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PRIVATE CUSTOMARY INTERNATIONAL LAW IN THE CONTEXT OF THE AMERICAS: FIRST REPORT

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

In this first report, I attempt to address the issue from an international case law perspective.

A significant portion of the doctrine on private international law stems primarily from a series of cases handled by the International Court of Justice (hereinafter "ICJ" or Court) over a period of more than 50 years that dealt with the subject at greater or lesser length.

That approach, which might be characterized as largely inductive ("the inference of general laws from particular instances") and based on cases judged by the ICJ, has obvious advantages, but also entails risks.

One major advantage is connecting the study of private customary international law with relevant judicial practice, thereby eschewing theoretic debates with little practical usefulness.

On the other hand, the main risk attached to such an approach is assuming coherence among ICJ judgments handed down over a long period of time and abstracted from the characteristics of concrete cases.

In fact, as will be shown below, the criteria used by the ICJ to identify a private customary norm or rule are not uniform, in addition to the fact that various arguments adduced in rulings are internally contradictory or exhibit clear omissions.

Initial analysis of judicial practice in this field is geared precisely to acquiring a more in-depth understanding of the cases judged by the ICJ, so as to reveal both the possibilities they offer and their limitations for applying private customary international law in the context of the Americas.

In this report, I will start by analyzing those cases in which, in its judgments, the ICJ pronounced, in one way or another, on private customary international law. Some individual stances taken by judges in those cases will also be assessed in order to elicit a better grasp of the context of the ruling. A subsequent report will examine cases in which the reference to private customary international law is found exclusively in individual opinions by ICJ judges, along with the few cases on the subject judged by other courts. The next report will also contain a general appraisal of the position taken in international jurisprudence with respect to private customary international law.

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The Colombian-Peruvian asylum case (Judgment of November 20th, 1950: ICJ Reports 1950, p. 266) was the first opportunity the ICJ had to pronounce on the possible existence of private customary international norms. The case is extremely important because it very largely shaped the legal doctrine debate and the Court's own subsequent case law.

The case dealt with a series of issues involved in the Colombian Government's granting of diplomatic asylum to Peruvian citizen Víctor Raúl Haya de la Torre.

The subject of private customary international law was addressed because of the Colombian argument that invoking American international law in connection with diplomatic asylum assumed the existence of a regional or local custom proper to Latin American States. Specifically, the Court was called upon to reach a decision regarding the rule that it is up to the State granting asylum to unilaterally and definitively characterize the offense that prompted diplomatic asylum.

In the Court's view, the party alleging the existence of such a custom must prove that it is binding for the other party. It is worth citing the passage concerned, which is constantly quoted in the literature on private 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'".[1]

It is worth noting that the Court invoked Article 38 of its Statute -- which does not mention private custom -- to argue that said rule derives from a constant and uniform usage as the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

Both arguments presented by Colombia were dismissed. As for the first, even though several treaties were cited as proof of the existence of a practice, the Court considered that they either had no bearing on the case at hand or had only been ratified by a few States in the Latin American context. As regards the second argument, even though Colombia pointed to several cases in which diplomatic asylum had been granted, according to the ICJ, they exhibited "uncertainty and contradiction," apart from being influenced by "political expediency," so that said practice did not demonstrate the existence of a constant and uniform custom capable of creating a customary norm.[2]

The Court also held that, even if Colombia had proved the existence of a customary rule on qualification (*qualificação*), it could not be invoked against Peru, which had repudiated it. That was allegedly confirmed by the fact that Peru had not ratified the Montevideo Conventions of 1933 and 1939, which were the first instruments to include

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1 INTERNATIONAL COURT OF JUSTICE. *Colombian-Peruvian asylum case*, Judgment of November 20th, 1950: ICJ Reports 1950, pp. 276-277.
2 Idem, p. 277.

rules governing qualification of the offense in diplomatic asylum cases. Also dismissed, without solid substantiation, were official communiques by Peru's Ministry of Foreign Affairs that Colombia had cited as proof of acceptance of the private customary norm.[3]

In one section of the judgment, the ICJ even refers to non-intervention as a Latin American tradition. However, it did not explicitly state whether such a tradition constituted a customary rule.[4]

A number of issues are raised in this case, four of which are worth mentioning here.

