THE DIVISION OF THE SEAS IN INTERNATIONAL AND ISLAMIC LAW AND THE CONCEPT OF *ḤARĪM AL-BAḤR*: A COMPARATIVE *FIQH* STUDY

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Abstract

This original research paper investigates how the division of the seas between international (the high seas) and territorial waters is approached in Islamic law as compared to international law. It describes the conceptualization of the seas against the background of contemporary international and Islamic law and analyses the Islamic legal concept of the appurtenance of the sea, *ḥarīm al-baḥr*, as a suitable vehicle to accommodate the modern division. The paper draws on source material from different Islamic schools, with a focus on the Ibāḍī school, which historically has paid relatively more attention to the seas. It suggests legal mechanisms that may be activated with regard to notions of territorial and international waters in Islamic law. The study arrives at the conclusion that some modern representations of *ḥarīm al-baḥr* are not commensurable with its intended legislative purpose (*ʿillah*).

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Introduction

Contemporary international law is known for its division of the seas between international (the high seas) and territorial waters. This division is of importance for topics ranging from the usage of resources to maritime piracy. Islamic law, on the other hand, has historically followed a rather specific conceptualization of the division of lands (*taqsīm al-maʿmūrah*) with manifold implications on Islamic legal rules pertaining to personal status, punishments, and financial transactions. How do international law and classical Islamic law each visualize and conceptualize the seas? Do both systems have a similar concept of the division of the seas? Did the classical division of lands in Islamic law affect the status of the seas? Is the concept of *ḥarīm al-baḥr*, the protective zone of the sea, suitable to advocate a division of the seas on Islamic grounds, or could there be other Islamic legal mechanisms? The paper investigates these questions and concludes by suggesting a number of Islamic legal mechanisms vis-à-vis a possible division of the seas in Islamic law.

On the Conceptualization of the Seas in International Law and Islam

The United Nations Convention on the Laws of the Sea (UNCLOS) defines territorial waters as extending to 12 nautical miles from the baseline or low water mark off the coast. This belt is considered part of the sovereign territory of the state, subject to its jurisdiction. Sovereignty also extends over bed and subsoil of the territorial sea, as well as its air space.[1] Innocent passage of war and trade ships as well as transit are permissible.[2] Some states claim a contiguous zone of up to 24 nautical miles; this is used to prevent or punish infringement. Differing interpretations of the Law of Sea may lead to conflict.[3]

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1 United Nations Convention on the Law of the Sea, 10 December 1982, Art 2(1), 23 ff. https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

2 UNCLOS, Articles 17 ff., 23 ff.

3 UNCLOS, 23 ff.; Michael Tsimplis, "The Liabilities of the Vessel," in *Maritime Law*, ed. Yvonne Baatz, 5th ed. (London: Routledge, 2020), 313 ff.,

While the concept of a territorial belt off the coast existed prior to UNCLOS, the establishment of the agreed-upon distance developed over time. From the 18th century, states claimed three (British Empire, US, France) to six (Spain) nautical miles, corresponding to the distance of a cannon shot at the time.[4] After World War II, many states claimed the continental shelves –some (e.g., Chile, Peru) extending up to 200 nm– so as to claim potentially valuable resources for themselves. These claims, however, have been disputed as an overextension of territorial claims.[5]

The sources of UNCLOS and preceding international maritime laws are commensurate with the five sources mentioned in Article 38 of the Statute of the International Court of Justice, listed as primary sources (conventions or treaties, customary law, and general principles recognized by civilized nations), and as secondary sources, judicial decisions, and the teachings of highly qualified publicists.[6]

As for the high seas or international waters, UNCLOS Article 87 defines the "Freedom of the high seas" thus:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises,

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https://doi.org/ 10.4324/9781003046943-7; Anthony Aust, *Handbook of International Law* (Cambridge, UK & New York: Cambridge University Press, 2005), 301 ff.

4 James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (New York: Oxford University Press, 2011), 115.

5 Kraska, *Maritime Power*, 88.

6 The exact wording of Art. 38 is as follows:

1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b) international custom, as evidence of a general practice accepted as law;
   c) the general principles of law recognized by civilized nations;
   d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. (International Court of Justice, *Statute of the Court*, icj-cij.org).

> inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII. 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.[7]

Western readings on the history of international law describe the division between territorial and international waters as the result of an ongoing discussion in the 17th century. Spain and Portugal, the emerging maritime powers of the late 15th and 16th centuries, had divided the seas between themselves. Hugo Grotius (and others, see below) had opposed this, underlining the freedom of the seas.[8]

Before the advent of Islam, the Mediterranean was governed by Roman law. A common point of reference in Western readings of the history of law, Roman law regarded the open sea as *res nullius* (ownerless property) or *res communis* (common property).[9] Roman vessels sailing outside coastal view were seen as extensions of the land, but imperial order could not be established beyond the human element on the ship.[10] Roman jurisdiction was exercised over any part of the coastal belt under Roman control.[11] As for the Indian Ocean, however, no unified sociocultural or geopolitical entity is known to have existed prior to the advent of Islam.[12] The free use of the ocean

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7 UNCLOS, Article 87.

8 Kraska, *Maritime Power and the Law of the Sea*, 47ff.; Hugo Grotius, *The Free Sea*, trans. Richard Hakluyt, ed. David Armitage (Indianapolis: Liberty Fund, 2004).

9 Kaius Tuori, "The Savage Sea and the Civilizing Law: The Roman Law Tradition and the Rule of the Sea," in *Thalassokratographie: Rezeption und Transformation antiker Seeherrschaft*, ed. Hans Kopp and Christian Wendt (Berlin & Boston: De Gruyter, 2018), 201 ff., https://doi.org/10.1515/9783110571820-009; see also Hassan S. Khalilieh, *Islamic Law of the Sea: Freedom of Navigation and Passage Rights in Islamic Thought* (Cambridge & New York: Cambridge University Press, 2019), 28, https://doi.org/10.1017/9781108630702.

10 Khalilieh, *Islamic Law of the Sea*, 28.

11 Khalilieh, *Islamic Law of the Sea*, 28.

12 *Ibid*., 28.

seems to have been common ground up to the advent of the new colonial powers from the 15th century onwards.[13]

Grotius, in his *De Jure Praedae: On the Law of Prize and Booty*, devotes a chapter to the "Freedom of the Sea." This chapter appeared in 1609 under the title *Mare Liberum* (The Free Sea).[14] Grotius is, in the Western reading of the history of international law, considered to be the intellectual precursor or even founding father of modern international law of the seas. There is, however, reason to question this evaluation, as much as there is a need to find the missing link between Roman law concepts and those formulated by Grotius. Grotius, who was Dutch, built on the legal philosophy of his predecessors, particularly the School of Salamanca (the Spanish scholastics), Vitoria and Suarez, who had been exposed to the centuries' old established practice of Muslim rule in the Mediterranean.[15] Given the historical background of colonial competition between the great seafaring powers of the day, it may have been Grotius' main intention to counteract the Spanish and Portuguese approach of claiming the high seas for themselves.[16] As Manṣūr rightly pointed out, the Dutch had a large trade fleet, but only a small military one.[17]

The sea routes to India, the East African Coast, Java, and China were already established in pre-Islamic times.[18] Muslim exposure to the sea and seafaring experience may have differed widely according to the advent of Islam in the different regions of its emerging world. While

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13 David Armitage, introduction to *The Free Sea*, by Hugo Grotius, trans. Richard Hakluyt (Indianapolis: Liberty Fund, 2004), xi-xx; cf. Ḥasan Ṣāliḥ Shihāb, *Aḥmad ibn Mājid wa-l-milāḥah fī l-Muḥīṭ al-Hindī* (Raʾs al-Khaymah: Markaz al-Dirāsāt wa-l-Wathāʾiq, 2001), 43 ff.

14 Armitage, introduction, xi.

15 Mark Somos and Joshua Smeltzer, "Vitoria, Suárez, and Grotius: James Brown Scott's Enduring Revival," *Grotiana* 41 (2020), 140 ff.; more research is needed to identify Islamic influences in the writings of these scholars.

16 See Kraska, *Maritime Power*, 48.

17 ʿAlī ʿAlī Manṣūr, *al-Sharīʿah al-Islāmiyyah wa-l-qānūn al-duwalī al-ʿāmm* (Cairo: al-Majlis al-Aʿlá li-l-Shuʾūn al-Islāmiyyah, 1971), 105.

18 George Fadlo Hourani, *Arab Seafaring in the Indian Ocean and Medieval Times* (New York: Octagon Books, 1975), 3 ff.; Philippe Beaujard, *The Worlds of the Indian Ocean: A Global History Volume 1: From the Fourth Millennium BCE to the Sixth Century CE* (Cambridge & New York: Cambridge University Press, 2019), 566 ff.

the Arabs from inland areas of the Arabian Peninsula may have been newcomers to seafaring, Omani and Yemeni tribes had a thorough naval experience sailing and trading the Indian Ocean. Ibn Khaldūn (d. 804/1406) mentions Bedouin nature as a reason for the lack of seafaring culture. In his *Muqaddimah*, he records the initial skepticism of ʿUmar ibn al-Khaṭṭāb about the sea, and the first reluctant steps toward building an Islamic fleet in the time of ʿUthmān, upon Muʿāwiyah's repeated request, which culminated in the first campaign on Cyprus in 27-28 AH /649 CE.[19]

Subsequent centuries experienced a quantum leap, from ʿAmr ibn al-ʿĀṣ' famous dissuasion to ʿUmar from venturing into the sea – warning him that humans are like "worms clinging to a piece of wood" at sea,[20] to eventual Islamic dominance over the Mediterranean.[21] *Ribāṭ* and jihad[22] on the sea and its littoral became realities in the *thughūr* (sg. *thaghr*), the military outposts of North Africa and Greater Syria (*bilād al-shām*), along the coastline of Syria, Lebanon, and Palestine. The Mediterranean advanced from a Roman inland sea (*mare nostrum* or *baḥr al-rūm*, the Roman Sea, in Arabic parlance) to a Muslim-dominated sea (referred to as *baḥr al-shām*, the Sea of Greater Syria). To the East, the Indian Ocean became culturally unified with the advent of Islam,[23] Muslim fleets sailed from Oman via Melaka to China. A (potential) unification of legal concepts and procedures along the coastlines is still subject to research. The existence of the Malay maritime code (*Undang-undang laut Melaka*) may give insights into the importance of Islamic legal concepts of seafaring, at least for later periods.[24] To the West, Muslim historians (such as al-Masʿūdī [d.

