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A MELTING SNOWBALL—DIFFICULTIES IDENTIFYING PARTICULAR CUSTOMARY INTERNATIONAL LAW

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Abstract This article discusses the relationship between particular and general customary international law, grappling with academic views affirming that, ordinarily, the emergence of the former is a stage in the consolidation of the latter. It is argued that the higher standard of State consent required for the configuration of bilateral or regional custom suggests otherwise. In addition, it is also contended that a distinctive kind of *opinio juris* must be present for particular custom to arise: a conviction from the States concerned that their conduct is governed by particular (as opposed to general) customary law.

Keywords: customary international law, particular customs, regional customs, customary norms, *opinio juris*, snowball theory of customary law.

I. HOW BILATERAL AND REGIONAL NORMS GO GLOBAL: THE SNOWBALL THEORY OF CUSTOMARY INTERNATIONAL LAW

Few people understand customary international law as well as Maurice Mendelson KC, who delivered a course on the topic at the Hague Academy in 1998.[1] On that occasion, he provided a comprehensive explanation of how these norms emerge—a process which, in his view, ordinarily required the formation of particular (eg regional or bilateral) custom before a general, world-wide custom could come into effect. He argued that:

> general customary law has normally evolved from the particular. What happens is that a customary rule develops which initially binds only a few States — particular customary law. But gradually, the practice may become more widespread, until it becomes general law.[2]

Shortly after Mendelson delivered his course at the Hague, Rein Müllerson conveniently used the image of a snowball to explain the mechanics at play:

> [a] customary norm of international law often develops like a snowball, binding more and more states on its way to maturity (i.e. on its way of becoming a norm of general [customary law]), and becoming finally binding for all states, excluding, theoretically at least, persistent objectors.[3]

[1] MH Mendelson, 'The Formation of Customary Law' (1998) 272 RdC 155.
[2] ibid 194.
[3] R Müllerson, *Ordering Anarchy: International Law in International Society* (Martinus Nijhoff 2000) 224.

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For the sake of clarity, it is worth stressing that '[a] rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States'.[4] In other words, there are two kinds of customary norms: general ones—which bind all States excepting persistent objectors—and particular ones, which bind only a subset of States. The latter category of custom includes regional customary law (such as Latin American custom),[5] bilateral custom (binding two States only, which are often neighbours) and other non-general customary norms (such as the so-called socialist international law postulated by Soviet scholars during the Cold War).[6] Particular customary norms have a long pedigree in international legal scholarship (as evidenced by the writings of Hugo Grotius and Emmer de Vattel)[7] and the jurisprudence of both the Permanent Court of the International Justice[8] and the International Court of Justice (ICJ).[9]

As will be argued below, some scholars might be tempted to rely on this snowball theory of custom to resolve one of the most controversial questions in relation to this source of international law—the methodological approach of the ICJ for identifying customary rules. The perceived issue with the ICJ's methodology can be summarized as follows. It has been argued that the Court's case law since *Nicaragua*[10] has not been true to the two-element test for the ascertainment of custom (State practice and *opinio juris*), which was established in the *North Sea Continental Shelf Cases*.[11] It has been observed that the Court often fails to demonstrate that there is a widespread practice among States who believe that their conduct is legally mandatory.[12] Indeed, according to

[4] International Law Commission (ILC), Draft Conclusions on Identification of Customary International Law, with Commentaries, UNYBILC, vol II (2018) Part Two, 122 (ILC Draft Conclusions).

[5] There is a longstanding tradition endorsed by some Latin American scholars asserting the existence of regional custom in this region. The best-known example of such particular custom might be the contested rule of 'diplomatic asylum', which was famously discussed in the International Court of Justice's (ICJ) *Colombian–Peruvian Asylum Case* [1950] ICJ Rep 266, 276–8 (finding that Colombia, the claimant, had not proved the existence of such custom). According to Arnulf Becker Lorca, between the 1880s and the 1950s many scholars from this region debated the existence of an 'American international law'. See A Becker Lorca, 'International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination' (2006) 47 HarvIntlLJ 283, 299. The presumptive rule of diplomatic asylum would have been inscribed within this regional expression of international law.