The arguments regarding identification of the custom are largely based on the perception that treaties are part and parcel of State practice. Peru's stance of opposing asylum is basically derived from its not having signed an asylum treaty. That argument has consequences with regard to identifying the part that silence plays in the establishment of a customary rule which would barely be taken into account or would even be dismissed in the case of a private custom, because failure to ratify does not amount to an express statement of choice.

Second. It is not clear whether the requirement that Colombia had to prove that the private custom was binding on Peru is a procedural or a substantive matter. In that context, the following query persists: Could the regional international custom only apply when a party to a proceeding has shown proof that it is binding for the other party, or could the Court recognize it ex officio?

It would seem reasonable to believe that the demand placed on Colombia amounts to a procedural issue, because the Court itself analyzes matters of practice -- albeit insufficiently -- and concludes that there is no private customary norm to regulate the matter it discussed.

The ICJ very clearly laid great store by the fact that Peru had not ratified the first treaty that ruled on the right of the State granting asylum to qualify the offense. That reference to "first" may have had to do with the principle of acquiescence or even what would become the Persistent Objector Doctrine, which, as is well known, requires that objection must have been made at the time the customary rule was developed.

The dissenting opinion of Judge Alvarez is of particular interest, since, even before joining the Court, he had written extensively on the role of regionalism in international law. Nevertheless, Alvarez's positions regarding private custom do not appear to be very clear.

Before delving into the question of diplomatic asylum as a private customary rule, Alvarez summarizes some of his ideas regarding American international law. For him, a custom does not need to be accepted by all the States in the New World to be considered part of American International Law. He also conceives of subdivisions within American International Law, such as Latin American International Law. As regards the relationship between overall international law and American international law, for him it is a matter of correlation, rather than subordination.[5]

Even though he takes a position in favor of the particular nature of international law, Alvarez concludes that there is no American customary international law of asylum due to the lack of uniform practice on the subject by the governments concerned. He admits, nevertheless, that there are certain practices or methods with respect to asylum that are followed by the Latin American States. Nonetheless, he does not explain whether

3 Ibid., pp. 277-278.
4 Ibid., p. 285.
5 Ibid., p. 294.

such practices or methods are endowed with some degree of legal force (*juridicidade*), which would render them mandatory in the Latin American context.[6]

Other judges, such as Judge Read, clearly stated that even though Colombia could not prove that there is a unilateral right to qualify and a right to safe-conduct based on customary law, there was no questioning the fact that diplomatic asylum constitutes an international custom. That assertion explains why the Court is capable of ascertaining the existence of the private custom without one of the parties having to prove that it is mandatory for the other.[7]

Judge Azevedo not only disagreed with the Court regarding the existence of a private custom with respect to diplomatic asylum; he also queried whether a failure to ratify entitled others to exclude a State from the group for which the custom is respected.[8]

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The Case concerning rights of nationals of the United States of America in Morocco (Judgment of August 27th, 1952: ICJ Reports 1952) had to do with the question of the continuity of certain privileges granted to nationals of the United States in Moroccan territory.

One of the arguments made by the United States maintained that the exercise of its consular jurisdiction and other capitulatory rights were based on "custom and usage." Worth noting is that there is no reference at any point to the expression "bilateral custom." The allegation referred to two distinct temporal frameworks: from 1787 to 1937 and to 1937, when the case in question was taken to court.[9]

The Court found that the American argument was inadmissible in respect of both temporal frameworks, for different reasons.

With regard to the first period, the Court gave two grounds for its ruling: First, American consular jurisprudence was not based on custom or use, but on treaty rights. On this point, the reasons adduced by the Court do not appear to be strong enough. Although it maintains that most states had rights derived from treaties, it also acknowledges that certain States exercise consular jurisdiction with the "consent and acquiescence" of Morocco. Nevertheless, for the Court that fact was not enough to conclude that the United States was entitled to consular jurisdiction based on "custom and use." It is worth underscoring that the judgment does not equate "consent and acquiescence", even in relation to (*ainda que em relação a)* those other States, with a private custom.[10]

In this case, unlike the general position adopted in the Asylum Case, the Court appears to espouse a very precise distinction between norms derived from conventions and customary norms, in order to preclude concomitant application of both sources of law. That is based on a dichotomy between those States possessing consular jurisdiction derived from treaties and those that have it based on Morocco's "consent and acquiescence." What is not ultimately clear is how "consent and acquiescence" can be separate from the treaty, when the latter is evidently a form of express consent.

