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CHINA'S SOUTH CHINA SEA CLAIMS, THE HISTORIC RIGHTS DEBATE AND THE MIDDLE APPROACH OF ISLAMIC INTERNATIONAL LAW

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ABSTRACT

The notion of historic rights forms the major basis to the claim by China to 'islands' in the South China Sea and the adjacent waters which are located within what is known as the nine-dash line. The *South China Sea Arbitration* case (*Philippines v. China*) has shown divergence between China's interpretation of historic rights and the territorial acquisition regime under positive international law. This paper argues that Islamic international law has clearer principles on historic rights that do not upset the territorial sovereignty of coastal states. However, these principles must be appraised in the correct context of Islamic international law because it subscribes to a different approach

to state sovereignty. Due to the importance of historic rights in this paper, the authors used both black letter and historical approaches to legal research. With historical legal research, the authors looked at the historical facts objectively in order to know how legal rules on sovereignty claims over maritime areas are formed throughout history particularly from the perspective of Islamic international law. This paper enables Islamic international law to offer a middle ground in which the proponents and opponents of China's historical rights claims could meet.

Keywords: Historic rights, law of the sea, consolidation of title, Islamic international law, South China Sea.

INTRODUCTION

History is important to international law. The notion of historic rights is one of the sources of conflict and dispute over the South China Sea. The claim by the People's Republic of China (China) to maritime features in the South China Sea and the adjacent waters which are located within what is known as the nine-dash line is related to its historic rights 'formed over a long course of history'. The historic basis informs not only sovereignty but also the exercise of sovereign rights over the islands and maritime areas there. The issue of whether the historic claims are in line with international law has been tested in the *South China Sea Arbitration (Philippines v. China) Permanent Court of Arbitration (PCA) Case No 2013-19, 12th July 2016*. China's claims were challenged by the Philippines at the Permanent Court of Arbitration (PCA) whose jurisdiction was provided for by the UN Convention on the Law of the Sea (UNCLOS). The UNCLOS has provisions on compulsory dispute settlement but at the same time provides options to Member States to opt out on grounds that include disputes involving historic titles. The Philippines sought a legal pronouncement from the PCA that China was only entitled to rights under the UNCLOS and that its claims to sovereignty rights jurisdiction and historic rights over the maritime areas were contrary to the UNCLOS and did not have legal effect to the extent that they exceeded what is conferred on it by the UNCLOS (*South China Sea Arbitration*: para. 169).

The PCA upheld the various notions under modern international law instruments including the UNCLOS that the areas claimed by China in

the South China Sea could not give rise to sovereignty and sovereign rights claims because the areas did not qualify as maritime features that create maritime zones under the UNCLOS (National Institute for South China Sea Studies, 2018). The PCA also limited the scope of maritime entitlements in the South China Sea to only those provided for by the UNCLOS. More importantly, the PCA declared that China's claims to historic rights relevant to the nine-dash line were contrary to the UNCLOS, and that the UNCLOS superseded all historic rights (National Institute for South China Sea Studies, 2018).

The PCA decision has created a greater divergence in the interpretation of the law and facts regarding the Chinese claims to historic rights over the islands and maritime areas in the South China Sea (Cherhat, 2022; Swaine, 2016). The question now is how may such divergence relate to Islamic international law which is also known as *siyar*? The nine-dash line claimed by China and the responsive PCA decision have something to do with the legal status of historic rights. As will be seen in the following, cases that deal with certain elements of historic rights involve Muslim States as well as the invocation of Islamic international law in the interpretation of traditional fishing rights, as can be seen in the *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea (Permanent Court of Arbitration (PCA) Case No. 1996-04)* arbitration case. As such, exploring the possible role of Islamic international law can be refreshing especially when the Arbitral Tribunal's decision is now facing a call for a more inclusive approach to international law that includes the so-called China's interpretation of historic rights.

This paper first discusses the reading of historic rights by China that purportedly gives it title over the maritime areas in the South China Sea. This paper then analyses the legal arguments against historic consolidation of the title which is creating divergence between China's narrative and modern positive interpretations of international law on the matter, which the authors term as the historic rights conundrum. This is followed by a short conceptual description of Islamic international law, and an examination of the law's distinct approach to historic rights, particularly traditional rights. Before concluding, the paper critically analyses whether such an approach can resolve the divergent interpretations of historic rights by China that will have an impact on the stability of the region.

In terms of research methodology, despite the complexities surrounding it being historicallegal in nature (it has been argued that methodology concerns international lawyers less than historians (Tarazona, 2015)), this paper employed both doctrinal/black letter and historical approaches. Doctrinal research is library-based study where materials are found in libraries, archives and databases. The aim is to discover, explain, examine, analyse and present, in systematic form, the facts, principles, provisions, concepts, theories or working of certain laws or legal institutions (Yaqin, 2007). It involves cross referencing of specific rules to more general underlying legal principles as if together they form a single, mutually reinforcing and rational system of regulation (Salter & Mason, 2007). The black-letter approach needs to be taken with caution because of its insulation of non-legal factors such as political factors and economic factors from the purview of a particular research (Salter & Mason, 2007). One of the other legal factors is history. Historical legal analysis can provide some useful insights. The historical approach to research looks at past facts objectively to know why and how present rules were formed (Yaqin, 2007). Hervey et al. (2011) remarked that “Many debates are influenced heavily by the past, whether this is admitted or not”. However, that may not be easy. International law has somewhat been detached from historical approach to law (domestic or municipal law research), and there have also been few links between history of international law and history studies (Hueck, 2001; Landefeld, 2019). Despite the resistance to ‘data’ contamination arising from multidisciplinary studies (Korhonen, 2021), and the possible tension between history and international law, requiring the avoidance of attributing something to a period to which it does not belong (anachronism) (Tarazona, 2015; Bendel, 2021), it is difficult to draw the line between the past and present of the relevant topic of particular legal discussion because “the present state of any topic” will still be “encrusted” by the “legacy of all” that stays over a long period of time (Salter & Mason, 2007). Historical approach helps explain the law especially judicial decisions because in international law cases, “the courts write histories” as historical facts are an important part of their judgements together with legal arguments (Hervey et al., 2011). This is even more evident in the law of sea discourse involving historic rights and the South China Sea, where given China’s contestation of the prevailing Eurocentric understanding of international law, researchers need to backtrack beyond the development of international law of

the 20th century or even one beyond the preceding British era of international law.

CHINA'S NARRATIVE ON HISTORIC RIGHTS

China's claims, as they are based on historic rights, consist of straight baselines around the claimed islands, archipelagic baselines, restriction on navigation, and the nine-dash line (Kardon, 2018). The writings supporting China's claims draw upon the contention that the UNCLOS is not everything and there is room for historic rights under customary international law, whether or not it is consistent with the UNCLOS (Ma, 2018; McDorman, 2014; O'Connell, 1982; Treves, 2013). This contrasts with what the Arbitral Tribunal has decided, which also reflected the International Court of Justice (ICJ) jurisprudence in which the historic right entitlements claimed by China were replaced by new regimes in the UNCLOS particularly the Exclusive Economic Zone (EEZ) and continental shelf (Ma, 2018). On the other hand, there could be two separate regimes which exist side by side: rights under the EEZ (UNCLOS) and historic rights under general international law (Ma, 2018). This is an attempt to create a new narrative for historic rights which may weaken the uniform reading of maritime entitlements by UNCLOS, although to say that China disregards international law altogether would be too far-fetched.

