

THE ADMISSIBILITY OF INTERNATIONAL LEGAL EVIDENCE

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Counsel in recent cases have sought to establish points of public international law by means of the affidavits and testimony of experts. The author contends that approach is misguided. What international law may require in a given case is not a question of fact to be proved. Rather, it is a question of law to be argued by counsel. Expert opinion on international law is therefore not admissible.

Dans des causes récentes, les avocats et avocates ont tenté de faire valoir des points de droit international au moyen d'affidavits et de témoignages d'experts et d'expertes. L'auteur juge cette approche malavisée. Ce que le droit international exige dans une cause donnée n'a rien à voir avec une preuve factuelle. Les témoignages d'experts sont donc inadmissibles en droit international.

Litigants are increasingly seeking to rely on public international law in Canadian proceedings. A growing body of commentary attempts to explain how this may be done.¹ Having identified a relevant rule of customary or conventional international law, counsel must consider how to engage that rule. Is international law to be treated as a matter of fact to

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¹ See G. van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) [*Using International Law*]. Other Canadian treatments include M. Freeman & G. van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) c. 8-11, 13; M. Copithorne, "National Treaty Law and Practice: Canada" in M. Leigh *et al.*, eds., *National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South Africa* (Washington, DC: American Society of International Law, 2003) 1-32; J. Brunnée & S. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" [2002] Can. Y.B. Int'l Law 3; J. Currie, *Public International Law* (Toronto: Irwin Law, 2001) c. 6; G. van Ert, "The Legal Character of Provincial Agreements with Foreign Governments" (2001) 42 C. de D. 1093; S. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 534; S. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001) 50 U.N.B.L.J. 11; G. van Ert, "Using Treaties in Canadian Courts" [2000] Can. Y.B. Int'l Law 3; W. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79:2 Can. Bar Rev. 174; W. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Scarborough: Carswell, 1996); R. Macdonald, "The Relationship between International Law and Domestic Law in Canada," c. 5 in R. Macdonald *et al.*, eds., *Canadian Perspectives on International Law and Organization* (Toronto:

be pleaded and proved in evidence, or is it a form of law that need not be pleaded but must instead be raised in argument?

In several recent cases, counsel have put international law into evidence by means of affidavits and testimony by international legal experts (usually professors of international law). The benefits of that approach are clear. The court gains a credible and (hopefully) accurate account of a possibly unfamiliar area of law. Counsel are spared the trouble of mastering the relevant international law themselves. And if the court is inclined simply to defer to the expert opinion, the party that has tendered it may enjoy an important advantage. In spite of these benefits, it is my contention that legal opinions by international law experts are inadmissible as evidence. A related point is that rules of international law are not to be pleaded. In this note I defend these claims and suggest more appropriate ways of putting international law before Canadian courts.

A Few Illustrations

The tendency of Canadian courts and litigants to treat international legal questions as evidentiary issues is illustrated by several recent cases. In *Bouzari v. Iran*, the plaintiff sought to sue the government of Iran for damages he suffered upon being abducted, imprisoned and tortured by Iranian government agents.² Both the plaintiff and the intervenor, the Attorney General of Canada, called professors to give expert evidence on the international law of state immunity and the meaning of certain Canadian treaty obligations. At first instance, Justice Swinton appeared at points to rely heavily on the Attorney General's legal expert, whose evidence she clearly preferred.³ At other points, however, she seemed to use the expert testimony only to confirm her own conclusions on relevant points of international law.⁴ On appeal, the court's uncertainty about the admissibility and relevance of the legal evidence admitted in the court below is even more pronounced. Justice Goudge (for the court) observed:

[T]he more fundamental question is whether Canada has the international law obligation contended for by the appellant. After careful examination, the motion judge concluded that it does not. She analysed this first as a matter of treaty law and then of customary international law. In both contexts she relied on the expert evidence of

University of Toronto Press, 1974); D. Vanek, "Is International Law Part of the Law of Canada?" (1949/50) 8 U.T.L.J. 251. For English law, see M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998); F. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986); H. Lauterpacht, "Is International Law a Part of the Law of England?" (1939) 25 *Trans. Grotius Soc.* 51.

² [2002] O.J. 1624 (H.C.J.).

³ *Ibid.* at paras. 52-55.

⁴ *Ibid.* at paras. 72-73.

