

# INTERNATIONAL LAW 1960 TO 2010: NOW AND THEN

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*In this tribute, I look back over 50 years of developments in selected areas of international law. I do this in part to prompt thought about future developments. I emphasise the importance of enduring principles and good process and the role they may play in facing massive new challenges arising across the globe, in balancing continuity and change, heritage and heresy.*

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## **I INTRODUCTION**

This tribute to George Barton looks back to 1960 when I came to Wellington near the end of my study for the LLB degree and became a student in his international law class, the beginning of a long, extremely valuable professional and personal relationship. One purpose in reviewing selected parts of the development of international law over that period is to prompt (younger) readers to look forward, say, to 2060. Another is to give a sense of law-making and law application as well as law breaking over that time. Yet another is the importance of enduring principles and processes. But first a word of warning about the dangers of prediction. In 1932 Ernest Rutherford dismissed as "moonshine" the practical relevance of nuclear energy. In 1937 the United States Academy of Science organised a study aimed at predicting scientific and technological breakthroughs. It got some things right, but, as Martin Rees has said, what is more remarkable is the things it missed: no nuclear energy (along with Rutherford), no antibiotics (8 years after Fleming discovered penicillin),

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\* Judge, International Court of Justice (2006– ); Professor Emeritus, Victoria University of Wellington. Thanks to Ellie Fogarty for research assistance and to Roger Clark and Geoffrey Palmer for comments. Given the potential scope of the paper, I have had to be very selective – for instance this paper contains nothing about trade, investment, the environment, the right to use force, air and space, territorial sovereignty, self-determination, State succession, treaty law, jurisdiction and sovereignty and very little about human rights (a major interest of George Barton's who was an early member of the Human Rights Division of the United Nations Secretariat). This paper is based in part on the address I gave in August 2010 at the Beeby International Law Colloquium. That date, the euphony of the title when read, and 50 as a round figure explain the title. Chris Beeby, also a Victoria University of Wellington graduate, was one of New Zealand's most eminent international lawyers: head of the legal division at the Foreign Ministry, Deputy Secretary, counsel at the International Court of Justice, Ambassador in Paris and Teheran (at the time of the coup) and at the time of his untimely death one of the seven original members of the Appellate Body of the World Trade Organisation.

no jet-aircraft, no rocketry or use of space, no computers, no transistors – that is, the study missed the technologies that have dominated the second half of the 20th century.<sup>1</sup> But who could have predicted Gordon Moore's 'law' that the number of transistors on microchips would double every 12 (later 18) months, as has been the case for nearly 30 years? And to come to 1960, who would then have predicted the social, ideological and political changes of the next 50 years – among them, the major, if incomplete, change in the role of women and the rejection of other forms of discrimination, the end of the Soviet Empire and the Cold War, the great rise of Asia, the terrible civil wars, the dangers of cyber warfare, the new diseases, the many dangers to the environment and new forms of trans-boundary crime. Those changes must be matched and, where appropriate, prohibited or regulated by international law, its processes and institutions, if they are to have a significant role. Continuity will be tested by change, heritage by heresy.<sup>2</sup>

Before I consider some areas of law, a brief word about New Zealand's place in the world in 1960 and now. The population had just reached two million, but is now well over four million. New Zealand had only 11 diplomatic posts. Now it has nearly 50. Well over 90 per cent of exports were pastoral, nearly 60 per cent were destined for the United Kingdom, with the United States second with 12 per cent and France next, mainly with wool purchases. (New Zealand, it might be noted, is still the second largest exporter of wool, behind Australia, but wool no longer appears in the list of main export commodities.) By 1960 the prospect of the United Kingdom joining the newly established European Common Market presented a major threat to the New Zealand economy and way of life and led over the next decade to one of New Zealand's great examples of diplomacy leading to the arrangements reached in 1973, a market access which continues to be important and to present challenges. Export trade has now greatly diversified both in commodities and services and in destinations, as have imports. The three largest trading partners are now Australia, China and the United States. One consequence in legal terms is that trade is no longer largely governed by bulk commodity agreements and relevant Imperial legislation, but by many different bodies of law such as that negotiated through the World Trade Organisation (WTO), bilateral and regional free trade agreements, the United Nations Convention on the International Sale of Goods 1980, shipping, aviation and intermodal transport conventions, and standard form agreements drawn up by bodies such as the International Chamber of Commerce and P&I Clubs. The movement of people in and out of New Zealand each year has increased from about 100,000 to over five million. That flow is supported by 45 bilateral air transport agreements and many visa arrangements and regulated but

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1 Martin Rees *Our Final Century: Will the Human Race Survive the Twenty-First Century?* (William Heinemann, London, 2003). Eugene Ionesco, the French playwright, warned in his play *The Rhinoceros* "You can only predict things after they've happened"! The perils of prediction are demonstrated by the speech the great American statesman and lawyer Elihu Root was to give on being awarded the Nobel Peace Prize for 1912. It was titled "Making Peace Permanent" and discussed The Hague Peace Conferences 1899 and 1907 and related developments. The speech could not be delivered in September 1914 as planned!

2 See Paul Freund *On Law and Justice* (Belknap Press, Massachusetts, 1968) at 23.

only to a limited extent by the Convention Relating to the Status of Refugees 1951 and in some degree by other human rights treaties.

By 1960, New Zealand had made important contributions to the role of international law and institutions in the post-War world, for instance through the delegation led by Prime Minister Peter Fraser at San Francisco in 1945, preparing the Charter of the United Nations; Sir Michael Myers, Chief Justice, and Colin Aikman at Washington and San Francisco at the Conferences preparing the Statute of the International Court of Justice; Colin Aikman in 1948 at the United Nations General Assembly which adopted the Universal Declaration of Human Rights; and Justice Northcroft as one of the judges at the Tokyo War Crimes Trial, assisted by RQ Quentin Baxter who also represented New Zealand at the Diplomatic Conference which drafted the four 1949 Geneva Conventions for the Protection of Victims of War.