The Arbitral Tribunal decision brings to the fore the question whether historic title differs from historic rights that form the crux of China's arguments. China questioned whether the PCA had jurisdiction to look at the historic rights claimed by a state in accordance with the UNCLOS (National Institute for South China Sea Studies, 2018). Historic rights and historical rights may have different meanings (Anh, 2016; Dupuy & Dupuy, 2013); however, such differences can be discarded for the sake of greater substantive differences between historic rights and historic title. The distinction between historic rights and historic title can begin from a double-barrel premise. First, China's claim over the nine-dash line and others stems from territorial and sovereignty acquisition of maritime areas independent of the nearest shore of its mainland. Second, since the claims are based on historic rights, there is a need to define the rights that international law, whether treaties or customary international law, can grant to states with regard to those

areas. This is where the points of argument of both camps result in a to-and-fro journey between the lack of reference to historic rights in UNCLOS and the mention of historic waters and historic bays by the same treaty. This also shows the complexity of China's claim because while the claim originates from the historical fact about the presence of Chinese fishermen in those areas for a very long time, it was difficult to prove that there had been uninterrupted exercise of sovereign activity linked to China especially from the time of the Qing Dynasty onwards.

As recognised by the Arbitral Tribunal itself, the notion of historic rights should be conceived through less normal law-making process under international law (Zou, 2016) because of where the historic rights are supposed to be useful includes far flung areas or maritime areas where no states have exerted control for a long time, and which have escaped 'codification' (Ma, 2018; O'Connell, 1982). As to how historic rights are defined in the context of the claimed maritime areas and the adjunct sovereign rights or even sovereignty, it is argued in support of such claims that modern international law poorly defines and has not much developed legal principles on historic rights. This is despite the lack of clarity and consistency of the extent of such rights until more recent maps were produced by China (Tanaka, 2017). There is also a need to resolve the issue of whether the legal conditions for historical rights are already fulfilled. The question now is the scope of the legal rules under which the fulfilment of the conditions can be assessed. Is it confined to UNCLOS or should it be extended to general international law?.

China's narrative has attempted to provide some clarification on what historic rights mean. One of them points to three possible types of historic rights namely historic rights regarding territorial sovereignty, exclusive historic rights short of territorial sovereignty but generating sovereign rights, and non-exclusive exclusive historic rights which may refer to traditional fishing rights (Keyuan, 2001; Kopela, 2017; Ma, 2018). Such taxonomy of historic rights was argued not to be developed under the UNCLOS. Nevertheless, the UNCLOS has its own attributes on maritime features that may have comparable legal implications as those of the three types of historic rights within China's narratives. Furthermore, the UNCLOS needs to be read together with customary international law on territory and sovereignty.

Legal Arguments against Historic Consolidation of Title

Historic rights and historic title can still have something in common as can be seen in the ICJ's judicial pronouncement in the *Tunisia/Libya* case, [1982] ICJ Rep 18, 24 February 1982, in that both are based on land usage and acquiescence (Anh, 2016). However, when it comes to historic consolidation of title, historic title, historic rights, historic waters and historic bay, all are governed by customary international law (Tanaka, 2017). Historic title, which is linked to sovereignty (Tanaka, 2017), is not a standalone notion and has to be read in the light of the modes of territorial acquisition namely occupation or prescription in order to allow territorial consolidation (Anh, 2016). However, historic title here can be distinguished from historic rights purportedly used by China. Historic title under ICJ jurisprudence has different rules for land territories and waters (Anh, 2016; Dupuy & Dupuy, 2013; Tanaka, 2017). As regards land territories, historical claims over such areas needs to be followed by the mode of territorial acquisition (occupation, prescription or cession). This makes sense because these land areas have been the subject of States' sovereign activities for thousands of years while assertion of sovereign authority over waters far from shore began quite late in history of the development of the relevant technology. Historic waters must thus be attached to certain land areas as certain waters are treated as internal waters due to historical factors and after fulfilment of the following conditions, namely long usage and absence of protest from other states (Anh, 2016; Dupuy & Dupuy, 2013; Tanaka, 2017). This is the position taken by Arbitral Tribunal in the *South China Sea Arbitration* case (PCA) Case No 2013-19) (Tanaka, 2017). Regarding maritime areas, absent from attachment with the shore, the lawful owners will be replaced by the coastal state, and this view is shared by the United Nations (UN) International Law Commission (ILC) (Anh, 2016).

The historic rights notion preferred by China found support from Yehuda Blum and Robert Y. Jennings who attempted to extend territorial acquisition beyond a *titre de souverain* (peaceful and uninterrupted exercise of sovereign authority) in that historic title consolidation can result in territorial acquisition if the state can show its long-standing vital interests and general tolerance or recognition by other states despite political upheavals and transition “conducive to the emergence of conflicting territorial claims” (Dupuy & Dupuy, 2013). Historical consolidation was not accepted by the

ICJ as in *Land and Maritime Boundary between Cameroon and Nigeria, Cameroon and Equatorial Guinea (intervening) v Nigeria, Judgment, Merits*, [2002] ICJ Rep 303, 10th October 2002, because it has never been used before to replace territorial acquisition that takes into account verifiable facts (Tanaka, 2017). Historical consolidation must be peaceful and continuous (Dupuy & Dupuy, 2013). In *Land and Maritime Boundary case* [2002] ICJ Rep 303, Nigeria attempted to effectuate historical consolidation of title to assert its sovereignty over the Bakassi Peninsula (Dupuy & Dupuy, 2013). The claims by China based on historic rights over the South China Sea islands and their waters could also not meet the conditions of territorial acquisition by similar standards.

Apart from territorial sovereignty (the first type of historic rights according to China's narrative), the historic rights of China have now given rise to the right to exclude others from exploiting what is in the waters including in the seabed and subsoil. China has argued that the South China Sea islands has been the fishing ground for their fishermen for a very long time. The cases of *Qatar/Bahrain (Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v Bahrain, Judgment, Merits*, [2001] ICJ Rep 40, 16th March 2001) and *Eritrea/Yemen* indicate that customary international law does not have a rule allowing territorial sovereignty based on historical fishing (Tanaka, 2017). Nevertheless, the UNCLOS provides for sovereign rights short of sovereignty in the forms of EEZ and continental shelf, but they also extend from natural prolongations of land territory. Historical facts to support or oppose China's claim bifurcates. China claimed that their fishermen's activities including living, digging wells and others were recorded before the 1930s but this was refuted by the Philippines on the grounds that China banned maritime trade in the 14th, 15th and 16th centuries (Tanaka, 2017). While China narrated about fishing, the Philippines spoke about trade; hence, a question is raised whether banning trade would also restrict voyage of fishing boats. The Arbitral Tribunal found no historical evidence that China restricted or regulated fishing beyond its territorial sea at that time (Tanaka, 2017). The area within the nine-dash line is a vast maritime area. The southernmost region of the claimed areas, which is near the island of Borneo, is more than a thousand kilometres away from Hainan Island. At a time when there was no refrigeration on fishing boats, given the perishable nature of sea produce, the farthest that fishermen could bring their catch would be different from what it is now.

