

Reinforcing Factors

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By considering certain international acts as legal precedents, we found in the previous chapter a possible initial impetus to the pressure upon nation-state officials to shape their subsequent actions in accordance with the precedents. But this pressure may require a considerably greater reinforcement in order to create a meaningful "normative" force out of customary behavior. The present chapter considers three elements—consent, estoppel, and reasonableness—that in the jurisprudential literature have each been advanced, at various times, as the sole basis for the otherwise loose expression "custom." Let us therefore consider whether any of these elements does constitute a full explanation or basis of, and hence a substitute for, international custom, and whether in any event each or all of them may reinforce the psychological authoritativeness of custom.

Consent

The idea that a state is not "bound" by a rule of international law unless it has previously "consented" to that rule is an extreme form of the positivist tradition in international jurisprudence in the nineteenth century. Its proponents, who in Lauterpacht's words had an "exaggerated regard for sovereignty,"¹ tried to explain custom as merely a tacit treaty, entered into by all the states which had consented to the given rules.² 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 Lissitzyn's words, "to pick and choose among the norms of international law."³ One of the leading spokesmen of the Soviet position, G. I. 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.⁴ Some non-Soviet writers have also concluded that consent is at the basis of custom. I. C. 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."⁵ 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.⁶

All of the views just summarized share the belief that international law emanates from the individual state, 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 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."⁷

However, on closer inspection, the statement in the Lotus Case may be seen to stand for a limitation on the idea of consent rather 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 point is significant 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; international law is obviously 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 particular controversy—must itself have consented to a rule in order to make the rule binding upon it. One writer who focused upon the distinction was Louis 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."⁸ In the Lotus Case, neither France nor Turkey was going to prevail because of any notion of individual state 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.⁹ 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 relevance of international law in international claim-conflict situations is itself at stake in this question of consent. If the only way a defendant state could be held accountable to law is by proving that that state consented to the particular rule in question, a plaintiff state would hardly ever win any case. 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 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, Jaffe's observation seems to be the only possible conclusion. By simply engaging in international legal argumentation, or simply by claiming 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 individual consent theory were valid, new states would typically, as soon as their statehood was recognized by other states, make a list of all the international norms they want and reject the others. But no states have 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, a general rule of law seems to exist to the effect that a new state "cannot repudiate a single rule."¹⁰ Of course, such a law means that a purported repudiation would not be given legal effect by the other states and not that a new state would lack the physical ability to repudiate a rule. If new states wanted to repudiate rules, they might conveniently do so when they are subject to suit in an international tribunal. But 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.¹¹

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 Lissitzyn has shown, many resent their colonial past and assert that some rules, such as those relating to expropriation, are not binding upon them.¹² On the other hand, their attitude even to rules of expropriation has not in practice been extremist; as 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.¹³ Broadly speaking, Waldock has observed that "the new States have at least as much to lose as anyone else from a denial of the validity of existing international law."¹⁴ Rather than trying to set up specific exemptions for themselves (and thus espousing the consent doctrine) the new states have expressed support of international law, and at the same time have worked to help change that law so that it would better reflect their needs. They are working particularly in the field of treaties and General Assembly resolutions, as Bishop noted in his Hague lectures of 1965, to change the substantive rules in the international legal system to which they have "consented."¹⁵ Even 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."¹⁶ Since no new state has entered *with* reservations, and since Tunkin has not, and could not, proclaim which "basic principles" the new states have, in some unstated manner, "recognized," perhaps even he 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 individual consent to each and every substantive rule within the system.

A second example of state practice that does violence to the "doctrine of agreement" may be found in 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 the acquiring state to

pick and choose among the norms it agrees with.¹⁷ We 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.

Other examples of state practice call into question the concept of consent itself. As a third area in our enumeration, we may consider the remarkable fact that a state's rights and duties in international law, in 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."¹⁸ Yet consent, in the sense given by 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. One should not anthropomorphize "states" by saying that a state itself has "consented"; yet international law functions because, 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 actually 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 they lacked authority under the state's own constitution. Article 2, section 6, of the United Nations Charter extends certain principles to nonmember states. And the World Court's advisory opinion in the *Reservations to the Genocide Convention Case*¹⁹ has signaled 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. For example, a state cannot get rid of its treaty obligations by passing contrary municipal laws. In sum, we may note that in a recent study of state practice as expressed primarily through domestic judicial interpretations of international obligations, Richard Falk concludes that the alleged requirement of presumed consent in customary law must be dropped.²⁰ Consent is a vertical verbal rationalization that in 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 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. The concept of "acquiescence" has accordingly become fashionable. But it is difficult to distinguish meaningfully between consent and acquiescence, especially between implied consent and acquiescence. In situations where these terms are interchangeable, the notion of acquiescence would be subject to the same drawbacks as that of consent. However, some writers have attempted to expand the notion of acquiescence to cover situations falling short of implied consent. MacGibbon, cited at the beginning of this chapter, defines acquiescence as "silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection."²¹ This formula is ambiguous; although it embraces certain clear situations which indeed "call for" an expression of protest (for

