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NOTES AND COMMENTS

The Specially-Affecting States Doctrine

*By Shelly Aviv Yeini**

The orthodox view of the Specially-Affected States Doctrine (SASD), grounded in the International Court of Justice's (ICJ) 1969 judgment in the *North Sea Continental Shelf* cases,[1] is that practice leading to the emergence of a customary rule must include that of states "whose interests were specially affected."[2] The framing of this passage of the *North Sea Continental Shelf* judgment seems to imply both a positive and a negative importance for the practice of specially-affected states. Such practice is a requirement for the emergence of a new rule of customary international law. Acceptance by specially-affected states is, in other words, necessary but not sufficient for a rule of custom to emerge. Whether practice of specially-affected states can be sufficient to form a general custom is not resolved by this formulation, although it seems reasonable to infer that the ICJ had in mind that the combined involvement of specially-affected and other states was needed for the formation of such a rule of customary international law concerning basic principles of continental shelf delimitation. Conversely, the absence of rule-supporting practice by specially-affected states would have a negating effect on the emergence of a rule of customary international law, despite rule-affirming practice of states not specially affected. On this view, practice of only such states could not crystalize into a custom.[3] One commentator has suggested that the negative construction does not mean that a single specially-affected state necessarily holds veto power over the formation of a new rule of customary international law,[4] but asserted that "[i]f several 'states whose interests are specially affected' object to the formation of a custom, no custom can emerge."[5] Unsurprisingly, given this level of abstraction, such formulations do not themselves provide specificity as to how many (or which) specially-affected states would be sufficient to prevent the formation of a custom in a particular situation.

It is important to emphasize, however, that the Specially-Affected States Doctrine operates differently from the persistent objector rule.[6] While a "normal" persistent objector would

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[1] North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.) 1969 ICJ Rep. 3 (Feb. 20).

[2] *Id.* at 43.

[3] Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. Int'l & Comp. L. 305, 316 (2014).

[4] Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, *in* Collected Courses of the Hague Academy of International Law, Vol. 322, at 243, 289 (2007).

[5] Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 82 Int'l L. Stud. 99, 109 (2006).

[6] *Id.*

exclude the custom from applying to the objector alone, the absence of rule-affirming practice by specially-affected states (including those specially-affected states that may object to practice of other states affirming the rule) would prevent the putative rule from crystalizing into a custom at all, so that the putative rule would bind neither the objectors nor other states.[7]

The practice or absence of practice by specially-affected states may thus have a disproportionate influence on the formation (*vel non*) of new rules of customary international law. As identified in Kevin Heller's lead article in this issue, the consequence is that, for the purposes of formation of customary international law, some states are "more equal" than others.[8]

I. The ICRC Study of Customary International Humanitarian Law

The International Committee of the Red Cross study of *Customary International Humanitarian Law* published in 2005 (ICRC Study)[9] grappled with the difficult problem of how to approach the state-differentiating SASD in the context of establishing the content of a body of customary international humanitarian law it regarded as universal and non-discriminatory. It does not forsake the SASD altogether, preferring instead to adopt framings and conditions that have the effect of minimizing the actual impact of the Doctrine.[10] The ICRC Study acknowledges that the SASD has two implications:

> (1) if all "specially affected States" are represented, it is not essential for a majority of States to have actively participated, but they must have at least acquiesced in the practice of "specially affected States"; [and] (2) if "specially affected States" do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required as explained.[11]

The ICRC Study further explains that the identity of specially-affected states varies according to the context. It acknowledges that with respect to humanitarian law, "who is 'specially affected' will vary according to circumstances," and it offers the following examples: for rules regarding blinding laser weapons, specially-affected states are those in the process of developing such weapons; for rules regarding humanitarian aid, states in need of aid and states that frequently provide such aid are specially affected; and "[w]ith respect to any rule of international humanitarian law, countries that participated in an armed conflict are 'specially affected' when their practice examined for a certain rule was relevant to that armed conflict."[12]

The examples provided by the ICRC Study, as applied in the study, seem to run in contradictory directions in some cases. With regard to humanitarian aid, the Study considers as specially affected those states that *frequently* provide humanitarian aid, whereas with regard to international humanitarian law (IHL) practice, states that frequently engage in armed conflict

[7] *Id.*

[8] Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AJIL 200–01 (2018). *See also* R.R. Baxter, *Treaties and Custom*, *in* Collected Courses of the Hague Academy of International Law, Vol. 129, at 27, 66 (1970); *North Sea Continental Shelf Cases*, *supra* note 1, at 19.

