

## The Concept of Special Custom

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We have seen in the preceding chapter arguments against the "consent" theory of customary international law. The notion of consent is troublesome beyond the level of theory, however, since the World Court has given it prominent mention in three leading cases purportedly dealing with customary law—the Asylum, Right of Passage, and Fisheries Cases.<sup>1</sup> Several scholars, including Richard Falk, have said that the Court insisted in these cases upon "some tangible evidence of consent on the part of the state that is bound," and thus have been pessimistic about ever finding sufficient proof for a rule of customary law.<sup>2</sup> However, these scholars and many others have failed to draw a basic distinction between special (or "local" or "particular") customary international law and general customary international law. That the World Court itself in these cases had in mind just such a distinction is evident from a structural analysis of their opinions in the context of the historical basis for drawing that distinction. The argument advanced here is that these leading cases concerned special, not general, custom, and that the difference between the two goes to the heart of an immensely important difference in the proof required for these types of custom. Special custom does indeed require stringent proof of consent or recognition of a practice on the part of the defendant state, whereas general custom is demonstrated by the method of proof outlined in previous chapters.

### *The Two Kinds of Custom*

The distinction between special and general custom is conceptually simple and has been noted (though not analyzed) by many writers dealing with international customary law.<sup>3</sup> General customary law applies to all states, while special custom concerns relations between a smaller set of states. As McDougal has put it, "Some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units."<sup>4</sup> An analogous instance might be conventional international law; in Lissitzyn's vivid terms, "the 'particular' international law . . . created by treaty could be visualized as consisting of a vast and ever changing number of circles of different and often fluctuating sizes, each enclosing a special 'legal community' composed of the parties to a treaty."<sup>5</sup> *General* customary international law contains rules, norms, and principles that, even upon mere inspection, seem applicable to any state and not to a particular state or an exclusive grouping of states. For example, norms relating to the high seas, to airspace and outer space, to diplomatic immunities, to the rules of warfare, and so forth, apply equally to all states having occasion to be concerned with these areas. By contrast, *special* customary law deals with nongeneralizable topics such as title to or rights in specific portions of world real estate (e.g., acquisitive prescription, boundary disputes, "international servitudes") or with rules expressly limited to countries of a certain region (such as the Latin American law of asylum).<sup>6</sup> The line separating general and special custom is similar to that in English common law, where a particular custom "must apply to a definitely limited though indeterminate class of persons" and to a limited geographic area; if the usage is laid in too wide an area, for example, it is taken out of the realm of custom and must be pleaded as an ordinary claim at law.<sup>7</sup>

From a claim-oriented viewpoint, the distinction is often unimportant insofar as a lawyer

may argue both kinds of custom on behalf of his client state, hoping that if he fails to persuade the court on one ground he may succeed on the other. Even so, the types of proof he must offer for each kind of custom will vary, as we shall see, and thus each kind will require separate treatment in his brief. And, on occasion, a court may require that the parties specify which kind of custom they are relying upon. An analogous instance occurred in the Second Phase of the South West Africa Cases when the applicant states attempted to rely upon both an anti-apartheid general norm of international law and an anti-apartheid "standard" applicable to South West Africa exclusively.<sup>8</sup> When the "norm" argument appeared to go badly for the applicants, they argued in response to Judge Fitzmaurice that even if the Court were to find no generally binding anti-apartheid norm of international law, there would still be a "standard" of precisely the same anti-apartheid content as the norm. But the applicants may have conceded too much in abandoning the "norm" argument (or, in what amounts to the same thing, in equating the "standard" argument, which originally had a different content, with that of the "norm"). For, under international law, if apartheid (like genocide) is illegal in one state it should be illegal everywhere. On the other hand, if there is no general norm of international law to the effect that the form of racial separation sometimes called "apartheid" is illegal everywhere, then the applicants might have been better advised to separate the questions of content and proof from that of the general norm. By choosing instead to run the two questions together in the form of similar arguments for both the "norm" and the "standard," the applicants may have undercut their persuasiveness on the "standard" by abandoning, or not putting much emphasis upon, the "norm" argument.<sup>9</sup> One might conclude that, if the distinction between general and special customary international law is valid, the international lawyer should take care to argue each type separately, so as not to dilute the effectiveness of the "strong" side of his case by conjoining it with a "weak" argument over the other type of custom.

### *The Bifurcation of Custom in Early Civil and Common Law*

Although it is generally dangerous to infer anything about international law from municipal law systems, we should at this point investigate the background of the distinction between special custom and general custom in order to appreciate the importance of the distinction. The analogies to Roman and English law here presented are at best suggestive. No direct relation exists between these systems and the international one other than the psychological relationship stemming from the fact that many international lawyers and jurists were educated in the classic systems.

Roman jurists of the classical period, who were very careful when it came to defining substantive law, were far less precise in their discussions *about* law. The matter of secondary rules of law-determination was left largely to historians and orators, who in turn did not see the need for precise legal distinctions. One result was that, in discussing "custom," they used a mixture of terms, the following being used more or less interchangeably: *mos*, *mores*, *usus*, and *consuetudo*.<sup>10</sup> (A modern parallel in international law is the widespread mixing of the terms *custom*, *practice*, and *usage*.) Another result was the feeling in Roman times of the danger of putting too much emphasis on "custom" as a fountain of law, since popular respect for law apparently increased to the extent that the foundations of law were demonstrated to stem from some sort of code, such as the Twelve Tables. Nevertheless, today's analyst can hardly disagree with Buckland and McNair's appraisal that "law may be said to begin, everywhere, in custom in

the sense that when a central authority begins to intervene in the settlement of disputes, the rules which it applies are mainly those rules of conduct which have been habitually observed by members of the community in their dealings with one another."<sup>11</sup> Moreover, we now know that the Romans were largely unaware of the "constitutional" law that was primarily customary. As Jolowicz has shown, "Much of the emperor's power, and indeed partly that of the senate, cannot be attributed strictly either to any enactment, or to the application of existing republican rules."<sup>12</sup> Although Justinian divided all law into *ius scriptum* and *ius non scriptum*, Suarez pointed out in the seventeenth century that the very term "law" to most Roman writers meant written law, and custom was only labeled for convenience of classification as *ius non scriptum*.<sup>13</sup>