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19 See Abū Zayd Walī al-Dīn ʿAbd al-Raḥmān ibn Muḥammad Ibn Khaldūn, *Muqaddimat Ibn Khaldūn*, ed. ʿAbd Allāh Muḥammad al-Darwīsh (Damascus: Dār Yaʿrib, 2003), I, 436 ff.

20 Abū Jaʿfar Muḥammad ibn Jarīr ibn Yazīd al-Ṭabarī, *Tārīkh al-rusul wa-l-mulūk*, 2nd ed. (Cairo: Dār al-Maʿārif, 1975), III, 259 ff.

21 Ibn Khaldūn, *Muqaddimah*, I, 439.

22 The term *ribāṭ* (from r-b-ṭ, to bind) specifically refers to settling in the fortified outposts of the Islamic state for defensive purposes, while *jihād*, from *j-h-d*, to strive for the sake of Allah, in this context, generally refers to military and affiliated actions.

23 See Khalilieh, *Islamic Law of the Sea*, 89.

24 Richard Winstedt and P. E. de Josselin de Jong, "The Maritime Laws of Malacca," *Journal of the Malayan Branch of the Royal Asiatic Society* 29, no. 3 (1956), 22-59; Zakaria M. Yatim, "The Development of the Law of the Sea in Relation to Malaysia,"

346/957]), have preserved random reports on travels from the Iberian Peninsula across the Atlantic (*baḥr al-ẓulumāt*, the "ocean of darknesses").[25] The Red Sea had the political and cultural status of an inland lake from early Islamic times; so had the Black Sea under Ottoman rule until the 18th century.[26] By the 14th-15th centuries, the unrivaled expertise of Muslim geographers, seafarers, and cartographers was used by the newly arising colonial powers, Portugal and Spain, in their struggle for hegemony over the oceans.[27] In other words, seas and littorals globally were exposed to Islamic culture, and Islamic culture, inclusive of its law and sciences, was affected by a preoccupation with the sea.

The seas either divided between the realms of Islam and non-Islam and represented actual borders, or they gradually came to be surrounded by Islamic territories, like the Mediterranean after the consolidation of Islamic hegemony and the Red Sea. They became places of hajj routes, travel, wars and treaties, taking prisoners, undertaking trade, and earning a livelihood. The seas remained places of interaction between individuals of different religions and cultures.[28] The influence of maritime Islamic culture on the adjoining peoples and cultures of both the Mediterranean and the Indian Ocean is well established.[29] The influence of Islamic legal rules on institutions,

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Malaysian Management Journal 1 (1992), 87-88; Stamford Raffles, "The Maritime Code of the Malays," *Journal of the Straits Branch of the Royal Asiatic Society* 3 (July 1879), 62-84; Mardiana Nordin, "*Undang-Undang Laut Melaka*: A Note on Malay Maritime Law in the 15th Century," in *Memory and Knowledge of the Sea in Southeast Asia*, ed. Danny Wong Tze Ken (Kuala Lumpur: Institute of Ocean and Earth Sciences [IOES], University of Malaya, 2008), 15-21.

25 Anwar ʿAbd al-ʿAlīm, *al-Milāḥah wa-ʿulūm al-biḥār ʿinda l-ʿArab* (Kuwait: al-Majlis al-Waṭanī li-l-Thaqāfah, 1979), 34 ff.

26 Khalilieh, *Islamic Law of the Sea*, 8; Nihat Çelik, "The Black Sea and the Balkans under Ottoman Rule," *Karadeniz Araştırmaları* 6/24 (2010), 19.

27 See Hourani, *Arab Seafaring*, 51 ff.; Beaujard, *Worlds of the Indian Ocean*, 566 ff.

28 See Omar H. Ali, *Islam in the Indian Ocean World: A Brief History with Documents. The Bedford Series in History and Culture* (Boston & New York: Bedford/St. Martin's, 2016).

29 For the Indian Ocean, see the newer work of Abdulrahman Al-Salimi and Eric Staples, *A Maritime Lexicon: Arabic Nautical Terminology in the Indian Ocean*, ed. Abdulrahman Al-Salimi and Ersilia Francesca (Hildesheim: Olms Verlag, 2019).

practices, and legal theories in East and West, however, has hardly been researched.[30]

Contemporary literature often belittles Muslim jurists' contributions to the law of the seas, within the Islamic framework as well as with regard to the Islamic influences on international legal concepts. Khadduri states, "Most of the Muslim jurists are silent about the sea, and those few who treated the subject scarcely provide us with adequate materials to reconstruct a legal theory of the sea as a vehicle between nations in war and peace."[31] Udovitch, in his introduction to *Kitāb Akriyat al-sufun*, an 11th century treatise on maritime trade laws, echoes this tone.[32] While it is obvious to remind these voices of the casuistic character of Islamic law,[33] one should also not forget that

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30 Contemporary research on Islam in the Indian Ocean does not focus on legal rules and institutions, but on Islam as a cultural force and unifier between stakeholders and networks as well as navigation; see Tuba Azeem, "Muslims' Share of the Waves: Law, War and Tradition," *Policy Perspectives* 17, no. 2 (2020), 81, https://doi.org/10.13169/polipers.17.2.0067; cf. Patricia A. Risso, *Merchants and Faith: Muslim Commerce and Culture in The Indian Ocean*, ebook edition (New York: Routledge, 2019); Hourani, *Arab Seafaring*; Syed Sulaiman Nadvi, *The Arab Navigation* (Lahore: Ashraf, 1966). For an exhaustive bibliography on navigation studies, cf. Juan Acevedo and Inês Bénard, "Indian Ocean Arab Navigation Studies Towards a Global Perspective: Annotated Bibliography and Research Roadmap," Technical Note 2, Version 3, University of Lisbon: ERC RUTTER Project, 31 December 2020, https://doi.org/10.6084/m9.figshare.12389855.
Hassan Khalilieh in his *Islamic Law of the Sea* has recently expounded on the immense contribution of Islamic Law and practice on the formation of the international law of the seas.
See also Khaled Ramadan Bashir, *International Islamic Law: Historical Foundations and Al-Shaybani's Siyar* (Cheltenham: Edward Elgar, 2018), doi:10.4337/9781788113861.

31 Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore & London: The Johns Hopkins Press, 1955), 111 ff.: "Few subjects has the juristic literature of Islam treated so inadequately as salt-water warfare. The indifference reflects not only early Muslim mistrust of the Sea, but also, perhaps more important, the fact that Muslim power was essentially a land –not sea– power." (p. 109); This statement unfortunately defies the historical reality of Muslim marine presence in the Mediterranean, the Red Sea, and the Indian Ocean.

32 Abraham L. Udovitch, "An Eleventh Century Islamic Treatise on the Law of the Sea," *Annales Islamologiques* 27 (1994), 38.

33 See Azeem, "Muslims' Share of the Waves," 76.

specific, relevant manuscripts may have been lost. The very discovery of *Kitāb Akriyat al-sufun,* "The Book on Hiring Ships," an 11th century Mālikī treatise,[34] may be indicative of the existence of similar manuscripts yet to be unearthed. As the focus of other contemporary scholars may have been on the cultural role rather than the legal agency of Islam in the seas, future research may bring the actual Islamic legal contribution into the limelight.[35] To assume a lack of (legal) interest in the seas defies centuries of historical Islamic hegemony over the same.[36] Initial research seems to hint that Ibāḍī scholars were more focused than others on the seas.[37] These writings may have been

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[34] Muḥammad ibn ʿUmar al-Kinānī, *Kitāb Akriyat al-sufun*, translated and analyzed by Hassan S. Khalilieh, in *Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800-1050): The Kitāb Akriyat al-Sufun vis-à-vis the Nomos Rhodion Nautikos* (Leiden & Boston: Brill, 2006); see also Udovitch, "An Eleventh Century Islamic Treatise on the Law of the Sea," 37-54.

[35] As Azeem points out, "There is vast amount of scholarly work to be unearthed in primary Sunni schools, historical accounts of Muslim travelers, legal commentaries, fatawas, khitab, glossaries, policy and legal directives of rulers, in the Mediterranean and Indian Ocean rims": Azeem, "Muslims' Share of the Waves," 81; Khalilieh made a major contribution in uncovering the Muslim contribution to maritime laws, but focuses, in his own mold, on natural and customary law concepts; see Khalilieh's *Admiralty and Maritime Laws in the Mediterranean* and *Islamic Law of the Sea*.

[36] As does, for instance, Kaegi's remark that "There was no tradition of Arab or Muslim seafaring" (Walter E. Kaegi, *Muslim Expansion and Byzantine Collapse in North Africa* [Cambridge University Press, 2010], 209), which does obviously not consider Arab seafaring experience in the Indian Ocean or Muslim hegemony over the Mediterranean, see also Udovitch, "Treatise on the Law of the Sea," 37-54.

[37] Wilkinson enthusiastically asserts that the Ibāḍī school is the only school to develop a system of maritime trade laws. The seas obviously played a major role for Oman, Ibāḍī heartland for centuries. The possibility that more directed research may uncover the existence of comparable laws in other legal schools should, however, not be excluded; John C. Wilkinson, *Ibāḍism: Origins and Early Development in Oman* (Oxford: Oxford University Press, 2010; Oxford Scholarship Online, 2011), 21, doi:10.1093/acprof:oso/9780199588268.001.0001.
For the exposure of Ibāḍī *fiqh* encyclopedias to maritime questions see Nāṣir ibn Sayf al-Saʿdī, "al-Baḥr min khilāl al-jawābāt wa-l-nawāzil al-fiqhiyyah al-ʿUmāniyyah: al-nuẓum, wa-l-ʿalāqāt, wa-l-ḥawādith," in *al-Awrāq al-ʿilmiyyah [Proceedings] li-l-muʾtamar al-dawlī: Turāth ʿUmān al-baḥrī*, 23-25 October 2018, ed. Aḥmad ibn Ḥāmid al-Rubʿānī (Al Khoudh, Oman: Markaz al-Dirāsāt al-

overlooked in the mainstream literature. Based on the current source situation, it seems premature to state that "neither the schools nor the other legal authorities set up comprehensive maritime codes."[38] Maritime codes, such as the Malaysian *Undang-undang laut Melaka*, have come down to us from later eras (here, the 15th century), and there is no reason to categorically deny the possibility that earlier codes existed.

