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The International Court of Justice and "non-universal" customary norms[1]

La Corte Internacional de Justicia y las normas consuetudinarias "no-universales"

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Abstract: The wording of Article 38(1) of the Statute of the International Court of Justice might imply that no other customs apart from the "universal" ones could be considered as sources of international law. However, the International Court of Justice took a proactive role and recognised the existence of "special" (i.e. local or regional) customary rules and perhaps employed a more creative approach and actually "read them" into Article 38(1) of the Statute. Moreover, the Court also seems to have created the "rules on how to ascertain the rules" of special custom, when it set a higher threshold for proving its establishment through its case-law in *Anglo-Norwegian Fisheries*, *Asylum*, *Nationals in Morocco* and *Right of Passage* cases. The 2009 *Navigational and Related Rights* case seems out of sync with the previous cases on special custom, and it remains to be seen whether it can be considered as more than anomaly in the Court's jurisprudence. Even though the International Court of Justice seemingly had quite a proactive role with regards to special custom, it appears that it avoided to pronounce explicitly on some issues such as how to ascertain *opinio juris* or relation between general and special customary rules.

Key words: International Court of Justice – Customary Rules – Special Custom.

Resumen: *La redacción del artículo 38 (1) del Estatuto de la Corte Internacional de Justicia quizá presupone que no otras costumbres, aparte de las "universales", podrían ser consideradas como fuentes del derecho internacional. Sin embargo, la Corte tomó un papel proactivo y reconoció la existencia de las reglas de costumbre "especial" (es decir, local o regional), quizás empleando un enfoque más creativo y realmente las "leyó" en el artículo 38 (1) del Estatuto. Por otra parte, la Corte Internacional de Justicia también parece haber creado las "reglas sobre la manera de determinar las reglas" de costumbre especial, cuando fijó un umbral más alto para*

[1] Artículo enviado el 05.10.2015 y aceptado el 13.12.2015.

acreditar su establecimiento a través de su jurisprudencia en Pesquerías Anglo-Noruegas*,* Asilo*,* Nacionales en Marruecos *y* Derecho de paso*. El caso de* Navegación y los derechos conexos, *de 2009, parece estar fuera de sintonía respecto a los casos anteriores sobre la costumbre especial, y debe aún verse si podría ser considerado como algo más que una anomalía en la jurisprudencia de la Corte. A pesar de que la Corte Internacional de Justicia aparentemente tenía un papel muy activo en materia de costumbre especial, parece que evitaba pronunciarse explícitamente sobre algunos temas, como la manera de determinación de* opinio juris *o la relación entre las normas consuetudinarias generales y especiales.*

***Palabras clave**: Corte Internacional de Justicia – reglas consuetudinarias – costumbre especial*

"Yet international law is a customary law system, despite all the treaties; even the principle of *pacta sunt servanda*, the obligation to comply with the treaties, is a customary law obligation. If we cannot explain custom, we might have to conclude that international law as a whole is built on shaky normative foundations"[2].

1. Introduction

The primary role of any international court, International Court of Justice (ICJ or the Court) included, is to solve a dispute before it on the basis of law applicable between the litigants. Still, every now and then international lawyers debate about whether the Court, while resolving the dispute, in effect does more than just applying the rules of international law (IL), by going further and developing, or perhaps even creating, rules of IL or at least rules on how to ascertain the IL rules. Having in mind in particular that the formation and evidence of customary IL has finally been included in the IL Commission (ILC) agenda, time is proper for (re)engaging in discussions about customary IL and the role of the ICJ in its establishment, development or perhaps even creation, given the links between IL and customs as explained by Judge Crawford. This paper shall attempt to contribute to the debate by focusing on the role of the ICJ with regards to "non-universal", i.e. special customary rules, in light of the terminology adopted here. The first section of the paper shall contain a brief overview of custom as source of IL, with the particular emphasis on the unsettled issues which arose in practice and which were stressed out by writers. Second section shall deal with the concept of "special custom" as compared with "general" or 'universal' customary law. Third section shall assess the case law of the ICJ concerning special customs and attempt to explain the method the Court used to ascertain the existence of this type of rules. In doing this, the article shall

[2] CRAWFORD, James. *Chance, Order, Change: The Course of International Law, General Course on Public International Law*. Leiden, Brill, 2014, p. 49.

draw upon the approach used by Alberto Alvarez-Jimenez in 2011[3]. The fourth section shall identify some questions regarding special custom which the ICJ left open, such as the manner of demonstrating *opinio juris* and the issue of hierarchy between special and general custom. Finally, I shall conclude by summing up the key findings of this article.

2. Custom as a source of International Law

Article 38(1) of the Statute of International Court of Justice[4], which the majority of international lawyers consider as providing an authoritative list of sources of IL[5], defines international custom[6] as "evidence of a general practice accepted as law". The two constitutive elements of international custom are commonly derived from this provision[7]: (1) state practice as an objective or material element of custom and (2) *opinio juris sive necessitatis* (*"opinio juris"*) as a subjective or psychological element that reflects the existence of a state's belief that it is bound by a certain practice[8] .

Controversies regarding this source of IL are plenty, ranging from doubts about existence of this source to the type of evidence for establishing state practice and *opinio juris*. As their evaluation is beyond the scope of this paper, they shall only be briefly noted here for the purpose of shedding some light on the concept of custom, as, arguably, special custom could not exist without general custom.

As noted above, some writers doubt that custom can even be considered a source of IL. Barberis believes that custom cannot be a source of law, because the procedure for its creation is not based upon law:

3 See generally: ALVAREZ-JIMENEZ, Alberto. "Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009". *International and Comparative Law Quarterly*, 2011, 60(3), pp. 681-712.

