

2010

# Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law

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## Repository Citation

D'Amato, Anthony, "Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law" (2010). *Faculty Working Papers*. Paper 102.

<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/102>

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**Consent, Estoppel, and Reasonableness:  
Three Challenges to Universal International Law,**  
by Anthony D'Amato, 10 Virginia Journal of International Law 1-31 (1969)

**Abstract:** Like consent and estoppel, the concept of reasonableness, while failing to provide an adequate explanation of the source of obligation in customary international law, does play an important psychological role in adding to the pressure of international norms upon states. The result is to increase the sense of legality of the rules that are accepted by states as part of "customary international law." This is not to say that each and every alleged rule of universal international law must contain one or more of the elements of consent, estoppel, or reasonableness in order for it to be "valid."

**Tags:** Consent, Estoppel, Reasonableness, International Law, International Norms, Lotus Case, Continental Shelf

[pg1]Although a very important part of international law is made up of rules found in treaties, conventions, executive agreements and contracts among nations, the usual image conjured up by the phrase "international law" is that of a body of rules that apply, or should apply, to all states irrespective of their explicit consent or "sovereign will" of the moment. If law were dependent merely upon each state's will, then there could be no violation of the law and the term would be fictitious.

Something close to fictionalization of universal rules of international law has appeared in the writings of several prominent scholars who deal with general customary law. For their theories of consent, estoppel, and reasonableness come very close to conditioning, if they do not actually condition, the validity of international law upon the wishes of the "defendant" state. While some degree of acquiescence of the member states of a system is necessary to the continued effective functioning of the system, a state will from time to time have to comply with norms with which it may not agree. Further inadequacies of these theories are their single-factored explanation of the source of obligation in international law and their reliance upon a single intellectual task, logical deduction.

Nevertheless, these theories—when they are actually applicable—do have a definite psychological appeal which adds to the felt pressure of international law on the "defendant." The present paper is an attempt to distinguish, and to show the importance of distinguishing, between these logical and psychological positions.

## I. CONSENT

The idea that a state is not "bound" by a rule of international law unless it had previously "consented" to that rule is an extreme form of the positivist tradition in international jurisprudence which flourished in the nineteenth century. Its proponents, who in Lauterpacht's words had an "exaggerated regard for sovereignty",<sup>FN1</sup> tried to explain custom as merely a tacit treaty, entered into by all the states which [pg2] had consented to the given rules.<sup>FN2</sup> In recent years this position has found important advocates among Soviet jurists who have seized upon the notion of strict consent as a way either to reject "capitalist" norms or simply, in Professor Lissitzyn's words, "to pick and choose among the norms of international law."<sup>FN3</sup> One of the leading spokesmen of the Soviet position, Professor Tunkin, has written that "agreement is the

essence of custom" in that it expresses the "will of a State" to "consent" to a rule and thus become bound by it.FN4 Some non-Soviet writers have also concluded that consent is at the basis of custom. MacGibbon, for example, attempts to explain the fundamental dilemma of custom (that an act is formative of custom if it is undertaken with a conviction that it is already required by international law) by focusing upon consent and acquiescence. If a state does not protest the actions of other states, MacGibbon argues that the acquiescence implied by this failure to protest

seems necessarily to involve the further otiose conviction that participants in the course of conduct are entitled to act as they are doing; and this in turn appears to leave little alternative to submission in the belief that submission is obligatory.

FN5

In 1954 Judge Fitzmaurice reached the same conclusion in a more moderately worded statement that has been frequently quoted:

Where a *general* rule of customary international law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.FN6

All of these views share common ground in the belief that international law does not exist unless the individual state agrees that it shall exist, and that therefore an individual state is not bound by anything that it has not consented to. The leading case on customary [pg3] law seems at first glance to corroborate this position. The World Court in the Lotus Case held that

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

FN7

However, on closer inspection, the statement in the Lotus Case may be seen to stand more for a limitation on the idea of consent than a reinforcement of it. The Court was careful to talk about *aggregate* consent; the terms are specified in the plural and not in the singular. This is a significant point even though it seems not to have been particularly noticed by writers on consent or custom. For it is in fact harmless to speak of aggregate consent; it is a truism that international law is the creation of all the states. From a functional point of view, the only difficulty arises when a claim is made that each individual state—indeed, the defendant state in any given controversy—must itself have consented to a rule in order to make the rule binding upon it. One writer who focused upon the distinction between aggregate and particular consent

was Professor Jaffe, who in 1933 wrote that "consent is given to international law as a system rather than 'to each and every relationship contained in it.'"FN8

The Lotus Case made it clear that neither France nor Turkey was going to prevail because of any notion of particular consent. Rather, the decision turned on whether customary law was created in four previous municipal-court cases, only two of which involved French vessels and none of which involved a Turkish vessel.FN9 The World Court has had numerous occasions to apply customary international law, and yet nowhere has it held as a matter of general customary law that the defendant state must have consented to the rule in question in order to be bound by it. The Court has no doubt recognized the importance of the general observation that the very existence of international law in international claim-conflict situations is at stake in this question of consent. If the only way a defendant state can be held accountable to law is by proving that that state *consented* to the *particular* rule in question, hardly any case could ever be won by a plaintiff state. Indeed, most disputes arise precisely because the disputing states have not specifically consented to the rule at issue. Since the facts of international state behavior demonstrate the continuing relevance of legal arguments based upon custom, and since the [pg4] World Court and all other international tribunals have been able upon occasion to reach decisions against defendant states in the absence of proof that the defendants had consented to the rules claimed by the plaintiffs, Professor Jaffe's observation seems to be the only possible conclusion. By the fact of their engaging in international legal argumentation, or by virtue of their claims of the benefits of international rules relating to boundaries or shared resources, all states have in fact consented to the international legal system—not to each and every rule in it, but to the secondary rules of law—formation and the generally accepted mode of legal argumentation and legal standards of relevance. This consent is, after all, a manifestation of the self-interest of states to settle a significant number of their international disputes by law, or to avoid frictions that would otherwise be present if that law depended in each application upon the consent of the state objecting to the particular application.

A more detailed look at state practice strengthens the validity of these observations. First, one would suspect that, if the particular consent theory were valid, new states would typically engage in the practice of making a list of all the international norms they want and of rejecting the others. But no state has ever done this. Nor have the existing states ever asked a new state, upon its entry into the family of nations, to consent to existing rules of law. Indeed, it appears to be a general rule of law, as Lauterpacht pointed out, that a new state "cannot repudiate a single rule."FN10 Of course, what this means is that a purported repudiation would not be given legal effect by the other states, not that a new state lacks the physical ability to repudiate a rule.

Further, if new states wanted to repudiate existing rules, a convenient opportunity would be when subject to suit in an international tribunal. But Professor Waldock observed in 1962:

Nor has any State ever argued before the [World] Court that it was exempt from a general customary rule simply because it was a new State that objected to the rule. In the Right of Passage case, for example, it never occurred to India to meet Portugal's contention as to a general customary right of passage to enclaves by saying that she was a new State; nor did Poland, new-born after the First World

War, ever make such a claim in any of her many cases before the Permanent Court. FN11

This is not to say that the new states have all accepted all the existing rules of international law with enthusiasm. On the contrary, as Professor Lissitzyn has shown, many of the new states resent their [pg5] colonial past and assert that some rules, such as those relating to expropriation, are not binding upon them.FN12 Nevertheless, their attitude even to rules of expropriation has not in practice been extremist; as Professor Lissitzyn has also pointed out, when occasions arose for the new nations to support Communist proposals on expropriation of foreign investments, many did not lend their support.FN13

Broadly speaking, Professor Waldock's observation seems true: "the new States have at least as much to lose as anyone else from a denial of the validity of existing international law." FN14 Rather than trying to set up specific exemptions for themselves, which would be an espousal of the consent doctrine, the new states have chosen to express support of international law while at the same time working to help change the content of that law so as better to reflect the needs of the growing numbers of new states. They are working particularly in the field of treaties and General Assembly resolutions, as pointed out by Professor Bishop in his Hague lectures of 1965, to change the content of substantive rules.FN15 Even Professor Tunkin, who attempts to maintain a strict individual consent or "doctrine of agreement" approach, has conceded that

if a new state enters without reservations into official relations with other states, this means that it recognizes a certain body of principles and norms of existing international law, which constitute the basic principles of international relations.FN16

Since no new state has entered *with* reservations, and since Professor Tunkin has not, and could not, proclaim which "basic principles" the new states have, in some unstated manner, "recognized," perhaps even Professor Tunkin might be included among those who really mean by the consent theory the aggregate consent of all the states to the international legal system and not particular consent to each and every substantive rule within the system.

