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LEGAL IMPERATIVE?
DECONSTRUCTING ACQUIESCENCE IN FREEDOM OF
NAVIGATION OPERATIONS

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For over 30 years, the United States has conducted freedom of navigation operations (“FONOPs”) in protest of excessive maritime claims by states around the globe. As tensions surrounding the maritime disputes in the South China Sea have escalated, so too has attention on these previously subtle military operations. Yet, despite that attention, the legal rationale posited by the United States as to why FONOPs are necessary as a matter of international law has largely escaped critical examination. In exploring the international law of protest and the principle of acquiescence, this paper concludes that the argument in favor of FONOPs as a legal imperative is unpersuasive and that the United States would be well-served to uncouple these military operations from the international law of protest.

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INTRODUCTION

On October 27, 2015, the U.S. Navy engaged in a much-anticipated “freedom of navigation operation” (“FONOP”) near disputed maritime features in the South China Sea (“SCS”).¹ This FONOP involved the USS *Lassen* (DDG-82), a guided missile destroyer, sailing within 12 nautical miles of Subi Reef,² a feature that, in its natural state, is totally submerged at high tide.³ According to

¹ Ben Blanchard & Andrea Shalal, *Angry China Shadows U.S. Warship Near Man-Made Islands*, REUTERS (Oct. 27, 2015, 7:21 PM), <http://www.reuters.com/article/2015/10/27/us-southchinasea-usa-idUSKCN0SK2AC20151027>. The “Freedom of Navigation Program” exercised by the United States will be explained *infra* pp. 2-4.

² Sam LaGrone, *U.S. Destroyer Comes Within 12 Nautical Miles of Chinese South China Sea Artificial Island, Beijing Threatens Response*, U.S. NAVAL INST. NEWS (Oct. 27, 2015, 8:09 AM), <http://news.usni.org/2015/10/27/u-s-destroyer-comes-within-12-nautical-miles-of-chinese-south-china-sea-artificial-island-beijing-threatens-response>.

³ *Subi Reef Tracker*, ASIA MAR. TRANSPARENCY INITIATIVE, <http://amti.csis.org/subi-reef-tracker> (last visited Feb. 11, 2017).

U.S. officials, this operation was intended to reinforce the navigational freedoms guaranteed to all states by international law.⁴

China responded strongly to the *Lassen* FONOP. Labeling it a “severe political provocation,”⁵ China asserted that the operation represented a violation of international and Chinese law that “threatened China’s sovereignty and security interests, put the personnel and facilities on the islands and reefs at risk and endangered regional peace and stability.”⁶ Statements from the Chinese government indicated that it was prepared to “take any measures necessary to safeguard” the security interests it claims in the disputed features and waters of the SCS.⁷ The United States has followed its *Lassen* FONOP with several more in the SCS in the last year, often challenging different Chinese claims in the region – all of which were met with reprobation by the Chinese government.⁸

⁴ Eric Schultz, Deputy Press Secretary for The White House, Remarks at Press Gaggle Aboard Air Force One (Oct. 27, 2015, 12:38 PM), <https://www.whitehouse.gov/the-press-office/2015/10/27/press-gaggle-principal-deputy-press-secretary-eric-schultz-en-route> (stating that “freedom of navigation operations serve to protect the rights, freedoms, and lawful uses of the sea and airspace guaranteed to all nations under international law. Our freedom of navigation operations do not assert any special U.S.-specific rights.”).

⁵ *Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Oct. 28, 2015), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1309900.shtml.

⁶ *Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Oct. 27, 2015), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1309625.shtml.

⁷ Tom Phillips, *South China Sea: Beijing “not frightened to fight a war” after US move*, THE GUARDIAN (Oct. 28, 2015, 3:16 PM), <http://www.theguardian.com/world/2015/oct/28/china-not-frightened-fight-war-south-china-sea-uss-lassen> (quoting an official from the Chinese Ministry of Defense).

⁸ See Ridzwan Rahmat, *Beijing Vows to Increase South China Sea Presence after USN’s Latest FONOP*, IHS JANE’S DEFENCE WEEKLY (May 12, 2016), <http://www.janes.com/article/60213/beijing-vows-to-increase-south-china-sea-presence-after-usn-s-latest-fonop>.

Since 1979, the United States government has maintained a “Freedom of Navigation” (“FON”) program.⁹ This program aims to dispute the maritime claims of other states that the United States has determined to exceed the state’s entitlement under international law and it consists of both diplomatic and physical protests, like that of the *Lassen*.¹⁰ These physical assertions, often referred to as “freedom of navigation operations” or FONOPs, are carried out both on and above the oceans by the U.S. Navy and U.S. Air Force.¹¹

The legal premise most often advanced for FONOPs is that physical objections are necessary to avoid “acquiescence” in these excessive maritime claims.¹² For example, the U.S. Navy’s Commander’s Handbook on the Law of Naval Operations states:

When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace.¹³

In other words, the United States believes that diplomatic protests alone are insufficient to preserve its objection to the claim at

⁹ William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 68 INT’L. STUD. 243, 244 (1993).

¹⁰ The U.S. Government refers to these claims as “excessive maritime claims.” See generally U.S. DEP’T OF STATE, LIMITS IN THE SEAS, NO. 112, UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS (Mar. 9, 1992).

¹¹ Jonathan G. Odom, *How the U.S. FON Program is Lawful and Legitimate*, ASIA MAR. TRANSPARENCY INITIATIVE (Oct. 30, 2015), <http://amti.csis.org/how-the-u-s-fon-program-is-lawful-and-legitimate>.

¹² *Id.* U.S. DEP’T OF NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, at 2-14 (July 2007), http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf [hereinafter COMMANDER’S HANDBOOK].

¹³ COMMANDER’S HANDBOOK, *supra* note 12.

issue, and that physical assertions in contravention of the claimed water and airspace are necessary to truly preserve the legal objection.

While commentators have questioned the use of FONOPs, those criticisms have generally focused on perceived political and strategic shortfalls in the program.¹⁴ Most notably, critics charge that FONOPs can be unnecessarily provocative because they involve military assets operating in areas over which another state asserts disputed rights.¹⁵ But critiques of the legal merits of FONOPs are uncommon and do not examine the principle of acquiescence in public international law as a justification for the program.

In an effort to fill this gap, this paper will explore the relationship between FONOPs and acquiescence, and critique the reliance on the latter as a basis for the former. In doing so, it will consider to what extent failing to engage in physical protests of excessive maritime claims risks acquiescing to those perceived violations of international norms, and the role of physical protests in the development of customary norms. It will also consider the effectiveness of physical protests in bringing states into conformity with international norms.

Part I will review the history of the FON program and the legal justification advanced for the program. Part II will consider the principle of acquiescence in international law, its treatment by international tribunals, and its significance for the development of customary international law. Part III will consider the legal significance of FONOPs in light of the discussion of acquiescence and will also empirically examine the success of FONOPs in altering the challenged excessive claims. Ultimately, this paper will conclude that

¹⁴ See Sam Bateman, *Why U.S. South China Sea FON Operations Don't Make Sense*, THE DIPLOMAT (Oct. 22, 2015), <http://thediplomat.com/2015/10/why-us-south-china-sea-fon-operations-dont-make-sense>.

¹⁵ *Id.* (labeling FONOPs “deliberate provocations”).

FONOPs are not a legal imperative for the protection of U.S. interests, but rather a strictly political tool for advancing strategic interests, and that characterizing them as a legal imperative undermines their effectiveness and sets an untenable precedent for both maritime and land disputes globally.

I. THE U.S. FREEDOM OF NAVIGATION PROGRAM

The United States has maintained a FON program for over 30 years, beginning with the administration of President Jimmy Carter.¹⁶ President Ronald Reagan formally introduced the FON program in 1982, the same year that the United States first indicated it would not accede to the United Nations Convention on the Law of the Sea (“UNCLOS”).¹⁷ At the time, President Reagan stated that the FON program was designed to “protect U.S. navigation, overflight, and related security interests in the seas through the vigorous exercise of its rights against excessive maritime claims.”¹⁸ The program was renewed by President Reagan in his 1983 Oceans Policy Statement, as well as in a subsequent directive in 1987, and again by President George Bush in 1990, where it was also provided that the Department of Defense (“DOD”) would submit an annual report on the

¹⁶ See *U.S. Department of Defense Freedom of Navigation Program: Fact Sheet*, U.S. DEP’T OF DEF. (Mar. 2015), [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20\(March%202015\).pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf) [hereinafter *U.S. DOD Fact Sheet*].