The question that needs to be asked in this context is whether there was, from the point of view of the *fuqahāʾ* (scholars of *fiqh*), a need for a particular Islamic theory of the "sea as a vehicle between nations in war and peace"[39] that is different from the legal theory of international relations *(siyar*; see below). Rather than implying neglect on the part of the Muslim jurists, I suggest that they saw no need for a distinctive legal theory of international relations regarding the seas, because most legal cases (regarding warfare, highway robbery and piracy, travel, *amān* [security], trade and customs) did not differ in between the land and the seas.

Taqsīm al-maʿmūrah, the Division of Land – and Seas? On the Conceptualization of the Seas in Islamic Law

Islamic *fiqh* compendia have always been expressive of the reality at hand. They discussed real legal cases, attempting to provide actionable solutions. It lies in the nature of these texts to discuss legal questions (*masāʾil*) that need a solution, not to formulate theories. The theoretical foundations, however, can be deducted from a comparison and analysis of these legal questions and their discussion. Cases related to the sea, whatever is taken from it of food and resources, piracy, trade, taxes, jihad, *ribāṭ*, taking prisoners, individuals stranded at the shore, people lost on the seas, and so forth, are integrated into the books of *fiqh* of all legal schools. (Legal) conceptualizations of the seas may also be found in books of geography and nautical sciences, history, travelogues, and contracts, with regard to Muslim practices across time and space.

ʿUmāniyyah, Sultan Qaboos University, 2020), 208-231; also, in the same proceedings: al-Khulūd bint Ḥamdān Khāṭiriyyah, "Turāth ʿUmān al-baḥrī fī l-fiqh al-Ibāḍī min khilāl Kitāb Bayān al-sharʿ li-l-shaykh al-qāḍī Muḥammad ibn Ibrāhīm al-Kindī (t. 508 hijrī/1115 mīlādī)," 443-463.

38 Azeem, "Muslims' Share of the Waves," 76.

39 Khadduri, *War and Peace in the Law of Islam,* 111 ff.

The Islamic theory of international relations (generally *siyar*, pl. of *sīrah*[40]) pivots around rules of conduct between Muslims and non-Muslims in both domestic and international spheres, in times of war and peace. Given the monistic character of Islamic law, there is no difference between sources of legal rules in international relations and others: they are derived from the primary and secondary sources.[41] First specialized extant treatises, such as the works of al-Awzāʿī (d. 157/774), his student al-Fazārī (d. 188/803), and standard works such as al-Shaybānī's (d. 189/804) *K. al-Siyar al-kabīr* stem from the second century AH, and subsequent *fiqh* compendia of all Islamic schools include discussions of related legal cases.[42] In classical Islamic jurisprudence, lives, properties, and minor children of non-Muslims inside and outside the abode of Islam are protected through covenant or treaty (generally, *ʿahd*; more specifically, *amān*: a guaranty to security of life and possessions). An *amān* granted to non-Muslims can be temporary (*amān al-mustaʾmin*, *amān muʾaqqat khāṣṣ*) or permanent (*amān ahl al-dhimmah*, *amān muʾabbad*). While each of these forms of *amān* or covenant has different conditions in terms of who may conclude it on behalf of the Muslims (the *imām* or head of state, his representative, or any Muslim individual), the basic principle is that authority needs to be invested in that person or group of persons

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[40] The Ḥanafī scholar al-Sarakhsī (d. 483/1090) produced an often quoted definition of the term *siyar* in the introduction to his Book of Siyar (*Kitāb al-siyar*), a chapter of *K. al-Mabsūṭ*: "Know that *al-siyar* is the plural form of *sīrah* (transl. method, way): and this book has been named so as it explains the method of the Muslims in their transactions (*muʿāmalāt*) with the polytheists (*mushrikūn*) of the people of war (*ahl al-ḥarb*), and those who are under treaty among them (*ahl al-ʿahd minhum*), of *mustaʾminūn* and *ahl al-dhimmah*, as well as with the apostates (*al-murtaddūn*), who are the most despicable disbelievers, as they are in a state of denial after their profession of faith; as well as with rebels (*ahl al-baghy*), whose situation is unlike the situation of the polytheists, even if they are ignorant and misguided in their interpretation [of Islam]; Abū Bakr Shams al-aʾimmah Muḥammad ibn Aḥmad ibn Sahl al-Sarakhsī,: *Kitāb al-Mabsūṭ* (Beirut: Dār al-Maʿrifah, 1993), X, 2.

[41] See Anke Iman Bouzenita, "The siyar – An Islamic law of nations?" *Asian Journal of Social Science* 35, no. 1 (2007), 19-46, https://doi.org/10.1163/156853107X170150, 37 ff.

[42] See Bouzenita, "Transgressing the Terms of Covenant in the Islamic Jurisprudence of International Relations: The cases of Socotra and Cyprus in Comparison," *Intellectual Discourse* 28, no. 2 (2020), 460 ff.

by the head of state. Once established, the *amān* is to be respected. It can be cancelled due to a proven transgression from the person under covenant. While the permanent *amān* (*dhimmah*) is comparable to the modern concept of citizenship, the temporary *amān* is needed to legally enter *dār al-Islām* for any purpose, including trade. Absence of *amān* may entail loss of life and property or be a reason for legal expulsion. The *mustaʾmin* (seeker of *amān*) needs to be allowed to transit or be escorted safely (i.e., safe passage) back to his *maʾman* (place of entry or security) once his term or mission has ended.[43]

Classical *fiqh* compendia are famous for their division of lands into different territories, i.e., the territory of Islam (*dār al-Islām*) or the territory of unbelief (*dār al-kufr*, also *dār al-ḥarb*). This division does not necessarily correspond to any fixed geographical location, but rather it depends on the laws and systems that are implemented, and upon security and defense.[44] *Dār al-ʿahd*, or the land under covenant, is sometimes constructed as a third entity, but legally pertains to either one of the abodes, depending on the terms of contract.[45] Given the prominence this division has in classical *fiqh* compendia, due to its consequences on many legal cases (usually referred to under *ikhtilāf al-dārayn*: the differences in the two abodes), one would expect that any discussion of the seas and their possible division would have been held within this framework. It seems, however, that classical scholars have not explicitly devoted themselves much to the sea and its legal status as far as this division is concerned. This does not necessarily

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[43] ʿAbbās Shawmān, *al-ʿAlāqāt al-duwaliyyah fī l-sharīʿah al-Islāmiyyah* (Cairo: Dār al-Thaqāfah li-l-Nashr, 1999), 73 ff.; cf. Bouzenita, "Transgressing the Terms of Covenant," 460 ff.

[44] The bulk of available literature on this topic is immense; I therefore refer to the minimum of works providing definitions and terminology: on *dār al-Islām*/*dār al-ḥarb* and related rules, cf. Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmiyyah, *al-Mawsūʿah al-fiqhiyyah al-Kuwaytiyyah* (Kuwait: Dār al-Salāsil, 1404-1427/1983-2006), XX, 201 ff. (definitions); on *maʾman* see *al-Mawsūʿah al-fiqhiyyah al-Kuwaytiyyah*, XLII, 228 ff.; cf. Muḥammad Khayr Haykal, *al-Jihād wa-l-qitāl fī l-siyāsah al-sharʿiyyah* (Beirut: Dār Ibn Ḥazm, 1996), 662ff.; for different *fiqhī* definitions, cf. Luṭfī Ismāʿīl al-Faṭṭānī, *Ikhtilāf al-dārayn wa-atharuhū fī aḥkām al-munākaḥāt wa-l-muʿāmalāt* (Cairo: Dār al-Salām, 1998), 23 ff.

[45] Al-Faṭṭānī, *Ikhtilāf al-dārayn*, 37ff.

mean that the seas are not subject to this division in their legal conceptualization.[46]

The sea was obviously considered as defying security. Some early Ibāḍī *fiqh* encyclopedias, such as Abū Bakr al-Kindī's (d. 557/1162)[47] *Muṣannaf*, advise that earning a livelihood should not be sought through the sea, whereas traveling by sea for hajj and jihad was considered acceptable.[48] Al-ʿAwtabī (d. 512/1119), the author of *K. al-Ḍiyāʾ*, a work of comparative *fiqh*, mentions the teaching of al-Imām al-Shāfiʿī that hajj is not obligatory for the people of Oman as the sea is not a safe hajj route, and no enemy could be more inimical than the sea.[49] Al-ʿAwtabī concludes that the pilgrimage of the people of Oman counts like two pilgrimages, due to its difficulty.[50] The Ḥanbalī scholar Ibn Qudāmah (d. 620/1223) in his *al-Mughnī* asserts, on the authority of the Prophet (pbuh), that someone martyred at sea has the equivalent reward of two martyrdoms on land.[51]

The Ḥanafī compendium *Radd al-muḥtār ʿalá l-durr al-mukhtār* by Ibn ʿĀbidīn, (d. 1252/1836) mentions different views with regard to the categorization of the seas as *dār al-Islām* or *dār al-ḥarb* (*dār al-*

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[46] Interestingly, the issue seems to have been neglected by some contemporary authors as well. Khalilieh (*Islamic Law of the Sea*) goes to great lengths to explain the division of the world into the abodes of Islam and *kufr* and the various affiliated legal rules, but does not examine the status of the seas in the jurisprudential writings with regard to this division.

[47] Abū Bakr Aḥmad ibn ʿAbd Allāh ibn Mūsá al-Kindī, a polymath and *mujtahid* from Nizwa, Oman, who left a rich literary heritage. See Sayf ibn Ḥamūd ibn Ḥāmid al-Baṭṭāshī, *Itḥāf al-aʿyān fī tārīkh baʿḍ ʿulamāʾ ʿUmān*, 2nd ed. (Oman: Maktabat al-Mustashār al-Khāṣṣ li-Jalālat al-Sulṭān li-l-Shuʾūn al-Dīniyyah wa-l-Tārīkhiyyah, 2004), I, 362 ff.

