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FOURTH REPORT ON PARTICULAR CUSTOMARY INTERNATIONAL LAW IN THE CONTEXT OF THE AMERICAS

(Presented by Dr. George Rodrigo Bandeira Galindo)

PART I. INTRODUCTION

At its 95th Regular Session, held in Rio de Janeiro from July 31 to August 9, 2019, the Inter-American Juridical Committee included in its agenda the topic of Particular Customary International Law in the Context of the Americas. On that occasion I had the honor to be selected rapporteur on the topic.

At the 96th Regular Session, held in Rio de Janeiro from March 2 to 6, 2020, I presented my first report.

The issue was not considered at the 97th Regular Session, held in Rio de Janeiro in 2020, from August 3 to 7, 2020.

On that occasion I sought to begin the approach to the topic from the perspective of the international case-law. I examined the judgments of the International Court of Justice that explicitly addressed particular custom in one or another of its forms (bilateral custom, local custom, and regional custom).

At the 98th Regular Session, which took place April 5 to 9, 2021, held virtually due to the covid-19 pandemic, I submitted my second report to the other members of the Committee. In it I completed the analysis of the relevant international case-law, looking at the individual opinions of the judges in the judgments in which there was no explicit reference to the particular custom. Decisions were also analyzed from other international courts, specifically from the Inter-American Court of Human Rights, on the matter, and a general summary of judicial practice in relation to particular custom was drawn up.

Later on, at the 99th Regular Session, held in Rio de Janeiro from August 2 to 11, 2021 – virtually as well – I delivered my third report on the subject. On that occasion, I began my analysis of the specialized doctrine on private custom, focusing on work whose inquiry is primarily private custom in its various forms (bilateral custom, local custom, or regional custom).

The Eighth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS member states was held during that session, on August 9, 2021, when, several representatives of the states made comments on this subject, which provided essential elements for a better approach to the issues discussed.

This report consolidates the observations from the three previous reports.

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A significant part of the doctrine on particular international law takes as its first reference a series of cases decided by the International Court of Justice (hereinafter ICJ, or Court) over more than 50 years, that addressed the issue, sometimes more carefully, other times less so.

That approach, which could be classified as preponderantly inductive, based on the cases decided by the ICJ, has clear advantages, yet it also faces risks.

The greatest advantage is connecting the study of particular customary international law to the relevant judicial practice – thereby avoiding theoretical debates with little practical application.

On the other hand, the great risk of such an approach is presupposing a coherence among the cases decided by the ICJ over a long time, and abstracted from the characteristics of the specific cases.

Actually, as will be see below, the criteria used by the ICJ to identify a particular customary rule are not uniform. In addition, several argumentative elements found in the decisions give rise to difficulties or have glaring omissions.

The beginning of the analysis of judicial practice in this area, set out in the report, was aimed precisely at understanding the cases decided by the ICJ in greater depth, so as to reveal their possibilities, and also their limits when it comes to applying particular customary international law in the context of the Americas.

In that report, I began the analysis with those cases in which the ICJ, in its judgments, ruled in one way or another on particular customary international law. I also analyzed some individual positions of the judges, put forth in those cases, to better grasp the context of the decision.

In the second report I investigated the cases in which the reference to particular customary international law is found in the individual opinions of the ICJ and in the few decisions of other courts that address the same matter. The same report also takes stock, generally, of the position of the international case-law on particular customary international law.

The analysis of individual opinions is not as compelling as establishing international case-law. However, such opinions have served as an important interpretive benchmark not only in other cases decided by international courts, but also for understanding the approach adopted in and the scope of the very judgments in relation to which the individual opinions were issued [1].

As regards analyzing the decisions of other international courts, it was found that only the Inter-American Court of Human Rights had ruled specifically on particular custom, and that as part of its advisory jurisdiction.

In the third this report I undertook an assessment of the specialized doctrine on the issue. I observed that specialized writings constantly gravitate around two issues raised by the international case-law. Moreover, the first writings that dealt in a more in-depth manner with the subject were constantly treated as an element within a larger debate, which opposed voluntarist and non-voluntarist perspectives in international law.

In this report I intend to complete the doctrinal analysis, including older works but also the more recent ones which have gradually changed the focus of the previous doctrinal debate. I will also seek to present the treatment given by the International Law Commission on the matter, in at least two topics that have composed its agenda in recent years.

Once the analysis of the cases that are heard and the debate on doctrine has been completed, I believe it would be worthwhile to delve into the practice of the states of the Americas with regard to the particular customary international law. To that end, I propose that the present report (and the earlier supporting reports) be sent to the member states of the Organization of American States for comment. Those comments can hopefully give us a broader picture of the states' practice in this area. The study will thus complement the judicial and doctrinal perspective with the state perspective on the particular customary international law.

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[1] As recognized by even the International Court of Justice in: INTERNATIONAL COURT OF JUSTICE. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, *I.C.J. Reports 1987*, p. 18.

PART II. ON THE INTERNATIONAL JUDICIAL PRACTICE

2.1. On the judgments of the ICJ that explicitly address customary international law (and on the individual opinions that address it)

2.1.1 The Asylum Case

The *Asylum Case* (Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 266) was the first opportunity the ICJ had to rule on the possible existence of particular customary international law norms. The case is of great importance because it very significantly set the stage for the doctrinal debates and subsequent case-law of the Court.

The case had to do with a series of issues involved in the granting of diplomatic asylum, by the Government of Colombia, to Peruvian citizen Víctor Raúl Haya de la Torre.

The issue of particular customary international law was addressed in light of the argument by Colombia, which, on invoking inter-American international law in a matter involving diplomatic asylum, relied on the existence of a regional or local custom particular to the Latin American states. Specifically, the court was called on to decide on the rule that it is up to the state granting asylum to characterize, unilaterally and definitively, the offense that rendered diplomatic asylum viable.

For the Court, the party that alleges the existence of such a custom must prove that it is binding on the other party. It is worth recalling the relevant excerpt, which is constantly cited by the literature on particular customary international law:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'[2]

It is relevant to note that the Court invoked Article 38 of its Statute – which says nothing about particular custom – to argue that such a rule would result from constant and uniform use as an expression of a right belonging to the state granting asylum, and a duty incumbent on the territorial state.

The two levels of arguments presented by Colombia were dismissed. In the first, even though several treaties have been raised as proof of the existence of a practice, the Court considered that they either were not relevant to the case or had been ratified by few states in the Latin American context. In the second, even though Colombia had submitted several cases in which diplomatic asylum was granted, according to the ICJ they presented "uncertainty and contradiction," in addition to being influenced by "political convenience," such that said practice would not show the existence of a customary rule.[3]

The Court also understood that even though Colombia had proven the existence of a customary rule on characterization, it could not be invoked against Peru, which had repudiated it. That would be confirmed by the fact that Peru did not ratify the 1933 or 1939 Montevideo Conventions, which were the first instruments to include rules regarding characterization of the offense in cases of diplomatic asylum. Official communications from the Ministry of Foreign Relations of Peru were dismissed; they had been introduced by Colombia as proof of acceptance of the particular customary rule.[4]

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[2]. INTERNATIONAL COURT OF JUSTICE. *Colombian-Peruvian asylum case*, Judgment of November 20th, 1950: I.C.J. Reports 1950, pp. 276-277.

[3]. *Id.,* p. 277.

[4] .*Id.,* pp. 277-278.

In one excerpt from the judgment the ICJ also addressed non-intervention as a Latin American tradition, though it did not explain whether that tradition constitutes a customary rule.[5]

Various issues arise from the case. Four of them merit special attention here.

The argument regarding identification of the custom is very much based on the perception that treaties are component elements of state practice. The position of Peru's opposing position on this issue is based first on the non-ratification by Peru of any treaty on asylum. That argument has consequences for identifying the role of silence in the formation of the customary rule, which would hardly be taken into account or might even be dismissed in the case of a particular custom – for the absence of ratification does not imply any statement of express will.

Second: It is not clear whether the requirement that Colombia had to have proven that the particular custom was binding on Peru was a procedural or a substantive question. In that context the question remains: Can regional international custom only be applied when a party to a proceeding has introduced evidence that it is binding on the other party? Or can the Court itself, at its own initiative, recognize it?

It seems reasonable to believe that the demand directed to Colombia arises as a procedural question because the Court itself analyzes elements of practice – albeit insufficiently – and finds that there was no particular customary rule to regulate or issue to be debated. Moreover, one could also argue that proof of custom is a condition for identifying it, which would make it, in some respects, a substantive issue.

The ICJ was very specific in assigning great weight to the fact that Peru had not ratified the first treaty on the right of the asylum-granting state to characterize the offense. The reference to the "first" one may be related to the principle of acquiescence, or even what would come to be known as the doctrine of the persistent objector – which requires, as is known, that the objection have taken place at the moment when the customary rule came into being.

The dissenting opinion of Judge Álvarez is of great interest, considering that even before he joined the Court he had written and reflected considerably on the role of regionalism in international law. Álvarez's positions on particular custom, however, do not appear to be very clear.

Before getting into the question of diplomatic asylum as a particular custom Álvarez summarizes some of his ideas on the international law of the Americas. For him, a custom does not need to be accepted by all the states of the New World to be considered as part of the international law of the Americas. He also conceived of the possibility of subdivisions in the international law of the Americas, such as a Latin American international law. And as for the relationship between general international law and the international law of the Americas, he argues that it is not characterized by subordination but rather by correlation.[6]

Even with a position favorable to particularity in international law, Álvarez concludes that there is no customary American law on asylum because there is no uniformity of practice of the respective governments on the matter. He admits, however, that there are certain practices and methods in applying asylum that are followed by the Latin American states. Yet there is no explanation of those practices and methods that would be endowed with some degree of legal force and, therefore, would be binding in the Latin American context.[7]

Other members of the Court, such as Judge Read, were express in that even though Colombia had not proven that there is a unilateral right to characterization and a right of safe-conduct based on customary law, there would be no doubt but that diplomatic asylum is an international custom. That

[5] *Id.*, p. 285.
[6] *Id.,* p. 294.
[7] .*Id.,* p. 295.

statement helps one understand that the Court is capable of verifying the existence of particular custom without one of the parties needing to prove that it was binding on the other.[8]

Judge Azevedo, in addition to taking issue with the Court regarding the existence of a particular custom concerning diplomatic asylum, questioned how it is that the failure to ratify it would have the effect of excluding a state from the group in relation to which the custom is respected.[9]

2.1.2 Case related to the rights of nationals of the United States of America in Morocco

The *Case concerning rights of nationals of the United States of America in Morocco* (Judgment of August 27th, 1952: I.C.J. Reports 1952) involved the question of the continuity of certain privileges granted to U.S. citizens in Moroccan territory.

One of the arguments presented by the United States was formulated so as to supports the exercise of its consular jurisdiction and other capitulatory rights would be founded on "custom and usage." It should be noted that at no time is the expression "bilateral custom" used. The argument had to do with two different temporal frameworks: first, from 1787 and 1937, and second, as from 1937, at the time the action in question was judged.[10]

The Court understood that the U.S. argument related to the two temporal frameworks was not in order, for various reasons.

As for the first period, the Court presented two grounds. First, the consular jurisdiction of the United States was based not on custom or usage, but on rights that emanated from a treaty. On this point, the reasons presented by the Court do not appear to be sufficiently strong. Even though it argues that most states have rights arising from treaties, it also recognizes that certain states exercised consular jurisdiction with the "consent or acquiescence" of Morocco. For the Court, however, that element would not suffice to conclude that the United States had the right to consular jurisdiction based on "custom and usage." It should be noted that the judgment does not equate "consent and acquiescence," albeit in relation to those other states, to a particular custom.[11]

In this case, and in contrast to the general position adopted in the *Asylum Case*, the Court appears here to adopt a very strict distinction between treaty norms and customary norms, so as to impede the concomitant application of both sources. This is done based on a dichotomy between those states that had consular jurisdiction based on treaties and those that had it based on the "consent and acquiescence" of Morocco. What is not clear is how "consent and acquiescence" can be separated from the treaty if it is a clear form of express consent.