WHY ISLAMIC INTERNATIONAL LAW?

Islamic international law is very rarely mentioned in the South China Sea discourse. An online literature survey using the Google Scholar of the terms “South China Sea claims” and “Islamic international law” produced only one writing that is by Malik (2015) who wrote on the Islamic notion of common heritage of mankind as a possible solution to the South China Sea’s claims (particularly the Spratly Islands); however, it did not address how Islamic international law views territorial claim of the sea based on historic rights. The region adjacent to the South China Sea has Muslim States who are active claimants to the maritime areas there, namely Brunei and Malaysia. Indonesia, which has the world’s largest Muslim population is involved because of China’s claim of traditional fishing rights on the North Natuna Sea. One of the states that reportedly supports China’s position is Pakistan (Kardon, 2018) which is not only a Muslim State but an Islamic republic as well. It should not be disregarded that the few cases cited in the critique of such position (*Qatar/Bahrain, Tunisia/Libya, Western Sahara, Libya/Chad and Ligitan and Sipadan (Indonesia/Malaysia)*) involved Muslim States and evaluated to a certain extent the application of Islamic international law rules to historic rights.

China’s narrative on territorialising historic rights purportedly represents an alternative to the Western or Eurocentric bias of positive international law. The narrative puts to question the more legalist or normative approach which may lead to a stalemate (Hui-Yi, 2016) or encourage judicial opt-outs due to dependence on judge-made law, and may not suit the Asian tradition of cooperation, pluralism and tolerance (Hu, 2020). Meanwhile, recourse by other claimant states which are part of ASEAN to international law solutions can produce unintended consequences because they may also rely on the unorthodox reading of historic rights elsewhere. Yet the South China Sea Arbitration case shows their preference to such solutions (Hu, 2020).

As said, and according to China, UNCLOS is not exhaustive, and that customary international law does not have complete rules concerning the notion of historic rights that purportedly forms the legal basis for its claims. What is missing here is the line of thought that shapes China’s alternative view on international law. Is it Confucianism

(Hui-Yi, 2016)? Or is it neo-realism (Nguyen, 2018)? It has been stated by Hu (2020):

An essential point of clarity is that before the nineteenth century-before positive international law was introduced to China-it was virtually impossible for the medieval Chinese State to form an intent to occupy during its connections with and administration of the disputed islands, because no such concept existed in medieval Chinese thought. The Chinese did not know about the concept and meaning of occupation in contemporaneous Europe. However, Chinese fishermen's use of the islands was closer and more comparable to the early modern meaning of occupation under the natural law theory. The Chinese medieval understanding of sovereignty also differs from the early modern tradition of Western international law which focuses on territorial control as a central underpinning of sovereignty. Therefore, it seems inappropriate to mechanically consider and analyse the Chinese claims under the Western framework.

Based on the above statement, China's acts in the South China Sea should draw upon legal considerations that are different from Eurocentric positive international law. Where the legitimacy of the acts from an international law perspective comes from is still unclear and subject to criticisms of modern international lawyers (Hu, 2020). Furthermore, Southeast Asian nations south of Vietnam did not approach territory, historically in the same way as China (and to some extent, Vietnam). For those nations which were maritime-based, territories were not clearly demarcated, and power revolved around the *mandala* (Alverdian, 2022; Gin, 2022; Dellios, 2003). The *mandala* concept delimited the scope of influence of a King through the idea of a *cakravartin* (powerful ruler) where power was the strongest in the centre of the circle (which could be the place of his palace) and as one moved further away from the centre, the authority of the powerful ruler weakened (Ahamat & Alias, 2018). Since the polities in maritime Southeast Asia mainly settled in coastal and riverine areas, it was common for independent or semi-independent regional rulers to rule the hinterlands and upper river areas; however, they continued to pay homage to the centre purely on the grounds of sacred royal lineage (Ahamat & Alias, 2018). In contrast, demarcation

of the frontiers or margins of the Empire, instrumental for governance and administration over land by the Chinese State was practised in pre-modern China (particularly from the Qin to the Qing dynasties) (Di Cosmo & Wyatt, 2003; Stuart-Fox, 2021). Hence, a question can be raised as to whether it mimics territorial acquisition from the perspective of positive international law. Nevertheless, it is not clear whether the territoriality nuance also extended to maritime areas far away from the Chinese shore, and near the coasts of the maritime Southeast Asian kingdoms and sultanates. Historical accounts of China's maritime expeditions were well documented, but it is doubtful whether they led to China's territorial expansion.

The debates over history can be a never-ending affair but the significance of the historical narrative to the South China Sea claims keeps increasing because historic or historical rights are central to claims which can now pit major powers among themselves and bring military conflicts to the doorstep of small countries like Malaysia and Brunei. This paper now turns to Islamic international law and why its appreciation of the link between state sovereignty and traditional rights is a critical factor.

STATES' APPROPRIATION OF THE SEA UNDER ISLAMIC INTERNATIONAL LAW

Islamic international law started its evolution as *siyar* since the time of Prophet Muhammad, which then further developed through the various periods of Islamic rule (Bouzenita, 2007). The term *siyar* was popularised as a result of the works by Al-Shaybani, though earlier writings have been found referring to such a term (Bouzenita, 2007). *Siyar*, which is a branch of Islamic jurisprudential science, and within the Shariah framework, has both religious texts (the Quran and the hadith of Prophet Muhammad), and juristic works as its legal sources. Khadduri (1966) defines Islamic law of nations as 'the rules and practices of Islam's intercourse with other peoples' which is narrower than the meaning conveyed by Hamidullah (2011 who defined 'Muslim international law' as 'part of the law and custom of the land and treaty obligations which a Muslim de facto or de jure state observes in its dealings with other de facto and de jure state' (Zahid & Shapiee, 2010c). A more articulate meaning refers to *siyar* in terms of its subject matter as 'legal matters such as the relations

between Muslims and non-Muslims, apostates and rebels within the Islamic State as well as outside of it' (Bouzenita, 2007). However, there are queries as to modern compatibility of *siyar*, drawing upon the difficulties of embedding the principles of *siyar* into modern international legal order (Cravens, 1998; Lombardi, 2007; Powell, 2016; Powell & McDowell, 2016; Westbrook, 1993).

It has been argued that since *siyar* is based on the Islamic faith, it could not fit into the international legal order or at the least, its principles could hardly be applied by modern international law institutions including the ICJ (Cravens, 1998; Lombardi, 2007; Powell, 2016; Powell & McDowell, 2016). In the modern international law system, a plurality of political, strategic, and legal factors affects how any government operates. International behaviour of any country emerges as an outcome of an intricate balance of these factors' convergence (Powell, 2016). In the meantime, modern international law is based on Western notion of sovereignty which is different from such notion in Islamic international law (Powell & McDowell, 2016). Sovereignty under the former denotes that ultimate political authority lies in a given territory that it (sovereignty) is in the exclusive domain of the state whose power is limited by people's inalienable rights (Powell & McDowell, 2016).