A second example of state practice that does violence to the "doctrine of agreement" supports Kelsen's argument that if an existing state acquires for the first time an access to the sea, that state immediately becomes subject to all the norms of international law regarding conduct of states on the seas, without there being any attempt on the part of other states to secure its consent or efforts by the acquiring state to pick and choose among the norms with which it agrees. FN17 We [pg6] may expect the same result to follow as states in turn acquire the technology to participate in activities in outer space; they will find awaiting them a fairly well developed body of legal rules fashioned primarily by the pioneers.

A third example of state practice which calls into question the concept of particular consent is the remarkable fact that a state's rights and duties in international law, in Professor Lissitzyn's words, "are not impaired by changes in its law, government, or constitutional structure, no matter how violent, at least so long as the core of its territory and population remain the same."FN18 Yet consent, in the sense given by Professors Tunkin, MacGibbon, and

Fitzmaurice at the beginning of this chapter, is something that is expressed by particular nation-state officials acting as representatives of their governments. It makes no sense to anthropomorphize "states" to say that a state itself has consented; yet even if the particular individuals who expressed a state's consent are overthrown in a revolution or defeated in the next election, the consent is not revoked. Treaties and contracts persist, as well as the state's obligations to the general body of customary international rules.

Fourth, international law sometimes assumes that a state has consented when in fact it has not. Treaties of peace, for example, are valid even when imposed upon the vanquished state. Moreover, a state is bound by a treaty if it has been entered into on the state's behalf by officials having the apparent authority to bind the state, even if in fact they lacked authority under the state's own constitution. Article 2, section 6, of the United Nations Charter extends certain principles to non-Member states. And the World Court's advisory opinion in the Reservations to the Genocide Convention Case<sup>FN19</sup> has signalled a breakdown of the strict consent theory where it had hitherto been thought to be especially applicable—in the matter of defining the parties to a treaty when some of them make reservations not accepted by the others.

Fifth, if the consent theory were truly an expression of an individual state's will to be bound, logic would require that if a state changes its mind it would cease to be bound. But international law has consistently given the opposite answer. Thus, for example, a state cannot get rid of its treaty obligations by passing contrary municipal laws.

Finally, it is interesting to note that in a recent study of state practice as expressed primarily through domestic judicial interpretations of international obligations, Professor Falk concludes that the alleged requirement of presumed consent in customary law must be dropped. <sup>FN20</sup> Consent is a vertical verbal rationalization that in Professor [pg7] Falk's analysis does not accord with the primarily horizontal ordering of authority and power among independent and relatively equal states in the international system. This conception appears to be closer to the meaning of the authoritativeness of custom than Professor Tunkin's solipsistic doctrine of agreement.

When a single term such as "consent" raises such logical difficulties, the temptation arises to resort to a kindred term to mask some of the problems. Thus, the concept of "acquiescence" has recently become fashionable. But it is difficult to distinguish meaningfully between consent and acquiescence, and especially between implied consent and acquiescence.

In situations where these terms are interchangeable, the notion of acquiescence would be subject to the same infirmities as that of consent. Writers who have attempted to expand the notion of acquiescence to cover situations falling short of implied consent add no strength to the concept. MacGibbon, for example, defines acquiescence as "silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection."<sup>FN21</sup> But this is an ambiguous formula. While it embraces certain clear situations which indeed "call for" an expression of protest (for instance, an attack on an embassy abroad), it also includes many other situations in which a state refrains from protesting another state's actions or omissions because the protest will be ineffective and only serve to annoy the other state. For example, many states may deplore France's nuclear test series in the Pacific Ocean, particularly in light of the Limited

Nuclear Test Ban Treaty, which most states have signed; yet only a few states have formally protested France's actions.<sup>FN22</sup> Their silence need not amount to acquiescence, but may rather be attributable to a realistic political assessment that a diplomatic protest would not deter France in the slightest but might only serve to worsen relations with France. On the other hand, there may exist situations where a state issues a formal note of protest but, by failing to take further steps, has in fact acquiesced. This could occur, for example, when a state expropriates a foreign-owned mining company that had paid below-par salaries to local workers and had shipped all profits abroad. The foreign state may issue a formal diplomatic note of protest on behalf of its national whose property was confiscated, perhaps because of the pressure exerted domestically by that national, and may nevertheless "let it be understood" informally that it is sympathetic with the act of expropriation. From these and many other possible situations, it is evident that there is no warrant for assuming that a state's silence or failure to protest is the equivalent of acquiescence.

This conclusion is apparent from the situations MacGibbon himself [pg8] cites. His examples prove at most that there is non-acquiescence when a state protests; they do not prove the converse, that discrete circumstances might be defined which "call for" protest.<sup>FN23</sup> For it is very difficult, except in certain clear situations where states normally protest certain types of acts, to say that protest is "called for" by the circumstances. Further, it is nearly impossible to say it in a situation that might create a new rule of international law or change an old rule; for such a situation, by definition, will have no precedents with respect to the practice of protest. In sum, MacGibbon's definition and use of the concept of acquiescence amount to finding acquiescence whenever states are silent. This, in turn, amounts to *presumed* acquiescence, which is not an analytically useful concept but merely another cumbersome legal fiction.

The vagueness of the term "acquiescence" may account for its use in a related but different sense, worth examining briefly. This is the notion of acquiescence not solely on the part of the state directly affected by the actions or omissions of another, but on the part of the community of states in general. Judge Hudson's fourth criterion necessary for the emergence of a customary rule of law, set forth in a draft prepared for the International Law Commission, is "general acquiescence in the practice by other States."<sup>FN24</sup> Similarly, Judge Fitzmaurice wrote of the effect of consent "in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law."<sup>FN25</sup> It is evident that what these writers have in mind is the truism that international law is only that which is recognized as such in the consensus of states. If a given rule, or the practice giving rise to a rule, meets with objection by the overwhelming majority of states—not simply verbal objection or notes of protest, but a complete unwillingness to recognize that rule in all relevant claim-conflict situations—then by definition that rule is not a rule of international law.

International law is that law which is manifested in the practice of all or most of the states; in this sense, it is the law that is generally accepted or "acquiesced in" by the international community. But in functional terms, the notion of acceptance or acquiescence does not normally help us decide what the rules in the international legal system in fact are. For only a very few rules can be cited that have actually been "acquiesced in" by explicit expression on the part of the preponderance of states. The great bulk of primary rules in all their detail owe their existence

directly to the workings of the secondary rules of law-formation, which themselves are the manifestations of the use by states of international legal techniques in their claim-conflict [pg9] situations. It is somewhat misleading to condition the validity of primary rules upon the acquiescence of other states, for the acquiescence does not relate to the primary rules but rather to the propriety of the processes (the secondary rules) by which the primary rules were created. Thus, the concepts of consent and acquiescence tend to become superfluous when they concern general community attitudes. To say that the community of states has acquiesced is simply to say that the rule is a valid rule of international law. This was indeed indirectly acknowledged by Judge Fitzmaurice six years after he wrote the passage previously cited. As Special Rapporteur to the International Law Commission's study on treaties, he noted that all States can be deemed to consent to rules embodied in treaties when such rules gain general-currency in international customary law.FN26 By thus *imputing* consent to the states, Fitzmaurice attests to its analytic uselessness.

Despite all the analytical difficulties involved in attempts to find consent or one of its permutations as the basis for customary law, it is nevertheless important to recognize the psychological importance of the role played by consent in reinforcing the authoritativeness of custom. The fact that some states do consent to some rules, the fact that some instances clearly amount to acquiescence, the fact that many international acts are the result of mutual tolerances, and even the increasing importance of treaties (which are clear cases of consent) in the body of international rules, all add to the acceptability of customary rules of international law. Government officials newly in power, for instance, often find it convenient to explain to their constituents that the state cannot do certain international acts because the state itself, through previous government officials, had agreed not to do so. The feeling of having previously consented to something is a powerful curb on desires to do something else. Hobbes recognized this in his attempt to show that citizens had constructively consented to the powers of the Leviathan, and Burke carried the process even farther by arguing that ancestral consent to the constitution binds the present inhabitants of a state. Apart from the merits of these political theories, their very existence and fame attest to the psychological importance people attach to the idea of consent. In international litigation, the attempt is invariably made to find some sort of evidence that the opponent state at one time consented to the rule it now opposes. In the Status of Eastern Greenland Case, for example, a mere verbal remark by one foreign minister to another was given critical importance in establishing one country's consent to the other's sovereignty in Greenland.FN27 But the frequency of recourse to arguments about prior consent does not establish the necessity of proving consent in [pg10] each alleged instance of a customary rule; rather it illustrates the psychological importance of consent, with respect to *some* rules or to the international legal system as a whole, that reinforces the authoritativeness of *any* customary rule.