Professor Greenwood concerning the scope of Canada's international law obligations....While the motion judge's acceptance of Professor Greenwood's opinion over that of Professor Morgan is not a finding of fact by a trial judge, it is a finding based on the evidence she heard and is therefore owed a certain deference in this court. I would depart from it only if there were good reason to do so and, having examined the transcript, I can find none. Indeed, for the reason she gave, I agree with her reliance on Professor Greenwood's evidence.⁵

In this passage, Justice Goudge acknowledges that Justice Swinton's "findings" based on the expert evidence are not findings of fact, but declares that he must nevertheless pay them "a certain deference" and may not depart from them unless "there were good reason to do so."⁶ That standard of review is unclear. Would there be "good reason" to depart from Justice Swinton's international legal "findings" if it appeared that they were mistaken, i.e., that they were wrong as a matter of international law? It is difficult to say for certain, but it appears that Justice Goudge was prepared to show some degree of deference both to Justice Swinton's international legal conclusions and to the testimony of the Attorney General's expert.

A similar approach is suggested, at least at first instance, in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.⁷ Both the Attorney General of Canada and the Foundation sought to support their arguments for and against the constitutionality of the *Criminal Code's* so-called spanking defence⁸ by reference to the provisions of the *Convention on the Rights of the Child 1989 (CRC)*.⁹ Among the many experts relied on by the parties at trial, two swore affidavits on the meaning of the *CRC* and other questions of international law.¹⁰ Both experts were cross-examined. Formally, then, the meaning of the *CRC* and the international legal position generally were treated as questions of fact to be ascertained by reliance on expert witnesses. The

⁵ (2004), 243 D.L.R. (4th) 406 at 423-24 (Ont. C.A.).

⁶ Elsewhere in his reasons (*ibid.* at 426-27), Justice Goudge observed that there was ample evidence to support Justice Swinton's conclusions on international law, and that he agreed with them.

⁷ (2000), 188 D.L.R. (4th) 718 (Ont. S.C.J.), affd. (2002), 207 D.L.R. (4th) (Ont. C.A.), [2004] 1 S.C.R. 76.

⁸ R.S.C. 1985, c. C-46, s. 43.

⁹ Can. T.S. 1992 No. 3.

¹⁰ The affiants were John Holmes, a lawyer and diplomat who represented Canada in the multilateral negotiations leading to the adoption of the convention, and Ed Morgan, an international law professor. Also in evidence was an affidavit by Peter Newell, a British children's rights advocate and the co-author, with R. Hodgkin, of *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 1998). Though Newell is not a lawyer, his affidavit contained the text of the *CRC* as an exhibit.

admissibility of such evidence was not considered on appeal, though it is notable that the majority judgment of Justice McLachlin examined the relevant international human rights instruments without making any mention of the expert evidence brought at trial.

Another recent case taking an evidentiary approach to international legal questions is *Ivanov v. United States of America*.¹¹ Three Russian sailors were arrested in Canada pursuant to a warrant issued under the Extradition Act. The United States sought their extradition following a deadly collision at sea. Upon being released on bail, the sailors asked to return to Russia pending their extradition hearing. The Russian ambassador to Canada wrote a letter to the court pledging Russia's cooperation in ensuring the sailors would return to Canada to face the hearing. The sailors also contested the United States' jurisdiction to prosecute them. At trial, Justice Mercer admitted the evidence of two experts, Professor Donald McRae and former diplomat and government legal advisor Leonard Legault. Their evidence was given to support certain *Charter* submissions¹² and concerned such matters as diplomatic immunity and the nature and interpretation of assurances given by one state to another.¹³ The Attorney General of Canada, appearing on behalf of the United States, challenged the admissibility of the expert evidence. The challenge is especially intriguing given the Attorney General's active reliance on such evidence in *Bouzari* and *Canadian Foundation*. Unfortunately, the nature of the Attorney General's challenge was not recorded in the reasons. Justice Mercer sidestepped the evidentiary issue by declaring that he would have reached the same conclusion on the weight to be given the ambassador's letter without the expert opinions.¹⁴ Notwithstanding Justice Mercer's admission of expert evidence, the points of international law were also addressed in submissions by counsel.¹⁵ In this, *Ivanov* resembles *Bouzari*. Both cases betray the uncertainty of litigants and courts about the proper characterization of international law.

One final example of an evidentiary approach to international law is the decision of the Nova Scotia Supreme Court in *Roumania v. Cheng*.¹⁶ Romania sought the extradition of seven officers of a Taiwanese registered vessel who were alleged to have thrown Romanian stowaways overboard at sea. At the extradition hearing, Justice MacDonald admitted

¹¹ (2003), 223 Nfld. & P.E.I.R. 33 (N.L.S.C.T.D.), 223 Nfld. & P.E.I.R. 44 (N.L.C.A.).

¹² *Ibid.* (T.D.) at 35-36.

¹³ *Ibid.* at 36-37.