Nevertheless a large element of custom persisted in the *ius gentium*. The application of this law to the peregrini, or foreigners within the Empire, was successful in part because, unlike the *ius civile*, it incorporated to a considerable extent the customs of the peregrini.<sup>14</sup> This strong influence of custom in the *ius gentium* became blurred later in the classic writings on international law (Pufendorf is the best example), which tended to equate the *ius gentium* with *ius naturale*. But the natural law, though it served much the same function as the *ius gentium* in increasing the law's reach in the Empire, was not necessarily congruent with the latter, as we can see for instance in the special case of slavery.<sup>15</sup> A more important reason why the strength of custom in the *ius gentium* became less evident is that, as time went on, enacted law and magistrate-made law (the *ius honorarium*) so rapidly encompassed all of existing law (save for the "constitutional" law mentioned previously) that little attention was paid to customary law.

Because interest in customary law was lacking, the idea of special custom as opposed to general custom received little explicit attention. Yet there was an important operative difference: general customary laws were codified, whereas the others which might in certain instances have conflicted with legislation, were not. Indeed, some statutes were expressly passed to cancel local customs and bring communities under the general laws of the Empire. In such instances, of course, the statute preempted the local or special custom. But remarkably enough, Roman law recognized the idea of desuetude: a statute could be canceled through lack of application and enforcement over a period of time.<sup>16</sup> Of course the statute was not removed from the books, and its "cancellation" applied only to particular communities in which it was not enforced. Thus a negative form of special custom arose--a community custom that, by opposing a statute, effectively annulled it as far as the community was concerned. *Desuetudo* is the verbal opposite of *consuetudo* (custom), although Kelsen calls it a "negative legal effect of custom."<sup>17</sup> The rationale given by Julian for *desuetudo*, which was incorporated in the Digest, is popular sovereignty--if statutes are binding because they are accepted by the public, then custom to the contrary must be of superior force to the statute.<sup>18</sup> Jolowicz shrewdly questions this view by arguing that special customs, involving only a fraction of the population, would not have constituted a . . . majority opinion contrary to the statute;<sup>19</sup> in Roman times, Constantine disagreed with the Digest rule.<sup>20</sup> Nevertheless there is sufficient modern acceptance of the fact that *desuetudo* was an important issue in Roman law to enable us to distinguish this form of special custom from the less noticed (because it was more habitual and because it became incorporated in written law) form of general custom.<sup>21</sup>

When we turn from the civil law system of the Romans to the common law system of England, the difference between the two forms of custom becomes much clearer, as befits a system which did not put decisive emphasis upon *ius scriptum*. We need not trace the historical

development, since Blackstone summed up the two forms with considerable precision in the eighteenth century. To Blackstone there were "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."<sup>22</sup> He gives as examples of general custom the rules of primogeniture, rules for the interpretation of wills, deeds, and acts of parliament (e.g., "wills shall be construed more favorably, and deeds more strictly"), criminal law, constitutional law, and so forth. But how can the content of general customs be determined? Blackstone answers that judges determine the customs in particular cases by the application of their experience and study, and according to the doctrine that precedents "must be followed, unless flatly absurd or unjust."<sup>23</sup> We should note with care the generality and flexibility in Blackstone's account of general custom. Judges are *not* given strict rules for its determination. While judges must generally follow precedent, the implication is that customs may change, and, when they do, the judges will follow the new customs. Plucknett has underscored the "flexibility and adaptability" of general custom: "In modern times we hear a lot too much of the phrase 'immemorial custom.' In so far as this phrase implies that custom is or ought to be immemorially old it is historically inaccurate. In an age when custom was an active living factor in the development of society, there was much less insistence upon actual or fictitious antiquity."<sup>24</sup>

Sharply contrasting with these elements of general custom is Blackstone's treatment of special custom, which he calls "particular customs." One example of a special custom is gavelkind in Kent, which ordains, among other things, a rule contrary to that of the general custom of primogeniture. (The rule of gavelkind is that all sons alike succeed to the father's estate.) Another exception to primogeniture is the custom of borough-English, prevailing in some other ancient boroughs, by which the youngest son inherits the estate. Blackstone notes numerous other examples of special customs within the city of London "with regard to trade, apprentices, widows, orphans, and a variety of other matters."<sup>25</sup>

Special customs require strict construction, Blackstone argues, because they are (or can be) in derogation of the common law (or general custom).<sup>26</sup> The following are the criteria he gives that are necessary to prove a special custom:

- (1) It must be specially pleaded.
- (2) It must be proved by a jury and not just by a judge.
- (3) It must have been in use "so long, that the memory of man runneth not to the contrary."
- (4) "It must have been peaceable, and acquiesced in; not subject to contention and dispute."
- (5) It must have been continuous.
- (6) It must not be unreasonable.
- (7) It must be certain. For example, "a custom that lands shall descend to the most worthy of the owner's blood is void; for how shall this worth be determined?"
- (8) Special customs must not be left to the option of the individual to decide whether or not he will use them.
- (9) Special customs must be consistent with each other.<sup>27</sup>

In 1902, Salmond made a thorough review of the subject and listed two additional important items which he argued were derived from Blackstone's general treatment:

- (10) The custom must be based on an *opinio necessitatis*; that is, it must have been

observed as a matter of right.

