

THE GROWING IMPORTANCE OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

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The original "game plan" of the Founding Fathers of the United Nations international human rights program was, first, to spell out in a non-binding Universal Declaration of Human Rights¹ the general principles falling within the phrase "human rights and fundamental freedoms" found in the UN Charter,² and then to draft a covenant (which later became two covenants) and various specific conventions relating to particular human rights that would contain legally binding obligations together with implementation provisions for those states that ratified such treaties.³ Thus, they intended international human rights law to be primarily, perhaps even exclusively, conventional law. That substantial portions of the Universal Declaration of Human Rights, adopted in 1948, eventually might become customary international law, and therefore binding on all states, was beyond the comprehension and vision of all but a few of the participants.⁴

Over the years, however, the Universal Declaration took on a life of its own,⁵ aided in no small measure by the fact that the two International Covenants on Civil and Political Rights⁶ and Economic, Social and Cultural

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¹ G. A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/180, at 71 (1948).

² U.N. Charter arts. 1, ¶ 3 & 55, ¶ c.

³ For a most useful summary of how this plan was carried out, by one who was "present at the creation," see Louis B. Sohn, *A Short History of United Nations Documents on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 39, 59-174 (Eighteenth Report of the Commission to Study the Organization of Peace ed., 1968).

⁴ But see JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 64-65 (1984).

⁵ For early documentation of this process, see Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 *PROC. AM. SOC'Y INT'L L.* 217 (1959). See also EGON SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 34-74 (1964).

⁶ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Rights⁷ took until 1966 to draft and entered into force only in 1976. "The process of creating an international law of human rights by the traditional method of concluding international treaties" having been so prolonged, the legal equivalent of the law of physics—that nature abhors a vacuum—came into play and, as the late Professor Schwelb noted in 1964, "the Declaration took over the function originally contemplated for the International Bill of Rights as a whole."⁸ Thus as early as 1965 the late Judge Waldock, perhaps a bit prematurely, concluded that the Universal Declaration had become, in toto, a part of binding, customary international law.⁹ Three years later the non-governmental Assembly for Human Rights adopted the Montreal Statement, which included the assertion that the "Universal Declaration of Human Rights . . . has over the years become a part of customary international law."¹⁰ Also in 1968, designated by the United Nations as Human Rights Year, the UN-sponsored International Conference on Human Rights adopted the Proclamation of Teheran stating that "[t]he Universal Declaration of Human Rights . . . constitutes an obligation for members of the international community."¹¹

Of course, these statements that the Universal Declaration had become legally binding did not make it so; they did, however, constitute important indications that an international consensus to the effect that it reflected customary international law was evolving. Thus in 1976 Professor Humphrey, who as the first Director of the UN Secretariat's Division of Human Rights played a major role in drafting the Declaration,¹² observed that in the course of over a quarter of a century "the Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states."¹³ The following year Professor Sohn

⁷ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. (entered into force Jan. 3, 1976).

⁸ SCHWELB, *supra* note 5, at 37.

⁹ Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (Int'l & Comp. L.Q. Supp. No. 11, 1965).

¹⁰ Montreal Statement, 9 J. INT'L COMM'N JURISTS 94, 95 (June 1968).

¹¹ Proclamation of Teheran, U.N. GAOR, 23d Sess., U.N. Doc. A/CONF. 32/41 (1968).

¹² See HUMPHREY, *supra* note 4, at 31-33 & 42-43.

¹³ John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527 (1976). See also HUMPHREY, *supra* note 4, at 75-76.

opined that he believed the Universal Declaration to be not only "an authoritative interpretation of the Charter obligations but also a binding instrument in its own right. . . ."¹⁴ In 1980 Professor McDougal and his colleagues, after describing "the evolution of the Universal Declaration of Human Rights from its first status as mere common aspiration to its present wide acceptance as authoritative legal requirement,"¹⁵ also reached the conclusion that it had become "established customary international law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights."¹⁶

Evidence of state practice confirming that at least some norms found in the Universal Declaration were thought to have become customary international law was provided in dramatic fashion by the United States in two exceptionally significant cases—one international, one domestic—decided in 1980. In its Memorial to the International Court of Justice in the *Hostages* case,¹⁷ the United States argued that Iran had violated "certain fundamental human rights" of the hostages "now reflected, inter alia, in the Charter of the United Nations, the *Universal Declaration of Human Rights* and corresponding portions of the International Covenant on Civil and Political Rights"¹⁸ The Court subsequently endorsed this argument in its Judgment:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the

¹⁴ Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977). See also Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 17 (1982).

¹⁵ MYRES S. MCDUGAL, HAROLD LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 272 (1980). The description of this evolution is found in *id.* at 320-32.

¹⁶ *Id.* at 274. See also Lung-chu Chen, *Restatement: Protection of Persons*, 14 YALE J. INT'L L. 542, 546-47 (1989).

¹⁷ Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24, 1980).

¹⁸ Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings (Case Concerning United States Diplomatic and Consular Staff in Tehran) 182 (Jan. 12, 1980) (emphasis added). As evidence of such rights, the Memorial cited Articles 3, 5, 7, 9, 12 and 13 of the Universal Declaration, *id.* at 182 n.36, which cover, respectively, the right to life, liberty and security of person; the prohibition of torture or cruel, inhuman or degrading treatment or punishment; the right to equality before the law and to non-discrimination in its application; the prohibition of arbitrary arrest or detention; the right to privacy; and the right to freedom of movement.

principles of the Charter of the United Nations, *as well as with the fundamental principles enumerated in the Universal Declaration of Human Rights*.¹⁹

While the above passage can be read narrowly to single out the prohibition against torture or cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person for special status, Professor Rodley's more convincing interpretation, with which the present writer agrees, "is that the Court was simply stating that the [Universal] Declaration as a whole propounds fundamental principles recognized by general international law."²⁰

Also in 1980, in the case of *Filartiga v. Pena-Irala*,²¹ the United States, pursuant to a request by the U.S. Court of Appeals for the Second Circuit at the end of oral argument, submitted an important amicus curiae brief further explaining its views on the customary international law of human rights.²² *Filartiga* involved an action by two Paraguayan plaintiffs against another Paraguayan citizen for the torture and death of their son and brother. The case was brought under the Alien Tort Statute, which provides 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."²³ Since the United States had yet to ratify the International Covenant on Civil and Political Rights,²⁴ Article 7 of which prohibits torture, the plaintiffs could not rely upon it to establish jurisdiction under the Statute, but instead had to show that torture violated "the law of nations," i.e., customary international law.

In its brief the United States contended that customary international law now guarantees individuals "certain fundamental human rights,"²⁵ including

¹⁹ 1980 I.C.J. at 42 (emphasis added).

²⁰ Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321, 326 (1989).

²¹ 630 F.2d 876 (2d Cir. 1980).

²² Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, reprinted in 19 I.L.M. 585 (1980) [hereinafter cited as U.S. Memorandum].

²³ 28 U.S.C. § 1350 (1994).

²⁴ *Supra* note 6. The United States eventually ratified the Covenant on September 8, 1992. See generally RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 248-68 (3d ed., 1995).

