

## SPECIALLY-AFFECTED STATES AND THE FORMATION OF CUSTOM

By Kevin Jon Heller\*

### ABSTRACT

*Although the United States has relied on the ICJ's doctrine of specially-affected states to claim that it and other powerful states in the Global North play a privileged role in the formation of customary international law, the doctrine itself has never been systematically developed by the ICJ or by legal scholars. This article fills that lacuna by addressing two questions: (1) what makes a state "specially affected"; and (2) what is the importance of a state qualifying as "specially affected" for the formation of custom? It concludes that a theoretically coherent understanding of the doctrine would give states in the Global South significant power over custom formation.*

### INTRODUCTION

The International Court of Justice (ICJ) articulated the doctrine of "specially affected states" (SAS) nearly fifty years ago, when it noted in its seminal *North Sea Continental Shelf* judgment that "very widespread and representative participation" in a convention might be sufficient to create customary international law if that participation "included that of States whose interests were specially affected."<sup>1</sup> Given the importance of custom as a formal source of international law, we would expect the ICJ and scholars to have devoted significant attention to developing the doctrine of specially-affected states in the decades since. But that is not the case. The ICJ itself has never again explicitly referenced the doctrine in a main judgment or advisory opinion.<sup>2</sup> And although it is nearly impossible to find a scholar that does not treat the consistent practice of specially-affected states as a general requirement of custom formation,<sup>3</sup> not a single book or article published in English since *North Sea Continental Shelf* has even attempted to provide a systematic analysis of what it means for a state to be "specially affected."

\* Associate Professor of Public International Law, University of Amsterdam; Recurring Visiting Professor of Criminal Law, SOAS, University of London.

<sup>1</sup> *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 ICJ Rep. 3, para. 73 (Feb. 20) [hereinafter *North Sea Continental Shelf* Judgment].

<sup>2</sup> Dire Tladi, *Progressive Development and Codification of International Law: The Work of the International Law Commission During Its Sixty-Sixth Session*, 38 S. AFR. Y.B. OF INT'L L. 124, 130 (2013).

<sup>3</sup> This article will refer to both the "doctrine of specially-affected states" and the "specially-affected states requirement." The latter expression is more specific, referring specifically to *North Sea Continental Shelf's* insistence that state practice cannot be widespread and representative unless it includes the practice of specially-affected states. The former expression refers more generally to the meaning and importance of the specially-affected states requirement.

This puzzling juridical and scholarly lacuna has led one scholar, Gennady Danilenko, to warn that SAS doctrine could easily be abused by powerful states:

In the absence of a clear definition, the notion of “specially affected” states may be used as a respectable disguise for “important” or “powerful” states which are always supposed to be “specially affected” by all or almost all political-legal developments within the international community.<sup>4</sup>

Danilenko’s worst fears have not been realized, because only three states have ever formally invoked the doctrine of specially-affected states: the United States, the United Kingdom, and Germany. But there remains cause for concern, because the U.S. conception of the doctrine—articulated in the context of the *jus ad bellum* and *jus in bello*—not only effectively limits specially-affected status to powerful states in the Global North, but also gives specially-affected states almost complete control over custom formation. Even worse, the U.S. conception has been embraced and promoted by a number of Global North scholars who appear to find the very idea of custom developing over the objections of a powerful state like the United States nearly unthinkable.

This article challenges any such Northern-centric conception of specially-affected states by providing the systematic analysis of the doctrine that has been noticeably lacking. It reaches three interrelated conclusions. The first is that the doctrine of specially-affected states matters, because the outcome of a number of key debates concerning customary international law—from the right to mine the deep seabed to the permissibility of belligerent reprisals involving civilians—likely depends on how we understand what makes a state specially affected and the importance we ascribe to specially-affected states in the formation of custom. The second is that the U.S. conception of the doctrine is fatally flawed, because it is based on a number of indefensible assumptions concerning the meaning and importance of a state qualifying as special affected. And the third is that, if properly understood and strategically invoked, the doctrine of specially-affected states could significantly enhance the law-making power of states in the Global South.

Regardless of what one thinks about these conclusions, the analysis the article provides is timely. Since 2011, the International Law Commission (ILC) has been debating the doctrine of specially-affected states as part of its project on the identification of customary international law. The ILC’s original Draft Conclusion 9 provided that “[i]n assessing practice, due regard is to be given to the practice of States whose interests are specially affected.”<sup>5</sup> That provision, however, met with significant opposition: some Commissioners rejected the doctrine *in toto*, while others opposed its inclusion in the Draft Conclusions on the ground that it could be wrongly used to “accord greater weight to powerful states.”<sup>6</sup> The Draft Conclusions adopted on first reading by the ILC in 2016 thus make no mention of the specially-affected states requirement; instead, the commentary to Draft Conclusion 8 (formerly 9) simply states that,

<sup>4</sup> GENNADY DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 96 (1993).

<sup>5</sup> Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session, UN Doc. A/69/10, at 223 (2014) (Draft Conclusion 9) [hereinafter Second ILC Report on Custom].

<sup>6</sup> *Id.*, para. 168.

[i]n assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule have participated in the practice.<sup>7</sup>

The debate, however, is not over: the Special Rapporteur intends to revisit the doctrine of specially-affected states in the ILC's next meeting<sup>8</sup>—something the United States favors.<sup>9</sup>

The article itself is divided into six sections. The first two address the status of the doctrine of specially-affected states. Section I traces the doctrine's adoption and tepid subsequent affirmation by the ICJ. Section II then discusses two interrelated issues raised by the paucity of ICJ jurisprudence: whether the doctrine of specially-affected states actually exists and whether there is a convincing legal basis for it. The section concludes that although it is impossible to reach a categorical conclusion on the existence question, the principle of sovereign equality actually requires specially-affected states to be recognized in certain circumstances—namely, those identified later in the article.

Section III turns to how the doctrine of specially-affected states has been invoked by the United States and by scholars in the Global North. It demonstrates that, as publicly articulated,<sup>10</sup> the U.S. conception is based on two fundamental assumptions: (1) that engaging in a non-universal practice makes a state specially-affected, but not being affected by that practice in a distinctive way; and (2) that custom cannot be formed over the objections of even one specially-affected state. It also explains how Northern scholars have applied the idea of specially-affected states even more aggressively than the United States itself.

Sections IV and V then systematically analyze the two critical questions raised by the doctrine of specially-affected states: what makes a state “specially affected” with regard to a potential customary rule; and what importance should be ascribed to the practice of specially-affected states in the formation of custom. Section IV argues that, *contra* the United States, a state should be considered specially affected if it either engages in a practice that some states do not or is distinctively affected by a practice—directly or indirectly—in a manner that distinguishes it from other states. And Section V defends the idea that when specially-affected states are divided over a potential customary rule, as they almost always are, custom formation requires a majority of specially-affected states to support the rule.

Finally, Section VI addresses the implication of the analysis provided in the previous two sections. It argues that a theoretically sound conception of specially-affected states is not only inconsistent with Northern hegemony over custom, it might actually favor the South's legal interests.

<sup>7</sup> Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, UN Doc. A/71/10, at 95 (2016) [hereinafter Fourth ILC Report on Custom]. Although it does not use the term, the commentary is referring to the concept of specially-affected states. See Tladi, *supra* note 2, at 131 (“[T]he Special Rapporteur decided not to pursue the provision in the Drafting Committee. He decided that he would, instead, include references to specially affected states in the commentaries.”).

<sup>8</sup> Email from Sir Michael Wood, ILC Special Rapporteur on Identification of Customary International Law (Feb. 13, 2018) (on file with author).

<sup>9</sup> U.S. Dep't of State, Office of the Legal Advisor, Remarks of Stephen Townley, Counselor for Legal Affairs for the U.S. Mission to the UN, to the 69th General Assembly Sixth Committee, 2014 DIG. U.S. PRAC. INT'L L. 295, 296–97 (2014) (noting, in response to the deletion of specially-affected states from the ILC's Draft Conclusions, that the United States believes “the role of the practice of such States in the identification of customary international law should be recognized and addressed in the final product of this exercise, so as to reflect accurately international law”).

<sup>10</sup> It is impossible to know, of course, to what extent the United States has thought through the implications of its public statements concerning the specially-affected states doctrine. If this article encourages U.S. officials to reconsider those implications, all the better.

Before proceeding, two caveats are in order. The first is that this article does not address an oft-cited explanation of why the Global North has generally played a more decisive role than the Global South in the formation of custom: namely, that because evidence of the practice and *opinio juris* of Northern states is much more readily available, courts, lawyers, and scholars have tended to focus on it.<sup>11</sup> Although that is clearly true, the U.S. conception of what makes a state specially affected would privilege the Global North *even if* the relevant actors had perfect information concerning the Global South's practice and *opinio juris*. The need to critique the United States' Northern-centric conception of specially-affected states thus remains.

The second caveat is that many of the conclusions defended in this article are necessarily tentative. The analysis presented below reduces what Galindo and Yip have called the "high level of abstraction" in the argument that the doctrine of specially-affected states is not inherently biased in favor of the powerful.<sup>12</sup> As will be evident, though, the article does not claim to have answered all of the difficult questions concerning what makes a state specially affected or what influence specially-affected states should have over custom formation. On the contrary, the article's animating goal is simply to show that SAS doctrine is much more complicated than courts, lawyers, and scholars have commonly assumed.

## I. ICJ JURISPRUDENCE

The ICJ's adoption of the concept of specially-affected states in *North Sea Continental Shelf* likely came as a surprise to the states involved in the merged cases—Germany, Denmark, and the Netherlands. Prior to the Court's judgment in 1969, there was no suggestion in ICJ jurisprudence concerning custom formation that the practice of specially-affected states was any more important than the practice of non-specially-affected ones.<sup>13</sup> Moreover, although the parties in *North Sea Continental Shelf* naturally focused on states with coastlines—the only states capable of delimiting the continental shelf—not one claimed in its written submissions to the Court that the practice of coastal states was more important to the customary rules governing delimitation than the practice of landlocked states. On the contrary, Denmark and the Netherlands argued in their common rejoinder that the key issue in the case was whether the principle of equidistance had received "general recognition" by states.<sup>14</sup> Similarly, although Germany noted that "a number of important States with a sea coast" had not accepted the Continental Shelf Convention a decade after the diplomatic

<sup>11</sup> See, e.g., George Rodrigo Bandeira Galindo & Cesar Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 CHINESE J. INT'L L. 1, 8 (2017) ("Effectively, scholars, courts and lawyers generally can more easily obtain documents proving the practice of western states than of the Third World."); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 23 (1976) ("Of course some States exercise a greater influence on the development of customary law than other States, but that is because the practice of some States is more frequent or better publicized than the practice of other States, not because it is intrinsically more important than the practice of other States.").

<sup>12</sup> Galindo & Yip, *supra* note 11, at 7–8 n. 31.

<sup>13</sup> Cf. Rainer Hofmann, *Comment on Skordas*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 348, 349 (Michael Byers & George Nolte eds., 2003) ("In the 'old' bipolar world, the United States would, when considering the issue of creating customary international law, not have been treated any differently from any other State—at least from a strictly legal point of view. Instead, it would have had to contribute to the creation of customary law by pursuing its own practice and persuading other members of the international community to follow that practice.").

<sup>14</sup> *North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.)*, Common Rejoinder Submitted by the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands, 1968 ICJ Plead. 479 (Aug. 30).

conference,<sup>15</sup> its basic argument was that state practice did not support the contention that “the principle of equidistance has now been generally accepted as a rule of international law by the international community,” because a minority of states had ratified or acceded to the Convention despite it being open to all states—coastal and landlocked alike.<sup>16</sup>

The ICJ nevertheless emphasized the role of specially-affected states in its judgment. In paragraph 73, quoted above, it stressed the need for such states to have ratified or acceded to an international convention: although “very widespread and representative participation” could in principle transform a conventional rule into a customary one even without the passage of considerable time, such participation had to include “that of States whose interests were specially affected.”<sup>17</sup> And in paragraph 74 it insisted that practice subsequent to the convention, however short, needed to include the practice of specially-affected states:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>18</sup>

The Court had little trouble rejecting the idea that the equidistance rule in the Continental Shelf Convention had passed into customary international law. It began by concluding that participation in the Convention was not “widespread and representative,” because the thirty-nine states that had joined the Convention<sup>19</sup> were significantly outnumbered by the states could have joined the Convention but had not. As it said,

even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being landlocked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient.<sup>20</sup>

It is not clear to what extent the Court focused in this inquiry on the practice of specially-affected states—those that had an interest in how the continental shelf was delimited because they possessed a coast. Not all of the states that had ratified the Convention qualified as specially affected, because seven of the thirty-nine were landlocked.<sup>21</sup> Nevertheless, by excluding landlocked states from the comparison between ratifications and possible ratifications, the Court essentially compared specially-affected states to specially-affected states: the thirty-

<sup>15</sup> North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Reply Submitted by the Government of the Federal Republic of Germany, 1968 ICJ Plead. 407–08 (May 31).

<sup>16</sup> North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Memorial Submitted by the Government of the Federal Republic of Germany, 1967 ICJ Plead. 57 (Aug. 21).

<sup>17</sup> *North Sea Continental Shelf*, Judgment, *supra* note 1, at 42, para. 73.

<sup>18</sup> *Id.* at 43, para. 74.

<sup>19</sup> *Id.* at 25, para. 26.

<sup>20</sup> *Id.* at 43, para. 73.

<sup>21</sup> Afghanistan, Belarus, Bolivia, Malawi, Nepal, Switzerland, and Uganda. See Convention on the Continental Shelf, Ratifying Parties, at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-4&chapter=21&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&clang=_en).

two coastal states that had ratified the Convention to the 104 coastal states that could have been expected to ratify if they supported the equidistance rule.<sup>22</sup>

The Court then turned to subsequent practice, concluding that it did not qualify as extensive and virtually uniform.<sup>23</sup> In reaching that conclusion, the Court had to focus exclusively on the practice of specially-affected states, because landlocked states obviously could not delimit the continental shelf. The problem for Denmark and the Netherlands, according to the Court, was a simple one: the number of specially-affected states that had not delimited the continental shelf vastly exceeded the number of specially-affected states that had.<sup>24</sup>

Despite *North Sea Continental Shelf*, it is an open question whether the ICJ is genuinely committed to the SAS requirement. Outside of separate opinions and dissents,<sup>25</sup> the ICJ has never again mentioned the requirement in a case—not even when it has specifically cited *North Sea Continental Shelf* regarding custom formation. In the *Nicaragua* case, for example, the Court stated that

[i]n considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned “amount to a settled practice,” but they must be accompanied by the *opinio juris sive necessitatis*.<sup>26</sup>

Similarly, in the more recent *Jurisdictional Immunities* case, the Court said simply that, “as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”<sup>27</sup>

It is particularly striking that the ICJ avoided referring to specially-affected states in the *Nuclear Weapons* case,<sup>28</sup> given that the United States and the United Kingdom each claimed its possession of nuclear weapons meant it had to be considered specially affected and that a customary rule prohibiting the use of nuclear weapons could not be formed over the objections of the specially-affected states.<sup>29</sup> Although the Court ultimately agreed with the United States and United Kingdom that there was no customary rule prohibiting the use of nuclear weapons,<sup>30</sup> it did

<sup>22</sup> The 104 number comes from Judge Lachs, who noted in his dissent that “[t]wenty-six of the total number of States in existence [130] are . . . land-locked and cannot be considered as having a special and immediate interest in speedy accession to the Convention.” *North Sea Continental Shelf* Judgment, *supra* note 1, at 227 (Dissenting Opinion of Judge Lachs).

<sup>23</sup> *Id.* at 25, para. 28.

<sup>24</sup> *Id.* at 44, para. 75 (noting that the delimitations cited by Denmark and the Netherlands “constituted [no] more than a very small proportion of those potentially calling for delimitation in the world as a whole”).

<sup>25</sup> See, e.g., Fisheries Jurisdiction (UK/Ice.; Ger./Ice.), Separate Opinion of Judge De Castro, 1974 ICJ Rep. 90 (July 25) (“For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform.”).

<sup>26</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar./U.S.), Merits, Judgment, 1986 ICJ Rep. 108–09, para. 207 (June 27).

<sup>27</sup> Jurisdictional Immunities of the State (Ger./It.: Greece Intervening), Judgment, 2012 ICJ Rep. 122, para. 55 (Feb. 3).

<sup>28</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8) [hereinafter *Nuclear Weapons* Advisory Opinion].

<sup>29</sup> See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Letter Dated 20 June 1995 from the Acting Legal Adviser to the Department of State, Together with Written Statement of the Government of the United States of America, 1995 ICJ Plead. 8–9 (June 20) [hereinafter U.S. Letter]; *id.*, Verbatim Record, Statement of the United Kingdom, CR 95/34 (Nov. 15, 1995) [hereinafter UK Statement].

<sup>30</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 28, at 255, paras. 71–73.



not do so because the supposedly specially-affected states opposed the rule. In its view, the evidence put forward in favor of a customary prohibition—which was essentially limited to the series of General Assembly resolutions that began with Resolution 1653(XVI)<sup>31</sup>—indicated that the international community was simply too divided over the use of nuclear weapons to establish a customary prohibition:

Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be “a direct violation of the Charter of the United Nations” and in certain formulations that such use “should be prohibited.” The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.<sup>32</sup>

The Court’s conclusion was sound, given that opposition to the resolutions went far beyond the nuclear powers. Consider the voting on a small sample of the relevant General Assembly resolutions: Resolution 1653(XVI) was adopted in 1961 with twenty negative votes and twenty-six abstentions<sup>33</sup> at a time when there four nuclear states;<sup>34</sup> Resolution 33/71B<sup>35</sup> was adopted in 1978 with eighteen negative votes and eighteen abstentions<sup>36</sup> at a time when there were seven nuclear states;<sup>37</sup> Resolution 42/42A<sup>38</sup> was adopted in 1987 with seventeen negative votes and ten abstentions<sup>39</sup> at a time when there were seven nuclear states; and Resolution 50/71E<sup>40</sup> was adopted in 1995—just as the *Nuclear Weapons* litigation was getting underway—with twenty-seven negative votes and twenty-eight abstentions<sup>41</sup> at a time when there were seven nuclear states. As Clark says, “the determinative fact [was thus] the size of the dissenting group, rather than that the group was composed primarily of the nuclear powers and their allies.”<sup>42</sup>

<sup>31</sup> GA Res. 1653(XVI), UN GAOR, 16th Sess., Supp. No. 17, UN Doc. A/RES/1653(XVI) (1961). The abolitionist side also cited the “consistent practice of non-utilization of nuclear weapons by States since 1945” as evidence in favor of a customary prohibition of their use. *Nuclear Weapons* Advisory Opinion, *supra* note 28, at 252. The Court ignored that argument.

<sup>32</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 28, at 255, para. 71.

<sup>33</sup> See <https://research.un.org/en/docs/ga/quick/regular/16>.

<sup>34</sup> The United States, the United Kingdom, France, and the Soviet Union. See ICAN, *Nuclear Weapons Timeline*, at <http://www.icanw.org/the-facts/the-nuclear-age>.

<sup>35</sup> GA Res. 33/71B, UN GAOR, 33rd Sess., Supp. No. 45, UN Doc. A/RES/33/71B (1978).

<sup>36</sup> See <http://research.un.org/en/docs/ga/quick/regular/33>.

<sup>37</sup> China, Israel, and India had become nuclear powers since Resolution 1653 (XVI). See *Nuclear Weapons Timeline*, *supra* note 34.

<sup>38</sup> GA Res. 42/42A, UN GAOR, 42nd Sess., Supp. No. 49, UN Doc. A/RES/42/42A (1987).

<sup>39</sup> See <http://research.un.org/en/docs/ga/quick/regular/42>.

<sup>40</sup> GA Res. 50/71E, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/RES/50/71E (1995).

<sup>41</sup> See <http://research.un.org/en/docs/ga/quick/regular/50>.