instance, an attack on an embassy abroad), in many other situations 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 Moscow Test Ban Treaty which most states have signed, yet only a few states have formally protested France's actions.²² Their silence may be attributable not to acquiescence, but rather to a realistic political assessment that a diplomatic protest would not deter France in the slightest and might only serve to worsen relations with France. On the other hand, situations may exist where a state has issued 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 and confiscates a foreign-owned mining company that has paid below-par salaries to local workers and has 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 nevertheless "let it be understood" informally that it is sympathetic with the act of expropriation. From these and many other possible situations, no warrant exists for assuming that a state's silence or failure to protest is the equivalent of acquiescence. This conclusion, furthermore, is evident from the situations MacGibbon himself cites. His examples prove at most that there was non-acquiescence when a state protested; they do not prove the converse, that discrete circumstances might be defined which "call for" protest.²³ For except in certain clear situations where states normally protest certain types of acts, one can hardly say that protest is "called for" by the circumstances, and indeed nearly impossible--since there is no history of protests--to say it in a situation that might be creative of a new rule of international law or a change in the old. In sum, MacGibbon's definition and use of the concept of "acquiescence" amounts to finding acquiescence whenever states are silent; but 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: 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 for the emergence of a customary rule of law, cited in the first chapter, was the necessity of "general acquiescence in the practice by other States."²⁴ Similarly, Judge Fitzmaurice's statement on consent, cited at the beginning of this chapter, discussed the element of consent "in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law."²⁵ These writers very evidently have in mind 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 from 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 practices 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 have been explicitly "acquiesced in" by most 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 manifest the practices of states in their use of international

legal techniques in claim-conflict situations. Thus, to condition the validity of primary rules upon the "acquiescence" of other states is somewhat misleading, 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. The concepts of consent and acquiescence therefore tend to become superfluous when they concern general community attitudes. To say that the body 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 writing the passage previously cited. As Special Rapporteur to the International Law Commission's study on treaties, he wrote that "all States can be deemed to consent" to rules embodied in treaties when such rules gain general currency in international customary law.²⁶ By thus *imputing* consent to the states, Fitzmaurice attests to its analytic uselessness.

But despite all the analytical difficulties involved in the 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, has 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 went even further 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 attests to the psychological importance people attach to the idea of consent. In international litigation, the attempt is invariably made to find some 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 remark by one foreign minister to another was given critical importance in establishing one country's consent to the other's sovereignty in Greenland.²⁷ But the frequency of recourse to arguments about prior consent does not establish the necessity of proving consent in each alleged instance of a customary rule; rather it illustrates the psychological importance of consent with respect to *some* rules and/or to the international legal system as a whole that reinforces the authoritativeness of *any* customary rule.

Estoppel

In the preceding section it was argued that failure to protest does not necessarily amount to acquiescence. If this statement is accepted, the question of acquiescence may nevertheless be placed to one side, and focus placed instead upon the issue of failure to protest. In brief, the argument would run that a state's failure to protest *estops* it to protest a similar rule in the future. A state thus estopped is effectively bound by that rule. Indeed, this process might explain why custom works, as Zdenek Slouka concluded in a recent study entitled *International Custom and the Continental Shelf*.²⁸ His reasoning warrants close examination.

In analyzing the concept of estoppel as it might operate in the formation of customary

international law, we should look at its essential 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 on question must have been addressed specifically to the party relying upon it.²⁹ But clearly international law would not appropriate all the trappings of legal concepts that are found in some or many domestic legal systems; 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 such as custom, we should not get sidetracked by preconceptions derived from domestic law. Slouka uses the term "estoppel" to mean that if a state gives the impression of going along with a certain practice or rule, perhaps by not protesting against it when the state could have done so conveniently, that state should not be allowed later to disavow the practice or the rule. Unfortunately, he did not fully develop the concept of estoppel in this work, 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.³⁰ So that we can examine his argument on its merits, let us assume that "estoppel" roughly means an "expectation-reliance complex."