¹⁷ Nat’l Security Decision Directive No. 72, President Ronald Reagan (Dec. 13, 1982), <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD72.pdf> [hereinafter NSDD No. 72]. This program had been alluded to in an earlier directive from President Reagan in which, in anticipation of UNCLOS not being ratified, he directed the Department of Defense to “review the United States navigation and overflight program focusing on protecting United States rights and directing the practice of states toward the U.S. interpretation of the navigation and overflight provisions of the Law of the Sea Convention.” Nat’l Security Decision Directive No. 43, President Ronald Reagan (July 9, 1982), <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD43.pdf>.

¹⁸ *Id.*

operational assertions that occurred each year.¹⁹ The program is still in operation today.

The FON program generally focuses on maritime claims assessed by the United States to not be in conformance with international law, with specific emphasis on the following categories of excessive claims: historic waters; excessive straight baselines; excessive territorial sea claims and unlawful restrictions on uses of the territorial sea; excessive claims over the uses of waters beyond the territorial sea; and excessive archipelagic claims.²⁰ Early on, the Presidential directives acknowledged a “possibility of damage to bilateral or other relations” resulting from FONOPs. Therefore, the program provided roles for both the DOD and Department of State (“DOS”), with the DOS continuing a parallel process of diplomatic protests of excessive claims.²¹

As such, the FON program includes diplomatic protests, bilateral and multilateral engagements, and the “operational assertions” of FONOPs.²² While the DOS manages the diplomatic process, the DOD manages the operational component of the program

¹⁹ Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983) [hereinafter Oceans Policy]; Proclamation No. 5030, 48 Fed. Reg. 10,601 (1983), reprinted in 16 U.S.C.A. § 1453; Nat’l Security Decision Directive No. 265, President Ronald Reagan (Mar. 16, 1987), <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD265.pdf> [hereinafter NSDD No. 265]; Nat’l Security Decision Directive No. 49, President George Bush (Oct. 12, 1990), <http://fas.org/irp/offdocs/nsd/nsd49.pdf> [hereinafter NSDD No. 49].

²⁰ NSDD No. 72, *supra* note 17.

²¹ *Id.*

²² See James Kraska, *Commentary: Defend Freedom of Navigation*, DEFENSENEWS (June 8, 2015), <http://www.defensenews.com/story/defense/commentary/2015/06/08/defend-freedom-navigation-china-pacific-islands-ships-intercept-sovereignty/28685409/> (stating that “[t]he program contains three elements: military-to-military engagement, official State Department diplomatic demarches, and operational assertions by ships and aircraft into areas purportedly claimed by coastal states”).

and FONOPs.²³ FONOPs generally refer to purposeful military operations by U.S. military ships and aircraft that enter into and conduct maneuvers within areas that are the subject of maritime claims that the United States deems excessive, but they may also include military operations conducted for other purposes that have the indirect result of challenging such maritime claims.²⁴ Examples of FONOPs might include operating an aircraft over an excessive territorial sea claim (overflight rights do not exist beyond the twelve nautical mile territorial sea) or operating a warship in a zone for which the coastal state requires warships to obtain advance permission.²⁵ Although the United States is not a party to UNCLOS, the FON program is linked to the U.S. general acceptance of the navigational rights and freedoms protected in the Convention, and the U.S. interest in exercising them.²⁶

²³ U.S. DOD Fact Sheet, *supra* note 16.

²⁴ See *id.* (stating that “[t]he Program includes both FON operations (i.e., operations that have the primary purpose of challenging excessive maritime claims) and other FON-related activities (i.e., operations that have some other primary purpose, but have a secondary effect of challenging excessive claims), in order to gain efficiencies in a fiscally- constrained environment”).

²⁵ See generally Julian Ku, *The U.S. Navy’s Innocent Passage in the South China Sea May Have Actually Strengthened China’s Sketchy Territorial Claims*, LAWFARE (Nov. 4, 2015, 11:10 AM), <https://www.lawfareblog.com/us-navys-innocent-passage-south-china-sea-may-have-actually-strengthened-chinas-sketchy-territorial> (observing that the launching of a helicopter in a claimed territorial sea could challenge that claim); Raul Pedrozo & James Kraska, *Can’t Anybody Play this Game? US FON Operations and Law of the Sea*, LAWFARE (Nov. 17, 2015, 10:57 AM), <https://www.lawfareblog.com/cant-anybody-play-game-us-fon-operations-and-law-sea> (noting that FON Operations may challenge requirements for advance notice).

²⁶ NSDD No. 265, *supra* note 19 (stating that “the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention”); see also Oceans Policy, *supra* note 19 (stating that “the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states”).

The 1983 Oceans Policy provided the first clear expression of the U.S. position that FONOPs were necessary to avoid “acquiescence” in excessive maritime claims, stating that “the United States will not . . . acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”²⁷ This perspective on acquiescence has continued to appear in U.S. policy statements and scholarly works on the FON program.²⁸ In all of these, the term “acquiescence” clearly suggests that the United States believes that there is an actual risk that its rights will be abridged and norms solidified if it fails to engage in physical protests like FONOPs. In other words, the United States believes that FONOPs represent a legal

²⁷ Oceans Policy, *supra* note 19. This same language was repeated in President Reagan’s 1987 directive and again in President Bush’s 1990 directive. See NSDD No. 265, *supra* note 19; NSDD No. 49, *supra* note 19.

²⁸ See, e.g., U.S. DOD Fact Sheet, *supra* note 16, at 2 (stating that FONOPs “are intended to demonstrate transparently the U.S. non-acquiescence to excessive maritime claims”); DEP’T OF DEF., INSTRUCTION 4540.01: USE OF INTERNATIONAL AIRSPACE BY U.S. MILITARY AIRCRAFT AND FOR MISSILE AND PROJECTILE FIRINGS 2 (2015), <http://www.dtic.mil/whs/directives/corres/pdf/454001p.pdf> (providing that “U.S. military aircraft will not acquiesce in excessive maritime claims by other States, including their claims to airspace, that, if left unchallenged, could limit the rights, freedoms, and lawful uses of airspace recognized in international law”); James Kraska, *The Law of the Sea Convention: A National Security Success – Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT’L L. REV. 543, 569 (2008) (stating that the purpose of the FON program is to “tangibly exhibit the U.S. determination not to acquiesce to coastal states’ excessive maritime claims”); Sean P. Henseler, *Why We Need South China Sea Freedom of Navigation Patrols*, THE DIPLOMAT (Oct. 6, 2015), <http://thediplomat.com/2015/10/why-we-need-south-china-sea-freedom-of-navigation-patrols> (arguing that “[i]f the United States, the only nation that uses military forces to assert freedom of navigation, doesn’t step up and act now, it may well be construed by the Chinese and others that Washington is in effect . . . acquiescing to China’s assertion of sovereignty over their man-made islands”); Dennis Mandsager, *The U.S. Freedom of Navigation Program: Policy, Procedure, and Future*, 72 INT’L L. STUD. 113, 115 (stating that “[i]f maritime nations acquiesce in an excessive claim by failing to exercise their rights, then the claims may eventually be considered to have been accepted as binding law”).

imperative and not just a policy one. But does this accord with the understanding of physical acts and acquiescence in international law?

II. ACQUIESCENCE IN INTERNATIONAL LAW

A. Customary International Law

Customary international law develops through a combination of state practice and a sense of legal obligation, referred to as *opinio juris*.²⁹ Often referred to as the “two-element approach,” “a rule of customary international law may be said to exist where there is ‘a general practice’ that is ‘accepted as law.’”³⁰ Customary international law, as elucidated through general practice and *opinio juris*, is “binding on all States, even new ones and those new to a type of activity, as well as those existing States which played no part in the new custom, neither engaging in the practice concerned nor acquiescing in any real sense.”³¹

Conduct by states in violation of customary international law implicates a number of interests and triggers a number of options for lawful response. A state generally has three possible avenues it can

²⁹ See *Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99, ¶ 55 (Feb. 3) (stating that “in particular ... the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*”); see also, *North Sea Continental Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.)*, Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20) (holding that “two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”).

