

## **Particular customary international law and the International Law Commission: Mapping presences and absences**

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### *1. Introduction*

It is not by coincidence that a section on particular customary international law was inserted only at the end of the International Law Commission's (ILC) conclusions on 'Identification of customary international law'.<sup>1</sup> If one of the core elements of customary international law is 'general practice', the treatment of a customary rule that 'applies only among a limited number of States'<sup>2</sup> must remain in the realm of the exception. The commentaries justify the option of treating particular customary international law at the end of the study because the preceding conclusions apply to, except as otherwise indicated,<sup>3</sup> the part devoted to particular customary international law. However, the fact remains that that exception must be put in contrast to the standard rule, which is (general) customary international law.

In many senses, international legal scholarship corroborates the treatment of particular customary international law as an exception. If one starts from the bibliography prepared by the Special Rapporteur and the United Nations Office of Legal Affairs in the context of the ILC study on identification of customary international law, a specific treatment of the

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<sup>1</sup> ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' UN Doc A/73/10 (2018) 154.

<sup>2</sup> *ibid* 154.

<sup>3</sup> *ibid* 154-155.



subject occupied no more than a dozen of writings. Besides that, most of them had been published several decades before.<sup>4</sup>

Paradoxically, the occasions in which international courts dealt with the subject were not rare. Whereas the *Asylum Case* is the most-quoted reference related to the topic,<sup>5</sup> the International Court of Justice (ICJ) was called to decide on particular customary international law on *The Right of Passage Case*,<sup>6</sup> the *Case concerning rights of nationals of the United States of America in Morocco*,<sup>7</sup> and the *Dispute regarding Navigational and Related Rights*.<sup>8</sup> More recently, the Inter-American Court of Human Rights (IACtHR) dedicated a topic, in its Advisory Opinion 25/18, to the regional customary international character of diplomatic asylum in the American continent.<sup>9</sup>

In this article, I would like to assess, in the first part, the ILC's treatment of the subject of particular customary international law. The second part embraces the analysis of two issues that should be treated more thoroughly by that body. The judgment by the ICJ on the *Dispute regarding Navigational and Related Rights* brings to the table, if not a revision, a more nuanced view on how to identify a particular customary international law rule. Besides that, issues such as the role of regionalism in its formation are very relevant to any investigation on particular customary international law rules. By the end, I will present some concluding remarks.

This piece is not devoted to theoretical aspects of international customary international law. Nevertheless, it seems undeniable that finding or not a more expansive place for particular customary international law is often related to the conception a given international lawyer has about

<sup>4</sup> ILC, 'Fifth report on identification of customary international law, by Michael Wood' UN Doc A/CN.4/717/Add.1 (6 June 2018) 32.

<sup>5</sup> *Colombian-Peruvian Asylum Case* [1950] ICJ Rep 266.

<sup>6</sup> *Case concerning Right of Passage over Indian Territory (Merits)* [1960] ICJ Rep 6.

<sup>7</sup> *Case concerning rights of nationals of the United States of America in Morocco* [1952] ICJ Rep 176.

<sup>8</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213.

<sup>9</sup> Corte Interamericana de Derechos Humanos (CtIDH), 'La institución del asilo y su reconocimiento como derecho humano el sistema interamericano de protección (Interpretación y alcance de los artículos 5, 22.7 y 22.8, en relación con el artículo 1.1 de la Convención Americana sobre Derechos Humanos)' Opinión Consultiva OC-25/18 (30 mayo 2018) <[www.corteidh.or.cr/docs/opiniones/seriea\\_25\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf)>. The official English version of the Legal Opinion is not yet available at the Court's website.



the role of universality in international law. In this sense, the call for a universal international law is frequently translated into little interest in how particular customary international law rules emerge and are identified. It is essential to consider this while addressing the options made by judges, practitioners, and academics on that specific issue.

## 2. *The ILC on particular customary international law*

As stressed in the introduction, the ILC conclusions on ‘Identification of customary international law’ clearly assume particular customary international law as an exception to the idea that customary international rules are binding on all states. Such conception can be identified not only because a choice was made to devote a specific part of the study to the issue but also because the Special Rapporteur explicitly used the word ‘exceptional’ to refer to particular customary international law rules.<sup>10</sup> In this sense, the term ‘general customary international law’ is only employed in the study as an opposing term to ‘particular customary international law’.<sup>11</sup> Customary international rules are, by their very nature, of a general character. Hence, they do not need to be regularly qualified as ‘general’.