¹⁴ *Ibid.* at 40-41.

¹⁵ *Ibid.* at 41.

¹⁶ (1997) 158 N.S.R. (2d) 13 (S.C.), affd. 162 N.S.R. (2d) 395 (C.A.).

the testimony of Professor Stephen Toope, expert for the intervenor Taiwan, that, “based on the facts of this case, the alleged offences according to established principles of international law, were not committed within the territory of Romania” and that “Taiwan, being the flag state of the vessel had a superior jurisdictional claim over the offences than did Roumania.”¹⁷ Justice MacDonald also admitted Professor Toope’s evidence on the meaning of territorial jurisdiction both in the applicable extradition treaty¹⁸ and the federal *Extradition Act*.¹⁹ The judge observed that he “fully accept[ed] Professor Toope’s conclusions in this regard.”²⁰

While these cases tend (sometimes hesitantly) to treat the ascertainment of international law as an evidentiary question, a different approach was adopted by the parties in *Reference Re Secession of Quebec*.²¹ International law experts participated in the case, but behind the scenes. Expert opinions were commissioned by the Attorney General of Canada, the amicus curiae and one intervenor. The parties appended these experts’ reports to their factums and relied upon them extensively in their written and oral arguments.²² Thus, international law was treated as a matter for argument and judicial determination, with the expert reports serving as authority for the parties’ submissions. It should be noted that the case arose as a reference by the Governor in Council rather than as a contested matter. No trial was held, no witnesses were called and the admissibility of international law as evidence was not directly in issue.²³ It may be that the approach taken was dictated more by the nature of the proceedings than by any notion of the propriety of entering international legal opinions into evidence.

¹⁷ *Ibid.* (S.C.) at 24 (Both spellings of Romania in the quoted material (and in the text of the N.S.R. report) are acceptable, though “Romania” is the modern name).

¹⁸ *Treaty between Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals*, U.K.T.S. 1894 No. 14.

¹⁹ R.S.C. 1985, c. E-2.

²⁰ *Supra* note 16 at 45 (S.C.).

²¹ [1998] 2 S.C.R. 217. I use “parties” here in an expansive sense to include the amicus curiae (who was appointed in lieu of the Government of Quebec, which declined to participate) and the intervenors.

²² See A. Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000).

²³ Note, however, that the related questions of the competence of a domestic court to consider questions of international law and the justiciability of international legal questions were very much in issue. The court rejected these challenges to its consideration of international law, noting *inter alia* that it had looked to international law in a number of previous cases, that the questions before it concerned the legal rights and obligations of institutions within the Canadian legal order, and that it was concerned only with the legal aspects of those questions. See *Re Secession*, *supra* note 21 at 235-38.

The approach of appending expert evidence to submissions was also adopted in a more recent reference, *Quebec (Minister of Justice) v. Canada (Minister of Justice)*.²⁴ The circumstances of the case were unusual. The Government of Quebec referred five questions to the Court of Appeal concerning a bill before Parliament on youth criminal justice. Quebec asked the court to consider not only the constitutionality of the bill (on both federalism and *Charter* grounds) but also its consistency with Canadian legal obligations under the *International Covenant on Civil and Political Rights 1966*²⁵ and the *CRC*.²⁶ By the time the reference was heard, the bill had become law.²⁷ The court, after much deliberation on the point, decided that it would answer the international law questions, and proceeded to do so at length. In the course of its deliberations, the court made several references to the expert report of Professor Toope, which was appended as an annex to the submissions of the Attorney General of Canada.

Another distinct approach to the admissibility of international legal evidence may be seen in the voluminous and difficult case law generated by the failed prosecution of alleged war criminal Imre Finta.²⁸ At trial, the testimony of a well-known international criminal law scholar, M. Cherif Bassiouni, was admitted. Yet in a pre-trial motion, the trial judge observed, “It is not necessary to refer to the massive weight of authority produced by the Crown that demonstrates that questions of international law are questions for the judge. That principle is as old as Blackstone.”²⁹ Similarly, on appeal to the Supreme Court of Canada, Justice La Forest criticized and rejected Bassiouni’s testimony, effectively treating it as a question of law (to which no deference was due) rather than a finding of fact.³⁰

Law or Fact?

This short survey of recent cases reveals the high degree of theoretical and practical confusion surrounding the proper characterization of public

²⁴ (2003), 228 D.L.R. (4th) 63 (Q.C.A.).

²⁵ 999 U.N.T.S. 171, Can. T.S. 1976 No. 47.

²⁶ *Supra* note 9.

²⁷ *Youth Criminal Justice Act*, S.C. 2002, c. 1.