[6] D Harris and S Sivakumaran, *Cases and Materials on International Law* (9th edn, Sweet & Maxwell 2020) 21. Socialist international law is included here as 'non-general custom' (instead of 'regional' custom) since it was arguably applicable to States that were as far away from the Soviet Union as Cuba, which makes it difficult to describe it as pertaining to a specific geographical region.

[7] M Akehurst, 'Custom as a Source of International Law' (1975) 47(1) BYIL 1, 30.

[8] AA D'Amato, 'The Concept of Special Custom in International Law' (1969) 63 AJIL 211, 222–3.

[9] GR Bandeira Galindo, 'Particular Customary International Law and the International Law Commission: Mapping Presences and Absences' (2021) 86 QuestIntlL 3, 4.

[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

[11] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3.

[12] M Lando, 'Secret Custom *or* The Impact of Judicial Deliberations on the Identification of Customary International Law' (2022) 81(3) CLJ 550, 551.

the 'traditional' theories of customary law,[13] only the State practice of a sufficiently broad group of States, including those that would be specially affected by the emerging norm, would satisfy the 'generality' requirement for the establishment of these kind of norms—assuming, of course, that *opinio juris* is also present. A closer look at the ICJ's approach to identifying custom raises the possibility that some norms it has recognized as general custom may not actually be so.[14]

This is a claim that resonates with critical legal scholarship from the Global South, which has observed that the practice of developing States is commonly neglected in judicial decisions and academic studies aiming to elucidate customary international law.[15] This aligns with the common assumption that powerful States disproportionately influence the formation of customary norms. In short, some believe that the Court often gets it wrong when it 'finds' new customary law. Although some of these narratives seem plausible enough (and are likely to be symptomatic of broader problems related to the unequal participation of States in the international legal system), the snowball theory might suggest that they are missing a crucial point.

For the sake of the argument, let it be assumed that the snowball theory of customary law is an accurate representation of how general custom ordinarily emerges. If so, one may be inclined to believe that irrespective of whether the ICJ had considered a sufficiently wide and representative array of State practice while asserting that a normative proposition is customary law, any such findings would be likely to be correct anyway. This would not follow from some sort of legal realism entailing the legal infallibility of the Court, but from the plausible assumption that if the customary norms ascertained in this fashion could not 'truthfully' be *general* custom, they would certainly be *particular* custom among the States whose practice had been considered by the Court.

To reformulate, even if a customary norm proclaimed by the ICJ should not properly be described as general custom, as long as the Court has considered the practice and *opinio juris* of the States appearing in the case at hand, the norm will inevitably constitute particular custom between those parties. As a result, an ICJ decision establishing general custom is likely to reach the correct outcome (as far as the parties to the case are concerned), even if it has been based upon flawed legal reasoning.

Of course, this does not deny the systemic ramifications that could follow from the Court's confusion of general and particular custom. The ICJ is widely perceived as the premier authority in the determination and interpretation of international law. Thus, even when the Court's decision in a contentious affair 'has no binding force except between the parties and in respect of that particular case',[16] and despite the

[13] AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757.

[14] SJ Choi and M Gulati, 'Customary International Law: How Do Courts Do It?' in CA Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 117. For some more pessimistic opinions on the customary norms 'found' by the ICJ, see FR Tesón, 'Fake Custom' in BD Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 86; DH Joyner, 'Why I Stopped Believing in Customary International Law' (2019) 9 AsianJIL 31.

[15] GR Bandeira Galindo and C Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16 ChineseJIL 251; BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) AJIL 1, 20–7.

[16] Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) UNTS, art 59 of the Court's Statute.

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status and legal weight of its advisory opinions being the subject of ongoing debate,[17] the nature of general customary law implies that when the ICJ finds it in one place it is similarly in force in others. However, the key implication of the snowball theory would suggest a response to these concerns: despite the criticism of the ICJ's methodology in relation to this source of international law, any custom ascertained by the Court would, in any case, eventually become 'true' general custom.