Part Seven of the Conclusions is composed of a single unit (Conclusion 16). Both that part and the conclusion are entitled ‘Particular customary international law’. For the Special Rapporteur, the exceptional character of particular customary rules is justified not only because they are binding on a certain number of States but also because they ‘are not frequently encountered’. Even though particular customary international law rules are scarce, a caveat applies that ‘they can play a significant role in inter-State relations, accommodating differing interests and values peculiar to only some States’.<sup>12</sup>

However, ‘interests and values’ are not criteria *per se* to differentiate general and particular customary international law rules. The ILC Con-

<sup>10</sup> ILC, Draft Conclusions (n 1) 123. It is worth mentioning that some authors use the terminology ‘exceptional customs’ to refer to customary international rules such as those that have a particular character. See, for example, IC MacGibbon, ‘Customary International Law and Acquiescence’ (1957) 33 *British YB Intl L* 115, 121-123.

<sup>11</sup> *ibid* 155.

<sup>12</sup> *ibid* 154.

clusions adopted a quantitative approach to qualifying a particular customary international law rule in Paragraph 1 of Conclusion 16 ('a rule of customary international law that applies only among a limited number of States'). In other words, although specific interests and values ground particular customary international law rules,<sup>13</sup> what counts for them to be formally converted into international legal rules is the number of States that hold them. Although legal writers have not disagreed that a quantitative approach is a requisite to identify a particular customary international law rule, a small minority added that it is necessary to refer to some specific strata of legal issues.<sup>14</sup>

The commentaries undoubtedly paid a significant contribution to clarifying the very possibility of the existence of particular customary international law rules in international law. Until the 1960s, a few (but strong) doctrinal voices denied or challenged the existence of all or some kinds of particular customary international law rules.<sup>15</sup> Based upon the

<sup>13</sup> We could conjecture that the commentaries are referring to material sources that form particular customary international law.

<sup>14</sup> That is the case of D'Amato, who refers to particular customary international law as a 'special custom'. For him, 'special customary international law deals with non-generalizable topics such as title to or rights in specific portions of world real estate (e.g., cases of acquisitive prescription, boundary disputes, and so-called international servitudes), or with rules expressly limited to countries of a certain region (such as the law of asylum in Latin America)'. A D'Amato, 'The Concept of Special Custom in International Law' (1969) 63 *AJIL* 211, 212-213. Such a position – that encapsulates particular (or special) customary international law to a set of issues – is indeed hard to find in other legal writers. As a matter of fact, it is strongly criticized by some. See eg O Elias, 'The Relationship between General and Particular Customary International Law' (1996) 8 *African J Intl & Comparative L* 67, 70-72. In any case, D'Amato himself seems not to firmly believe in it because in the case of a special customary international rule applied to a region, there are no subjective boundaries just as in the case of other kinds of special customary international law. The ILC commentaries list a set of issues that were examined by international as well as national courts involving particular customary international law: 'a right of access to enclaves in foreign territory; a co-ownership (condominium) of historic waters by three coastal States; a right to subsistence fishing by nationals inhabiting a river bank serving as a border between two riparian States; a right of cross-border/international transit free from immigration formalities; and an obligation to reach agreement in administering the generation of power on a river constituting a border between two States. ILC, Draft Conclusions (n 1) 155. Nevertheless, the commentaries do not advance the argument that those issues are exclusive or proper to particular customary international law.

<sup>15</sup> That is the case of Guggenheim, for whom only regional customary international law - and not, for example, bilateral customary international law - is possible. See P Guggenheim, *Traité de Droit International Public*, tome I (Librairie de l'Université 1953) 50.



ICJ case law, the commentaries state that the existence of rules of customary international law that are not general in nature 'is undisputed'.<sup>16</sup>

The ILC opted for the terminology 'particular customary international law' instead of 'particular custom' to stress their nature as rules of legal nature, something that other expressions such as 'local customs' might evoke.<sup>17</sup> Doctrine and international courts' case law have referred to a rule of customary international law limited to a certain number of States with different terminology: 'particular customary international law', 'local custom', 'regional custom', and 'bilateral custom'. Some have deployed the term 'special custom', but based upon the idea, as explained earlier, that only a limited number of legal issues are embraced by customary rules that are limited to a certain number of states. But the terminology 'particular customary international law' also seems to be employed for two additional reasons: (1) to stress its relational character in opposition to 'general customary international law', and (2) to indicate that proximity of State territories is not a necessary feature of this kind of

