THE ROLE OF EXPERTS IN PROVING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS: A COMMENTARY

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I. INTRODUCTION

Cases in which United States courts determine and apply the customary international law of human rights have arisen with increasing frequency since World War II, especially in more recent years.† Although customary international law is used by United States courts in the same manner as any other law, its content and applicability are often proved by expert testimony rather than by means of citation and argumentation by counsel. This is so because of a perceived "special nature" of international law. Traditionally, it addresses the relationships between "independent sovereign states." Its norms are the product of a consensual and decentralized legal system.‡

Unfortunately, most judges in the United States (and, one suspects, in many other legal systems as well) have, at the most, a superficial familiarity with the theory of law creation in the international legal system and only the vaguest notion of how the system functions. Furthermore, many judges share the view of the lay public—and of many lawyers—that no true "law" can exist absent some sort of central enforcement authority.¶ This problem is exacerbated with respect to international human rights law.

Even with respect to those judges that have a general grounding in traditional public international legal theory, the international law of human rights may not appear to fit that traditional model.** Superficially, international human rights law is different because it addresses the relationships between sovereign states and individual human beings, including a state’s

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** Id. at 89.

own citizens, not the relationships among sovereign states *inter se*. Consequently, cases involving the international law of human rights may require more detailed explanations of that law's jurisprudential underpinnings to U.S. decision makers than do those cases involving more traditional public international law. This 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 with special emphasis on cases involving the customary international law of human rights.

II. PROVING CUSTOMARY INTERNATIONAL LAW

A. *International Law in United States Law*

The Supreme Court's statement in *The Paquette Habana* that "international law is part of our [the United States'] law" is generally accepted law in United States courts, at least to the extent that it means that those courts are free to find and "apply" the norms of customary international law in appropriate domestic cases. The Court made it clear that international legal norms and theory are part of the process of authoritative decision in the United States, as long as those norms do not conflict with domestic law.

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6 The doctrine of state responsibility for injury to aliens was, of course, an important element in "traditional" international law. See Carter & Trimble, supra note 2, at 11. Those rules did not recognize, however, that individuals had international legal rights against their state of nationality. Bilder, supra note 5, at 4-5.


8 175 U.S. 677 (1900).

9 *Id.* at 700. See Republica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784).


in the form of a controlling executive or legislative act or an existing treaty. The final authority on the content and interpretation of customary international law as part of the law of the United States is the United States Supreme Court. Controversy continues about the precise meaning of this principle of incorporation in the context of the United States governmental structure and its constitutionally created judicial and administrative decision making authorities.

The question whether international law is "directly applicable" within the United States or must first be "incorporated" into United States law by some official act, the hoary monist-dualist controversy, is, in reality, a controversy over form, not substance. It is primarily a dispute about styles of


14 A discussion of the philosophical and theoretical aspects of the status of customary international law in the United States law is beyond the scope of this article. For a clear explanation and description of these issues, see Edwin D. Dickinson, Changing Concepts and the Doctrine of Incorporation, 26 Am. J. Int'l L. 239 (1932). For an excellent summary critique of various theories as well as the best historical analysis of the intent of the framers of the United States Constitution with respect to this issue, see Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 848 (1989). For the proposition that customary international law is directly authoritative in United States courts, see generally Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984). For this writer's views on that question and citation to views of other scholars, pro and con, see generally, Maier, supra note 12.

15 In The Paquette Habana, for example, the rules of customary international law had been incorporated into the U.S. Navy's rules of engagement by order of the fleet admiral, speaking for the President. See 175 U.S. at 712-13. The question whether the Court would
argumentation—which books and holdings may be cited as “authority” and which are only “persuasive” or about which branch of the United States government shall decide “whether to constrain our own institutions.” In fact, the dispute has more relevance to theoretical academic discussion than to predicting the results of actual authoritative decision making. United States courts do, in fact, give effect to the norms of customary international law in domestic adjudications and, once they have done so, follow, distinguish or ignore precedent on these issues just as they do in purely domestic matters.