(11) The custom "must not be contrary to an Act of Parliament."<sup>128</sup>

In a further review of the subject in 1927, Sir Carleton Allen added three more criteria:

(12) Special customs cannot apply to the generality of citizens, but only to "a particular *class* of persons or to a particular *place*."

(13) The right claimed by special custom must have been exercised neither by stealth nor by revocable license.

(14) The custom must be notorious; it "cannot avail against a party who did not know, could not be expected to know, and was under no duty to know of its existence."<sup>129</sup>

These items, one and all, serve to set off special custom from general custom as a much more difficult proposition to prove. Since many writers have not taken care to differentiate the two types, the result has been a confusion in the international law literature. Many writers have imported one or more of the above criteria into their analyses of general custom and in consequence have found its proof an onerous task. Mingling the two types of custom is an easy error to make; Blackstone himself did it at one point. (In section 63 of the *Commentaries* he said that the unwritten law includes both general customs and "particular customs of certain parts of the kingdom," but in section 64 he observed that *all* unwritten laws have a "universal reception throughout the kingdom.") Some writers have attempted to avoid confusion by using the term "custom" only in the sense of "special custom." Thus Carleton Allen writes: "A custom applying to all the king's subjects is not truly a custom at all in the legal sense, for, as Coke says, 'that is the common law.' Customs, then, are *local variations* of the general law."<sup>30</sup> But other writers do not restrict the term "custom" to this sense, and even greater error may arise from such an attempt to stipulate the use of a common term. Indeed, in a recent work on the sources of international law, Clive Parry makes just this error. Although he is aware of Allen's distinction between common law and special custom,<sup>31</sup> he goes on to apply Allen's criteria of special custom as descriptive of *all* international custom, both special and general.<sup>32</sup>

Moreover, the equation of general custom with the common law, suggested by Coke and Blackstone and taken literally by Allen, does not hold up under close observation. First, the historical common law was much more refined and ramified than general customary law. The courts, for example, required common carriers and innkeepers to hold to a higher standard of due care than bailees, for it would be expecting "too much of human nature," as Braybrooke observes, to assert a custom among common carriers and innkeepers freely to indemnify their customers against loss of goods in circumstances when an ordinary bailee would not be considered liable.<sup>33</sup> Although courts may introduce such rules in the belief that they are merely applying existing customary law, as Allen argues in a letter to John Dewey,<sup>34</sup> objectively speaking the rules could not have been the product of custom. Second, some kinds of customs could not be categorized either as common law or special custom. Mercantile customs are the best example; although often pleaded as special customs, they were of general application through the realm.<sup>35</sup> Yet the "law merchant" was not considered part of the "common law." Third, general customs such as the law merchant began to conflict with the common law. The law merchant soon became sufficiently rigidified through incorporation into regular judicial law to prevent new mercantile customs from rising up to change the common law of mercantile custom.<sup>36</sup> Parliament had to step in to modify the rigors of the common law in order to make it meet the new requirements of the mercantile class, which had formerly been served by the more

flexible operation of the general custom of the law merchant. Fourth, the tendency to equate common law with general custom may in part reveal the Anglo-American predilection for viewing law as a "seamless web." By thus setting off "special custom" from the common law as a whole, we may argue that "special custom" is always and invariably in derogation of the common law. But this latter conclusion does not appear to be supported in practice; even in Blackstone we find that the customs of gavelkind and borough-English are given judicial notice in the courts where they apply, despite Blackstone's general rule that special customs must be pleaded specially and must be verified by a jury.<sup>37</sup> The "seamless web" argument is itself a generalization and must not in turn be used as a self-fulfilling prophecy which gives an inferior place to "special custom" and thus equates general custom with the common law.

In short, putting aside the complicating factor of the term "common law," the English legal experience demonstrates that general custom and special custom were two distinct legal phenomena, each supported by criteria of definition and application, and neither explainable solely in terms of its effect upon the other.

### *Special Custom in International Law*

The preceding section proves nothing directly about the two forms of custom in international law, although it may underline the importance of the distinction insofar as it has been rooted in the practicality of the municipal legal experience. The fact that the distinction has not been maintained in international legal studies has led many writers to become pessimistic about proving custom before international tribunals. With respect to the Asylum Case, Herbert Briggs has emphasized the International Court of Justice's reasoning as "admirably illustrating] how international customary law in general is proved."<sup>38</sup> The Court in this case laid down a strict requirement of consent; it found that Peru was not bound by the alleged rule because Peru did not consent to the rule, and moreover the lack of consent was inferred from Peru's failure to ratify a convention which she had already signed.<sup>39</sup> Should this constitute a requirement for general custom, then general customary law would be a myth. For no law can depend upon unanimous consent, particularly if lack of consent can so easily be inferred from an action such as failure to ratify a multilateral convention. As we saw in the last chapter, international law does *not* depend upon consent for its authoritativeness. Thus the Asylum Case must be examined more closely to see whether it really stands for the proposition suggested by Briggs.