The best summary of the doctrinal debate can be found in the seminal article by G Cohen-Jonathan, 'La Coutume Locale' (1961) 7 *Annuaire Français de Droit International* 119, 121-127. A good reference is also F Francioni, 'La consuetudine locale nel diritto internazionale' (1971) 54 *Rivista di Diritto Internazionale* 396, 398-400. For more recent accounts, although not focusing thoroughly on the debate, see M Galvão Teles, 'Costume bilateral em Direito Internacional Público' (2010) 142 *O Direito* 353, 359-362 and L Crema, 'The "Right Mix" and "Ambiguities" in Particular Customs: A Few Remarks on the Navigational and Related Rights Case' in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press/Springer 2013) 65, 66-68. It is important to add that there are still authors, in more recent times, who deny the existence of particular customary international law. That is the case of Gamio, for whom all the cases in which the ICJ debated the existence of a particular customary international rule were, in fact, cases in which a rule emanating from a different source (treaty or general principles of law) was at stake. See JM Gamio, 'Costumbre universal y particular' in M Rama-Montaldo (ed), *El derecho internacional en un mundo en transformación. Liber amicorum: en homenaje al profesor Eduardo Jiménez de Aréchaga*, vol 1 (Fundación de Cultura Universitaria 1994) 79-92. In fact, Gamio is not comfortable with the concept of particular customary international law because it relies on the idea of consent. The author, by contrast, puts himself in strong opposition to voluntarism in international law.

<sup>16</sup> ILC, Draft Conclusions (n 1) 154.

<sup>17</sup> *ibid* 155. Such is a reasonable choice, but the fact remains that international courts – including the ICJ, for example, in the *Asylum* case (n 5) – and legal writers have usually employed terms such as 'particular custom' or 'local custom'.

rule – what expressions such as ‘regional custom’ or ‘local custom’ might suggest.

As a matter of fact, the ILC was not very interested in the terminological debate since it characterized particular customary international law, in paragraph 1 of Conclusion 16, as a rule ‘regional, local or other’. If additional terms emerge to describe the definition inserted in paragraph 1, they will be valid. The context will be the main factor to indicate the best terminology to be employed.

Just as the case law of the International Court of Justice, the ILC saw no reason why the wording of Article 38, para 1 (b) of the ICJ Statute<sup>18</sup> should not encompass particular customary international law rules. Although it provided no further explanation on this issue, it is possible that the Conclusions embraced the understanding of scholars such as Basdevant that even in the 1930s interpreted the term ‘general’ as having inaccurate wording. For him, if the International Court were called to apply a particular customary international law rule (which he labelled ‘relative custom’), it should do it without fixing itself in the wording of Article 38, para 1 (b).<sup>19</sup>

Paragraph 2 of Conclusion 16 deals with what is required for the identification of a particular customary international law rule. The conclusion restricts itself to restate the necessity of the two-element approach applied to the States involved in the particular international customary rule but adds the term ‘among themselves’. In this sense, ‘it is necessary to ascertain whether there is a general practice among the States concerned that they accept as law (*opinio juris*) among themselves’.<sup>20</sup>

<sup>18</sup> In the *Asylum Case*, the ICJ stated that the ‘regional or local custom peculiar to Latin-American States’ alleged by Colombia found its basis also in art 38: ‘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 (...). 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’. *Colombian-Peruvian Asylum case* (n 5) 266, 276-277.

<sup>19</sup> J Basdevant, ‘Règles Générales du Droit de la Paix’ (1936) 58 *Recueil des Cours* 475, 486-487. It is also worth mentioning Cohen-Jonathan argument that the wording of art 38, para 1 (b), did not exclude particular customary international law, since the reference to ‘general practice’ could perfectly be read not in the sense of its spatial dimension but in the sense of its continuing application through time. See Cohen-Jonathan (n 15) 122. In a similar way, see Francioni (n 15).

<sup>20</sup> ILC, Draft conclusions (n 1) 154.



Although Conclusion 16 itself is dubious in this respect, the commentary admits that the two-element approach is ‘stricter’ on what relates to particular customary international law. Following the ICJ reading in the *Asylum Case*, the comment understands that different from general customary international law, ‘all the States among which the rule in question applies’ must accept a given particular customary rule.<sup>21</sup> In other words, the generality of practice – in the sense that it is not equivalent to the unanimity of States – is not applicable to particular customary international law.

