AALCO-ICRC HALF DAY SPECIAL MEETING ON "UNIVERSAL JURISDICTION AND ITS ROLE IN THE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW" HELD ON WEDNESDAY, 5TH APRIL 2006 AT 2.30 PM

Amb. Dr. Wafik Z. Kamil, Secretary-General (AALCO): Gentlemen, hope you had an excellent lunch and we all ready to start the second half-day meeting related to "Universal Jurisdiction and its Role in the Enforcement of International Humanitarian Law".

Mr. President, Mr. Vincent Nicod, Head of Regional Delegation, ICRC New Delhi, Your Excellency Dr. Iskander Ghattas, Member of the People's Assembly of Egypt, Former Under Secretariat State for Justice and Secretary-General of the National International Humanitarian Law in Egypt, Mr. Yves Daccord, ICRC Delegate from Geneva, Hon'ble Justice Lokur and Prof. Mani. I welcome your Honourable Ministers, Excellencies, Distinguished Delegates and Observers, Ladies and Gentlemen, on behalf of the AALCO and on my own behalf, I welcome you all to this special meeting, being organized in cooperation with the International Committee of the Red Cross (ICRC). The AALCO and the ICRC have joined hands to organize this meeting, which would address some of the very important issues in the area of international humanitarian law.

AALCO's association with ICRC is not new and it started with concrete steps in 1997 when both Organizations jointly organized a special meeting in conjunction with AALCO's Thirty-Sixth Annual Session in Tehran on an important item entitled "Inter-related aspects of International Criminal Court and International Humanitarian Law". This cooperation further continued as the AALCO and ICRC jointly organized a Seminar on the various aspects of international humanitarian law on 17th November 2000 in New Delhi on the occasion of AALCO's Constitution Day. It is the determination to uphold international humanitarian law that continues to remain as the guiding principle for the joint efforts of both the Organizations. We have formalized our cooperation by initialing a Cooperation Agreement in New Delhi on 17 December 2002 and by signing it in Geneva on 7 July 2003. Promotion and development of international humanitarian law is the primary objective of our Cooperation Agreement.

The topic for today's discussion is "Universal Jurisdiction and its Role in the Enforcement of International Humanitarian Law". The concept of universal jurisdiction asserts that there are some heinous crimes, the perpetrators which should not escape justice by invoking doctrines of sovereign immunity or national frontiers. The principle of universal jurisdiction allows any State to prosecute individuals who are believed to have committed certain international crimes, even if the prosecuting State has no link to the crime in question other than the bonds of common humanity. In other words, universal jurisdiction is national jurisdiction over international crimes.

National courts traditionally prosecute people accused of crimes committed in their territory, but under the universal jurisdiction States can enact national laws that will allow their national courts to investigate and, if there is sufficient admissible evidence, prosecute any person who enters their territory suspected of certain crimes, regardless of where the crime was committed and the nationality of the accused and the victim.

Universal jurisdiction, to summarize, refers to the principle that every State has a fundamental interest in bringing to justice the perpetrators of international crimes, genocide, crimes against humanity, or war crimes no matter where the acts were committed and regardless of the nationality of the perpetrators or their victims.

However, there are certain issues on which international community should have common understanding. These include issues like, double jeopardy, the lack of uniform legal standards both in procedural rights as well as in sentencing, and the retrospective effect of legislation on crimes committed in the past, and the lack of uniformity in defining the crimes and a general deficit in legal training in international law for judges and lawyers often

pose grave obstacles. I hope the distinguished panelists will focus on some of the significant issues involved in the application of universal jurisdiction.

To conclude, I express my special gratitude to all the panelists who came all the way to enlighten us about this topic and I hope that this half-day special meeting will be very fruitful that the one we had in this morning and dialogue between the audience and the panelists would be really enlighten us our personal experience and would express our views about this important matter. Thank you.

Thank you very much. I give the floor now to Mr. Larry Maybee to steer our discussions for today.

Mr. Larry Maybee, ICRC, Regional Legal Adviser for South Asia: Thank you very much Amb. Kamil, Hon'ble Amos Wako, President of the Forty-Fourth AALCO Annual Session, Mr. Narinder Singh, Joint Secretary, Legal & Treaties Division, Ministry of External Affairs, India and President of the Forty-Fifth AALCO Annual Session, Ambassador Wafik Z. Kamil, Secretary-General of AALCO, Excellencies, Distinguished Representatives of AALCO Member States, Other Distinguished Participants and Guests, it is a great pleasure to welcome you all here today to attend this half-day special Session.

The ICRC will be conducting under the good offices of AALCO to discuss a very important issue, which Amb. Kamil is already very ably introduced, which is "Universal Jurisdiction and its Role in the Enforcement and implementation of International Humanitarian Law". I want spend time going through the panels and topics except to say we have very eminent list of speakers with us to this afternoon who will be introduced in greater detail in term as there about to speak but we have tried to have a mix of people from academia, we have with us Prof. V. S. Mani, one of the leading legal experts in IHL in India, We have Dr. Ghattas who is coming to us as one of the Legal Experts in Egypt, who is also representing government and we have a member of the judiciary Justice Madan B. Lokur who is from the High Court of Delhi So we talked, we can bring some different perspectives until the discussion of this afternoon discussing the issue "Universal Jurisdiction" and before I turn the floor over to Mr. Vincent Nicod who is the Regional Delegate for India covering several States in South Asia and I also would like to make point mentioning that there will be some materials distributed during afternoon and this will be included papers of the panels will be giving this afternoon. So you have the opportunity to read those at leisure and later on perhaps in the aeroplane or back to your country. Without further due, perhaps I could turn the floor over to Mr. Vincent Nicod for some welcoming remarks.

Mr. Vincent Nicod, Head of the Regional Delegation, ICRC, New Delhi: Thank you Larry. Shri. Narinder Singh, President of the Forty-Fifth AALCO Annual Session, Namestay, Hon'ble Amos Wako, Attorney General the Republic of Kenya and past President of the Forty-Fourth Annual Session of AALCO, Amb. Kamil, Secretary-General of AALCO, Salam Alekum, Distinguished Representatives of the Member States of AALCO, Eminent panelist members of today Panel, the colleagues of the ICRC, Ladies and Gentlemen good afternoon and Thank you very much for joining us on the occasion of AALCO 45th Annual Session celebrating the Organization's Golden Jubilee. I feel AALCO is very lucky. They have a Golden Secretary-General and they have a Golden Jubilee at the same time. Besides congratulating AALCO for its achievement in fact congratulating its Member States for supporting the cause of the International Law, I would like to thank more specifically AALCO Secretary-General Amb. Kamil for giving the ICRC the possibilities to address here today this assembly. This is on line with the resolution you adopted at the Forty-Second Annual Session in Seoul on the Relevance of the International Humanitarian Law in today's armed conflict. Back in 2002 ICRC and AALCO signed a Cooperation Agreement in Geneva in order to enhance a capacity to promote the cause of the International Humanitarian Law around the world, the world, which badly need it today. AALCO with its growing numbers of Member States is very quick to help the ICRC to fulfill its role of custodian of International

Humanitarian Law. The Cooperation Agreement between arranged situations already facilitated the set of couple initiatives. The last one was a partnership in holding the important ceremonies marking the laws in Asia of the ICRC study on custom as a source of International Humanitarian Law attended by representatives of 23 countries of Asia and some of them are here as well today. I give them a special greeting. AALCO and ICRC also exchange researches in regular basis as well as document and study material. This partnership is therefore, a success and the presence is here today is a big sign in this context.

This afternoon we shall be studying whether international law in general and international humanitarian law in particular are adequate tools for dealing with the post September 11 reality. Scrutiny of the evolution of conflicts in the last few years suggests a shift in the nature of these armed conflicts. In 2005 the involvement of the conflicts and violence was marked by on-going consultations of global dimensions the so-called war for the terror. This would against a certain group of States and the highly decentralized a loosing connected range of non-state actors of the other side. These lead as well as a combination of military and counter terrorism operations and the introduction of the anti-terrorism legislations in some country and we are the other side of the spectrum of the wild highly localized forms of intercommunity and tribal conflicts of a transnational in nature some times mobilizing child soldiers but always inflicting high levels of human sufferings erupts in regions where almost all modern notions of law and order have collapsed. International Humanitarian Law is therefore paying challenge by the nature of these new types of violence and conflicts effecting numbers of victims today but as a President Mr. Kiron Bergo phrased it contrary to perceptions according to which international humanitarian law is static these body of norms like all others is constantly subject to refinement and change, I therefore hope that AALCO Forty-Fifth Annual Session will help us to promote any change, which will reinforce protection afforded by International Humanitarian Law to victims of conflicts. And now I pleased to introduce our next speaker Mr. Yves Daccord, the Director of Communication, ICRC based in Geneva. Mr. Daccord has accumulated to solid experience as a Journalist, as a Swiss broadcasting cooperation as well as ICRC Delegate and later Head of Delegation in Yemen and in Israel and occupied territories in the Middle East, in Kenya and in the Sudan and Africa and in Georgia and Chechnya in Central Asia. Mr. Daccord is going to deliver the keynote address and he is going to speak on "Interplay between the ICRC's Humanitarian Action and Pursuit of Justice". This address should help us to establish the necessary links between the theory and the practice between the reality of the field where the implementation of the law open-closed difficult and the ideals defended by those like you promoting new laws in order to improve the protection, which should be afforded to all categories of victims of conflicts and violence. Please welcome Mr. Daccord and I thank you very much for your attention.