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6 Ibid., p. 295.
7 Ibid., p. 321.
8 Ibid., p. 338.
9 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.

10 Ibid., pp. 199-200.

The second argument adduced is based on the burden of proof. After transcribing the Asylum case, the Court finds "insufficient proof" to be able to conclude that the exercise of consular jurisdiction was based on custom and usage. There is therefore no detailed argument to warrant drawing that conclusion.[11]

With respect to the second time frame, beginning with the 1937 Convention between Great Britain and France,[12] the Court analyzed diplomatic correspondence between France and the United States with a view to assessing whether it would be possible to find elements pointing to the existence of custom and usage. Its conclusion, however, is that the purpose underlying the exchange of correspondence suggests that the two States were seeking a solution to the matter, with neither party intending to relinquish its juridical stance. Even during that negotiation, for instance, the United States continued to exercise consular jurisdiction. The Court interpreted the maintenance of that state of affairs as the product of a temporary situation acquiesced to by the Moroccan authorities.[13]

The judgment failed to distinguish clearly between "custom and usage" and "acquiescence." Nevertheless, the latter concept refers to the explanation, with regard to the first time frame, that that Court gave of the behavior of States exercising consular jurisdiction without it being based on treaties. Yet it is also not clear whether, for the Court, the aforementioned acquiescence would arise with or without the existence of a treaty permitting the exercise of consular jurisdiction.

Thus, in the present case, the ICJ found no customary rule binding upon the parties.

The dissenting opinion of Judges Hackworth, Badawi, Carneiro, and Rau addressed the matter of "custom and usage" and disagreed with the position taken by the majority.

The basic methodological premise for those dissenting is that treaty, on the one hand, and custom and usage (which they call "usage and sufferance"), on the other, can coexist. That appears to be the most appropriate follow-up approach to the Asylum Case, which, as we saw, establishes a tight connection between treaty and custom. Unlike the majority position, the dissenting opinion points to several factors purportedly demonstrating prolonged usage vis-à-vis the United States' exercise of consular jurisdiction.[14]

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The judgment in the Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: ICJ Reports 1960, p. 6) was the first time that the ICJ ascertained the existence of a private customary international law rule. In this case, the rule in question applied to India and Portugal.

To arrive at that conclusion, the Court established an initial framework for ascertaining the existence of a practice authorizing right of passage for Portugal over

11 Ibid., p. 200.

12 The relevance of that treaty to the case has to do with application of the most-favored-nation principle. By virtue of that treaty, the last State to enjoy privileges in Morocco --Great Britain --ceased to have them. That would directly impact American rights, as application of that principle could no longer be invoked.

13 INTERNATIONAL COURT OF JUSTICE. *Case concerning rights of nationals of the United States of America in Morocco*, *op. cit.*, pp. 200-201.

14 Ibid., pp. 219-221.

Indian territory. That framework began with the start of British colonialism and subsisted even after India's independence.[15]

India's defense contested the existence of a custom between only two States. The Court refutes that argument in a passage that is now a classic, indeed mandatory, reference in the literature on private 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"[16]

The ICJ found, based on the material provided by the parties, that there was sufficient practice to show that, as far as private persons, civil servants, and property in general are concerned, there was a "constant and uniform" practice to sustain the Portuguese State's right of passage. The Court further pointed out that said practice had gone on for one and a quarter centuries without being affected by the change of regime after India had become independent.[17]

It is important to observe that the local custom – right of passage – was ascertained due to the fact that it made possible "the exercise of its (Portugal's) sovereignty over the enclaves, and subject to India's regulation and oversight." The custom thus arose out of a right that Portugal possessed because its sovereignty had been recognized.

Be that as it may, the analysis performed by the Court of the practice of the two States is generic and does not go into the various acts that appear to have constituted it.

The judgment found that there was no Portuguese right, based on local custom, to passage by the Armed Forces, armed police, weapons, or ammunition. Based on those hypotheses, the ICJ considered that passage was regulated on the basis of reciprocity, and not as a right.[18] That is because, under such hypotheses, Portugal would always need to ask for authorization to exercise passage through Indian territory. Taking the above into account, the Court found that "this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right".[19]

On this point, the judgment's distinction between rights and reciprocity does not appear to be very clear, particularly since rights are usually based on reciprocity. Reciprocity can be found to be part and parcel of any rule, be it treaty-based or customary. Nor is it clear why the Court finds that, even though the British always authorized passage, that was based on reciprocity, and not acquiescence. In the same vein, a possible contradiction in the argument emerges if the case involving the rights of United States nationals in Morocco is taken as a benchmark. As we saw earlier, in that case the ICJ attached great importance to the principles of acquiescence, to the detriment of a possible private custom.

