98th REGULAR SESSION
April 5 to 9, 2021
Virtual session

OEA/Ser. Q
CJI/doc. 627/21
February 17, 2020
Original: Portuguese

PARTICULAR CUSTOMARY INTERNATIONAL LAW IN THE CONTEXT OF THE AMERICAS: SECOND REPORT

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In the 95th regular session, held in Rio de Janeiro on July 31, 2019, the Inter-American Juridical Committee included in its work agenda the matter of Particular Customary International Law in the context of the Americas. On this occasion, I had the honor of being chosen as the rapporteur on this matter.

In turn, in the 96th regular session, held in Rio de Janeiro from March 2 to 6, 2020, I presented my first report.

On this occasion, I sought to begin with an approach to the subject from the perspective of international jurisprudence.

A significant part of the doctrine on particular international law takes as its primary point of reference a series of cases decided by the International Court of Justice (hereinafter ICJ, or the Court) over the course of more than 50 years bearing –more or less directly– on the subject.

This approach, which could be classified as overwhelmingly inductive, based on cases decided by the ICJ, offers clear advantages, although it is not without its drawbacks.

Its greatest advantage lies in linking the study of particular customary international law with relevant judicial practice –thus avoiding arguments of a theoretical nature with little practical application.

On the other hand, the great risk of such an approach is in presupposing a certain coherence between the decisions of the ICJ over a long period of time and thereby drawing abstract conclusions from the characteristics of concrete cases.

In fact, as we will see below, the criteria used by the ICJ in the identification of particular customary rules are not uniform, to say nothing of how diverse lines of argumentation contained in the decisions lead to inherent contradictions or present clear omissions.

The starting point of the analysis of judicial practice on the subject aims precisely at a deeper understanding of the cases decided by the ICJ, so as to unveil its potential as well as its limits in being applied to particular customary international law in the context of the Americas.

In said report, I began my analysis with the cases in which the ICJ, in its published opinions, had ruled, in some way, concerning particular customary international law. I also took into account certain positions taken by individual judges, delivered in the cases in question, in order to better understand the reasoning behind these decisions.

This report is a consolidated version of the previous one, with corrections, and additional analysis of the cases in which the reference to particular customary international law relies solely on the opinions of individual judges of the ICJ, and in a few cases, those decided by other tribunals dealing with the subject. The report also provides an overall assessment of the position of international jurisprudence relating to particular customary international law.

The analysis of individual opinions does not itself hold the power to constitute international jurisprudence. Nevertheless, such vantage points have served as an important interpretative beacon not only in other cases decided by international tribunals, but also for understanding the size and scope of the rulings themselves with respect to which the individual opinions were issued.

As to the analysis of decisions by other international tribunals, it was noted that only the Inter-American Court of Human Rights has ruled specifically on particular custom, and even then only with regard to its own scope of jurisdiction.

In the report that follows, I seek to systematically outline the main body of doctrine on the subject.

1. On the rulings of the ICJ that deal explicitly with particular custom (and on the individual opinions related to it)

1.1 Asylum Case

The *Asylum Case* (Colombian-Peruvian asylum case, Judgment of November 20, 1950: ICJ Reports 1950, p. 266) marked the first time that the ICJ had to rule on the possibility of the existence of particular customary international legal norms. The case is highly important because, in a very meaningful way, it has driven the doctrinal debate and the Court's subsequent jurisprudence itself.

The case dealt with a series of questions arising from the granting of diplomatic asylum, by the Colombian Government, to Víctor Raúl Haya de la Torre, a Peruvian citizen.

The subject of particular customary international law was dealt with by addressing the Colombian argument that, by invoking inter-American international law on the subject of diplomatic asylum, it was based on the existence of a regional or local custom proper to the states of Latin America. Specifically, the Court was asked to decide on the rule by which the definitive assessment of the offense giving rise to asylum rests solely with the state granting diplomatic asylum.

In the Court's view, the party alleging the existence of such a custom must prove that it is binding on the other party. It is worth quoting the relevant passage, which is frequently cited in 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."[1]

It bears noting that the Court invoked Article 38 of the Statute –which says nothing about particular custom– in order to argue that such a rule derives from a constant and uniform use relating to the exercise of a right belonging to the state granting the asylum, which is a duty of a territorial state.

Both lines of reasoning used in the arguments presented by Colombia were dismissed. On the first of these, even though several treaties were cited as proof of the existence of such a practice, the Court considered these either non-germane or to have been ratified by too few Latin American states. On the second, even though Colombia had presented several cases of granting diplomatic asylum, these displayed, according to the ICJ, "uncertainty and contradiction," besides being influenced by "political convenience," and that such practice did not demonstrate the existence of a constant and uniform use so as to lead to the creation of a customary rule.[2]

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

[2] *Idem*, p. 277.

Furthermore, in the Court's understanding of the matter, even if Colombia had proven the existence of a customary rule regarding assessment, it could not be invoked against Peru, which had repudiated it. This would be confirmed by the fact that Peru had not ratified the Montevideo Conventions of 1933 and 1939, which were the first instruments to include rules relating to the assessment of the offense as relates to diplomatic asylum. Official communications of the Ministry of Foreign Relations of Peru that were put forward by Colombia as proof of the acceptance of the particular customary rule were dismissed, without much reason given for doing so.[3]

In one passage from the ruling, the ICJ even declared nonintervention to be a Latin American tradition, despite failing to specify whether such tradition itself constituted a customary rule.[4]

Several questions arise from the case. Four of them merit special attention.

