

ARTICLES

CHRISTOPHER R. ROSSI*

The Critical Date and the Dispute over Islands in the Strait of Hormuz: Abu Musa and the Tunbs

Abstract	1
Introduction	2
I. The Power Vacuum	9
II. Territorializing a Civilizational Unit	13
A. Place Naming and Toponymy	16
B. Toponymic Hearsay	19
III. Periodizing Sovereignty, <i>Uti Possidetis</i> , and the Critical Date	20
A. Square Pegs, Round Holes, and the Southernmost Palm Tree	23
B. Historical Claims	27
C. The Unfitting Metaphor of the Critical Date	31
1. The Hauntology of the Critical Date	34
2. A Wide Margin of Appreciation	39
Conclusion	42

ABSTRACT

An intractable sovereignty dispute over three Lower Gulf Islands in the Strait of Hormuz, a critical energy chokepoint, prompts a reconsideration of the ambiguities and tensions associated with

* Professor of International Law and International Relations, UiT, The Arctic University of Norway; associate member, Norwegian Center for the Law of the Sea.

international legal mechanisms to establish title to territory. Vagaries of history and competing narratives inform parochial perspectives of the disputants, the United Arab Emirates (UAE) and Iran, but tend to focus decision-maker attention on establishing a critical date on which to assess competing claims. This Article interrogates the significance of the critical date, noting its ontological development and shortcomings, and problematizes the significance of the critical date considering complexities associated with international law's reliance on effectivités. Liberal internationalism's chimerical emphasis on finality cannot escape the tensions associated with letting bygones be bygones through reliance on the critical date.

INTRODUCTION

The islands of Abu Musa and the Greater and Lesser Tunbs are Lower Gulf Islands located near the chokepoint of the Strait of Hormuz.¹ This chokepoint connects the Arabian or Persian Gulf to the Gulf of Oman, then to the Arabian Sea, and finally to the high seas.² About twenty-one percent of the global petroleum liquids consumed annually flow through the strait, averaging twenty-one million barrels per day.³ These islands are strategically situated “near the route that all vessels entering or leaving the Gulf use.”⁴

¹ See *Strait of Hormuz: Assessing the Threat to Oil Flows Through the Strait*, STRAUSS CTR. FOR INT'L SEC. & L., <https://www.strausscenter.org/strait-of-hormuz-about-the-strait/#:~:text=In%20order%20to%20regulate%20the,and%20one%20for%20outgoing%20traffic> [<https://perma.cc/NJ8H-ATVS>] [hereinafter STRAUSS CTR.] (locating the strait and referring to it as a “narrow chokepoint”).

² The Strait of Hormuz is 38.4 kilometers wide at its narrowest western end. It has an average depth of fifty meters. Saudi Arabia and the UAE have pipelines that can circumvent the shipment of crude oil through the Strait of Hormuz, but their combined pipeline capacity amounts only to about 6.5 million barrels per day. OPEC's top five oil exporters are located inside the Gulf. The Strait of Hormuz is regarded as “critical to global energy security.” Justine Barden, *The Strait of Hormuz Is the World's Most Important Oil Transit Chokepoint*, U.S. ENERGY INFO. ADMIN. (Dec. 27, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=4107> [<https://perma.cc/C88U-VAZ2>]. Other important petroleum product choke points around the world are the Strait of Malacca (sixteen million barrels per day (mbd)), the Suez Canal and SUMED Pipeline (5.5 mbd), Bab Al-Mandeb (4.8 mbd), Danish Straits (3.2 mbd), Turkish Straits (2.4 mbd), and the Panama Canal (0.9 mbd). See *The Strait of Hormuz: A U.S.-Iran Maritime Flash Point*, COUNCIL ON FOREIGN RELS. (June 18, 2019, 3:14 PM), <https://www.cfr.org/in-brief/strait-hormuz-us-iran-maritime-flash-point> [<https://perma.cc/8H99-VUBH>].

³ Barden, *supra* note 2 (noting the amount and volume of oil flow).

⁴ Fariborz Haghshenass, *Iran's Asymmetric Naval Warfare*, WASH. INST. FOR NEAR E. POL'Y 3 (Sept. 2008), <https://www.washingtoninstitute.org/media/3446> [<https://perma.cc/P87V-EXT5>]. The strategic significance of the islands relates most obviously to the narrowness of the strait, see *id.*, but also to the depth of the sea lane leading into the Gulf

In 1968, Great Britain announced its intention to withdraw from the Gulf by the end of 1971,⁵ ending its 151-year protectorate over the Trucial States.⁶ A “sense of urgency” enveloped the region due to many

and the deeper sea lane used by tankers exiting the Gulf. Both lanes pass between Abu Musa and the Tunbs. See Giorgio Cafiero, *UAE-Iran Islands Dispute Complicates Regional Diplomacy*, RESPONSIBLE STATECRAFT (Aug. 9, 2023), <https://responsiblestatecraft.org/2023/08/09/uae-iran-islands-dispute-complicates-regional-diplomacy/> [https://perma.cc/TDK6-CKYF] (noting the geopolitical advantage for whichever country controls the sea lanes passing by the Tunbs and Abu Musa). The width of these incoming and outgoing shipping lanes are only three kilometers in either direction. See STRAUSS CTR., *supra* note 1. They are separated by a safety lane about 1.6 kilometers wide. See PIROUZ MOJTAHED-ZADEH, MARITIME POLITICAL GEOGRAPHY: THE PERSIAN GULF ISLANDS OF TUNBS AND ABU MUSA 24 (2015) (noting the width of the safety lane is one mile). There are also other islands proximate to the disputed islands of strategic importance, namely Bani Forur and Sirri.

⁵ HC Deb (16 Jan. 1968) (756) cols. 1577–620 (statement of Prime Minister Harold Wilson) (“We have also decided to withdraw our forces from the Persian Gulf by [the end of 1971] . . . apart from our remaining Dependencies and certain other necessary exceptions, we shall by that date not be maintaining military bases outside Europe and the Mediterranean.”).

⁶ The Trucial States consisted of the sheikhdoms of Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al-Khaimah, Sharjah, and Umm Al Quwain. Following the British defeat of the Qawasim seafaring dynasty, based in the Gulf port city of Ras Al-Khaimah, done to protect British East India Company land and sea trade routes, Britain established a series of treaties with these sheikhdoms that created an official protectorate. See generally Mubarak Al-Otobi, *The Qawasim and British Control of the Arabian Gulf* (1989) (Ph.D. dissertation, University of Salford) (on file with the University of Salford Repository) (discussing the regional politics and defeat of the Qawasim dynasty); SULTĀN MUHAMMAD AL-QĀSIMĪ, *THE MYTH OF ARAB PIRACY IN THE GULF* (1986) (contesting the singular claim that British naval engagement in the Gulf had less to do with trade than with piracy); General Treaty for the Cessation of Plunder and Piracy by Land and Sea, *reprinted in* A COLLECTION OF TREATIES AND ENGAGEMENTS RELATING TO THE PERSIAN GULF SHAIKHDOMS AND THE SULTANATE OF MUSCAT AND OMAN IN FORCE UP TO THE END OF 1953, at 35 (1820), QATAR DIGIT. LIBR., https://www.qdl.qa/en/archive/81055/vdc_100023550810.0x000028 [https://perma.cc/9RU6-W7X7] (establishing the first of a series of treaties with the sheikhdoms); The Maritime Truce (1835) (establishing an intra-Gulf truce during pearling season that is renewed annually and introducing the term “Trucial States”); Perpetual Maritime Truce (1853) (establishing “lasting and inviolable” maritime peace and making Britain responsible for obtaining reparations for injuries suffered). Britain incrementally guaranteed the defense of Oman (1829), Bahrain (1861), Kuwait (1899), and Qatar (1916). See also Nathan Toronto, *Can a 19th Century Maritime Truce Help Ease 21st Century Tensions in the Gulf?*, ARAB GULF STATES INST. IN WASH. (Oct. 10, 2019), <https://agsiw.org/can-a-19th-century-maritime-truce-help-ease-21st-century-tensions-in-the-gulf/#:~:text=The%201835%20Maritime%20Truce%2C%20origin,the%20day%2C%20using%20limited%20resources> [https://perma.cc/8XCE-U8ZS] (discussing the 1835 Maritime Truce); James Onley, *Britain and the Gulf Sheikhdoms, 1820–1971: The Politics of Protection*, CIRS 1, 3 (2009) (reflecting on the legacy of Britain’s protectorate system in the Gulf and noting the *de facto* 1899 arrangement with Kuwait). Onley also points out that the 1835 Maritime Truce “does not appear in any Govt. of India publications,” but is identical to the 1843 truce except for terms of duration. See *id.* at 30 n.32.

unresolved intra-Arabian and international territory and boundary disputes.⁷ A series of maritime boundary negotiations ensued among all littoral states of the Gulf.⁸ Geographically overlapping interests exposed unresolved sovereignty questions relating to fishing zones, continental shelves, anticipated oil and gas deposits, and the drawing of baselines for purposes of maritime delimitation.⁹ The ownership of the three Lower Gulf Islands became important due to their proximity to the Strait of Hormuz and the nearby Iranian port of Bandar Abbas.¹⁰

On November 30, 1971, two days before British withdrawal, which was timed to coincide with the founding of the United Arab Emirates (UAE), Iranian marines invaded the Tunbs, sustaining casualties and killing four of the six policemen stationed there from the Emirate of Ras Al-Khaimah.¹¹ The day before, Iran had negotiated control over the northern part of Abu Musa, signing a Memorandum of Understanding (MOU) with the Emirate of Sharjah,¹² which had been

7 MOJTAHED-ZADEH, *supra* note 4, at 20. *See also* Richard A. Mobley, *The Tunbs and Abu Musa Islands: Britain's Perspective*, 57 MIDDLE E.J. 627, 637 (2003) (reviewing declassified documents outlining the concern about the transition of power and Britain's fourteen-month shuttle diplomacy to head off coming sovereignty disputes).

8 On the many and major intramural Arab boundary disputes among the Sheikhs (such as boundary disputes between Abu Dhabi and Dubai, Sharjah and Dubai, Oman and the Trucial States, Fujairah and Sharjah, and Fujairah and Ras Al-Khaimah), serious enough to threaten the British foreign policy objective of bringing about a federation of the Trucial States, see Saif Mohammad Obaid Bin-Abood, *Britain's Withdrawal from the Gulf: With Particular Reference to the Emirates 160* (1992) (Ph.D. dissertation, University of Durham) (on file with the University of Durham Library). *See generally* RONGXING GUO, TERRITORIAL DISPUTES AND RESOURCE MANAGEMENT: A GLOBAL HANDBOOK 19 (2007) (discussing boundary disputes generally).

9 The UAE and Iran have reached partial agreement on the delimitation of their shared continental shelf boundary, but the agreement fails to address ownership of the shelf surrounding the islands. *See* Simon Henderson, *The Persian Gulf's 'Occupied Territory': The Three-Island Dispute*, WASH. INST. OF NEAR E. POL'Y (Sept. 8, 2008), <https://www.washingtoninstitute.org/policy-analysis/persian-gulfs-occupied-territory-three-island-dispute> [<https://perma.cc/E2CP-TE27>].

10 *See* GUO, *supra* note 8, at 39–40.

11 *See* U.N. SCOR, 26th Sess., 1610th mtg. ¶ 58, U.N. Doc. S/PV 1610 (Dec. 9, 1971) (quoting November 30, 1971, cable from Sheikh Saqr Bin Mohamad Ali Al-Qasimi to Gov. of Iraq). *See also* *Iranian Troops Occupy Three Strategic Islands in Persian Gulf, and a Sheikdom Protests*, N.Y. TIMES (Dec. 1, 1971), <https://www.nytimes.com/1971/12/01/archives/iranian-troops-occupy-three-strategic-islands-in-persian-gulf-and-a.html> [<https://nyti.ms/3MVCC55>] (reporting three Iranian deaths and several injured persons).

12 MEMORANDUM OF UNDERSTANDING, IRAN-SHARJAH, Nov. 30, 1971, *reprinted in* THE LOWER GULF ISLANDS: ABU MUSA AND THE TUNBS DISPUTE 487–504 (Patricia Toye ed., 1993). Circumstances surrounding the MOU suggest that “it was procured under the threat of the use of force by Iran against the Sharjah.” CHARLES L.O. BUDERI & LUCIANA T. RICART, THE IRAN-UAE GULF ISLANDS DISPUTE: A JOURNEY THROUGH INTERNATIONAL LAW, HISTORY AND POLITICS 556 (2018). The countries agreed to share

in possession of the islands for about 150 years.¹³ The MOU “gave Iran full jurisdiction over the range of hills on the northern side of Abu

oil revenues while holding in abeyance the question of who owned Abu Musa. *See* Mobley, *supra* note 7, at 627. The agreement required Iran to give Sharja \$3.75 million per year until Sharja’s annual oil revenue reached \$7.5 million. *Iranian Troops Occupy Three Strategic Islands in Persian Gulf, and a Sheikdom Protests, supra* note 11. It has been noted that “[o]ne of the most important significant features of the Abu Musa is that it is potentially full of oil reserves.” Saeed Bagheri, *Iran’s Attitude to Security in the Strait of Hormuz: An International Law Perspective*, 13 N.Z. Y.B. INT’L L. 83, 102 n.78 (2015). The MOU is problematized by a state succession issue, as the countries signed the MOU on November 29, 1971, before the UAE came into being on December 2, 1971. If the MOU constitutes a binding international agreement, then customary international law could call into question the logic supporting Article 52 of the Vienna Convention on the Law of Treaties. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 52 holds that “[a] treaty is void if its conclusion *has been procured* by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.” *Id.* art. 52 (emphasis added). The italicized phrase makes illegal *ab initio* treaties procured by illegal use of force. *See* Kirsten Schmalenbach & Alexander Prantl, *How to End an Illegal War?*, VÖLKERRECHTSBLOG (Apr. 21, 2022), <https://voelkerrechtsblog.org/how-to-end-an-illegal-war/> [<https://perma.cc/S3TV-9M2J>]. In 1992, Iran expelled foreigners and denied entry to UAE noncitizen workers on Abu Musa. *See* William A. Rugh, *The Foreign Policy of the United Arab Emirates*, 50 MIDDLE E.J. 57, 61 (1996). “In April 1992, Iran took complete control of Abu Musa and subsequently placed some military equipment and administrative offices there.” KENNETH KATZMAN, CONG. RSCH. SERV., RS21852, THE UNITED ARAB EMIRATES (U.A.E.): ISSUES FOR U.S. POLICY 8 (2020). Though Iran subsequently repudiated the act and reaffirmed the 1971 MOU, the UAE interpreted the act as “terminally damaging the validity of the . . . MOU.” Richard Schofield, *Anything but Black and White: A Commentary on the Lower Gulf Islands Dispute, in SECURITY IN THE PERSIAN GULF: ORIGINS, OBSTACLES, AND THE SEARCH FOR CONSENSUS* 171, 172 (Lawrence G. Potter & Gary G. Sick eds., 2002). The Emir of Sharjah was murdered in 1972, partly for having signed what was perceived as a “traitorous agreement with Iran.” ROSEMARIE SAID ZAHLAN, THE MAKING OF THE MODERN GULF STATES: KUWAIT, BAHRAIN, QATAR, THE UNITED ARAB EMIRATES AND OMAN 103 (1989).

¹³ *See* James Onley, *Britain’s Informal Empire in the Gulf, 1820–1971*, 22 J. SOC. AFFS. 29, 31 (2005). Important sources of income for the Sheikh of Sharjah included concessions granted in 1898, 1923, 1935, and 1953 to mine red (ferric) oxide on Abu Musa. *See* BUDERI & RICART, *supra* note 12, at 13. In 1906, one of the lease holders sold his interest to a British subject, who in turn transferred the interest to the German company Wönckhaus and Partners. Eventually, a dispute arose when Sheikh Saqr bin Khalid Al-Qasimi cancelled the concession. Future concessions involved extensive infrastructural development on the island, including tunnels, railways, and worker residences. *See* SULTAN BIN MOHAMMED AL-QASIMI, TALE OF A CITY, PT. II 35–41 (David Wilmsen ed., Ahmed Ali trans., 2017). Buderi and Ricart regard the concessions as an important display of territorial sovereignty during the late nineteenth and early twentieth centuries. *See* BUDERI & RICART, *supra* note 12, at 13. They note that while “[t]here is no record of any protest by Persia over the 1898 agreement, nor, however, any record that the Persian government was aware of it,” the extensive documentation and legal argumentation surrounding the Wönckhaus Affair addresses with “particular relevance” the question of Sharjah’s sovereignty over the island. *Id.* *The New York Times* Tehran Bureau Chief, Thomas Erdbrink, noted Iranian claims that the islands were Iranian until Britain occupied them in 1908. He also noted that the UAE

Musa, where it could maintain a military presence.”¹⁴ The Sheikh of Ras Al-Khaimah had refused to sign a similar agreement relating to the Tunbs,¹⁵ prompting Iran to invade.¹⁶

Iran had increasingly made claims over the sparsely populated Abu Musa and Greater Tunb Islands, as well as the uninhabited Lesser Tunb, following Britain’s 1968 departure announcement.¹⁷ To this day, both Iran and the UAE continue to claim the islands as hereditary estates and as inseparable parts of their respective territories.¹⁸ The U.N. Security Council addressed this contention but deferred action on the invasion in December 1971,¹⁹ never to return to the subject. Bilateral negotiations in 1992 and 1995 ended in stalemate.²⁰ Despite

took their claim to the U.N. Security Council in 1980, which rejected the claim based on Iran’s development of the island’s infrastructure, including roads, schools, and a university. See Thomas Erdbrink, *A Tiny Island Is Where Iran Makes a Stand*, N.Y. TIMES (Apr. 30, 2012), <https://www.nytimes.com/2012/05/01/world/middleeast/dispute-over-island-of-abu-musa-unites-iran.html> [<https://perma.cc/RU2R-CYXB>]. See also FRED M. SHELLEY, *NATION SHAPES: THE STORY BEHIND THE WORLD’S BORDERS* 457 (2013) (noting the 1980 appeal to the U.N. Security Council). Iraq intimated that Iran’s occupation of the islands was a *casus belli* leading up to the Iran-Iraq war. See Letter from the Minister of Foreign Affairs of Iraq [Sadoon Hammadi] to the Secretary General A/35/201; S/13918 (Apr. 2, 1980), <https://search.archives.un.org/uploads/r/united-nations-archives/5/b/7/5b7d1965ba66919d99ae3ddf6ded1a5243bff592de3baafee70a28685ddc812d/S-0904-0022-13-00001.PDF> [<https://perma.cc/598Q-ESYZ>].

