

## CUSTOMARY INTERNATIONAL LAW: WHAT IT IS AND WHAT IT IS NOT

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### INTRODUCTION

The judges on this panel have been asked to reflect briefly on “judicial experiences with human rights litigation in U.S. Courts.”

The charge is simultaneously daunting and treacherous—daunting because the subject covers so much terrain, and treacherous because we are required by our code of judicial conduct to refrain from public discussion of pending cases. Pending cases include cases decided in the U.S. Court of Appeals that may return to our Court on remand from the Supreme Court of the United States. Accordingly, my remarks are not intended to intimate the slightest view on any pending case. Nevertheless, my comments are, understandably, informed by my participation in cases now closed and rely on some of my published work in the field. I also rely on some personal experience in the study of international human rights law, and *pro bono* service in one of the earliest NGOs working in the field, the International League for Human Rights.

With your forbearance, I will comment on some history, including personal history, before circling back to the question of judicial experiences with litigation of this sort.

### I. HISTORY

I turn to history for a simple reason: history matters. It matters always, and it is relevant always, in the law, and especially in the Anglo-American legal system. As Holmes famously taught us, “[t]he life of the law has not been logic: it has been experience”<sup>1</sup>—and by “experience” we of course mean history.

The history of international human rights litigation in the U.S. courts is important—and it is important to know that this history is relatively

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass’n 2009) (1881).

short.

International human rights law in the federal courts is, of course, merely part of the larger international human rights movement that flowered in the Western world in the course of the 1970s. It is no coincidence, I think, that the seminal case in this field was decided by my Court in 1980, as this broader movement came to the fore in public life.

That case, *Filartiga v. Peña-Irala*,<sup>2</sup> breathed life into the Alien Tort Statute (“ATS”).<sup>3</sup> That statute, whose very origins are a mystery, had been virtually unknown and untouched since its enactment as part of the Judiciary Act of 1789. *Filartiga* literally created a whole new species of litigation, one aimed at harnessing the authority of the American federal courts to vindicate the rights of *aliens* who claimed to be victims of war crimes and crimes against humanity.

1980 is a year worth remembering. This is the year when international human rights litigation under the ATS began.

In an important new book, *The Last Utopia: Human Rights in History*, Professor Samuel Moyn of Columbia University locates the origins of the current international human rights movement in the zeitgeist of the 1970s—not, as is so often assumed, in the post-war response to the Holocaust, the English (“Glorious”), French, or American Revolutions, or even in the worlds of the ancient Greeks or Hebrews.<sup>4</sup>

Professor Moyn’s thesis suggests that those who celebrate the origins of the current international human rights movement are engaged in writing a kind of “Whig history”—the sort of history famously defined by the Cambridge historian Herbert Butterfield as the writing of history to serve the interests of today’s reigning ideas; in effect, a look backward to serve the interests of today’s elites.<sup>5</sup>

In Moyn’s view of this Whig history, international human rights activists today avoid recognizing that their movement is wholly novel, claiming to find its historical roots in Nuremberg, or in Paris, Philadelphia, Athens or Jerusalem.<sup>6</sup>

Contrary to this Whig history, Professor Moyn explains that it was in the 1970s that “the moral world of Westerners shifted, opening a space for

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2. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

3. The Alien Tort Statute states that “[t]he district courts shall have original jurisdiction of any civil action by an *alien* for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2006) (emphasis added).

4. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 5-8 (2010).

5. See generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (Charles Scribner’s Sons 1951) (1931).

6. MOYN, *supra* note 4, at 5.

the sort of utopianism that coalesced in an international human rights movement that had never existed before”<sup>7</sup>—not a movement that “implied a politics of citizenship *at home*,” but rather, “a politics of suffering *abroad*.”<sup>8</sup>

Moyn describes the emergence of activist international human rights organizations like Amnesty International, betokened by the award of the Nobel Peace Prize in 1977, in contrast to what he calls the “ineffectual” human rights organizations of the three prior decades, including most notably, and “ineffectual[ly],” the International League for Human Rights<sup>9</sup> (an “ineffectual” organization of which, as it happens, I was Vice President and Counsel until 1980, when I went to the federal bench).