One additional terminology point needs mention. Numerous cases deal with the acquisition of prescriptive rights, both in domestic and in international law, where failure to protest is a 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 from these specific cases, and unworthy even of a caveat, except that MacGibbon has made extensive use of the term "estoppel" in these cases and implied that his reasoning was applicable to customary international law in general.³¹ 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.

The salient feature of Slouka's analysis is that the concept of estoppel is a thorough, relativistic substitute for the notion of a general customary law. Slouka never *proves* the non-existence of general law; instead, he assumes that international legal relationships are made up of many 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."³² But we should not rest on the observations that Slouka has assumed: 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.

Slouka's main reasoning concerns three hypothetical cases which might have arisen in the early 1950's and which, had they arisen, would have tested the legal validity of competing claims relating to the continental shelf. In the first of these, the *United States vs. Great Britain*, an American oil company is supposed to have been engaged in the exploration and exploitation of oil on the outer submarine areas adjacent to Abu Dhabi, a British protectorate whose sheikh had proclaimed in 1949 his exclusive jurisdiction and control over those submarine areas. The oil company decides not to pay Great Britain for exploitation rights, and the United States espouses

the company's claim for nonpayment. What legal arguments could the United States use? 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.³³ Moreover, by 1953--assuming this hypothetical case arises then--the United States had implemented its continental shelf policy by administrative practices involving over sixty governmental agencies and by various legislative decrees. These moves by the United States government, Slouka argues, had 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. Additionally, by 1953 a British oil company in fact was engaged in its own exploitation activities on the continental shelf off Abu Dhabi; 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 terms and spirit of reciprocity in the 1945 Truman Proclamation, which contained generalizable 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, the British oil company engaged in exploitation off Abu Dhabi probably relied upon the Truman Proclamation's apparent disavowal of *res nullius*, and this action operates to estop the United States' claim off the coast of Abu Dhabi.

Although Slouka has attempted with admirable specificity to indicate how "custom" works in practice, several difficulties remain. First, a claim by the United States in apparent contradiction to the Truman Proclamation of 1945 would not "expressly revoke" the latter; no such concept of express revocation exists 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 a "spirit of reciprocity" in the Proclamation would have been pure salesmanship. At best, Slouka's 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; that they first built plants in the United States does not estop the United States to attempt to protect their foreign plants from confiscation.

Third, we must not forget that the American oil company in Slouka's hypothetical case was already established off the coast of Abu Dhabi and engaged in the exploration and exploitation of oil. Great Britain, then, did not prevent the establishment of the drilling rigs. What reliance interest, therefore, does Great Britain have? It expects to be paid for the exploitation, but this expectation 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 Slouka's analysis is that it proceeds on the assumptions that either a *res communis* or a *res nullius* position are relevant alternatives. But these concepts introduce general international law into what Slouka had attempted to keep as a pure bilateral situation. 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. But why could not the United States adopt the completely relativistic position that there are no general legal alternatives, that there are only specific situations, in one of which the United States owns its own continental shelf, whereas 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 necessarily illegal if analyzed in the vacuum of a purely bilateral approach to international customary law.

Some or all of these difficulties may have led Slouka to formulate a second hypothetical case, Great Britain vs. Japan. The facts are the same as in the first, 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 (Japan has no easily exploitable "shelf" of its own). Given this change of facts, no estoppel can be found that might be based on Japan's positive acts. Yet, asks Slouka, could Japan be estopped by its failure to protest 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, Slouka states that Japan would have the better of this argument by pointing out that four years is an insufficient lapse of time 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, and therefore Japan would need an argument to clinch its case. Such an argument would be the allegation that there exists a general positive rule relating to the continental shelf in international law—either the rule of *res communis*, or that of *res nullius*. But as soon as these concepts emerge, we find ourselves once again in the realm of general customary law and out of the purely bilateral relationship posited by Slouka, as he in this instance admits.³⁴

In order to test whether any such general rule exists, Slouka invents another hypothetical case arising in 1953—Norway vs. 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, Slouka posits that France in 1953 would not have officially

acknowledged the existence of the rig. However, Norway too had taken such a position on the nonexistence of a general rule of customary international law on continental shelves. Now the question was 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. Slouka answers his question in the negative: "By its own continental shelf policy, Norway was estopped *vis-à-vis* France--a country maintaining a similar stand--to claim French negligence."³⁵

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 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.³⁶ Even if we are willing to assume, along with Slouka, that Norway's expressed attitude in 1958 accurately reflects its unstated attitude in 1953 why would such an attitude 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. And, as a more general point, when a state expresses an opinion on the nonexistence of a general customary rule, it is not effectively barred under international practice from making specific claims which might be inconsistent with the general opinion. For the state might plead that it incorrectly stated the nonexistence 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, how could Norway's *unstated* attitude in have been relied upon by France? Neither France nor Slouka could have known prior to 1958 what the Norwegian attitude was. Moreover, may we reasonably 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 Slouka in this instance, for he assumes that real-life conditions do 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 had 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 the price that France might have to pay to Norway for the damage of 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.