Islam's notion of sovereignty is not exclusively tied to territory but to personal affiliation to the Islamic faith (the umma) (Powell & McDowell, 2016). Sovereignty belongs to God (Allah) and unlike the right to own land being tied to the notion of 'title' in the Western context, such ownership in Islam is held in trust of God (Powell & McDowell, 2016), negating absolute ownership by a title holder of certain types of land and natural resources which are subject to community beneficial use and state stewardship (Cravens, 1998). Prophet Muhammad also had international legal personality, having legal capacity to enter into treaties with neighbouring states (Khalilieh, 2019).

Islamic international law has taken a consistent stand with regard to certain aspects of the sea and the activities thereon. The sea is a common right of all peoples and nations, Muslims and non-Muslims, and is traversable by all, just like great rivers and lakes (Khalilieh, 2019). This is evident both conceptually and in practice. In terms of legal concept, the hadith of Prophet Muhammad provides that "Every land has its appurtenance forbidden (to other than the proprietor)"

(Khalilieh, 2019). The concept is called *harim* which resembles a buffer zone. Relating the concept to the coast, it prohibits building and cultivation on the adjacent or surrounding lands to allow fishermen or others free access to the sea (Bouzenita, 2021). While the coast has *harim*, the sea does not (Hamidullah, 2011; Khalilieh, 2019). Hence, *harim* arguably reflects the territorial sea not the international sea, just as what is claimed about Islamic law which is land-centred whose beginning has been associated with Arabia (Ibn Khaldun, 2003; Khalilieh, 2019). Despite initial reluctance, the Muslim navy started to display significant presence in the Mediterranean as early as the reign of Muawiya, the first caliph of the Umayyads.

The practices of Muslim rulers from the time of Prophet Muhammad until the Abbasids show consistency of not hampering navigation by merchants and traders of all nations unless the security of the Muslim lands were under threat from the sea. As a result of the treaty between Prophet Muhammad and the Christian ruler of Aylah that covered among others access to the sea and freedom of navigation, non-Muslims not only from Aylah but also from Syria were given free access to the Sea of Hijaz (Khalilieh, 2019). This is despite the Hijaz, which has Mecca in it, being a *haram* (a place beyond the reach of non-Muslims) (Khalilieh, 2019). Upon the death of Prophet Muhammad, no successors claimed possession of the Sea of Hijaz, militarily and in terms of territorial acquisitions (Khalilieh, 2019).

Clearly, sea traversing should be uninterrupted in Islam. Procurement of safe conduct by a non-Muslim traveller entails obligation of the Islamic government to protect even an enemy traveller on board a vessel flying the flag of a party to a treaty with the Islamic States, as can be seen in the Aylah treaty. The rule of law governing freedom of the sea in Islam did not change relative to the ups and downs of the Islamic Empire. Notwithstanding, some restrictive practices were found such as Ottoman's denial of free passage through the Straits of Bosphorus and Dardanelles, imposition of toll by the Ruler of Dahlak and the Ottoman governor of Kamaran, and the requirement of permits imposed by the Ruler of Hormuz, all of whom were accepted as violating Islamic law (Khalilieh, 2019). Freedom of the sea guaranteed by Islamic rulers might still require payment of trade tax upon arrival at Muslim ports but far differed from the Venetian practice of *gabella* in the Adriatic Sea (Khalilieh, 2019) or the Portuguese actions in the Eastern Seas (the Indian Ocean and the Malay/Indonesian Archipelago) of disrupting

navigation and trade by Muslim and non-Muslim traders through the *cartaz* system (Azeem, 2020). The freedom discussed mainly concern freedom of navigation. Do they extend to fishing? Furthermore, does the extraction of freedom of the sea in Islam directly divide the sea into territorial and international seas? The concept of *ribat* in Islamic law entitles coastal population with exclusive fishing rights and access to other marine resources within the adjacent coastline (Khalilieh, 2019). Furthermore, permitting non-Muslims to traverse the Sea of Hijaz despite it being part of the Holy Land for Muslims, does not come together with the right to fish unless fishing is done for personal consumption during voyage (Khalilieh, 2019). Hence, the freedom of navigation guaranteed is akin to innocent passage in the territorial sea of the coastal states under modern international law. On the other hand, the exclusion of non-Muslims (or non-citizens in the Westphalian context) which paves the way for exclusive fishing rights and access to other resources signifies that sovereignty of the Islamic State over its maritime belt exists in the classical works of Islamic international law.

As regards the right to apportion the high seas, Islam's view of the sea as common property suggests an absence of such right. However, the division of the sea into territorial sea and high seas is not clearly found in Islamic classical works. The application of the rules on land were merely extended to the sea by classical Muslim scholars, with some exceptions caused by the peculiarities of the seas, in particular, the "capability of appropriation and habitation" (Khalilieh, 2019). While sovereign authority of the state ends in the sea where the coast is no longer sighted and hence, the authority is now in the hands of the sea captain, that argument does not validate the establishment of the high seas as a distinct maritime zone since the *raison d'être* is built upon a concept called *taskhir* (subservience) (Bouzenita, 2021). Such concept contemplates divine subjugation of the sea based on divine authority, divine subjugated elements, and serviceability; man being God's vicegerents on earth creates a presupposition that powerful nations do not have the privilege to monopolise the riches of the universe (Khalilieh, 2019). The concept also ensures that every individual is free to navigate, trade and exploit natural resources within the commonality of the seas (Khalilieh, 2019). The distinctive high seas regime is not clearly defined in classical Islamic works (Bouzenita, 2021), which means there is less rigidity in Islamic international law in accepting newer maritime zones that stem from

contemporary technologies, allowing for exploration and exploitation activities which were unheard of in the past. Further, the flexibility allows more policy space for Muslim rulers in authorising measures to maintain peace and security in the oceans. *Urf* (local custom) has always been instrumental in how Muslims appreciate navigation and trade in the oceans (Bouzenita, 2021), enriching the rules and practices of the Muslim States and Empires in the same regard. Nevertheless, as rules regarding land apply to the sea in Islamic law, it is safe to say that Islamic international law does not allow appropriation of the sea independent of land mass whether it is done in the name of historic rights.

THE *ERITREA/YEMEN* CASE AND MODERN ISLAMIC INTERNATIONAL LAW HISTORIC RIGHTS PROPOSITION

A question may be raised when the Arbitral Tribunal in the South China Sea arbitration case decided that historic rights are not the same as claim of jurisdiction based on historic title, and that the Tribunal has the jurisdiction to look at the historic rights claimed by a state in accordance with the UNCLOS. The question is why did the Arbitral Tribunal not make as broad an interpretation as the Arbitral Tribunal in the *Eritrea/Yemen* case (National Institute for South China Sea Studies, 2018)? The case of *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea (Permanent Court of Arbitration Case No. 1996-04)* whose award came in two phases (First Stage Award: Territorial Sovereignty and Scope of Dispute, 9 October 1998 and Second Stage Award: Maritime Delimitation, 17 December 1999) established a broader rule on traditional fishing rights. The rights according to China's narrative is part of the historic rights but such rights are scantily mentioned in the UNCLOS, which as can be seen in the following, places emphasis on mutual agreement of related states instead.