Mr. Yves Daccord, Director of Communications, ICRC, Geneva: Ladies and Gentlemen, it is a real privilege and pleasure for me to take part in this very Special Meeting on International Humanitarian Law in the context of the Asian-African Legal Consultative Organisation's Annual Session. It's a privilege and to be able to participate in this very important event, which continued the excellent partnership we talked about has developed over the years between AALCO and the ICRC.

In this brief address, I would like to highlight the link between the theme of this meeting's overarching theme "universal jurisdiction – or more broadly in fact, the pursuit of justice through criminal repression" and the humanitarian action of the International Committee of the Red Cross. In essence, they are distinct but complementary components of an effective enforcement of international humanitarian law.

To do this, to highlight this link, I will start by briefly describing how the ICRC strives to fulfil its mandate in practice, given the challenges posed by today's conflict environment. Then I will position the ICRC's

action in relation to IHL's system for repressing violations.

As you know, Ladies and Gentlemen, international community has given the ICRC a mandate to act in situations of armed conflict and armed violence through international humanitarian law treaties and other legal instruments. This mandate fixes the characteristics of the organisation's specific approach, which means an impartial, neutral and independent approach. From this mandate, the ICRC's mission to protect and assist victims of armed violence with a view to prevent violations of the law and alleviating their consequences has crystallised in practice over the last decade.

In carrying out its mandate ICC confronted with increasingly complex operational realities. Perhaps change firstly; many of today's conflicts are characterized by the proliferation of actors involved in violence. Each of these actors may have different agenda and method of operating. This results in increased this regards for IHL rule. For the ICRC it also makes much more difficult dialogue with all parties as well as access to the victims. This access hinges on the ICRC being accepted by all actors involved in our armed violence. Suddenly most ICRC delegates operate in a very polarised environment, where expectations that every actor including humanitarian actors should take sides; there is no perceived middle ground between ally and enemy, friend and foe. Receptivity to a message of neutrality and independence may be diminished, making it more complicated for organisations like the ICRC to get the humanitarian message across. This reality increases the risk that the ICRC or its humanitarian action will be rejected. So more than ever the ICRC needs to conduct impartial, neutral and independence humanitarian action. Action where need is the sole criteria considered for the protection and assistance action, which must be distant and perceive as such from any political and military interest. So to explain the link between this actions, the ICRC's action and the Universal Jurisdiction, I must firstly briefly described IHL enforcement framework. IHL set up a system for repressing violations centred around the obligation of States to prosecute persons accused of grave breaches in their national courts and these regardless of the location of the crime or the nationality of the perpetrator. This concept of the universal jurisdiction is a key element in ensuring the effective repression of crime of grave breaches.

As you all aware, beyond national jurisdictions, different international criminal tribunals have been established in the aftermath of World War II and again since the early 1990s. This supplement the repression mechanisms provide for in the core IHL treaties, which are the Geneva Convention and the Additional Protocol. It constitutes a major step by forwarding the efforts to prevent and punish serious violations of IHL. They are the two *ad hoc* international tribunals, established by the UN Security Council to try certain crimes committed within the territory of the former Yugoslavia and in connections with the events in Rwanda. They are also several "mixed" tribunals such as the Special Court for Sierra Leone, which comprise elements of both international and domestic jurisdictions. And there is the International Criminal Court, the ICC. Some eight years after its establishment, the ICC is now moving from the preparatory to the judicial phase. The Prosecutor has opened investigations into three situations (in the Democratic Republic of the Congo, Sudan, and Uganda) and has unsealed six arrest warrants as a result. The first suspect was arrested and transferred to the court's custody less than three weeks ago.

So even with the establishment of international institutions with jurisdiction over certain violations of IHL, it is important to note that States retain the primary role in the prosecution of alleged war criminals. And national courts remain the cornerstone of the IHL enforcement framework. States must still bring to justice those accused of grave breaches; nothing in the statutes of these international criminal tribunals releases States from their obligations under existing instruments of IHL or under customary law.

So, where does this leave humanitarian action? In the IHL system, preventive and remedial action on one hand and punitive action on the other are complementary in other term the work of the ICRC and other humanitarian

organisations and the work of States and international criminal tribunals are complementary means of regulating violence in armed conflict and ensuring respect for the law. Preventive and remedial action aim to produce an immediate effect: avoiding violations of the law and alleviating their consequences. Punitive action, designed to punish those who have violated the law and deter future violations, has a longer-term focus. Despite this complementarity, these types of action must nevertheless remain distinct.

As an institution that works to protect and assist victims of armed violence, crossing front lines and visiting military detainees and civilian internees, the ICRC becomes aware of violations of IHL in the course of its activities. The ICRC then takes action in response to such violations. It brings the acts or omissions that might constitute breaches of IHL to the attention of suspected offenders. And then try to persuade them to put a stop to those practices and prevent their recurrence that is what the ICRC called its protection work.

Beyond this, a major task of the ICRC is to promote the rules of IHL to those who decide the fate of war victims or who can obstruct or facilitate the ICRC action. These groups include armed forces, police, security forces and other weapons bearers, as well as present and future decision makers and opinion leaders. In addition, the ICRC supports the efforts of governments and armed forces to integrate humanitarian law into national legislation as well as military doctrine, education, and training.

But the ICRC stops short of playing any punitive role in response to violations. For one thing, it does not have the mandate to establish criminal responsibilities; and as I said it is an obligation of States and the larger international community. The ICRC strongly believes that its work would be jeopardising if it were to be implicated in the repression of violations. To do so would risk being seen has taking inside in a conflicts and this could compromise the ICRC ability to fulfil its mandate of protecting and assisting victims.

So humanitarian action and the pursuit of justice are not an "either-or" proposition; both I think are essential to the effective functioning of the IHL system. In a perfect world, there would be no violations of the law and no need for humanitarian action or criminal repression. But we are not living in this perfect world. Perhaps the best we can hope for is that there is effective penal action that States assume their role of punishing violations of IHL, and that in the meantime, the ICRC and other organisations are able to ensure that victims of armed violence receive much needed protection and assistance. The ICRC's humanitarian action is its contribution to the effort to make the world that I can say place a better place.

So to conclude, the IHL system is based on effective, preventive and remedial action as well as effective punitive action. The ICRC and States are both essential actors in this system – the ICRC for its role in providing protection and assistance to victims of armed violence, and States for their role in repressing violations of IHL. So during two days Session on IHL we will be discussing one important aspect of the punitive action, which is ensuring that those who commit war crimes are held criminally responsible for their actions. Thank you very much.

Mr. Larry Maybee: I thank you Yves for providing us with a very top of the overview the subject that we are going to discuss today and setting the table if you will putting enforcement of IHL into the humanitarian action framework and also setting up some of the more specific topics that will be going to discussing today that will be nicely into our next subject, which is the "Responsibility of States for the implementation and enforcement of International Humanitarian Law" and for that we have an eminent IHL expert from Egypt, Dr. Iskander Ghattas . Dr. Ghattas is the former Under Secretariat State for Justice and International Cooperation for the Arab Republic of Egypt, he is also the former President of the Court of appeal for Cairo, he is the serving Secretary-General of the national IHL Commission for Egypt and top of all that he is a Member of the Empowerment of People's Assembly for the Republic of Egypt and he is going to talk today as I said early on the topic of "Responsibility of States for the

implementation and enforcement of International Humanitarian Law".

Dr. Iskander Ghattas: Mr. Chairman, Delegates, Ladies and Gentlemen, the subject suppose to me was to talk about the "Responsibility of States in the Implementation and Enforcement of International Humanitarian Law". We all know that the common article and the Geneva Convention providing the States commit themselves to respect and to make respect those Conventions. That is to say that on the one hand there is a commitment to respect the Convention and not only to respect them but to ensure that other also respect the provisions of the Geneva Conventions. This of course entail quite a number of obligations, which are imposed to the States and I would like to open here for the emphasis concerning the IHL. Some States believe that if the State parties of IHL convention dispenses of them of all responsibilities of any obligations to respect convention such law. In fact, international humanitarian law is not only made upon conventional provisions but it also contain a certain number of standard with are considers imperative norms for international Law and all States have to respect these provisions whether the State parties of these to the convention or not. Indeed there is no as such provision which is a part and parcel of the customary international law that all States have to observe and to respect.

When we talk of responsibility of States in the implementation and enforcement of IHL, we think here about three essential missions; the first one, the responsibility of the States to ratify the IHL Conventions, the Second, is the responsibility of the States to disseminate IHL and third, is the enforcement of IHL within the boundaries of nations, and they say this also entail the respect by the others of all the provisions of IHL.