Hence, particular customary international law is not different from general customary international law only regarding the number of States involved in a given rule. Its diversity also derives from the assertion of the practice element, since unanimity among the States involved, their full consent, is required in this kind of customary rule.<sup>22</sup>

Although the commentaries read the *Asylum Case* as the great majority of legal writers have done for decades, scrutiny of recent developments, especially the *Dispute regarding Navigational and Related Rights Case*, judged by the ICJ in 1992, was not made. That case at least put some doubts about the ‘strictness’ of the ‘stricter rule’, as discussed in next section.

Before the Commentaries, the ILC had dealt with the issue during the discussion of Special Rapporteur’s Third Report, presented in 2015.

In that Report – that devotes no more than three paragraphs to the issue – the Special Rapporteur also employed the term ‘special custom’ to refer to particular custom. Besides that, he associated the word ‘local custom’ with ‘bilateral custom’.<sup>23</sup>

For the Special Rapporteur, the difference between general and particular customary international law was ‘conceptually simple’. It was based solely on the number of States to which a particular international

<sup>21</sup> *ibid* 156.

<sup>22</sup> A recent doctrinal reading of particular customary international law that stresses more its differences from general customary international than its similarities is K Gulyev, ‘Local Custom in International Law: Something in between General Custom and Treaty’ (2017) 19 *Intl Community L Rev* 47. For the author, what can be labelled the ‘stricter approach’ is seen progressively since ‘local custom allows all States concerned to contribute to the process of its formation irrespective of their political weight’. This is so because consent is demanded from all States involved in that customary international rule. *ibid* 67.

<sup>23</sup> ILC, ‘Third report on identification of customary international law, by Michael Wood’ UN Doc A/CN.4/682 (27 March 2015) 55.



customary rule applies.<sup>24</sup> He also briefly touched upon the issue of how particular customary international law rules emerge. They may develop autonomously or from the disintegration of general customary international rules or treaty rules. They may also evolve to form a general customary international law rule.<sup>25</sup>

It is important to note that the Special Rapporteur explicitly excluded the issue of hierarchy between general and particular customary international law from the scope of the study.<sup>26</sup> This issue required more attention since it was addressed, at least partially, by the ICJ in the *Right of Passage Case*.<sup>27</sup>

The discussion of the Third Report on the issue was very brief in the ILC Plenary. A minority of members understood that it was outside the scope of the topic. There was some discussion on the proper terminology to refer to particular customary international law rules and the need to address the issue of geographical link among States that accepted a particular customary international law rule. Although the discussions' summary is not very clear, it also seems that the Commission was divided in following the stricter standard to the two-elements approach proposed by the Special Rapporteur. Some members advanced that 'all rules of customary international law were subject to the same conditions'.<sup>28</sup>

In his Fourth Report, the special rapporteur addressed commentaries made by States during the 2015 meeting of the Sixth Committee. Some of them showed concern that the reference, in the ILC study, to rules of particular customary international law could 'encourage fragmentation of international law'. Although he found such concerns understandable, the Special Rapporteur reminded that such rules were indisputable in the

<sup>24</sup> *ibid* 56.

<sup>25</sup> *ibid* 56-57.

<sup>26</sup> *ibid* 55.

<sup>27</sup> For the Court: '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'. *Case concerning Right of Passage* (n 6) 44. However, it is not clear if the Court has established the prevalence of a particular over a general customary international law as a principle. It seems that that reasoning was mainly based upon the circumstances in which Portugal and India developed a specific practice that became particular customary international law among them.

<sup>28</sup> (2015) II(2) YB of the Intl L Commission 31.





case-law of the ICJ and invoked their usefulness to accommodate interests and values found in the legal intercourse of a certain number of States. He also reminded that some rules of particular customary international law might evolve into those of a general character.<sup>29</sup>

States also presented comments after the adoption, on first reading, of the Conclusions. Special Rapporteur's Fifth Report addressed them. The substantial majority favoured keeping, in the draft, a conclusion on particular customary international law. A few comments suggested that the conclusion should be clarified in the sense that particular customary international law does not bind third States. Such statements made the Special Rapporteur to include, in the last part of Paragraph 2 of the Conclusion, the term 'among themselves', to emphasize that all States involved in the particular customary international law rule must accept it.<sup>30</sup> However, some States suggested a further examination of the possibility of a particular customary rule to emerge even with the objection of a State concerned.<sup>31</sup>

