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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.<sup>60</sup> 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.<sup>61</sup> Accordingly,

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

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 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].

<sup>58</sup> See POTTER, *supra* note 54.

<sup>59</sup> 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.).

<sup>60</sup> POTTER, *supra* note 54, at 1.

<sup>61</sup> 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.<sup>62</sup>

This history equally diminishes sweeping hegemonic claims of ownership over the Gulf and centuries of commercial penetrations from India and East Africa,<sup>63</sup> South East Asia,<sup>64</sup> and Ming China.<sup>65</sup> The Europeans have predominantly authored these remnants of history,<sup>66</sup> particularly after the Scottish hydrographer James Horsburgh published the Gulf navigational directory<sup>67</sup> and the sacking of Ras Al-

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<sup>62</sup> *Id.* at 44:39–45:21.

<sup>63</sup> 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).

<sup>64</sup> 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).

<sup>65</sup> 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).

<sup>66</sup> 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).

<sup>67</sup> 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.<sup>68</sup> These narratives compounded to create an orientalist discourse of Western dominance,<sup>69</sup> 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 century<sup>70</sup>—for instance, an 1886 British War Ministry map that showed Abu Musa and the Tunbs as belonging to Iran<sup>71</sup>—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.<sup>72</sup> 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.”<sup>73</sup> At issue is the transmission of beliefs, transmuted into understandings of historical

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<sup>68</sup> 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).

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

<sup>70</sup> 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).

<sup>71</sup> 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.

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

<sup>73</sup> 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.<sup>74</sup> 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)<sup>75</sup> and Hooshang Amirahmadi’s less obviously titled but still suggestive *Small Islands, Big Politics: The Tunbs and Abu Musa in the Persian Gulf* (1996).<sup>76</sup> 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.<sup>77</sup>

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*.<sup>78</sup> Claudius Ptolemy’s *Geographia* (ca. 150) influentially transported the exonym<sup>79</sup> around the Western world. Later, Martin Waldseemüller’s famous 1507 *Universalis Cosmographia* map references the *Sinus Persicus*.<sup>80</sup>

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<sup>74</sup> 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).

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

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

<sup>77</sup> 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).

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

<sup>79</sup> 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).

<sup>80</sup> Martin Waldseemüller, *Universalis Cosmographia Secundum Ptholomaei Traditionem et Emerici Vespucii 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 world<sup>81</sup> 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,<sup>82</sup> and in Lord Curzon's nineteenth century assessment of Arab seafaring dominance over the Gulf.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> For more than a century, the garrison at Hormuz exacted tolls and controlled trade over the *Sino Persico* and wider region.<sup>86</sup> Whatever political meaning attaches to place naming and the Gulf, cartographic references themselves are of little evidentiary import. And if courts, as

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.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).

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

<sup>82</sup> 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).

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

<sup>84</sup> 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").

<sup>85</sup> 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.

<sup>86</sup> 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,<sup>87</sup> 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.<sup>88</sup> Repeated over time, such references take on the appearance of a languified geography,<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup> 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

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

<sup>88</sup> 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).

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

<sup>90</sup> 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)).

<sup>91</sup> See al-Qasimi, *supra* note 85, at 17.

<sup>92</sup> *Id.*

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

Place naming on cartographic projections is pregnant with preconceived toponymic biases, often ignorant of endonymic usage, and proffered to accord with political interests.<sup>94</sup> The ICJ recognizes the evidentiary value of maps,<sup>95</sup> however, it has generally adopted a “cautious and restrictive” approach regarding their significance.<sup>96</sup> Maps are treated “as secondary evidence”—as a form of toponymic hearsay<sup>97</sup>—rather than as dispositive of *à titre de souverain*. Because maps embed a history they help to create,<sup>98</sup> 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

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<sup>93</sup> 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).

<sup>94</sup> 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.

<sup>95</sup> 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).

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

<sup>97</sup> *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.”).

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

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

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<sup>99</sup> 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).