²⁸ *R. v. Finta* (1989), 61 D.L.R. (4th) 85 (Ont. H.C.J.), (1992), 92 D.L.R. (4th) 1 (Ont. C.A.), [1994] 1 S.C.R. 701.

²⁹ *Ibid.* (C.A.) at 46. That “weight of authority” was seemingly overlooked by the Crown in *Bouzari* and *Canadian Foundation*.

³⁰ *Supra* note 28 at 760-64 (S.C.C.). Justice La Forest (dissenting) equated Bassiouni’s testimony with an acknowledged subsidiary source of public international law, namely the writings of the most highly qualified scholars. That approach is considered in the discussion of *Zelter* (note 58 *infra*).

international law as a matter of evidence and procedure. The distinction between law and fact is a cornerstone of Canadian legal procedure. From pleadings to judgment, questions of law are distinguished from questions of fact. Facts are to be pleaded. Law is not.³¹ Facts must be proved, subject to certain presumptions of fact and the rules of judicial notice. Laws generally do not need to be proved. The court takes judicial notice of them.³² Opinions on matters of fact are admissible as evidence when relevant, necessary in assisting the trier of fact, not prohibited by any exclusionary rule, and given by properly qualified experts.³³ Opinions on matters of law, by contrast, are not admissible. The judge will decide questions of law.³⁴ How, then, should Canadian courts characterize international law? Is it law or fact?

It may seem obvious that international law, being law, should be characterized as such. But there is abundant authority for treating another type of law, foreign law, as fact. The common law has long characterized foreign law as fact for the purposes of the law of evidence, civil procedure and conflict of laws. Unless otherwise provided for by statute, Canadian courts do not take judicial notice of foreign law. Instead, they regard foreign law as a matter of fact to be pleaded and proved at trial. Absent such proof, Canadian law prevails as the only available law.³⁵ The treatment of foreign law as fact may seem anomalous in an era of global communications, in which the laws and judgments of foreign states are often easily accessible to litigants and judges. But the rule has its virtues, including comity and simplicity.

The common law approach to foreign law may therefore seem to offer a precedent for treating international law as a matter of fact. A closer look at the common law, however, suggests otherwise. In his *Commentaries on the Laws of England*, Blackstone famously declared that “the law of nations...is here adopted in it’s [sic] full extent by the

³¹ *North-Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.*, [1913] 3 K.B. 422 (C.A.) at 425; *Middlesex County Council v. Nathan*, [1937] 2 K.B. 272 at 276. The rule may be varied by legislation. See British Columbia *Supreme Court Rules* (B.C. Reg. 221/90, as amended), r. 19(9) and (9.1) (permitting pleadings of objections in point of law and conclusions of law supported by material facts).

³² Judicial notice of law is a common law doctrine and covers legislation, the common law, the principles of equity and (as we will see) international law. See *Halsbury’s Laws of England*, 4th ed. vol. 17 (London: Butterworths, 1976) at para. 100.

³³ *R. v. Mohan*, [1994] 2 S.C.R. 9.

³⁴ *R. v. Century 21 Ramos Realty Inc.* (1987), 37 D.L.R. (4th) 649 (Ont. C.A.), in which the court observed that what constitutes an appropriation was “a question of law for the judge” on which an expert witness could not give evidence. See also *Graat v. The Queen*, [1982] 2 S.C.R. 819.

³⁵ See J. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed., looseleaf (Markham, Ontario: Butterworths, 2004) at s. 7.4.

common law, and is held to be a part of the law of the land.”³⁶ This phrase must be approached with some caution. When Blackstone wrote, the phenomenon of states concluding treaties of a law-making nature, the provisions of which might address the rights of citizens, was virtually non-existent. Blackstone clearly did not mean that treaties, once concluded by the Crown, are self-executing in domestic law. Such a rule would conflict with the basic constitutional proposition that the Crown cannot make law outside of Parliament.³⁷ Yet Blackstone’s dictum is accurate in relation to custom, the more prevalent form of international law in his day. English and Canadian authorities have repeatedly affirmed that rules of customary international law are automatically incorporated by the common law and made “the law of the land.”³⁸ The incorporation of custom is one example of the common law’s different treatment of foreign and international law. The former is foreign and therefore *not* domestic, while the latter – at least as regards customary norms – is international and therefore *also* domestic.