4 *Statute of the ICJ*, 26 June 1945.

5 SHAW, Malcolm. *International Law*. 6th ed. Oxford, Oxford University Press, 2008, pp. 70-71; CRAWFORD, James. *Brownlie's Principles of International Law*. 8th ed. Oxford, Oxford University Press, 2012, p. 20; THIRLWAY, Hugh. "The Sources of International Law". In EVANS, Malcolm D. (ed.), *International Law*. 3rd ed. Oxford, Oxford University Press, 2010, pp. 113-114; GEIGER, Rudolf H. "Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal". In FASTENRATH, Ulrich *et. al.* (eds.). *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*. Oxford, Oxford University Press, 2011, p. 674. *Contra*: CANÇADO TRINDADE, Antônio Augusto. *International Law for Humankind: Toward a New Ius Gentium*. Leiden, Martinus Nijhoff, 2010, pp. 114-115.

6 Terms "custom", "customary international law", "customary rule" used throughout this text all have the same meaning and refer to 'international custom' as source of IL as provided by Article 38(1) of Statute of the ICJ.

7 For the critique of the provision's wording, see *e.g.* CRAWFORD, *Chance*…, *op. cit.*, pp. 49-50.

8 CRAWFORD, *Principles*…, *op.cit.*, pp. 23-27.

> *"Les considérations qui précèdent permettent d'aboutir à la conclusion que les normes coutumières internationales ne sont crées par aucun procédé établi par voie de droit ou, en d'autres termes, que la coutume n'est pas une source du droit des gens*"[9].

He believes that state practice and *opinio juris* are only techniques for 'recognizing the existence' of a customary rule:

> *"Ce qu'il importe de souligner dans cette analyse, c'est que la pratique ou élément matériel et l'opinio juris ne font partie d'aucun procédé juridiquement établi dans le but de créer des normes coutumières, mais qu'il s'agit uniquement d'une technique permettant de reconnaître leur existence*"[10].

A particularly heavy criticism of customary law as a source of IL can be found in Kelly's seminal work, where the entire concept was called "meaningless", for the following three reasons: 1) "the substantive CIL norms of the literature lack the authority of customary law and therefore are not binding on states" 2) custom is a poorly defined and undetermined source, which 3) lacks "procedural legitimacy"[11].

Some scholars, such as Estreicher, do not deny the existence of custom, but appear doubtful about its binding character in IL[12]. Others, who support "one-element theory" of custom, are of the opinion that one of the two constituent elements of customary IL is redundant. For instance, Guzman and Cheng claim that custom is comprised only of *opinio juris*[13]. Interestingly, Guzman actually views state practice as evidence of *opinio juris*[14] and states that "a rule of CIL exists if and only if *opinio juris* exists"[15], which, when applied to special customary rules, in effect means that the stringent requirements for demonstrating such a rule are superfluous[16].

Famous Austrian positivist, Hans Kelsen, considered state practice a sufficient element for establishment of a customary international rule:

> *"Cet auteur soutient que cette conception est fondée sur une erreur parce que ceux qui exercent la pratique doivent croire en l'existence d'une norme qui, en réalité, n'existe pas. S'agissant des aspects pratiques, Kelsen affirme que la preuve de opinio juris est quasiment*

9 BARBERIS, Julio. "Réflexions sur le coutume internationale". *Annuaire Français de Droit International,* 1990, 36, p. 17.
10 BARBERIS, "Réflexions…", p. 20.
11 KELLY, J. Patrick. "Twilight of Customary International Law". *Virginia Journal of International Law*, 1999-2000, 40, pp. 453-454.
12 ESTREICHER, Samuel. "Rethinking the Binding Effects of Customary International Law". *Virginia Journal of International Law*, 2003-2004, 44, p. 5.
13 CHENG, Bin. "United Nations Resolutions on Outer Space.'Instant' International Customary Law?". *Indian Journal of International Law,* 1965, 5, pp. 35-40; GUZMAN, Andrew T., "Saving Customary International Law". *Michigan Journal of International Law*, 2005, 27, pp. 124-125.
14 GUZMAN, "Saving Customary…", *op.cit*., p. 157.
15 GUZMAN, "Saving Customary…", *op.cit*., p. 160.
16 GUZMAN, "Saving Customary…", *op.cit*., p. 161. For overview of the requirements, see text to notes 52, 53 and 54.

> *impossible à établir et que, dans de nombreux cas, l'élément psychologique ne joue aucun rôle dans la formation de la coutume"*[17].

The citation also leads us to the dilemma which has pervaded customary IL and which has left international lawyers baffled for decades. Namely, Kelsen refers to a crucial paradox of custom – i.e. to the question of how one "deluded state" commenced the "chain of false beliefs" that certain practice initially supported by (false?) *opinio juris* of that state, which eventually led other states to accept such practice as binding, resulting in the formation of a rule of customary IL[18].

Scholars have tried to untangle the paradox mostly by denying the requirement of either of the elements of custom[19] as noted above. Intriguingly, it seems that the original custom actually had only one element: state practice[20], while *opinio juris* appears to be a comparatively recent development[21]. However, "one-element approach" has not found support in the jurisprudence of the ICJ.

The Court's has been in favour of "two-element theory" ever since *Lotus* case decided by its predecessor Permanent Court of International Justice (PCIJ)[22].