[48] Abū Bakr Aḥmad ibn ʿAbd Allāh ibn Mūsá al-Kindī, *al-Muṣannaf*, ed. Muṣṭafá ibn Sālim Bājū (Muscat: Wizārat al-Awqāf wa-l-Shuʾūn al-Dīniyyah, 2016), XVIII, 52; cf. al-Saʿdī, "al-Baḥr," 217.

[49] Abū l-Mundhir Salām ibn Muslim al-ʿAwtabī, *Kitāb al-Ḍiyāʾ*, ed. al-Ḥājj Sulaymān ibn Ibrāhīm Bābzīz and Dāwūd ibn ʿUmar Bābzīz (Muscat: Wizārat al-Awqāf wa-l-Shuʾūn al-dīniyyah, 1436/2015), XI, 49; cf. al-Saʿdī, "al-Baḥr," 217.

[50] Al-ʿAwtabī, *Kitāb al-ḍiyāʾ*, XI, 50; cf. al-Saʿdī, "al-Baḥr," 217.

[51] Muwaffaq al-Dīn Abū Muḥammad Ibn Qudāmah al-Maqdisī, *al-Mughnī* (Cairo: Maktabat al-Qāhirah, 1968), IX, 200 ff.

kufr). The author states, citing al-Ḥamawī,[52] that the desert and open sea (*al-baḥr al-māliḥ*: lit. "the salty sea") are classified as *dār al-ḥarb* if there is no *dār al-Islām* on the other side of it; that the surface of the open sea (*saṭḥ al-baḥr*) takes the rule of *dār ḥarb* (according to the *Ḥāshiyah* of Ibn Saʿūd). "The reader of the *Hidāyah* was asked whether the open sea (*al-baḥr al-māliḥ*) pertained to *dār al-ḥarb*, or *dār al-Islām*? He answered: It does not pertain to either of them, as no one can subjugate it."[53] For some scholars, the lack of state authority over the deep sea seems reason enough not to categorize it as either abode of war or of peace. The author of *Radd al-muḥtār*, however, prefers the view that the open sea (like the desert) is categorized as *dār al-ḥarb*, and refers to a preceding discussion of the marriage of a non-Muslim. In that chapter, the author explicitly states that whatever is not classified as *dār al-ḥarb* or *dār al-Islām*, like the open sea (*al-baḥr al-māliḥ*), takes the rule of *dār ḥarb*, "as nobody has any authority over it". If, for instance, a *dhimmī* embarks on the open sea, he is considered to have left *dār al-Islām*, and his *dhimmī* contract is void; the *mustaʾmin* who takes to the open sea thereby loses his contract, and his merchandise will be taxed (*ʿushr* will be levied) upon reentry to *dār al-Islām*.[54] The legal reason is the lack of authority (*wilāyah*) over the open sea.[55]

The theme of authority with regard to the seas is verifiable in the earliest works on Islamic international relations (*siyar*). In his *Kitāb al-Siyar*, one of the earliest and most extensive works on this topic, al-Fazārī (d. 192/807) mentions (as a remark about the partition of war spoils if somebody finds his possessions among the spoils of war, after the non-Muslim enemy had taken control of it): "Whatever the sea has seized (*mā ghalaba ʿalayhi l-baḥr*) is in the same category as what the

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[52] Abū ʿAbd Allāh Shihāb al-Dīn Yāqūt ibn ʿAbd Allāh al-Rūmī al-Ḥamawī (d. 626/1229), author of *Muʿjam al-buldān*, a literary geographical encyclopedia.

[53] Muḥammad Amīn ibn ʿUmar Ibn ʿĀbidīn, *Radd al-muḥtār ʿalá l-durr al-mukhtār: Sharḥ Tanwīr al-abṣār* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2003), VI, 267; The discussion comes under the headline: "The desert and open sea have the status of the abode of war."; cf. Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Ashraf, 1945), 83 ff.; Aḥmad Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī wa-l-ʿalāqāt al-duwaliyyah fī l-fiqh al-Ibāḍī* (Muscat: Wizārat al-Awqāf wa-l-Shuʾūn al-Dīniyyah, 2013), II, 69.

[54] Ibn ʿĀbidīn, *Radd al-muḥtār*, IV, 363.

[55] See Hamidullah, *Muslim Conduct of State*, 85ff.

enemy has conquered."[56] The analogy drawn from the enemy's authority or control to that of the sea is obvious. The enemy's authority defies Islamic authority, and so does the sea's. Elsewhere, al-Fazārī refers to "something found in the sea in enemy territory, of gems or pearls" and its property status; a clear indication of the existence of different divisions of the sea, depending on who can claim authority over them, the enemy, or the Muslims.[57]

An excerpt from the Shāfiʿī scholar al-Shāshī (d. 344/955) may serve to further elucidate this point regarding the lack of authority over the high seas: "The hand of authority (*yad al-tasalluṭ*) extends over the greater lands and what they enclose of the seas (inland lakes), [but] not over the greater oceans and whatever is in them […]"[58] The discussion of *wilāyah* (authority), or rather the absence of it, with regard to the seas in the quoted excerpts of *fiqh* compendia is based on the basic conceptualization of what constitutes *dār al-Islām* and its antipode: that authority as well as security either belong to Islam (i.e., are being upheld by Muslims), or do not. We may take the scholars' references as a hint at their underlying concept of authority. The high seas defy Islamic authority and security, just like enemy territory.

Apart from the legal conceptualization vis-à-vis the division of lands in *fiqh* compendia, excerpts from geographical and nautical literature are often referred to in contemporary contributions to prove the division of seas in Islam. Al-Idrīsī (d. 560/1165, in his epochal work *Nuzhat al-mushtāq fī ikhtirāq al-āfāq* commissioned by the ruler of Sicily, describes manned outposts on the coastline of the Arab Sea (by the mouth of the Tigris River): wooden pole constructs with platforms occupied by guards who row over to their posts and back with small

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[56] Abū Isḥāq Ibrāhīm ibn Muḥammad ibn Ḥārith al-Fazārī, *Kitāb al-Siyar li-shaykh al-Islām Abī Isḥāq al-Fazārī*, ed. Fārūq Ḥamādah (Beirut: Muʾassasat al-Risālah, 1987), 152, para. 127.

[57] Al-Fazārī, *Kitāb al-Siyar*, 107, para. 13.

[58] Niẓām al-Dīn Abū ʿAlī Aḥmad ibn Muḥammad ibn Isḥāq al-Shāshī, *Uṣūl al-Shāshī* (Beirut: Dār al-Kitāb al-ʿArabī, 1982), 395; cf. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 69. The context of the discussion relates to levying *khumus* (a fifth of its value, which is to be paid to the state) on ambergris (*ʿanbar*) and the Ḥanafī views on it. Given that ambergris is taken from the sea and not by force, it does not count as booty (*ghanīmah*); therefore, it is to be treated like fish and the *khumus* is not levied on it. *Ghanīmah*, on the other hand, is what is taken by force; thus, *khumus* is levied on it.

boats.[59] Whether this practice was common at the time to protect the coastline from intruders, or exceptional, is a subject for more research. It may, however, serve as an indicator of an extension of territorial sovereignty to the shoreline.[60]

Aḥmad ibn Mājid (1435-1500 CE), the well-known seafarer and scholar who spent his life on the Indian Ocean, and a precursor to Grotius by nearly two centuries, was the author of several books summarizing his knowledge on seafaring and navigation, most importantly *K. al-Fawāʾid wa-l-qawāʿid fī uṣūl ʿilm al-baḥr*. As much as Ibn Mājid may have drawn on the customs of his time, shaped by many prior and contemporary seafaring nations (China, India, Persia, and coastal African nations, among others), his knowledge was in turn taken up by the Portuguese in the Indian Ocean. He is often referred to as having made a distinction between territorial and high seas, defining the end of territorial waters as the point where the view of the coast vanishes from the view of the seafarer positioned atop the highest mast of a sailing vessel as it leaves the shore.[61] This distance could be measured at four nautical miles under normal conditions.[62] Ibn Mājid, however, does not mention any numbers in defining this distance. The hard evidence for these statements proves to be a minor quote from his book:

> But the sea does not belong to any of these groups (referring to the great seafaring nations of Chinese, Indians, Persians, and Africans); once the lands disappear from your sight, the only thing left to you is your knowledge of the stars and how to be guided by them.[63]

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59 Abū ʿAbd Allāh Muḥammad ibn Muḥammad ibn ʿAbd Allāh al-Idrīsī, *Kitāb Nuzhat al-mushtāq fī ikhtirāq al-āfāq* (Cairo: Maktabat al-Thaqāfah al-Dīniyyah, 2002, I, 385.

60 See Khalilieh, *Islamic Law of the Sea*, 166: "Save for Idrisi's unique fixing of the maritime sovereignty of the coastal village of Bajanis at six miles (10 kilometers), the breadth of a territorial sea varies from one place to another due to topographical differences."

61 See ʿAbd al-ʿAlīm, *al-Milāḥah*, 183; cf. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 56, and Khalilieh, *Islamic Law of the Sea*, 104 ff.

62 ʿAbd al-ʿAlīm, *al-Milāḥah*, 219; cf. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 66.

63 Shihāb al-Dīn Aḥmad ibn Mājid ibn Muḥammad al-Najdī, *Kitāb al-Fawāʾid fī maʿrifat ʿilm al-baḥr wa-l-qawāʿid*, transcr. Najm al-Dīn Beg (Damascus: Ecole Superieure d'Arabe, 1926), Manuscript/Mixed material, Library of Congress no. 2008401696, https://www.loc.gov/item/2008401696/, 350/151; cf. ʿAbd al ʿAlīm,

Although the quotation has frequently been used as evidence for the existence of a division in Islam between territorial and international waters, caution is advised. The context is clearly the nautical orientation of the seafarer according to the coastline or lack of it; if the coast is out of sight, the sailor can only rely on the stars. The text does not carry any implication of a conceptual or legal division of the seas.