However, a careful examination of the snowball theory reveals its flaws and suggests that it cannot in fact explain the ICJ's approach. An illustration of how the snowball theory of customary law functions in practice would be useful, following the example used by Mendelson in his Hague Academy course to explain this proposition. On that occasion, he invited the audience to consider:

> the 1945 proclamation by the United States President, Truman, of 'jurisdiction and control' over the continental shelf adjacent to the United States. This claim was accepted and imitated by several States: Mexico, the United Kingdom and so on. At this point, the rule was not yet a general one, but merely a particular one: that is to say, it bound only those States who accepted the novel claim. But the process did not stop there: an ever-widening pool of Governments adopted the idea of sovereign rights over the continental shelf, and eventually the rule became a general one.[18]

According to Mendelson, in a hypothetical dispute between Mexico and the United Kingdom (to use the States mentioned in his example) concerning the jurisdiction of States over the continental shelf, arising before the general customary law on the matter had crystallized, both States would have already been bound to abide by the 'nascent' customary norm insofar as it was already particular custom between them. In other words, had the Court inaccurately stated in this hypothetical case that general international law regulated the conduct of Mexico and the United Kingdom at the time, the end result would likely have been the same for the disputing parties—although the systemic implications of such a pronouncement could still be significant, as noted above.

Even though some might be persuaded by this snowball theory of how particular and general customary norms relate to one another, further reflection reveals that this view is mistaken, and that particular custom is not necessarily a 'checkpoint' or a 'phase' in the development of general custom. There is no denying that this may be true in some limited scenarios, but evidence suggests it is unlikely to be the usual case, as outlined in the next section.

Before engaging in this discussion, it is appropriate to address the question likely to be on the reader's mind: if this is the case, what are the implications? Why should theoretical—almost philosophical—discussions about particular customary law be entertained, when the concept rarely comes into play in practice?

In response, it must be noted that the study of how this kind of custom works and relates to its general cousin might have more practical relevance than would be expected. Particular customary law has in fact slowly been gaining traction as a means

[17] C Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice' in G Gaja and JG Stoutenburg (eds), *Embracing the Rule of Law through the International Court of Justice* (Brill 2014) 63–4; P Webb, 'The United Kingdom and the *Chagos Archipelago* Advisory Opinion: Engagement and Resistance' (2021) 21 MJIL 1, 6; FS Eichberger, 'The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case – Judgment on Preliminary Objections' (2021) 22 MJIL 1, 12–18.

[18] Mendelson (n 1) 194.

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to advance consequential views about international law. By way of illustration, some Chinese scholars have argued that China's alleged sovereign rights over the South China Sea are grounded in regional customary law.[19] Academic discussion of the existence of regional human rights law is also on the rise.[20] Arguably, the development of regional customary law may also be identified in fields as diverse as international refugee law,[21] international indigenous law[22] and international investment law.[23]

II. A MORE NUANCED RELATIONSHIP: ON HOW TO DIFFERENTIATE BETWEEN PARTICULAR AND GENERAL CUSTOM

This section explains some distinctive traits of particular custom that are not captured by the snowball theory outlined above, giving a more nuanced account of how particular and general customs differ and interact. This comparison, it is submitted, reveals that the formation of the two categories of custom requires different kinds of *opinio juris*.

Although in theory the emergence of particular customary law can be one stage in the development of general custom, in practice this is unlikely to be the case. This flows from the fact that particular custom is often established among a group of States *in derogation* of a general custom. In other words, general custom often precedes a distinct regional or particular custom in the same subject matter.[24] An example of this is provided by a recent report commissioned by the European Parliament on the legality of a prospective confiscation of Russian sovereign assets to support the reconstruction of Ukraine. It mentions the possibility of 'an evolution in *regional* practice – whether in Europe or the Americas – to permit confiscation of [Russian Central Bank's] assets in narrowly defined situations'.[25] Irrespective of the (perhaps limited) plausibility of this idea, should such a regional custom materialize, it would operate in derogation of the general customary law on State immunities that is already in place.

Moreover, regional customary law might also arise to supplement (and possibly also to mirror) regional treaty norms,[26] potentially implying that a State that withdraws from a convention may still be obliged to follow the equivalent customary norms that emerged

[19] C Liu, 'Regional Customary International Law Related to China's Historic Rights in the South China Sea' (2019) 7 KoreanJIntlCompL 262.

[20] W Schabas, *The Customary International Law of Human Rights* (CUP 2021) 91–4; L Mardikian, 'The Right to Property as Regional Custom in Europe' (2018) 9(1) TLT 56.

[21] JI Mondelli, 'La obligatoriedad de la definición de refugiado de la Declaración de Cartagena en el Derecho Internacional' (2019) 1 RevTemasDerIntern 27.