³⁰ Michael Wood (Special Rapporteur on Identification of Customary International Law), *Second Report on Identification Of Customary International Law*, U.N. Doc. A/CN.4/672 at 7 (May 22, 2014).

³¹ Int’l Law Ass’n, Comm. on the Formation of Customary (Gen.) Int’l Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, at 25 (2000) [hereinafter *Statement of Principles*].

pursue in this regard: recognition, protest, or acquiescence.³² Recognition is defined as “a public acknowledgement by a state of the existence of another state,³³ law, or situation.”³⁴ It may be a unilateral act by the responding state,³⁵ perhaps through a diplomatic statement,³⁶ or a bilateral or even multilateral expression of acceptance of the conduct.³⁷ Such endorsements, even when consisting exclusively of verbal statements, may be considered sufficient evidence of state practice regarding the acceptance of emerging customary norms.³⁸

B. *The Law of Protest*

Conversely, a state may react to an unlawful act with an official protest. In fact, if a state objects to another state’s conduct it

³² See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 143 (8th ed. 2012).

³³ While “recognition” is often associated as a term-of-art with recognizing another entity as a state or another government as the lawful and legitimate government of a state, it is used in a more general sense here to describe affirmative acknowledgement of a state’s conduct. See *id.*

³⁴ Thomas W. Donovan, *Challenges to the Territorial Integrity of Guyana: A Legal Analysis*, 32 GA. J. INT’L & COMP. L. 661, 711 (2004) (citing IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 165 (3d ed. 1979)).

³⁵ CRAWFORD, *supra* note 32.

³⁶ See, e.g., *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 47 (Sept. 5) (holding that the statement by the Foreign Minister of Norway in recognition of Danish sovereignty over Greenland, also known as the “Ihlen Declaration,” constituted recognition of Denmark’s claim under international law).

³⁷ See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 205 (2010) (stating that “if a nation wants to engage in a practice contrary to an established [customary international law] rule, it must either violate the rule or enter into a treaty that overrides the rule as between the parties to the treaty”). Another example of a multilateral expression of acceptance is a declaration from a body of the United Nations, as occurred when the United Nations Security Council reaffirmed the territorial sovereignty and independence of Cyprus. S.C. Res. 355 ¶ 5 (Aug. 1, 1974).

³⁸ *Statement of Principles*, *supra* note 31, at 41.

can be said to have a duty to protest, both to preserve the objection and to put the offending state on notice of the objection.³⁹ A protest is “a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter.”⁴⁰ Protests are generally marked by formality and clarity and, in diplomatic parlance, are often referred to as “demarches.”⁴¹ To have legal effect, the communications must be issued by an authority competent to act as a representative of the respondent state, and must be public in nature.⁴² Critically, “the care with which a statement is made is a relevant factor; less significance may be given to off-the-cuff remarks made in the heat of the moment.”⁴³

³⁹ See Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L. 376, 396 (1950). Professor Lauterpacht states the following regarding a state's duty to protest:

It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states.

Id.

⁴⁰ I.C. MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L 293, 294 (1953) (citing Oppenheim, *International Law*, vol. I (7th ed., by Lauterpacht, 1948)).

⁴¹ *Id.*; *Foreign Affairs Manual, Correspondence Handbook*, Vol. 5 FAH-1 H-613.1, U.S. DEP'T OF STATE (May 20, 2013), <https://fam.state.gov> (stating that demarches are designed to “protest or object to actions of a foreign government” as well as “persuade, inform, or gather information” from those governments).

⁴² *Statement of Principles*, *supra* note 31, at 15; see generally Richard B. Lillich, John Norton Moore, & John R. Brock, *Archipelago Concept of Limits of Territorial Seas*, 61 INT'L L. STUD. 328 (1980).

⁴³ Wood, *supra* note 30, at 14.

As with recognition, a protest may be made by states acting individually or collectively.⁴⁴ By protesting, a state, or a group of states, indicates its objection to the specific conduct or claim in question and its unwillingness to abandon its rights on the subject.⁴⁵ A protest also contributes to the establishment or preservation of customary international law.⁴⁶ In this sense, a protest is relevant for both old and nascent customs, because “instances of State conduct inconsistent with a particular customary norm could be treated not only as ‘breaches’ of the rule, but also ‘indications of the recognition of a new rule.’”⁴⁷

It is said that, to be effective, a protest must be repeated as long as the disputed conduct or claim persists and a “one-off” protest may not sufficiently protect a protesting state’s rights.⁴⁸ This view is not without criticism, with one commentator arguing that the requirement for repeated protest creates an unnecessary “tit-for-tat” in international relations that is both juvenile and provocative.⁴⁹ But

⁴⁴ See, e.g., S.C. Res. 502 (April 3, 1982) (objecting to the invasion of the Falkland Island (Islas Malvinas) by Argentine military forces and demanding immediate withdrawal).

⁴⁵ MacGibbon, *supra* note 40, at 307.

⁴⁶ See generally MacGibbon, *supra* note 40, at 293 (stating that, “in addition to providing evidence of what States consider to be the law, protests are apt to influence the development of customary rules of international law either as showing the extent of the generality of the custom in question or by assisting in the appreciation of the existence of the *opinio juris sive necessitatis* in respect of any particular practice”).

⁴⁷ David J. Bederman, *Acquiescence, Objection, and the Death of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 31, 37 (2010) (quoting Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14, p. 186 (June 27)).

⁴⁸ See MacGibbon, *supra* note 40, at 310 (stating that “in the event of repetition of the acts protested against or the continuation of the situation created by them, it is clear that scant regard will be paid to the isolated protest of a State which takes no further action to combat continued infringements of its rights”). See also *Statement of Principles*, *supra* note 31, at 28 (asserting that an objection “must be repeated as often as circumstances require”). This requirement forms the basis of the “persistent objector” dynamic discussed *infra*.

⁴⁹ David A. Colson, *How Persistent Must the Persistent Objector Be*, 61 WASH. L.

the view that states must persist in their objections cannot be totally ignored. The “persistent objector” doctrine holds that “a state that has persistently objected to a rule of customary international law during the course of the rule’s emergence is not bound by the rule.”⁵⁰ Persistent objection can take any of the many forms available to states in protesting. Yet, for the principle to apply, the state wishing to oppose application of the norm must persistently object “during the process of crystalizing;” opposition only after general acceptance of the norm is insufficient.⁵¹ “It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage.”⁵² Moreover, a state cannot unilaterally exempt itself from a customary norm without having established a record of objection prior to the rule achieving general acceptance.⁵³

However, despite widespread acceptance of the persistent objector principle, there is scant evidence of the doctrine being invoked as the basis to exempt a state from a customary norm.⁵⁴ It should also be noted that persistent objection is not the method by which a state avoids the force of a treaty-based rule. Rather, in the context of treaty law application, withdrawal or, where permissible,

REV. 957, 964 (1986).

⁵⁰ Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 457 (1985). An underlying premise of the persistent objector principle would seem to be that customary international law is consent-based, an arguable topic which will not be addressed in this paper. See generally Bradley & Gulati, *supra* note 37, at 233 (discussing the emergence of the principle); *Statement of Principles*, *supra* note 31, at 40 (observing the opposing perspectives on consent and customary international law and stating that “it would not be correct to say that consent or will play no part at all in the formation of customary rules. But equally, it would not be accurate to say that it is only through consent that customary law is created.”).

⁵¹ Bederman, *supra* note 47, at 35.

⁵² *Statement of Principles*, *supra* note 31, at 27.

⁵³ Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 2 (1985).

⁵⁴ See Bradley & Gulati, *supra* note 37, at 239-40.

reservation is the appropriate manner by which a state gains exemption from a rule.⁵⁵ As one commentary on the subject succinctly observed:

If the objecting state has signed a treaty which covers the issue (even if they have signed and later withdraw) they are no longer a persistent objector. They have consented, at least for a time, and should be bound by the norm if it has the status of international custom.⁵⁶

Returning to the issue of protests more generally, protests may be buttressed by state practice, such as “verbal acts” expressing an explicit objection or “physical acts” intended to represent an objection.⁵⁷ While “verbal acts” in this sense would include diplomatic protests, they would also extend to “policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt.”⁵⁸ “Physical acts,” on the other hand, could consist of such tangible actions as arrest of individuals, seizure of property,⁵⁹ publicly flouting a claimed right,⁶⁰ economic

⁵⁵ See generally Bradley & Gulati, *supra* note 37, at 233 (discussing both the express and implied withdrawal rights from treaties).

