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Hope and History: The Spirit of Time in International Law

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History Says,
Don't hope on this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.[1]

International lawyers and legal historians have recently started a promising dialogue in investigating international legal history and theory. So far, however, most studies have examined developments in the field from a fragmented, brief, and narrow perspective. As an alternative to this narrow perspective, this Article proposes a different approach—a comprehensive, long-term, and broad perspective to the study of the history of international law that eminent historian Fernand Braudel (1902–1985) calls the longue durée. *The Article sets out to examine whether it may be possible to transplant the wide view from the historical field to international law. It then discusses the promises and pitfalls of introducing the long-term perspective to the field of international law. The Article highlights how adopting a wide, interdisciplinary, and long-term perspective to studying international law can help international lawyers step out of their comfort zone to better understand the history and theory of international law. By taking a*

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1. Seamus Heaney, THE CURE AT TROY (Farrar, Strauss, and Giroux, 1990).

comprehensive view of the past, international legal historians can spot and explain long-term patterns and trends that would not otherwise be detected. It could be particularly appropriate to illuminate the origins and evolution of legal norms, the establishment of international institutions, and the evolution of international legal processes; that is, how international law operates in practice and develops through time. Gaining a wider perspective in investigating the field thus allows international lawyers to consider seemingly intractable problems from new angles and perspectives and see solutions to those issues.

I. INTRODUCTION

International lawyers and legal historians have started a promising dialogue to investigate international legal history. So far, however, most studies have examined developments in the field from a fragmented, brief, and narrow perspective. In terms of timeframe, this perspective typically considers time periods of ten years or less; only rarely does it encompass periods of a hundred years. Most analyses focus on transient trends and particular facets of international law rather than the whole of it. This narrow perspective has become prevalent due to the growing fragmentation of international law, the proliferation of international legal instruments, courts and tribunals, and the (over)specialization of experts. Such perspectives focus on specific crises, episodes, and events. Crises capture international lawyers' imagination and often monopolize their attention.[2]

In the midst of dynamic if not turbulent times, can international lawyers benefit from adopting a comprehensive, long-term, and broad

2. CRISIS NARRATIVES IN INTERNATIONAL LAW *in* CRISIS NARRATIVES IN INTERNATIONAL LAW, 45 (MakaneMoïse Mbengue and Jean D'Aspremont eds., 2022); HOW INTERNATIONAL LAW WORKS IN TIMES OF CRISIS (George Ulrich and InetaZiemele eds., 2019).

analytical approach to their field? What does this perspective actually mean? Can history and international law illuminate each other for mutually beneficial reasons?[3] One could contend that such an approach is backward-looking, as it implicitly requires considering past events. Rather, if a scholar wishes to influence future behavior, then a *forward*-looking approach, rather than a *backward*-looking one, would be preferable. However, adopting a long-term perspective considers looking backward as necessary to looking forward and opening debates about what alternatives to the current global order are possible.[4] History is not a science of the past, but rather a link between the past and the present.[5] Taking a long view "makes it possible to consider the interrelated operation of legal practices and concepts before they were fragmented into separate fields."[6]

Given that existing scholarship has not yet examined the promises and pitfalls of long-term approaches to the history of international law, and some eminent contemporary historians advocate a return to the *long durée* in historiography, it seems appropriate to consider whether such an approach could benefit the field of international legal history.[7] This approach would entail accessing international law as a learning system through deep focus ("a technique in which objects in the foreground, the mid-ground, and the distant background appear in equally sharp focus") and slow motion (a visual technique whereby time appears to be slowed down).[8]

Against this backdrop, this Article sets out to investigate whether adopting a long-term perspective can benefit the history and theory of international law. By observing long-term trends, detecting hidden connections, and mapping the slow evolution of international legal norms, institutions, and processes, international lawyers can not only glimpse the deep-rooted history of their field, but also understand the present and map the future. By adopting this broad lens, time becomes both a maker—

3. Richard E. Lee, *Lessons of the Long Durée: The Legacy of Fernand Braudel* 69 HIST. CRÍTICA 69, 75 (2018).

4. Søren Kierkegaard, *Journalen JJ*: 167 [1843], SØREN KIERKEGAARDS SKRIFTER, 306 (Søren Kierkegaard Research Centre ed., 1997)(admitting that "life can only be understood backwards; but it must be lived forwards.").

5. Jacques Le Goff, *Prefazione*, MARCH BLOCH, APOLOGIA DELLA STORIA X (2009).

6. Anne Orford, *Theorizing Free Trade*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 701, 710 (Anne Orford and Florian Hoffmann eds., 2016).

7. David Armitage and Jo Guldi, *The Return of the Long Durée: An Anglo-American Perspective*70 ANNALES 219, 220 (2015); JO GULDI & DAVID ARMITAGE, THE HISTORY MANIFESTO 47 (2014).

8. LINDA COSTANZO CAHIR, LITERATURE INTO FILM 284 (2006).

enabling the coalescence of customary law and general principles of international law—and a marker—signaling epochal shifts revealed by the adoption of important international legal instruments or the adjudication of landmark cases. The long-term perspective does not only reveal the longevity and timelessness of certain international law concepts and processes, but it also goes beyond this descriptive level. In fact, it can shed light on international law's mode of development, and, as a result, how time shapes international law by illuminating the slow but vital and resilient heartbeat of international legal dynamics.

In particular, the Article adopts a long-term perspective on the evolution of: 1) international law norms; 2) international courts; and 3) international legal processes. First, the Article demonstrates that adopting a long-term perspective is crucial in mapping the emergence of legal norms and their future trajectories. It illuminates the discussions that occurred before the formation of given legal norms, the alternatives that they displaced, and even the attempts to resist their inception. Second, the Article examines and evaluates the emergence of judicial dispute settlement mechanisms. As is known, international courts and tribunals have been a recurring theme in international legal history. To chart the origin, development, and even future course of international courts and tribunals, it is essential to examine their evolution by adopting a long-term perspective. Third, the Article explores how the adoption of long-term perspectives makes it possible to dispel notions of linearity, progress, and predictability in the evolution of international legal processes.[9] In fact, such perspective reveals that international legal processes are not always simple or predictable. Rather, international legal history endorses multiple temporalities, be they cyclical, linear, or even responsive to unpredictable, untimely, and contingent events. To clarify this specific articulation of the long view to the history and theory of international law, the Article discusses several pertinent examples.

The Article thus proceeds as follows. After this short introduction, Part II briefly introduces the long-term view to history as elaborated by Braudel. Part III hypothesizes whether it may be possible to transplant such ideas from the historical field to international legal history and theory. Part IV examines whether adopting a long-term perspective can shed light on how legal norms are created and change over time. Part V adopts a long-term perspective to illuminate the creation of select international courts and tribunals. Part VI discusses international legal

9. Kathryn McNeilly, *Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change* 28 SOC. & LEGAL STUD. 817, 817-838 (2019).

processes. Part VII evaluates the benefits and drawbacks of introducing the long-term perspective into the terrain of international legal history. The Conclusions sum up the key findings of the study.

II. A GLIMPSE OF ETERNITY? THE LONG-TERM PERSPECTIVE IN HISTORY

Written in a prisoner's camp during the Second World War and published in 1949, *The Mediterranean* is generally considered the masterpiece of the French historian Fernand Braudel (1902-1985).[10] In this pivotal work, Braudel expresses his love for and joy in the bright light of the Mediterranean Sea and invites readers to bring their memories to add color to his book, immersing them in shared emotions.[11] While historians of the Mediterranean basin focus on domestic histories inspired by competing nationalist agendas, Braudel adopts a global research agenda. Getting off the beaten track and away from a purely historicist vision, Braudel combines economic, social, historical, legal, and political approaches[12]: For him, only by implementing a whole range of social sciences can we understand the depths of the Mediterranean Sea.

Braudel uses the sea as the ideal metaphor for history, representing many temporalities. In fact, he conceives of history as a sea with three layers.[13] The first layer, known as *geographical history*, is almost immovable and timeless, and it focuses on the interaction between humankind and the environment.[14] It is comparable to the deep seabed. All change in this layer of history is continuous, gradual, and irresistible.[15] The second lawyer, *social history*, focuses on social groups and civilizations.[16] This layer resembles the marine currents that travel across time and space beneath the surface of the sea.[17] The history of civilizations

10. FERNAND BRAUDEL, LA MÉDITERRANÉE ET LE MONDE MÉDITERRANÉEN À L'ÉPOQUE DE PHILIPPE II 20 (1949).

11. Lucette Valensi, *The Problem of Unbelief in Braudel's Mediterranean in* BRAUDEL REVISITED: THE MEDITERRANEAN WORLD 1600-1800 (Gabriel Piterberg, Teofilo F. Ruiz, Geoffrey Symcox eds., 2010) 17-34.

12. Sevret Pamuk, *Braudel's Eastern Mediterranean Revisited* in BRAUDEL REVISITED: THE MEDITERRANEAN WORLD 1600-1800 99, 99 (Piterberg, Ruiz, and Symcox eds., 2010).

13. Braudel, *supra* note 10, at 21 (discussing the tripartite framework of history).

14. *Id.* at 21. See also Melvin M. Knight, *The Geohistory of Fernand Braudel*, J. OF ECON. HIST. 10 212, 212 (1950) (noting that Braudel defined the "geographical time" as "human geography in historical order").

15. *Id.*

16. *Id.* at 21. See also JO GULDI AND DAVID ARMITAGE, THE HISTORY MANIFESTO (2014) 16 (explaining that social history refers to "the story of states, societies and civilizations.").

17. *Id.*

creates a singular tapestry by weaving together the threads of social groups' vicissitudes, empires' rise and fall, and civilizations' development. Such history is characterized by subtle yet detectable rhythms. Finally, the third layer, *individual history* or history of events (*histoire événementielle*) focuses on people, military skirmishes, and political events.[18] Such time is comparable to the sea's surface and the waves' constant, relentless motion. This layer is characterized by "brief, rapid, nervous fluctuations."[19] In Braudel's view, individuals are only "frail cockleshells" cast on moving waters, minute threads in the 'immense pattern' of unfolding history.[20] He felt the fleeting nature of everything and realized how short human beings' time in the realm of things is.