These actions are to be seen as motivated by the aspiration stated in the Preamble to the Charter of the United Nations. "We the peoples of the United Nations" there declared their determination to "save succeeding generations from the scourge of war", "to reaffirm faith in human rights" and to "establish conditions under which justice and respect for the obligations arising from ... international law can be maintained". But resources of all kinds were limited and, to take just one measure, in the decade following the end of the War, only three New Zealanders studied international law at a graduate level abroad – Colin Aikman, George Barton and Daniel Patrick O'Connell. The latter two were members of a remarkable group who studied at Cambridge University under the supervision of Professor Hersch Lauterpacht before he was elected to the International Court of Justice, replacing his great mentor, Arnold McNair, in 1955. The group included Richard Baxter, later to be a professor at Harvard Law School and a judge of the International Court of Justice; Hans Blix, a great Swedish and international civil servant including being Director-General of the International Atomic Energy Agency and the last Head of the United Nations Monitoring, Verification and Inspection Commission in Iraq; Christopher Pinto, until very recently the long serving Secretary-General of the Iran-United States Claims Tribunal; and Stephen Schwebel who succeeded Baxter at The Hague.<sup>3</sup> A notable feature of the members of that group is the wide range of their professional lives, as scholars, advocates, law reformers, advisers, civil servants, arbitrators and judges, nationally and internationally.

I now consider selected aspects of five areas of international law, as they have changed over the last 50 years.

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3 See Elihu Lauterpacht *The Life of Hersch Lauterpacht* (Cambridge University Press, New York, 2010) at 97 fn 26. Colin Aikman was a student of Georg Schwarzenberger at the University of London where he prepared a valuable thesis, unfortunately not published, on the *inter se* doctrine as it applied within the British Empire and Commonwealth.

## II *INTERNATIONAL LAW IN COURTS, NATIONAL AND INTERNATIONAL*

In 1960 a full list of New Zealand reported cases concerned with international law would scarcely have exceeded 15.<sup>4</sup> Several are, however, of real interest, including an 1877 decision on jurisdiction over a murder on a foreign flag vessel on the high seas, cases on the extent of the powers of the New Zealand General Assembly to legislate in respect of the League of Nations Mandate for Western Samoa and for labour conditions on trans-Tasman shipping, and the place of the Treaty of Waitangi in New Zealand law. It helps to get perspective by recalling that in 1960 the Permanent Court of Appeal had only just been established and that in London, seen from New Zealand at least as the centre of the common law system, Lord Simonds was still the senior member of a House of Lords dominated by legal formalism. But real change was in prospect – Lord Reid was about to take that senior position and Lord Denning to return to the Court of Appeal as Master of the Rolls. Those changes had a major impact on perceptions of the judicial role throughout much of the common law world. One more comprehensive measure of the limited role of international law in national courts up to that time is provided by the *International Law Reports* published since 1929 and featuring decisions from 1919. By 1960 when Sir Hersch handed over the editorship to his son Elihu, only 23 volumes had been published. (Among the assiduous contributors of cases from the British Commonwealth and colonies, Palestine, Burma and the Philippines was Dr GP Barton of Wellington.) They will soon extend to 150 volumes. That change is a reflection of the great increase in the range of international law, its much more extensive application in the national legal order by national courts and the greater understanding by legal academics, practitioners and judges of the role that international law plays – an understanding long held by those preparing legislation implementing international law.<sup>5</sup> The New Zealand list of cases would now be many times the 1960s' list of 15 and would include issues arising in respect of arbitration, bills of lading, commercial law, discrimination, employment and family law – to take only the first six letters of the alphabet.

The positions of international courts in 1960 and now also differ greatly. The European Courts were only just getting under way. No other regional courts were in prospect; one in central America had lasted from only 1907 to 1917. The Permanent Court of Arbitration was invisible, and, because of the refusal of the former enemy States to cooperate, the attempts of western States to invoke the provisions of the Peace Treaties with Bulgaria, Hungary and Romania for the arbitration of disputes about human rights failed. By contrast, the Conciliation Commissions established under the Italian

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4 See for example KJ Keith "International Law and New Zealand Municipal Law" in JF Northey (ed) *AG Davis Essays in Law* (Butterworths, London, 1965) 130.

5 Legislative implementation of international law still does not receive the scholarly attention it should; for a notable exception see James Crawford "The International Law Standard in the Statutes of Australia and the United Kingdom" (1979) 73 *AJIL* 628. The New Zealand Law Commission provides a useful account of the New Zealand situation in *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996).

Peace Treaty were active and handed down a number of interesting decisions in the 1950s and the 1960s. The International Court of Justice was getting to the end of a busy and successful first 12 years, with major decisions on the law of the sea, the law of treaties, the status of South West Africa, and the law of international institutions, with two cases from Asia nearing decision.<sup>6</sup> But that case load was about to collapse after the disaster of the *South-West Africa Cases*,<sup>7</sup> and the disappointment of *Barcelona Traction*.<sup>8</sup> Those cases precipitated challenging debates in the General Assembly about the role of the Court and proposals, which were adopted in one particular context at the United Nations Conference on the Law of the Sea,<sup>9</sup> for alternative permanent and ad hoc tribunals. The Court nevertheless continued to be involved in the law of the sea through that period with the *North Sea Continental Shelf*,<sup>10</sup> the *Icelandic Fisheries* and the *Libya/Tunisia Continental Shelf* cases.<sup>11</sup> Forty or 50 years on, the situation is dramatically different in ways which few, if any, anticipated. To take a few instances, the European Court of Human Rights is overwhelmed with more than 100,000 cases pending; in a little more than 15 years, the WTO Dispute Settlement Bodies have dealt or are dealing with more than 400 trade disputes, involving almost 100 States and trading entities, some with no other experience of international adjudication or arbitration; the 26 cases filed with the International Centre for the Settlement Investment Disputes in its first 25 years are to be matched with well over 300 in the following 20 years; and the Permanent Court of Arbitration has a list of more than 50 pending cases and 20 decided within the last 10 years (plus a number which remain confidential), some of them major controversies between States such as those between Eritrea and Yemen over sovereignty, Ireland and the United Kingdom over the MOX Plant, Eritrea and Ethiopia over their boundary and breaches of the law of armed conflict, India and