## II. ESTOPPEL

The preceding section concluded that failure to protest does not necessarily amount to acquiescence. Acquiescence aside, it is nevertheless open for someone to argue that a state's failure to protest *estops* it to protest a similar rule in the future. If a state is thus estopped, it is effectively bound by that rule. That this process might be a complete explanation of why custom works is the conclusion reached by Dr. Zdenek Slouka in a recent doctoral dissertation entitled *International Custom and the Continental Shelf*.FN28 His reasoning warrants close examination.

In analyzing the concept of estoppel as it might operate in the formation of customary international law, it is important to look at the essence of its meaning and not at the manifold refinements grafted onto it by domestic legal systems. McNair in 1924 and Bowett in 1957 tried to argue that estoppel in international law necessarily contained certain elements, such as the refinement that the statement in question must have been addressed specifically to the party relying upon it.<sup>FN29</sup> But it is unrealistic to assume that international law would appropriate all the trappings of domestic legal concepts. A treaty, for example, is quite different from a municipal-law contract, and neither one has any claim to authority as a reference-point for the other. Particularly in an attempt to understand the workings of a concept as unique and difficult as custom, it is important not to get sidetracked by preconceptions derived from familiarity with domestic law.

The essential meaning of "estoppel" as used by Dr. Slouka is that if a state gives the impression of going along with a certain practice or rule, perhaps by not protesting against it when it was convenient to do so, that state should not be allowed later to disavow the practice or the rule. Unfortunately, Dr. Slouka did not fully develop the concept of estoppel in his dissertation, as he later admitted, and in future writing he intends to avoid the term and use instead an "expectation-reliance complex" as an ordering factor. <sup>FN30</sup> For the purpose of analyzing his argument, it is preferable to assume that "estoppel" roughly means an "expectation-reliance complex" than to criticize as inaccurate the use of the term "estoppel" and thus be unable to examine the main argument on its merits.

One additional terminological point needs mention. There are numerous cases dealing with the acquisition of prescriptive rights, both in domestic and in international law, where failure to protest is a [pg 11] constitutive element in the finding of title in favor of the possessor or user as against the owner. It would be dangerous to infer anything about customary international law in general from this specific class of cases. They would be unworthy even of a caveat were it not for the fact that MacGibbon has made extensive use of the term "estoppel" in these cases and has implied that his reasoning was applicable to customary international law in general.<sup>FN31</sup> Quite to the contrary, in cases of acquisitive prescription, a finding that the owner is estopped to protest the possessor's new rights is simply a legal conclusion on the question of title and not an explanation of why the result was reached.

Moving now to a consideration of Dr. Slouka's thesis, the salient feature of his analysis is that the concept of estoppel is a thorough, relativistic substitute for the notion of a general customary law. Dr. Slouka never *proves* the nonexistence of general law; rather, he assumes that international legal relationships are made up of a large number of specific *bilateral* relationships of varying degrees of legal force. Although he cautions the reader at the outset of his study that his conclusions pertain only to the area that he has examined—that of the continental shelf—he conveys the impression that any particularistic study *of* any given area of "customary law" would result in the same conclusion of relativity. Indeed, among his conclusions is the generalization that the role of the factors affecting the emergence of a customary norm "is relative to the conditions in which those factors operate." <sup>FN32</sup> But we should not rest on the observations that Dr. Slouka has assumed, and not proven, that the law of the continental shelf is made up of a number *of* bilateral relationships, or that he has not demonstrated whether his approach with

respect to the continental shelf is applicable in other areas. Rather, let us examine his main line of reasoning to see whether the assumptions he makes are at all persuasive as ways of approaching a legal problem.

Dr. Slouka's main reasoning concerns three hypothetical cases which might have arisen in the early 1950's. Had they arisen, they would have tested the legal validity of competing claims relating to the continental shelf.

A. *Hypothetical 1: The United States v. Great Britain*

In the first of these hypothetical cases, *The United States v. Great Britain*, an American oil company is supposed to have been engaged in the exploration and exploitation of oil on the outer submarine areas [pg12] adjacent to Abu Dhabi, a British protectorate whose Sheikh had proclaimed in 1949 his exclusive jurisdiction and control over those submarine areas.<sup>FN33</sup> The oil company decides not to pay Great Britain for exploitation rights, and the United States espouses the company's claim. What legal arguments could the United States use'?

Dr. Slouka argues that it could not maintain that the submarine areas in question are a *res communis* exploitable by the first comer, as such a position would "expressly revoke" the Truman Proclamation of 1945 in which the United States itself asserted its jurisdiction and control over its contiguous continental shelf.<sup>FN34</sup> Moreover, assuming this hypothetical case had arisen in 1953, the United States by that time had implemented its continental shelf policy by various legislative decrees and by administrative practice involving over sixty governmental agencies. These moves by the United States government, Dr. Slouka argues, created an expectation on the part of other countries that the United States would not claim any rights on any continental shelf other than its own. Dr. Slouka finds in this fact a specific estoppel for the United States to claim oil rights in the area. Secondly, he argues that the United States could not maintain a *res nullius* concept of the continental shelf, which would award title to specific areas of any continental shelf to the effective occupier. For such a claim would officially renounce the spirit of the 1945 Truman Proclamation, which contained general terms and concepts that betokened reciprocity. Moreover, *res nullius* would, if espoused by the United States, cast doubt upon the legal status of its own contiguous continental shelf. Finally, a British oil company actually engaged in exploitation off Abu Dhabi by 1953 probably had relied upon the Truman Proclamation's apparent disavowal of *res nullius*, and this operates to estop the United States' claim off the coast of Abu Dhabi.

Although Dr. Slouka has attempted in this case, with admirable specificity, to indicate how custom works in practice, there are several difficulties. First, a claim by the United States in apparent contradiction to the Truman Proclamation of 1945 would not "expressly revoke" the latter; there is no such concept of express revocation either in international law or in the law of the United States. Nor would such a claim amount to an official renunciation of the terms of the Truman Proclamation, which after all could be characterized as relating specifically to the continental shelf contiguous to the United States and not passing on the question of foreign continental shelves. Even if there was a "spirit of reciprocity" in the Proclamation, this may have been wholly gratuitous. At best, Dr. Slouka's [pg13] arguments amount to a position that it would be unwise as a matter of policy for the United States to espouse the oil company's claim,

not that such an espousal would be insufficient in law. To this extent he is of course right, for his case is purely hypothetical; the United States never espoused such a claim.

Second, even though American companies, with American administrative and legislative support, were busy exploiting the American continental shelf, this fact is not sufficient to explain why the United States would be estopped to make a claim on behalf of an American company attempting to exploit a foreign continental shelf. Analogously, many American firms have built manufacturing plants in foreign countries; the mere fact that they first built plants in the United States does not estop the United States from attempting to protect their foreign plants from confiscation.

Third, we must not lose sight of the fact in Dr. Slouka's hypothetical case that the American oil company had already established itself off the coast of Abu Dhabi and had begun the exploration for and exploitation of oil. Great Britain had not prevented the construction of the drilling rigs. What reliance interest, therefore, does Great Britain have? It expects to be paid for the exploitation, but this is hardly a reliance interest; if it were, then all plaintiffs would win all cases involving monetary claims. On the other hand, if Great Britain could show that it refrained from exploiting the exact areas occupied by the American company because of reliance on the Truman Proclamation and the "spirit of reciprocity," then perhaps there would be an estoppel. But this would be exceedingly difficult to prove in 1953 when many areas were available for exploitation and only few were actually utilized. Indeed, the presence of a British company *also* drilling for oil off Abu Dhabi indicates that the American company was not occupying the only possible position for a drilling rig.

A fourth, and perhaps even more basic, difficulty with Dr. Slouka's analysis is that it proceeds on the assumptions that *res communis* and *res nullius* positions are relevant alternatives. But this introduces *general* international law into what Dr. Slouka had attempted to keep as a pure bilateral situation. Dr. Slouka assumed that the United States, if it wanted to back the oil company's claim, would have to adopt either a *general res communis* or a *general res nullius* position with respect to all continental shelves. Why could not the United States adopt instead a completely relativistic position that there are no general legal alternatives, that there are only specific situations, and in one of them the United States owns its own continental shelf while in another it has the right to exploit the one off Abu Dhabi? Such a position might seem unwise or even greedy; on the other hand, it might strike some as reasonable, if account is taken of the community interest in the rapid exploitation of accessible oil deposits by the most technologically able states. But wise or unwise, such a policy is not [pg14] necessarily illegal if analyzed in the vacuum of a purely bilateral approach to international customary law.