In comparison with other international judicial and arbitral bodies, the Court seems to have had a crucial role in development of customary IL[23]. Overall, its jurisprudence has so far shed light on many dilemmas concerning this source of IL, but, to be fair, has also created some new ones. A few are in turn briefly assessed below: attributes or 'qualities' of each element of custom, evidencing *opinio juris* and methodology for identification of norms of customary IL.

As regards the attributes that each element of custom should have, several conclusions can be drawn. Crawford generally concluded that state practice should have certain duration, consistency and generality[24]. The Court has assessed these attributes in the seminal *North Sea Continental Shelf* case as follows:

> "Although the *passage of only a short period of time is not necessarily, or of itself, a bar* to the formation of a new rule of customary IL on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both *extensive and virtually uniform* in the sense of the provision invoked;

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17 KELSEN, Hans. "Théorie du droit international coutumier". *Revue Internationale*, 1939, p. 263, cited in BARBERIS, "Réflexions…", *op.cit.*, p. 27.

18 CRAWFORD, *Chance*…, *op. cit.*, p. 56. Thirlway explains the paradox as "a case of *communis error facit jus* (a shared mistake produces law)", THIRLWAY, "The Sources of…", *op.cit.*, pp. 102-103

19 THIRLWAY, "The Sources of…", *op.cit.*, p. 103.

20 CRAWFORD, *Chance*…, *op. cit.*, p.53.

21 Franz von Litzt may be the "founding father" of concept of *opinio juris*. See also STERN, Brigitte. "Custom at the Heart of International Law". *Duke Journal of Comparative and International Law*, 2011, 11, p. 95

22 PCIJ (1927). *The Case of the SS Lotus* (France v. Turkey) (Merits).

23 See similarly: ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, p. 683.

24 CRAWFORD, *Principles*…, *op.cit.*, pp. 24-25.

> and *should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved*"[25].

The most confusing part of this passage seems to be the last one, which may indicate that the ICJ requires state practice to in itself demonstrate the existence of *opinio juris*.

Then, in *Nicaragua* the Court said that the state practice does not have to be "in absolute rigorous conformity with the rule", clarifying that the possible occurrence of an inconsistency rather signals a breach of the rule than the formation of a new rule[26]. This might signal a departure from "virtually uniform" stance expressed in *North Sea Continental Shelf*. But, at least it appears undisputed that the generality of practice does not have to be absolute. This could indicate that, at least in theory, universal customary rules other than the rules of *jus cogens*, do not exist as there could be at least one state which could object to a customary rule.

State practice does not have to be long-lasting, since, e.g. customs related to outer space and continental shelf have developed over a relatively short period of time[27]. However, the Court implicitly refused to acknowledge the so called "instant customs", extrapolated from the General Assembly (GA) resolutions, concluding that they are evidence of *opinio juris*, but not at the same time evidence of state practice[28].

The Court touched upon another possible problem related to state practice in *Nuclear Weapons* advisory opinion, but eventually provided no answer to it: namely, is the practice of the "specially affected states", i.e. states possessing nuclear weapons, "more significant" then the practice of others?[29]

An important issue which kept puzzling the Court seems to be evidencing the existence of *opinio juris*. Thirlway considers that the subjective element is deduced mainly '(…) from a general practice, from scholarly consensus or from its [*the Court's*] own or other tribunals' previous determinations'[30]. To this one could add the GA resolutions, as in *Nicaragua* and *Nuclear Weapons*[31]. *Lotus* case set an even higher threshold, indicating that each state's belief in a binding character of a rule needs to be proven:

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25 ICJ (1969). *North Sea Continental Shelf* (Federal Republic of Germany/The Netherlands; Federal Republic of Germany/Denmark) (Merits) (*emphasis added*).

26 ICJ (1986). *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits).

27 CRAWFORD, *Principles*…, *op.cit.*, p. 24. The Court stated in *North Sea Continental Shelf* that, as long as the state practice related to continental shelf was 'consistent' and 'virtually uniform', the short passage of time is not a bar to formation of the customary rule (*North Sea Continental Shelf*, p. 43).

28 Thirlway gives the examples of *Nicaragua* and *Legality of Threat or Use of Nuclear Weapons* cases in support of this view. See THIRLWAY, "The Sources of…", *op.cit.*, p. 104.

29 THIRLWAY, "The Sources of…", *op.cit.*, p. 104.

30 CRAWFORD, *Principles*…, *op.cit.*, p. 26 and fn 33.

31 ICJ (1986). *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits); ICJ (1996). *Nuclear Weapons Advisory Opinion*.

> "(…) for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom"[32].

In *North Sea Continental Shelf*, the Court similarly did not extract *opinio juris* from the state practice ascertained in 1958 or even subsequent practice, but expressly required "a general recognition that a rule of law or legal obligation is involved"[33]. Crawford makes an interesting observation concerning *opinio juris*: the Court seems to consider primarily "the state of law" regarding the disputed issue. If it is covered by a treaty, *opinio juris* suffices to "expand application of the treaty norms as custom", but if there is not - the Court's discretion might play the main role[34].

Scholars have attempted to uncover the method whereby the ICJ ascertains customary IL. Alvarez-Jimenez seems to have been particularly successful in that enterprise, although his research encompassed only the Court's jurisprudence during the first decade of this century. He identified two key methods or approaches whereby the Court seems to ascertain norms of "universal" customary IL: "the strict inductive method" and "flexible deductive approach"[35]. The first method is characterised by "bottom-up" approach, whereby the Court begins ascertaining custom by assessing the quality and quantity of state practice and then turns to finding support for such practice in *opinio juris*. It was conceived in the *North Sea Continental Shelf* case, and subsequently employed in recent cases such as *Romania/Ukraine*, *Diallo*, *Arrest Warrant* and *Germany v. Italy*[36]. Conversely, "flexible deductive approach" is essentially "top-down", as the ICJ begins by ascertaining *opinio juris* through GA resolutions and only then turns to assessment of state practice. The approach was cradled in *Military and Paramilitary Activities in and against Nicaragua,* and was also in essence employed in *Nuclear Weapons Advisory Opinion*[37].