⁵⁶ Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 163 (1996).

⁵⁷ *Statement of Principles*, *supra* note 31, at 14.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *infra* notes 1-27, and accompanying text.

boycott or embargo,⁶¹ or the referral of a dispute to an international tribunal for resolution.⁶²

The extent to which a protest must be supported by “physical acts” to adequately preserve the rights in question is a crucial consideration. The International Law Association (“ILA”) has declared that “[v]erbal protests are sufficient: there is no rule that States have to take physical action to preserve their rights.”⁶³ This appears to be the majority view and one recognized by the International Court of Justice (“ICJ”) in its *Nicaragua* ruling.⁶⁴ Nonetheless, some commentators emphasize the “visible, real and significant” impact of physical acts in asserting a right internationally.⁶⁵ Refuting this point, the ILA asserts that “talk is not always cheap.” “[V]erbal acts can constitute a form of State practice, and not all verbal acts carry little weight.”⁶⁶

In its defense of the sufficiency of verbal acts in establishing state practice, the ILA points to three important practical factors. First, verbal acts are a more common form of state practice than physical conduct.⁶⁷ Second, verbal acts may be the only means of

⁶¹ See generally Hersch Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125, 130 (1933) (explaining that “[i]n the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory”).

⁶² MacGibbon, *supra* note 40 (stating that “protests may not of themselves be sufficient...and that courts will require evidence of the assumption by the protesting State of some positive initiative towards settlement of the dispute in the form of an attempt to utilize all available and appropriate international machinery for that purpose”).

⁶³ *Statement of Principles*, *supra* note 31, at 28.

⁶⁴ HCM Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT'L L. 28 (1991).

⁶⁵ Benjamin Langille, *It's “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 148 (2003).

⁶⁶ *Statement of Principles*, *supra* note 31, at 13.

⁶⁷ *Id.* at 14.

practice available to states that are relatively weak or without resources to engage in physical acts, yet those states have the right and duty to protest. Space must exist in the law for such states to effectively protest despite their relative powerlessness.⁶⁸ Third, physical acts “are not always formal and deliberate manifestations of State practice” and, in terms of *opinio juris*, “verbal acts are probably more likely to embody the beliefs of the State (or what it says it believes) than physical acts, from which belief may need to be inferred by others.”⁶⁹ Ultimately, “both forms of conduct are manifestations of State will.”⁷⁰

Arguably just as relevant as the form of the protest in developing customary international law is the source of the protest. In this sense, there is both a quantitative and qualitative dimension. Quantitatively, general participation or acquiescence by states collectively is thought to provide strong evidence of the accepted nature of a norm for purposes of crystallization.⁷¹ But the quantity of states accepting of the practice is not the only measure; the interests of the particular states objecting is also significant. Often referred to as the “specially affected state” doctrine,⁷² an examination of state practice must “include[] that of states whose interests are specially affected” by the issue at hand.⁷³ This doctrine has been interpreted to mean that recognition or protest from states with a unique interest in the dispute, either due to geography or subject matter, is particularly

⁶⁸ *Id.* at 61.

⁶⁹ *Id.* at 14.

⁷⁰ *Id.*

⁷¹ See I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 117 (1957). According to this argument, customary international law “may most readily and objectively be gauged by estimating the degree of general consent, or, failing express consent, the degree of general acquiescence which the practice has encountered.” *Id.* at 119.

⁷² *Statement of Principles*, *supra* note 31, at 13.

⁷³ *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

important in assessing recognition or protest by the international community.⁷⁴

C. *Failure to Protest*

Notwithstanding the question of how a state must protest and which states must do so to resist creation of a norm, the consequences of withholding an international protest are clear, and are summed up by Sir Hersch Lauterpacht in the following comment:

[T]he absence of protest in the past can be adduced not only as showing that in the view of the complaining state itself the act which is now being made the subject of challenge was not inconsistent with international law. The absence of protest may, in addition, in itself become a source of legal right inasmuch as it is related to – or forms a constituent element of – estoppel or prescription.⁷⁵

In other words, a state that fails to protest may be determined to have acquiesced in the offending state's conduct, potentially leading to application of the principle of estoppel or crystallization of a norm as customary.

Acquiescence has been described as “the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights ... tak[ing] the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection.”⁷⁶ “The primary purpose of acquiescence is evidential; but

⁷⁴ See, e.g., U.S. Dep't of State, Office of the Legal Advisor, *Law of the Sea and International Waterways*, 1973 DIG. U.S. PRAC. INT'L L. 239, 245 (1973) (contending that, “the consent or opposition of some States (i.e. neighboring or interested States) may be more important in establishing acquiescence than the actions of uninterested States”).

⁷⁵ Lauterpacht, *supra* note 39, at 395.

⁷⁶ I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 143 (1954).

its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical.”⁷⁷ Acquiescence in the realm of international relations primarily has force in two contexts: first, acquiescence may lead to estoppel during international adjudication of a dispute; and second, it may provide important evidence as to the general acceptance of international norms and customs.⁷⁸

Looking first at estoppel, a state’s silence in the face of unlawful conduct may preclude a later objection to that conduct before international tribunals.⁷⁹ In this regard, acquiescence is viewed narrowly and “operates to bind only parties to the representation . . . giving rise to the estoppel, whereas acquiescence by the international community generally may in time create a rule of customary international law binding on all States.”⁸⁰ Like acquiescence more generally, estoppel is an equitable principle that flows from the expectation of good faith in the international relations of states and reflects “the requirement that a State ought to be consistent in its

⁷⁷ *Id.* at 145.

⁷⁸ See generally *id.* at 146-51. Acquiescence can also be utilized as evidence for purposes of interpreting a legally-binding agreement or treaty to which both states are parties. While acquiescence in the realm of treaty interpretation is not the focus of this paper, it may be relevant to the FON Program insofar as that program is related to interpretation of the United Nations Convention on the Law of the Sea (UNCLOS). In that regard, the following is informative: “[t]he failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.” *Id.* at 146.

⁷⁹ See *In re the Chagos Marine Protected Area Arbitration (Mauritius v. U.K.)*, PCA Case Repository 1, 172 (Perm. Ct. Arb. 2015).

⁸⁰ Phil C.W. Chan, *Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 CHINESE J. INT’L L. 421, 424 (2004). “[T]he plea of estoppel is made inter partes (or their privies); it affects the position between the parties without regard to the question whether the claim is recognized or acquiesced in by the community generally.” D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT’L L. 176, 200 (1957).

attitude to a given factual or legal situation.”⁸¹ The principle may be invoked when the following conditions are present:

(a) a State has made clear and consistent representations, by word, conduct, or *silence*; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.⁸²

The preclusive effect of estoppel has been frequently invoked in international proceedings, but the contours of the principle continue to develop.⁸³ As recently observed by one tribunal, “the forms of representation capable of giving rise to estoppel are not strictly defined in international law.”⁸⁴ These forms may include declarations of states as well as persistent conduct evidencing an official position upon which other states can reasonably rely.⁸⁵

For purposes of examining the U.S. FON program, estoppel is not the focus. This is primarily the case because the United States is not a party to the UNCLOS or its compulsory dispute resolution provisions and, as such, there is no indication that it exercises FONOPs as a means of strengthening its position before an

⁸¹ See generally I.C. MacGibbon, *Estoppel in International Law*, 7 INT’L & COMP. L.Q. 468, 468-69 (1958) (stating that “[s]uch a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct”).

⁸² Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Perm. Ct. Arb. at 174.

⁸³ See MacGibbon, *supra* note 81, at 468.

⁸⁴ Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Perm. Ct. Arb. at 174.

⁸⁵ See *id.* (citing Temple of Preah Vihear (Cambodia v. Thailand), Judgment of 15 June 1962, Separate Opinion of Sir Gerald Fitzmaurice, I.C.J. Reports 1962, p. 52 at p. 63).

international tribunal. Rather, the U.S. focus is on the preservation of the rights and duties it believes to be rooted in customary international law.⁸⁶ That makes the significance of acquiescence in the development of customary law much more relevant for this discussion.