[22] For instance, it might be argued that the American Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the Organization of American States in 2016, reflects particular customary law binding most countries in the Americas.

[23] *Barcelona Traction, Light and Power Company, Limited, Judgment* (Preliminary Objections) [1970] ICJ Rep 3, Sep Op Gros, 278; Akehurst (n 7) 30.

[24] It must be conceded that this could present a 'chicken and egg' problem, since the particular custom established in derogation of the general one that preceded it might, in time, turn into a general custom that abrogates the former one.

[25] P Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine' (European Parliament Research Service, February 2024) 14 <https://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf>.

[26] Consider, for example, the possibility that provisions within the European Convention on Human Rights might have consolidated regional human rights law in Europe. See Mardikian (n 20) 59–60.

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and bound the State before its treaty withdrawal. Such a scenario could have significant domestic implications for that State if its national law incorporates international custom directly.

Historical evidence suggests that in contemporary international law, framed by the Charter of the United Nations and governing almost 200 sovereign States, general custom is seldom preceded by regional custom. Of course, a counterexample can always be found if one looks hard enough. *Uti possidetis* was considered to be regional customary law exclusive to Latin America until the ICJ declared in 1986 that this principle 'is logically connected with this form of decolonization wherever it occurs'.[27] Beyond *uti possidetis*, however, a comparison of the short list of examples of particular custom mentioned in international law textbooks with the growing inventory of general customary norms that are 'found' in dispute settlement contexts and academic materials would prompt the concession that the latter does not ordinarily flow from the former. Indeed, if the snowball theory were correct, there would be historical evidence of as many examples of particular customary norms as there are current illustrations of general custom.

It has also been suggested that there is a presumption in international law against particular custom,[28] which arguably prevents the emergence of normative regionalisms that might erode the global authority of the ICJ.[29] This presumption paradoxically makes it easier to find general custom than particular custom, which further suggests that the former will very rarely arise from the latter. The limited legal scholarship that studies the connections between these types of custom has focused on their hierarchical relationship (or lack thereof),[30] rather than on presumptive chronological links between them.[31] Popular portrayals of particular customary law as derogations or additions to general custom arguably presuppose that the latter ordinarily precedes the former.[32]

It is thus becoming evident that Mendelson's portrayal of general custom as ordinarily emerging from particular custom does not stand up to close scrutiny. As noted above, he recalled the gradual acceptance of the continental shelf regime originally advanced in the Truman Proclamation as an illustration of how wider custom would normally evolve from a narrower one. Strikingly, however, the story of this Proclamation (and the events that it unfolded) is more usually cited as an explanation of how general customary law is created.[33] Only Mendelson has argued that particular customary law

[27] *Frontier Dispute (Burkina Faso/Mali)* [1986] ICJ Rep 552, para 23.

[28] HWA Thirlway, *International Customary Law and Codification* (AW Sijthoff 1972) 139.

[29] LR Helfer, 'Customary International Law: An Instrument Choice Perspective' (2016) 37(4) MichJIntlLaw 563, 572.

[30] M Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (CUP 2006) 445–50; Akehurst (n 7) 29; D'Amato (n 8) 219.

[31] For academic views supporting this perspective, see AT Guzman and J Hsiang, 'Reinvigorating Customary International Law' in Bradley (n 14) 295; JP Trachtman, 'The Customary International Law Game' (2005) 99(3) AJIL 541, 568.

[32] 'Common Rejoinder Submitted by the Kingdom of Denmark and the Kingdom of the Netherlands' (1968) 504 <https://www.icj-cij.org/sites/default/files/case-related/52/9347.pdf>; P Dumberry, *The Formation and Identification of Rules of Customary International Investment Law* (CUP 2016) 25.

[33] Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 RdC 243, 296; H Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 BYIL 376, 393–5;

on this matter emerged before the general custom was embraced by the international community at large.