¹⁴ GEOFFREY KEMP & ROBERT E. HARKAVY, *STRATEGIC GEOGRAPHY AND THE CHANGING MIDDLE EAST* 96 (1997).

¹⁵ ZAHLAN, *supra* note 12, at 103.

¹⁶ NOURA S. AL-MAZROUEI, *DISPUTED ISLANDS BETWEEN UAE AND IRAN: ABU MUSA, GREATER TUNB, AND LESSER TUNB IN THE STRAIT OF HORMUZ* 11 (2015). See BUDERI & RICART, *supra* note 12, at 566 (“[The negotiated MOU on Abu Musa and] the failed negotiations over the Tunbs which led to the Iranian seizure of those islands.”).

¹⁷ See U.N. SCOR, 26th Sess., *supra* note 11, ¶ 66 (presenting the claims of T. El-Shibib, the Iraqi representative to the U.N. Security Council).

¹⁸ See *Iran Responds to UAE’s Claim over 3 Islands in Persian Gulf*, ISLAMIC REPUBLIC NEWS AGENCY (Sept. 28, 2021, 11:35 AM), <https://en.irna.ir/news/84486438/Iran-responds-to-UAE-s-claim-over-3-islands-in-Persian-Gulf> [<https://perma.cc/ZQJ7-DAYH>] (reiterating the Islamic Republic of Iran’s “consistent and principled position” regarding ownership of the islands); *Occupied UAE Islands*, EMBASSY OF THE U.A.E., D.C., <https://www.uae-embassy.org/discover-uae/foreign-policy/occupied-uae-islands> [<https://perma.cc/W8UV-RV8C>] (protesting Iran’s “illegal occupation” of the islands and noting the UAE). See generally HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 91 (Longmans, Green Co. ed, 1927) (discussing the monarchical idea of *patrimonium*).

¹⁹ See U.N. DEP’T OF POL. & SEC. COUNCIL AFFS., *REPertoire OF THE PRACTICE OF THE SECURITY COUNCIL: SUPPLEMENT 1969–1971*, at 167, U.N. Doc. ST/PSCA/Add.6, U.N. Sales No. E.76.VII.1 (1976).

²⁰ See *UAE, Iran Resume Island Dispute Talks*, UPI (Nov. 19, 1995), <https://www.upi.com/Archives/1995/11/19/UAE-Iran-resume-islands-dispute-talks/9885816757200/> [<https://perma.cc/VJ5Q-4T36>] (noting the 1992 talks and the commencement of the 1995

repeated UAE bids to resolve the dispute in accordance with U.N. Charter Article 33 at the International Court of Justice (ICJ),²¹ Iran refuses to consent to third-party settlement.²² Other efforts have also since failed to resolve the dispute, including a joint UAE-Iran commission,²³ a purported land swap involving Omani intermediaries,²⁴ and sea swaps.²⁵ Iranian President Ahmadinejad's visit to the island on Iran's 2012 National Day of the Persian Gulf only provoked tensions around the Arab world.²⁶ Accordingly, the Lower Gulf Islands remain among the frozen disputes in international law.²⁷

negotiations); AL-MAZROUEI, *supra* note 16, at 17 (noting the collapse of the 1995 negotiations).

²¹ Article 33 of the U.N. Charter mandates that members seek a peaceful means of dispute settlement on matters likely to endanger the maintenance of international peace and security. On the UAE's calls to refer the issue to the ICJ, see Rola Alghoul et al., *Statement by UAE before the General Debate of the 76th Session of UNGA*, EMIRATES NEWS AGENCY-WAM (Sept. 28, 2021, 16:09 PM), <http://wam.ae/en/details/1395302974589> [<https://perma.cc/6WAW-GV5P>].

²² See *Abu Musa, Greater Tunb, Lesser Tunb Belong to Iran: Foreign Ministry*, ISLAMIC REPUBLIC NEWS AGENCY (Sep. 17, 2021, 2:47 PM), <https://en.irna.ir/news/84473937/Abu-Musa-Greater-Tunb-Lesser-Tunb-belong-to-Iran-Foreign-Ministry> [<https://perma.cc/6RRV-87LZ>] (“[Iranian Foreign Ministry Spokesman Saeed] Khatibzadeh said . . . that the repetitive and tedious statements issued . . . will not change the status of these islands.”); *Q&A: Iran President's Controversial Visit to Abu Musa*, BBC NEWS (Apr. 23, 2012), <https://www.bbc.com/news/world-middle-east-17770111> [<https://perma.cc/KWD6-CRFJ>] (quoting Iranian Foreign Ministry's longstanding claim that Iran's ownership was “definitive, permanent and non-negotiable”); *Abu Musa Lesser Tunb, Greater Tunb Islands Inseparable Part of Iranian Territory, Any Claim to the Contrary Rejected*, IRANIAN STUDENTS' NEWS AGENCY (Sept. 28, 2021, 13:52), <https://en.isna.ir/news/1400070603722/Abu-Musa-Lesser-Tunb-Greater-Tunb-islands-inseparable-part> [<https://perma.cc/NX8T-XSDH>] (quoting Iranian U.N. official Payman Ghadirkhomi's claim of Iran's inviolable sovereignty over the islands and the nonrecognition of any dispute with the UAE over contrary claims).

²³ See KATZMAN, *supra* note 12, at 8.

²⁴ See Daniel Pipes, *Has Iran Gained a Foothold in the Arabian Peninsula?*, NAT. REV. (Jan. 17, 2014, 12:00 PM), <https://www.nationalreview.com/corner/has-iran-gained-foothold-arabian-peninsula-daniel-pipes/> [<https://perma.cc/2NZP-4GDM>] (proposing Iran exchange control over the islands for a strategic foothold in Ras Musandam at the tip of the Strait of Hormuz in Oman, along with payments of oil and gas to the Sultanate).

²⁵ KATZMAN, *supra* note 12, at 9 (granting Iran control over the islands' seabed in exchange for returning the *terra firma* to the UAE); Awad Mustafa, *Iran, UAE Close to Deal on Hormuz Islands*, DEF. NEWS, Dec. 9, 2013, at A16.

²⁶ See Erdbrink, *supra* note 13.

²⁷ See generally Thomas D. Grant, *Frozen Conflicts and International Law*, 50 CORNELL INT'L L.J. 361 (2017) (noting that the term escapes precise legal definition, but relates to unsettled status, referencing examples such as Transnistria, Nagorno-Karabakh, South Ossetia, Abkhazia, and Eastern Ukraine).

This Article critically reviews the international legal considerations attaching to the disparate claims of sovereignty over the Lower Gulf Islands. Contested narratives relating to historic title have led international law to rely on a *critical date* on which to base sovereign title. Establishing the critical date problematizes the periodization of sovereignty and creates its own peculiar problems. The conundrum of the critical date, set against the backdrop of Abu Musa and the Tunbs, reveals the arbitrary nature of international law. This realization rationally suggests that the critical date dispute may be resolved through sharing or de-territorializing space. However, these are unlikely prospects that leave the international community in search of a second-best solution and, oddly, the UAE in search of a counterbalance—perhaps its own island to control in the mouth of the Gulf of Aden, which connects the Indian Ocean to the Mediterranean Sea through the Suez Canal.²⁸

To interrogate the utility of the critical date and its relation to the impasse involving the status of the Lower Gulf Islands, Part I reviews the political circumstances that contributed to the sovereignty dispute at the end of the *Pax Britannica* in the Gulf region. Part II introduces place naming and toponymic complications that coincide with the conceptual problem of territorializing civilizational units. Languified characterizations of the Gulf can inform the way international law addresses questions of sovereignty. Part III frames the international law relating to periodizing sovereignty and assesses the metaphorical significance of the critical date in relation to *uti possidetis* and the nomadic, non-Euclidean history of Gulf peoples. Here, the Article asserts that the idea of the critical date succumbs to indefinite and nontemporal characterizations that attach a specter of ambiguity to the ascertainment of the critical date. Absent a willingness of the parties to negotiate or ascertain the critical date through a third party, the Article concludes by noting an emerging attempt by the UAE to leverage political interests opposing Iran elsewhere. This adventurism raises concerns about another critical date, proffered to secure the UAE's efforts to territorialize a counterbalancing island of strategic value. Rather than contributing to fixity and certainty, international law's interest in associating territorial title with the temporal component of

²⁸ See Elin Hellquist & Samuel Neuman Bergenwall, *Managing Security in the Red Sea and Gulf of Aden*, 8112 FOI STUD. AFR. SEC. 1, 2 (Feb. 13, 2023), <https://www.foi.se/rest-api/report/FOI%20Memo%208112> [<https://perma.cc/L2B4-5ZAE>] (noting the Gulf of Aden's "immense strategic value" as a link between the Mediterranean Sea and Indian Ocean).

the critical date unavoidably conjures up specters of the past. Those specters return to haunt the fate of three small islands in the Lower Gulf and reveal the inherent difficulty in determining the critical date.

I

THE POWER VACUUM

This Part discusses the circumstances of political intrigue that accompanied the Iranian attacks. Arab diplomats asserted that Britain and America connived²⁹ to allow Iran to fill the anticipated power vacuum caused by the retiring *Pax Britannica*. Rising Arab nationalism and the Soviet pursuit of an anchorage in the Gulf supported Arab claims that Western powers underwrote Iran’s billion-dollar military buildup to fill the anticipated British void.³⁰ Decolonization had already presented itself as an eventuality with the 1956 Anglo-French debacle at Suez and the 1958 overthrow of the Britain-supported Hashemite monarchy in Iraq.³¹ The 1967 decision by the British to withdraw from the Aden Protectorate (Yemen)—“the last major vestige of [its]

²⁹ U.N. SCOR, 26th Sess., *supra* note 11, ¶ 68 (referencing the Arab claim of “connivance” of the United States and U.K. allowing for Iran’s seizure of the islands).

³⁰ See, e.g., William E. Griffith, *Iran’s Foreign Policy in the Pahlavi Era*, in IRAN UNDER THE PAHLAVIS 365, 378 (George Lenczowski ed., 1978) (“[There were] gloomy predictions in the West of a power vacuum . . . that the Soviets and Arab radicals, notably the Iraqi Ba’th regime, would fill.”); J.C. Hurewitz, *The Persian Gulf: British Withdrawal and Western Security*, 401 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 106 (1972) (noting “Soviet attempts to establish a naval anchorage in the Gulf” and the “Western support” of the Iranian military buildup). Mobley’s review of declassified documents tells a different story. Britain chiefly focused on filling its void in the Gulf with the establishment of the federated UAE. Despite concerted efforts to diplomatically resolve the island dispute—which was, for a time, configured along a suggested meridian line ceding the Tunbs to Iran and Abu Musa to the UAE—Britain satisfied itself with the more salient shared arrangement over Abu Musa while ‘writing off’ UAE control over the Tunbs. Given that the final result settled the question of Bahrain, Bahrain and Qatar entered into the Arab League and the U.N. and, thus, created the UAE. See Mobley, *supra* note 7, at 644. Buderer and Ricart concluded that despite efforts to find a common ground, and “after almost a century of consistently defending Qawásim sovereign rights over the islands, the British had openly adopted a decidedly indifferent position in the face of an Iranian seizure of the islands by force.” BUDERI & RICART, *supra* note 12, at 568.

³¹ These two events contributed to the end of colonial rule in the Middle East. For a discussion of tensions and economic threats created by the British, French, and Israeli invasion of Egypt, see generally DAVID A. NICHOLS, *EISENHOWER 1956: THE PRESIDENT’S YEAR OF CRISIS—SUEZ AND THE BRINK OF WAR* (2012). On the overthrow of the British-backed Hashemite monarchy by the Free Officers Revolution and the security dilemma posed, particularly for American policymakers, see BRANDON WOLFE-HUNNICUTT, *THE PARANOID STYLE IN AMERICAN DIPLOMACY: OIL AND ARAB NATIONALISM IN IRAQ* 9 (2021).

erstwhile global empire”³²—may have served as a “harbinger” of Britain’s impending departure plan, and a catalyst for Iran to upgrade air capabilities through American military purchases.³³ When Britain’s declared date of departure arrived³⁴—at the cusp of the creation of the federated sheikhdoms of the UAE—Iran made its move. With retreating Britain unwilling, and the fledgling UAE unable to respond to the invasion,³⁵ Iran secured its *fait accompli* over the islands. In response, Libya nationalized British Petroleum assets and Iraq severed diplomatic relations with Britain.³⁶

Iranian perspectives point to an informal *quid pro quo* whereby Iran was to acquire the islands as compensation for relinquishing historical claims to Bahrain.³⁷ Bahrain had maintained a special place in the

32 Alvin J. Cottrell, *Iran’s Foreign Policy in the Pahlavi Era*, in *IRAN UNDER THE PAHLAVIS* 389, 404 (George Lenczowski ed., 1978). Britain occupied the Gulf Port of Aden in 1839 and established the Aden Protectorate via transfer from the Government of India. The Aden Protectorate dissolved in 1963, and after attacks against British forces, Britain withdrew in 1967. The area today forms the territory of the Republic of Yemen. For its colonial history, see Robert R. Robbins, *The Legal Status of Aden Colony and the Aden Protectorate*, 33 AM. J. INT’L L. 700 (1939). For the escalating nationalist conflict leading to the British withdrawal, see *Why Did British Troops Leave Aden?*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/why-did-british-troops-leave-aden> [https://perma.cc/SV27-9R56]. The withdrawal “deeply concerned” the Sheikdoms of the lower Gulf. In response, the British sent their Minister of State for Foreign Affairs, Goronwy Roberts, to allay concerns of abandonment. Bin-Abood, *supra* note 8, at 57–58. Notwithstanding the assurances, Roberts returned a few months later, in January 1968, “to inform the rulers that Britain now had a plan to withdraw [from the Gulf] by the end of 1971.” *Id.* at 95. At that time, Roberts reportedly may have proposed the Gulf rulers federate, an idea that took the form of a bilateral agreement between Dubai and Abu Dhabi on February 18, 1968. *See id.* at 249.

33 *See* Cottrell, *supra* note 32 (“It was not by mere coincidence that the Shah began to procure the F-4 aircraft from the United States in . . . 1968.”). Citing a US government analysis in 1970, Al-Mazrouei concluded that the US began to envision a Twin Pillar policy of Gulf security based on regional cooperation between Iran and Saudi Arabia on the departure of the British. He postulated, however, that Saudi Arabia would withhold recognition of the fledgling federated UAE until there was a favorable resolution of border issues. *See* Noura Saber Mohammed Saeed Al-Mazrouei, *UAE-Saudi Arabia Border Dispute: The Case of the 1974 Treaty of Jeddah 112–14* (Oct. 2013) (Ph.D. dissertation, University of Exeter) (on file with the University of Exeter).

34 The British withdrawal from the Gulf began on December 2, 1971. The last British servicemembers to leave Bahrain withdrew on December 16, 1971. R.P. Owen, *The British Withdrawal from the Persian Gulf*, 28 *WORLD TODAY* 75, 75 (1972).

35 *See* Mobley, *supra* note 7, at 628 (noting the view that London ultimately pursued the “Pontius Pilate solution” by washing its hands of a negotiated solution).

36 *See* ZAHLAN, *supra* note 12, at 103 (discussing Arab anger regarding the timing of the invasion and the withdrawal of Britain that caused the Tunbs to fall “between two stools”).

37 *See* Jalil Roshandel, *On the Persian Gulf Islands: An Iranian Perspective*, in *SECURITY IN THE PERSIAN GULF: ORIGINS, OBSTACLES, AND THE SEARCH FOR CONSENSUS*

geopolitics of the region, given the early discovery and development of oil resources there³⁸ and the “fragile demographic-political makeup of the principality, in which a Sunni minority rules a Shiite majority.”³⁹ Iran had purportedly asserted its claim to Bahrain “uninterruptedly,” except during the period of Portuguese occupation (1507–1622),⁴⁰ which began when the Portuguese *Fidalgo* (nobleman) Alphonso Burkerk captured Hormuz in 1507.⁴¹ Persian claims of control over the islands date from 1165 BCE and the Elamite Empire of Shilhak-In-Shushinak.⁴² A lingering perception is that the incentive required for

135, 136 (Lawrence G. Potter & Gary G. Sick eds., 2002) (noting the Iranian belief in a deal to “compensate Iran for recognizing Bahrain’s independence”); KOUROSH AHMADI, ISLANDS AND INTERNATIONAL POLITICS IN THE PERSIAN GULF: ABU MUSA AND THE TUNBS IN STRATEGIC PERSPECTIVE 3 (2008) (situating the dispute in a broader historical and strategic context in which the islands became “pawns” in a greater game). Hassan H. Al-Alkim, a UAE scholar, agreed that the reason for Iran insisting on annexing the islands may have had more to do with providing the Shah with a face-saving gesture for relinquishing the claim to Bahrain than any strategic objective, given that Iran has control over “much more strategic territory than the disputed islands, notably Qeshm island and Bander Abbas controlling the entrance of the Gulf.” Hassan H. Al-Alkim, *The Islands Question: An Arabian Perspective*, in SECURITY IN THE PERSIAN GULF: ORIGINS, OBSTACLES, AND THE SEARCH FOR CONSENSUS 155, 158 (Lawrence G. Potter & Gary G. Sick eds., 2002). A confidential British Foreign Office memorandum noted the Shah’s private recognition of the need to control the islands as a face-saving spoil for relinquishing Iranian claims to Bahrain. See BUDERI & RICART, *supra* note 12, at 557 (quoting a confidential June 1968 British memorandum).

