The "Right Mix" and "Ambiguities" in Particular Customs: A Few Remarks on the *Navigational and Related Rights* Case

Luigi Crema

1 Introduction

In *Customary International Law* recently published in the Max Planck Encyclopedia of International Law, Professor Treves describes the assessment of a custom as the delicate operation of "determining the right mix of what States say and do, want and believe".[1] Treves, in describing what *practice* is and is not for the purposes of ascertaining customary law, strongly stressed the need to be cautious, avoiding stiff *black-or-white* assertions, and to be "aware of the ambiguities with which many elements of practice are fraught".[2] The *Navigational and Related Rights* decision illustrates certain interesting facets of the practice in customary law, and once again confirms the need for such caution.

On the 13th of July 2009 the International Court of Justice upheld a decision between Costa Rica and Nicaragua regarding certain rights in the *San Juan river*.[3] At the very end of its reasoning, the Court found that "fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right."[4] The Court was rather thrifty in detailing the description of the formation of that right; thus, this finding

[1] Treves 2008, para 28.
[2] Ibidem.
[3] ICJ: Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment (13 July 2009).
[4] Ibidem, para 144.

L. Crema (✉)
Emile Noël Fellow (2011–2012), New York University, New York, USA
e-mail: luigi.crema@unimi.it

L. Crema
Research Associate, University of Milan, Milan, Italy

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represents a good occasion to reconsider particular customs, their existence in international law, and to face certain questions that arise in attempting to unravel the formation of customary rules.

2 On Particular Customs

Customary rules in international law can be general or particular, that is, not binding on all states: they may be regional, local, plurilateral, or bilateral.[5] Article 38 of the PCIJ, and later the ICJ Statute—the *biblia pauperum* of international law[6]—in saying "The Court (…) shall apply (…) b. international custom, as evidence of a *general* practice accepted as law", appears to include only general customs, and to exclude particular customs. However, already in the 1930s the prevailing interpretation of Article 38.1.*b* proposed by eminent scholars was that the generality of a practice was not a fundamental requisite for a custom to come into being.[7] The debate on this issue lasted a few decades: during the second post-war period, a few commentators still insisted that international law recognizes only *general*, that is *worldwide* customs,[8] while others proposed to read the term *general* as *uniform*, thereby including particular customs.[9] The different proposals discussed by the Advisory Committee of Jurists in the preparation of the PCIJ Statute confirms the latter interpretation.[10] Today the question of understanding the meaning of that expression is no longer at issue, and among scholars it is undisputed that international law also admits particular customs.[11]

Custom, indeed, is one way in which a rule may come into being, through evidence of repetition rather than through a written agreement. There is no reason why it should regard only the collective of states, and not also smaller groupings: its generality and its particularity, that is, its effects *ratione personae*, depend on the actual subjects involved in the formation process. Moreover, they also depend on

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[5] RightIy Mendelson 1998, p. 215, prefers the term *particular* to *regional*, as the second is contained within the first. For the same reason Akehurst 1975, p. 29; van Hoof 1983, pp. 96–97, used the term *special*.

[6] *Biblia pauperum* referred to the frescos in churches that explained, in a synthetic way, doctrines of faith; this expression was often used by Bruno Simma to describe Article 38 in 2009, during his general course on public international law at The Hague Academy of International Law (the *Course* has still to be published).

[7] See already Basdevant 1936, p. 486. On the theoretical disputes over the admissibility of local customs under Article 38 during the PCIJ period see Cohen-Jonathan 1961, pp. 121–127, with additional references.

[8] Guggenheim 1953, p. 47; Kunz 1953, p. 666; Tunkin 1974, p. 118.

[9] Meijers 1978, p. 21; Wolfke 1993a, p. 7.

[10] They are briefly summarized in Danilenko 1993, pp. 76–77.

[11] Treves 2008, para 40; Kolb 2003, pp. 136–137, Gamio 1994, pp. 84 and 92, highlights that the letter of Article 38.1.*b* is clear in excluding particular customs, but that the ICJ decisions have overridden it; similarly Pellet 2006, p. 762.

the nature of the process itself: a small number of particularly interested subjects, together with a handful of representatives of the generality of states, can originate a general custom,[12] which, when circumscribed within a specific scope, can result in a particular custom. In short, the outcome of the process relies as much upon who is involved and how the process is structured, as it does upon claims of generality.