Therefore, in order to understand an epoch or a civilization, in Braudel's opinion, historians should constantly move from the surface of the sea to the deep seabed and then from the ocean floor to the water's surface.[21] Accordingly, they should contextualize the turbulent political and military events that occur on the surface of history against the backdrop of deep currents of economic, social, and even geographical structures. He thus emphasizes the value of looking over long stretches of time, prioritizing long-term history over short- and medium-term historical research.[22] At the same time, he acknowledges the importance of "tak[ing] several time-frames into consideration" and "playing on several chronological depths," thus combining the long view with medium and short views.[23] Therefore, Braudel's *longue durée* perspective is "part of an experimental approach, weaving together different temporalities and scales of analysis."[24] It never excludes the validity of other approaches; rather, it acknowledges that "the long term is only one possible avenue for research."[25]

18. *Id.* at 21. See also Christopher Rundle, *Temporality*. In A HISTORY OF MODERN TRANSLATION KNOWLEDGE: SOURCES, CONCEPTS, 235, 235 (Lieven d'Hulst and Yves Gambier eds. 2018) (noting that Braudel argued that "historians should move away from *histoire événementielle*, the history of discrete events traced in a linear sequence of cause and effect.").

19. *Id.* See also Lucian Staiano Daniels, *That Sea is History: Water Metaphors in Modern European Historiography*, J. OF THE HIST. OF IDEAS BLOG, 6 October 2021.

20. *Id.*

21. *Id.*

22. Fernand Braudel, *History and the Social Sciences: The Longue Durée* 32 REV. 171-203, 195-196 (2009).

23. Christian Lamouroux, *Chronological Depths and the Long Durée* 70 ANNALES 285, 290-291 (2015).

24. *Editorial* 70 ANNALES 215, 216 (2015).

25. Claudia Moatti, *E-story, or the New Hollywood Myth* 70 ANNALES 255, 258 (2015).

Braudel's reflections on the *longue durée* stem from his depressing experience as a prisoner of war in Germany from 1940 to 1945. They are an attempt, in part, to escape the rhythms of camp life and bring hope by adopting a broader view.[26] His insights deeply transformed historiographical landscape. The *longue durée* approach initially characterized the work of the *Annales* School in France, a group of historians focused on long-term social history and named after its scholarly journal *Annales d'histoire économique et sociale*.[27] It soon spread widely, "flourished, and then withered away before returning with fresh purpose."[28]

What is the current relevance of the long-term approach after almost seventy years since the publication of Braudel's masterpiece? The *longue durée* history helps "explain and understand the genesis of contemporary global discontents."[29] Long-term histories can contribute to public debate and analysis of current concepts and institutions by providing the grounds for "reject[ing] anachronisms founded on deference to longevity alone."[30] The *longue durée* remains relevant today, for it calls for experimenting approaches, adopting interdisciplinarity, stepping outside the confines of national history, and decentering points of view.[31] While long-term perspectives may seem daunting, they have become easier to investigate due to the "unprecedented availability of materials, along with the tools to make sense of them."[32] In fact, the development of new technologies, large scale digitization, and databases enhances access to and help analyze information on a large scale. These digital corpora encourage researchers to test historical theories over the course of several centuries.[33]

After briefly illustrating the main features of Braudel's long-term perspective, the next Part addresses the question of whether it may be possible to transplant such ideas from the historical field to international legal history.

26. *See* ARMITAGE &GULDI, *supra* note 7, at 223.
27. *Id.* at 221.
28. *Id.*
29. *Id.* at 222.
30. *Id.* at 247.
31. *Editorial*,70 ANNALES 215, 216 (2015).
32. Armitage & Guldi, *supra* note 7, at 221.
33. *Id.* at 241.

III. INTERNATIONAL LEGAL HISTORY AND THE LONG-TERM PERSPECTIVE

International lawyers and legal historians have started a promising dialogue to investigate international legal history.[34] Most studies examine field developments in a piecemeal, short-term, and narrow manner. This perspective is typically limited to decade-long timeframes with only a few exceptions that cover a century. Most analyses focus on short-term patterns and outcomes. Narrow perspectives are becoming more common due to the growing fragmentation of international law; the proliferation of international instruments, courts, and tribunals; and the (over)specialization of experts. International legal historians have mined minor episodes while seeking insights into grand themes of international legal history.[35] They have investigated individual cases;[36] material objects;[37] the lives and works of individuals;[38] institutional developments;[39] and military history events.[40] Scholars have also focused on the history of dispute settlement mechanisms or specific trials.[41] Such

34. *See* ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, 1 (2021); *See* IGNATIO DE LA RASILLA, INTERNATIONAL LAW AND HISTORY—MODERN INTERFACES (2021); Valentina Vadi, *International Law and its Histories: Methodological Risks and Opportunities* 58 HARV. INT'L L.J. 311, 311-352 (2017).

35. JAN PAULSSONDENIAL OF JUSTICE IN INTERNATIONAL LAW 171(2005).

36. GIORGIO FABIO COLOMBO, JUSTICE AND INTERNATIONAL LAW IN MEIJI JAPAN—THE MARIA LUZ INCIDENT AND THE DAWN OF MODERNITY 2 (2023); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 149 (2012); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law,* 117 YALE L.J. 550 (2008).

37. Jessie Hohmann, *Material Pasts and Futures: International Law's Objects*, 7 LONDON REV. INT'L L. 283, 286 (2019); INTERNATIONAL LAW'S OBJECTS 2 (Jessie Hohmann and Daniel Joyce eds., 2018); Valentina Vadi, *The Power of Scale: International Law and Microhistories*, 46 DENVER J. INT'L L. &POL'Y 315, 328 (2018); Valentina Vadi, *Grotius' Book Chest, International Law and Material Culture*, 68 N. IR. LEGAL Q.317, 317-328 (2017).

38. TIRZA MEYER, ELISABETH MANN BORGESE AND THE LAW OF THE SEA 254 (2022); VALENTINA VADI, WAR AND PEACE—ALBERICO GENTILI AND THE EARLY MODERN LAW OF NATIONS 1-5 (2020); IGNATIO DE LA RASILLA, IN THE SHADOW OF VITORIA—A HISTORY OF INTERNATIONAL LAW IN SPAIN (1770-1953) (2017); James T. Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 LEIDEN J. INT'L L. 317, 317-349 (2008); MARTINE VAN ITTERSUM, PROFIT AND PRINCIPLE—HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE ROSE OF DUTCH POWER IN THE EAST INDIES 1595-1615 (2006);A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS (Onuma Yasuaki ed., 1993).

39. ANTONIO PARRA, THE HISTORY OF ICSID (2017).

40. Eyal Benvenisti and Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856-1874* 31 EUR. J. INT'L L. 128, 129 (2020).

41. THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 15 (Chichiro Hosoya, Nisuki Ando, Yasuaki Onuma, Richard H. Minear eds., 1986).

perspectives reflect the perennial focus on specific crises, incidents, and events in international law.

Nonetheless, international legal historians have started to adopt a long-term perspective to the history of international law.[42] While some scholars have focused on the geological, geographical, and agricultural features of international law,[43] others have adopted an extended lens to examine the historical evolution of specific international legal concepts.[44] In parallel, while some eminent contemporary historians advocate a return to the *long durée* in historiography,[45] historians have tended to cover long swathes of time in their recent works.[46]

Given that existing scholarship has not yet examined the promises and pitfalls of long-term approaches to the history of international law, it seems appropriate to consider whether such an approach could benefit the field of international legal history and theory[47] and whether international law is a fertile field for the transplantation of historiographical theories in general and the long-term perspectives in particular.

This Part thus investigates whether adopting a long-term perspective can benefit the history of international law. By observing long-term trends, detecting hidden connections, and mapping the slow evolution of

42. Martti Koskenniemi, *What Should International Legal History Become?*, in SYSTEM, ORDER, AND INTERNATIONAL LAW: THE EARLY HISTORY OF INTERNATIONAL LEGAL THOUGHT FROM MACHIAVELLI TO HEGEL (Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit eds., 2017) (arguing that "the scope of history of international law ought to be expanded beyond its received sense"); MARTTIKOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300-1870 1 (2021); DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY 1-6 (2009).

43. Joseph H.H. Weiler, *The Geology of International Law - Governance, Democracy, and Legitimacy* 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 547, 549 (2004); Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT'L L.525, 529 (2007); Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 EUR. J. INT'L L. 10, 10-24 (2014); Nikolas Rajkovic, *The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis*, 31 LEIDEN J. INT'L L.267, 269 (2018); Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945-2017* in NEW VOICES AND NEW PERSPECTIVES IN INTERNATIONAL ECONOMIC LAW 66 (J. D. Haskell and A. Rasulov eds., 2020).

44. *See*, *e.g.*, DAVID ARMITAGE, CIVIL WARS: A HISTORY IN IDEAS (2017); Jörn Leonhard, *The Long Durée of Empire: Comparative Semantics of a Key Concept in Modern European History*, 8 CONTRIBUTIONS TO THE HISTORY OF CONCEPTS 1, 6 (2013); BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR 10 (2007).

45. GULDI & ARMITAGE, *supra* note 7; David Armitage, *What's the Big Idea? Intellectual History and the Longue Durée,* 38 HIST. EUR. IDEAS 493, 493-507 (2012).

46. Francesca Trivellato, *A New Battle for History in the Twenty-First Century?* 70 ANNALES 261, 266 (2015).

47. GULDI & ARMITAGE, *supra* note 7, at 222.

international law, international legal historians can identify and explain long-term patterns and trends. Not only can they glimpse the deep-rooted history of their field, but they can also understand the present and map the future. As the past shapes ongoing dilemmas, seemingly intractable issues may be productively solved by adopting an expansive lens. Accordingly, a long-term perspective considers looking backward as a necessary condition for looking forward and opening debates about alternatives to the current global order. History is not a science of the past, but rather a link between the past and the present.[48]

By adopting this broad lens, time becomes both a marker and a maker of law. On the one hand, international law has a historical dimension: "international law has a history and can be examined from an historical perspective."[49] On the other hand, time and history shape international law: "To make an argument about the history of international law is to make an international legal argument."[50] In other words, "international law is suffused with history."[51] The long-term perspective reveals the longevity and timelessness of certain international law concepts and processes. It also goes beyond this descriptive level. In fact, it can shed light on international law's mode of development, and, as a result, how time shapes international law. Adopting a long-term perspective is crucial in mapping the emergence of legal norms and their future trajectories. It illuminates the discussions that occurred before the formation of given legal norms, the alternatives that they displaced, and even the attempts to resist their inception. Time enables the coalescence of customary law and general principles of international law. By contrast, prescription (or limitations) enables the extinction of stale claims after the passage of time.[52] History illuminates the slow but vital and resilient heartbeat of international legal dynamics. The slow evolution of international law is due to the multilayered diversity of the international community. Given the social, cultural, and economic differences among states, reaching consensus on issues can take time.

