controversy it invited about universal jurisdiction in absentia. Its exercise can always be conditioned because of policy reasons, because of political reasons on having the accused in your territory. Even those reasons usually have to do things like gathering evidence; there are international relations, their precautions. All these reasons can be much better addressed by limiting the exercise of universal jurisdiction in a different way, and not having the procedural requirements saying that the accused need to be on your territory. The different ways probably to provide for subsidy add to the universal jurisdiction, which is that when you recognize a state which has a closer link with the crime in question or the offender in question, is willing and able to exercise
jurisdiction, you give priority to that state - again, not for any theoretical reasons connected with universal jurisdiction per se, but for political and pragmatic reasons that take into account the reasons that people have been opposing the exercise of universal jurisdiction in absentia.

7.5 The principle of universality: A critical Evaluation
Let me begin with a question as to the exercise of universal jurisdiction and its effectiveness. First and foremost, it is related to the crimes of universal jurisdiction. There are certain crimes in the international field; there are certain crimes that are considered to be international in content. In the sense that it varies from one state to another; it goes and it passes from one state to another and hence, various states elements are involved and hence, they call it 'international component is involved in that'. Next comes the concept of official capacity. National legislatures should ensure that national courts can exercise jurisdiction over anyone suspected or accused of heinous crimes under international law. Whatever the official capacity of the suspect or the accused at the time of alleged crime or anytime thereafter. This is with reference as to the indispensable nature and kind of the universal jurisdiction principle, which every court in law should take into account.

With respect to the retrospective effect and time limit, as well as the national or the political influence or interference, the guarantee in fair trials as also with respect to death penalty or punishment, the cruel or inhuman degrading punishments, national legislation should ensure that grave crimes under international law are not punishable by death penalty or other cruel inhuman degrading punishment. As to the issue in question, we see in reality as well as in practice, it remains still unclear as the states or the members in international community of nations have different stance and points of view in taking the treatment of crime as well as criminal.

The international cooperation, as well as investigation in the prosecution, as well as the process involved in that, the states must fully cooperate with investigations and the prosecution by the competent authorities of other states, exercising
universal jurisdiction over grave crimes under international law, regarding effective training of judges, prosecutors, investigators and defence lawyers, national legislation should ensure that judges, prosecutors, investigators receive effective training in this particular branch of law. So, with this, the exercise of universal jurisdiction becomes very clear that the universal jurisdiction which is an important component in the international administration of justice, particularly with respect of the criminal justice system, these are the various outlines, the broad themes that have to be taken into consideration while looking at enforcing it.

With respect to justification, what type of justification is there, is there any justification for universal jurisdiction as such, despite the acts of genocide crimes against humanity, war crimes and cases of torture, since the end of the Second World War, only a handful of individuals have been brought to the fore. In this instance, we see why such a justification is very essential and how are we going to go about that. One of the fundamental and foremost reasons is the state's failure to act. Some states fail to act; the reasons being that they fail to fulfill their obligations to bring those responsible for the grave crimes in international law to justice. Often courts in the states where crimes occurred are unable to exercise jurisdiction because the territorial state has not yet enacted the necessary legislation. The crimes under international law or crimes under national law, are such that the legislation that they have is inadequate.

Again we see that even when the territorial state has fulfilled its international obligations, to enact such a legislation, there are a number of reasons why prosecutors and investigation judges may fail to act. The entire legal system might have collapsed; or we see that the courts could be functioning, but they may be incapable of bringing those responsible to justice, for reasons such as lack of resources or inability to provide security for suspects, victims, witnesses, etc. Again, in another context we see that the absence of ICC, the limits and its scope as to its jurisdiction which we are discussing, the community will continue to rely on national prosecutions since it is unlikely and perhaps undesirable. It
would be unable to handle all the cases that there were ever would be an ICC with exclusive and comprehensive jurisdiction over crimes in international law.

In this context, we have seen a particular quotation given by Mr. Phillippe, the President of ICC, which says: "It must be understood that no one expects the ICC on its own to deter all crimes; the ICC must be a part of a framework of measures to sustain a culture of accountability, including increased domestic prosecution of such crimes, greater use of universal jurisdiction and greater cooperation in suppressing international crimes". Then, we look into the justification, being that the catalyst for action by territorial states, in which a prominent international human rights lawyer explained: after the event of the impact of arrest in London of the former President of Chile, previously the Chilean Judges began looking for chinks in the dictator’s legal armour. After decades of silence, the former collaborators stepped forward to tell of his role in covering up atrocities, revelations that have had a snowball effect. The number of criminal cases against him jumped into dozens and hundreds, by the time the British Home Secretary, Jack Straw sent a note to him, ostensibly on health grounds, which was later on revealed, the myth of his immunity has been totally shattered. The last justification that we have for the exercise of universal jurisdiction is this. IK again quote from a US Special Rapporteur on Extra-Judicial Territorial content, in 1993, he has said that lessons should be drawn from the past and the cycle of ethnic violence that has drenched both Burundi and Rwanda in blood must be broken. To this end, the impunity of perpetrators of the massacres must be definitely brought to an end and preventive measures to avoid the recurrence of such tragedies must be designed.