Arguments about whether international law becomes “part of” United States law before or after such decisions are reached are somewhat vacuous and clearly circular. When law is correctly recognized as a process of authoritative decision, the ultimate authority to determine the role and impact of international law in domestic law in specific United States cases lies with the national courts which decide them. Judges in such cases have the same limitations upon, and freedom to make, value choices, that they have with respect to all other legal issues. Their decisions are binding unless and until they are overturned on appeal. The only authority that can overturn them is the highest United States court that reviews them or, in some special instances, the appropriate domestic legislative authority. Therefore, more important for the lawyer than the theoretical debate have applied the rules of customary international law to determine the validity of the capture without such incorporation is not raised by the record in the case. The Executive Branch chose to argue the content of international law before the Court and lost. Jordan J. Paust, 34 VA. J. INT’L L. 981, 988 (1994). Therefore, the Court necessarily did not consider whether other components of executive power might have justified the seizure as a matter of domestic law without regard to international legal norms.


17 See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

18 LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 11-16 (1989). See McDougal, supra note 11, at 71.

19 CHEN, supra note 18, at 12.


is the question: what do United States courts actually do in cases in which the rights of the parties may depend in whole or in part on the court's decision to be guided by international legal norms in reaching a result?

B. Proving Customary International Law in United States Courts

Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure make reference to methods or requirements for pleading or proving customary international law in United States courts. Rule 44.1 of the Federal Rules of Civil Procedure recognizes the utility of expert witnesses in proving foreign law but says nothing about international law.\(^\text{22}\) The Federal Rules of Evidence describe in some detail the role of opinions and expert testimony with respect to domestic matters,\(^\text{23}\) but intentionally omit any reference to proving foreign law on the grounds that that process is more properly treated as being guided by rules of procedure.\(^\text{24}\) The Federal Rules of Evidence, like the Federal Rules of Civil Procedure, make no reference to international law.

But the Federal Rules of Evidence permit proof of "legislative facts" defined as "facts which have relevance . . . in the formulation of a legal principle . . . by a judge or court."\(^\text{25}\) Since the norms of customary international law are inferred from the facts of community conduct, this definition necessarily permits proof of such activities.\(^\text{26}\) Regardless of the statutory base, United States courts regularly admit expert testimony about the content and applicability of customary international law.\(^\text{27}\)

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\(^{22}\) \text{FED. R. CIV. P.,} \$ 44.1, provides in pertinent part: "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." \textit{See} \text{9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE} \$ 2444 (1994).

\(^{23}\) \text{FED. R. EVID.,} \$\$ 701-704.

\(^{24}\) \textit{See} Advisory Committee's \textit{Note on Judicial Notice of Law}, Rule 201 (g), \text{FED. R. EVID.,} 56 F.R.D. 183, 207 (1973) [hereinafter Advisory Committee Note].

\(^{25}\) \textit{Id.} at 202.


\(^{27}\) \textit{RESTATEMENT (THIRD),} supra note 13, \$ 113. There appears to be no particular reason why expert testimony should not also be used to prove the correct interpretation of treaties to which the United States is a party. \textit{See} Jonathan I. Charney, \textit{Judicial Deference in Foreign Relations}, 83 \textit{AM. J. INT'L L.} 805, 808-10 (1989) (arguing that difficulties of accurately
The United States Supreme Court's opinion in *The Paquette Habana* contains what is still the most authoritative general statement about the role of expert witnesses in proving customary international law in United States courts. With respect to that process of proof, the Court wrote:

... resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*

discovering and applying customary international law are no greater than difficulties in dealing with various branches of domestic law or with treaties). In fact, one author suggests that courts may admit testimony of expert witnesses even on the content of purely domestic law without fear of reversal. Baade, *supra* note 26, at 628. Nonetheless, expert testimony may be more suspect in treaty interpretation cases than it is in cases dealing with customary international law. *See, e.g.*, the Solicitor General's statement that the "Court should neither accept nor attach any weight to . . ." an affidavit by Professor Louis Hankin concerning the meaning of the U.N. Convention Relating to the Status of Refugees, July 3, 1951, 189 U.N.T.S. 150. Reply Brief for Petitioners at 232, Sale v. Haitian Ctrs. Council (No. 92-344). Nonetheless, there seems to be considerable confusion about the utility of *travaux preparatoires* as a guide to correct interpretation. For an excellent discussion of this and other issues related to treaty interpretation, see David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. Rev. 953 (1994).