The line of argumentation regarding the identification of custom is very much based on the idea that treaties are component parts of state practice. Peru's position opposing the matter is basically derived from it not having chosen to ratify, in its capacity as a state, a treaty on the subject of asylum. Such an argument has consequences for identifying the role of silence in the formation of custom, which would be scarcely be taken into account or even outright disregarded in the case of a particular custom –since a lack of ratification does not equal the manifestation of an express will.

Secondly, it is not clear if the requirement for Colombia to have proven that a particular custom was binding on Peru is a procedural or a substantive matter. In this context, the question remains: does regional international custom only apply when one party to a case has produced evidence of its being binding on the other party or, in its official capacity, can the Court itself recognize it?

It seems reasonable to believe that the requirement placed on Colombia would be treated as a procedural matter, because the Court itself engaged in the analysis of elements of practice –however inadequately– and concluded that there did not exist a particular customary norm regulating the subject in question. On the other hand, one could argue that proving a custom constitutes a condition for its own identification, which would make the question appear to be a substantive matter.

The ICJ was quite right in giving great weight to the fact that Peru had not ratified the first treaty that reserved the right of assessment to the asylum-granting state. Such reference to the "first" treaty could 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 we know, the objection to have occurred at the time when the customary rule was being formed.

The dissenting opinion of Judge Álvarez is of great interest given the fact that, before he even joined the Court, he had written extensively on the role of regionalism in international law. Álvarez' positions relating to particular custom, however, seem unclear.

Before getting into the question of diplomatic asylum as a part of particular customary law, Álvarez reviews some of his ideas on inter-American international law. In his view, a custom need not be accepted by all states in the New World in order for it to be considered part of Inter-American International Law. He also concedes the possibility of subdivisions within Inter-American International Law, such as a Latin American International Law. And concerning the relationship between general international law and inter-American international law, he maintains that it is not one of subordination, but rather of correlation.[5]

Even from a position favorable towards matters of circumstance in international law, Álvarez concludes that there does not exist an inter-American customary international law of asylum for the reason that there would be no uniformity in the practice of the respective governments concerning the matter. He admits, however, that there are certain practices and methods in the application of asylum that

[3] *Ibidem*, p. 277–278.
[4] *Ibidem*, p. 285.
[5] *Ibidem*, p. 294.

are followed by Latin American states. Nonetheless, it is not explained if such practices and methods would be given some degree of legal force and, accordingly, if they would be binding in a Latin American context.[6]

Other judges, such as Judge Read, were explicit in stating that, even if Colombia had not proven the existence of a unilateral right of assessment and a right of safe passage based on customary law, it would be beyond any doubt that diplomatic asylum qualifies as international custom. This statement helps us to understand that the Court is able to ascertain the existence of particular custom without one of the parties needing to prove that the other is bound by it.[7]

Judge Azevedo, besides dissenting from the Court's opinion with regard to the existence of a particular custom concerning diplomatic asylum, questioned whether it was in fact the case that a lack of ratification gives rise to the power to exclude a state from the group within which the custom is respected.[8]

1.2 Case concerning the rights of nationals of the United States of America in Morocco

The *Case concerning the rights of nationals of the United States of America in Morocco* (Judgment of August 27, 1952: ICJ Reports 1952) involves the question of continuity of certain privileges accorded to American citizens in Moroccan territory.

One of the arguments presented by the United States was formulated so as to maintain that the exercise of its consular jurisdiction and other enumerated rights should be founded on "custom and usage." It bears noting that at no time is the phrase "bilateral custom" used. The argument concerned two distinct time periods: that from 1787 to 1937, and the latter, from 1937 to the time that the action was brought in court.[9]

The Court reached an understanding that the American argument did not add up, with respect to either time period, for different reasons.

As to the first period, the Court laid out two sets of guidelines. Firstly, American consular jurisdiction was based not on custom or usage, but on rights emanating from a treaty. To the point, the Court's reasoning did not seem sufficiently strong. Although it held that the majority of states had rights arising from treaties, it also recognized that certain states exercised consular jurisdiction with the "consent and acquiescence" of Morocco. As far as the Court was concerned, however, this fact would not be sufficient to conclude that the United States had a right to consular jurisdiction based on "custom and usage." It is worth noting that the ruling does not draw an equivalence between "consent and acquiescence" and particular custom, even with respect to these other states.[10]

In this case, and as different from its general stance taken in the *Asylum Case*, the Court seems here to draw a very strict distinction between conventional norms and customary norms, in order to prevent the application of both sources at once. This is done based on a dichotomy between those states which maintained consular jurisdiction on the basis of treaties and those which held it on the basis of the "consent and acquiescence" of Morocco. What is not clear is how "consent and acquiescence" can be separated from a treaty, since it is a clear form of express consent.