More fruitful in this context may be the discussion of *maʾman* in the *fiqh* literature. It is the safe place any individual seeker of *amān* must be returned to without being harmed. The *maʾman* or place of safe refuge designates the marking point where Islamic authority ends, be it on land or at sea. Two examples from the Mālikī *madhdhab*, of representatives of different periods (Ibn Saḥnūn's [d. 240/855] *al-Mudawwanah* and Ibn Rushd's [d. 595/1198] *al-Bayān wa-l-taḥṣīl*) may illustrate how differently this marking point came to be defined even within the same legal school, depending on the spheres of influence and authority in different eras.

> Mālik was asked about Romans who disembark on the Muslims' coast with an *amān*. They have merchandise with them and buy and sell [engage in trade]. They then embark on the sea, returning to their homelands, and as they are extremely far out at sea (*fa-idhā amʿanū fī l-baḥr*), the wind casts them to the shores of some Muslim lands, other than the ones they had taken their *amān* from. Mālik said: I opine (*arā*) that their *amān* is still valid as long as they are trading [on their business trip] until they return to their countries, and I do not see (*lā arā*) that they should be attacked.[64]

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al-Milāḥah, 183; cf. Khalilieh, *Islamic Law of the Sea*, 104 ff.; Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 66.

[64] The reference is also interesting with regards to its interpretation in the contemporary literature. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 69 (mis)reads Mālik's answer "I opine that they are still in the state of having *amān*, as long as they are trading (on their business trip) (*mā dāmū fī tajribim*)" as "as long as they are in their sea (*mā dāmū fī baḥribim*)". The principles he deduces from this example, the first of which being "the supposition of the existence of areas in the sea under the authority of non-Muslim states," are therefore without evidence. Upon verification in different editions of the *Mudawwanah*, I have come to the conclusion that the text actually reads "*tajribim*" and not "*baḥribim*." If the author has come to his reading based on analysis of different manuscripts rather than a misreading of the text, I assume that he would have mentioned it. See also: Muḥammad ibn Ibrāhīm al-Kindī, *Bayān al-sharʿ* (Muscat: Wizārat al-Turāth al-

Ibn Rushd, centuries later, specifies the *maʾman*, the safe refuge, for a group of people who had entered *dār al-Islām* to undertake trade and then travel back via the sea: where is their *maʾman*, their safe place, where they do not fear their enemy? He refers to the view of some that their safe place is their land, once they get out of the sea, as the number of Muslim ships in the sea is very high.[65] This alludes to the fact that the sea was under Islamic authority at the time, and that non-Muslim territory started on the other side of that sea, as compared to al-Imām Mālik's time (see above) where the end of Islamic territory regarding the sea seems to have been conceptualized as "where ships cannot be sighted."

These examples also showcase that non-Muslims are in need of an *amān* to enter Islamic territory from the sea. With regard to the treatment of *mustaʾminūn*, it does not look like the *fuqahāʾ* differentiated between people coming from the land- or seaside. In the *fiqh* scholars' conceptualization, the sea constituted an effective border if the coastline on the other side led to the non-Islamic territory, whereas the sea was considered part of Islamic territory if the opposite side was under Islamic control. In this case, Islamic authority automatically extended over the sea and foreign ships needed permission for passage. There was, on these grounds, no need for a juristic treatment and theorization of territorial and international seas.

Upon perusal of the relevant *fiqhī* treatises, we may summarise that the classical *fuqahāʾ* have mentioned a number of legal cases related to the sea regarding trade, piracy, and jihad and *ribāṭ*. These do not differ essentially from comparable cases on land. Many examples support this reasoning. Al-Fazārī's *Kitāb al-Siyar*, for instance, states with regard to the division of spoils on land and at sea: "I asked him: If

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Qawmī wa-l-Thaqāfah, Salṭanat ʿUmān, 1993), LXIX, 192, for a discussion of similar cases of doubtful or pretended *amān*.

65 Abū l-Walīd Muḥammad ibn Aḥmad Ibn Rushd al-Qurṭubī, *al-Bayān wa-l-taḥṣīl wa-l-sharḥ wa-l-tawjīh wa-l-taʿlīl fī l-masāʾil al-mustakhrajah* (Beirut: Dār al-Gharb al-Islāmī, 1988), III, 60-62; cf. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 74 ff. and Khalilieh, *Islamic Law of the Sea*, 105.
Khalilieh, interestingly, after quoting Ibn Mājid (see above) sets the maritime belt (the visible distance from the coast) on a par with *maʾman*, referring to Ibn Rushd; although the two statements were made in different contexts and the *maʾman* with regard to the sea obviously had different interpretations, depending on the security situation at the specific time (Khalilieh, *Islamic Law of the Sea*, 105 ff.).

they (the *Murābiṭūn*) take the horses with them in their boats (*marākib*) on the sea, does the horse's owner receive a share at sea just like he does on land? He said: Yes."[66] Khadduri infers with regard to permissible and impermissible actions in marine warfare: "As a general rule the jurists agreed to apply, by analogy, the rules governing a castle in land warfare to a vessel in sea warfare."[67] While the possibility cannot be excluded, some examples quoted by Khadduri do not bear any relation to sea warfare at all,[68] and no Muslim jurist seems to have explicitly stated this analogy.

Borders in early and late medieval times, and in the conceptualization of the *fuqahāʾ*, were not hard, permanent, or sacrosanct, but rather were considered to be fluid. While *ribāṭ* and *thughūr* along the land or sea borders, for instance in Greater Syria (*bilād al-shām*) and the Caucasus (*arḍ al-rūm*), were considered outposts of *dār al-Islām*, they were also points of extension for that *dār* and starting points for military campaigns. From this perspective, there was no difference between a land or sea border with regard to the entry and exit of individuals, be they traders or travelers, just as there was no difference in the rules of warfare on land and at sea. Whoever entered *dār al-Islām* via a land or sea border could be a Muslim from *dār al-Islām*, a Muslim from *dār al-kufr*, a *dhimmī*, *mustaʾmin* or *ḥarbī* without prior *amān* or clarified status. Permission or denial of entry as well as taxes on goods and merchandise were levied according to the person's status and, in the case of *mustaʾminūn*, often based on reciprocal agreements.

Some contemporary authors try to prove the existence of a territorial sea in Islamic law on the basis of taxes having been levied, as discussed in the *fiqh* literature. Nāṣir al-Saʿdī mentions a number of cases in the *fiqh* and historical literature (with relevance to Oman, mainly) that draw a connection between state protection (*ḥimāyah*) and levying *zakāh* and *ʿushūr*.[69] What can be concluded from these

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66 Al-Fazārī, *Kitāb al-Siyar*, 113, see also para. 253.

67 Khadduri, *War and Peace in the Law of Islam*, 113.

68 The discussion of the permissibility to attack enemy vessels at sea if they shield themselves with Muslims, women or children seems to be a reference to the famous case of *tatarrus* on land, discussed in Shaybānī's *K. al-Siyar al-kabīr* (see Khadduri, *War and Peace in the Law of Islam*, 113). This is clearly Khadduri's interpretation: Shaybānī himself does not mention the sea in this case.

69 Al-Saʿdī, "al-Baḥr," 211 ff.; cf. al-Khāṭiriyyah, "Turāth ʿUmān al-baḥrī," 448.

cases and reports is that the sea was considered a border just like the land border, and that harbors and ports receiving seafarers and traders were outposts of *dār al-Islām*. As for the various dues that were levied (on merchandise) during the different periods of Islamic history, they are linked to the personal legal status of their owner: Muslim (liable to pay *zakāh*), *dhimmī* (liable to pay *ʿushūr*) or *ḥarbī mustaʾmin* (liable to pay taxes according to the principle of reciprocity).[70] These examples are not conclusive with regard to the existence of territorial seas in the modern sense, but they do prove the existence of entry points to *dār al-Islām*.

ʿUmar ibn ʿAbd al-ʿAzīz is reported to have written to his governors regarding the general permissibility of acquiring a livelihood from the land and the sea alike, and informing them that earnings from such work should not be taxed. ʿUmar's instruction is sometimes quoted to support the concept of free seas; however, it seems to refer to the concept of subservience (*taskhīr*) rather than to questions of authority or the division of seas.[71]

An interesting aspect to discuss here is the authority of the captain on board the ship: how far did his authority go, and does the question of his authority allow conclusions with regard to the status of the seas? ʿAbd al-ʿAlīm contends that the captain's authority and jurisdiction over his boat and what is on it, the transport of goods, and dicta on territorial and high seas, was accepted practice in Ibn Mājid's time and today has become part of international law.[72] I am inclined to be more cautious with regard to the extent of the captain's authority in Islamic law. The practice regarding the captain's authority may have changed from era to era, and according to the influence of different legal interpretations. Generally, the extent and limits of the captain's authority depended on the specific powers that the state (personified by the head of state or imām) had invested him with.

If the open sea really was regarded as enemy territory (*dār al-ḥarb*), it is likely that the same legal rules (in their diversity and different interpretations) found in the *fiqh* compendia with regard to the legal

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70 See al-Saʿdī, "al-Baḥr," 213.

71 Manṣūr, *al-Sharīʿah al-Islāmiyyah wa-l-qānūn al-duwalī*, 106; ʿAlī Muḥammad Muḥammad al-Ṣallābī, *ʿUmar ibn ʿAbd al-ʿAzīz: Maʿālim al-tajdīd wa-l-iṣlāḥ al-rāshidī ʿalá minhāj al-nubuwwah* (Cairo: Dār al-Tawzīʿ wa-l-Nashr al-Islāmiyyah, 2006), 69; cf. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 33.

72 ʿAbd al-ʿAlīm, *al-Milāḥah*, 184.

authority of a (here: military) leader in enemy territory would be applied. While according to some schools the captain had the authority to implement some rules and punishments, according to other schools he may have had to bring delinquents on shore to the state authorities (usually referred to as the *imām*) for judgment.[73] Although the captain of a ship may have been invested with certain powers, it is to be expected that some cases had to be resolved ashore, in the presence of the head of state or appointed judge (*qāḍī*) in a formal hearing. To what extent was legal authority represented on board a vessel through the presence of a judge? Or, in the absence of that, did principles allowing the community of Muslims to take over certain functions come to be applied? Further investigation is needed in order to answer these questions. Despite contemporary attempts at classification, Islamic law (with its own independent systemic categories and rationale) cannot be categorized as following exclusively either the personality or the territoriality principle of law.[74] Accordingly, more research is necessary to examine the relationship between the implementation of different types of Islamic law, be they related to personal status, trade, taxes, punishments (*ḥudūd* and *taʿzīr*), spatial considerations (*dār al-Islām*, *dār al-ḥarb*), and invested authority (*wilāyah*) on the seas.