The need to interpret treaties to which the United States is a party occurs primarily when the treaty is self-executing and the court must apply it in the light of the intent of the states-parties. Because the courts regularly give "great weight" to opinions of the Department of State on the interpretation of treaties, the importance of private expert testimony may be greatly diminished when the executive weighs in as a "super expert." *Restatement (Third), supra* note 13, § 326(2). Consideration of "informative and reliable" testimony from executive branch officials is consistent with the judicial process. Charney, *supra*, at 809.

175 U.S. 677 (1900).


175 U.S. at 700 (emphasis added). The Court, of course, refers here to the written works of scholars, but there is no reason to assume that it would take any different position with respect to scholarly oral testimony. Furthermore, the statement contains its own internal difficulties. One cannot know what the law "really is" (as distinguished from knowing what
Thus, for purposes of United States domestic law, scholarly opinions are not
themselves authoritative sources of customary international law but provide
indirect evidence of the existence and content of international legal norms.31

C. The Role of the Expert Witness

Most often, expert witnesses in United States trials are social, physical or
biological scientists presenting forensic evidence to the judge or jury. The
very nature of customary international law suggests that the determination
of its norms and their application in specific cases most closely resembles an
exercise in social scientific empiricism.32 The international legal system
has no central decision maker to provide an authoritative articulation of the
policies that inform the system's rules. Rather, a multiplicity of scholars,
courts and statesmen articulate the norms of customary international law in
opinions derived in large part from historic records of national practice.
Competing theories about the jurisprudential nature of public international
law—indeed, disputes over its very existence—find their principal expression

31 In this respect, the U.S. Supreme Court's view of the role of publicists roughly parallels
the provision of Article 38(1) of the Statute of the International Court of Justice. That article
designates judicial opinions and writings of highly qualified publicists as secondary sources
of international law. These writings make accessible a coherent history of acts and statements
by national decision makers from which inferences can be drawn that certain conducts and
customary practices are treated as legally prohibited or required by states in the world
community. Determining the existence and applicability of norms of customary international
law in United States courts is generally treated as a question of law, not as a question of fact.
In other words, the content of customary international law is determined by courts under
appropriate tests to determine the existence and validity of legal norms. Whether such norms
exist is not determined in accordance with the "weight of the evidence." See Tinker, supra
note 29, at 7.

32 Hartman, supra note 7, at 749. The accuracy of this statement does not depend upon
whether one treats international law as "natural" law, as "positive" law, or as describing a
process of authoritative decision. The record of historic practice remains relevant to
determine the expectations of world community members with respect to the norm in question
regardless of the theoretical basis assigned to give that norm the force of legality.
in the writings of "expert" publicists.  

Access to the norms of traditional customary international law is supposed to require that the facts of national practice and decision be discovered, interpreted and described in much the same manner as a sociologist or anthropologist collects and characterizes other facts of human activity. This was especially true at the time of The Paquete Habana when most authoritative international legal rules were evidenced by the give and take of on-going diplomatic exchange and bargaining, or by inferences derived from national acts and their legal characterizations collected and described by scholars.

Those rules were not usually articulated by international arbitration or adjudication or even by formal international agreement. Public records of those diplomatic exchanges, discussions and conclusions were difficult, if not impossible, to find in an organized collected form. Therefore, most authoritative statements synthesizing customary international legal rules were found in the writings of publicists and, occasionally, in the opinions of domestic courts. In fact, even the International Court of Justice virtually ignores the facts of state practice in determining the content of international law. Consequently, 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.