The main issue discussed in States' comments was the possibility of identifying a particular customary international law rule that is not geographically linked somehow among States. Although some States supported that particular customary international law depended on geography to be identified, most States saw that such a link was not a necessary one. They generally supported the approach followed by the Special Rapporteur that a particular customary international law rule might emerge because of a 'common cause, interest or activity other than their geographical position'.<sup>32</sup>

Although the treatment of particular customary international law by the Special Rapporteur and the ILC itself is commendable, some issues remain not addressed. Perhaps the scarce treatment of the issue in the Special Rapporteur's reports, in the ILC discussions, and in the commentaries is explained by the impossibility of a body such as the ILC to focus thoroughly on matters of a non-global reach. Nevertheless, the fact remains that international law is expressed through particular lenses – restricted to

<sup>29</sup> ILC, 'Fourth report on identification of customary international law, by Michael Wood' UN Doc A/CN.4/695 (8 March 2016) 11.

<sup>30</sup> ILC, 'Fifth report on identification of customary international law, by Michael Wood' UN Doc A/CN.4/717 (14 March 2018) 50, 53.

<sup>31</sup> *ibid* 50.

<sup>32</sup> *ibid* 50-51.

two or few States – and States’ interests are far from being limited to wide geographical spaces. Investigating the implications of particular customary international law is necessary for the present and for any project of future international legal rules. In the next section, I will address at least two important issues for a deep analysis of the consequences for admitting the existence of particular customary international law.

### 3. *Acceptance by all States*

In the literature on particular customary international law, it is almost common sense to state that all States involved in this kind of rule must accept it. The bindingness of the rule depends on such acceptance. The authority for such a position is found in the ICJ ruling on the *Asylum Case*.

In that case, the Court stated that the party alleging a particular customary international law rule must prove it is binding on the other party. It is worth quoting the relevant passage:

“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”<sup>33</sup>.

Such a statement is precisely the ‘stricter rule’ the Commentaries understand peculiar to customary international law.

ICJ’s immediate subsequent cases would have reinforced this ‘stricter rule’, such as the 1952 *case concerning rights of nationals of the United States in Morocco*<sup>34</sup> – albeit in a poorly reasoned manner – and the 1960 *case concerning Right of Passage over Indian Territory*<sup>35</sup> – even if the identification of State practice had been made generically. In cases in which

<sup>33</sup> *Colombian-Peruvian Asylum case* (n 5) 276–277.

<sup>34</sup> *Case concerning rights of nationals* (n 7) 199–200.

<sup>35</sup> *Case concerning Right of Passage* (n 6) 37–41.



the judgment on the case was not explicit on particular customary international law, some separate opinions also followed the 'stricter rule'. The separate opinion of Judge Ammoun in the 1969 *North Sea Continental Shelf cases* emphasized the need to prove particular international customary law, although he admitted that its acceptance could be tacit by the State.<sup>36</sup> In the 1974 *Case of Fisheries Jurisdiction*, Judge De Castro, by underscoring the need for proof of regional customary international law, gave a clear indication that this was a question relating to the burden of proof in a specific case, and not necessarily a characteristic of regional customary international law as opposed to general customary international law *per se*.<sup>37</sup>

The characterization of the 'stricter rule' as a question related to the burden of proof is exactly something that would be essential for the ILC to develop in its Commentaries on what regards particular customary international law. In other words, it is not clear if the 'stricter rule' is a procedural or a substantive matter. It is true that the Commission itself decided 'not [to] deal in general terms with the question of a possible burden of proof of customary international law'.<sup>38</sup> However, the question remains: does particular customary international law only apply when one party to a case has produced evidence of its binding on the other party? Or can the Court itself recognize it *ex officio*?

It seems reasonable to believe that, in the *Asylum Case*, the requirement placed on Colombia would be treated as a procedural matter because the Court itself engaged in the analysis of elements of practice and concluded that there was no particular customary international law rule regulating the subject in question. Conversely, one could argue that proving a particular customary international law rule constitutes a condition for its identification, making the question a substantive matter.

Although both readings of the *Asylum Case* seem plausible, the 2009 judgment on the *Dispute Regarding Navigational and Related Rights* has probably leaned towards the procedural character of the 'stricter rule'.

<sup>36</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 131-132 Separate Opinion of Judge Fouad Ammoun.

<sup>37</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland) Merits* [1974] ICJ Rep 80 Judgment, Separate Opinion of Judge De Castro.