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6 *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4; *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116; *Reservations to the Convention on Genocide* [1951] ICJ Rep 15; *International Status of South-West Africa* [1950] ICJ Rep 128; *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174; *Rights of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 16; *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 60.

7 *South-West Africa Cases (Ethiopia v South Africa and Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 319.

8 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3.

9 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), pt XV.

10 *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3.

11 *Fisheries Jurisdiction (Germany v Iceland) (Merits)* [1974] ICJ Rep 175 and *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3; *Continental Shelf (Tunisia v Libya) (Judgment)* [1982] ICJ Rep 18.

Pakistan over the Indus waters, and Bangladesh and India over maritime areas.<sup>12</sup> The case load of the International Court of Justice has also increased greatly in number, complexity and geographic scope. For periods in 1970 and 1971, not a single case was pending and in 1972 the Court gave only one judgment, on a technical question concerning the appellate jurisdiction of the Council of the International Civil Aviation Organisation. In the past three years it has given 14 substantive decisions (with another two due to be given in early 2012) including two relating to armed conflicts, three arising from the break-up of the Federal Republic of Yugoslavia, three relating directly to human rights, three concerning rivers including environmental issues, and one delimiting the Black Sea between two of its littoral States.<sup>13</sup> The last was between two former members of the Soviet Bloc, one of three recent cases from that region. Others came from Africa, the Americas, and Western Europe and some were intercontinental.<sup>14</sup>

### **III INTERNATIONAL LAW IN THE UNITED NATIONS**

In many ways 1960 was a spectacular year for the United Nations including the admission of 16 African States and Cyprus, the Secretary-Generalship of Dag Hammarskjöld, the attacks on him by Nikita Khrushchev, the collapse of government and order in the Republic of Congo (Leopoldville)<sup>15</sup> and the appearance of many Heads of State, notably Fidel Castro.

For New Zealand, that year in the United Nations was also significant. Along with the Netherlands, it was one of only two States with responsibilities for non-self-governing territories to vote in favour of the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>16</sup> The other six colonial powers abstained. The Declaration has since been recognised as being declaratory of customary international law and an authoritative interpretation of the Charter.<sup>17</sup>

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12 Each of these bodies has a very good website, another far cry from 50 years ago when those institutions were reliant on (sea) mail hard copies or very short newspaper accounts.

13 On the International Court of Justice website, see the recently installed "Select the Year" search tool.

14 To make another connection with George Barton, two of the ICJ cases in the last six years have come by way of requests for advisory opinions, the subject of my LLM Thesis supervised by George, published as Kenneth James Keith "The Extent of the Advisory Jurisdiction of the International Court" (Sijthoff, Leyden, 1971). They concern two sharply different matters – whether the unilateral declaration of independence of Kosovo accorded with international law (2010) and whether a judgment given in a staff dispute by the International Labour Organisation Administrative Tribunal was taken within jurisdiction and was valid (2012).

15 The role of the United Nations Operation in the Congo (ONUC), an early United Nations military force, was at the centre of the Soviet attack on the Secretary-General. George Barton participated at about that time in the preparation of Derek Bowett *United Nations Forces* (Stevens, London, 1964).

16 *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, XV (1960).

17 See for example *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ

Four days later, the General Assembly provided for a referendum on the Constitution of Western Samoa, a New Zealand Trust Territory, and on its independence which followed in 1962. That referendum was to be on the basis of universal suffrage with all adult citizens being entitled to vote.<sup>18</sup> By contrast, Western Samoa's electoral law at that time provided that only the *Matai*, the Chiefs, could be electors and be candidates for election to Parliament. This limit was controversial during the United Nations' consideration of the progress of the Territory towards self-determination, and was subject to two unsuccessful court challenges some decades later by reference to the guarantee of equality included in the Constitution.<sup>19</sup>

Two of the judges elected to the International Court of Justice that year were Gerald Fitzmaurice (to replace Hersch Lauterpacht who had died earlier in the year after less than six years in office) and Philip Jessup (at the end of the term of Green Hackworth). Fitzmaurice is the only one of the seven British judges elected in the 65 years of the Court to have been the legal advisor in the Foreign Office, and Hackworth the only American judge who held the equivalent position in the State Department (although more recently two deputies have been elected). A contrast may be seen in the almost consistent practice of the other three permanent members of the Security Council. The nomination of Jessup, an outstanding international lawyer of wide accomplishments, a Democrat at the end of a Republican administration, provides one clear instance of the national group which makes the nominations acting independently.<sup>20</sup> A third feature of the general election to the five vacancies that year (the Fitzmaurice election was an occasional one) was that there were 10 credible candidates for the three seats in which there was a real contest, with the other two going to the American and Russian candidates who were not opposed. That number is to be contrasted with the

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Rep 16 at 31–32; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 at 31–32; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 at 138 per Judge Vereshchetin.