³⁸ *About Us*, BAPCO REFINING, <https://www.bapco.net/en/page/history/#history> [<https://perma.cc/MH8Z-FL2U>] (noting that oil in the Arabian Gulf was first discovered in Bahrain in 1932). The Englishman, William Knox D’Arcy, negotiated the first concession agreement with Persia in 1901, finding oil there (at Masjed Soleyman) in 1908. British mapping of the region progressed between 1905 and 1908 with the publication of Lieutenant Fraser Hunter’s *Map of Arabia*. A strike in Iraq in 1927 led to further exploration and the major strike in Bahrain, which sparked the intensive exploitation of Middle East petroleum. See *Oil Maps of the Middle East*, BRIT. LIBR., <https://www.bl.uk/maps/articles/oil-maps-of-the-middle-east> [<https://perma.cc/H5NS-96X2>] (detailing the cartographic history of oil exploration in the Middle East).

³⁹ Doron Itzhakov, *Iran and Bahrain: Ancient Ambitions, New Tactics*, BEGIN-SADAT CTR. FOR STRATEGIC STUD. (Mar. 7, 2018), <https://besacenter.org/iran-bahrain/> [<https://perma.cc/2KPL-T2Q2>].

⁴⁰ Majid Khaddurri, *Iran’s Claim to the Sovereignty of Bahrayn*, 45 AM. J. INT’L L. 631, 634 (1951) (reviewing the historical claim of Iran to Bahrain but discounting its significance after the 1820 arrival of Great Britain in the Gulf).

⁴¹ Ahmad Jalinusi & Vahid Barari Arayee, *The Three Islands: (Abu Musa, the Greater & Lesser Tunb Islands) Integral Parts of Iran*, 19 IRANIAN J. INT’L AFFS. 1, 3 (2007). *Historical, Geographical and Legal Validity of the Name: Persian Gulf* 3 (U.N. Grp. of Experts on Geographical Names, Working Paper No. 61, Apr. 4, 2006), <https://unstats.un.org/unsd/geoinfo/UNGEGN/docs/23-gegn/wp/gegn23wp61.pdf> [<https://perma.cc/BDM9-79D7>].

⁴² Jalinusi & Arayee, *supra* note 41.

Iran's abandonment of its purported historical claim to Bahrain involved acquiescing to, if not allowing, its takeover of the Lower Gulf Islands.⁴³

An involved historical debate surrounds possessory claims to more than the Lower Gulf Islands; this complexity relates to the entire Gulf region. Sir Clements Markham (1830–1916), the influential Secretary of the Royal Geographical Society, contended that “[t]he whole trade of the Persian Gulf remained in the hands of the Arabs for many centuries, and a long line of merchant-kings reigned at Ormuz [Hormuz], before Vasco da Gama discovered the Cape of Good Hope.”⁴⁴ Sir Clements' historical account aligned with what appeared to be contemporary British interests at the time, however, his account underemphasized the territorial extent of the two hundred year Achaemenid Empire (538–330 BCE).⁴⁵ Under Cyrus the Great, the Persians conquered Babylonia and the Tigris and Euphrates river valley. The Persians crossed the Strait of Hormuz and converted the southern littoral of the Gulf of Oman into the semi-exclave satrapy (province) of Maka.⁴⁶ Sir Clements' view also contrasted with polyphonic narratives of conflict involving the British East India Company, the Dutch East India Company, and the Ottomans of Basra following Shah Abbas' defeat of the Portuguese maritime empire at Hormuz in 1622.⁴⁷

Claims of uninterrupted historical control of the Gulf appear in modern Iranian accounts as well. However, Iran's purported relinquishment over the Upper Gulf only served to reinforce that its claim of perpetual possession over the Lower Gulf Islands of Abu Musa and the Tunbs was nonnegotiable. As the Shah stated in 1971: “What we are demanding [regarding the islands] is what has always belonged

⁴³ On the “widespread belief in the region” involving this quid pro quo, see Henderson, *supra* note 9.

⁴⁴ CLEMENTS R. MARKHAM, A GENERAL SKETCH OF THE HISTORY OF PERSIA 415–16 (London, Longmans, Green, & Co. 1874).

⁴⁵ See generally JOSEF WIESEHÖFER, ANCIENT PERSIA FROM 550 BC TO 650 AD (Azizeh Axodi trans., 2d ed. 2001).

⁴⁶ See Simeon Netchev, *The Achaemenid Persian Empire c. 500 BCE*, WORLD HIST. ENCYCLOPEDIA (July 5, 2022), <https://www.worldhistory.org/image/16107/the-achaemenid-persian-empire-c-500-bce/> [<https://perma.cc/59NQ-NHSQ>] (illustrating the imperial reach of the Achaemenid Persian Empire from its origins in 550 BCE to its demise following conquest by Alexander the Great in 329 BCE).

⁴⁷ See generally Joan-Pau Rubiés, *1622 y la crisis de Ormuz ¿Decadencia o reorientación?*, 48 MÉLANGES DE LA CASA DE VELÁZQUEZ 121 (2018) (Spain) (broadening the discussion of the fall of the Hormuz fortress in 1622 to include imperial perspectives of the metropolis).

to our country throughout history It is perfectly natural and reasonable that, now that imperialism is withdrawing, Iran should regain what has always been its possession historically.”⁴⁸

Filling this imperial void involved “[twenty-six] months of secret . . . negotiations” between Britain and Iran in the lead-up to Iran’s abandonment of its historical claim to Bahrain in March of 1970.⁴⁹ During this period of the Cold War, United States engagement policy with the Middle East depended on establishing regional partnerships with Sunni-majority Saudi Arabia and Shiite-dominated Iran as monarchical buffers against Soviet intrusion and guarantors of stable oil supplies at tolerable prices.⁵⁰ Preserving Iran’s status quo position as one of the Twin Pillars, along with Saudi Arabia, of newly forming Gulf regional security policy,⁵¹ necessitated a pragmatic solution to the Bahrain question that would not compromise the Shah’s already “waning domestic legitimacy.”⁵² The question of exchanging Iranian claims to Bahrain for control over the Lower Gulf Islands, and the perception of a colonial exclusion of Arab interests, remain as backdrops to this territorial dispute.⁵³

II

TERRITORIALIZING A CIVILIZATIONAL UNIT

The anthropology of the Gulf affirms the complexity of its polyphonic, commercial, and human history. This Part illustrates challenges confronting international law in its treatment of disputed sovereignty issues. The interconnectedness and porosity of human geography make spatial and territorial divisions, preferred by the arrival of the state system, imperfect.

⁴⁸ AL-MAZROUEI, *supra* note 16, at 20.

⁴⁹ Roham Alvandi, *Muhammad Reza Pahlavi and the Bahrain Question, 1968–1970*, 37 BRIT. J. MIDDLE E. STUD. 159, 159–60 (2010).

⁵⁰ Stephen Brannon, *Pillars, Petroleum and Power: The United States in the Gulf*, 2 ARAB STUD. J. 4 (1994) (discussing the Twin Pillar Middle Eastern policy position of the United States).

⁵¹ See Claudia Castiglioni, *The Relations Between Iran and Saudi Arabia in the 1970s*, 97 CONFLUENCES MÉDITERRANÉE 143, 144 (2016) (Fr.) (discussing Tehran and Riyadh as the cornerstones of the Twin Pillars Policy for Gulf regional security).

⁵² Alvandi, *supra* note 49, at 160.

⁵³ See Hussein Ibish, *Iran’s New Ploy to Disrupt the Mideast: Laying Claim to Bahrain*, BLOOMBERG (Sept. 20, 2022, 9:00 PM), <https://www.bloomberg.com/opinion/articles/2022-09-21/iran-claims-bahrain-to-shake-up-nuclear-talks-and-rebuff-israel#xj4y7vzkg> [<https://perma.cc/8EJJ-DG4F>] (noting Iran’s revival of its claim that Bahrain, or Mishmahig, is the long-lost fourteenth province of Iran).

Cracks in sovereignty's container arise in multiple areas of the Gulf. For instance, Farsi, the official language of Iran, is of Indo-European extract.⁵⁴ Arabic is often spoken along the Iranian littoral south of Bushehr.⁵⁵ At the turn of the century, expatriate Iranian communities populated Bahrain and Dubai, and one could hear fourteen languages spoken in the *suks* of Muscat and Matrah.⁵⁶ Similarly, several religions coexisted. Although the majority of Arab Iraqis share the Shiite Islam of the Iranians,⁵⁷ “[a] Portuguese visitor in 1549 commented that in Hormuz, God was celebrated four times a week—by the Muslims on Friday, the Jews on Saturday, the Christians on Sunday, and the Hindus on Monday.”⁵⁸ The cross-fertilization of cultures around this inland sea promotes the conclusion that the conflict between Arabs and Persians is more the product of “state formation and the rise of nationalism” than of imperial interference or millennial historical antagonisms.⁵⁹

While Gulf Shia had prolonged periods of political ascendancy during the Būyid (945–1055), Fāt imid (909–1171), and Safavid (1502–1736) eras, no evidence supports a claim of uninterrupted hegemony over the Gulf by any of the multitudinous factions that sailed its sea. Separated from interiors bounded by mountains and deserts, the peoples of the littoral Gulf shared a crisscrossing maritime history. This indicates that the Gulf historically represented a unified “civilizational unit,” as opposed to the divisions introduced by modern statehood.⁶⁰ Archeological evidence of the prehistory of the UAE points toward the conclusion that the Gulf is better understood in relation to the region as a whole.⁶¹ Accordingly,

[l]ong before it became the Trucial States, let alone the United Arab Emirates, this region interacted with its neighbors in Northeastern

⁵⁴ LAWRENCE G. POTTER, *THE PERSIAN GULF IN HISTORY 2* (Lawrence G. Potter ed., 2009).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Munqith Dagher, *Avoiding the Iranian Trap: Iraqi Shia Are Not Loyal to Iran*, WASH. INST. FOR NEAR E. POL’Y: FIKRA F. (Jan. 15, 2021), <https://www.washingtoninstitute.org/policy-analysis/avoiding-iranian-trap-iraqi-shia-are-not-loyal-iran> [https://perma.cc/NN9K-WNTL].

⁵⁸ See POTTER, *supra* note 54.

⁵⁹ Fred Halliday, *Arabs and Persians Beyond the Geopolitics of the Gulf*, 22 *CAHIERS D’ÉTUDES SUR LA MÉDITERRANÉE ORIENTALE ET LE MONDE TURCO-IRANIEN* 251, 252 (1996) (Fr.).

⁶⁰ POTTER, *supra* note 54, at 1.

⁶¹ N.Y.U. Abu Dhabi Inst., *The Development of the Trucial Coast: From the Buyids to the British*, YOUTUBE at 41:53 (Mar. 7, 2016), <https://www.youtube.com/watch?v=4qCVJ-49tfw> [https://perma.cc/G37U-XA29] (talk by Professor Daniel Potts).

and Central Arabia, the Central and Northern Gulf, and Southern Iran, and bore the brunt of foreign state and imperial pressure from the era of the Buyids through subsequent periods of dominance by the Kingdoms of Kish and Hormuz, the Portuguese, Safavids, Omanis, Afsharids, and the East India company. One could look much further back in time, as well, for evidence of similar patterns, as archeology provides ample evidence of the extent to which the coast of what is today the UAE was intimately linked to its Mesopotamian, Iranian, and Indian neighbors.⁶²

This history equally diminishes sweeping hegemonic claims of ownership over the Gulf and centuries of commercial penetrations from India and East Africa,⁶³ South East Asia,⁶⁴ and Ming China.⁶⁵ The Europeans have predominantly authored these remnants of history,⁶⁶ particularly after the Scottish hydrographer James Horsburgh published the Gulf navigational directory⁶⁷ and the sacking of Ras Al-

⁶² *Id.* at 44:39–45:21.

⁶³ See DIONISIUS A. AGIUS, SEAFARING IN THE ARABIAN GULF AND OMAN PEOPLE OF THE DHOW 111–26 (2005) (discussing seafaring routes to West India and East Africa); POTTER, *supra* note 54, at pt. II (presenting three essays on cultural links between the Gulf and Indian Ocean).

⁶⁴ Christophe Jaffrelot & Laurence Louër, *The Gulf-South Asia Religious Connections: Indo-Islamic Civilizations vs. Pan-Islamism?*, in PAN-ISLAMIC CONNECTIONS: TRANSNATIONAL NETWORKS BETWEEN SOUTH ASIA AND THE GULF 1 (Christophe Jaffrelot & Laurence Louër eds., 2017) (presenting historical background on the multifaceted relationships between the Gulf and South Asia).

⁶⁵ See Lin Meicun & Ran Zhang, *Zheng He's Voyages to Hormuz: The Archeological Evidence*, 89 ANTIQUITY 417 (2015) (discussing Ming Imperial Fleet Admiral Zheng He's four sailings to Hormuz in the fifteenth century); Ralph Kauz & Roderich Ptak, *Hormuz in Yuan and Ming Sources*, 88 BULLETIN DE L'ÉCOLE FRANÇAISE D'EXTRÊME-ORIENT 27 (2001) (Fr.) (discussing Admiral Zheng He's fifteenth-century sojourns in Hormuz and interactions with the local elite).

⁶⁶ See generally [1908] 1 & [1915] 2 JOHN GORDON LORIMER, GAZETTEER OF THE PERSIAN GULF, OMAN, AND CENTRAL ARABIA (compiling then-confidential historical, geographical, statistical, and ethnological background for British diplomats in the region); ANTÓNIO DIAS FARINHA, OS PORTUGUESES NO GOLFO PÉRISCO, 1507–1538: CONTRIBUIÇÃO DOCUMENTAL E CRÍTICA PARA A SUA HISTÓRIA (1991) (presenting a leading Portuguese account); SANJAY SUBRAHMANYAM, THE PORTUGUESE EMPIRE IN ASIA, 1500–1700: A POLITICAL AND ECONOMIC HISTORY (2d ed. 2012) (updating his account of Portuguese colonialism in the Gulf and Asia); C.R. BOXER, THE DUTCH SEABORNE EMPIRE, 1600–1800 (1965) (a classic presentation of the rise of Dutch maritime power); PHILIP LAWSON, THE EAST INDIA COMPANY: A HISTORY (1993) (canvassing the epic 250-year history of the British trading company).

⁶⁷ See generally JAMES HORSBURGH, INDIA DIRECTORY, OR DIRECTIONS FOR SAILING TO AND FROM THE EAST INDIES, CHINA, NEW HOLLAND, CAPE OF GOOD HOPE, BRAZIL, AND THE INTERJACENT PORTS (London, H. Brewis & Sons 1809) (presenting the first of eight editions published between 1809 and 1864, including descriptions of Sharjah, Dubai, Abu Dhabi (Abothubbee), Bahrain, and Hormuz, compiled from journals of ships employed by the East India Company).

Khaimah in 1809, which led to British dominance in the region for the next 150 years.⁶⁸ These narratives compounded to create an orientalist discourse of Western dominance,⁶⁹ which depicted the Middle East as antirational and in need of the West's civilizing mission (*mission civilisatrice*). While some documents implied that British authorities recognized Iran's claim in the nineteenth century⁷⁰—for instance, an 1886 British War Ministry map that showed Abu Musa and the Tunbs as belonging to Iran⁷¹—European colonial rule was preoccupied with the consolidated Sunni regimes of the Gulf. This phenomenon is largely typified by Sir Clements's Royal Geographical Society and the imperial influences of the nineteenth century British East India Company.⁷² However, the significance of cartography and place naming informed colonial impressions of the Gulf region, with lasting and problematic consequences for international law and its engagement with the sovereignty dispute.

A. Place Naming and Toponymy

The nomenclature of the Gulf and the “hostilities” between Iran and the UAE over the disputed islands have been described as “[o]ne of the longest running toponymic battles in the world.”⁷³ At issue is the transmission of beliefs, transmuted into understandings of historical

⁶⁸ See generally CHARLES E. DAVIES, *BLOOD-RED ARAB FLAG: AN INVESTIGATION INTO QASIMI PIRACY 1797–1820* (1997) (recounting the disputes and decisive battle between British East India Company brigs and the Qawasim Arabs, which led to the complete destruction of the town of Ras Al-Khaimah in 1819).

⁶⁹ See ZACHARY LOCKMAN, *CONTENDING VISIONS OF THE MIDDLE EAST: THE HISTORY AND POLITICS OF ORIENTALISM* 66 (2d ed. 2009).

⁷⁰ See Henderson, *supra* note 9 (noting that British historical records “portray confusion” about bequeathing the islands to both Persians and tribal sheikhs on the Arabian side of the Gulf).

⁷¹ The map is sometimes called the 1888 map because the British gave a copy of the map to the Persian ruler, Nasser Ad-Din Sha Qajar, in 1888. See AL-MAZROUEI, *supra* note 16, at 22. The British admitted that coloring the islands as belonging to Iran was an “unfortunate mistake.” See Mobley, *supra* note 7, at 629.

⁷² N.Y.U. Abu Dhabi Inst., *supra* note 61, at 3:14.