The difficulty with Slouka's use of hypothetical cases to demonstrate an expectation-reliance complex is thus 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 demonstrated that up through the 1958 Geneva Convention on the Continental Shelf not a single state--not even Japan³⁷--had protested any of the claims to the continental shelves 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.³⁸

Nevertheless, one might well ask how the uniformity of state practice just described came about if not by the estoppel process illustrated in 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.³⁹ The uniformity of state practice would thus have manifested 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 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."⁴⁰ 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 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 Slouka are easily resolved. Great Britain would prevail in the first two cases, 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 even if no special bilateral relationships could be found between such states and Great Britain; indeed, Slouka's second case involving Japan and Great Britain proves the nonexistence of any special bilateral relationship. In the third case, Norway would not have been estopped to institute a claim against France, and indeed France might have welcomed a claim based on a general rule of customary law giving France exclusive jurisdiction and control over the adjacent continental shelf.

Nevertheless, the question still remains *how* the general customary rule of adjacent state rights to the continental shelf arose in the first place. In 1950 Lauterpacht used a variety of arguments to support this rule, including, interestingly, the idea of "estoppel" linked with a "failure to protest."⁴¹ For Lauterpacht's basic difficulty was to discover how a state's unilateral declaration, such as the Truman Proclamation of 1945, could result in the formation of a general rule of customary law when publicists almost unanimously agree 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 exists when the case is one of acquisitive prescription. Then a unilateral declaration is a claim of ownership; in particular, with respect to the continental shelf, it may be the only feasible symbolic act⁴² 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 of the state making the unilateral declaratory claim. In this line of reasoning, the role of protest is significant; the outcome, however, 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 of states to protest a few

unilateral declarations by some states claiming exclusive rights in continental shelves constituted an acknowledgment of a general customary rule to that effect. 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 the Atlantic Ocean? Must the other states protest such a claim in order to defeat it? Lauterpacht did not want to go this far; he wrote 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 other states need not protest it. He mentioned 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.⁴³ 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 in this regard. 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 noncommunist 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 argued? Or might it demonstrate the claims' patent illegality in light of the fact that they involved vast underseas areas which some writers had previously thought were not at all subject to national appropriation?⁴⁴ 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 few 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.⁴⁵ However, there are 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 expresses a state's intention to commit such a breach. The state may not intend to implement its declaration, which it may have made, for example, for bargaining purposes, in order later to settle for an advantageous compromise. Even if the state intends to implement the claim, it may later change issuance of notes of protest whenever a questionable unilateral claim is promulgated. Although some states at times issue declarations of intent not to abide by sweeping claims made by foreign states, usually such claims are politely ignored. Richard Bilder's account of the activities of the office of legal adviser to the Department of State does not even mention a function of reacting to unilateral declarations of other states; protests are normally actuated upon the application of aggrieved persons or corporations.⁴⁶ Protests would often be ineffective and hence are not made, or they may be issued for "face-saving" reasons that in fact acknowledge an unwillingness to object more effectively (see chapter 4). Notes of protest indicate a *failure* of diplomacy by other means. States reacting to unilateral declarations do not usually resort to these notes, although Lauterpacht suggests that they do. Indeed, what are the "numerous examples" of protest in international law cited by Lauterpacht? He cites only five, four of them arbitrations and two out of the four involving *prescription*. Additionally he cites an example involving an alleged breach

of neutrality, and indirectly (by citing Oppenheim's treatise) refers to a few incidents of protests relating to violation of rules of warfare.⁴⁷ 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. No frequency statistics on the use of notes of protest are available. No evidence exists indicating that protests might have been made in a given percentage of cases, or that a certain percentage was actually made in those cases. Scholars have perhaps made too big an issue of diplomatic protests; in the world of politics, foreign offices do not consider it their business to antagonize other governments by issuing notes of protest. This would be particularly likely if the potential protesting state is not immediately affected by the other's behavior (when, for instance, the behavior is an unimplemented unilateral declaration). It seems 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.