When the United Nations Organizations was created it was sort that all being forbidden by the Charter of the United Nations therefore be no more wars and the right of war would no longer be an applicable right. And it has been seen and noticed that there was certain difference towards the right to war because the UN Charter forbade how can we talk or even think of right. But unfortunately reality is absolutely different, war is there, war is launched and the victims of these wars are no longer only the military also the civilian population which forms the greatest parts of the population, victim of any breaches to the IHL within the follow-up of possibilities of the States in order to respect and the true respect of the international humanitarian law, ICRC had studied this question. Many States neglected and ignored completely their obligations. The obligations they accepted, when they signed the IHL Convention. One of the possibilities, which are often to respect in order to assume the role very efficiently is to or create or to establish National Commission of International Humanitarian Law whose role will be the consultative body for the governmental authorities so that these conditions will help the States to assume the responsibilities and the obligations to fullfil their obligations. First obligation is of course the obligation to ratify treaties and Convention. It is not enough for the States to sign the IHL Convention. But, it is necessary for the States to ratify these conventions and according to all the drafting of these Conventions and the Additional Protocols the States are invited, which is quite rare in the drafting of the Conventions and the States are invited to do that as soon as possible. And it is there the national commission can play a very important role. They can play this important role when they take part to the negotiations to preceding negotiations, to the signature of these conventions. They can also play an important role when they advice their States to follow the appropriate measures and to ratify those Conventions. And that is to say and that is why we say that the State have this very first obligation, which is to ratify international instruments of IHL. We have also to remind you that those international instruments are not the only Geneva Conventions and Additional Protocols, but it is all legal international instruments to which the States should ratify. The second obligation is dissemination of IHL.

We all know that nobody is supposed to ignore the law or not to know the law but of course at the same time no body is suppose to know everything within the law. Therefore, we have to disseminate the source that everybody

would know it. There is a rare essential role, which is the role of the State parties to disseminate the international humanitarian law and mainly do the various categories, which are meant in the enforcement of such humanitarian law. First and foremost the military, the armed forces are the first categories, which are meant when we talk of disseminating the humanitarian law. Therefore, the provisions of the IHL must be known to the armed forces of military. One remains obligation for the States is that during the military operation the text of the Geneva Conventions and I Additional Protocol are given to the military that we have well in their position. Not only the forces but also the civilians the dissemination of humanitarian law must also be guaranteed by all possible communication means and be included in training programme, which are meant for all what we call the officers who are in charge with enforcing the law, which is not only the military but also in police forces, magistrate, media, and including the university, school curriculum and also we have to raise awareness of the public opinion and inform them of how to respect IHL This is even more even easier when you think that IHL is accompanied other values, which are quite familiar to us and these are very often are limited to our culture or to our religious convictions. There is of course no contradiction or no position between our culture and religious belief's and what requires IHL. This law, this humanitarian law has been defined as being a law, which is trying to put a human dimension into what is not human. And all our civilization, culture or religious belief's tend to make the real world a more human world. Here is our second obligation, which is to disseminate the IHL and the States have to comply with it. The third obligation is the enforcement of the IHL, it is not enough to ratify that it will be of course very easy. It is not enough ratify or then after not to respect what you have ratified. What you have to do is guarantee real implementation and enforcement and effective one of IHL and which seemed to be the weakest link in international law. In general, it shows that for the past few decades showing that it is indeed that can be rather strict and that can until criminal pursuits that nobody would have even imagined a few indicators. For the implementation and enforcement of IHL. First of all we should have a plan of action or programme of action, which should also established priorities and all this is particularly important.

We know very well that with recreation of the International Criminal Court following resolution adopted by the Security Council within the framework of the Chapter VII of the UN Charter. The States have the obligation to deal with these Criminal Courts, when the establishment of the International Criminal Court in conformity with Rome Treaty, the States whether the parties or non-parties to be Rome Treaty have the obligations to deal with this International Criminal Court. The Treaty of Rome has created what we call the complementarity link between the various national jurisdiction and international jurisdiction, the International Criminal Court and therefore considered being the complement in its jurisdiction to all national jurisdictions. How can we affirmed underline this complementarity if further is a State who doesn't have the legislative and judiciary instruments necessary to be able to pursue somebody who has the bridge of the International Humanitarian Law. The International Court of Justice has approached and that's the way this problem mainly when they have rendered decision concerning genocide and besides that the legislative measures should be taken in order to enforce this Convention. Most of our States are Parties to this Convention and by I can tell you on that many of them until now did not take the necessary legislative measures to enforce this Convention. Therefore, if our States wanted to escape this sort of law, which is prevailing they should be at the national level provide for legislative instrument or system that would be able to dealing with this problem and to solve it as well as creating awareness for everybody whether it is the leaders or those who are the nationals and mainly to ensure awareness so that they would respect the IHL. IHL is very important within the resolution of United Nations. The representative of the Red Cross in India has bridged us the subject of terrorism. Since September 11, 2001 all the resolutions of the Security Council within the framework of Chapter VII, which is the imperative for all the States that should take

the necessary measures in order to control terrorism.

Nevertheless, despite all these resolutions which encourage the States to pursue the terrorist and although terrorism may considered as being a threatened to peace and security to international peace and security we find in the same resolution warning as these pursuits have to be done within the respect of the rights of the person insult and the humanitarian law. The respect of the IHL, which has to be guaranteed in any circumstances in this, comes back what is said in all the Convention themselves. When it says in any circumstances we cannot talk about war or just war. That is to say that we do not have to apply the reciprocity rule even if you are faced with the unjust war, even if you are faced with measures, which are breaches to the IHL. The authority of the State is self-authorized to proceed to the same breaches. This is why I would like to address towards the delegations here and to the Secretary-General of AALCO. I would like to address that the special attention be given to a legislative action giving to our respected States working tool sort of legal guide that would allow them to apply the provisions of IHL. I think that this might be one of recommendations that could be adopted by this conference. That is to say organizing a workshop any type of meeting whatever of the decision has taken but that would give to our States this possibility. I know that ICRC has made an excellent job in this field and may be we could also offer to our States such opportunity also and I am sure it will help them very much. Thank you.

Mr. Larry Maybee: I would like to thank Dr. Ghattas for a very illuminating and comprehensive presentation on the "Responsibility of States" in all aspects of International Humanitarian Law. And I think it's a very good summary of the responsibility starting from the signing of a treaty right through to one aspect will be focusing on from this point on the Session this afternoon, which is effective enforcement and investigation of prosecution work of penal repression and I thank that at least nicely into the slightly more narrow a focus will be giving on this point on. Beginning with our next speaker Prof. V. S. Mani who will be talking to us on the specific, the more specific issue of "Individual Criminal Responsibility for War Crimes and the Duty of State to Prosecute and those Violation of IHL" In fact, I can say a few words of Prof. Mani, he is currently the Director of the Gujarat National Law University and he is a former Prof. of International Space law at Jawaharlal Nehru University in New Delhi. And at that time, he was simultaneously the Chair for the International Environmental Law and the Director of the Humanitarian Law and Teaching and Research Programme. He is a PhD from JNU. His Doctor of thesis is on "Procedure before International Tribunals". He brings to the table more than the 35 years of teaching and research experience. Prof. Mani is well known expert in International Law in India and abroad. And he has considerable practical experience. For example, he was a visiting Professor in the faculty of Law Politics in Tokyo University, at West Bengal National Juridical Sciences in Kolkatta. He was the visiting fellow of Max Planck Institute for international law at Hiedelberg. And he has delivered a prestigious international law lectures at Hague Academy in The Hague, Netherlands. He is also the Executive Vice President of the Indian Society of International Law and very important International Law issues in General and International Humanitarian Law specifically. So without further delay, I will give the floor over to Prof. Mani, Sir.

Prof. V. S. Mani: Thank you Larry. Mr. Chairman, Distinguished Experts on the Dias, Your Excellencies, Distinguished Members of the various Delegations, and my friends I thank through Amb. Dr. Kamil, AALCO and through Mr. Vincent Nicod, ICRC, Delegation in New Delhi for inviting me into this a very serious discourse on "International Criminal Law" that to on the occasion of the Silver Jubilee celebrations of AALCO. My heart felt congratulations for AALCO many more Golden Jubilees to come.

I selected an area on my temptation, of course is to present a historical view of anything I touch. One thing that is safe I can overwhelm you with the historical facts and escape analytical problems of present day situation to

wish. But at the same time I thought about it, I thought this was an area in international criminal jurisdiction, issues of enforcement of international criminal law obligations of States. This is a very critical area, which needs to be looked at from a historical point of view in the first place. We are talking of criminal jurisdiction of states. Criminal jurisdiction of States is an essential thought of States over sovereignty. Suddenly the States are faced with emerging international criminal law norms. At the sheer high moral weight of these norms old ideas of sovereignty must crumbled. This is not only a conceptual problem but also the willingness on the part of States to concede some space for this emerging international criminal law. When the international humanitarian law began to take shape with the Leiber Code during the American Civil War and more importantly at the beginning of their efforts of the ICRC Henry Dunant 1864, the first Convention. The emphasis of IHL, I suspect was on amelioration of victims of violence. There were not of that time to worried about international criminal law, I think that transition probably took place through the Second World War with the experience of the Nuremberg and Tokyo tribunals. Suddenly we now have the concept of grave violation of international humanitarian law. You find this in all the four Geneva Conventions of 1949 since then the concept of grave violations of IHL joined hands with gross violations of human rights. So I think this seems to be a confluence now of grave violations of IHL and gross violations of human rights, evidence Gulf. In 2005, the Human Rights Commission came out with some principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of IHL this has been endorsed by the UN General Assembly. General Assembly Resolution 60/147 dated 21st March 2006, this I suppose is the latest evidence of this confluence and also the transition from simply victim amelioration oriented law, international norms to more active redress mechanism for the victim and also prevention of these crimes in the future. At this transition probably is central to my understanding of international criminal law to be.