The *Eritrea/Yemen* case involved a sovereignty claim dispute between the two countries over groups of islands in the strategic area of the Red Sea. The *Eritrea/Yemen* case can be considered an accidental law-making exercise which gives breath to Islamic international law. There have been attempts to theorise the modernisation of the traditional discipline of Islamic international law that is *siyar*, to be relevant in contemporary international relations especially those

between Muslim States (Ahamat, 2010; Ahamat & Kamal, 2011; Bashir, 2018; Powell, 2022; Shapiee, 2007; Shapiee, 2006).

The Permanent Court of Arbitration in *Eritrea/Yemen* (First Stage) though awarded sovereignty to Yemen, granted traditional fishing rights to Eritrean fishermen, and the Tribunal did not only uphold the religious affiliation between the Ottoman Sultan and the Imam of Yemen as one of the bases of sovereign title (para. 121) and establish a *res communis* principle based on cultural patterns of African and Yemeni fishermen (para. 128), but also drew upon the inadequacy of the Western notion of sovereignty to address the interests of peripheral communities, based on Islamic international law.

In making this award on sovereignty, the Tribunal showed awareness that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and whose familiarity with notions of territory is quite different from those recognised in contemporary international law. Moreover, appreciation of regional legal traditions is necessary to render an award which, in the words of the Joint Statement signed by the Parties, will ‘allow the re-establishment and development of a trustful and lasting cooperation between the two countries.’ The Tribunal further held (First Stage Award: para. 526),

In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.

The Tribunal reaffirmed in the Second Stage of the Award, the legal significance of “historical realities which characterised the lives of the populations on both the eastern and western coasts” (namely Yemeni and Eritrean coasts) to the basic Islamic concept that:

“all humans are ‘stewards of God’ on earth, with an inherent right to sustain their nutritional needs through

fishing from coast to coast with free access to fish on either side and to trade the surplus, remained vivid in the collective mind of Dankhalis and Yemenites alike” (Second Stage Award: para. 92).

The Tribunal also attached the application of the legal concept on traditional fishing rights not only to the fishermen as immediate beneficiaries of the international law principle but more importantly, the Tribunal stated that the concept applies ‘to States in their mutual relations’ (Second Stage Award: para. 93).

Interestingly, the Tribunal stated that despite the award of traditional fishing rights to Eritrea, the sovereignty of Yemen was not conditional but subject to “the fundamental moralistic general principles of the Quran and the Sunnah’ that support ‘positive international law rules in their progressive development towards the goal of achieving justice and promoting the human dignity of all mankind” (Second Stage Award: para. 94). However, the Tribunal distanced itself from making assessments about the volume of both Yemeni and Eritrean fishing. The author submits that this does not mean that the Tribunal’s legal reasoning is hollow as more specific obligations can be laid out in future treaties, whereas the location of such reasoning by the Tribunal is to stop ‘classical Western territorial sovereignty’ from causing the award of sovereignty to Yemen to exclude fishermen of a different nationality(s) from Yemeni waters (Second Stage Award: para. 95). Title over Jabal al-Tayr and the Zubayr group and over the Zuqar-Hanish group was found by the Tribunal to be indeterminate until recently. Moreover, these islands lay at some distance from the mainland coasts of the Parties. Their location meant that they were put to a special use by the fishermen as way stations and as places of shelter, and not just, or perhaps even mainly, as fishing grounds. These special factors constituted a local tradition entitled to the respect and protection of the law (Second Stage Award: para. 95).

Further, the Tribunal awarded the fishing rights to the Dankhalis not purely based on adjacency. The obligation on Yemen to preserve the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen is “for the benefit of the lives and livelihoods of this poor and industrious order of men” (*Eritrea/ Yemen*, First Stage Award: para. 526).

TRADITIONAL RIGHTS AND ISLAMIC INTERNATIONAL LAW

‘Tradition’ means a belief, custom, or way of doing something that has existed for a long time among a particular group of people (Oxford Learner’s Dictionary, 2022). Traditional rights must thus be something conferred on a group of people directly by the law in cases where the proof of their long-standing existence among the people is clear enough. The notion has remarkable significance in certain areas of human rights. Such notion has been associated with the rights of indigenous people (Jackson, 2018; Gupta et al., 2014; Metcalf, 2003) and those who live in frontier areas (Akweenda, 1990) to their land and other resources that sustain their way of life (Brundtland, 1987; Metcalf, 2003) such as fishing, hunting, grazing or even cultivation (Richardson, 2001; Akweenda, 1990; Burton et al., 1999; Emiowele & Oji, 2020). It is important to note that by virtue of traditional rights, the rights’ owners will have greater rights than those given to their neighbours (Kameri-Mbote, 2022; Burton et al., 1999). Interestingly, it has been argued that traditional rights should cover the rights of a country like Japan, to ocean resources (Ouchi, 1978; Friedheim & Akaha, 2019). Traditional, customary or historic rights have taken centre stage in states or communities’ response to changes in the law (including international law) that could alter or upset their long-established rights on access to sources of livelihood. For example, the rights of Japan to exploit ocean resources were once argued within the context of traditional rights because a new ocean regime was emerging and there was concern that the regime could proscribe certain aspects of Japan’s fishing activities which had been in place for years (Friedheim & Akaha, 2019; Ouchi, 1978). Similarly, grazing and cultivation rights of people living in frontier areas in Africa were jeopardised by formulation of boundary treaties (Akweenda, 1990). States may not accord the traditional rights the same level of importance as the more entrenched settlement, concession or compromise from other states. If the traditional rights should conflict with sovereignty interests of states and under modern international law, a question may be raised as to whether a state can be forced to grant traditional rights to non-citizens even if their enjoyment collides with the state’s exercise of its sovereignty.

This shows how important it is for modern international law to treat the nexus between people and land. Both population and territory

are among the indispensable elements of statehood under customary international law. Modern international law still puts emphasis on indivisibility between both elements. In *Western Sahara Advisory Opinion*, ICJ GL No 61, [1975] ICJ Rep 12, 16th October 1975, the ICJ recognised rights of nomadic tribes to the land that they had been traversing for a long duration. Nevertheless, the basis of the link under modern international law could not be the Islamic faith as the ICJ rejected Morocco's claim that it should have sovereignty over Western Sahara based on the past allegiance of the Western Saharans to Moroccan Sultans who directly descended from Prophet Muhammad (Cravens, 1998; Lombardi, 2007; Powell, 2016; Powell & McDowell, 2016).

In contrast, in Islamic international law, faith interacts not only with power but also with tradition. This is because the higher power of the state is not absolutely sovereign as sovereignty belongs to God, and at the same time, the beneficiary(s) of the traditional rights has to be properly identified.