Admittedly, James Crawford suggested that in the time separating the Proclamation and the consolidation of general custom there might have been 'a network of bilateral relations based on opposability and acquiescence as between specific States',[34] an idea that Hersch Lauterpacht had outlined half a century earlier.[35] Nevertheless, both were careful enough to portray their respective claims only as mere possibilities, and upon closer examination they are arguably unsustainable. Acquiescence can only take place when a response by one State to the conduct of another—or, perhaps, that of an international organization—is called for,[36] which would hardly be the case when a State advances a claim of 'inchoate' custom for the first time,[37] since acquiescence presupposes clear and consistent acceptance of another State's position.[38] Moreover, even when one State clearly and consistently propounds an emerging customary norm, the acquiescence of other States may only be established when their interests or rights may be affected by the practice in question, assuming they have had sufficient time and ability to act.[39] Otherwise, it is difficult to understand how a claim from a minority of States advocating for the establishment of new custom, which does not meet the representativeness requirement for general custom, could affect third States, given that the principle of sovereign equality suggests that one State is not obligated to follow another's interpretation of the law.[40] In short, the threshold for a finding of acquiescence is a high one.[41]

Another element of State conduct also highlights that the processes of formation of general and particular customary law are distinct. The requirement of *opinio juris* differs in relation to the formation of particular custom, since a special volition must be evident on the part of the States engaging in the relevant practice—that of following a particular (instead of general) customary norm. This higher standard of consent also contradicts the snowball theory of particular customary law.[42] As the ICJ explained in the *Asylum* case, a State that relies on presumptive regional custom when bringing a case against another State must show that the latter has expressly consented to

MP Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2013) 107–22.

[34] J Crawford, *Chance, Order, Change: The Course of International Law* (Brill 2014) 81.

[35] Lauterpacht (n 33) 395–8.

[36] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2021] ICJ Rep 206, para 51 (*Somalia v Kenya*).

[37] For a discussion on how estoppel might have played a role in the formation of bilateral obligations related to the continental shelf before it became general customary international law, see AA D'Amato, 'Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law' (1969) 10 VaJIntlL 1, 10–20.

[38] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 309, para 145. An alternative viewpoint might consider that a State should react as soon as it becomes aware of a claim of 'inchoate' custom to ensure it will gain the status of persistent objector if the practice crystallizes into a rule of customary international law. Nevertheless, a State's failure to react at this point would not prevent it from becoming a persistent objector, as long as it expressed its persistent opposition before the crystallization of the relevant practice into custom. See ILC Draft Conclusions (n 4) 153.

[39] ILC Draft Conclusions ibid 142.

[40] J Basdevant, 'Règles Générales du Droit de la Paix' (1936) 58 RdC 471, 589.

[41] *Somalia v Kenya* (n 36) para 51.

[42] *North Sea Continental Shelf Cases* (n 11) Sep Op Ammoun, para 31.

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be bound by that norm.[43] For the most part, academic commentary has interpreted this decision as implying a crucial distinction in the formation of the two types of custom.[44] In the words of Malcolm Shaw:

> [w]hile in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule.[45]

One final point must be made about the distinction between the two types of customary norms. If the above observations are correct, they also imply that particular custom is not only distinguished by its limited membership and the higher threshold of consent required among the concerned States for its creation. It may also be argued that a particular kind of *opinio juris* is required to establish a particular custom. This seems to be implied in the International Law Commission's (ILC) commentaries to its Draft Conclusions on identification of customary international law which affirm that:

> [t]he two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) thus also applies in the case of identifying rules of particular customary international law. In the case of particular customary international law, however, the practice must be general in the sense that it is a consistent practice 'among the States concerned', that is, all the States among which the rule in question applies. Each of these States must have accepted the practice *as law among themselves*. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.[46]

Even though the ILC made no further observations on how the process for ascertaining particular custom might differ from that of general norms, the requirement that each of the participating States must accept the practice *as law among themselves* arguably suggests a specific awareness from those States that their conduct is mandated by particular (as opposed to general) customary law. Indeed, the higher consensual threshold for the formation of special custom would seem to reflect this awareness.

The proposition that a special kind of *opinio juris* is required in relation to particular customary law finds some support in the ICJ's *Right of Passage* judgment on the merits, where the Court described bilateral custom—one subcategory of particular customary law—as 'long continued practice between two States accepted by them as regulating *their* relations'.[47] In other words, the Court did not derive the bilateral custom between Portugal and India from a presumptive general customary rule which was supported by the practice of those and perhaps other States; instead, the Court ascertained a particular customary rule that was accepted by the parties as governing their specific relationship. Limited support for this claim can also be found in the comments and observations submitted by States to the ILC in relation to the Draft Conclusions.[48] In relation to particular custom, the United States suggested that 'the *opinio juris* to be sought among the States concerned is one in which they accept a

[43] *Asylum Case (Columbia v Peru)* [1950] ICJ Rep 266, 276–8.
[44] Dumberry (n 32) 25; Bandeira Galindo (n 9) 9. Contra, see Thirlway (n 28) 136–7.
[45] MN Shaw, *International Law* (9th edn, CUP 2021) 78.
[46] ILC Draft Conclusions (n 4) 156 (emphasis added).
[47] *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 39 (emphasis added).
[48] ILC Draft Conclusions (n 4).