In a similar manner, Wilfred Jenks assumes that general custom is at issue in the Anglo-Norwegian Fisheries Case. He finds in the Court's statement that "the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast"<sup>40</sup> a rule of proof of custom that, in his words, "may appear to verge upon the extreme positivist position that no State is bound by custom in the absence of proof of its own recognition of the alleged custom in deference to an *opinio juris sive necessitatis*. This position involves a frontal challenge to any possibility of the development of international law by means of international adjudication."<sup>41</sup> It is illuminating to look at the lengths to which Jenks will go to discredit the Court's opinion. First, in an attempt to pass over what he thinks is a bad judicial decision, he resorts to the device of labeling the international legal system "primitive." Second, he offers the veiled threat that rigid customary rules such as the one given by the Court may have to be changed by states engaging in a good deal of law-breaking, if not violent, activity. Third, he cites long extracts from the dissenting opinions in

the case, attempting to disparage the majority opinion. But this technique is dangerous, particularly in international legal practice, since it only serves to underline for the reader the reasoning that the majority of the Court had considered and decisively rejected. In domestic Anglo-American practice, the citation of dissenting opinions might, from time to time, carry weight with a court that could reverse a previous decision. But in international practice, a World Court decision passes into the stream of international law accepted by states, and the World Court could not easily reverse an earlier opinion on the ground that its reasoning at that time had been incorrect. Only a change in the underlying customary law itself would justify a World Court reversal. Thus the World Court has adhered tenaciously to its own precedents, and it may be counterproductive for a scholar to challenge a decision by lengthy citation from individual dissenting opinions. Finally, Jenks' suggested corrective is a plea to the Court to exercise much more discretion in future cases in matters of finding custom. He would have the Court make findings about custom without bothering to adduce evidence, for "in the nature of the case it may frequently be impossible to furnish" evidence of custom.<sup>42</sup>

In short, the way to avoid the custom's stringent requirements, as interpreted by Jenks, is to give international courts the power to make law at their convenience. Yet Jenks' avowed purpose, reflected in his title ("The Prospects of International Adjudication"), is to promote, and not reduce, recourse to international legal procedures. But how many states would become more inclined to submit their disputes to an international court if the court, following Jenks' advice, were to insist upon exercising unfettered discretion in matters of finding custom? The jeopardy in which he consciously or unconsciously places his goal of increased international adjudication testifies to the danger Jenks perceives in the doctrine that custom depends upon the consent of the defendant state. If mere protest against a rule relieves a defendant state from any obligation to follow that rule, as Jenks infers from the Fisheries Case, then each state can carve out for itself a privileged exemption from any rule which it deems onerous. On the other hand, if consent and absence of protest are components of *special* custom but not *general* custom, as was suggested in the preceding section with respect to special custom in municipal law, then the international system is not faced with a "frontal challenge" to the rule of law as Jenks feared.

There are several basic reasons why any legal system, including the international, would require a strong showing of consent in matters affecting a subgroup of the legal subjects, even while eschewing consent--for reasons given in the preceding chapter--with respect to rules of general applicability. Legal systems in the first place are concerned with social interactions, not with what an individual does, without social repercussions, in the privacy of his room. An individual is usually legally free, as John Stuart Mill argued that he should be, when his actions do not affect others. Second, if two or more individuals decide to "privatize" certain of their special interrelationships, legal systems usually give them the power to do so. The law does not usually concern itself with the substance of the myriad contracts and agreements among subgroups of its subjects, but only with the breakdown or misinterpretation of those agreements. For example, contracts are typically enforced even when they have settlement procedures or arbitration clauses built into them, and courts will usually defer in the first instance to the judgments of the private settlement authorities. The law thus recognizes a power in individuals to invent their own rules *inter se* and their own procedures for resolving them. In general, legal systems will let people do what they want so long as they have clearly agreed among themselves as to their mutual rights and duties. Of course there may be exceptions: some agreements (an

agreement to commit a crime, for example) may be declared void because they violate public policy, and others may run afoul of specific legislation (such as antitrust legislation). But apart from these infrequent exceptions, the basic premise appears to be that if A and B have consented to do something, that consent is "binding" between them despite what might otherwise have been the legal rule in the absence of such consent.

The various components of special custom in municipal law which were discussed in the preceding section all reflect the importance of the element of consent. The notion of a longstanding community custom, found as a fact by a jury, and reasonable, peaceable, continuous, certain, notorious, and even observed as a matter of right--the Blackstonian elements--certainly approaches, if not coincides with, "consent" on the part of the defendant.

We might expect international law to be abundantly stocked with instances of particular agreements and special customs among the subject states. The equality of states, their geographical immobility, and the absence of a central legislature, all have encouraged the proliferation of bilateral and regional agreements, understandings, and conventions. Indeed, the vast bulk of international law is found in treaties. These treaties, the embodiment of consent, may derogate from or may reinforce previous "law," but usually the question of derogation or reinforcement does not arise since the treaty itself, or perhaps an interpretation of it, provides the operative rules for the parties. To be sure, international law might possibly not enforce certain types of substantive provisions in treaties, as the debate over *jus cogens* suggests.<sup>43</sup> But apart from that specialized problem, we might think of treaties as a highly formal type of "special custom," or indeed we might view special custom as an informal treaty. Either way we have rules evolved by particular states that concern themselves only, that indicate their mutual agreement. International tribunals typically enforce these agreements if sufficient tangible evidence of them is available, such as evidence of a long-standing custom between the states, enforcement of the practice as a matter of right, awareness of the custom, and so forth. These are analogues of the Blackstonian components of special custom, and as such would help complete the system of international law, for without them the reasonable expectations of states would in large measure be frustrated.

But the foregoing considerations do not prove that special custom in the sense suggested exists in international law. For proof we must turn to decisions of the World Court where the matter has been made explicit. Numerous instances of the application of special custom could be gleaned from state papers and other elements of diplomatic intercourse, but these are rarely clear as to the legal theories under which they present the state's case. Even so, once a theory of special custom has been extracted from World Court opinions, a student of international law can test it against diplomatic correspondence by the use of content and factor analysis and other multivariate regression techniques designed to indicate the degree of successful reliance upon certain types of arguments, citations, and precedents, in the state papers.