History reveals epochal shifts, determining the adoption of important international legal instruments or landmark decisions. Breathless claims of historical moments, epochal changes, and new eras

48. Le Goff, *supra* note 5, at X.

49. Henry Jones & Aoife O'Donoghue, *History and Self-Reflection in the Teaching of International Law*, 10 LONDON REV. INT'L L. 71, 77 (2022).

50. *Id.*

51. *Id.* at 94.

52. Yehuda Z. Blum, *Prescription in International Law* in HISTORIC TITLES IN INTERNATIONAL LAW 6 (1965).

occur all the time. Scholars question whether international lawyers should respond during in times of change, and if so, then how—should they lead or should they follow?[53] Does international law respond only when confronting crisis and devastating events?[54] Or, should it "provide a compass for the tempestuous waters that lay ahead?"[55] Scholars have differing opinions about and chart international change.

Finding a precise starting point for the history of international law is controversial. Choosing a specific point of departure can be unrealistic, overly simplistic, and politically charged because it risks favoring one worldview over another.[56] Most histories of international law start in the XIX century or the colonial period, assuming that the history of international economic law overlaps with the development of capitalism.[57] For instance, Third World Approaches to International Law (TWAIL) put the colonial encounter at the center of (the history of) international law.[58] While TWAIL does not merely focus on the history of international law, its historical reading of the colonial encounter influences its approaches to a range of international law issues.[59] TWAIL scholars suggest "continuing complicity between international law and violence"[60] and "seek to transform international law from being a language of oppression to a language of emancipation."[61] In other words, they explore the colonial legacies of international law and engage in decolonizing efforts. TWAIL scholars have authored several works on international legal history.[62]

53. Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?* 26 AM. U. INT'L L. REV.1315, 1316 (2011).

54. *Id.* at 1317.

55. *Id.* at 1318 (quoting Weeramantry).

56. Onuma Yasuaki, *When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perpective* 2 J. HIST. INT'L L.1, 63 (2000).

57. KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW—EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL 346(2013); CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 5 (1985).

58. Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 2 CHINESE J. INT'L L. 77, 77-79, 84 (2003).

59. *Id.* at 84.

60. *Id.* at 102.

61. *Id.* at 79.

62. See, e.g., NTINA TZOUZALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 8 (2020); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 318 (2004) (arguing that colonialism was central to the constitution of international law); MICHAEL FAKHRI, SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW 8 (2014).

Long-term perspectives certainly include TWAIL approaches. However, they also necessarily embrace a broader temporal span. They rely on the assumption that international, cultural, and economic exchanges are intrinsic to human nature. Therefore, it is not only possible, but also necessary to investigate older interactions among different civilizations and the contributions that various African, American, Asian, European, and Oceanian civilizations have made to the development of international law.[63] International law has a longer history than is commonly assumed, and this history is fundamental to understanding its development. As Bederman points out, "As a legal system, international law has been present, in some form, at all times in which an authentic system of self-aware polities has existed in human history."[64] Such a broad perspective on history highlights various civilizations' histories, which date back hundreds if not thousands of years before the colonial encounter. It endorses hybrid histories that pluralize the origins of international law.[65] As Becker Lorca points out, histories that focus on the fundamentally imperialist character of international law perpetuate the Eurocentric distortion by downplaying the agency and influence of civilizations outside the West.[66] For thousands of years prior to colonial times, various civilizations have interacted and variously governed their interactions. Ancient laws and customs governed international relations.[67] Ancient rock art, engravings, inscriptions, artifacts, and the like reveal deep time histories.[68]

The adoption of long-term perspectives makes it possible to dispel notions of linearity, progress, and predictability in the evolution of international law.[69] In fact, such perspective reveals that the development

63. BEDERMAN, *supra* note 42.

64. DAVID BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 1 (2002).

65. Ntina Tzouvala, *The Specter of Eurocentrism in International Legal History*, 31 YALE J.L. & HUMAN. 413, 420 (2021).

66. Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1035, 1035-46, 1054 (Bardo Fassbender and Anne Peters eds., 2012).

67. IRENE WATSON, ABORIGINAL PEOPLES, COLONIALISM, AND INTERNATIONAL LAW—RAW LAW 12 (2016).

68. Ann McGrath, *All Things will Outlast Us*, THE CONVERSATION, 18 August 2020, https://theconversation.com/all-things-will-outlast-us-how-the-indigenous-concept-of-deep-time-helps-us-understand-environmental-destruction-132201(last visited 26/01/2024).

69. McNeilly, *supra* note 9, at 818 (calling for "abandoning commitment to linearity, progression and predictability in understanding international human rights law and its development and viewing such as based on a conception of the future that is unknown and uncontrollable, that does not progressively follow from the present, and that is open to embrace of the new.").

of international law is not always simple or predictable. Rather, international legal history simultaneously endorses multiple temporalities, namely short, medium, and long-term perspectives. It can endorse cyclical, linear, or even contingent concepts of time. Adopting a long-term historical perspective "attempts to understand the perspective of others;" it enables "the possibility for change, [by] reanimating the potential for the world to be a different way."[70] By illuminating this broader perspective, international law can more effectively recognize and even redress historical injustices and respond to contemporary challenges with hope, compassion, and justice.

Finally, a long-term perspective can foster the decolonization of international law by "disordering" it and endorsing multiple histories and perspectives.[71] How can colonialism be undone? At the end of WWII, nearly a third of the world's population, or 750 million people, resided in colonies.[72] Eighty former colonies have achieved independence since then.[73] Less than two million people now reside in the seventeen remaining non-self-governing territories.[74] Under Chapter XI of the Charter of the United Nations, the Non-Self-Governing Territories are defined as "territories whose people have not yet attained a full measure of self-government."[75] While former colonies have gradually achieved their political independence and severed the political chains that subjugated them,[76] economic, social, and cultural decolonization remains a work in progress.[77] Decolonization is more than political emancipation. Among the de-colonial strategies, the de-colonization of knowledge is an epistemological approach that aims to overcome the monopolization of knowledge production by colonial powers. The decolonization of knowledge entails diversifying its production by putting into conversation

70. Jones and O'Donoghue, *supra* note 49, at 81.

71. Michelle Staggs Kelsall, *Disordering International Law*, 33 EUR. J. INT'L L. 729 (2022).

72. GLOBAL ISSUES: DECOLONIZATION, https://www.un.org/en/global-issues/decolonization (last visited Jan. 26, 2024).

73. *Id.*

74. *Id.*

75. Non Self-Governing Territories include Western Sahara, Anguilla, Bermuda, British Virgin islands, Cayman Islands, Falkland Island (Malvinas), Montserrat, Saint Helena, Turks and Caicos Islands, United States Virgin Islands, Gibraltar, American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn. NON SELF-GOVERNING TERRITORIES, https://www.un.org/dppa/decolonization/en/nsgt (last visited Jan. 26, 2024).

76. CYRIL LIONEL ROBERT, THE BLACK JACOBINS 366 (2d ed. 1963).

77. SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 12 (2011).

differing cultural systems.[78] It aims at recognizing the different ways of knowing by which peoples across the globe run their lives and provide meaning to their existence. Not only does a long-term perspective to international legal history enable international lawyers to develop tools to right historical wrongs, but it also acknowledges the rich cultural and epistemological diversity of the world. Thus, it can nurture the emancipatory potentials of international law. Such a broad perspective on history is inclusive and global as it encompasses different worldviews and conceptualizations of time and history.

IV. THE EVOLUTION OF INTERNATIONAL LAW NORMS: JETTISONING *TERRA NULLIUS*

This Part investigates whether or not a long-term perspective could help illuminate the origins and evolution of legal norms. The development of several legal concepts could benefit from the adoption of a long-term perspective. This Part briefly explores the potential of applying such a perspective to concepts such as *terra nullius*.[79]

The concept of *terra nullius*, which means land without an owner, refers to a space that is unclaimed by anyone. The phrase first appeared throughout historical colonialism, became ingrained in domestic law, and eventually made its way into international law to justify state occupation, colonization, and sovereignty acquisition under the doctrine of discovery.[80] According to this theory, territories could be occupied if they did not already belong to another state, whether they were uninhabited or inhabited by persons whose community was not regarded as a state.[81] *Terra nullius* was a legal fiction, a legal weapon, a principle of violence.

In Roman law, the term *res nullius* denoted movable property without an owner. Under Roman law, wild animals (*ferae naturae*) and objects left abandoned (*res derelictae*) were both *res nullius*, open to anyone's seizure and claim. However, under Roman law, the concept of *res nullius* did not justify the acquisition of land or sovereignty. In fact,

78. *See generally* BOAVENTURA DE SOUSA SANTOS, THE END OF THE COGNITIVE EMPIRE: THE COMING OF AGE OF EPISTEMOLOGIES OF THE SOUTH 8 (2018).

79. Shane Chalmers, *Terra Nullius? Temporal Legal Pluralism in an Australian Colony*, 29 SOC. & LEGAL STUD. 463, 466 (2019).

80. See generally Petra Gümplová, *Rights of Conquest, Discovery and Occupation, and the Freedom of the Seas: A Genealogy of Natural Resource Injustice*. 54 ISONOMIA. REVISTA DE TEORÍA Y FILOSOFÍA DEL DERECHO 1-36, 1 (2021) (analyzing the colonial origins of the right of discovery and occupation and exposing their "morally arbitrary origins.").

81. OPPENHEIM'S INTERNATIONAL LAW 264 (Sir Robert Jennings & Sir Arthur Watts eds., 1982) 687.

only movable objects (*mobiles res*), as opposed to immovable objects like lands and buildings, could be lawfully appropriated under Roman law. As Benton and Strauman highlight, *terra nullius* only derived from *res nullius* through analogy.[82]

However, by the early modern period, several scholars had already examined the *terra nullius* argument and judged it to have questionable validity and applicability. As a result, they opposed the use of *terra nullius* for justifying conquest. The philosopher and theologian Domingo de Soto (1494-1560), for example, contended that Spain had no claim to the Americas because the continent was not *res nullius* at the time of discovery.[83] The philosopher, theologian, and jurist Francisco de Vitoria (1483-1546) similarly contended that Indigenous peoples had private ownership and sovereign control over their territories and that the Spaniards had no legal right to acquire these lands through simple discovery.[84]

In his 1598 *De Jure Belli Libri Tres*, Alberico Gentili (1552-1608), a religious refugee and Regius Professor at the University of Oxford, rejected the argument of *terra nullius*.[85] He recognized that "we are by nature all akin" and acknowledged the sovereignty and property rights of Indigenous peoples.[86] He saw the occupation of vacant lands as a tool to gain property rather than sovereignty.[87] Gentili asserted that other nations can "live in a manner different from that which we follow in our own state."[88] As such, no one should be offended by the fact that someone else follows a different religion or lives by different customs. Gentili backed the cause of refugees, asserting that those who have been driven from their own land should somehow find a safe place somewhere.[89] However, Gentili supplemented the hospitality idea with both subjective and objective requirements. First, the migrants should have been compelled to flee their country through some emergency.[90] Therefore, in the Gentilian scheme, economic migrants did not have the right of

82. Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 L. AND HIST. REV.1, 2 (2010).