Foreign and international law are also differentiated by the interpretive presumption that domestic laws are intended to conform to Canadian international obligations. There is, of course, no interpretive presumption that Canadian law conforms to the requirements of Dutch or Brazilian or American law. Such foreign laws do not bind (or even, in most cases, purport to bind) Canada, and there is therefore no reason for a court to construe a Canadian statute or regulation consistently with them.³⁹ International law is different. It applies to all states and may bind them merely by virtue of their statehood (in the case of customary international law) or by their consent (in the case of treaties). Violations of international law by Canadian legislatures, executives or courts attract international responsibility to the Canadian state. Our courts know this, and therefore construe domestic law according to the

³⁶ Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4 (New York: Garland Publishing, 1978) at 67.

³⁷ *Bill of Rights 1688* (U.K.), 1 William & Mary, Sess 2, c. 2.

³⁸ The most recent affirmation of this rule is found in *Bouzari (C.A.)*, *supra* note 2 at para. 65. For more on the incorporation doctrine, see van Ert, *Using International Law*, *supra* note 1, c. 5 and Freeman & van Ert, *supra* note 1, at 159-64.

³⁹ However, where a foreign law serves to implement a treaty to which Canada is also a party, or a foreign judgment treats a matter of general international law, it may be helpful for a Canadian court to have regard to foreign sources. An example of this is *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1981] F.C.J. 1033 at para. 50 (F.C.T.D.), where Justice Addy observed: “Maritime law, because of its international aspect, is one of the areas of our law where decisions of foreign courts on that subject are of paramount importance and should be followed wherever possible.” See also *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.*, [1932] A.C. 328 at 350 and *Scruttons v. Midland Silicones Ltd.*, [1962] A.C. 446 at 471.

rebuttable presumption that it conforms to the requirements of international law.⁴⁰

To give effect to both the incorporation doctrine and the presumption of conformity, Canadian judges must take judicial notice of international law.⁴¹ Though the authorities for doing so are not as direct as one might wish, the practice in Canadian and other Commonwealth courts is to take judicial notice of international law – again in contrast to foreign law. The view expressed in *Halsbury's Laws of England* is that English courts take judicial notice of every branch of English law including the principles of international law – thus equating international law with domestic law in much the same way Blackstone did.⁴² There is explicit Supreme Court of Canada authority for taking judicial notice of international law in *The Ship "North" v. The King*.⁴³ There is less explicit authority to the same effect in *Re Secession*, where the court rejected a submission that so-called “pure” questions of international law were beyond the court’s competence.⁴⁴ Ultimately, however, actions speak louder than words. Though there is only sparse authority directly affirming that Canadian courts take judicial notice of international law, there are numerous cases in which our courts consider customary and conventional international norms without any apparent doubt about the propriety of doing so.⁴⁵

One final common law indicator of the legal, rather than factual, nature of international law derives from the rules of pleading. It was noted earlier that foreign law must be pleaded. International law, it seems, must

⁴⁰ The presumption of conformity was invoked by the majority of the Supreme Court of Canada in *Canadian Foundation*, *supra* note 7 at 100-102 in construing *Criminal Code* section 43. For more on the presumption, see van Ert, *Using International Law*, *supra* note 1, c. 4 and Freeman & van Ert, *supra* note 1, at 151-59.

⁴¹ See van Ert, *Using International Law*, *supra* note 1, at 30-40; Freeman & van Ert, *supra* note 1, at 148-51; G. van Ert, “Judicial Notice and Reception Theory: Thoughts on the Contribution of Ronald St-John Macdonald” [2002] *Can. Y.B. Int'l Law* 251; Macdonald, *supra* note 1, at 111-14; Lauterpacht, *supra* note 1, at 59.

⁴² *Halsbury's*, *supra* note 32. See also *Re Queensland Mercantile and Agency Ltd.*, [1892] 1 Ch. 219 at 226; *Pan-American World Airways Inc. v. Department of Trade*, [1976] 1 Lloyd’s Rep. 257 at 261.

⁴³ (1906), 37 S.C.R. 385. In that case, Canadian authorities captured an American vessel fishing illegally off the coast of British Columbia. The poacher argued that its capture was contrary to international law because it occurred on the high seas. Canada noted that its pursuit of the vessel began in Canadian waters and sought to rely on the customary international law of hot pursuit, whereby a state pursuing a suspect vessel in its territorial waters may continue its pursuit into the high seas. Justice Davies held that the trial judge was right to take judicial notice of international law, including the right of hot pursuit.

⁴⁴ [1998] 2 S.C.R. 217 at 235, 276.