The role of expert witnesses in cases involving customary international law is often anomalous. Because there is no universally acknowledged

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33 For an excellent short review and critique of these various theories, see McDougal, supra note 11, at 27-32.
34 Finding the content and applicability even of domestic rules of law is necessarily largely an empirical process. The language of the rule is abstract with respect to the case before the court. Social facts relevant to determining the case's result include the intent of the decision makers who promulgated the rule, the prior practice under it, the way in which prior courts have interpreted it, and, sometimes, what has been said about it in the scholarly literature. But, in ordinary domestic cases, that kind of "empirical" research is carried out by the lawyers and the court, not by outside experts. Cf. Charney, supra note 27, at 810.
35 For a good illustration of the nature of this material, see 175 U.S. at 686-708.
36 International adjudication and arbitration did not begin until the early nineteenth century. For an excellent short summary of the early history of international adjudication see Mark W. Janis, An Introduction to International Law 91-97 (1988).
37 See, e.g., 175 U.S. at 697-710.
authoritative "text" for the rules of customary international law, a domestic court is necessarily faced with the task of determining not only the outcome of a case but also the relevant verbal formula that accurately describes the policies accepted as law in the international community. Expert witnesses on customary international legal matters, therefore, testify at trial both about the verbal forms of rules and about how the rules' norms operate under the facts of the case at bar.

The title "expert" suggests that such witnesses testify as "objective observers" of the international legal scene. Given the often indeterminate nature of customary international legal rules, experts usually act both as advocates for particular conclusions about the content and applicability of the international legal norms at issue and as reporters of the facts of international community law making. Whether this dual role adversely effects the expert's ability to aid the court is problematic. In any event, international law experts do not differ, in this respect, from physical or social scientists who may give conflicting expert opinions, based on their analysis of identical empirically derived data. Also, they do not differ from experts on foreign law who testify about how rules are applied in foreign courts or, perhaps, about how a rule is regarded by a foreign population.

In all litigation, each party who engages an expert does so to obtain testimony favorable to his or her side of the case. Those who use international legal experts are no exception. Like expert witnesses in the sciences whose relevant empirical research is often "case-specific," international legal experts normally testify about general legal norms inferred from the history of the conduct of nation states and testify about how those

39 The increased frequency of international adjudication since World War II has begun slowly to create a body of case law derived from decisions of international courts and specialized tribunals interpreting various aspects of international law. Although many of these cases are highly persuasive, there is no general legal requirement in United States law that the decisions of such tribunals be treated as authoritative sources for the verbal forms of customary international legal rules.

40 RESTATEMENT (THIRD), supra note 13, § 113. See Tinker, supra note 29, at 13.

41 One appropriate approach for engaging an expert is for the lawyer to pose to the expert a hypothetical problem, based on the facts of the lawyer's case. Drawing on his or her existing expertise, the expert gives a tentative opinion. Based on that opinion, the lawyer decides whether to ask the expert to testify in the case. In addition, prudent counsel, before engaging the expert, will examine, or at least ask about, any material that the expert has published with respect to the legal issue on which he or she will testify. Thus, counsel can determine whether anything in that written record might appear to contradict the position that the expert will assert in affidavit or testimony.
norms apply under the specific facts of the case at bar. Despite their overt association with one of the parties in the case, expert witnesses do testify under oath that the opinions they give accurately represent their own conclusions. Thus, regarding them as “objective reporters” with respect to this element of their testimony is hardly inappropriate.

The participation of expert witnesses may be comforting to the judge in an international case. Perceptive judges, at least in common law countries, recognize that courts play a role as active policy makers in all legal decisions, even when deciding “purely” statutory issues. The perception of public international law as a body of rules and principles generated by the world community outside the authority of any single nation state necessarily suggests caution on the part of the court when deciding public international questions. Furthermore, matters touching foreign affairs are especially sensitive to judicial intervention in the United States where constitutional principles of separation of powers and centralized control of foreign affairs matters signal that both state and federal judges need to exercise care to avoid interfering with the national government or its political branches by making conflicting or inappropriate policy judgments. Thus, even the most sophisticated United States judges may find comfort in treating public international rules as norms that are “found,” not as a set of legal inferences drawn from legal facts created outside the forum’s system whose effect can be modified or influenced by judicial decision. Expert testimony about the results of the law creation process in the international community necessarily creates confidence for courts who may be venturing into theretofore untrodden territory.