I cannot do justice to the depth and subtlety of Professor Moyn’s remarkable thesis, which is illuminating and likely controversial. But in describing the emergence of a new international human rights movement in the 1970s, he points out that the first course on international human rights taught in the United States was one offered at Yale Law School in 1964 by a now obscure, but highly significant, figure by the name of Egon Schwelb.<sup>10</sup>

Dr. Egon Schwelb was an émigré Czech lawyer and international civil servant who had long served in the United Nations Human Rights Division and who, upon retirement from the U.N., went to teach at Yale Law School. And it is at Yale Law School where my friend and classmate, Judge Nina Gershon (who is also a participant in this Duke Law School Seminar), and I met Dr. Schwelb; Judge Gershon and I were both in Dr. Schwelb’s seminar nearly fifty years ago. Another member of Dr. Schwelb’s seminar was Luzius Wildhaber, then a graduate student at Yale Law School and, in due course, a distinguished Swiss international lawyer and a member and president of the European Court of Human Rights.

Dr. Schwelb was a wonderful man and a warm friend to his students. We treasure his memory.

It was in Dr. Schwelb’s seminar that his students were introduced to the intense, scholastic reading of international human rights treaties. We were introduced also to their drafting history (*travaux préparatoires*), and amended drafts, year by year, article by article. The course did not encourage celebration of one’s politics or sanctimonious comments on

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7. *Id.* at 1.

8. *Id.* at 12 (emphasis added).

9. *Id.* at 60.

10. *Id.* at 199.

world affairs; no political arias, and no *Ode to Joy*. In sum, this was an unusual enterprise for us, an enterprise very much in the European tradition of legal education, and a form of education wholly foreign to the agitated activism that we associate with the human rights movement about to be born.

So it is with Professor Moyn's help that I have recently learned that Judge Gershon and I were part of history—the early history of the newly-emergent international human rights movement. My own surprise and delight at learning of my place in this history is akin to that of Molière's "bourgeois gentleman," who was surprised and delighted to learn that he had been speaking "prose" all of his life without knowing it.<sup>11</sup>

## II. INTERNATIONAL LAW AND THE JUDICIAL EXPERIENCE

So the history of international human rights law (and international human rights litigation in particular) matters, for litigants and judges and for all of us. It provides us with a context in which to place the special challenges posed by modern human rights claims. And this history is exquisitely relevant, because it is only since 1980—that is, since *Filartiga*—that the federal courts have had to handle such cases. By coincidence, 1980 is the year I began to serve on the federal bench. Accordingly, while I may have been present at the creation, I have encountered the new international human rights movement principally while on the bench.

Like other judges here today, I have sat on a wide range of cases that arguably fall under the rubric of "international human rights." Some emerge from the traditional law-making function of multilateral treaties—for example, cases under the Vienna Convention on Consular Relations<sup>12</sup> and the Vienna Convention on Diplomatic Relations.<sup>13</sup> Others are the product of treaties that are themselves a result of the new, activist international human rights movement, such as the hundreds of immigration petitions relying on the U.N. Convention Against Torture.<sup>14</sup> Still others

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11. MOLIÈRE, MOLIÈRE'S LE BOURGEOIS GENTILHOMME 27 (F.M. Warren, ed., D.C. Heath & Co. 1899) (1670).

12. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force in U.S. Dec. 24, 1969); *see, e.g.*, *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001); *Sorensen v. New York*, 413 F.3d 292 (2d Cir. 2005).

13. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force in U.S. Dec. 13, 1972); *see, e.g.*, *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010).

14. U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; *see, e.g.*, *Dedji v. Mukasey*, 525 F.3d 187 (2d Cir. 2008).

require that courts interpret non-treaty law—“customary international law.”

As we know, international law consists, in substance, of two types of law: treaty law and customary international law. The interpretation of treaties, and their application when appropriate, involves tasks that are familiar to reasonably well-educated judges, although reliance on some obscure sources may be required. It is roughly akin to the interpretation of domestic statutes.