<sup>100</sup> 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).

<sup>101</sup> *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).

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

<sup>103</sup> See ROSSI, *supra* note 89, at 18–19.

<sup>104</sup> 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,”<sup>105</sup> the brutal simplicity of *uti possidetis* actually made many border wars “inevitable.”<sup>106</sup>

*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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> However, Brazil did not gain independence until 1822.<sup>110</sup> Ecuador and Venezuela subsequently seceded from Colombia by 1830.<sup>111</sup> In the early 1840s, the Central American Federation splintered, creating five more

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

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

<sup>107</sup> 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.”).

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

<sup>109</sup> 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).

<sup>110</sup> 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).

<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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,<sup>114</sup> 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.<sup>115</sup> 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."<sup>116</sup> As is

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

<sup>113</sup> See ROSSI, *supra* note 89, at 21–24.

<sup>114</sup> 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).

<sup>115</sup> 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).

<sup>116</sup> 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.<sup>117</sup>

Britain’s colonial control over the lower Gulf region began in 1820,<sup>118</sup> but most of the Trucial States’ oil did not begin to flow until the 1950s and 1960s.<sup>119</sup> The need to demarcate oil concessions necessitated the creation of borders among the sheikhdoms.<sup>120</sup> 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.”<sup>121</sup> Due to the “primitive region,” it was “fanciful to suggest” the Sheikh

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<sup>117</sup> 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).

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

<sup>119</sup> 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.

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

<sup>121</sup> 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.”<sup>122</sup> Foregoing multiple references governing commercial transactions in the Quran,<sup>123</sup> 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*).<sup>124</sup> 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.<sup>125</sup> Similarly, Britain demarcated the border separating Iraq and Kuwait by reference to the “southernmost palm tree.”<sup>126</sup>

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).<sup>127</sup> Line drawing produced a series of land and sea disputes between Saudi Arabia, Oman, and Yemen involving the Red Sea,<sup>128</sup> as well as disputes

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<sup>122</sup> *Id.* at 149.

<sup>123</sup> 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).

<sup>124</sup> 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”).

<sup>125</sup> 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).

<sup>126</sup> Okruhlik & Conge, *supra* note 125, at 233.

<sup>127</sup> 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.

<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> Fractious border disputes arose between Saudi Arabia and the UAE over the giant Zararah/Shaybah oilfields,<sup>131</sup> between Qatar and Bahrain,<sup>132</sup> and between Dubai and Sharjah.<sup>133</sup> Territorial disputes contributed to the eight-year war between Iraq and Iran (1980–1988),<sup>134</sup> which involved reasserted Iraqi claims to the eastern bank of the Shatt Al-Arab (Farsi: Arvand Rūd) confluence of the Tigris and Euphrates Rivers.<sup>135</sup> In 1991, Iraqi irredentism served as pretext for a major war between Iraq and Kuwait, over Saddam Hussein’s so-called reclamation of the

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<sup>129</sup> 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>].

<sup>130</sup> 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.”).

<sup>131</sup> *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).

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

<sup>133</sup> 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>].

<sup>134</sup> 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>].

<sup>135</sup> *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,<sup>136</sup> which ultimately led to his overthrow in the Second Gulf War in 2003.<sup>137</sup> 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,<sup>138</sup> are key factors noted by international courts and tribunals as a means of determining title to land or maritime territory.<sup>139</sup> Such claims depend on an uninterrupted and public (notorious) display of state authority, as measured over a long period of time.<sup>140</sup> Taken together, these acts constitute *à titre de souverain*,<sup>141</sup> meaning that the title holder exercises the functions of state authority on behalf of its own authority.<sup>142</sup> 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

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<sup>136</sup> 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).

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

<sup>138</sup> 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).

<sup>139</sup> 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).

<sup>140</sup> 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).

<sup>141</sup> 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).