<sup>38</sup> ILC, Draft conclusions (n 1) 124

In that case, the ICJ understood that Costa Rica and Nicaragua had agreed 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. The ICJ responded in the affirmative, in the sense that that practice led to an international customary rule 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 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’.<sup>39</sup>

This passage seems to show that the need to prove if a certain customary rule is binding on another State can rely not only on the State that is alleging it. The Court seems to have presumed the existence of the *opinio juris* by the practice not being documented in any formal manner in any official document. This conclusion caused the burden of proof to be placed back on Nicaragua, which did not deny the existence of a right arising from the practice of warranting subsistence fishing.

Judge Sepúlveda-Amador realized the landmark character of the judgment in his dissenting opinion. For him, Costa Rica did not prove that the customary right to subsistence fishing had become binding on Nicaragua, following what had been established in the *Asylum Case*. Furthermore, Costa Rica’s invoking of that customary international legal rule only happened in 2006, in the application submitted to the Court; prior to that, the subsistence fishing would not have been articulated in the form of a customary rule. Another relevant point in the separate opinion of Judge Sepúlveda-Amor is that, for him, the practice in question had been carried out by the local riparian community of Costa Rica and not

<sup>39</sup> Dispute Regarding Navigational and Related Rights (n 8) 265-266.



by the Costa Rican State – which would be necessary to the formation of the customary rule.<sup>40</sup>

Some commentators have mitigated the extent of such change in the ICJ's case law. For *Crema*, for instance, the case is an example of a trend found in its jurisprudence of assessing international customary rules in a 'more liberal way'. Furthermore, both parties agreed about the existence of practice that would be the basis of a customary rule.<sup>41</sup> Besides that position, it cannot be ruled out that the conclusion found in the case was related to the subject matter in question, which involved a sensitive question regarding human rights affecting the very subsistence of riparian populations.<sup>42</sup>

It is certain that, in that case, the ICJ did not remove the need for consent of all States involved in a particular customary international law rule to be expressed. But if it loosened the 'stricter rule' to invert the burden of proof in the given circumstances, such judgment should be seen as a significant development in its case law.

As a matter of fact, perhaps the procedural nature of the 'stricter rule' was present even in the *Asylum Case*. The *Dispute Regarding Navigational and Related Rights* may only have made that more explicit.

One indicator that proof of regional customary international law was continuously considered by the ICJ as a procedural question has to do with the possible inadmissibility of an allegation based on a regional customary international rule. 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 can be seen in the manner in which the ICJ required, in the *Asylum Case*, that Colombia prove that Peru was

<sup>40</sup> *ibid*, Separate Opinion of Judge Sepúlveda-Amor 279-280.

<sup>41</sup> *Crema* (n 15) 72-73.

<sup>42</sup> If human rights is an issue that may invert the burden of proof in cases related to particular customary international law, the Inter-American Court of Human Rights did not understand in that manner. In the only case so identified, outside the remit of the ICJ, in which there was a pronouncement on particular customary international law, the Inter-American Court of Human Rights did not pay regard to the *Dispute Regarding Navigational and Related Rights*. Following only the *Asylum Case*, it concluded that it could not find a particular customary international law rule in the American Continent because not all States of the region accepted such a rule.

bound by the particular customary international law rule. In the *Case concerning Right of Passage over Indian Territory*, individual opinions made a detailed analysis of evidence introduced by Portugal to demonstrate that a bilateral customary international rule existed.<sup>43</sup> Judge De Castro, as mentioned earlier, also expressly identified the difference between general and particular customary international law 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, reverting it from the plaintiff to the defendant.

Such a way of reading the ICJ's case law on the issue shows that the idea of a 'stricter rule' on what regards particular customary international law has many nuances. The context in which a given case is inserted may determine what State has the burden of proof.

More thorough scrutiny on this issue would certainly have made the ILC Conclusions more solid on the part devoted to particular customary international law.

#### 4. *The role of regionalism in particular customary international law*

The United States comments on the ILC's Conclusions, as approved on first reading, strongly questioned the very existence of bilateral customary international law. Thus, 'States other than those linked by geography, and bilateral customary international law generally, are theoretical concepts only and are not yet recognized parts of international law'.<sup>44</sup>

Although such is an isolated statement compared to other States' comments and, as mentioned earlier, it is incontestable that the ICJ's case law confirms the existence of bilateral customary international rules, the point made is intriguing. It may be read as recognizing that there is a space for regionalism in international law that cannot be translated into a mere set of bilateral relations among States.