A cursory reading reveals diverse case studies in the *fiqh* compendia which incorporate the question of *wilāyah* on the sea, for instance in Ibn Qudāmah's *al-Mughnī*: if someone had participated in sea raids and then wanted to settle on the coast, he needs to ask for permission from the person who has authority over all the ships; it does not suffice to ask the one in authority over his ship alone.[75] It is to be expected that cases regarding authority (*wilāyah*) on the open seas have been treated comparably to cases implementing legal rules *(al-ḥukm al-sharʿī)* in *dār al-ḥarb*, with difference of opinion involved mainly in the domain of punishments for capital crimes (*ḥudūd*).

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[73] Bouzenita, "The Principles of Territoriality and Personality in Islamic Law: Is There a Locus Regit Actum in Shari'ah?" *International Journal of the Humanities* 9, no. 7 (2011), 185-195, https://doi.org/10.18848/1447-9508/cgp/v09i07/43287.

[74] See Bouzenita, "The Principles of Territoriality and Personality," 165.

[75] Ibn Qudāmah, *al-Mughnī*, IX, 209.

Cases of maritime piracy generally take the same rule as highway robbery (*ḥirābah*, *qaṭʿ al-ṭarīq*).[76] This may serve as proof that no major differences existed between land and sea with regard to legal rules; a transgression against people's lives and properties is the same at sea as on land. Interesting for our topic is the following from al-Kindī's *Bayān al-sharʿ*: "In case they (the pirates) leave the borders of the Muslims' governance, they may be left alone and not prosecuted, but if they commit a crime in the governance of the Muslims, penalty (*ḥadd*) is adjudged according to their deeds."[77] "Muslims' governance" here obviously refers to shores and waters under Islamic authority.[78] Al-Kindī insists that pirates who pretend to leave their criminal actions and embrace Islam need to be brought to the *imām* first, to ascertain the credibility of their case.[79] Similar cases underline the necessity to forward cases to the *imām* to decide.[80] According to al-Kindī, it is also permissible to destroy pirate vessels that are moored on the shores.[81]

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[76] See ʿAbd al-Raḥmān ibn Aḥmad ibn Muḥammad Fāyiʿ, *Aḥkām al-baḥr fī l-fiqh al-Islāmī* (Jeddah: Dār al-Andalus al-Khaḍrāʾ & Beirut: Dār Ibn Ḥazm, 2000), 581; Anke Iman Bouzenita and Saʿīd al-Ṣawāfī, "ʿUmān wa-l-qarṣanah al-baḥriyyah," *al-Tajdīd* 25, no. 49 (2021), 215-247.

[77] Al-Kindī, *Bayān al-sharʿ*, LXIX, 189; cf. Bouzenita and al-Ṣawāfī, "ʿUmān wa-l-qarṣanah al-baḥriyyah," 497.

[78] The famous letter of al-Imām al-Salṭ, directed to his armies ahead of the Socotran campaign in the 3rd century H to restore Omani rule after an insurgence of the local Dhimmah population, contains the opposite advice: "If the matter between you and your enemy extends to the African coastline (*raʾs al-zinj*: Guardafui, on today's Somalian coastline), take it out there; and if the matter between them and you has been decided, do not violate your agreement, Allah willing. Should the matter not be decided up to Tabramah, then take it as far as Tabramah (probably Barmah on the East African coast), Allah willing. I hope that you will have enough food to last you until then, Allah willing"; See Nūr al-Dīn ʿAbd Allāh ibn Ḥumayd al-Sālimī, *Tuḥfat al-aʿyān bi-sīrat ahl ʿUmān*, ed Abū Isḥāq Aṭfayyish (Ruwi, Muscat: al-Maṭābiʿ al-Dhahabiyyah, 1983), 182; cf. Bouzenita, "A Reading in the Applied Ibāḍī Fiqh of International Relations: The Directive of Imām al-Ṣalt (d. 275/888) to His Army Concerning Socotra," *Ilahiyat Studies* 10, no. 1 (2019), 7-45, https://doi.org/10.12730/13091719.2019.101.188, 40.

[79] Al-Kindī, *Bayān al-sharʿ*, LXIX, 194.

[80] *Ibid*., LXIX, 194.

[81] *Ibid*., LXIX, 195.

The Division of the Seas and the Concept of *Ḥarīm al-baḥr*

While classical scholarship has devoted ample space to the discussion of the *ḥarīm* or protected zone, modern scholarship and encyclopedias generally touch on the issue without in-depth discussion.[82] However, a number of contemporary authors (probably starting with Hamidullah's groundbreaking work *Muslim Conduct of State*, 1945) have referred to the Islamic legal concept of *ḥarīm*, more particularly the *ḥarīm* of the sea (*ḥarīm al-baḥr*), as a vehicle to declare the division of the seas into territorial and international waters as Islamically recognized or valid. While details of the contemporary contributions will be discussed below, we will begin with a discussion of the concept of *ḥarīm al-baḥr* and explore its suitability to accommodate this analogy.

It is incumbent to investigate the *fiqhī* definition, rule (*ḥukm*), rationale (*ʿillah*) and/or wisdom (*ḥikmah*)[83] of legislation of the legal concept of *ḥarīm*. Linguistically, the term *ḥarīm*, (pl.: *ḥurum*, from the root word *ḥ-r-m*, to prohibit, forbid, protect) refers to whatever is forbidden and must not be violated or transgressed against, including the clothing that the pilgrim in the state of purification (*muḥrim*) puts aside, the yard/compound of a house or mosque, what a person fights for and protects, and a protected space (*ḥimá*).[84]

Technically, the *ḥarīm* of a particular place or thing comprises the rights and facilities that surround it;[85] "it was called this because it is prohibited for anyone other than the proprietor to monopolize its

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[82] Against the trend, a master's thesis was devoted to the topic in 1999: Ḥasan ibn Khalaf ibn Saʿīd al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū fī l-fiqh al-Islāmī: Dirāsah muqāranah" (master's thesis, Mafraq, Jordan: Jāmiʿat Āl al-Bayt, 1999).

[83] The term *ʿillah* or rationale in Islamic legal theory describes the reason for which a legal rule was legislated; it follows a number of conditions and procedures for identification and is, briefly, inseparable from the existence of the legal rule ("The legal rule turns with its rationale in existence and absence"). The *ḥikmah* or wisdom, on the other hand, generally refers to the effect of implementing the legal rule, which may or may not transpire with its implementation. The difference or congruence between *ʿillah* and *ḥikmah*, and whether a legal rule can or cannot be rationalized though its *ḥikmah* is a contested field among legal theorists, the point of view adapted here is that the two concepts are different; cf. Wahbah al-Zuḥaylī, *Uṣūl al-fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1986), I, 646 ff.

[84] *Al-Mawsūʿah al-fiqhiyyah al-kuwaytiyyah*, XVII, 212.

[85] *Ibid*.

usage."[86] The *ḥarīm* of something are the facilities that surround it, pertain to it, and are off-limits. The Shāfiʿī school defines *ḥarīm* as what is needed for a complete usage of something, even if the original usage can occur without it.[87]

Fiqh compendia of all schools discuss the *ḥarīm* or protected zone of houses, villages, mosques, trees, date palms, cultivated lands, and explicitly of different water sources: wells, springs, canals (*aflāj*), streams and rivers, and the sea. The legitimacy of a *ḥarīm* goes back to the Prophetic hadith "Whoever digs out a well has a protected zone (*ḥarīm*) of 40 cubits (*dhirāʿ*)[88] in which to tether his livestock," as well as similar hadiths and *āthār*.[89] The conditions for possessing this type of land are the same as the conditions for taking possession of barren land by reviving (i.e., cultivating) it.[90]

Scholars of various schools differ on the exact extension of the *ḥarīm* of a particular thing. This difference is due to different narrations that vary in their description of the particular extent. In addition, some scholars prefer to assess the extent of the *ḥarīm* depending on the specified measurements in the narrated texts, while others consider the particular purpose and kind of usage and are therefore open to assessing it on the basis of custom (*ʿurf*).[91] Ḥanafī scholars, for instance, differentiate between a well from which a human could draw water and one that needed an animal to draw water from it and therefore needs more space to be operated.[92] Scholars of the Mālikī and

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86 *Ibid*.

87 *Ibid*.; cf. the definitions in al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 11 ff.

88 The term *dhirāʿ* designates a unit of length measurement in Islamic culture (such as *farsakh*, *mayl* and *barīd*) and may be translated as ell or cubit; cf. al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 54 ff. and Khalilieh, *Islamic Law of the Sea*, 118. A *dhirāʿ* corresponds to approximately half a meter, with divergent views; al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 71.

89 *Al-Mawsūʿah al-fiqhiyyah al-kuwaytiyyah*, XVII, 213.

90 *Ibid*., 213.

91 Haná Fahmī ʿĪsá, "Ḥimāyat al-sharīʿah al-Islāmiyyah li-l-bīʾah al-ṭabīʿiyyah: Dirāsah fiqhiyyah muqāranah," *Majallat Kulliyat al-Sharīʿah wa-l-qānūn bi-Ṭanṭā* 33 (2018), 200; al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 32.

92 *Al-Mawsūʿah al-fiqhiyyah al-Kuwaytiyyah*, XVII, 214; see ʿAlāʾ al-Dīn Abū Bakr ibn Masʿūd ibn Aḥmad al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, 2nd ed (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1986), VI, 195 ff.