²⁵ U.S. Memorandum, *supra* note 22, at 589.

the right to be free from torture.²⁶ “*This universal condemnation [of torture],*” the brief concluded after an extensive canvass of the evidence demonstrating the existence of such an international norm, “*is made explicit in the Universal Declaration of Human Rights, which declares that ‘No one shall be subjected to torture’*”²⁷ The Court of Appeals, which undertook its own thorough examination of the sources from which customary international law is derived,²⁸ endorsed the government’s views when it unanimously held that the prohibition against torture “has become part of customary international law, *as evidenced and defined by the Universal Declaration of Human Rights. . . .*”²⁹ Thus state practice, confirmed by a judicial decision, again affirmed that certain fundamental human rights contained in the Universal Declaration now have acquired the status of customary international law.

The *Filartiga* case was almost unanimously lauded by the many legal commentators appraising it.³⁰ It has spawned a flurry of Alien Tort Statute litigation³¹ that, coupled with the occasional instance where customary international human rights law has been invoked in other contexts,³² has

²⁶ *Id.* at 595-601.

²⁷ *Id.* at 598 (emphasis added), citing Article 5 of the Universal Declaration, *supra* note 1.

²⁸ See 630 F.2d at 880-85.

²⁹ *Id.* at 882 (emphasis added).

³⁰ See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53 (1981); *Human Rights Symposium*, 4 HOUS. J. INT’L L. 1 (1981); *Symposium: Federal Jurisdiction, Human Rights and the Law of Nations: Essays on Filartiga v. Pena-Irala*, 11 GA. J. INT’L & COMP. L. 305 (1981); and the articles cited in Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 n.1. (1984). But see Michael Danaher, *Case Comment, Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353 (1981).

³¹ For a relatively recent compilation of cases that have arisen under the Statute, all but a handful since *Filartiga*, see Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute* (28 USCS § 1350), *Providing for Federal Jurisdiction over Alien’s Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (1993).

³² See, e.g., *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) (“[A]rbitrary detention is prohibited by customary international law.”), *aff’d on constitutional grounds sub nom. Rodriguiz-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), where an excludable Cuban refugee sought and obtained a writ of habeas corpus on the ground that his confinement in a federal penitentiary pending deportation violated his constitutional rights.

produced a sizeable body of U.S. case law affirming that a number of the norms found in the Universal Declaration have achieved customary international law status. In addition to the prohibition against torture, they include the prohibitions against arbitrary detention,³³ summary execution or murder,³⁴ "causing the disappearance" of individuals,³⁵ cruel, inhuman or degrading treatment,³⁶ and genocide.³⁷

All these core human rights—along with prohibitions against slavery or the slave trade, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights—are listed in the blackletter of Section 702 of the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States,³⁸ which purports to state the generally accepted "Customary International Law of Human Rights" as of 1987. As was to have been expected,³⁹ however, human rights not specifically enumerated in Section 702's blackletter have not been held by U.S. courts to have achieved customary international law status, even when found in the Universal Declaration. They include the right to education,⁴⁰ the right to property,⁴¹ and the right of free speech.⁴² Arguments that these and other human rights, whether contained in the Declaration or not, now are part of customary international law can be expected to

³³ See text accompanying *supra* note 32.

³⁴ *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987).

³⁵ *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988).

³⁶ *Xuncax v. Gramajo*, 886 F. Supp. 162, 185-89 (D. Mass. 1995).

³⁷ *Id.* at 187 n.35 (dictum). The U.S. Court of Appeals for the Second Circuit recently held that not only genocide, but also war crimes and crimes against humanity, constituted violations of customary international law. See *Kadic v. Karadzic*, Nos. 94-9035 & 94-9069, 1995 U.S. App. LEXIS 28826, at *4 (2d Cir. Oct. 11, 1995).

³⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT]. For critiques of Section 702 in draft form and after its adoption, see Richard B. Lillich, *The Revised Draft Restatement of the Foreign Relations Law of the United States and Customary International Law: Remarks*, 79 PROC. AM. SOC'Y INT'L L. 84 (1985) and Chen, *supra* note 16, at 550-53.

³⁹ See Lillich, *supra* note 38, at 85-86. See generally Karl M. Meesen, [Foreword to] *Special Review Essays: The Restatement (Third) of the Foreign Relations Law of the United States*, 14 YALE J. INT'L L. 433, 434 (1989) ("[T]he Restatement will be of greatest significance in the United States itself. In fact, it will be hard to persuade U.S. Federal and State courts of international law rules differing from those set out in the Restatement.").

⁴⁰ *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 596 (S.D. Tex. 1980), *aff'd unreported memo.*, (5th Cir. 1981), *aff'd sub nom. Plyer v. Doe*, 457 U.S. 202 (1982).

⁴¹ *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985).

⁴² *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986).

be made in courts in the United States with increasing frequency.⁴³

As one who has prepared affidavits, been an expert witness and helped to draft numerous amicus curiae briefs in many of the U.S. cases that have developed the customary international law of human rights over the past 15 years, the present writer came to believe by the early 1990s that some stock-taking was highly desirable—indeed sorely needed—in this area. The normative character of the Universal Declaration, as well as the jurisprudential underpinnings of customary international human rights law in general and, more specifically, its past as well as potential future application in courts in the United States, seemed eminently worthy of review and reassessment by legal scholars and human rights practitioners. While the present writer, at Professor Meron's urging, had completed in 1981 a very tentative survey of the civil rights articles in the Universal Declaration to see which could be said to reflect customary international law,⁴⁴ no systematic attempt to collect and evaluate the practice of states with respect to the Declaration had been made.⁴⁵ Indeed, it was not until 1990 that the International Law Association's Committee on the Enforcement of Human

⁴³ At the Symposium Professor Henkin, the Restatement's Chief Reporter, indicated that if he were drafting Section 702 today he would include as customary international law rights the right to property and freedom from gender discrimination (*see* RESTATEMENT, *supra* note 38, § 702 cmts. k, l), plus the right to personal autonomy and the right to live in a democratic society. For the Human Rights Committee's list of rights found in the UN Civil and Political Covenant that it believes *already* represent customary international law, *see* text *infra* note 100.

⁴⁴ Richard B. Lillich, *Civil Rights*, in 1 THEODOR MERON, HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115 (1984).

⁴⁵ *See* HUMPHREY, *supra* note 4, at 75:

I would need a very long chapter to review all the evidence that could be marshalled in support of the proposition that the Universal Declaration of Human Rights is now part of the customary law of nations. As far as I know, no one has ever attempted to bring together and analyze the countless times that the Declaration has been invoked, either within or outside the United Nations, or been used as the standard of permissible action.

See also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 94 (1989): "Empiric studies of state practice are therefore of the highest importance in establishing whether a particular right has matured into customary law." The author cites as a (rare) example "the detailed study of national practices" contained in HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE (1987).

Rights Law began a more thorough study, one which led to reports in 1992⁴⁶ and 1994⁴⁷ and served as the basis for the ILA's Buenos Aires Declaration on the Status of the Universal Declaration of Human Rights in National and International Law.⁴⁸ The latter confirmed the Committee's view that "there would seem to be little argument that many provisions of the [Universal] Declaration today do reflect customary international law."⁴⁹

The state practice gathered by the ILA and set out in Professor Hannum's article in this Symposium is impressive indeed. It demonstrates beyond any doubt, in this writer's opinion,⁵⁰ that many of the norms found in the Universal Declaration and replicated in the Civil and Political Covenant now constitute part of customary international law binding upon all states. The rich diversity of state practice found in the article also reflects the fact that in the human rights arena "it is clear that [in] determining whether or not a particular customary law norm exists [one must] draw upon a wide variety of sources."⁵¹ This approach to ascertaining custom mirrors that of the Restatement's reporters, who observed that "the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary internation-

⁴⁶ Committee on the Enforcement of Human Rights Law, *Interim Report on the Status of the Universal Declaration of Human Rights in National and International Law*, in REPORT OF THE SIXTY-FIFTH CONFERENCE 446 (Cairo 1992).

