

“WAR IS NOT THE ANSWER:
the ever present threat to the Rule
of Law”

A perspective from the Special Tribunal for Lebanon

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David Baragwanath, President
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The best riches for us are the Laws of England. In my opinion, the greatest of all evils is war.

(Para Tuhaere, 10 July 1860, at the Kohimarama Conference, Auckland during the Land Wars, following the disastrous British defeat by Maori of Atiawa and Ngati Maniapoto at Puketakauere *The Maori Messenger – Te Karere Maori*, vol 7, number 13 14 July 1860, 14 cit Mark Hickford *Lords of the Land* (Oxford 2011) 395; James Belich *The New Zealand Wars* (Auckland University Press/Oxford 1986) chapter 5.)

Since wars begin in the minds of men, it is in the minds of men that defenses of peace must be constructed ... ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.

(UNESCO Constitution)

*Il ne suffit pas
D'avoir horreur de
La guerre il faut
Savoir organiser
Contre elle les
Éléments de défense
Indispensables*

...

*Il s'agit de fonder
La paix du monde
Sur un ordre
Légal de faire
Une réalité de
Droit de cette
Solidarité
Internationale
Qui apparait
Déjà dans les
Faits comme
Une réalité
Physique*

“It is not enough to be appalled
by war; we must
know how to organize against it
the elements vital to defence

...

It is about founding world peace on a legal
base;
achieving the rule of law
by the common international effort
which as a physical reality
already exists.”.

(Memorial to Aristide Briand, French Nobel laureate, in front
of the Quai d'Orsay)

Our profession has a three-fold responsibility for minimizing the risk of war, by:

- (1) understanding the fundamental principles of the international rule of law;
- (2) implementing and developing those principles;
- (3) insisting, before the international community and those in power, that to achieve peace all of us including Governments must be beneath the law.

By infringing all three, New Zealand judges contributed to the Land Wars of the 1860s, with long-term effects.

In May 1861 Chief Justice Arney and fellow members of the Supreme Court, Justices Johnston and Henry Gresson, wrote to the Governor stating that:

...the constitution and mode of procedure of the Supreme Court as it exists at present are not well adapted for the investigation and determination of questions relating to Native Title *generally*.

(Arney, Johnston and Gresson to Browne, 9 May 1861, *AJHR-1861*, E-3, 13 cited by Hickford n2 above at 425.)

Like the Privy Council the following century (*Hoani Te Heuheu Tukino v Aotea District Land Board* (1941) NZLR 590, [1941] AC 308), both colonial government and the judges abdicated responsibility for protecting Maori from abuse of the 1840 Treaty of Waitangi – the formal compact by which the British Crown undertook in exchange for authority over New Zealand to protect the Maori people from the abuses committed by all colonists elsewhere.

And in 1964, in my first case as counsel before what is now the High Court of New Zealand, appearing on behalf of the Crown I did the same by infringing responsibilities (1)- (3).

(Keepa v Inspector of Fisheries [1965] NZLR 322, applying Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) 72 via Waipapakura v Hempton (1914)33 NZLR 1065)

It took a quarter of a century to begin repair.

Te Rununga O Muriwhenua v Attorney-General [1990] 2 NZLR 641 (CA)

Some milestones:

- **1648 Peace of Westphalia**

followed the death of some 7 million people, exceeding in proportion to population the 15 million of WWI. Basis of the modern concept of the autonomous Nation State

- **1945 United Nations Charter**

responded to the enormities of WWII. Endorsed the concept of autonomous Nation State; provided as exception Chapter VII.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.

Article 42

[empowers use of armed force]

Since 1945 “ ... some 313 conflicts have taken place resulting in an estimated 92 to 101 million people killed. In addition an inestimable number of persons have been injured, as have millions of survivors who have suffered physical, psychological and material harm.”

Professor M Cherif Bassiouni (ed) *The Pursuit of International Justice: a world study on conflicts, victimization and post-conflict justice* (intersentia2010) at xiii



There has been insufficient effort to turn the rule of law into a systematic measure of protection of human dignity.

Notable exception: *A(FC) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, described by Lord Phillips as the most impressive in his lifetime (London Review of Books 17 April 2014 p29).

The House of Lords quashed counter-terrorism legislation purporting to authorise long-term or indefinite detention of a non-UK national whom the Home Secretary wished to remove, for the reason that nationals were not exposed to such treatment. So it was unnecessary for protection against terrorism.

A more typical case is *West Coast Coal Ent Incorporated v Buller Coal Limited* [2013] NZSC 87, [2014] 1 NZLR 32 (Elias CJ dissenting):

- no business of the Environment Court to concern itself about the fact that the end use of coal, to occur overseas if a land use consent is granted, will probably release greenhouse gases into the atmosphere, contributing to climate change.

It is time for John Donne's distinction between mankind and islands to find its way into the law of an ever more globalized international society.

We need to return to Kant's 1795 essay "Perpetual Peace" with its three conditions:

- (1) that states be democratic: because citizens are decision-makers, they are reluctant to put their own blood and money to risk and so democracies tend not to fight one another;
- (2) a "League of Nations" recognizing the homage that each state pays (as least in words) to the concept of law;
- (3) a "world community" based on the hope that "peaceable relations" such as communications and trade across national boundaries would mean that "a violation of rights in one place is felt throughout the world".

JL Gaddis *The Long Peace* (Oxford 1989)

A revolution: the international criminal courts

- *First generation:* Nuremberg created under the London Charter for the war criminals, applying substantive international criminal law including war crimes and crimes against humanity
- *Second generation:* International Criminal Tribunal for the former Yugoslavia (ICTY) created by Security Council under UN Charter's Chapter VII exception to State autonomy; applying substantive international humanitarian law including genocide and crimes against humanity
- *Third generation:* Special Tribunal for Lebanon ICTY created by Security Council under UN Charter's Chapter VII, applying substantive domestic criminal law of Lebanon. First international criminal tribunal with jurisdiction over crimes of terrorism.

The Future

- Kant's third theme – contribute to strengthening the international community
- Premier Président Jean Fahed, Chief Justice of Lebanon:
“ We share the same values of the rule of law, impartiality, fairness and equality”
- Borne out by Lebanon's unique contribution:
 - Ulpian (from Sidon) “by nature all people free and equal” (2/5) and Papinian: (from Emesa, now Homs) (3/5) of Justinian's Digest which called Beirut “ the nurse of law”; now underpins the entire civil law and much common law
 - 17 graduates of American University of Beirut delegates to the San Francisco Conference creating the UN Charter who represented, as well as Lebanon
 - Iran
 - Iraq
 - Saudi Arabia
 - Syria
 - Charles Malik with Eleanor Roosevelt and others created the Universal Declaration of Human Rights
- Powerful Bar; eight law schools - all participating in STL's fourth annual course in international criminal law; Lebanon regional centre for banking and finance
- Vision of a rule of law future for Lebanon and the Middle East

Thank you!