Nearly every World Court case involves some aspect of customary law. The many cases of interpretation of treaties have applied customary rules of treaty-interpretation; numerous other cases have applied general custom or special custom in deciding the merits of the dispute. Nevertheless, most of these cases have not explicitly referred to the law-determining processes that were involved. But a few opinions have been relatively articulate in dealing with general or special custom:

<i>General Custom</i>	<i>Special Custom</i>
Lotus Case <sup>44</sup>	Asylum Case <sup>50</sup>
S.S. Wimbledon <sup>45</sup>	Nationals in Morocco Case <sup>51</sup>
Corfu Channel Case <sup>46</sup>	Rights of Passage Case <sup>52</sup>
Reservations to the Genocide Convention <sup>47</sup>	Fisheries Case (part)
Nottebohm Case <sup>48</sup>	
Fisheries Case <sup>49</sup> (part)	

These cases on general custom have been examined in preceding chapters, along with the reasons for categorizing them as "general custom." Here let us consider the "special custom" cases, analyzing whether they are correctly so listed and what they contribute to the notion of special custom in international law.

Many writers have thought that the Asylum Case established the requirements of custom in general; according to DeVisser, the World Court's decision in the Asylum Case with respect to custom "fixes its jurisprudence on this subject."<sup>53</sup> But a close look at the majority opinion demonstrates that the Court specified it was *not* dealing with general custom or with the process of custom-formation as a generalization. Rather (in the section that writers quote as laying down the requirements of custom), the Court prefaced its analysis by a reference to the Colombian government's reliance "on an alleged regional or local custom peculiar to Latin-American States." The Court then held:

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 practiced 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>54</sup>

The Court proceeded to find no evidence of a constant and uniform usage in the matter of diplomatic asylum in Latin America, because of the uncertainty, contradiction, fluctuation, discrepancy, and political expediency in the various cases and instances on the subject. Moreover, it held that Peru had "repudiated" the Montevideo Conventions of 1933 and 1939 (which contained the rule Colombia was contending for) by its failure to ratify those conventions.

Since there was no proof of a "custom of this kind," the Court denied Colombia's plea of "an alleged regional or local custom." We should especially note that the Court used the arguments in the preceding paragraph solely with respect to this "local custom." A reading of what came before this section in the Court's opinion shows that the Court also considered matters of general custom, including treaty interpretation, yet nowhere in discussing those matters did the Court require a showing of the strict elements of special custom just quoted. For example, the Court discussed the concept of "derogation from territorial sovereignty" without referring to constant and uniform practice or explicit rights and duties. Also, in dealing with treaty

interpretation, there was no reference to the strict elements of special custom. Rather, these elements were restricted to the section of the opinion where the Court explicitly dealt with "an alleged regional or local custom," or in other words, special custom.<sup>55</sup>

Additional support for the preceding interpretation may be found in the dissenting opinion of Judge Alvarez, which highlights the Court's particular concern with the matter of a special custom in Latin America,<sup>56</sup> and also in the majority opinion in the later case of the Nationals in Morocco. This case dealt with many separate contentions relating to matters of general custom and treaty interpretation, but also with a special question of specific American capitulatory rights in Morocco. Only with respect to this latter issue did the Court cite its earlier statement in the Asylum Case on special custom. Moreover, the Court made a point of noting that its previous language in the Asylum Case dealt with "the question of the establishment of a local custom peculiar to Latin-American States."<sup>57</sup>

The portion of the Nationals in Morocco opinion dealing with capitulatory rights, by citing the Asylum Case on special custom, provides us with a good example of special customary law. No general rule of international law grants all states extraterritorial rights in other states. If among any particular states extraterritorial rights exist, they stem either from a treaty or from special customary practice that amounts to consent on the part of the territorial state. Perhaps the only general rule on the subject in present international law may take the form of a presumption, or pressure, against the existence of capitulatory rights, an "old and dying institution" in the words of Verzijl.<sup>58</sup> The manner in which the Court analyzed the rights of the parties in the Nationals in Morocco Case lends support to this interpretation. The Court found no rule of general customary law on behalf of the United States' claim to extraterritorial rights in Morocco. And the citation of the Asylum Case, with its restrictive view of the necessary elements for proving the existence of a "regional or local custom," indicates that for subjects such as capitulatory rights, the plaintiff must prove in a very specific way that the defendant has expressly or impliedly consented to the alleged "derogation from [its] territorial sovereignty."<sup>59</sup>

Nor are the preceding interpretations invalidated by the Court's reference to Article 38 in the Asylum Case, quoted previously, and in the Nationals in Morocco Case when the Court quoted its own prior language. To repeat the quotation, the Court held that the elements of special custom follow from the reference in Article 38 of the Statute of the Court to international custom "as evidence of a general practice accepted as law." At first impression, the word "general" in this clause might seem inconsistent with a finding of special custom. But in 1936 Jules Basdevant pointed out the need for a broad interpretation of Article 38--one which would include special custom. Such an interpretation was necessary in order to fulfill the reasonable expectations of states who often order and regularize special relationships among themselves in the manner discussed previously.<sup>60</sup> The World Court must have agreed with Basdevant's reasoning, even before 1936, since it has refrained entirely from mentioning Article 38 in all of the numerous cases involving general custom, while mentioning it explicitly in the portions of the Asylum and Nationals in Morocco Cases dealing exclusively with special custom. In so doing, the Court has fixed upon Article 38 the broad interpretation called for by Basdevant. Additionally, to make the matter crystal clear, in 1960 the Court disavowed the notion of "general" custom as including a number of states in the Right of Passage Case, which concerned special custom:

[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.<sup>61</sup>

In the Right of Passage Case the Court held that Portugal had a right of passage over Indian territory, permitting private persons, civil officials, and goods in general to reach the Portuguese enclaves in India. This holding was based on evidence of a local custom, continuous over a period exceeding a century and a quarter, "accepted as law" by the parties, and constant and uniform. This case, according to Karol Wolfke, contains "the most decisive recognition of particular customary rules," as opposed to general customary rules.<sup>62</sup> The Court went on to reject other alleged rights also on the basis of special custom. It found no special custom entitling Portugal to transport armed forces, police, or ammunition over Indian soil. Thus the heart of the case concerned special custom as the secondary rule of law-determination with respect to the bundle of alleged rights of passage.

An entirely new section of the Court's opinion deals with the parties' arguments on general custom. As for nonmilitary rights of passage, the Court held it superfluous to inquire whether general custom would yield the same result as special custom. The situation of the alleged military rights was more complex. Portugal did not advance any convincing arguments either in the briefs or in the oral presentation that a right of military access existed under general customary international law. Much of the argumentation consisted of analogies to municipal law granting access to private persons over the land of another, but these did not involve military access. Therefore, since the Court was able to find in the special customary practice between Portugal and India a distinction between nonmilitary and military rights, it refused to deal with the alleged general custom of military access. The Court noted that the situation was "a concrete case having special features," that the practice between the two states was "clearly established," and that therefore "such a particular practice must prevail over any general rules."<sup>63</sup>

Thus the Court in the Right of Passage Case clearly distinguished between special custom and general custom in international law. Yet can we say which type of custom would have priority in the event of a clash? The Court's assertion of the primacy of special custom in this case was made possible largely by Portugal's failure to demonstrate a general custom of military access to enclaves. Moreover, the Court would not have argued the superfluity of examining Portugal's contention of general custom for nonmilitary access if it could have disposed of this point simply by stating that special custom in all cases preempts general custom. We are at too early a point in international jurisprudence to state with any degree of conviction clear "conflict-of-law" principles with respect to special and general custom. The Right of Passage Case seems to suggest that when special custom is easily proved, and general custom is very vague and dependent upon analogies, the Court will accept the former and not make any particular effort to inquire into the latter. Even more elusive relationships between general and special custom are possible. Thus, in the Nationals in Morocco Case, a possible rule of general customary law in the background, exerting a presumption against the finding of capitulatory rights, may have made it harder for the United States to prove the existence of a special custom

of such rights. The converse is also conceivable. Slouka's thesis, examined in the preceding chapter, operated on an assumption ("the bilateral approach") that the law of the continental shelf was a series of special customary rules. This assumption may have been facilitated by the existence of a general customary rule in favor of coastal state rights over the continental shelf. As we have seen, the pressure of such a general customary rule was apparently always the decisive factor in his conclusions that the coastal state had the better claim to the disputed area in the offshore submarine territory.

When general custom is too vague to cover a specific case (even though it could clearly apply to different cases), a decisive role might be played by special custom when otherwise special custom would not be invoked at all. Such a role seems to have been given to special custom in the complex case of the Anglo-Norwegian Fisheries. The Court's opinion is not easy to analyze; Douma lists over fifty articles devoted to the case, offering conflicting interpretations.<sup>64</sup> The opinion is rambling and cryptic, possibly because the judges deliberated only fifty days despite the voluminous pleadings and lengthy oral arguments.<sup>65</sup> It has been severely criticized, particularly by losing counsel.<sup>66</sup> Yet if the opinion is read in its entirety, taking all the passages together and in context, a rational scheme becomes evident.

The most important parameter in the Court's judgment is that Norway's delimitation of its territorial waters must accord with general international law: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."<sup>67</sup> The Court then gave three indications of the requirements of general customary international law in this area: "the drawing of baselines must not depart to any appreciable extent from the general direction of the coast"; if the coastline is unusually rugged, the choice of base-lines should be "liberally applied"; and as a general principle "governing any delimitation of the territorial sea," the base-lines "must be drawn in such a way as to respect the general direction of the coast and . . . must be drawn in a reasonable manner."<sup>68</sup> That these are all statements of general customary rules is evident from the fact that the Court simply takes judicial notice of them, with no attempt to offer independent proof. We should moreover note that, although the statements may not offer precise guidelines in close cases, they certainly rule out arbitrary and excessive claims and thus serve the function of any general rule of law in indicating broad standards of permissible and impermissible conduct.

The opinion also contains statements of general custom for which the Court does offer, or allude to, evidence of state practice. An example is the statement that for the purpose of measuring the breadth of the territorial sea, "it is the low-water mark . . . which has generally been adopted in the practice of States."<sup>69</sup> The Court also found certain *alleged* general rules not to be accurate statements of international law. The most important example was Great Britain's claim that, to be considered as internal waters, a "bay" may not have, under general customary law, a closing line of its indentation that exceeds ten sea miles. But the Court held that "although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."<sup>70</sup>

It is within the preceding formulations of general customary law that the Court considers

matters of special custom. Many instances of special custom occurring in different places throughout the opinion concern "historic waters." These are, of course, instances of prescription. As Judge Fitzmaurice has analyzed the matter, "The acquisition of a historic right by prescriptive means is merely a special case of the creation of right by custom or usage."<sup>71</sup> In such an instance, "the element of consent, that is to say, acquiescence with full knowledge, on the part of the [complaining] States is not only present, but necessary, to the formation of the right."<sup>72</sup> Indeed, Great Britain did not contest the validity of prescriptive rights, conceding that the "historic waters" belonged to Norway if *possessio longi temporis* was proved in each instance.<sup>73</sup>