International jurisprudence has recognized the possibility that a custom can arise in a particular, local, even bilateral, context. Examples of such a dynamic can already be found in the jurisprudence of the Permanent Court of International Justice (PCIJ); however, all the decisions related to treaties, and more closely resembled *subsequent practice which is modificative of a treaty* rather than a *particular custom*.[13] It was the International Court of Justice (ICJ) that explicitly accepted particular customs: in its 1950 *Asylum* decision, it explicitly accepted the existence of regional customs, and gave a detailed explication of how they are to be appraised. According to the Court:

> The Party which relies on a [regional custom] 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.[14]

The Court acknowledged the admissibility of regional customs in international law, but did not find that the conditions to establish it had been satisfied. Similarly, in the *Rights of American Nationals in Morocco* case the Court admitted the possibility of bilateral customs, again without finding their conditions fulfilled.[15]

A few years later, in the 1960 *Right of passage* judgment between India and Portugal, the Court returned to the question of particular customs, this time dealing with a bilateral custom. India relied on the *Asylum* case to argue that international law admits regional customs, but not bilateral ones. The Court rejected this

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[12] Treves 2008, paras 35–6; see also ICJ: North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands), Judgment (20 February 1969), para 75, and the observations by Lachs in his Dissenting Opinion, pp. 227–230.

[13] In 1927 the Court spoke about a local usage: "[T]he pre-war usage in the Galatz-Braila sector was that jurisdictional powers were exercised there by the European Commission. In this usage the Roumanian delegate tacitly but formally acquiesced, in the sense that a modus vivendi was observed on both sides according to which the sphere of action of the Commission in fact extended in all respects as far as above Braila", PCIJ: Jurisdiction of the European Commission of the Danube, Advisory Op. (8 December 1927), p. 17. A few years later, in the City of Danzig advisory opinion, the Permanent Court analogously did not talk about a local custom, but assessed a common practice: "[M]any differences of opinion as to foreign affairs arose between Poland and the Free City, but a practice, which seems now to be well understood by both Parties, has gradually emerged from the decisions of the High Commissioner and from the subsequent understandings", PCIJ: Free City of Danzig and ILO, Advisory Op. (26 August 1930), p. 13.

[14] ICJ: Asylum (Colombia/Peru), Judgment (20 November 1950), pp. 276–277.

[15] ICJ: Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment (27 August 1952), pp. 199–201.

argument, instead considering the actual way India and Portugal had reciprocally behaved.[16] The Court concluded:

> This practice having continued over a period extending beyond a century and a quarter (…) the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[17]

For the first time the Court recognized a particular custom: it gave force of law to attitudes, voluntary or spontaneous, followed as binding by only two states.[18]

3 The Navigational and Related Rights Case

For several decades after those decisions, the ICJ did not again face the question of particular customs. The Court often addressed general custom, drawing clear and specific doctrines such as in the *North Continental Shelf case*.[19] Only relatively recently, in 2009, did the ICJ again address the question of particular customs, in the case between Costa Rica and Nicaragua on the *Navigational and Related Rights in the San Juan river*.[20] This river is a section of the border between the two States, according to a treaty signed in 1858.[21] The treaty fixed the boundary along the Costa Rican bank, and established "Nicaragua's dominion and sovereign jurisdiction" over the waters of the river.[22] In its memorial Costa Rica maintained that the riparian people of the two sides of the San Juan river (a very small number: around 450 people),[23] had the right to fish for subsistence purposes.[24] The Court observed that:

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[16] ICJ: Right of Passage over Indian Territory (Portugal v. India), Judgment (12 April 1960), p. 39: « [I]t is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States».

[17] Ibidem, p. 40. On this Case, see the comments of Buss 2010, pp. 111–126

[18] On spontaneous customary law see Bobbio 1942, p. 19 ff.; Ago 1950, pp. 78–108; Giuliano 1950, p. 161 ff.; Barile 1953, pp. 150–229; Treves 2008, paras 17–18; Dupuy 2000, pp. 157–179, with further references. See also the critics of Arangio-Ruiz 2007, pp. 97–124.

[19] North Sea Continental Shelf, supra n. 12, paras 75–78.

[20] ICJ: Navigational and Related Rights, supra n. 3.

[21] Tratado de límites entre Nicaragua y Costa Rica Cañas-Jerez (San José, 15 April 1858).

[22] Article VI reproduced in Navigational and Related Rights, supra n. 3, para 19.

[23] Ibidem, para 98.

[24] Ibidem, paras 4.124–4.128.

> Costa Rica requests the Court to declare that Nicaragua has the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes. (…) Subsistence fishing has without doubt occurred over a very long period. (…) [T]he 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.[25]

The Court thus found a customary right allowing local fishermen of both the Nicaraguan and the Costa Rican banks to fish for subsistence purposes. This finding raises a number of interesting points that will now be considered.