While looking into the deterrence aspect, we see the effectiveness of the deterrence is likely to depend firstly on factors applicable to the repression of the crimes such as the certainty of arrest, prosecution and conviction, the severity of punishment and the amount of reparation. Secondly, it is on special factors related to jurisdiction. In this context, the effectiveness of deterrence, at the international level is so difficult to document and yet, we have not seen a proper documentation on this particular aspect. But various scholars have said
something on this that this is an effective deterrence. With respect to the other approaches to universal jurisdiction I have got into the international legal order, from the perspective of international law. Scholar F A M Man sighted that the threat to the international legal order as providing a rationale for universal jurisdiction over crimes under international law. He said and I quote; the second exception to the general rule that states do not have criminal jurisdiction over crimes committed by aliens abroad arise from the character of certain offences. This is such as to affect and therefore, justify, perhaps even compel every member of the family of nations to punish the criminal over whom the jurisdiction can in fact be exercised. These are crimes which are found in international law which the nations of the world have agreed, usually by treaty or to suppress which are thus recognized, not merely as acts, commonly treated as criminals but dangerous to, and indeed attacks upon the international order as such. From the international community values' point of view, I again quote: This universality principle is based upon the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation, which as the custody of perpetrators, may punish them according to its law applicable to such offences'. From the national perspective - this is the last submission, which I have - I would like to quote this. This was argued during the parliamentary debates in The Netherlands, on the Bill to implement the Convention against torture, in support of the universal jurisdiction, and I quote: 'a shock wave would go through the Dutch legal order, if first with the presence in this country a foreign national recognized as a torturer by the witnesses and victims, the courts were to declare themselves incompetent to hear in this case.' The last but not least, in conclusion, I would say that certain crimes are invariably considered or accepted and regarded in international law as to threaten the very international peace and security; indeed, the International Law Commission has consistently treated the crimes of genocide, crimes against humanity and war crimes, as crimes which threaten international peace and security. The argument has its greatest force when the crimes are committed on a large scale or were they lead to cross-border refugees laws and conflicts, which may draw in other states'.
7.6 Jurisdictional powers of International Criminal Tribunals: From Nuremberg to Rome and beyond

I have identified four issues for the purpose of studying the problem at hand, which are controversial. The first issue relates to temporal powers of the International Criminal Tribunals. The second is the territorial jurisdiction. The third is the relationship between international criminal tribunals and domestic courts. The fourth is the relationship between the Security Council and the International Criminal Tribunals. Let me begin by looking at the first issue, that is 'temporal powers of tribunals'. All of us know that there is the principle of 'nullum crimen sine lege'. You cannot have criminal laws ex post facto. This was one of the major criticisms that arose in the context of Nuremberg. In Nuremberg this principle seems to have been violated because the Nazis were tried for crimes, which were not really defined as such, before the Charter of London. The justification for this was basically given on three grounds: one, it was said that this rule was not a rule of law, it is rule of equity or justice which really cannot be enforced and so, you cannot say that this principle had been violated. The second thing that was said was that as per the Kellog Bri- and Pact of 1928, Japan and Germany had agreed that all disputes between them and other countries will be resolved by peaceful methods and they will not resort to war and hence, since they resorted to war now, they have been in violation of that and also that they have signed a number of conventions between 1928 on a variety of those issues, and hence, they were bound by them - though there were no penal provisions in any of these conventions that they had signed, yet the fact that it was defined that you cannot do something like this, it was taken as a justification to punish the offenders. The third argument was that of the natural law. You cannot say that something does not exist. God has given all these things earlier. So, even before the Ten Commandments came about, 1600 years before that, there had been situations where God had punished the offenders of the laws that he had laid down and hence, you can really see that there is no argument against doing something like this. If you do not punish people who have violated the rights of so many people during these wars, it will really be unfair and go against the natural law. The arguments against this argument are two. One was,
as Germans said, that the Charter of London is what laid down the things as crimes and hence you could not possibly prosecute people for things that were not defined as crimes. The second is that they tried to counter the fact that various treaties that had been signed, saying the circumstances are such that you cannot really require the states to follow these principles because they are now in the state of war. Because of these two principles, you cannot really exercise jurisdiction over these states.