[9] Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (a study by the International Committee of the Red Cross) [hereinafter Study].

[10] Major J. Jeremy Marsh, Lex Lata *or* Lex Ferenda*: Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 Mil. L. Rev. 116, 152 (2008).

[11] Study, *supra* note 9, at xliv.

[12] *Id.* at xliv–xlv.

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do not seem to have any specially-affected status different from those whose relevant practice arose in a *specific* armed conflict. A possible reconciliation of these examples is to differentiate voluntary actions from involuntary actions by states. While engagement in armed conflict is not always a matter of a state's discretion, as such engagement can be by self-defense, humanitarian aid is a matter of a state's will (and ability) to provide aid.

The ICRC Study does not claim that the SASD is inapplicable or ceases to exist, rather it shifts the emphasis to the proposition that, for many matters of international humanitarian law, *all* states are affected. While this approach does not in itself nullify the SASD, the result is quite similar—if all states are affected, and the specially-affected are regarded as not differentiable (or not very much differentiable) from the broad category of affected states, then states with a much higher frequency of involvement in an issue, or with greater capacity on the ground, will not have any greater influence on the formation of custom than other states. While the ICRC does not go so far as to claim that all states are *equally* affected, and some are indeed more affected than others, it diminishes the impact that specially-affected states were perceived to exert. This in turn made it easier for the ICRC Study not to try to resolve a key question left open by accepting that specially-affected states can have a more privileged influence than others in the development of custom: how much more of an influence do specially-affected states have over other states in international humanitarian law? This question remains unanswered. Nevertheless, it is clear that the ICRC wishes to lessen the weight of specially-affected states and distribute the power to determine which rule is indeed custom in a more equal and inclusive manner among states.

II. United States' Criticism of the ICRC Study and the "Most Powerful States" Approach

The United States government issued an official response (United States Response)[13] criticizing the ICRC Study. It claims that "the Study often fails to pay due regard to the practice of specially affected States" and that it

> tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine.[14]

The United States claimed that while states that had a minimal rate of participation in armed conflict could generate salient practice,

> it is those States that have a distinctive history of participation that merit being regarded as 'specially affected. . . .' [S]pecially affected states generate practice that must be examined to reach an informed conclusion regarding the status of a potential rule.[15]

[13] John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 Int'l Rev. Red Cross 443, 446 (2007). The United States Response was intended to be an initial response until its officials can better review the Study (*id.* at 443–44). Thus far, no other document has been published by the U.S. government on the matter.

[14] Bellinger & Haynes, *supra* note 13, at 445–46.

[15] *Id.* at 445 n. 4.

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Since it can be assumed that states that more regularly engage in hostilities devote greater resources to their militaries, such an interpretation of the SASD tends to mean that the same *powerful states* would always be considered specially affected for purposes of IHL, regardless of the facts and circumstances surrounding the rule in question. The "most powerful states" approach to the doctrine obviously reflects the interests of the United States, as it would grant the United States permanent undefinable power over the formation of customary IHL.

The ICRC Study's suggestion that all states are affected by international humanitarian law was a telling sign that specially-affected states would be diluted. As the United States recognized, this dilution was keenly evident in the ICRC's analysis of its suggested Rule 45. Rule 45 began with the determination that "[t]he use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. . . ."[16]

The United States asserted that the ICRC Study failed to assess that practice carefully, since France and the United States have repeatedly declared that Articles 35(3) and 55 of Additional Protocol I, on which Rule 45 is based, do not reflect customary international law.[17] Furthermore, with regard to nuclear weapons, the United States argued that states possessing nuclear weapon capabilities, such as the United States, the United Kingdom, Russia, and France, which are for this matter specially affected, have asserted repeatedly that these articles do not apply to nuclear weapons, and have even argued so in their submissions to the International Court of Justice.[18]

The United States further criticized the ICRC Study's argument that specially-affected states' objections to Rule 45 grant them "persistent objector" status, stating that (their being enough such objectors) the ICRC should have concluded from their objections that the rule has not formed a customary rule.[19] Therefore, when a substantial proportion of the "nuclear club" states object to the articles mentioned above with regard to nuclear weapons, such articles retain their ordinary treaty status only.

