By Dr. V. G. Venturini

Chances that we may learn the truth on this subject from the 'debate' now progressing through Parliament are very slim.

A proper sense of history would have indicated the impossibility of 'winning' a war in the tribal world of Afghanistan. But even little knowledge would have demanded a familiarity with Cyrus, Darius, Alexander and the British Raj.

Knowledge of events only 30 years ago would have explained how a world power was humiliated by bands of raggedy partisans, some of them armed and organised by American 'intelligence'.

A modest knowledge of the law would have been decisive.

The United States invaded Afghanistan on 7 October 2001, ostensibly to pursue Al Qaeda, held responsible for the outrages in New York, Washington and Pennsylvania. The invasion was an act of misdirected revenge, because the majority of the plane hijackers were Saudis, and the nervous centre of the operation was Hamburg, Germany.

There is no evidence linking Afghanistan with the attacks. There are some indications that the Taliban offered to deliver up Osama bin Laden, under certain conditions, to the United States months before and even one month after it began the invasion. The offers were rejected. Revenge was obviously preferred.

In any event, revenge is not a legal ground for going to war, which is a crime under the UN Charter unless a) for self-defence or b) under UN

Security Council authorisation.

There was no legal basis for the invasion: neither UN Resolution of the Security Council 1368/12.09.2001 nor UNSC Resolution 1373/28.09.01 authorised it.

Australia joined between October and December 01. The current 'reason' is based on 'the national interest' and 'solidarity with an ally'.

Intervention was deemed authorised by the ANZUS Treaty, presumably art. IV, by which:

Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes./

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security./

Australia's presence in Afghanistan is in violation of art.2(4) of the UN Charter, whereby:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations./

Nor does Australia's action meet the letter and spirit of art.51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security./

Time has revolved the reasons for Australia's intervention, from 'solidarity with our great and powerful friend the US', 'obligations under ANZUS', a sharing of 'self-defence', to 'the capture of Osama bin Laden', 'the pursuit of Taliban', the 'war on terror', 'avenging the victims of Bali outrage', 'establishing freedom', 'honouring human rights', 'liberating Afghan women', 'supporting free elections', 'training the Afghan National Army'.

They are all /ex post facto/ rationalisations. Nor can they be justified with that mysterious, never defined /passe/-/partout/ which is 'the national interest'.

In fact and in law, nothing, not even the establishment of an International Security Assistance Force in December 2001, could 'cure' that initial violation of the law. Afghanistan is now devastated, its people systematically killed, its democracy non-existent, its impotent 'government' recognisably corrupt.

When war is entered into outside or against the provisions of the UN Charter a serious consequence follows: it becomes a crime.

That crime is now punishable under the 2002 Rome Statute of the International Criminal Court, to which Australia is a signatory, while the US is not.

Under art.5(1) of the ICC Statute the crimes within the jurisdiction of that Court are: those of genocide, those against humanity, war crimes, and the crime of aggression. All such crimes, but the last one, have been extensively defined in arts. 6, 7 and 8.

There has been a problem with the meaning of aggression, a definition of which is still to be adopted in accordance with arts.121 and 123. But help is on the way: a Review Conference of the Statute which concluded on 11 June 2010 adopted a resolution by which it proposed an amendment so as to include a definition of the crime. The definition is to be based on UN General Assembly Resolution 3314 (XXIX) of 14.12.1974, and the offence is likely to be defined as one committed by a political or military leader and which, by its character, gravity and scale constitutes a manifest violation of the Charter. The Conference agreed also to authorise the ICC Prosecutor to initiate investigation of the crime, under certain conditions, and always pending amendment to the Statute.

It seems that, if an action were to be initiated against all Prime Ministers, Ministers of Defence, Foreign Affairs Ministers and all other members, from time to time, of the Cabinet National Security Committee who took the initial and subsequent decisions to authorise and maintain the Australia's presence in Afghanistan, the list of the collectively-called "the Accused" open to investigation and possible charges would be a long one.

The Accused could be charged and held responsible for:

- acts of aggression, as defined in United Nations G.A. Res. 3314, art. 1 (1974)

- breaches of international humanitarian law and human rights

- crimes against peace, as define in art. 6(a) of the Charter of the International Military Tribunal at Nuremberg and art. 16 of the Draft Code of Crimes Against the Peace and Security of Mankind (1996)

- war crimes, as defined in art. 6 (b) of the Charter of the IMT at Nuremberg and in art. 8 of the ICC Statute

- crimes against humanity, as defined in art. 6(c) of the Charter of the IMT at Nuremberg and art. 7 of the ICC Statute

- crimes against Prisoners of War, including acts in contravention of the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and arts. 13 and 14 of the Geneva Conventions Relative to the Treatment of Prisoners of War (1949), and their 1977 Protocols

- crimes against civilians, including the targeting of civilian populations and civilian infrastructure such as markets and residential areas, causing extensive destruction of property not justified by military objectives, using cluster bombs, using depleted uranium; and acting in violation of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) and the relative Protocol 1, art. 54 on the protection of objects indispensable to the survival of the civilian population, and art. 55 on protection of the natural environment.

It is beyond question that the International Criminal Court has jurisdiction and, subject to any other ground that the Prosecutor may find in the course of his investigation, the Accused are responsible for flagrant, repeated and longstanding violation of the provisions of the ICC Statute arts. 5 (1) (b), (c) [crimes against humanity and war crimes] and (d) [aggression], 7 (k) [other inhumane acts of a similar

character intentionally causing great suffering, or serious injury to body or to mental or physical health], and 8 [war crimes].

A formal complaint to the ICC would contain a request that, pursuant to art. 15 (1) of the Statute, the Prosecutor initiate an investigation of the type /proprio motu/ on the basis of the abundant information provided by the Complainant. The Complaint would also contain a request that, pursuant to art. 15 (3), the Prosecutor "submit to the Pre-Trial Chamber a request for authorisation of an investigation" of the Accused.

The Accused should then be very wary of travelling to any signatory to the Rome Statute, because the Complainant would have asked the Prosecutor to obtain ICC arrest warrants for the Accused, pursuant to art. 58 (1).

Clearly, if Australia wishes to uphold the rules of international law, it should set the example, abide by the UN Charter, by all the Conventions to which Australia is a party, including the ICC Statute, and consequently withdraw from Afghanistan as quickly as possible, having served - simply out of self-respect - a short, firm notice on the other partners in crime.

Maybe something may still come out of the debate. Otherwise the admonition of recently departed historian could appear most relevant: if one does not know history, it is just like being born yesterday. And if one is like being born yesterday, then any leader can say anything - in the case of Afghanistan, with impunity.

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