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15 INTERNATIONAL COURT OF JUSTICE. *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Reports 1960, p. 37.
16 Idem, p. 37.
17 Ibid., p. 40.
18 Ibid., pp. 40-41.
19 Ibid., p. 40.

Even if the existence of a local custom is denied, under such hypotheses, two important elements in the judgment stand out: (1) The Court provides a much more detailed analysis of the practice than under the first hypothesis. It cites a number of examples of the practice that, in its view, point to reciprocity, and not a right, with a related obligation to transit (*com uma correlata obrigação de passagem*). (2) The Court's handling of the relationship between treaty and custom is much more dynamic than in the case involving the rights of United States nationals in Morocco. Basically, the Court attempts to discern how established treaties can give rise to a practice between States. Thus, even if not enough practice was found that would amount to a custom in connection with such hypotheses, the methodology used by the Court to address the relations between treaty and custom appears to have changed significantly, inasmuch as treaties are regarded as factors for confirming (*aferir*) a practice, and for combining it with practices subsequent to such treaties. In reality, the methodology may not have changed but, rather, reverted 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 private 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."[20]

Regarding that passage, one remaining doubt is whether the prevalence of that private 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 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 private custom prevails over the general on logical grounds.

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

Judge V.K. Wellington Koo's opinion dissents from the majority view in the sense 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.[21]

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".[22]

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20 Ibid., p. 44.
21 Ibid., p. 60.
22 Ibid., p. 54.

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.[23]

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.[24] 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.[25]

For Judge Percy Spender, the treaty came in as part of the process of forging a local customary rule.[26]

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".[27]

Worth noting is Judge Fernandes' treatment of the matter of the prevalence of *jus cogens* over special rules.[28] However, the argument is not developed sufficiently with regard to the contrasting of peremptory (compelling) norms with private custom.

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In the case of 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".[29]

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 a victim of an armed attack.[30]

However, the reference to regional customary law is made without going into regional practice. Reference is made to treaties that address, in the Americas, the issue of legitimate collective defense but nothing is said about the process of interaction between conventional norms and regional customary rules and regulations[31], as is done in lengthy sections of the judgment regarding the relation between treaties and general custom.

The strict criterion for identifying private 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 *ex officio*, 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.

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23 Ibid., pp. 82-83.
24 Ibid., p. 90.
25 Ibid., p. 95.
26 Ibid., p. 106.
27 Ibid., p. 134.
28 Ibid., p. 135.
29 INTERNATIONAL COURT OF JUSTICE. *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).* Merits, Judgment. ICJ Reports 1986, p. 14.
30 Idem, p. 105.
31 Ibid., pp. 104-105.

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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 private 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 private 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 only 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 of general 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".[32]

The Court expressly pointed out that the practice of African States did not constitute the custom but was more of a statement of it, that is to say, 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.[33]

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 of general 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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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 private 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 private custom.

Nevertheless, prior to recognizing Costa Rica's application, the Court expressly abstained from pronouncing on the existence of rules governing navigation of

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32 INTERNATIONAL COURT OF JUSTICE. *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 565.
33 Idem, p. 566.

international rivers based on general or regional customary international law.[34] 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 the sense of recognizing an established practice of fishing for a livelihood. The difference between them had to do with whether or not 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."

That stance, if adopted in all its extremes, signifies a reversal of the previous position regarding proof of the private custom set forth, as we saw above, in the Asylum Case. On that occasion, the Court determined that the State alleging the existence of a regional custom must prove that the other party is bound by that same norm. In the case regarding navigational and related rights, the Court appears to have presumed the existence of *opinio juris*, because of the practice 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 ICG really does appear to have changed its position on proving a private customary international right. 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 private custom with no mention of any subsequent development in case law.[35]

Among the dissenting votes, the only judge 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 relevant point made in the judge's dissenting opinion is that, for him, the practice in question had been carried on by the

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

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

local riverside community in Costa Rica and not by the Costa Rican State, which would be necessary for the forging of the custom.[36]

For his part, the 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.[37]

36 Ibid., pp. 279-280.
37 Ibid., p. 291.