4 A Few Reflections

4.1 Which Custom Is It?

The first interesting point concerns the nature of that particular customary right. The description thereof given by the Court is not entirely clear and explicit: it considers, on the one side, the practice of the local inhabitants of the banks of the river; and on the other side the lack of any reaction by the Nicaraguan state.[26] Given the fact that the *active* practice considered by the Court had been carried out only by private individuals on both sides of the river (the attitude of the Government of Nicaragua was the absence of any reaction), is it more appropriate to consider it as an *international* customary right among two nations, or a *transnational* right among private individuals, recognized and accepted by Nicaragua?[27]

A similar problem emerged in the first of the two decisions on the *Hanish Islands in the Red Sea*, in which an Arbitral Tribunal dealt with a local system of justice, with its own customs and judges, between Eritrean and Yemenite fishermen.[28] In this case, the arbitrators maintained that those customs were a matter of private law (*Lex Pescatoria*), and the fact that Yemen was aware of them did not transform them into a public international law custom.[29] Also the reference to the customary

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[25] Ibidem, paras 134 and 141.

[26] Ibidem, para 141.

[27] Ibidem, para 144.

[28] PCA Arbitral Tribunal: Eritrea/Yemen, Award in the First Stage (9 October 1998).

[29] Ibidem, para 340: "In the Tribunal's understanding, the rules applied in the *aq 'il* system do not find their origin in Yemeni law, but are elements of private justice derived from and applicable to the conduct of the trade of fishing. They are a *lex pescatoria* maintained on a regional basis by those participating in fishing. (…) The fact that this system is recognized or supported by Yemen does not alter its essentially private character".

rights of the inhabitants along a river made in the *Eritrea-Ethiopia Boundary Commission* award seems to point to customs among private individuals.[30]

Lathrop, on the *American Journal of International Law*, reads the *Navigational and Related Rights* decision as dealing with this kind of private right,[31] while Weckel has expressed disappointment that the Court was not explicit in stating that the right is private in nature.[32] These explanations and these precedents, however, are incompatible with the attitude maintained by Costa Rica during the proceedings,[33] and with the final part of the decision, in which the Court attributed the right deriving from local practice to Costa Rica, and not to the fishermen.[34] Thus, the Court established a particular custom of public international law.[35]

In his separate opinion Sepúlveda-Amor, the only judge voting against this finding of the Court, regretted the position taken by the majority: [36] he recalled the traditional *principle of acquired or vested rights* as a better description of such an issue, arguing that recourse to international custom was unnecessary.[37]

In conclusion, the first notable point emerging from this decision regards the existence of particular customs in themselves: after many years in which the ICJ did not touch upon the topic, the *Navigational and Related Rights* decision confirms the weight of particular customs in general international law.

[30] PCA/Eritrea-Ethiopia Boundary Commission: Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia), Decision (13 April 2002), para 7.3: “Regard should be paid to the customary rights of the local people to have access to the river”.

[31] Lathrop 2010, p. 460.

[32] Weckel 2009, p. 938.

[33] As described at para 132 of the judgment. However, during the proceedings Costa Rica itself was very generic in sustaining the existence of fishing rights: “Peu importe au fond que l’on parle de coutume locale, d’acquiescement, d’accord tacite, de régime territorial ou encore de subsistance d’un droit traditionnel datant de l’époque coloniale auquel il n’a jamais été dérogé. Le résultat est le même: les résidents de la rive costa-ricienne ont un droit de pêche à des fins de subsistance dans les eaux du San Juan”, ICJ: Navigational and Related Rights, CR 2009/3, p. 62, para 41 (Kohen), internal footnote omitted.

[34] Navigational and Related Rights, supra n. 3, paras 140–1, 156 (3).

[35] In this sense also Tanaka 2009, p. 8.

[36] Navigational and Related Rights, supra n. 3, Separate Opinion of Judge Sepúlveda-Amor, para 20: “The Court’s reasoning in the present case is not in accordance with its previous findings on the recognition of rules of customary international law. It will be difficult to find a precedent which corresponds with what the Court has determined in the present case. (…) These are the grounds on which the Court concludes that there is a customary right. An undocumented practice by a community of fishermen in a remote area”.