⁴⁷ Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, in REPORT OF THE SIXTY-SIXTH CONFERENCE 525 (Buenos Aires 1994).

⁴⁸ *Id.* at 29.

⁴⁹ *Id.* at 544. The uncut version of the Committee's Final Report appears in this Symposium as Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995-96).

⁵⁰ See also the views of the Human Rights Committee in the text *infra* note 100.

⁵¹ *Id.* at [34]. The author quotes Professor Brownlie who, after observing generally that the "sources of custom are very numerous," includes among them:

diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, . . . executive decisions and practices, . . . comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.

IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (4th ed., 1990).

al law generally.”⁵² Greater emphasis especially is placed on widely accepted multilateral treaties and UN General Assembly resolutions like the Universal Declaration. Inspired in large measure by *Filartiga* and its progeny, several prominent legal scholars, notably Professor Schachter⁵³ and Professor Meron,⁵⁴ have endorsed and developed the Restatement’s

⁵² RESTATEMENT, *supra* note 38, § 701 note 2. The reporters noted that practice accepted as building customary international human rights law included:

virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin American, and Africa . . . ; general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and law; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.

Id.

⁵³ See Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 334-35 (1982-V):

Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual process of customary law formation. States do not usually make claims on other States or protest violations that do not affect their nationals. In that sense, one can find scant State practice accompanied by *opinio juris*. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence . . . [none of which] confirm to the traditional criteria.

⁵⁴ MERON, *supra* note 45, at 92-94:

The Restatement . . . attempts . . . to identify customary human rights. Of greater interest than the identification of already accepted customary human rights are the types of evidence used to identify them and the processes used to support the maturation of a right into customary status.

approach to the determination of customary international human rights law.

If these developments in the area of customary international human rights law were not enough to warrant the stock-taking suggested two paragraphs above, the appearance in 1992 of a somewhat strident critique by two distinguished foreign scholars of what they regard as a U.S. "customary-law-of-human rights school"⁵⁵ served to spur the present writer and his sometime colleague, Professor Wilner, into organizing the 1994 Colloquium at the University of Georgia that brought together the twelve contributors to this Symposium for two days of discussion and debate.⁵⁶ Since the Colloquium did not focus except in passing on the Simma-Alston critique of U.S. scholarship and lawyering in the international human rights law area, however, a brief description and response to it here may serve both to introduce the topic of this Symposium and to call attention to its general theme and various specific points made in the articles that follow.

... The Restatement's list [see text accompanying *supra* note 52] of types of evidence to be utilized to prove customary human rights is extremely useful. Also useful are the indicators suggested by Professor Schachter, who refers to the need to assess general statements on human rights by international bodies by reference to actual state practice and the intensity and depth of third-party condemnation of violations. . . .

Of course, the initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted. In this context my own preferred indicators evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws. . . . It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence.

⁵⁵ Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 106 (1992).

⁵⁶ The present writer served as Visiting Woodruff Professor of International Law at the University of Georgia School of Law during the 1994 Spring Semester. He would like to express his appreciation to Dean Edward D. Spurgeon of the School of Law for his encouragement and financial support that made the holding of the Colloquium and the publication of this Symposium possible.

Preliminarily, it should be noted that the Simma-Alston critique comes as something of a surprise to anyone familiar with their past writings. Although Professor Simma revealed some time ago that he was no fan of customary international human rights law, he nevertheless acknowledged that it "has flowered quite impressively in many domestic legal orders."⁵⁷ Indeed, while critical of the International Court of Justice's approach to the determination of customary international law in the *Nicaragua* case,⁵⁸ he rightly recognized that most of the candidates for customary international human rights law status found in Section 702 of the Restatement would so qualify according to that Judgment, which he labeled "the Court's own contribution to the softening of custom."⁵⁹ Moreover, over a decade ago, as two contributors to this Symposium,⁶⁰ perhaps puckishly, have pointed out, Professor Alston had no difficulty in finding "a large and growing body of evidence" to support the proposition that the first 21 articles of the Universal Declaration—concerned exclusively with civil and political rights—already had become part of customary international law.⁶¹ Whatever the reasons for the first author's reassessment of his prior views and the second author's inexplicable volte-face, the Simma-Alston critique was

⁵⁷ Bruno Simma, *A Hard Look at Soft Law: Remarks*, 82 PROC. AM. SOC'Y INT'L L. 377, 378 (1988).

⁵⁸ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.) (Merits), 1986 I.C.J. 14 (Judgment of June 27). Professor Simma noted that in *Nicaragua*, "after paying lip service to the classic view [of custom], the Court itself has submitted to the current trend of deemphasizing practice in favor of opinio juris and looking to soft law innovations for determining the content of this objective element . . ." Simma, *supra* note 57, at 379.

⁵⁹ *Id.*

⁶⁰ See Hannum, *supra* note 49, at 324; Jordan J. Paust, *The Complex Nature, Sources and Evidence of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 149 (1995-96).

⁶¹ Philip Alston, *The Universal Declaration at 35: Western and Passé or Alive and Universal*, 31 I.C.J. Rev. 60, 69 (Dec. 1983). It is passing strange, to say the least, that the author of the above-cited article now joins Professor Simma in making the characteristically (for the former) uncharitable charge of "normative chauvinism, albeit of an unintentional or sub-conscious variety," against Professor Schachter, Professor Meron, the present writer and even the Restatement, whose far more modest list of civil and political rights found in Section 702 they savage as "a particularly striking instance of assuming that American values are synonymous with those reflected in international law." Simma & Alston, *supra* note 55, at 94. Even more puzzling is the fact that six pages later they concede that a strong case can be made that many of the rights contained in Section 702 "are capable of satisfying the appropriate criteria for the creation of customary international law." *Id.* at 100. See also text *supra* notes 58-59.

completely unexpected.⁶²

However one may feel about caustic comments from a critic whose previously recorded views were far more extreme than the "radical approach to custom" the selfsame critic now so energetically deplores,⁶³ one still may decide to take note of his pronouncements, like Saul's after his revelation on the road to Damascus, even if one is reluctant to accept their validity on faith. Especially is this so when "the word" emanates from two distinguished international lawyers, well-known for their scholarly writings and UN activities in the human rights field.⁶⁴ What then, briefly, is their message?

In a nutshell, stripped of its "trashing customary international human rights law"⁶⁵ rhetoric, the Simma-Alston critique rests upon a preference for and commitment to a pre-Nicaragua,⁶⁶ perhaps even pre-North Sea Continental Shelf case⁶⁷ approach to customary international law formation, an approach that looks "into the past to identify customary patterns of State practice" and then turns "this empirical result into a normative projection for the

⁶² Most certainly by the present writer and Professor Schachter, who in August 1990 had been invited to the Australian National University in Canberra, Australia, to comment upon the first draft of the authors' article!

⁶³ Simma & Alston, *supra* note 55, at 96. Other adjectives employed throughout the Simma-Alston critique are "dubious," "progressive," and "streamlined." All are employed in one splendid polemical sentence in the authors' conclusion: "The mainstream position, particularly in the United States, satisfies its appetite by resorting to a progressive, streamlined theory of customary law, more or less stripped of the traditional practice requirement, and through this dubious operation is able to find a customary law of human rights whenever it is needed." *Id.* at 107. For one scholar-litigant's plea of innocence to such charges, see Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. L. 165 (1995-96).