⁴⁵ Taking only Supreme Court of Canada cases as examples, see *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571; *Suresh v. Canada (Minister of Citizenship and*

not. An old decision of the US Supreme Court contrasts the two directly: “Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.”⁴⁶ The same conclusion was reached by Justice MacKay in *Hijos (Jose Pereira E) S.A. v. Canada (Attorney General)*.⁴⁷ The Crown moved to strike out portions of the statement of claim and the plaintiffs’ reply to the Crown’s demand for particulars that relied on international law. The Crown argued that such reliance suggested the priority of international law over Canadian law. Justice MacKay rightly rejected this submission but did strike parts of the pleadings, saying: “To the extent that international conventions or treaties are considered authority for international law principles, it is unnecessary to plead them specifically, in the same way that it is unnecessary to plead other authority, e.g., jurisprudence or legislation, and such pleading is not of facts, the essence of pleading, but of law, which is not to be pleaded.”⁴⁸ Justice MacKay therefore struck references to specific treaties from the pleadings, though he allowed such phrases as “established principles of international law” and “international law giving exclusive jurisdiction to the flag state,” for these phrases did not plead specific treaties but were simply “general descriptions of sources of law” and “a part of the factual description of the legal regime here applicable.”⁴⁹ In sum, the common law consistently recognizes international law as “law,” and foreign law as “fact.”

Opinion Evidence on Matters of Law

The judgment of the Supreme Court of Canada in *R. v. Mohan* is the leading authority on the admissibility of expert opinion evidence.⁵⁰ It

Immigration), [2002] 1 S.C.R. 3; *United States v. Burns*, [2001] 1 S.C.R. 283; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Re Canada Labour Code*, [1992] 2 S.C.R. 50; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Reference re Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Municipality of Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263. There are countless other cases at the Supreme Court level and in lower courts.

⁴⁶ *The Scotia*, 81 U.S. 822 at 826 (1871). See also *The New York*, 175 U.S. 126 (1899).

⁴⁷ (1997), 126 F.T.R. 167.

⁴⁸ *Ibid.* at 174. See also 175.

⁴⁹ *Ibid.* at 175. In *Mack v. Canada (Attorney General)* (2001), 55 O.R. (3d) 113 at 125, Justice Cumming struck out pleadings invoking international human rights norms for a different reason. He held it to be plain and obvious that Mack’s submissions on the *Charter* and international human rights law could not succeed because the events that were the subject of Mack’s claim occurred between 1885 and 1947, and neither the *Charter* nor the international instruments had retroactive effect.

⁵⁰ *Supra* note 33.

established four criteria for the admissibility of such evidence: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert. The case, it should be noted, was concerned only with expert opinion on questions of fact and did not expressly address the admissibility of expert opinion on questions of law. Arguably, then, the *Mohan* criteria are irrelevant to the issue at hand. If they are applied, however, we find that at least three of the criteria seem to bar the admission of expert opinion on questions of law.

Expert evidence on law is not relevant, in the sense of tending to prove a fact, for it is not about fact at all. Expert legal evidence does not seek to prove facts but to establish and support propositions of law. For the same reason, legal evidence is not necessary to assist the trier of fact. It does not speak to fact but to law. The proper qualification of a legal expert may also be questioned. While it is no doubt true that a scholar who has long studied a particular question of law may be more knowledgeable about it than a trial judge at the outset of a hearing, our adversarial legal system is predicated upon the conviction that a qualified judge, assisted by learned counsel presenting competing views and acting for parties with a real interest in the outcome, and protected (if all else fails) by the possibility of reversal on appeal, is capable of correctly resolving any legal controversy. If we begin to doubt this proposition for international law, on the ground that it may be unfamiliar to many judges, why should we not also doubt it for other lesser-known areas of law?

The Syllogism and its Authorities

We now have two parts of a syllogism in place: (a) international law is law and (b) law is not admissible as evidence. The syllogistic conclusion, then, is (c) international law is not admissible as evidence. But Aristotelian logic is never quite as satisfying to a lawyer as good old-fashioned case law. Authority on the point is not plentiful, but two cases, one Canadian and one Scottish, are instructive.

In *Pan American v. The Queen*,⁵¹ the dispute concerned the proper interpretation of a treaty to which Canada is a party, the *Chicago Convention on International Civil Aviation*.⁵² The plaintiff attacked federal aeronautics regulations on the ground that they were contrary to the terms of the treaty. Justice Mahoney dismissed the argument by reference to the relevant treaty articles themselves, which he examined in some detail.⁵³ He concluded that the impugned fees were not contrary to

⁵¹ (1979), 96 D.L.R. (3d) 267 (F.C.T.D.), affd. (1980), 120 D.L.R. (3d) 574 (F.C.A.), [1981] 2 S.C.R. 565.

⁵² Can. T.S. 1944 No. 36.