[37] Navigational and Related Rights, supra n. 3, Separate Opinion of Judge Sepúlveda-Amor, paras 28–31. Also Judge Skotnikov in his Separate Opinion, para 20, affirms that a construction of a bilateral custom is superfluous, because those rights pre-exist the relations between the two states: “the 1858 Treaty, as in the case of the practice of riparians traveling on the river to meet the requirements of their daily life (see para 13 above), left unaffected the practice of subsistence fishing by riparians from the Costa Rican bank of the San Juan River”.

4.2 The Role of Private Individuals

Given the fact that it was an international custom of public international law, the fact that the Court referred to the conduct of private individuals in assessing it is problematic: the inclusion of private entities' action in the development of international custom has been controversial in the past. This is probably why certain comments in the decision were criticisms or were careful concerning this point. Although there are some notable exceptions,[38] in general this possibility has been categorically excluded.[39] However, this decision does not seem to intervene in this question; it rather considers to which extent it is possible to consider private individuals' practice in the assessment of state conduct. The Court did not consider the practice of non-state actors *per se*; rather, it considered the practice of a state *through* an analysis of the practice of private individuals.

It is important as a matter of good order to give pre-eminence to practice of state officials when assessing a customary rule,[40] the proper progression should begin with the practice of the state and of its officials, an analysis which will resolve the vast majority of cases. Only in exceptional and residual cases and when the circumstances thereby allow, should the analysis have recourse also to the practice of private individuals. This also seems to be the position taken by Guillaume in its declaration attached to the *Navigational and Related Rights* decision: on the point in question, he agrees with the Court, but he marks the exceptional uniqueness of such a rationale.[41] Thus, the position of the Court seems to be that lacking any clear evidence of the consistent conduct of Costa Rica, it has looked at the behavior of private individuals, and the corresponding lack of any reaction by the State that maintained sovereignty over the river.

This gradual approach of the attribution of a certain conduct is consistent with another decision in which the Court has decided on the sovereignty of a territory. In the *Kasikili/Sedudu Island* case the Court's analysis moved in steps beginning with the declarations of the states' most prominent officials, and gradually reaching the conduct of private individuals on the ground.[42] There is a sort of scale

[38] Wolfke 1993b, p. 4; Ochoa 2007, pp. 119–186.

[39] For Akehurst 1976, p. 11, the acts of private individuals only count through the reaction of the states. Dinstein 2006, pp. 267–268 and 271, contemplates just a role in forming the *opinio iuris* of states; similarly Treves 2008, paras 33–34.

[40] A critical reflection on the role of personality can be read in Byers 1999, pp. 75–87.

[41] Navigational and Related Rights, supra n. 3, Declaration of Judge Guillaume, para 22.

[42] The ICJ, in order to assess sovereignty over an island, considered the habits of a local tribe, the conduct of low-ranked officials on the ground and the declarations made by representatives of the two Governments, ICJ: Kasikili/Sedudu Island (Botswana/Namibia), Judgment (13 December 1999), para 71 ff; see also the interesting reflections on the point made by Rezek and Parra-Aranguren in their Dissenting Opinions, respectively at paras 12–16 and para 88.

of strength in the necessary evidence: from the practice closest to State power (i.e. declarations of the highest ranked officials), to the conduct of private individuals.[43]

4.3 The Peculiarities of a Particular Custom

Apart from the number of subjects, a particular custom entails certain further differences from general customs. In contrast to the principle *iura novit curia*, which applies to general customs,[44] in the *Asylum* case the ICJ explained that the burden of proof for demonstrating a local custom lies on the party invoking it.[45] Scholars have suggested that general customs must be proved less rigorously than particular customs, given the fact that the former resemble a sanctification of general rules not explicitly accepted by the totality of states through the voice of the World Court.[46] In the *Navigational and Related Rights* case, however, the Court was satisfied without absolute proof being provided by Costa Rica, observing that the Costa Rican fishing 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".[47] Rather than requiring any clear proof from the Costa Rican state, the Court relied on Costa Rica's general claims.[48]

Thus, the ICJ seems to digress from its previous orientation. However, this point must not be emphasized for two reasons. First, the rough analysis employed by the Court,[49] especially compared to certain rigorous and structured analyses of the past, confirms its more liberal way of assessing customary rules nowadays.[50] Second, and more importantly, the provision of evidence by the parties was not

[43] Also this problem can entail further difficulties: public statements and effective deeds can be contradictory, and it is not always the former, even if emanating from a Government, that should always prevail over the latter. In general, in analysing practice, it is not possible to set a hard and fast rule that provides guidance, cf. Treves 2008, para 28.

[44] PCIJ: Payment in Gold of Brazilian Federal Loans Contracted in France (France/USA), Judgment (12 July 1929), p. 124.