- 18 *Question of the Future of Western Samoa* GA Res 1569, XV (1960). In a non-recorded vote there were 10 abstentions.
- 19 The challenges involved three members of the Victoria University of Wellington Law Faculty. Colin Aikman, as a principal advisor on the Constitution, had prepared the Bill of Rights including the equality guarantee as recommended by the responsible United Nations bodies; George Barton was counsel for the plaintiffs in both challenges (not being able to appear in the first because he was in London for the *Lesa v Attorney-General* [1983] 2 AC 20, [1982] 1 NZLR 165 (PC) litigation); with Robin Cooke presiding, I was one of the appeal judges on both occasions; and, in the first, Aikman appeared for the State, led by Neroni Slade, another Victoria University of Wellington graduate and Attorney-General. The limited suffrage had been referred to in 1956 by George's former supervisor, by then Judge Lauterpacht, in *Southwest Africa – Voting Procedure (Advisory Opinion)* [1955] ICJ Rep 67 at 116–117.
- 20 See Richard Baxter "The Procedures employed in connection with the United States Nominations for the International Court in 1960" (1961) 55 AJIL 445. As was recorded after his sadly very brief time on the Court, he too had been nominated by a national group acting independently of, indeed contrary to, the preferred position of the President and Secretary of State. See Oscar Schacher "Editorial Comments: Richard R Baxter" (1980) 74 AJIL 890. That former student of Lauterpacht's had in a Harvard Law School seminar in 1965 two future judges of the International Court of Justice, Thomas Buergenthal and the writer.

situation in recent years in which only one (or two) of the five seats may be the subject of a real contest between just two (or four) candidates among which limited number the 193 Member States of the United Nations make their choices through the election process. I mention those features of the elections because the qualifications of candidates for international judicial office and the methods of selection and election are increasingly matters of study and debate.<sup>21</sup>

By contrast to all that activity in the 1960 General Assembly, the legal committee of the General Assembly, the Sixth Committee, had almost nothing to consider. The International Law Commission (ILC) had completed its work on diplomatic relations and that text had been referred to a conference for the adoption of a convention; its work on the law of treaties had been interrupted by the election to the Court of Fitzmaurice, its special rapporteur on that matter; it was badly divided on State responsibility;<sup>22</sup> and it no longer had a role in respect of the law of the sea – the second United Nations Conference earlier in the year had narrowly failed to agree on a proposal for a six mile territorial sea and a further six-mile fishing zone. I will come back to that topic. The Committee did, however, take tentative steps which led to the adoption of an important text 10 years later. Under the heading "Future work in the field of the codification and progressive development of international law" – the terms, if reversed, of art 13(1) of the Charter – the Assembly, having recalled the work of the ILC, stated that:<sup>23</sup>

... the conditions prevailing in the world today give increased importance to the role of international law – and its strict and undeviating observance by all Governments – in strengthening international peace, developing friendly and co-operative relations among the nations, settling disputes by peaceful means and advancing economic and social progress throughout the world.

It also stated that, "many new trends in the field of international relations have an impact on the development of international law".<sup>24</sup>

One proposal in respect of the first of those statements would have referred not to friendly and cooperative relations but rather to peaceful coexistence, an expression popularised by Soviet jurists and drawing from the Bandoeng Principles declared in 1955. The second statement may be seen as counterposing new States and old law. The present state of international law, the Assembly

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21 See for example the work of the "Practice and Procedure of International Tribunals" International Law Association Study Group resulting in the Burgh House Principles (2004); and the Rhodes Declaration of the Institut de Droit International on the Position of the International Judge (9 September 2011).

22 The topic was about to be fundamentally reshaped – from the rights of aliens to general rules of State responsibility, completed in 2001, and very extensively applied in practice (even before 2001) by courts, tribunals and governments.

23 *Future Work in the Field of the Codification and Progressive Development of International Law* GA Res 1505, XV (1960).

24 Ibid.



continued, needed to be surveyed to determine whether new topics should be considered for codification and progressive development, whether priority should be given to topics already on the ILC's list or whether a broader approach was called for. The ILC's programme was to be reconsidered "in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among States" with a view to the Assembly, not the Commission, surveying the whole field of international law and making "necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law".<sup>25</sup>

A few months later, the members of the ILC held an interesting discussion of the resolution and its background.<sup>26</sup> For one member the resolution was "closely associated with one of the most aggressive and demagogic campaigns in the history of the United Nations".<sup>27</sup> By contrast, another member was happy that, in the Resolution, the General Assembly unanimously expressed its interest in the codification and development of international law and rightly stressed the growing importance of international law as a means of establishing friendly relations and cooperations between nations and in the maintenance of peace.<sup>28</sup> The ILC did not reach any conclusions, it did not respond to the Assembly by reviewing its list of topics, nor did the Sixth Committee itself undertake any general review of the ILC's program. Rather, the ILC's process for selecting topics continued much as before, in part on the basis of a 1971 survey of international law prepared by the United Nations Secretariat, the first since that of 1948 prepared by Hersch Lauterpacht.<sup>29</sup> That survey, recognising changes over the previous two decades, called attention to the increased number of institutions with law reform roles in the international community.

As that survey was being completed, the General Assembly adopted, on the 25th anniversary of the United Nations, the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*.<sup>30</sup> That text, elaborating seven principles, was prepared by a Special Committee consisting of 27 (later 31) State representatives who, because of "the general importance and the technical aspect of the

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25 Ibid.

26 *Planning of future work of the Commission* [1961] vol 1 YILC 206–223; *Resolution Adopted by the General Assembly regarding future work in the field of the codification and progressive development of international law* [1961] vol 2 YILC 76–77; *Report of the International Law Commission covering the work of its thirteenth session* [1961] vol 2 YILC 88 at 128–129 ([40]–[41] of the report to the Assembly).

27 *Planning of future work of the Commission*, *ibid* vol 1 at 207, specifically at [51] per Garcia Amador.