The second ground presented is based on the burden of proof. After transcribing from the *Asylum Case*, the Court understood that there is not "sufficient proof" to conclude that the exercise of consular jurisdiction was enshrined in custom and usage. Nonetheless, there is no careful reasoning to lead to that conclusion.[12]

As regards the second period, which begins as of the 1937 convention between France and the United Kingdom[13], the Court undertook an analysis of diplomatic correspondence exchanged between France and the United States to evaluate whether it would be possible to find therein elements such as to consider custom and usage to exist. Its conclusion, however, is that the purpose of that exchange of correspondence indicates that both states sought a solution to the question, with neither party claiming

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[8]. *Id.,* p. 321.
[9]. *Id.,* p. 338.
[10]. INTERNATIONAL COURT OF JUSTICE. *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C. J. Reports 1952, p. 199.
[11]. *Id.,* pp. 199-200.
[12]. *Id.,* p. 200.
[13].The relevance of that treaty to the case has to do with the application of the most favored national principle. Pursuant to that treaty, the last state that enjoyed privileges in Morocco – the United Kingdom – ceased to have them. That would have an impact precisely on U.S. rights, but they could not argue application of the principle.

to let go of their legal positions. It so happens that even during that negotiation the United States continued exercising consular jurisdiction. The Court explained the maintenance of said state of affairs in light of a provisional situation to which the Moroccan authorities acquiesced.[14]

The judgment clarifies the difference between "custom and usage" and "acquiescence." This last concept, however, refers to the explanation, with respect to the first temporal framework, that the Court gave of the conduct of those states that exercised consular jurisdiction not based on a treaty. Nonetheless, it is not clear whether, for the Court, said acquiescence would occur in the presence or in the absence of a treaty making possible the exercise of consular jurisdiction.

In the case, therefore, the ICJ did not identify any customary rule to which the parties were bound.

The dissenting opinion of Judges Hackworth, Badawi, Carneiro, and Rau addressed the question of "custom and usage" and took issue with the majority position.

The basic methodological premise of the dissent is that treaty law, on the one hand, and custom and usage (what they call "usage and sufferance"), on the other, can coexist. That appears to be the most appropriate line for following the *Asylum Case* which, as already seen, establishes a close relationship between treaty and custom. In contrast to the majority, the dissenting opinion raises several factors that it says show a relatively prolonged exercise of the consular jurisdiction by the United States.[15]

2.1.3 Case concerning Right of Passage through Indian Territory

The judgment on the merits in the *Case concerning Right of Passage over Indian Territory* (Merits) (Judgment of 12 April 1960: ICJ Reports 1960, p. 6) was the first occasion on which the ICJ found the existence of a norm of particular customary international law. In the case, the norm in question was applicable to India and Portugal.

To reach that conclusion the Court established an initial framework for finding the existence of a practice that authorized Portugal's right of passage over Indian territory. That framework resulted from the beginning of British colonization and subsisted after the independence of the Indian State.[16]

India's defense questioned the possibility of the existence of a custom between two states. The Court refuted that argument in a passage that is a compulsory reference in the literature on particular customary international law:

> With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[17]

The ICJ found, based on the arguments presented by the parties, that there was sufficient practice to show that, in relation to private persons, civilian public servants, and property in general there ~~was~~ (would have been - teria havido) a "constant and uniform" practice so as to allow the right of passage of the Portuguese State. The Court also noted that such a practice persisted for more than 125 years without alterations with the change in regime after India gained independence.[18]

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[14]. INTERNATIONAL COURT OF JUSTICE. *Case concerning rights of nationals of the United States of America in Morocco*, *op. cit.*, pp. 200-201.
[15]. *Id.,* pp. 219-221.
[16]. INTERNATIONAL COURT OF JUSTICE. *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Reports 1960, p. 37.
[17]. *Id.,* p. 37.
[18]. *Id.,* p. 40.

It is important to note that the finding of the local customary norm – the right of passage – resulted from the fact that it made it viable for Portugal "to exercise its sovereignty over the conclaves, and subject to the regulation and control of India." The customary norm, therefore, existed as the result of a right that Portugal possessed since it was recognized as the sovereign.

Regardless, the Court's analysis of the practice of the two states is generic, not getting into the various acts said to have constituted it.

The judgment considered that there was not a Portuguese right, based on local custom, to passage of armed forces, armed police, weapons, or munitions. In relation to those hypotheses, the ICJ considered that passage was regulated on the basis of reciprocity, and not as a right.[19] That is because Portugal would always need to request authorization, under those hypotheses, to be able to engage in passage over Indian territory. Mindful of the considerations in the case, the Court understood that "this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right."[20]

On that point, the distinction made in the judgment between rights and reciprocity does not appear to be very clear, considering that rights are commonly based on reciprocity. Reciprocity made be part and parcel of any norm, be it conventional or customary. Nor is it clear why the Court considered, on finding that even though the British always authorized passage, that it would be based on reciprocity and not on acquiescence. Following that line, one possible contradiction of this argument arises if one takes the *Case related to the rights of nationals of the United States of America in Morocco* as a reference. As seen above, in that case the ICJ accorded great importance to the principle of acquiescence to the detriment of a possible particular custom.

Even the judgement denying the existence a local custom, in the case of such hypotheses, two important elements of the judgment stand out: (1) the Court renders an analysis of the practice that is much more detailed than in the first hypothesis of the same case. Various examples from practice are raised that would constitute, in its view, reciprocity, and not a right – with a correlate obligation of passage. (2) The way in which the Court addresses the relationship between treaty and custom is much more dynamic than in the *Case related to the rights of nationals of the United States of America in Morocco*. Basically, the Court tries to perceive how established treaties can give rise to a practice among states. Accordingly, even if one had not found sufficient practice to constitute a custom in relation to those hypotheses, the methodological procedure for dealing with the relationships between treaty and custom appear to have changed significantly, insofar as treaties are considered elements for verifying the practice, together with the subsequent practice in relation to those treaties. Actually, the methodology may not have changed, while there may have been a return to the precedent established in the *Asylum Case*. In its analysis of Portugal's argument that right of passage is also based on general international law, the Court came to an important finding, when it determined that particular practice takes precedence ("prevails") over general rules. That passage is worth citing:

> The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.[21]

Regarding that passage, one remaining doubt is whether the prevalence of that particular practice over general rules is established as a principle or just for the concrete case at hand, given the long-standing ties between Portugal and India with regard to this disputed matter. The latter hypothesis is

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[19]. *Id.,* pp. 40-41.
[20]. *Id.,* p. 40.
[21]. *Id.,* p. 44.

more likely, especially because of the specific reference to a concrete case. Nevertheless, that does not preclude the possibility that that Court reached a conclusion that the particular custom prevails over the general on logical grounds.

The dissenting opinions in this case are interesting with regard to the question of particular custom.

Judge V.K. Wellington Koo's opinion dissents from the majority view in that, for him, there was also a Portuguese right with regard to the passage of armed forces, armed police, weapons, and ammunition. That opinion is extensively substantiated as regards the analysis of the elements constituting the practice, and concrete examples are cited. However, the methodology with regard to the relation between custom and treaty appears not to differ from that of the majority opinion: that treaties may be regarded as a part of practice and subsequent practice may also refer to those treaties. In this view, treaties may "formalize" a customary practice.[22]

The way Judge Koo addresses the characterization of right of passage incorporates reciprocity as part of the practice itself. For him, "A practice had been established for such passage on a basis of reciprocity."[23]

Judge Armand-Ugon associates the effectiveness principle with the constitution of the local customary norm. For him, effective exercise (practice) of passage has the unique quality of constituting the right to such passage itself.[24]

Judge Moreno Quintana appears to perceive a more hermetic relation between treaty and custom. For him, Portugal's request, basing right of passage simultaneously on treaty, custom, principles, and doctrine, is inconsistent.[25] On this point, he appears to diverge from the methodology espoused by the majority, including the majority of the dissenting votes. Moreno Quintana came to the conclusion that there was not enough practice to justify talking about the existence of a local custom.[26]

For Judge Percy Spender, the treaty came in as part of the process of forging a local customary rule.[27]

Judge Fernandes did not agree to compare and contrast right and reciprocity, because "Most of the rights recognized between nations rest on a basis of reciprocity."[28]

Worth noting is Judge Fernandes's treatment of the matter of the prevalence of *jus cogens* over special rules.[29] However, the argument is not developed sufficiently with

regard to the contrasting of peremptory norms with particular custom.

2.1.4 Case of Military and Paramilitary Activities in and against Nicaragua

In the case *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). (Merits, Judgment. ICJ Reports 1986, p. 14), the Court very briefly addressed the issue of regional custom. In the case at hand, such custom would affect all the Americas: "customary international law ... particular to the inter-American legal system."[30]

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[22]. *Id.,* p. 60.
[23]. *Id.,* p. 54.
[24]. *Id.,* pp. 82-83.
[25]. *Id.,* p. 90.
[26]. *Id.,* p. 95.
[27]. *Id*., p. 106.
[28]. *Id*., p. 134.
[29]. *Id*., p. 135.
[30]. INTERNATIONAL COURT OF JUSTICE. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits*, Judgment. I.C.J. Reports 1986, p. 14.

With that, the Court sought to argue that in customary international law particular to the inter-American system there is no rule permitting the exercise of legitimate collective defense without a request for it by the State that considers itself the victim of an armed attack.[31]

However, the reference to regional customary law is made without going into regional practice. Reference is made to treaties in the Americas that address the issue of legitimate collective defense but nothing is said about the process of interaction between treaty norms and regional customary rules and regulations[32], as is done in lengthy sections of the judgment regarding the relationship between treaties and general custom.

The strict criterion for identifying particular customary rules – such as that found in the *Asylum Case* – would appear to be unknown in this case. It is also worth noting that the Court did not proceed to identify the regional customary norm based on any evidence adduced by one of the litigating parties to the case. The ICJ appears to have made that identification on its own initiative, which reinforces the thesis that the burden of proof for identifying a custom would appear to be more procedural than substantive, as already pointed out in our comments on the *Asylum Case*.

2.1.5 Frontier Dispute Case

In 1986, the Court Division constituted to hear the Frontier Dispute case involving Burkina Faso and the Republic of Mali (Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554) handed down its judgment, which is also relevant when it comes to identifying particular customary rules.

The importance of the judgment stems not so much from the fact that the Division of the Court based its judgment on a particular customary rule, as from its recognition that such rules exist in international law.

In order to establish the borders to be adjudicated by the interested states, the Division of the Court invoked the principle of *uti possidetis*. The Division found that the principle was essentially customary and initially applied almost exclusively in Latin America. It had, however, been generalized, so that African practice with respect to the principle now meant that it was a practice of "a rule general in scope." Thus:

> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.[33]

The Court expressly pointed out that the practice of African states did not constitute the custom but was more of a statement of it. In other words, it did not come about in order to create or extend to Africa a principle that already existed in Latin America. Rather, it was the recognition of a pre-existing customary rule of a general nature.[34]

What is not clear in the judgment, regarding this last-mentioned aspect, is that not enough practice is adduced to corroborate that generalization process. There is no reasonable way of knowing, for instance, when the "rule general in scope" arose. It might be supposed that the general customary rule crystallized after the decolonization of the Latin American states but, of necessity prior to the decolonization of the African states. Furthermore, the practice referred to is limited to Latin American and African states. Even though the customary rule may derive from the practice of the interested states, it would not be reasonable to believe that the practice of states in other parts of the world – including states under the yoke of the large colonial empires – is to be ignored.

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[31]. *Id.,* p. 105.
[32]. *Id.,* pp. 104-105.
[33]. INTERNATIONAL COURT OF JUSTICE. *Frontier Dispute*, Judgment: I.C.J. Reports 1986, p. 565.
[34] *Id.,* p. 566.

2.1.6 Dispute regarding Navigational and Related Rights

In the *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), (Judgment, I.C.J. Reports 2009, p. 213), the Court recognized one of the requests of Costa Rica based exclusively on a particular customary – in this case bilateral –rule. The case is also of paramount importance because the ICJ appears to have adopted more flexible criteria for proving the existence of a particular custom.

Nevertheless, prior to recognizing Costa Rica's application, the Court expressly abstained from pronouncing on the existence of rules governing navigation of international rivers based on regional customary international law.[35] As is well known, there are several doctrines maintaining the existence, at least in South America, of a regional customary rule on freedom of navigation.

As regards Costa Rica's application for recognition of a bilateral custom concerning fishing as a means of subsistence for persons living near the San Juan river, the Court embraced it wholeheartedly. The ICJ found that both parties were in agreement in recognizing an established practice of fishing for a livelihood. The difference between them had to do with whether the practice was mandatory. In a particularly succinct passage in its ruling, the Court established the existence of a customary rule applicable to Costa Rica and Nicaragua, as follows:

> The Court observes that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment.[36]

That stance, if adopted in all its extremes, signifies a reversal of the previous position regarding proof of the particular custom set forth, as we saw above, in the *Asylum Case*. On that occasion, the Court determined that a state alleging the existence of a regional custom must prove that the other party is bound by that same norm. In the *Case concerning the Dispute Regarding Navigational and Related Rights*, the Court appears to have presumed the existence of *opinio juris*, as the practice is not being documented in any formal way in any official record. That would place the burden of proof on Nicaragua, for not having denied the existence of a right derived from the practice of guaranteeing subsistence fishing.