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certain practice as law among themselves (as opposed to "mistakenly believ[ing] the rule is a rule of general customary international law")'.[49]

This argument will not be universally persuasive. Since the difficulty of defining and ascertaining *opinio juris*—which was aptly described by Hugh Thirlway as 'the philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules'[50]—is already a source of consternation among international legal scholars, suggestions such as the above, which impose additional hurdles for the establishment of particular customary law, are unlikely to receive a warm welcome. Akehurst, for example, commented that:

> [i]t would certainly be very inconvenient if the rules governing the formation of special custom differed from the rules governing the formation of general custom; one would not know which set of rules to apply in cases where it was uncertain whether the custom under consideration was special or general.[51]

Many international lawyers would be inclined to sympathize with this view, being reluctant to complicate further the task of identifying customary international law. However, legal certainty should not be sacrificed in favour of convenience, and the obstacles to identifying this special *opinio juris* should not be overstated, for three reasons.

First, States occasionally express their positions regarding the existence of particular customary law.[52] Second, the identification of regional customary law—arguably the most common category of particular custom—may be simplified by the presence of regional international organizations (such as the Organization of American States or the European Union) or broad recognition of regional perspectives on international law, such as Latin American customary law. Indeed, recent academic works have used these groupings to ascertain the regional custom in force in certain geographical regions.[53] Finally, a State adhering to a particular customary norm concerning ideological principles that are only accepted by a specific group of States must be aware of its particular status, rather than believing it to be general custom. An example of the latter is the so-called socialist international law postulated by Soviet scholars during the Cold War.[54]

III. CONCLUSIONS

The relationship between particular and general customary law is a troubling one. There are no easy answers to questions about possible conflicts between them, how State

[49] ILC, 'Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (14 March 2018) UN Doc A/CN.4/717, 50.
[50] Thirlway (n 28) 47.
[51] Akehurst (n 7) 30.
[52] *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 25 (30 May 2018) paras 157–163.
[53] For illustration, it has been argued that regional customary law for the protection of human rights in Europe has developed in parallel to the European Convention on Human Rights and European Union law, see Mardikian (n 20). For the proposition that Latin American States are bound by regional customary law concerning the protections of refugees, which expands the range of individuals benefiting from such safeguards, see Mondelli (n 21).
[54] Harris and Sivakumaran (n 6) 21.

consent to each of them might differ, or how the formation of one may aid or detract from the consolidation of the other. Since particular custom rarely makes headlines in international case law or scholarship, it is unsurprising that discussions on the topic are relatively neglected. Nevertheless, given recent tendencies for States to rely on particular customary law to advance consequential views, and the increasing development of regional approaches in various branches of international law, there are reasons to believe that particular customary law may be staging a comeback, which justifies a re-examination of the issue.

This article has grappled with the academic theory positing that the emergence of particular customary law is ordinarily one of the steps in the formation of general custom, a theory that—thanks to Rein Müllerson—may be visualized through the allegory of a snowball. While there may be situations where general customary law develops from particular custom, this article argues that in the present day this is not usually the case. In fact, general customary law is usually created without there being any regional or bilateral custom preceding it. This can be explained by the apparent presumption in international law against the emergence of these norms, and also the higher standard of State consent that is required for the formation of particular custom. Indeed, the *opinio juris* required for the establishment of particular norms is different to that required for general custom, given that there must be an understanding among the States involved that the relevant behaviour is law among themselves, rather than generally.

The ingenious portrayal of the process through which general customary law is formed, as a snowball of growing particular custom, makes intuitive sense. As an allegory, it also has great pedagogical value. Unfortunately, the intricacies of the relationship between general and particular custom that have been discussed here suggest that such a snowball would melt faster than it grows. A more nuanced account of the dynamics at play between these two kinds of custom is required, which this article has sought to provide.

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