28 *Ibid* vol 1 at 216, specifically at [52] per Jaroslav Zourek.

29 See for example a helpful general account in *The Work of the International Law Commission* (7th ed, United Nations Publications, 2007) vol 1 at 32–44.

30 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* GA Res 2625, XXV (1970).

item", the Assembly recommended, were to be jurists. That use of government, if expert, representatives (including Georges Abi-Saab, Kenneth Bailey, Hans Blix, Jorge Castaneda, Kenneth Dadzie, Vratislav Pechota and Krishna Rao) rather than the ILC is significant as was, for instance, the separate establishment of Committees on the Definition of Aggression following the ILC's early failure to draw up a definition, and the much later work on the same topic in the Assembly of State Parties of the International Criminal Court. Also significant was the Assembly's emphasis in an early resolution on the "paramount importance, in the progressive development of international law and the promotion of the rule of law among nations, of the [seven] principles" later included in the 1970 Declaration.<sup>31</sup> No reference there to codification, and an early reference to the rule of law among nations. That declaration of principle continues to be of real significance as appears from several decisions of the International Court of Justice.<sup>32</sup>

#### **IV INDEPENDENT INTERNATIONAL SERVICE**

Also of continuing critical importance are the principles and rules underlying and regulating the independence of the international public service. The rules have been challenged by major powers, in particular by the United States in the 1950s and by the Soviet Union and its allies in 1960. Recalling the failure of League Secretariat officials to maintain their independent role in the 1930s, particularly Joseph Avenol the Secretary-General from 1933 to 1940, the New Zealand delegation in San Francisco (in particular JV Wilson a League Secretariat official from 1921 to 1941 and a foundation member of the New Zealand foreign service) made a major contribution to the drafting of arts 100 and 101 of the Charter – the Secretary-General and the staff are not to seek or receive instructions from any government or external authority, and member States are to respect the exclusively international character of their responsibilities; appointments are to secure the highest standards of efficiency, competence and integrity, while having regard to geographic considerations. While the United States delegation lauded that contribution in its report on the San Francisco Conference,<sup>33</sup> by 1953 when McCarthyism was at its height, it was for New Zealand, again through Mr Wilson, to speak out effectively against American attempts to interfere with the Secretary-

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31 *Consideration of the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* GA Res 1815, XVII (1962).

32 See for example *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 171–172 and 199; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at 226–227; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)* (2010) available online at International Court of Justice <[www.icj-cij.org](http://www.icj-cij.org)> at [80] citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 101–103.

33 *Report on United Nations Conference on International Organisation* (Department of External Affairs, 1945) at 167 and 34–36; *Report to the President on the Results of the San Francisco Conference ... by the Chairman of the United States Delegation, the Secretary of State* (United States Government Printing Office, 1945) at 150–152 and 224–227.

General's powers of appointment.<sup>34</sup> It was at that time that Hammarskjöld took office with the FBI on the premises and a demoralised staff. He had the FBI removed and insisted in his dealings with the staff, through staff regulations and in speeches responding to criticism at first of United States Secretary of State, John Foster Dulles, and later Nikita Khrushchev, on the vital importance of loyal service and the Charter principles. In a major speech at Oxford University on 30 May 1961, just three months before he was killed in a plane crash in Northern Rhodesia, he responded, I think very convincingly, to the Khrushchev proposition that "while there are neutral countries there are no neutral men. There can be no such thing as an impartial civil servant in this divided world".<sup>35</sup> He followed that with the equally brilliant introduction to his last Annual Report in which he compares the conception of the United Nations as a static conference machinery with the organisation as a dynamic instrument of governments. The needs of the present (as of 1961) required not simply a mechanism for achieving peaceful coexistence but increasingly effective forms of constructive international cooperation. He emphasised Charter principles, including the purpose of establishing conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. In those words the Charter, he said, gave expression to another basic democratic principle, that of the rule of law, which aims at the substitution of right for might.

## V THE LAW OF THE SEA

As briefly mentioned already, the ILC made a major contribution to the law of the sea. In the course of five early sessions the ILC completed draft articles on the territorial sea and contiguous zone, the high seas, the continental shelf and fishing and conservation of the living resources of the high seas, to anticipate the titles of the four conventions drafted at the first Law of the Sea Conference in 1958, along with an optional protocol on the compulsory settlement of disputes. The first of those conventions incorporated rules and principles, clarified by the International Court of Justice in two early judgments, in provisions which have been carried forward in the 1982 Convention. That first conference did not resolve the critical questions of the breadth of the territorial sea and fishery limits, nor did the second conference held in 1960. That conference narrowly failed to adopt a proposal for a six mile territorial sea and a further six mile exclusive fishing zone; States whose vessels had made a practice of fishing in the outer six miles for the previous five years would have been able to continue for another 10 years. New Zealand, which had

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34 New Zealand and Secretary-General Hammarskjöld contributed to debates in the Fifth Committee, Eighth Session; *Report of the Secretary-General on Personnel Policy A/2533* (1953); see also the changes made to the staff regulations and the Statute of the United Nations Administrative Tribunal *Personnel Policy of the United Nations GA Res 782, VIII* (1953); and the request for an advisory opinion made to the ICJ, *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion [1954] ICJ Rep 47.