⁶⁴ Professors Alston and Simma are members of the Committee on Economic, Social and Cultural Rights, created by the Economic and Social Council in 1986 to monitor state parties' compliance with their reporting obligations under the International Covenant on Economic, Social and Cultural Rights, *supra* note 7, and have served as Chairman and Rapporteur thereof.

⁶⁵ With apologies to one of the contributors to this Symposium. See D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987).

⁶⁶ See *supra* note 58.

⁶⁷ North Sea Continental Shelf Case (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3 (Judgment of February 20).

future.”⁶⁸ This approach, emphasizing “hard core” past practice to the near-exclusion of customary international law’s other component, *opinio juris*,⁶⁹ is expressly criticized by several of the contributors to this Symposium,⁷⁰ and would appear to be well outside the “mainstream” of contemporary international law scholarship.⁷¹ Certainly the consensus that emerges from this Symposium, while not rejecting “the established formal criteria of

⁶⁸ Simma & Alston, *supra* note 55, at 89. They quote with approval the late Professor Kelsen’s observation that “states ought to behave as they have customarily behaved.” Hans Kelsen, *Principles of International Law* 418 (1952).

⁶⁹ See RESTATEMENT, *supra* note 38, § 102(2): “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation,” *see also id.*, cmt. c.

⁷⁰ See, e.g., Fitzpatrick, *supra* note 63, at 169; Paust, *supra* note 60, at 148-50. All but one of the other contributors either expressly or impliedly reject the Simma-Alston critique. *But cf.* Professor Weisburd, who, after an extensive examination of the travaux préparatoires of the Civil and Political Covenant, *supra* note 6, the Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984) (entered into force June 26, 1987), argues that the states drafting those treaties did not regard the rights included therein to be part of customary international law in 1966, 1979 and 1984 respectively. Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 24 GA. J. INT’L & COMP. L. 99, 116-20 (1995-96). Nor, after assessing patterns of adherence to or practice under the treaties, does he believe they have achieved that status even today. *Id.*

For an earlier debate by this author and Professor D’Amato on the role of treaties in the creation of customary international human rights law, compare Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1 (1988) (relatively unimportant) with Anthony D’Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 *id.* at 459 (1988) (exceptionally important). Professor D’Amato restates his belief that treaties are the most obvious evidence of state practice in the customary international human rights law area in his contribution to this Symposium. See Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47, 97-98 (1995-96).

⁷¹ As even Professors Simma and Alston acknowledge in the quotation accompanying *supra* note 63. Elsewhere they would appear to associate themselves with “an embattled group of writers who declare themselves unable to verify the presence of (what they perceive to be) the prerequisites of customary international law in a large part of a field so torn by ideology and politics, and so replete with hypocrisy, double standards and second thoughts.” Simma & Alston, *supra* note 55, at 85.

custom,"⁷² supports the Restatement⁷³ in looking as well to other sources of state practice and in finding *opinio juris* in state conduct not necessarily involving interaction with other states.⁷⁴ This consensus, as even Professors Simma and Alston admit, fully accords with the teachings of the *Nicaragua* case⁷⁵ and the views of the vast majority of legal commentators.⁷⁶

In an attempt to close their critique on a positive note, and without doubt as homage to Professor Simma's former mentor, the late Professor Verdross, the learned authors devote several pages towards the end of their lengthy article to developing an alternative basis for a non-conventional legal obligation in the human rights area that would bind all states, namely,

⁷² *Id.* at 99. The attitude of Professors Simma and Alston towards these "formal criteria" seems somewhat crabbed and rigid; moreover, they set the bar of state practice so high that few international human rights norms could ever clear it, as they themselves acknowledge. *Id.* at 101. In this regard, Professor Charney recently made the point, one well-known to any international law practitioner but apparently not to all academics, that "[t]he evidence traditionally used to establish new [and, indeed, often old] norms of international law is considerably less comprehensive and persuasive than some theory would suggest. . . ." Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537-38 (1993). Furthermore, in words that could have been written to respond to the Simma-Alston critique, he observed that:

[t]he relatively exclusive ways of the past are not suitable for contemporary circumstances. While customary law is still created in the traditional way, that process has increasingly given way in recent years to a more structural method, especially in the case of important normative developments.

Rather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law.

Id. at 543.

⁷³ See text accompanying *supra* note 52.

⁷⁴ See generally D'Amato, *supra* note 70; Paust, *supra* note 60; Fitzpatrick, *supra* note 63; Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT'L & COMP. L. 205 (1995-96). Hannum, *supra* note 49.

⁷⁵ They note that the Court only paid "lip-service to the classic view [of state practice]" to which they remain committed. Simma & Alston, *supra* note 55, at 96. See also text at and accompanying *supra* notes 58-59.

⁷⁶ *Id.* at 84: "[A] majority of authors today take the view that international human rights obligations incumbent upon States may, and actually do, also derive from customary international law."

general principles of law recognized by civilized nations,⁷⁷ which they contend should not be limited to legal principles developed *in foro domestico*, but also be extended to such principles accepted in an international setting, e.g., by their express articulation in U.N. General Assembly declarations.⁷⁸ They admit that “the concept of custom will be difficult to distinguish from that of general principles recognized internationally in the first instance,”⁷⁹ and they also acknowledge that “general principles have not fared too well as a source of international law, mainly due to their natural law flavour and the uncertainties surrounding the ways in which they are to be established and applied.”⁸⁰ Nevertheless, they apparently believe that reliance upon general principles sidesteps the problems associated with proving customary international law. This belief is puzzling, to say the least, unless, like the authors of the latest edition of Oppenheim, they also believe that general principles are an independent source of international law giving rise to legal rules binding upon states even without their consent.⁸¹ Yet they plainly state that:

the recourse to general principles suggested here remains grounded in a consensualist conception of international law. Consequently, what is required for the establishment of human rights obligations qua general principles is essentially the same kind of convincing evidence of general acceptance and recognition that Schachter asks for—and finds—in order

⁷⁷ Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1055, 1060 (1945).

⁷⁸ Simma & Alston, *supra* note 55, at 102.

⁷⁹ *Id.*

⁸⁰ *Id.* at 107. The quotation is something of an understatement. For a succinct summary of the “considerable debate over the nature of international obligations derived from general principles of law,” see Charney, *supra* note 72, at 535. See also 1 OPPENHEIM’S INTERNATIONAL LAW 36-40 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

⁸¹ *Id.* at 38-40 *passim*. Cf. Charney, *supra* note 72, at 535-36:

Another view holds that the usage of a principle found in all the principal legal systems is analogous to state practice as required for customary international law. If the practice is sufficiently uniform, a norm of international law is established. Uniform domestic practice converts the domestic rule into one of international law. Proof that states accept the rule as international law is not required.