<sup>43</sup> See eg *Case concerning Right of Passage* (n 6) 54, 60, 82-83, 90, 95 Separate Opinions of individual opinions of Judge Koo, Judge Armand-Ugon, and Judge Moreno Quintana.

<sup>44</sup> Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as adopted by the Commission in 2016 on First Reading <[https://legal.un.org/ilc/sessions/70/pdfs/english/icil\\_usa.pdf](https://legal.un.org/ilc/sessions/70/pdfs/english/icil_usa.pdf)>.



Neither the Special Rapporteur nor the ILC went deep into the role of regionalism in customary international law in the study of the topic of Identification of Customary International Law. The same can be said even if one regards the international legal literature on regionalism.

For example, Ján Klučka's monograph on the issue pays almost no attention to regionalism as a factor in forming and identifying particular customary international law.<sup>45</sup>

Another example is Mathias Forteau's entry - Regional International Law - in the Max Planck Encyclopedia of Public International Law. He discusses the impact of regionalism on customary international law, but in a cursory way and under the premise that 'current international law does not grant regional international law any specific regime, except insofar as it constitutes special law (but then, it is considered as such, not as regional law)'.<sup>46</sup> Thus, the genuine opposition is between general and particular customary rules and not universal and regional ones.

Paradoxically, one of the most instigating contributions to regionalism in international law comes from the ILC itself, precisely from its 2006 report on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'.

In that Report, the ILC inquired about the legal consequences of regionalism in international law and identified three different meanings for the term. First, "Regionalism" as a set of approaches and methods for examining international law'; Second, "Regionalism" as a technique for international law-making'; and Third, "Regionalism" as the pursuit of geographical exceptions to universal international law rules'. Only the third meaning of the term is directly relevant to the discussion on customary international law.<sup>47</sup>

<sup>45</sup> J Klučka, *Regionalism in International Law* (Routledge 2018) 117, 144 who restricts himself to a cursory analysis of the possibility of regional international organizations' impact on the formation as well as on the development of customary international legal rules.

<sup>46</sup> M Forteau, 'Regional International Law' (2008) Max Planck Encyclopedia of Public Intl L para 17 <<http://opil.ouplaw.com>>.

<sup>47</sup> ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' UN Doc A/CN.4/L.682 (13 April 2006) 106-112. It is important to note that, among scholars, this is not a new way of conceiving regionalism as applied to customary international law. In his Hague Academy Lectures, in 1992, Julio Barberis identified two elements for a regional customary



The Report admits that it is challenging to address the issue of a regional rule (including a customary one) that becomes binding on a State that did not adopt or accept it. It reminds that that idea was what Colombia was precisely trying to argue in the *Asylum Case*, something that was, in many senses, in Judge Alvarez's reasoning in his separate (concurring) opinion on the case.<sup>48</sup>

For the Report, the ICJ's Judgment on the *Asylum Case* did not deal with the issue of 'rules binding automatically on States of a region and binding others in their relationship with those States'. Colombia's claim was mainly dismissed 'in view of Colombia's failure to produce the required evidence'.<sup>49</sup> This is an interesting reading of the case because it confirms that the so-called 'stricter approach' is a procedural issue and it is invocable in the context of a specific judicial proceeding.

In any case, the Report is not very optimistic about treating regionalism as a legal category. In this sense:

[T]here is very little support for the suggestion that regionalism would have a normative basis on anything else apart from regional customary behaviour, accompanied, of course, with the required *opinio juris* on the part of the relevant States. In such Case, States outside the region would not be automatically bound by the relevant regional custom unless there is specific indication that they may have accepted this either expressly or tacitly (or perhaps by way of absence of protest). This would also render any specific normative (in contrast to historical, sociological or legislative-technical) debate about regionalism superfluous'.<sup>50</sup>

From that passage, it is noteworthy to note that: (1) whatever practical implications the discussion has, it has to do with customary international law; and (2) opening up the possibility of an absence of protest for

rule to emerge: (1) a limitation in its spatial and personal sphere of validity; and, additionally, (2) the existence of substantive spheres of validity different from those applicable to rules of universal international law. J Barberis, 'Les règles spécifiques du droit international en Amérique latine' (1992) 235 *Recueil des Cours* 122. In other words, in order to emerge, regional customary international rules must be different from those of general international customary ones.

<sup>48</sup> ILC, *Fragmentation of International Law* (n 47) 109-110.

<sup>49</sup> *ibid* 111.

