REMOVING THE CAUSES OF WAR, MITIGATING ITS HORRORS, AND SETTLING INTERNATIONAL DISPUTES PEACEFULLY

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In the two Salmond lectures we see the Professor at the peak of his academic career and, 15 years later, the Judge drawing on his experience and learning as law officer, judge and diplomat – and as scholar.

His three topics still dominate the world's agenda, although parts of their content have been transformed, in some cases beyond recognition, by science and technology, the experience of the following 75 years and ideological change. His discussion also raises recurring questions of legal philosophy and method and about the roles of the university lawyer.

A striking feature of the 1922 Harvard lecture is the emphasis on the causes of war and especially on racial antagonism. The Judge moves away from the detail of arms limitation which was preoccupying the Washington Conference[1] he was attending to deeper worries about a war between the former allies of the Great War – a worry expressed at the same time by another great New Zealander, Sir Apirana Ngata.[2] Salmond's recognition of racism as a matter of international concern was probably not shared by New Zealand Ministers who just two years later vigorously opposed proposed supplements to the Covenant of the League of Nations, strongly supported by Japan, which would have enabled the

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1 The Hon Sir John Salmond was the New Zealand representative on the British Empire Delegation to the Washington Conference of 1921-22 on the Limitation of Armaments. See A Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) 202; Ministry of Foreign Affairs and Trade *New Zealand Consolidated Treaty List: Part 1 Multilateral Treaties* (1997) 8. For a summary of treaties entered into at the Conference, see 84-86.

2 See Apirana Ngata *The Treaty of Waitangi: An Explanation – Te Tiriti o Waitangi; he whakamarama* (Maori Purposes Fund Board, Christchurch, 1963); first published (Strickland and Bryant, Hastings, 1922) 11.

examination by the League Council of issues which New Zealand saw as domestic (such as its immigration policy).[3] But the Ministers were wrong and the Judge was right, at least as a prophet, since the international character of racial issues is now beyond dispute. In a more general way the 1922 lecturer was anticipating the declaration in the preamble to the Constitution of the United Nations Educational, Scientific and Cultural Organisation that "since wars begin in the minds of men, it is in the minds of men that the defence of peace must be constructed". That declaration, like the human rights provisions of the United Nations Charter, was a direct response to the horrors of the Holocaust. But since 1945 have followed Cambodia, Rwanda, the Balkans and other horrors. Salmond's lessons about blind prejudice and racial hatred and their international consequences have yet to be fully learned. Later members of the faculty have participated in the work of UNESCO and the Human Rights Commission in which issues of race were central.[4] They were also involved as scholars and advisers in the processes of incorporating the related international texts into New Zealand law.[5]

In 1906 the Professor reflects something of the optimism of the years following the First Peace Conference held at the Hague exactly 100 years ago as the first professors of Victoria University College were giving their first lectures. While that Conference had not had the impact on the limitation of armaments that some, especially the Czar, had hoped for, it did make major additions to the law of war as stated at that time in a handful of late 19th century treaties which the lecture mentioned. Thus the conference affirmed in principle and developed in detail both the principle of distinction – that only combatants and military objects were to be the subject of attacks – and the prohibition on causing unnecessary suffering.[6]

By 1922 the Judge is both sadder (with the death of one of his sons, Captain William Guthrie Salmond, in France in July 1918) and wiser (or at least better informed). His 1906 optimism about the security of the individual in warfare, for wars were to be only between navies and armies, has been tragically and massively disappointed throughout the century with the development of horrifying weapons of mass destruction, genocidal policies and the

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3 For example, see Malcolm Templeton *Human Rights and Sporting Contacts: New Zealand Attitudes to Race Relations in South Africa 1921-94* (Auckland University Press, Auckland, 1998) 7-9.

4 For example, see Quentin-Baxter "International Protection of Human Rights" in K J Keith (ed) *Essays on Human Rights* (Sweet & Maxwell (NZ), Wellington, 1968) 132-145.

5 For examples, see K J Keith "'Concerning Change': the Adoption and Implementation of the New Zealand Bill of Rights Act 1990" in the forthcoming festschrift by Margaret Clark in honour of Professor John Roberts.

6 For an evocative account of the times see Barbara W Tuchman *The Proud Tower: a portrait of the world before the war 1890-1914* (Macmillan, New York, 1962) ch 5.

recent predominance of civil wars with their greater impact on non-combatants. The process of attempting to "purify warfare" continues however, with moves, in part successful, to prohibit or control the use of certain weapons and to reaffirm and develop the law for the protection of victims of armed conflict in 1929, 1949 and 1974-77. Again, members of the faculty have been involved in these processes, participating in the diplomatic conference of 1974-77, and in 1973-74 in the proceedings in the International Court to attempt to prevent French nuclear testing in the Pacific. (One of them had earlier assisted the New Zealand Judge at the Tokyo War Crimes Tribunal and represented New Zealand at the 1949 Geneva conference.)[7]

The diplomatic efforts to strengthen the law governing armed conflict are concerned not simply with the substance of the law but also with the processes for the better implementation and enforcement of the law. That latter emphasis relates to Salmond's third topic – the peaceful settlement of international disputes.

The 1899 Hague Peace Conference adopted the Convention on the pacific settlement of international disputes, providing for independent and impartial fact finding, conciliation and arbitration. It also established the Permanent Court of Arbitration, building on the successful use over the previous century of ad hoc arbitrations, sometimes in crisis situations. That step was followed by the setting up of the International Court of Justice within the League of Nations. Again the optimism of the early part of the century has not been matched by later practice, although the International Court is at present as busy as it ever has been and there is a greater use of specialised tribunals and *ad hoc* procedures (one of which was used in 1925 to resolve a dispute, the *William Webster* case, in which Salmond had been heavily involved as Solicitor-General).[8] Again the faculty involvement with the peaceful settlement of international disputes has continued in both scholarly and professional roles (including in addition to the nuclear tests case the *Rainbow Warrior* dispute).

The lectures give brief glimpses of Salmond's understanding of the source of obligation in international law (something he considered more extensively in his *Jurisprudence*).[9] He was plainly also looking to a greatly enhanced role for deliberate lawmaking through treaty conferences like those of 1899 and 1921-22. The development of the law could not be left to state practice and the decisions of international arbitrators and courts. That message

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7 See "Mr Quentin-Baxter's Address" [1949] NZLJ 129 and Quentin-Baxter "The Task of the International Military Tribunal at Tokyo" [1949] NZLJ 133.

8 For an account of the *William Webster* case, and of Salmond's involvement, see A Frame, above n 1, ch 10.

9 See for example, Salmond *Jurisprudence* (3 ed, Steven & Haynes, London, 1910) 55-57.

was not only for the international community, for a day or two after his Harvard address he delivered an important and influential lecture to the New York Bar Association on the need for the systematic, professional restatement of national law.[10]

Those restatement processes call on the public responsibility of members of all parts of the profession and notably of the academics. Those processes can in general succeed only if sound scholarly work is available both as a basis for reform and restatement proposals and to test them, as with other products of the legal process, and to do that on a broad basis. Sir John Salmond in these brief lectures, as in his more substantial works, demonstrates within the one remarkable professional life the healthy interaction between the various professional and public roles of lawyers. He continues to present an extraordinary challenge and example.

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10 Salmond "The Literature of the Law" (1922) 22 Colum L Rev 197.