Albeit in relation to a very limited practice, the ICJ really does appear to have changed its position on proving particular customary international law. It is important to note that that shift was not noticed by the International Law Commission which, in our comments on the conclusions regarding identification of customary international law, cites the *Asylum Case* in the section on proving a particular custom with no mention of any subsequent development in the case-law.[37]

Among the dissenting votes, the only member of the Court who noticed the change in position vis-à-vis the *Asylum Case* was Judge Sepúlveda-Amor.

For him, Costa Rica had not proved that the customary right to subsistence fishing had become mandatory for Nicaragua, as the *Asylum Case* required. For him, also, Costa Rica's invoking of the customary norm was not supported with respect to the time needed to forge the custom, because it was only in the petition to the Court in 2006 that the existence of the customary norm was alleged. Another

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[35]. INTERNATIONAL COURT OF JUSTICE. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment: I.C.J. Reports 2009, p. 233.

[36] *Ibid,* p. 265 – 266.

[37]. INTERNATIONAL LAW COMMISSION. *Draft Conclusions on Identification of Customary International Law, with Commentaries*. A/73/10, pp. 155-156. Available at: < http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>

relevant point made in the judge's dissenting opinion is that for him the practice in question had been carried on by the local riverine community in Costa Rica and not by the Costa Rican state, which would be necessary for the forging of the custom.[38]

For his part, *ad hoc* Judge Guillaume, despite not having opposed observance of the customary norm on subsistence fishing, declared that there was no freedom of navigation right in Latin America based on custom.[39]

2.2. On the individual opinions of ICJ judges who explicitly address particular custom

2.2.1 North Sea Continental Shelf Cases

In the *North Sea Continental Shelf Cases* (Judgment, I.C.J. Reports 1969), which involved, by special agreement, the Federal Republic of Germany, Denmark, and the Netherlands, the ICJ had nothing to say regarding regional custom in the judgment on the merits. Nonetheless, the separate opinion by Judge Fouad Ammoun, which concurs with the majority result but adopts different reasoning, addressed the issue.

The case had to do with the delimitation of the continental shelf in areas adjacent to the North Sea region, and specifically the possibility of applying the equidistance method.

In his separate opinion Judge Ammoun engaged in a detailed analysis on the possible existence of a regional custom peculiar to the North Sea in relation to delimiting the continental shelf.

As he sees it, there's a difference between general and regional custom. In the case of general consent, the consent of all states would not be required, but at least the consent of those which, aware of the general practice and opposing it, fail to do so. The way in which the rule of regional customary international law would work would be different mindful of the small number of states to which any effort would be made to apply the rule. Absent express or tacit consent, the regional custom could not be imposed on the states that reject it. He cites, in support of his position, a part of the judgment in the *Asylum Case* that provides that the party relying on a regional or local custom must prove that said custom is binding on the parties.[40]

Addressing the issue from the perspective of the specific case, Judge Ammoun held that the Federal Republic of Germany could not be obligated by a hypothetical regional customary norm because it rejects it. In this vein, he lists acts of government that would expressly be at odds with such a rule.[41]

At least three issues arise from this statement.

First, the way the judge generally addresses the very idea of customary law is based on the reference to consent, which is very controversial, as is known, when it comes to explaining custom.

Second, and still in relation to the role of consent, Judge Ammoun allows for the possibility of the regional particular custom being formed on the basis of tacit consent. Although he doesn't explain what situations would constitute this type of consent, one cannot rule out an intent on his part to refer to the silence of a given group of states. This being the case, he could be inverting the order that the methodology applied by the Court in the *Asylum Case* inaugurated: that one does not presume particular custom. Accordingly, he always states that it must be proven. In the final analysis, his interpretation of the *Asylum Case* – which he cites to support his position – may not be in line with the terms of the judgment itself.

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38. *Id.,* pp. 279-280.
39. *Id.,* p. 291.
40. Separate Opinion of Judge Fouad Ammoun. *North Sea Continental Shelf (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, pp. 131-132.
41. *Id.,* p. 132.

It is also important to highlight how he addressed the issue of the burden of proof. The examples he raises from the Federal Republic of Germany are not to establish proof of the existence of the regional custom, but to establish proof of its non-existence. It was not exactly the non-existence of a regional custom that was proven, but just that such a custom could not be invoked against the Federal Republic of Germany.

2.2.2 Fisheries Jurisdiction Case (United Kingdom v. Iceland)

The *Fisheries Jurisdiction Case*, which involved the United Kingdom and Iceland (Merits, Judgment, I.C.J. Reports 1974, p. 3), was another in which the judgment on the merits of the International Court of Justice specifically addressed the question of particular custom. However, in the separate opinion of Judge de Castro, he does so, albeit in an ancillary and instrumental manner in the analysis for identifying a general customary norm of international law.

The case involved the issue of whether Iceland's extension of its fisheries jurisdiction was contrary to international law.

Having concurred with the majority, Judge Federico de Castro sought to emphasize his own reasons for aligning with the Court's majority.

The separate opinion addresses several aspects of the judgment. The reference to particular customary international law comes exactly when the judge seeks to analyze the question of proving international custom.

Using English law as a reference Judge de Castro establishes the existence of two categories of custom, "general customs" and "particular customs". Customary norms of the second type, albeit exceptions, "applicable to the inhabitants of certain regions," would have to be proven. General customary norms – which would constitute common law –would not need to be proven.[42]

Based on this analogy, de Castro argues that customary international law – which is general in nature and founded on the general belief in its validity (*opinio iuris*) – would not need to be proven. The Court would apply it at its own initiative. Only "regional customs or practices, as well as special customs, would have to be proven."[43]

At least three issues are relevant in light of the pronouncement by Judge de Castro.

First, he makes it clear – and this did not happen in the *Asylum Case* – why particular custom must be proven. This would be by virtue of a clear analogy with how custom operates in the domestic law. Thus, in light of how certain domestic legal systems developed – in the example he provides, English law – a delimitation is promoted both in relation to space ("certain regions") and in relation to persons ("inhabitants") in respect of whom the law is valid. de This delimitation would have an impact on proof, since particular customs would be exceptions, not the rule.

Second, given how the judge structures his argument, there would be no distinction between particular custom and general custom in terms of their nature. The fact that particular custom is exceptional does not render it any less of a custom nor a second-tier custom, it would just impact the "burden of proof" issue. And that is the title of section II of his separate opinion. In other words, particular custom would be capable of shifting the burden of proof, not exactly to make it different from the general custom.

One can also perceive the use of expressions that are not duly broken down, even though they go to the question of the need for proof: "regional customs," "practices," and "special customs." The first expression appears self-evident, for it refers to the geographic factor. The other two are more obscure. As regards "practices," perhaps the judge did not even refer to a customary norm; and "special

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[42]. INTERNATIONAL COURT OF JUSTICE. *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits*, *Judgment*, Separate Opinion of Judge de Castro, I.C.J. Reports 1974, p. 80.
[43]. *Id.,* p. 80.

customs" may indicate a custom delimited by the subject matter – that would render it "special" – but it is not known with certainty what he meant in using these terms.

It should be noted that the separate opinion contains another reference to regional custom. On rejecting a customary rule on the establishment of fishery zones at 200 miles, Judge de Castro thus understands it to mean not enjoying "uniformity or general acceptance." The lack of these elements would be the deciding factor even if it were considered a customary rule, "even one of regional scope."[44]

Even though uniformity may be required for general custom and particular custom, general acceptance, in the case of particular custom, has to be seen contextually, i.e. based on a group of a certain number of states – which is not explained by the separate opinion. Even so, the judge appears, albeit indirectly, to emphasize once again in that section that there is no difference in the nature of general and particular custom – their differences having implications just for mastering, as a procedural matter, the principle of the burden of proof. This is why uniformity and general acceptance apply to both general and regional (particular) custom.

2.3. On the decisions of other international courts

2.3.1 OC-25/18 (Inter-American Court of Human Rights)

Regionally, the Inter-American Court of Human Rights already had the opportunity to rule on the question of regional custom in due course.

In Advisory Opinion OC-25/18, on the *Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*, the Court ruled, albeit tersely, on the characterization of diplomatic asylum as a regional custom.

For the Inter-American Court, even though the International Court of Justice had held in the Asylum Case that a regional custom can only be constituted when one has proven the "existence of a uniform and constant use as an expression of a right of the state granting asylum," mindful of the broad nature of the advisory jurisdiction, the framework for verifying the existence of a regional custom would be the 35 member states of the OAS. That interpretation was rendered so that the scope of its advisory opinions would not be limited to only some states.[45]

The analysis on the *opinio juris* of a supposed regional custom on diplomatic asylum was undertaken based on three main elements. First, not all of the OAS member states are parties to the conventions on diplomatic asylum, plus the texts of those treaties are not uniform in their terminology or in their provisions. Second, some states that took part in the advisory procedure stated that there does not appear to be a uniform position even in the Latin American subregion so as to be able to conclude that diplomatic asylum is a regional custom. Moreover, most of the states that participated in the proceeding argued that there is not a legal obligation to grant diplomatic asylum. Third, the United States of America persistently opposed a regional customary norm on diplomatic asylum.[46]

The Inter-American Court concluded that the element of *opinio juris*, necessary to identify a regional customary norm, was not present, yet it did recognize the practice of the states of granting diplomatic asylum or protection for individuals in their diplomatic legations.[47]

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[44]. *Id.,* p. 95.
[45]. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Advisory Opinion OC-25/18, May 30, 2018, requested by the Republic of Ecuador. Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*, para. 158.
[46]. *Id.,* paras. 159-161.
[47]. *Id.,* para. 162.

The case is really significant because for the first time an international court was able to address the issue outside the context of a contentious case – in which burden-of-proof issues are relevant.

Independent of the Court's conclusion, it is important to perceive that the Americas were considered a whole for the test as to the existence of a regional custom. Even when the Latin American subregion was considered, the Court took into account just the pronouncements of those states that participated in the advisory procedure to argue that there was a "uniform position" on the customary nature of diplomatic asylum. It was not considered a general practice, taking into account the entire subregional group. In addition, even more delimited subgroups, within the Latin American subregion, were not considered, though it is understandable that the exercise of the advisory jurisdiction, in the matter, made it difficult to take a position on the issue in relation to a very specific group of Latin American states.

Some elements are murky when it comes to inferring the non-existence of a regional custom on diplomatic asylum, such as the argument that there is not a legal obligation to grant it. That argument appears to be much more about a primary rule on granting asylum. The identification of a customary norm – which could be verified without the obligation to grant diplomatic asylum, but as a prerogative of the state – appears to be much more in the realm of a secondary rule; because it would be a rule about a rule; a rule to identify the existence of another rule.

One more important piece of information with respect to the advisory opinion: the question of persistent objector is analyzed in light of regional custom – an issue that was addressed by the International Law Commission in its study on identifying particular custom and, in general, it is absent in the doctrinal analysis of the specific topic. Based on its analysis of the conduct of the United States, the Inter-American Court appears to conclude that the principle would apply to regional custom.

Extending the notion of the persistent objector to regional custom reinforces the understanding that the regional customary norm does not require unanimous acceptance by the states, for one could consider a specific group of them. In addition, that conclusion had a significant impact on the issue of burden of proof, as it suggests that in certain situations one must prove that a custom cannot be invoked against a certain state, not that it can be.

2.4. Taking stock of the actions of international courts in relation to particular international custom

The first cases of the ICJ on particular custom revolved around the *Asylum Case*, decided in 1950. Nonetheless, in recent years the Court's decisions on the matter have shown a significant modification, culminating in the *Case Concerning the Dispute Regarding Navigational and Related Rights*.

The restrictive view that the ICJ developed in the *Asylum Case*, especially in relation to the need for a state that alleges the existence of the particular custom to prove that the other party is bound by it, set the standard for several other cases that followed. That is what happened in the *Case related to the rights of nationals of the United States of America in Morocco*, of 1952 – albeit without much foundation – and in the *Case concerning Right of Passage through Indian Territory,* of 1960 – even though the identification of the element of international practice, in relation to one point in the decision, was done generically. The separate opinions, in the cases in which the judgment was silent on the particular custom, reinforce that restrictive view, even though they do show some openings. The separate opinion by Judge Ammoun in the *North Sea Continental Shelf Cases*, of 1969, emphasizes the need to prove the particular custom, but holds that its acceptance may be tacit. Already in the *Fisheries Jurisdiction Case*, of 1974, Judge de Castro, on highlighting the need for proof of regional custom, clearly indicated that the question of proof has to do with the burden of proof in a given case, and is not necessarily a characteristic intrinsic to regional custom as compared to general custom.

As of the case of *Military and Paramilitary Activities in and against Nicaragua*, of 1986, the position of the International Court of Justice appears to have gradually shifted. Generic references,

without even a minimal analysis of proof – in favor or against – of the existence of a regional customary international norm are beginning to rear their head. The same type of generic consideration occurs in the *Frontier Dispute*, also from 1986.