<sup>42</sup> Roger S. Clark, *Treaty and Custom*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 171, 178 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999). It is worth noting that it is possible, though ultimately unconvincing, to read the judgment as obliquely referencing the doctrine of specially-affected states. First, the Court may not have credited the U.S. and UK position because it believed that *all* states were specially affected with regard to the use of nuclear weapons. That reading, however, is difficult to reconcile with Judge Weeramantry’s and Judge Shahabuddeen’s dissents, both of which specifically criticized the

The Court at least implicitly relied on the doctrine of specially-affected states, however, in the *Fisheries Jurisdiction* case. In that case, decided in 1974, the Court held that Iceland was not entitled to unilaterally extend its exclusive fishing zone to fifty miles<sup>43</sup> because state practice was not sufficient to displace the traditional customary rule that limited fisheries jurisdiction to twelve miles.<sup>44</sup> Although the Court did not specifically invoke the SAS requirement, it implied that two different categories of states should be considered specially affected with regard to customary rules governing fisheries jurisdiction: (1) coastal states that were entitled to preferential fishing rights in adjacent waters because of their “special dependence” on their coastal fisheries, such as Iceland itself;<sup>45</sup> and (2) other fishing states that were dependent on the same waters, such as the UK.<sup>46</sup> According to the Court, mutual “economic dependence” on the common fisheries meant that both categories of states would necessarily be distinctively affected—the former positively, the latter negatively—by any expansion of the customary limits on exclusive fishing zones.<sup>47</sup>

There is also a glimmer of the doctrine of specially-affected states in the recent *Marshall Islands* case, in which the Marshall Islands accused the United Kingdom, India, and Pakistan of failing to live up to their international obligations to pursue nuclear disarmament. The narrowly divided Court ultimately dismissed the case for lack of a legal dispute between the parties, but it suggested in its Preliminary Objections judgment that it considered the Marshall Islands specially affected with regard to customary issues concerning nuclear weapons:

The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament.<sup>48</sup>

Court for *not* viewing all states as specially affected. See text accompanying note 168 *infra*. Second, it is also possible that the Court is alluding to the doctrine of specially-affected states in paragraph 73, the final paragraph in its discussion of custom, where it wrote that “[t]he emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.” *Nuclear Weapons Advisory Opinion*, *supra* note 28, at 255. This might be an acknowledgment of the U.S. and UK’s insistence that they were specially affected, given that only nuclear powers can engage in deterrence. The precise meaning of paragraph 73, however, is impossible to divine with any certainty—and even if it does refer to the doctrine of specially-affected states, it does not answer any of the critical issues, such as who qualifies (only states that engage in deterrence?) and the importance of the status (does the opposition of the nuclear powers doom the customary rule no matter how many non-nuclear states oppose it?).

<sup>43</sup> *Fisheries Jurisdiction*, *supra* note 25, at 29, para. 67 (Judgment).

<sup>44</sup> See *id.* at 22–23, paras. 51–52.

<sup>45</sup> *Id.* at 23, para. 52.

<sup>46</sup> *Id.* at 29, paras. 66, 68.

<sup>47</sup> *Id.* Judge Petren explicitly relied on the doctrine of specially-affected states in his dissenting opinion, emphasizing that states distinctively affected by the expansion of exclusive fishing zones should be considered specially affected with regard to the customary rule. Although he did not believe that the number of coastal states claiming exclusive fishing zones beyond twelve miles was sufficient to satisfy the practice requirement, he specifically noted that “the States whose interests are threatened by these claims have constantly protested” them. Those protests, he insisted, would themselves have been sufficient to doom any rule permitting a more expansive exclusive fishing zone, because they meant that “another element which is necessary to the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects.” *Id.* at 161 (Dissenting Opinion of Judge Petren).

<sup>48</sup> Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is./UK), Preliminary Objections, para. 44 (Int’l Ct. Just. Oct. 5, 2016).



Although this is far from an unequivocal endorsement of SAS doctrine, there is obviously a stark contrast between the Court's acknowledgment of the impact of nuclear testing in *Marshall Islands* and its failure in the *Nuclear Weapons* case—in which the Marshall Islands submitted a letter recounting how it been harmed by nuclear testing<sup>49</sup>—to even consider the possibility that states threatened by the use of nuclear weapons should be considered specially affected.

## II. THE LEGAL BASIS OF SAS DOCTRINE

The dearth of ICJ jurisprudence concerning specially-affected states raises a stark question: does the doctrine actually exist? The ICJ obviously thought so when it decided *North Sea Continental Shelf*, but judgments of international tribunals are not themselves a formal source of international law; they are merely “subsidiary means for the determination of the rules of law.”<sup>50</sup> What matters, therefore, is not the *North Sea* judgment itself, but how the Court reached the conclusion that state practice cannot be considered widespread and representative if it does not include the practice of specially-affected states.

Unfortunately, the Court's analysis in *North Sea Continental Shelf* is conspicuously limited. Neither paragraph in the judgment that mentions specially-affected states—paragraphs 73 and 74—contains even a single footnote. Nor could the Court have unproblematically derived the doctrine from Article 38 of the ICJ Statute, which is widely assumed to reflect the formal sources of international law.<sup>51</sup> Paragraph (1)(b) speaks only of “international custom, as evidence of a general practice accepted as law.” That provision is consistent with the *North Sea Continental Shelf* Court's insistence that custom requires widespread and representative state practice, but it provides no support for the specially-affected states requirement. Indeed, a plain meaning interpretation of paragraph 1(b)'s reference to “general practice” would seem to suggest that the practice of all states should be weighted equally when assessing support for a customary rule.

The ICJ, in short, seems to have simply cut the doctrine of specially-affected states from whole cloth, likely because it had been called upon to determine the customary status of a practice that, as a matter of simple geography, was necessarily non-universal. That might not be problematic if states had affirmatively embraced the doctrine in the wake of *North Sea Continental Shelf*. After all, as Onuf says, “certain decisions of the Court can have a near oracular impact on community opinion, catalyzing the necessary practice for the rapid emergence of a customary norm.”<sup>52</sup> But that description is difficult to apply to *North Sea Continental Shelf*. To begin with, claiming that the doctrine of specially-affected states is valid because states have accepted it as customary implicates the vexed question of

<sup>49</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Letter Dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, Together with the Written Statement of the Government of the Marshall Islands (Int'l Ct. Just. June 22, 1995), available at <http://www.icj-cij.org/files/case-related/95/8720.pdf>.

<sup>50</sup> Case of Readaptation of the Mavrommatis Jerusalem Concessions, Jurisdiction, 1927 PCIJ (ser. A), No. 11, at 18 (Oct. 10).

<sup>51</sup> See, e.g., Jean d'Aspremont, *The Idea of “Rules” in the Sources of International Law*, 84 BRIT. Y.B. INT'L L. 103, 111 (2014) (noting that Article 38 “has been taken out of its institutional context and elevated into a sort of constitutional rule about the rules of international law”).

<sup>52</sup> NICHOLAS ONUF, INTERNATIONAL LEGAL THEORY: ESSAYS AND ENGAGEMENTS, 1966–2006, at 69 (2008).

how a rule governing the formation of custom could itself be produced *through* custom. Presumably, the argument would be that the SAS requirement originally applied only as the law of the case in *North Sea Continental Shelf* but was then “elevated” into a general requirement of custom formation by states endorsing it through their practice and *opinio juris*. Even if the argument is capable of avoiding infinite regress,<sup>53</sup> however, it is difficult to conclude that support for the doctrine of specially-affected states is “widespread and representative.” The United States, the United Kingdom, and Germany<sup>54</sup> are the only states that have formally invoked the doctrine of specially-affected states, and although the Special Rapporteur of the Asian-African Legal Consultative Organization (AALCO) Informal Expert Group believes AALCO’s forty-seven member states support the doctrine,<sup>55</sup> the vast majority of the world’s states have taken no position on it.

Given the dearth of state practice, it is impossible to reach a definitive conclusion concerning the existence of the doctrine of specially-affected states. Nevertheless, given the importance of custom as a formal source of international law and the potential impact of the doctrine on a variety of customary disputes, the meaning and importance of specially-affected status is likely to continue to be of interest to courts,<sup>56</sup> lawyers, and scholars. It is thus important to consider not only whether the doctrine of specially-affected states *does* exist, but also whether it *should*.

The answer to that normative question is anything but self-evident. Any defense of specially-affected states must confront what is unquestionably the most powerful objection to the doctrine: the sovereign equality of states, one of the basic constitutional principles of international law in the Westphalian era. Oppenheim provides the classic statement of the principle:

The equality before International Law of all member States of the Family of Nations is an invariable equality derived from their international personality. Whatever inequality may exist between states as regards their size, power, degree of civilisation, wealth and other qualities, they are nevertheless equals as international persons.<sup>57</sup>

What sovereign equality requires in terms of international law-making is unclear. Simpson usefully distinguishes between two forms of legislative equality that might inhere in and derive from sovereign equality. The “weak” form takes the position that “states are bound only by those legal norms to which they have given their consent.”<sup>58</sup> The “strong” form,

<sup>53</sup> See d’Aspremont, *supra* note 51, at 111 (“[T]he ruleness of sources is supposed to be grounded in another and different layer of (meta-) rules. As a result, a problem of infinite regress arises. Such an infinite regress is inherent in a rule-based approach to sources: should the foundations of rules on sources be itself a rule, the question of the foundation of sources repeats itself *ad infinitum*.”).

<sup>54</sup> See text accompanying note 236 *infra*.

<sup>55</sup> Email from Sienho Yee, Special Rapporteur of the Asian-African Legal Consultative Organization (AALCO) Informal Expert Group (Feb. 10, 2018) (on file with author) (explaining that member states have voiced support for the AALCO Informal Expert Group’s position that the doctrine is valid).

<sup>56</sup> As Petersen notes, determining the content of customary international law has always been one of the International Court of Justice’s (ICJ) central preoccupations. Niels Petersen, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*, 28 EUR. J. INT’L. L. 357, 385 (2017).

<sup>57</sup> Quoted in GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 27 (2004); see also *id.* at 26 (“It is a commonplace in international law that states are equal or, at least, that they possess something called sovereign equality. This form of equality is a foundational principle of the international legal order.”).

<sup>58</sup> *Id.* at 48.

by contrast, “mandate[s] . . . an equal role in the formation and application of customary law and treaty law.”<sup>59</sup>

The weak form of legislative equality is not inconsistent with the doctrine of specially-affected states. It merely affirms the necessity of states being able to persistently object to a customary rule;<sup>60</sup> it does not rule out some states being more important than others in the formation of custom. The strong form of legislative equality, by contrast, is impossible to reconcile with the specially-affected states requirement, because the purpose of recognizing certain states as specially affected is precisely to give those states an unequal role in custom formation.<sup>61</sup> It is thus not surprising that the most common objection to the doctrine of specially-affected states is that it is inconsistent with sovereign equality. Consider, for example, Judge Shi’s criticism of the U.S. and UK position in the *Nuclear Weapons* case:

No doubt, these States are important and powerful members of the international community and play an important role on the stage of international politics. However, the Court, as the principal judicial organ of the United Nations, cannot view this “appreciable section of the international community” in terms of material power. The Court can only have regard to it from the standpoint of international law. Today the international community of States has a membership of over 185 States. The appreciable section of this community to which the Opinion refers by no means constitutes a large proportion of that membership, and the structure of the international community is built on the principle of sovereign equality. Therefore, any undue emphasis on the practice of this “appreciable section” would . . . be contrary to the very principle of sovereign equality of States.<sup>62</sup>

Similar statements have been made by a number of scholars. Price rejects the idea that certain states are specially affected with regard to the customary prohibition of anti-personnel mines because “[t]he foundational doctrine of the sovereign and legal equality of states, a cornerstone of international law, is not to be overridden lightly.”<sup>63</sup> Villiger argues that “the equality of states in international law . . . forestalls any *a priori* assumptions of ‘specially important’ States in the law-making process.”<sup>64</sup> Several members of the ILC specifically reject the doctrine of specially-affected states on the ground that “all States are interested in the content and scope, in the formation and development, of general international law in all fields,” making the doctrine “irreconcilable with the sovereign equality of States.”<sup>65</sup> And Ratner simply concludes that,

[w]ith respect to customary international law, a stronger version of sovereign equality could conceivably be achieved through a challenge to the doctrine that the support of

<sup>59</sup> *Id.*

<sup>60</sup> A controversial possibility, to be sure. See note 232 *infra*.

<sup>61</sup> See, e.g., Christian J. Tams & Antonios Tzanakopoulos, *The Use of Force*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 498, 510 (Jörg Kammerhofer & Jean d’Aspremont eds., 2014) (noting that the doctrine of specially-affected states “is best understood as qualifying the requirement of generality of practice”).

<sup>62</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 28, at 278 (Declaration of Judge Shi).

<sup>63</sup> Richard Price, *Emerging Customary Norms and Anti-Personnel Landmines*, in THE POLITICS OF INTERNATIONAL LAW 106, 120 (Christian Reus-Smit ed., 2004).

<sup>64</sup> MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 15 (1985).

<sup>65</sup> Second ILC Report on Custom, *supra* note 5, at 228.

“specially affected states” is required for custom to emerge, since in many cases such states are powerful states.<sup>66</sup>

Given the seeming requirements of sovereign equality, it is tempting to reject the doctrine of specially-affected states out of hand. But that would be too hasty, because a strong argument can be made that sovereign equality actually requires recognizing certain states as specially affected—at least with regard to some rules of customary international law. The doctrine of specially-affected states does not deny that all States are *interested in* “the content and scope . . . of general international law in all fields.” It simply recognizes that not all practices regulated or potentially regulated by customary international law *affect* all states—much less affect them *equally*. Some practices may, in fact, affect all states equally—and I argue in Section IV that the SAS requirement should not apply in such situations. But three other situations are possible: (1) a practice could affect all states but affect some states more than others; (2) a practice could affect only some states but affect all of those states equally; or (3) a practice could affect only some states and affect some of those states more than others.

In the second and third situations, it is difficult to see why sovereign equality, even in its strong law-making equality form, requires giving non-specially-affected states the same power over custom formation as states that are specially affected. Such “superficial equality,” to quote Sienho Yee,<sup>67</sup> seems inconsistent with the principle of non-intervention that is at the heart of sovereign equality.<sup>68</sup> One rationale underlying the principle of non-intervention is that states should not interfere with decisions by other states that do not directly affect them.<sup>69</sup> That rationale applies as strongly in the context of custom formation as it does in the context of domestic affairs: just as states generally lack an interest in determining how other states organize themselves politically and economically, states generally lack an interest in determining the content of legal rules that neither directly nor indirectly affect their interests.<sup>70</sup> And of course the doctrine of specially-affected states does not even go that far: the doctrine does not consider the practice of non-specially-affected states *irrelevant*; it simply says that such practice is *less important* than the practice of specially-affected states.

The first situation—where a practice affects all states but does not affect them all equally—is not fundamentally different. Here the fact that the doctrine does not disregard the practice of states that are affected by a practice but not *specially* affected by it is particularly important. As long as it is possible to reliably distinguish between “affected” and “specially affected” states—a big if, as we shall see—the non-intervention rationale sketched above would seem to still apply. If a practice affects all states but affects some of those states more

<sup>66</sup> STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* 209 (2015).

<sup>67</sup> Sienho Yee, *Report on the ILC Project on “Identification of Customary International Law,”* 14 CHINESE J. INT’L L. 375, 389 (2015).

<sup>68</sup> See, e.g., SIMPSON, *supra* note 57, at 27 (noting that “the significance of sovereign equality is made explicit . . . in the 1970 Declaration on Friendly Relations”).

<sup>69</sup> See, e.g., Marcelo Kohen, *The Principle of Non-intervention 25 Years After the Nicaragua Judgment*, 25 LEIDEN J. INT’L L. 157, 160 (2012). The international community’s understanding of what kinds of activities directly affect other states has, of course, evolved over time. *Id.* But the underlying rationale has stayed the same.

<sup>70</sup> The idea of direct and indirect effect—including the possibility that some issues affect all states in a manner that rules out recognizing individual states as specially affected—is explored in more detail below. See text accompanying notes 184–191 *infra*.

distinctively than others, granting the specially-affected states (comparatively) greater power over the formation of custom would seem to respect, not undermine, sovereign equality.

In short, although it is unclear whether the doctrine of specially-affected states qualifies as a principle of custom formation, considerations of sovereign equality suggest that it should.

### III. RHETORIC OF THE GLOBAL SOUTH

As noted in the Introduction, the doctrine of specially-affected states raises two interrelated questions: (1) when should a state be deemed specially affected by a particular practice?; and (2) what importance should be ascribed to the practice of specially-affected states in the formation of custom? This section explains how the United States and scholars in the Global North have answered those questions in a manner that gives powerful states nearly complete control over custom formation. The following sections—IV and V—then critique the North’s answers as part of a systematic analysis of the meaning and importance of specially-affected status.

#### A. *The United States*

In the *Nuclear Weapons* case, the United States took the position that “customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected.”<sup>71</sup> That statement reflects the United States’ fundamental assumption concerning the doctrine of specially-affected states: that a state qualifies as specially affected only by engaging in the practice whose customary status is at issue—here the possession of nuclear weapons, the necessary precondition of their use. Having been actually harmed by nuclear weapons, as in the case of Japan, or having the potential for being harmed, such as any state in the vicinity of the states targeted by nuclear weapons, does not suffice.<sup>72</sup>

The United States has taken an even stronger position about the meaning of specially-affected status in the context of customary international humanitarian law (IHL). To begin with, it rejects the idea that merely engaging in armed conflict is enough for a state to be considered specially affected. In its view, only states with a “distinctive history of participation” qualify. Here is what is said regarding specially-affected states in its formal response to the International Committee of the Red Cross’s (ICRC) “Customary International Humanitarian Law” study:

In this context, the Study asserts, this principle means that “[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.” This rendering dilutes the rule and, furthermore, makes it unduly provisional. Not every State that has participated in an armed conflict is “specially affected”; such

<sup>71</sup> U.S. Letter, *supra* note 29, at 9.

<sup>72</sup> The United Kingdom took a slightly broader view, claiming that there was no consistency of practice supporting the existence of a customary rule prohibiting the use of nuclear weapons because “nuclear-weapon States and those States on whose territory such weapons are situated have, by word and deed, disavowed the existence of such a rule.” UK Statement, *supra* note 29, at 47. That expansion simply increased the number of specially-affected states opposed to the rule—which might well have been the UK’s intention.

States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as “specially affected.”<sup>73</sup>

On its face, a state could have such a “distinctive history of participation” either quantitatively (because it has engaged in a large number of armed conflicts) or qualitatively (because it has unusually significant experience with a particular practice). The former standard would favor powerful states, while the latter standard would apply much more widely—for example, deeming a state that has faced a particularly dangerous insurgency to be specially-affected with regard to the customary rules of IHL that apply in non-international armed conflict. Later in its ICRC response, however, the United States makes clear that it views “distinctive history of participation” solely in quantitative terms:

The United States disagrees with the Study’s conclusion that France, the United Kingdom, and the United States are not among those specially affected with regard to environmental damage flowing from the use of conventional weapons, given the depth of practice of these States as a result of their participation in a significant proportion of major international armed conflicts and peacekeeping operations around the globe during the twentieth century and to the present.<sup>74</sup>

The Department of Defense’s newly adopted *Law of War Manual* (Manual)—“an institutional publication” that “reflects the views of the Department of Defense”<sup>75</sup>—goes even further. Instead of emphasizing how often states like the United States participate in armed conflict, it simply claims that “nuclear powers” and “other major military powers” are the type of states that are specially-affected in the context of IHL.<sup>76</sup>

The *Law of War Manual* also indicates that the United States takes the strongest position possible concerning what it means for a state to qualify as specially affected. According to the Manual, “States with a distinctive history of participation in the relevant matter must support [a] purported rule”<sup>77</sup> for it to qualify as customary international law. Read literally, that formulation gives each and every specially-affected state a veto over custom formation.<sup>78</sup>

As this discussion indicates, the United States has formally invoked the doctrine of specially-affected states only three times—and only in the context of the *jus ad bellum* or *jus in bello*. It is nevertheless reasonable to assume that the position it takes in the *Nuclear Weapons* case, in the response to the ICRC’s custom study, and in the *Law of War Manual*

<sup>73</sup> 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, 445 n. 4 (2007) (internal citation omitted).

<sup>74</sup> *Id.* at 455.

<sup>75</sup> DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, at v (2015). The Manual also says that, in the right circumstances, “occupying or occupied” states might qualify as specially affected. *Id.* The latter could obviously include weaker states, although the Manual does not explain how occupied states could have a “distinctive history” of occupation in a quantitative sense.

<sup>76</sup> *Id.* at 32.