83. *Id.* at 23-25.

84. Francesco de Vitoria, *On the American Indians*, *in* POLITICAL WRITINGS 264 (Anthony Pagden & Jeremy Lawrance eds., 1991).

85. ALBERICO GENTILI, DE JURE BELLI LIBRI TRES bk. I, at 54 (J. C. Rolfe trans., Clarendon Press 1933) (1612).

86. *Id.*

87. VADI, *supra* note 38, at 301.

88. GENTILI, *supra* note 85, at 41.

89. *Id.* at 80.

90. *Id.* at 79.

hospitality.[91] Second, a safe space should be provided "if it [could] be given without too much inconvenience."[92] In fact, full sovereignty over these lands remained with the host country. In other words, the immigrants would become subjects of the host governments while the host states would retain control over them and could restrict access to their territories for legitimate reasons.[93] Nonetheless, Gentili's writings did not have much influence at the time because they were out of sync with contemporary expansionism.

Powerful states articulated arguments of discovery and *terra nullius* despite fierce Indigenous opposition and territorial concessions granted over land they did not own. Colonial rule disregarded Indigenous sovereignty, conflating private occupation of territories with public acquisition of sovereignty, something that the legal discourse had "kept separate since Alberico Gentili."[94]In this way, colonists became proprietors of given land while remaining subjects of their homeland.[95] While "the various European powers made different claims as to the basis of the acquisition of the territory . . . 'there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions.'"[96] In fact, the concept of *terra nullius* "not only disregard[ed] the will of the conquered original inhabitants of the land, but treat[ed] them, in essence, as legally irrelevant."[97] Colonial powers viewed Ireland, the Americas, and most of the African and Australasian territories as ownerless lands because they counted the native inhabitants as nothing.[98] By depicting local people as "barbarous," domestic charters handed foreign land to the colonists.[99] The absence of agriculture was factored in the *terra nullius* argument.[100] In fact, colonists did not recognize and respect Indigenous lifestyles, farming, and

91. *Id.* at 80.

92. *Id.*

93. VADI, *supra* note 38, at 224.

94. Anthony Pagden, *Empire and Its Anxieties* 117 AM. HIST. REV. 141, 146 (2012).

95. VADI, *supra* note 38, at 361.

96. Steven Wheatley, *Conceptualizing the Authority of the Sovereign State over Indigenous Peoples*, 27 LEIDEN J. OF INT'L L. 371, 381 n. 60 (2014).

97. Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. OF TRANSNAT'L L.1141, 1153 (2008).

98. Gümplova, *supra* note 80, at 7-8 (noting that the doctrine of discovery and occupation became expansion tools by enclosing "land that seemed to belong to nobody or was used ineffectively.").

99. VADI, *supra* note 38, at 337.

100. Koskenniemi, *supra* note 42, at 256-257 (referring to Irish colonization).

pastoralist methods.[101] This instrumental view of the environment remains embedded in international law concepts such as territorial jurisdiction and *ius standi*, which still prevent thinking about indigenous-inherent rights and the environment in more creative and sustainable ways.[102]

For example, in the famous *Mabo v. Queensland* case, the High Court of Australia determined that the continent was not *terra nullius* at the time of its settlement.[103] In this case, the indigenous plaintiffs, who inhabited the Mer Islands situated in the Torres Strait between Australia and Papua New Guinea, sought declarations that the Meriam people were entitled to such islands "as owners; as possessors; as occupiers; or as persons entitled to use and enjoy the said islands."[104] The High Court rejected the argument of *terra nullius* advanced by the defendant and recognized that the Mer Islanders had a pre-existing legal system, which remained in force under the new sovereign except where specifically modified or extinguished by legislative or executive action.[105] Accordingly, the Murray islands' natives were entitled to possess, use, and enjoy their islands.[106] The court famously held that "[w]hatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, [the] unjust and discriminatory doctrine of [*terra nullius*] can no longer be accepted."[107] The court added that,

> [t]he expectations of the international community accord in this respect with the contemporary values of the Australian people. International law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.[108]

101. Gümplova, *supra* note 80, 8-9 (arguing that Europeans conceptualized agriculture as the best interplay between man and nature and a legitimate tool to appropriate natural resources and acquire land.).

102. Karin Mickelson, *The Maps of International Law: Perceptions of Nature in the Classification of Territory*, 27 LEIDEN J. OF INT'L L. 621, 626 (2014).

103. *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1, 147 (Austl.).

104. Valentina Vadi, *Spatio-temporal Dimensions of Indigenous Sovereignty in International Law* in THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW (Antonietta Di Blase and Valentina Vadi eds, 2020) 104.

105. *Id.* 104.

106. *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 217, also 76 (Brennan J).

107. *Id.* at 35, ¶ 42.

108. *Id.*

In conclusion, "political imperatives [forced] the legal system to jettison . . . the . . . doctrines which [had] enabled it to ignore accepted history in [other cases]."[109]

On the international level, the International Court of Justice held that an 1884 treaty concluded between the Kings and Chiefs of Old Calabar on the one hand and Great Britain on the other was not "governed by international law" because it was not a treaty between states.[110] It thus rejected the argument advanced by Nigeria that "in the pre-colonial era the City States of the Calabar region constituted "independent entities with international legal personality."[111] Quoting Huber's Award in the Island of Palmas case, the Court considered the treaty "not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy of the natives . . . And thus suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations."[112]

International law has discarded the concept of *terra nullius* since the 1975 Western Sahara Opinion of the ICJ.[113] In this case, the court did not recognize original title obtained by occupation of *terra nullius*.[114] Instead, it held that agreements between indigenous peoples and states were "derivative roots of title."[115]As the inhabitants of Western Sahara were nomadic but politically organized at the time of Spanish colonization in 1884, the land was not *terra nullius*.[116]

What does this long view on the *terra nullius* concept entail for international lawyers? First, this short examination demonstrates that already in the early modern period, a few Western scholars rejected the epistemological fallacy and injustice of *terra nullius*. Adopting a long-term historical perspective can help dismantling the remains of colonial injustice by enabling international lawyers to expose the shaky foundations of specific legal rules, expose their injustice, and develop

109. Gerry Simpson, *Mabo, International Law, Terra Nullius, and the Stories of Settlement: An Unresolved Jurisprudence*, 19 MELB. UNIV. L. REV. 195, 210 (1993).

110. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgement, 2002 I.C.J. 303, ¶ 205 (Oct. 10).

111. *Id.* at ¶ 201.

112. *Id.* at 205 (quoting Max Huber, Island of Palmas case, *United States v Netherlands*, Permanent Court of Arbitration Award, II Review of International Arbitral Awards 829, 858-859 (April 4, 1928)).

113. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

114. *Id.* at 39, 80.

115. *Id.*

116. *Id.* at 39, ¶ 81.

tools to right historical wrongs. Thus, it can nurture the emancipatory potentials of international law.

Second, by adopting a long-term and intercultural lens, it is possible to draw on concepts used by other civilizations. Indigenous peoples, for example, demand that their laws, philosophy, and knowledge be given a more prominent place in the history and theory of international law.[117] They call for filling the empty space of *terra nullius* with Indigenous law, history, and theory as well as adopting de-colonial strategies to foster true equality and reconciliation.[118] Adopting a long-term historical perspective enables international legal historians to reveal long neglected legal histories. Indigenous peoples' histories and legal systems date back hundreds if not thousands of years before the colonial encounter.[119]For thousands of years prior to colonial times, First Peoples governed their territories in sustainable manners.[120] Their laws dictated how land should be treated.[121] The land itself contains evidence of Indigenous histories. Ancient rock art, engravings, inscriptions, and the like reveal deep time histories.[122]

Moreover, extensive maritime exchanges occurred between Oceanic civilizations in the Pacific.[123] As the Pacific Ocean covers one-third of the Earth's surface and the Pacific islands host almost one-third of the world's language and cultures, it seems appropriate to investigate how these cultures governed international exchanges.[124] The Pacific Ocean has separated as much as it has bound the people of this region. For over three-thousand years, seafarers have navigated the Pacific Ocean for discovery, trade, and cultural exchange.[125] These geographical, cultural, and historical conditions have resulted in particular legal frameworks that are worthy of investigation. Hearing past and present Aboriginal voices

117. Irene Watson, *Re-centering First Nations Knowledge and Places in a Terra Nullius Space* 10 ALTERNATIVE: AN INTERNATIONAL JOURNAL OF INDIGENOUS SCHOLARSHIP 508, 514 (2014).

118. *Id.* at 518.

119. *Id.* at 509.

120. *Id.* at 509.

121. WATSON, *supra* note 67, at 14.

122. McGrath, *supra* note 68.

123. ALASTAIR COUPER, SAILORS AND TRADERS: A MARITIME HISTORY OF THE PACIFIC PEOPLES 8 (2009).

124. See generally CULTURE AND HISTORY IN THE PACIFIC (Jukka Siikala ed., 2021).

125. COUPER, *supra* note 123, 1 (discussing how "centuries before the Pacific was revealed to Europeans" indigenous seafarers and traders navigated the Pacific Ocean: "their oral traditions in stories, songs and creation myths told of great voyages.").

enables international legal historians to envision a more sustainable future based on mutual respect.

In parallel, pre-colonial African civilizations had their own historical international dynamics, and thus the emergence of African postcolonial states cannot be understood from the sole point of view of their relations with the West.[126] Key African kingdoms nurtured international relations since antiquity. African civilizations "forged alliances, declared wars, negotiated cease-fires, made peace treaties, sent emissaries, [and] received diplomats."[127] They had rules governing international trade.[128] Trading posts like Alexandria (Egypt) and Timbuktu (Mali) facilitated connections between Northern African and the Mediterranean peoples and between the Arab-Islamic and West African peoples respectively.[129] They were world centers of intellectual pursuit and knowledge production.[130] African societies developed parameters of the conduct of conflict. For instance, the Numidian (Algeria/Tunisian) Bishop (or Saint) Augustine of Hippo (354-430) elaborated some early tenets of the just war, as they were used in many African countries.[131] Adopting a long-term historical perspective reveals Africa's contribution to the making of international law. It can also help examine the root causes of Africa's current poverty while also imagining new possibilities.[132]

Third, the long-term perspective on the history of international law is inclusive because it acknowledges different conceptualizations of time and history. Braudel conceptualizes the *longue durée* "in symbiosis with other conceptions of time."[133] Such long-term perspective is thus

126. Jean-François Bayart, Béatrice Hibou, and Boris Samuel, *L'Afrique Cent ans Après les Indépendances: Vers quel Gouvernement Politique?* 119 POLITIQUE AFRICAINE 129, 150 (2010) (noting the long-term history of African societies).