The taking of distance from the *Asylum Case* intensified further in the *Dispute regarding Navigational and Related Rights*, of 2009. On that occasion the Court found there to be a particular custom – bilateral, in this case – due to the fact that the opposing party, Nicaragua, had failed to deny its existence. In other words, the burden of proof was shifted. It is not ruled out that this change in position occurred by virtue of the issue being discussed, which involved a sensitive human rights issue, affecting the very survival of riverine populations. Regardless, that position expresses a trend to loosen up the rigorous test ushered in by the *Asylum Case*.

Since the *Asylum Case* itself, the ICJ did not explicitly answer the question as to whether it is necessary to that the regional custom is a substantive or a procedural issue. If it is a substantive problem, the very existence of a particular custom is conditioned on proof that certain states are bound by it. If the need for proof is a procedural issue, the existence of the custom would not necessarily be at stake, but just the ability of one of the parties to oppose it, within the bounds of the contentious case being adjudged.

One indication suggesting that proof of the regional custom is a procedural issue has to do with the possible inadmissibility of an argument based on a regional customary norm. In none of the cases above did the ICJ address proof was an admissibility issue. In addition, it is striking that in various decisions evidence is characterized as an issue referring to the "burden" that one of the parties will have in a judicial case; in other words, a typical procedural issue. That is very clear in the way in which the ICJ requires, in the Asylum Case, that Colombia prove that Peru is bound by the particular customary norm. In the *Case concerning the Right of Passage through Indian Territory*, individual opinions engage in a careful analysis of evidence introduced by Portugal to show that the existence of a bilateral custom. Judge de Castro also identifies the difference between general and particular custom expressly in an item called "burden of proof." Finally, in the *Dispute regarding Navigational and Related Rights*, the issue was resolved due to the shifting of the burden of proof from the applicant to the respondent.

The first cases ruled on by the ICJ take into account aspects which, over the years, have gone unnoticed in more recent decisions.

The relationship between treaty and custom was sometimes accorded greater weight – as in the *Asylum Case* and in the *Case concerning Right of Passage through Indian Territory* – whereas in others it was not considered sufficiently relevant – as in the *Case related to the rights of nationals of the United States of America in Morocco*.

Reciprocity – *Case concerning Right of Passage through Indian Territory* – and acquiescence – *Asylum Case*, *Case related to the rights of nationals of the United States of America in Morocco*, and *Case concerning Right of Passage through Indian Territory* – were also considered elements for identifying – or not identifying – a particular customary international norm. Subsequently, they were not present in other cases. That may be due to the gradual decline – albeit not total disappearance – in the use, by the ICJ, of analogies from the private sphere in its interpretation of international law.

Beginning with the case *Military and Paramilitary Activities in and against Nicaragua* it appears to affect identification of the regional custom (and even the burden of proof) with the existence of general collective interests. Accordingly, particularizing the custom could contribute to – and not oppose – such general collective interests. And so it was that in the above-mentioned case, norms on the use of force were identified at the regional level for the Americas region that coincided with the universal norms. And in the *Frontier Dispute Case*, the interest in stabilizing world borders, especially mindful of the decolonization process, was crucial for identifying *uti possidetis* as being regional in origin, but also that subsequently it was embraced universally. Finally, in the *Dispute regarding Navigational and Related Rights*, the bilateral customary norm was found in the human rights

framework and, even more so, rights related to the survival of riverine populations. Protection of human rights locally would not clash with, but rather would complement, universal human rights.

It should be noted that the context in which the ICJ decided the first cases on regional custom required it have a conception of international law that saw opposition between the dimensions of localism (sometimes in the guise of regionalism) and universalism. Hence the criteria established for identifying customary norms are quite strict.

In addition one cannot rule out that more flexible criteria for identifying the regional customary norm has been a consequence of the gradually looser methodology that the ICJ, over the years, has come to apply when it comes to identifying even general custom.

In the only matter identified outside of the ICJ in which there was a pronouncement on particular custom, the Inter-American Court of Human Rights clearly sought to engage with the ICJ, first citing the *Asylum Case*, yet dismissing other subsequent cases.

The Inter-American Court took into account the strict criterion for proof of regional custom. Though it is not a contentious case, but rather an advisory opinion, the verification of the *opinio juris* gave strong consideration to the position of the states who made the view known in the advisory proceeding. Even though the threshold for identifying a possible regional customary norm has been the 35 member states of the OAS, an evaluation of the positions of each one was not done.

Like the ICJ in the *Asylum Case*, the Inter-American Court placed great weight, for identifying *opinio juris*, on the terms of the regional treaties that include rules on diplomatic asylum.

The Inter-American Court took a position that the principle of persistent objector should not be incompatible with a particular custom when it described the position of the United States of America.

Regardless, it is perceived that while the Inter-American Court could rule on issues regarding particular custom outside the scope of a contentious case, there were also clear limits for doing so. Indeed, it would not be reasonable, mindful of the large group of 35 member states of the OAS, for the Inter-American Court to delimit subregions to categorically affirm the existence of a regional custom. If that idea were to move forward, the Inter-American Court could send a mistaken signal on the unnecessary need to consider, from a legal standpoint, the inter-American human rights system as a whole, and analyse it in fragmented way from a sub-regional standpont. In the case, the very definition of a large group of states in which a supposed regional custom was operating affected, from the outset, the conclusion of the Inter-American Court on identifying that regional custom.

PART III : REGARDING THE DOCTRINE ON PARTICULAR CUSTOMARY INTERNATIONAL LAW

3.1. Introduction

The issue of particular customary international law is far from being a recent one in the international law literature.

Already in the first half of the 20th century experts in the doctrine explicitly allowed for the possibility of the existence of customary norms that would attach only to a certain group of states.

A good example of that position is Jules Basdevant, in the general course he gave at the Hague Academy of International Law, in 1936.

Basdevant allowed for the possibility of what he called “relative customary rule,” specifically in light of the practice of the states that evolved in that direction. The examples he raised, albeit without much depth in terms of treaties, referred to bilateral customary rules on the extent of the territorial sea, diplomatic asylum among the states of South America, and even immunity from visit of ships in a convoy. The possibility of this type of custom had been silenced by Article 38 of the Statute of the Permanent Court of International Justice, whose drafting the author considered “all told, quite vague.” He argued that if the Court were called upon to rule on a relative custom – which, he understood, was a

matter it had not yet addressed – and a matter on which, in his understanding, it had not yet addressed – one should not adhere to the text of Article 38.[48]

Most striking in Basdevant's treatment of the issue is that he clearly places it in a dichotomy between the general and the particular. Such considerations were inserted in the First Chapter of his Course, which was suggestively called "Universal Conception and Relativism in International Law" ("*Conception Universelle et Relativisme en droit international*"). The argument of the French jurist, even if he considered relative international law fully legitimate (not just customary, but also treaty-based), placed it in him in a clearly exceptional mindset. International law, given its own historical foundations, is universal, yielding space for states to establish particular (or relative) rules among themselves.[49]

One significant concern with the universalist nature of international law – as shown by Basdevant – appears to be one of the reasons why the doctrine did not take more consistent interest in particular customary international law. Indeed, the idea of universalism in international law – which has its origins in the historical moment of expansion of the international legal system to the world beyond Europe, is that it is grounded in a colonialist conception not only of the law, but also of international politics[50] – created little space for the discussion of a custom that is binding only on a specific group of states. The universalization of international law was rapidly associated with the idea of the unity of the international legal system[51]; particular custom brought many more questions than solutions to the idea of a universal international law.

Yet there also appears to be a reason, more technical in nature, that explains the scant interest in particular customary international law.

As of the second half of the 19th century, international custom gradually came to occupy a place of less primacy, as a source of international law, in the writings of experts in international law. Movements for codification and the exponential growth of treaties for regulating international legal relations occurred clearly to the detriment of customary law as a source.[52] In that context, research into custom, and more specifically on particular custom, was relegated to a secondary role.

It cannot be denied that in tandem with the universalist trend defended by most of the international law doctrine, a consciousness of regional identity –legally speaking – was forming, also as of the 19th century, in some places. In the Americas, specifically, and in the Latin American subcontinent, a notion of legal regionalism was gaining strengthen so as to encompass not only the drafting of treaties among the states of the region, but also the identification of general principles and

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48. BASDEVANT, Jules. Règles générales du droit de la paix. *Recueil des Cours de l'Académie de Droit International*. Tome 58, 1936, pp. 486-487.

49. *Id*., pp. 483-491.

50. On such a process of "universalization," with its contradiction and internal tensions, see BECKER LORCA, Arnulf. Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation. *Harvard International Law Journal*. Vol. 51. No. 2, 2010, pp. 475-552.

51. Based on how it disseminated among several international law experts, the very conception of formal unity of the international legal system is intrinsically associated with its own universality, as described by P.M. Dupuy, who also emphasizes the role of the state in that relationship: "What is it that gives the general international legal order, whose scope by definition is universal, the unity of its forms, i.e. first of all, its modes for producing and applying norms? One can, from the outset provide a simple answer to this question: it is the state. From its origins, noted above, it is by reason of the particular nature of its primary subjects that this original legal order owes its unity." DUPUY, Pierre-Marie. L'Unité de l'ordre juridique international. *Recueil des Cours de l'Académie de Droit International de la Haye*. Tome 297, 2002, p. 93.

52 Several international law scholars of the period, such as, for example, Ernest Nys, based on resource to a domestic law analogy, saw custom be gradually replaced by conventional sources in international law. Though one could not the risk of immobility of the system – which would no longer have the flexibility of custom – the judiciary and international arbitration would round out and develop the international codes. See NYS, Ernest. Codification of international law. *American Journal of International Law*. Vol. 5. No. 4, 1911, pp. 871-900.

customary rules applied locally. Nonetheless, during the 19th century and the first half of the 20th century specific studies on particular custom were rare or non-existent. The issue was commonly addressed in generic term, reflecting on the existence of an international law of the Americas or, at least, a special application of international law in the Americas, or in the Latin American subcontinent.[53]

Notwithstanding the absence of systematic studies on the matter, the International Court of Justice was first called on to rule on particular custom in a case involving two states of the Americas. The Americas were the ideal setting – albeit not yet fully developed systematically, from the standpoint of international law doctrine – for a more in-depth discussion on particular customary international law.

Even so, the International Court of Justice's judgment in the *Asylum Case*, in 1950, did not immediately spark an interest in the matter due to the more influential doctrine. It is highly likely that this can be explained because, as noted, the International Court of Justice, in addition to not identifying the existence of a particular customary norm, regional in nature, established a very rigorous test for identifying it – that in the future would split the doctrine as to whether it was inherent to particular custom, or could be extended to general custom.

In one of the first commentaries on the *Asylum Case*, by Herbert Briggs, the question of proof of customary international law was brought up, rather than the particularity of the context by virtue of its regional or subregional context in the Americas. Briggs apparently supported the Court's conclusion because one could not identify a "uniform and constant usage, accepted as law" in relation to the rule on unilateral and definitive characterization of asylum. The facts that had been brought before the Court revealed much "uncertainty and contradiction, much fluctuation and discrepancy in the practice of diplomatic asylum."[54]

In other words, Briggs was not so interested in analyzing the case from the perspective of a custom binding on just a certain number of states, but in the method used by the Court to identify a customary norm – which, by the way, would not vary with the number of countries where the norm would be applied –universally or regionally. The particularity of the international legal system was also engulfed by a rigidly universal perspective.

Other commentaries were more sympathetic to the argument that the International Court of Justice should have more carefully addressed the question of regionalism in international law, but likewise they did not get involved specifically in the question of the formation of a particular customary norm.[55]

It was only in the early 1960s that more systematic analyses of particular custom began to appear. Clearly this is because after the *Asylum Case* the International Court of Justice heard and decided, in 1952, the *Case related to the rights of nationals of the United States of America in Morocco*, and, in 1960, the *Case concerning Right of Passage through Indian Territory*.

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[53]. The basic references for the issue are the works of Álvarez and Sá Vianna that show not only the somewhat abstract nature – to the detriment, for example, of a more specific and systematic discussion on the sources of the system – of the debate on the existence of an international law of the Americas, but the possibilities – and difficulties – of approaching international law from a regional perspective. See ÁLVAREZ, Alejandro. *Le droit international Américain*. Paris: Pedone, 1910 and SÁ VIANNA, Manoel Álvaro de Souza. *De la non-existence d'un droit international américain*. Rio de Janeiro: L. Figueiredo, 1912.

[54] BRIGGS, Herbert W. The Colombian–Peruvian asylum case and proof of customary international law. *American Journal of International Law*. Vol. 45, No. 4, 1951, p.731.