35 As recorded in Dag Hammarskjöld "The International Civil Servant in Law and in Fact" (Clarendon Press, Oxford, 1961).

supported that proposal, legislated in 1965 to create a nine mile fishing zone beyond its three mile territorial sea. Japan, which had abstained on the 1960 proposal, protested against that measure and proposed to refer the dispute to the International Court of Justice. Instead the two Governments reached an agreement in 1967 for limited Japanese fishing in the outer six miles until the end of 1970.<sup>36</sup> The 1960 proposal, agreements such as that of 1967, and the 1974 rulings of the International Court against Iceland's 50-mile zone were soon to be inundated. Two hundred mile claims had first been made a decade earlier by a number of Latin American countries which were among those voting against the 1960 proposal, and by the late 1970s such claims had very wide international support. New Zealand in 1977, in part on the basis of a proposal that it and other States with lengthy coastlines had made to the third United Nations Conference on the Law of the Sea, established an exclusive economic zone of 200 miles. That action is reflected in the following preambular paragraphs of the Agreement on Fisheries 1978 between it and Japan. The two Governments:<sup>37</sup>

Recognis[ed] that, in accordance with relevant principles of international law, the Government of New Zealand has established a zone of 200 nautical miles within which it exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources, [and]

Consider[ed] that nationals and fishing vessels of Japan have been engaged, for a considerable period of time, in the utilisation of the living resources off the coast of New Zealand and have also contributed to the development of and research into such resources.

In terms of the agreement, New Zealand determined annually "in the exercise of its sovereign rights" the total allowable catches for fisheries, the New Zealand harvesting capacity, and the allocations to Japanese vessels of parts of the surpluses. In the exercise of those rights, the New Zealand government was to take into consideration, amongst other things, the record of Japanese fishing for living resources off the coast of New Zealand before the signing of the agreement. Those provisions, also to be found in agreements of 1978 with the Republic of Korea,<sup>38</sup> and the USSR,<sup>39</sup> were later matched by particular provisions of Part V of the United Nations Convention on the Law of the Sea 1982.

The law relating to the continental shelf and its resources began its rapid change a good deal earlier. In 1942 the United Kingdom and Venezuela agreed to a seabed boundary dividing the Gulf of Paria which lies between Trinidad and the east coast of Venezuela.<sup>40</sup> Each State declared that it

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36 Agreement on Fisheries (New Zealand–Japan) 683 UNTS 45 (signed 12 July 1967).

37 Agreement on Fisheries (New Zealand–Japan) 1167 UNTS 441 (signed 1 September 1978) at Preamble.

38 Agreement on Fisheries (New Zealand–Republic of Korea) 1167 UNTS 415 (signed 16 March 1978).

39 Agreement on Fisheries (New Zealand–USSR) 1151 UNTS 273 (signed 4 April 1978).

40 Treaty relating to the Submarine Areas of the Gulf of Persia (United Kingdom–Venezuela) 205 LNTS 121 (26 February 1942).

would not assert any claim to sovereignty or control over the parts of the submarine areas which were on the other side of the line they had drawn. The treaty referred only to the submarine areas and had no effect on the status of the islands, islets or rocks above the surface of the sea together with their territorial seas. Nothing in the treaty was to affect in any way the status of the waters of the Gulf or any rights of passage or navigation outside the parties' territorial seas. It will be seen that the treaty dissociates various areas of the marine environment and applies distinct bodies of law to them. No longer is a strict line drawn between coastal State sovereignty over territorial waters and the seabed beneath them and the high seas and their beds free to all. Coastal State rights beyond the territorial sea had indeed been asserted for some time, for instance in respect of mines dug from land through submarine areas and in respect of customs controls over an area contiguous to the territorial sea ('Hovering' Acts). Such differential attention to distinct areas of the marine environment appears in a notable paper by Hersch Lauterpacht. In "Sovereignty over submarine areas" he separates the various areas of waters and seabed and subsoil, the claims over them and the uses to which they might be subject in accordance with developing international law.<sup>41</sup> The substantive issues he saw as critical, as indeed they were, were the rapid development of technology, the growing need for oil,<sup>42</sup> and the need to maintain freedom of navigation on the high seas and free exploitation of their resources. He also highlighted, again with good reason, the example this area of international law provides of the law being adapted in response to fresh needs and conditions of the international community. He demonstrated that adaptation through State practice – the United Kingdom annexation order of 1942 following the Treaty with Venezuela, the Proclamation of the United States of September 1945, Mexico in October 1945, Argentina in 1946, Chile in 1947, Peru in 1947, Costa Rica in 1948, the United Kingdom in respect of the Bahamas and Jamaica in 1948, Saudi Arabia in 1949, nine Gulf Sheikdoms under British rule in 1949, Iran in 1949 and 13 others. The claims varied greatly, with some also claiming sovereignty over the waters and airspace within the area, claims which led to protests. Freedom of navigation was either recognised in all or not affected by the claims. And there were no protests against claims to the seabed and subsoil alone. Large questions remained: the definition of the submarine area, the resolution of overlapping claims, and increasingly from the late 1960s the matter of rights to the area beyond national control, the deep seabed. This matter was brought to prominence at that time by the Permanent Representative of Malta to the United Nations, Ambassador Arvid Pardo, who it is said spent part of his Mission's library fund on the Scientific American journal rather than the American Journal of International

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41 Hersch Lauterpacht "Sovereignty over submarine areas" (1950) 27 BYIL 376.

42 Northcutt Ely, a United States oil and gas lawyer, writing in 1938 recorded that the total known world reserves of oil were about 80 billion barrels. The American reserves of about one fifth of that equated to about 12 or 13 times one year's domestic consumption. In the preceding 17 years car registrations had trebled to 30 million. He reported that shortages were predicted by 1945, even 1940 – and that without wartime usage of oil. In 2010, the oil reserves of Alberta alone were twice the world figure of 1938 and the United States private car ownership had octupled to over 250 million. See Northcutt Ely "The Conservation of Oil" (1938) 51 Harv L Rev 1209.

Law. That reading alerted him to the prospects of exploiting for the benefit of humanity the rich universal resources of that area, as a common heritage.