See also RESTATEMENT, *supra* note 38, § 102(4) cmt. 1 & note 7; § 701(c) cmt. b & notes 2 & 3; § 702 note 1.

to arrive at customary international law. However, this material is not equated with State practice but is rather seen as a variety of ways in which moral and humanitarian considerations find a more direct and spontaneous "expression in legal form."⁸²

Leaving aside criticism of the highly abstract, even abstruse, language in their last sentence, one ultimately is left wondering what benefits the authors perceive will come from having recourse to general principles if their establishment depends upon proving their consensual acceptance by states—manifested by "the same kind of convincing evidence" the authors find objectionable when used by other international lawyers to establish customary international law norms.⁸³

It is true, of course, that general principles may play a role in the human rights area; this role, however, traditionally has been regarded as one of "promoting the passage of human rights into customary law,"⁸⁴ not of metamorphasizing them into free-standing, independent rules of international law.⁸⁵ Professors Simma and Alston invoke the jurisprudence of the International Court of Justice in support of their thesis, contending that none of its judgments addressing human rights issues "expressly speak of customary international law. . . ."⁸⁶ This debater's point is unpersuasive; while the Court, as they state, "has unambiguously accepted that the obligation to respect fundamental human rights is an obligation under *general international law*,"⁸⁷ this language normally is equated with customary international law, not general principles of law within the meaning

⁸² Simma & Alston, *supra* note 55, at 105 (emphasis added).

⁸³ Ironically, a criticism also made by Professor Weisburd, albeit from a different perspective. See Weisburd, *supra* note 70, at 105 n.9.

⁸⁴ MERON, *supra* note 45, at 88. Professor Merson predicts that general principles increasingly will become "a route for the passage of international human rights norms into general international law." *Id.* at 88-89. Whether he equates general international law with customary international law, or thinks it embraces general principles as well, is not clear. Indeed, the author observes that, "as in other fields of international law, the distinction between international customary law . . . and general principles of law . . . will eventually become blurred." *Id.* at 89.

⁸⁵ But see text *supra* note 81.

⁸⁶ Simma & Alston, *supra* note 55, at 105.

⁸⁷ *Id.* at 105 (emphasis added).

of Article 38(1)(c) of the Court's Statute.⁸⁸

Furthermore, domestic courts routinely rely upon customary international law rather than general principles in deciding cases where international human rights norms are relevant. Ample evidence to support this proposition is found in Professor Hannum's article, including German cases that apply customary international law—not general principles—under Article 25 of the Basic Law (German Constitution), which provides that "[t]he general rules of public international law shall be an integral part of federal law."⁸⁹ Domestic courts in other Western European countries that recognize customary international law as "part of the law of the land" presumably take

⁸⁸ See, e.g., MERON, *supra* note 45, at 106-14, who devotes an entire section of one chapter to "The International Court of Justice and Customary Human Rights." See also *id.* at 25-37, an entire section of another chapter about how the Court in the Nicaragua case, *supra* note 58, attributed "customary law character to Articles 1 and 3 of the Geneva Conventions. . . ." *Id.* at 37. Accord, RESTATEMENT, *supra* note 38, § 701(b) note 2: "The International Court of Justice and the International Law Commission have recognized the existence of customary human rights law." Professor Cassese believes "general international law" and "customary international law" to be synonymous. Antonio Cassese, *Modern Constitutions and International Law*, 192 RECUEIL DES COURS 331, 391 (1985-III). Cf. Rodley, *supra* note 20.

⁸⁹ Grundgesetz art. 25. See Hannum, *supra* note 49, at 294, 347. For further discussion of German court decisions that rely on customary international law to decide cases, see MERON, *supra* note 45, at 132-34; Luzius Wildhaber & Stephan Breitenmoser, *The Relationship between Customary International Law and Municipal Law in Western European Countries*, 48 ZaoRV (Heidelberg J. Int'l L.) 163, 179-82 (1988).

Professors Simma and Alston cite decisions of the German Constitutional Court and the German Administrative Court supposedly applying "general international law" and "general principles of international law" respectively as evidence that German case law "cannot be read as lending support to the customary-law-of-human rights school." Simma & Alston, *supra* note 55, at 106. With all due respect to a leading German jurist, the first decision is replete with references to "general rules of public international law" (46 BVerf GE 342, 362-63 (1978)), which most authorities equate with customary international law rather than general principles of law within the meaning of Article 38(1)(c) of the Court's Statute, and the second decision, which actually refers to "general principles of public international law" (45 ZaoRV (Heidelberg J. Int'l L.) 88 (1985)) (emphasis added), contains no suggestion that the Administrative Court had "general principles of law recognized by civilized nations" in mind. Thus the absence of express reference to customary international law in the above two decisions does not mean that it was not being applied; at the very least, the decisions provide no support for the Simma-Alston "general principles" thesis. *Nota bene*: Wildhaber & Breitenmoser, *supra*, at 180 n.61: "Some German authors deny that the notion 'general rules of public international law' also includes the generally recognized principles of international law."

the same approach.⁹⁰ Indeed, Italian courts applying customary international law under that country's constitution do not even have the option of looking to general principles.⁹¹ As for the United States, while the Supreme Court has ruled that customary international law is "part of our law,"⁹² it never has expanded this holding to embrace general principles—nor is it likely to do so. Thus it would seem futile, even counterproductive, to undercut the growing importance of customary international human rights law by commencing, as Professors Simma and Alston propose, a quixotic campaign to achieve the same objectives via the general principles approach.

As mentioned above,⁹³ the consensus emerging from this Symposium rejects the Simma-Alston critique; along with the Restatement, it looks not only to traditional but also to new sources of state practice and new expressions of *opinio juris* to determine and develop the content and contours of the emerging customary international law of human rights. Professor Henkin, whose Hague Lectures Professors Simma and Alston invoke in support of their thesis,⁹⁴ far from agreeing with them uses his Sibley Lecture in this Symposium to highlight "the pressure, beginning at Nuremberg in 1945, to develop and achieve recognition for a 'customary,' 'non-conventional' law of human rights (i.e., law not made by treaty)," and correctly concludes that "there is now a significant, and increasing, amount of such non-conventional law of human rights."⁹⁵ While noting that "the

⁹⁰ *Id.* at 204.

⁹¹ *Id.* at 184:

In contradistinction from what the Federal Constitutional Court and the predominant doctrine in the Federal Republic of Germany assume, the general principles of law, as stated in Art. 38(1)*lit.* (c) of the Statute of the ICJ are held not to fall within the scope of Art. 10(1) of the Italian Constitution [which refers to "generally recognized principles of international law"].

⁹² *The Paquete Habana*, 175 U.S. 670, 700 (1900).

⁹³ See text *supra* notes 72-76.

⁹⁴ Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 0, 61-62 (1989-IV).

⁹⁵ Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 37 (1995-96). Professor D'Amato, in the course of his sprightly critique of what he considers Professor Henkin's adherence to "the Sovereignty Paradigm," views the latter as now denying that "human rights norms have their origin in custom." D'Amato, *supra* note 70, at 52. He thus proceeds to criticize Henkin both for inventing a "new source" of human rights law—"non-conventional law"—and for deriving its content from "liberal national constitu-

state practice supporting non-conventional human rights law looks different, is different,"⁹⁶ his increased concern with "the national roots of international human rights law"⁹⁷ should be read as a reaffirmation rather than a rejection of the approach to the customary international law of human rights that he pioneered when first drafting Section 702 of the Restatement a decade ago.

That approach, which finds near-unanimous support from the contributors to the Symposium and, save Professors Simma and Alston, from most international lawyers in the United States and elsewhere, recently received a resounding endorsement from the Human Rights Committee, the authoritative and prestigious body of experts from 18 countries established to monitor compliance with the International Covenant on Civil and Political Rights.⁹⁸ In the course of its General Comment No. 24 on reservations to the Covenant issued in 1994, the Committee reached the conclusion that states parties to the Covenant may not make reservations to provisions therein that

tions." *Id.* On the latter point he concludes that "national constitutions simply are not, and have never been, sources of international law. It is rather astounding that Professor Henkin wants to elevate them to the status of sources of international law in order to 'explain' what he means by 'non-conventional' law." *Id.* at 55.