Apart from "estoppel" and "failure to protest," Lauterpacht's article gives a traditional and sensible explanation, based on state practice including treaties, of how the customary rule relating to the continental shelf arose. The preceding analysis has attempted only to show the inadequacy of the idea of estoppel in explaining the workings of international custom. Nevertheless, estoppel and failure to protest may direct attention to the operative features of custom. First, Slouka's initial hypothetical case may have been his most persuasive because the United States had acted administratively to implement the Truman Proclamation and a British oil company had set up a rig off Abu Dhabi. Tangible acts were in evidence, not merely unilateral declarations. In his other cases, "estoppel" was harder to find because the cases rested on unilateral declarations which the issuing states might decide never to implement. Since a declaring state is not "bound" by its own unilateral declaration, other states can never be certain whether to rely upon it. One can hardly see how unilateral declarations, even in series, can themselves constitute customary international law. Although Slouka's first case involved a unilateral declaration—the Truman Proclamation—the facts of the case suggest that Great Britain may have relied less upon the proclamation itself than upon its administrative and legislative implementation by the various agencies. Accordingly, the concept of estoppel may help us focus on the physical actions of states as opposed to their statements of intent and in this sense may come close to the notion of "precedents" suggested in the preceding chapter. Secondly, *if* the actions of a state establish a "precedent," the notion of "estoppel" certainly reinforces the sense of bindingness or authoritative nature of the incipient customary rule. Of course the idea of estoppel cannot tell us *which* acts by states may have customary international law implications, but psychologically it may help reinforce the legitimacy of the custom-generation process.

Reasonableness

As some writers tried to make consent or estoppel the sole explanatory basis for their concepts of customary law, Myres McDougal has attempted to assign to the notion 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."⁴⁸ One of course should not take this statement too literally. Presumably 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 seem to reiterate the claim that all decisions are reasonable. Nevertheless, he does apparently equate his conception of reasonableness with the traditional concept of custom in international law. By "international custom" 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."⁴⁹ 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 appears so often in McDougal's writings. But here McDougal is perhaps purposefully broad as he views "custom" as only one, even if it is the most basic, of a number of "past communications" to which national decision-makers may turn for guides to policy-making and indicators of relevant community expectations.⁵⁰

In the course of his writings, McDougal makes a number of arguments for "reasonableness" as the authoritative guide to the prescriptive requirements of international custom. Some contentions are purely descriptive of international claim-conflicts, such as the concepts of reciprocity, retaliation, and *dédoublement fonctionnel*. As such, they do not prove McDougal's case for reasonableness. For although competing claims are often settled by "mutual tolerances" based on expectations of reciprocity or fear of retaliation, 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 nonexistent (e.g., the United States has a continental shelf but Japan does not), or the mutual toleration may place the interests of the immediately affected parties ahead of larger community interests. In addition, the idea of *dédoublement 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"⁵¹ does not assure that the officials will gradually become fairer and more reasonable by moderating their own country's claims and meeting external claims half-way. Many officials simply become more hardened in a "my country, right or wrong" attitude.

Apart from the description of claim-conflict behavior, 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."⁵² 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 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 proliferation of national airlines operating over international air routes. "Among all the stultifying ingredients of egocentric aerial nationalism," McDougal observes, "this has probably been the most irrational."⁵³ 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, McDougal finds the inclusion of the "genuine link" theory in Article 5 of the Geneva Convention on the High Seas as "drastic," "misconceived," "uneconomic," "positively dangerous," and "unnecessary."⁵⁴ Yet because the convention resulted from the consensus and mutual toleration of many national views as perceived by lawyers and national representatives, one might suspect that what is "reasonable" to McDougal may not be so to the

international claimants whose views he is purporting to describe.

This leads to McDougal's second interpretive argument: international claimants share a certain set of values, identified in Lasswellian terms as security, wealth, respect, enlightenment, well-being, affection, and rectitude.⁵⁵ One can only wish that this neo-*philosophe* position were true. But as Robert Woetzel has observed, "policy-oriented approaches with other goals than human dignity, such as Marxism-Leninism," produce different results and would "vitate expectations of reciprocity in terms of general rules governing all mankind."⁵⁶ Moreover, if the Lasswellian values were universally shared, then the arguments of the chief interpreter of those values, McDougal, would also be universally accepted. But even a Western observer, Richard Falk, has found unpersuasive McDougal's briefs supporting of "the legality of the use of force by Western states in cold war contexts."⁵⁷

The root of the problem may involve an age-old device of political philosophers who, to add to their own persuasiveness, claim that the behavioral norms they set forth are in fact obeyed 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 that nothing the reader may do will derail what the writer perceives as historically inevitable. So too 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? McDougal would consign such men to the extra-legal world, much 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 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. Writing on hydrogen-bomb testing for instance, McDougal found no need to persuade the United States that the tests were legal since the United States claimed that they were.⁵⁸ But did he succeed in persuading the Soviet Union and other states who did not agree with the claim of the United States and probably also did not agree with the Lasswellian values?