#### *B. Hypothetical 2: Great Britain v. Japan*

Some or all of these difficulties may have led Dr. Slouka to formulate a second hypothetical case. In this case, *Great Britain v. Japan*, the facts are the same as in the first case with the exceptions that a Japanese oil company is substituted for the American company, and that Japan had not by 1953 made any declaration with respect to the continental shelf issue. On this change of facts, no estoppel can be found that might be based on Japan's positive acts. Yet,

asks Dr. Slouka, could Japan be estopped by its failure to protest, because it had no easily exploitable shelf of its own, the continental shelf claims of others?

Although Great Britain might argue that there is an estoppel based on the Sheikh's assumption of exclusive jurisdiction and control in 1949, Dr. Slouka states that Japan would prevail in this case. He points out that four years is an insufficient lapse of time to raise an estoppel in light of the fact that the Sheikh's declaration was not accompanied by overt manifestation of control. Nevertheless, a court might be persuaded by the British position absent a Japanese allegation that there exists a general positive rule relating to the continental shelf in international law—either the *res communis* or the *res nullius* rule. But as soon as this is acknowledged, we find ourselves once again in the realm of general customary law and out of the purely bilateral relationship posited by Dr. Slouka, as he in this instance admits. FN35

### *C. Hypothetical 3: Norway v. France*

In order to test whether any such general rule exists, Dr. Slouka invents another hypothetical case arising in 1953: *Norway v. France*. In this third case a Norwegian fishing vessel collides with an oil-drilling platform or rig that is insufficiently equipped with warning devices. The rig is located on the continental shelf adjacent to France but outside of French territorial waters or contiguous zones. Although France had notice that the rig was being constructed, in line with its official attitude on the continental shelf that no general rule of customary international law existed with respect to the shelf, Dr. Slouka posits that France in 1953 would not have officially acknowledged the existence of the rig. Norway, too, had taken such a position on the non-existence of a general rule of customary international law on continental shelves. Now the question is whether Norway could obtain redress against France under the theory that France had an obligation to enforce reasonable safety standards on rigs in its continental shelf waters. Dr. Slouka answers his question in the negative: "by its own [pg15] continental shelf policy, Norway was estopped vis-a-vis France—a country maintaining a similar stand-to claim French negligence." FN36

But wherein lies the estoppel here? Norway had done nothing; it had not even issued an official declaration on the subject. The only evidence given by Dr. Slouka as to Norway's *attitude* on the continental shelf problem was the Norwegian position at an international conference in 1958 (five years *after* the hypothetical case) that no general rule of customary law existed with respect to the shelf.FN37 Even if we are willing to assume, along with Dr. Slouka, that Norway's expressed attitude in 1958 accurately reflects its unstated attitude in 1953, it is not clear why such an attitude would be inconsistent with Norway's claim in the hypothetical case. Norway could argue that France, as the nearest coastal state, had a duty (as agent of the international community) to enforce reasonable safety precautions even in the high seas. In the alternative, Norway could claim that while the continental shelf itself did not belong to France, that portion of it tapped by the oil rig had a more genuine link with France than with any other state. Finally, as a more general point, it is not an accepted practice in international law that when a state expresses an opinion on the non-existence of a general customary rule that it is effectively barred from making specific claims that might be inconsistent with that general opinion. For the state might plead that it incorrectly stated the non-existence of the general rule;

or it might argue that the specific instance did not occur to its officials when they issued a general opinion, and if it had they would have appropriately modified the opinion.

Additionally, it is difficult to see how Norway's *unstated* attitude in 1953 could have been relied upon by France. Neither France nor Dr. Slouka could have known prior to 1958 what the Norwegian attitude was. Moreover, is it reasonable to assume that, if the hypothetical case had actually arisen, Norway *would* have expressed an attitude in 1958 contrary to its stand in the 1953 case? This question underscores the unreality of the hypothetical case method used by Dr. Slouka in this instance, for he assumes that real-life conditions would not change after history itself has been hypothetically changed. Such an assumption is even more questionable if the position of France is considered. If the drilling rig actually existed off the French coast in 1953, France might very well have decided *not* to contest the Norwegian claim for damages. For the mere existence of the rig would point to a level of profitability of offshore oil drilling that would greatly exceed [pg16] the price that France might have to pay to Norway for the damage to its fishing vessel. Indeed, the actual installation of a rig might itself have convinced France to declare its exclusive jurisdiction and control over the continental shelf off its coast, and perhaps to see to it that warning devices were placed on the rig.

#### *D. Beyond the Hypotheticals*

The difficulty with Dr. Slouka's use of hypothetical cases to demonstrate an expectation-reliance complex is that the cases either would not have arisen in the manner in which he describes, or that subsequent conduct of the states in question would have or could have been different if the cases had actually arisen as described. The actual practice of states demonstrates that up through the 1958 Geneva Convention on the Continental Shelf not a single state—not even Japan FN38—had protested any of the claims to the continental shelf nor had taken any position in any international litigation for or against any person, company, or state engaged in any of the exploration and exploitation activities. Nor had any state claimed or established for itself exclusive rights to exploit the resources of a continental shelf adjacent to another state.FN39

Nevertheless, one might well ask how the uniformity of state practice just described came about if not by the estoppel process as illustrated in Dr. Slouka's hypothetical cases. The simple answer may have been furnished as early as 1950 by Lauterpacht, who argued that the regime of the continental shelf expressed an established rule of general customary international law. FN40 The uniformity of state practice would thus have been a manifestation of the consensus as to the general rule. Lauterpacht pointed in 1950 to a certain pressure in the direction of exclusive coastal state jurisdiction and control over the continental shelf (and concomitant responsibility for the safety of navigation with respect to oil drilling platforms). This pressure *might* have been changed by contrary state actions after 1950, but in fact such actions did not take place and therefore the basic rule was reinforced. Even Dr. Slouka admitted the existence of a certain pressure by saying that "it was indeed highly reasonable to expect in 1950 that the doctrine of exclusive coastal shelf rights would eventually mature into a general legal system." FN41 But who is to say whether and when a law has "matured," and what in any case would be the relevance of such a determination? Even an incipient rule may have functional utility if compared to no rule at all.

If *some* pressure existed by 1953 in the direction of the legality of exclusive coastal shelf rights, all the hypothetical cases suggested by [pg17] Dr. Slouka are easily resolved. Great Britain would prevail in each of the first two, not by virtue of a claimed estoppel against the United States or an attenuated version of such an estoppel against Japan, but simply because of the pressure of the general rule of customary law. That general rule would apply to all states, and one need not look for special bilateral relationships between states. Of course, in Dr. Slouka's second case, involving Japan and Great Britain, no such special bilateral relationship existed. In the third hypothetical, Norway would not have been estopped to institute a claim against France; indeed, France might have welcomed the claim if based on a general rule of customary law giving France exclusive jurisdiction and control over the adjacent continental shelf.

Nevertheless, the question still remains as to *how* the general customary rule of adjacent state rights to the continental shelf arose in the first place. Lauterpacht in 1950 suggested a variety of arguments, including, interestingly, the idea of "estoppel" linked with a "failure to protest." FN42 Lauterpacht's basic difficulty was to discover how a unilateral declaration by a state, such as the Truman Proclamation of 1945, could result in the formation of a general rule of customary law when the overwhelming consensus among publicists holds that a unilateral declaration is merely a claim having no substantive impact upon the rights and obligations of other states. Lauterpacht *might* have argued that an exception to this general consensus exists when the case is one of acquisitive prescription. In such a case, a unilateral declaration is a claim of ownership; in particular, with respect to the continental shelf, it may be the only feasible symbolic act FN43 that a state could make inasmuch as the territory in question is submerged under the high seas. Here, also, the function of protest on the part of other states would not be to reserve a general legal position but to rebut the particular inference of undisputed possession by the state making the unilateral declaratory claim. Although in this line of reasoning the role of protest is significant, the outcome does not yield a general rule of customary international law but rather establishes individual proprietary rights. Thus this reasoning was not used by Lauterpacht, who wanted to prove the existence of customary law in general and not, to take an example, American ownership of its continental shelf in particular.