In this, there are indeed two aspects are on which I have been asked to briefly dwell on one international criminal responsibility individual responsibility and the other duty to prosecute. The eminent judge from Egypt has given you a considerable a broad canvas of international criminal tribunal as such ICC. A question would arise. I mean these two questions would arise individual criminal responsibility on the one side and the duty to prosecute on the other. Some other recent news point to the practical problems both international and national tribunal would face. We have had two sets of cases over the International Court of Justice between Democratic Republic of Congo and Belgium and now between Democratic Republic of Congo and France, this pending now. We have had news trying to trace the long winding road Charles Taylor took from Nigeria to Sierra Leone. Probably, the Sierra Leone tribunal has begun the trial I do not know, I also heard, I also saw the news that Sierra Leone tribunals was planning to have sittings at the Hague. There the problems are not sure of how to handle this Gentleman Charles Taylor. Then we also have formal statements by the Yugoslavia International Tribunal and also the Rwanda International Tribunal towards the Security Council, these news items made on 15 December 2005. Both the Tribunals complained that many Member States are quite unwilling to cooperate. Cooperate in tracing the culprits, tracing the accused persons. Obviously, these two topics Individual Criminal Responsibility and Duty to Prosecute demand urgent attention on the part of States. At normative level, it's not much of a problem as since the beginning of the first World War through the treaty over side, through the Nuremberg and Tokyo Tribunals, to the Nuremberg Principles of ILC in 1950, it is very well settled individuals can be held criminally responsible for World War Crimes, war of aggression, crimes against humanity. Now one sentence, which is of quoted from the Nuremberg Judgment of 30th September, 1st October 1946 crimes against international law are committed by men not by the abstract entities at only by punishing individuals who commits such crimes, can the provisions of the international law be enforced? And this would slowly take you to Article 25 of the Statute of International Criminal Court; you get individual criminal

liability well enshrined in this provision. But I think that practical level you could have atleast two types of problems soon after the Second World War or probably after every war. You will try to distinguish between major war criminals and minor war criminals. Are war criminals not so major? We had the Yamashita case. Was Yamashita major war criminal or not so major? Yugoslavia, Rwanda Tribunals have got away from that kind of a problem. Yamashita situation would be a grave violation of international criminal law. The difference, I am referring to relates to the problem of identifying the *mens rea* on one side and criminal knowledge on the other. In criminal law it is quite clear and in the Indian Penal Code, and I am sure most of the penal code would do it. The Indian Penal Code Section 299 defines murder, first part of its say the action has to be committed with criminally intention, the other part of the Criminal knowledge, knowledge that the act would result in killing. Now if one translation the international criminal law, I think we will have bit of quite a problems in Yamashita case. The Yamashita was a General, Japanese General during the war in Philippines and many atrocities took place and he failed to stop them. So the question clearly was whether he knows these atrocities going to being committed whether he could have stopped these atrocities. I think this is going to be a very important area for international tribunal.

Then, let me straight away get into the duty to prosecute. Let us look at the criminal legal system in various countries. I am familiar with India of course. A bit familiar with other commonwealth systems of the common law systems, Britain and Australia. We do have a concept of prosecution policy after all the investigation, arrest of the accused, prosecution would still deliberate has to whether to prosecute or not to prosecute. This decision will be taken on the bases of strength of evidence purely evaluation by the Prosecutor or the Director of Public Prosecutions in the British Centre. Subjectivity cannot be hold down. Subjectivity in evaluating evidence cannot be ruled out. And once a Director of Public Prosecution decides that no prosecution shall proceed because of evidence. He shall appear before the court and say *nulle prosequi* no prosecution. Of course, in the context of the Indian Courts there is another dimension, human dimensions to it. An Indian Court in a appropriate case would tell the Prosecutor wait a minute, let us have a look at it. Let's see what you do is in accordance with the fundamental rights of our Constitution Court may say so. This is another dimension. I am just putting to you that in natural practice decision to prosecute not to prosecute could vary with the type of domestic legal system you have. Even in the context of the international criminal court such a decision needs to be taken but luckily the pre-trial chamber supervises that decision. I said luckily because it is a collegiate body not one person you could have less subjectivity I suppose. Then, we are also familiar in international law, the concept of duty to extradite or prosecute. I think this began with anti-terrorism treaties 1970, 1971 the Hague Convention and 1971 Montreal Convention. I felt its ICAO Conventions. These provide Articles 7 or 8 would provide for a duty to extradite or submit the case to competent authorities that the purposes of prosecution are not straight away duty to prosecute. Submit the case to competent authority for the purposes of prosecution. In the Draft Code of Crimes against International Peace and Security, the final draft of the International Law Commission in 1996, I think Article 9 provides for a duty to the extradite of prosecute. Now have a look at the commentary, the obstacle as such doesn't give you much of the problem. We don't extradite you must prosecute but when it comes to commentary, it says prosecution has to be on the basis of evidence available obviously it has to be. Then the 2006 General Assembly Resolution I referred to, right of redress Resolution. You will find Article 4, it talks about the duty to submit to prosecution the person allegedly responsible for the violations and if found guilty the duty to punish him/her. This is paragraph 4 of the other basic principles. In other word, it is wrong to talk about the duty to prosecute as such straight away that duty depends upon the amount, the nature of evidence you have before you, the evidence the prosecutor has before him. And now, when we talk of evidence, I am sure that raises another duty, the duty to investigate in good faith. In India, recently there was a case

right in Delhi where some witnesses turned hostile and there was no case before the Court. The Court said well, there is no case. So, I think duty to investigate must be brought into consideration when we talk of a duty to prosecute otherwise duty to prosecute, would be rather hollow if I may say so. I noticed in the international criminal law literature increasingly there is some talk about *jus cogens* and its relations with an obligations *erga omnes* to prosecute obligations. I think two important authors have come up with this Antonio Cassese and Cherif Bassiouni, they argue on the basis of the Barcelona Traction judgment by ICJ spoke for the first time obligations *erga omnes* in the context of human rights violations. So the argument is that there is a *jus cogens* of prohibition of IHL norms, prohibition of international crimes. If there is as such a *jus cogens*, obviously an obligation to prosecute should ensue from this *jus cogens* from the peremptory norms of international law. So there is an obligation *erga omnes* are we justifying unbridled universality principle being practice by a few countries for instance, Belgium before the reason amendments. Could you pursue and prosecute an alleged culprit anywhere in the world not under your custody, for offences committed any where in the world not in your territory? Thank you sir.

Mr. Larry Maybee: Thank you Prof. Mani who was providing usual thought provoking presentation raising several questions were for all of us to respond. I thought it was very instructive talking about some of the practical difficulties with exercising this duty to prosecute and to investigate and what, are the practical question that raises. As well as some of the practical difficulties that States might face in honouring their obligations of IHL. These are precisely some of the issues that I will be going into more depth in after the Coffee Break with my presentation and Justice Lokur's presentation as well. Before we do that we do have some time for some questions and some discussions. So if we have any questions of the panelists on this or may be some other general issues will be happen to take those now. Provide a microphone. Yes, I give the floor to Oman.

The Delegate of Oman:[18] Thank you Mr. Chairman. Humanity at large wishes to prosecute those who commit crimes of wars or crimes against humanity, but we here have the right suppose to question. Why does the international community deal with double standards as what pertain to those who commit these crimes? Some do go to international court and order to be punished. Why others are just over looked and ignored as what pertains to terrorism, which has been mentioned in this great and august meeting here. We all condemned terrorism with all its kinds and forms. But what is terrorism and is there agreed found definition among States about terrorism? And why do you consider struggling against terrorism at the present time as a crime of whole while this resistance in the Second World War for example against the Nazi aggression, against the European countries was a national honour, which was highly appreciated and respected and besides all that if terrorism of the State side by side the terrorism, which is being hold by the whole world of the present time. And why don't you consider occupation and crimes perpetrated there way as terrorism is occupation allows in the international law and its crimes are quite applicable and therefore within the form of self-defence a second matter I would like to raise as what pertain to acceding to international agreements or certain conventions.

We see some States do not commit itself to that and hear to that and so one way or the other way they do evades the provisions and these Conventions while other countries, which accede to these agreements of conventions are to be faced with punitive actions and when these of question are being forced about distinguishing between those who did accede to the agreement or convention angles, who did not the answer from the international Organization unfortunately would be that this country did not accede to the convention or agreement and so can not be inspected or followed or being after it. Isn't this stands make countries not to accede to these conventions and agreements and also why the special being exercised on the some

[18] Statement delivered in Arabic. Unofficial transcription from the interpreter's version.

countries to join or accede these agreements or conventions while others are not subjects to such pressure. How can equality be reached among these countries in this domain? These are periods, which are pin pointed in every States and every phase when we talk about such subjects. So can we be decides about it and get about to know decisively and I thank you.

Mr. Larry Maybee: Yes, I would like to thank the representative from Oman for his question and I think the way it everybody agrees to proceed his to take the question individually and then try to give answer them before to proceed to next question. As I understand it that there were three issues raised one has to do with international standards and whether they are double standards in this area of the Law in this issue related. The second one is so called issue of terrorism and whether the definition and how would issues related to the whole so called war against terrorism and related to other issues such as occupation and the final area is concerning international agreements and whether there is double standards and why some States pressured who were not being pressured to comply and whether the some States are being pressured in terms of punitive actions for there involvement are not in these treaties. So, I wonder if one of our panel members would volunteer to take on the issue of double standard in the international community, perhaps Prof. Mani could deal with that issue first.