But applying customary international law, also known as “the law of nations,” as required by the ATS, is something altogether different. The ATS presents special challenges for all of us. As our Court has explained,

the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source.<sup>15</sup>

These characteristics give this body of law what Professor Louis Henkin, a leader of the academic side of the new international human rights movement, called a “soft, indeterminate character.”<sup>16</sup> This softness and

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15. *Flores v. S. Peru Copper Co.*, 414 F.3d 233, 247-48 (2d Cir. 2003). For a definition of customary international law, there is no more authoritative or more succinct statement than that of Judge Henry J. Friendly in *IIT v. Vencap, Ltd.*: Customary international law, Judge Friendly explained, consists “of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.” 519 F.2d 1001, 1015 (2d Cir. 1975) (quoting *Lopes v. Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)), *abrogated on other grounds by* *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). Judge Friendly’s statement of basic principles was re-stated and adopted by Judge Irving R. Kaufman in the context of the ATS in his iconic opinion in *Filartiga v. Peña-Irala*, which underscored that customary international law addresses only those “wrong[s]” that are of “*mutual*, and not merely *several*, concern.” 630 F.2d 876, 888 (2d Cir. 1980) (emphasis added); *see also supra* text accompanying note 2; *Kadic v. Karadzic*, 70 F.3d 232, 238-39 (2d Cir. 1995) (Newman, J.) (quoting *Filartiga*); *id.* at 243 n.8.

On the sources of international law generally, and customary international law in particular, see Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060; *see also* *United States v. Yousef*, 327 F.3d 56, 99-103 (2d Cir. 2003) (collecting authorities on “sources” of international law); *id.* at 102 nn.35-36 and accompanying text (rejecting the notion that contemporary scholars engage in creation of international law as “inconsistent with the law-making processes within and between States,” and describing the idea as inconsistent with a “system governed by the rule of law”); *Flores*, 414 F.3d at 250-52 & nn.24-26 (on the ICJ Statute, sources and evidence of customary international law, and rejecting the idea that contemporary scholars engage in creation of international law); Remarks of Professor Jack L. Goldsmith, Panel Discussion, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC’Y INT’L L. PROC. 317, 318 (2000); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 467-68 (2001).

16. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995).

indeterminacy unavoidably tempts judges to free-wheeling adjudication. As a result, our Court has cautioned that “in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.”<sup>17</sup>

In articulating the basic framework in which this care and restraint is applied in the exercise of our judicial powers, our Court has explained some basic hornbook law on the law of nations—that is, customary international law<sup>18</sup>—that will reveal the challenges faced by any court in an ATS case.

The most important of these challenges is that the primary sources of customary international law are not judicial decisions as in our own common law, or the works of scholars, but rather, the usage and practice of States.

As the late Professor Clive Parry of Cambridge University wrote of international law generally, “the records or evidence of international law are the documents or acts *proving the consent of States* to its rules,” and “[a]mong such records or evidence, treaties and practice play an essential part, though recourse must also be had to unilateral declarations, instructions to diplomatic agents, laws and ordinances, and, in a lesser degree, to the writings of authoritative jurists.”<sup>19</sup>

Repeating this basic point is necessary: *the consent of States to be bound* is the indispensable basis of legitimacy in all realms of international law—including customary international law.<sup>20</sup>

This elementary principle appears often to be lost on those who would like to define international law by reference to their values and aspirations rather than to the sovereign commitments of States.

Perhaps the most important, and difficult, challenge for a court in a case involving customary international law is to recall always the basic rule that “customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation

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17. *Flores*, 414 F.3d at 248.

18. Among the “classics” of international law cited in our opinions are Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT’L L. 58 (1944); OPPENHEIM’S INTERNATIONAL LAW (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996); and J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (Sir Humphrey Waldock ed., 6th ed. 1963).

19. CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 2 (1965) (quoting P. E. Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y.B. INT’L L. 20, 30 (1925)) (emphasis added and omitted from original).

20. I have had occasion to speak on this subject in José A. Cabranes, *International Law by Consent of the Governed*, 42 VAL. U.L. REV. 119 (2007) (Supreme Court of Indiana Lecture).