Although the lecture origins of Professor Henkin's article and his typically flowing prose may have introduced an element of uncertainty into his text, a careful reading thereof suggests that he was not rejecting customary international human rights law at all, but actually equating it with (or including it under) the phrase "non-conventional law." See text and Henkin, *supra*, at 40, where he concludes that some rights in the two Covenants have become "non-conventional ('customary') law." Thus Professor D'Amato misinterprets his former mentor on this point, which may explain his above-quoted statement that "national constitutions simply are not, and have never been, sources of international law." That statement is accurate to the extent that national constitutions are not independent sources of international law, but not if it is meant to suggest that they cannot be "sources from which customary international law is derived . . ." *Filartiga v. Pena-Irala*, *supra* note 21, at 884. Professor Henkin, like Judge Kaufman in *Filartiga*, *id.* at 882 n.10, presumably is using them for the latter purpose.

But see Henkin, *supra*, at 38, where he "muddies the waters" by noting that "[s]keptics might insist that the non-conventional law of human rights is not 'customary' in any traditional sense; . . . it is not based on 'custom' or on state practice at all . . . [I]n a radical derogation from the axiom of 'sovereignty,' that law is not based on consent: at least it does not honor or accept dissent, and it binds particular states regardless of their objection."

⁹⁶ *Id.*

⁹⁷ *Id.* at 39.

⁹⁸ See generally MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993).

represent customary international law.⁹⁹ Accordingly, it explained that, in its view

a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.¹⁰⁰

This imposing list of customary international law rights, far more expansive than the modest number found in Section 702 of the Restatement, may incur the ire of Professors Simma and Alston, as it already has that of the U.S. Department of State's Legal Adviser,¹⁰¹ but whatever its faults it demonstrates that the Human Rights Committee, like the International Court of

⁹⁹ Human Rights Committee, General Comment No. 24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6, at 3 (1994).

¹⁰⁰ *Id.*

¹⁰¹ Observations on General Comment 24 Accompanying Letter from the Hon. Conrad K. Harper, Legal Adviser, Department to State, to the Hon. Francisco José Aguilar-Urbina, Chairman, Human Rights Committee (Mar. 28, 1995) (on file with author):

The precise specification of what is contrary to customary international law . . . is a much more substantial question than indicated by the Comment [, which] asserts in wholly conclusory fashion that a number of propositions are customary international law which, to speak plainly, are not. It cannot be established on the basis of practice or other authority, for example, that the mere expression (albeit deplorable) of national, racial or religious hatred (unaccompanied by any overt action or preparation) is prohibited by customary international law Similarly, while many are opposed to the death penalty in general and the juvenile death penalty in particular, the practice of States demonstrates that there is currently no blanket prohibition in customary international law. Such a cavalier approach to international law [raises] serious concerns about the methodology of the Committee as well as its authority.

Justice and the International Law Commission,¹⁰² now recognizes the growing importance of customary international human rights law.

How this body of law has been developed and the challenges U.S. lawyers face in convincing courts to recognize and apply it are the subject of five articles in this Symposium. Paul Hoffman, former Legal Director of the ACLU Foundation of Southern California and a prominent human rights litigator, describes and critiques what he labels the "blank stare phenomenon," the failure of many judges to recognize the basic legitimacy of customary international law.¹⁰³ He correctly concludes that "[t]his judicial skepticism is one of the largest obstacles for a lawyer trying to use customary law in domestic litigation."¹⁰⁴ He also makes the interesting—and provocative—point that one reason judges may be reluctant to find a certain norm part of customary international law—cruel, inhuman, and degrading treatment and punishment, for instance, as opposed to torture—is the fear "that it might then be applied to U.S. government officials."¹⁰⁵ The "critical crossroads" for Alien Tort Statute precedents, he maintains, "will come when we try to rely upon them to sue U.S. government defendants."¹⁰⁶

Beth Stephens, an attorney at the Center for Constitutional Rights in New York and counsel in a number of international human rights lawsuits, including the *Karadzic* case,¹⁰⁷ agrees with Hoffman that "the drive to enforce international [human rights] law has often been stymied by U.S. courts' reluctance to apply international norms."¹⁰⁸ She shows, however, that recent cases have moved well beyond torture "to recognize additional customary international norms as falling within the reach of the Alien Tort

¹⁰² See text accompanying *supra* note 77.

¹⁰³ Paul L. Hoffman, *The "Blank Stare Phenomenon: Proving Customary International Law in U.S. Courts*, 25 GA. J. INT'L & COMP. L. 181 (1995-96).

¹⁰⁴ *Id.* at 182.

¹⁰⁵ *Id.* at 183.

¹⁰⁶ *Id.* at 189. As will be the case in *Alvarez-Machain v. Berellez et al.*, a lawsuit filed July 9, 1993, by the former defendant in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), against at least four U.S. DEA officials for, inter alia, prolonged arbitrary detention, disappearance, torture and cruel, inhuman, and degrading treatment and punishment. (Complaint on file with author.)

¹⁰⁷ See *supra* note 37.

¹⁰⁸ Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191 (1995-96).

Claims Act.”¹⁰⁹ She also makes the very important—and often overlooked—point that “pending cases also push to expand the definitions of violations which have already been recognized,”¹¹⁰ using as an example the assertion in the *Karadzic* case that rape, forced impregnation and forced prostitution are forms of torture under international human rights law.¹¹¹ Equally important is her point that:

International human rights litigation will greatly increase in value if it is conducted in many countries around the world, not just in the United States. Some legal systems resist such suits, arguing that jurisdiction requires a nexus between the forum state and the human rights violation or the parties. An argument can be made, however, that international law permits—or even obligates—states to provide a remedy to victims of gross human rights violations, even if those violations did not occur in the forum state.¹¹²

The point is a good one and will be taken up again at the end of this Introduction.

Professor Maier’s interesting article “addresses the relationship between the special attributes of customary international law and the manner in which its norms are introduced by expert testimony into the decision making processes of United States courts”¹¹³ Although not going as far as

¹⁰⁹ *Id.* at 194.

¹¹⁰ *Id.* at 195.

¹¹¹ *Id.* at 196-97. Cruel, inhuman or degrading treatment was defined more broadly than heretofore in the thoughtful opinion of Judge Woodlock in *Xuncax v. Gramajo*, *supra* note 36, at 185-89, another case in which Ms. Stephens served as counsel for the plaintiffs.

¹¹² *Id.* at 200.