Shāfiʿī schools suggest that the exact limits of the protected zone change according to need, purpose, kind of use, and type of soil.[93]

A transgression against the *ḥarīm* is not permissible, and buildings erected in this zone can be destroyed, even if it is a mosque.[94] The transgression may be considered more severe in case the *ḥarīm* of public property (like rivers and seas) has been usurped, as accessibility must be safeguarded. It is not permissible to erect residential or other buildings on the beach, for example.[95] The discussion of the extent of a particular *ḥarīm* is also linked to the legal maxim of preventing harm (*lā ḍarar wa-lā ḍirār*).[96]

The *Ḥarīm* of the Sea in Islamic Law

The discussion of *ḥarīm* of water sources (wells, springs, rivers) is often embedded in the context of *iḥyāʾ al-mawāt*, the cultivation of barren land. Scholars of the Ḥanafī school seem to have focused on the *ḥarīm* of wells and rivers.[97] The *Majallat al-aḥkām al-ʿadliyyah* mentions different protective zones[98], but does not discuss the *ḥarīm* of the sea. It also stays true to the principle of open access to water resources,[99] common property of water, grass, and fire,[100] and declares "seas and large lakes are free for all to use."[101]

The *Mudawwanah* states that neither wells nor springs have a specified *ḥarīm* in the *fiqh* of Imām Mālik, with the exception of what involves any harm.[102] Al-Siqillī (d. 451/1059) mentions specified *ḥarīm* zones for different types of wells, springs, and rivers, but does not

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93 *Al-Mawsūʿah al-fiqhiyyah al-Kuwaytiyyah*, XVII, 214.

94 ʿĪsá, "Ḥimāyat al-sharīʿah al-Islāmiyyah li-l-bīʾah," 203.

95 Ibid., 204.

96 Al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 43 ff.

97 Al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, VI, 195 ff.; al-Sarakhsī, *Kitāb al-Mabsūṭ*, XV, 31.

98 Charles Robert Tyser, D. G. Demetriades, and Ismail Haqqi Effendi, trans., *The Mejelle: Being an English Translation of Majallah el-Ahkam-i-Adliya and a Complete Code of Islamic Civil Law* (Kuala Lumpur: The Other Press, 2001; repr. 2003), paragraphs 1280 ff., 209 ff.

99 *Ibid*., paragraph 1234ff., 202.

100 *Ibid*., paragraph 1234.

101 *Ibid*., paragraph 1237, 202.

102 Mālik ibn Anas ibn Mālik ibn ʿĀmir al-Aṣbaḥī al-Madanī, "Harīm al-ābār," in *al-Mudawwanah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1415/1994), IV, 168; cf. ʿĪsá, "Ḥimāyat al-sharīʿah al-Islāmiyyah li-l-bīʾah," 198.

mention the sea.[103] Some Mālikī jurists, like Ashhab ibn ʿAbd al-ʿAzīz (d. 204/819) did not opine in favor of the existence of a protective zone to the sea.[104]

Al-Māwardī (d. 450/1058) in his *al-Aḥkām al-sulṭāniyyah* goes into great detail discussing the *ḥarīm* of rivers, wells, and springs, and a multitude of related legal rules, in the chapter titled "On reviving barren land and the extraction of water."[105] He does not, however, discuss the *ḥarīm* of the sea or any division of the sea. The Ḥanbalī scholar Abū Yaʿlā's book with the same title is nearly identical in approach and discussion; he does not mention the *ḥarīm* of the sea, either.[106] Wahbah al-Zuḥaylī, in his encyclopedic *al-Fiqh al-Islāmī wa-adillatuhū*, renders the scholars' views on the *ḥarīm* of different kinds of wells and rivers, but does not mention the *ḥarīm* of the sea.[107]

Upon perusal of the *fiqh* compendia of different legal schools and traditions, it seems that the compendia of the Ibāḍī school have more references to the topic than do other schools. One may infer that the sea and its *ḥarīm* have not been a focal point of the scholars. Al-Riyāmī emphasizes that only the scholars of the Ibāḍī school have mentioned the *ḥarīm* of the valley (*wādī*) and the sea.[108] This corresponds to my

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[103] Muḥammad ibn Yūnus al-Tamīmī al-Ṣiqillī, *al-Jāmiʿ li-masāʾil al-Mudawwanah*, ed. scholars (*majmūʿah min al-bāḥithīn*) from Maʿhad al-Buḥūth al-ʿīlmiyyah wa-Iḥyāʾ al-Turāth al-Islāmī (Mecca: Jāmiʿat Umm al-Qurá, 2013), XVIII, 225.

[104] Abū Muḥammad ʿAbd Allāh ibn Abī Zayd al-Qayrawānī, *al-Nawādir wa-l-ziyādāt ʿalá mā fī l-Mudawwanah min ghayrihā min al-ummuhāt* (Beirut: Dār al-Gharb al-Islāmī, 1999), X, 251; cf. Khalilieh, *Islamic Law of the Sea*, 120.

[105] Al-Māwardī, *al-Aḥkām al-sulṭāniyyah*, 264-274.

[106] Al-Qāḍī Abū Yaʿlá Muḥammad ibn al-Ḥusayn ibn Khalaf ibn al-Farrāʾ, *al-Aḥkām al-sulṭāniyyah*, ed. Muḥammad Ḥāmid al-Fiqī, 2nd ed. (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1938), 209 ff.

[107] Wahbah Muṣṭafá al-Zuḥaylī, *al-Fiqh al-Islāmī wa-adillatuhū*, 4th ed. (Damascus, n.d.), VI, 511 ff.

[108] Al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 102; he refers to al-Fursuṭāʾī's *al-Qismah wa-uṣūl al-araḍīn* and al-Shaqṣī's *Minhāj al-ṭālibīn*: Abū l-ʿAbbās Aḥmad ibn Muḥammad al-Fursuṭāʾī al-Nafūsī, *al-Qismah wa-uṣūl al-araḍīn: Kitāb fī fiqh al-ʿimārah al-Islāmiyyah*, ed. Bakīr ibn Muḥammad al-Shaykh Balḥāj and Muḥammad ibn Ṣāliḥ Nāṣir (al-Qarārah: Nashr Jamʿiyyat al-Turāth, 1997); Khamīs ibn Saʿīd ibn ʿAlī ibn Masʿūd al-Shaqṣī, *Minhāj al-ṭālibīn wa-balāgh al-rāghibīn*, ed. & annot. Muḥammad Kamāl al-Dīn Imām (Muscat: Wizārat al-Awqāf wa-l-Shuʾūn al-Dīniyyah, 2011).

own findings. Numerous cases in the Ibāḍī *fiqh* literature show that the question of *ḥarīm al-baḥr* was discussed and applied over the centuries,[109] a clear indicator of the important role of the geographical coastline for followers and scholars of the Ibāḍī school.

Abū Bakr al-Kindī states in his *Muṣannaf*, on the authority of Abū l-Hawārī, a third century H Omani Ibāḍī scholar, that the *ḥarīm* of the sea's coastline is 500 *dhirāʿ* (cubits). If the extension of this zone of 500 cubits is barren land, no one has a claim over it, no one may build on it, unless he cultivates the land.[110] He also mentions a different opinion: a *ḥarīm* of 40 *dhirāʿ* from the coastline; the zones start from the point of highest extension of the tide toward the land side ("*thumma al-ṭarīq, thumma al-buyūt*"), respectively. The purpose of this zone (be it 40 or 500 cubits) is to allow people to benefit from the sea by ensuring its accessibility for all. Hence, it is not permissible to build within this zone, and whoever did so is to be dispossessed of the building.[111]

Al-Shaqṣī (d. 1090/1679) explains:

> The *ḥarīm* of the sea is 40 cubits, starting from the point where the high tide reaches to people's facilities. And it is said: The *ḥarīm* of the sea is 500 cubits and more if there is no sign of cultivation, and this is considered barren land (*mawāt*) for those who cultivate it. And it is said: It is permissible to benefit from it, and no one may forbid [access to] it, even if he builds on it and cultivates it.[112]

Al-Fursuṭāʾī, a North African Ibāḍī scholar (d. 504/1110) mentions a difference of opinion between the scholars regarding the distance: 500, 200, or 40 cubits, starting from the highest point of extension of the tide. He emphasizes the prohibition of building in this zone, even for

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109 Al-Saʿdī, "al-Baḥr," 209 ff.

110 Al-Kindī, *al-Muṣannaf*, XI, 7.

111 The contemporary *Muʿjam al-muṣṭalaḥāt al-Ibāḍiyyah* summarizes the most salient rules, referring to the most important Ibāḍī works cited here, among them al-Fursuṭāʾī, Abū Bakr al-Kindī, and al-Shaqṣī (Majmūʿah min al-bāḥithīn, *Muʿjam al-muṣṭalaḥāt al-Ibāḍiyyah*, 2nd ed. [Muscat: Wizārat al-Awqāf wa-l-Shuʾūn al-Dīniyyah, 2012], I, 243); see also al-Kindī, *Bayān al-sharʿ*, XXXIII, 10-11, 42, 65, & 233; cf. al-Khāṭiriyyah, "Turāth ʿUmān al-baḥrī," 448 and al-Saʿdī, "al-Baḥr," 208, and their entries on *ḥarīm al-baḥr* in Ibāḍī *fiqh* compendia.

112 Al-Shaqṣī, *Minhāj al-ṭālibīn*, III, 447.

the inhabitants of the coastline, whether they own the land or not.[113] If someone has already cultivated or built on this *ḥarīm*, it will not be destroyed, under condition that it is not communal property. The *ḥarīm* originally concerns the land side of the highest tide point; the scholars did not consider this *ḥarīm* to extend into the sea. The same ruling applies to people who anchor their boats (*aṣḥāb al-marāsī*). If they have already built a structure to anchor their boats, they will not be kept from using these facilities and the way leading to it, whether they own the land or not. As for those who have moorage stations (*ājām*, sg. *ujum*)[114] in the sea, they are entitled to a surrounding *ḥarīm* and may hinder people from cultivating it, blocking the way to fishing grounds, and the like.[115] Although the author mentions a *ḥarīm* located in the sea, rather than on the shore, it is obvious that he discusses a particular place reserved for the personal benefit and usage of an individual, not a territorial belt adjacent to the land.

According to the 19th century work *K. Lubāb al-āthār*, the *ḥarīm* of the sea is 40 cubits from (the highest point of) the tide. It is not permissible to hinder anyone from using it. Should someone build on the *ḥarīm*, the construction should be destroyed, and it is not permissible to live in a house built (by oneself or somebody else) in the *ḥarīm*, even if that structure has not been demolished. The same source gives the contemporary reader a hint as to the intricateness of natural topography of the littoral and its repercussions on the *fiqhī* deliberations:

> A case study on the authority of Ḥabīb ibn Sālim:[116] About the *ḥarīm* of the sea, if it turns to sea, as well as what the sea had covered before, and it becomes land, and the sea does not cover it anymore; or what used to be land, then turned to sea and back again to land. What is the legal rule on it? He said: If it used to be sea and then turned to land, it is considered barren land. And if it used to be *milk* (property) and

[113] Al-Fursuṭāʾī, *al-Qismah wa-uṣūl al-araḍīn*, 538 ff.