Responding to the United States' critique, Jean-Marie Henckaerts, a coauthor of the ICRC Study, argued that, unlike the law of the sea, "where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become 'specially affected.'"[20] Henckaerts's response repeats the original claim of the Study that all states have a legitimate interest in the development of humanitarian law.[21] Accordingly, Henckaerts sees the U.S. position with respect to conventional weapons as affirming its persistent objector status without preventing the rule from coming into effect as custom.[22] But Henckaerts acknowledged that with respect to the use of nuclear weapons, Rule 45 has not gained the status of customary law. However, Henckaerts's response did not refer to U.S. claims that France also objected to Rule 45 with respect to all weapons and

[16] Study, *supra* note 9, at 151.

[17] Bellinger & Haynes, *supra* note 13, at 455.

[18] *Id.* at 456; U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL, at para. 6.10.3.1 (2015) (updated May 2016).

[19] Bellinger & Haynes, *supra* note 13, at 457.

[20] Jean-Marie Henckaerts, Customary International Humanitarian Law*: A Response to US Comments*, 89 INT'L REV. RED CROSS 473, 482 (2007).

[21] *Id.*

[22] *Id.*

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whether wider objection by specially-affected states might hypothetically have prevented the rule from emerging as customary law.

The ICRC's position on Rule 45 could lead to the absurd situation where a vast number of the states to which the rule practically refers would be characterized as persistent objectors and hence not bound by it. While there may still be some normative and policy benefits to adopting such a rule, its actual impact would be small and the spillover costs of including in the system an unevenly applicable and broadly ineffectual rule quite high. On the other hand, the United States' position grants inordinate power to militarily powerful states under the cover of their (imprecisely defined) legal contribution. This disagreement highlights the serious need for reevaluating the SASD and Heller's contribution in this issue is a welcome reopening of this surprisingly undertheorized concept in international law.

III. Reconsidering the Specially-Affected States Doctrine

Heller argues that what he terms the Global North conception of the SASD is asymmetrical and designed to favor states of the Global North over those of the Global South through its different criteria, and especially with regard to the criterion of physical engagement.[23]

While such an argument has merit, it is not always apt as a description of how the SASD is understood by most Global North states and scholars. Heller's argument is most accurate when applied to the field of possession of weapons. The ICRC Study suggests that when it comes to the use of specific weapons, it is only the holders of such weapons, or states that are in the process of developing such a weapon, that are deemed to be specially affected.[24] Such criteria favor powerful states of the Global North and ignore the states that are or might be affected by such weapons. On topics other than weaponry, however, the SASD does not seem to favor only very strong or very assertive states. In a given conflict, both the aggressor and the defender are specially affected.[25] It is now a mainstream view that the state that is on the "receiving end" of a practice is engaging in the practice as well and is deemed specially affected.

For this reason, Heller's focus on the admittedly North/South dimensions of the SASD does not take us very far in resolving the rival ICRC/U.S. government positions noted above. This note, accordingly, moves in a different direction. It suggests that globalization has greatly diminished the significance of the received approach to the specially-*affected* states doctrine, at least with regard to international humanitarian law, because in many situations all states are affected, and there are not many situations where the status of specially affected amongst all of the affected has much purchase. Instead, it is argued that the doctrine should be reconstructed and justified on the basis of what in shorthand might be called the "specially-*affecting* states" approach. Such an approach includes states' effects on the development of experience-based rules as well as their ability to act upon a rule of international law. This approach promises to bridge the United States' and ICRC's positions. The ICRC in its 2005 study did not seem to consider—or perhaps it silently considered and rejected—this proposed new approach to the nature and justifications of the SASD. The United States,

[23] Heller, *supra* note 8, at 219.

[24] Study, *supra* note 9, at xlv.

[25] Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238, 249 (1996).

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in its response, in effect employed a specially-affecting states justification (albeit not by that name), but it did not articulate the justifications very fully, nor did it sufficiently develop the essential limitations and qualifications to such a doctrine.

IV. The "Specially-*Affecting* States" Approach

"Among the users [*of a path*] *are always some who mark the soil more deeply with their footprints than others, either because of their weight . . . or because their interests bring them more frequently this way."*[26]

Situations in which only a few of the world's states are affected by action relating to a proposed rule are by now quite rare. If any differentiation among states is sustainable as regards a special status with relation to practice counting in the formation of customary international law, it is possible, at least in relation to international humanitarian law, that states with a high volume of relevant practice and relatively high influence through this practice might call for special consideration. The SASD would thus be adapted so that the category of specially-affected states includes specially-affecting states. These are states that have all three of these: extensive relevant practice; a notable impact on the formation and formulation of the rule; and ability actually to carry the rule out in practical conduct. Due to its focus on states' effect on international law rather than international law's effect on states, this approach would be called "the Specially-Affecting States."