Some other examples of special custom in the Court's opinion have caused considerable trouble for critics of the case who have not differentiated the two types of custom. First, we have already seen that the Court rejected the ten-mile rule for bays as far as *general* customary law was concerned. But then the Court added an argument addressed specifically to the two parties in the litigation: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."<sup>74</sup> In short, the Court considered the ten-mile rule both in general and in special custom. It upheld Norway on the general ground because of the division of state practice throughout the world. And it upheld Norway on the special ground because, as between Norway and Great Britain, Norway had not consented to the practice (indeed she opposed it). Here the Court was in effect saying that Norway's delimitation of bays was not unreasonable in light of general customary practice, and therefore Great Britain could not *limit* Norway's rights within the ambit of reasonableness unless Norway consented to the establishment of such a special custom.

But if Norway has certain rights within the ambit of reasonableness, Great Britain may also have similar rights. For if a certain area is contested, one cannot say *a priori* that the coastal state and not the state that is attempting to fish in the area has the better preemptive claim to whatever may reasonably be claimed. Thus it became relevant to see if Great Britain had consented or acquiesced to Norway's use of any part of the area defined by the general customary rules previously stated by the Court. Thus, as a second example of special custom, and with respect to the questions of the ten-mile rule, the historic waters, and the "skjaergaard" and other specific configurations of the Norwegian coast, the Court took account of the notoriety of the Norwegian claims and the failure of Great Britain to engage in substantial protest:

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

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.<sup>75</sup>

This language, coming near the end of the Court's opinion, points up the Court's concern for the special aspects of the bilateral relationship between Norway and the United Kingdom. The Court's reasoning on toleration and lack of protest thus served a specific purpose relating to consent in the matter of special customary rights within the disputed ambit of the reasonable possible extensions of Norway's internal waters.

Two other relevant World Court cases include the question in 1927 of whether the European Commission of the Danube had jurisdictional powers from Galatz to above Braila.<sup>76</sup> The Court looked to "usage having juridical force simply because it has grown up and been consistently applied with the unanimous consent of all the States concerned."<sup>77</sup> This case was clearly a matter of special custom inasmuch as it concerned a specific commission for a specific river; no one has ever suggested the existence of a general rule setting up river commissions and giving them precise jurisdictional powers. Hence the idea of "unanimous consent" was restricted to a situation of special custom. Second, in 1930 the Court delivered an advisory opinion concerning a specific place--the Free City of Danzig. It based its holding that Poland did not have absolute rights to control the conduct of the foreign relations of Danzig on a "practice, which seems now to be well understood by both Parties . . . [that] gradually emerged from the decisions of the High Commissioner and from subsequent understandings and agreements arrived at between the Parties under the auspices of the League."<sup>78</sup> Again, the attempt to show consent was necessary in a situation of special custom.

Unfortunately, international tribunals other than the World Court have not addressed themselves expressly to the distinction between special and general custom. The few examples from the practice of the World Court discussed in this chapter indicate the importance of the distinction, particularly with respect to the elements of consent, acquiescence, and failure to protest. Nevertheless, the examples are too few to spell out all the elements of special custom in international law. Nor can we be sure that there exist generalizable elements of special custom, for out of the practice of states may emerge many varied rules relating to different types and situations of special custom.<sup>79</sup> Even so, the extent to which special custom appears to rely upon consent would appear to make it less significant in international law than general custom, since consent often means the absence of a dispute. Perhaps the best we can do is not to allow special custom to confuse us in our examination of the elements of general custom.

### Footnotes to Chapter 8

1 Asylum Case, 1950 I.C.J. Rep. 266; Rights of Passage Case, 1960 *id.* at 4; Fisheries Case, 1951 *id.* at 116.

2 Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 *A.J.I.L.* 782 (1966).

3 See Wolfke, *Custom in Present International Law* 86-92 (1964), and writers cited therein.

4 McDougal *et al.*, *Studies in World Public Order* 15 (1960). The term "general" used in this chapter is preferable to "universal" as it avoids the connotation of complete unanimity which has perhaps never been available in international law. As stated by Justice Chase in *Ware v. Hylton*, "General" international law is "universal" and thus binding upon "all nations." 3 Dall. 199, 227 (1796).

5 Lissitzyn, *International Law Today and Tomorrow* 7 (1965).

6 See Asylum Case, 1950 I.C.J. Rep. 266, 190 (dissenting opinion of Judge Azevedo).

7 Salt, "The Local Ambit of a Custom," in *Cambridge Legal Essays* 279, 283 (1926)

8 1966 I.C.J. Rep. 4.

9 For a general critique and references to the oral arguments, see D'Amato, "Legal and

Political Strategies of the South West Africa Litigation," 4 *Law in Transition Q.* 8, 26-29, 36-39 (1967).

10 Jolowicz, *Historical Introduction to the Study of Roman Law* 364 (2d ed. 1961).

11 Buckland & McNair, *Roman Law and Common Law* 14 (1936).

12 Jolowicz, *op. cit. supra* n. 10, at 365.

13 Suarez, *A Treatise on Laws and God the Lawgiver* 446-47 (Carnegie Series, 1944).

14 See Buckland, *A Text-Book of Roman Law* 53 (2d ed. 1950); Pollock, *Maine's Ancient Law* 398 (1906).

15 See Buckland, *op. cit. supra* n. 14, at 54-55.

16 *Id.* at 52

17 Kelsen, *General Theory of Law and the State* 119 (1945).

18 See Jolowicz, *op. cit. supra* n. 10, at 363-64.

19 *Id.* at 364.