Coming to the International Criminal Tribunal for Yugoslavia and Rwanda, they were not really such a problem because of the situation there—because Yugoslavia and Rwanda had signed most human rights conventions and also had incorporated them into the national laws, because of which there was not really a problem with respect to prosecution. But again, there are three arguments that come up here. The first was that this is an internal armed conflict and not an international conflict and so, can you really use chapter VII of the UN Charter and can you set up an international tribunal? That was the argument. That was rebutted by saying that this is not really an international conflict; there are shades of international armed conflict in this because of which the Security Council can act. The second argument was the same - what I said in the context of Nuremberg - that is, no penal element in any of the treaties that have been signed by the two nations is there.

In the context of the ICTY, What it did was that the Statute refers to domestic laws which I spoke about earlier and hence that problem is also taken care of. The third but not really a tenable argument is the fact that tribunals are set up after the offences were committed, which is not tenable and you cannot say that the court should exist at that time. That again cannot be insisted upon really.

In the context of the ICC, it becomes quite clear because the Rome Statute says that only after 1 July 2002, whatever crimes are committed, can be tried by the ICC. But there are a couple of problems there. Firstly, there is a situation where a state can become a signatory to the Statute and ratify it. If that is done, look at Articles 22 and 24, which reiterates this principle of temporal jurisdiction. There is
a possibility that if the state ratifies the Statute, then there is a period of time, in which you cannot prosecute situations and this can be effectively used to shield people who have committed crimes. That is one problem. The second is a situation of a non-party state, accepting jurisdiction with respect to an individual, also from other non-party states, for crimes committed within its territories. So, that could be used for political motives where you accept the jurisdiction just for prosecuting a person.

In the context of the Iraqi Special Tribunal, it seems that victor's justice is being re-visited because of the fact that it says that temporal jurisdiction extends from 17 July 1968, when the B'aath Prerty came to power, till 1 may 2003, when UN took effective control; so, it means prosecuting Saddam Hussein and the rest of the people for things that were not crimes at that point of time.

Coming now to the issue of territorial jurisdiction, there is one interesting principle that arises in this context is that of delegated territorial jurisdiction. The argument that every state has a territorial jurisdiction which is recognized, what has been done in the Rome Statute, when the referral is made is that this territorial jurisdiction is delegated to the ICC. You can counter this by saying that the entire argument for territorial jurisdiction is that has taken place there.

If you are going to delegate this really, it does not make sense. The other issue is, is there any other state practice in this regard. If you look at European Convention on Transfer of Criminal Proceedings that is one place where you find something like this happening, but there again, you cannot really bind states; you cannot bind nations or states which have not consented to their nationals being tried before any other tribunal. This is exactly what is happening here because even if a person from a non-party state is tried before the ICC and if the state does not consent, it does not make really any difference. So, delegated territorial jurisdiction cannot really be used as an argument.

In the context of the next issue, which is relationship between domestic courts and international tribunals, we see a new system which has been brought about within the Rome Statute which is of complementarily. The doctrine of
complementarity says that the ICC will not prosecute an offence if it is ably tried by domestic courts and hence, in such a situation, its primacy is given to domestic courts over international tribunals. In the ICTY and ICTR, the primacy was given to the tribunal itself. The doctrine of complementarity seeks to say that the ICC is a safety net which is trying to stop any sort of impunity. In this context, there are three issues. Firstly we have complementarity and truth commissions. We have situations of truth commissions coming up. Does that really mean that states have effectively prosecuted these people and shielding the offenders or there is no punishment as such, if the truth commission happens to give award, what will happen, in the context of South Africa or in the context of what happened in Sierra Leone when amnesty provisions were utilized. That is one situation that you might have to look at.

There second is something that India rests on - complementarity in the context of Article 13 (b). One of India’s reasons for not really signing the Rome Statute seems to have been that if there are situations, because of political reasons, the ICC, might take up situations of alleged human rights violations in India. That is something that can be done now because if you use Article 13(b) and the Security Council does happen to refer any such situation to the ICC, the doctrine If complementarity does not apply to Article 13(b), and hence, there is no question of domestic court really being able to say that, we have effectively prosecuted and you cannot take over this issue.

Lastly, I will deal with the powers of the Security Council in International Criminal Tribunals. The argument that first comes up is chapter VII? Chapter VII does not talk about setting up of tribunals and so, can you really set up tribunals under Chapter VII ? The referrals under Rome Statute where the Security Council can refer, seem to be curtailed to a certain extent, which limits the powers of Security Council because of the fact that even if it is referral, the court can even go into the issue of whether there is actually a situation which has arisen, so, it limits that to a certain extent. That has already been just discussed. The power of referral really takes all this away because what are you doing with the power of referral ? You are recognizing and seem to indicate the ICC is subordinate to the UN.
Security Council and the UN Security Council can ask the ICC to stop proceedings, which in fact, has been done earlier in the context of US soldiers. So, in this context, we can see that the Security Council is still playing a controversial role with respect to its relationship with the International Criminal Tribunals.

7.7 The Princeton Principles of Universal Jurisdiction