The Specially-Affecting States approach to the Doctrine lays its emphasis *not on the actual effect a rule might have on a state, but on the positive effect the state may have on the optimal formation of the rule.* While such an approach is in closer proximity to the perspective of the United States on the Doctrine than that of the ICRC and, as will be seen, relies on some of the United States' base assumptions, its standards of qualification when it comes to specially-affected states are different as they rely on dynamic and case-based parameters, rather than the United States' permanent "most powerful states" standard.

A. The Quality of States' Contribution to the Formation of Custom

"The Life of the law has not been logic: it has been experience."[27]

According to Baxter, the Specially-Affected States Doctrine assumes that some states are given greater influence over the formation of customary law "by virtue of their size, volume of international relations and—by way of rather circular reasoning—*the 'contribution that [they make] to the development of international law*."[28] Such identification of specially-affected states goes beyond the narrow effect a rule has on a single state—and its validity is at the heart of the disagreement between the United States and the ICRC on the formation of custom.

The United States Response reflects a stand whereby some states have more qualitative contributions to offer to international humanitarian law because of their *practical experience*. According to the United States, specially-affected states that have a distinctive history of participation in armed conflict, generate practice that must be examined in order to reach an

[26] Charles De Visscher, Theory And Reality In Public International Law 149 (1957).

[27] Anonymous [Holmes], *Book Notices*, 14 Am. L. Rev. 233, 234 (1880).

[28] Landmark Cases in Public International Law 294 (Eirik Bjorge & Cameron Miles eds., 2017) (emphasis added), *citing* Baxter, *supra* note 8, at 66.

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informed conclusion regarding the status of a potential rule.[29] In the same spirit, Theodor Meron, a member of the Study's Steering Committee, stated in an earlier article that: "The practice of 'specially affected states'—such as nuclear powers, other major military powers, and occupying and occupied states—which have a track record of statements, practice and policy, remains particularly telling."[30]

In other words, the protected interest in the Doctrine is not that of the actual specially-affected states, but that of the international community, which will be realized by forming well-developed and mature rules of customary law—rules of more robust quality, based on serious efforts at practical compliance that have aided the working out of problems always faced by law-in-action. Such robustness may be achieved by giving greater weight to the practice of states that have developed and polished their policies through years of experience with such issues. States that have a history of participation in armed conflict are expected to have developed a more detailed familiarity with case law, research, and official positions of different states and international agencies, and developed and improved over time to fit the realities of armed conflict.[31] For customary international humanitarian law to be effective and applicable, it must be realistic. As the very reason states comply with customary law is its accurate representation of reality.[32] A military manual of a non-engaging state is something of an untested product (to the extent that it does not simply draw on the military manuals of others), since such a state has not had the opportunity to examine its practical application, draw conclusions, and improve it accordingly.

B. States' Capacity to Carry Out Specific Rules

The other aspect of being "specially-affecting" is a state's power to execute or follow the provisions of a specific rule. This applies in particular to rules that in practice have implications only toward a limited group of states, even though their actual language might be general—such as rules directed toward holders of specific weapons. "[E]xisting scholarly commentary tends to focus on the *weapons-possessors*, not on the *places where the weapons may be used*, as the 'specially affected' states."[33] For example, regarding blinding laser weapons, specially-affected states are those in the process of developing such weapons,[34] and "[i]f an emerging rule in respect to the use of sophisticated weaponry is considered then the practice of only a few states technically capable of production may suffice."[35] It is true all states might be affected by the use of any weapons but only a few may have needed to work through the practical exercises, training, and legal analysis necessarily undertaken by states that possess the weapons and have

[29] Bellinger & Haynes, *supra* note 13, at 445.

[30] Meron, *supra* note 25, at 249.

[31] William Thomas Worster, *The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law*, 31 Boston U. Int'l L.J. 1, 63 (2013).

[32] Eric A. Posner & Jack L. Goldsmith, *A Theory of Customary International Law* 77 (John M. Olin Program in Law and Economics Working Paper No. 63, 1998).

[33] Dustin A. Lewis, Gabriella Blum & Naz K. Modirzadeh, *War-Algorithm Accountability* (2016), *available at* https://ssrn.com/abstract=2832734 (emphasis in original).