¹¹³ Maier, *supra* note 74, at 206. In an earlier comment, Professor Maier advanced the thesis that the “difficult problem of proving specific state practice can be solved in large measure by treating these abstract customary norms of international human rights law, when used in courts in the United States, as having their authoritative source in federal common law. The specific content and application of these rules as federal common law rules would then be informed by, but not dependant upon, evidence of specific state practice.” Harold J. Maier, *The Role of International Law in Human Rights Litigation in the United States: Remarks*, 82 PROC. AM. SOC’Y INT’L L. 456 (1988). “If the authoritative source of the decisions is treated as federal common law,” he explained, “informed by the abstract principles of customary international human rights law, evidence of state practice applying

Professor Sohn, who asserts that publicists really make customary international law,¹¹⁴ he maintains that since the "most authoritative statements synthesizing customary international rules [are] found in the writings of publicists . . . it is not surprising that United States courts are likely to accept the conclusions of publicists without inquiring carefully into the empirical data from which the expert witness draws his inferences about the content and applicability of international law."¹¹⁵ "Expert testimony about the results of the law creation process in the international community," he also observes, "creates confidence for courts who may be venturing into theretofore untrodden territory."¹¹⁶ In short, "[t]he expert witness can, if properly used, play an educational role that is invaluable both to counsel and the court."¹¹⁷

Professor Maier sees a special role for experts in international human rights law cases,¹¹⁸ particularly in making clear that "there are universal norms of conduct that result from human expectations and that these expectations of pattern and uniformity are as important a source of international law as are any formal or informal indicia of consent expressed through the institution of the sovereign nation state."¹¹⁹ The present writer agrees completely with the thrust of Maier's article. He only would add that human rights litigators should pay heed to Maier's observations and make more use of expert testimony, as they did in the early 1980s, rather than resort exclusively to the ubiquitous (and arguably somewhat less effective) "Affidavit of International Law Scholars" that has become the norm in recent

the principle in contexts specifically like those before the court would no longer be necessary." *Id.* at 459. Human rights practitioners have been slow to pick up his intriguing argument.

¹¹⁴ Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399 (1995-96): "I submit that states really never make international law on the subject of human rights. It is made by the people who care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."

¹¹⁵ Maier, *supra* note 74, at 212. The step from merely referring to the writings of publicists to permitting their oral testimony as expert witnesses was one made several decades ago. See Hans W. Baade, *Proving Foreign and Domestic Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1978). Thus "United States courts regularly admit expert testimony about the content and applicability of customary international law." Maier, *supra*, at 209. See also RESTATEMENT, *supra* note 38, § 113(2) cmt. c & note 1.

¹¹⁶ Maier, *supra* note 74, at 214.

¹¹⁷ *Id.* at 216.

¹¹⁸ *Id.* at 219-21.

¹¹⁹ *Id.* at 222.

human rights cases.¹²⁰

Professor Christenson, one of the first commentators to call attention to the choice of law questions with respect to the defendant's liability and the amount of damages to be awarded in Alien Tort Statute cases,¹²¹ returns to this topic in his article, which also contains a number of other pertinent, albeit somewhat pessimistic conclusions, about the current status of "Customary International Human Rights Law in Domestic Court Decisions."¹²² Noting that "[m]any commentators credit the Kaufman opinion [in *Filartiga*] with deciding that customary international human rights law prohibiting official torture is to determine the outcome of the case as well as jurisdiction under the Alien Tort Statute," he points out that "that was plainly not what Judge Kaufman decided or said."¹²³ The latter used customary international human rights law only to find subject matter jurisdiction under the Alien Tort Statute, leaving to the District Court the choice of law inquiry, which he characterized as "a much broader one, primarily concerned with fairness"¹²⁴

Judge Nickerson's "under-appreciated opinion"¹²⁵ on remand remains the most thoughtful, if not definitive, judicial treatment of this issue to date.¹²⁶ Since a default judgment already had been entered against the defendant, the

¹²⁰ See, e.g., *Xuncax v. Gramajo*, *supra* note 36, at 184.

¹²¹ Gordon A. Christenson, *The Use of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981). For the present writer's views on these questions, see Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 HUM. RTS. Q. 207 (1993).

¹²² Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225 (1995-96). Among them are that U.S. courts "now seem to have adopted the exceedingly onerous burden of proving the existence of a norm of *jus cogens* quality as the threshold to limit tort claims for violations of the law of nations under the Alien Tort Statute," despite the fact that "[i]ts text refers only to tortuous breach of the law of nations (or a treaty), a norm shown by reference to traditional sources of international law," *id.* at 230, and that elsewhere, despite the fact that customary international law "is part of our law" (see text at *supra* note 92), "federal courts do not incorporate customary international law of human rights without clear legislative authority. They simply do not give any encouragement to judicial application of the newer customary international human rights law." Christenson, *supra* at 234.

¹²³ Christenson, *supra* at 248.

¹²⁴ 630 F.2d at 889.

¹²⁵ Christenson, *supra* note 122, at 249.

¹²⁶ *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). For a summary and critique of this opinion, see Lillich, *supra* note 121, at 210-14.

judge did not have to address the question of what law governed the determination of his liability, but only the rule of decision concerning the damages to be awarded the plaintiffs.¹²⁷ Concluding that he "should determine the substantive principles to be applied by looking to international law,"¹²⁸ he nevertheless believed that he "should consider the interests of Paraguay to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States."¹²⁹ Applying this approach, Judge Nickerson balanced the contacts with the United States and Paraguay and found it "appropriate to look *first* to Paraguayan law in determining the remedy for the violation of international law."¹³⁰ Thus he held Paraguayan law to be the rule of decision with respect to most items of damages. When it came to punitive damages, however, which were not recoverable under the Paraguayan Civil Code, he regarded it "essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objective of the international prohibition against torture."¹³¹ He allowed such damages, though, not by invoking public policy concepts, rejecting Paraguayan law and applying the *lex fori*, but by looking directly to international law as the rule of decision.¹³²

While Professor Christenson seems comfortable with both Judge Nickerson's analysis and holding, he observes that "[c]ustomary international human rights law, forum law and relevant foreign law represent different policies and interests," and that "[a]ll should contribute to the best policy to guide decisions for each aspect of human rights litigation in domestic courts in the United States."¹³³ Addressing but going beyond the issues raised in *Filartiga*, he identifies five distinct questions for courts to ask in international human rights law cases:

Jurisdiction. First, should courts ever invoke customary international human rights law to determine federal jurisdic-

¹²⁷ Presumably the same principles would apply to both questions. Professor Christenson does not address this point, but his functional approach to the rules of decision in U.S. human rights litigation suggests that he would agree with the present writer's assessment. Christenson, *supra* note 122, at 251-54.

¹²⁸ 577 F. Supp. at 863.

¹²⁹ *Id.* at 863-64.

¹³⁰ *Id.* at 864 (emphasis added).

¹³¹ *Id.* at 865.

¹³² *Id.* at 865-67.

¹³³ Christenson, *supra* note 122, at 251.

tion over civil cases or controversies, . . . as law of the United States or federal common law?¹³⁴

Substantive Rules of Decision. Second, assuming a U.S. domestic court has subject matter jurisdiction over a case or controversy (including transitory torts), should customary international human rights law ever determine the law governing the cause of action?¹³⁵

Procedure of the Case. Third, should U.S. forum law alone continue to govern procedure in human rights litigation with important effects in other countries?¹³⁶

Choice of Law Governing Remedies. Fourth, what principles should govern the choice of remedies sought or allowed, including actual and punitive damages, equitable relief and injunctions in aid of future enforcement?¹³⁷

Recognition and Enforcement of Judgments Abroad. Fifth, what principles of private international law or comity should govern the enforcement of a judgment in the courts of one state for breach of customary international human rights law arising in another against assets in the courts of a third state?¹³⁸

Professor Christenson's posing of these questions and his answers to them, tentative as they sometimes are, represents a substantial contribution to the identification and clarification of a number of significant issues that heretofore have not received the serious, scholarly attention they deserve. Both academic and practicing international human rights lawyers will benefit from his careful analysis and thoughtful insights.

Another serious problem that often arises in connection with customary international human rights law litigation concerns sovereign immunity. Although nothing in the Alien Tort Statute prohibits suits against foreign states, the Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*¹³⁹ held that the Statute does not constitute an exception to the

¹³⁴ *Id.* at 251.