[55]. For example, VAN ESSEN, J. L. F. Some reflections on the Judgments of the International Court of Justice in the Asylum and Haya de la Torre Cases. *International and Comparative Law Quarterly*. Vol. 1. No. 4, 1952, pp. 533-539.

It was especially the last case, in which the International Court of Justice explicitly recognized the possibility of the existence of a particular custom (a bilateral one, in the case), that appears to have been the major stimulus for the doctrine to seek, more carefully and more systematically, to understand particular custom in international law.

Nonetheless, the more systematic approach to the topic also resulted in a discussion in the context of a more drawn-out debate between voluntarists and non-voluntarists. The authors would constantly return to the question of the proof of particular custom and understanding it as an expression of the state's consent. It is likely that the publication of a cutting-edge article by Cohen-Jonathan contributed significantly to the way custom was treated in that debate. However, the judgment itself in the *Asylum Case*, in 1950, was also an incentive for such an endeavor. Over the years, the debate on voluntarism lost ground to the approach that considered private customary international law as a built-in element of the international legal system – albeit sometimes uncomfortably so. One recurrent feature of the doctrinal debate, however, is that it is almost always guided by decisions taken by international tribunals. The doctrine assumes a distinctly defensive posture, rather than an innovative one on the issue.

In the next section I will seek to present a critical analysis of writings that set out to analyze particular custom systematically, and which in one way or another have inserted it in the debate between voluntarists and non-voluntarists. With that I seek to set forth the choices that the doctrinal currents made to address the issue at the time. Next, I will analyze the works that were gradually able to free themselves from this debate by recognizing – even if timidly – the potential of private customary international law. And this exposition, I think, may open the way for new possibilities for analyzing particular custom, especially in the Americas.

3.2. Particular custom between voluntarism and non-voluntarism

The 1960s saw an explosion in the number of publications on private customary international law, especially its bilateral component. Undoubtedly, the 1960 judgment in the *Right of Passage over Indian Territory Case* was the main reason behind the plethora of publications in the period. That case therefore marked the first time that the International Court of Justice unequivocally recognized the existence of particular customary international norms.

The article by Cohen-Jonathan, entitled "La Coutume Locale," is the first major effort to understand particular custom in an orderly and systematic manner. Originally published in 1961, in the *Annuaire Française de Droit International*, it is most likely – especially in light of the subsequent references made to it – the most influential doctrinal work on particular customary international law to date.

The first lines of that article clearly situate his ideas in the tension between universalism and particularism. In that sense, his first reference is to the Álvarez/Sá Vianna debate on the existence of an international law of the Americas. That debate would reveal that international society allowed for legal relativism, albeit tempered.[56] As the universal and the particular are capable of coexisting, a more systematic investigation into particular international law would not pose risks to the unity of the international legal system.

The article, divided into two main parts, sought first to analyze the existence of local custom as a source of international law – discussing doctrinal controversies on the matter and the enshrining of local custom in the case-law of the ICJ – and then turned immediately to aspects referring to the legal nature of local custom – which sought to distinguish it from general custom and tacit agreement.

The author's strategy was clear: to show the errors of the doctrinal writers who argued the non-existence of local custom, using logical arguments and the very case-law of the ICJ. He also sought to

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[56]. COHEN-JONATHAN, Gérard. La coutume locale. *Annuaire français de droit international*. Vol. 7, 1961, p. 119.

enshrine a specific place for local custom in the face of similar rules such as tacit agreement and estoppel. Yet the backdrop, properly speaking, of the article was a defense of non-voluntarist arguments to justify international custom – and local custom, specifically – as a source of international law.

His own definition of local custom – based on the limited number of states, was relational, i.e. it was posited in contraposition to universal custom. It contrasted, as well, with the notion of special custom, based on the object of the rule, and not on the size of the group it governs – which is the criterion he sought to emphasize.[57]

Analyzing the doctrinal positioning on this issue, the author identified those who denied the existence of local custom – describing it as a tacit agreement, i.e. an unwritten treaty –and the positivist current, incorporated by Soviet doctrine, which could only justify local custom by having recourse to the idea of tacit consent.[58]

The two types of positions, in his perspective, were insufficient for understanding local custom, and should give way to a non-voluntarist approach to the matter.[59] Just like a general customary norm, a local customary norm would also be endowed with both elements, objective and subjective. It would be characterized by its existence as an emanation of a particular legal society. And a restricted legal community would be characterized by the common awareness between two or more persons at law of a certain social need, which finds expression in concordant conduct.[60] Not even Article 38 of the Statute of the International Court of Justice would stand in the way of recognizing local custom. That article, itself defective and vague, on referring to the term "general," does not necessarily refer to the spatial element, but to the continuous application over time.[61] With that, Cohen-Jonathan dodged the most obvious criticism – based on the literal meaning of the terms of the norm – made by those who deny the local custom, at the same time as he removed from Article 38 exclusivity in defining the extent of the elements that make up any customary norms. The author also made a point of noting that the existence of a given region did not exhaust the local nature of the custom, which could be manifested at lower levels, for example sub-regionally, thus dispensing with a predetermined territorial seat.[62]

The analysis was then based on studying the cases, beginning with the *Asylum Case*, before the International Court of Justice.[63]

His non-voluntarist position clearly expanded the possibilities of some judgments of the ICJ. In the *Asylum Case*, even though the Court had not identified a regional customary norm concerning asylum, the judgment held that more local customs more restricted to regional custom could arise or even that in that judgment it had been understood that the lack of an act of non-recognition of a given local custom by a state could be considered tacit recognition of that custom.[64] In the *Fisheries Jurisdiction Case*, even though the ICJ did not, anywhere in its judgment, make use of the term "particular custom" or its correlates, Cohen-Jonathan understood that there had been implicit recognition of a local custom between Norway and the United Kingdom, constituted by the positive action of the first and the abstention of the second.[65]

The non-voluntarist presupposition of the author, however, gave rise to clear internal tensions in his argument, as in the case of the distinction he sought to develop between local custom and general

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[57]. *Id*., p. 120.
[58]. *Id*., pp. 121-123.
[59]. *Id*., p. 125.
[60] *Id*., p. 126.
[61]. *Id*., p. 122.
[62]. *Id*., p. 122.
[63]. *Id*., p. 128.
[64] *Id*., p. 129.
[65] *Id*., p. 131.

custom. To that end, local custom could be understood by analogy to a restricted agreement: the norm binds the parties who participated in its formation, and only them.

Citing the *Asylum Case*, he understood that local custom could not be extended to a state that has repudiated it or that has not recognized it expressly or tacitly, adhering thereto by its attitude (which, beyond mere silence, would require a positive statement of will or a qualified abstention).[66] However, such a strict analogy between custom and treaty (restricted agreement) gives rise to important inquiries, on better approximating the idea of local custom than that of a tacit agreement. Seen in that light, would it not be easier, following the line of authors who Cohen-Jonathan had criticized, to completely associate local custom with a tacit agreement?

On one specific topic the author goes over what he sees as the differences between local custom and tacit agreement: (1) repetition is present in the first but not the second – because of that criterion, in the two advisory opinions of the PCIJ – *Danzig* and *Jurisdiction of the European Commission on the Danube* – there was a finding of local custom, thus they were grounded in the idea of continuity; (2) in local custom there is *opinio juris*, which is formed from a slow process that gradually finds expression, not as a matter of obligation at that moment, and not always with the same degree of intensity; and (3) the *treaty-making power* is necessary for tacit agreement but not for local custom.[67]

Nonetheless, except for the first difference – which, in itself, is a controversial reading of the advisory opinions – the other reasons for separating local custom from tacit agreement were more conceptual than based on the practice of states or the case-law of international courts. The fact is that the limit between the two was very much shaped by the theoretical position defended by the author. Depending on the adoption of other theoretical presuppositions, confusion could arise between local custom and tacit agreement. It would be easier to allow that the case-law of the International Court of Justice resolved the problem by defining that local custom is recognized in international law – despite the doctrinal opinions that may be at odds with this finding by the Court.

Cohen-Jonathan agreed with the rigorous test developed by the ICJ in the *Asylum Case*, that the party that alleges particular custom must show that the opposing party accepts it. He approaches that requirement as a burden-of-proof issue. It is borne by the one who alleges the particular custom, because a state that bases its right on a particular practice must show why that right corresponds to the limitation on the sovereignty of the territorial state.[68] However, that association of particular custom with a limitation on the sovereignty of a certain state results exclusively from the cases decided by the ICJ. It is not shown how a local custom would always be associated with a matter entailing a limitation of sovereignty – unless it is understood that each and every norm of international law constitutes a limitation on state sovereignty.

In the last pages of the article Cohen-Jonathan analyzed the interactions between general custom and local custom. In the event of a conflict, he gave preference to local custom, based on the *Case concerning Right of Passage*. Also, he did not agree with the thesis that local customs may only arise to fill caps in general custom.[69]

At the end, though he did not see local customs as capable of attacking the unity of international law – for they addressed particular social exigencies – he called attention to local customs whose purpose was more general and that bound a large number of states. In that situation, it was his understanding that the special law should always be based on the general law, lest the international legal system become fragmented.[70] Here, Cohen-Jonathan clearly indicated that particularism in

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[66] *Id*., p. 133.
[67] *Id*., pp. 137-139.
[68] *Id*., pp. 134-135.
[69] *Id*., pp. 135-137.
[70] *Id*., p. 140.

international law could not exist autonomously from its universalism. In the final analysis, particularism was somehow subordinated to universalism.

In 1961 as well, Paul Guggenheim published an article, *Lokales Gewohnheitsrecht*, which sought to give doctrinal expression to the arguments he had already advanced in the 1960 *Right of Passage Over Indian Territory Case*, when he served as an agent for the Government of India.[71] That is perhaps why the article does not delve into deeper theoretical considerations, nor is it sufficiently systematic. Rather, it seeks to challenge the arguments that led the International Court of Justice to recognize a bilateral customary rule between Portugal and India.

Guggenheim was not opposed to there being any particular type of customary international rule, just those that were purely bilateral – which he associated, terminologically, with local customary international law. He expressly recognizes – and citing the *Asylum Case* – the possibility of a regional customary international law.[72]

In his view, when an international court recognized that a bilateral practice of two states was binding, this could go back to a unanimous declaration of intention by the parties - and thus to a contractual aspect. And he cites, to that end, the Advisory Opinion of the Permanent Court of International Justice on the Free City of Danzig and the International Labour Organization.[73]

And the crux of his argument was that if it could not be reduced to a general international customary norm, a bilateral international customary rule, would necessarily be reduced to an unwritten agreement.[74] This is because, in order to exist, a bilateral custom would need the consent of both parties – a unanimity – and this would lead it to be considered an agreement.[75]

Given the few references in the writings of other authors, Guggenheim's article had no significant impact on the doctrine of private customary international law, most likely because it ran in direct opposition to the conclusion reached by the Court in the *Right of Passage over Indian Territory Case.* He does offer an interesting line of argument, however, because he finds the basis for his refutation of the existence of bilateral customary international norms precisely in the strict distinction drawn between treaty and custom. For him, one of the essential features of custom is that it is enforceable without the need for a unanimous consent – something not feasible under bilateral customary international law. This has two consequences:

First of all, an anti-voluntarist argument is apparently used to refute bilateral customary international law. Secondly, by its very argument, regional customary international norms without unanimity are possible - because that is precisely what makes them customary: the absence of unanimity. The paradox in such outcomes is that denying the existence of a bilateral customary international norm was usually associated with a voluntarist argument. Guggenheim's article thus envisaged a tension between voluntarism and anti-voluntarism, which could sometimes bring about a coming together or switching around of positions, the voluntarist arguing for such a custom and the anti-voluntarist for it not to be – as will occur with subsequent doctrinal works.