127. STEPHEN M. MAGU, EXPLAINING FOREIGN POLICY IN POST-COLONIAL AFRICA vii (2021).

128. Jeremy Levitt, *African Origins of International Law: Myth or Reality?* 19 UCLA J. OF INT'L L. & FOREIGN AFF. 113, 139 (2015).

129. Sara M. Guérin, *Exchange of Sacrifices: West Africa in the Medieval World of Goods*. 3 THE MEDIEVAL GLOBE 97-123, 97 (2017) (highlighting that "West Africa . . . played a central role in this economic network via the trans-Saharan routes linking the Mediterranean with Africa south of the Sahara.").

130. Mukhtar Bin Yahya Al-wangari, *Shaykh Baghayogho al-Wangari and the Wangari Library in Timbuktu*, *in* THE MEANINGS OF TIMBUKTU 278 (Shamil Jeppie & Souleymane Bachir Diagne eds., Nurghan Singh & Mohamed Shaid Mathee trans., 2008).

131. *See generally* John Langan, *The Elements of St. Augustine's Just War Theory*, 12 JOURNAL OF RELIGIOUS ETHICS (1984) 19-38.

132. AFRICA'S DEVELOPMENT IN HISTORICAL PERSPECTIVE 5 (Emmanuel Akyeampong et al. eds., 2014); Patrick Manning, *African and World Historiography* 54 J. OF AFR. HIST. 319, 330 (2013).

133. Trivellato, *supra* note 46, at 266.

compatible with and complementary of other civilizations' conceptions of time. For example, Aboriginals do not view history in a linear way, that is, past-present-future; rather, they place events in a cyclical pattern, a temporal continuum from past to future.[134] Accordingly, they see the past in the present and the present in the past.[135] They also do not see time as a "linear" category, rather they place events in a cyclical pattern according to their subjective importance. The more important events are perceived as being "closer in time."[136] Therefore, their conception of time is close to, albeit it does not necessarily overlap with Braudel's concept of time. In fact, for Braudel, "the *longue durée* not only denotes slow processes of change . . . but is also a cyclical time . . . cyclicality is a central . . . feature of the *longue durée*" because Braudel's fundamental concern was the interaction between humans, technology, and the environment in the preindustrial period."[137] In sum, Braudel was fascinated by the combination of multiple temporalities and different analytical perspectives. It may be time to take up the unfulfilled promises and challenges of combining multiple temporalities and analytical perspectives into the history of international law.[138]

Finally, a long-term view of international legal history reveals that extractivism perpetuates the practice of *terra nullius* by "creat[ing] space for the tangible expansion of the [settlers'] world" while simultaneously erasing or minimizing the existence of other (Indigenous) worlds.[139] Extractivism indicates "socio-ecologically destructive processes" of natural resources exploitation.[140] It is diametrically opposed to the concept and practices of sustainability, stewardship, reciprocity, regeneration, conservation, and intergenerational equity that characterize Indigenous peoples' beliefs and legal systems. Most industrial development projects take place in Indigenous peoples' lands. Such developments are often incompatible with Indigenous cultures and worldviews. If the discussion

134. Howard Morphy, *Australian Aboriginal Concepts of Time*, in THE STORY OF TIME (Kristen Lippincott ed. 1999) 264-267.

135. TONY SWAIN, A PLACE FOR STRANGERS: TOWARDS A HISTORY OF AUSTRALIAN ABORIGINAL BEING 15(1993).

136. WATSON, *supra* note 67, at 16.

137. Trivellato, *supra* note 46, at 266.

138. For a similar argument in the historiographical field, *see id.* at 268.

139. Mario Blaser & Marisol de la Cadena, *Introduction: Pluriverse—Proposals for a World of Many Worlds*, *in* A WORLD OF MANY WORLDS 3 (Marisol de la Cadena & Mario Blaser eds., 2018).

140. Christopher W. Chagnon et al., *From Extractivism to Global Extractivism: The Evolution of an Organizing Concept*, 49 J. OF PEASANT STUD. 760, 760 (2022).

centered on current human rights law, it would focus on the state duty to respect Indigenous peoples' free, prior, and informed consent in matters potentially affecting their interests. If the discussion centered on international investment law, it would examine how arbitral awards have addressed issues of expropriation; fair and equitable treatment; and full protection and security of foreign investments in areas traditionally inhabited by Indigenous tribes.[141] Instead, by adopting a long-term perspective to international legal history, it is possible to identify the double jeopardy which Indigenous peoples are enduring.[142]

Once sovereign nations capable of signing legally binding international treaties, Indigenous peoples have become "trapped peoples" within state borders.[143] While most Indigenous peoples are not interested in exercising forms of external self-determination (thus becoming new and independent states in international relations), they do reclaim self-determination within existing state boundaries.[144] The exercise of internal self-determination would include the power to say no to forms of development that are culturally, spiritually, and historically incompatible with their worldviews, ways of life, and laws. Indigenous legal systems that have existed for centuries if not millennia before the colonial encounter are not mere customs, stories, and songs. Such systems reflect Indigenous peoples' relationship to nature and their fundamental values and beliefs. Adopting an intercultural approach to international law requires considering these systems for the emergence of general principles of international law. By looking at the history of international law from a broader perspective, it is possible to see that Indigenous peoples are looking for something they have never lost. In fact, they are reclaiming what has always been theirs—Indigenous sovereignty, a sovereignty that parallels that of states but do not exclude the latter. In other words, Indigenous peoples reclaim the power to determine their own destiny.[145]

141. Valentina Vadi, *The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration*, *in* THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 209 (Antonietta Di Blase & Valentina Vadi eds., 2020).

142. Valentina Vadi, *Spatio-Temporal Dimensions of Indigenous Sovereignty in International Law*, in THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 87-114 (Antonietta Di Blase and Valentina Vadi eds., 2020).

143. Darryl Cronin, *Trapped by History: Democracy, Human Rights, and Justice for Indigenous People in Australia* 23 AUSTRALIAN J. OF HUM. RTS. 220, 220-41 (2017).

144. Antonietta Di Blase and Valentina Vadi, *Introducing the Inherent Rights of Indigenous Peoples*, in THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW (A. Di Blase & Valentina Vadi eds., 2020) 1, 30.

145. Vadi, *supra* note 141.

Such power risks being jeopardized again by an extractivism that is also seen as a form of neo-colonialism. "Neo-colonialism" refers to the situation in which foreign capital is used for the exploitation rather than for the development of the less developed parts of the world. Under neo-colonialism, foreign investment increases (rather than decreases) the gap between the rich and the poor countries.[146] This is not to say that foreign investments should not flow in developing countries; rather, they should be used in such a way as to benefit the host countries. Instead, extractive projects have taken place in Indigenous land without Indigenous peoples' free, prior, and informed consent.[147]

In conclusion, a long-term view of international legal history opens the doors to intercultural perspectives and "the possibility for transformational practices, policies, and designs."[148] It also reveals the importance of righting past wrongs to ensure peaceful and just contemporary societies.[149]

V. THE EMERGENCE OF INTERNATIONAL COURTS

The current network of international courts and tribunals is an important feature of the international community. By providing an alternative to war, they are necessary for the operation of a rules-based international order.[150] The adoption of a long-term perspective is particularly appropriate to the study of international courts and tribunals. Although some international dispute settlement mechanisms have emerged decades (if not centuries) after their initial proposal,[151] mechanisms for resolving international disputes have been a relatively constant feature of international legal history and "a persistent part of the

146. Philippe Ardant, *Le Néo-colonialisme: Thème, Mythe et Réalité* 15 REVUE FRANÇAISE DE SCIENCE POLITIQUE 837, 845 (Oct. 1965).

147. Eduardo Faleiro, *Colonialism, Neo-Colonialism, And Beyond* 16 WORLD AFFAIRS: THE JOURNAL OF INTERNATIONAL ISSUES12, 14 (2012).

148. Chagnon et al., *supra* note 140, at 762.

149. Michel Erpelding, *Vers de Réparations au Titre du Colonialisme?* 67 ANNUAIRE FRANÇAIS DE DROIT INT'L (2022); Francesco Francioni, *Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 36 (Federico Lenzerini ed., 2008).

150. *See generally* THE FUTURE OF INTERNATIONAL COURTS—REGIONAL, INSTITUTIONAL, AND PROCEDURAL CHALLENGES (Avidan Kent et al., eds., 2019).

151. For instance, *see* Suzanne Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 HARV. INT'L L.J. 151, 151 (2014).

theoretical debates about the nature of international law."[152] Yet, most of the literature has focused on "specific cases and procedural issues rather than . . . articulating an analytical framework for the study of the international judiciary."[153] Therefore, it would be worthwhile to investigate the permanent and contingent, consistent and irregular features of international dispute settlement mechanisms through millennia. Indeed, adopting a long-term perspective on their development is crucial for mapping their reason for being, trajectory, and even future direction.

The establishment of an international court is a difficult institutional decision that states confront: it typically "depends upon the contribution of a large number of states, both in funding the tribunal and in accepting the sovereignty costs involved, such as possibly being exposed to litigation if there is some degree of compulsory jurisdiction."[154] If we consider international adjudication as a continuum, we can identify different levels of juridification along the spectrum.

So far, efforts to establish a global human rights court have failed.[155] This is not to say that a rich body of jurisprudence is not developing in the field. On the contrary, several UN organs and regional human rights courts are helping to develop a robust body of jurisprudence in the field. Yet, states could not agree to limit their sovereignty to such an extent in a field that went directly to the heart of government, relating to the interplay between a state and its citizens.[156] Several fields of international law including international cultural heritage law and international environmental law have tended to use diplomatic rather than legally binding dispute resolution mechanisms because states were unwilling to accept intrusive scrutiny over their policies in these areas.[157]

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152. Mary Ellen O' Connell and Lenore Vanderzee, *The History of International Adjudication in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 40, 41 (Cesare Romano et al. eds., 2014).