Traditional rights under Islamic international law have been invoked as traditional fishing rights with substantive rules attached as can be seen in *Eritrea/Yemen*. The case lays down the conditions for sustainable usage of such rights. The substantive approach was however not found in ICJ jurisprudence such as *Fisheries Jurisdiction, Germany v Iceland, Merits, Judgment*, [1974] ICJ Rep 175, ICGJ 147 (ICJ 1974), 25th July 1974, which involved an application by West Germany to the ICJ against expansion of the Icelandic fishing zone. The measure taken by Iceland had prevented fishing by foreign vessels in a certain area where West Germany claimed its fishermen benefited from West Germany's historic rights. The case was not a pronouncement that the expansion violated customary international law, but on something to prohibit Iceland from unilaterally expanding its fisheries zone without being opposed by West Germany. The ICJ imposed an obligation to negotiate for an equitable solution, taking into account Iceland's preferential share on the extent of the special dependence on fisheries, and West Germany's established rights in the fishery resources of the said areas on which elements its people depended for their livelihood and economic well-being (para. 77). *Fisheries Jurisdiction* though involved invocation of traditional rights by West Germany. However, no specific reference to traditional fishing or traditional fishing communities was mentioned despite West

Germany's claim that the expansion of Iceland's fisheries zone caused deleterious effects on two coastal German towns (Bremerhaven and Cuxhaven) (para. 56). *Eritrea/Yemen* and *Fisheries Jurisdiction* both involved traditional fishing rights but, in the latter, the ICJ did not satisfactorily identify which German community should be conferred the traditional fishing rights. *Fisheries Jurisdiction* reaffirmed a more state-centric approach in traditional rights where it is up to the state to determine how to distribute those rights (this is within the limits of state sovereignty). However, where states are in dispute territorially, and there is no realistic hope for unilateral distribution of those rights, they (the rights) and who can enjoy them have to be negotiated by states or else, disputes will continue unresolved.

It is not that there have been no other ICJ cases on historic rights that can allow some space to Islamic international law. Most ICJ cases that saw rejection of Islamic international law could involve historic rights in one way or another. This can be seen in *Western Sahara* ICJ GL No 61, [1975] ICJ Rep 12 (religious allegiance of the Western Saharans to Moroccan Sultan), *Qatar/Bahrain* [2001] ICJ Rep 40 (sovereignty claims over Hawar islands and al-Zubarah Settlement on Qatar mainland by both based on the ties with the al-Thani and al-Khalifa rulers, respectively), *Libya/Chad (Territorial Dispute, Libya v Chad, Judgment, Merits*, [1994] ICJ Rep 6, 3rd February 1994) (claim of sovereignty based on religious authority of the Sanusi Brotherhood granted by the Ottomans over the Aouzou Strip), and even in *Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia v Malaysia, Judgment, Merits*, [2002] ICJ Rep 625, 17th December 2002, which involved Malaysia and Indonesia (as argued by Powell and McDowell (2016), where rejection of Malaysia's reliance on the personal ties between the fishermen frequenting the two disputed islands and the Sultan of Sulu could be associated with rejection of the *siyar* concept by the ICJ).

The recourse to Islamic international law arguments in those cases sought to effectuate title consolidation by one state to the exclusion of the others, and not equitable distribution of resources. Hence, the *Eritrea/Yemen* case might not be useful to support China's historic rights arguments because its sovereignty claims will have an excluding effect on other claimant states with regard to the South China Sea. This marks a point of departure against China if it wants to enjoy similar rights propounded in *Eritrea/Yemen*. Furthermore, the *Eritrea/Yemen* case reaffirmed Islamic international law's qualification of

state sovereign rights, something which is inconsistent with what is claimed by China in the South China Sea. It remains to be seen if China can come up with alternative concepts on sovereignty and sovereign rights based on its perspective of international law, and if so, whether they allow sharing of resources on equitable basis to deserving traditional communities from other countries despite the law that interprets allowing exercise of sovereignty over such maritime areas on historical grounds. As mentioned, the second type of historic rights in China's narrative occupies the space between sovereignty and lesser traditional fishing rights, which is the sovereign rights over living and non-living resources. Equitable solution in this area is found in the principle of joint administration under Islamic international law which can run parallel with the concept of joint administration. It is argued that such parallelism is found in the treaty arrangements between Saudi Arabia and Kuwait that provide for equal share of petroleum resources in a partitioned neutral zone between them, and for joint exploitation in adjacent submerged areas (Almuhana, 2021; Malik, 2016). The series of events in Scarborough Shoal involving traditional Filipino fishermen, which included a moratorium imposed on fishing in the area (but the Spratly islands which are located further south are excluded), might be worth an evaluation (Zhang, 2016). Another point to ponder is the militarisation of Chinese fishermen who fished in the nine-dash line and beyond those areas in which China claimed traditional fishing rights for its fishermen (Zhang, 2016).

More recently, it has been argued that China may contend that its fishermen enjoy traditional fishing rights in the North Natuna Sea (Darmawan, 2020). This will add to the historic rights conundrum in the South China Sea claims. It has been argued that China has to enter into a bilateral arrangement with Indonesia in respect of traditional fishing rights as in the case of Malaysia and Indonesia (Darmawan, 2020).

In 1982, Indonesia and Malaysia entered into a bilateral treaty known as the 1982 Treaty between the Republic of Indonesia and Malaysia relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia (1982 Treaty). The 1982 Treaty made Indonesia agree to give Malaysia traditional rights in the sea that straddles between

West Malaysia and East Malaysia in return for Malaysia recognising Indonesia's regime of archipelagic waters. Such archipelagic waters regime seriously affects the "existing rights and other legitimate interests traditionally exercised by Malaysia" (see preamble to the 1982 Treaty) as the western (the Malay Peninsular) and the eastern parts (Sabah and Sarawak) of Malaysia are separated by Indonesia's Natuna and Anambas Isles (which are part of the Riau Islands Province) in the South China Sea. Those rights and interests include air flight and sea communications, and telecommunication cables that need to connect East Malaysia with West Malaysia. However, the scope of what is considered traditional rights, which in this case refers to traditional fishing rights, is not defined by the 1982 Treaty. This is important to note because the other rights provided in the treaty pertaining to navigation, overflight, laying submarine cables and pipelines have clear legal provisions under international law of the sea (particularly the UNCLOS). Hence, the interpretation of the latter rights by Courts, in the case that there is a dispute, can be guided by the UNCLOS whereas the former (traditional rights) will not have the luxury of such legal interpretation. There again, the need to look at the issues from the historical perspective and to place an emphasis on the proven links between time, people (not state) and area arises.

Traditional fishermen ought to show the use of such traditional fishing methods including traditional fishing boats, which is central to their livelihood, being in place for a long time. There is a historic link between the traditional fishing area in Natuna and the East Coast of the Malay Peninsula, particularly Terengganu which is the place of the traditional Malaysian fishermen. More importantly, the traditional fishing rights regime does not compromise Indonesia's sovereignty.

The UNCLOS does not lay down substantive rules on traditional fishing rights because while its Article 51(1) recognises traditional fishing rights of the immediately adjacent neighbouring states in certain areas falling within archipelagic waters of a state, the terms, and conditions for the exercise of such rights shall be regulated by bilateral agreements between the states. The 1982 Treaty between Indonesian and Malaysia places emphasis on equitable use of the traditional fishing area so that non-traditional fishermen from Malaysia, especially those using commercial fishing boats are not allowed to fish there. The 1982 Treaty also provides that the rights shall not be transferred to or shared with third States or their nationals.