In 1962, Christian Domincé set himself the task of checking whether there were any bilateral customs between Switzerland and Germany and between Switzerland and Italy governing the right of passage over the landlocked territories of Büsingen and Campione. The reason for such an exercise was the ruling in the *Right of Passage over Indian Territory Case*, which, as everyone knows, was handed down the previous year. In his article *Coutume Bilatérale et Droit de Passage sur Territoire Suisse*, Dominicé demonstrates a remarkable grasp of various international legal concepts, but seems to

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[71] The written and oral proceedings of the case can be found at https://www.icj-cij.org/en/case/32.
[72] GUGGENHEIM, Paul. Lokales Gewohnheitsrecht. *Österreichische Zeitschrift für öffentliches Recht*, Vol. 11, 1961, p. 329.
[73] *Ibid*, p. 330.
[74] *Ibid*, p. 330- 331.
[75] *Ibid*, p. 333.

have written it with a predetermined conclusion, since none of the hypotheses it advanced – and the article is based on successively alternative arguments – could justify the existence of a bilateral customary rule. As the article was inspired by the Court's unambiguous finding that bilateral customs exist, he could not deny this fact; he could, however, remove the practical relevance of this type of custom when he made an empirical analysis and found that the elements he thought necessary for bilateral custom to arise had not been fulfilled.[76]

The conclusions of the article seem to be predetermined because Dominicé's negative responses concerning the identification of bilateral customary international norms were based on a very fixed notion of the relationship between treaty and custom. The author made little or even no room for understanding that these sources could overlap in regulating certain conduct – which seems to depart from the logic on which the Court drew in ruling in the case that inspired the article, wherein a dynamic approach was taken to the relationship between treaty and custom. He holds the view, for example, that Switzerland's practice prior to the treaties that established the right of passage over its territory, even if stemming from a bilateral custom, could not be reestablished. The eventual expiry of the treaties would create a situation of anomie in this regard.[77]

Although an empirically narrow study, it drew general conclusions about bilateral custom, such as: there can be no deviation from general rules; general regulations had to be taken into account when setting conditions for its proof; a practice pursued under the umbrella of a treaty could not lead to the creation of a bilateral custom; a treaty that codifies a bilateral custom voids the latter, unless this was expressly excluded from its text; and the same regulation of a given matter in several treaties cannot give rise to a bilateral custom.[78]

He concluded that the ruling in the *Right of Passage over Indian Territory Case* gave the illusion that there were many avenues for bilateral custom to be applied; these avenues, however, were in fact quite modest.[79]

Although Dominicé does not explicitly subscribe to voluntarism, his view of the restricted existence of bilateral custom coupled with a clear preponderance of the conventional source at the level of bilateral relations between states led him to practically deny that this specific type of custom exists. The reason for this denial had to do with the difficulty of linking the strict consent of states to be bound at the international legal level by a customary rule.

Within the Americas, the first and most consistent reflection on the particular customary international law after the International Court of Justice ruling in the *Right of Passage over Indian Territory Case* was the article by Julio Barberis, published in 1962, *La Costumbre Bilateral en Derecho Internacional Público*.

The paper itself was clearly structured from an inductive perspective. To answer the question as to whether the bilateral customary norm was instituted by the general customary norm formation procedure or by the treaty-making procedure, the author initially resorted to arbitration, Permanent Court of International Justice, and International Court of Justice jurisprudence.[80]

Barberis traces recognition of bilateral custom back to cases earlier than other authors did, thus radicalizing the strategy already adopted by Cohen-Jonathan to give legitimacy to the past. His view was that the first time this type of custom was recognized was in the 1905 Permanent Court of Arbitration ruling in the *Matter of Perpetual Leases in Japan*, when several agreements between Japan

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[76] DOMINICÉ, Christian. Coutume Bilatérale et Droit de Passage sur Territoire Suisse. *Swiss Yearbook of International* Law. Vol. 19, 1962, p. 71-102.
[77] *Ibid*, p. 89.
[78] *Ibid*, p. 102.
[79] *Ibid*, p. 102.
[80] BARBERIS, Julio. La Costumbre Biltareal en Derecho Internacional Público. *Revista Jurídica de Buenos Aires*. Vol. 2. Nº 1, 1962, p. 313-324.

and European states engendered the creation of a bilateral custom. He understood that the Permanent Court of International Justice had also recognized the bilateral custom in the *Case of the Free City of Danzig and the International Labour Organization,* but that this was not the case in the same Court's *Advisory Opinion on the European Danube Commission*. As he understood it at that time, the PCIJ had only recognized a practice that later became a right embodied in a conventional instrument.[81]

The analysis, especially of the 1960 *Right of Passage over Indian Territory Case*, led the author to conclude that the bilateral custom was, in fact, customary international law. He therefore examined the issue in terms of three elements that make a distinction between a treaty and a custom: (a) unlike a treaty, a custom may be established via the activity of organs that are not necessarily competent to represent the state at the international level, as happened with a bilateral custom; (b) the standard that a feature of the customary rule is to make it binding on third parties would be impossible to apply to bilateral customs, since the need for the consent of both parties would not provide elements to make it distinguishable from an implicit agreement; Nevertheless, he stressed that he disagreed with Guggenheim, who holds that the customary rule could hardly be binding on third parties as a matter of necessity, whereas for Barberis, it could only be binding on third parties; (c) the need for uninterrupted, ongoing repetition of actions, unlike a treaty, which stems from an agreement of wills, would be present in a bilateral custom, and it could be classified as a customary rule.

Although his article is short and make no major theoretical inroads in bilateral custom or other forms of private customary international law, Barberis' intention was clearly to combine efforts to argue for the possibility of bilateral custom with recourse to the authority of cases adjudicated by international arbitration and permanent tribunals. In that regard, as the International Court of Justice seemed at the time of the 1960 case, to lean more towards a stance that departed from strict voluntarism in recognizing the possibility of bilateral custom, Barberis also seemed to join in such an effort.

In the late 1960s, Anthony D'Amato published an article in the *American Journal of International Law* called "The Concept of Special Custom in International Law."

At the same time as the author affirmed the existence of particular custom, which he preferred to call "special custom," his main objective was, based on the ICJ case-law, to isolate the need to comply with the requirement of consent for this type of custom. Therefore, it is also an attempt to address the matter within the perspective of a non-voluntarist theoretical position.

The first datum that stands out, in the article, is the author's defense of a different object for the special custom. For him, such custom addressed issues that cannot be generalized, such as titles or rights to specific parts of "world real estate," cases of adverse possession, border disputes, and so-called international easements. In addition, special custom could establish rules expressly limited to countries of a certain region, as is the case of the right to asylum in Latin America.[82] The distinction is not based on rigorous criteria. As for the first part, it addresses issues that refer to territorial titles, the second further expands the object of special custom. It appears that here D'Amato took as the starting point cases already decided by the ICJ on particular custom, then expanded them to a horizon of more general questions, without ceasing to open up very broad possibilities, relative to his object, with the example of the right to asylum.

It was in the Roman law and in the English common law that D'Amato discerned the origins of special custom, its differentiation from general custom, and, moreover, the requirement that it be proven. Having recourse to Blackstone, he recalled that the rules on the need for proof of custom were stricter because these were derogations from the common law or general custom.[83] International law

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[81] *Ibid*, p. 314 - 318.
[82] D'AMATO, Anthony. The Concept of Special Custom in International Law. *American Journal of International Law*. Vol 63. No. 2, 1969, pp. 212-213.
[83] *Id*., p. 213.

was said to have absorbed that idea, notwithstanding the wording of Article 38 of the ICJ Statute – which he argued, like Basdevant, should not be read literally.[84]

Such recourse to history only reinforced the core of his argument: that the ICJ had used the strictest test of consent to identify the existence of that special custom, and not of the general custom. On thus isolating that type of custom, it sought to maintain the argumentative coherence of the ICJ at the same time as he attacked the voluntarist currents.

Nonetheless, the author does not let go of an escape value should the ICJ, in the future, come to adopt a looser test for consent even for special custom. Hence his admission that, depending on the type of case analyzed, the requirements for proving special custom could vary – in the case of prescription, borders, regional law, or whatever may be at issue.[85] This appears to show that the way in which he approached special custom – on allowing for flexibility in the tests to determine what constitutes it – depended on a larger thesis, which sought to reject voluntarist arguments in international law. This procedure is not so different from that adopted by Cohen-Jonathan.

It is also important to recall that D'Amato was not advocating the idea that special custom should prevail over general custom in all cases. Analyzing the *Case concerning Right of Passage*, he recalled that the prevalence of special custom had not been fully established, whereas the general custom was not duly proven by Portugal.[86]

In the early 1970s, when very little specific study of private customary international law was done, Francesco Francioni published what is perhaps the most comprehensive article on the subject. Entitled *La Consuetudine Locale nel Diritto Internazionale*, the article was not exactly original in its approach - for it was rather reminiscent of the scheme Cohen-Jonathan introduced on the subject, using International Court of Justice jurisprudence to refute doctrinal arguments, the more theoretical as well as the more practice-oriented. However, Francioni's arguments are more thorough than Cohen-Jonathan's because, by applying sophisticated reasoning grounded in the dogma of international law, he challenges point by point the positions opposed to local custom – a category which, in his terminology, encompassed all private customary international law – or those that sought to link it with other principles of international law, such as implicit agreement, *estoppel*, or acquiescence.

Francioni correctly observed a discrepancy between a flawed doctrinal analysis of the issue and, on the other hand, a thorough analysis using international jurisprudence, especially by the International Court of Justice and, earlier on, by the Permanent Court of International Justice itself.[87] His proposal was precisely to fix that discrepancy.

Art. 38 (1) (b) of the Statute of the International Court of Justice was not an obstacle to discussing particular customary international law, either because a treaty cannot limit the scope of another source – in this case, custom – or because the general nature of the provision could be applied on a smaller scale, such as regional, or with reference not to space but to time.[88]

Francioni is far more generous than other authors – except possibly Barberis – in noting the recognition of private customary international law in cases that other internationalists did not see so clearly, such as the 1951 *Fisheries Case* involving the United Kingdom and Norway, and the Permanent Court of International Justice Advisory Opinions on Danzig and on the European Danube Commission – decisions which, as Cohen-Jonathan had already noted, recognized private customary international law, albeit not expressly.[89] The argumentative strategy here was very clear. With a

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[84] *Id*., pp. 217-218.
[85] *Id*., p. 223.
[86] *Id*., p. 219.
[87] FRANCIONI, Francesco. La Consuetudine Locale nel Diritto Internazionale. *Rivista di Diritto Internazionale*. Vol. 54, Fasc 3, 1971, p. 398.
[88] *Ibid*, p. 399 - 400.
[89] *Ibid*, p. 402 - 405.

consistent body of jurisprudence dating back to the 1920s, international jurisprudence had already settled a problem that doctrinaires insisted on wanting to leave open. He never hid his clear opposition to voluntarist positions that sought to reduce the particular customary international law to an implied agreement. He thus demonstrated that, in his view, such reductionism was not only theoretically mistaken, but also at odds with the position of international jurisprudence. The need for a uniform behavior to be repeated for this kind of customary international rule already made it different from an implied agreement, which conveyed a specific declaration of will with respect to a particular rule or set of rules.[90]

Particular customary international law could not be *estoppel* because it involves a question of substance, whereas the latter would serve as a procedural exception in court. Neither could it be confused with acquiescence, which is merely an outward expression of a psychological or volitional attitude of an international subject that may take the form of an implied agreement or a custom, and should therefore not be confused with the latter, being only one aspect of *opinio juris* rather than the customary rule in its entirety.[91]

Particular customary international law should not be confused with general international law either, because, to be enforceable, the state in question must have participated in the creation of the customary rule itself. Thus, Francioni strictly follows the criterion that the Court originally established in the *Asylum Case* and therefore removes any possibility of affording regionalism legal status by admitting that within a specific group a rule of particular customary international law may be enforceable upon states that are part of a region or sub-region but had no hand in the creation of the customary rule.[92]

Also strictly following the most widely disseminated reading of the *Asylum Case*, the author understood that the burden of proof in particular customary international law falls entirely on the state so claiming, unlike what obtains under general international law, where it is shared between the judge and the parties involved.[93] Yet for the author, it is quite typical for burden of proof issues in private customary international law to get confused with its very existence. In his own words:

> "In that connection, it is worth pointing out that, given the relative nature of local custom, such burden of proof necessarily involves a twin set of facts: first of all, the very existence of the local custom with its own two elements, that is, uniform practice and *opinio juris*; secondly, actual involvement by the state it is intended to challenge in the customary practice."[94]

Francioni's article delivered a clear message that international jurisprudence should shape doctrine both to dispel the doubts that some doctrinaires still had about the existence of this type of customary rule and to demonstrate that voluntarist explanations to deny or dismiss its autonomy were easily refutable. The author deftly constructs his article with strong arguments for (international judicial) authority to continue supporting the existence of the particular customary international law. And he himself relied on that authority to advance his own arguments.

In the 1990s, the theoretical affiliation with voluntarism – or opposition to it – still informed doctrinal positions and ways of thinking about particular custom. Two good examples of these positions, which led to antagonistic and even counterposed understandings, are the essay by José María Gamio, "Costumbre universal y particular," and the article by Olufemi Elias, "The relationship between general and particular customary international law."

As for the first, Gamio did not deny that the case-law of the ICJ focused, when it had occasion to exam particular custom, on the need to show the consent to the rule by the state in question.

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[90] *Ibid*, p. 407- 409.
[91] *Ibid*, p. 414- 415.
[92] *Ibid*, p. 415- 419.
[93] *Ibid*, p. 420- 421.
[94] *Ibid*, p. 421.