The second set of guidelines laid out had to do with the burden of proof. After having gone over the *Asylum Case*, the Court understood that there was not "sufficient proof" to conclude that the exercise

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[6] *Ibidem*, p. 295.
[7] *Ibidem*, p. 321.
[8] *Ibidem*, p. 338.
[9] INTERNATIONAL COURT OF JUSTICE. *Case concerning the rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: ICJ Reports 1952, p. 199.
[10] *Idem*, p. 199–200.

of consular jurisdiction was reckoned from custom and usage. There was not, however, a step-by-step explanation provided as to how to reach such a conclusion.[11]

In relation to the latter period, which takes as its starting point the Convention between France and the United Kingdom of 1937,[12] the Court gave an analysis of diplomatic correspondence exchanged between France and the United States so as to evaluate whether it would be possible to discover material in it from which to derive the existence of custom and usage. Its conclusion, however, is that the purpose of this exchange of correspondence indicates that both states sought a resolution of the question, with neither party prepared to give up its juridical positions. It so happens that, even during the negotiation itself, the United States continued exercising consular jurisdiction. The Court explained the maintenance of this state of affairs by virtue of a provisional situation acquiesced to by the Moroccan authorities.[13]

The ruling does not make clear the difference between "custom and usage" and "acquiescence." The latter concept, however, begs for an explanation, relative to the first time period, which the Court gave to the behavior of the states that exercised consular jurisdiction without a basis in treaty. However, it is also unclear if, in the eyes of the Court, said acquiescence would have taken place in the presence or in the absence of a treaty allowing the exercise of consular jurisdiction.

In this case, therefore, the ICJ did not identify any customary rule binding the parties.

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

The basic methodological premise of the dissent is that treaty law, on the one hand, and custom and usage (which they call "usage and sufferance"), on the other, can exist simultaneously. This seems to be the most appropriate line of reasoning based on the *Asylum Case* which, as we have already seen, established a close relationship between treaty and custom. Unlike that of the majority, the dissenting opinion brings several factors to bear in demonstrating a relatively prolonged usage compared with the exercise, by the United States, of its consular jurisdiction.[14]

1.3 Case concerning Right of Passage over Indian Territory

The judgment on the merits in the *Case concerning the Right of Passage over Indian Territory*, of 1960 ([Merits], Judgment of 12 April 1960: ICJ Reports 1960, p. 6) marked the ICJ's first chance to show the existence of a norm in particular customary international law. In this case, the norm in question applied to India and Portugal.

To arrive at its conclusion, the Court established an initial guideline for its finding of the existence of a practice which conferred upon Portugal a right of passage over Indian territory. This guideline was traced back to the beginnings of British colonization and persisted after the onset of independence of the Indian state.[15]

India's defense objected to the possibility of the existence of a custom between just two states. The Court refuted this argument in a passage which has become required reading on particular customary international law:

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[11] *Ibidem*, p. 200.

[12] The relevance of this treaty to the case has to do with the application of the principle of the most favored nation. By virtue of this treaty, the last state that enjoyed privileges in Morocco –the United Kingdom– ceased to do so. This would have an impact precisely on the American rights, which principle they could no longer argue for the application of.

[13] INTERNATIONAL COURT OF JUSTICE. *Case concerning the rights of nationals of the United States of America in Morocco*, *op. cit.*, p. 200–201.

[14] *Idem*, p. 219–221.

[15] INTERNATIONAL COURT OF JUSTICE. *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Reports 1960, p. 37.

> 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 noted, based on the arguments presented by the parties, that there had been sufficient practice to demonstrate that, regarding private persons, public civil servants, and goods in general, there had been a "constant and uniform" practice such that it allowed for the right of passage by the Portuguese state. The Court further pontificated that such practice had persisted for a period of more than a century and a quarter without interruption following the change of regime, after India became independent.[17]

It is important to note that the ascertainment of the local customary law –the right of passage– arose out of the fact that it made possible "the exercise of its [Portugal's] sovereignty over the enclaves, and subject to the regulation and control of India." The customary norm, therefore, existed in consequence of a right which Portugal held by way of having been recognized as sovereign.

Be that as it may, the analysis the Court makes of the practice of both states is generic, without getting into specifics about the many acts that would have constituted it.

The ruling found that, based on local custom, there was no Portuguese right of passage for armed forces, armed police, or arms and munitions. With regard to these scenarios, the ICJ found passage to be regulated on the basis of reciprocity, and not as a right.[18] This is because Portugal would always need to request authorization, under such scenarios, in order to be able to exercise its passage over Indian territory. Taking the findings of the case into account, the Court deemed 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, it does not seem quite clear what distinction the ruling makes between rights and reciprocity, given that normally rights are based on reciprocity. Reciprocity can be substantiated by any norm, be it conventional or customary. It is also unclear because the Court, upon ascertaining that even the British always gave authorization for passage, this would be based on reciprocity, and not on acquiescence. According to this line of reasoning, one possible contradiction in the argument emerges if we take the *Case concerning the rights of nationals of the United States of America in Morocco* as our reference. As has already been shown, the ICJ admitted, in that case, the great importance of the principle of acquiescence in undermining a possible particular custom.

Even if one denies the existence of a local custom, under such assumptions, the ruling offers two important takeaways: (1) the Court offers a much more detailed analysis of the practice than in the first scenario. An array of examples of the practice are brought up that would constitute, in their view, reciprocity, and not a right –with an accompanying obligation to allow passage. (2) The manner in which the Court addresses the relationship between treaty and custom is much more dynamic than in the *Case concerning the rights of nationals of the Untied States of America in Morocco*. Basically, the Court attempts to discover how established treaties can give rise to the practice between states. Thus, even when there has not been sufficient practice found to substantiate a custom relating to such scenarios, the methodological procedure for dealing with the relationships between treaty and custom seem to have changed significantly, wherefore treaties are considered instruments for gauging practice, thereby joining

[16] *Idem*, p. 37.
[17] *Ibidem*, p. 40.
[18] *Ibidem*, p. 40–41.
[19] *Ibidem*, p. 40.

themselves to subsequent practice with respect to said treaties. In fact, this methodology might not have changed, and might actually have returned to the precedent established in the *Asylum Case*.