<sup>77</sup> *Id.*

<sup>78</sup> This appears to be an even more uncompromising position than the one the United States took in the *Nuclear Weapons* case, in which it claimed that “customary law could not be created over the objection of the nuclear weapon States, which are the states whose interests are most specially affected.” U.S. Letter, *supra* note 29, at 9. That formulation left open the possibility that more than one specially-affected state has to oppose a rule to prevent it from passing into custom.



reflects the United States' general understanding of the meaning and importance of specially-affected status. First, all three invocations of the doctrine qualify as both state practice<sup>79</sup> and as evidence of *opinio juris*.<sup>80</sup> Second, the three statements reflect a consistent position on the meaning and importance of specially-affected status, which increases their overall weight.<sup>81</sup> Third, and most importantly, the United States has offered a general and unqualified endorsement of the doctrine of specially-affected states in response to the ILC's custom study, telling the Sixth Committee in 2014 that "the role of the practice of such States in the identification of customary international law should be recognized and addressed" in the ILC's final conclusions, "so as to reflect accurately international law, given the well-established jurisprudence on this point."<sup>82</sup> That statement is difficult to reconcile with the idea that the United States believes the doctrine of specially-affected states is either limited to the *jus ad bellum* and *jus in bello* or functions differently in other areas of international law.

### B. Scholars

A number of scholars in the Global North have defended a conception of specially-affected states that even more overtly privileges the role of powerful states in the process of custom formation<sup>83</sup>—a tradition that dates back to at least Kelsen, who insisted in his *Pure Theory of Law* that a customary rule could not exist unless "it has been applied or recognized in numerous cases by those states which by reason of their size and their culture are the most important for the development of international law."<sup>84</sup>

Some of these Northern scholars valorize the powerful by emphasizing the first aspect of the U.S. conception of specially-affected states: the idea that a state qualifies as specially affected only if it engages in a particular practice. Clagett, for example, explicitly limits the category of states specially affected with regard to direct expropriation to "the United States and other capital-exporting countries," excluding capital-importing states completely.<sup>85</sup> Post and Barnsby adopt a similar distinction in the context of means of warfare: Post deems specially affected only states that are "technically capable of produc[ing]" a particular weapon,<sup>86</sup> while Barnsby insists that "the practice of . . . nations with nuclear capability" must "be

<sup>79</sup> See, e.g., Int'l Law Assoc., Statement of Principles Applicable to the Formation of General Customary International Law 14, Report of the Sixty-Ninth Conference (2000) (noting that state practice includes "policy statements," "official manuals (e.g. on military law)," and "pleadings before international tribunals") [hereinafter ILA Custom Report].

<sup>80</sup> See, e.g., Fourth ILC Report on Custom, *supra* note 7, at 77 (Draft Conclusion 10) ("Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; [and] government legal opinions.")

<sup>81</sup> See, e.g., *id.* at 18 (noting that inconsistent practice by a state reduces the weight that can be attached to individual instances of practice).

<sup>82</sup> Townley Statement, *supra* note 9, at 296–97.

<sup>83</sup> The quotes in this section have been chosen because they articulate specifically legal claims. They do not simply make the (difficult to deny) legal-realist point that, as a matter of actual fact, powerful states tend to get their way internationally.

<sup>84</sup> HANS KELSEN, *PURE THEORY OF LAW* 260–61 (Charles Eisenmann trans., 1962).

<sup>85</sup> Brice M. Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73, 89 (1984–1985).

<sup>86</sup> See 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).

weighed more heavily than the practice of those without such a capability.”<sup>87</sup> Finally, Thirlway says that, for purposes of the customary law of outer space, “the States whose interests are specially affected would presumably be those which are actually or potentially in control of the economic and scientific assets necessary for the exploration of space.”<sup>88</sup>

Other scholars privilege powerful states by focusing on the second aspect of the U.S. conception: the idea that customary rules cannot be generated over the objection of specially-affected states. A few take the position—as the United States appears to—that each and every specially-affected state has the ability to block the creation of a customary rule. McClaren and Schwendimann, for example, state categorically that state practice cannot be considered “representative” if it does not include the United States, because the United States’ “international interests”—the fact that it is “very active abroad militarily” and “at the forefront of developing new weapons technology”—make it specially affected with regard to all customary rules of IHL.<sup>89</sup> Similarly, Schmitt and Vihul assert in the context of the “paramount” role of specially-affected states in cyberwarfare that, “given the military wherewithal of the United States, and its frequent involvement in armed conflicts, it would be difficult for an IHL cyber norm to materialise in the face of a U.S. objection thereto.”<sup>90</sup> Two other scholars take positions that are nearly as strong: Wolfrum suggests that the opposition of two powerful specially-affected states, Russia and the United States, would be sufficient to doom any potential customary rule governing outer space,<sup>91</sup> while Hulme argues (echoing Barnsby) that custom cannot prohibit excessive environmental damage caused by nuclear weapons because three states that possess nuclear weapons—the United States, the United Kingdom, and France—object to the rule.<sup>92</sup>

Other scholars, by contrast, do not specify how many powerful specially-affected states must object to a rule to prevent it from becoming custom. The commentary to the Restatement (Third) of Foreign Relations, for example, simply claims that a conventional rule can pass into customary international law only if the multilateral agreement in question is “not rejected by a significant number of important states.”<sup>93</sup> Similarly, Clagett says that

[w]hen the dissenters are among the most important actors in the international arena on a particular issue and on a broad range of related issues, their withholding of support is sufficient to prevent a would-be norm from replacing the established legal rule.<sup>94</sup>

<sup>87</sup> Robert E. Barnsby, *Yes, We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 53, 75–76 (2009).

<sup>88</sup> H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 72 (1972).

<sup>89</sup> 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).

<sup>90</sup> MICHAEL N. SCHMITT & LIIS VIHUL, *THE NATURE OF INTERNATIONAL LAW CYBERNORMS* 25 (2014), available at <https://ccdcoe.org/sites/default/files/multimedia/pdf/Tallinn%20Paper%20No%20%205%20Schmitt%20and%20Vihul.pdf>.

<sup>91</sup> Rudiger Wolfrum, *Comment, in UNITED STATES HEGEMONY*, *supra* note 13, at 359–60.

<sup>92</sup> Karen Hulme, *Natural Environment, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 204, 233 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

<sup>93</sup> AMERICAN LAW INSTITUTE, *I RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES* §102 cmt. i (1986).

<sup>94</sup> Clagett, *supra* note 85, at 90; cf. THOMAS BUERGENTHAL & SEAN D. MURPHY, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 28 (4th ed. 2011) (claiming that it is “undisputed” that, to create custom, “the practice must be one that is accepted by the world’s major powers and by states directly affected by it”).

Finally, it is worth noting that a few scholars valorize the role of powerful states in custom formation by emphasizing their ability to *create* custom. Shaw takes the maximalist position in this regard, insisting “that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice.”<sup>95</sup> By contrast, Baxter takes a position that is more restrained, though still biased toward the powerful. He acknowledges that the practice of all states counts toward custom formation but insists that

there must be some weighting of the “votes” cast for and against the rule according to the size of the State, the volume of its international relations, and, in general, the contribution that it makes to the development of international law.<sup>96</sup>

#### IV. WHEN IS A STATE “SPECIALLY AFFECTED”?

As the survey in Section I indicates, ICJ jurisprudence suggests that two categories of states should be considered specially affected. The first, which is based on *North Sea Continental Shelf*, includes states that engage in a particular practice that other states do not. The second, which is based on *Fisheries Jurisdiction* and *Marshall Islands*, includes states that are affected by a practice in a manner that other states are not.

A number of commentators have similarly underlined the Janus-faced nature of special effect. With regard to humanitarian aid, for example, the ICRC emphasizes that specially-affected states include both those that provide aid and those that receive it.<sup>97</sup> Porterfield<sup>98</sup> and Treves<sup>99</sup> make a similar argument for expropriation, each taking the position that both capital-importing and capital-exporting states are specially affected, while Akehurst and Tladi each point out that states specially affected by delimitations of the continental shelf should include not only the delimiting coastal states, but also landlocked states that are significantly affected by delimitation—such as those with a merchant fleet<sup>100</sup> or those

<sup>95</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 56 (7th ed. 2014) (emphasis added). Shaw’s reference to a state’s “special relationship” with a practice at least leaves open the possibility that a state does not have to engage in a practice to qualify as specially affected.

<sup>96</sup> R. R. Baxter, *Treaties and Custom*, 129 *COLLECTED COURSES HAGUE ACAD. INT’L L.* 1, 66 (1979). Reisman & Armstrong hint in the same direction, although not specifically in the context of specially-affected states, when they say that “doctrines of sovereign equality notwithstanding, the actions of a great power may be more generative of law than those of smaller states.” W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 *AJIL* 525, 526 (2006).

<sup>97</sup> ICRC, *I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES*, at xlv–v (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (“States whose population is in need of such aid or States which frequently provide such aid are to be considered ‘specially affected.’”)

<sup>98</sup> Matthew C. Porterfield, *State Practice and the (Purported) Obligation Under Customary International Law to Provide Compensation for Regulatory Expropriations*, 37 *N.C. J. INT’L L. & COM. REG.* 160, 172–73 (2011) (“Accordingly, in determining the content of CIL with regard to the treatment of foreign investment, it is appropriate to focus on the practices of the major capital importing and exporting countries, which presumably constitute the relevant ‘specially affected States.’”)

<sup>99</sup> Tulio Treves, *Customary International Law*, in 9 *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, at para. 36 (Rudiger Wolfrum ed., 2012) (“Similarly, rules on economic relations, such as those on foreign investment, require practice of the main investor States as well as that of the main States in which investment is made.”)

<sup>100</sup> Akehurst, *supra* note 11, at 16 n. 6.

with a tangible economic interest in the size of the high seas or the deep seabed.<sup>101</sup> Boyle and Chinkin focus on the customary prohibition of unilateral humanitarian intervention, asking rhetorically whether a specially-affected state must “be the one that provides military support rather than the state targeted for intervention.”<sup>102</sup> And Rahmat Mohamad—the secretary-general of AALCO—argues that specially-affected states in the context of new weapons technology include not only states that develop the technology, but also “those not possessing such technology who may face the risk of an armed conflict in which the opponent uses such new technology.” Both, he notes, “would appear to have a specific interest in how the law in this field develops.”<sup>103</sup>

Individual issues raised by the two criteria for specially-affected status—engaging in a non-universal practice and being distinctively affected by a practice—will be examined below. The general point to be made here is that neither criterion inherently favors powerful states. Powerful states in the Global North tend to be specially affected because they engage in non-universal practices, while weaker states in the Global South tend to be specially affected because they are distinctively affected by practices.<sup>104</sup> The criteria, however, are formally neutral: if a state engages in a non-universal practice or is affected by a practice in the requisite manner, it qualifies as specially affected.<sup>105</sup> As China says, “big or small, rich or poor, strong or weak . . . [a]s long as a state has specific interests and real influence in these fields, its practice must be given full importance.”<sup>106</sup>

<sup>101</sup> Statement by Dire Tladi on the Second Report of the Special Rapporteur on the Identification of Customary International Law (on file with author). For a summary view, see the Provisional Summary Record of the 3225th Meeting of UN International Law Commission, July 17, 2014, 10:00 am, UN Doc. A/CN.4/SR.3225.

<sup>102</sup> ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 29–30 (2007); cf. TOM RUY, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 44–45 (2010) (deeming specially affected, for purposes of the *jus ad bellum*, “those States which are in a position to participate in the practice under consideration and/or which have an interest in the subject matter”).

<sup>103</sup> Dr. Rahmat Mohamad, Secretary-General, AALCO, Address at the AALCO Legal Advisors Meeting, Identification of Customary International Law (Oct. 29, 2015), available at <http://www.aalco.int/Sg%20new%20york%20address%20%202015.Pdf>.

<sup>104</sup> This is, of course, a generalization. Some states traditionally considered part of the Global South are quite powerful, such as China or Brazil, while some states traditionally considered part of the Global North are quite weak, such as Croatia or Bermuda. Moreover, even weak states can initiate the development of custom by engaging in practice. An example is the exclusive economic zone (EEZ), which “was not initiated—and was indeed originally opposed—by major maritime powers.” Maurice H. Mendelson, *The Objective Element in Customary International Law*, 272 *RECUEIL DES COURS* 226 (1998).

<sup>105</sup> See, e.g., ILC Custom Report, *supra* note 79, at 26; Yee, *Report on the ILC Project*, *supra* note 67, at 390 (“[T]he concept of specially affected States is not reserved for the big and powerful States, but applies to all States who are specially concerned with the subject matter under consideration and whose interests are specially affected by the rule under consideration. A State need not be big and powerful to be specially affected.”); RUY, *supra* note 102, at 45 (“Some authors interpret the concept of specially affected States as implying that the practice of more powerful or dominant States would have a greater impact on the development of customary rules. In accordance with the principle of sovereign equality, there is no *intrinsic* reason why larger States should exercise a greater influence on the customary process.”); Jeremy Pearce, *Customary International Law: Not Merely Fiction or Myth*, 2003 *AUSTL. INT’L L.J.* 125, 129 n. 16 (2003) (“[W]hilst one could argue that more powerful states may be more likely to be specially affected since they tend to participate more regularly in different theatres of international law and relations . . . this cannot counter the ‘process’ by which customary law pays particular attention to interests of ‘specially affected’ states irrespective of their power.”)

<sup>106</sup> Statement by Mr. Xu Hong, Chinese Delegate, Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China, at the 69th Session of the UN General Assembly (Oct. 29, 2014), available at <http://www.china-un.org/eng/hyfy/t1205398.htm>.

### A. *Engaging in Practice*

The idea behind this category of specially-affected states is straightforward: because not all states engage in every practice regulated or potentially regulated by customary international law, states that do engage in a particular non-universal practice should be considered specially affected. In *North Sea Continental Shelf*, for example, the ICJ limited the category of specially-affected states to those with a coastline, because only coastal states were capable of delimiting the continental shelf.

The Court never explained in *North Sea Continental Shelf* why engaging in a non-universal practice means that a state should be considered specially affected—most likely because it seemed self-evident that coastal states and landlocked states did not have the same interest in the purported customary rule. There are, however, three basic rationales for specially-affected status in this context. First, states that engage in a currently permissible practice have more to lose than states that do not if the practice becomes prohibited.<sup>107</sup> We can call this the “cost” rationale. For example, it is very unlikely that customary international law currently prohibits unilateral exploitation of the deep seabed.<sup>108</sup> Were that to change, states that have the capacity to engage in deep seabed mining would suffer significant economic harm. Similarly, customary international law currently tolerates the use of anti-personnel landmines.<sup>109</sup> Should they become prohibited, states that use such landmines would lose a valuable warfighting technique.

Second, and conversely, states that engage in a currently prohibited practice have more to gain than states that do not if the practice becomes permissible. We can call this the “benefit” rationale. Consider, for example, self-defense against non-state actors whose armed attacks are not attributable to the territorial state. Customary international law has not traditionally recognized self-defense in situations where the territorial state is simply “unwilling or unable” to prevent the non-state actor’s armed attack.<sup>110</sup> If that changes,<sup>111</sup> states that have the ability to

<sup>107</sup> Yee makes a version of this argument. See Yee, *Report on the ILC Project*, *supra* note 67, at 389 (arguing that because specially-affected states “may have to shoulder greater burden than others . . . [n]aturally their concerns and their conduct deserve special consideration”). Hugh Thirlway does, as well. See HUGH THIRLWAY, II *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE* 1195 (2013) (noting that nuclear states have more to lose from custom prohibiting the use of nuclear weapons than non-nuclear states).

<sup>108</sup> See text accompanying notes 215–218 *infra*.

<sup>109</sup> See text accompanying notes 251–257 *infra*.

<sup>110</sup> See, e.g., Christian Henderson, *The 2010 United States National Security Strategy and the Obama Doctrine of “Necessary Force,”* 15 J. CONFLICT & SEC. L. 403, 422 (2010) (“[F]orcible responses on the territory of a state have traditionally only been permissible if the actions of the non-state entities can be attributed to the territorial state.”); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT’L L. 359, 368 (2009) (noting that, traditionally, “[f]or an attack to qualify as an ‘armed attack’ in the sense of Article 51 (or its customary equivalent), the direct attack by a non-state actor had to be attributed to another state under rather stringent rules on attribution”); Olivier Corten, *The “Unwilling or Unable” Test: Has it Been, and Could it Be, Accepted?*, 29 LEIDEN J. INT’L L. 777, 791 (2016) (“Nothing would preclude the international community of states as a whole to gradually tolerate or even accept this kind of argument. This, however, would imply a radical change in the existing *jus contra bellum*.”); Paulina Starski, *Right to Self-Defense, Attribution and the Non-state Actor—Birth of the “Unable or Unwilling” Standard?*, 75 ZAÖRV 455, 496 (2015) (arguing that “all arguments put forward in order to base attribution within Art. 51 on unwillingness or inability ultimately fail to convince *de lege lata*”); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo/Uganda)*, Judgment, 2005 ICJ Rep. 168, 173 (Dec. 19) (Separate Opinion of Judge Simma) (noting that “a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time”).

<sup>111</sup> Some scholars believe that the “unwilling or unable” test is already *de lege lata*. See, e.g., Ashley S. Deeks, *“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense*, 3 VA. J. INT’L L. 483, 488

engage in extraterritorial self-defense will find it much easier to address threats from terrorist groups like ISIS and Al-Qaeda.

Third, and finally, there is what we can call the “experience” rationale: states that have a history of engaging in a particular practice presumably understand the nature of that practice—its advantages and disadvantages, its benefits and costs—better than states that do not.<sup>112</sup> Their decision to either continue that practice or to stop engaging in it should thus carry greater weight in the formation of custom. Bellinger and Padmanabha capture the logic behind this category when they write—specifically with reference to the possibility of states agreeing to rules concerning the detention of non-state actors—that

[t]he practice of specially affected states is especially important in developing international law because the extent and depth of their experience provides a useful background against which to evaluate possible new rules. The experience of these states would ensure that they come to the table with realistic ideas and possible proposals.<sup>113</sup>

Taken together, these three rationales explain why states that engage in a non-universal practice should generally be considered specially affected. There are, however, a number of important questions about what it means for a state to “engage in practice.”

### 1. *Nature of practice*

The first concerns the nature of the practice in question. There are three issues here regarding custom formation: (1) whether some practices are so universal that no state should be considered specially affected; (2) whether states that attempt to modify custom by engaging in an unlawful practice should be considered specially affected; and (3) whether some practices are so abhorrent that no state should be considered specially affected.

#### a. Universal practices

Although likely limited in number, some practices are genuinely universal. Examples include diplomatic relations<sup>114</sup> and treaty-making.<sup>115</sup> Because such practices are universal, there is no basis for considering individual states specially affected with regard to

(2012); Anders Henriksen, *Jus ad Bellum and American Targeted Use of Force to Fight Terrorism Around the World*, 19 J. CONFLICT & SEC. L. 211, 228 (2014). But this is the minority position.

<sup>112</sup> The experience rationale might favor states in the Global North, which have generally existed longer than most states in the Global South and thus have had more opportunity to develop the kind of experience with a practice that justifies specially-affected status. Determining whether and to what extent such an asymmetry exists is beyond the scope of this article, but the possibility is worth noting.

<sup>113</sup> John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AJIL 201, 243 (2011).

<sup>114</sup> Every state in the world operates embassies and consulates in other states.

<sup>115</sup> The Geneva Conventions, for example, are universally ratified.



customary issues involving them unless the doctrine of specially-affected states takes into account the specificity or intensity of practice<sup>116</sup>—ideas considered below.<sup>117</sup>

### b. Unlawful practices

States sometimes attempt to modify a prohibitive customary rule by engaging in practice that violates it. “Self-defense” by the United States and its allies against armed attacks by non-state actors (NSAs) that are not attributable to the territorial state is an example: although the best reading of custom holds that such uses of force violate Article 2(4) of the UN Charter, since 9/11 the United States and its allies have deliberately tried to expand the concept of self-defense to include situations in which a territorial state is “unwilling or unable” to prevent an NSA from using its territory to launch armed attacks.

There is no question that this kind of unlawful practice can contribute to the modification of custom. As the ICJ said in the *Nicaragua* case,

[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.<sup>118</sup>

But should a state that attempts to modify a prohibitive customary rule by engaging in an unlawful practice be considered specially affected?