Furthermore, Alvarez-Jimenez also pinpointed two "non-traditional" approaches concerning method of ascertaining customary IL in the Court's jurisprudence[38]. The first one is "reliance on judicial decisions" as a method for determining customary IL (as in *Wall,* where the Court used the reasoning employed in *South West Africa, Western Sahara* and *East Timor* so as to determine the existence of right to self-determination; also in *Cameroon v. Nigeria: Equatorial Guinea Intervening*, where the Court used its earlier jurisprudence and arbitral awards on

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32 PCIJ (1927). *The Case of the SS Lotus* (France v. Turkey) (Merits).

33 ICJ (1969). *North Sea Continental Shelf* (Federal Republic of Germany/The Netherlands; Federal Republic of Germany/Denmark) (Merits).

34 CRAWFORD, *Principles*…, *op.cit.*, p. 27.

35 ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, pp. 3-4.

36 ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, pp. 4, 7-9.

37 ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, pp. 3-4.

38 Milisavljević/Čučković, who in essence consider that the ICJ used "identification without evidence" and "identification through evidence" to ascertain the existence of the rules of customary international law; add another possible approach, which the Court seems to have employed in *Gabčikovo/Nagymaros* case when assessing the criteria for the state of necessity in international law, by "simply pointing to the position taken by the ILC as regards customary character of a rule in question"; *see* MILISAVLJEVIĆ, Bojan and ČUČKOVIĆ, Bojana. "Identification of Custom in International Law". *Annals of the Faculty of Law -Belgrade Law Review*, 2014, 56(3), p. 46.

maritime delimitation to demonstrate the non-existence of customary rule whereby oil concessions represent relevant circumstance for delimitation purposes)[39]. The second "non-traditional" approach involved "implicit recognition of customary rules" (i.e. actually applying the rules as if they were customary, but without an explicit pronunciation on their customary character), as in *Bahrain/Qatar* case[40]. This approach shall be relied on further in the article, as the Court's jurisprudence on special customary rules can also be divided into two main groups identified by Alvarez-Jimenez.

Another possible approach that deserves acknowledgment is Geiger's. Noting that the Court often does not end up following the methodology it preaches[41], Geiger explains that the Court follows two distinct approaches in determining the rules of customary IL, depending on the type of problem at hand. Namely, when the problem concerns basic norms of IL (e.g. prohibition of the use of force, principle of non-intervention, minimum considerations of humanity, sovereign immunity, *pacta sunt servanda* etc.) the standard of proof is seemingly lower than in situations when the Court is faced with the dilemma whether a more particular norm represents customary IL[42].

This also seems like a useful basic remark for assessment of the Court's role with regards to special customary rules – essentially, the more specific a rule is, the higher should be a standard for identifying it.

3. General and special customary rules

The Court had a particularly important role in recognition of the existence of "non-universal" customary rules, as proposed in 1936 by Professor Basdevant[43]. Basically, Article 38 (1) of the ICJ Statute *prima facie* does not suggest that there is any other type of international custom other than the one that is "evidence of general practice accepted as law". The wording implies that there exist no other customs apart from the "general" ones, applicable solely to the international community as a whole, but not to some of its parts. Another possible argument in favour of this interpretation could be that the ICJ Statute, unlike with treaties, omits to

39 ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, pp. 10-11.
40 ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, pp. 11-12.
41 GEIGER, "Customary International Law... ", *op.cit.*, p. 692.
42 GEIGER, "Customary International Law... ", *op.cit.*, pp. 692-695.
43 D'AMATO, Anthony. "The Concept of Special Custom in International Law". *American Journal of International Law*, 1969, 63, p. 217. Professor Basdevant then referred to Article 38 of the Statute of the PCIJ, which is in essence the same as the statute of its successor. See CRAWFORD, *Principles*…, *op.cit.*, pp. 21-22.

provide the possibility that the states could be bound by customs that are evidence of a more particular practice[44].

But, the two types of custom are rooted in the legal history of common law. D'Amato traces the distinction between general and special customary law to "Roman law and English common law"[45]. When it comes to the latter, "Blackstone summed up the historic distinction between the two types of custom: general customs, which are the universal rule of the whole kingdom, and form the common law...[and] particular customs, which, for the most part, affect only the inhabitants of particular districts"[46]. "England" replaced with "world", and Blackstone's definition could be used for general and special customs.

Some terminological perplexities should also be resolved. Perhaps the most convenient and the least confusing solution is to name "non-universal" customary norms "special", as suggested by D'Amato[47]. The reason for this is that other terms (local custom, regional custom, etc.) could cause uncertainty concerning the scope of application and number of states bound. On one hand, the notion "local custom" is manifold: it could imply that certain rule exists only within one country (i.e. England), or that it binds two countries within the same or different region or even several countries belonging to the same region. "Regional custom" could similarly mean different things: that it is a rule which binds states of one continent (e.g. asylum rules of Latin America), but also states belonging to a specific organisation within the continent (e.g. European Union, Organisation of American States). On the other hand, notion "special custom" does not cause such a problem, as it encapsulates all these varieties, while at the same time allowing for further sub-classifications. More importantly, the conditions required for identifying any possible type of special customary rule are the same, as explained in the following section.