Beyond the unfairness of a state maintaining inconsistent positions, the principle of acquiescence in the development of customary international law attempts to ascribe meaning to a state's silence and provides that such silence may be interpreted as "tacit recognition" or consent to the offending conduct.⁸⁷ In this sense, a state's acquiescence to a controversial interpretation of a treaty may be viewed as an indication of acceptance. Similarly, acquiescence can lead to the implicit acceptance of the legality of a state's conduct, potentially contributing to the development of customary international law or exempting the violating state from a customary norm already in existence.⁸⁸ In this regard, acquiescence is interpreted as a kind of "inferred consent."⁸⁹

⁸⁶ Raul Pedrozo, *Freedom of Navigation Exercises Essential to Preserve Rights*, THE STRAITS TIMES (Oct. 30, 2015, 5:00 AM), <http://www.straitstimes.com/opinion/freedom-of-navigation-exercises-essential-to-preserve-rights> (arguing that FONOPs "are a necessary measure to preserve enduring and non-negotiable rights at sea").

⁸⁷ See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), Judgment, 1984 I.C.J. 246, ¶ 130 (Oct. 12); Michael Byers, *Custom, Power, and the Power of Rules Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 165 (1995) (observing that acquiescence is representative of ambivalence by states and functions as tacit consent in the development of customary international law).

⁸⁸ JOHN P. GRANT & J. CRAIG BARKER, PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 137 (2009) (observing that a customary international legal rule can emerge from "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law").

⁸⁹ Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523 (2004).

In the context of the larger scheme of developing customary international law, the process revolves around “the assertion of a right, on the one hand, and consent to or acquiescence in that assertion, on the other.”⁹⁰ Herein lies the strategic importance of acquiescence for the scheme of “action and reaction” that characterizes the development of customary international law.⁹¹ When reaction is replaced by inaction, a state may be interpreted as acquiescing to the customary norm in question. As the International Law Commission (“ILC”) has observed in considering how customary international law is identified, state practice includes not only physical and verbal acts, but also inaction when “[s]tates were in a position to react and the circumstances called for some reaction.”⁹²

D. Clarifying “Inaction”

There is no support for the conclusion that a state’s verbal acts in response to circumstances warranting a reaction constitute, as a matter of international law, “inaction,” either with respect to the application of estoppel or the development of a customary norm. For instance, in the ICJ’s 1984 ruling in the *Gulf of Maine* case, the Court recognized that the maritime delimitation dispute between the United States and Canada crystallized when diplomatic notes were exchanged in which both parties refused to alter their positions.⁹³ In other words, the Court found that verbal acts were sufficient to preserve the dispute and declined to apply estoppel, despite the fact that over the course of its dispute with Canada, the United States intentionally avoided

⁹⁰ MacGibbon, *supra* note 71, at 117.

⁹¹ *Id.* at 118.

⁹² INT’L LAW COMM’N, *Identification of Customary International Law*, ¶¶6, 10 U.N. Doc. A/CN.4/L.869 (Jul. 14, 2015) (draft conclusions) <http://legal.un.org/docs/?symbol=A/CN.4/L.869> (last visited Jan. 6, 2017).

⁹³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, Judgment, 1984 I.C.J. 246, ¶ 64 (Oct. 12).

physical acts that might have more forcefully asserted its rights.⁹⁴ The ICJ did not penalize the United States for not choosing to physically assert its claimed rights. This comports with the ICJ's jurisprudence elsewhere in the context of maritime delimitation in that the Court underemphasizes the significance of physical acts of the parties to the dispute in determining their official position.⁹⁵

While the ICJ has certainly acknowledged the availability of physical assertions as a method of preserving a state's rights, it has not held that a state *must* engage in such assertions to avoid acquiescing. Reference has been made to the *Corfu Channel* case in support of the proposition that it is appropriate to challenge excessive maritime claims through physical acts.⁹⁶ However, the ICJ's holding that the United Kingdom had no duty to abstain from a physical assertion against Albania's claim is quite different from suggesting that the United Kingdom would have been held to have acquiesced in the excessive claim had it elected instead to stand on its verbal protest.⁹⁷ Rather, the Court gave consideration to a series of diplomatic protests

⁹⁴ See, e.g., *id.* at ¶ 67 (observing that the United States exercised a "policy of restraint" by not granting leases of oil/gas tracts in disputed portions of Georges Bank).

⁹⁵ Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 220 (Nov. 19) (stating that "[w]hile it cannot be ruled out that conduct might need to be taken into account as a relevant circumstance in an appropriate case, the jurisprudence of the Court and of arbitral tribunals shows that conduct will not normally have such an effect").

⁹⁶ See, e.g., Lynn Kuok, *The U.S. FON Program in the South China Sea: A lawful and necessary response to China's Strategic Ambiguity*, CTR. FOR E. ASIA POL'Y STUD. 14 (Jun. 2016), <https://www.brookings.edu/wp-content/uploads/2016/07/The-US-FON-Program-in-the-South-China-Sea.pdf> (citing the holding in the *Corfu Channel* case as supportive of the argument in favor of FONOPs).

⁹⁷ See *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 30 (Apr. 9) (stating that "[t]he 'mission' was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.").

from both the United Kingdom and Albania to one another's positions, reflecting again that verbal acts can preserve the dispute.⁹⁸

It is telling that Judge Read's position in the 1951 *Fisheries* case arguing "the only convincing evidence of State practice is to be found in seizures" was a dissenting one and not adopted by the majority of the Court.⁹⁹ There, the Court was convinced by the absence of *any* protest, either physical or verbal, that states had acquiesced to Norway's claims.¹⁰⁰ The Court was also particularly persuaded by France's exchange of notes with Norway that ultimately appeared to accept Norway's claim, but it did not imply that, had France or any other state rested its objection on a verbal protest, it would have been insufficient to prevent crystallization of Norway's claim.¹⁰¹

Similarly, while the ILC has acknowledged the potential significance of inaction in the development of customary norms, it has explicitly declined to endorse the notion that physical acts are necessary to avoid acquiescence.¹⁰² To be sure, the ILC takes the perspective that state practice that is relevant to the development of customary international law includes diplomatic correspondence and "operational conduct 'on the ground,'" but it clarifies that "there is no predetermined hierarchy among the various forms of practice."¹⁰³ This perspective was promoted by the ILC's Special Rapporteur, Sir

⁹⁸ *Id.* at 27.

⁹⁹ *Fisheries (U.K. v. Norway)*, Judgment, 1951 I.C.J. 115, 191 (Dec. 18) (separate opinion by Read, J.). Judge Read's position on this point is also somewhat inconsistent on the question of a requirement for physical acts in that he discounted those seizures of fishing vessels by Norway that immediately met with verbal protest from the United Kingdom, implying that the U.K.'s verbal act was sufficient and it did not have to engage in physical acts itself to preserve its rights. *Id.*

¹⁰⁰ *Id.* at 138 (holding that "[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it.").

¹⁰¹ *Id.* at 135-36.

¹⁰² INT'L LAW COMM'N, *supra* note 92, at 2 (Draft Conclusion 6).

¹⁰³ *Id.*

Michael Woods, in his report on customary international law, in which he stated that “no one manifestation of practice is *a priori* more important than the other; its weight depends on the circumstances as well as on the nature of the rule in question.”¹⁰⁴ In other words, physical acts are not necessarily more persuasive on the question of state practice than are verbal acts. In this regard, the Special Rapporteur expressly departs from the apparent minority notion advanced by Judge Read, and other scholars, that physical acts are the fulcrum on which international protests rest.

III. ASSESSING THE U.S. POSITION ON ACQUIESCENCE IN THE LOS

As the discussion above demonstrates, the United States’ suggestion that failure to engage in physical acts of protest constitutes acquiescence appears to exaggerate the legal value of physical acts over other means of protest. Neither the judicial nor the scholarly opinions in this field support the conclusion that a state must, as a matter of law, physically protest claims by other states to either preserve its own rights and objections or to prevent the claims of the other state from crystallizing into customary law. Rather, verbal acts are sufficient to record a state’s protest. For three reasons, this fact should be embraced by the United States.

First, this conclusion is logical. If a state can recognize emerging norms or conduct by other states exclusively through verbal acts,¹⁰⁵ certainly states should be able to rely exclusively on verbal acts to protest such norms. Additionally, as described below, rational policy reasons favor verbal acts over physical protests.

Second, reliance on physical acts undermines clarity in international communications.¹⁰⁶ A physical act by a warship or

¹⁰⁴ Wood, *supra* note 30, at 35.