*and mutual concern.*<sup>21</sup> In other words, the law of nations consists only of those norms or rules that emerge from the relations of States *inter se*.<sup>22</sup>

In the nature of things, there are likely to be relatively few such rules of customary international law, because the consent of States—the core principle of international law—is best achieved, and most readily comprehended by all, in the form of treaty law. We should not be surprised to find relatively few norms that are “specific, universal, and obligatory,”<sup>23</sup> and thus may be considered customary international law—apart from some long-established trade practices; war crimes and crimes against humanity (such as those identified at Nuremberg after the Second World War); and other basic rules governing the relations of sovereign States, where matters of mutual concern have indeed produced universal recognition or extraordinary homogeneity of State practice outside the context of a treaty.

There is a natural temptation for judges in the common law tradition to find in the “soft, indeterminate” character of customary international law an invitation to be creative—to show their stuff—rather than rely on the laborious but authoritative compilations of State practice. This is a temptation to be resisted. Indeed, it is in service of resisting this temptation that the most valuable work in the field of international law often comes from those willing to undertake the time-consuming (and less glamorous) task of compiling, recording, and indexing the practices of individual states, from which customary international law can be ascertained; that is, work from authorities such as Professor Clive Parry and others, who, as the Supreme Court stated in *The Paquete Habana*, “by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”<sup>24</sup>

The work of which I am speaking is, in truth, quite similar to that to which Judge Gershon and I were exposed in Dr. Schwelb’s seminar at Yale Law School. I therefore speak from experience when I say it is difficult, even tedious, work. But I also speak from experience when I say it is critically important to the practice of international law in the federal courts.

Indeed, it is when scholars immerse themselves in the records of the

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21. *Flores*, 414 F.3d at 248 (emphasis added).

22. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (holding that customary international law includes only “those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*”), *abrogated on other grounds by Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

23. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting with approval *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

24. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

practices of individual States, and diligently document the areas where sufficiently established norms of international law have developed, that courts may have confidence in looking to their work—“not for the[ir] speculations . . . concerning what the law ought to be, but for trustworthy evidence of what the law really is.”<sup>25</sup>

A simple example may be instructive. It is tempting to look to statements by the United Nations General Assembly or other international agencies or conferences for expressions of customary international law. Yet, when one turns to the history of that august body—to the Charter and other founding documents—one finds that General Assembly resolutions and declarations do not have the power to bind member States.<sup>26</sup> Indeed, the founding member States specifically denied the General Assembly that power after extensively considering the issue, first at the Dumbarton Oaks Conference, held in Washington in 1944, then at the Yalta conference in 1945, and finally at the United Nations’ founding conference, held in San Francisco in 1945.<sup>27</sup> Accordingly, as our Court noted in 2003, resolutions of the General Assembly “are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations.”<sup>28</sup> And repeated adoption of such non-binding resolutions of international organizations cannot, by miraculous alchemy, transform those resolutions into “law”—in international affairs, as in basic arithmetic, one hundred times zero, is, alas, zero.<sup>29</sup>

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25. *Id.*

26. See D.W. Bowett, *The General Assembly*, in *THE UNITED NATIONS: THE FIRST TEN YEARS* 3, 9-10 (B.A. Wortley ed., 1957) (“The [General] Assembly is a deliberative body, an organ for discussion in the widest sense. It has, of course, power to investigate facts, to make recommendations, but it has no power to bind the members; it cannot take binding decisions as the Security Council can. This means, then, that any analogy with the legislature of a state is very misleading, for the Assembly’s functions cannot be legislative in the true sense. The only way in which its recommendations can become binding upon members is for the members to agree in advance to treat those recommendations as binding, but the Assembly’s recommendations themselves have no legally binding force.”); D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 41 (3d ed. 1975).

27. I *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 269 (Bruno Simma ed., 2d ed. 2002) (describing the rejection at Dumbarton Oaks and San Francisco of proposals to accord General Assembly resolutions the power to bind member States); cf. STANLEY MEISLER, *UNITED NATIONS: THE FIRST FIFTY YEARS* 13-14 (1995) (discussing the Yalta voting formula and the veto power in the Security Council, which alone would be empowered to issue resolutions binding on States).