In the light of the reasons above, it is not surprising that courts find it appropriate to receive information about the content and applicability of international law from witnesses who testify as experts about that system’s

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44 Id. at 423-24, 431-33.

45 In this sense, the role of public international law is similar to the role of the Common Law, as described by William Blackstone’s COMMENTARIES ON THE LAWS OF ENGLAND. Blackstone treated the common law as a body of rules that courts “found,” not as a process of judicial decision making, characterized by the application of general principles to specific fact situations to arrive at a judicially influenced legal result. See WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press, 1979).
norms and processes rather than by means of the ordinary research and argumentation employed by adversary counsel when dealing with domestic law. But despite this fact, as one scholar correctly points out,

\[\ldots\text{the resulting choice of values depends on their [the courts'] perception of the system. No matter what the rationale, the choice remains a human one. While the use of a "rule of reason" or similar "objective" technique for "discovering" the law that exists ostensibly outside of the judge's discretion may disguise the realities, ultimately, judicial decisions are part of a legislative process, and not merely the administration of pre-existing, objectively real, law.}\]

In other words, the judicial process in international law cases does not differ from that same process in domestic cases.

**D. Criticisms of the Role of Expert Witnesses in International Law Cases**

The international legal expert's multifaceted role as a witness to sociological, historical, anthropological, jurisprudential, psychological and legal facts in domestic international litigation has lead to a multiplicity of concerns, criticisms and misunderstandings about that role. One of the early concerns stated is a red herring and can be dismissed virtually out of hand. The question was whether an expert witness who testified under oath necessarily guaranteed the accuracy of his or her analysis and would be, therefore, guilty of perjury if the testimony turned out to be "wrong" or if the court ruled

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46 The empirical process required to determine the content of international legal norms is reflected in Article 38 of the Statute of the International Court of Justice. After expressly identifying treaties and conventions, "customary practice accepted as law" and "general principles of domestic law" as primary sources of international law, Article 38(1) explicitly permits the use of "expert witnesses" in the form of judicial decisions and the writings of publicists as "secondary sources" of international law. The role of these "experts," however, is more closely analogous to the role of treatise writers and court opinions in civil law jurisdictions than to the role of expert witnesses on international law before U.S. tribunals.

47 Rubin, *supra* note 20, at 150.

48 See Maier, *supra* note 10, at 830-45.
against the expert's position. It is clear, however, that the expert swears solely to the proposition that his or her testimony is an honest opinion, not that it is the only possible opinion or that reasonable persons cannot reasonably disagree about the conclusions that the expert reaches.

A different and more relevant criticism is that, once involved in a case, the expert witness perforce changes from an "objective" analyst of international law to a partisan advocate of a particular point of view. There is, I think, a good bit of truth to this claim, but the advocate's role is not harmful to the expert's ultimate utility to the decision maker nor does it differ significantly in this respect from the role of other types of expert witnesses. It is certainly not detrimental when there are "experts" on different sides of an issue. In those circumstances the advocacy roles played by the experts may tend to sharpen the opinions and provide more, rather than less, assistance to the court.

The expert witness can, if properly used, play an educational role that is invaluable to both counsel and the court. This is especially true with respect to cases that involve issues arising under customary international law. Most lawyers and judges who have not had extensive experience with international legal matters have only a vague idea of what international legal scholars do. Most of the scholarship in this field is read solely by persons already knowledgeable and interested (or by students), not by the general bench and bar. Even those who work in the legal offices of foreign affairs ministries are often too rushed or too busy to keep up with new developments or new analytical approaches in the international field. Responses to the problems on which they work are frequently needed on daily or hourly deadlines; there is no such thing as a six month lead time to research and consider "the best" solution. Thus, even for government officials specifically charged with the task of dealing with international law, the presence of international legal experts can play an important and useful educational role.