Prof. V. S. Mani: Thank you Mr. Larry. I thank the distinguish delegate from Oman for raising this issue. Indeed, I would go a little beyond the point he made and I would say there are double standards in international relations not just in this case. There are double standards in many aspects of international relations. And why don't we discuss it, I think we should discuss it but then some other Session. Then on terrorism the reason why I referred to 1970 and 1971 Conventions and these Conventions related to hijacking of aircraft or acts, unlawful acts against the safety of international civil aviation. And these conventions are near universal by norm. I was referring to the concept of the duty to extradite or prosecute within this. In fact these Conventions really do not define terrorism. These Conventions did not have to. One Convention defined unlawful seizure of the aircraft and the other convention defined unlawful acts against the safety of civil aviation and something, which you would find in your own domestic law. The point at issue was whether concepts such as duty to extradite or duty to prosecute could be understood in the context of international humanitarian law crimes of during situation of violence and in that context probably a definition of terrorism is not relevant and as you are probably aware that there is a Comprehensive Convention on International Terrorism tabled by India early as in 1996, is still pending discussion on the international plane. I would humbly wait for a consensus on the part of UN General Assembly on definition of International Terrorism.

Then I think one more point the distinguished delegate made concerning crimes in occupied territory I totally agree with him. I totally agree with him that there is a concept of occupied territory under international law and crimes committed in this territory must be condemned. They are international crimes, they are crimes against humanity and they all fall within the four corners of IHL. This is the precise of an area we would be discussing now. Even in that context is a good idea to trace the criminal who exactly I mean we would be just spoke about individual criminality, Criminality of an individual. I think we need to do more work on who exactly did what crime, then we have to invoke international bodies against that of those individual for having committed such crime. Probably a discussion such as this here would be extremely relevant. Then I was also happy to see that International Court of Justice through its rate on other side if I may so in regard to the law relating to occupied territories by condemning the construction of an artificial wall. Thank you very much.

Mr. Larry Maybee: I thank Prof. Mani his current scope of the question except perhaps for the last one and in the interest of time giving other people the chance to who to ask for the questions and who wants to ask perhaps two next question. I am sorry the representative of Indonesia. You have the floor.

The Delegate of Republic of Indonesia: Mr. President, I address to Prof. Mani, I was wondering if you can explain us clear-cut in terms of practicality and the circumstances, the States can use the principles of the *jus cogens* to justify their action in terms of prosecuting, in terms of due process of law regarding criminal activity. Is there any clear-cut of criminal activity a State can use the principle of *jus cogens* for the prosecution. Thank you.

Prof. V. S. Mani: Thank you sir for that question, may be I fell short of taking more time in that area I mean you caught me right there. I was trying to put before this august audience, that there is a view by even eminent jurist like Cassese and Bassiouni to treat the duty to prosecute as a general duty against the whole world that is *erga omnes* flowing from the principle of prohibition of international humanitarian law violations. One danger to this is precisely, what I thought we will find in the old unamended Belgium Law that is every State should be free to prosecute any where in the world. Irrespective of whether the offences committed within the territory of the prosecuting State. This I would consider as a unreasonable extension of the universality principle as we are all aware that every State exercises its criminal jurisdiction on the basis of as many as five principles. Territoriality, where the act has been committed nationality depending on who committed the act if it is my national I have jurisdiction. Then protective principle to protect the system, economic system particularly within a State, then fourth, we have passive personality that is if my national is a victim, I must have, I mean the State must have jurisdiction. It is under this principle that Spain sought the extradition of Pinochet from England. It is passive personality because Spaniards are victims of crimes. Then finally universality as we noticed in the unamended Belgium Law, old Belgium Law anybody in the world could be prosecute against Belgium. Anybody in the world for any act or omission done anywhere in the world it has to be in Belgium. This in my humble opinion first extending too far in 1998 AALCO held an important Session in Tehran at that time we discussed unilateralism in extension of extraterritorial laws. And that is of course, in the context of certain American laws extending to third party actions outside United States. I think same logic would apply here no State should be allowed to overreach, over-arch its universal jurisdictional to all kinds of acts or all kinds of person outside its territory or its control. Thank you.

Mr. Larry Maybee: Ok, there are no further question or discussion and perhaps I close the Session and have a break for tea until 5 0' clock. Thank you.

Mr. Larry Maybee: In the last panel we discussed some of the general issues and themes in the role of Universal Jurisdiction and the general enforcement of International Humanitarian Law. In this last panel we will be discussing some more specific issues for a little behind time so I beg your indulgence. But it is forced me to talk about slightly more technical subject and that is the concept of universal jurisdiction and its role of prosecution of war crimes. I suppose as the cheered and speaker to bit like being a playing coach because of me to introduced myself. I won't be long but I will just say few words about my background. My background is not academic. I was a military officer for many years in the Canadian forces, first is a military commander and then later as a military lawyer including doing a lot of prosecution, criminal prosecution work and then later on specializing in international operational law issues including international humanitarian law and that let me to doing the same work for the International Committee for the Red Cross. And I can tell you that the work is the same, the rule are the same and the interpretation may be slightly different but it is all the same law as we know as a lawyer. The law doesn't change but the interpretation mind. As so in the presentation, I will be discussing universal jurisdiction and its role.

I would be talking about the development of universal jurisdiction as well as summary approaches that countries have taken in implementing their obligations to such jurisdiction over war crimes to legislation and other measures. And you will see that there really isn't coherent approach, there is no standard model that the States follow when they want to implement the IHL obligations

and provide the Court and tribunals with universal jurisdiction to investigate and to prosecute. Now because I am doing the slightly technical subject and I will try to be brief. I think my paper has been circulated. I put the slide up that's behind me to try to actually link universal jurisdiction and this specific theme with the aim of international humanitarian law. And I think that it is good to go back to central aim of IHL, whatever we discussed these technical legal issues. And I think we must not forget that the aim is quite simple. And that aim is to protect victims of armed conflicts and to alleviate the suffering that is caused by armed conflicts in particular to the victims and those victims of course includes civilians who has been said make up by further majority of casualties and who endures the most sufferings in conflicts of all types whether the conflict is international or non-international.

And so we see from the slide that from this aim of protecting the victims, it is the ICRC's position that the compliance with the rules is the weak point but it's also critical to ensuring that the aim is achieved. It is acknowledged that the respect and compliance is lacking and that is for several reasons. It could be because of lack of implementation and enforcement or lack of political will to follow up with the implement of IHL obligations or to sign by IHL obligations. But implementation and enforcement is directly linked to compliance and the aim here is to end impunity that seems to be the order of the day and the moral context in conflicts, in particular, in non-international conflicts, in the current climate. In order to have respect and compliance you need effective enforcement and that means individual accountability to act as deterrent or as I guess negative incentive for people to follow the rules when they are involved in an armed conflict. Universal Jurisdiction is one part of this accountability and it's our belief that this is one concept, that needs to be explore if we have to further the aim of IHL, the central aim, which is in fact to protect to victims, to provide better protection of victims. So that's why the entire slide is meant to show. Starting with the concept of Jurisdiction, I suppose I should begin with developing the concept of jurisdiction and universal jurisdiction.

And firstly in international law, the term "jurisdiction" refers to the aspect of a State's sovereignty, comprising the sum of its judicial, legislative, and administrative competences. Now in national legal systems we are assume as lawyers as legal people that the jurisdiction of a court, the tribunal has been conferred upon it by the State, and must always have specific legal basis. This comes habitually through the Constitution or some other legislative means, which provides the means to exercise Jurisdiction.

To contrast this with jurisdiction of States at the international level, I think it's important. Jurisdiction of States at international level is not conferred in this sense by anybody. It is exercise by the ends of a matter of sovereignty. Long ago in the *Lotus Case*, in 1927 the Permanent Court of International Justice rejected the view that there was any prohibition on States extending *"the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory."* So that the starting point I think and States are free to extend their jurisdiction to beyond their borders. That's not to say that this discretion to do this was without limit of course. This is the court of the Lotus case implied that the State must have a substantial and legitimate interest in the subject matter of which it wanted its jurisdiction.

The exercise of extra-territorial jurisdiction by a State can be a matter of some controversy precisely because the exercise of its sovereign power may well hinge or in fact the sovereignty of another State. Indeed, the limit of extra-territorial jurisdiction that a State can legitimately exercise through its national legislation is the central issue of one of the AALCO briefs that is included in the conference materials entitled *"Extra-Territorial Application of National Legislation: Sanctions Imposed Against Third Parties"*.

Accordingly, I think it is top of the subjects in worthwhile to briefly to examine the grounds under which a State can legitimately exercise criminal jurisdiction under international law.

And Prof. Mani mentioned briefly these grounds for exercising jurisdiction outside in the territory of one's country or of one's State. Some of these are accepted and well settled in international law such as territorial principles that State can exercise, jurisdictional over any crime committed on its territory. However, some States have extended the territorial principle to include what is called "effects jurisdiction" or "objective territorial principle". This principle gives the State jurisdiction over acts committed outside its territory, which have a detrimental effect within the State. This effects jurisdiction is more controversial, as we mentioned in relation to the sanctions brief that has been submitted and circulated in the conference particularly, where the effects are purely economic. So this is example of one of the limits. One other there is the national personality and nationality of the suspect, nationality to victim and these are more less settled. One that is may be going to the borders and which causes of controversy is this concept of protective principles, which is as a basis of the extra-territorial jurisdiction, which justifies the States Jurisdiction over offences committed that abroad that expect its violate aspects. Now these could be sovereignty and security or some other important governmental function.