⁷³ William O. Beeman, *Gulf Society: An Anthropological View of the Khalijis—Their Evolution and Way of Life*, in *THE PERSIAN GULF IN HISTORY* 147 (Lawrence G. Potter ed., 2009). Toponymy is the study of place names. As a concept, it was introduced by cultural geographers to interrogate the cultural significance, social relationships, linguistic moorings, and onomastic recognition of landscapes, often demonstrative of the power relationships between the colonial and colonized. See generally V.R. Savage, *Place Names*, in *INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY* 178, 178–84 (Rob Kitchin & Nigel Thrift eds., 2009).

entitlement, that express the refracted recordings of human identity.⁷⁴ Historical book titles foreshadow the painstaking reconstructions of sovereignty over the islands, such as Thomas R. Mattair's *The Three Occupied UAE Islands: The Tunbs and Abu Musa* (2006)⁷⁵ and Hooshang Amirahmadi's less obviously titled but still suggestive *Small Islands, Big Politics: The Tunbs and Abu Musa in the Persian Gulf* (1996).⁷⁶ As the title of Amirahmadi's work suggests, evidence of Persia's historical suzerainty over the islands attaches to the very name of the Gulf water—a point of special emphasis by the Iranian Ministry of Foreign Affairs.⁷⁷

Although the Persian Gulf's toponymic reference is politically charged, its usage is informed by centuries of map making and history. The Portuguese usage of the term *Sino Persico*, meaning the Persian Sea, derives from a term possibly initiated by the Greek geographer Hecataeus around 500 BCE: *Persikos kolpos*.⁷⁸ Claudius Ptolemy's *Geographia* (ca. 150) influentially transported the exonym⁷⁹ around the Western world. Later, Martin Waldseemüller's famous 1507 *Universalis Cosmographia* map references the *Sinus Persicus*.⁸⁰

⁷⁴ See CHRISTOPHER R. ROSSI, SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY 11–14 (2017) (reviewing the life expressions of tradition as construed by historians such as Edward Shils, Eric Hobsbawm, Mark Salber Phillips, Wilhelm Dilthey, and others).

⁷⁵ See generally THOMAS R. MATAIR, THE THREE OCCUPIED UAE ISLANDS: THE TUNBS AND ABU MUSA (2006).

⁷⁶ See generally SMALL ISLANDS, BIG POLITICS: THE TONBS AND ABU MUSA IN THE PERSIAN GULF (Hooshang Amirahmadi ed., 1996).

⁷⁷ See *Iran's Ministry of Foreign Affairs Issues Statement to Mark National Persian Gulf Day*, IRANIAN STUDENTS' NEWS AGENCY (Apr. 30, 2022), <https://en.isna.ir/news/1401021006547/Iran-s-Ministry-of-Foreign-Affairs-issues-statement-to-mark-National> [<https://perma.cc/J5LB-JBET>] (inferring entitlement over the Gulf based on ancient, historical, and widespread usage of the name Persian Gulf).

⁷⁸ See BUDERI & RICART, *supra* note 12, at xxvi (employing the term *Persikos kolpos*).

⁷⁹ An exonym is the name used to describe a geographical feature outside the area where that language is spoken. Its opposite is called an endonym. Toponymists have long understood the politicized and passionate consequences of exonyms, and efforts have been made through the United Nations Group of Experts on Geographical Names (UNGEGN) to change words like Peking or Lake Victoria to Beijing or N'yanza. Confining or reducing the use of exonyms has proven difficult due to widespread usage in major world languages, "particularly for the countries of Europe." U.N. GRP. OF EXPERTS ON GEOGRAPHICAL NAMES, EXONYMS AND THE INTERNATIONAL STANDARDISATION OF GEOGRAPHICAL NAMES 3 (Peter Jordan et al. eds., 2007).

⁸⁰ Martin Waldseemüller, *Universalis Cosmographia Secundum Ptholomaei Traditionem et Emerici Vespucci Alioru[m]que Lustrationes Composite Map*, LIBR. OF CONGRESS, <https://www.loc.gov/resource/g3200.ct000725C/?r=0.086,-0.085,0.833,0.709,0> [<https://perma>

Together, Ptolemy and Waldseemüller radically reenvisioned cartography. Their maps monumentally and indelibly informed humanity's understanding of the world⁸¹ and contributed to modernity's common toponymic reference to the Persian Gulf.

However, Arabs refer to the waters as the Arabian Gulf. Such references are found in the writings of Greek historian Herodotus (484–425 BCE), in reports from the eighteenth century Dutch East India garrison authority stationed at Khark (Kharg) Island,⁸² and in Lord Curzon's nineteenth century assessment of Arab seafaring dominance over the Gulf.⁸³ The Danish Captain Carsten Niebuhr confounded the place-naming debate by referring to the Red Sea as the Arabic Gulph and bounding Arabia by the Indian Ocean and the Persian Gulph.⁸⁴ By the early eighteenth century, the Ottomans variously referred to the water as the Gulf of Basrah, the Gulf of Qatif, or the Gulf of Arabia, while important English cartographers used the name Persian Gulf.⁸⁵ For more than a century, the garrison at Hormuz exacted tolls and controlled trade over the *Sino Persico* and wider region.⁸⁶ Whatever political meaning attaches to place naming and the Gulf, cartographic references themselves are of little evidentiary import. And if courts, as

.cc/U6T5-EKUL]. Waldseemüller's masterpiece is one of the most prized collections of The Library of Congress in Washington D.C. It can be viewed through the Geography and Map Division's digital composite creation. In addition to projecting the name Persian Gulf or Sea, the map curiously shows the Pacific Ocean six years before Balboa's overland sighting in 1513. See generally JOHN W. HESSLER & CHET VAN DUZER, *SEEING THE WORLD ANEW: THE RADICAL VISION OF MARTIN WALDSEEMÜLLER'S 1507 & 1516 WORLD MAPS* (2012) (presenting detailed images of Waldseemüller's radical sixteenth-century revisioning of the world, particularly the New World, in which Waldseemüller diverged from Christopher Columbus's idea that it was connected to India).

⁸¹ For more detailed discussion, see generally HESSLER & VAN DUZER, *supra* note 80, at 703.

⁸² See Willem Floor, *The Dutch on Khark Island: A Commercial Mishap*, 24 INT'L J. MIDDLE E. STUD. 441, 457 (1992) (discussing the 133-year Dutch presence in the Gulf, and the rise and fall of the Khark commercial enterprise).

⁸³ See BUDERI & RICART, *supra* note 12, at xxvi (quoting Curzon's assertion of Persia's historic uninterest in maritime pursuits).

⁸⁴ 2 M. CARSTEN NIEBUHR, *TRAVELS THROUGH ARABIA, AND OTHER COUNTRIES IN THE EAST* 388 (Robert Heron trans., Perth, R. Morrison & Sons 1792) (referencing the "Arabian Gulph" and noting the Turks and Arabs considered its navigation "the most dangerous in the world").

⁸⁵ Sultan bin Muhammad al-Qasimi, *Power Struggles and Trade in the Gulf 1620–1820*, at 19 (1999) (Ph.D. dissertation, Durham University) (on file with the University of Exeter Library) (citing Christopher Brown and Samuel Thornton's usage of the term Persian Gulf in 1712 and 1716, respectively); BUDERI & RICART, *supra* note 12, at xxvii.

⁸⁶ For a general history of the Portuguese presence in the Gulf and wider region, see generally PORTUGAL, *THE PERSIAN GULF AND SAFAVID PERSIA* (Rudi Mathee & Jorge Flores eds., 2011).

has been demonstrated by the international practice of tribunals, “adopt a cautious and restrictive approach” in attaching evidentiary significance to maps,⁸⁷ much the same can be concluded about their legal toponymic significance.

B. Toponymic Hearsay

The toponymic transformation of space into place subtly conveys assumptions about imperial history.⁸⁸ Repeated over time, such references take on the appearance of a languified geography,⁸⁹ simultaneously asserting and masking historical narratives. The symbolic significance of place naming as a metaphorical narrative of imperial domination helped to create a languified image of international law. Iran asserted this point during the U.N. Security Council debate over the Tunbs and Abu Musa seizures in 1971, when the Iranian representative, objecting to the usage of the term Arabian Gulf, said:

We are here dealing with a sea which, as everyone knows, has from the most ancient times been called the Persian Gulf. To call it something else is to distort fundamental truths. . . . It is symbolic of a deliberate attempt to alter historic reality and betrays a wish to attribute to the area an Arab character not justified by the facts.⁹⁰

With one interchangeable word, Arabs could have made the same point about Iranian intentions. Interestingly, Sultan bin Muhammad al-Qasimi noted that the lexical debate did not take politicized form until 1958.⁹¹ He claimed Arabs “had always called it the Persian Gulf until the Persians began citing the usage of the term ‘Persian’ as a justification for Iranian power politics” at the time.⁹² The names of the disputed islands admit a less binary distinction: Abu Musa has borne the Arabic name for hundreds of years, and in local dialects bears other

⁸⁷ William Thomas Worster, *Maps Serving as Facts or Law in International Law*, 33 CONN. J INT’L L. 278, 284–85 (2018).

⁸⁸ See generally PAUL CARTER, *THE ROAD TO BOTANY BAY: AN EXPLORATION OF LANDSCAPE AND HISTORY* (1987) (discussing the ideology of historiography and the complicit implications of place naming and symbols).

⁸⁹ CHRISTOPHER R. ROSSI, *RE MOTENESS RECONSIDERED: THE ATACAMA DESERT AND INTERNATIONAL LAW* 52 (2021).

⁹⁰ BUDERI & RICART, *supra* note 12, at xxviii–xxix (quoting U.N. SCOR, 26th Sess., 1610 mtg., U.N. Doc. S/PV.1610 (Dec. 9, 1971)).

⁹¹ See al-Qasimi, *supra* note 85, at 17.

⁹² *Id.*

names such as Bu Mouf and Gap Sabz; the Tunbs derive from the Persian word for “hillock” or “mound.”⁹³

Place naming on cartographic projections is pregnant with preconceived toponymic biases, often ignorant of endonymic usage, and proffered to accord with political interests.⁹⁴ The ICJ recognizes the evidentiary value of maps,⁹⁵ however, it has generally adopted a “cautious and restrictive” approach regarding their significance.⁹⁶ Maps are treated “as secondary evidence”—as a form of toponymic hearsay⁹⁷—rather than as dispositive of *à titre de souverain*. Because maps embed a history they help to create,⁹⁸ they reflect as much about the biases of their makers as they do about the configuration of the world. They are to be received with caution. This caution extends to the evidentiary conclusions that periodize the creation of states and the establishment of states’ borders.

III

PERIODIZING SOVEREIGNTY, *UTI POSSIDETIS*, AND THE CRITICAL DATE

The classical Western mindset repositioned the idea of Aristotelian sociability and turned it into a metaphorical *Mightie Frame*—the

⁹³ See Roshandel, *supra* note 37, at 138–39. Greater Tunb Island is called Tunb Al-Kubra in Arabic and Tonb-e Bozorg in Farsi; Lesser Tunb Island is called Tunb Al-Soughra in Arabic and Tonb-e Kuchek in Farsi. Dan Caldwell, *Flashpoints in the Gulf: Abu Musa and the Tunb Islands*, 4 MIDDLE E. POL’Y 50, 50 (1996).

⁹⁴ If these biases have shaped debates about the Gulf, it is important to note they are inescapably apparent elsewhere. For instance, in his “discovery” of the New World, Christopher Columbus rank ordered his first landings in honor of the Savior (San Salvador), the Virgin Mary (Santa María de la Concepción), and for members of the Crown of Castile. See ROSSI, *supra* note 89, at 52–53.

⁹⁵ See Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 544, ¶ 56 (Dec. 22); see also *Minquiers & Ecrehos* (Fr./U.K.), Judgment, 1953 I.C.J. 47 (Nov. 17); *Sovereignty Over Certain Frontier Land* (Belg./Neth.), Judgment, 1959 I.C.J. 209 (June 20); *Temple of Preah Vihear* (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (June 15). See generally Guenter Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 AM. J. INT’L L. 781 (1963) (affirming instances in international adjudication where maps were accorded strong evidentiary value in support of sovereignty claims over disputed territory).

⁹⁶ William Thomas Worster, *Maps Serving as Facts or Law in International Law*, 33 CONN. J. INT’L L. 278, 284 (2018).

⁹⁷ *Id.* at 285. See also *Honduras Borders* (Guat./Hond.), 2 R.I.A.A. 1307, 1325 (Int’l Cent. Am. Trib. 1933) (“[Maps are] of slight value when it relates to territory of which little or nothing was known and in which it does not appear that any administrative control was actually exercised.”).

⁹⁸ DENIS WOOD & JOHN FELS, *THE POWER OF MAPS* 28 (1992).

artificial state.⁹⁹ In the New World, territorial borders formed around remnants of European colonialism.¹⁰⁰ Sovereignty's frame took shape through the application of the *uti possidetis* doctrine,¹⁰¹ which intended to remediate spatial problems caused by the “vertiginous,”¹⁰² but hardly instantaneous, collapse of Spanish imperial power over eight million square miles (20,719,904 square kilometers) of the New World.¹⁰³ *Uti possidetis* meant to preempt disputes over unoccupied territory (*terra nullius*) by granting to states emerging from decolonization the prior colonial administrative borders.¹⁰⁴ These borders were often nothing more than unformed frontiers. Although employed because of its

⁹⁹ See generally NICHOLAS GREENWOOD ONUF, *THE MIGHTIE FRAME: EPOCHAL CHANGE AND THE MODERN WORLD* 84 (2018) (noting major historical ruptures and continuities leading to epochal change in humanity's transition toward the sovereign state system).

¹⁰⁰ The complexities associated with this project now inform international law's turn to spatial studies. See ROSSI, *supra* note 89 (reframing international law and western hemispheric relations); Henry Jones, *Property, Territory, and Colonialism: An International Legal History of Enclosure*, 39 *LEGAL STUD.* 189 (2019) (conceptualizing law's relation to space); Nikolas M. Rajkovic, *The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis*, 31 *LEIDEN J. INT'L L.* 267 (2018) (noting the multilayered edges to the traditional notion of bounded territorial space); Nicholas Onuf, *Center-Periphery Relations: What Kind of Rule, and Does It Matter*, 6 *ALL AZIMUTH* 5 (2017) (rethinking Johan Galtung's center periphery theory of imperialism); Andreas Philippopoulos-Mihalopoulos, *Law's Spatial Turn: Geography, Justice and a Certain Fear of Space*, 7 *L., CULTURE & HUMANITIES* 187, 187 (2010) (investigating law's spatial turn and the concept of spatial justice); LAURA A. BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* (2010) (canvassing law's correlation with geography); CARL SCHMITT, *NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM* (G.L. Ulmen trans., 2006) (discussing lines of amity and spatiality in international law).

¹⁰¹ *Uti possidetis* is an awkward legal idiom originating from Roman law's treatment of private property. It originally dealt with assigning one party the burden of proof for disputed property claims. It translates poorly into English (“as you possess, so you may possess”). As applied to international law, it gave newly emerging republics in Latin America the national borders that coincided with the borders established when the Spanish empire retreated from the New World in the early nineteenth century. Although highly criticized, *uti possidetis* remains a bedrock principal of modern international law. See generally Christopher R. Rossi, *Shadings of Nuance: Contextualizing a “Convergence of Opinion” Regarding a River Located in the Imaginarium of the Western Mind*, 23 *WYO. L. REV.* 153, 164 (2023).

¹⁰² Gabriel Paquette, *The Dissolution of the Spanish Atlantic Monarchy*, 52 *HIST. J.* 175, 181 (2009).

¹⁰³ See ROSSI, *supra* note 89, at 18–19.

¹⁰⁴ Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 *AM. J. INT'L L.* 590, 590 (1996). The principle is sometimes subdivided. *Uti possidetis de facto* refers to a border demarcation based on actual possession. *Uti possidetis juris* establishes possession based on legal instruments, such as colonial maps.

efficiency and positioned “among the most important legal principles,”¹⁰⁵ the brutal simplicity of *uti possidetis* actually made many border wars “inevitable.”¹⁰⁶

Uti possidetis preferred the status quo, as imaginary as it was. It attached primary legal significance to the moment power changed hands from the colonial superintendent to the newly emerging state.¹⁰⁷ According to the ICJ, *uti possidetis* intended to create a “‘photograph of the territory’”—a momentary snapshot in time referred to as the critical date—to “freeze the territorial title” at the moment of independence.¹⁰⁸ The association of the critical date with *uti possidetis*—conflating them into one and the same concept—conformed to an imprecise understanding of the way *uti possidetis* first took hold. Its reception into international law was not as immediate as a snapshot of the times might imply. While this imagery creates a convenient conceptual fiction to eliminate the possibility of a gap forming between sovereignty’s conveyance from one polity to the next, in reality, the process of state succession took much longer to form than the time needed to take a snapshot.

Certainly, this timeline was true regarding the emergence of *uti possidetis* in the wake of Spain’s crumbling New World empire. Simón Bolívar’s liberation movement across Spanish America began in 1810 with the successive creation of seven new republics.¹⁰⁹ However, Brazil did not gain independence until 1822.¹¹⁰ Ecuador and Venezuela subsequently seceded from Colombia by 1830.¹¹¹ In the early 1840s, the Central American Federation splintered, creating five more

¹⁰⁵ Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 544, ¶ 26 (Dec. 22).

¹⁰⁶ Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT’L L. 269, 290 (1909).

¹⁰⁷ See Ratner, *supra* note 104, at 590 (“[S]tates emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence.”).

¹⁰⁸ Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. ¶ 30.

¹⁰⁹ See generally LESTER D. LANGLEY, SIMÓN BOLÍVAR: VENEZUELAN REBEL, AMERICAN REVOLUTIONARY (2009) (presenting a leading biography on Bolívar and his role in the Spanish-American wars of independence from 1810–1825).

¹¹⁰ See Alan K. Manchester, *The Recognition of Brazilian Independence*, 1 J. LAT. AM. STUD. 115 (1969) (recounting Brazil’s two-year war of independence from Portugal, commencing with Dom Pedro’s 1822 declaration of independence).

¹¹¹ See PEDRO BALDÓ, THE DESOLATION OF THE UNIVERSE: THE DEATH OF GRAN COLOMBIA (1826–1831) (2023) (discussing the collapse of Gran Colombia and its replacement by the republics of Venezuela, Ecuador, and New Granada).

independent states.¹¹² Spain's irredentist claim in South America ensued in the 1860s, only to end in its defeat in the Chincha Islands War, followed by its final expulsion from the Americas with the end of the Spanish-American War in 1898.¹¹³ None of this history supports the momentary appearance of the state system existing in Latin America or, impliedly, elsewhere. However, the idea of sovereignty arising at a critical date, perhaps popularized in international legal discourse by reference to the creation of the Westphalian state system as a Grotian Moment,¹¹⁴ provided a convenient, although unpersuasive, starting point for the crystallizing of claims relating to the three Gulf Islands.