153. Thomas Skouteris, *The Idea of Progress*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 939, 949 (Anne Orford & Florian Hoffmann eds., 2016).

154. Joshua Paine, *International Adjudication as a Global PublicGood?* 29 EUR. J. INT'L L. 1223, 1229 (2019).

155. *Compare* Ignacio de la Rasilla, *The World Court of Human Rights: Rise, Fall and Revival?* 19 HUM. RTS. L. REV. 585, 596 (2019) *with* Philip Alston, *Against a World Court for Human Rights* 28 ETHICS & INT'L AFFAIRS 197, 197-212 (2014).

156. On the interplay between human rights and state sovereignty *see generally* Hélène Ruiz Fabri, *Human Rights and State Sovereignty: Have the Boundaries been Significantly Redrawn?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (Philip Alston and Euan Macdonald eds, 2008) 33-86.

157. Valentina Vadi, Cultural Heritage in International Economic Law (2023) 55 (noting that "international cultural heritage law instruments generally have bland dispute settlement

At the other end of the spectrum, international economic law has been distinguished by highly effective dispute settlement mechanisms whose historical antecedents date back to antiquity. The nature of international economic exchanges necessitates the security and predictability that can only be provided by binding dispute settlement mechanisms.

While most studies to date have focused on current developments such as the potential creation of a world human rights court and a world investment court, as well as ways to counteract the (perhaps counterintuitive) demise of the WTO Appellate Body, very few scholars have investigated earlier dispute resolution mechanisms. Studies on contemporary dispute settlement mechanisms demonstrate how difficult it can be to reach agreement on the establishment of international courts and tribunals in various, albeit related, fields of international law.[158] They also show how international courts can be victims of their own success, with excessive juridification preventing adaptability, change, and their optimal functioning in the long run. What is lacking is a long-term, in-depth examination of the antecessors of today's international courts and tribunals.

For instance, only recently have international legal historians begun to investigate the issue of extraterritoriality in international trade and investment disputes.[159] When questioning the legitimacy of investor–state arbitration, seminal studies have demonstrated the profound impact that this dispute settlement mechanism can have on the host state's domestic policies.[160] These revealing studies sparked a large debate that has contributed to the evolution of the field. The next questions are: how can we reimagine the field?[161] Why is the field set up this way? What can we learn from history? Similarly, the debate over the origins of international human rights law has been divided into two camps: those who believe it

provisions mostly providing for diplomatic means of dispute settlement, such as negotiations in good faith, good offices, mediation, and conciliation. Some contemplate arbitration and, albeit more rarely, litigation before national and international courts.").

158. *See generally* Suzanne Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 HARV. INT'L L.J. 151, 151(2014)

159. MARIYA TAIT SLYS, EXPORTING LEGALITY—THE RISE AND FALL OF EXTRATERRITORIAL JURISDICTION IN THE OTTOMAN EMPIRE AND CHINA (2014); Matteo Miele, *English Common Law, Extraterritoriality, and Parsi Law: A Case in 1930s' China* 2 PRAGUE PAPERS ON THE HIST. OF INT'L RELATIONS 19, 29 (2019); THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS (Daniel S. Margolies, UmutÖzsu, Maïa Pal, NtinaTzouvala eds., 2019).

160. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 89 (2007).

161. NICOLÁS PERRONE, INVESTMENT TREATIES & THE LEGAL IMAGINATION 4 (2021).

is a relatively new field[162] and those who believe it has a longer history.[163] It would be interesting to broaden the scope of current studies to look into precursor cases and early dispute settlement mechanisms.[164]

VI. INTERNATIONAL LEGAL PROCESSES

Long-term perspectives can be used to examine international legal processes, that is, how international law functions in practice and changes over time. The term "international legal process" refers to how international law operates: it focuses not so much on the discussion of rules or international institutions as on the application of international legal rules in actual international relations.[165] Investigating the law in action entails discovering how international law affect people's lives in the real world. Adopting a long-term perspective on international legal processes can shed light on how international law operates in practice. Such a viewpoint reveals that international legal processes are not always smooth, linear, and progressive.

The long-term perspective could be applied to various issues, including the restitution of Nazi-appropriated art to its rightful owners,[166] the Caribbean campaign for reparations for slavery and the slave trade,[167] and the return of colonial artifacts from museums, art galleries, and universities to their respective countries of origin.[168] What, in general, do

162. Samuel Moyn, *The End of Human Rights History*233 PAST & PRESENT 307, 310 (2016); SAMUEL MOYN, THE LAST UTOPIA 5 (2010).

163. See THE ROUTLEDGE HISTORY OF HUMAN RIGHTS 5 (Jean Quataert and Lora Wildenthal eds., 2020); MARTINEZ, *supra* note 36, at 140; MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 4 (2d ed., University of California Press 2008); Lynn Hunt, *The Long and the Short of the History of Human Rights*, 233 PAST & PRESENT 323, 331 (2016); LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY 23 (W.W. Norton & Company 2008).

164. Frédéric Mégret, *Mixed Claim Commissions and the Once Centrality of the Protection of Aliens*, in EXPERIMENTS IN INTERNATIONAL ADJUDICATION 128 (Ignacio de la Rasilla and Jorge E. Viñuales eds., 2019).

165. Mary Ellen O'Connell, *New International Legal Process* 93 AM. J. INT'L L. 334, 334-351 (1999). For a seminal study, *see* ABRAHAM CHAYES, THOMAS EHRICH, AND ANDREAS LOWENFELD, INTERNATIONAL LEGAL PROCESS 354 (1968).

166. Leora Bilsky, *Cultural Genocide and Restitution: The Early Wave of Jewish Cultural Restitution in the Aftermath of World War II,* INT'L J. OF CULTURAL PROP. 340, 349-374(2020).

167. ANA LUCIA ARAUJO, REPARATIONS FOR SLAVERY AND THE SLAVE TRADE—A TRANSNATIONAL AND COMPARATIVE HISTORY 1432 (2017); Andreas Buser, *Colonial Injustices and the Law of State Responsibility: The CARICOM Claim for Reparations* 2 HEIDELBERG J. INT'L. L. 409, 410 (2017).

168. JOS VAN BEURDEN, INCONVENIENT HERITAGE: COLONIAL COLLECTIONS AND RESTITUTION IN THE NETHERLANDS AND BELGIUM 12 (2022); ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS XIII (2006).

former colonial powers owe the descendants of those they colonized? Is apologizing and returning human remains and cultural objects sufficient? Claims for historical injustice, such as colonialism and slavery, are difficult to cast in legal terms due to the inter-temporal principle, which states that a legal question must be evaluated using the laws in effect at the relevant time (*tempus regitactum*).[169] As a result, the intertemporal principle limits State liability for reparations to acts that were internationally wrongful at the time the State committed them.[170] The intertemporal principle protects against the retrospective application of international law.[171] Statutes of limitations and evidentiary obstacles also bar claims regarding historical injustice. Questions arise as to how far the inhabitants of former imperial powers should accept responsibility for the deeds of their predecessors, and how far back into history one should go to right historical wrongs.[172] Finally, engagement with colonial history is hampered by "colonial amnesia."[173]

As legal claims and other reparation requests continue to be filed against former colonial powers,[174] Tendayi Achiume, the UN Special Rapporteur on Racism, notes that the greatest barrier to reparations for colonialism and slavery is a lack of political will and moral courage on the part of the biggest beneficiaries of both.[175] She also emphasizes how, to this day, slave-holding families, who benefitted the most from slavery, received reparations, whereas descendants of people who were enslaved and traded as property have gone unheard.[176] For instance, after the abolition of slavery in the British colonies in 1833, approximately 3,000 families received £20 million, which is now worth more than £16 billion, for the loss of "property," i.e. enslaved Africans.[177]

169. *Island of Palmas (Netherlands v. USA)* (1928) *2 RIAA* 829, 845 (holding that "[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.").

170. *ILC Draft Articles on State Responsibility*, art. 13.

171. *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, art. 28.

172. Robert Aldrich, *Apologies, Restitutions, and Compensation: Making Reparations for Colonialism*, THE OXFORD HANDBOOK OF THE ENDS OF EMPIRE 1 (Martin Thomas & Andrew S. Thompson eds., 2018).

173. Carsten Stahn, *Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?*, 33 LEIDEN J. INT'L. L. 823, 825-35 (2020).

174. *See*, *e.g.*, Charlie Mitchell, *Kenyan Tribes Take UK to European Court of Human Rights over Colonial Land Grab*, THE TIMES, 1 (Aug. 22, 2022).

175. U.N. Secretary-General, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Racial Intolerance*, 15, 51, U.N. Doc. *A/74/321*. (Aug. 21, 2019).

176. *Id.* at 11.

177. *Id.* at 11.

While formalistic approaches have hampered reparations, the Special Rapporteur believes that States should not prioritize technical rules over racial justice and human rights.[178]

On a legal level, the opportunity to reconsider the current approach to colonial reparations is supported by various arguments. The inter-temporal principle does not imply that treaty provisions must be interpreted as if frozen in time; rather, it is open to evolutionary interpretation.[179] When "the wrongful act extends to a time when the act and its consequences are considered internationally wrongful," international responsibility is extended.[180] If the wrongful act is racial discrimination, this remains widespread despite ongoing efforts to achieve equality for all. Furthermore, human rights law seems to allow for some anachronism in its application.[181]

Returning human remains and cultural items to their communities of origin can also help with healing and repairing historical traumas.[182] While most debate over the return of colonial items and human remains has taken place in the context of museum studies, the question of whether items should be returned is inextricably linked to the human, economic, and cultural pillage that former colonies endured.[183] Thus, it relates to history and international law.[184] As is well known, colonial agents collected Indigenous peoples' remains and cultural artifacts from around

178. *Id.* at 49.

179. Steven Wheatley, *Revisiting the Doctrine of Intertemporal Law* 41 OXFORD J. LEGAL STUD.484, 488 and 509 (2021); Christian Djeffal, *An Interpreter's Guide to Static and Evolutive Interpretations: Solving Intertemporal Problems According to the VCLT*, EVOLUTIONARY INTERPRETATION AND INT'L. L. 21-34 (Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau, and Clément Marquet eds., 2019).

180. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, (2001) 2 Y.B. INT'L L. COMM'N 33, art. 15.