50 One recognition of the utility of academic counsel was the United States Department of State's practice of inviting, each year, one academic international lawyer to serve as Counselor on International Law in the Office of the Legal Adviser. Not only did that practice provide easy access to academic expertise for lawyers in the Legal Adviser's Office during each Counselor's term, but it forged continuing informal relationships between personnel in that office and a cadre of former Counselors that is of continuing utility.

The Counselor's position was created in the early 1970s as the result of consultations between John R. Stevenson, then Legal Adviser to the Department of State, and Professor
The presence of an expert witness in the courtroom to testify with respect to the content and applicability of international law may lead a court to expand the expert's role beyond that field to encompass subject matter that is normally accessible to the court by judicial notice and argument of counsel. This is precisely what happened in Fernandez Roque v. Smith, one of the Marielitos Cases, involving the rights of Cuban citizens who had come to the United States as part of the “Freedom Flotilla” from Cuba’s Mariel Harbor in 1980. The principal issue that the expert witnesses addressed was whether detention in federal prisons of some 1800 of the 125,000 Cubans who had entered the United States in the boat lift violated either the United States Constitution or the customary international law of human rights.

The Cubans involved in that case were classified as “excludable aliens,” aliens who are physically present inside the United States but who had arrived in United States territorial waters without proper immigration papers or prior authorization from United States government officials. They were permitted to land because the alternative was to leave them on the high seas in their mostly unseaworthy boats. Most of the Mariel Cubans were released on parole into the U.S. population on a finding that they were non-violent.

Louis B. Sohn of Harvard Law School who served as the first Counselor. This writer had the privilege of serving as Counselor in 1983-84. Unfortunately, the nature of the position seems to have changed in recent years with its occupants being either existing personnel from the Legal Adviser’s Office or academicians who use the position principally as a base for conducting their own research.

52 The experts were Professor Louis Henkin of Columbia University Law School for the plaintiffs and this writer for the defendant United States government.
53 Their journey was encouraged in part by a statement from President Jimmy Carter that the United States would “provide an open heart and open arms to refugees seeking freedom from Communist domination...” Garcia-Mir, 788 F.2d at 1448, quoting League of Women Voter’s Speech, 16 Weekly Comp. Pres. Doc. 834-35 (May 5, 1980). As the price of their freedom to depart, Cuban President Fidel Castro had required that the emigrants take with them a group of some 400 mental defectives and violent criminals who were incarcerated in Cuban prisons and other institutions. See Fernandez-Roque, 622 F. Supp. at 896. The Eleventh Circuit held that Carter’s statement did not amount to a carte blanche invitation to enter the United States without complying with United States immigration law or other established policies. Garcia-Mir, 788 F.2d at 1451-53.
and likely to remain so. The United States government incarcerated some 1800 of them in an Atlanta federal prison, some because they had criminal records for violent crimes in Cuba, some because they had forfeited their freedom by violating their parole conditions after release in the United States and some because they had not yet been granted parole under a Status Review Plan. Few of the Cubans had actually been convicted of crimes under United States law.

The American Civil Liberties Union together with the Atlanta Legal Aid Office and the Columbia University Law School Immigration Clinic brought a class action for habeas corpus to have the Cuban detainees released on the theory that detaining them violated the United States Constitution. The Eleventh Circuit Court of Appeals dismissed the case, holding that the due process provisions of the United States Constitution did not apply to the processes of admission or immigration for excludable aliens because, for this purpose, such aliens are treated, as a matter of law, as if they were still outside United States borders.

The ACLU reasoned that the detainees might have rights under customary international law because, as excludable aliens, they were still constructively in international waters. Consequently, the ACLU filed another suit, this time arguing that the Cubans were being subjected to prolonged arbitrary detention in violation of the customary international law of human rights. That law, the ACLU argued, was part of the law of the United States and

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54 Such releases were accomplished under a Status Review Plan and Procedures, issued by the United States Attorney General. In addition to being found non-violent, an applicant had to demonstrate that he or she was unlikely to commit any criminal offense if released and had to have a suitable domestic "sponsor." For a more complete discussion of the facts of these cases, see Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983), rev'd, 734 F.2d 576 (11th Cir. 1984).