Nonetheless, in his view in such cases one would not be in the presence of custom, but of other sources of international law.[95]

Like D'Amato, Gamio understood that those cases in which the ICJ required consent were the ones in which issues regarding particular custom would have been considered. As regards general custom, the position of the Court would clearly be inclined towards the idea of consent.[96] However, unlike D'Amato, he draws another conclusion from that finding.

Gamio reads the case-law of the ICJ on particular custom based on the presupposition that each time it has faced the issue, it could have reached the conclusion that particular custom – local, bilateral, or regional – should be approached as related to a source other than custom.

It is in that regard that the author criticizes the *Case concerning Right of Passage* insofar as, in his understanding, the Court could have reached the same conclusion drawing on the idea of titles that revert in adverse possession or even estoppel. In the *Case related to the rights of nationals of the United States of America in Morocco*, he suggests that the dispute could have been decided drawing support from the idea of tacit agreement, based on the dissenting vote of four judges in the case. Along the same lines, the PCIJ was talking about tacit agreement when it handed down its Advisory Opinion in *Danzig*.[97]

Nor would regional custom exist as an autonomous category. Even if he allowed that in the *Asylum Case* the Court recognized the existence of a practice among states of the Americas, he was not able to see a necessary relationship between that finding and the existence of a customary norm binding on a limited universe of states. That practice would be the substratum by which some other source of international law would be affirmed in the case, but not a custom particular to a region. Gamio sees the idea of "specially affected states" developed in the case-law of the ICJ as a specific way to designate what some prefer to call particular custom.[98] Instead of constituting a formal source of law or even a legal rule, regional custom would merely describe a way of externalizing (in a more restricted manner, as regards the number of participants) a well-defined formal source, properly speaking, or a well-defined legal rule.

As regards the process in which a particular custom becomes general, he understood that, in the case, there would be a transformation that was not only quantitative – in the number of states bound by a norm – but also qualitative – for what was initially a mere partial agreement, among a given number of states, would be transformed into a custom.[99]

In the final analysis, the rejection of the particular custom by Gamio was owing to a strong association of the authority with an anti-voluntarist conception of international law. The requirement of consent for identifying the particular custom was simply inadequate for explaining custom, which does not require such consent. At a given moment the author does not hide his objective, i.e. to deny the particular custom. Recognizing it would end up "upsetting the whole purpose of developing a coherent theory of custom as a source of international law."[100]

Actually, the author appears to dissociate particular custom from custom as a source of international law because its characteristics differentiate it markedly from an effort to understand custom organically. Yet certainly that position is subject to criticism because it makes custom, as a

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[95]. GAMIO, José María. Costumbre universal y particular. In: RAMA-MONTALDO, Manuel (ed.). *El derecho internacional en un mundo en transformación. Liber amicorum: en homenaje al profesor Eduardo Jiménez de Aréchaga. Vol 1*. Montevideo: Fundación de Cultura Universitaria, 1994, p. 79.
[96] .*Id*., p. 80.
[97] *Id*., pp. 86 - 87.
[98]. *Id*., pp. 88 - 89.
[99] *Id*., p. 98.
[100] *Id*., p. 92.

source, depend on a theory, not the other way around. That position clashes even more so with the practice of international courts, which do not distinguish particular custom from general custom.

This being the case, the theoretical debate, all the more intense, finds a confrontation between voluntarists and anti-voluntarists resonate with great vigor in Gamio's assessment of particular custom in international law, even in his reading of the cases decided by the ICJ.

The article by Olufemi Elias, "The Relationship between General and Particular Customary International Law," was, in various ways, a counterpoint to the essay by Gamio, though it is likely that Elias was unaware of that essay.

Based on a vigorous defense of the role of consent in customary international law, Elias did not reach the conclusion that the particular custom did not exist. Rather, he maintained its conceptual autonomy on not drawing a fundamental distinction between it and general custom.

He rejects all the criteria for distinguishing particular custom from general custom, such as the existence of a special interest, geography, or even the number of participants in the formation of the custom. Indeed, in the last criterion he saw circularity, thus, on relating the terms "general"/"particular" to the number of participants in the formation of the custom, one was simply reaffirming that they *are* two categories, instead of explaining *why* they are, indeed, two categories. If every custom were based on the consent of the states, then every custom would be particular.[101]

Elias also rejects the idea that the difference between general custom and particular custom turns on the burden of proof, which is definitive, for other authors, in relation to particular custom.

He was not able to see how, rationally, a distinction should exist between the burden of proof required to establish a particular customary norm and that needed to show a general customary norm. To that end, he relied either on the fact that a particular custom is as much law as is a general custom, or on the judgments of the ICJ, which never properly established that there was a distinction in the burden of proof for a particular custom compared to a general custom.[102]

And he put forward the argument that even if there were such a distinction, it would not be about what needs to be proven, but who must prove it, which would not affect the conclusion that the *probandum* is the same for general custom as for particular custom.[103]

While the article clearly intends to advance theoretical considerations, he reaches a conclusion similar to that of Gamio, but with the signal switched: the practice, especially judicial, would explain his theory. Even so, particular custom – insofar as it is similar to general custom – may only be understood by having recourse to a type of voluntarist theory that reinforces the role of the states' consent. In other words, particular custom should be understood as no different from general custom to justify a theory based on consent; particular custom serves such a theory, and not the contrary position.

3.3 Particular custom between doctrinal recognition and the potential for its application

The 2010s saw renewed interest in the issue of doctrine. Although there were echoes of the voluntarist-non-voluntarist debate, the arguments challenging the very existence of particular customary international law lost steam. From that point on, new issues began to emerge, giving rise to deeper reflection on the possibilities for this specific type of customary rule.

One reason for such a shift likely had to do with the growing debate on fragmentation of international law, which once again brought the issue of regionalism to the forefront of international legal debates. Furthermore, a reassessment of issues concerning expansion of international subjectivity, and the possibility of subjects other than the state influencing the formation of customary international norms, also came into prominence during this period.

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[101] ELIAS, Olufemi. The relationship between general and particular customary international law. *African Journal of International & Comparative Law*. Vol. 8. No 1, 1996, pp. 68-72.
[102] *Id*., p. 82.
[103] *Id*., p. 84.

A good example of an approach that no longer emphasized the debate between voluntarists and non-voluntarists is the article by Miguel Galvão Teles, published in Portuguese, entitled "Costume bilateral em Direito Internacional Público."

Part I was dedicated to revisiting the *Right of Passage over Indian Territory* case, especially from the perspective of the petitioning state, Portugal, and emphasizing the role of Inocêncio Galvão Telles, that country's agent in the case and the author's father. Part II dealt, however, with particular customary international law, taking the position that, following the ICJ decision in that case, and notwithstanding the insistence of certain authors in denying the possibility of particular customary international law, it was now generally accepted.[104] This idea of moving beyond the doctrinal debate on the very existence of this type of customary international rule enabled the author to adopt a more pragmatic and even conciliatory tone on the matter.

Galvão Teles offered explanations on the suitability of the idea of generality to particular international law – which has to do with a state's unique practice, rather than with the number of states that engage in the practice, since no action is taken based on the belief that third parties should also be bound by the same practice. This is even why he could label particular customary international law as "limited custom," which is associated with situations that are localized and specific. He also refuted any connection between this type of custom and implied agreement – because he found there were such agreements that were not the result of a repeated practice and customary rules applicable to states not involved in creating them. This latter is an interesting point, because he seems to be admitting that for a given group of states, a particular customary international rule may be enforceable *erga omnes*. But the author does not develop this argument any further.[105]

The author admits that while there is room in the formation of custom for elements of consent – such as acquiescence, reciprocity, and the admission of the persistent objector principle itself – this consent need not be couched in the form of a "statement of law internationally constitutive (or so deemed)."[106]

The way he viewed it, the discussion about bilateral custom as implicit agreement would be settled based on the fact that treaty and custom are constantly interacting. Thus, the same facts could give rise to both a customary rule formation process and an implicit agreement. In other words, his argument could be read as saying that, since international practice has removed any strict dichotomy between treaty and custom, there would no point insisting on the need to strictly distinguish between bilateral custom and implicit agreement on a theoretical level.[107]

This approach that emphasizes pragmatism over theoretical consistency of a bilateral customary international rule.

In 2010 as well, Andreas Buss published his article "The Preah Vihear Case and Regional Customary International Law," the main purpose of which was to revisit, from the perspective of regional customary international law, the classic case decided by the International Court of Justice in 1962.

While its title emphasized the issue of regional customary rules, the article itself is more focused on analyzing the case and the criticisms leveled against it, in particular, a history of the facts and law that led to the case.[108]

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[104] TELES, Miguel Galvão. Costume bilateral em Direito Internacional Público. *O Direito*. Vol. 142. Nº II, 2010, p. 362-363.
[105] *Ibid*, p. 363- 364.
[106] *Ibid*, p. 364.
[107] *Ibid*, p. 365- 366.
[108] BUSS, Andreas. The Preah Vihear Case and Regional Costumary Law. *Chinese Journal of International Law*. Vol. 9. Nº 1, 2010, p. 112-120.

But the major trend of the time period, which the article incorporates, was to reflect on customary international law from the perspective of the practice of non-state actors. Drawing on a concept dating back to certain theoretical lines supporting legal pluralism, Buss provides elements to demonstrate that the borders between Cambodia and Thailand were marked by "fluidity and flexibilities," so that "territorial jurisdiction could not be strictly defined by permanent boundaries." This was due to the fact that alongside official law, unofficial law made by non-state groups and religiously based rules and concepts were also in operation in the region. Thus, the sovereign gave up his right to own land donated to monks to build a monastery, which at that time was considered inviolable, endowed with its own jurisdiction. It could, for example, grant asylum and did enjoy immunity from taxation. In his view, in order to better understand how concepts such as territory and jurisdiction were applied the International Court of Justice should have taken into account regional customary law before France settled in the region. The author goes so far as to suggest that taking into account factors such as regional customary law would help minimize Third World skepticism towards international law.[109]

Although the article does not expressly refer to the *Case Concerning Navigational and Related Rights,* involving Costa Rica and Nicaragua and decided in 2009, the previous year, and considered the conduct of coastal populations on the border river between the two states, it is clear that it incorporates the tendency to assign non-state actors a more relevant role in the process of shaping the particular customary international rule. Here again, the question is no longer whether this particular type of customary international law exists, but rather whether it is in keeping with the developments of the historical moment that would compel international law to transcend a purely state-centric character.

Three years later, a powerful commentary on the aforementioned International Court of Justice case was published from the specific perspective of particular customary international law. In "The 'Right Mix' and 'Ambiguities' in Particular Customs: A Few Remarks on the Navigational and Related Rights Case," Luigi Crema explores what can be considered the two main developments in the case: the relationship between private customary international law and non-state actors and the question of burden of proof in this specific type of customary rule. As with other studies from the 21st century onward, his starting point is the assumption that "among scholars it is indisputable that international law also admits particular custom."[110]

Probably because he acknowledges this indisputable feature, Crema is more careful to verify that particular customary international law is recognized in the jurisprudence of the Permanent Court of International Justice. There would no longer be any need to look to the distant past for such recognition. That is why, for him, what that court would have recognized in the *Case of the European Danube Commission* and in the *Case of the Free City of Danzig and the International Labor Organization* would be something closer to a subsequent practice modifying a treaty.[111]

In considering the relationship between non-state actors and particular customary international law, the author downplayed the impact of the ruling in the *Case Concerning Navigational and Related Rights*. In his opinion, the Court did not properly consider the practice of non-state actors, but observed state practice by looking at the practice of private individuals. This recourse occurred in exceptional and residual cases, when the specific circumstances so required. Thus, absence any clear evidence of state conduct, to identify a particular customary international rule the Court would have looked at the behavior of individuals and the corresponding lack of reaction by the state. In an effort to ensure consistency in the International Court of Justice jurisprudence, the author even saw a connection

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[109] *Ibid*, p. 120- 126.

[110] CREMA, Luigi. The 'Right Mix' and 'Ambiguities' in Particular Customs: A Few Remarks on the Navigational and Related Rights Case. In: BOSCHIERO, Nerina et al (eds.). *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*. The Hague; Heidelberg: T.M.C. Asser Press; Springer, 2013, p. 66.