181. Fleur Johns, *The Temporal Rivalries of Human Rights* 23 IND. J. GLOBAL LEGAL STUD. 39-60 (2016).

182. Robert Peters, *Dealing with Collections from Colonial Contexts: Current Developments in Germany* 8 SANTANDER ART & CULTURE L. REV. 311, 377 (2022); Sophie Vigneron, *The Repatriation of Human Remains in France: 20 Years of (Mal)practice* 6 SANTANDER ART & CULTURE L. REV. 313, 316 (2020); LOUISE TYTHACOTT & PANGGAH ARDIYANSYAH, RETURNING SOUTHEAST ASIA'S PAST: OBJECTS, MUSEUMS, AND RESTITUTION 2 (2021).

183. Amy Niang, Restitution Culturelle: Pourquoi il Faut Repenser le Moment Colonial, *Le Point* (Jan. 2, 2019), https://www.lepoint.fr/culture/restitution-culturelle-pourquoi-il-faut-repenser-le-moment-colonial-02-01-2019-2282791_3.php.

184. PIERRE NOUAL, RESTITUTIONS. UNE HISTOIRE CULTURELLE ET POLITIQUE (Noto Revue 2021).

the world without regard for their will or spiritual beliefs.[185] Human remains and cultural artifacts acquired during colonial times are often hidden in plain sight in museum collections, university deposits, and even private collections.[186] This process lasted for hundreds of years, scattering human remains and Indigenous cultural artifacts all over the world. The United Nations Declaration on the Rights of Indigenous Peoples calls for states to repatriate human remains through fair and open policies developed in collaboration with Indigenous people.[187] Several states' current practice seems to indicate the emergence of a general principle of international law requiring the return of human remains and colonial items to their respective communities of origin.[188]

In general, apologies, acknowledgement, and recognition are cathartic and help rebuild trust.[189] They can be combined with other forms of redress such as the construction of public memorials, commemorations, and tributes to the victims.[190] New law, legal principles, and educational programs can be developed to ensure justice and equality for all. While former colonial powers have argued that development aid should also be regarded as a type of reparation, as Goldmann has persuasively argued, "we should come up with something more creative than development aid to compensate for colonial injustice."[191] Despite its merits, development aid still emanates colonial hegemony. In fact, a State may agree to compensate for damage caused by conduct that was not a violation of any international obligation in force at the time.

Regardless of one's final position on the legal or moral nature of reparations, adopting a long-term perspective and conducting historical inquiries can set the record straight and "explore how the legal and the

185. Federico Lenzerini, *Cultural Identity, Human Rights, and Repatriation of Cultural Heritage of Indigenous Peoples* 23 BROWN J. WORLD AFF. 127, 136-141 (2016).

186. El Hadji Malick Ndiaye, *Musée, Colonisation, et Restitution* 52 AFR. ARTS 1, 1-6 (2019).

187. G.A. Res.61/295 (IV), Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

188. Marie-Sophie de Clippele and Bert Demarsin, *Pioneering Belgium: Parliamentary Legislation on the Restitution of Colonial Collections* 8 SANTANDER ART & CULTURE L. REV 323, 328 (2022).

189. International Covenant on Civil and Political Rights, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (stating that reparation can involve measures of satisfaction such as public apologies and public memorials).

190. Stephen Pitt-Walker, *Apologies and the Legacy of an Unlawful Application of Terra Nullius in Terra Australis* 32 DENNING L. J. 177, 182 (2020).

191. Matthias Goldmann, *Why the Key to the Past Lies in the Future*, 4 VERFASSUNGSBLOG, (Aug. 2020).

non-legal interact,"[192] illuminate questions of intergenerational equity, and enable international law's emancipatory potential. A global historical inquiry could help us devise better remedies for historic injustice as well as better explanations for why those remedies are morally required.[193] Adopting a long-term view on international legal history can break past silences, clear the air, recognize historical and structural injustices, change contemporary discourses, and pave the way for transformation.

Another international process worth investigating through a broad lens is the application of the concept *uti possidetis, ita possideatis* (meaning "as you possess, thus may you possess"). Under Roman Law, such concept prohibited altering the possessory condition provided the latter was not gained through violence, clandestinity, or a precarious title.[194] The expression also indicated "the territories occupied by armies in the course of a conflict."[195] Latin American scholars used this concept "in response to the 'boundaries question' that arose after their independence."[196] According to this principle of law, "states emerging from decolonization shall presumptively inherit the colonial . . . borders that they held at the time of independence."[197] The *uti possidetis* rule appeared in both constitutional charters and in American international treaties.[198]

To avoid territorial conflicts, colonial powers and African countries adopted this principle.[199] As the International Court of Justice pointed out,

> Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the

192. Larissa Van Den Herik, *Historical Inquiry as a Form of Colonial Reparation?*, HARV. J. INT'L. L. 1, 2 (2018).

193. John Linarelli, *Reparations and the International Law Origins Story* 11 J. RACE, GENDER & ETHNICITY 106, 116 (2022).

194. Marta Lorente Sariñena, *Uti Possidetis, Ita Domini Eritis—International Law and the Historiography of the Territory*, *in* SPATIAL AND TEMPORAL DIMENSIONS FOR LEGAL HISTORY: RESEARCH EXPERIENCES AND ITINERARIES 131, 138 (Massimo Meccarelli & María Julia Solla Sastre eds., 2016).

195. *Id.* at 161.

196. *Id.* at 143.

197. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States* 90 AM. J. INT'L L. 590-624, 590 (1996).

198. Sariñena, *supra* note 194, at 145.

199. ILIASBANTEKAS& LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS—LAW AND PRACTICE 469 (3d ed. 2020).

> independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[200]

The principle has been applied in Eastern Europe for delimitating the frontiers of states that acquired their independence after the fall of the Soviet Union.[201] It is now being invoked in the disputes over the China Seas. In fact, the Chinese argument that history must be taken into account when determining states' territory "shares the logic of the *uti possidetis* principle of the international law, according to which 'the new states formed through gaining their independence retain the borders they had as colonial demarcations."[202]

However, contrary to expectations, keeping colonial boundaries has perpetuated colonial injustice, fueled several conflicts, and forced migration.[203] Indeed, former colonial powers often drew boundaries on maps that ignored geographical features, pre-colonial histories, and cultural, ethnic, and social groups, thus dividing villages, families, and lives, and creating ethnic and cultural minorities across artificial lines. Moreover, colonial authorities often lacked reliable information with respect to large territories. Some were unexplored; "[o]ther parts which had occasionally been visited were but vaguely known. In consequence, not only had boundaries of jurisdiction not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administrative authority."[204]

More fundamentally, while the *uti possidetis* principle aimed at decolonizing countries, it was based on colonial maps redacted during the colonial era. In other words, such principle re-enacted the colonial ordering of the earth, almost cancelling the pre-colonial time. Therefore, such principle endorses a "mirror game": "it does not refer to the history of the territory to resolve border disputes, but to the contrary, it creates that history, and projects it upon the disputed territory."[205] Perpetuating colonial boundaries risk perpetuating colonial history; it can be

200. *Case Concerning the Frontier Dispute* (*Burkina Faso v. Republic of Mali*), Judgment, 1986 I.C.J. 14, ¶ 20 (Dec. 22).

201. ANTONIO CASSESE, DIRITTO INTERNAZIONALE 99 (Micaela Frulli ed., 2021).

202. Sariñena, *supra* note 194, at 133.

203. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951) (on the displacement of communities after the division of a given territory among states).

204. United Nations, *Reports of International Arbitral Awards*, Vol. II, 1325 (1949).

205. Sariñena, *supra* note 194, 162.

fundamentally irreconcilable with the right to self-determination, as demonstrated in the Western Sahara case.[206]

Adopting a long-term perspective on the *uti possidetis* rule allows one to identify the concept's strengths and weaknesses and visualize the need for more comprehensive, historically and culturally-sensitive approaches to territorial disputes. Novel approaches can be developed to consider the principle of equity, the right to self-determination and other human rights of the populations concerned.[207]

In recent years, international courts have increasingly deviated from the *uti possidetis* principle and colonial boundaries to promote peace efforts, "arguments of a human nature" and the principle of effectivity.[208] For instance, in *Land, Island and Maritime Frontier Dispute*, the ICJ noted that in theory each islands appertained to one of the Gulf States by succession from Spain, according to the principle of *uti possidetis juris*.[209] Nonetheless, it found that in practice effective possession by one of the States could constitute a post-colonial effectiveness (*effectivité*) confirming the legality of the current situation.[210] Since Honduras had occupied El Tigre an island located in the Pacific Ocean since 1849, the Court concluded that El Tigre appertained to it.[211]

206. *Id.* at 151,153.

207. BENEDETTO CONFORTI & MASSIMO IOVANE, DIRITTO INTERNAZIONALE 129 (12th ed. 2021).

208. Michal Saliternik, *Expanding the Boundaries of Boundary Dispute Settlement: International Law and Critical Geography at the Crossroads* 50 VAND. J. TRANSNAT'L L.113 (2017).

209. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, 1991 I.C.J. Reports 589, ¶ 386: "it is necessary to enquire into the legal situation of the waters of the Gulf in 1821 at the time of succession from Spain; for the principle of the *uti possidetis juris* should apply to the waters of the Gulf as well as to the land.").

210. Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Judgment, 1992 I.C.J. 351, ¶¶ 40, 333 (Sep. 11) ("it is particularly appropriate to examine the conduct of the new states in relation to the islands during the period immediately after independence. Claims then made, and the reaction—or lack of reaction—to them may throw light on the contemporary appreciation of what the situation in 1821 had been"). *See also* Frontier Dispute, *supra* note 200, at ¶ 63 (clarifying that "where effective administration is additional to the UTI POSSIDETIS JURIS, the only role of EFFECTIVITÉ is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the EFFECTIVITÉ does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The EFFECTIVITÉ can then play an essential role in showing how the title is interpreted in practice.").

211. Frontier Dispute, *supra* note 209, at ¶ 431 (unanimously "Decid[ing] that the island of El Tigre is part of the sovereign territory of the Republic of Honduras.") and ¶ 368 ("the Chamber is . . . entitled to consider both the effective interpretation of the UTI POSSIDETIS JURIS by

VII. THE PROMISES AND PITFALLS OF LONG-TERM PERSPECTIVES TO INTERNATIONAL LAW

The section highlights the promises and pitfalls of transplanting the long-term perspective from the historical realm to the terrain of international law. First, applying long-term perspectives to international law enables international legal history to move beyond short-term considerations, deepens its inquiry, and expands its field of observation. Indeed, the expansive view allows past and present to "mutually illuminate each other."[212]

Second, adopting an expansive perspective helps reveal the unconscious history of international law.[213] The expansive view enables researchers to uncover hidden fears, emotions, and passions[214] and delve into the subject matter of study.[215] According to Braudel, "there exists a social unconscious" and from a scientific standpoint, "this unconscious should be richer . . . than the surface to which we are accustomed."[216] According to some legal scholars, states have constructed social order by responding to unconscious needs and histories.[217] Already in his 1748 *The Spirit of the Law*, Montesquieu aptly notes that the law always reflects the passions of its lawmakers.[218] The same could be said for international law. In fact, emotions significantly influence international law and can shape judgments of what represents an equitable allocation of scarce resources

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the Parties, in the years following independence, as throwing light on the application of the principle and the evidence of effective possession and control of an island by one Party without protest by the other . . . The evidence as to possession and control, and the display and exercise of sovereignty, by Honduras over El Tigre . . ., coupled . . . with the attitude of the other Party, clearly shows . . . that Honduras was treated as having succeeded to Spanish sovereignty over El Tigre.").