Upon analyzing Portugal's argument that the right of passage would also be based on general international law, the Court made an important finding in terms of determining that particular practice prevails over general rules. It is worth citing the text at length:

> 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]

The question that remains, given the text under consideration, is whether it is an established principle that particular practice always takes precedence over general rules, or merely on a case-by-case basis, given that relations between Portugal and India, in the question under dispute, had been so long established. The latter scenario is more likely, especially because the concrete case is expressly referred to. This does not rule out the possibility, however, of the Court having arrived at the conclusion that that which is specific would prevail over that which is general by means of logical reasoning.

The individual opinions on the case provide a wealth of information pertaining to the question of a particular custom.

The opinion of Judge V.K. Wellington Koo diverges from that of the majority in that, in his view, as well as with the scenarios involving armed forces, armed police, and arms and munitions, there did exist a Portuguese right. His opinion is quite substantive in its analysis of the elements that constitute such practice, citing several examples. His methodology in terms of the relationship between custom and treaty, however, seems to be the same as that of the majority: that treaties can be considered an element of practice and a later practice also refers back to them. Treaties, in his view, can formalize a customary practice.[21]

The way in which Judge Koo deals with the characterization of the right of passage introduces reciprocity into practice itself. For him, "A practice had been established for such passage on a basis of reciprocity."[22]

Judge Armand-Ugon tied the principle of effectiveness to the constitution of the local customary norm itself. For him, the effective practice of passage would have the power to constitute the right to such passage itself.[23]

Judge Moreno Quintana seems to conceive of a more airtight relationship between treaty and custom. For him, Portugal's request, which at the same time would base the right of passage on a treaty, on custom, on principles, and on doctrine, is inconsistent.[24] On this point, he seems to distance himself from the methodology adopted by the majority, including a majority of the dissenters. Moreno Quintana arrived at the conclusion that there was insufficient practice to be able to speak of the existence of a local custom.[25]

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[20] *Ibidem*, p. 44.
[21] *Ibidem*, p. 60.
[22] *Ibidem*, p. 54.
[23] *Ibidem*, p. 82–83.
[24] *Ibidem*, p. 90.
[25] *Ibidem*, p. 95.

For Judge Percy Spender, the treaty entered into the process of formation of the local customary norm.[26]

Judge Fernandes did not concur in the contraposition between law and reciprocity, because "Most of the rights recognized between nations rest on a basis of reciprocity."[27]

It is important to note that Fernandes deals with the question of whether *jus cogens* takes precedence over special rules.[28] However, his argument is not sufficiently developed in terms of contraposition between cogent norms and particular custom.

1.4 Case concerning Military and Paramilitary Activities in and against Nicaragua

In the *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*. Merits, Judgment. ICJ Reports 1986, p. 14), the Court, in a quite cursory manner, broaches the subject of regional custom. In this case, such custom would apply all throughout the Americas, in the following sense: "customary international law [...] particular to the inter-American legal system."[29]

By referring to this wording, the Court intended to maintain that in particular customary international law within the inter-American system there is no rule which permits the exercise of collective self-defense absent the solicitation of the state which considers itself to be the victim of an armed attack.[30]

The reference to regional customary law, however, was made without getting into regional practice at all. They point to treaties that deal, in the Americas, with the question of collective self-defense, but they barely scratch the surface of the process of interaction between the body of conventional norms and the body of regional customary norms[31] –as is done, in lengthy passages within the text of the ruling, on the relationship between treaties and general custom.

One can see that the rigorous criteria for identifying particular customary norms –as in the *Asylum Case*– are ignored here. Likewise, one may note that the Court did not proceed with the identification of the regional customary norm on the basis of the proof that one of the parties to the lawsuit had raised in the case. The ICJ seems to have proceeded with said identification in a perfunctory manner, which reinforces the reading that the burden of proof in the identification of custom seems to be of a more procedural than substantive nature, as has already been pointed out in the commentary on the *Asylum Case*.

1.5 Case concerning the Frontier Dispute

In 1986, the Panel of Judges assembled to hear the *Case concerning the Frontier Dispute*, involving Burkina Faso and the Republic of Mali (Frontier Dispute, Judgment, ICJ Reports 1986, p. 554) rendered its judgment, which also holds relevance for the identification of particular customary norms.

The importance of the judgment resides not in the fact of the Panel's having rendered a judgment on the basis of a particular customary norm as such, but rather in the recognition that such norms exist in international law.

In order to establish the boundaries to be adjudicated by the interested states party, the Court Panel made use of the principle of *uti possidetis*. It maintained that the principle was customary in nature and that it applied solely within Latin America, at the time of its emergence as a set of independent states.

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[26] *Ibidem*, p. 106.
[27] *Ibidem*, p. 134.
[28] *Ibidem*, p. 135.
[29] INTERNATIONAL COURT OF JUSTICE. *Military 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] *Ibidem*, p. 104–105.