[34] Study, *supra* note 9, at xliv.

[35] Harry H.G. Post, *The Role of State Practice in the Formation of Customary International Humanitarian Law*, *in* On the Foundations and Sources of International Law 129, 142 (Ige F. Dekker & Harry H.G. Post eds., 2003).

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to formulate policies and rules in case a situation ever arises in which they are conceivably to be used.

Regarding Rule 45 and its nuclear context, the specially-affecting states must be those that possess such weapons. Forbidding non-holders of such weapons to use them is of little significance and non-holders' failure to use such weapons would not, in most cases, be seen as a credible demonstration of either state practice or *opinio juris*. It would not reflect the literal meaning of practice.[36] Indeed, when taken to the extreme, the modern approach that regards all states as equal in relation to the formation of custom "is divorced from reality for lacking an immediate connection to state behavior, will, or interest."[37] Broadening the extent of a custom in a way that does not reflect actual state practice—including that of specially-affecting states—may lead to a weakening of the entire body of customary law. What keeps customary law in close proximity to reality and grants it legitimacy is the fact that it is reflective of states' actual practice.[38] Such proximity is better achieved by granting considerable weight to the practice of specially-affecting states.

C. Application of the Specially-Affecting States Approach

The specially-affecting states approach to the SASD is undoubtedly fraught with moral, political, and legitimacy challenges.

This approach loses credibility—including across North/South lines—if it is used to keep power over the formation of custom in the hands of the same powerful states, regardless of their actual contribution. Thus, even though some scholars assert that the United States is to be considered as specially affected regarding all rules of international humanitarian law,[39] such a claim is wrong if it purports to grant to the United States (or any other modern powerful state) a generalized status and power and does not take into consideration the different circumstances of each rule separately. The allocation of weight can vary in different scenarios and should be dynamic and flexible. It should consider the circumstances, depth, and stability of states' different practices to assess the weight of such practices. A state cannot claim itself to be specially affecting and assume that it would be accepted as such in all cases for all rules. Its contribution should be reexamined repeatedly with reference to different rules, fields of law, changing of contexts, and circumstances. The aim is to grant greater weight to states whose practice is based on experience, research, and thoughtful assessment of consequences. Even-handed objective consideration of all three factors acknowledges, as Heller argues, that the rules for the formation of custom should respect the juridical equality of states.

Such an approach would help to differentiate specially-affecting states from merely "powerful states." It would further encourage states to back their claims and practices, and to invest

[36] This is not intended to suggest that omissions may not constitute practice. To the extent states that do not possess nuclear weapons do so because of a belief that such weapons are illegal, such *opinio juris* would be relevant in establishing custom. As has long been recognized, the reasons beyond the omissions of states matter for purposes of developing custom.

[37] Noura Erakat, *The U.S. v. The Red Cross: Customary International Humanitarian Law and Universal Jurisdiction*, 41 DENVER J. INT'L L. & POL'Y 225, 233 (2013); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 355 (2000).

[38] *See* Marsh, *supra* note 10, for the distinction between *lex lata* and *lex ferenda* in customary international law.

[39] Malcolm MacLaren & Felix Schwendimann, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, 6 GERMAN L.J. 1217, 1232 (2005).

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in relevant legal research and publication thereof, a process that would benefit the entire international community.

The following are hypothetical cases intended to illustrate means of using the above considerations in the allocation of weight in light of states' practice:

Objection to an emerging rule by a state: In the case of an objection to an emerging or putative rule of international humanitarian law by a particular state, it would be necessary to examine in detail the quality of the objector state's relevant practice, and the depth and coherence and legal relevance of its conflicting policy and of its objections, to determine whether it is indeed specially affecting. If even a very powerful state simply objects to the rule, without backing up its objection with well-considered and well-founded justifications and claims relating to its practical experience and concerns, it might simply be a persistent objector to the rule (if those conditions are met). But if such a state has an elaborate and well-established case to put forward on the matter, and a number of other such states take comparable views, the rule may not be granted the status of custom. The more comprehensive, reasoned, and experience-based the specially-affecting state's practice is, the more weight it should be given. Therefore, it is not only the "power" of the state that matters for the formation of custom (or prevention thereof), but the actual quality of its legal contribution. The prospect that objection by a single specially-affecting state would ever be enough to prevent custom from emerging would be a very rare event that would depend on the specific circumstances and the actual density of relevant practice by states.