A. Square Pegs, Round Holes, and the Southernmost Palm Tree

Uti possidetis presupposed a telluric transfer of title in a European sense of postimperial rule. However, Arabian sheikhdoms and dynastic traditions did not conform to such territorial etching or reconfiguration.¹¹⁵ In the Gulf region, the sheikhdoms presented round and porous holes of human geography into which the square pegs of European Euclidean borders could not fit tightly. Indeed, "the idea of fixed, defined boundaries was totally alien to the Arab world."¹¹⁶ As is

¹¹² See William F. Slade, *The Federation of Central America*, 8 J. RACE DEV. 79, 103 (1917) (discussing the failed 1842 Central American convention).

¹¹³ See ROSSI, *supra* note 89, at 21–24.

¹¹⁴ Richard Falk coined the term Grotian Moment. See Richard Falk, *The Grotian Moment*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al. eds., 1985). It has been interpreted to mean "an instance in which a fundamental change in the existing international system happens." Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209, 211 (2011). Falk pinpointed Hugo Grotius's sixteenth-century writings around the shadowy period leading up to the Treaty of Westphalia (1648) and the critical date—in Falk's words, the "time of transition between world order systems"—in which state sovereignty formed. Falk, *supra*, at 7. Falk's elegant portrayal of the arrival of the state system gained widespread acceptance as a periodized contribution to the study of international law as conceptual history. *Id.* However, important critiques of the concept have noted that the history of sovereignty involves much more temporal consideration than the Grotian Moment suggests. See generally Nicholas Greenwood Onuf, *Sovereignty: Outline of a Conceptual History*, 16 ALTS.: GLOB., LOC., POL., 425 (1991); JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY (1995); THOMAS J. BIERSTEKER & CYNTHIA WEBER, STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996) (critiquing the concept of the Grotian Moment).

¹¹⁵ A variant of this argument informed Bahrain's position in its border dispute with Qatar. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment, 2001 I.C.J. 40, ¶ 107 (Mar. 16).

¹¹⁶ D.W. Bowett, *The Dubai/Sharjah Boundary Arbitration of 1981*, 65 BRIT. Y.B. INT'L L. 103, 104 (1995).

true throughout colonial history in the Americas, Africa, and Asia, the inexact application of *uti possidetis* “caused rather than ended disputes” about state frontiers.¹¹⁷

Britain’s colonial control over the lower Gulf region began in 1820,¹¹⁸ but most of the Trucial States’ oil did not begin to flow until the 1950s and 1960s.¹¹⁹ The need to demarcate oil concessions necessitated the creation of borders among the sheikhdoms.¹²⁰ It also created choice of law problems that revealed serious cultural misunderstandings. After applying so-called hard lineaments of established international law to a concession contract between a British petroleum company and the Sheikhdom of Abu Dhabi, Lord Asquith, the British umpire in the *Abu Dhabi Arbitration* (1951), concluded that “no such law [of Abu Dhabi] can reasonably be said to exist.”¹²¹ Due to the “primitive region,” it was “fanciful to suggest” the Sheikh

¹¹⁷ MALCOM YAPP, *THE NEAR EAST SINCE THE FIRST WORLD WAR* 205 (1991). On the consequences of *uti possidetis*’ inexact application, see ROSSI, *supra* note 89, at 22–23 (noting the ways *uti possidetis* played tricks on its benefactors in the Americas); Achille Mbembe, *At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa*, 12 *PUB. CULTURE* 259, 272–73 (2000) (discussing the irrationality of colonial border drawing in Africa, in relation to human geography); Vanshaj Ravi Jain, *Frozen Frontier: Uti Possidetis and the Decolonization of South Asia* (Refugee Stud. Ctr., Working Paper No. 130, 2019) (discussing the problems of the Radcliffe Line in the partitioning of India and Pakistan); A.L.W. Munkman, *Adjudication and Adjustment—International Judicial Decision and the settlement of Territorial and Boundary Disputes*, 46 *BRIT. Y.B. INT’L L.*, 1, 93 (1972–1973) (noting that tribunals have had difficulty applying *uti possidetis* because “it suffers the defect of being difficult to elucidate at a later date”). For general histories of *uti possidetis* and its effects on international law, see generally CHRISTOPHER R. ROSSI, *SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY* (2017); Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 *AM. J. INT’L L.* 590 (1996); GIUSEPPE NESI, *L’UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE* (1996).

¹¹⁸ See Onley, *supra* note 6, at 1 (periodizing British hegemony over the Gulf from the 1820 antipiracy General Treaty).

¹¹⁹ See YAPP, *supra* note 117, at 203 (noting social and economic development on the Trucial coast began in the 1950s, generally coinciding with the progression of oil production in Kuwait (1946), Qatar (1949), Abu Dhabi (1962), and Dubai (1969)). Bahrain was the exception. It first exported oil in 1934 and began refining oil in 1937.

¹²⁰ See *id.* (connecting the need for demarcating Trucial Coast land boundaries to the interests of oil concessionaires).

¹²¹ See *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 *I.L.R.* 144, 149, 155 (1951). The substantive issue in the case, aside from the choice of law problem, involved the interpretation of an oil concession contract and its application to the submarine area lying outside Abu Dhabi’s three nautical mile belt of territorial water. The concession, signed in 1939, granted the British oil company an exclusive seventy-five-year concession. The issue involved Sheikh Shakhbut’s claim that the concession did not extend further offshore drilling rights to the seabed and subsoil pertaining to Abu Dhabi’s continental shelf because the term had no defined meaning at the time the concession was concluded.

administered anything other than “a purely discretionary justice” regarding “modern commercial instruments.”¹²² Foregoing multiple references governing commercial transactions in the Quran,¹²³ the umpire ironically meted out his own brand of discretionary justice, relying on what he deemed to be just and fair (*ex aequo et bono*).¹²⁴ When Britain withdrew from the Gulf in 1968, it ambiguously delimited the singular border of the UAE, but left the relatively undefined internal expanses of the federation for the sheikhs to sort out.¹²⁵ Similarly, Britain demarcated the border separating Iraq and Kuwait by reference to the “southernmost palm tree.”¹²⁶

Such line drawing, abetted by Britain’s quick withdrawal, ignited territorial disputes. It provoked longstanding border disputes between Qatar and Bahrain over ownership of the Hawar Islands, the town of Zubarah, Janan Island, and shoals (*fashts*) important for establishing maritime boundary delimitations (Al-Dibal and Al-Jaradah).¹²⁷ Line drawing produced a series of land and sea disputes between Saudi Arabia, Oman, and Yemen involving the Red Sea,¹²⁸ as well as disputes

¹²² *Id.* at 149.

¹²³ See *Business Transactions*, VERSE BY VERSE QUR’AN STUDY CIRCLE (June 30, 2018), <https://versebyversequranstudycircle.wordpress.com/tag/business-transactions/> [<https://perma.cc/FGD8-2YCD>] (detailing verses on financial and commercial transactions).

¹²⁴ See CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 168–69 (1993) (discussing Lord Asquith’s reliance on the *ex aequo* principle to render an award “in justice and fairness”).

¹²⁵ See Gwenn Okruhlik & Patrick J. Conge, *The Politics of Border Disputes on the Arabian Peninsula*, 54 INT’L J. 230, 233 (1999) (highlighting confusion over the post-protectorate borders). See also Christopher R. Rossi, *The Migingo Island Dispute Between Kenya and Uganda*, 42 BROOK. J. INT’L L. 659, 681–85 (2017) (demarcating the water borderline between Uganda and Kenya as the westernmost point of Pyramid Island, leading to confusion as to which island looked like a pyramid). Cf. Peggy A. Hoyle, *The Eritrean National Identity: A Case Study*, 24 N.C. J. INT’L L. 381, 413 (1999) (discussing not a natural feature but a natural being, the camel, as evocative of Eritreans’ sense of place).

¹²⁶ Okruhlik & Conge, *supra* note 125, at 233.

¹²⁷ See generally *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment, 2001 I.C.J. 4 (Mar. 16) (resulting in Qatar’s sovereignty over Zubarah and the Janan Islands (including Hadd Janan) and the low-tide elevation of Fasht Dibali; Bahrain’s sovereignty over the Hawar Islands and the island of Qit’at Jaradah; and a single maritime boundary between the two states). The case lasted almost twenty years from the time Qatar instituted proceedings in 1991, making the case the longest in the ICJ’s history.

¹²⁸ See Askar Halwan Al-Enazy, “*The International Boundary Treaty*” (*Treaty of Jeddah*) *Concluded Between the Kingdom of Saudi Arabia and the Yemeni Republic on June 12, 2000*, 96 AM. J. INT’L L. 161 (2002); Okruhlik & Conge, *supra* note 125, at 230 (noting border conflicts in 1995, 1997, and 1998).

between Oman and the UAE.¹²⁹ It created tensions between Saudi Arabia and the UAE over the fifteen-mile coast east of Khor Al-Udaid, and it created tensions surrounding whether the UAE bordered Qatar or whether Saudi Arabia separated the two countries.¹³⁰ Fractious border disputes arose between Saudi Arabia and the UAE over the giant Zararah/Shaybah oilfields,¹³¹ between Qatar and Bahrain,¹³² and between Dubai and Sharjah.¹³³ Territorial disputes contributed to the eight-year war between Iraq and Iran (1980–1988),¹³⁴ which involved reasserted Iraqi claims to the eastern bank of the Shatt Al-Arab (Farsi: Arvand Rūd) confluence of the Tigris and Euphrates Rivers.¹³⁵ In 1991, Iraqi irredentism served as pretext for a major war between Iraq and Kuwait, over Saddam Hussein’s so-called reclamation of the

¹²⁹ The dispute concerned a fourteen-kilometer stretch of the Musandam Peninsula near the Strait of Hormuz, demarcating the Emirates’ northern borders with Oman. *See UAE, OMAN Finalize Border Demarcation Agreement*, KUWAIT NEWS AGENCY (June 22, 2002), <https://www.kuna.net.kw/ArticleDetails.aspx?id=1263641&language=en> [<https://perma.cc/2G8X-B58T>].

¹³⁰ Al-Mazrouei, *supra* note 33, at 3 n.9 (“Khor Al-Udaid is a shallow inlet located on the eastern side of the base of the Qatar peninsula.”).

¹³¹ *See id.* at 156 (concluding that the discrepancies, made public in 1995, existed, but demurring on the cause of the discrepancies due to the unavailability of secret negotiations leading up to the signing of the Treaty of Jeddah in 1974).

¹³² *See generally* Maritime Delimitation and Territorial Questions between Qatar and Bahrain, 2001 I.C.J. ¶ 107.

¹³³ Dubai/Sharjah Border Arbitration, 91 I.L.R. 543 (Ct. Arb. 1981). The case involved a land and maritime boundary dispute between the adjacent Emirates. Interestingly, Sharjah invoked ownership over Abu Musa to give half effect in delimiting the disputed continental shelf boundary. Dubai claimed no effect should be given to Abu Musa because it was a disputed feature also claimed by Iran. *See* Stephen Fietta & Robin Cleverly, *Part B Commentary on Judgments and Awards in Maritime Boundary Delimitation Disputes, 4 Dubai-Sharjah Border Arbitration (Award of the ad hoc ‘Court of Arbitration’, 19 October 1981)*, OXFORD PUB. INT’L L., <https://opil.ouplaw.com/display/10.1093/law/9780199657476.001.0001/law-9780199657476-chapter-7> [<https://perma.cc/MJQ2-2G8B>].

¹³⁴ Although dubiously connected to *uti possidetis*, more recent intramural Arab enmity arose in 2018 when Qatar instituted proceedings at the ICJ against the UAE for alleged human rights abuses. These abuses arose from the UAE’s June 2017 expulsion of Qataris in violation of the UAE’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The dispute took on an intramural Arab character when non-CERD states—Egypt, Bahrain, and Saudi Arabia—supported the UAE and joined in a land, sea, and air blockade on Qatar, to which Yemen, the Eastern Government of Libya, Maldives, Mauritania, and Comoros joined in fraternal support. *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.)*, Application Instituting Proceedings (June 11, 2018), <https://www.icj-cij.org/en/case/172/institution-proceedings> [<https://perma.cc/Z6VS-U72H>].

¹³⁵ *See* Joseph J. Cusimano, *Analysis of Iran-Iraq Bilateral Border Treaties*, 24 CASE W. RES. J. INT’L L. 89, 91 (describing the strategic importance of the Shatt Al-Arab for Iraq as “the only true outlet” to the Gulf).

nineteenth governorate of Iraq,¹³⁶ which ultimately led to his overthrow in the Second Gulf War in 2003.¹³⁷ And, of course, the dispute with Iran over the birth of the UAE led to continuing enmity regarding control over the three Lower Gulf Islands.

B. Historical Claims

General claims of historical title, which are commonly asserted in sovereignty disputes,¹³⁸ are key factors noted by international courts and tribunals as a means of determining title to land or maritime territory.¹³⁹ Such claims depend on an uninterrupted and public (notorious) display of state authority, as measured over a long period of time.¹⁴⁰ Taken together, these acts constitute *à titre de souverain*,¹⁴¹ meaning that the title holder exercises the functions of state authority on behalf of its own authority.¹⁴² When title is in dispute, subsequent acts pertaining to the administration of the territory (*effectivités*) may “play an essential role in showing how the title is interpreted in

¹³⁶ See Mark Fineman, *Iraq Remaps Kuwait as Province 19*, L.A. TIMES (Aug. 29, 1990), <https://www.latimes.com/archives/la-xpm-1990-08-29-mn-176-story.html> [<https://perma.cc/U7RV-JRYU>] (reporting on Saddam Hussein’s presidential decree renaming Kuwait City as Khadima, the capital of Province 19).

¹³⁷ See *Timeline: The Iraq War, 2003–2011*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/iraq-war> [<https://perma.cc/TEG5-4MYE>].

¹³⁸ See, e.g., *In re S. China Sea Arb.* (Phil. V. China), PCA Case Repository Case No. 2013-19, ¶¶ 264–72 (Perm. Ct. Arb. 2016) (involving China’s claim of historic title over most of the South China Sea, an area covering a body of water 3.5 million square miles and stretching more than 1500 kilometers from its southernmost territory of Hainan Island to James Shoal, off the coast of Borneo).

¹³⁹ See generally YEHUDA Z. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 6 (1965) (assessing the treatment of the doctrine in early twentieth-century international case law and associating it with “acquisitive” as opposed to “extinctive” prescription); CLIVE R. SYMMONS, *HISTORIC WATERS IN THE LAW OF THE SEA: A MODERN RE-APPRAISAL* (2d ed. 2019) (updating the doctrine in light of international court decisions); Alexander N. Vylegzhanin & Ekaterina L. Sokolova, *Prescription in International Law*, 2 MOSCOW J. INT’L L. 37 (2014) (equating the doctrine of prescription with historic title).

¹⁴⁰ See *Kasikili/Sedudu Island* (Bots./Namib.), Judgment, 1999 I.C.J. 1045, ¶ 94 (Dec. 13) (discussing elements of prescriptive rights as understood and agreed to by Namibia and Botswana).

¹⁴¹ See *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), Judgment, 2002 I.C.J. 625, ¶¶ 142, 144, 147 (Dec. 17); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶¶ 196, 197, 200 (Mar. 16); *Award of the Arbitral Tribunal in the First Stage of the Proceedings Between Eritrea and Yemen*, 22 R.I.A.A. 211, ¶ 241 (Perm. Ct. Arb. 1998).

¹⁴² *Kasikili/Sedudu*, 1999 I.C.J. ¶ 98.

practice,”¹⁴³ but they cannot trump rights derived from preexisting legal title.¹⁴⁴

Although historical claims are embedded within the concept of state sovereignty, they often encounter ambiguities of territorial control. For instance, areas historically claimed by Pakistan, India, and China are ripe with ambiguities—from the law of the sea’s bedeviling encounter with tiny hydrographic formations and outcroppings amorphously referred to as “features”¹⁴⁵ to the sprawling and remote High Himalayan landscapes of Ladakh, Aksai Chin, and the Shaksgam Valley.¹⁴⁶ The porosity of human geography, abetted by cavities of sovereignty, critically exposes “the western legal fiction” that all legal rights arise from states.¹⁴⁷ International law has recently recognized the legal significance of nonstate activity—for instance, in terms of artisanal fishing practices “exercised continuously through the ages”¹⁴⁸—however, its tolerance for Indigenous peoples’ conflictual encounters with sovereignty’s *Mightie Frame* remains limited.¹⁴⁹

Acquiring territorial sovereignty can be analogized, albeit imprecisely, to real estate law.¹⁵⁰ Proprietorship attaches to individuals in realty law in the way sovereignty attaches to states in international

¹⁴³ Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 544, ¶ 63 (Dec. 22).

¹⁴⁴ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, ¶¶ 67–68 (Oct. 10).

¹⁴⁵ See *In re S. China Sea Arb.* (Phil. V. China), PCA Case Repository Case No. 2013-19, ¶ 169 (Perm. Ct. Arb. 2016) (discussing the status of nine maritime features in the South China Sea). See also Christopher R. Rossi, *Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea Arbitration*, 50 CORNELL INT’L L.J. 231, 233 (2017).

¹⁴⁶ See Christopher Rossi, *Interstitial Space and the High Himalayan Dispute Between China and India*, 62 HARV. INT’L L.J. 429, 430 (2021) (discussing the 1,000-kilometer stretch of contested borderland involving the three countries).

¹⁴⁷ *In re S. China Sea Arb.*, PCA Case Repository ¶ 798; Award of the Arbitral Tribunal in the Second Stage of Proceedings Between Eritrea and Yemen, 22 R.I.A.A. 335, ¶ 101 (Perm. Ct. Arb. 1999).