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

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

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”<sup>145</sup> to the sprawling and remote High Himalayan landscapes of Ladakh, Aksai Chin, and the Shaksgam Valley.<sup>146</sup> The porosity of human geography, abetted by cavities of sovereignty, critically exposes “the western legal fiction” that all legal rights arise from states.<sup>147</sup> International law has recently recognized the legal significance of nonstate activity—for instance, in terms of artisanal fishing practices “exercised continuously through the ages”<sup>148</sup>—however, its tolerance for Indigenous peoples’ conflictual encounters with sovereignty’s *Mightie Frame* remains limited.<sup>149</sup>

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

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

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

<sup>145</sup> 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).

<sup>146</sup> 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).

<sup>147</sup> *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).

<sup>148</sup> *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.”).

<sup>149</sup> 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).

<sup>150</sup> 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,<sup>151</sup> 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."<sup>152</sup> The nomadic history of the Arabian Peninsula, writ large, reflects this complexity.<sup>153</sup>

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.<sup>154</sup> 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."<sup>155</sup> 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,<sup>156</sup> failing to ratify a signed treaty,<sup>157</sup> and failing to respond in a timely fashion.<sup>158</sup> As upheld by the ICJ, "silence may . . . speak, but only if the conduct of the other State calls for a response."<sup>159</sup>

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<sup>151</sup> 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).

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

<sup>153</sup> 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).

<sup>154</sup> BLUM, *supra* note 139, at 99.

<sup>155</sup> *Id.* at 99–100.

<sup>156</sup> *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).

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

<sup>158</sup> *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).

<sup>159</sup> *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.”<sup>160</sup> Ironically, in the *Rann of Kutch Arbitration*,<sup>161</sup> 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,<sup>162</sup> decades before the British completed the Survey of Sind in 1870.<sup>163</sup> The parties in the case agreed that no defined boundary consolidated title to the Rann before British colonization.<sup>164</sup> Instead, the parties relied solely on historical consolidation.<sup>165</sup> The dissenting umpire, Aleš Bebler, astutely concluded that the yardstick of continuous peaceful possession of territory had to be applied *cum grano salis*.<sup>166</sup> Citing Huber’s opinion in the *Island of Palmas Arbitration*<sup>167</sup> and also the *Legal Status of Eastern Greenland Case*,<sup>168</sup> continuity might amount to a “certain

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

<sup>161</sup> 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).

<sup>162</sup> 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]”).

<sup>163</sup> 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.

<sup>164</sup> See *id.* at 461.

<sup>165</sup> See *id.*

<sup>166</sup> *Id.* at 483 (Bebler, J. dissenting).

<sup>167</sup> *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.

<sup>168</sup> *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.”<sup>169</sup>

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.”<sup>170</sup> Although international powers used *uti possidetis* to cement respect for international borders<sup>171</sup> and to avoid land grabs,<sup>172</sup> 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

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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.

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

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

<sup>171</sup> 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*.”).

<sup>172</sup> 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.”<sup>173</sup> Since that time, a series of sectarian disputes—from the establishment of the Gulf Cooperation Council (GCC)<sup>174</sup> 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.<sup>175</sup>

The protracted historical debate accompanying the international legal proof of title to the three Lower Gulf Islands<sup>176</sup> seems to hammer

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<sup>173</sup> 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>].

<sup>174</sup> 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>].

<sup>175</sup> 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”).

<sup>176</sup> 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 claims<sup>177</sup> 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.<sup>178</sup> 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.'"<sup>179</sup> Even so, he noted the British government was "no more than 60 percent" sure of its legal understanding of the islands' chain of title.<sup>180</sup> 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.<sup>181</sup> Jalil Roshandel dated the gift in 1903.<sup>182</sup> However, Saeed Bagheri noted that Abu Musa was Iranian territory until Great Britain transferred sovereignty to Sharjah in 1908.<sup>183</sup> Noura S. Al-Mazrouei

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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.

<sup>177</sup> 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).

<sup>178</sup> 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).

<sup>179</sup> Mobley, *supra* note 7, at 629.