It is also conceivable that a "non-universal" customary norm evolves over time into a general one[48]. But, Tunkin claims that there are no customary rules by which all countries in the world are bound, as he believes that the fact that a significant number of states accept a rule as customary is no more than 'assumption' that a rule has achieved the status of general custom[49]. While this reasoning may seem attractive at the first sight, it squarely fits with *jus cogens* norms, which some writers regard as customary[50], despite the lack of explicit confirmation of that status in Article 53 of the Vienna Convention on the Law of Treaties[51]. However, Crawford

44 COHEN-JONATHAN, Gérard. "La coutume locale". *Annuaire Français de Droit International*, 1961, pp. 120, 122 and authors cited there.
45 D'AMATO, "The Concept of Special Custom…", *op.cit.*, p. 213.
46 D'AMATO, "The Concept of Special Custom…", *op.cit.*, pp. 213-214.
47 D'AMATO, "The Concept of Special Custom…", *op.cit.*, p. 213. Another possible (and correct) solution is to use the term 'particular custom' as defined by International Law Association (ILA). See: ILA (2000). *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, p. 64.
48 TUNKIN, Grigory. "Remarks on Juridical Nature of Customary Norms of International Law". *California Journal of International Law*, 1961, 49(3), p.425.
49 TUNKIN, "Remarks on Juridical Nature…", pp. 428-429.
50 CRAWFORD, *Principles…*, *op.cit.*, p.594.
51 *Vienna Convention on the Law of Treaties*, 23 May 1969.

notices that, if "*opinio juris* requires states to consent individually to customary rules", that would result in prevalence of "bilateral customary rule"' (i.e. special customary rules) in public IL, where "universal is exceptional"[52]. Whether this is so or not is a question which goes beyond the scope of this paper, but the argument here is that the *opinio juris* does require states to explicitly or tacitly consent individually to a special customary rule or, at least, the ICJ has thus concluded in the majority of cases in which it dealt with special custom.

4. Special Custom before the International Court of Justice

4.1. 1950s and 1960s: a relatively settled jurisprudence

The Court dealt with the "non-universal" customs for the first time in the *Asylum* case[53]. The case is of paramount importance, because the ICJ had not only recognised the status of special customs as sources of IL (and perhaps creatively 'read them' into Article 38 of the Statute), but also developed customary IL by establishing the conditions for their identification, which have been, at least until recently, fairly consistently used in similar situations in Court's jurisprudence.

Colombia argued that there had been a rule of regional customary law specific for Latin America, which allows the state granting asylum ("state of refuge") to unilaterally determine the nature of a criminal offence (military or ordinary crime) committed by an asylum seeker and to bind the home state (Peru) by such determination[54]. Although it denied Colombia's claim, the Court for the first time acknowledged a theoretical possibility that "non-universal" customary norms could exist. Moreover, the Court set a higher threshold for establishing these norms by listing four elements which need to be satisfied for the identification of a special custom. The first three of them include proving the existence of "standard" *opinio juris* and state practice elements, and shifting a burden of proof for evidencing custom to the claimant state[55]. This is substantially different from reasoning of the ICJ concerning general customary law, where it has been guided by principle *jura novit curia*, so that the Court, not a party, identified and evidenced custom[56]. The fourth and final condition for the existence of a non-universal customary rule is that the state that is claimed to be bound by it has not explicitly or tacitly objected to the alleged rule[57].

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52 CRAWFORD, *Chance*…, *op.cit.*, pp. 56-57. For an analysis on "'[h]ow much *opinio juris* is required" in terms of quantity to establish a customary norm, see *ibid.*, pp. 56-61.

53 ICJ (1950). *Colombian-Peruvian Asylum case* (Colombia v Peru) (Merits).

54 ICJ (1950). *Colombian-Peruvian Asylum case* (Colombia v Peru) (Merits).

55 See similarly BARBERIS, "Réflexions…", *op.cit.*, p. 39.

56 ICJ (1950). *Colombian-Peruvian Asylum case*; CASSESE, Antonio. *International Law*. 2nd ed. Oxford, Oxford University Press, 2005, p.164.

57 ICJ (1950). *Colombian-Peruvian Asylum case*; COHEN-JONATHAN, "La coutume locale", *op.cit.*, pp. 132-133.

The relevant passages from the judgment in *Asylum* are as follows:

> "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"[58].
>
> The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence[59].
>
> The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum"[60].

Judge Alejandro Alvarez appended a dissenting opinion to the judgment, in which he supported the view that, although there existed Latin American IL as a special regional system within general IL, there was no customary Latin American IL on asylum, apart from "certain practices or methods in applying asylum which are followed by the states of Latin America"[61]. While admitting that one of such "practices or methods" was the right of of the state of refuge to decide on the character of crime commited by the asylum seeker, Judge Alvarez stopped short of conflating it with the rule of a regional, local or, in accordance with terminology adopted here, special custom. Judge Alvarez also omitted to address the possible consequences of the majority's view that Peru objected to such practices, probably because he was of the

58 ICJ (1950). *Colombian-Peruvian Asylum case.*
59 ICJ (1950). *Colombian-Peruvian Asylum case.*
60 ICJ (1950). *Colombian-Peruvian Asylum case.*
61 ICJ (1950). *Colombian-Peruvian Asylum case* (Colombia v Peru) (Dissenting Opinion by Judge Alvarez).

opinion that the right of the state of refuge to decide on the character of the crime was not absolute[62].