¹⁴⁸ *In re S. China Sea Arb.*, PCA Case Repository ¶ 799 (“[I]nternational law has long recognised that developments with respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights.”).

¹⁴⁹ Domestic courts have been instrumental in reassessing indigenous beliefs and practices relating to land, with notable support from international organizations involved in the development of the law. See, e.g., *Orissa Mining Corp. v. Ministry of Env’t & Forest*, 6 S.C.R. 881 (2013) (India) (involving the Supreme Court of India’s judgment favoring the Dongria Kondh’s protection of sacred horticultural landscape in a decade long dispute with global capitalism).

¹⁵⁰ As noted, *uti possidetis* developed out of Rome’s legal treatment of real property before it was incorporated into international law. See *supra* note 101.

law. Realty requires a registry to record good title,¹⁵¹ whereas, international law's registry is missing many certificates. As the ICJ Chamber has noted, "there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates."¹⁵² The nomadic history of the Arabian Peninsula, writ large, reflects this complexity.¹⁵³

Yehuda Blum reduced the establishment of historic title to two "mutually interdependent" prerequisites: an "unmistakable display of authority . . . usually referred to as effective possession" and its "continuous and peaceful" display.¹⁵⁴ Blum acknowledged the inherently slippery proof of this second prerequisite, as it sometimes implicates the *negative* meaning of silence, which he labeled "acquiescence in disguise."¹⁵⁵ In applying the doctrine of acquiescence, the ICJ has held that certain "silences" produce *positive* legal consequences—for example, failing to object when reason dictates otherwise,¹⁵⁶ failing to ratify a signed treaty,¹⁵⁷ and failing to respond in a timely fashion.¹⁵⁸ As upheld by the ICJ, "silence may . . . speak, but only if the conduct of the other State calls for a response."¹⁵⁹

¹⁵¹ See, e.g., *Recorder Information*, DEEDS.COM, <https://www.deeds.com/recorder/> [<https://perma.cc/2DH9-BGFG>] (explaining the role of the county recorder relating to real estate ownership and deeds).

¹⁵² *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 544, ¶ 63 (Dec. 22).

¹⁵³ A similar complexity arose in the Straits of Singapore, involving the nomadic seafarers, the Orang Laut, and their relationship with the Sultanate of Johor. See *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)*, Judgment, 2008 I.C.J. 12, ¶¶ 70–72 (May 23).

¹⁵⁴ BLUM, *supra* note 139, at 99.

¹⁵⁵ *Id.* at 99–100.

¹⁵⁶ *Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. 6, at 21 (June 15) (affirming that circumstances dictated a response by Thailand, and that Thailand's extended absence of a reaction acquiesced a map depicting the placement of a temple in Cambodia); *Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malay./Sing.)*, 2008 I.C.J. ¶¶ 70–72 (noting that the absence of an objection to a display of sovereignty may result in acquiescence); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening)*, Judgment, 2002 I.C.J. 303, ¶ 70 (Oct. 10) (concluding that Cameroon did not acquiesce in favor of Nigeria's claim of title to territory); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, Judgment, 2002 I.C.J. 625, ¶ 48 (Dec. 17) (finding that Britain's silence to a line on a map did not amount to acquiescence).

¹⁵⁷ See *Vienna Convention on the Law of Treaties*, *supra* note 12, arts. 11–17.

¹⁵⁸ *Id.* art. 20, §§ 3–5 (holding signatories accountable to a reservation if the reservation does not raise an objection by the end of a specific time period).

¹⁵⁹ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, 2008 I.C.J. ¶¶ 70–72.

Interpreting actions that do not call for a response problematize the meaning of negative silence.

Another problem arises out of proving the first prerequisite of unmistakable display. In acknowledging the relevance of “acquisitive prescription,” D.H.N. Johnson affirmed its role to supplement references to antiquity “whose original validity [] is impossible to prove.”¹⁶⁰ Ironically, in the *Rann of Kutch Arbitration*,¹⁶¹ which involved line drawing to separate the Indian state of Gujarat and the Sindh province of Pakistan, the tribunal had to establish a “conterminous” boundary in the marshy Great Rann that may not have been there “at all times” before Britain “froze” the political system by entering a treaty with Pakistan in 1819,¹⁶² decades before the British completed the Survey of Sind in 1870.¹⁶³ The parties in the case agreed that no defined boundary consolidated title to the Rann before British colonization.¹⁶⁴ Instead, the parties relied solely on historical consolidation.¹⁶⁵ The dissenting umpire, Aleš Bebler, astutely concluded that the yardstick of continuous peaceful possession of territory had to be applied *cum grano salis*.¹⁶⁶ Citing Huber’s opinion in the *Island of Palmas Arbitration*¹⁶⁷ and also the *Legal Status of Eastern Greenland Case*,¹⁶⁸ continuity might amount to a “certain

¹⁶⁰ D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT’L L. 332 (1950).

¹⁶¹ See J. Gillis Wetter, *The Rann of Kutch Arbitration*, 65 AM. J. INT’L L. 346 (1971) (the Rann of Kutch is a massive salt desert off the coast of the Arabian Sea, intermittently flooded during the monsoon season).

¹⁶² The Indo-Pakistan Western Boundary (Rann of Kutch) (India v. Pak.), 17 R.I.A.A. 1, 12–16 (Perm. Ct. Arb. 1968) (specifying the critical date regarding sovereignty of the Rann of Kutch in 1819). See also Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT’L & COMP. L.Q. 501, 506 (1997) (observing that in international law “[t]he concept of ‘continuing acts’ is not an easy one [to grasp]”).

¹⁶³ The Indo-Pakistan Western Boundary Case Tribunal, 17 R.I.A.A. at 15–16. The so-called Survey of Sind (1855–1870), completed in its last four years by the British Deputy Superintendent of Survey, Donald Macdonald, produced a mapping of the region.

¹⁶⁴ See *id.* at 461.

¹⁶⁵ See *id.*

¹⁶⁶ *Id.* at 483 (Bebler, J. dissenting).

¹⁶⁷ *Island of Palmas Case (or Miangas) (Neth. v. U.S.)* 2 R.I.A.A. 829, 840 (Perm. Ct. Arb. 1928) (“The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved . . .”). The case involved a territorial dispute between the US and the Netherlands. The US claimed title based on Spain’s secession after the Spanish-American War concluded. The arbitration found in favor of the Netherlands, based on the establishment and degree of prior Dutch authority. See generally *id.* 866–71.

¹⁶⁸ *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (Ser. A/B.) No. 53, at 46 (Apr. 5) (“[T]he tribunal has been satisfied with very little in the way of the

regularity In other words, continuity is a relative notion It has to be regular in spite of its intermittence.”¹⁶⁹

The danger of acquisitive prescription is that it may assert a view of historical title that itself selectively abridges events that history can inform but fail to prove. Often caught between two equally rational proofs—effective possession versus continuous and peaceful display—international law becomes ensnared in a condition of indeterminacy as paradoxical as Buridan’s Ass. Rather than fail to resolve the quandary of determining which proof prevails, international law has tended to assert a temporal starting of the possessory clock, however arbitrary the result is in terms of historical abridgment.

C. The Unfitting Metaphor of the Critical Date

International law’s tendency to reframe the complexities of history by emphasizing “the critical date” rests on *uti possidetis*’ own “problematic bedrock.”¹⁷⁰ Although international powers used *uti possidetis* to cement respect for international borders¹⁷¹ and to avoid land grabs,¹⁷² it has often provoked the very aggression it meant to guard against. In the case of the Lower Gulf Islands, Iran’s takeover of the three islands, timed to coincide immediately before the formation of the UAE, represented a shallow attempt to abridge a long and involved history by establishing a flimsy critical date immediately before the end of colonial rule.

Such an abridgment also extends to the beginning of colonial rule over the Trucial States and to the rudimentary assessment of strife in

actual exercise of sovereign rights . . . in the case of claims to sovereignty over areas in thinly populated or unsettled countries.”). The case involved a sovereignty dispute over parts of Eastern Greenland.

¹⁶⁹ Indo-Pakistan Western Boundary Case Tribunal, 17 R.I.A.A. at 483 (Bebler, J., dissenting).

¹⁷⁰ JOSHUA CASTELLINO ET AL., TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS 229 (2003).

¹⁷¹ Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 34 (June 15) (emphasizing a “primary” objective of achieving frontier stability on the bases of certainty and finality); see also Christopher R. Rossi, *Russian Arctic Straits and the Temptation of Uti Possidetis*, 24 TRANSNAT’L L. & CONTEMP. PROBS. 19, 46 (2014); Higgins, *supra* note 162, at 511 (“[Time limitations occupy a] prominent role . . . in all legal systems and that the finality can be stated as the Roman law maxim the public interest requires an end to disputes i.e., *interest rei publicæ ut finis litium sit*.”).

¹⁷² Land, Island, and Maritime Frontier Dispute (El Sal./Hond.: Nicar. Intervening), Judgment, 1992 I.C.J. 351, ¶ 42 (Sept. 11) (noting that a “key” aspect of the application of *uti possidetis* is the “denial of the possibility of *terra nullius*”).

the region. Notably, Derek Bowett reduced the nineteenth century to a rivalry between the inland and Bani Yas tribe of Abu Dhabi and the seaborne and pearl fisheries tribe of the northern Qawasim, concluding simply that piracy and lawlessness “prompted Great Britain to intervene.”¹⁷³ Since that time, a series of sectarian disputes—from the establishment of the Gulf Cooperation Council (GCC)¹⁷⁴ to the violence of the Iranian Revolution, the Iran-Iraq War, and the conflict over oil and nuclear policy in the Gulf—have reduced the complexity of the Gulf to the intractable identification of the sectarian schism within Islam. However, these default explanations for turbulence in the Gulf also obscure centuries of peaceful coexistence while selectively reinforcing narratives of victimhood, marginalization, piratical chaos, and imposed treaties.¹⁷⁵

The protracted historical debate accompanying the international legal proof of title to the three Lower Gulf Islands¹⁷⁶ seems to hammer

¹⁷³ See, e.g., Bowett, *supra* note 116, at 103–04 (1995). Although not a topic of consideration here, the general historical designation of the UAE’s shoreline as the Pirate Coast has increasingly prompted a much broader interrogation of the Western imperial narrative and description of the practice as such. Compare, e.g., AL-QĀSIMĪ, *supra* note 6 (connecting the practice to the British East India Company’s suppression of the Qawasim), with CHARLES BELGRAVE, *THE PIRATE COAST* (1966) (presenting a standard and widely read narrative of the British pacification of Arab pirates). For a presentation of evolving historical accounts of piracy in the Gulf, see Johan Mathew, *Essential Readings: Piracy in the Persian Gulf*, ARABIAN PENINSULA (Jan. 15, 2019), <https://www.jadaliyya.com/Details/38292> [<https://perma.cc/TR8R-3QQ7>].

¹⁷⁴ The GCC, composed of the UAE, Saudi Arabia, Bahrain, Oman, Qatar, and Kuwait, formed in 1981 primarily as an economic bloc, but also out of growing concern for regional security following the 1979 Iranian revolution. See Abdel Aziz Aluwaisheg, *The Founding of the GCC*, ARAB NEWS (Apr. 16, 2020, 1:55 PM), <https://www.arabnews.com/node/1659796> [<https://perma.cc/WB63-32E3>].

¹⁷⁵ Mohammed Aly Sergie, *The Sunni-Shia Divide*, COUNCIL ON FOREIGN RELS. (Apr. 27, 2021), <https://www.cfr.org/sunni-shia-divide/#/> [<https://perma.cc/7T9T-UNHQ>] (presenting a historical review of entrenched sectarian division); N.Y.U. Abu Dhabi Inst., *supra* note 61, at 6:06 (on piracy and imposed treaties); POTTER, *supra* note 54, at 3 (noting that the British dominated writing of Gulf history characterized what could be regarded as “lawful resistance to foreign intrusion” as “piracy”).

¹⁷⁶ For example, Iranian scholar, Jalil Roshandel, noted the “superpower” status of the ancient Persians over “almost all urban and populated centers of the Arabian Peninsula.” See Roshandel, *supra* note 37, at 137. See also Asghar Ja’fari Valdani, *The Historical and Legal Foundations of Iran’s Sovereignty over Tunb and Abu Musa Islands*, IRANIAN REV. FOREIGN AFFS. 155, 156–58 (2015) (noting Gulf coastal areas have been under Persian sovereignty up until the nineteenth century, thereafter, the areas were illegally occupied by the British, who forced Iranian concessions due to power imbalances); Pirouz Mojtahed-Zadeh, *Iran’s Maritime Boundaries in the Persian Gulf: The Case of Abu Musa Island*, in *THE BOUNDARIES OF MODERN IRAN* 104 (Keith McLachlan ed., 1994).

The UAE scholar, Al-Alkim argued that the first Iranian official claim to the islands dated to 1904. Al-Alkim, *supra* note 37, at 156. Alkim also argued that Iranian recourse to

or hack Arab and Persian accounts of ownership into historical narratives as inflexible as Procrustes' iron bed. A whiggish eye, blurred by these selective readings of the past, results in triumphal and unyielding claims¹⁷⁷ of ownership, which only the use of force seems able to remedy.

Periodizing the establishment of title to the islands has led to a jumble of modern and historical interpretations of the critical date. Richard Schofield's review of historical documents housed at the British Library's Oriental and India Office Collection indicated that Sharjah's prescriptive title to Abu Musa dated back to 1872, and the Qawasim sheikhs of Linghe and Ras Al-Khaimah controlled the Tunbs.¹⁷⁸ Contrastingly, Richard Mobley dated Britain's belief that the islands had been under Arab occupation "well before 1820, the year of Britain's 'first serious involvement in the region.'"¹⁷⁹ Even so, he noted the British government was "no more than 60 percent" sure of its legal understanding of the islands' chain of title.¹⁸⁰ On the other hand, the Iranian claim relies on the notion that the British essentially gifted the islands to the Trucial States, following the destruction of the Qawasim in 1887.¹⁸¹ Jalil Roshandel dated the gift in 1903.¹⁸² However, Saeed Bagheri noted that Abu Musa was Iranian territory until Great Britain transferred sovereignty to Sharjah in 1908.¹⁸³ Noura S. Al-Mazrouei

historical British maps were unofficial and without legal value or authenticity, *id.* at 157, and that the islands were effectively controlled by the Ras al-Khaimah and Sharjah and administered by the Qasimi family for more than 200 years, *id.* at 156. He cites Arab authorities, such as Mohammed Al-Mamoud, Abdul Wahab Abdul, Mohammed Al Roken, and Walid Al-Adhami, as well as Western authorities, including Rosemarie Said Zahlan, Frauke Heard-Bey, David Poole, and Richard Schofield, in support of the claim that Iran's legal title is either unfounded or questionable. *Id.* at 155.

¹⁷⁷ See generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931) (introducing the uses and abuses of whiggish conceptions of history used to substantiate triumphal presentist assertions).

¹⁷⁸ Richard N. Schofield, *Borders and Territoriality in the Gulf and the Arabian Peninsula during the Twentieth Century*, in *TERRITORIAL FOUNDATIONS OF THE GULF STATES* 36 (Richard Schofield ed., 1994).

¹⁷⁹ Mobley, *supra* note 7, at 629.

¹⁸⁰ *Id.*

¹⁸¹ BUDERI & RICART, *supra* note 12, at 558 (reportedly quoting the Shah) ("[I]t was only the British presence in the Gulf in support of the Trucial Rulers which prevented Iranian recovery of the Tunbs and Abu Musa in 1887 . . ."). *Id.* at 560 (quoting the Shah) ("Sovereignty over the island of Abu Musa is Iran's right from ancient times. It was Britain who took the island from Iran and gave it to Sharjah . . .").

¹⁸² Roshandel, *supra* note 37, at 136 (claiming the British seized the islands from Iran and gave them to the Sharjah in 1903).

¹⁸³ Bagheri, *supra* note 12, at 102.

referenced British recognition of Ras Al-Khaimah's claim to the Tunbs in 1921, while continuing to support Sharjah's claim to Abu Musa dating to the 1860s.¹⁸⁴ Although the concept of a critical date implies fixity and certainty, practically determining the critical date reinforces its elusive quality as a historical construct and its imperfect utility in international law.

1. The Hauntology of the Critical Date

Treating Western decolonization as synonymous with a critical date of territorial transfer projected a seamless and administratively convenient means of conceptualizing state succession. Taslim O. Elias wrote that fixing the critical date was "vital in the determination of title to territory, *simpliciter*."¹⁸⁵ He seconded the idea that it was the "precise date" where the "change of sovereignty should be fixed as between the original State with title and the subsequent claimant State."¹⁸⁶ African countries agreed with this idea of fixity out of concerns for stability and the consolidation of power. Accordingly, the African Union's organic charter, adopted in 1963 (itself a critical date reconfigured as a critical year), enshrined the *uti possidetis* principle that Europeans had laid upon Africa—namely, that African borders are never again to be moved.¹⁸⁷

Linking the critical date to independence from colonial rule—which by implication attaches overriding importance to *uti possidetis*—factored into decisions by the ICJ in the *Frontier Dispute* case. There, the court held:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.¹⁸⁸

¹⁸⁴ AL-MAZROUEI, *supra* note 16, at 7.

¹⁸⁵ TASLIM O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS: ESSAYS ON INTERNATIONAL LAW* 129 (1983).

¹⁸⁶ *Id.* at 128.

¹⁸⁷ Charter of the Organization of African Unity art. III, § 3, May 25, 1963, 479 U.N.T.S. 70 ("Respect for the sovereignty and territorial integrity of each State.").