It would have, however, gone through a process of generalization, such that the African practice with respect to the principle as such meant that the practice was related to a customary norm of a general nature. To wit:

> 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 was explicit insofar as it stated that the practice of African states was not constitutive, notwithstanding it being declaratory of custom; that is, it did not occur in such a way as to create or extend a principle extant in Latin America on the part of Africa: that would be the recognition of a customary norm of a general, pre-existing nature.[33]

The obscure point of the judgement, in relation to the latter aspect, resides in the fact of there not having been shown sufficient practice so as to corroborate said process of generalization. It is not known, for example, in a manner that can be reasoned, when the general norm would have arisen. One may suppose that the general customary norm would have crystalized following the process of decolonization of the Latin American states, albeit necessarily before the decolonization of the African states. Otherwise, the practice shown would be restricted to Latin American and African states. Even if the customary norm might have taken shape based on the practice of interested states, it would be unreasonable to suppose that the practice of states in various other parts of the world –including in states that had been under the yoke of great colonial empires– must be disregarded.

1.6 Dispute Regarding Navigational and Related Rights

In the *Dispute Regarding Navigational and Related Rights*, which pitted Costa Rica against Nicaragua (Costa Rica v. Nicaragua, Judgment, ICJ Reports 2009, p. 213), the Court recognized one of the petitions of the first state solely on the basis of a particular (in this case, bilateral) customary norm. The case is also of singular importance because the ICJ seems, clearly, to have bent the rules concerning the criteria required for proof of a particular custom.

Prior to recognizing the Costa Rican petition, however, the Court expressly declined to issue a ruling on the question of the existence of an applicable regime concerning the navigation of international rivers based on general international or regional customary law.[34] As we have seen, there exist various doctrinal understandings in the sense that, at least in South America, a regional customary norm concerning freedom of navigation upon rivers should exist.

In terms of what bears on the Costa Rican petition for recognition of a bilateral custom concerning subsistence fishing along the banks of the San Juan River, this was given a warm welcome. The ICJ understood that both parties had been in agreement insofar as they recognized the existence of an established practice of subsistence fishing. Where they differed had to do with determining whether or not this practice was binding on them. In a passage that provides more or less a synthesis of this, the Court defined the existence of a customary norm applicable to Costa Rica and Nicaragua in the following terms:

> 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

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[32] INTERNATIONAL COURT OF JUSTICE. *Frontier Dispute*, Judgment, ICJ Reports 1986, p. 565.
[33] *Idem*, p. 566.
[34] INTERNATIONAL COURT OF JUSTICE. *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, p. 233.

> 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.[35]

Such a position, when taken to its logical extreme, means a reversal of the previous position on proof of established particular custom, as we have already seen, in the *Asylum Case*. On that occasion, the Court decided that the state alleging the existence of a regional custom must prove that the other party is bound by that custom. In the *Dispute Regarding Navigational and Related Rights*, the Court seems to have presumed the existence of the *opinio juris* by virtue of the practice not being documented in any formal manner in any official document. This caused the burden of proof to be placed back on Nicaragua, which did not deny the existence of a right having arisen from the practice of warranting subsistence fishing.

Even as it relates to a very limited practice, the ICJ really seems to have altered its understanding on the proof of particular international custom. It is important to note that this change went unnoticed by the International Law Commission which, in its concluding commentaries on the identification of international customary law, cites the *Asylum Case* where it deals with proof of particular custom without reference to any later jurisprudential development.[36]

Among the dissenting voices, the only judge who did notice the change of position in relation to the *Asylum Case* was Judge Sepúlveda-Amor.

In his perspective, Costa Rica did not prove that the customary right to subsistence fishing had become binding on Nicaragua, in accordance with what had been established in the *Asylum Case*. For him, furthermore, Costa Rica's invoking of the customary norm did not have time on its side, which would be necessary to the formation of custom, insofar as only in the application submitted to the Court, in 2006, had it included the allegation of the existence of a customary norm; prior to that, the subsistence fishing would not have been articulated in the form of custom. Another relevant point in the separate opinion of the judge is that, for Judge Sepúlveda-Amor, the practice in question had been carried out by the local riparian community of Costa Rica and not by the Costa Rican state –which would be necessary to the formation of custom.[37]

The *ad hoc* Judge Guillaume, although he did not show himself to be in opposition with respect the customary norm on subsistence fishing, did make his view known that there did not exist in Latin America a right to freedom of navigation based on custom.[38]

2. On the Individual Opinions of ICJ Judges that deal explicitly with particular custom

2.1 North Sea Continental Shelf Cases

In the *North Sea Continental Shelf Cases* (Judgment, ICJ Reports 1969), which involved, by special agreement, the Federal Republic of Germany, Denmark, and the Netherlands, there was no indication from the ICJ, by way of its ruling on the merits, regarding regional custom. Nevertheless, the separate opinion of Judge Fouad Ammoun, which concurred with the majority ruling but adopted a different line of reasoning, did broach the subject.

The case dealt with the delimitation of adjacent continental shelves in the North Sea region and, specifically, the possibility of applying the equidistance method.

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[35] *Idem,* p. 265-266.
[36] 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
[37] *Idem*, p. 279–280.
[38] *Ibidem*, p. 291.

At the time of the writing of his separate opinion, Judge Ammoun inquired as to the possible existence of a peculiar regional custom in the North Sea bearing on delimitation and continental shelves.