28. *Flores v. S. Peru Copper Co.*, 414 F.3d 233, 259 (2d Cir. 2003).

29. One formidable example of a statement or proclamation of the General Assembly may suffice to underscore this simple point. In the aftermath of the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Declaration”), it was the earnest hope of the first generation of academic students of international human rights law, *see supra* note 10 and accompanying text, to assimilate the Declaration and other general pronouncements of international organizations into



Treaties too, which create legal obligations on the States parties to them, present a challenge to those seeking to discern a norm of *customary* international law; though they surely establish international norms governing the relations between States parties, treaties do not by their own force establish rules of customary international law. The general rule was stated by Lord McNair: “[N]o State can be bound by any treaty provision unless it has given its assent . . . .”<sup>30</sup> Nevertheless, in unusual circumstances, widely ratified treaties may provide *some* evidence of the customs and practices of States. It is vital to recall, however, that “treaties may diverge broadly from customary international law.”<sup>31</sup>

Two crucial considerations in deciding whether a given treaty may reflect customary international law are the treaty’s prevalence and its actual implementation. “The evidentiary weight to be afforded to a given treaty varies greatly depending on (i) how many, and which, States have ratified the treaty, and (ii) the degree to which those States actually implement and abide by the principles set forth in the treaty.”<sup>32</sup> Both the number of States and their relative influence on international affairs are essential indicators

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domestic law, either directly, or by a kind of judicial osmosis—that is, by its invocation and citation in opinions of federal judges. See, e.g., Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 17 (1982) (“The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations.”); Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 AM. SOC’Y INT’L L. PROC. 217, 226-27 (1959) (describing the influential effect of the Declaration on certain judicial opinions in the United States); see also Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 876 n.365 (1997) (noting the efforts of the Aspen Institute to “expose judges to international human rights law—a body of law which is largely unfamiliar to most U.S. judges” (quotation marks omitted)). Despite modest gains in this effort in an era when hopes for the United Nations Organization were still high among transnational elites, the campaign did not succeed, perhaps in part because of the significant decline or evaporation of confidence in the work of the General Assembly and the U.N.’s special conferences—a recent example being “the debacle in Durban.” See generally Tom Lantos, *The Durban Debacle: An Insider’s View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31 (Winter/Spring 2002). In any event, our Supreme Court has made it abundantly clear that the Universal Declaration of Human Rights has no legal force in American jurisprudence. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (“[T]he Declaration does not of its own force impose obligations as a matter of international law.”).

30. LORD MCNAIR, *THE LAW OF TREATIES* 162 (1961).

31. *United States v. Yousef*, 327 F.3d 56, 108 (2d Cir. 2003).

32. *Flores*, 414 F.3d at 256-57. On the relevance of the practices of the United States in its relations with other countries, our Court has stated on more than one occasion: “While it is not possible to claim that the practice or policies of any one country, including the United States, has such authority that the contours of customary international law may be determined by reference only to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international law principle.” *Id.* at 257 n.33 (quoting *Yousef*, 327 F.3d at 92 n.25).

of a treaty's prevalence. As for a treaty's actual implementation, its principles must be uniformly and consistently adhered to and applied by its States parties before it can be said to have created an obligation on non-parties. In order for a treaty to constitute some proof of a norm of customary international law, then, the overwhelming majority of the States that have ratified it must routinely act according to its principles.<sup>33</sup>

### CONCLUSION

I conclude where I began. In the study of customary international law ("the Law of Nations")—as in all areas of the law—an understanding of history is important, and in particular the history of international law itself. It is important to understand how and when international human rights law emerged and the body of treaty law and customary law on which it rests. It is essential to understand what is, and what is not, customary international law—that is, what practices have been (or have not been) universally accepted by the nations of the world in their relations *inter se*.

In sum, history—the history of international relations—is the most important beacon for any judge who seeks to chart the difficult shoals of customary international law.

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33. Cf. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940 (2002) (noting widespread non-compliance with human rights treaties by States that have ratified them).