PROPRIO MOTU POWERS - THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE 15 OF THE ROME TREATY.

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ABSTRACT

The signing of the "London Charter" in 1945 by the Allied powers who conducted World War I, established an international tribunal to try those who among the Axis powers had committed serious war crimes and crimes against humanity.

Under that charter the Allied powers established a number of important bench marks which in subsequent years broadened into the elicitation of a whole new jurisprudence under what has now come to be known as International Human Rights Law. Aside from those rules embodying what are referred to as Human Rights Law, the Nuremburg and Tokyo tribunals established the principle that individuals were personally subjected to a Universal Law that underpins International Law: It was further said that persons who commit either War Crimes and/or Crimes against Humanity or Genocide or Aggression against other States, remain subject to a higher law having a universal application referred to as International Human Rights Law. To that law, such persons become personally liable.

Notwithstanding many criticism by subsequent critics of the ex-post facto nature of the laws applied by both the Nuremburg and Tokyo tribunals which were established under the "London Charter", judgments that resulted from those two tribunals set forth a universalistic jurisdiction to which War Crimes and Crimes against Humanity became subjected. The universal nature of the jurisdiction posited a power among all nations to prosecute individuals who had committed such breaches of international law, whether or not, it had affected the state or nationals of that state which commences the prosecution. This universal jurisdiction applicable to War Crimes is similar to the universal jurisdiction held by all nations over pirates – piracy in jure gentium.

The next resort to this form of universal jurisdiction was taken by the Security Council of the United Nations in 1990 when the Council under its powers posited in Chapter VII of the UN Charter proceeded to establish for the first time two International Criminal Tribunals for both the former Federation of Yugoslavia and for Rwanda. By establishing those two tribunals the Security Council displayed that the nations represented in the world body were committed to hold individuals answerable to breaches of International Humanitarian Law caused by their committing of War Crimes and Crimes against Humanity.

Since establishing the first two tribunals the Security Council established four further tribunals for: Sierra Leone, Cambodia, Timor-Leste and more recently for Lebanon.
These ad-hoc tribunals were able to enquire into crimes arising out of both international and internal conflicts and were answerable to the Security Council. However, these were found to be expensive to maintain and difficult to co-ordinate.

Their jurisdiction was limited to war crimes and crimes against humanity and not for the crime of aggression and crime against genocide. These ad hoc tribunals were not permanent and are timed to end in 2012. These do not have a unified Administrative structure to back them and are also ad-hoc in nature. These structures were found to be corrupt and biased. This had been repeatedly seen in the way the Administrative structure that supported the ad-hoc tribunal for Rwanda functioned.

The approach taken by the Prosecutors to render justice at these ad-hoc tribunals was prosecutorial and was not reconciliatory. The prosecutorial approach did not strike a concord with the defence. Therefore no exculpatory evidence if any was made available to the defence from the prosecutor. With these several deficiencies in mind the nations met in Rome to forge The Treaty of Rome to establish a permanent International Criminal Court (ICC) with universal jurisdiction with a global reach while permanently sitting in the Hague.

The International Criminal Court having arisen out of the Treaty introduced into its vocabulary a distinction of two groups of Nations. "State Parties" where nations have accepted the Treaty and "non - State Parties" who have not.

The United States of America among several others including Sri Lanka and the Sudan have not signed and accepted the Treaty. The generality of the provisions of the Rome Treaty provides for prosecutions to be commenced with the support of both "State-Parties" and the United Nations Security Council (UNSC). It was felt by a considerable number of Nations who were members of the preparatory committee that such an arrangement limits access to the ICC, and thereby some miscreant nations might remain free beyond the reach of the prosecutor and hence the ICC. To correct such an anomalous result from defeating the very aims and purposes of the Treaty and the reach of the ICC, the nations that took part in the final stages of the discussions in Rome in March - April 1998 proposed the giving of proprio motu powers to the Prosecutor in an Article monumentally detailed – Article 15.

The core of the writing here is to detail the history, purpose and the application of that Article (15) to point out that even "non-state" powers are liable to be prosecuted for their misdeeds. These misdeeds are those which are mentioned in Article 5 and detailed in Articles 5, 6, 7 and 8 of the Treaty. The prosecutor could under that Article, and acting on his "Own-Volition" spread his net wide enough to provide the Treaty with what amounts to "a universal jurisdiction".

Therefore the argument is made that "non-state parties" are equally liable for prosecution before the ICC. That forms the pith and substance of the writing.

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