The North Natuna Sea is outside the nine-dash line. The issue of sovereignty claim by China may thus not be as relevant to Indonesia as other claimant States, but the nine-dash line may overlap with Indonesia's EEZ and continental shelf. To decipher the traditionality in the Chinese fishermen's activities however can be a daunting task. This is because of the view that traditional fishing activities are static, subsistence-oriented, and non-commercial, which means once the fishermen changed to more commercial techniques, they may no longer be considered traditional fishermen. In the context of the traditional fishing rights negotiated by Indonesia for its Bajau Laut (Bajo) fishermen in Australia's Fishing Zone in Timor Sea and Arafura Sea, it has been argued that despite the Cooperation MoU between Indonesia and Australia, these Indonesian traditional fishermen were still prosecuted under Australia's fishing law and policy which were argued to have failed to cushion the impact of Australia's maritime zone expansion, and that "while Australia and Indonesia continue to enforce policies towards 'traditional' fishermen as if they were people frozen in time", the Bajo were in fact demonstrating a form of cultural dynamism in response to a range of local and international forces (Stacey, 2007, p 4). Traditional fishing rights under Islamic international law have their rationale of preventing the cessation of activities important for the continuity and livelihood of traditional coastal communities; hence, they come with distribution of rights and obligations between the national state of the beneficiaries of such rights and the territorial state. This can be seen in the *Eritrea/Yemen* case in which the beneficiaries of the traditional fishing rights concept were the poor Dankhali fishermen. The Danakhil region of Eritrea is one of the most inhospitable places on earth. The traditional cultural patterns that link the coastal communities of the traditional fishermen with the traditional fishing areas will also have to be preserved.

The *Eritrea/Yemen* case shows that Islamic international law safeguards the existence of such rights through original entitlement of claim to traditional rights based on personal ties. This can be considered distinct from positive international law which requires state sovereign activities, but the latter (positive international law which is state-centric)'s perspective on the 'lesser' traditional fishing rights is already built on the understanding that they are private rights (Anh, 2016). Islamic international law as operationalised by the *Eritrea/Yemen* case law presupposes a continuum from the time of original entitlement until the present, subject to modifications through

negotiated settlement in accordance with international law and domestic law. The continuous and unbroken chain of legal entitlements under Islamic international law is not merely conceptual. Its purist application has passed the test of time as can be seen in St. Catherine's Monastery of Mount Sinai, which is the oldest Christian monastery in the world. The legal entitlements under Islamic international law of such a monastery which is located on the soil of the Muslim Empire and now the Muslim State of Egypt were conceived by 'The Covenant of Prophet Muhammad with the Monks of Mount Sinai' fourteen centuries ago; despite changes of sovereignty over Mount Sinai in the course of time, the monastery continues to be safeguarded until today (Mehfooz, 2022; Morrow, 2013; El-Wakil, 2019), despite changes of sovereignty over Mount Sinai all along.

The *Eritrea/Yemen* case in principle extends the purpose of property ownership under Islamic law to inter-state relations. A man being a God (Allah)'s vicegerent acts merely as a trustee to what he owns and the enjoyment of property (usufruct) by others is protected by certain principles of Islamic law. The *Eritrea/Yemen* case proves to be a fertile ground for these concepts because it was decided by arbitration, and not the ICJ. Article 38 of the Statute of the ICJ does not explicitly prohibit reference to Islamic international law. Arguably, the formation of Islamic international law rules can be customary (in line with Article 38(1)(b), while equity derived from Islamic sources can fall under Article 38(1)(c) (general principles of international law) or that fair and just settlement espoused by Islamic international law mirrors *ex aequo et bono* as per Article 38(2). Undoubtedly, the ICJ has made reference to Islamic international law in several cases, including *North Sea Continental Shelf*, *Germany v Denmark*, *Merits, Judgment*, (1969) ICJ Rep 3, 20th February 1969, *Western Sahara* (aforementioned case number), *Aegean Sea Continental Shelf*, *Greece v Turkey*, *Jurisdiction, Judgment*, [1978] ICJ Rep 3, ICGJ 128 (ICJ 1978), 19th December 1978, *Libya/Chad* (aforementioned case number) and *Qatar/Bahrain* (aforementioned case number). However, such references have not enhanced the application of Islamic law principles by the ICJ whether in its advisory or dispute settlement function. Islamic international law referencing was limited to histories, and where the Court needs to identify the rules, they (rules) could no way be extracted from the historical facts and narratives underlying the Islamic history of the globe. Mentions of Islamic international law did not manifest in identification and use of the law's principles for the Court's legal

reasoning (Lombardi, 2007). Bearing in mind the anachronism dilemma in the historical approach to international law, the efforts to analogise principles on land or property ownership to ownership of territory therefore become harder. Meanwhile, the ease with which the arbitrators in *Eritrea/Yemen* referred to Islamic law principles (even though Eritrea is not a majority Muslim country) can be explained by the more accommodative attitude of arbitration towards *ex aequo et bono* (to mean ‘according to the right and good’) since for such principle to be used before the ICJ, agreement of disputing states may be needed (Ahamat, 2014; Alshadaifat & Silverburg, 2020).

DOES ISLAMIC INTERNATIONAL LAW PROVIDE A MIDDLE GROUND?

Positive international law treats traditional fishing rights separately from maritime-driven title consolidation which, if based on historic considerations, needs to fulfil the requirements of territorial acquisition, something that China’s narrative disagrees with. On the other hand, Islamic international law takes a few steps back from absolutism on territorial sovereignty or else the *Eritrea/Yemen* case would not be capable of imposing obligation on Yemen to respect Eritrean fishermen’s traditional fishing rights, without an agreement between both *ex ante*. Both positive international law and China’s narrative subconsciously converge on the understanding of such absolutism and its monopolising as well as excluding effects against aliens. Then, they go separate ways when it comes to territorial sovereignty over maritime areas. Eurocentric positive international law reverts to the original natural state of law, hence the upholding of the freedom of high seas in the South China Sea’s maritime features because the area is not far-flung enough to warrant the application of customary international law rules on occupation such as those developed in the cases of *Clipperton Island (France v Mexico)* King of Italy (Arbitrator) 26 AJIL 390 (1952) and *Island of Palmas (Netherlands v United States)* Permanent Court of Arbitration, 2 RIAA 829. China’s narrative on the other hand, while demonstrating a positivist character, rejects the original natural state of law in favour of revived historical dominance over the maritime areas. This is despite the fact that should the South China Sea maritime features sustain human habitation, the areas would have been a theatre to major European powers between the 16th and the 19th centuries.

