

expertise, have superior knowledge of the law. Response, p. 2. However, only testimony which is probative as to the *facts* at issue is admissible. The standard for admissibility of evidence is set out in Military Commission Order (MCO) No.1 (6)(D)(1): “Evidence shall be admitted if ... the evidence would have probative value to a reasonable person.”¹ “Evidence” pertains to facts. A common definition of “relevant evidence,” for example, is evidence “tending to prove or disprove or disprove a *fact*.” Black’s Law Dictionary (6th ed. 1990) (emphasis added); *accord* Mil. R. Evid. 401; Fed. R. Evid. 401.

c. Attempting to categorize these witnesses as “experts” is equally unavailing. The Federal and Military Rules of Evidence, while not binding upon the Commission, are illustrative. Both restrict expert witness testimony to questions of fact. Federal Rule of Evidence 702 provides the following: “If scientific, technical, or other specialized knowledge will assist the trier of *fact* to understand the evidence or to determine a *fact* in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of opinion or otherwise.” (*See also*, Mil. R. Evid. 702 which is identical) (emphasis added). Witnesses who will offer only legal opinions having no bearing on a *fact* in issue should not be permitted to testify. That is what legal briefs and cited authority are for.

d. The Defense correctly points out that the District Court in *Fernandez-Roque v. Smith*, 622 F. Supp 887 (1980), heard testimony from two law professors. However, there was no indication that this was over any objection, and it was for the limited purpose of determining, in the absence of other controlling law, what the existing international custom was in a particular area. Furthermore, in considering this type of testimony, the court cited the following language from a U.S. Supreme Court case demonstrating that resort to the *works* of jurists, not testimony, is the norm:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty and no controlling executive or legislative act or judicial decision, 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.

The Paquete Habana, 1175 U.S. 677 (1900)(emphasis added). *See also*, *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003).

¹ The United States Supreme Court noted and affirmed similar language in addressing the issue of admissibility and probativeness in considering an earlier military commission: “The regulations prescribed by General MacArthur governing the procedure for the trial of [Yamashita] by the commission directed that the commission should admit such evidence ‘as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission’s opinion would have probative value in the mind of a reasonable man.’” *In re Yamashita*, 327 U.S. 1, 18 (1946).

e. Litigants calling professors to testify on the law implicates precisely the concerns cited by the court in *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989) when it held that it was error for the lower court to allow expert testimony on the law. *Id.* at 808. Primarily, an “expert” on the law supplants the judge’s role as the source of the law and creates confusion. *Id.* at 807. Secondly, the trial process is such that if one side calls an expert on the law, the other will do so as well. *Id.* at 809. The result is an inefficient process with lengthy testimony of multiple contradictory experts.

5. Oral Argument. This motion can be resolved without the necessity of oral argument.

6. Legal Authority. Beyond that already noted in the motion and response, the following legal authority was cited:

a. *The Paquete Habana*, 1175 U.S. 677 (1900).

b. Black’s Law Dictionary (6th ed. 1990).

//Original Signed//

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