¹³⁵ *Id.*

¹³⁶ *Id.* at 252.

¹³⁷ *Id.*

¹³⁸ *Id.* at 252-53.

¹³⁹ 488 U.S. 428 (1989).

Foreign Sovereign Immunities Act (FSIA),¹⁴⁰ which now is the sole basis for obtaining jurisdiction over foreign states in U.S. courts. The Court specifically ruled that the "tort exception" contained in Section 1605(a)(5) of the FSIA was inapplicable in *Amerada Hess*, since it was limited by its very terms to those rare cases where tortuous acts occur within the United States.¹⁴¹ The roadblock the Court thus raised to recovery against foreign sovereigns was recognized by Professor Fitzpatrick several years ago, at which time she urged the courts to recognize a "human rights exception" to the FSIA and, if they did not, Congress to enact one into law.¹⁴²

Unfortunately, as Professor Bederman relates in his fine contribution to this Symposium,¹⁴³ neither eventuality has occurred. The courts repeatedly have rejected arguments that a "human rights" or "jus cogens" exception to the FSIA exists, most recently giving them an "ignominious burial"¹⁴⁴ in the *Princz* case.¹⁴⁵ Congress, moreover, has shown no enthusiasm either for writing such an exception into the FSIA or otherwise amending it to permit human rights suits against foreign sovereigns.¹⁴⁶ "The joker in the deck," as Bederman remarks, "is, obviously, the Supreme Court's decision in *Amerada Hess*,"¹⁴⁷ but as he ruefully observes it would take an "extraordinary shift in sentiment on the High Court"¹⁴⁸ for that decision to be overruled.

Indeed, perhaps the best that can be hoped for at present is that the courts will reject claims by individual defendants—"the minions and lackeys of foreign governments: free-lance torturers, war criminals, and exploiters"¹⁴⁹—that they too are entitled to immunity under the FSIA on the grounds that their acts really were acts of a foreign state. Since, as now

¹⁴⁰ 28 U.S.C. §§ 1330, 1332, 1391, 1441 & 1602-11 (1994).

¹⁴¹ 488 U.S. at 439. For one such case, see *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

¹⁴² Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary and Possible?*, 86 PROC. AM. SOC'Y INT'L L. 338 (1992).

¹⁴³ David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255 (1995-96).

¹⁴⁴ *Id.* at 273.

¹⁴⁵ *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (D.D.C. 1992), *rev'd*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 Sup. Ct. 923 (1995).

¹⁴⁶ For a summary of recent unsuccessful efforts to do so, see Bederman, *supra* note 143, at 282.

¹⁴⁷ *Id.* at 281.

¹⁴⁸ *Id.* at 282.

¹⁴⁹ *Id.* at 257.

seems settled, individuals may invoke the FSIA, the fighting issue has become one of determining just when "an individual's actions [will] be attributed to a foreign sovereign in order to grant immunity."¹⁵⁰ Bederman, who believes the courts unfortunately have "imported domestic notions of *respondent superior* in sovereign immunity claims, and applied them to the FSIA,"¹⁵¹ correctly concludes that "[i]f the standard of attribution is construed liberally, more individual conduct will be covered by the FSIA, and thus fewer cases will likely clear the Act's presumptive grant of immunity."¹⁵² Thus he warns that "human rights advocates had best think of arguments to defeat renewed claims by individual defendants that their conduct is covered by the presumptive immunity of the FSIA."¹⁵³ It is a pessimistic but nevertheless realistic warning.¹⁵⁴

In concluding this Introduction, the present writer would like to return to the important point made by Ms. Stephens, namely, that "[i]nternational human rights litigation will greatly increase in value if it is conducted in many countries around the world, not just in the United States."¹⁵⁵ The growing importance of customary international human rights law, as Professor Hannum's article clearly reveals, is a worldwide phenomenon. As long as there is less than universal acceptance of the major human rights treaties—which, after all, do not form a comprehensive code of international human right law and, moreover, permit reservations and allow derogations and limitations to their coverage—there will be a need for a customary international law of human rights, to be used both on the international level and in the domestic context. While U.S. courts and U.S. lawyers have played a prominent role in developing and calling attention to it, even

¹⁵⁰ *Id.* at 261.

¹⁵¹ *Id.* at 262. He urges instead the use of international standards of attribution to determine when an individual actor's conduct is imputable to a foreign sovereign, noting that "[t]o date, no human rights litigation has resorted to the standard rules of attribution developed in the law of State responsibility." *Id.* at 269. He admits, however, that "it may be too late to deal a new hand in this regard. Attribution jurisprudence under the FSIA has already been too heavily influenced by what may be inappropriate domestic analogies." *Id.* at 270.

¹⁵² *Id.* at 263.

¹⁵³ *Id.* at 267.

¹⁵⁴ On a more upbeat note, Bederman sees much less of a problem with the Act of State and forum non conveniens doctrines. *Id.* at 268-69. His conclusions here find confirmation in *Kadic v. Karadzic*, *supra* note 37, at *52-53, where the U.S. Court of Appeals for the Second Circuit summarily rejected such arguments.

¹⁵⁵ See text *supra* note 112.

Professors Simma and Alston recognize its impressive flowering in many other countries.¹⁵⁶ Frankly, however, foreign courts and foreign lawyers have yet to play the role they should in creating and clarifying this growing body of human rights law.

Several years ago, surveying U.S. human rights case law, the present writer wrote as follows:

The courts of a single state, of course, cannot provide even a partial solution to the problem of providing redress to victims of gross human rights violations. Other states should be encouraged to enact legislation . . . to enable their courts to provide similar redress against human rights violators found within their jurisdiction. An International Convention for the Redress of Human Rights Violations that would obligate states parties to enact legislation along these lines would be a promising first step.¹⁵⁷ Such a convention could define just what gross human rights violations were actionable, provide a common choice of law approach for courts to follow, establish general norms governing the allowance of compensatory and, especially, punitive damages, and provide for the enforcement of judgments against human rights violators wherever they may reside. While US courts to date have taken the lead in the limited area of providing remedies to aliens whose human rights have been

¹⁵⁶ See text *supra* note 57.

¹⁵⁷ The Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms of 1992 concluded, *inter alia*, that the proposed convention "deserves due consideration. The preparatory and drafting process for such a convention can serve to focus the attention of governments on these issues, promote exchanges of national experience and lead countries to develop adequate arrangements for anticipating, preventing, stopping and remedying gross violations of human rights." NETHERLANDS INSTITUTE OF HUMAN RIGHTS, SEMINAR ON THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 20 (SIM Special No. 12, 1992). The Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on this topic attached the Maastricht Conference conclusions to his Second Progress Report. Theo van Boven, *Study Concerning the Right to Restitution, Compensation, and Rehabilitation, for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/Sub.2/8, at 21 (1992).

violated, it is high time to expand and universalize the protection that domestic courts are capable of providing.¹⁵⁸

If our colleagues overseas, including Professors Simma and Alston, eventually join us in this great adventure, the U.S. "customary-law-of-human rights school"¹⁵⁹ someday may become what Professor Schachter once called "the invisible college of international lawyers."¹⁶⁰ If so, the use of customary international human rights law to provide redress for victims will have received a tremendous boost. In the meantime, this Symposium serves to point the way.

¹⁵⁸ Lillich, *supra* note 121, at 216-17.

¹⁵⁹ See text *supra* note 55.

¹⁶⁰ Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).