The possibility is disquieting, because in general only powerful states have the ability to violate existing customary prohibitions through physical practice.<sup>119</sup> Weaker states must normally rely on verbal practice when they seek to change custom.<sup>120</sup> That asymmetry, which rewarded powerful states simply for being powerful,<sup>121</sup> is no longer particularly important in

<sup>116</sup> Cf. RUYSS, *supra* note 102, at 45 (rejecting the idea that “the concept of ‘specially affected States’ is applicable in each and every situation” because “certain treaties such as the Vienna Convention on the Law of Treaties or the Vienna Conventions on Diplomatic and Consular Relations would seem to be of equal importance to all members of the international community”); DANILENKO, *supra* note 4, at 95–96 (“It is clear . . . that a number of general legal issues, such as the law of treaties, are of direct interest for every state.”); VILLIGER, *supra* note 64, at 14 (“How can one assess the practice of ‘affected’ States upon the 1961 and 1963 Vienna Conventions, if virtually all States entertain diplomatic and consular relations?”).

<sup>117</sup> For specificity, see text accompanying notes 142–144 *infra*; for intensity, see text accompanying notes 156–160 *infra*.

<sup>118</sup> *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 26, at 98, para. 186; see also Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT’L L. 523, 532 (2004) (“Why would violations not be eligible as state practice? Customs (behavioural regularities) have no ‘legality’ for their purpose as building-blocks of (new) law. The act has two meanings, given to it by two different norms. . . . I do not see a logical contradiction in saying that the wearing of a green hat is to be punished and that it is part of law-making; there are two norms at work here.”).

<sup>119</sup> See, e.g., Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 177, 188 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

<sup>120</sup> See, e.g., Akehurst, *supra* note 11, at 8 (“[A]n alternative to changing customary law by breaking it, States can change it by repeatedly declaring that the old rule no longer exists—a much more desirable way of changing the law.”).

<sup>121</sup> See, e.g., DANILENKO, *supra* note 4, at 86–87 (“From a broad political legal perspective, the emphasis on actual practice made custom a source of law which tended to reflect preferences of those powerful states that were able to assert a particular rule of conduct in inter-state relations.”); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 505 (2000) (“The ‘acts-only’ jurisprudence gives lawmaking

terms of the meaning of state practice itself, because it is now beyond doubt that verbal statements count as state practice. That is the position of the ICJ,<sup>122</sup> the ILC,<sup>123</sup> the International Law Association (ILA),<sup>124</sup> and the American Law Institute (ALI).<sup>125</sup> Because verbal statements count as state practice—a development driven, not coincidentally, by the Global South<sup>126</sup>—weaker states can now promote the modification of custom “by repeatedly declaring that the old rule no longer exists.”<sup>127</sup>

The asymmetry remains, however, concerning the doctrine of specially-affected states. As discussed in more detail below,<sup>128</sup> a state should not be considered specially affected simply because it regularly opines on the legality or illegality of a particular practice. Only states powerful enough to violate a prohibitive customary rule through physical practice, therefore, will qualify as specially affected—a result that simply reproduces the problem of custom formation rewarding powerful states for being powerful.

One response to this asymmetry would be to deny specially-affected status to a state that engages in unlawful physical practice. Doing so, however, would be transparently fictitious, because both the benefit and experience rationales justify the state being considered specially affected. We may be opposed to expanding self-defense to include unwilling or unable situations, but there is no question that the United States has much to gain from the doctrine becoming customary and has vast experience concerning extraterritorial self-defense against NSAs whose attacks cannot be attributed to the territorial state.

In any case, the real concern with unlawful physical practice is that specially-affected states will have too much power over custom—not that such states do not actually qualify as specially affected. That is a legitimate issue, but it is important to recognize that, as *Nicaragua* reminds us, no state can unilaterally dictate the modification of a prohibitive customary rule:

The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle

authority to the more powerful states while disenfranchising other members of the world community.”); Byers & Chesterman, *supra* note 119, at 188 (noting that an emphasis on physical practice “provides a substantial advantage to powerful states in developing customary international law”).

<sup>122</sup> *Jurisdictional Immunities*, *supra* note 27, at 123, para. 55 (deeming state practice to include “the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention”).

<sup>123</sup> Fourth ILC Report on Custom, *supra* note 7, at 77 (Draft Conclusion 6) (“Practice may take a wide range of forms. It includes both physical and verbal acts.”).

<sup>124</sup> ILA Custom Report, *supra* note 79, at 14 (“Verbal acts, and not only physical acts, of States count as State practice.”).

<sup>125</sup> RESTATEMENT THIRD, *supra* note 93, at §102 cmt. b (“Practice of states’ . . . includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states.”).

<sup>126</sup> See, e.g., DANILENKO, *supra* note 4, at 88 (noting that the recognition of verbal statements as state practice “reflect[s] the quest of the developing countries for equal participation in community law-making”); Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 81 (2003) (noting that “the Third World states attempted, in effect, to formulate a new approach to sources doctrine by arguing that General Assembly resolutions passed by vast majorities had some binding legal effect”); cf. Kelly, *supra* note 121, at 505 (“If statements such as U.N. declarations can alone create international law, then the less powerful have a strong voice in customary law formation.”).

<sup>127</sup> Akehurst, *supra* note 11, at 8.

<sup>128</sup> See text accompanying notes 161–167 *infra*.

might, if shared in principle by other States, tend towards a modification of customary international law.<sup>129</sup>

The same is true even when the state in question qualifies as specially affected. As we will see,<sup>130</sup> a specially-affected state that wants to modify a prohibitive rule will need the support not only of other specially-affected states, but also of a widespread and representative group of non-specially-affected states. There is no guarantee that such support will be forthcoming—particularly when the vehicle for custom modification is the kind of unlawful physical practice that is so internationally destabilizing.<sup>131</sup>

### c. Abhorrent practices

In a similar vein, some scholars have argued that certain practices are so abhorrent that no state that engages in them should be considered specially affected. Ferdinandusse, for example, claims that

it is irreconcilable with the very character of IHL to grant specially affected status to the manufacturers of certain dubious weapons, just as it would have been problematic to grant South-Africa specially affected status with regard to the question of apartheid.<sup>132</sup>

States that commit genocide are another obvious example.

This argument is superficially attractive, particularly when the practice in question violates a *jus cogens* norm—as do apartheid and genocide.<sup>133</sup> It seems odd that a state should be rewarded for violating a peremptory norm of international law by being deemed specially affected. That result is unavoidable, however, if we want to adopt criteria for specially-affected status that are based on the neutral application of the rationales discussed above instead of on inherently contestable normative considerations. South Africa's practice of apartheid is an excellent example: no other state had as much to lose from apartheid's customary prohibition, and no other state had as much experience with creating and maintaining "an institutionalized regime of systematic oppression and domination."<sup>134</sup> Refusing to consider South Africa specially affected with regard to apartheid<sup>135</sup> would thus be no less fictitious than refusing to consider specially affected a state that deliberately resorts to unlawful physical practice in order to modify a customary rule.

It is also important to recognize that denying specially-affected status to a state that engages in an abhorrent practice will almost always be a solution in search of a problem. Specially-affected status means nothing for a state that maintains apartheid or commits genocide,

<sup>129</sup> *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 26, at 109, para. 207.

<sup>130</sup> See Section V(A) *infra*.

<sup>131</sup> See Akehurst, *supra* note 11, at 8 (noting that trying to modify custom by engaging in unlawful physical practice is far more destabilizing to "the rule of law in international relations" than trying to modify it "by repeatedly declaring that the old law no longer exists").

<sup>132</sup> Ward Ferdinandusse, *Book Review*, 53 NETH. INT'L L. REV. 502, 504 (2006).

<sup>133</sup> See, e.g., Erika de Wet, *Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments Since Barcelona Traction*, 38 S. AFR. Y.B. INT'L L. 1, 6 (2013).

<sup>134</sup> Rome Statute of the International Criminal Court, Art. 7(2)(h), July 17, 1998, 2187 UNTS 90.

<sup>135</sup> South Africa, it is worth noting, never claimed that status. At most it claimed to be a persistent objector. See, e.g., JAMES A. GREEN, *THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW* 198 (2016) (noting that South Africa explicitly described itself as a persistent objector in the *South-West Africa* cases).

because a *jus cogens* norm “can be modified only by a subsequent norm of general international law having the same character.”<sup>136</sup> Even if such modification is possible—which some scholars doubt<sup>137</sup>—it is unimaginable that the “international community of States as a whole”<sup>138</sup> will recognize and accept a subsequent norm recognizing the permissibility of apartheid or genocide.<sup>139</sup>

The situation is only slightly more concerning for less abhorrent practices such as manufacturing “certain dubious weapons.” As discussed below,<sup>140</sup> a lone specially-affected state—or even a small number of specially-affected states—cannot prevent the formation of a customary prohibitive rule; opposition by a majority of specially-affected states is likely required. If the practice in question is indeed abhorrent, it is doubtful that such a majority will exist—especially taking into account states that qualify as specially affected because the practice affects them in a distinctive way.<sup>141</sup>

## 2. Specificity

Another question concerns the specificity of practice: must a state have engaged in the specific non-universal practice whose customary status is at issue to qualify as specially affected, or is practice in the general area sufficient? Which states, for example, are specially affected with regard to the permissibility of deep seabed mining under customary international law: only those that actually engage in such mining, or all seafaring states? Similarly, are the

<sup>136</sup> Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331, 8 ILM 679 [hereinafter VCLT].

<sup>137</sup> See e.g., Anthony d’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!*, 6 CONN. J. INT’L L. 1, 5 (1990).

<sup>138</sup> VCLT, *supra* note 136, Art. 53.

<sup>139</sup> This response, of course, raises another important question: if states that engage in an abhorrent practice like genocide qualify as specially affected, could a *jus cogens* norm prohibiting genocide have developed without their support? Most positivists agree with de Wet that in order to acquire peremptory status, “a norm . . . first [has to be] recognised as customary international law, whereafter the international community of States as a whole further agrees that it is a norm from which no derogation is permitted.” Erika de Wet, *Jus Cogens and Obligations Erga Omnes*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 542 (Dinah Shelton ed., 2013); see also *Domingues v. United States*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 12.285, paras. 49–50 (Oct. 22, 2002) (“[W]hile based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole.”). Specially-affected states doctrine and the doctrine of *jus cogens* can coexist, therefore, only if a *jus cogens* norm can form over the objections of a lone specially-affected state or a small number of specially-affected states. There is nothing theoretically incoherent about that position; in fact, Samoa specifically endorsed it in the *Nuclear Weapons* case. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Verbatim Record, Statement by Samoa, CR 95/31, at paras. 49–50 (Nov. 13, 1995) [hereinafter Samoa Statement] (“Was it necessary for a general norm, a *jus cogens* norm, of non-discrimination to emerge (or a particular norm against apartheid) that South Africa (and perhaps Portugal and Southern Rhodesia too) must agree? South Africa surely regarded itself as the State most “specially affected.” The world did not wait for its acquiescence!”). At least one scholar, however, has suggested that a customary prohibition cannot rise to the level of *jus cogens* if even one specially-affected state insists on the legality of the practice:

It may well be argued that by analogy these [specially affected] states would also have a major influence in matters relating to the elevation of the relevant general rules to the rank of peremptory norms. In certain areas of law, where a limited number of “specially affected” states play a predominant role, their opposition to a proposed norm may be a decisive factor. To take an obvious example, it is difficult to envisage the establishment of peremptory rules regarding outer space in the face of the opposition of major space power.

DANILENKO, *supra* note 4, at 236.

<sup>140</sup> See Section V(C) *infra*.

<sup>141</sup> See Section IV(B)(2) *infra*.

specially-affected states regarding the customary status of functional immunity for international crimes only those that have prosecuted such cases and those whose government officials have been prosecuted? Or are there *no* specially-affected states in this context because all states have at least some officials who could potentially be accused of an international crime?

This is a critical issue, because the outcome of a dispute over custom can depend on the degree of specificity required for specially-affected status. Functional immunity is an excellent example. Although scholars widely assume that there is no such immunity for international crimes under customary international law, that conclusion is sound only if the category of specially-affected states is not limited to those that have squarely faced the issue:

[T]hose very few jurisdictions that have declined to afford immunity in the few cases to have proceeded so far to judicial determination have all been western European. Conversely, African states jointly and severally, Chile, China, Israel, Mongolia and the United States—many of them states with a strong claim to being considered “specially affected” by any purported customary “international crime” exception—have all vociferously insisted on the grant of immunity *ratione materiae* to their serving and former officials in the face of foreign investigations or proceedings pertaining to alleged international crimes.<sup>142</sup>

In the context of the *jus in bello*, Global North scholars have taken an expansive position concerning the specificity of practice, suggesting that a state with extensive experience in armed conflict should be considered specially-affected with regard to most specific warfighting issues. As noted earlier, for example, Schmitt and Vihul argue that “given the military wherewithal of the United States and its frequent involvement in armed conflicts, it would be difficult for an IHL cyber norm to materialise in the face of a U.S. objection thereto.”<sup>143</sup> In a similar vein, Guldahl suggests that “[s]tates that have participated in the most international armed conflicts” are specially affected with regard to the customary status of belligerent reprisals against civilians, because those states “are more likely to have been faced with the issue”<sup>144</sup>—a version of the experience rationale.

In fact, all of the rationales for deeming a state specially affected cut the other way. Only those states that have actually engaged in cyberwarfare or carried out belligerent reprisals against civilians have the requisite experience that justifies specially-affected status. And only those states have something to lose or gain if the customary status of the practices changes. There is thus no reason to extend the category of specially-affected states to include those that have engaged in the broader practice but not the specific practice whose status is at issue—the exception being where a state’s failure to engage in the specific practice despite having the capacity to do so represents a deliberate decision, an issue discussed immediately below.

### 3. *Temporality*

The next question about practice focuses on temporal concerns—*when* a state must be engaged in a particular non-universal practice to be considered specially affected. This

<sup>142</sup> Roger O’Keefe, *An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AJIL UNBOUND 167, 168 (2015).

<sup>143</sup> SCHMITT & VIHUL, *supra* note 90, at 25.

<sup>144</sup> Camilla G. Guldahl, *The Role of Persistent Objection in International Humanitarian Law*, 77 NORDIC J. INT’L L. 51, 76 (2008).

question has three aspects. First, must a state be currently engaged in a practice, or is past activity enough? Ukraine, for example, once possessed nuclear weapons but later dismantled them and renounced their use.<sup>145</sup> Does that mean Ukraine is no longer specially-affected with regard to customary issues concerning nuclear weapons? Similarly, a number of states, such as the United States, no longer execute juveniles. Does that mean they should be treated as non-specially-affected when determining whether custom still permits the juvenile death penalty?

In both cases, the rationales for specially-affected status suggest that past practice is sufficient. A state that no longer engages in a practice obviously retains the capacity to engage in it again—by restarting a dormant nuclear weapons program or by changing the law to (again) permit executing juveniles. That state thus faces the cost of prohibition or the benefit of permissibility in a manner similar to a state that currently engages in the practice, the difference simply being one of degree. Moreover, the experience rationale also suggests that the state should be considered specially affected—especially where the state has made a deliberate decision to stop engaging in a practice because it believes that the practice is unlawful (*opinio juris*), as was the case with Ukraine’s nuclear-weapons program.<sup>146</sup> Indeed, excluding a state like Ukraine from specially-affected status would serve only to unfairly bias the doctrine in favor of states that want to continue an unpopular practice.

Second, what about states that have never engaged in a practice but clearly have the capacity to do so? Many states, for example, are capable of developing chemical weapons but have never chosen to actually produce them.<sup>147</sup> Does that mean they are not specially affected with regard to whether custom prohibits the use of chemical weapons?

*North Sea Continental Shelf* suggests that such states should also be considered specially affected. The Court did not limit the category of specially-affected states to those that had actually delimited the continental shelf; it treated all states capable of such delimitation—the coastal states—as specially affected.<sup>148</sup> More importantly, the rationales for specially-affected status suggest that the status is warranted. To offer one obvious example, states that do not use anti-personnel landmines because they believe they are or should be illegal are giving up a valuable warfighting tool. Indeed, as with the previous scenario, excluding states from specially-affected status that have made an informed decision not to take advantage of their ability to engage in a practice would be antithetical to the experience rationale, which deems a state specially affected when it has a deeper understanding of the costs and benefits of a practice than other states.

This is not simply an academic distinction, as *North Sea Continental Shelf* itself illustrates. As discussed above, the Court concluded that participation in the Continental Shelf Convention was not “widespread and representative” because only thirty-two of the 104 states that could have been expected to join the Convention—those that had coasts and

<sup>145</sup> William J. Long & Suzette R. Grillot, *Ideas, Beliefs, and Nuclear Policies: The Cases of South Africa and Ukraine*, 7 *NONPROLIFERATION REV.* 24, 33 (2000).

<sup>146</sup> *See id.* at 34–35.

<sup>147</sup> *See Post, supra* note 86, at 142 (“If 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. For practice regarding an emerging rule on chemical weapons, the practice of many more states is of relevance.”).

<sup>148</sup> *See also* RUYLS, *supra* note 102, at 44–45 (taking the position that the rule announced in *North Sea Continental Shelf* means that “primary attention should go to the actions of those States which are in a position to participate in the practice under consideration”).



were thus specially affected with regard to delimitation—had actually done so.<sup>149</sup> In his dissent, Judge Lachs disagreed with the idea that any state with a coast should be considered specially affected and included in the comparison between ratifications and potential ratifications. In his view, that understanding of practice was not temporally specific enough: the Court should have considered specially affected only those states “at present engaged in the exploration and exploitation of continental shelf areas.”<sup>150</sup> Had it done so, Judge Lachs asserted, the Court would have reached a very different conclusion concerning whether practice in support of the equidistance rule was widespread and representative:

[I]t is noteworthy that about 70 States are at present engaged in the exploration and exploitation of continental shelf areas. It is [this] analysis which is relevant, not the straight comparison between the total number of States in existence [with coasts] and the number of parties to the Convention. It reveals in fact that the number of parties to the Convention on the Continental Shelf is very impressive, including as it does the majority of States actively engaged in the exploration of continental shelves.<sup>151</sup>

Third, and finally, should a state that currently lacks the capacity to engage in a practice but is close to achieving it be considered specially affected? The case against specially-affected status is the strongest here, given that the state does not yet have any specific experience with the practice and is not yet in a position to suffer the costs of its prohibition or accrue the benefits of its permissibility. But the temporal qualifier still seems critical: if there is little question that a state will develop the capacity to engage in a practice—such as a technologically-sophisticated state that is actively developing blinding laser weapons<sup>152</sup>—the experience rationale and either the cost or benefit rationale mean that the state will eventually qualify as specially affected.<sup>153</sup> It would thus seem unfair to draw a categorical distinction between states that currently have capacity and states that will have capacity in the near future—especially because that division will often break down along North/South lines, as with deep seabed mining.

It is also worth noting that the international community has generally been willing to extend specially-affected status to states developing the capacity to engage in a practice. The ALI notes with regard to deep seabed mining, for example, that

[t]he doctrine of the continental shelf became accepted as customary law on the basis of assertions of exclusive jurisdiction by coastal states and general acquiescence by other states, although for some years actual mining on the continental shelf (outside a state’s territorial sea) was not technologically feasible.<sup>154</sup>

<sup>149</sup> See text accompanying note 20 *supra*.

<sup>150</sup> *North Sea Continental Shelf* Judgment, *supra* note 1, at 227 (Dissenting Opinion of Judge Lachs)

<sup>151</sup> *Id.* Judge Lachs got his math wrong. Seven ratifying states were landlocked. (He thought the number was five. *Id.*) So in fact only 46% of specially-affected states had ratified.

<sup>152</sup> Cf. Louise Doswald-Beck, *Developments in Customary International Humanitarian Law*, 15 SWISS. REV. INT’L & EUR. L. 471, 487 (2005) (noting that, according to the experts the ICRC consulted, such states should be considered no less specially affected than states that have already developing blinding laser weapons).

<sup>153</sup> This is almost certainly why the ICRC considers states developing a particular weapon to be specially affected. See, e.g., I ICRC STUDY, *supra* note 97, at xlv (“Who is ‘specially affected’ will vary according to circumstances. Concerning the question of the legality of the use of blinding laser weapons, for example, ‘specially affected States’ include those identified as having been in the process of developing such weapons.”).