¹⁰⁵ See *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

¹⁰⁶ *Statement of Principles*, *supra* note 31, at 13-14.

aircraft conducting a FONOP overtly communicates very little on its own. Only through verbal communication of some kind, such as radio communications during the operation or later diplomatic notes, does the protesting state express the physical act's intentions. Even then, however, the communications may not clarify the intention of the mission or the rights asserted. This fact was displayed recently when a maritime patrol and reconnaissance aircraft from Australia was operating in the SCS.¹⁰⁷ During that operation, the aircraft was queried by a Chinese ground station and communicated that it was operating in international airspace and exercising its rights under international law.¹⁰⁸ What this meant in an area with overlapping and excessive maritime claims, however, was ambiguous and left doubt as to whether the Australian aircraft was conducting a FONOP to refute a specific maritime claim or engaging in a routine patrol in an undisputed area.¹⁰⁹

Even when physical acts are accompanied by diplomatic and public statements by senior government officials, clarity can remain elusive. The FONOP by the USS *Lassen*, introduced above, highlights this point. Despite multiple statements from U.S. officials and countless examinations by experienced scholars and commentators, the exact nature of the operation and the excessive claim being challenged remained unclear.¹¹⁰ Even a U.S. government agency, the U.S.-China Economic and Security Review Commission, struggled to

¹⁰⁷ Shannon Tiezzi, *Did Australia Secretly Conduct Its Own Freedom of Navigation Operation in the South China Sea?*, THE DIPLOMAT (Dec. 16, 2015), <http://thediplomat.com/2015/12/did-australia-secretly-conduct-its-own-freedom-of-navigation-operation-in-the-south-china-sea>.

¹⁰⁸ *Id.*

¹⁰⁹ Nick Bisley, *Australia's Air Force in the South China Sea: Flying Quietly and Carrying a Medium-Sized Stick*, THE INTERPRETER (Dec. 16, 2015, 08:57 AM), <http://www.lowyinterpreter.org/post/2015/12/16/Australias-air-force-in-the-South-China-Sea-Flying-quietly-and-carrying-a-medium-sized-stick.aspx>.

¹¹⁰ Adam Klein & Mira Rapp-Hooper, *What Did the Navy Do in the South China Sea?*, LAWFARE (Nov. 4, 2015, 11:21 AM), <https://www.lawfareblog.com/what-did-navy-do-south-china-sea>.

ascertain the message being communicated through the FONOP.¹¹¹ Incredibly, it was not until the U.S. Secretary of Defense responded to a formal inquiry by a U.S. Senator,¹¹² over two months after the *Lassen* FONOP, that a clear description emerged as to what excessive claims were protested and what rights were asserted by the operation. There is no indication that a similar letter or detailed legal analysis was sent to the People's Republic of China.

The confusion surrounding this operation arguably eviscerated any immediate value that it may have had in protesting a claim,¹¹³ a result that seems unlikely to have occurred had a formal demarche been utilized instead. In fact, past U.S. diplomatic correspondence concerning freedom of navigation demonstrates its superior value in clearly communicating the U.S. position. For example, in January 2007, the United States submitted an *aide memoire* to the Chinese government concerning military survey activities in China's Exclusive Economic Zone ("EEZ").¹¹⁴ In six paragraphs, the communiqué disputed China's assertion of a requirement for prior notification of such activities in its EEZ and provided detailed legal reasoning for the U.S. position on the subject.¹¹⁵ The muddled message regarding freedom of navigation put forth by the USS *Lassen* stands in stark contrast to the one provided in this 2007 memorandum.

The emphasis on physical acts also erodes clarity in international relations because it expands the field of practice that a

¹¹¹ See, e.g., Matthew Southerland, *U.S. Freedom of Navigation Patrol in the South China Sea: What Happened, What it Means, and What's Next?*, U.S.-CHINA ECON. & SEC. REV. COMM'N (Nov. 5, 2015) (using qualified phrases like "appears" and "apparently" to decipher the possible messages of the FONOP).

¹¹² Letter from Ash Carter, U.S. Sec. of Def., to Sen. John McCain (Dec. 22, 2015), <https://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>.

¹¹³ Pedrozo & Kraska, *supra* note 25.

¹¹⁴ J. Ashley Roach & Robert W. Smith, *EXCESSIVE MARITIME CLAIMS* 384 (2012).

¹¹⁵ *Id.* at 384-85.

state must interpret in ascertaining a fellow state's position, potentially leading to reliance on non-authoritative acts. A recent example of this dilemma involved two U.S. military B-52 bomber aircraft that mistakenly overflowed the territorial sea of a land feature in the SCS.¹¹⁶ While the Chinese government issued a demarche to the United States over this incident,¹¹⁷ the U.S. over-emphasis on physical acts could invite other states to attribute unjustified significance to this sort of navigational error.

Third, the emphasis on physical acts is potentially in tension with the U.N. Charter and the peaceful resolution of disputes.¹¹⁸ This point was affirmed by Sir Michael Wood in his report to the ILC, in which he refuted the focus on physical acts and instead stated that:

Accepting such views [advocating physical acts] could also be seen as encouraging confrontation and, in some cases, even the use of force. In any event, it appears undeniable that the method of communication between States has widened. The beloved "real" acts become less frequent because international law, and the Charter of the UN in particular, place more and more restraints on States in this respect.¹¹⁹

¹¹⁶ Jeremy Page & Gordon Lubold, *U.S. Bomber Flies Over Waters Claimed by China*, WALL ST. J. (Dec. 18, 2015, 7:11 PM), <http://www.wsj.com/articles/u-s-jet-flies-over-waters-claimed-by-china-1450466358>.

¹¹⁷ *Id.*

¹¹⁸ U.N. Charter art. 2, ¶ 3 (stating that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."); see also BERNARD H. OXMAN & JOHN F. MURPHY, NON-VIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS: THE CASES OF DISPUTED MARITIME CLAIMS AND STATE-SPONSORED TERRORISM 3 (1991) (stating that "[t]heories of international law that require either a coastal state or a maritime state to take affirmative action that may entail a risk of armed conflict, solely to preserve its contested claims of right at sea, are in tension with the underlying principles and purposes of the Charter of the United Nations.").

¹¹⁹ Wood, *supra* note 30, at 20.

In fact, in the *Gulf of Maine* case, the United States did indeed exercise restraint by avoiding physical acts to assert rights, part of a concerted effort to promote the peaceful resolution of the dispute.¹²⁰

In contrast to the restraint exercised by the United States in not selling leases to oil tracts in the Gulf of Maine, FONOPs are not only physical acts, but are conducted by warships and military aircraft. Notwithstanding reassurances from the United States to the contrary, one can understand how a coastal state might interpret FONOPs as provocative or intended as a “show of force” - not the legal statement they are intended to be.¹²¹ This point was made quite persuasively by the American Society of International Law’s (“ASIL”) Special Working Committee on Disputed Maritime Claims when it stated the following:

When either a coastal state or a maritime state explicitly or implicitly dares the other to “enforce” its view of the law, it is being provocative. While we believe that neither is compelled to yield its legal position pending an authoritative resolution of the matter, each should seek to minimize, rather than maximize, the chances of a violent reaction by the other.¹²²

The history of FONOPs themselves confirm the risks involved in executing them and the possibility for provocative military interactions. In 1981, for instance, during FONOPs in the Gulf of Sidra to protest Libya’s excessive claim of sovereignty over those waters, U.S. fighter aircraft were repeatedly intercepted and once fired upon by Libyan aircraft.¹²³ Two Libyan aircraft were ultimately shot

¹²⁰ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Counter-Memorial of U.S., 1983 I.C.J. 141 (June 28).

¹²¹ *Commentary: Planned U.S. Provocative Move in the S. China Sea Risks Destabilizing Region*, XINHUANET (Oct. 15, 2015, 2:13 PM), http://news.xinhuanet.com/english/2015-10/16/c_134720306.htm.

¹²² OXMAN & MURPHY, *supra* note 118, at 4.