212. BRAUDEL, *supra* note 3, at 8.

213. *Id.* at 9.

214. Vesselin Poposki, EMOTIONS IN INTERNATIONAL LAW, IN EMOTIONS IN INTERNATIONAL POLITICS (Yohann Araffin, Jean-Marc Coicaud, and Vesselin Poposki eds., 2015); Gerry Simpson, *The Sentimental Life of International Law*, 3 LOND. R. INT'L. L. (2015).

215. BRAUDEL, *supra* note 3, at 9.

216. *Id.*

217. Ríán Derrig, *Unconscious or Behavioral: Psychological States in International Law*, presentation held at the Berlin Social Science Center, 14 July 2020.

218. Sharon Krause, *The Rule of Law in Montesquieu*. In THE CAMBRIDGE COMPANION TO THE RULE OF LAW (J. Meierhenrich and M. Loughlin eds. 2021) 137-152 (noting that for Montesquieu "the principle of each government is its distinctive moral psychology, the human passions that make it move"); Ana J. Samuel, *The Design of Montesquieu's "The Spirit of the Laws"* 103 AMERICAN POLITICAL SCIENCE REVIEW 305-321 (2009) (highlighting that for Montesquieu, "the spring of each regime form is the human passion that sets and preserves the political structure in motion.")

or a just settlement of international disputes.[219] Most people, including policy makers and adjudicators, "have strong moral intuitions about how institutions should make decisions and the types of decisions institutions should make."[220] Political scientists have weaved psychological analysis into the fabric of international relations theory.[221] There is a growing awareness of international law's invisible frames.[222] Scholars are investigating whether concepts of collective trauma (trauma experienced by communities) and intergenerational trauma (trauma passed from generation to generation) can help international law better address migrations, decolonization, human rights, and reparations.[223] While concepts like intergenerational trauma are difficult to prove in court,[224] focusing on humanity's unconscious history opens the door to insight, change, and healing. Only by recognizing the strength of our moral and legal obligations to the other can we realize our shared humanity. Only by being aware of one another's human dignity and inherent rights can justice be done. In other words, applying long-term perspectives to the study of international law could help international law's struggle for change.

Third, adopting long-term approaches to international legal history could be particularly appropriate for researching intergenerational equity, or fairness in access to and use of natural resources over time.[225] Other research topics that necessitate a long-term view include the prevention and mitigation of climate change, desertification, and drought, as well as safeguarding biodiversity, world heritage, cultural landscapes, and

219. Andrea Bianchi and Anne Saab, *Fear and International Law—Making an Exploratory Inquiry* 32 LEIDEN J. INT'L. L.351, 365 (2019).

220. J. M. Goldgeier & P. E. Tetlock, *Psychology and International Relations Theory*, 4 ANN. REV. POL. SCI. 67, 69 (2001).

221. Anne Van Aaken & Tomer Broude, *The Psychology of International Law: An Introduction*, 30 EUR. J. INT'L. L. 1225, 1225-36 (2019).

222. *See generally* Andrea Bianchi & Moshe Hirsch (eds.), *International Law's Invisible Frames* 1 (2021).

223. *See*, *e.g.*, David McCallum, *Law, Justice, and Indigenous Intergenerational Trauma*, INT'L J. FOR CRIME, JUSTICE, & SOCIAL DEMOCRACY 165, 171 (2021); Daniel D. Ntanda Nsereko, *The Law's Response to the Plight of Victims of Trauma in the Context of International Criminal Justice*, NIGERIAN Y.B. INT'L. L. 231-249 (2019); Zachary Steel, et al., *Human Rights and the Trauma Model: Genuine Partners or Uneasy Allies?* 22 J. TRAUMA STRESS 358, 360 (2009).

224. *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Order for Reparations, ¶¶ 132-34 (Mar. 24, 2017), (failing to award reparations for transgenerational harm due to lack of evidence).

225. Lydia Slobodian, *Defending the Future: Intergenerational Equity in Climate Litigation*, 32 GEO. ENV'T L. REV. 569, 571 (2020). For a seminal study, *see* Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment* 84 AM. J. INT'L. L.198, 199-200 (1990).

cultural diversity. In this way, international lawyers could move away from the contingent constraints of their field toward new horizons.

Finally, and more fundamentally, adopting a broad diachronic lens to international law enables international lawyers to see things in perspective. It also allows them to recognize the timeless nature of certain international law concepts such as justice and equity, individual rights and common concerns, peremptory norms and voluntary agreements, the emerging centrality of human dignity and the pervasive role of states in the international legal architecture. Adopting a broad perspective on international legal history allows international lawyers to become aware of the whole story and see how different threads are all woven together into a single tapestry.

Adopting a long-term perspective could also have some drawbacks. First, the methodology to be used requires expertise in processing data coming from various fields of study while maintaining the research's focus on international law. One may legitimately wonder whether there should be some necessary boundaries and some fields could be safely left out. This Article does not call international lawyers to become physicians or archeologists. Rather, it calls for adopting some interdisciplinarity. It is about acknowledging our epistemological limits and relying on other fields of study to investigate our own field. International law is a social science, not a silo completely detached from other sciences. Moreover, even international courts and tribunals routinely ask for expert advice when needed to achieve some sensible outcomes.[226] As noted by Braudel, "among the different time-spans of history, long duration seems a disturbance or complication."[227] In fact, not only would "the acceptance of long duration . . . signify a change in style and attitude," but "reaching the dark depths" would be "sometimes difficult and fortuitous."[228] This can create "disorder" in international legal history—but such disorder is needed to acknowledge the rich cultural diversity of the international community, adopt inclusive epistemologies, and strive for just and peaceful international relations.[229]

Second, critics may argue that taking a long view of international legal history threatens the structure of international law. As is well known, international law considers time in a linear way. Every legal rule has a

226. *See* VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL ECONOMIC LAW 425, 429 (2023).

227. BRAUDEL, *supra* note 3, at 6.

228. *Id.* at 7, 9.

229. Michelle Staggs Kelsall, *Disordering International Law*, 33 EUR. J. INT'L. L. 729 (2022).

time frame for its application. The intertemporal law principle serves the field's desire for stability and predictability. International legal rules enter into force in accordance with strict temporal constraints, do not retroact, and international courts apply the law in effect at the time the facts in dispute occurred. After the statutory limitations period, a claim might no longer be filed. If it is filed, it may be dismissed if the defense is raised that the claim is time-barred. However, linear time can jeopardize substantive justice by making past injustice unjusticiable. A thorough understanding of international legal history does not undermine the structure of international law; rather, it can strengthen its emancipatory potential. Rather than viewing international law as a tool for perpetuating power, inequality, and racism, it should be viewed as a platform for building just and peaceful relations among nations.

Third, some could contend that if one adopts a long-term view, then the past never ends and closure is never achieved. Nothing good can come from digging into the past as this approach has the potential to open a Pandora's box. As a result, claims could be filed for millennia-old perceived wrongs. If taken to extremes, the long-term perspective would bring a never-ending string of claims, requests, engulf courts, and ultimately prevent peaceful relations among nations. However, a long-term perspective on the history of international law does not imply such a radical transformation of international law. While international law has the ability to be all things to all international lawyers[230] and interdisciplinary approaches are welcome, such approaches do not necessitate conflating law and history. The languages of law and history can mutually illuminate each other, but they remain distinct fields of study, and international lawyers are all too aware of the distinctions.

VIII. CONCLUSION

Humankind has been fascinated by time since antiquity, viewing it as a philosophical and physical enigma. Both lawyers and legal historians have focused on the interaction of time and law. Time reveals when a treaty enters into force or expires or when a common state practice becomes binding customary law. It also establishes the limits for the jurisdiction of international courts. Time is an important dimension of international legal history because it enables us to examine the evolution of legal concepts, institutions, and processes.

230. Jan Klabbers, *The Cheshire Cat that is International Law*, 31 EUR. J. INT'L. L. 269 (2020).

This Article explores some of the promises and pitfalls of adopting a long-term approach to the history and theory of international law to better understand international legal norms, institutions, and processes. Braudel posits that time moves at different speeds, which he defines as geographical, social, and individual.[231] He contends that a clear awareness of this plurality of timeframes is required for developing a sound social science methodology.[232] In fact, he calls for cooperation (*rapprochement*) among the social sciences.[233] While he uses all three perspectives to investigate the history of the Mediterranean Sea, he favors the long-term perspective over shorter, narrower, and frantic visions of time.[234] At the same time, he is aware that "long duration is but one of the possibilities of a common language for the social sciences" and acknowledges methodological pluralism.[235]

While welcoming the existing plurality of research methods, this Article argues that the long view can fruitfully be transposed into international legal history and theory. The Article reveals that some slowness is an inherent feature of international law due to difficulty of reaching consensus on certain matters of international relevance given the social, cultural, and economic diversity of the international community. Adopting a long view enables international lawyers to better understand the emergence and decline of international law norms; the inception and demise of international courts and tribunals; and the dynamic functioning of international law. The languages of law and history can mutually illuminate each other, but they remain distinct fields of investigations, and international lawyers are aware of the boundaries. At the same time, adopting a long view enables international lawyers to see things in perspective and perceive the timelessness of given international law concepts such as human dignity; inherent rights and peremptory norms; and the need to put these at the center of the international legal system.

231. Fernand Braudel, *History and the Social Sciences: The Long Duration*. 3 POLITICAL RESEARCH, ORGANIZATION AND DESIGN (1960) 3-13.

232. BRAUDEL, supra note 3, at 4.

233. Richard E. Lee, *Lessons of the Longue Durée: The Legacy of Fernand Braudel*, HISTORIA CRITICA 69-77, 69 (2018).

234. Braudel, *History and the Social Sciences: The Longue Durée,* 32 REVIEW 171-203, 195-96 (2009).

235. BRAUDEL, *supra* note 3, at 13.