That and related initiatives led at first to the establishment of a Committee of the General Assembly on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction in 1968. The regime was to meet the interests of humanity as a whole.<sup>43</sup> The Committee – not the ILC – reported to the first, political, Committee of the Assembly, not to the sixth, legal, Committee. The work of that Committee and related negotiations led to a 1970 Declaration on the Peaceful Uses of the Seabed beyond National Jurisdiction and its Resources and to a major diplomatic conference, which met throughout the 1970s, with the United Nations Convention on the Law of the Sea being concluded in 1982.

Much can be and has been said about the process and its product, along with the relevant developments including those concerning the deep seabed and fish stocks (both the subject of further negotiations and agreements in the 1980s), the implementation of the treaties, the working out of regional and species-specific regimes, and an extensive body of conventions prepared by the International Maritime Organisation and the International Labour Organisation. From all that material I select five matters:

The first is the great impact of technological developments especially in respect of fishing methods and oil and gas exploitation on the law and its rapid modification in response to those developments. A related, second development from the 1950s is political, particularly the major changes in the membership of the world community. Only seven African States and two Caribbean attended the 1958 conference while 49 African, 10 Caribbean and nine Pacific States participated in the process leading to the 1982 Convention. Another related development, mentioned earlier, was the extensive maritime and submarine claims made initially by Latin American and Gulf States and then by many others. Plainly, many States saw the earlier law with narrow coastal rights and unfettered freedom of the high seas as no longer acceptable or indeed sustainable: technology had proved false the Grotian view that the resources of the oceans were inexhaustible.

A third feature of the lengthy process through the 1970s and beyond is the emphasis placed on producing a 'package deal' – also referred to, more grandly, as a "Constitution for the Oceans" by Ambassador Tommy Koh of Singapore, the President of the third United Nations Conference on the Law of the Sea. In particular the extension of coastal sovereignty rights was to be balanced by protections of freedom of navigation, by access of foreign fishers to any available catch which the coastal State does not exploit, and by more effective methods of dispute settlement; the plethora of conflicting claims with all their accompanying uncertainty were to be replaced by universally agreed

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<sup>43</sup> *Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-bed and the Ocean Floor, and the Subsoil thereof, underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind* GA Res 2467 A, XXIII (1968).

limits. The overall purpose, seen at the technical level by the express denial to States becoming party of the right to make reservations to the Convention, was to deny to States the ability to pick and choose – which they had in respect of the four 1958 Conventions and indeed in the years following when they took unilateral action (although often in terms of proposals before the United Nations Conference, as with the 1977 New Zealand fisheries legislation).

A fourth matter is the interaction between national action, the diplomatic process and international court and tribunal decisions (through the processes of the preparation of the 1958 and 1982 Convention), an interaction which continues to this day. The process can be traced back to 1930 with the decision of the Permanent Court of International Justice in the *Lotus* case,<sup>44</sup> the law in which was overturned by a treaty of 1952 as well as by the 1958 and 1982 Conventions. By contrast, as mentioned, the law stated in the *Corfu Channel Case*<sup>45</sup> and the *Fisheries Case*<sup>46</sup> was taken essentially without change into the 1958 and 1982 Conventions and the 1969 *North Sea Continental Shelf Cases*,<sup>47</sup> based in part on the Continental Shelf Convention 1958, were influential in the preparation of the later Convention. When Libya and Tunisia submitted their continental shelf dispute to the Court in 1978 they asked the Court to state the applicable principles and rules of international law, to make its decision according to equitable principles and the relevant circumstances as well as the new accepted trends in the Conference.<sup>48</sup> The terms of that agreement, the Convention and the now extensive case law highlight another significant feature of the law of the sea – the balance between rules, principles and processes, a feature of course of all law-making. The Court's application of that law continues with cases from the Americas, the Mediterranean, the Gulf and the Black Sea. That continued flow of cases puts into relief, if not question, the decisions made about dispute settlement in the preparation of the United Nations 1982 Convention.

The picture I have so far presented of the law of the sea is largely positive, but consider the adequacy of the law for the protection of endangered fish stocks, particularly migratory and straddling stocks which move between exclusive economic zones and the high seas beyond. A negative assessment of the law's adequacy appears for instance in the positions taken by Iceland in the 1970s and Canada in the 1990s. The Court in its judgments of 1974 held that Iceland's 50-mile fishing zone was not opposable to Germany and the United Kingdom, but, recognising the developments then underway, held that the States were obliged to undertake good faith negotiations

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44 *The Case of the SS Lotus (France v Turkey)* (1926) PCIJ (Series A) No 10.

45 *Corfu Channel Case* [1948] ICJ Rep 15; *Corfu Channel Case (Merits)* [1949] ICJ Rep 4; *Corfu Channel Case* [1949] ICJ Rep 244.

46 *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116.

47 *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3.

48 *Continental Shelf (Tunisia v Libyan Arab Jamahirija)* [1982] ICJ Rep 18.

for the equitable solution of their differences.<sup>49</sup> But 200-mile zones were coming to be accepted, as indicated earlier, and the rulings appear to have had limited, if any, significance. By way of a new reservation to its acceptance of the Court's jurisdiction (an action it had taken earlier in relation to Arctic environmental concerns) Canada dealt with the inadequacy of the law as it saw it in a different and legally effective way. By reference to that reservation it persuaded the Court that it did not have jurisdiction over a claim brought by Spain in respect of fisheries management measures taken by Canada on the high seas in the North West Atlantic.