So these principles enjoyed varying levels of support but they all required some link between the act committed and the State that asserting jurisdiction over that act. But what about the situation where a State has no link over a perpetrator of a crime by way of one of these basis in this case the concept of Universal Jurisdiction comes into its own.

Universal jurisdiction

Universal jurisdiction originally developed as an exception to the general principles. It involves the assertion of jurisdiction over offences regardless of the place where they were committed, where the nationality of the perpetrator. Under the principle of universal jurisdiction a State is entitled and some times even required or obligated to bring proceedings in respect of certain serious crimes, in these cases. Now this principle is fairly limited in scope. It started out as being limited to be certain crimes, which States historically has exercised universal jurisdiction over, these include: piracy; slavery; war crimes; crimes against humanity; crimes against peace; and of course torture.

This principle is based on the assumption and it is an exceptional step but it is based on the assumption that some crimes are so universally condemned that the perpetrators are considered the enemies of all people and, therefore, any nation, which has the custody of the perpetrators, may punish them according to the law applicable to those offences.

Ok, so that's a bit of the background of Universal Jurisdiction. I would like to move now to perhaps talk about Universal Jurisdiction over war crimes specifically and more specifically the universal jurisdiction that is provided under treaty law leaving aside customary law as Prof. Mani I referred to a little earlier.

Certain international treaties as we have discussed in passing place States parties under a duty to ensure that suspects who come within their borders are brought to justice. This is a duty that typically set out in the treaties to either prosecute and before the national courts or they do not wish or don't have the capacity to extradite them to stand trial elsewhere. This duty to prosecute or extradite was referred to by Dr. Ghattas in his presentation. It is set out clearly there is an obligation and all four of the 1949 Geneva Conventions, which was ground breaking in this regard. The States parties to the Geneva Conventions are currently 192, States parties are one who have ratified that the Geneva Conventions are required to exercised this jurisdiction in respect of grave breaches of them. So the type of offence that's set out in the Geneva Conventions, which tracks this type of jurisdiction and poses this obligation is relatively narrow.

Geneva Conventions provides for what is called mandatory universal jurisdiction, since they oblige States to try those who have committed grave breaches in institute necessary proceeding to try them or extradite them. To given that extradition to another State might not be an option, this is where the requirement to implement through national

measures such as national laws comes into place. If there is no possibility of extraditing then the saddest part of obligations is the requirement to a penal legislation to enable to States to try offenders as I said the regardless of the nationality or the place of the offence. Now it was written clearly in the Convention. The Geneva Conventions include the grave breaches include a list of certain offences in the relevant provisions that set out in the papers as well as conventions so I don't propose to go through that list. Except to say that the limitation to this scope of this jurisdiction and this obligation to grave breaches is I think the weakness of the Geneva Conventions in two respects; they don't cover the offences for non-international armed conflicts that are list in common Article 3 of the Geneva Conventions. And that is important to given the moral context because they don't apply to non-international conflicts or other violations of the Geneva Conventions that amount to grave breaches.

The Additional Protocol of the Geneva Conventions extends this principle of jurisdiction set out in 1949 Convention before those countries that have signed. I think it is 163 States that have ratified the 1977 additional first additional Protocol. It extends the principle of jurisdictional to grave breaches of the rules relating to the conduct of hostilities and not just in relation to protect persons in qualifies all grave breaches of war crimes. There are of course other instruments in human rights law as well as IHL that impose this obligation. This includes the 1954 Hague Cultural Property Convention and its Second Protocol. So the laws in respect of international conflicts obligation to exercise the universal jurisdiction on States is quiet clear and its been in existence since the Geneva Conventions came into force. It is most recent in the case of non-international conflicts. So a wide range of violations of international humanitarian law committed during non-international conflict however, are now in the current climate widely recognized these war crimes and they are subject to universal jurisdiction as well. This was not only the case as recently as 1994 some observers doubted that international law imposed individual criminal responsibility for violations of IHL during non-international conflict. There has been a remarkable shift, however, since this time and in particular with the establishment of the Yugoslavia and Rwanda war crimes Tribunals. And of course with the subsequent document of the Rome Statute, it's now generally recognized that violations of IHL during non-international conflict are crimes that tracked in the individual criminal responsibility and also universal jurisdiction. This was enforced in 1995 by the Security Council in its Resolution 978 where it urged states to exercise in the universal jurisdiction over violation of IHL during non-international conflict in relation to the matter which the Rwanda Tribunal has jurisdiction.

I would say a passing that where the obligation to exercise universal jurisdiction in respect of international armed conflicts and the war crimes committed in those conflicts. This is mandatory under the treaty law as we discussed for non-international conflict, it is more permissive, more universal jurisdictional that States are invited and encouraged to exercise. At the Statutes of the International Criminal Court and International Criminal Tribunal for Rwanda for example: specifically provided universal jurisdiction to these courts for violations committed in an internal armed conflict and Parties to the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment are also obliged to either extradite or prosecute those persons who commit violation of that convention within their borders whether not these violations are perpetrated in conflicts of or not. So that was the very quick overview of the sort of state of play of universal jurisdiction in international and non-international conflicts.

We bring this to the present with the conclusion that this concept exists and it does exist in slightly different ways or is implied in slightly different ways in international, non-international conflicts. I am not sure that I entirely agree with Prof. Mani's characterization of this view of the limitations there are imposed for the universal jurisdiction and to exercise universal jurisdiction. We will take that up with in other form of discussion. But certainly the case law and the strict reading of the treaty provisions as distinct

from customary law do not seems to set out limits for the exercise of universal jurisdiction. In fact, I think may be one of the slight difficult with the obligation set out in the 1949 Geneva Convention is that they don't provide perhaps enough specific guidance two State Parties on what exactly either obligations and how far it need to go. These reach us to the final section that I wish to discuss and that is the issue of implementing the obligation in national legislation and the approaches that States have adopted in this area. Time doesn't permit in this forum for us to talk about individual State and you will be more familiar with what your home States have done in this regard where there it does exit legislation, but we can provide some draws and conclusion after examination of somebody's country's on certain different approaches that State have taken.

Mr. Justice Lokur will talk about some specific examples in his presentation, which will be very interesting but for my part, I will just like to talk about certain crimes and may be certain options States are followed.

Pursuant to the obligations contained in the Geneva Conventions, many States have adopted national laws granting some form of universal jurisdiction over war crimes. Most Commonwealth countries, which follow the common law tradition, tend to use legislation to implement their obligation and provide for repression or that is ability to investigate or to prosecute offences or grave breaches and serious violation of IHL. These are the typically implementing by way of the Geneva Convention act, which amongst other things establishes the offences under the domestic law, and then provides the courts with jurisdiction with the ability to exercise to jurisdiction and respect of the offenders as well as the offences.

Now countries that follow the civil law tradition have a slightly different approach and many of you more familiar with that then I as a common law lawyer but there is not this requirement necessarily for country follows civil law traditions to implement obligation for international treaties by way of national legislation. This makes finding the precise numbers of those countries that have actually implemented their obligations through national legislation somewhat difficult. I can tell you that 39 of the 53 Commonwealth States in the world had an act of some forms of legislation providing for limited universal jurisdiction to some extent. There is a report that Amnesty International did in 2001 where they done an examination of all States and they estimated more then 120 countries somewhere in the Europe, 2/3 of the countries in the world have some sort of mechanism legislation or otherwise to implement of that provide for universal jurisdiction over crimes. But again these figures are very difficult to verify and difficult to come up with an accurate number. So the approaches that some other countries have taken, some countries have provided, taken the laws, enacted laws, some countries cooperate directly their obligations under the legal systems of by virtue of their constitution or their legal systems. Still some countries have adopted laws providing the jurisdictional over crimes with any reference to the international treaties such as the Geneva Conventions. As I said, it doesn't appeared to be any coherent or standard model followed by States in this area some States have provided for unrestricted universal jurisdiction in their war crimes legislation, as required by the Geneva Conventions discussed earlier. Other States had imposed restrictions on the exercise of this jurisdiction, in various ways.

Certain States, as I said have unrestricted universal jurisdiction. Their legislation includes not only the grave breaches of the Geneva Conventions, it includes grave breaches of all the treaties, the IHL treaties that they have signed, other violations of IHL, the two grave breaches and some of have taken the additional steps of extending the scope of the offences that are covered by the universal jurisdiction to include customary law offences and States that do this strictly have a general clause in their legislation that speaks about violations of the "laws and customs of war", which is a very general phrase and to be a interpret quite broadly. These States typically have not restricted universal jurisdiction to the presence on their territory of the alleged offenders but it would be seem to give them jurisdiction over the offenders even in those offenders are present or outside their territories.

Many States have chosen for some reason to limit the universal jurisdiction that there Courts exercise investigating more crime and prosecuting more criminals. This doesn't seems to be required certainly under the Geneva Conventions over treaties provisions but one typically is that some States including Common Law States required the presence of the offenders on their territory before they will be able to get jurisdiction and as Prof. Mani says there is a certain analogies to this and practicality I think, the legislation in some states restricts universal jurisdiction to only international war crimes that is could be grave breaches or other violations but only in international conflicts.