20 See Buckland, *op. cit. supra* n. 14, at 52.

21 Braybrooke represents the currently prevailing view that *tacito consensu populi* operated in Roman law to abrogate statutory law that had fallen into desuetude. See Braybrooke, "Custom as a Source of English Law," 50 *Mich. L. Rev.* 71, 90 (1951).

22 Blackstone, *Commentaries* \*67.

23 *Id.* at \*68, \*69-70.

24 Plucknett, *A Concise History of the Common Law* 307 (5th ed. 1956).

25 Blackstone, *Commentaries* \*74-75, \*78.

26 *Ibid.* Local customs were sometimes called "costumals"; see Plucknett, *op. cit. supra* n. 24, at 313.

27 Blackstone, *Commentaries* \*76-78.

28 Salmond, *Jurisprudence* 262-64 (9th ed. 1937); *cf.* Allen, *Law in the Making* (3d ed. 1939). Both Salmond and Allen claim that *opinio juris sive necessitatis* derives from Blackstone. Blackstone does not refer to it *per se*, though it might be inferred from his criterion that a custom cannot depend on the individual's option. But even so, Blackstone thought of this as part of the meaning of custom and not as an independent determinant of custom. The concept of *opinio juris*, however, has taken on a life of its own in the writings of many scholars as an alleged way of proving the existence of custom.

29 Allen, *op. cit. supra* n. 28, at 126-36. Note however that in the Anglo-American common-law systems there is generally no concept of desuetude of statutes.

30 *Id.* at 126.

31 Parry, *The Sources and Evidences of International Law* 61 n.2 (1965).

32 *Id.* at 59-67. In addition, Parry makes the error of assuming that what Allen (and Blackstone) said about custom in domestic law directly applies to the international legal system.

33 Braybrooke, *op. cit. supra* n. 21, at 74.

34 Reprinted in Allen, *op. cit. supra* n. 28, at 147.

35 Braybrooke, *op. cit. supra* n. 21, at 84.

36 *Id.* at 88.

37 Blackstone, *Commentaries* \*75.

38 Briggs, "The Colombian-Peruvian Asylum Case and Proof of Customary International Law," 45 *A.J.I.L.* 728, 730 (1951).

- 39 1950 I.C.J. Rep. 260, at 276-78.
- 40 1951 I.C.J. Rep. 116, at 131.
- 41 Jenks, *The Prospects of International Adjudication* 237 (1964).
- 42 *Id.* at 237, 261, 263, 264.
- 43 See Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law," 60 *A.J.I.L.* 55 (1966); Riesenfeld, "*Jus Dispositivum* and *Jus Cogens* in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court," 60 *A.J.I.L.* 511 (1966).
- 44 P.C.I.J. Rep., Ser. A, No. 10, at 4 (1927).
- 45 P.C.I.J. Rep., Ser. A, No. 1, at 15 (1923).
- 46 1947 I.C.J. Rep. 4.
- 47 1951 I.C.J. Rep. 15.
- 48 1955 I.C.J. Rep. 4.
- 49 1951 I.C.J. Rep. 116.
- 50 1950 I.C.J. Rep. 266.
- 51 1952 I.C.J. Rep. 176.
- 52 1960 I.C.J. Rep. 4.
- 53 DeVisscher, *Theory and Reality in Public International Law* 148 (1957).
- 54 1950 I.C.J. Rep. 266, at 276-77.
- 55 *Id.* at 274-77.
- 56 *Id.* at 290-302.
- 57 1952 I.C.J. Rep. 176, at 199-200.
- 58 2 Verzijl, *The Jurisprudence of the World Court* 135 (1966).
- 59 1950 I.C.J. Rep. 266, at 274-75.
- 60 Basdevant, "Règles Générales du droit de la paix," 58 *Recueil des Cours* 471, 486 (1936).
- 61 1960 I.C.J. Rep. 4, at 39-40.
- 62 Wolfke, *op. cit. supra* n.3 at 90.
- 63 1960 I.C.J. Rep. 4, at 44.
- 64 Douma, *Bibliography on the International Court Including the Permanent Court 1918-1964*, at 203-07 (1966).
- 65 Hudson, "The Thirtieth Year of the World Court," 46 *A.J.I.L.* 1, 25-26 (1952).
- 66 See Waldock, "The Anglo-Norwegian Fisheries Case," 28 *B.Y.I.L.* 114 (1951).
- 67 1951 I.C.J. Rep. 116, at 132.
- 68 *Id.* at 133, 140-41.
- 69 *Id.* at 128.
- 70 *Id.* at 131.
- 71 Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 *B.Y.I.L.* 1, 39 (1953).
- 72 *Id.* at 68-69.
- 73 1951 I.C.J. Rep. 116, at 130.
- 74 *Id.* at 131.
- 75 *Id.* at 139.
- 76 European Commission of the Danube, Advisory Opinion, P.C.I.J. Rep., Ser. B, No. 14, at 6 (1927). For an instance of special custom in a prescriptive setting, see the *Minquiers and*

Ecrehos Case, 1953 I.C.J. Rep. 47.

77 P.C.I.J. Rep., Ser. B, No. 14, at 17.

78 Free City of Danzig, Advisory Opinion, P.C.I.J. Rep., Ser. B, No. 8, at 4, 12-13 (1930).

79 Special custom in Latin America seems to have its own peculiarities. See Judge Alvarez' dissenting opinion in the Asylum Case, 1950 I.C.J. Rep. 266, at 290-302. See also G. Cohen-Johathan, "La coutume locale." *7 Annuaire français droit int.* 119 (1961).