<sup>50</sup> *ibid* 111.





a customary international rule to be binding on a State belonging to a given region can possibly mean a deviation from the strict application of the idea of consent on particular customary international law.

In this regard, it is very useful to understand Hugh Thirlway's positions on particular customary international law. Unfortunately, these positions were not taken duly into consideration by the specific literature on the topic. Two of those positions suffice to substantiate a view of the need to better understand the concept of region in customary international law.

Thirlway clearly diverges from the reading of the *Asylum Case* that sees on it the recognition that particular customary international law binds only States that participated in its creation. For him, the expression 'the States in question', present in the aforementioned passage of the Case, 'may have been deliberately imprecise'. In his view, the Court was possibly avoiding 'committing the Court further than necessary to the decision of the case'. Additionally, he understands that when the Court analysed the Montevideo Convention as evidence of practice in the American region, it could have recognized a regional customary international rule if there was 'quasi-universal acceptance' of that treaty – which was not the case.<sup>51</sup>

Although Thirlway did not give to the concept of 'region' any specificity – he was more interested in a broad concept where 'region' was equated to any relevant (and specific) 'community' – he understood that bilateral must have been distinguished from other particular customary international law rules. Whereas in the former, 'something of a presumption against' them applies, in the latter, 'to prove that the custom exists at all will be sufficient'.<sup>52</sup>

Such a doctrinal position opens new paths to conceive the concept of region as applied to customary international law in the sense that they discern from pure bilateral customary international law.

The ILC Conclusions on Identification of Customary International Law would have benefitted from a more complex discussion on the pos-

<sup>51</sup> H W A Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Sijthoff 1972) 136-137.

<sup>52</sup> *ibid* 139.



sible implications of regionalism for customary international law. Specifically, one crucial issue was to understand if, differently from a bilateral customary international rule, a regional customary international rule may emerge even without the consent of a certain State or, at least, in the absence of its formal protest.

### 5. *Conclusions*

In this essay, I tried to assess the treatment by the ILC, in the framework of the topic of the identification of customary international law, of the issue of particular customary international law. Although ILC's work must be praised for dealing with it, including reaffirming the recognition by international law of this kind of customary international law, some issues remained unsolved or poorly scrutinized.

First, concerning the need for a particular customary international law rule to be accepted by all States involved – the so-called 'stricter rule' – recent developments in the ICJ's case law point out to a more nuanced view of that need when compared to the traditional reading of the *Asylum Case*. Specifically, the 'stricter rule' seems to have a more procedural than substantive character. That is the reason why in the *Dispute Regarding Navigational and Related Rights*, the ICJ – although based on the circumstances of the case – seemed to have inverted the burden of proof from Costa Rica to Nicaragua. Besides that, one might suggest that ICJ's case law related to particular customary international law as a whole, including the *Asylum Case* itself, may be read as recognizing that the 'stricter rule' has more a procedural character.

Second, the role of regionalism in particular customary international law was not fully developed in the ILC's Conclusions on Identification of Customary International Law. The main issue is: does regional customary international law differ somehow from other kinds of particular customary international law rules, such as bilateral ones? The ILC's Report on Fragmentation of International Law provides food for thought on this issue, especially on what concerns the possibility of not requiring, in regional customary international law, acceptance by all States in a given region – or at least, that the proof of their consent can be found more narrowly than in other kinds of particular customary international law.



Despite the strong attachment of several international lawyers to the idea of the unity of international law and, consequently, to universalism in international law,<sup>53</sup> research into the possibilities that particular customary international law opens to accommodate specific interests and values among States and even among other international legal subjects is urgent. Closing the eyes to the exuberant forms in which customary international law takes shape in the international legal order means distancing the international legal argument from the social reality of international relations and an undue restriction to the power of legal imagination. The ILC took the first steps; international lawyers should pave the way for longer distances.

<sup>53</sup> The conception of formal unity of the international legal system is deeply linked to its own universality. In Pierre-Marie Dupuy's words, for whom the role of the State should also be emphasized in such a relationship: 'Qu'est-ce qui donne à l'ordre juridique international général, de portée par définition universelle, l'unité de ses formes, c'est-à-dire, en premier lieu, de ses modes de production et d'application des normes ? A cette question, on peut d'emblée apporter une réponse simple: c'est l'Etat. Depuis ses origines, on l'a vu plus haut, c'est en raison de la nature particulière de ses sujets primaires que cet ordre juridique original doit son unité'. P-M Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *Recueil des Cours* 93.