## **VI THE LAW OF ARMED CONFLICT**

In 1960 there was very limited governmental or scholarly interest in the law of armed conflict. The Nuremberg Tribunal was in the past, the Tokyo Tribunal scarcely known, the ILC did not place the matter on its agenda – a principal purpose of the Charter was to abolish war – and in any event the Geneva Red Cross Conventions had been updated and supplemented in 1949, law which was being taken into account in military manuals and to the extent necessary in national law. Two features of the 1949 Conventions recognised major gaps in the earlier law, the first a gap of disastrous consequence. That gap concerned the protection of civilians in armed conflict, particularly in occupied territory. A conference had in fact been planned – but for 1940 – to deal with that matter. One dreadful practical consequence was that the International Committee of the Red Cross had no legal rights of access to civilians held in concentration camps, in contrast to their right in respect of prisoners of war where the relevant 1929 Convention was applicable. The 1949 Conference added a fourth Convention to deal with that matter. The other major change was the inclusion of Common Article 3, a 'mini convention' designed to protect victims of internal armed conflict. The state of academic interest may be sensed from the 1965 assessment by an important American law school that the rules of warfare were "largely obsolete".<sup>50</sup> That led to a "Weary Word on the Law of War" by another of the Cambridge students of the late 1950s who no doubt had in mind recent wars in Korea and Algeria and current ones in Southern Africa and especially in South East Asia: Richard Baxter recalled that 106 States were by then bound by the Geneva Conventions and commented that "a little less talk about the obsolescence of the law of war might also be welcomed by the victims of warfare."<sup>51</sup>

Just a short time later, especially with the war in Vietnam, interest and opinion changed dramatically at the governmental level as well as at the scholarly, as illustrated by the Declaration on the occasion of the 20th anniversary of the Universal Declaration of Human Rights adopted at

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49 *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Merits)* [1974] ICJ Rep 175; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland) (Merits)* [1974] ICJ Rep 3.

50 School of Law *International Legal Studies* (Columbia University School of Law, New York, 1965) at 2.

51 Richard Baxter "A Weary Word on the Law of War" (1965) 59 AJIL 920. The United Nations membership reached 117 that year.



Teheran in 1968 about the protection of human rights in armed conflict. That brought together at the formal level two bodies of law with a common essential core – the protection of humanity. The following work within the United Nations, at the International Committee of the Red Cross and with governments (notably the Swiss), led to the Diplomatic Conference of 1974–1977 which prepared the two protocols additional to the 1949 Conventions: the first concerned with international armed conflict, the second with non-international armed conflict.<sup>52</sup> The second greatly developed Common Article 3 – one major change in the law. Both also updated, extended and refined the rules applicable to the battlefield, particularly those designed to protect civilians and non-military objects. Both incorporated the central non-derogable human rights guarantees to be found in the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The first attempted to strengthen methods of implementation and enforcement.

Five features of that law and its development stand out. Two relate to the technological and political changes which demanded change. The rules governing the methods and means of warfare had not been updated since 1907 and since then aerial warfare and long distance bombardment had developed in ways unimaginable 60 or 70 years earlier, with the consequence of many more civilian casualties. The nature of warfare had also changed markedly with many more non-international armed conflicts, again with many civilian casualties. So called 'Wars of National Liberation' were also being fought in Southern Africa and elsewhere in the world. They were to become the subject of a particular provision in the First Protocol, and to absorb most of the first session of the Conference.

A third feature is enduring principle. The principle of humanity has been mentioned already. Others which were reaffirmed in 1977 were that the methods and means of warfare are not unlimited, that belligerents are to distinguish between combatants and military objects on the one side and civilians and civil objects on the other, that weapons were not to cause unnecessary suffering and that those who were *hors de combat* – the wounded, prisoners of war, civilians – were to be respected.

Fourth, methods of implementation and enforcement have continued to be the subject of close attention and action, as a necessary reaction to the dreadful breaches which continue to occur. The action has included the remarkable growth of international criminal tribunals, both temporary and permanent. Particularly in the case of the Yugoslav and Rwanda Tribunals many accused are facing their accusers and facing trial, with all those indicted before the Yugoslav Tribunal being brought to The Hague. Those conflicts have also appeared in cases brought in the International Court by one

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52 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts 1125 UNTS 3 (adopted 8 June 1977, entered into force 7 December 1979); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978).

State against another, and the Security Council and other United Nations bodies have also undertaken inquiries into situations involving armed conflict. These were developments beyond prediction in 1960, although I would stress that the real work on better implementation must be done in the training of members of the armed forces. Wider public understanding is also important, a matter within the responsibility of national Red Cross and Red Crescent societies as well as governments, with the critical support of the International Committee of the Red Cross.

Fifth, the processes leading to the 1977 Protocols involved the bringing together of three previously distinct areas of law – distinct that is in formal origins and development, involving the Geneva Conventions, The Hague Rules of 1907 and the United Nations Law of Human Rights and Self-determination. In the view of an initially cautious International Committee of the Red Cross, as guardian of the Geneva Conventions, the pure waters of Lake Lemman were in danger of being polluted by the lower stretches of the Rhine or even worse by the murk of the East River. But the caution was overcome with the texts bringing together the three sources. The protocols are now ratified or acceded to by more than 160 States, with the important exceptions of the United States, and several States in the Middle East and south-east Asia. Although the principal immediate challenge for that established body of law is its better implementation, technological change brings great changes: consider cyber warfare.

## **VII CONCLUSION**

To conclude I emphasise the continuing importance of principle, of ideals. In a recent outstanding study of New Zealand's diplomacy during the Second World War Gerald Hensley quotes Lord Acton – "ideals in politics are never realised, but pursuit of them determines history" – and concludes that, "New Zealand learned the strength of ideals and the need for patience and persistence in pursuing them. Building from a bedrock of principle was [Prime Minister] Fraser's lasting legacy".<sup>53</sup>

Across his personal and professional life, George Barton demonstrated that commitment, patience and persistence.

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<sup>53</sup> Gerald Hensley *Beyond the Battlefields: New Zealand and its Allies 1939–1945* (Penguin, Viking, North Shore, 2009) at 404.