The following dispute in which the Court dealt with 'non-universal' customs, albeit implicitly, was *Fisheries* case[63]. United Kingdom asserted that the baselines determined by a Norwegian royal decree were contrary to the established norm of customary IL for drawing the baselines[64]. The claim was not upheld by the Court on the basis that, even if there existed such a rule, Norway had never conformed to it, while other countries "had acquiesced in this [Norwegian] practice"[65]. However, since the Court adjudged that the rule had not, according to state practice of the time, belonged to the corpus of general international norms[66], some authors claimed that the rule could have been considered a local custom[67]. In addition, the Court perhaps could have declared straight baselines method, as employed by Norway, a special customary rule:

> "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.
>
> The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, *this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law*"[68].

Dissenting opinions refer to an interesting point, namely a possible requirement that practice forming a special customary rule is "publicised" or "made known" to interested state(s). Thus, Judge Read was of the view that, while Norway's position was contrary to "customary international law" in the first place[69], its potential "special status" could not have been acknowledged as it failed to make its position on "straight baselines" known to United Kingdom and thus prevented it from protesting[70]. Sir Arnold McNair, also dissenting, seems to share the same position with regards to "publicity" of a special regime of IL towards interested

62 ICJ (1950). *Colombian-Peruvian Asylum case* (Colombia v Peru) (Dissenting Opinion by Judge Alvarez), 297.
63 ICJ (1951). *Fisheries case* (United Kingdom v Norway) (Merits).
64 THIRLWAY, "The Sources of…", *op.cit.*, p. 107.
65 CRAWFORD, *Principles*…, *op.cit.*, p.29.
66 ICJ (1951). *Fisheries case* (United Kingdom v Norway) (Merits). For a comprehensive critique of the outcome and the Court's reasoning, see article by Professor Humphrey Waldock, Counsel for the United Kingdom in the case: WALDOCK, Humphrey. "The Anglo-Norwegian Fisheries Case". *British Yearbook of International Law*, 1951, 28, p. 114.
67 COHEN-JONATHAN, "La coutume locale", *op.cit.*, p. 131. The Court, however, failed short of attributing such character to the 'straight baselines rule'. D'Amato expressed the opinion that the notion of "historic waters" could have been considered a type of special custom. D'AMATO, "The Concept of Special Custom…", *op.cit.*, p. 219.
68 ICJ (1951). *Fisheries case* (United Kingdom v Norway) (Merits). (*emphasis added*).
69 ICJ (1951). *Fisheries case* (United Kingdom v. Norway) (Dissenting Opinion of Judge Read).
70 ICJ (1951). *Fisheries case* (United Kingdom v. Norway) (Dissenting Opinion of Judge Read).

states[71]. The Court appears to have stopped short of expressly requesting the "publicity" of the special regime, but still hinted that the issue is not without importance when it took pains to demonstrate Norway's regime was known to United Kingdom[72].

The ICJ has continued the line reasoning about the evidence of special customary rules of the *Asylum* case in *Nationals in Morocco* case[73]. Although the United States failed to demonstrate that its extraterritorial consular jurisdiction could have been established on the basis of a local custom, the Court again confirmed a theoretical possibility for the existence of such a norm[74].

Finally, the Court upheld the claim on existence of a special customary rule in the *Right of Passage* case[75]. Portugal succeeded in persuading the Court that there existed a right of passage for private persons, civil servants and goods between littoral territory and the two enclaves on Indian territory; but failed to prove the existence of such right related to the transport of arms and ammunition[76]. Significantly, the Court upheld Portugal's argument that local custom can exist between only two states:

> "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"[77].

However, Kelly considers that the ICJ showed some inconsistency in reasoning concerning the existence of special customary IL, quoting the following passage from the *North Sea Continental Shelf* case:

> "In the case of general or customary law rules and obligations... by their very nature, must have equal force for all members of the international community, *and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour*"[78].

The ICJ seems to have quite clearly established the criteria for ascertaining a special customary rule during the 1950s and 1960s. In general, they appear to be more stringent when compared to criteria needed for establishing such general custom. Thus, practice forming a special customary rule should be "constant and uniform", and accepted as law by the opposing state.

71 ICJ (1951). *Fisheries case* (United Kingdom v. Norway) (Dissenting Opinion of Sir Arnold McNair).
72 ICJ (1951). *Fisheries case* (United Kingdom v. Norway).
73 ICJ (1952). *Nationals in Morocco case* (France v. United States).
74 COHEN-JONATHAN, "La coutume locale", *op.cit.*, p. 131.
75 ICJ (1960). *Case concerning Right of Passage over Indian Territory* (Portugal v. India).
76 ICJ (1960). *Case concerning Right of Passage over Indian Territory* (Portugal v. India).
77 ICJ (1960). *Case concerning Right of Passage over Indian Territory* (Portugal v. India).
78 KELLY, "Twilight…", *op.cit.*, pp. 512, fn 270 (*emphasis added*).

The burden of proof for demonstrating a special custom is shifted from the Court to the claimant state. Also, the opposing state should not object to such practice, although the way in which the lack of opposition should manifest is not entirely clear[79]. Also, the meticulous inductive manner in which the Court assessed the issue of special customs in cases presented above seems to correspond to "strict inductive approach" as identified by Alvarez Jimenez, or "bottom up" method for establishing custom.

4.2. Late 2000s: the beginning of a new era?

The Court has not dealt again with the issues concerning special customs until late 2000s. It seems that its fairly consistent "bottom up" approach was reversed in 2009 *Navigational and Related Rights* case which dealt with the existence of what is in essence a special customary right of Costa Rica to subsistence fishing from the bank of the San Juan river[80]. The most relevant passage from the judgment is the following:

> "The Parties agree that the practice of subsistence fishing is *long established.* They disagree however whether the practice has become binding on Nicaragua thereby entitling the riparians as a matter of customary right to engage in subsistence fishing from the bank. 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 long period is particularly significant. The Court accordingly concludes that Costa Rica has a customary right*"[81].