Accordingly, Lauterpacht chose to argue that the general failure to protest a few unilateral declarations by states claiming exclusive rights in continental shelves amounted to the acknowledgement of a general customary rule recognizing such exclusive rights. But if the unilateral declarations in themselves did not affect the international rights of other states, why *should* the others have protested the declarations? What if a state unilaterally declares its sovereignty over [pg18] the Atlantic Ocean? Must the other states protest such a claim in order to defeat it? Lauterpacht does not want to go this far; he writes that if a unilateral declaration is "so patently at variance with general international law" as to render it "wholly incapable of becoming the source of legal right" then there is no need for other states to protest it.FN44 He mentions as an example a claim to the exclusive use of the high seas, such a claim being "so tainted with nullity *ab initio*" that protest is unnecessary.FN45 The vagueness of Lauterpacht's language is obvious. Who is to decide what is "so patently at variance" or "so tainted with nullity"? What seems patent to one observer might seem modest to another. Two directly relevant illustrations might be considered. First, the United States in 1954 claimed the exclusive use of a large portion of the high seas for nuclear weapons tests. Could Lauterpacht cite the failure of non-communist

states to protest the nuclear weapons tests as demonstrating the "patent" illegality of the tests? Or does it demonstrate their legality in light of the claim that the exclusive use of a large portion of the high seas was only temporary? Second, does the absence of protest of unilateral claims to the continental shelf demonstrate the legality of the claims, as Lauterpacht argues? Or might it demonstrate their patent illegality in light of the fact that vast underseas areas were involved which some writers had previously thought were linked with the concept of free seas and not at all subject to national appropriation? FN46 Lauterpacht offers no criteria for distinguishing between these contrary possibilities.

Nor are Lauterpacht's general arguments on the role of protest in international law persuasive enough to prove that the failure of states to protest unilateral continental shelf declarations was formative of a general rule of international law. He argues that because courts of compulsory jurisdiction are often unavailable in international law, one of the only ways for a state to avert injury is to protest another state's intention to violate the law as expressed in that other state's unilateral declarations. And he finds "numerous examples" of protests in international law. FN47

There are, however, several basic objections to Lauterpacht's position. In the first place, a unilateral declaration does not itself involve a breach of international law; at worst it is an expression of a state's intention to commit such a breach. A state may never follow up its unilateral declaration with the threatened act; Chile, Costa Rica, Ecuador, and El Salvador, for example, have never attempted forcibly to implement their declarations of exclusive fishing rights in territorial seas off their coasts of 200 miles in breadth (although Peru has, and stands [pg19] as an exception). Since the declaring state might not follow through on its unilateral declaration, it is *not* generally considered prudent for other states to issue notes of protest whenever a questionable unilateral claim is made. Professor Bilder's account of the activities of the Office of Legal Adviser to the United States Department of State does not even mention a function of reacting to unilateral declarations of other states by way of notes of protest, which are normally actuated upon the application of aggrieved persons or corporations. FN48 In the preceding section, it was argued that protests will often be ineffective and hence are not made for that reason, or that they may be issued for "face-saving" reasons that in fact acknowledge an unwillingness to object more effectively. FN49 Particularly in the case of a unilateral declaration, a note of protest would appear to represent a *failure* of "quiet diplomacy" to get the issuing government to change its mind. Their use in this case would not appear to be a typical practice of states as Lauterpacht suggests.

What are the "numerous examples" of protest in international law cited by Lauterpacht? He only cites five cases, four of them arbitrations and two out of the four involving *prescription*. FN50 Additionally he cites an example involving an alleged breach of neutrality; and indirectly (by citing Oppenheim's treatise) he refers to a few incidents of protests relating to violation of rules of warfare. FN51 Most of these citations are irrelevant to the matter of unilateral declarations, an indication of the necessity to search far afield merely to list examples of notes of protest. Of course, many other examples could be adduced by simply paging through foreign-office papers. But these represent only the smallest fraction of inter-governmental communications and an unimportant part of international relations. Indeed, they represent only a small fraction of all the *possible* protests that might have been made but never were formulated.

Foreign offices are not in the business of antagonizing other governments by issuing streams of protests, particularly when other governments issue questionable unilateral declarations or pass organic legislation that might someday result in a transgression of international law if implemented. It is thus unrealistic for Lauterpacht to claim that governments are estopped if they fail to protest all the unilateral declarations of other governments that fall short of "patent" illegality.

Thus, the idea of estoppel has not yet been persuasively demonstrated to "explain" the workings of international custom. Nevertheless, estoppel and failure to protest may be highly suggestive in directing attention to the operative features of custom. First, the fact that [pg20] Dr. Slouka's first case was more persuasive than the other two may be due to the allegations that the United States had acted administratively and legislatively to implement the Truman Proclamation and that a British oil company had set up a rig in the continental shelf off Abu Dhabi. Tangible acts were in evidence, and not merely unilateral declarations. In the other cases, it was harder to find "estoppel," perhaps because of the fundamental ambiguity of unilateral declarations (or the failure to make such declarations!)—they might or might not be implemented in practice, according to the discretion of the declaring state. Since the declaring state itself is not "bound" by its own statement (which it may withdraw or simply fail to implement), no other state can know for sure whether it should or should not rely on such a statement. However, Great Britain in the first hypothetical case may have relied more upon the administrative and legislative implementation of the Truman Proclamation than upon the proclamation itself. Thus the concept of estoppel may help us focus on physical actions of states as opposed to their statements of intent. Secondly, *if* a "precedent" is established by the actions of a state, the notion of "estoppel" certainly *reinforces* the sense of "bindingness" or authoritativeness of the incipient customary rule. A state which actually *does* something which may have repercussions in the realm of customary international law can be said to be "estopped" to allege a contrary rule later. Of course this use of the idea of estoppel is not necessary to an analytic appreciation of the elements of custom-formation, but it may help reinforce the legitimacy of the process in a psychological sense. Nor can the idea of estoppel tell us *which* acts by states may have customary international law repercussions. That does not render it superfluous to say that estoppel may be linked with each valid instance of custom-formation to add to the persuasiveness of the secondary rule, but the impact is again psychological.

### III. REASONABLENESS

As some writers tried to make consent or estoppel the sole basis for their views of customary law, so too Professor McDougal has attempted to assign to the concept of "reasonableness" this central role. Arguing that national decision-makers operating in the international environment must constantly make policy choices between complementary prescriptions, he writes that

for all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is *reasonable* as between the parties. FN52

[pg21] It is of course important not to take this statement too literally. Presumably Professor McDougal would not intend it to apply to fixed treaty obligations that in the short run seem to one party to be unreasonable. Moreover, in other writings he does not appear to reiterate the claim that *all* decisions are reasonable. Nevertheless, he does appear to equate his concept of reasonableness with the traditional concept of custom in international law. By "international custom" Professor McDougal specifically means

that total flow of explicit communications and acts of collaboration among peoples which create community-wide expectations that certain uniformities in decision will successfully survive challenge.FN53

This too is an overly broad and inclusive statement, one which might well serve as a tautological definition of "law" as well as custom, and also of the terms "prescription" and "authority" which appear so often in Professor McDougal's writings. But here Professor McDougal perhaps is purposefully broad as he views "custom" as only one, even if it is the most basic,FN54 of a number of "past communications" to which national decision-makers may turn for guides to policy-making and indications of relevant community expectations.FN55

In the course of his writings, Professor McDougal makes a number of arguments for "reasonableness" as the authoritative guide to the prescriptive requirements of international custom. Some of these are purely descriptive of international claim-conflicts, such as the concepts of reciprocity, retaliation, and *dedoublement fonctionnel*. As such, they do not prove Professor McDougal's case for reasonableness. For although it is true that competing claims are often settled by "mutual tolerances" based on expectations of reciprocity or fear of retaliation, FN56 their resolution does not have to be "reasonable." A larger power may prevail over a smaller one that cannot communicate as credible a threat of retaliation; reciprocity may be non-existent (*e. g.*, the United States has a continental shelf but Japan does not); or the mutual toleration may maximize the interests of the immediately affected parties against larger community interests. In addition, the idea of *dedoublement fonctionnel*—where "the same nation-state officials are alternately, in a process of reciprocal interaction, both claimants and external decision-makers passing upon the claims of others"FN57— does not assure that the officials will gradually become fairer and more reasonable by moderating their own country's claims and meeting [pg22] external claims halfway. Many officials simply become more hardened in a "my country, right or wrong" attitude.