⁵³ *Pan American*, *supra* note 51 (T.D.) at 271-74.

the treaty and, having reached that conclusion, found it unnecessary to consider “the places, if any, of arts. 15 and 70 of the Chicago convention in Canadian domestic law.”⁵⁴

Justice Mahoney then dismissed a second international legal argument raised by the plaintiff based on the supposed existence of a “fundamental principle of equity” violated by the impugned fees. The judge observed that the existence in law of such a principle or reciprocal obligation as between nations “has not been established to my satisfaction either by evidence or argument.”⁵⁵ He went on to observe that:

[T]he expert evidence...was wholly inadmissible....While expert evidence as to foreign law is, of course, admissible, expert evidence as to domestic law is not. It is well established that international law has no force in Canada unless it has been adopted as domestic law. Opinion evidence as to the proper construction to be placed on the Chicago Convention was not admissible and I have not, therefore, considered Mr. Seagrave’s statement as evidence but, on the assumption that plaintiff’s counsel would willingly adopt it as argument, I have considered it such.⁵⁶

Though the reasoning in this passage is not entirely clear, the result is correct. Justice Mahoney began by describing expert evidence on a question of international law as “wholly inadmissible.” He contrasted domestic law with foreign law, noting that evidence on the latter is indeed admissible but that expert evidence on domestic law is not. At that point in the passage, it appears that Justice Mahoney is equating international law with domestic law, at least for the purposes of the law of evidence. But the judge then adds that international law has no force in Canada unless made part of Canadian law. By affirming that rule (which is consistent with both the doctrine of incorporation of custom and the implementation requirement for treaties), Justice Mahoney may seem to be suggesting that expert evidence on international law is inadmissible because irrelevant. But that clearly cannot be his meaning, given his lengthy consideration of the Chicago convention earlier in his reasons and his rejection of the plaintiff’s international law arguments on the basis of his finding that the impugned fees were consistent with Canada’s treaty obligations. Instead, Justice Mahoney’s affirmation of the rule that international law has no force in Canadian law unless made part of it appears to be something of an aside – one that actually does no work here. That interpretation (admittedly unsatisfying) is supported by Justice

⁵⁴ *Ibid.* at 274. Justice Mahoney’s willingness to reach such definitive conclusions on the meaning of a treaty, without regard to whether or not it is implemented in domestic law, is an illustration of my earlier point that Canadian courts take judicial notice of international law.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 274-75.

Mahoney's following comment, which reiterated that expert opinion as to the proper construction of a treaty is not admissible as evidence. Rather than ignore Mr. Seagrave's statement entirely, Justice Mahoney pragmatically assumed that counsel for the plaintiff would adopt it as argument.

Though Justice Mahoney's reasoning is perplexing at points, the result he reaches is surely right. International law is not a proper subject for expert evidence. Like domestic law, but unlike foreign law, international law is a matter to be presented by counsel in argument and to be decided by the judge as a matter of law. Justice Mahoney's judgment was upheld both at the Federal Court of Appeal and the Supreme Court of Canada, though without comment on the point.⁵⁷

A second authority against the admission of expert evidence on questions of international law is the decision of Scotland's final court of criminal appeal in *H.M. Advocate v. Zelter*.⁵⁸ The case was a reference arising from the trial of three anti-nuclear protesters acquitted of malicious damage to a support vessel for Trident submarines. At trial, the accused argued that the deployment of Trident nuclear missiles by the UK is contrary to international law and therefore criminal in Scots law. The argument supported a defence of necessity – that the protesters acted to prevent or obstruct a crime. In support of these arguments, the accused led evidence as to the content of customary international law. The presiding judge (known as the sheriff) admitted expert evidence from international lawyers. The evidence was led before the jury “and not,” as the appeal court later observed, “merely before the sheriff...as some kind of alternative or substitute for legal submissions.”⁵⁹ Upon the acquittal of the accused, the government referred four legal questions to the court, including: “In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies in the United Kingdom?” The court's answer was clear:

We are in no doubt that in relation to evidence in the trial itself this Question must be answered in the negative. A rule of customary international law is a rule of Scots law. As such, in solemn proceedings it is a matter for the judge and not for the jury. The jury must be directed by the judge upon such a matter, and must accept any such direction. There can thus be no question of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is.⁶⁰

The court noted that foreign law is admissible in Scottish proceedings, but

⁵⁷ *Pan American*, *supra* note 51 (S.C.C.) at 567.

⁵⁸ [2001] Scot. J. 84 (Scot. H.C.J.).

⁵⁹ *Ibid.* at para. 22.