There are even greater problems in attempting to specify exactly where the values--assuming they are shared--point in concrete cases. Does the value of "wealth" mean that a country, to increase the "wealth" of its people, may expropriate without compensation the assets of aliens doing business in that country, 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 gain respect if it displays its armed might abroad, or does it gain respect if it refrains from using its military power? Indeed, should we 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 definitely increase Asian "respect" for Old Glory? If such a finding could be established by statistical techniques, would 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 would indeed increase if their solution appeared to

depend upon the definition of incompatible values.

McDougal's third argument--the complementarity of customary prescriptions--shares some of these difficulties. He contends that rules of custom come often in paired opposites, thus affording wide discretion to the policy maker. Although 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 "reasonableness," that might put some meaningful content into international law. Thus it is important to trace McDougal's contention in some detail.

In his essay on the hydrogen bomb tests, 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. 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 is that of exclusive jurisdiction, comprising "a wide variety of technical terms such as 'territorial sea,' 'contiguous zones,' 'jurisdiction,' 'continental shelf,'" and so forth. Out of the dialectics of these antithetical prescriptions, 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." The hydrogen bomb tests, in McDougal's view, were "reasonable, and hence lawful."⁵⁹

The apparatus of complementary prescriptions has one serious drawback--it proves too much. If national decision-makers are actually subject to complementary prescriptions, they have unfettered discretion to do whatever they desire. Hopefully they will be "reasonable" and perhaps espouse McDougal's values, but in fact they may often do what they feel is "reasonable" and what McDougal would describe as irrational. Of course, if by his doctrine of complementary prescriptions 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. 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.⁶⁰ 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 fishing jurisdictions. As 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 claim 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 would have been 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."⁶¹

A second, more basic fault of the doctrine of complementary prescriptions is its focus upon rationalization rather than 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. Whereas a proper quantitative focus upon the acts (or omissions) of states sharpens the characterization of customary legal rules, a shift to a subjective notion of complementarity tends to enable any nation to justify anything. Moreover, McDougal unnecessarily complicates the concept of custom by looking at the rationalizations of decision-makers in terms of their interests rather than at the conduct itself. 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 those as vague and all-inclusive as "security," one of McDougal's choice nominees) for anything that their client states want to do. And 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. And we should not be further surprised to find each side asserting that its view of the matter is the only "reasonable" one.

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 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," and 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, not in the concrete sense relevant to the hydrogen bomb tests. If they *were* relevant, then one might equally well cite *mare liberum* as either an excuse for violating *aer clausus* or a reason for not doing so.

McDougal much more persuasively cites "naval maneuvers, military exercises, and other peacetime defensive activities" in support of the hydrogen-bomb tests.⁶² For these have been conducted on the high seas and constitute a real precedent for larger testing programs. Similarly, they indicate the compatibility of highly temporary exclusive appropriations of portions of the high seas with the norm of freedom of the seas. They also indicate the importance of establishing clear warning zones in areas off the main navigational and fishing routes. However, McDougal

mentions these precedents only in passing, without devoting much analysis to them. Even so, they are clear examples of customary practice that strongly support the conclusion McDougal reaches that the specific United States tests as conducted were legal.

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. An example is McDougal's analysis of the laws of warfare, which he finds fall between the complementary policies of military necessity and humanitarianism.⁶³ This example is especially instructive because McDougal synthesizes the complementary prescriptions in the generalization that warfare must be conducted so that there is a "minimum destruction of values."⁶⁴

Although 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, he never clarifies how instances could be resolved when belligerents disagree over the weights they might assign to their values. What to the outside observer (who is not privy to many of the critical facts) might seem a squandering of military power to the belligerent might appear an attempt to end the war sooner by a terrorization of the opponent. Indeed, 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."⁶⁵ So too, a belligerent might decide that express violation of the rules of warfare laid down by the Geneva Conventions or accepted in general practice might terrorize the opponent; in that instance, McDougal's overriding value justification for military conduct might contravene any and all rules of warfare, including customary rules and those rules McDougal himself accepts. It is significant that in his work of over 800 pages on the laws of war, McDougal mentions only once, in a footnote, the atomic bombing of Hiroshima and Nagasaki; he does so without relating the bombing to his analysis and concludes only that it is a "difficult" example.⁶⁶ From the American point of view, these bombings were clearly necessary to promote in the long run the "minimum destruction of values" by bringing the war to a quick conclusion. Yet can an impartial observer, applying 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 uninhabited 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 such a standard as McDougal's 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 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."⁶⁷