For him, there is a difference between general and regional custom. In the first case, it was not necessary to have the consent of all states, but rather, at least that of those which, being aware of the general practice and finding themselves in a position to oppose it, did not do so. The manner in which regional customary international law applied would differ when taking into account the small number of states to which the rule would apply. In the absence of an express or tacit consent, regional custom could not be imposed on those states that rejected it. He cited, then, in order to support his position, a passage from the ruling in the *Asylum Case* which states that the party that bases its claim on regional or local custom must prove that such custom is binding on the parties.[39]

Dealing with the question within the perspective of a concrete case, Judge Ammoun maintained that the Federal Republic of Germany could not be bound by a hypothetical regional customary rule that it had rejected. In this sense, he listed acts by the government in question which expressly opposed any rule of the sort.[40]

At least three subjects arise from this line of thinking.

Firstly, the manner in which the Judge engages, in a general manner, the very idea of a customary norm (quite controversially, as we know) takes consent as its point of reference in order to explain a custom.

Secondly, and even in relation to the role of consent, Judge Ammoun admits the possibility of a particular regional custom being formed on the basis of tacit consent. Even if he does not explain which situations would constitute this type of consent, one cannot rule out the possibility that he was referring to the silence of a certain group of states. Be that as it may, he could have been reversing the order of the methodology applied by the Court introduced in the *Asylum Case*: that a particular custom should not be assumed; for this reason, it must always be proven. In the final analysis, his interpretation of the *Asylum Case* –the text of which he cites in order to support his position– may not be appropriate to the terms of the actual ruling.

It is furthermore important to stress the manner in which he dealt with the question of the burden of proof. The examples that the Federal Republic of Germany cited were not for establishing proof of the existence of regional custom, but rather for establishing proof of its inexistence. The inexistence of a regional custom as such was not what was proven, but merely its lack of applicability to the Federal Republic of Germany.

2.2 Case of Fisheries Jurisdiction (United Kingdom v. Iceland)

In the *Case of Fisheries Jurisdiction*, which involved the United Kingdom and Iceland (United Kingdom v. Iceland, Merits, Judgment, ICJ Reports 1974, p. 3), neither did the ruling on the merits by the International Court of Justice deal specifically with the question of particular custom. The separate opinion by Judge De Castro, however, did, albeit in a manner ancillary and instrumental to the analysis of the identification of an international customary norm of a general nature.

The case involved the question of how to know whether the expansion, on the part of Iceland, of its fisheries jurisdiction, was contrary to international law.

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

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[39] Separate Opinion of Judge Fouad Ammoun. *North Sea Continental Shelf (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, p. 131–132.
[40] *Idem*, p. 132.

His separate opinion dealt with various aspects of the ruling. His reference to particular customary international law occurs exactly when the Judge seeks to analyze the question of proof in international custom.

Relying on English law as his point of reference, Judge De Castro established the existence of two kinds of custom: "general customs" and "particular customs." Customary norms of the latter type, albeit with exceptions, "being applicable to the inhabitants of certain regions," must be proven. As for general customary norms –which form the basis of the common law– the same need not apply.[41]

Based on this analogy, De Castro maintained that customary international law –which is by nature general and based on the general belief in its validity (*opinio juris*)– need not be proven. The Court applied it *ex officio*. Only those "regional customs or practices, as well as special customs, need be proven."[42]

At least three questions are relevant when dealing with Judge De Castro's pronouncement.

Firstly, he makes clear –as was not done in the *Asylum Case*– why particular custom needs to be proven. This occurs by virtue of a clear analogy relating to the way in which custom operates in the heart of domestic law. Thus, by virtue of the manner in which certain domestic laws have developed –the example he provides being English law– he offers a snapshot of how validity of law works with respect to both space ("certain regions") as well as to persons ("inhabitants"). The source base for this snapshot has an impact on the question of proof, since particular customs are the exception, and not the rule.

Secondly, based on the way in which the judge structures his argument, there is no natural distinction between particular custom and general custom. The fact that this form of particular custom is exceptional does not make it either any less of a custom nor a second-order custom; it merely bears on the question of "the burden of proof." It is precisely this term which gives meaning to item II of his separate opinion: that is, that particular custom has the power to alter the burden of proof, but not to turn it into something else entirely with respect to general custom.

One can still see the use of certain terms that are not adequately laid out, even if they all tie back into the question of the necessity of proof: "regional customs," "practices," and "special customs." The first term seems self-explanatory, since it refers to a matter of geography. The latter two are more obscure: in relation to the first, perhaps the judge was not even referring precisely to a customary norm; the second could point to a custom bounded by subject matter –which would make it "special"– but it is not known for certain what he meant by these terms.

It bears noting that the separate opinion still contains another reference to regional custom. By rejecting a customary rule on the establishment of fishing zones of 200 miles, Judge De Castro thereby understands this to not enjoy "uniformity or general acceptance." The lack of these factors would matter even if it were considered a customary rule "of regional extent."[43]

Even if uniformity were to be required for general custom and particular custom, general acceptance, in the latter case, has to be looked at in a contextual manner: that is, based on a sample source of a certain number of states –which is not explained in the separate opinion. Even so, the judge seems, albeit indirectly, to underscore, again in this passage, that there is no difference in nature between general and particular custom –their differences having implications solely in the procedural domain of the principle of the burden of proof. Therefore, uniformity and general acceptance apply in the case of general custom as well as for regional (particular) custom.

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[41] INTERNATIONAL COURT OF JUSTICE. *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment*, Separate Opinion of Judge De Castro, ICJ Reports 1974, p. 80.
[42] *Idem*, p. 80.
[43] *Ibidem*, p. 95.