Apart from the description of claim-conflict behavior, Professor McDougal advances a number of interpretive arguments on behalf of "reasonableness." First, customary rules tend to be "formulated at the highest level of abstraction" and hence are "ambiguous in highest degree." FN58 The implication is that policy-makers have a wide ambit of choice within these broad rules, and therefore do what is "reasonable." But the conclusion does not necessarily follow, as we can see from Professor McDougal's own writings. For example, the very broad or even ambiguous international rule of *aer clausus* has led, at a great economic loss, to the establishment of national airlines operating over international air routes. " Among all the stultifying ingredients of egocentric aerial nationalism," Professor McDougal observes, "this has probably been the most irrational."FN59 Clearly, then, he does not view *aer clausus* as yielding reasonable policy decisions in the same manner as he views *mare liberum*, though both are

clearly norms of custom. With respect to freedom of the seas, as a second example, Professor McDougal finds the inclusion of the "genuine link" theory in Article 5 of the Geneva Convention on the High Seas "drastic," "mis-conceived," "uneconomic," "positively dangerous," and "unnecessary."FN60 Yet the Convention was the result of a shared consensus and mutual toleration of many national views as perceived by lawyers and national representatives, a fact that might lead one to suspect that what is "reasonable" to Professor McDougal may not be so in the views of the international claimants whom he is purporting to describe.

This leads to Professor McDougal's second interpretive argument: that international claimants share a certain set of values, identified in Lasswellian terms as security, wealth, respect, enlightenment, well-being, affection, and rectitude. FN61 One could only hope that this *neo-philosophy* position were true. But as Professor Woetzel has observed, "policy-oriented approaches with other goals than human dignity, such as Marxism-Leninism" lead to different results and would "vitiating expectations of reciprocity in terms of general rules governing all mankind." FN62 Moreover, if the Lasswellian values were universally shared, then the arguments of the chief interpreter of those values, Professor McDougal, would also be universally accepted. But even a Western observer such as Professor Falk has found unpersuasive Professor [pg23] McDougal's briefs in support of "the legality of the use of force by Western states in cold war contexts." FN63

The root of the problem may involve an age-old device of political philosophers, who have attempted to add to their own persuasiveness by claiming that the norms they set forth to govern behavior are in fact obeyed in practice by mankind in general. Marx, Hobbes, Hegel, and Austin, among many others, have attempted to show "scientifically" that what ought to be the case is in fact the case, and nothing the reader may do will derail the historical inevitability perceived by the writer. So too Professor McDougal argues that the Lasswellian values not only *should* be accepted by all reasonable and decent men, but in fact they *are* so accepted throughout the world. What, then, if someone *rejects* them? Professor McDougal would consign such men to the extra-legal world, just as Rousseau, for example, solved the problem of dissent in his *Social Contract* by banishing the dissenters from the body politic.

This process obviously defines away the objectors, but in so doing defeats its own claim of universality. Perhaps Professor McDougal wants to do this; perhaps he wants to say, for example, that the Soviet Union or Red China should not be allowed to participate in the world's legal system. But the trouble with this approach is that, normally, it is the dissenter on any given legal issue whom we are trying to persuade. In his famous essay on the hydrogen bomb tests, for instance, there is no need to persuade the United States that the tests are legal since the United States claimed that they were legal. But there was need to persuade the Soviet Union and other states who did not agree with the claim of the United States and probably also did not share the Lasswellian values.

There are even greater problems in attempting to specify exactly where the values—assuming they are shared—point with respect to concrete cases. In the first place, taken individually, they are vague. Does the value of "wealth" mean that a country may expropriate without paying compensation the assets of aliens doing business in that country so that the people may increase their "wealth," or does it mean that there should be no such confiscation

because the country in the long run will become poorer if it does so? Does the value of "rectitude" mean that a student should burn his draft card because he feels the war in Vietnam is immoral, or does it mean that the United States government alone may define the morality and rectitude of its foreign policy? Does a nation increase in respect if it displays its armed might abroad, or is there an increase in respect if it refrains from using its military power? Indeed, should we answer the previous question by resort to survey techniques to determine in what way a nation can increase its stock of respect? What if it were found, for example, that dropping nuclear weapons on North Vietnam would [pg24] definitely increase Asian "respect" for Old Glory? If such a finding could be established by statistical techniques, would Professor McDougal go along with it? Secondly, it is easy to imagine instances where one value would contradict another. "Affection" may be incompatible with "security," "wealth" with "enlightenment," and so forth. One's problems may indeed increase if their solution appeared to depend upon the definition of incompatible values.

Professor McDougal's third argument—the complementarity of customary prescriptions—shares some of these difficulties also. He contends that rules of custom come often in paired opposites, thus affording wide discretion to the policy maker. While this contention does not necessarily mean that the policies selected will be reasonable, nevertheless it renders the impact of customary prescription so feeble that the reader is inclined to grab hold of any straw, such as that of "reasonableness," in order to put some meaningful content into international law. Thus it is important to trace Professor McDougal's contention in some detail.

In the hydrogen-bomb essay, Professor McDougal describes the regime of the high seas, "a living, growing, customary law," as presenting a "maze of conflicting claims" categorizable under two sets of complementary prescriptions. FN64 The first prescription is that of "freedom of the seas," invoked to honor inclusive claims such as navigation, fishing, and cable-laying. The opposite set of claims are those of exclusive jurisdiction, summed up "in a wide variety of technical terms such as 'territorial sea,' 'contiguous zones,' 'jurisdiction,' 'continental shelf,' " and so forth.FN65 Out of the dialectics of these antithetical prescriptions, Professor McDougal offers a synthesis justifying the temporary exclusive use of a portion of the high seas for the American hydrogen bomb tests. The complementarity of the prescriptions, in short, forced American decision-makers to consider "security" goals of the United States and the "free world" and resulted in a decision that infringed temporarily but reasonably upon the set of interests characterized as "freedom of the seas." FN66 The hydrogen bomb tests, in Professor McDougal's view, were "reasonable, and hence lawful." FN67

One important difficulty with the apparatus of complementary prescriptions just described is that it proves too much. If national decision-makers are actually subject to complementary prescriptions, they may do whatever they desire to do in their unfettered discretion. Hopefully they will be "reasonable" and perhaps espouse Professor McDougal's values, but in fact they may often do what *they* feel is "reasonable" and what Professor McDougal would describe as irrational. Of course, if by his doctrine of complementary prescriptions Professor [pg25] McDougal is merely trying to say that there is no international law at all, then he has picked a rather cumbersome way of doing so. Moreover, the doctrine proves too much even in terms of his essay on the hydrogen bomb tests. For the bulk of the essay is a careful description of the *minimal* intrusions upon free fishing and navigation that accompanied

the United States' tests. Professor McDougal shows that the tests were well safeguarded, that they were temporary in duration and occupied a minimal and relatively unused portion of the high seas, that they were appropriately based from "strategic" trust territories with adequate safeguards for the native population, that the United States paid adequate compensation (although disclaiming legal liability) to certain interests in the area adversely affected by the tests, and that the tests were conducted on behalf of the nuclear security interests not only of the United States but also of a number of other "free world" nations.FN68 These arguments would well accord with the view of customary law in the present study. For if we start with a customary rule of "freedom of the seas" defined as a *pressure* upon national decision-makers, the rule was vindicated by the conduct of the United States in using the high seas for nuclear testing. There is no need to invoke "complementary" prescriptions to arrive at this result, any more than a fishing fleet would have to invoke "temporary exclusive jurisdiction" as a complementary prescription to "freedom of the seas" if fishing vessels from another state attempted to maneuver in between their vessels. For the rule of free seas *means* that one fishing party has the freedom for a temporary exclusive use in the immediate area of its vessels; what it does not mean is that any single country can "rope off" a portion of the high seas for exclusive fishing permanently. In short, the rule of free seas creates a pressure upon users to allow for the free use of the seas by others, such allowance sometimes entailing temporary exclusive jurisdictions. As Professor McDougal seems to concede by implication, the American tests would not have been legal had the United States claimed the area as a permanent testing ground. For that would have violated the norm of freedom of the seas, even though it might possibly have been justifiable on the grounds of national security interests and certainly justifiable if a set of prescriptions relating to exclusive use of the high seas were complementary in all respects to the set characterized as "freedom of the seas."FN69

A second, more basic objection to the doctrine of complementary prescriptions is its mistaken focus upon rationalization rather than [pg26] action. Custom in international law depends upon what states do, and in terms of their practice contradictory lines of conduct do not arise nearly as frequently as do contradictory explanations. While a proper reliance upon the acts (or omissions) of states sharpens the characterization of customary legal rules, a shift to a subjective notion of complementarity tends to make it possible for any nation to justify anything. Moreover, Professor McDougal unnecessarily complicates the concept of custom by taking an interests approach. He looks to the rationalizations of decision-makers in terms of their interests rather than just at the conduct itself. Yet once these rationalizations are invoked, it becomes easy to find among them many sets of complementary prescriptions. Lawyers the world over are clever enough to articulate a set of values, rationalizations, and interests (particularly those as simple as the well-being of the nation or as vague and all-inclusive as "security," one of McDougal's choice nominees) for anything that their client's states want to do. Thus, whenever there is a claim-conflict situation we should not be surprised to find lawyers on each side invoking a set of prescriptions that, taken together, are complementary. Further, we should not be surprised to find each side asserting that its view of the matter is the only "reasonable" one.