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 the decision to disobey them was made with some calculations 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 theater 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 McDougal's volume on the law of war. He cites memoranda prepared by the German Wehrmacht at the last stage of World War II on a proposal that Germany denounce its international obligations concerning the conduct of the war. The Wehrmacht's conclusion was that there should be no denunciation on the following grounds:

- (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.)⁶⁸

Although McDougal cites this document to demonstrate "compelling testimony to the effectiveness of the sanction of self-interest," clearly one cannot distinguish rules of international law on the basis of the observer's calculation of the states' self-interest. If international law were not based upon the self-interest of states 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. Obviously 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; it would have been intended to signal 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 without an official denunciation. The Wehrmacht's conclusion that, by such a denunciation, "Germany will by no means free herself from this essential obligation of the laws of war," is highly significant.⁶⁹ It attests the power not only of the rules of warfare but also 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, advice that was shaped by the psychological pressure of the traditional rules of warfare.

Admittedly many of these traditional rules are vague and need updating. But they do not seem nearly so vague as McDougal's suggested standard of the "minimum destruction of values," nor so limitlessly broad as his notion of complementary prescriptions.

Despite these objections to McDougal's arguments for "reasonableness" as the central ordering factor in customary law, in an important sense reasonableness does reinforce custom's authority. For nearly all acts that states undertake seem reasonable to the actors. If these same acts are later cited as precedents for rules of customary law, then such citation is enhanced by the

feeling of reasonableness that invested the constitutive acts. Like the notions of consent and estoppel, the objective reasonableness of some acts and the subjective reasonableness (from the actors' standpoint) of *all* acts combine and transfer their aura to all the constitutive data of custom, thus increasing the sense of legality of the system of rules that states accept as part of "customary international law."

Footnotes to Chapter 7

- 1 Lauterpacht, "Decisions of Municipal Courts as a Source of International Law," 10 *B.Y.I.L.* 65, 83 (1929).
- 2 For a modern restatement of this position, see Corbett, "The Consent of States and the sources of the Law of Nations," 6 *B.Y.I.L.* 20, 22-25 (1925).
- 3 Lissitzyn, *International Law Today and Tomorrow* 55 (1965).
- 4 Tunkin, "Co-Existence and International Law," 95 *Recueil des Cours* 3, 13 (1958).
- 5 MacGibbon, "Customary International Law and Acquiescence," 33 *B.Y.I.L.* 115, 131 (1957).
- 6 Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 *B.Y.I.L.* 1, 68 (1953).
- 7 Lotus Case, P.C.I.J. Rep., Ser. A, No. 10, at 4, 18 (1927).
- 8 Jaffe, *Judicial Aspects of Foreign Relations* 90 (1933).
- 9 Lotus Case, *op. cit. supra* n. 7, at 28-29 (listing cases).
- 10 Lauterpacht, *Private Law Sources and Analogies of International Law* 53 (1927).
- 11 Waldock, "General Course on Public International Law" 106 *Recueil des Cours* 1, 52 (1962).
- 12 Lissitzyn, *op. cit. supra* n. 3, at 73-89.
- 13 *Id.* at 103.
- 14 Waldock, *op. cit. supra* n. 11, at 52.
- 15 Bishop, "General Course of Public International Law," 115 *Recueil des Cours* 151, 463 (1965).
- 16 Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," 49 *Calif. L. Rev.* 419, 428 (1961).
- 17 Kelsen, *Principles of International Law* 114 (2nd ed. Tucker 1966).
- 18 Lissitzyn, *op. cit. supra* n. 3, at 10.
- 19 Reservations to the Genocide Convention, Advisory Opinion 1951 I.C.J. Rep. 15.
- 20 Falk, *The Role of Domestic Courts in the International Legal Order* 171 (1964).
- 21 MacGibbon, "The Scope of Acquiescence in International Law," 30 *B.Y.I.L.* 143 (1954).
- 22 See D'Amato, "Legal Aspects of the French Nuclear Tests," 6 *A.J.I.L.* 66-67, 76 (1967)
- 23 See MacGibbon, *op. cit. supra* nn. 5, 21; MacGibbon, "Some Observations on the Part of Protest in International Law," 29 *B.Y.I.L.* 293 (1953).
- 24 2 Int'l Law Comm'n, *Yearbook* 26 (1950).
- 25 Fitzmaurice, *op. cit. supra* n. 6, at 68.
- 26 2 Int'l Law Comm'n, *Yearbook* 73 (1960).
- 27 Legal Status of Eastern Greenland, P.C.I.J. Rep., Ser. A/B, No. 53, at 22, 57-58 (1933).