55 See Fernandez-Roque, 567 F. Supp. at 1115, rev'd, 734 F.2d at 576. The administrative machinery under the Status Review Plan moved very slowly. Paroles under the plan were suspended altogether in early 1985 when the Castro government agreed to accept the return of the incarcerated Cubans at the rate of slightly more than 100 per month. Shortly after the repatriations began, the Cuban government refused to carry out the agreement in retaliation for the anti-Castro broadcasts of a U.S. radio station (RADIO MARTI) that began operations, with the blessings of the Reagan Administration, in early 1985.

56 See 567 F. Supp. at 1115.

57 The ACLU came into the case late but handled most of the litigation in connection with the international human rights issues.

58 Fernandez-Roque, 734 F.2d at 576.

59 See RESTATEMENT (THIRD), supra note 13, § 702(e).
required the Cubans' release.\textsuperscript{60}

The only evidence submitted at the trial was expert testimony that dealt with the content and applicability of the international law of human rights in United States courts. Both the U.S. government and the ACLU accepted the proposition that there was a customary international law of human rights and that it prohibited "arbitrary and prolonged detention." There were two important issues before the federal court. One was whether the detention of the 1800 Cubans in federal prison was "arbitrary and prolonged" within the meaning of that customary rule; the second was what, if any, effect that rule had on the internal law of the United States.

This second issue is a matter of United States constitutional law, not of international law. Nonetheless, the two experts, with the encouragement of the trial judge, spent considerable time giving opinions about the role of customary international law in the law of the United States in addition to testifying about the customary international law of human rights. Technically, the domestic law issue was not a proper subject for "expert" testimony, even though both witnesses had scholarly credentials in the field, because it dealt solely with the law of the United States of which the court can take judicial notice. My own view is that the court, recognizing the importance of the constitutional issue involved, welcomed the chance to hear from two experts who had opposing views in the exercise of its right to inform itself. In effect, the experts on international law became advocates for conflicting views about United States constitutional law, almost as if they were attorneys representing clients before the court.\textsuperscript{61}

\textbf{E. The Experts' Special Role in Human Rights Cases}

Cases involving the customary international law of human rights may suggest a false dichotomy between that body of law and traditional public international law. One pole of the dichotomy is the proposition that nations are absolutely sovereign within their own territories and have freedom to do anything they wish within those territorial borders as a result of that absolute
sovereignty.\textsuperscript{62} This concept of sovereignty is tied directly to the jurisprudential principle that public international law is created by the consent of nations.\textsuperscript{63} The "consent" metaphor conjures up the image of the nation state as a living sentient entity that has, in principle, absolute independence unless limited by community norms. Given such a view, the proposition that human beings can have rights as individuals under international law, separate and apart from domestic legal protections of national law, necessarily appears to be an anomaly. These traditional principles and attitudes anthropomorphize states, implying that each is a separate entity existing in its own right and with legal authority independent of the acts of human beings.

But no one has ever seen a nation state. One can see its territory, its population, even its government buildings, but the state itself is an abstraction that does not exist except in the minds of lawyers. To treat it as something other than that is to obscure its role as a conduit for the acquisition and exercise of human rights and duties.

The other pole of the dichotomy is the proposition that because the customary international law of human rights purports to grant rights to individuals against sovereign states, including a complainant's state of nationality, recognizing the existence of a body of law conferring rights on individuals is in conflict with the traditional view that the state is the only legal person in international law. The perception of such a conflict arises from a failure of decision makers to understand the role played by the characterization "sovereign state" in modern public international law.

The concept "sovereignty" is a legal construct, used to describe a particular nexus of human social interaction. It embodies, as Professor Michael Reisman has put it, "a decision about decision making,"\textsuperscript{64} recognizing "a structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decision by what criteria and what procedures."\textsuperscript{65}

Thus, the label "sovereignty" characterizes a process, not a particular set


\textsuperscript{63} Thus, traditionally, only states can be parties before an international tribunal. See, e.g., ICJ Stat., Art. 34(1).