⁶⁰ *Ibid.* at para. 23.

explained that was because foreign law is treated as a question of fact and not of law. It added that: “Any analogy between such foreign law and customary international law is false.”⁶¹ The court also commented on the role of lawyers in trials involving international law, saying: “Just as it is for the judge to direct the jury upon a point of law, it is important to remember that it is for the solicitor or counsel appearing on behalf of any party to present to the court any submission which is thought appropriate upon any issue of law.”⁶²

The court also addressed a possible objection to this approach. If a court may consult a textbook, article or other authoritative secondary source on questions of international law, arguably it should not be precluded from hearing from experts directly. The court acknowledged an initial attraction to the argument, and hesitated to rule out the possibility as a matter of law, because it had not heard argument on the point. Yet the court observed that “if in any particular situation it were thought necessary by those representing a party to have recourse to some specialist source of advice, the appropriate course would of course normally be to seek that advice, whether in writing or by consultation or both, so that the appropriate submissions could be made, by that party’s representative, at the appropriate time.”⁶³ The court went on to observe that, “having regard to the different skills and expertise of an advocate on the one hand, and some other kind of specialist on the other hand [it is] very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party.”⁶⁴

The court’s reasons on this point are, with respect, beyond reproach. The court affirmed the unity of domestic law and customary international law, differentiated international law from foreign law, and identified the respective roles of expert, counsel and judge with regard to questions of law. In cases where counsel feel they need specialist help, the court recommended that they seek such advice and incorporate it into their submissions. That was the approach adopted in *Re Secession*, though in that case the parties took the extra step of appending the expert advice to their written submissions.

Evidence and Customary International Law

The observations made above are subject to an important, and somewhat uncertain, qualification respecting customary international law. Though the bulk of international law today is created by treaty, custom remains a

⁶¹ *Ibid.* at para. 24.

⁶² *Ibid.* at para. 26.

⁶³ *Ibid.* at para. 27.

⁶⁴ *Ibid.*

significant source.⁶⁵ Some rules of customary international law are so well established that their existence is not disputed. Others, however, are hotly contested and must be proved. In this custom differs greatly from treaty. One of the virtues of treaty-based international law-making is its relative transparency. For the purposes of international law, proving the existence of a treaty-based norm is a simple matter of identifying a valid treaty, demonstrating who has ratified or otherwise become a party to it, and isolating the provision or provisions of the treaty which enunciate the rule. Proving the existence of a customary norm is more difficult. It is necessary to show two elements: state practice consistent with the existence of the supposed custom, and *opinio juris*, meaning a belief on the part of states that the practice in question is required by international law.⁶⁶

The question that arises when a domestic litigant wishes to rely on a supposed rule of customary international law is how to characterize custom's two elements. The first element, state practice, is a matter of fact. It is the answer to the question: "What do states actually do?" The nature of *opinio juris* is somewhat less clear. The International Court of Justice has sometimes permitted *opinio juris* to be inferred from state practice, but has insisted on its being independently proved in other cases.⁶⁷ Given these uncertainties, some leeway from the court is in order for pleadings or evidence concerning customary international law. The court in *Zelter* observed: "In matters of customary international law, we can appreciate that the question of whether an *opinio juris* has emerged, and won the general acceptance which is necessary to constitute a rule of customary international law, might well make recourse to expertise appropriate."⁶⁸

⁶⁵ The classic statement of the sources of international law is article 38(1) of the *Statute of the International Court of Justice*, Appendix to the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

For more on the sources of international law see, e.g., R. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. 1 (Harlow, England: Longman, 1992).

⁶⁶ See *Mack v. Canada (Attorney General)* (2002), 217 D.L.R. (4th) 583 at 593-94.

⁶⁷ I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 7-11; Brunnee & Toope, *supra* note 1 at 17-18.

⁶⁸ *Supra* note 58 at para. 27.

Even here, however, it may be that expert opinion is properly directed to the elements of the supposed custom rather than the ultimate question of whether or not the custom exists in international law.

Conclusion

Cases treating international law as a question of fact increasingly outnumber authorities suggesting otherwise. Those cases are unsound. Unlike *Pan American* and *Zelter*, recent cases like *Bouzari*, *Ivanov* and *Canadian Foundation* do not consider the evidentiary matter directly. More importantly, the latter cases are inconsistent with the principles of pleading, evidence and the domestic reception of international law. Those considerations point to two conclusions. First, the presentation of international law submissions is the responsibility of counsel, not an expert. Counsel should make these submissions themselves, both in written and oral argument. If counsel require expert assistance, they may engage a lawyer experienced in international law to make the required submissions as special counsel or write an opinion for counsel to rely on in submissions. Second, counsel are entitled to have specific references to international law struck from the pleadings and may have evidence of international law excluded as inadmissible. Doing so will confirm that the international law at issue in the case is a matter of argument and, ultimately, decision by the judge.