- 28 Slouka, *International Custom and the Continental Shelf* (1968).
- 29 McNair, "The Legality of the Occupation of the Ruhr," 5 *B.Y.I.L.* 17, 31-37 (1924); Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence," 33 *B.Y.I.L.* 176 (1957).
- 30 Letter from Dr. Zdenek Slouka to the author, Jan. 27, 1967.
- 31 See MacGibbon, *op. cit. supra* n. 21; MacGibbon, "Estoppel in International Law," 7 *Int'l & Comp. L.Q.* 486 (1958).
- 32 Slouka, *op. cit. supra* n. 28, at 174.
- 33 United States Proclamation, 10 Fed. Reg. 12303 (Sept. 28, 1945).
- 34 Slouka, *op. cit. supra* n. 28, at 146.
- 35 *Id.* at 152.
- 36 *Id.* at 150. However, Slouka seemingly overlooked the significant item (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 43 n.7.
- 37 *Id.* at 27 n.86.
- 38 *Id.* at 162.
- 39 Lauterpacht, "Sovereignty Over Submarine Areas," 27 *B.Y.I.L.* 376 (1950).
- 40 Slouka, *op. cit. supra* n. 28, at 164.
- 41 Lauterpacht, *op. cit. supra* n. 39, at 395-98.
- 42 Cf. Keller, Lissitzyn, & Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* (1938).
- 43 Lauterpacht, *op. cit. supra* n. 39, at 397-98.
- 44 For a review of the literature, see Johnson, "Acquisitive Prescription in International Law," 27 *B.Y.I.L.* 332 (1950).
- 45 Lauterpacht, *op. cit. supra* n. 39, at 397.
- 46 Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs," 56 *A.J.I.L.* 633, 660 (1962).
- 47 Lauterpacht, *op. cit. supra* n. 39, at 397 nn.1, 2.
- 48 McDougal *et al.*, *Studies in World Public Order* 778 (1960).
- 49 McDougal, Lasswell, & Vlasic, *Law and Public Order in Space* 116 (1963).
- 50 *Id.* at 115.
- 51 McDougal, *op. cit. supra* n. 48, at 774.
- 52 *Id.* at 776.
- 53 McDougal, Lasswell, & Vlasic, *op. cit. supra* n. 49, at 252.
- 54 McDougal & Burke, *The Public Order of the Oceans* 1023-24 (1962).
- 55 McDougal, *op. cit. supra* n. 48, at 32-36.
- 56 Woetzel, "Review of McDougal, Lasswell, & Vlasic, *Law and Public Order in Space*," 61 *A.J.I.L.* 626, 628 (1967).
- 57 Falk, "International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal," 59 *A.J.I.L.* 66, 67 (1965).
- 58 McDougal, *op. cit. supra* n. 48, at 773, 776, 797-843.
- 59 *Id.* at 778, 779, 797-843.
- 60 McDougal does not include ecological values, such as damage to the marine

environment, affecting all mankind. For a discussion of some of these factors see D'Amato, *op. cit. supra* n. 22, at 75-76.

61 The pressure of the "freedom of the seas" norm and of other norms, primarily those of Article 2 paragraph 4 of the United Nations 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 lawyers in top policy-making circles to shape the policy away from a pre-emptive strike on Cuban territory to the one actually followed--the searching of only Soviet ships for missiles and not any other ships for any other purposes. Similarly the pressure of international law, among other factors, may have helped minimize the American military invasion of Cambodia in the spring of 1970. Although in one sense the invasion literally violated certain norms of international law, these and other international norms may have exerted a pressure upon United States policy resulting in the territorial and temporal limitations that were actually observed by American forces.

62 McDougal, *op. cit. supra* n. 48, at 774.

63 McDougal & Feliciano, *Law and Minimum World Public Order* 71 (1961). A more accurate dichotomy would appear to be the one given by Wright, not cited by 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).

64 McDougal & Feliciano, *op. cit. supra* n. 63, at 59.

65 *Id.* at 80 n. 195.

66 *Id.* at 74 n.178.

67 *Id.* at 57. 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 follow-up bombing of Nagasaki which had no military justification and was not needed, after Hiroshima, to "demonstrate" the efficacy of the new weapon. *Cf.* D'Amato, Gould & Woods, "War Crimes and Vietnam: The 'Nuremburg Defense' and the Military Service Resister," *57 Calif. L. Rev.* 1055, 1081-84 (1969).

68 McDougal & Feliciano, *op. cit. supra* n. 63, at 54-55.

69 *Ibid.*