Some States have extended that non-international conflict others have not. It tends to be that the older the legislation the more likely that more restricted to the treaties provisions such as the Geneva Conventions that is restricted to international crimes or international conflicts. More modern implementing legislation some times then incorporates the non-international conflict crimes.

Still others States adopt strictly approach they have enumerated specific crimes over which the courts can have jurisdiction and restrict any application of the legislation to those treaties that actually have a requirement set out in the international treaty that requires them to exercise jurisdiction over offenders that are found on their territories such as the Torture Convention, Genocide Convention and the 1949 Geneva Conventions. Some other restrictions you see in the legislation are limiting the jurisdiction of the national courts war crimes. Some States restrict the type of court can deal with these issues you see courts countries that can exclude military tribunal from dealing with war crimes and then you have other States they might designate High Court or Supreme Court is the only court have the jurisdiction over the matter and still other States exclusively provides the jurisdiction to the military courts in exclusively civil wars. So again there is no standard approached that's followed.

Many States limit the ability of the authorities to commence investigations are to institute proceedings it typically find a requirement from the Attorney General to sign of rising the commencement of the investigation for which will permit the court then to proceed with the war crimes trial perhaps because the political dimensions of these types of trial and high profile nature of them. Other states and I think there are some here that have this approach their constitutions were national legislation provide the international law whether the treaty or customary law automatically becomes part of the domestic law when ratification takes place, when they accept, when the treaties are accepted by the States. This is automatically incorporation into the domestic law.

States that have ratified the Rome Statute for the International Criminal Court have to consider the effect of the principle of complementary of jurisdiction of that Court. I think when assessing of the domestic law of legislation and how broad this scope of the universal jurisdiction that they will give to courts to exercise. As we know Article 17 of the International Criminal Court provides that the International Criminal Court will not get jurisdiction for do not have the authorization to set the jurisdiction for States Parties if, unless of the country that has jurisdiction is unwilling or genuinely unable to carry out the investigation or prosecution, if the domestic legislation is not adequate or not broad enough in scope it could be gaps that the International Criminal Court could move to fill and I think it is in the States interest to deal domestically with these crimes because as has been stated it is their specific responsibility prime responsibility and when another comes before an international tribunal, I think that is the least desirable option for everybody concerned.

Time precludes the details discussion of the International Criminal Court and its jurisdictional provisions many of you already will be familiar with them. I have a couple of pages and set up very briefly in the paper if you are interested in doing that. I move now to my conclusion by saying the difficulty with State practice in the area of universal jurisdiction over war crimes is the lack of coherent approach were standard approach in

the area. Limitations and restrictions that are frequently imposed by States international legislation don't appear to be legally required under international law. These restrictions someone would say unnecessarily restrict the universal jurisdiction provided for by the IHL treaties and specifically the Geneva Conventions of a provisions of which are very broad. There are of course many different reasons by States may choose to limit the ability of their courts to exercise universal jurisdiction over war crimes; these undoubtedly include practical as well as political concerns, quite apart from the legal considerations.

The ICRC for its part is not advocating any single law or any single model for States to follow in establishing universal jurisdiction over war crimes under their domestic laws. Although the ICRC has develops a model implementation laws, which we feel does satisfy the obligations. We really offer this to States, as assistance where it means required by those States. The ICRC does however take the position that would like to urge and encourage to States to adopt all the measures (legislative or otherwise) that are necessary to permit them to satisfy their IHL obligations to effectively prosecute war crimes, wherever they occur. This includes providing a national courts with the widest possible jurisdiction, covering the widest number and category of offences including treaty-based as well as customary law violations of IHL to enable them to accomplish this goal. Compliance with IHL rules and, ultimately, going back to slide the aim of IHL that is the protection of the victims of armed conflict, ultimately depend upon it. Thank you very much for your attention.

And now with any other further review, I will turn the podium over to Mr. Justice Madan Lokur, who is a serving Judge, of the Delhi High Court, where he has been serving since 1997, first as an additional in a temporary capacity 1999 as a permanent Judge of Court. He obtained his Law Degree from Delhi University Faculty of Law in 1977. He has vast experience in Civil, Criminal, Constitutional, Revenue and Service Law. As a Judge, he has been actively initiating traditional forum to speed up with judicial justice delivery system and also encouraging continuous judicial education through the national judicial capacity. He generously volunteers his time to international law events throughout India and contributed greatly to the study of international law. We have a partner Organization in New Delhi called the Indian Society of International Law and often you can seen him there after hours in the library reading up on various aspects of International Law. So, Justice Lokur.

Justice Madan B. Lokur, Judge, Delhi High Court: Thank you Larry, Mr. Chairman, Your Excellencies and Distinguished Guests. For my presentation, I have divided into four parts, the first part I have just broadly deal with some of the legislations in few countries in Europe, in the second part I will refer to some cases that have been decided by the Domestic Court in Europe, in the third part, I would like to just mention about the international response to universal jurisdiction to war crimes that is the special tribunals and the International Criminal Court and finally whatever the problem we are facing and how can we deal with them. I will end up by giving you just a brief idea of the Indian legal scene since you are here in this country. It does appear to me that the 1949 Geneva Conventions in a sense laid the post-war foundations for universal jurisdiction. And there are three important factors, I think we need to keep in mind one is that these State parties have undertaken a legal obligation to search for the guilty parties and to bring them to trial before their domestic courts or to extradite them, this is one. Secondly, the 1977 Additional Protocol reinforces and expands this obligation on the States and thirdly, the States cooperate and assist each other, which is the requirement of the Additional Protocol I in the investigation and prosecution of serious violations of IHL.

So I think, without formally using these as the basis for exercising universal jurisdiction, countries have enacted legislation their conducted investigations, their conducted trials, without realizing that they are actually getting their source from the Geneva Conventions. But I think what we need to do is to ask ourselves: what would the domestic court in our country do if the case of universal jurisdiction were filed in that court? It appears

to me that the tendency is to exercise universal jurisdiction, but it must have some legal backing. It is not that the court can do whatever it feels like doing. There must be some statutory backing. Belgium had a rather sweeping law, which of course, it has had to roll back, the courts in Spain, and the courts in England have exercised universal jurisdiction and they have some legal backing for that. But, there is a qualitative difference between, legislative action and action through the courts. I would like to give some brief introduction to some of the legislations in Europe. For example, in Austria, the Penal Code requires the Courts to exercise universal jurisdiction over acts, which Austria is "under an obligation to punish". Now this includes the grave breaches under the Geneva Conventions and the Convention against Torture. It has also other statutes, domestic statutes providing for universal jurisdiction such as for kidnapping, for slavery, for human trafficking, etc. And in these examples, the presence of the accused or presence of the suspect is not necessary in Austria. On the other hand, in the case of hijacking, for example, hijacking an Aircrafts the presence of the accused is necessary.

The Belgian law in 1993 dealt with grave breaches of the Geneva Conventions and the Additional Protocols. In 1999, the Belgian law under went to a substantial change and it included crimes like genocide and crimes against humanity. But this was repeated on 1st August 2003 and it was made far more restrictive. One of the reasons was that during this period, the Belgium courts exercised jurisdiction over all kinds of crimes, over all kinds of persons including Heads of States, Heads of Government and that is perhaps what lead to be the amendment of the law. And today a suspect cannot be tried only if he is a Belgian or has primary residence in Belgian territory or if the victim is a Belgian or if Belgium is required or Belgium itself is required by treaty to exercise jurisdiction over the case. The nexus requirement, which were absent earlier try to 2003 have now been incorporated in the new legislation.

The German Penal Code, of course also exercises vast jurisdiction enables courts to exercise vast jurisdiction over war crimes, genocide, crimes against humanity and it effectively incorporates Articles 6, 7 and 8 of the Rome Statute. It also includes widespread or systematic attack directed against civilian population. With regard to local or ancillary laws, offences, such as human trafficking, prosecutions are permissible on the basis of international agreements.

Netherlands has an International Crimes Act, which is also remarkably broad in its reach. The presence of the suspect is not required in war crimes, genocide, crimes against humanity and torture. But the presence requirement is mainly the sanction is some of the other crimes partly, because of the difficulty in carrying out the trial in absentia.

The Swiss Military Penal Code, underwent a revision in 1968 and it provides for universal jurisdiction, and it makes an offence to violate international humanitarian law, but the offences are required to be tried by a Military Tribunal.

Now from these four or five examples of laws in Europe is not possible to find a common or a golden thread, which runs through all these laws. But, I think the basic elements of exercise of universal jurisdiction in some crimes; it is war crimes, genocide, crimes against humanities, crimes related to torture are adhered to. There are differences of course presence requirements, are required in some countries, nexus requirement is there in some countries, territorial requirement, or nationality-based or offence-related requirements are necessary.

Just look at few cases that have been dealt by the courts. A Court in Spain tried an Argentinean, Adolfo Scilingo and sentenced to him 640 years in prison for crimes against humanity. The important thing is that charges of genocide and terrorism were dropped against him because of the difficulty in establishing proof. And Afghan warlord, who had fled to Britain in 1998, was tried in person for torture and hostage-taking in Afghanistan. Another Argentinean, again a part of the dirty war in Argentina, Ricardo Miguel is being held in Spain awaiting charges of crimes against humanity. He was extradited from Mexico. Now these are examples, these three examples are given are of individuals who are

present in the country and who are being tried for war crimes.