<sup>180</sup> *Id.*

<sup>181</sup> 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 . . .").

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

<sup>183</sup> 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.<sup>184</sup> 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*."<sup>185</sup> 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."<sup>186</sup> 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.<sup>187</sup>

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.<sup>188</sup>

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<sup>184</sup> AL-MAZROUEI, *supra* note 16, at 7.

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

<sup>186</sup> *Id.* at 128.

<sup>187</sup> 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.").

<sup>188</sup> *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.<sup>189</sup> 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.<sup>190</sup>

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.”<sup>191</sup> The purpose of the critical date—its *raison d’être*—is to stop time.<sup>192</sup> 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”<sup>193</sup>: “[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.”<sup>194</sup>

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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.

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

<sup>190</sup> 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).

<sup>191</sup> 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.

<sup>192</sup> Oral Argument of Mr. Fitzmaurice, 1953 I.C.J. Pleadings at 64.

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

<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> 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*?”<sup>197</sup> 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.”<sup>198</sup>

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.”<sup>199</sup> 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*).<sup>200</sup> Two such examples are

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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).

<sup>195</sup> 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).

<sup>196</sup> 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).

<sup>197</sup> Bowett, *supra* note 116, at 112.

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

<sup>199</sup> Fitzmaurice, *Law and Procedure*, *supra* note 191, at 41, 43.

<sup>200</sup> 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.<sup>201</sup>

To determine exclusive sovereignty, international law has attempted to attach a critical date to every case of a disputed territorial claim.<sup>202</sup> If an actor establishing that date intends to negate the legal significance of acts subsequent to that date,<sup>203</sup> 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.<sup>204</sup> This agreement led to an investigation into and weighing of the factual positions (*effectivités*) asserted by the disputants to determine sovereignty.<sup>205</sup> The sole arbitrator, Swiss jurist Max Huber, diminished considerations relating to discovery<sup>206</sup> and

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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.

<sup>201</sup> *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).

<sup>202</sup> *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.'").

<sup>203</sup> 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).

<sup>204</sup> *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.").

<sup>205</sup> *See generally id.*

<sup>206</sup> *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 acquiescence<sup>207</sup> or lack of opposition to possessory claims. Huber's award embodied the element of intertemporality,<sup>208</sup> as opposed to the freeze framing of a critical date,<sup>209</sup> even suggesting at one point that the temporal date could be stretched into a "critical epoch."<sup>210</sup> 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."<sup>211</sup>

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 Canal<sup>212</sup>—both parties refused to discuss a critical date except in terms of establishing the procedures of arbitration.<sup>213</sup> Yemen based its claim on historical title dating to the Bilad el-Yemen of the sixth century<sup>214</sup> and a (rejected) claim of reversion, which attempted to preserve its historical chain of title notwithstanding imperial and colonial interruptions.<sup>215</sup> 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

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

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

<sup>208</sup> *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.").

<sup>209</sup> *See id.* at 846 (discussing intertemporal law).

<sup>210</sup> *Id.* at 848.

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

<sup>212</sup> 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).

<sup>213</sup> *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.").

<sup>214</sup> *Id.* ¶¶ 47, 116–117, 119.

<sup>215</sup> *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.<sup>216</sup> 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*,<sup>217</sup> whereby determining the critical date was “of little value.”<sup>218</sup> Instead, the tribunal needed to interpret the historical evidence “irrespective of the date of the acts to which such evidence relates.”<sup>219</sup> 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.<sup>220</sup>

## 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,”<sup>221</sup> but noted “some danger . . . in allowing what is basically no more than a descriptive term . . . to develop into a . . . ‘rule.’”<sup>222</sup> 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.”<sup>223</sup> A margin of appreciation indicated that “the critical date is not necessarily the same for all purposes.”<sup>224</sup> In the *Western Sahara Advisory Opinion*, the ICJ

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

<sup>217</sup> *Id.* ¶ 95.

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

<sup>219</sup> *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.