¹⁸⁸ *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 544, ¶ 23 (Dec. 22); *Frontier Dispute (Benin/Niger)*, Judgment, 2005 I.C.J. 90, ¶ 26 (July 12) ("[S]ince the effect of the *uti possidetis* principle is to freeze the territorial title, . . . the examination of

In the *Land, Island, and Maritime Frontier Dispute* case, however, the court dismissed the absolutist suggestion that the critical “date of independence is always determinative,” and “that no other critical date can arise” through adjudication or subsequent treaty.¹⁸⁹ Other important authorities began disassociating the critical date from the tumultuous process of decolonization. Rather than connecting the critical date to the lowering of the imperial flag, or the last striking up of the band—symbolic commemorations of the date when a successor state is often said to be born—emphasis began to shift to when a territorial dispute took concrete shape and justiciable *legal* form.¹⁹⁰

Sir Gerald Fitzmaurice, in his pleading as counsel to the United Kingdom in the *Minquiers and Ecrehos* case, referred to this quickening as “the date on which the situation is deemed to have become crystallized or . . . frozen.”¹⁹¹ The purpose of the critical date—its *raison d’être*—is to stop time.¹⁹² It is the temporal reference point used to determine the factual and legal claims regarding ownership of the disputed territory. Its effect is to establish a preemptive “dividing line”¹⁹³: “[A]cts of the parties after that date cannot alter the legal position, so as either to improve or prejudice the claim of either party.”¹⁹⁴

documents posterior to independence cannot lead to any modification of the ‘photograph of the territory’ at the critical date” unless by agreement of the parties.”). The case involved a post-independence border dispute between Burkina Faso and Niger, stemming from French colonial rule.

¹⁸⁹ *Land, Island, and Maritime Frontier Dispute* (El Sal./Hond.: Nicar. Intervening), Judgment, 1992 I.C.J. 351, ¶ 67 (Sept. 11).

¹⁹⁰ See L.F.E. Goldie, *The Critical Date*, 12 INT’L & COMP. L.Q. 1251, 1252–53 (1963) (citing Fitzmaurice at 1252; arguing the critical date may arise when defined in concrete terms capable of legal settlement at 1253).

¹⁹¹ Oral Argument of Mr. Fitzmaurice, *Minquiers and Ecrehos* (U.K./Fr.), 1953 I.C.J. Pleadings 10, 61 (Sept. 18, 1953); *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), Judgment, 2002 I.C.J. 625, ¶ 135 (Dec. 17) (“[The Court] cannot take into consideration acts having taken place after the date on which the dispute . . . crystallized.”). See also Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II*, 32 BRIT. Y.B. INT’L L. 20, 20 (1955–1956) [hereinafter Fitzmaurice, *Law and Procedure*]; SHABTAI ROSENNE, *THE TIME FACTOR IN THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* (1960). The case involved a dispute between France and Great Britain over two groups of islets situated between the British island of Jersey and the coast of France.

¹⁹² Oral Argument of Mr. Fitzmaurice, 1953 I.C.J. Pleadings at 64.

¹⁹³ *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nica. v. Hond.), Judgment, 2007 I.C.J. 659, ¶ 117 (Oct. 8).

¹⁹⁴ See *id.* at 698. See also R.Y. JENNINGS, *ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 31 (1963) (“[A] certain date appeared to be ‘critical’, in the sense that

Sir Gerald's formulation has been critiqued as misconceived and artificial.¹⁹⁵ Jacques Derrida philosophically problematized the fictional implications of this time stoppage—reflected in the so-called End of History argument—by noting that history's hauntings appear as revenants to disrupt the modernist, liberalist penchant to start anew by letting bygones be bygones.¹⁹⁶ The same specters revisit the determination of the critical legal date.

Would determining “[w]ho was the sovereign over the territory on a specific date . . . [have relevance on w]ho is the sovereign *now*?”¹⁹⁷ International courts and tribunals have recognized this problematic practicality of establishing the critical date. Invoking the critical date attempts to confirm for a party “an already existing sovereignty”; by implication then, the “activities of the other Party” represent “an intrusion and an effort to build up a new claim . . . as a means of shutting out evidence of its opponent's activities than of excluding its own.”¹⁹⁸

Sir Gerald argued that deliberate actions undertaken by a party to improve its legal position at the critical date of power transition “may even afford evidence to the contrary—for instance, the party concerned would not have needed to be consciously improving its position subsequently, if it had really possessed sovereignty at the critical date.”¹⁹⁹ Such a ban on these deliberate actions are consonant with the prohibition against conferring legal rights on actions that arise from wrongdoing (*ex injuria jus non oritur*).²⁰⁰ Two such examples are

the decision one way or the other would largely turn upon what was found to be the position at that date.”); Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. 12, ¶ 32 (May 23).

¹⁹⁵ See Bowett, *supra* note 116, at 112 n.24 (noting Dubai's contention that Fitzmaurice's concept of the critical date was “essentially misconceived” and Munkman's complaint was artificial).

¹⁹⁶ See generally JACQUES DERRIDA, SPECTERS OF MARX (Bernd Magnus & Stephen Cullenberg eds., Peggy Kamuf trans., Routledge 1994) (1993) (attacking modernist, Enlightenment historical progressivism, as advanced by Kant, Hegel, Marx, and Kojève). See also FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1989) (articulating the supremacy of liberal democracy following the implosion of the Soviet Union).

¹⁹⁷ Bowett, *supra* note 116, at 112.

¹⁹⁸ Argentine-Chile Frontier (Arg./Chile), 16 R.I.A.A. 111, 166 (U.K. Queen Appointed Ct. 1969).

¹⁹⁹ Fitzmaurice, *Law and Procedure*, *supra* note 191, at 41, 43.

²⁰⁰ See Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 107 (Mar. 16) (noting that illegal and *de facto* occupation cannot metamorphose into a *de jure* entitlement to territory absent acquiescence by the territorial sovereign). The UAE has protested Iranian efforts to improve the islands

displayed by Russia's unconvincing attempts to characterize the annexations of the Donbas region of Eastern Ukraine and the so-called Republic of Crimea and Sevastopol as parts of Mother Russia, based on critical dates established by sham referenda and accession processes.²⁰¹

To determine exclusive sovereignty, international law has attempted to attach a critical date to every case of a disputed territorial claim.²⁰² If an actor establishing that date intends to negate the legal significance of acts subsequent to that date,²⁰³ a problem of intertemporal law arises. In the famous *Island of Palmas* arbitration, the critical date of 1898 was fixed and uncontested by the disputants, the United States and the Netherlands.²⁰⁴ This agreement led to an investigation into and weighing of the factual positions (*effectivités*) asserted by the disputants to determine sovereignty.²⁰⁵ The sole arbitrator, Swiss jurist Max Huber, diminished considerations relating to discovery²⁰⁶ and

with infrastructural developments following the 1992 annexation of Abu Musa and additional construction projects, such as Tehran's announcement that it was building maritime offices on Abu Musa. *See supra* note 11; Henderson, *supra* note 9.

²⁰¹ *See* Maria Stromova & Alexander Smith, *Donetsk Asks to Join Russia After Referendum to Leave Ukraine*, NBC NEWS (May 12, 2014), <https://www.nbcnews.com/storyline/ukraine-crisis/donetsk-asks-join-russia-after-referendum-leave-ukraine-n103201> [<https://perma.cc/HJD8-3XTS>]; Christopher R. Rossi, *Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur and the Elusive Search for Equilibrium after Ukraine*, 24 TUL. J. INT'L & COMP. L. 143 (2015).

²⁰² *See* *Argentine-Chile Frontier* (Arg./Chile), 16 R.I.A.A. at 166 ("As in most territorial disputes, there has been much discussion of the question of the 'critical date.'").

²⁰³ Oral Argument of Sir Lionel Heald, *Minquiers and Ecrehos* (U.K./Fr.), 1953 I.C.J. Pleadings 19, 31 (Sept. 17, 1953). As an indication of how radically opposing assertions of the critical date can be: in a case of contested sovereignty over islets between the island of Jersey and the coast of France, Britain asserted in this case that the proper date vested with the signature of a *compromis* on December 29, 1950; France argued that the critical date arose 111 years earlier, on August 2, 1839, when the 1839 Fishery Convention was signed. *See id.* at 31. In the dangerously contested waters of the South China Sea, China has asserted wide-ranging sovereign rights over upwards of ninety percent of the sea based on historical claims dating back by millennia. Critics assert China's claim, intermittently asserted, did not appear until 1947. *See* Christopher R. Rossi, *Treaty of Tordesillas Syndrome: Sovereignty Ad Absurdum and the South China Sea Arbitration*, 50 CORNELL INT'L L.J. 231 (2017).

²⁰⁴ *See* *Island of Palmas Case (or Miangas)* (Neth. v. U.S.) 2 R.I.A.A. 829, 843 (Perm. Ct. Arb. 1928) ("The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris [1898] formed a part of the Spanish or Netherlands territory.").

²⁰⁵ *See generally id.*

²⁰⁶ *See id.* at 846 ("[D]iscovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty . . . [A]n inchoate title of discovery must be completed

emphasized the peaceful and continuous display of state sovereignty, along with evidence of acquiescence²⁰⁷ or lack of opposition to possessory claims. Huber's award embodied the element of intertemporality,²⁰⁸ as opposed to the freeze framing of a critical date,²⁰⁹ even suggesting at one point that the temporal date could be stretched into a "critical epoch."²¹⁰ In a case between Nicaragua and Honduras, the ICJ found that where two interrelated disputes exist, involving territorial and maritime claims, "there is not necessarily a single critical date and that date may be different in the two disputes."²¹¹

In the *Eritrea/Yemen Arbitration*—a sovereignty dispute involving "small to tiny" islets "habitable only with great difficulty" and, yet, straddling "one of the most important and busiest seaways in the world," the Suez Canal²¹²—both parties refused to discuss a critical date except in terms of establishing the procedures of arbitration.²¹³ Yemen based its claim on historical title dating to the Bilad el-Yemen of the sixth century²¹⁴ and a (rejected) claim of reversion, which attempted to preserve its historical chain of title notwithstanding imperial and colonial interruptions.²¹⁵ Eritrea proffered a historical chain of title that drew from the beginning of Italian colonization in the later part of the nineteenth century and its post-World War II federation

within a reasonable period by the effective occupation of the region claimed to be discovered.").

²⁰⁷ See *id.* at 869 (noting the principle of acquiescence and sovereignty's association with continuous and peaceful display of state authority).

²⁰⁸ See *id.* at 845 ("[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.").

²⁰⁹ See *id.* at 846 (discussing intertemporal law).

²¹⁰ *Id.* at 848.

²¹¹ Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (*Nicar. v. Hond.*), 2007 I.C.J. 659, ¶ 123 (Oct. 8).

²¹² Award of the Arbitral Tribunal in the First Stage of the Proceedings Between Eritrea and Yemen, 22 R.I.A.A. 211, ¶ 93 (Perm. Ct. Arb. 1998).

²¹³ *Id.* ¶ 95 ("[T]he Parties themselves have spoken of a critical date only in relation to the question discussed above: whether in deciding on the scope of the Arbitration, . . . [n]either of them has sought to employ a critical date argument in relation to any of the questions involving the substance of the dispute.").

²¹⁴ *Id.* ¶¶ 47, 116–117, 119.

²¹⁵ See *id.* ¶ 125 ("It has not been established in these proceedings to the satisfaction of the Tribunal that the doctrine of reversion is part of international law. In any event, the Tribunal concludes that on the facts of this case it has no application. No 'reversion' could possibly operate, since the chain of titles was necessarily interrupted . . .").

with Ethiopia.²¹⁶ Presented with voluminous historical material to buttress competing claims of historical consolidation and state succession, the tribunal “thought it best to follow the example” established by Lord McNair in the *Argentina/Chile Frontier Arbitration*,²¹⁷ whereby determining the critical date was “of little value.”²¹⁸ Instead, the tribunal needed to interpret the historical evidence “irrespective of the date of the acts to which such evidence relates.”²¹⁹ The temporal vantage points of fixity and continuity, in view of intertemporal law, have created a conundrum for international decision-makers. However, nothing is more odious to the judicial mind than failing to render a final decision. The need to avoid a *non liquet* reinforces the judicial search for the critical date.²²⁰

2. A Wide Margin of Appreciation

The emphasis on a singular or particular date—indicative of crystallizing title to territory—presents a compelling but not completely satisfying solution to disputes over title to territory. R.Y. Jennings described the critical date as “a sophisticated and technical doctrine,”²²¹ but noted “some danger . . . in allowing what is basically no more than a descriptive term . . . to develop into a . . . ‘rule.’”²²² The tribunal in *Argentina/Chile* struggled to determine that critical date even though the parties were “not so very far apart in their ideas as to when the critical date should be fixed.”²²³ A margin of appreciation indicated that “the critical date is not necessarily the same for all purposes.”²²⁴ In the *Western Sahara Advisory Opinion*, the ICJ

²¹⁶ *Id.* ¶ 480 (“[Eritrea’s claim] derived from the Italian colony of Eritrea, and by the way of the subsequent federation of Ethiopia and Eritrea . . .”).

²¹⁷ *Id.* ¶ 95.

²¹⁸ *Argentine-Chile Frontier (Arg./Chile)*, 16 R.I.A.A. 111, 167 (U.K. Queen Appointed Ct. 1969).

²¹⁹ *Award of the Arbitral Tribunal in the First Stage of the Proceedings Between Eritrea and Yemen*, 22 R.I.A.A. ¶ 95. *See also* *Argentine-Chile Frontier (Arg./Chile)*, 16 R.I.A.A. at 166.

²²⁰ *See Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. 3, ¶ 40 (July 25) (“The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision.”).

²²¹ JENNINGS, *supra* note 194, at 31.

²²² *Id.* at 34.

²²³ *Argentine-Chile Frontier (Arg./Chile)*, 16 R.I.A.A. at 166 (noting Argentina’s 1941 claim and Chile’s 1945 or, alternatively, 1952 claim).

²²⁴ *Id.* at 167.

contemplated the expansive question of when Spain colonized the Western Sahara (Rio de Oro and Sakiet El Hamra).²²⁵ Mindful of Spain's allegations that their sovereignty dated back to the fifteenth and sixteen centuries, the Court dismissed those remote antecedents for the display of Spanish continuity, originating in 1884 with the Spanish proclamation of a protectorate over the Rio de Oro.²²⁶

As argued in *Eritrea/Yemen*, international law presumes “that the boundaries of the independent states which replace the Empire will correspond to the boundaries of the administrative units of which the dismembered Empire was constituted.”²²⁷ This is the problematic “legal presumption of *uti possidetis* For such a legal presumption to operate it is necessary to know what were [the boundaries]”²²⁸ more than the consequences of dismemberment.

The Radcliffe Line, unveiled by the retreating British Imperial Raj on the singular date of August 17, 1947, partitioned India, created and partitioned Pakistan, launched epic migrations that killed between one and two million people, and led to the secession of East Pakistan and the creation of Bangladesh.²²⁹ The line also prompted the Muslim-majority, princely state of Jammu and Kashmir to accede into the Union of India, and contributed directly to three Indo-Pakistani wars while indirectly contributing to a fourth.²³⁰ Finally, the line led to the massive division of six major rivers of the Indus Waters Basin, which now poses existential problems for water-insecure Pakistan.²³¹ Sir Cyril Radcliffe, the man who almost singlehandedly drew the vivisection

²²⁵ See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 1 (Oct. 16) (“Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?”).

²²⁶ See *id.* ¶ 77.

²²⁷ Award of the Arbitral Tribunal in the First Stage of the Proceedings Between Eritrea and Yemen, 22 R.I.A.A. 211, ¶ 96 (Perm. Ct. Arb. 1998) (quoting Yemen's counter memorial).

²²⁸ *Id.* ¶ 97.

²²⁹ See William Dalrymple, *The Great Divide*, NEW YORKER (June 22, 2015), <https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple> (discussing the lingering consequences of one of history's greatest human migrations).

²³⁰ See Christopher R. Rossi, *Interstitial Space and the High Himalayan Dispute between China and India*, 62 HARV. INT'L L.J. 429, 438 (2021) (discussing the Indo-Pakistani wars of 1947, 1965, 1971, and the 1999 Kargil conflict). The 1971 war did not involve Kashmir at its outset, but Indian and Pakistani soldiers fought on Kashmiri soil during the 1971 war's final stages. See ALASTAIR LAMB, *KASHMIR: A DISPUTED LEGACY 1846–1990*, at 1 (1991).

²³¹ See generally Christopher R. Rossi, *Blood, Water, and the Indus Waters Treaty*, 29 MINN. J. INT'L L. 103 (2020) (discussing, *inter alia*, the consequences of the critical date associated with the partitioning of India).

line, improbably underestimated the consequences of the critical date when he admittedly left “80 million people with a grievance” upon unveiling his demarcation.²³²

For the first time in Africa’s history, the Berlin Conference (1884–1885) formalized the principal contours of the continent,²³³ influentially shaping today’s atlas of Africa and the “politics of contemporary Africa.”²³⁴ The conference promulgated a General Act on February 26, 1885,²³⁵ which operationalized a “structural logic” or a “chain of reasoning” that affected explicit European aspirations and material possibilities.²³⁶ While purportedly ending the so-called Scramble for Africa, it may have “precipitated the Scramble.”²³⁷ A disregard for local conditions and a largely unexplored understanding of the political and ethnic geography resulted in a substantially “accidental,” rather than “conspiratorial,” division of Africa—at a time when Europeans were not drawing borders of prospective states or, in many cases, even colonies.²³⁸ The politics of economy overshadowed considerations of capricious line drawing, notwithstanding British Prime Minister Lord Salisbury’s observation that the countries of the Berlin Conference had ceded “mountains and rivers and lakes to each [colonial power] only hindered by the small impediment that [they] never knew exactly where the mountains and rivers and lakes were.”²³⁹

Winston Churchill associated the European Euclidean cartographic mentality with the *mission civilisatrice*, which represented the religio-

²³² See Rossi, *supra* note 230, at 449 (referencing Radcliff’s 1947 letter to Mark Tennant).

²³³ See Stelios Michalopoulos & Elias Papaioannou, *The Long-Run Effects of the ‘Scramble for Africa,’* 106 AM. ECON. REV. 1802, 1803 (2016) (statement of Jeffrey Herbst) (“[F]or the first time in Africa’s history [at independence], territorial boundaries acquired salience . . .”).

²³⁴ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 91 (2004).