<sup>154</sup> RESTATEMENT THIRD, *supra* note 93, §102 rep. n. 2.

Similarly, Thirlway points out that the Outer Space Treaty's ban on appropriating celestial bodies passed into custom even though not even space-going states such as the UK and the Soviet Union had the capacity at the time to engage in such appropriation.<sup>155</sup>

#### 4. Intensity

The discussion thus far has treated practice as a binary: either a state engages in a practice or it does not. That is an oversimplification, because there will always be some states that engage in a practice more than others. That is true for non-universal practices such as deep seabed mining and for universal practices like treaty-making. Are those differences relevant to the doctrine of specially-affected states? More specifically, should specially-affected status require a state to engage in a certain intensity of practice?

The ICRC takes the position that there is no intensity requirement. As it says in its custom study, “[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.”<sup>156</sup> By contrast, as noted above, the United States believes that merely engaging in a practice is not enough for a state to qualify as specially affected:

This rendering dilutes the rule and, furthermore, makes it unduly provisional. Not every State that has participated in an armed conflict is “specially affected”; such States do generate salient practice, but it is those States that have a distinctive history of participation that merit being regarded as “specially affected.”<sup>157</sup>

John Bellinger III endorsed an intensity requirement even more unequivocally in a blog post as the Legal Advisor to the State Department, insisting that “the law develops largely from the practice of specially affected states, not from . . . the practice of states with little history of participation in the activities in question.”<sup>158</sup> The American Bar Association appears to take a similar position.<sup>159</sup>

The ICRC adopted its binary approach to practice over the United States' objections<sup>160</sup>—and rightfully so. Compared to less active states, states with a “distinctive history of participation” obviously have more experience with a practice and a greater stake in that practice's customary status. But the doctrine focuses on which states are *specially* affected by a practice,

<sup>155</sup> THIRLWAY, *supra* note 88, at 71 n. 29. Thirlway thus suggests that, “[i]n this context, the States whose interests are specially affected would presumably be those which are actually or potentially in control of the economic and scientific assets necessary for the exploration of space.” *Id.* at 72.

<sup>156</sup> I ICRC CUSTOM STUDY, *supra* note 97, at xlv.

<sup>157</sup> Bellinger & Haynes, *supra* note 73, at 445 n. 4.

<sup>158</sup> John B. Bellinger III, *The Work of the Office of the Legal Adviser*, OPINIO JURIS (Jan. 2007), available at <https://www.state.gov/s/l/2007/116111.htm>.

<sup>159</sup> American Bar Association, House of Delegates Resolution and Report 6 (Aug. 9, 2004), available at <https://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/crimeextradition/universaljurisdiction.auth-checkdam.pdf> (“Just as coastal states are the primary relevant states for purposes of customary law on maritime territorial boundaries, states with forces experienced in armed conflict are the primary relevant states for purposes of the customary international law of war.”).

<sup>160</sup> See Doswald-Beck, *supra* note 152, at 475 (“There was a discussion with both the Steering Committee and the experts consulted on whether the practice of States regularly involved in conflict, in particular the United States, should be given greater weight than other practice. The general view was negative . . .”).

not which states are the *most* affected by it—and there is no question that states that occasionally engage in a practice are specially affected relative to states that do not engage in the practice at all. The relevant difference thus seems to be—consistent with the ICJ’s approach in *North Sea Continental Shelf*—between states that engage in a practice and states that do not. Any other approach simply rewards powerful states for being powerful.

Two other factors counsel rejecting an intensity requirement. To begin with, any such requirement would be nearly impossible to implement. How many times must a state engage in armed conflict to have a “distinctive history of participation”? Two? Five? Ten? How often must it mine the deep seabed? There are no evident answers to these questions—which simply reinforces the suspicion that the United States’ insistence on an intensity requirement reflects little more than self-interest.

An intensity requirement is also difficult to reconcile with the idea that a state should be deemed specially affected if it has made a considered decision to renounce a practice. If that is the case, it makes little sense to require the state in question to have a “distinctive history of participation” in the practice before renouncing it. Doing so would simply reward states that took longer to recognize that a particular practice should be prohibited. Those recalcitrant states are no doubt specially affected—but they are not the only states entitled to that status.

### 5. *Physical vs. verbal practice*

As alluded to above, limiting state practice to physical practice generally favors powerful states in the Global North—those that have the ability to regularly engage in physical practice,<sup>161</sup> including the unlawful kind intended to modify prohibitive customary rules. That is almost certainly why Northern states still occasionally suggest that verbal statements should not be considered equivalent to physical acts—an excellent example being the U.S. response to the ICRC custom study, in which it criticized treating “written materials, such as military manuals,” as state practice on the ground that such materials “cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations.”<sup>162</sup>

Now that there is no question that verbal statements qualify as state practice—a position the United States generally accepts<sup>163</sup>—it is important to assess the relationship between verbal practice and the doctrine of specially-affected states. Can a state become specially affected through verbal statements alone?

That possibility is difficult to reconcile not only with *North Sea Continental Shelf*’s emphasis on physical practice, but also with the rationales for deeming specially-affected a state that

<sup>161</sup> See, e.g., ILA Custom Report, *supra* note 79, at 26 (“Given the scope of their interests, both geographically and *ratione materiae*, they often will be ‘specially affected’ by a practice . . . .”); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 38 (2003) (noting that “powerful States, given the broader range and greater frequency of their activities, are more likely than less powerful States to have interests which are affected by any particular legal development”); RUYSS, *supra* note 102, at 45–46 (noting that “major States” are more likely to be specially affected “in a wide variety of international legal domains” because they “possess the resources to engage in physical practice for which smaller States may not have the necessary capabilities”).

<sup>162</sup> See, e.g., Bellinger & Haynes, *supra* note 73, at 445.

<sup>163</sup> See, e.g., Townley Statement, *supra* note 9, at 297 (“[T]he United States agrees that ‘[p]ractice may take a wide range of forms,’ including physical acts, verbal acts and—in some circumstances—inaction, as stated in Draft Conclusion 6.”).

engages in a non-universal practice. In the absence of the capacity (or near capacity) to engage in physical practice, not even the most vociferous state will suffer an actual cost if custom prohibits a currently permissible practice or obtain an actual benefit if custom permits a currently prohibited practice. Nor does a state gain the kind of experience that can justify specially-affected status merely by regularly opining on a practice's legality or illegality.

But that does not mean verbal statements are irrelevant to the doctrine of specially-affected states. On the contrary, such statements are critical for two categories of states that should be considered specially-affected: (1) those that used to engage in a practice but no longer do so; and (2) those that have the capacity to engage in a practice but have never done so. For these states, verbal statements are important not as a replacement for physical practice, but as evidence of what the state's inactivity means. Did a state dismantle its nuclear weapons because it believed customary international law prohibited their use, as was the case with Ukraine, or because of more realist foreign policy reasons, as was the case with South Africa?<sup>164</sup> Has a state not developed chemical weapons because it believes customary international law prohibits their possession or because it has concluded their development would simply be too costly? Without verbal statements concerning the meaning of inactivity, the absence of physical practice would make it impossible to answer these questions—and would thus make it impossible determine whether the state in question should be considered specially affected.<sup>165</sup>

Interestingly, the United States has traditionally accepted the idea that a state can qualify as specially affected through the combination of near capacity and verbal statements. The United States considered itself specially affected with regard to deep seabed mining long before it could act on its belief that custom permitted it to engage in such mining outside of the territorial sea.<sup>166</sup> And a similar situation existed when the United States first began to insist that it was specially affected with regard to the customary law of outer space.<sup>167</sup>

### B. *Affected by Practice*

Although generally ignored by the United States and scholars in the Global North, states that are affected by a practice in a distinctive manner should also qualify as specially affected. Judge Weeramantry captured the essence of this second category in his dissent in the *Nuclear Weapons* case:

The nuclear States possess the weapons, but it would be unrealistic to omit a consideration of those who would be affected once nuclear weapons are used. They would also be among the States most concerned, for their territories and populations would be exposed

<sup>164</sup> See Long & Grillot, *supra* note 145, at 32 (explaining that South Africa dismantled its nuclear weapons to improve its political and economic ties with the West).

<sup>165</sup> Cf. RUYSS, *supra* note 102, at 41 (“An approach that bases itself almost exclusively on physical practice presents far greater risks of arbitrariness than one that focuses on what States say. It tends to ignore rule-compliant behaviour and to downplay the (positive and negative) reactions of third States. Furthermore, it implies a great risk of subjectiveness in the sense that the interpreter will examine the practice through the lens of what he believes the State could or should have said to justify its conduct.”).

<sup>166</sup> See RESTATEMENT THIRD, *supra* note 93, at 6 (“The doctrine of the continental shelf became accepted as customary law on the basis of assertions of exclusive jurisdiction by coastal states and general acquiescence by other states, although for some years actual mining on the continental shelf (outside a state's territorial sea) was not technologically feasible.”).

<sup>167</sup> See, e.g., THIRLWAY, *supra* note 88, at 71 n. 29.

to the risk of harm from nuclear weapons no less than those of the nuclear powers, if ever nuclear weapons were used. . . . Suppose a metropolitan power were to conduct a nuclear test in a distant colony, but with controls so unsatisfactory that there was admittedly a leakage of radioactive material. If the countries affected were to protest, on the basis of the illegality of such testing, it would be strange indeed if the metropolitan power attempted to argue that because it was the owner of the weapon, it was the State most affected.<sup>168</sup>

Indeed, the cost, benefit, and experience rationales apply equally here. States that are affected in a distinctive manner by a practice have more to lose than other states if a currently prohibited practice becomes permissible—the cost rationale. Syria, for example, will suffer a far greater loss of sovereignty than France if the “unwilling or unable” test for self-defense against non-state actors achieves customary status. Similarly, states that are affected in a distinctive manner by a practice have more to gain than other states if a currently permissible practice becomes prohibited—the benefit rationale. The Marshall Islands, for example, has far more to gain than Germany if customary international law categorically prohibits nuclear testing. And finally, states that are affected in a distinctive manner by a practice have a greater understanding of the effects of that practice than other states. For example, given how often it has accepted refugees from states riven by conflict, Turkey has a far better understanding of the costs and benefits of customary rules governing conflict refugees than, say, Finland.

As these examples indicate, there is an additional—though certainly not deliberate—benefit to recognizing distinctive affect as a ground for specially-affected status: it helps balance the custom-formation scales between the North and South.<sup>169</sup> Just as the practice criterion generally favors powerful states in the Global North because they have the resources to engage in physical practice, the affect criterion generally favors weaker states in the Global South because they are traditionally on the receiving end of the North’s practices.<sup>170</sup> In fact, recognizing the affect criterion can even tilt the balance of custom-formation power toward weaker states, because the practice of one specially-affected Global North state can create multiple specially-affected states in the Global South. Consider, for example, United States acts designed to establish the customary status of the “unwilling or unable” test: although the United States qualifies as specially affected by virtue of those acts, so do all of the states

<sup>168</sup> *Nuclear Weapons* Advisory Opinion, *supra* note 28, at 535 (Dissenting Opinion of Judge Weeramantry). Judge Shahabuddeen took a similar position in his dissent: “Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all States are equally affected, for, like the people who inhabit them, they all have an equal right to exist.” *Id.* at 414 (Dissenting Opinion of Judge Shahabuddeen).

<sup>169</sup> See, e.g., Mendelson, *Objective Element*, *supra* note 104, at 227 (noting that “the broad meaning of the concept ‘specially affected States’ . . . prevent[s] the formation of customary international rules being the sole preserve of the mighty”).

<sup>170</sup> See, e.g., Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT’L L. & POL. 391, 460–61 (2012–2013) (noting that because Global South states face the largest number of asylum claims, “[e]xamining specially affected parties in the asylum context therefore opens the door to engage more deeply with the laws and interpretations of less powerful countries, rather than simply reinforcing the views of those that already dominate the international stage”); cf. Michael Byers, *Review Essay*, 97 AJIL 712, 723 (2003) (“It would seem equally appropriate to argue that weaker states, being much more vulnerable to applications of military force, should thus be considered ‘specially affected states’ in the sense identified in the *North Sea Continental Shelf* cases . . .”).

that those acts target<sup>171</sup>—a larger number, given that the United States has invoked the unwilling or unable test in at least Syria, Pakistan, Afghanistan, and Sudan.<sup>172</sup>

### 1. *Universal effects*

There are a number of important questions concerning what kind of effects qualify a state as specially affected. A threshold question parallels the question about universal practices discussed above: do some practices affect all states in such a way that no state should be considered specially affected by them? Two different versions of this question are possible: one factual, the other legal.

#### a. Factual

The first version simply asks whether, as a descriptive matter, some practices affect all states so significantly that no state should be singled out as specially affected. Judge Weeramantry's insistence in the *Nuclear Weapons* case that “[e]very nation in the world is specially affected by nuclear weapons, for when matters of survival are involved, this is a matter of universal concern”<sup>173</sup> is an example of this approach. Starski has offered a similar argument regarding the *jus ad bellum*, claiming that “[s]ince terrorism is not limited by state borders, every state has an equal interest in giving the right to self-defence and the *grundnorm* of the international legal order—the prohibition on the use of force—normative shape.”<sup>174</sup> And Tladi has invoked the idea of universal affect to contest *North Sea Continental Shelf* itself, noting that

[e]ven with respect to . . . the continental shelf, where it could be argued that States without a continental shelf couldn't be specifically affected, the fact that the extension of the continental shelf will affect the extent of the Area (or deep Seabed) shows how limited such a view is.<sup>175</sup>

The factual version of the “universal effect” argument is compelling with regard to the use of nuclear weapons, given that any significant nuclear exchange could render the entire planet uninhabitable. Few other issues, however, affect all states so significantly that it is impossible to identify any individual states as specially affected. Any state could be the victim of a terrorist attack, but transnational terrorism does not threaten all states equally. Dozens of states have never been attacked by a foreign terrorist group and are not reasonably likely to be attacked in the future. Similarly, although Tladi is correct to point out that all states have an interest in the size of the high seas, that does not mean coastal and other fishing states are not disproportionately affected by unilateral extensions of exclusive fishing zones. Even climate change,

<sup>171</sup> See Section 4(B)(2)(a) *infra*.

<sup>172</sup> Elena Chachko & Ashley Deeks, *Who Is on Board with “Unwilling or Unable”?*, LAWFARE (Oct. 10, 2016), at <https://www.lawfareblog.com/who-board-unwilling-or-unable#UnitedStates>.

<sup>173</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 28, at 536 (Dissenting Opinion of Judge Weeramantry); see also Rachel A. Weise, *How Nuclear Weapons Change the Doctrine of Self-Defense*, 44 N.Y.U. J. INT'L L. & POL. 1331, 1356 (2012) (noting that “the non-nuclear weapons states have a valid point that all states are specially affected given the hugely destructive power of nuclear weapons”).

<sup>174</sup> Paulina Starski, *Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility*, 4 J. USE OF FORCE & INT'L L. 14, 24 (2017).

<sup>175</sup> Tladi Statement, *supra* note 101.



which clearly affects every state in the world, affects some states far more than others—as Tuvalu can attest.<sup>176</sup>

### b. Legal

The second version of the “universal effect” question asks whether there are some practices that implicate legal interests shared equally by all states, making it inappropriate to recognize individual states as specially affected. A number of scholars have argued that no state should be considered specially affected when a practice affects the “common heritage of mankind” or the “global commons”—such as the high seas, outer space, or the environment. Villiger, for example, claims that “[t]he concept of a Common Heritage of Mankind implies the interest of every State, not only in the deep ocean floor but also in non-maritime issues, such as the New International Economic Order, the moon, or the geostationary orbit.”<sup>177</sup> Similarly, according to Danilenko, “issues of a global nature, such as those relating to global commons, presumably affect all states without exception.”<sup>178</sup>

The problem with such arguments is the one identified above: they elide the critical difference between being affected and being *specially* affected. Although all states have a legal interest in areas that qualify as the “common heritage of mankind” or as “global commons,” that does not mean all states are affected equally by practices involving those areas. On the contrary, some states will still be distinctively affected by particular practices, as the fishing zones and climate change examples indicate. IHL provides another example: should occupied states not be considered specially affected with regard to the law of occupation simply because all states have a legal obligation to respect IHL?

Not surprisingly, the ICRC itself distinguishes between affected states and specially-affected states when discussing the customary status of specific rules of IHL:

[n]otwithstanding the fact that there are specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict.<sup>179</sup>

The commentary to Article 42 of the Draft Articles of State Responsibility (DASR) draws a similar distinction, insisting that

[e]ven in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States.<sup>180</sup>

<sup>176</sup> See Leslie Allen, *Will Tuvalu Disappear Beneath the Sea?*, SMITHSONIAN MAG. (Aug. 2004), at [www.smithsonianmag.com/science-nature/will-tuvalu-disappear-beneath-the-sea-180940704](http://www.smithsonianmag.com/science-nature/will-tuvalu-disappear-beneath-the-sea-180940704).

<sup>177</sup> VILLIGER, *supra* note 64, at 14–15.

<sup>178</sup> DANILENKO, *supra* note 4, at 96.

<sup>179</sup> I ICRC STUDY, *supra* note 97, at xlv.

<sup>180</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int’l Law Comm’n on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 119, UN Doc. A/56/10 (2001).

The ILC cites pollution of the high seas as a (compelling) example.<sup>181</sup>

Other scholars have taken a related approach to the idea of universal legal interests, claiming that no state should be considered specially affected when a practice implicates an obligation *erga omnes*—one “whose breach gives rise to a legal interest on the part of all States.”<sup>182</sup> Cismas, for example, invokes the universal interest in self-determination to deny specially-affected status to states facing remedial secession:

[I]t is submitted that in the case of remedial secession the notion of “specially affected” does not do “sufficient justice.” Hence, if one accepts that massive and grave human rights’ abuse gives rise to the right of self-determination of the cultural people a right that attaches an obligation *erga omnes* one also has to cede that remedial secession cannot be the special concern of only one state or just of few but of all states. Thus, the notion of “specially affected” would appear to be inapplicable or on the contrary universally applicable with all states equally affected.<sup>183</sup>

This argument parallels the one for excluding states from specially-affected status that violate *jus cogens* norms, and it suffers from the same flaw: regardless of the legal interests involved, it is a fiction to pretend that a state facing a secessionist movement is not affected by the practice of self-determination in a distinctive manner compared to other states. In fact, the *erga omnes* argument is even weaker, because it will often—perhaps usually—exclude from specially-affected status states that are the innocent victim of a practice. That is not the case with regard to remedial secession, where the bad actor is the state, not the people seeking self-determination. But it makes little sense to deny specially-affected status to states that experience genocide or have their nationals enslaved because of the fiction that all states are harmed by such practices.

## 2. Non-universal effects

For most practices, then, we have to determine which states are affected in such a distinctive way that they should be considered specially affected. Two factors are critical here: (1) how directly a practice affects a state; and (2) how immediately a practice affects a state.

### a. Direct vs. indirect effect

A state is directly affected when it is the specific target of a practice. The Marshall Islands was directly affected when the United States tested nuclear weapons at Bikini Atoll. Ukraine is directly affected by Russia’s belligerent occupation of the Crimea. And Yemen is directly affected by Saudi Arabia’s use of cluster munitions against Houthi rebels. A state that is directly affected by a practice should always qualify as specially affected, as *Fisheries Jurisdiction*<sup>184</sup> and *Marshall*

<sup>181</sup> *Id.*

<sup>182</sup> Jacqueline Peel, *New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context*, 10 REV. OF EUR. COMM. & INT’L ENVTL. L. 1, 86 (2001)

<sup>183</sup> Ioana Cismas, *Secession in Theory and Practice: The Case of Kosovo and Beyond*, 2 GOETTINGEN J. INT’L L. 531, 584 (2010).

<sup>184</sup> This was Iceland’s situation.

*Islands* suggest. It is precisely the fact that the state was targeted instead of other states that establishes its special, as opposed to ordinary, effect.

A state is indirectly affected when it is not the specific target of a practice, but nevertheless suffers its consequences. The UK was indirectly affected by Iceland's unilateral extension of its exclusive fisheries zone. Turkey is indirectly affected by the conflict in Syria, which causes refugees to stream across its border. And Malaysia is indirectly affected by fires in Indonesia that cause large amounts of dangerous greenhouse gases to drift into Malaysian airspace.