Professor McDougal himself plays the role of advocate in his far-ranging search to find prescriptions complementary to those of freedom of the seas. In his essay he cites the territorial sea, the contiguous zones, and the continental shelf as examples of the predominance of exclusive use. But none of these areas was involved in the actual hydrogen bomb testing zone,

which was the concrete issue in the essay. The fact that the "high seas" are bordered by territorial seas and in part coincide with contiguous zones does not necessarily change the character of the rules pertaining to the area that is conceded to be "high seas," while the rules pertaining to the continental shelf below seem as irrelevant as those pertaining to the air above. The "exclusive interests" of the coastal state in the territorial waters of course contrast with the freedom of the high seas, but happily they relate to two entirely different geographical areas. Such prescriptions are complementary only in an artificial sense, and not in the concrete sense relevant to the hydrogen bomb tests. If they *were* relevant, then it would be equally permissible to cite *mare liberum* as an excuse for violating *aer clausus* and vice versa.

Professor McDougal much more persuasively cites "naval maneuvers, military exercises, and other peacetime defensive activities" in support of the hydrogen bomb tests. FN70 For these have been conducted on the high seas and constitute a real precedent for larger testing programs. Similarly, they indicate the compatibility of temporary exclusive appropriations of portions of the high seas with the norm of freedom of the seas. They also indicate the importance of establishing [pg27] clear warning zones in areas off the main navigational and fishing routes. However, Professor McDougal mentioned these precedents only in passing, without devoting much analysis to them; rather, he spent most of his legal analysis on territorial seas and contiguous zones, which are only superficially related to the "high seas."

The idea of complementary prescriptions in some cases seems to have an explanatory power at a high level of abstraction, but when related to specific instances is not helpful in deciding concrete cases. An example is Professor McDougal's analysis of the laws of warfare, which he finds fall between the complementary policies of military necessity and humanitarianism.FN71 This example is especially instructive because Professor McDougal synthesizes the complementary prescriptions in the generalization that warfare must be conducted so that there is a "minimum destruction of values."FN72

Although Professor McDougal proceeds to list his versions of what this generalization would entail with respect to combatants, areas of operation, weapons, objects of attack, reprisals, superior orders, prisoners of war, and so forth, it is never clear how instances could be resolved when belligerents disagree as to the weights they might assign to their values. What might seem to the outside observer (who is not privy to many of the critical facts) as a squandering of military power might appear to the belligerent as an attempt to end the war sooner by terrorization of the opponent. Indeed, Professor McDougal acknowledges in a footnote that "terror bombing...might conceivably result in less aggregate destruction of values than other alternatives in the application of violence."FN73 So too, a belligerent might decide that express violation of the rules of warfare as laid down by the Geneva Conventions or as accepted in general practice might terrorize the opponent; in that instance, Professor McDougal's over-riding value justification for military conduct might contravene any and all rules of warfare, including customary rules and those rules accepted by Professor McDougal.

It is significant that in his work of over 800 pages on the laws of war, Professor McDougal adverts only once, in a footnote, to the atomic bombing of Hiroshima and Nagasaki. He does so without relating the example to his analysis and concludes only that it is a "difficult" example.FN74 From the American point of view, these bombings were clearly necessary to

promote in the long run the "minimum [pg28] destruction of values" by bringing the war to a quick conclusion. Yet can an impartial observer, applying Professor McDougal's approach, reach the same conclusion? Was it necessary, one might ask, to demonstrate the overwhelming power of the atomic bombs by dropping them on population centers rather than on an offshore island? Was the Nagasaki bomb, as distinct from the Hiroshima bomb, necessary for any conceivable military or demonstration purpose? And did the bombings bring about a peace treaty that was significantly different from the terms offered by the Japanese in the summer of 1945? The relevant factor here is not what the impartial observer might conclude, but the impossibility of applying a standard such as the one suggested by Professor McDougal to a specific act, such as the atomic bombing of Japan. Subsequent observers may disagree with prior policy-makers, and a definitive answer to the question of "minimal" destruction cannot be rendered until after the event, if at all. Thus the wartime leaders could not have access to any rational standard for deciding at the time whether certain policies are legal or illegal. To adopt Professor McDougal's "reasonableness" approach to the rules of warfare would ensure the uselessness of those rules. It would make a self-fulfilling prophecy of his statement that the rules of warfare merely "guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision."FN75

Of course, *if* national decision-makers in wartime in fact treat rules of warfare as mere attention-getting devices, we must acknowledge that fact. But examination of state practice in wartime demonstrates many instances where specific rules of warfare exerted pressure upon decision-makers to comply with their prescriptions. This is not to say that the rules were always obeyed, but rather that they were sometimes obeyed and when they were disobeyed the decision was made with some calculation of the risks of disobedience. The degree of compliance with the Hague and Geneva conventions on the rules of warfare varied from general to general as well as from one theatre of operations to another. Yet all wars have instances of military commanders complying with rules of warfare despite their own judgment that to do so increased the risk to their own soldiers and slowed down the prosecution of the war. It is unnecessary to catalogue specific cases; one striking instance can be found in Professor McDougal's volume on the law of war. He cites memoranda prepared by the German Wehrmacht at the last stage of the war on a proposal that Germany denounce its international obligations concerning the conduct of the war. FN76 The Wehrmacht's conclusion was that there should be no denunciation, on the grounds that:

[pg29] (1) Strictly formally, a denunciation of the agreements is not possible. The conventions concerning P. W. and wounded provide for no denunciation, the Hague Convention admits a denunciation only if one year's notice is given.

(2) On the basis of the practice of states in the wars of the last centuries, there exists the "International Law of Usage" which cannot be done away with unilaterally. It comprises the latest principles of a humane conduct of war; it is not laid down in writing. To respect it is however considered a prerequisite for membership [in] the community of states. (Prohibition on misusing the flag of truce, killing of defenseless women and children, etc.)FN77

Although Professor McDougal cites this example to demonstrate "compelling testimony to the

effectiveness of the sanction of self-interest,"FN78 it is clearly fruitless to attempt to distinguish rules of international law on the observer's calculation of the states' self-interest. International law as a whole is based upon the self-interest of states; if it were not, it would neither have arisen nor survived. What is analytically more useful is to see in this example the pressure exerted by the rules of warfare. Clearly some German military leaders contemplated denouncing the rules of warfare, and asked the Wehrmacht's legal advisers for their opinion. The contemplated denunciation would not have been a mere formality; clearly it would have been intended to signal to certain German generals in the field that they no longer needed to respect the laws of warfare, a signal which presumably would not have been effective if given informally in the absence of an official denunciation. It is highly significant that the Wehrmacht concluded that "Germany will by no means free herself from this essential obligation to the laws of war" by such a denunciation. FN79 For this conclusion attests to the power not only of the rules of warfare, but of the rule of international law relating to the effectiveness of a unilateral denunciation of the rules of warfare. In short, something that was contemplated was not undertaken because of legal advice, attesting to the pressure of the traditional rules of warfare.

Admittedly, many of these traditional rules are vague and are in need of updating. But they do not appear nearly so vague as Professor McDougal's suggested standard of the "minimum destruction of values." And, however wide the possible ambit of their interpretation, they do not admit of the limitless area of discretion afforded by an [pg30] approach to customary law that would characterize all rules of custom in terms of complementary prescriptions.

Despite these objections to Professor McDougal's arguments for "reasonableness" as the central ordering factor in customary law, there remains an important sense in which reasonableness is a reinforcing factor for the authoritativeness of custom. For nearly all acts that states undertake appear to the actors as reasonable. If these same acts can in the future be cited as precedents for rules of customary law, then the authoritativeness of such citation is enhanced by the recognized reasonableness of the constitutive acts. Thus, reasonableness fails to provide an adequate basis for the obligation underlying customary law; but it does contribute psychologically to the pressure of customary rules upon the actors in the international system.