¹²³ Bernard Gwertzman, *U.S. Reports Shooting Down 2 Libya Jets that Attacked F-14’s Over Mediterranean*, N.Y. TIMES (Aug. 20, 1981),

down by U.S. aircraft acting, justifiably, in self-defense during these operations.¹²⁴

Similarly, while conducting a FONOP in the Black Sea in 1988, two U.S. warships were shouldered and bumped by ships of the Union of Soviet Socialist Republics (“U.S.S.R.”).¹²⁵ Both U.S. ships were asserting rights to innocent passage in the U.S.S.R.’s territorial sea and each suffered damage as a result of the incident.¹²⁶ To be sure, this incident prompted bilateral negotiations between the United States and U.S.S.R. that ultimately resulted in the Agreement on the Prevention of Dangerous Military Activities and the 1989 Uniform Interpretation of Rules of International Law Governing Innocent Passage,¹²⁷ but that later success does not confirm the legal necessity of the FONOP or the ensuing short-term escalation of Cold War tensions.

Moreover, the precedent that states must engage in physical acts to protect their rights is untenable from the perspective of global and regional stability. Territorial and maritime disputes are ubiquitous, and easing the tensions involved in these disputes is in the interests of the international community, including the United States. Two such disputes highlight this point: the Sino-Indian border dispute and the United Kingdom-Mauritius dispute over the Chagos Archipelago.¹²⁸ The United States has strategic interests in both

<http://www.nytimes.com/1981/08/20/world/us-reports-shooting-down-2-libya-jets-that-attacked-f-14-s-over-mediterrane.html?pagewanted=all>.

¹²⁴ *Id.*

¹²⁵ John H. Cushman, Jr., *2 Soviet Warships Reportedly Bump U.S. Navy Vessels*, N.Y. TIMES (Feb. 13, 1988), <http://www.nytimes.com/1988/02/13/us/2-soviet-warships-reportedly-bump-us-navy-vessels.html>.

¹²⁶ *Id.*

¹²⁷ See generally Aceves, *supra* note 9 (discussing the Black Sea incident and the agreements concluded following it).

¹²⁸ *Id.* The Chagos Archipelago was the subject of a Permanent Court of Arbitration judgment in March of 2015 in which the tribunal ruled that the United Kingdom, which refers to the territory as the British Indian Ocean Territory (BIOT), had

disputes, either because of what or who is involved.¹²⁹ Yet demanding that either India or Mauritius engage in physical acts to avoid acquiescence in the potentially excessive claims of China or the United Kingdom, respectively, would pose substantial challenges to regional stability and would not be in the interests of the United States.

This point reveals an additional and troubling challenge to the emphasis on physical acts to assert international rights—it implies that the only acceptable manner in which a state with excessive claims may effectively preserve a legal right is through its own physical acts. In other words, if physical acts are essential to avoid acquiescence, then the only effective way that a state could counter-protest a FONOP and assert its arguably excessive rights is to engage in physical acts itself. As an initial observation, this would be an unworkable expectation for many states that may simply be incapable, either due to a lack of resources or other factors beyond their control, of asserting their rights through physical acts. But more importantly, this principle sets a risky precedent.

Take, for instance, the scenario involving the U.S. B-52s mistakenly overflying disputed features in the SCS. The U.S. position could be interpreted to have required China to engage in a physical act

violated the terms of its agreement with Mauritius regarding use of the archipelago. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, Case No. 2011-03 (Perm. Ct. Arb. 2015), <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>.

¹²⁹ See Lisa Curtis & Dean Cheng, *The China Challenge: A Strategic Vision for U.S.-India Relations*, THE HERITAGE FOUND. (July 18, 2011), <http://www.heritage.org/research/reports/2011/07/the-china-challenge-a-strategic-vision-for-us-india-relations> (arguing that “the U.S. must keep a watchful eye on the trend lines in Sino-Indian relations and factor these into its overall strategies in the broader Asia region”); Peter Harris, *U.S. Naval Base is Under Threat . . . And It’s Britain’s Fault*, THE NAT’L INTEREST (Mar. 24, 2015), <http://nationalinterest.org/blog/the-buzz/us-naval-base-under-threatand-its-britains-fault-12473> (describing Diego Garcia, the U.S. base located on the Chagos Archipelago, as “one of the most strategically important U.S. military installations in the world”).

in response to the incursion into its claimed sovereign airspace in order to avoid acquiescing in that incursion, an unpalatable result if that physical act entailed a use of force.

Examples certainly abound of states using force and risking the escalation of a conflict merely in response to incursions of maritime or territorial boundaries. For instance, in December 2015, the Republic of Korea Navy (ROK-N) fired warning shots at a Chinese patrol boat that allegedly crossed the disputed maritime boundary between the Republic of Korea and the Democratic People's Republic of Korea ("DPRK").¹³⁰ Warning shots were also fired by the ROK-N in October 2015, on that occasion toward a DPRK patrol boat in response to a similar boundary incursion,¹³¹ and the same two states also exchanged warning shots in October of 2014.¹³²

Similarly, in November 2015, as evidence of the stakes involved when states rely on physical acts to defend rights, Turkey shot down a Russian SU-24 fighter aircraft that was conducting operations over Syria after it apparently violated Turkish airspace and failed to heed warnings (i.e., verbal protests) to depart.¹³³ Ultimately, it was

¹³⁰ *South Korean Navy Fires Warning Shot at Chinese Patrol Boat*, DEFENSENEWS (Dec. 8, 2015), <http://www.defensenews.com/story/defense/2015/12/08/south-korean-navy-fires-warning-shots-chinese-patrol-boat/76988690>.

¹³¹ *South Korea Fires Warning Shots at North Patrol Boat Near Border*, REUTERS (Oct. 25, 2015, 5:47 AM), <http://uk.reuters.com/article/uk-northkorea-southkorea-shooting-idUKKCN0SJ03J20151025>.

¹³² Kim Tong-Hyung, *Warships of rival Koreas exchange warning shots*, USA TODAY (Oct. 7, 2014, 10:49 PM), <http://www.usatoday.com/story/news/world/2014/10/06/koreas-exchange-warning-shots/16839959>.

¹³³ Matthew Chance & Michael Martinez, *5 Things You Need to Know About Russian Jet Shot Down by Turkey*, CNN (Nov. 24, 2015, 7:15 PM), <http://www.cnn.com/2015/11/24/middleeast/russia-turkey-jet-downed-syria/index.html>. The U.S. and North Atlantic Treaty Organization (NATO) both defended Turkey's use of force in enforcing its national airspace. Kevin Liptak, *Obama: Turkey Has the Right to Defend Itself and Its Airspace*, CNN

Turkey that formally apologized for the physical act in defense of its national airspace.¹³⁴

Whether or not the Korean or Turkish actions were motivated by a belief that the state was defending a legal right or claim, the actions of these states represent a logical product of the view that physical acts are necessary to avoid acquiescence. States are hardly shy in using force to protest incursions into claimed maritime and territorial spaces, and the legal interpretation of acquiescence with respect to FONOPs tends to endorse such behavior. This approach to international protests promotes the escalation of tensions associated with numerous maritime and territorial disputes around the world, a result that conflicts with the strategic interests of the United States in peace and stability.¹³⁵ It also exposes U.S. global military operations to potentially hostile physical assertions of rights and claims if the notion that such assertions are necessary to maintain a state's interests was to become widely accepted.¹³⁶

Finally, while it has been suggested that the FON program is useful in a normative sense in persuading other states to give up their

(Nov. 24, 2015, 8:51 PM), <http://www.cnn.com/2015/11/24/politics/obama-francois-hollande-white-house-meeting>; Press Release, North Atlantic Treaty Org., Statement by the NATO Secretary General After the Extraordinary NAC Meeting

(Nov. 24, 2015, 10:32 PM), http://www.nato.int/cps/en/natohq/news_125052.htm?selectedLocale=en.

¹³⁴ *Vladimir Putin received a letter from President of Turkey Recep Tayyip Erdogan*, PRESIDENT OF RUSSIA (June 27, 2016, 3:55 PM), <http://en.kremlin.ru/events/president/news/52282>.

¹³⁵ See generally *Mar. Territorial Disputes and Sovereignty Issues in Asia, Before the S. Foreign Relations Comm. Subcomm. on E. Asian and Pac. Affairs*, 112th Cong. 6 (2012) (statement of Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs) (stating that the United States has a national interest in peace and stability).