There is little question that a state can qualify as specially affected because it is indirectly affected by a practice. The ICJ implied that the UK was specially affected in *Fisheries Jurisdiction*, and the ILC specifically cites a state suffering the effects of pollution on the high seas as an example of special affect. But that does not mean every state that is indirectly affected by a practice should be considered specially affected—even those where the effect is *de minimis*. If that was the rule, almost all practices would create so many specially-affected states that the doctrine would be impossible to apply.<sup>185</sup>

But where is the dividing line between “indirectly-affected state” and “specially-indirectly-affected state”? Consider conflict refugees: Worster is clearly correct that “states that experience significant numbers of refugees are ‘specially affected’ in the *North Sea Continental Shelf* sense,”<sup>186</sup> and at the margins the rule could be applied without undue controversy: Turkey, which has taken in more than 3,000,000 Syrian refugees, should clearly be considered specially-indirectly-affected by the *jus in bello* practices in Syria that have displaced civilians,<sup>187</sup> while Finland, which has taken in less than 1,200, should just as clearly not. But what about Austria, which has taken in 45,000? Iraq, with 230,000?

Or consider transboundary environmental harm. Peel understandably argues that

[o]ne possible solution to the difficulties posed in attempting to fit breaches of collective environmental obligations . . . within the framework of the category of specially affected States, is to interpret the specially affected requirement broadly to include States with some reasonable nexus to the damage suffered, over and above a general interest in the protection of the environmental resource damaged.<sup>188</sup>

But what is a “reasonable nexus” in the context of indirect transboundary environmental harm? Malaysia's air pollution has such a nexus with air pollution in Indonesia—experts attribute 6,500 deaths in the former to the fires in the latter<sup>189</sup>—while France's air pollution does not. But what about Papua New Guinea's? Australia's? At what distance do we say that the

<sup>185</sup> Cf. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 COLLECTED COURSES HAGUE ACAD. INT'L L. 212 (1993) (“All activities of a modern industrialized society have, to a greater or lesser extent, repercussions beyond the borders of the State in whose territory they are carried out, by affecting air, water and soils.”)

<sup>186</sup> William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERK. J. INT'L L. 94, 110 (2012).

<sup>187</sup> This example illustrates the need to distinguish between practice and effect. Turkey's processing of refugees makes it specially affected with regard to issues of refugee law (through practice). The influx of refugees into Turkey makes it specially affected with regard to the *jus in bello* (through effect).

<sup>188</sup> Peel, *supra* note 182, at 88.

<sup>189</sup> Elodie Abo and Bobbie Sta. Maria, *100,000 May Have Died but There Is Still No Justice over Indonesian Air Pollution*, GUARDIAN (Feb. 4, 2017), at <https://www.theguardian.com/global-development-professionals-network/2017/feb/04/indonesian-air-pollution-death-justice>.

harm of transboundary air pollution is so attenuated that a state should not be deemed specially indirectly affected?

No uncontroversial formula for distinguishing between indirect effect and special indirect effect exists—which is almost certainly why the ILC ducked the issue in its commentary to Article 42 of the DASR, simply stating that “the nature or extent of the special impact that a State must have sustained in order to be considered ‘injured’ . . . will have to be assessed on a case by case basis.”<sup>190</sup> That “solution” is not satisfying in the context of state responsibility, and it is not satisfying in the context of custom formation. Indeed, the indeterminacy of the concept of indirect affect is perhaps the most important obstacle to operationalizing the doctrine of specially-affected states.<sup>191</sup>

### b. Temporality

The idea that being distinctively affected by a practice can justify considering a state specially affected also raises difficult temporal issues. In many situations, a state will be currently affected by the practice whose customary status is at issue. But two other situations require consideration. The first is where a state is not currently distinctively affected by a particular practice but has been distinctively affected by it in the past. Should Japan not be considered specially affected with regard to the use and testing of nuclear weapons because the United States dropped atomic bombs on Hiroshima and Nagasaki in 1945? The second situation is where a state has never been distinctively affected by a practice but is likely to be distinctively affected by it in the future. An example here would be a state that is finding itself increasingly unable to prevent terrorists from using its territory as a base of operations, making it likely that the United States or one of its allies will eventually invoke the “unwilling or unable” doctrine to justify attacking the NSA. Should that state be considered specially affected?

The first situation is the more difficult of the two: whether we deem the state specially affected depends on which rationale we prioritize. If a state no longer feels the effect of a practice, it has nothing to lose or gain by a change in the customary rule. But that state nevertheless has experience with the practice that distinguishes it from other states. After all, what state knows better the devastating effects of a nuclear attack than Japan?

The argument for specially-affected status is much stronger in the second situation. Given that states developing the capacity to engage in a practice should be considered specially affected, it makes little sense to treat differently states that will be distinctively affected by a practice in the near future. If there is a difference between the two situations, it is simply an epistemological one: it is probably easier to predict when a state will develop the capacity to engage in a particular practice than predict when a state will be affected by a practice in a manner distinctive enough to justify considering it specially affected. But there are exceptions that prove the rule: determining when Iran might become nuclear capable has proven nearly impossible, while scientists are quite certain when Tuvalu will disappear under water given the current rate of climate change. The best position, therefore, is that as long as the best available scientific evidence indicates that a state is reasonably likely to become distinctively

<sup>190</sup> Draft Articles, *supra* note 180, at 119.

<sup>191</sup> Further efforts to define indirect effect are beyond the scope of this article. Developing workable guidelines for identifying when a state should be considered specially indirectly affected by a particular practice is a key task for future research.

affected by a practice in the near future, it should be considered specially affected.<sup>192</sup> That standard strikes an appropriate balance between overinclusivity and underinclusivity, even if it will not always be easy to apply.

## V. WHAT IS THE IMPORTANCE OF BEING “SPECIALLY AFFECTED”?

Having discussed *when* a state should be considered specially affected, we can now turn to our second question: *what it means* for a state to be specially affected. It is clear that the practice of specially-affected states is more important to custom formation than the practice of non-specially-affected states; were that not the case, the ICJ would not have needed to insist in *North Sea Continental Shelf* that practice cannot be considered “widespread and representative” unless it includes the practice of specially-affected states. But how much more important are specially-affected states?

To answer this question, it is useful to distinguish between three possible scenarios in which one or more states are specially affected concerning a potential prohibitive or permissive customary rule—“potential” understood to include both rules emerging *ex nihilo* (such as the right to mine the deep seabed) and rules that require the modification of an existing rule (expanding self-defense to include “unable or unwilling” situations).<sup>193</sup> In the first scenario, all specially-affected states support<sup>194</sup> the rule. In the second, all specially-affected states oppose the rule. And in the third, some specially-affected states support the rule while other specially-affected states oppose it.

This analysis, it is important to note, is necessarily oversimplified. Except where specifically discussed, the analysis assumes for each debate over custom that it is possible to reliably identify not only which states qualify as specially affected, but also the attitude of those states toward the potential rule in question. Both inquiries are anything but straightforward, and nothing in what follows should be read to suggest otherwise. Moreover, I am not claiming that the debates in this section can be resolved solely by mechanically applying the doctrine of specially-affected states. Each raises difficult issues of custom formation more generally—such as the relationship between treaties and custom or what exactly qualifies as “widespread and representative” state practice—that can only be touched upon below. The analysis is simply designed to illustrate the importance that should be assigned to specially-affected states when the doctrine is relevant to custom formation.

### A. All Specially-Affected States Support

The first scenario, in which all specially-affected states support a potential customary rule, is only likely when the practice in question does not have negative transnational effects—space exploration being an obvious example. When a practice does have such negative effects,

<sup>192</sup> Cf. Statement by the Netherlands, Sixty-Ninth Session of the General Assembly, para. 11 (2014) (suggesting that specially-affected status should be extended not only to “States possessing modern weapons technology,” but also to “States not possessing such technology who may face the risk of an armed conflict in which the opponent uses such new technology”).

<sup>193</sup> Whether the doctrine of specially-affected states applies differently to new rules and modified rules is considered below. See note 244 *infra*.

<sup>194</sup> “Support” equates here to *opinio juris*—the state’s position concerning the legality of a practice.

as with any issue of the *jus ad bellum*, there will normally be specially-affected states on both sides of the potential rule.

The key question in this scenario is whether the uniform support of specially-affected states is sufficient to create a new customary rule even if non-specially-affected states do not support the rule. Surprisingly, a number of scholars believe that it is. As noted earlier, Shaw insists “that custom may be created by a few states, provided those states are intimately connected with the issue at hand . . . .”<sup>195</sup> Similarly, according to Post, “[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.”<sup>196</sup> And Thirlway claims, in the context of space law, that “the fact of only two States being at present in a position to contribute to the practice implies that the practice of those two states would, if it were consistent enough, be sufficient.”<sup>197</sup>

This strong version of the doctrine of specially-affected states is impossible to reconcile with *North Sea Continental Shelf*. Recall what the ICJ said: “a very widespread and representative participation in the convention might suffice of itself, provided it *included* that of States whose interests were specially affected.”<sup>198</sup> The qualifier “included” is critical, because it makes clear that the practice of specially-affected states is a necessary but not sufficient condition of custom formation. Specially-affected states must engage in the practice in question—but support for the practice can only qualify as “widespread and representative” if non-specially-affected states engage in it, as well. That understanding of *North Sea Continental Shelf* is accepted by the ILA,<sup>199</sup> the ICRC,<sup>200</sup> numerous scholars,<sup>201</sup> and even by a judge in the case itself.<sup>202</sup>

<sup>195</sup> SHAW, *supra* note 95, at 56.

<sup>196</sup> Post, *supra* note 86, at 142.

<sup>197</sup> THIRLWAY, *supra* note 88, at 71. Bin Cheng comes close to embracing this position, although he leaves open the possibility that “effective opposition” by non-specially-affected states could block the creation of a new rule. See Bin Cheng, *Opinio Juris: A Key Concept in International Law That Is Much Misunderstood*, in INTERNATIONAL LAW IN THE POST-COLD WAR WORLD 56, 68 (Sienho Yee & Wang Tieya eds., 2001) (“[W]hen all the States specially affected, when all the States that really matter in the area in question, have embraced the rule, and there is no effective opposition, we then definitely have an *opinio generalis juris generalis*.”) What constitutes effective opposition, Bin Cheng does not say.

<sup>198</sup> *North Sea Continental Shelf* Judgment, *supra* note 1, at 42, para. 73 (emphasis added).

<sup>199</sup> ILA Custom Report, *supra* note 79, at 26 (“[I]f all major interests (‘specially affected States’) are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of them). The *negative* aspect is that if important actors do *not* accept the practice, it cannot mature into a rule of general customary law.”).

<sup>200</sup> ICRC STUDY, *supra* note 97, at xlv (“[I]f 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 . . . .”).

<sup>201</sup> Akehurst, *supra* note 11, at 22 (noting that requiring specially-affected states to engage in a practice “is not the same as saying that the practice followed by the States whose interests were specially affected could give rise to a rule of customary law if a contrary practice had been followed by other States”); VILLIGER, *supra* note 64, at 14 (rejecting the idea that “if *all* specially affected States engage in such practice, a customary rule *must* come about, since the remaining practice of other States may be sufficiently *inconsistent* to prevent formation of the customary rule”); DANILENKO, *supra* note 4, at 94 (“[T]he requirement of generality presupposed that general custom must be based on practice of various groups of states representing all the constituent elements of the modern international community.”).

<sup>202</sup> *North Sea Continental Shelf* Judgment, *supra* note 1, at 227 (Dissenting Opinion of Judge Lachs) (“This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States . . . . For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process.”).



More importantly, the strong version of the doctrine of specially-affected states is inconsistent with the principle of sovereign equality. As discussed above, because certain practices affect some states more than others, privileging the practice of specially-affected states in the formation of custom is not only consistent with sovereign equality, it is probably required by it. But that does not—and should not—mean that the practice of non-specially-affected states is *irrelevant* to custom formation when specially-affected states agree on a rule. On the contrary, given that even non-specially-affected states have at least some interest—whether factual<sup>203</sup> or legal<sup>204</sup>—in a practice potentially regulated by custom,<sup>205</sup> sovereign equality requires their position to be accorded at least some importance.<sup>206</sup>

The better position, then, is simply the one articulated in *North Sea Continental Shelf*: to satisfy the practice element of custom, state practice must be widespread and representative. State practice cannot be widespread and systematic without the practice of specially-affected states, but the practice of specially-affected states is not itself sufficient to satisfy the requirement. More is required: (1) a certain number of non-specially-affected states must participate in the practice,<sup>207</sup> even if only through inaction;<sup>208</sup> and (2) the overall number of participating states must include—to quote Judge Lachs’ dissenting but indicative opinion in *North Sea Continental Shelf*—“States with different political, economic and legal systems” and “States of all continents.”<sup>209</sup>

<sup>203</sup> See, e.g., Tladi Statement, *supra* note 101 (“Even with respect to . . . the continental shelf, where it could be argued that States without a continental shelf couldn’t be specifically affected, the fact that the extension of the continental shelf will affect the extent of the Area (or deep Seabed) shows how limited such a view is.”); Tomuschat, *supra* note 185, at 212 (“All activities of a modern industrialized society have, to a greater or lesser extent, repercussions beyond the borders of the State in whose territory they are carried out, by affecting air, water and soils.”).

<sup>204</sup> See, e.g., I ICRC STUDY, *supra* note 97, at xlv (“Notwithstanding the fact that there are specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict.”).

<sup>205</sup> See, e.g., *id.* (noting that, because of the universal legal interest in respect for international humanitarian law, “the practice of all States must be considered, whether or not they are ‘specially affected’ in the strict sense of that term.”); *Nuclear Weapons Advisory Opinion*, *supra* note 1, at 278 (Declaration of Judge Shi) (“The appreciable section of this community to which the Opinion refers by no means constitutes a large proportion of that membership, and the structure of the international community is built on the principle of sovereign equality. Therefore, any undue emphasis on the practice of this ‘appreciable section’ would . . . be contrary to the very principle of sovereign equality of States . . . .”); Tomuschat, *supra* note 185, at 291 (“The minimum threshold of general acceptance is reached only when all major groups of States have, through their practice, shown that a given pattern of conduct encapsulates an equitable balance of interests.”).

<sup>206</sup> See, e.g., Mendelson, *Objective Element*, *supra* note 104, at 227 (noting that “the requirement of representativeness prevent[s] the formation of customary international rules being the sole preserve of the mighty”).

<sup>207</sup> The number of such states is notoriously uncertain and context-dependent. See, e.g., ILA Custom Report, *supra* note 79, at 25 (“Given the inherently informal nature of customary law, it is not to be expected, neither is it the case, that a precise number or percentage of States is required. Much will depend on circumstances and, in particular, on the degree of representativeness of the practice.”). Both the ILA and the ICRC take the position that less than a majority of the world’s states is sufficient. See *id.* at 26 (“[I]f all major interests (‘specially affected States’) are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of them)”); I ICRC STUDY, *supra* note 97, at xlv (“[I]f 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’”). A thorough analysis of the issue, however, is beyond the scope of this article.

<sup>208</sup> See, e.g., RESTATEMENT THIRD, *supra* note 93, §102 cmt. b (“Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights.”); ILA Custom Report, *supra* note 79, at 26 (“Practice’ here includes acquiescence.”); I ICRC STUDY, *supra* note 97, at xlv (“[I]f 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.’”)

<sup>209</sup> *North Sea Continental Shelf* Judgment, *supra* note 1, at 227; see also Tomuschat, *supra* note 185, at 291 (“The minimum threshold of general acceptance is reached only when all major groups of States have, through their

The customary rule that requires states to use space for peaceful purposes illustrates this process. As noted earlier, Thirlway suggests that the unified support of the specially-affected states—“those which are actually or potentially in control of the economic and scientific assets necessary for the exploration of space”<sup>210</sup>—was sufficient to create the rule, because it did not affect “the interests of the smaller and economically less well-developed States to more than an infinitesimal extent.”<sup>211</sup> That argument is mistaken, for the reasons explained above. The rule exists because it is supported not only by the practice of specially-affected states, but also by the essentially universal verbal practice of the non-specially-affected states—whether through voting in favor of General Assembly resolutions such as the Outer Space Declaration<sup>212</sup> or through ratifying the Outer Space Treaty.<sup>213</sup>

### B. All Specially-Affected States Oppose

The second scenario, in which all of the specially-affected states oppose a potential customary rule, is also likely only when the practice in question does not have transnational effects—and will most often occur when the international community is trying to prohibit a non-international practice that some states see as desirable, such as deep seabed mining, or is trying to permit a non-international practice that some states reject, such as remedial secession.

Regardless of whether the potential rule is prohibitive or permissive, there is no possibility of creating a new rule or modifying an existing one in this scenario. As *North Sea Continental Shelf* makes clear, state practice cannot qualify as widespread and representative unless it includes the practice of specially-affected states. By definition, therefore, unified opposition by those states will prevent the creation of a rule.<sup>214</sup>

Two practices mentioned above should suffice to illustrate the power of specially-affected states to block the formation of custom. The first concerns the idea that the deep seabed cannot be unilaterally exploited because customary international law deems it part of the “common heritage of mankind.” States in the Global South have consistently attempted to establish such a prohibitive rule,<sup>215</sup> which conflicts with the traditional freedom of the

practice, shown that a given pattern of conduct encapsulates an equitable balance of interests.”); Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GERMAN Y.B. INT'L L. 9, 30 (1988) (“[A]n important prerequisite, resulting from the generality requirement, is that participation in the practice leading to the creation of general customary rules must in one way or another include States with different political, economic and legal systems and States of all continents.”).

<sup>210</sup> THIRLWAY, *supra* note 88, at 72.

<sup>211</sup> *Id.*

<sup>212</sup> See, e.g., RESTATEMENT THIRD, *supra* note 93, §102 rep. n. 2 (“The Outer Space Declaration, for example, might have become law even if a formal treaty had not followed, since it was approved by all, including the principal ‘space powers.’”)

<sup>213</sup> See, e.g., Jesse Oppenheim, *Danger at 700,000 Feet: Why the United States Needs to Develop a Kinetic Anti-satellite Missile Technology Test-Ban Treaty*, 38 BROOK. J. INT'L L. 761, 768 (2012–2013) (“Ratified by nearly 100 countries, the Outer Space Treaty of 1967 . . . uses the same wording of the ‘Principles Declaration’ in its preamble and confirms the fundamental principles that outer space is ‘the province of all mankind.’”)

<sup>214</sup> See ILA Custom Report, *supra* note 79, at 26 (noting that the “negative” aspect of the representativeness requirement “is that if important actors do *not* accept the practice, it cannot mature into a rule of general customary law”).

<sup>215</sup> See, e.g., DANILENKO, *supra* note 4, at 89 (“Thus, the developing countries of the Group of 77 claimed that the principle of common heritage of mankind, which excludes unilateral exploitation of the international resources of the deep seabed, has ripened into a norm of customary law.”).

high seas.<sup>216</sup> Their efforts, however, have been just as consistently opposed by all of the specially-affected states—those that have a “short-term seabed mining capacity” (practice) or are “involved with ocean mining consortia” (effect).<sup>217</sup> That opposition means practice in favor of a prohibitive rule concerning unilateral exploitation of the deep seabed cannot be considered widespread and representative.<sup>218</sup>

The second example concerns whether customary international law permits remedial secession for peoples that have suffered systematic human-rights abuses. Many states have been willing to either endorse the idea of remedial secession or recognize states that have ostensibly been created by it, such as Kosovo. The problem is that the specially-affected states—those that have faced or are currently facing claims for external self-determination—are uniformly opposed to recognizing remedial secession as an exception to the traditional customary rule that guarantees territorial integrity:

Importantly, the consensus of specially affected States, i.e. those themselves facing serious claims to independence of parts of their territories, goes directly against any recognition of an external right to self-determination. This is supported by the political reaction of such States to the recent declaration of independence by Kosovo, which represent unfolding evidence of State practice and *opinio juris*. . . . Most notable amongst the vehement opponents to Kosovo’s independence who are also being threatened by secessionists, i.e. “specially affected States,” are: Russia (Chechnya), Spain (Basque Region and Catalonia), Georgia (South Ossetia), Cyprus (TRNC), Sri Lanka (Tamil Eelam).<sup>219</sup>

These examples illustrate the inherently conservative nature of the doctrine of specially-affected states. When a practice has no significant transnational effects, the states that qualify as specially affected will generally have a shared interest in either permitting (deep seabed mining) or prohibiting (remedial secession) that practice. Creating a contrary customary rule will thus require the non-specially-affected states to convince at least some specially-affected states to go against their own material interests.