\textsuperscript{64} W. Michael Reisman, Law from the Policy Perspective, in International Law Essays: A Supplement to International Law in Contemporary Perspective 9 (1981) [hereinafter International Law Essays].

\textsuperscript{65} Myres S. McDougal & Harold D. Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, in International Law Essays, supra note 64, at 20.
of substantive rights. It is a process by means of which human beings acquire rights and exercise duties as groups; but the rights thereby acquired are nonetheless human rights.

From this perspective, all international law is international human rights law. Rights of a nation are merely the rights a group of human beings. Only human beings make the relevant decisions and only human beings can have expectations about the competence of the decision makers in the nation state. The nation state is merely a conduit through which human beings act and communicate. It can have no role or authority separate from humankind, either inside or outside its borders. Like a corporation or any other legal construct, a sovereign state cannot act without the agency of human beings; it is solely the decisions of human beings that the acts of sovereign states reflect. This was the lesson of Nuremberg.

In the same sense that the concept of due process transcends the authorities conferred upon the governmental units in the United States, the concept of a pervasive international law of human rights necessarily transcends the legal constructs used to explain the social mechanisms employed to conjoin and corroborate those common expectations concerning authority that we understand by law.

III. CONCLUSION

Today, the expert witness's role when testifying about customary international law need no longer be restricted to reporting evidence of the

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consent of nations. One important role an expert witness may play in human rights cases is to make clear that there are universal norms of conduct that result from legitimate 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. Whether those expectations are treated as having their formal source in a customary international law of human rights or in the federal common law of the United States is immaterial. In either event, customary international law principles will be applied by the court to the facts of the cases at bar. The end result is the same. The results in the individual cases are unlikely to differ with the authoritative source selected. Thus, the court may avoid the difficult (and, likely unsolvable) jurisprudential problems inherent in the monist-dualist controversy while, at the same time, arriving at a result that "makes sense." Whether the party before the court has his or her human rights adequately protected from incursion by government without removing, at the same time, adequate protection for the rights of the forum state's citizenry is, (or, at least, ought to be) the principal objective sought by both the state and the advocates.

Expert witnesses on customary international human rights law should be careful not to attempt to prove too much. There is an understandable tendency for all of us to wish to right the wrongs of the world in one fell swoop. Unfortunately, neither do the wrongs provide a subject-matter nor does the world provide an environment conducive to such sweeping solutions.

One of the quickest ways to weaken international human rights law is to claim too much for it. The "Oh-My-God-Isn't-It-Awful" style of legal

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72 This approach may avoid "the temptation to adapt or reinterpret the concept of customary law in such a way as to ensure that it provides the 'right' answers. . . ." Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens and General Principles, 12 AUSTL. Y.B. INT'L L. 82, 83 (1992).

73 If customary international law is treated as being part of federal common law, expert testimony might not be permitted or required; rather, the issue would be resolved by the briefing and argument techniques normally employed by counsel with respect to domestic law matters. Since the informing general principles that the court seeks to guide its common law decision in such cases would derive from customary international law, however, it is highly unlikely that the court would refuse the assistance of expert witnesses to determine the current state of those principles whether such witnesses were presented by the parties or called on the court's own motion.

74 See KARL LLEWELLYN, HOW APPELLATE COURTS DECIDE CASES 1-28 (1951).
analysis is all too prevalent in some human rights literature, including some of the case law. When that approach is used as a substitute for analysis, not only the progress of the general cause but the likelihood of winning the specific case is weakened. Worse, even, is the tendency to treat those who disagree with the expert’s conclusions as if they were, on that account, evil minions of oppression. No such approach is likely to convince the doubtful.

75 "... [T]he attempt to impose any person or class or orthodoxy’s view of morality on society as a whole must, by definition, deny the full humanity of those who disagree, thereby justifying atrocities in the name of reason and morality." See Rubin, supra note 20, at 153.