<sup>220</sup> *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.”).

<sup>221</sup> JENNINGS, *supra* note 194, at 31.

<sup>222</sup> *Id.* at 34.

<sup>223</sup> *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).

<sup>224</sup> *Id.* at 167.

contemplated the expansive question of when Spain colonized the Western Sahara (Rio de Oro and Sakiet El Hamra).<sup>225</sup> 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.<sup>226</sup>

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.”<sup>227</sup> 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]”<sup>228</sup> 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.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> Sir Cyril Radcliffe, the man who almost singlehandedly drew the vivisection

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<sup>225</sup> 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*)?”).

<sup>226</sup> See *id.* ¶ 77.

<sup>227</sup> 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).

<sup>228</sup> *Id.* ¶ 97.

<sup>229</sup> 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).

<sup>230</sup> 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).

<sup>231</sup> 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.<sup>232</sup>

For the first time in Africa’s history, the Berlin Conference (1884–1885) formalized the principal contours of the continent,<sup>233</sup> influentially shaping today’s atlas of Africa and the “politics of contemporary Africa.”<sup>234</sup> The conference promulgated a General Act on February 26, 1885,<sup>235</sup> which operationalized a “structural logic” or a “chain of reasoning” that affected explicit European aspirations and material possibilities.<sup>236</sup> While purportedly ending the so-called Scramble for Africa, it may have “precipitated the Scramble.”<sup>237</sup> 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.<sup>238</sup> 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.”<sup>239</sup>

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

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

<sup>233</sup> 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 . . .”).

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

<sup>235</sup> 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).

<sup>236</sup> 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).

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

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

<sup>239</sup> 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.<sup>240</sup> 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.”<sup>241</sup> 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.<sup>242</sup> 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).<sup>243</sup> 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.”<sup>244</sup> 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*.”<sup>245</sup>

### CONCLUSION

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

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<sup>240</sup> 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).

<sup>241</sup> WINSTON S. CHURCHILL, *MY AFRICAN JOURNEY* 8 (1908).

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

<sup>243</sup> See *id.* at 678–80.

<sup>244</sup> 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).

<sup>245</sup> 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).

<sup>246</sup> 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).

<sup>247</sup> 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.<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> 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

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

<sup>248</sup> 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).

<sup>249</sup> 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*)).

<sup>250</sup> 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.”<sup>251</sup> 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.”<sup>252</sup>

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.<sup>253</sup> This declaration attempts to dramatically alter the islands’ demographics to solidify Iranian sovereignty.<sup>254</sup>

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-

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

<sup>252</sup> 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>].

<sup>253</sup> 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).

<sup>254</sup> *Id.* at 344, 350.

Mandeb Strait.<sup>255</sup> It strategically connects the Arabian Sea and the Gulf of Aden to the Red Sea and the Suez Canal.<sup>256</sup> It also serves as a way station for legal and illegal trade and fishing connected to the Horn of Africa.<sup>257</sup> More than six million barrels of Gulf oil flow through the Bab el-Mandeb Strait annually.<sup>258</sup> Since experiencing three devastating cyclones from 2015 to 2018, the UAE has been providing humanitarian aid to the island and building up its infrastructure.<sup>259</sup> 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.<sup>260</sup> 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.<sup>261</sup> The UAE's influence on the island and support of the

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<sup>255</sup> 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).

<sup>256</sup> 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).

<sup>257</sup> 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).

<sup>258</sup> 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).

<sup>259</sup> 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).

<sup>260</sup> 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).

<sup>261</sup> 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.<sup>262</sup> 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,<sup>263</sup> which is itself beset by a protracted civil war and humanitarian disaster.<sup>264</sup> 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,<sup>265</sup> 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 hedge<sup>266</sup> 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

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-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).

<sup>262</sup> 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).

<sup>263</sup> 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).

<sup>264</sup> 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").

<sup>265</sup> 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).

<sup>266</sup> 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).

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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.