¹³⁶ See, e.g., U.S. JOINT CHIEFS OF STAFF, *THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2015* (June 2015) (envisioning that the U.S. military will continue to operate globally).

excessive claims,¹³⁷ there is little evidence that FONOPs have had this effect. For example, in 1991, the first year that the annual FONOP report was publicly released, 13 excessive claims were challenged by the United States.¹³⁸ Today, 10 of those claims still persist.¹³⁹ Of the five claims challenged through FONOPs in 2006,¹⁴⁰ all five remain in force.¹⁴¹ In fact, a recent study of FONOPs concluded that, as it relates to those maritime claims studied, “[i]f success is determined by whether states have rolled back their black letter excessive maritime claims following FON operations, the program is arguably a failure.”¹⁴² What is more, even if these states were to repeal their excessive claims, it is hardly clear that FONOPs are the driving force for such decisions, as opposed to other international or domestic considerations.¹⁴³

IV. CONCLUSION

The thrust of the U.S. argument is that a lack of physical protests will result in a surrender of its rights and the crystallization of unacceptable binding norms. As stated by the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, John Negroponte, in his 1986 explanation of FONOPs, “[i]f the United States and other maritime states do not assert international rights in the face of claims by others that do not conform with the

¹³⁷ See generally Mandsager, *supra* note 28 (stating that “the FON Program seeks to encourage coastal States to conform their ocean claims to international law”).

¹³⁸ 1992 Sec’y of Def. Ann. Rep. at 77-78.

¹³⁹ See U.S. NAVY JUDGE ADVOCATE GEN.’S CORPS, MARITIME CLAIMS REFERENCE MANUAL (2014).

¹⁴⁰ Freedom of Navigation (FON) FY 06 Operational Assertions, U.S. DEP’T OF DEF., http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Annual_Report_2006.pdf

¹⁴¹ MARITIME CLAIMS REFERENCE MANUAL, *supra* note 139.

¹⁴² Joshua L. Root, *The Freedom of Navigation Program: Assessing 35 Years of Effort*, 43 SYRACUSE J. INT’L L. & COM. 321, 347 (2016) (specifically examining “roll backs” of claims by the Philippines, Indonesia, Burma, and Libya).

¹⁴³ See, e.g., Roach & Smith, *supra* note 114, at 638 (observing that the fact that UNCLOS has been in force for over two decades itself motivates states to conform their practices to the Convention).

present status of the law, they will be said to acquiesce in those claims to their disadvantage.”¹⁴⁴ In other words, FONOPs are presented as having intrinsic legal value.¹⁴⁵ Yet, this interpretation of the international law of acquiescence finds little support in either judicial or scholarly consideration of the law of protest.

Further challenging the utility of FONOPs as a legal tool is the hyped political character they have recently assumed in the disputes over maritime claims in the South China Sea (SCS). While FONOPs had been traditionally reported with little fanfare in an annual report issued by the DOD,¹⁴⁶ FONOPs directed against China’s excessive claims in the SCS have been trumpeted with almost real-time press releases,¹⁴⁷ significant political posturing,¹⁴⁸ and unprecedented academic examination.¹⁴⁹ Meanwhile, FONOPs directed at other

¹⁴⁴ Aceves, *supra* note 9, at 246 (quoting John Negroponte, *Who Will Protect Freedom of the Seas?*, 855 CURRENT POL’Y 3 (1986)).

¹⁴⁵ See, e.g., Sam LaGrone, *U.S. Warship Conducts South China Sea Freedom of Navigation Operation*, U.S. NAVAL INST. (Oct. 22, 2016, 11:11 AM), <https://news.usni.org/2016/10/21/u-s-warship-conducts-south-china-sea-freedom-navigation-operation> (quoting Professor James Kraska as stating that FONOPs can “provide[] an unambiguous legal record that China’s purported straight baselines are not valid.”).

¹⁴⁶ See generally DOD ANNUAL FREEDOM OF NAVIGATION (FON) REPORTS, U.S. DEP’T OF DEF., <http://policy.defense.gov/OUSSDP-Offices/FON>.

¹⁴⁷ See LaGrone, *supra* note 145 (reporting that a DOD statement was released the same day as an October 2016 FONOP conducted by the USS *Decatur* (DDG-73) in the South China Sea).

¹⁴⁸ See Sydney J. Freedberg, Jr., *McCain, Forbes Praise New Navy Challenge to China in Parcel Islands*, BREAKING DEF. (Jan. 30, 2016, 2:06 PM), <http://breakingdefense.com/2016/01/mccain-praises-new-navy-challenge-to-china-in-parcel-islands> (reporting on the statements released by United States politicians in support of increased FONOPs in the South China Sea as a strong signal of “America’s enduring commitment to Asia and the rule of law”).

¹⁴⁹ See Bonnie S. Glaser & Peter A. Dutton, *The U.S. Navy’s Freedom of Navigation Operation Around Subi Reef: Deciphering U.S. Signaling*, THE NAT’L INTEREST (Nov. 6, 2015), <http://nationalinterest.org/feature/the-us-navy’s-freedom-navigation-operation-around-sub-reef-14272> (scrutinizing the possible explanations for why the United States Navy conducted the *Lassen* FONOP in the

states, both in the Asia-Pacific and elsewhere,¹⁵⁰ have occurred with the standard subtlety generally characterizing the FON program.¹⁵¹ This divergent approach to FONOPs emphasizes that the imperative at play is international strategy, influenced by the practical political considerations of the states involved, and not the international law principle of acquiescence.¹⁵²

This is not to say that, even if they were viewed as a political rather than a legal imperative, the tension that FONOPs may create between peaceful dispute resolution and the consistent desire for states to preserve their rights is necessarily relieved. As the ASIL Special Working Committee observed, there is a circular problem inherent in the perceived necessity to actually exercise claimed maritime rights. “Such exercise may lead to and indeed may be seen by one claimant or the other as requiring physical confrontation, which – again – they may each see as lawfully supportable by the use or threats of force, on

way that it did). See also Julian Ku, *The Latest US Freedom of Navigation Operation Opens the Legal Door to More Aggressive US Challenges to China's Artificial Islands*, LAWFARE (Oct. 24, 2016, 2:51 PM), <https://www.lawfareblog.com/latest-us-freedom-navigation-operation-opens-legal-door-more-aggressive-us-challenges-chinas> (arguing that the United States should pursue “more aggressive” challenges to China’s activities in the South China Sea”).

¹⁵⁰ Freedom of Navigation (FON) Report for Fiscal Year (FY) 2015, U.S. DEP’T OF DEF., http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf (including FONOPs directed at Indonesia, Taiwan, Vietnam, and the Philippines, among others).

¹⁵¹ See, e.g., *A Freedom of Navigation Primer for the Spratly Islands*, ASIA MAR. TRANSPARENCY INITIATIVE (Nov. 2, 2015), <https://amti.csis.org/fonops-primer/> (noting that “[t]he Lassen’s patrol through the Spratlys has suddenly pushed the little-known U.S. FON program into the spotlight”); Chong Ja Ian, *Freedom of Navigation Operations: Better Quiet Resolve*, RSIS COMMENTARY, No. 236 (Nov. 6, 2015), <https://www.rsis.edu.sg/wp-content/uploads/2015/11/CO15236.pdf> (arguing that “[a] more effective American approach to FONOPs in the South China Sea may be to conduct such activities regularly and without fanfare”).

¹⁵² This is despite efforts to characterize FONOPs as “politically neutral.” COMMANDER’S HANDBOOK, *supra* note 12.

grounds of self-defense and perhaps other grounds.”¹⁵³ While “[i]t is unlikely that we will ever witness a time when coastal states are not tempted to expand their assertions of control over waters off their coast beyond what is generally regarded as permissible,”¹⁵⁴ states should challenge such excessive claims in a manner that promotes both the law of the sea as well as the law of protest.

Admittedly, FONOPs may have practical strategic and political value insofar as they normalize a U.S. military presence in certain regions or signal and reinforce existing alliances. But those substantial benefits should not be conflated with the requirements of international law to preserve rights and freedoms. The U.S. linkage of FONOPs to the international law principle of acquiescence overstates the importance of physical acts in the realm of international protest. In advancing this view, the United States has staked out a potentially untenable interpretation of how states must enforce rights and duties guaranteed by international law. The question is whether the strategic and political benefits realized through FONOPs are worth the promotion of this view of international law.



¹⁵³ OXMAN & MURPHY, *supra* note 118, at vi.

¹⁵⁴ *Id.* at 3.