That conservatism, however, raises an important question: if only one state is specially affected by a practice, is its opposition sufficient to prevent the creation of a new customary rule? This is not a fanciful possibility, as the example of apartheid indicates. When the customary prohibition of apartheid was crystallizing, South Africa might have been the only state that qualified as specially affected. And there is no question that South Africa objected to the

<sup>216</sup> See Dennis W. Arrow, *Seabeds, Sovereignty, and Objective Regimes*, 7 *FORDHAM INT’L L.J.* 169, 226–27 (1983–1984).

<sup>217</sup> Dennis W. Arrow, *The Customary Norm Process and the Deep Seabed*, 9 *OCEAN DEV. & INT’L L.J.* 1, 36–37 (1981); see also Yoshifuma Tanaka, *Protection of Community Interests in International Law: The Case of the Law of the Sea*, 15 *MAX PLANCK Y.B. UN L.* 329, 346 (2011) (identifying states).

<sup>218</sup> See Arrow, *Customary Norm Process*, *supra* note 217, at 38 (noting that the rule has failed “to achieve a qualitative consensus among the specially affected states”); Tanaka, *supra* note 217, at 346; Christopher C. Joyner & Elizabeth A. Martell, *Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law*, 27 *OCEAN DEV. & INT’L L.* 73, 79 (1996).

<sup>219</sup> Laura Rees-Evans, *Secession and the Use of Force in International Law*, 4 *CAMBRIDGE STUDENT L. REV.* 249, 258 (2008–2009); cf. Sienho Yee, *Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion*, 9 *CHINESE J. INT’L L.* 763, 778 (2010) (noting that “the strong oppositions to the claimed right of self-determination or remedial secession put forward by those specially affected States which have to endure any potential fallout, and the half-hearted ‘secondary argument’ of those States little touched by and situated far away from the claimed right all militate against the finding of an *opinio juris* supporting such a claimed right”).

customary rule.<sup>220</sup> Does that mean—*contra* the widespread assumption that the prohibition of apartheid is not only customary but *jus cogens*<sup>221</sup>—that custom does not prohibit apartheid?

There are two arguments against the idea that a lone specially-affected state can prevent the formation of custom. First, it is possible that the international community is only willing to accept the doctrine of specially-affected states—if it accepts it at all—as long as the doctrine applies only where there are multiple states that are specially affected. In the *Nuclear Weapons* case, for example, Samoa rejected the idea that South Africa possessed a veto over prohibiting apartheid on the ground that “[t]he world did not wait for its acquiescence.”<sup>222</sup> Second, it may well be the case that the “lone specially-affected state” scenario is chimerical, because the practice of that state will always produce at least one other specially-affected state, if only indirectly. It is reasonable to conclude, for example, that South Africa’s “internal” practice of apartheid had such a destabilizing effect on states like Namibia and Botswana that they were also specifically affected by apartheid.

### C. Some Specially Affected States Support, Others Oppose

The third scenario, in which some specially-affected states support a potential customary rule while other specially-affected states oppose it, is unquestionably the most common. Divisions almost always exist when a practice has transnational effects, because the states engaging in the practice normally disagree with the states that are affected by it. The “unwilling or unable” test is a good example: not surprisingly, the states attacking extraterritorially believe that the test is *de lege lata*, while the territorial states insist that it is *de lege ferenda*. But such splits can also occur when a practice has solely internal effects, because the ability to engage in a practice is no guarantee that a state will believe that the practice is lawful. Many states that used to engage in torture, for example, have renounced the practice because they believe that customary international law prohibits it.<sup>223</sup>

Because divisions between specially-affected states are so common, we must be able to ascertain the secondary rule that governs custom formation in such situations. What percentage of specially-affected states must support a potential customary rule to satisfy that element

<sup>220</sup> See, e.g., GREEN, *supra* note 135, at 198. Scholars disagree about whether South Africa qualified as a persistent objector to the customary prohibition of apartheid, despite the unwillingness of the international community to recognize it as one. Compare *id.* (noting that South Africa and the unrecognized state of Rhodesia “maintained a degree of persistent objection to this customary prohibition, both by way of ‘deed’ (through their continuance of the policy) and declarations that they were not bound by the customary norm”) with Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 119 (1982) (arguing that South Africa was not a persistent objector because it had consented to the principle of racial equality in Article 55 of the UN Charter). Elias describes South Africa as having engaged in “disguised persistent objection.” Olufemi Elias, *Some Remarks on the Persistent Objector Rule in Customary International Law*, 6 DENNING L.J. 37, 46–47 (1991). The debate is not germane to the issue here, which concerns what happens when a lone state specially-affected state objects to a crystallizing customary rule.

<sup>221</sup> See, e.g., de Wet, *Invoking Obligations Erga Omnes*, *supra* note 133, at 7 (“The better view is that in order to acquire peremptory status, a norm first has to be recognised as customary international law, whereafter the international community of States as a whole further agrees that it is a norm from which no derogation is permitted.”).

<sup>222</sup> See Samoa Statement, *supra* note 139, at 49–50.

<sup>223</sup> Such states include Bhutan, Central African Republic, Comoros, Haiti, and the Sudan, all of which have criminalized torture despite being under no conventional obligation to do so. See Status of Ratifications Interactive Dashboard, Convention Against Torture, available at <http://indicators.ohchr.org>.

of the “widespread and representative” requirement? All of them? A supermajority? A majority? Something less?

Before we can answer that question, we must first consider the problem of inactivity: states that remain silent in the face of a claim concerning the customary status of a practice that specially affects them. Does that silence count as opposition to the claim or as support for it? Equating silence with consent is very controversial.<sup>224</sup> But there seems to be widespread acceptance of the idea that *specially-affected* states, unlike states that are not specially affected, have an obligation to object to a claim concerning the customary status of a practice—and that their silence should be considered support if they do not. As Mendelson says, “[i]n principle, it is only the former who, if their interests are affected, are expected to protest, with the result that, if they do not, they are bound by the rule.”<sup>225</sup>

In order to oppose the creation of a new customary rule, then, a specially-affected state must affirmatively state its opposition. The question, however, still remains: when specially-affected states are divided over a rule, what percentage of those states must support that rule—whether through action or inaction—to overcome the opposition of the dissenting states?

As noted earlier, the United States’ *Law of War Manual* suggests that a rule cannot qualify as customary unless *all* specially-affected states support it. Some judges and scholars agree. In his Separate Opinion in the *Fisheries Jurisdiction* case, Judge De Castro explicitly took the same position, arguing that the twelve-mile rule did not become customary until the last specially-affected holdout, Japan, endorsed it.<sup>226</sup> The International Law Association (ILA) insists that the representativeness requirement is not satisfied unless participation in a practice includes “all major interests (‘specially affected States’).”<sup>227</sup> Akehurst says that practice cannot be considered general unless it includes “the conduct of all states which can participate in the formation of the rule or the interests of which are specially affected.”<sup>228</sup> And Schmitt and Vihul claim, in the context of states specially affected with regard to cyberwarfare, that “it would be very unlikely that a customary norm could emerge over the objection of such a state.”<sup>229</sup>

If this position is correct, each and every specially-affected state possesses a veto over the formation of custom. Such power is irreconcilable, however, with even the thinnest understanding of sovereign equality. Giving specially-affected states more power over custom formation than non-specially-affected states is one thing; permitting one specially-affected state

<sup>224</sup> See, e.g., Kelly, *supra* note 121, at 474 (listing problems); Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT’L L. 177, 186–87 (1996) (arguing that “it is simply not true that all of those who failed to protest can reasonably be taken to have acquiesced”).

<sup>225</sup> Maurice Mendelson, *Subjective Element*, *supra* note 224, at 186; see also Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT’L L. 376, 397–98 (1950) (claiming that “any such duty to protest is especially incumbent upon states directly interested—in the case of the proclamations relating to submarine areas in particular upon neighbouring states . . .”); Starski, *Silence Within the Process*, *supra* note 174, at 22 (“In the context of individual inter-state relationships (for example, acquisitory prescription), specially affected states are deemed to have acquiesced if they do not protest.”); RUY, *supra* note 102, at 38 (inferring from ICJ jurisprudence that “acquiescence matters most when it emanates from States directly concerned with a concrete recourse to force”); Kelly, *supra* note 121, at 473 (“At most, acquiescence furnishes some evidence of the attitude of a few states. It is insufficient to demonstrate general acceptance unless the vast majority of states have failed to protest when a norm has been asserted against their immediate interests.”).

<sup>226</sup> *Fisheries Jurisdiction*, *supra* note 25, at 90–91.

<sup>227</sup> ILA Custom Report, *supra* note 79, at 26.

<sup>228</sup> PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 42 (7th ed. 1997).

<sup>229</sup> SCHMITT & VIHUL, *supra* note 90, at 25.



to block the formation of a customary rule that is supported by *every other specially-affected state* is quite another.<sup>230</sup> Custom formation must surely be more democratic than that, even if pure legislative equality “in the formation and application of customary law”<sup>231</sup> is reserved for specially-affected states *inter se*.

The ability of a lone specially-affected state to block the formation of custom is also difficult to reconcile with the possibility of persistent objection. That possibility—if it exists at all, an issue that elicits passionate scholarly debate<sup>232</sup>—makes little sense if a customary rule cannot form over the objection of even one specially-affected state. Such states are presumably the most likely to persistently object to a potential customary rule, given that they are distinctively affected by the practice in question. The moment even one specially-affected state registers its objection, however, the customary rule cannot crystalize. So, if the lone holdout position is correct, there is no such thing as persistent objection for specially-affected states.

This is a distinction with a difference. Consider, for example, whether customary IHL prohibits the use of blinding laser weapons. The ICRC takes the position that such a prohibitive rule exists, because only one specially-affected state<sup>233</sup>—the United States—believes that the use of blinding laser weapons is legally permissible.<sup>234</sup> If anything short of complete unanimity among specially-affected states is required, the ICRC’s position is sound and all states other than the United States as a persistent objector are prohibited from using blinding laser weapons. But if the “lone holdout” position is correct, not only is the United States permitted to use blinding laser weapons, *all* states are permitted to use them—because the United States’ objection dooms the prohibitive customary rule. Such an outcome makes a mockery both of sovereign equality and persistent objection.

<sup>230</sup> Torsten Gihl mentions an example of one specially-affected state being able to resist the formation of a customary rule supported by nearly all other specially-affected states: the United Kingdom “prevent[ing] the rule that neutral convoys were immune from search from becoming a general rule of international law, although it was accepted by practically all the Continental powers.” Torsten Gihl, *The Legal Character and Sources of International Law*, 1 SCAND. STUD. L. 51, 82 (1957). As Gihl notes, though, the United Kingdom was able to resist the rule because it was the “strongest naval power” and was willing to use force to ensure that other states accepted its position. *Id.* Such opposition would not be possible in the modern era, in which the use of force is so carefully regulated.

<sup>231</sup> SIMPSON, *supra* note 57, at 48.

<sup>232</sup> The ILA, ILC, and AALCO Informal Expert Group each accept the possibility of persistent objection. ILA Custom Report, *supra* note 79, at 27; Fourth ILC Custom Report, *supra* note 7, at 79 (Draft Conclusion 15); Yee, *Report on the ILC Project*, *supra* note 67, at 391 (noting that, at the first meeting of the Informal Expert Group, “the importance of the persistent objector rule was stressed and a recommendation was made that the Group should address this issue”). A number of scholars do, as well. *See, e.g.*, MALANCZUK, *supra* note 228, at 43; VILLIGER, *supra* note 64, at 33–37; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4–11 (4th ed. 1990); Mendelson, *Objective Element*, *supra* note 104, at 238. Other scholars reject the possibility. *See, e.g.*, Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 459–63 (1985); Jonathan I. Charney, *Universal International Law*, 87 AJIL 529, 540 (1993) (“[S]tate practice and other evidence do not support the existence of the persistent objector rule.”); Kelly, *supra* note 121, at 508 (“The persistent objector principle, far from being an integral part of CIL theory, is a new concept and one of doubtful pedigree.”).

<sup>233</sup> A state that has developed or is developing such weapons, according to the ICRC. *See* Doswald-Beck, *supra* note 152, at 486–87. No state qualifies as specially affected via effect, because such weapons have not yet been used in combat. *See* Dan Drolette, Jr., *Blinding Them with Science: Is Development of a Banned Laser Weapon Continuing?*, BULL. ATOMIC SCIENTISTS (Sept. 14, 2014), at <https://thebulletin.org/blinding-them-science-development-banned-laser-weapon-continuing7598>.

<sup>234</sup> Doswald-Beck, *supra* note 152, at 486–87.



It seems clear, then, that the mere existence of division between specially-affected states cannot prevent the formation of a customary rule. Another possibility is that a rule must be supported by a very high percentage of specially-affected states. This seems to be the ICJ's position, given that *North Sea Continental Shelf* says that "State practice, including that of States whose interests are specially affected, should have been both extensive and *virtually uniform* in the sense of the provision invoked."<sup>235</sup> Germany endorsed a similar test in *Fisheries Jurisdiction*, arguing that "a new rule of customary law cannot emerge without the consent or at least the acquiescence of virtually all of those states whose interests would be affected by the new rules."<sup>236</sup> And a number of scholars have suggested that any opposition by more than one specially-affected state is enough to prevent a customary rule from forming. Hulme, for example, argues that customary IHL's prohibition of means of warfare that cause excessive environmental damage cannot apply to nuclear weapons because three specially-affected states—those that possess nuclear weapons—object to the rule.<sup>237</sup> Even more dramatically, Wolfrum suggests that the opposition of two specially-affected states, Russia and the United States, would be sufficient to doom any potential customary rule governing outer space.<sup>238</sup>

Although not quite as uncompromising as the "lone holdout" test, requiring almost complete unanimity among specially-affected states is subject to the same criticism. Giving a veto over custom to a group of two or three states seems no more consistent with the legislative equality of specially-affected states than giving a veto to one. And it seems more appropriate to recognize a small minority of specially-affected states as persistent objectors (assuming timely objection) instead of concluding that the potential customary rule does not exist.

Any test that allows a minority of specially-affected states to prevent the formation of a customary rule supported by a majority of specially-affected states would be vulnerable to the same critique. The most defensible position, therefore, is that a potential rule cannot pass into custom unless it is supported by a majority of specially-affected states. Requiring a bare majority would ensure that specially-affected states are legislatively equal *inter se* and would be without prejudice to the possible right of the minority to persistently object to the rule while it is crystallizing.

Although far from incontestable,<sup>239</sup> a bare majority test finds considerable support in ICJ jurisprudence. Judge Lachs based his dissent in *North Sea Continental Shelf* on the fact that the "very impressive" number of parties to the Convention on the Continental Shelf included "the majority of States actively engaged in the exploration of continental shelves."<sup>240</sup> Similarly, the five judges who filed a Joint Separate Opinion in *Fisheries Jurisdiction*—Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh, and Ruda—rejected the idea that customary international law limited a state's exclusive fishing zone to twelve miles because "more than half the maritime States are on record as not supporting in fact and by their conduct

<sup>235</sup> *North Sea Continental Shelf* Judgment, *supra* note 1, at 43, para. 74 (emphasis added).

<sup>236</sup> Quoted in DANILENKO, *supra* note 4, at 95 n. 66.

<sup>237</sup> Hulme, *supra* note 92, at 233.

<sup>238</sup> Rudiger Wolfrum, *Comment, in UNITED STATES HEGEMONY*, *supra* note 13, at 359–60.

<sup>239</sup> Mendelson is correct to insist, of course, that how to strike the correct balance between specially-affected states and non-specially-affected states is an "ultimately political question." Mendelson, *Objective Element*, *supra* note 104, at 227.

<sup>240</sup> *North Sea Continental Shelf* Judgment, *supra* note 1, at 227.

the alleged maximum obligatory 12-mile rule.”<sup>241</sup> Even Judge Schwebel implicitly endorsed a bare majority test in his dissent in the *Nuclear Weapons* case. Notably adopting the U.S. position,<sup>242</sup> Judge Schwebel insisted that Resolution 1653 (XVI), which called for a categorical ban on the use of nuclear weapons, could not be considered declaratory of customary international law because the states that voted against it included “the majority of the nuclear Powers.”<sup>243</sup>

In general, then, a rule qualifies as custom if two requirements are satisfied: (1) a majority of specially-affected states support the rule; and (2) overall support for the rule is widespread and representative.<sup>244</sup> Four different situations are thus possible when specially-affected states are divided over a potential customary rule.

### 1. *SA majority opposes; no W/R support*

A rule cannot qualify as customary if it is opposed by a majority of specially-affected states and it lacks widespread and representative support from non-specially-affected states.

<sup>241</sup> *Fisheries Jurisdiction*, *supra* note 25, at 221–22 (Joint Separate Opinion).

<sup>242</sup> U.S. Letter, *supra* note 29, at 18–19 (“[S]uch General Assembly resolutions could only be declarative of the existence of principles of customary international law to the extent that such principles had been recognized by the international community, including the States most directly affected. In fact . . . these resolutions were not accepted by a majority of the nuclear-weapon States.”).

<sup>243</sup> *Nuclear Weapons Advisory Opinion*, *supra* note 28, at 319 (Dissenting Opinion of Judge Schwebel).

<sup>244</sup> Some scholars suggest that modifying an existing rule of custom requires more state practice than creating a new customary rule. *See, e.g.*, Akehurst, *supra* note 11, at 19 (“The better established a rule is (i.e. the more frequent, long-standing, and widespread the practice which supports it), the greater the quantity of practice needed to overturn it. Conversely, a new rule which differs only slightly from the pre-existing rule can be established more easily than a rule which is radically different from the pre-existing rule.”); Mendelson, *Objective Element*, *supra* note 104, at 222–23 (“Obviously, the amount of practice required to overturn an old rule will be greater than in cases where the matter has not previously been the subject of specific regulation in international law; but even in the latter instance, it must be sufficiently general.”) That is, however, anything but a universal view. Some scholars insist that there is no difference between custom modification and custom creation. *See, e.g.*, Treves, *supra* note 99, para. 3 (“[T]he process through which customary rules are modified or extinguished is the same as that through which they come into being.”). Others believe that the practice requirement is the same but that greater evidence of *opinio juris* is required for custom modification. *See, e.g.*, Danilenko, *supra* note 209, at 45 (“[S]tricter requirements ought to be applied in respect of evidence of the existence of *opinio iuris* as compared with, for example, the situations where new customary norms emerge with regard to problems that previously were not regulated by international law.”). Although a satisfactory analysis is beyond the scope of this article, the “more practice” position seems difficult to reconcile with the ICJ’s approach to custom formation. In the *Nicaragua* case, for example, the ICJ explicitly addressed a potential modification of the customary principle of non-intervention. *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 26, at 108, para. 206 (noting that the United States was arguing for “a fundamental modification of the customary law principle of non-intervention”). Yet the Court did not suggest that custom modification required more practice than custom creation. On the contrary, it simply repeated the *North Sea Continental Shelf* mantra about settled practice being required. *Id.*

Even if the “more practice” position is correct, it is difficult to see why that would affect the doctrine of specially-affected states. Presumably the argument would be that although support by a bare majority of specially-affected states is required to create a new rule of custom, modifying an existing customary rule requires more—a supermajority, say. But why should the sovereign-equality based need to treat specially-affected states as legislatively equal *inter se* give way simply because the majority wants to modify a customary rule instead of create a new one? The “more practice” argument not only penalizes specially-affected states for changing their mind about the desirability of a particular customary rule, it also penalizes states that do not become specially affected (either through practice or distinctive effect) until after the rule has crystallized. The doctrine of specially-affected states as understood in this article seems conservative enough, unless we ascribe exceptional importance to the stability of customary international law—a position that is difficult to reconcile with the ascendance of modern custom, which is designed to promote rapid legal development. *See generally* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 758 (2001). If the “more practice” position is correct, therefore, it should be interpreted to require more *non-specially-affected* states to support the customary rule, not more specially-affected ones.