Islamic international law does not share with modern international law the same roots with regard to freedom of high seas. While modern international law promotes freedom of high seas which challenges China's claims of the South China Sea, it was the European powers (Portuguese) who disrupted trade and navigation in the Indian Ocean and the Malay/Indonesian Archipelago (Anand, 1981; Khalilieh, 2019). The maritime history underlying the Islamic world particularly in the East establishes for Islamic international law greater impact on such freedom because at the height of the Islamic Empire, maritime trade in the Eastern Seas flourished. Seafarers, traders and merchants from all nations navigated the coasts of Africa, Arabia, Persia, India and the Malay/Indonesian isles without being threatened by Muslim, Indian or Chinese imperial ambitions to conquer the relevant seas and their trade and riches (Anand, 1981; Khalilieh, 2019). The works of Muslim jurists have laid down the legal theory of the sea as a vehicle for these nations and peoples in times of war and in peace (Bouzenita, 2021). The appraisal of those jurists' writings by Western literature has mainly emphasised on the cultural rather than legal aspects (Bouzenita, 2021); even though the Muslims themselves whether they were jurists, seafarers or geographers had developed maritime legal rules that contributed to spiritual, social and cultural diversity parallel to the coastal peripheries both in the Mediterranean Sea and the Indian Ocean (Azeem, 2020). On the "possible" contribution of oriental law of nations including the Islamic ones to modern international law corpus on freedom of the sea, neglect is the best word to describe it.

Hugo Grotius's *mare liberum* was conceived against the backdrop of an environment fed by the displeasure of Portuguese monopoly of the Eastern Seas and the unity and harmony of the Indian Ocean before the arrival of the Portuguese (Anand, 1981; Van Ittersum, 2021). Grotius's teachers who belonged to the School of Salamanca located in Spain were exposed to Muslim practices in the Mediterranean (Bouzenita, 2021; Somos & Smeltzer, 2020). Grotius's legal offensive on the conduct of the Portuguese must be read in light of the fact that *mare liberum* was used in Grotius's legal defence of his company which was the Dutch East India Company and country, namely the Netherlands (Anand, 1981; Bouzenita, 2021), both of whom had a lion's share in depriving freedom of the sea in the Malay/Indonesian Archipelago. The Amboyna massacre of numerous British and other non-Dutch subjects in spice-rich Moluccas occurred during the lifetime of Grotius, and the event sparked interest about state practice

on freedom of the sea since the Dutch used to be the one who opposed maritime trade monopoly by the Portuguese. Grotius-propounded *mare liberum* was accepted in Europe only after the European powers could see the benefits of freedom of navigation and enhanced trade towards the Industrial Revolution, only to be prone to abuses by mighty nations at the expense of the weaker ones (Anand, 1981; Van Ittersum, 2021). It can be argued that since the 18th century, there has been a shift in the jurisprudence of international law from natural law to positivism, which sought to justify European colonialism (Hueck, 2001; Jones & O'Donoghue, 2022). Since then, the history of modern international law had centred around the “imagination” by international law lawyers of Europe and how its nation states (and Empires) were formed (Tarazona, 2015). However, things have now changed. Post colonialism, even the alternative Third World Approach to International Law (TWAIL) has become a method in the history of international law, where a more pluralistic understanding of legal issues is envisaged (Bendel, 2021). The shift from naturalism to positivism may no longer be an exclusive purview of the West. Such shift can also happen to a state which used to be weak but has emerged as a regional or international power post colonialism. This can have an impact on TWAIL which builds upon the suspicion of Eurocentric narratives of international law (Bendel, 2021). With the emergence of China, such critical view may now shift to a Third World State. Given the supposed plurality of international law from Third World perspectives, the inclusion of an alternative Third World approach that is *siyar* can prevent biases in the TWAIL's critiques of the Western approach.

At the time when Islamic law rules on the subject matter involved, Muslim jurists and scholars did not possess similar positions as Christian clerical establishments which could ratify a treaty that divided the 'New World' between Spain and Portugal (the 1494 Treaty of Tordesillas). Muslim jurists and scholars were merchants or seafarers like Ahmad ibn Majid (Bouzenita, 2021). These jurists and scholars travelled on their own and might not write legal compendia on behalf of their ruler, let alone issue decrees which bound rulers and sultans, although they might be royal guests in transit. Their vocation and knowledge combined, allowed greater immersion of Islamic rules with the practice of the people off-shore and on-shore especially in the Indian Ocean region (Risso, 1995; Bishara & Chatterjee, 2021; Chowdhary, 2021).

There are anomalies within Islamic international law because persistent conflicts among Muslim States arguably could not be solved by Islamic law principles. This can be seen in *Qatar/Bahrain* where deeper Islamic proposed solutions through regional mechanisms did not work, but the ICJ successfully put an end to the dispute (Powell, 2016). However, that does not restrict the discourse should researchers adopt historical analysis to international law. The historical and comparative methods used (these refer to Harvard's New Approaches to International Law [NAIL] project) have significant reflection on the political objectives, and where the theoretical underpinnings, operational procedures, and legal frameworks of international law are critically analysed; judgement on international law and the international law discipline was often passed without explicitly laying out any alternatives or solutions (Hueck, 2001). Islamic international law has strong links with customary international law (Zahid & Shapiee, 2010a) and *pacta sunt servanda* tradition (Zahid & Shapiee, 2010b). However, the reason Islamic international law is not attractive to Muslim governments needs to be investigated. The worry when bringing a dispute for judicial settlement is that territorial disputes may end up with a zero-sum solution, and what entails from the territorial gains and losses respectively will test the relations between the disputing states. In this regard, Islamic international law will espouse respect for the customary rights or entitlements of peripheral communities, but it will not allow appropriation of the sea or ocean by states.

CONCLUSION

Under Islamic international law, states are not allowed to extend their sovereignty to the sea. At the same time, where history shows that certain people have been enjoying certain traditional rights including fishing rights, the enjoyment of these rights can be made possible regardless of whether there is a legal finding of which state has or has no sovereignty over the maritime area where those rights operate. Under Islamic international law, the determination of state sovereignty and ensuring respect of traditional rights can be separable as shown in *Eritrea/Yemen*.

As discussed, in detail earlier when it comes to the South China Sea, there is increasingly limited room for convergence between Western

or Eurocentric positive international law and China's narrative on the understanding of what historical rights can give China legal title over the maritime areas that it claims. China's narrative will act as a State practice of China over what it considers to be under the ambit of its sovereignty, but this has been protested to by other claimants and interested states holding on to positive international law norms. However, China's narrative does not challenge the general paradigm of sovereign power and control over areas which the State claims to have title. Here, the areas are maritime areas. This is where compromises are difficult to be made.

This paper focuses on Islamic international law because the principles established in an international judicial decision may challenge such a paradigm. Islamic international law has greater flexibility in upholding traditional rights of non-state actors. However, if such flexibility is not considered in the correct context, its misuse and misinterpretations will pose danger. While it is important to ascertain who can qualify as the beneficiary of a traditional right under international law, and what they can and cannot do, states will not compromise their territory, sovereignty and sovereign rights, and give way to equitable rights without any consideration. Otherwise, all parties will return to the initial clash between UNCLOS and ICJ jurisprudence and China's narrative on historic rights, giving it title to maritime areas in the South China Sea.

Hence, future research needs be conducted on the histories of the relations between China, the West and the other civilisations adjacent to the South China Sea. This is to better understand the contesting narratives over the areas subject to the overlapping claims and the activities that happened thereon. More research should be undertaken on the extent to which the arrival of European powers changed those narratives and impacted on the control of the activities there.

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