State neutrality regarding a rule: Contrary to one possible reading of the *North Sea Continental Shelf* formulation, when a specially-affected state is not openly engaging in a particular practice, but is silent in this regard, even though participation in the practice must positively "include those States whose interests are specially affected," custom may still be established despite that silence. In light of the modern rationales behind the Doctrine, a non-response to a practice does not represent a contribution that justifies granting a state "specially-affecting" status for that matter.

Rules that practically refer to specific states: In a case where all of the specially-affecting states (thus including all of those with direct capacity to act to conform to the rule) object to a putative new rule of international humanitarian law, even without a well-established jurisprudence to back this objection up, the rule cannot mature into custom. The purpose of this rule is to achieve the objective of close proximity to reality. A rule cannot be called a custom if the only states to accept it are not those to which the rule practically refers. This is not to say that other states would not be affected by the rule, but simply accepts the fact that the opposition of the states that the rule practically refers to prevent it from gaining the status of custom.

State neutrality regarding a rule and rules that practically refer to specific states may indeed contradict each other. For example, even though the state of Israel may be, traditionally, considered specially affected regarding nuclear weapons, it is not specially affecting in the legal contribution sense, to the extent it does not have an admitted, public, well-reasoned policy on that matter. However, its actual practices cannot be ignored as specially affecting in order to accurately reflect reality and grant greater weight to the holder of a specific type of weapon. In this case, the weight given to such practice would vary with respect to the practice's density. The more weapon-holding states which have a well-developed policy on the matter, the less weight can be given to the practice of the silent state.

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Formation of custom by the practice of specially-affecting states: In situations where specially-affecting states are the only states to engage in a practice, and other states neither oppose nor engage in such a practice, one can assume the practice to be a matter of custom so long as all other requirements for the formation of custom are satisfied. If one believes, as most do, that "where there is no evidence presented against a rule of customary international law, a small amount of practice is sufficient to prove the existence of such rule,"[40] and that "most customs are found to exist on the basis of practice by fewer than a dozen States,"[41] it stands to reason that the lack of opposition by non-specially-affected states legitimates the identification of custom that accords by the practice and *opinio juris* of specially-affecting states acting alone.

The above hypotheticals, admittedly simplistic, are only guides to real world instances that are likely to pose more complicated factual and legal situations. But these paradigmatic examples, if accepted as the consequences of the specially-affecting doctrine, would enable the international community to advance beyond the current stalemate suggested by the rival ICRC and U.S. government approaches to the SASD. The specially-affecting states doctrine is a flexible formula that may grant the practices of specially-affected states different weight according to the circumstances, including a different allocation of weight for different specially-affecting states regarding the same rule.

V. Conclusion

The Specially-Affected States Doctrine was articulated in the late 1960s, but the world has since undergone radical changes. Globalization has had far-reaching effects, and states are now codependent on each other in almost all fields.[42] Over the years, the original justification for the SASD has become less and less relevant, and new justifications have emerged. In most areas of international humanitarian law, as in many other fields of international law, all states are affected by customary international law rules. But a special position may need to be accorded to states specially-affecting of international law on the very particular issue. If there is to be a "specially-affecting states" approach—itself a highly controversial proposition—then it must be specified and operated in the optimal way to adhere to its underlying justifications. Therefore, for a state to be considered "specially affecting" regarding a putative rule of international humanitarian law, it should either have a well-developed, reasoned, and rooted practice in that matter, or be the target of a rule—as in, be one of the states with a positive practical obligation to act or refrain upon the provisions of a rule. The status of a state as specially affecting should be considered on a case-by-case basis, and should not be a permanent and general situation, contrary to one construction that can be put on the United States Response to the ICRC study. Such an approach to the SASD is better fitted to modern realities, promotes optimal development of international law, and protects the legitimacy of customary international law. At the very least, it encourages states to explain their practices in legal detail and to back these explanations with research, data, and legal arguments.

[40] Michael Akehurst, *Custom as a Source of International Law*, 47 Brit. Y.B. Int'l L. 1, 12 (1974–1975); *see also* Scharf, *supra* note 3, at 317.

[41] Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 767 (2001), citing the works of Charney, Chodosh, Schacter, and Weisburd. It is important to note that this work is prior to the ICRC Study of 2005. *See also* Scharf, *supra* note 3, at 317.

[42] Nilüfer Karacasulu Göksel, *Globalisation and the State*, IX J. Int'l Aff. 2 (2004).

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