3. On the Decisions of other international tribunals

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

In the international arena, the Inter-American Court of Human Rights has already had the opportunity to rule on the question of regional custom.

In Consultative Opinion OC-25/18, on *The Institution of Asylum and Its Recognition as a Human Right within 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 as a synthesis, on the characterization of diplomatic asylum as a regional custom.

For the Inter-American Court, despite the fact that the International Court of Justice, in the *Asylum Case*, has maintained that a regional custom can only be established when the "existence of a uniform and constant usage as the exercise of a right of the state authorizing asylum" has been proven, taking into account the broad character of consultative competence in the case, the point of reference for gauging the existence of a regional custom would be the 35 member states of the OAS. Such an interpretation was made so that the scope of its consultative opinions would not be limited to covering only a few states.[44]

The analysis on the *opinio juris* of a supposed regional custom on diplomatic asylum was made on the basis of three principle factors. Firstly, not all OAS member states are parties to the conventions on diplomatic asylum, to say nothing of the fact that the texts of said treaties are not uniform, be it in their terminology or their dispositions. Secondly, some states that took part in the consultative process observed that there would not be a uniform position even within the Latin American region to be able to conclude that diplomatic asylum is a regional custom. Besides this, the majority of states that participated in the process maintained that there does not exist a juridical obligation to grant diplomatic asylum. Thirdly, the United States of America has consistently opposed the establishment of a regional customary norm on diplomatic asylum.[45]

In this way, the Inter-American Court concluded that it did not find the *opinio juris* factor present in order for it to be able to identify a regional customary norm, even if it did recognize the practice of states conceding, in certain situations, diplomatic asylum or protection to individuals within their diplomatic legations.[46]

The case truly is relevant because, for the first time, an international tribunal was able to address the subject apart from a ruling in a contentious case –in which questions relating to the burden of proof are relevant.

Regardless of the Court's conclusion, it is important to realize that the Americas were considered as a whole for purposes of probing the existence of a regional custom. Even when the Latin American region was considered by itself, the Court took into account only the pronouncement of the states that participated in the consultative procedure in order to maintain that there did not exist a "uniform position" on the customary character of diplomatic asylum. Focusing on the whole regional group, general practice was not considered. Furthermore, even more restricted subgroups within the Latin American region were not considered, even if it is conceivable that the exercise of consultative jurisdiction, in such case, would make taking a position as to the question in relation to a very specific group of Latin American states difficult.

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[44] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Consultative Opinion OC-25/18, 30 May 2018, requested by the Republic of Ecuador. The institution of asylum and its recognition as a human right within 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.

[45] *Idem*, para. 159–161.

[46] *Ibidem*, para. 162.

There are some very unclear factors for inferring the inexistence of a regional custom on diplomatic asylum, such as the argument that there does not exist a juridical obligation for it being granted. Such an argument would seem to speak much more to a first principle of granting asylum. The identification of a customary norm –which could be verified without any obligation of granting diplomatic asylum, but rather as a state prerogative– seems to fit much more within the scope of a second-order principle.

One important additional fact about the consultative opinion: the question of the principle of the persistent objector is analyzed in light of the regional custom –a subject which was not dealt with by the International Law Commission in its study of the identification of particular custom and, in a general manner, is absent from the doctrinal analysis of the topic itself.

Based on the analysis of the behavior of the United States, the Inter-American Court seems to conclude that the principle applies to regional custom. This may reinforce the understanding that the regional customary norm does not necessitate unanimous acceptance on the part of all states, taking into consideration a specific group of them. Furthermore, such a conclusion has a significant impact on the question of the burden of proof, since it suggests that, in certain situations, it must be proven that a custom is not opposable by a certain state, and not the other way around.

4. General summary of the actions of international tribunals on the subject of particular international custom

The ICJ's first cases on particular custom have all revolved around the *Asylum Case*, which was adjudicated in 1950. Meanwhile, in recent years, decisions of the Court on the subject have undergone significant changes, culminating in the *Dispute Regarding Navigational and Related Rights*.

The restrictive view that the ICJ developed in the *Asylum Case*, especially as relates to the need for a state which alleges the existence of particular custom to prove that the opposing party is bound by it, guided various other rulings that followed. This is what happened in the *Case concerning rights of nationals of the United States in Morocco*, of 1952 –albeit in a poorly reasoned manner– and in the *Case concerning Right of Passage over Indian Territory*, of 1960 –even if the identification of the practical international factor, in relation to a point raised in the decision, had been made in a generic way. The separate opinions, in the cases in which the ruling did not speak to particular custom, reinforced this restrictive view, although they did leave something of an opening. The separate opinion of Judge Ammoun in the *North Sea Continental Shelf Cases*, of 1969, emphasized the need to prove particular custom, but maintained that its acceptance could be tacit. Then in the *Case of Fisheries Jurisdiction*, of 1974, Judge De Castro, by underscoring the need for proof of regional custom, gave a clear indication that this is a question relating to the burden of proof in a specific case, and not necessarily a characteristic of regional custom as opposed to general custom per se.

Based on the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, of 1986, the position of the International Court of Justice seems to have been gradually modified. Generic references, without the slightest analysis of evidence –either for or against– regarding the existence of a regional customary international norm began to arise. The same sort of generic consideration was seen in the *Case concerning the Frontier Dispute*, also of 1986.