[45] Asylum, supra n. 14, p. 276: "The Party which relies on a [special custom] must prove that this custom is established in such a manner that it has become binding on the other Party".

[46] D'Amato 1969, pp. 212 and 216; Shaw 2008, pp. 92–93, requires greater flexibility in assessing general customs; *contra* see Cassella 2009, p. 274.

[47] Navigational and Related Rights, supra n. 3, para 141.

[48] Ibidem, para 140.

[49] On this point see the strong criticism by Sepúlveda-Amor in his Separate Opinion to Navigational and Related Rights, supra n. 3, paras 20–24.

[50] See Treves 2008, para 20. See also ICJ: Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo), Judgment (24 May 2007), para 39.

controversial because both had agreed during the trial on the practice forming the basis of the local custom.[51] Thus, even if the Court stressed the truly customary nature of the phenomenon analysed, through an express reference to inveterate practices among the parties, the fact that both parties recognized the practice at issue during the trial shows the close attention of the Court to the element of the parties’ consent.[52] Also in the *Right of passage* case, the only other decision in which the ICJ has found a particular custom, the parties did not contest the parties’ conduct forming the basis of the bilateral custom, but only their legal effects.[53]

However, as briefly demonstrated in the previous sub-section, this decision shows a specific characteristic of *bilateral* customs: the practice considered by the Court in this kind of custom can be different from a general one. The practice looked at is broader than a general one: that is why the Court could consider the practice of private individuals in order to assess a custom. Such an operation is not likely to be possible in the case of general customs, where a matter of order obliges only practice of state officials to be considered. Otherwise it would either create a duty too burdensome, or a situation in which those invoking the existence of a custom can pick and choose whatever practice is closer to their own interests or convictions. In the assessment of such a local custom, in the context of a close bilateral relationship concerning a particular border, this precaution is no longer present, and the survey by the Court can and should have been broader.

5 Conclusions and Some Further Reflections

Many years after its first pronouncements on particular customs the ICJ again discussed this issue. The question whether or not particular customs are accepted in international law was not even addressed either by the Parties or by the Court: it

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[51] Navigational and Related Rights, supra n. 3, paras 140–141; see also the comments by Sepúlveda-Amor in his Separate Opinion, cit., para 36. The importance of the attitude of Nicaragua before the bench in the establishment of the local custom has also been stressed by Cassella 2009, pp. 275–276, and Palchetti 2009, p. 313. Indeed, not only concerning its attitude, but also in the written proceedings Nicaragua admitted that it had always allowed the very minor activity of fishing for subsistence purposes, cf. ICJ: Navigational and Related Rights, Rejoinder of Nicaragua (15 July 2008), pp. 200–201, para 4.67.

[52] On a special custom being non-existent, but as a tacit agreement, see already Gianni 1931, p. 123; Haemmerlé 1936, p. 170; more recently certain authors have stressed the consensual nature of special customs, Condorelli 1991, pp. 206–7; Cassese 2005, pp. 164–165 (referring to both Asylum and Right of Passage cases as describing a tacit agreement); Shaw 2008, p. 93. On the contrary, Thirlway 1972, pp. 135–141, criticises the strict consent theory of local custom: if many states follow a customary rule within a region, also the other few states not explicitly accepting the rule have to conform to it.

[53] ICJ: Right of Passage, supra n. 16, p. 40: “It is common ground between the Parties that the passage of private personas and civil officials was not subject to any restrictions, beyond routine control during these periods. There is nothing on the record to indicate the contrary”.

is now simply taken for granted. Certain questions once typical of particular customs, such as the need for clear proof in order to establish it, were not dealt with; on the contrary, in the *Navigational and Related Rights* case the proof required by the Court was very thin. However, this point cannot be pushed too far because of the position taken by the parties during the trial. The necessity of clear evidence in the case of particular customs is therefore still valid.

The *Navigational and Related Rights* case demonstrated another difference that can be drawn between general and particular, namely bilateral, customs, and it regard the extent of the state practice that can be considered. The limited and restricted area in which the survey of practice is carried out in bilateral customs allows for a broader definition thereof, also including private individuals' activities.

Of course, the relative weight of such a finding has to be considered in light of many questions. First, the relatively minor interest at stake: the number of people involved in this decision was very small, around 450 inhabitants living on the two banks; second, such a minor economic activity does not touch upon any interest of the two States; lastly, Nicaragua, both in its written proceedings and before the bench, was conciliatory concerning this point. However, this decision, and the way in which a state's conduct has been assessed, deserves attention: it represents another brush stroke on the already colorful canvas of custom.

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