Even if, given the specific circumstances of the case, one agrees with the view in which the Court treated the scarcity and lack of formal evidence of a long-lasting practice of subsistence fishing, the same hardly seems to be the case when the remaining three elements for demonstrating a special customary rule are concerned. Essentially, it appears that the ICJ has established a special customary rule solely on the basis of scarce practice and lack of protest on the side of Nicaragua, which does not seem to fit well with the line of reasoning conceived in *Asylum* case and in essence continued in *Fisheries*, *Nationals in Morocco* and *Right of Passage* cases. Remark of the Court with regards to "particularly significant" failure of Nicaragua to deny the existence of a special custom may imply that the Court established the right by relying mostly on abstention as evidence of *opinio juris,* is particularly striking. Reliance on the (inadequately justified?) *opinio juris*, accompanied by a brief reference to state practice may resemble "top

79 See below text to notes 85 and 86.
80 ALVAREZ-JIMENEZ, "Methods for the Identification…", *op.cit.*, p. 15.
81 ICJ (2009). *Case Concerning the Dispute Regarding Navigational and Related Rights* (Costa Rica v Nicaragua*) (emphasis added).*

down" or "flexible deductive approach" for identifying customary rule as envisaged by Alvarez-Jimenez.

The reasoning of the majority was subject to criticism within the Court. While agreeing that Costa Rica has a customary right to subsistence fishing from the bank of the river, Judge *ad hoc* Gilbert Guillaume did so only because of the "special circumstances described by the Court", while expressly declining the "precedential value" of the judgment in that regard[82]. Judge Sepúlveda-Amor was the only one who dissented from the majority on this issue, as he considered that the Court failed to follow its established jurisprudence on "nature and substance of customary IL"[83]. Indeed, his opinion in this regard is to be preferred. Lathtrop agrees and states that the alternative argument for Costa Rica as proposed by Judge Sepúlveda-Amor (reliance on "acquired or vested rights") was more in line with the established reasoning of the Court[84].

5. Open Questions

Crawford noticed a particular problem with the subjective element of a special customary rule, namely how "*opinio juris* merges into acquiescence"[85]. The blur between the two institutes makes the establishment of a special customary rule more difficult in some circumstances, and it seems that the ICJ has not at all times been successful in making the distinction. To be fair on the Court, at times it can be indeed unclear whether the lack of reaction of a state concerned equals approval of a certain practice or simply unawareness of a special custom *in statu nascendi*. This was the case particularly in *Navigational and Related Rights,* where the Court has deduced *opinio juris* perhaps in a similar way to *Anglo-Norwegian Fisheries*, essentially conflating "tolerance" of a certain practice with *opinio juris*. Often, the issue occurs when it is necessary to interpret abstention (or tolerance), which that could indicate "either tacit agreement or a simple lack of interest" towards a certain practice from the actual protest[86].

Another important issue does not seem to have been resolved by the Court yet - namely**,** the question of the hierarchy between general and special customary rules, and consequently whether the l*ex specialis derogit legi generali* rule could apply. It seems that the only clear-cut

82 ICJ (2009). *Case Concerning the Dispute Regarding Navigational and Related Rights* (Costa Rica v Nicaragua) (Declaration of Judge *ad hoc* Guillaume).

83 ICJ (2009). *Case Concerning the Dispute Regarding Navigational and Related Rights* (Costa Rica v Nicaragua) (Separate Opinion of Judge Sepúlveda-Amor).

84 LATHROP, Coalter G. "Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)". *American Journal of International Law*, 2010, 104, pp. 460-461. This choice would have also been in the interest of the affected local populations (which may have been the reason why the ICJ identified the existence of a customary right to subsistence fishing). For this point I remain grateful to Professor Ben Chigara of Brunel University.

85 CRAWFORD, *Principles*…, *op.cit.*, p. 30 and authors cited there.

86 CRAWFORD, *Principles*…, *op.cit.*, p. 25.

situation occurs when a special customary rule is juxtaposed to a *jus cogens* norm, when of course the latter prevails[87]. In remaining actual and hypothetical situations, the answer to the dilemma is not that simple.

The problem arose in the *Asylum* case. As already noted, the Court then established the stricter criteria for ascertaining the special (regional) customary rule, but at the same time held the following:

> "(…) *what the Court saw as systematic elements of general IL* (sovereignty, non-intervention, the regular enforcement of national law even against political offenders) *overwhelmed considerations of regional custom or practice*. And since the body of Latin American practice is the most sophisticated and generalized of the systems of regional custom in the modern era, one is inclined to say of the rest of the world – *a fortiori*"[88].

The ICJ also ruled on the matter in the *Right of Passage* case, reasoning as follows:

> "Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, *the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result*[89].
>
> The Court is *here dealing with a concrete case having special features*...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*"[90].

As far as *Asylum* is concerned, *prima facie* it seems that the Court gave preference to general norms of IL, albeit those which are not specifically related to diplomatic asylum. Furthermore, it should be noted that the Court has not ruled out the existence of a special, region-specific rule on grating asylum, but held that the existence of such a rule was not proven.

It could be argued that the Court in the *Right of Passage* actually gave explicit preference to a special (in this case, local) custom over a general rule. Conversely, it should also be noted that a general customary rule regulating the right of passage between land territory and enclaves did

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87 COHEN-JONATHAN, "La coutume locale", *op.cit.*, p. 139 and authors cited there.