There is a case for example now that is going on in the Spanish courts of Genocide. The victims are staying in Spain but the genocide is believed to have been committed elsewhere. The problem is the evidence of the quality of the evidence can stand scrutiny in a court of law. What about the suspects? The suspects are again not within the territorial jurisdiction of Spain. So get over the difficulty of problems regarding immunity and so on and so forth. Some of the suspects have been dropped. The point is that even at the preliminary stage of a case of this nature some compromises are required to be made.

Netherlands set up a National Investigating Team for War Crimes in the 1990s as a result of a large number of asylum seekers from Afghanistan. Investigations by this unit revealed that two secret police officers were in Afghanistan. Investigations were conducted into their affairs and the investigations were lengthy, they were difficult because it involved investigation into offences that were committed a long time back, in a different country and in a different cultural environment, in a different land altogether. The investigators had to make several trips to Afghanistan and to other countries to obtain the testimony of witnesses. And unfortunately during trial, many of the witnesses changed their testimony partly, because of threats that they received from the relatives and the associates of the accused persons. So it does appear easy to prosecute an individual for an offence if he is within the territorial jurisdiction of the country but even in such cases it is possible like the Afghan warlord.

There was also a case of Bosnian Serb in Austria to press justice. In the case of Bosnian Serb none of the five prosecution witnesses could identify this person. Of course, if the accused is outside the country then the problems become worse. Trials in absentia really need no where. This is a fact of life, which I think we all have to except. There are also problems of extradition is not so simple.

The case of Augusto Pinochet for example it is quite fresh in everybody's mind. Sometimes like the example that I gave about Spain it appears that its students not to press charges against the Head of state or Head of Government or former Head of state or the former Head of Government and now in any case the international court of justice in the case of the Republic of Congo Vs Belgium has made it impossible to prosecute a Head of State or a Head of Government.

There are also a large numbers of logistical problems that have been involved carrying out cases of this nature. It's very expensive, that's one. Evidence is something that I have already adhered to. Rich country like Netherlands found the trial and the investigation into the Afghan warlords case to be very expensive. Now we cannot overlook the fact that the financial burden is quite heavy on the country, which is carrying out the exercise. So we have to fall back on international responses and what can the international community do.

We have had for examples in the recent past the first one that, I would like to advert is to International Criminal Tribunal for Rwanda or ICTR, which was set up in 1994. The intention of this Tribunal was to prosecute the organizers and leaders of genocide and other serious violations of international humanitarian law in Rwanda, where about the 800,000 people were killed. The achievements of the Tribunal have been quite important from the legal point of view.

In the Akayesu case, for example the ICTR ruled upon genocide as defined in the Convention for the Prevention and Punishment of the Crime of Genocide. It is the first decision of its kind on genocide. The ICTR also held that rape and sexual violence might constitute genocide in the same way as any other act of serious bodily or mental harm, as long as such acts were committed with the intent to destroy a particular group targeted as such. In actual fact the ICTR has decided very few cases and there are some three issues, which I think we need to address. One is the pace of proceedings the ICTR was constituted in 1994 and the pace of proceedings has been very slow. It could be partly due to the voluminous evidence, the voluminous records, it could also be the complexity of the cases but how far and how long can the international

community wait for prosecution to take place? The second problem is that some of the entities have still not be apprehended and the other prosecutions are likely to be closed because of insufficient evidence. Now this we can come about after 10 or 12 Years. Now is this the problem that the domestic courts have to solve at a subsequent stage or is it a problem the international community has to address to itself too. The third is the huge expense that is involved. The ICTR is believed to have cost US Dollar 1 billion, which is a huge-huge amount of money.

Witness protection has always been a problem in Criminal law. Prof. Mani has referred to a case of Delhi. The ICTR fortunately has made adequate arrangements for the protection of witnesses and some of whom have been relocated, and also of the victims. We tend to forget about victims of crime, who are been given physical and psychological support, especially victims of rape and sexual assault.

International Criminal Tribunal for the Former Yugoslavia, that's ICTY was the first of its kind and that was set up in 1993. Its terms of reference are very broad and it includes grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity, which resulted in the death about 250,000 people. The Tribunal intense to spearhead the shift from impunity to accountability affirming what UN Secretary-General, Kofi Annan said during his visit to the Tribunal in 1997 that, "impunity cannot be tolerated, and will not be. In an interdependent world, the rule of law must prevail."

The ICTY has made some significant contribution in showing that the question no longer is whether leaders should be held accountable. The question now is whether they can at all be held to account. This is been shown by indicting Slobodan Milosevic, who was an Acting Head of State, who allegedly committed serious crimes while he was in office but unfortunately the investigation went on for so long the trial as a prosecution went on for so long that even though it began in February 2002 it continued till his death in March 2006 without any final result.

The ICTY of course has also been made some advances in law such as enslavement has been given an expanded definition, legal treatment and punishment of sexual violence in wartime has also been considered by the ICTY. But there are two contributions made by the ICTY, the first is that wherever necessary the cases have been referred to national jurisdictions. This is to strengthen the capacity of the national courts and is a part of the over all the strategy of the ICTY this is one important factor. The second is that the War Crime Chamber of the Court of Bosnia and Herzegovina, who has been set up, which meant the creation of the first permanent and specialized state-level organ to deal with war crimes and international humanitarian law. The second is an aspect of the capacity of building

The Special Court in Sierra Leone I think has been more pragmatic in sense that it has limited its jurisdiction to try those who bear the greatest responsibility for war crimes. The result is that only eleven persons have been indicted and it is expected that because of this the proceedings before the special court will perhaps in soon. It is also the first court, which has been set up of the first tribunal that has been set up in the theatre of conflict. This poses its own problems of infrastructure. Another significant achievement is that of the eleven Judges that have been appointed some of them are from Sierra Leone itself, again an aspect of capacity building and the involvement of the domestic judges. This will also hopefully reduce cost and speed up the justice delivery system.

The special tribunal for Cambodia has been yes or no sort of an affair, crime was suppose to be committed between 1975 and 1979, which was almost 25 years ago but the suspects have not been brought under book. A lot of been said by the International Criminal Court, so I would not like to repeat that except to say that it is almost 4 years old but the first suspect that is the Congolese militia leader Thomas Lubanga made his pre-trial appearance only on 17 of March 2006, i.e., a gap of about of 4 years.

Finally, whatever the lessons that we are learning from this there are 6 and 7 lessons, which I think we need to learn, one is that the international community is alive to the problems of violations of international humanitarian law but I think the greater effects need to be made by the international community. It has to be greater cooperation between the members of international community. Second, the costs need to be controlled, it has a huge burden on any State if it has to try war crimes so the cost need to be controlled. Thirdly, capacity building has to be encouraged the special court in Sierra Leone has given us this break through by setting up in the court of the theatre of conflict, the war crime chamber in Bosnia and Herzegovina is also another step in this direction. Fourthly, is the problem of evidence gathering, how reliable is the evidence, how to gather evidence, how expensive is it going to be. These are questions that would need to be answered. Fifthly, witness protection and crime and victim protection. This is also extremely important. The ICTR has done some commendable work in this. The Rome Statute of international criminal court also has some very interesting articles on this. They have set up a victim trust fund for example. We need to look after the interest of the witnesses in the victims. Sixthly, the indictment must be clear and focused like the case of Milosovic, for example they were almost 66 indictments and that is perhaps one of the reasons why the trial never came to an end. Number seven; I don't think, I would like to adequate the setting of the military tribunal. I think it would have to be civilian tribunal the standards of justice how much more different than they are in the military tribunals as in compare to civilian tribunals. What about the law in India? Our law is about 150 years old. The Indian Penal Code was set up in the year 1860. It applies to citizens of India who commit an offence within the territory and even beyond its territories. It applies to non-citizens who commit an offence in India. The jurisdiction of the Courts under the Indian Penal Code stretches to persons on any ship or aircraft registered in India. Therefore, it appears to me on a reading of the law as it now stands that it may not be possible for a Court in India to exercise universal jurisdiction in the sense that we understand it. They have of course been no such case that has been tried in India, although we have implemented the Geneva Conventions. We have had crimes on mass scale riots and so on but which may perhaps involve violations of international humanitarian law, but there has been no direct universal jurisdiction exercise. We do have a statute in India, which is the Information Technology Act of 2000, which was enacted by a parliament and as far as I am aware this is the only act, which has enacted in universal jurisdiction. It has made punishable an offence committed by any person of any nationality anywhere in the world, if his act affects any computer or computer network situated in India. As and when a case is filed in this act, you can be sure I will be there. Thank you very much for your patience.

Mr. Larry Maybee: Thank you Justice Lokur for providing us an additional perspective of the issues and providing us a very relevant case examples from countries as well as issues that might be a concerned to specific States. It is very interesting and I think an acts note upon, which to finish this Session afternoon now. I have been told that the banquet hall needs to be arranged for the dinner this evening that's kind of being hosted by Government of Japan and that were urgently required to determinate so I would suggest then if there is very serious questions. May I have the hope to hold the questions till the evening activities and we will be available at the dinner so if you have any questions, the panelists will be available to answer the questions there. That is acceptable. Thank you very much for your attendance and your indulgence. Thank you.

Secretary-General: Excuse me, Ladies and Gentlemen, I will just remind you that we are going to enjoy the Government of Japan's hospitality and you all are invited at 7.30 pm in this same Kamal Mahal. Thank you.

The meeting was thereafter adjourned.