#### IV. CONCLUSION

Like consent and estoppel, the concept of reasonableness, while failing to provide an adequate explanation of the source of obligation in customary international law, does play an important psychological role in adding to the pressure of international norms upon states. The result is to increase the sense of legality of the rules that are accepted by states as part of "customary international law." This is not to say that each and every alleged rule of universal international law must contain one or more of the elements of consent, estoppel, or reasonableness in order for it to be "valid." "Validity" itself is only a psychological construct subject to widely divergent "tests" among writers and publicists. There is no single reason why international law, or any law for that matter, is or is not "valid"; the only operatively important question is whether many or most of the laws in the legal system we are talking about *work* most of the time. In the international system, as we have seen, a rule of law "works" if it exerts some pressure upon national decision-makers to comply with its proscriptions (or, in what amounts to the same thing, to recognize that opponent decision-makers are not changing the status quo

politically if they persuasively clothe themselves in such rules). *Why* rules of international law are effective in this manner is in part a function of consent, of estoppel, and of reasonableness, and in part a function of many other things (*e.g.*, morality, habit, effective sanctions, and so forth). The time has surely come when writers should cease their attempts at single-factored explanations of the "validity" of law, and attempt to understand legal phenomena in a manner which to some may unfortunately be less logically rigorous or "deductive" but which at least holds the promise of salvaging most of the delicate and often interlocking branches of the subject. Logical rigor combined with single-factored analysis would chop away most of these branches, leaving a well-defined trunk that bears less and less resemblance to reality. In particular, in the [pg31] case of international customary law, rigid adherence to any of the three factors discussed in this essay would leave few, if any, genuine rules of international customary law to worry about.

### Footnotes

FN1. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y. B. INT'L L. 65, 83 (1929).

FN2. For a more recent restatement of this position, see Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y. B. INT'L L. 20, 22-25 (1925).

FN3. O. LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 55 (1965).

FN4. Tunkin, *Co-Existence and International Law*, 95 ACADEMIE DE DROIT INTERNATIONAL, THE HAGUE, RECUEIL DES COURS [RECUEIL DES COURS] 3, 13 (1958).

FN5. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y. B. INT'L L. 115, 131 (1957).

FN6. Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y. B. INT'L L. 1, 68 (1953).

FN7. Case of the S. S. "Lotus," [1927] P.C.I.J., ser. A, No.9, at 4, 18.

FN8. L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 90 (1933).

FN9. Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No.9, at 28-29.

FN10. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 53 (1927).

FN11. Waldock, *General Course on Public International Law*, 106 Rec. des Cours (Neth.) 1, 52 (1962).

FN12. O. LISSITZYN, *supra* note 3, at 73-89.

FN13. *Id.* at 103.

FN14. Waldock, *supra* note 11, at 52.

FN15. Bishop, *General Course of Public International Law*, 115 Rec. des Cours (Neth.) 147, 463 (1965).

FN16. Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 428 (1961).

FN17. H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 114 (R. Tucker transl. 1966).

FN18. O. LISSITZYN, *supra* note 3, at 10.

FN19. Advisory Opinion on Reservations to the Genocide Convention, [1951] I.C.J. 15.

FN20. R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 171 (1964).

FN21. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y. B. INT'L L. 143 (1954).

FN22. *See* D'Amato, *Legal Aspects of the French Nuclear Tests*, 61 AM. J. INT'L L. 66-67, 76 (1967).

FN23. *See* MacGibbon, *supra* notes 5, 21; MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y. B. INT'L L. 293 (1953).

FN24. Hudson, *Working Paper on Article 24 of the Statute of the International Law Commission*, [1950] 2 Y. B. INT'L L. COMM'N 24, 26, U.N. Doc. A/CN. 4/16 (1950).

FN25. Fitzmaurice, *supra* note 6, at 68.

FN26. Fitzmaurice, *(Fifth) Report on the Law of Treaties*, [1960] 2 Y. B. INT'L L. COMM'N 69, 94-96, U.N. Doc. A/CN. 4/130 (1960).

FN27. Case of the Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No.53, at 22, 57-58.

FN28. Z. Slouka, *International Custom and the Continental Shelf*, 1965 (unpublished diss. in Columbia Univ. Library).

FN29. McNair, *The Legality of the Occupation of the Ruhr*, 5 BRIT. Y. B. INT'L L. 17, 31-37 (1924); Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y. B. INT'L L. 176 (1957).

FN30. Letter from Dr. Zdenek Slouka to the author, Jan. 27, 1967.

FN31. See MacGibbon, *supra* note 21; MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L. Q. 468 (1958).

FN32. Slouka, *supra* note 28, at 307.

FN33. There are some complications in Dr. Slouka's account due to the fact that this particular sheikdom was involved in a litigation unrelated to the hypothetical cases. These complications are omitted here on the supposition that Dr. Slouka did not intend to present wholly atypical hypothetical cases. In any event the complications are immaterial.

FN34. United States Proclamation, 10 Fed. Reg. 12303 (1945).

FN35. Slouka, *supra* note 28, at 267.

FN36. *Id.* at 275.

FN37. *Id.* at 182-83. However, Dr. Slouka appears to have overlooked a significant item appearing in one of his earlier footnotes, that both France and Norway were *consulted* in 1945 by the United States Department of State prior to the issuance of the Truman Proclamation, and that neither country objected to the draft proclamation. See *id.* at 69, 17.

FN38. *Id.* at 78 n. 52.

FN39. *Id.* at 290.

FN40. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y. B. INT'L L. 376 (1950).

FN41. Slouka, *supra* note 28, at 292.

FN42. Lauterpacht, *supra* note 40, at 395-98.

FN43. Cf. A. KELLER, O. LISSITZYN & F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS, 1400-1800 (1938).

FN44. Lauterpacht, *supra* note 40, at 397-98.

FN45. *Id.* at 398.

FN46. For a review of the literature, see Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y. B. INT'L L. 332 (1950).

FN47. Lauterpacht, *supra* note 40, at 397.

FN48. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 660 (1962).

FN49. *See text supra* at note 21.

FN50. Lauterpacht, *supra* note 40, at 397 n. 1.

FN51. *Id.* at 397 n. 2.

FN52. M. McDOUGAL *et al*, STUDIES IN WORLD PUBLIC ORDER 778 (1960).

FN53. M. McDOUGAL, H. LASSWELL, & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 116 (1963).

FN54. *Id.*

FN55. *Id.* at 115. *See D' Amato, Review of McDougal's Studies in World Public Order*, 75 HARV. L. REV. 458 (1961).

FN56. M. McDougal, *et. al.*, *supra* note 52, at 774.

FN57. *Id.*

FN58. *Id.* at 776.

FN59 M. McDOUGAL, H. LASSWELL & I. VLASIC, *supra* note 53, at 252.

FN60: M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1023-24 (1962).

FN61. M. McDOUGAL, *supra* note 52, at 32-36.

FN62. Woetzel, *Review of McDougal, Lasswell & Vlastic, Law and Public Order in Space*, 61 AM. J. INT'L L. 626, 628 (1967).

FN63. Falk, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT'L. L. 66, 67 (1965).

FN64. McDougal, *supra* note 52, at 773.

FN65. *Id.* at 776.

FN66. *Id.* at 797-843.

FN67. *Id.* at 779.

FN68. On the importance of this last point in Professor McDougal's essay, *see* D' Amato, *supra* note 22, at 67-68.

FN69. The pressure of the "freedom of the seas" norm and of other norms, primarily those of Article 2 paragraph 4 of the U.N. Charter, combined to help minimize the "blockade" of Cuba by the United States in 1962; in the actual "quarantine," the pressure of these norms may have helped shape the policy of only searching Soviet ships for missiles and not any other ships or for any other purposes.

FN70. McDougal, *supra* note 52, at 774.

FN71. M. MCDUGAL, F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961). A more accurate dichotomy would appear to be the one given by Professor Wright, not cited by Professor McDougal, between ending a war quickly and securing a lasting peace after the war. *See* Wright, *The New Law of War and Neutrality*, *VARIA JURIS GENTIUM* 412 (1959).

FN72. M. MCDUGAL & F. FELICIANO, *supra* note 71, at 59.

FN73. *Id.* at 80 n. 195.

FN74. *Id.* at 74 n. 178.

FN75. *Id.* at 57.

FN76. *Id.* at 54. The Hiroshima-Nagasaki situation is certainly difficult to appraise from a legal standpoint. If the United States had lost the war, and if President Truman and his advisers were indicted before a "Nuremberg" type tribunal composed of the Axis powers, it is fairly easy to imagine a war-crime conviction being returned on the basis of the excessive use of explosive power on Japanese citizens in Hiroshima and, what is a more compelling but hardly ever heard argument, the unnecessary followup bombing of Nagasaki which had no military justification and was not needed, after Hiroshima, to "demonstrate" the efficacy of the new weapon.

FN77. *Id.* at 54-55.

FN78. *Id.* at 54.

FN79. *Id.* at 55.