88 CRAWFORD, James. "Univeralism and Regionalism from the Perspective of the Work of the International Law Commission". In: CRAWFORD, James (ed.) *International Law as an Open System, Selected Essays*. London, Cameron May Ltd, 2002, pp. 590-591.

89 ICJ (1960). *Case concerning Right of Passage over Indian Territory* (Portugal v. India) (*emphasis added*).

90 ICJ (1960). *Case concerning Right of Passage over Indian Territory* (Portugal v. India) (*emphasis added*).

not exist in 1960, and has not been established ever since, which might have contributed to the Court's conclusion[91]. More importantly, the ICJ emphasised that the situation in the *Right of Passage* was a concrete one[92]. Exactly the same line of reasoning could be used to interpret the effects of the *Asylum* case, since the Court could not establish the existence of any general rule related to granting of the diplomatic asylum back in the 1950s. Therefore, *lex specialis* rule could not apply, as there has been no *lex generalis* in either case. This brief analysis might imply that the Court actually avoided declaring on the prevalence of a certain type of custom in the theoretical situation when clashing general and special customary rules cover the same matter. Therefore, this issue shall remain unresolved in practice until the Court faces this problem.

ILC is of the view that *lex specialis* rule can be used with regards to customary law[93]. What is more, its report indicates that special custom prevails over general customary IL[94].

Crawford's view is not so straightforward. He explains that the ICJ "tends to see cases raising regional considerations through the prism of general IL"[95]. He also notes that "universalist" tendencies overruled regional considerations in *Asylum* case[96]. Also, Crawford understood *Frontier Dispute* case so as to reflect the tendency of the ICJ to accommodate originally "non-universal" rules such as *uti possidetis* only if they "fit within the ordinary framework of IL" as reflected in the principle of intangibility of frontiers[97]. *Right of Passage* case and its message of prevalence of specific practice between two states over any general rule still may sit comfortably with the message of the *Frontier Dispute* case, since the Court refused to deal with the question of existence of a general rule in the former.

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91 D'Amato argues that 'the primacy of special custom in this case was made possible largely by the absence of any convincing demonstration by Portugal of a general custom of military access to enclaves.' D'AMATO, "The Concept of Special Custom…", *op.cit.*, p. 219.

92 ICJ (1960). *Case concerning Right of Passage over Indian Territory* (Portugal v. India).

93 ILC (2006). *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*. However, the ILC noted that there are several instances in which the special rules should not prevail, citing the following examples: 1) when the nature of general law or the intention of the parties could point out to the prevalence of the general rule, 2) when the purpose of *lex generalis* is frustrated by *lex specialis*, 3) possible negative effects of the *lex specialis* to third-party beneficiaries of the rule and 4) when balance of the rights and duties, 'established by general law may be negatively affected by special law' (*ibid.*, para.9).

94 ILC (2006). *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of International Law Commission, Finalized by Martti Koskenniemi*, A/CN.4/L.682. Interestingly, Konskenniemi does not seem to have such a clear-cut personal view on the relation between universal and local, as he appears to believe there is no given hierarchy between them. See: KOSKENNIEMI, Martti. "Hierarchy in International Law: A Sketch". *European Journal of International Law*, 1997, 8, p. 577.

95 CRAWFORD, *Chance…*, *op. cit.*, p. 246.

96 CRAWFORD, *Chance…*, *op. cit.*, p. 247.

97 CRAWFORD, *Chance…*, *op. cit.*, p. 249.

6. Conclusion

International custom is by far the most disputed source of IL. It seems that everything – from its existence to the type of evidence required for demonstrating its constitutive elements- is controversial. It is hardly arguable that the ICJ has sometimes gone further than just adjudicating when it was engaged with matters of customary IL, and has played a particularly important role in developing the rules of customary IL. To be fair, the development at times included introducing some confusion and inconsistency, especially when it came to the methodology Court has employed in order to establish customary rules. However, one of the most prominent contributions of the ICJ to such a development relates to the body of "non-universal" rules of customary IL. Soon after its establishment, the ICJ took a proactive role and recognised the existence of "special" customary rules and perhaps creatively "read them" into Article 38(1) of the Statute. Moreover, the Court also seems to have created, by using inductive "bottom up" approach, the "rules on how to ascertain the rules" of special custom. Namely, it has set a higher threshold for proving the emergence of these norms through its case-law in *Asylum, Fisheries*, *Nationals in Morocco* and *Right of Passage* cases. Thus, the fulfilment of "standard" *opinio juris* and state practice requirements does not suffice for the establishment of a special custom. In addition, the ICJ also demands that the party which asserts that a special custom exists proves that the opposing party is bound by such a rule, while also demonstrating that such party has not explicitly or tacitly objected to the rule. However, the question remains whether the "top down" approach perhaps employed in *Navigational and Related Rights* is simply an anomaly in jurisprudence concerning special customs, or an indicator of nascent different approach of the Court in determining these rules. Even though the ICJ has generally had quite a proactive role with regards to special custom, it appears that it has failed to satisfactorily clarify what exactly is required to evidence *opinio juris* of such rule – evidence that a certain practice is "accepted as law" (as in *Asylum* or perhaps in *Right of Passage* cases) or "tolerance"/acquiescence as in *Fisheries* and *Navigational and Related Rights.* Also, the Court seems not to have resolved the issue of hierarchy between general and special customary rules (apart from the obvious case when *jus cogens* is involved), as *Asylum* and *Right of Passage* cases appear to send conflicting messages on the issue, which are also prone to multiple interpretations.