²³⁵ General Act of the Conference of Berlin, Relative to the Development of Trade and Civilization in Africa; the Free Navigation of the Rivers Congo, Niger, etc.; the Suppression of the Slave Trade by Sea and Land; the Occupation of Territory on the African Coasts, Feb. 26, 1885, No. 128, *reprinted in* 2 E. HERTSLET, *THE MAP OF AFRICA BY TREATY* 468 (3d ed. 1909).

²³⁶ Matthew Craven, *Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade*, 3 LONDON REV. INT’L L. 31, 58 (2015).

²³⁷ THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: WHITE MAN’S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912*, at 254 (1991).

²³⁸ Michalopoulos & Papaioannou, *supra* note 233, at 1808 (quoting A.I. Asiwaju).

²³⁹ See *The Mansion-House Banquet to Her Majesty’s Ministers*, LONDON TIMES 6 (Aug. 7, 1890) (quoting Lord Salisbury).

political-cultural justification for imperial expansion.²⁴⁰ To him, the railroad line, created by the British and travelling from the port of Mombasa on the Indian Ocean into the interior of Africa to the eastern shore of Lake Victoria, represented “one slender thread of scientific civilization . . . drawn across the primeval chaos of the world.”²⁴¹ That railroad line consolidated an administrative territory that required another (cartographic) line, revealed by the British Superintendent of African Protectorates, Sir Clement Hill, on April 1, 1902.²⁴² Sir Clement’s line removed huge portions of the Rift Valley that had been under the traditional control of the Buganda kingdoms to create the East African Protectorate (now Kenya).²⁴³ As was argued in the *Minquiers and Ecrehos* case, “a title to territory is not a legal relation in international law whose existence and elements are a matter of one single moment.”²⁴⁴ Emphasis in that case depended on a process of historical consolidation, later summarized by Judge Bebler in the *Rann of Kutch* case, arguing that there should be “effective, i.e., real and not fictitious, display of State authority . . . [that] have certain qualities and, above all, the qualities of continuity, of intention, of manifestation of State sovereignty and of possession *à titre de souverain*.”²⁴⁵

CONCLUSION

The arbitrariness of temporal and spatial boundaries has long been recognized,²⁴⁶ as has the fictional understanding that statehood conforms to tightly fitted natural frontiers.²⁴⁷ This arbitrariness

²⁴⁰ The term is a byword of French colonial expansion under the Third Republic (1870–1940). Mathew Burrows, *Mission Civilisatrice: French Cultural Policy in the Middle East, 1860–1914*, 29 HIST. J. 109 (1986).

²⁴¹ WINSTON S. CHURCHILL, *MY AFRICAN JOURNEY* 8 (1908).

²⁴² See Christopher R. Rossi, *The Mingo Island Dispute Between Kenya and Uganda*, 42 BROOK. J. INT’L L. 659, 678 (2017).

²⁴³ See *id.* at 678–80.

²⁴⁴ Oral Argument of Sir Lionel Heald, *Minquiers and Ecrehos* (U.K./Fr.), 1953 I.C.J. Pleadings 19, 52 (Sept. 17, 1953) (quoting the Netherlands’ counter memorial).

²⁴⁵ The Indo-Pakistan Western Boundary (*Rann of Kutch*) (India v. Pak.), 17 R.I.A.A. 1, 482 (Perm. Ct. Arb. 1968) (Bebler, J., dissenting).

²⁴⁶ Jeffrey Herbst, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT’L ORG. 673, 674–75 (1989) (noting the particularly arbitrary and “haphazard” configuration of African boundaries, forty-four percent of which are straight lines that conform to astrological or adjacent straight-line measurements, not nature).

²⁴⁷ See Jan O. M. Broek, *The Problem of Natural Frontiers*, in *FRONTIERS OF THE FUTURE: LECTURES DELIVERED UNDER THE AUSPICES OF THE COMMITTEE ON INTERNATIONAL RELATIONS ON THE LOS ANGELES CAMPUS OF THE UNIVERSITY OF CALIFORNIA 1940*, at 3, 11 (1941) (recognizing the utility of “certain physiographic

continues to conflict with ancient religious, monarchical, and ecclesiastical vestiges, such as frankalmoign, that connect territorial control to personal allegiance.²⁴⁸ The development of sovereignty and the centuries-long transition to statehood required the imposition of a critical date to signify the transfer of power. International law's mechanisms for establishing this date included an array of techniques and *effectivités* to support title to territory.²⁴⁹ At the hub of this determination lays the idea of a critical date. The critical date can be conceived as a temporal moment in time, a legal fixture reliant on uninterrupted and continuous control, or an arbitrary line meant to dispossess claimants beyond that line of a right to subsequently establish better title. The critical date retains its significance despite subjectivities of historical abridgment, the hauntology of colonialism, and concessions to dominant Western narratives, which compartmentalize civilizational units into sovereign units. International law's progressive desire to let bygones be bygones presses a weight on the historical scales of justice—if only the consequences of that dismissiveness quieted complaints as much.

An ambivalent jurisprudence surrounds the critical date. Ambiguities of application continue to confound decision-makers, who labor under the obligation to render a judgment.²⁵⁰ Absent a political will among parties to adjudicate disputes, judicially constructed concepts, such as the critical date, create outcomes that necessarily preference particular political interests. These interests affect strategic considerations, which remain as important today as they did half a century ago when the United States and Britain allegedly connived to turn a blind eye to Iran's takeover of the islands. As was well known at

features," but noting the "wrong premise," that nature provides unambiguous divisions of the earth).

²⁴⁸ See James D. Fry & Melissa H. Loja, *The Roots of Historic Title: Non-Western Pre-Colonial Normative Systems and Legal Resolution of Territorial Disputes*, 27 LEIDEN J. INT'L L. 727 (2014) (contrasting state-centric rules of territorial sovereignty with ancient normative systems of allegiance); Frederic William Maitland, *Frankalmoign in the Twelfth and Thirteenth Centuries*, in 2 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 206 (H.A.L. Fisher ed., 1911) (discussing the thirteenth-century feudal practice of frankalmoign, a land tenure system allowing ecclesiastical bodies to hold land as free alms in exchange for spiritual service).

²⁴⁹ See Ashgar Ali Ali Mohamed, 'Effectivités': *An Imperative Legal Principle in Resolving the Senkaku/Diaoyu Islands Dispute*, 60 J. INDIAN L. INST. 137, 139 (2018) (reviewing the principal international decisions evidencing the proof of 'effective control' (*effectivités*)).

²⁵⁰ See Statute of the International Court of Justice art. 38, June 26, 1945, TS 993 (holding that the function of the Court is to decide disputes "as are submitted to it").

that time, “a small group of men using a boat and a bazooka”—and using the islands as a staging ground—“could threaten navigation in the waterway.”²⁵¹ Currently, asymmetrical warfare tactics, involving numerous fast attack crafts, complicate this security calculation. Swarming tactics are likely to outmaneuver civil and military traffic in the narrow confines of the Strait of Hormuz. Even one attack against a commercial vessel poses a “direct threat” and “could cause catastrophic damage, with global policy and private sector ramifications.”²⁵²

The Lower Gulf Islands have been described as one of international law’s frozen disputes. Perhaps this metaphoric description is not entirely fitting. In what has been described as “the most provocative act in the last five decades,” Iran’s Supreme Leader, Ayatollah Khamenei, declared in 2020 that the three islands must be converted into residential property.²⁵³ This declaration attempts to dramatically alter the islands’ demographics to solidify Iranian sovereignty.²⁵⁴

Iran’s strategic and military superiority over the Lower Gulf Islands has moved the UAE to exert influence in another direction. Yemen’s island of Socotra, situated off the Horn of Africa, overlooks the Bab el-

²⁵¹ U.N. Doc. S/PV 1610, *supra* note 11, ¶ 71.

²⁵² Berenice Baker, *Iran’s Fast Attack Craft Fleet: Behind the Hyperbole*, NAVAL TECHNOLOGY (Jan. 16, 2013), <https://www.naval-technology.com/features/featureiran-fast-attack-craft-fleet-behind-hyperbole/> [<https://perma.cc/9NRL-XCSA>]. Recent tensions between the US and Iran stem from: the 2018 Trump Administration withdrawal from the Iran nuclear deal (the Joint Comprehensive Plan of Action (JCPOA)); the 2019 Iranian downing of a US surveillance drone; the 2019 Iranian seizure of a British tanker transiting the Strait of Hormuz; the 2020 Trump Administration assassination of Qasem Soleimani, the commander of the Iranian Quds Force; and proxy attacks stemming from the war in Yemen. The proxy attacks renew concerns about Iranian intentions to mine and/or close the Strait of Hormuz. Such threats appear more rhetorical than serious, due to the devastating self-harm such an action would bring to Iran’s economy. “[Ninety percent] of Iran’s oil exports pass through the Strait of Hormuz, representing approximately 83 percent of all Iranian exports” and eighty-five percent of all Iranian government revenue. STRAUSS CTR., *supra* note 1. Iran has recently opened a new two-billion-dollar oil terminal east of the strait on the Gulf of Oman. See Amanda Macias, *Iran Opens New Oil Terminal in Bid to Bypass Crucial Strait of Hormuz for Exports*, CNBC (July 22, 2021, 11:19AM), <https://www.cnbc.com/2021/07/22/iran-opens-new-oil-terminal-in-bid-to-bypass-crucial-strait-of-hormuz-for-exports.html> [<https://perma.cc/WA8U-XGPZ>]. See also Lolita C. Baldor & Jon Gambrell, *US Military May Put Armed Troops on Commercial Ships in Strait of Hormuz to Stop Iran Seizures*, ASSOC. PRESS (Aug. 4, 2023, 5:52 PM), <https://apnews.com/article/persian-gulf-tensions-us-armed-guards-57295a81dc45c9e0755bd6a83ece86d9> [<https://perma.cc/G8CV-RFGQ>].

²⁵³ Mohammad Eslami & Saba Sotoudehfar, *Iran–UAE Relations and Disputes Over the Sovereignty of Abu Musa and Tunbs*, in THE GEOPOLITICS OF IRAN 343, 344 (Francisco José B.S. Leandro et al. eds., 2021).

²⁵⁴ *Id.* at 344, 350.

Mandeb Strait.²⁵⁵ It strategically connects the Arabian Sea and the Gulf of Aden to the Red Sea and the Suez Canal.²⁵⁶ It also serves as a way station for legal and illegal trade and fishing connected to the Horn of Africa.²⁵⁷ More than six million barrels of Gulf oil flow through the Bab el-Mandeb Strait annually.²⁵⁸ Since experiencing three devastating cyclones from 2015 to 2018, the UAE has been providing humanitarian aid to the island and building up its infrastructure.²⁵⁹ At the same time, it has been fortifying its military presence on the island in support of Yemen's Southern Transitional Council (STC), which seeks the separation of South Yemen from the rest of the country.²⁶⁰ The UAE's influence on the island and support of the STC complicates relations with its Saudi ally and conflicts with Saudi expansion interests in the Horn region.²⁶¹ The UAE's influence on the island and support of the

²⁵⁵ See Rene Tebel, *Perim and Socotra: Can Yemen Maintain Its Territorial Integrity?*, GEOPOLITICAL MONITOR (Aug. 26, 2021), <https://www.geopoliticalmonitor.com/perim-and-socotra-can-yemen-maintain-its-territorial-integrity/> [<https://perma.cc/F68D-8U39>] (referring to Yemen's territorial outpost 100 km off the Horn of Africa).

²⁵⁶ John Calabrese, *The Bab el-Mandeb Strait: Regional and Great Power Rivalries on the Shores of the Red Sea*, MIDDLE E. INST. (Jan. 29, 2020), <https://www.mei.edu/publications/bab-el-mandeb-strait-regional-and-great-power-rivalries-shores-red-sea> [<https://perma.cc/GED8-TYKB>] (referring to the Bab el-Mandeb Strait ("Gate of Tears" in Arabic) as the "vital strategic link" between the Mediterranean Sea and the Indian Ocean via the Suez Canal).

²⁵⁷ See generally Afyare A. Elmi, *Illegal Fishing and Piracy in the Horn of Africa: The Role of the Mena Region*, in ENVIRONMENTAL POLITICS IN THE MIDDLE EAST: LOCAL STRUGGLES, GLOBAL CONNECTIONS 149–66 (Harry Verhoeven ed., 2018) (noting Socotra's geostrategic location and illegal, unreported, and unregulated fishing in the Horn of Africa).

²⁵⁸ See Justine Barden, *The Bab el-Mandeb Strait Is a Strategic Route for Oil and Gas Shipments*, U.S. ENERGY INFO. ADMIN. (Aug. 27, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=41073> [<https://perma.cc/PV6C-YZ4S>] (estimating that 6.2 barrels of oil transit the strait annually, with 3.6 million barrels heading to Europe (2018 est.)). The Bab el-Mandeb Strait and the Strait of Hormuz compose the two major transit arteries in the region. See generally Greg Shapland, *Maritime Boundaries in the Middle East*, 51 ASIAN AFFS. 146 (2020).

²⁵⁹ See *UAE Aid for Socotra Education and Health Services*, RELIEFWEB (June 30, 2020), <https://reliefweb.int/report/yemen/uae-aid-socotra-education-and-health-services> [<https://perma.cc/U6HW-BURJ>] (detailing humanitarian relief).

²⁶⁰ See Mohammed Mukhashaf, *Yemeni Separatists Seize Remote Socotra Island from Saudi-Backed Government*, REUTERS (June 21, 2020, 4:09 AM), <https://www.reuters.com/article/us-yemen-security-separatists/yemen-separatists-seize-remote-socotra-island-from-saudi-backed-government-idUSKBN23S0DU> [<https://perma.cc/B74F-2QNG>] (noting UAE support for the STC).

²⁶¹ See SEBASTIAN SONS, BETWEEN POWER PROJECTION AND REGIONAL RIVALRIES. SAUDI ARABIA'S ENGAGEMENT IN THE HORN OF AFRICA, MEGATRENDS AFRIKA 2 (Dec. 10, 2022), <https://www.megatrends-afrika.de/assets/afrika/publications/policybrief/MTA>

STC also threatens Iranian interests in the region.²⁶² The UAE's activity on Socotra has been characterized as a creeping (de facto) annexation of the island, if not a partial and ongoing dismemberment of Yemen,²⁶³ which is itself beset by a protracted civil war and humanitarian disaster.²⁶⁴ Viewed in conjunction with the UAE's participation in the Saudi-led proxy war against Iran and its Houthi surrogates in Yemen, and the UAE's establishment of military bases on Yemen's island of Mayun, in Somaliland (Berbera), Eritrea (Assab), and in the Puntland region of Somalia,²⁶⁵ little about the status of the Lower Gulf Islands in the Strait of Hormuz indicates that the politics in the region remain frozen. A controlling UAE interest over Socotra provides leverage as a strategic hedge²⁶⁶ against Iranian adventurism in the Gulf, when it does not appear as the UAE's own form of adventurism in the Horn of Africa region.

The metaphoric fixity of the critical date awaits a challenge with Socotra's own declaration of accession to the UAE. Such a declaration, which appears to be in the making, will doubtless recycle disputes

-PB_Sons_Saudi_Arabia_HoA_final.pdf [https://perma.cc/M4Z2-BP3C] (noting Riyadh's increasing rivalry with the UAE and its increasing regard of the Horn of Africa as a foreign policy priority).

²⁶² See Giorgio Cafiero, *The UAE's Expansionist Agenda in Yemen Is Playing Out on Socotra*, DAWN (Apr. 8, 2022), <https://dawnmena.org/the-uaes-expansionist-agenda-in-yemen-is-playing-out-on-socotra/> [https://perma.cc/KB5J-FU5J] (noting the shifting interests affecting UAE-Saudi foreign policies).

²⁶³ See Bruce Riedel, *Saudi Arabia and the UAE Consolidating Strategic Positions in Yemen's East and Islands*, BROOKINGS (May 28, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/05/28/saudi-arabia-and-the-uae-consolidating-strategic-positions-in-yemens-east-and-islands/> [https://perma.cc/2WFK-SNBS] (discussing Yemen's dismemberment and alternative Saudi and UAE intentions to circumvent the Strait of Hormuz); Arwa Mokdad, *What the UAE Takeover of Yemen's Islands Really Means*, RESPONSIBLE STATECRAFT (June 14, 2021), <https://responsiblestatecraft.org/2021/06/14/what-the-uae-takeover-of-yemens-islands-really-means/> [https://perma.cc/5E62-RXNN] (characterizing UAE intentions on Socotra as a de facto takeover, with UAE plans of holding a secession referendum to declare the island officially part of the UAE).

²⁶⁴ See Kari Robinson, *Yemen's Tragedy: War, Stalemate, and Suffering*, COUNCIL ON FOREIGN RELS. (May 1, 2023), <https://www.cfr.org/backgrounder/yemen-crisis> [https://perma.cc/7VZ9-7DSG] (describing the Yemeni civil war as an "intractable" problem that has created a humanitarian crisis "among the worst in the world").

²⁶⁵ See generally Ismail Numan Telci & Tuba Öztürk Horoz, *Military Bases in the Foreign Policy of the United Arab Emirates*, 20 INSIGHT TURK. 143 (2018), <https://www.insightturkey.com/file/922/military-bases-in-the-foreign-policy-of-the-united-arab-emirates> [https://perma.cc/B8R6-EYC4] (discussing the UAE's establishment of military bases abroad, notably in the Horn of Africa).

²⁶⁶ On the concept of strategic hedging in relation to the UAE's rivalry with Iran, see generally Ayman El-Dessouki & Ola Rafik Mansour, *Small States and Strategic Hedging: The United Arab Emirates' Policy Towards Iran*, REV. ECON. & POL. SCI. 1, 1–14 (2020).

2024] *The Critical Date and the Dispute over Islands in the Strait of Hormuz: Abu Musa and the Tunbs* 47

about international law's uneasy encounter with the hauntings of history, as imperfectly remediated by its *desiderata* to achieve finality by letting bygones be bygones.