Unilateral humanitarian intervention (UHI) is an excellent example. In this context, specially-affected states would include states that have used force extraterritorially for ostensibly humanitarian reasons (practice), states that have been the object of “humanitarian” uses of force (direct effect), and—arguably—states that have suffered distinctive indirect consequences as a result of those uses of force (indirect effect), such as massive refugee flows or significant transboundary environmental damage. Three specially-affected states, the UK,<sup>245</sup> Belgium,<sup>246</sup> and Denmark,<sup>247</sup> have affirmed the legality of UHI. But the overwhelming majority of specially-affected states—including a number specially affected through practice—have rejected that position, whether explicitly<sup>248</sup> or by justifying potential UHI situations on the grounds of Security Council authorization, self-defense, or the consent of the territorial state.<sup>249</sup> Moreover, support among non-specially-affected states is anything but widespread and representative. On the contrary, the G77, which represents 133 states, has unequivocally condemned UHI as unlawful on at least two occasions.<sup>250</sup>

## 2. SA majority opposes; W/R support

Even when a rule enjoys widespread and representative support from non-specially-affected states, the opposition of a majority of specially-affected states will prevent the rule from passing into custom. This situation is a weaker version of the second scenario, in which all specially-affected states oppose a rule—but the outcome is the same. Consider, for example, whether custom prohibits the use of anti-personnel (AP) landmines. Specially-affected states here fall into two categories: states that have produced, traded, or used AP landmines (practice);<sup>251</sup> and states where AP landmines have caused distinctive harm (effect).<sup>252</sup> There is little question that the vast majority of non-specially-affected states believe that the use of AP landmines is unlawful under customary international law: to date, 162 states have ratified or acceded to the Ottawa Convention<sup>253</sup>—a classic example

<sup>245</sup> Byers & Chesterman, *supra* note 119, at 182–83.

<sup>246</sup> *Id.* at 186.

<sup>247</sup> See Statement by Niels Helveg Petersen, Minister of Foreign Affairs for Denmark, to the United Nations 55th General Assembly, at <http://www.un.org/ga/webcast/statements/denmarkE.htm>.

<sup>248</sup> For example, Germany and Belgium specifically disavowed unilateral humanitarian intervention (UHI) as a justification for NATO’s intervention in Kosovo, even though they participated in it. See Vaughan Lowe & Antonios Tzanakopoulos, *Humanitarian Intervention*, 4 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, at para. 32 (Rudiger Wolfrum ed., 2012).

<sup>249</sup> See, e.g., Byers & Chesterman, *supra* note 119, at 183 (“The few interventions that might have been justified on a humanitarian basis—Bangladesh, Cambodia, Uganda—were justified on other terms, while interventions in Liberia, Somalia, Bosnia, Haiti, and Rwanda were conducted on the basis of Security Council authorizations, and in some cases also at the invitation of the targeted state.”); see also Lowe & Tzanakopoulos, *supra* note 248, para. 29 (noting that UHI was not invoked by the states intervening in Somalia, Rwanda, East Timor, Liberia, Sierra Leone, East Pakistan, Tanzania, and Vietnam).

<sup>250</sup> Byers & Chesterman, *supra* note 119, at 183–84; see also Lowe & Tzanakopoulos, *supra* note 248, para. 33 (“The Non-Aligned Movement (NAM), numbering well over half of the Member States of the UN, unequivocally condemned the use of force against the (then) FRY, as did many other States, some of which are nuclear powers.”).

<sup>251</sup> See, e.g., *BE v. Sec. of State*, [2007] UKAIT 35, para. 62, at <https://tribunalsdecisions.service.gov.uk/utiac/37892> (noting that specially-affected states include “States that historically have produced, traded in or deployed landmines”).

<sup>252</sup> See, e.g., Price, *supra* note 61, at 121 (“If any states were to be regarded in a meaningful sense as ‘specially affected,’ it would be those with enormous landmine problems . . .”).

<sup>253</sup> See generally LANDMINE MONITOR 2014, at <http://www.the-monitor.org/en-gb/reports/2014/landmine-monitor-2014/major-findings.aspx>.

of the kind of law-making treaty that *North Sea Continental Shelf* says can give rise to custom.<sup>254</sup> That number includes at least eight states that are specially affected because of the effect of AP landmines: Afghanistan, Angola, Bosnia-Herzegovina, Cambodia, Croatia, Eritrea, Mozambique, and Somalia.<sup>255</sup> The vast majority of specially-affected states, however, have refused to join the Ottawa Convention and/or rejected a categorical ban.<sup>256</sup> Price thus rightly concludes that customary international law does not currently categorically prohibit the use of AP landmines.<sup>257</sup>

The customary permissibility of the death penalty for genocide is another example. More than 130 states representing every continent and a variety of political, economic, and legal systems have abolished the death penalty for all crimes,<sup>258</sup> indicating that support for prohibiting the death penalty even for genocide is widespread and representative. The problem is that most specially-affected states—those that have committed genocide, such as Germany (practice), or suffered it, such as Rwanda (effect)—take the opposite position. As Ohlin notes, “[i]n the majority of full-scale genocides during the last century, the death penalty was available for domestic prosecutions.”<sup>259</sup>

A third and final example concerns whether customary international law requires the automatic succession of human rights treaties.<sup>260</sup> Here the specially-affected states are those that have resulted from state succession—the most obvious examples being the states that emerged from the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) and the Soviet Union. Although state practice in this area is difficult to assess,<sup>261</sup> Kamminga claims that there is widespread and representative support in the international community for automatic succession, citing to that effect, inter alia, a variety of statements of the UN Commission on Human Rights and the Human Rights Committee;<sup>262</sup> the requirements of international organizations like the International Labour Organization;<sup>263</sup> and practice under the European Convention on Human Rights.<sup>264</sup> But there is little doubt that the majority of specially-affected states opposes automatic succession. In fact, Rasulov’s careful analysis

<sup>254</sup> MALANCZUK, *supra* note 228, at 37.

<sup>255</sup> Price, *supra* note 63, at 121.

<sup>256</sup> The list includes the United States, India, China, Russia, Pakistan, Iran, Iraq, North Korea, South Korea, Cuba, Israel, Libya, Syria, Egypt, Myanmar, Eritrea, Georgia, India, Israel, Kyrgyzstan, Nepal, Pakistan, Russia, Somalia, Sri Lanka, Turkey, Uzbekistan, Burundi, Ethiopia, Senegal, and Guinea-Bissau. *See id.* at 116–26.

<sup>257</sup> *Id.* at 119.

<sup>258</sup> *See* Death Penalty Information Center, Abolitionist and Retentionist Countries, at <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries>.

<sup>259</sup> Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AJIL 747, 756 (2005).

<sup>260</sup> “Automatic succession, as the term is used in international law, is succession that occurs regardless of the volition of the successor state and without any steps being taken by that state. It is a succession that is both implied and obligatory.” Akbar Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUR. J. INT’L L. 141, 149–50 (2003).

<sup>261</sup> *See id.* at 154 (noting that useful evidence is “an extremely rare occurrence in the field of state succession”).

<sup>262</sup> Menno T. Kamminga, *Preliminary Report: Human Rights Treaties and State Succession*, European Commission for Democracy Through Law, at 4, CDL-UD(2005)013 (Sept. 7, 2005).

<sup>263</sup> Menno T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EUR. J. INT’L L. 469, 473 (1996).

<sup>264</sup> Kamminga, Preliminary Report, *supra* note 262, at 6.

indicates that, with the exception of the former Czechoslovakian states<sup>265</sup> and Bosnia-Herzegovina,<sup>266</sup> all of them do.<sup>267</sup>

These three examples, all of which involve a small group of specially-affected states frustrating the will of the larger international community, illustrate the conservative nature of SAS doctrine. But that conservatism is the logical consequence of *North Sea Continental Shelf*, which insists that specially-affected states must participate in the practice that supports a customary rule.

### 3. SA majority supports; no W/R support

The third situation, in which a majority of specially-affected states support a rule that lacks widespread and representative support among states generally, illustrates the opposite effect: the inability of specially-affected states to dictate custom over the objections of non-specially-affected states. This situation is simply a weaker version of the one discussed above, where all specially-affected states support a rule, and the outcome is the same.

### 4. SA majority supports; W/R support

The final situation, in which a majority of specially-affected states support a rule that has widespread and representative support from non-specially affected states, leads to the formation of a rule of customary international law despite the objections of the dissenting specially-affected states. In such a situation, the dissenting states might qualify as persistent objectors, but they cannot prevent the rule from passing into custom.

Two examples are worth mentioning here. The first is the customary rule that prohibits all nuclear testing. Support for a categorical ban is widespread and representative among non-specially-affected states: the Comprehensive Test Ban Treaty (CTBT), another example of a law-making treaty, has been signed by 183 states and ratified by 166,<sup>268</sup> while seven of the thirteen states that have not even signed the CTBT are party to a Nuclear Weapons Free Zone treaty that categorically prohibits testing.<sup>269</sup> Moreover, a categorical ban has been endorsed by a significant majority of specially-affected states—those that possess nuclear weapons, are close to attaining nuclear capability (such as Iran), those that used to possess nuclear weapons (South Africa and Ukraine), and those that have a distinctive history of being affected by nuclear weapons (such as Japan and the Marshall Islands).<sup>270</sup> France, Russia, the UK, South Africa, Japan, and the Marshall Islands have each ratified the CTBT, while the United States, China, Israel, and Iran have each signed it.<sup>271</sup> Tabassi persuasively argues that signing the CTBT counts toward a customary prohibition of all nuclear testing, given

<sup>265</sup> *Id.* at 5.

<sup>266</sup> Rasulov, *supra* note 260, at 158.

<sup>267</sup> *Id.* at 158–61.

<sup>268</sup> CTBTO Preparatory Commission, Status of Signature and Ratification, at <https://www.ctbto.org/the-treaty/status-of-signature-and-ratification>.

<sup>269</sup> Lisa Tabassi, *The Nuclear Test Ban: Lex Lata or de Lege Ferenda?*, 14 J. CONFL. & SEC. L. 309, 321 (2009).

<sup>270</sup> It could be argued that the nuclear-weapons-sharing states—Belgium, Germany, Italy, Netherlands, and Turkey—also qualify as specially affected. If so, the majority supporting a comprehensive ban is even greater, because all four have ratified the CTBT. See CTBTO, *supra* note 268.

<sup>271</sup> *Id.*

that any such testing would be antithetical to the CTBT's object and purpose.<sup>272</sup> Only three states, therefore, have not formally supported a categorical prohibition of nuclear testing: the DPRK, India, and Pakistan.<sup>273</sup> That is not enough to prevent the prohibition from passing into custom. Instead, the DPRK, India, and Pakistan, because of their continual and timely opposition, should at most be considered persistent objectors.<sup>274</sup>

The second example concerns the customary prohibition of belligerent reprisals against civilians in international armed conflict.<sup>275</sup> This is another context in which it is important to carefully define the category of specially-affected states. That category should not be limited to states that have actually engaged in belligerent reprisals against civilians (practice), because any state that participates in armed conflict is capable of engaging in them.<sup>276</sup> As the ICRC custom study indicates, many states have not engaged in belligerent reprisals against civilians because they believe that they are unlawful.<sup>277</sup> Refusing to consider those states specially affected on the basis of inactivity is thus indefensible, for the reasons discussed above.<sup>278</sup>

There is clearly widespread and representative support among non-specially-affected states for a customary rule prohibiting reprisals against civilians in IAC. In 1970, the General Assembly adopted Resolution 2675 (XXV)<sup>279</sup> by a vote of 109–0–8. Paragraph 7 of the Resolution provides that “civilian populations, or individual members thereof, should not be the object of reprisals . . . .” Even more importantly, although the conventional prohibition in Article 51(6) of the First Additional Protocol (AP I)<sup>280</sup> did not codify custom,<sup>281</sup> the Protocol has been ratified by 174 states and is clearly a law-making treaty.<sup>282</sup>

As for the specially-affected states—a sizable category, as it includes all states that have participated in international armed conflict—it is highly likely that the vast majority support prohibiting belligerent reprisals against civilians in IACs. Many of the states that have participated in IACs voted in favor of Resolution 2675 and/or have ratified AP I, and a number of states that ratified AP I while entering reservations regarding civilian reprisals have subsequently affirmed their illegality—a group that includes France, Germany, and Egypt,<sup>283</sup> as

<sup>272</sup> Tabassi, *supra* note 269, at 318–19.

<sup>273</sup> *Id.* at 322.

<sup>274</sup> *Id.*

<sup>275</sup> The case for an equivalent customary prohibition in non-international armed conflict is very weak, as Darcy has shown. See Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 *MIL. L. REV.* 184, 219 (2003); see also Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 *NETH. Y.B. INT'L L.* 43, 78 (1990) (same).

<sup>276</sup> *Cf.* Doswald-Beck, *supra* note 152, at 482 (“Is the practice of the US, UK and Italy enough to prevent the emergence of a rule because they are ‘specially affected’ States? This is not certain because any State has the capacity to indulge in such reprisals.”)

<sup>277</sup> I ICRC CUSTOM STUDY, *supra* note 97, at 514 (citing numerous examples).

<sup>278</sup> See Section IV(A) *supra*.

<sup>279</sup> GA Res. 2675, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970).

<sup>280</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Art. 51(6), June 8, 1977, 1125 UNTS 3 (“Attacks against the civilian population or civilians by way of reprisals are prohibited.”).

<sup>281</sup> See Guldahl, *supra* note 144, at 71.

<sup>282</sup> Darcy, *supra* note 275, at 223 (“Although not as numerous as those to the Geneva Conventions, this is still a substantial figure, and such a level of acceptance would strengthen any claim toward the customary character of norms set out therein.”).

<sup>283</sup> See Doswald-Beck, *supra* note 152, at 481.



well as India.<sup>284</sup> Indeed, based on her analysis of state practice, Doswald-Beck concludes that, “[p]utting aside . . . elements of ambiguity, the only States that now assert a right to attack civilians by way of reprisal (and whose military manuals are to the same effect) are Italy, the United Kingdom and the United States.”<sup>285</sup> That is not sufficient to block the formation of a customary rule<sup>286</sup>—although the three dissenting states may qualify as persistent objectors.<sup>287</sup>

## CONCLUSION

Galindo and Yip have noted that the development of persistent objection in the 1970s and 1980s was the Global North’s response to the increasing legal power of the Global South:

[I]t can be argued that this doctrine arose precisely to deal with the independence of Third World states and its effects in the international legal order, when “Western States feared losing control over the development of customary law.” In this sense, the doctrine would be a sort of “counter-reformation” by the West against the attempt of Third World countries to use their majority in multilateral organizations to reshape international law, or, in other words, an exhaust valve so that traditional states would not be bound by the norms put forward by the Third World.<sup>288</sup>

Unlike persistent objection, the doctrine of specially-affected states was not *created* by the Global North to neutralize the law-making power of the Global South. On the contrary, the doctrine was first articulated by the ICJ in a case where the criterion that determined whether a state was specially affected, geography, had nothing to do with power or importance. The doctrine of specially-affected states has, however, been *appropriated* by the United States and Northern scholars. As we have seen, although the ICJ itself has only tepidly affirmed the doctrine in the five decades since *North Sea Continental Shelf*, the United States and Northern scholars have invoked specially-affected status in a manner that gives powerful states almost complete control over custom formation. Indeed, in a critical respect, their reliance on the doctrine of specially-affected states has been even more ambitious than the Global North’s earlier efforts to establish persistent objection: whereas the latter argument holds only that persistent objectors are not bound by a customary rule, the former denies that custom formation is even possible over the objections of the specially affected.

<sup>284</sup> See ICRC, II CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE 3409 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

<sup>285</sup> Doswald-Beck, *supra* note 152, at 482.

<sup>286</sup> Cf. Guldahl, *supra* note 144, at 75 (“[A]lthough the existence of a customary rule is not yet definite, the contrary practice of not just any State but of some of the world’s major military powers has not been sufficient to prevent the rule from at least being in the process of formation.”).

<sup>287</sup> *Id.* at 77 (noting that “it is safe to conclude that they meet the requirement of objecting from the time of formation of the rule”).

<sup>288</sup> Galindo & Yip, *supra* note 11, at 17; see also Kelly, *supra* note 121, at 514 (“In the 1960s and early 1970s, as the newly independent nations became a majority at the U.N. General Assembly, Western states began to lose control of the development of customary law regimes. . . . The notion of the persistent objector can be seen as the Western counter-reformation to this revolution.”); Stein, *supra* note 232, at 471 (noting that because modern custom “may generate outcomes unfavorable to the United States . . . [t]he principle of the persistent objector presents a highly respectable doctrinal solution to that problem”).

This hegemonial approach<sup>289</sup> to the doctrine of specially-affected states, however, rests on a series of indefensible assumptions: that engaging in a non-universal practice makes a state specially-affected but being affected by that practice in a distinctive way does not; that only states that engage consistently in a practice qualify as specially affected; and that custom cannot be formed over the objections of even one specially-affected state. As this article has shown, there *is* room in international law for the doctrine of specially-affected states—but only for a doctrine that takes a formally neutral approach to what makes a state specially affected and to what importance should be ascribed to the practice of specially-affected states in the formation of custom.

There is no question that the doctrine of specially-affected states has a conservative effect on the development of customary international law. Although no individual specially-affected state possesses a veto over custom formation, a majority of specially-affected states can always block the formation of a customary rule. That is true even if the non-specially-affected states vastly outnumber the specially-affected ones. And it is true even if the specially-affected states are themselves deeply divided.

The doctrine, however, does not inherently privilege powerful states in the Global North over weaker states in the Global South. In fact, the opposite may well be true. To begin with, because Southern states outnumber Northern states nearly three to one, the Global South should find it much easier than the Global North to muster the widespread and representative participation in a practice that—along with majority support from the specially-affected states—is a necessary condition of custom formation. Such participation will not be able to prevent specially-affected Northern states from blocking the formation of custom when they are in the majority.<sup>290</sup> But it means that a specially-affected majority of Northern states will not be able to *create* custom—*ex nihilo* or by modifying an existing rule—without attracting the support of a significant number of non-specially-affected Southern states.

It also seems likely that states in the Global South will form a majority of specially-affected states more often than states in the Global North. As we have seen, the practice of one specially-affected Northern state will often produce—via distinctive effect—a number of specially-affected Southern states. Extraterritorial self-defense in unwilling or unable situations is one example. Foreign direct investment is another. When specially-affected states in the Global South are in the majority, they can prevent a minority of specially-affected states in the Global North from creating custom—and they can create custom themselves as long as

<sup>289</sup> Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, 255 RECUEIL DES COURS 49 (1995-I) (“The hegemonial approach to international relations may be defined as an approach to the sources which facilitates the translation of the difference in power between States into specific advantages for the more powerful actor.”); cf. Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and U.S. Predominance in International Law*, in UNITED STATES HEGEMONY, *supra* note 13, at 153 (“The greater reach and strength of international law, however, reduces the possibilities for keeping inequalities “outside the law,” which, for centuries, had been the strategy for mitigating the effects of sovereign equality on the exercise of superior power. Powerful States therefore try to introduce inequalities into international law. . . . This is precisely what the United States sought during the last century.”).

<sup>290</sup> This discussion assumes for the sake of argument that specially-affected states in the Global North states and Global South take the same position concerning a potential customary rule. That will not always be the case. As we have seen, Global North states are divided over blinding laser weapons and belligerent reprisals against civilians, while Global South states are divided over anti-personnel landmines.

they can attract widespread and representative support from the group of non-specially-affected states that will itself be disproportionately Southern.

This article, then, is not simply a critique of the U.S. conception of the doctrine of specially-affected states. More fundamentally, it is a *cri de cœur* to the Global South to appropriate the doctrine's transformative potential.<sup>291</sup> The South has generally been silent about the doctrine of specially-affected states, almost certainly because of the perception—fostered by Northern scholars—that the doctrine is simply yet another legal tool the powerful can use to subjugate the weak. But that is not true, for all the reasons explained in this article. On the contrary, the doctrine of specially-affected states, properly understood, has the potential to provide states in the Global South with more power over the formation of custom than they or Global North states have ever imagined.

<sup>291</sup> Cf. Anghie & Chimni, *supra* note 126, at 102 (describing Third World approaches to international law (TWAIL) as “an ongoing project that is continuously questioning not only the foundations and operations of international law, but also its own methodological premises”).