Its distancing from the *Asylum Case* intensified even further in the *Dispute Regarding Navigational and Related Rights*, of 2009. In this instance, the Court concluded that there did exist a particular custom –bilateral, in this case– due to the fact that the opposing party, Nicaragua, had failed to deny its existence. That is, there had been a reversal in the burden of proof. It cannot be ruled out that this change of position may have occurred due to the subject matter in question, which involved a sensitive question regarding human rights affecting the very subsistence of riparian populations. Be that as it may, such a position demonstrates a tendency to loosen the rigorous test introduced in the *Asylum Case*.

Ever since the *Asylum Case*, the ICJ has not explicitly answered the question of whether the need for proof of regional custom is a problem of a substantive or of a procedural nature. If one is addressing a substantive problem, the very existence of a particular custom is conditioned on proving that certain states are bound by it. If the need for proof addresses a procedural question, the existence of custom would not necessarily come into play, but rather only its opposability by one of the parties, within the bounds of the controversy being decided, would.

One indicator that proof of regional custom would be a procedural question has to do with the possible inadmissibility of an allegation based on a regional customary norm. In none of the above cases did the ICJ treat proof as a question of admissibility. On the other hand, in several decisions, its characterization of proof as a question relating to the "burden" that one of the parties would have in a court case stands out –that is, as a typical procedural question. This was quite clear in the manner in which the ICJ required, in the *Asylum Case*, that Colombia prove that Peru was bound by the particular customary norm. In the *Case concerning Right of Passage over Indian Territory*, individual opinions made a detailed analysis of evidence introduced by Portugal in order to demonstrate that a bilateral custom existed. Judge De Castro also expressly identified the difference between general and particular custom under a rubric he called "burden of proof." Lastly, in the *Dispute Regarding Navigational and Related Rights*, the question was resolved by virtue of the burden of proof, which was a reversal of its relationship between the plaintiff and the defendant.

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

The relationship between treaty and custom at times has been given greater weight –as in the *Asylum Case* and the *Case concerning Right of Passage over Indian Territory*– while in others it has not been considered sufficiently relevant –as in the *Case concerning the rights of nationals of the United States of America in Morocco*.

Reciprocity –*Case concerning Right of Passage over Indian Territory*– and acquiescence –*Asylum Case*, *Case concerning the rights of nationals of the United States of America in Morocco*, and *Case concerning Right of Passage over Indian Territory*– have also been considered factors in identifying a particular customary international norm or not. Later on, these did not figure greatly in other cases. This may have been due to the gradual decline –if not the total disappearance– of the usage, by the ICJ, of private analogies in its interpretation of international law.

Based on the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the existence of general collective interests seems to interfere with the identification of regional custom (and even the burden of its proof). Therefore, the particularization of custom may contribute –and not be opposed– to such general collective interests. It was thus that, in said case, norms on the use of force were identified at the inter-American regional level –which overlap with norms at a universal level. And, in the *Case concerning the Frontier Dispute*, the interest in stabilization of the world's borders, especially taking into account the process of decolonization, was a burning issue in the identification of how *uti possidetis* had regional origins, but was later universalized. Finally, in the *Dispute Regarding Navigational and Related Rights*, the bilateral customary norm and, furthermore, rights relating to riparian population survival, were discovered by applying a human rights framework. The protection of human rights at the local level would not disparage, but rather complement, human rights at the universal level.

One cannot ignore the fact that the context in which the ICJ decided the first cases on regional custom required it to have a concept of international law that made it pit aspects of localism (at times dressed up as a form of regionalism) and universalism against one another: hence the established criteria for identifying customary norms being rather rigid.

Likewise one cannot ignore the fact that the bending of the criteria for identifying a regional customary norm has come about as a consequence of the gradual loosening of the ICJ's methodology which, over the years, has gotten to the point of applying them in order to identify even general custom.

In the only case so identified, outside the remit of the ICJ, in which there was a pronouncement on particular custom, the Inter-American Court of Human Rights clearly sought to work with the former by citing the *Asylum Case* –even going so far as to disregard other subsequent cases.

The Inter-American Court took into account the strict criterion for proof of regional custom. Although it was not dealing with a contentious case, but rather a consultation, the weighting in favor of the *opinio juris* gave strong consideration to the position of the states that had declared themselves part of the consultative process. Even though the sample source base for identifying a possible regional customary norm had been the 35 member states of the OAS, an evaluation of the positions of each one of them was not made.

As with the *Asylum Case*, the Inter-American Court placed great weight, for purposes of identifying the *opinio juris*, on the terms of the regional treaties that laid out rules on diplomatic asylum.

The Inter-American Court took the position that the principle of the persistent objector did not seem to be compatible with particular custom, as it described the position of the United States of America.

Be that as it may, one can see how if there were any potentiality for the Inter-American Court to rule on questions relating to particular custom outside the scope of a contentious case, there also exist clear limits on the same. In fact, it would not be reasonable, taking into account the broad group of 35 OAS member states, for the Inter-American Court to consider taking samples based on sub-regions with variable boundaries in order to categorically affirm the existence of a regional custom. If this idea were to be advanced, the Inter-American Court might send the wrong signal regarding the need to consider, from a juridical point of view, the inter-American system of human rights as a whole, and not in a fragmentary manner from a sub-regional point of view. In this case, the demarcation of a broad group of states governed by a supposed regional custom would affect, from the beginning, the very conclusion of the Inter-American Court on the identification of such a regional custom.