[111] *Ibid*, p. 67.

between this procedure and the Court's assessment of practice in the case concerning *Kasikili/Sedudi Island*, in which conduct by state officials at the highest levels was taken as the starting point and then came the conduct of private individuals.[112]

On the matter of burden of proof in particular customary international law, he held that only in appearance did the Court deviate from the precedent set in the *Asylum Case*. Firstly, because in more recent times the criteria the Court uses to identify international customary rules have become looser than those in place at the time of the ruling in the *Asylum Case*. Secondly, the issue of proof in the case was not controversial, because during the trial both Nicaragua and Costa Rica had agreed on the practice that formed the basis of the local customary rule. That is to say, the Court had duly taken into consideration the consent of both states in order to conclude that there was a particular international customary norm in the situation it was examining. But Crema felt that the case demonstrated something distinctive about a bilateral custom as compared to a general custom. The practice observed in the former is broader than in the latter, because it is carried out in the context of a closer bilateral relationship; hence the practice of individuals is observed – which would be impossible in a custom that is general in nature.[113]

While also intended to ensure the reasoning behind the Court's ruling remained consistent, the arguments were not entirely convincing – first of all, because the fact that the parties agree on the existence of a practice underlying a customary rule is not the same as agreeing that the customary rule itself exists. Such a practice could lead to the situation being framed as acquiescence or implicit agreement, for example. Secondly, investigating the conduct of non-state actors bears no relation *per se* to investigating a closer bilateral relationship between two states. A practice that is unofficial in nature (because it is conducted by private actors) reveals the question of attribution of an action, not the closer link (as a matter of mutual interest) between two states.

In the end, Crema may be perceived as striving to find answers to an innovative feature of the International Court of Justice's judgment in that court's own jurisprudence. But this may well be explained by an oddity stemming from new developments that have affected the Court's perception of matters of particular customary international law. The fact is that the Court may really have sought to be innovation in its own jurisprudence in the face of an ever-changing international reality.

More recently, a number of doctrinal exercises have shown not only that the clash between voluntarists and non-voluntarists is less intense in the debate over the existence of particular customary international law, but also that a more flexible and pragmatic view offers potential for application of this specific type of custom. This holds true of Khagani Guliyev's article, "Local Custom in International Law: Something in between General Custom and Treaty."

The author recognized that the existence of local custom had been widely accepted in international law since at least the time of the *Right of Passage over Indian Territory case*. However, he went on to argue that international judges were reluctant to recognize it because of problems surrounding its formation, identification, and duration.[114]

These problems stemmed from the specificities of local custom, such as there being a universal, rather than general, custom; a practice that needs to be repeated over a long period of time – a requirement he drew (very indirectly and certainly not explicitly) from the cases the ICJ heard, involving this type of custom and dealing with practices that extended over a long period of time; *opinio juris* identified in all of the states involved in this type of custom, not just most. These

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[112] *Ibid*, p. 71- 72.
[113] *Ibid*, p. 72- 73.
[114] GULIYEV, Khagani. Local Custom in International Law: Something in between General Custom and Treaty. *International Community Law Review*. Vol. 19. Nº 1, 2017, p. 49-50.

characteristics enabled the author to draw the conclusion that local custom took on a clearly consensualist bias, unlike general customary international law.[115]

Because of its consensualist nature, local custom could be compared – but not equated – with implied agreements. The difference between the two had to do with the fact that in local custom there is practice, whereas with implied agreement there is a contractual logic to its formation. Time for formation, required for the former and not for the latter; the need for several state bodies to be involved in the case of local custom, and for bodies vested with full powers in the case of an implied agreement, were two more reasons for making the distinction.[116]

This movement of closeness and separation – which can also be understood as a movement between voluntarism and non-voluntarism – is explained in the second part of the article, in which the international rules on state succession are used as a means to illustrate the changing nature of local custom.

Guliyev's view is that, unlike general custom, local custom is not binding on new states that emerge from succession processes. By not regulating common issues agreed on by the international community – respect for which would be expected for the international system to be stable – local customary rules are not enforceable against new states. The need for universal practice does not carry over to the new state, but rather requires its specific acceptance. The author even – implicitly – draws this conclusion from the *Right of Passage over Indian Territory Case*, insofar as the International Court of Justice analysis of the practice covered both the period of British colonial rule and the period of Indian independence. This means that the Court needed to establish whether the practice that existed prior to independence continued post-independence. While this was an inference bordering on conjecture – because the Court is not the least bit forthright in linking the analysis of practice to a supposed feature of local custom with respect to state succession – it did lead the author to conclude that, at least for the case of state succession, local custom followed the logic of a treaty.[117]

However, following the logic of the treaty the author would, by logical consequence, also argue that if few treaties – concerning territorial boundaries and territorial regimes – are imposed on the new states that emerged from a succession, even without their consent, the same way local customs dealing with those matters are imposed on the latter.[118] In other words, if the issue of territorial limits and territorial regimes calls consensualism in treaty law into question, it would also call it into question in customary international law. The consensualist basis of local custom is, in other words, made to uphold the idea that, in specific situations, it will be enforceable against a state even without its consent.

The article therefore allows an appreciation of the potential of particular customary international law to regulate certain situations – rules on succession – without necessarily getting fixated on a voluntarist or non-voluntarist argument in international law. Its *sui generis* character, "something between general custom and treaty," affords it the flexibility to regulate matters in the international legal arena.

3.5. Overview of the doctrinal debate on particular customary international law

There is little doubt that the doctrinal debate on the subject of particular customary international law was basically influenced by the decisions rendered in cases judged by the International Court of Justice especially. Although some authors read it retroactively, in the sense that the Permanent Court of International Justice or even the Arbitration Tribunals had already accepted this type of custom as a category of international law, the truth is that only after the *Asylum Case* did scholars truly begin to take an interest in the subject; and interest grew substantially after the *Right of Passage over Indian Territory* case, which was the first time that a bilateral custom was being recognized explicitly.

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[115] *Ibid*, p. 50- 55.
[116] *Ibid*, p. 56- 58.
[117] *Ibid*, p. 59- 61.
[118] *Ibid*, p. 61- 65.

The problems some authors had in accepting particular customary international law related mostly to its bilateral form. The reason for such resistance certainly has to do with the lack of a strict separation between a bilateral custom and an implied agreement between states. In many respects, these difficulties were based on the theoretical concepts defended by authors of the post-World War II period, especially those that could be considered voluntarist, and their anti-voluntarist counterpoint. Generally speaking, authors more closely associated with voluntarist schools of thought dismissed, or even denied, any relevance of the existence of particular customary international law – usually only its bilateral aspect – whereas anti-voluntarist authors, usually upheld by the authority of International Court of Justice rulings, defended its existence.

Up until the end of the 20th century, much of the specific doctrine on the subject remained influenced by the theoretical debate between voluntarists and non-voluntarists, which may have given rise to at least three major problems: (1) the studies, by repeatedly fixating on rigid theoretical positions, escaped potential regulation under private customary international law of various subjects; (2) probably because of the influence of the Right of Passage over Indian Territory Case, the debate was often focused on bilateral customary international law, to the detriment of other types, such as regional law; as a result, more in-depth reflections on the value and legal relevance of regionalism for international law were practically non-existent during that period; (3) the debates reflected only slightly on proposals for the International Court of Justice to advance its jurisprudence on the subject matter; positions applauding the Court's decisions or not accepting the Court's recognition of particular customary international law, especially in its bilateral form, obscured important issues such as the burden of proof in all forms of particular customary international law or potential interaction between treaty and custom in order to identify it.

Beginning in 2000, approaches that were more pragmatic and less influenced by the theoretical debate between voluntarists and anti-voluntarists gradually emerged. For certain authors, the fact that the particular customary international rule approaches or departs from consent could be seen not necessarily as a problem, but as an advantage. Moreover, discussion began to emerge as to whether the practice of non-state actors could be taken into consideration for the purpose of identifying the particular customary international law. Positions that were less state-centric in terms of the concept of the law itself found space during this period as well. However, reflections on the role of regionalism in international law and how it relates to customary international law were hardly nurtured. Little has been explored in terms of the ruling in the *Case Concerning Navigational and Related Rights*, which introduced new elements to at least propose a more thorough reflection on particular customary international law, even though, as noted earlier, their potential to trigger a re-examination of the majority reading that has been done of *Asylum Case* by doctrine is not so negligible.

PART IV - THE INTERNATIONAL LAW COMMISSION AND PARTICULAR CUSTOMARY INTERNATIONAL LAW

For more than five years, the United Nations International Law Commission has devoted itself to the subject of identifying customary international law. The designated Rapporteur, Sir Michael Wood, produced five distinguished reports dealing with the "methodology for identifying rules of customary international law."[119]

In 2018, the Commission adopted the "Draft Conclusions on Identification of Customary International Law" that was referred to the UN General Assembly, which, in turn, took note of the Draft in Resolution 73/203 of December 20, 2018. The last of the Conclusion in said Draft dealt exactly with regional customary international law and was stated as follows:

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[119] INTERNATIONAL LAW COMMISSION. *Draft Conclusions on Identification of Customary International Law, with Commentaries*. A/73/10, p. 122. Available at: < http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.

"Conclusion 16 Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves."

In the Draft, such a conclusion appears last not only because the other conclusions apply to particular customary international law, unless otherwise identified, but because, as the Special Rapporteur asserts, this type of customary rule is regarded as "exceptional." Hence, the term "customary international law" denotes that which is general in nature – that is, the rule; the adjective "particular" is always needed, in order to denote a customary international law that is not general.[120]

For the Rapporteur, even if "not often to be found," private customary international law "can fulfill a significant role in interstate relations by accommodating different interests and values that are peculiar to only a few states."[121] But in a limited number of states such interests and values need to be verified, because it is the quantitative, rather than qualitative, standard that characterizes this type of customary international norm, as paragraph 1 of Conclusion 16 ("among a limited number of states") makes clear.

From a terminology standpoint, the clear option for the ILC was to choose the term private international law as a category, of which "regional, local, or other" customary international norms would be a species. In the ILC's own reasoning, the term "particular" fulfills two important functions: (a) to demonstrate relational nature as opposed to general customary international law; (b) to point out that closeness between states (as the term regional or local would imply) is not a prerequisite for identification of this type of customary rule.[122]

The two elements (practice and *opinio juris*) are also needed for the identification of particular customary international law, but paragraph 2 of Conclusion 16 emphasizes that such elements must be identified among the states concerned. Although the wording of the provision is unclear, the comments establish that a "stricter" approach is taken to the two elements in matters of particular customary international law[123]– in other words, the ILC has clearly adopted the widespread understanding established at the time of the International Court of Justice ruling in the *Asylum Case* that all states involved must accept the particular customary rule in question.[124] However, the arguments introduced by the International Court of Justice in the *Case Concerning Navigational and Related Rights* are not brought by the International Law Commission, not even from the perspective of a reversal of the burden of proof or the presumption of proof of the customary rule.

It is important to draw a contrast between defense of the stricter standard and what was stated in the Commission's 2006 Report on the Fragmentation of International Law. At that time, the final report inquired about the normative meaning of regionalism under international law. The answer was clear, in that international law did not support regionalism in any "stronger sense" to support a rule or principle with a regional sphere of application or a regional limitation awaiting the application of a rule or principle that is universal in scope.[125]

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[120] *Ibid*, p. 123, 155.
[121] *Ibid*, p. 154.
[122] *Ibid*, p. 154- 155.
[123] *Ibid*, p. 156.
[124] In the rather brief discussions within the Commission, nevertheless, some members did signal that they did not agree with following the "stricter" approach in gauging the two elements in so far as the particular customary international law was concerned. See INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission*, Vol. II (2), 2015, p. 31.
[125] INTERNATIONAL LAW COMMISSION, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law*

The report maintained, however, that there was no normative basis for regionalism, except insofar as the issue concerns regional customary practice accompanied by *opinio juris* of the relevant states. The report only rules out the possibility of states outside the region being bound by customary norm – although they may still be so bound, expressly or implicitly. But it does not necessarily exclude the possibility that states in the same region may be bound by a regional customary norm. Unlike what many authors argue, the report holds that, "[i]n the Asylum case, the Court itself did not specifically pronounce on the conceptual possibility of there being specifically regional rules of international law in the above, strong sense (i.e. rules automatically binding on States of a region and binding others in their relationship with those States)."[126] That is, there is no such acceptance that the case heard by the Court necessarily required the consent of the state on which the regional custom of origin is invoked. Moreover, it is at least understandable that such a finding would mean that what was at issue in the *Asylum Case* was not so much a question of whether the regional customary rule existed, but rather the burden of proving it.

In any event, although the ILC's Conclusions on Identification of Customary International Law added nothing new on the subject of private customary international law, notwithstanding the fact that the implications of the entire jurisprudence of the International Court of Justice on the subject are not sufficiently addressed – neither are even its previous considerations in the study of other issues, such as the Fragmentation of International Law – they contributed a great deal to firmly establish this type of custom. To that end, the Commission considered its existence to be "incontrovertible," especially in view of the various rulings of the International Court of Justice on the subject.[127]

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Commission. UN Doc A/CN.4/L.682, p. 108-109. Available at: < https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf >

[126] *Ibid*, p. 110- 111.

[127] INTERNATIONAL LAW COMMISSION. *Draft Conclusions on Identification of Customary International Law, with Commentaries*. A/73/10, p. 154. Available at: < http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.