[114] The term may relate to a natural station in the sea, a rock or sandbank. See editor's note, al-Fursuṭāʾī, *al-Qismah*, 539.

[115] Al-Fursuṭāʾī, *al-Qismah*, 538 ff.

[116] Ḥabīb ibn Sālim ibn Saʿīd Ambūsaʿīdī, a 12th c. H Omani scholar.

turned to sea and then became land again, it is considered property as it was: it does not change. And Allah knows best.[117]

Nūr al-Dīn al-Sālimī (d. 1914), in his *Jawhar al-niẓām*, cites different views on the *ḥarīm* of the sea, like the well or the river, starting from the (highest point of) the tide, toward the land, 500 cubits to allow for free access.[118]

The (Ibāḍī) scholars mentioning the *ḥarīm* of the sea do not quote particular narrations, nor do they explicitly refer to the Prophetic Sunnah. It is therefore not clear whether they refer to an established sunnah or accepted custom (*ʿurf*). As a matter of fact, buildings have not always been 40 or 500 cubits away from the sea: a question brought forward to the 12th/18th century Omani scholar Muhammad ibn ʿAbd Allāh ibn ʿUbaydān mentioned that in Muscat the sea reached up to the walls of houses. The questioner wanted to know if there was any difference between constructed ports and natural ones. The shaykh answered that he did "not recall any difference."[119]

Scholars of the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī schools have expressed different views regarding the permissibility of cultivating the littoral (*iḥyāʾ al-sāḥil*).[120] The discussion is documented in later Ibāḍī works which debated the permissibility to "lease (*ijārah*) the *ḥarīm* of the coast (*ḥarīm al-sāḥil*), which is (the same as) the *ḥarīm* of the sea." Saʿīd ibn Khalfān al-Khalīlī (1230-1287 AH/1863-1906 CE) declared it permissible, as the coast's *ḥarīm* takes the same rule as the coast itself.[121] The argument for its non-permissibility clearly centers around its being common property. Fāyiʿ concludes that the *imām* may

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[117] Muhannā ibn Khalfān ibn Muḥammad al-Būsaʿīdī, *Kitāb Lubāb al-āthār al-wāridah ʿalá l-awwalīn wa-l-mutaʾakhkhirīn al-akhyār* (Muscat: Wizārat al-Turāth al-Qawmī wa-l-Thaqāfah, 1985), VII, 108.

[118] Nūr al-Dīn ʿAbd Allāh ibn Ḥumayd al-Sālimī, *Jawhar al-niẓām fī ʿilmay al-adyān wa-l-aḥkām*, ed. Abū Isḥāq Aṭfayyish and Ibrāhīm al-ʿAbrī, 2nd ed. (Muscat: Wizārat al-Awqāf wa-l-Shuʾūn al-Dīniyyah, 2018), III-IV, 105 ff.

[119] Al-Saʿdī, "al-Baḥr," 209; Ibn ʿUbaydān Muhammad ibn ʿAbd Allāh, *Jawāhir al-āthār* (Muscat: Wizārat al-Turāth al-Qawmī wa-l-Thaqāfah, 1985), V, 3.

[120] Fāyiʿ, "Aḥkām al-baḥr," 461 ff.; the discussion of its non-permissibility clearly centers around its being common property.

[121] Saʿīd ibn Khalfān al-Khalīlī, *Ajwibat al-Muhaqqiq al-Khalīlī*, ed. Badr ibn ʿAbd Allāh al-Raḥbī, 2nd ed. (Muscat: Maktabat al-Jayl al-Wāʿid, 2011), IV, 196; cf., Aflaḥ ibn Aḥmad al-Khalīlī, *al-Siyāsah al-sharʿiyyah ʿinda l-imāmayn al-muḥaqqiq al-Khalīlī wa-l-ʿallāmah al-Sālimī* (Dhākirat ʿUmān, 2016), 61, 116.

allocate permission to lease parts of the beach for a specified time for purposes that benefit the public.[122]

What is apparent from these *fiqhī* discussions as a common denominator is the focus on the access to and usage of facilities. The protection of access to different sources of water, including the sea, through the institution of *ḥarīm* is also commensurate with the fact that water is categorized as public property according to the Prophetic hadith "People share in three things: water, meadows and fire."[123] Following this rationale, the *ḥarīm* of the sea is the *ḥarīm* of public property. It needs to be protected from individual monopolization, to the extent that unlawfully erected buildings should be removed.

Modern Conceptualizations

Hamidullah refers to the concept of *ḥarīm* ("appurtenance") as having been developed

> regarding municipal law so as to apply to wells, roads, waterways, canals, houses, etc., yet it does not seem to have been developed and worked out so as to apply to international law, more particularly to open sea. And probably there was then no need even.[124]

None of the pre-20th century classical scholars of *fiqh* have mentioned the concept of *ḥarīm* with regard to the status of the (open) sea or the belt adjacent to the coastline. In contrast, the number of references in contemporary literature to this concept (as grounded in modern international law) has begun to increase exponentially. This snowball effect is likely to produce an avalanche of related literature.

Fāyiʿ explicitly states that the classical scholars did not know the modern-day division of the seas into territorial and international waters,[125] and asserts that there is no obstacle for accepting the division and the 12 nautical mile zone on the basis of international agreements, accepted custom and mutual benefits.[126] He refers to the concept of *ḥarīm* as a "suitable legal accommodation of the territorial sea."[127] The author constructs, on the basis of Qāriʾ al-Hidāyah's view (that the sea

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122 Fāyiʿ, "Aḥkām al-baḥr," 468.

123 Reported by Aḥmad, Abū Dāwūd, and Ibn Mājah.

124 Hamidullah, *Muslim Conduct of State*, 84-85.

125 Fāyiʿ, "Aḥkām al-baḥr," 681.

126 Ibid., 682 ff.

127 Ibid., 684.

pertains neither to *dār al-Islām* nor *dār al-ḥarb*), that all states are bestowed with equal rights with regard to the free use of the seas, in navigation, fishing, laying pipes and cables, aviation, creation of artificial islands, and scientific research; he thereby reiterates the specifications of UNCLOS.[128]

Abū l-Wafāʾ asserts, after a number of definitions of the term *ḥarīm* in different *fiqh* compendia that the idea of *ḥarīm* "with certainty alludes to the existence of internal waters, ports and the territorial sea, and the continental shelf in Islamic law, as these are considered necessary to benefit from the sea or are attachments to it."[129] Although he is aware that the *ḥarīm* of a river or sea relates to the landside or territory of the state on firm ground (*al-yābisah*), and that Muslim scholars did not discuss the concept of *ḥarīm* as comprising the sea side adjacent to the land, he extends the concept as to comprise the sea side adjacent to the land. In his view, territorial waters and ports can be considered *ḥarīm* as they are essential in order to fully benefit from the sea economically, with regard to customs and security.[130] He therefore extends the classical *fiqh* concept of *ḥarīm al-baḥr* so as to accommodate the modern international legal concept of territorial (and international) seas.

Al-Dawsarī explicitly states, after citing the classical definitions of *ḥarīm*: "And territorial water is equivalent to the owner of a water source. This extrapolation, in my view, is acceptable due to its correspondence in the legislative rationale (*al-ittifāq fī l-ʿillah*)."[131] He declares the territorial zone as acceptable on the basis of international custom (*ʿurf)* in the realization of benefit (*maṣlaḥah*), and asserts that

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[128] Ibid., 688 ff.

[129] Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 59; see also the concise translated version: Ahmed Abou-El-Wafa, "Ibāḍī Jurisprudence and the Law of the Sea," in *Ibadi Jurisprudence, Origins, Developments and Cases*, ed. Barbara Michalak-Pikulska and Reinhard Eisener (Hildesheim: Olms, 2015), 257-264: "The concept of *ḥarīm* of the sea ineluctably proves that Ibāḍī jurists have known the existence of maritime zones under the sovereignty of a coastal state," 259.

[130] Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 62.

[131] Nāʾif ibn ʿUmār ibn Watyān al-Dawsarī, "al-Ikhtiṣāṣ al-qaḍāʾī ʿalá l-miyāh al-iqlīmiyyah wa-l-dawliyyah: dirāsah fiqhiyyah muqāranah," *Majallat Kulliyyat al-sharīʿah wa-l-dirāsāt al-Islāmiyyah* 31, no. 2 (2013), 302.

Islamic law corresponds with [international] law with regard to the state's sovereignty of the territorial sea.[132]

Al-Riyāmī arrives at the conclusion that, as is not permissible to transgress a *ḥarīm* unless there is a communal benefit, any transgression against sea or airspace pertaining to a country is (therefore) not permissible. [133] These references reflect the general tenor in the contemporary literature to "accommodate" prevailing international legal concepts. A common denominator of these contributions may be the juristic background of most of the authors. A critical contribution to the literature that questions this methodology seems to be absent.

The most recent contribution in this respect, Hasan S. Khalilieh's erudite work on the "Islamic Law of the Sea" (2019) deserves a more detailed discussion. Khalilieh starts out defining the term *ḥarīm* as an "inviolable zone within which development is prohibited or restricted to prevent the impairment of: (a) natural resources [...] and (b) utilities [...], and other public spaces crucial to public welfare."[134] While these statements are correct, they are also incomplete, as private property (houses, trees) may also have a *ḥarīm*, as described above. Subsequently, the legislative reason and purpose between the *ḥarīm* of a natural resource, utility, or private space may differ. As evidence from the Prophetic Sunnah, he quotes "a tradition attributed to the Prophet" (without the usual referencing from the standard hadith collections, referring to al-Kasānī's *Badāʾiʿ al-ṣanāʾiʿ*, VI, 195) and Hamidullah's translation): 'Every land has its appurtenance forbidden to other than the proprietor' (*li-kull arḍ*^{in} *ḥarīm*^{an})."[135]

As a matter of fact, al-Kāsānī refers to the Prophetic Sunnah generally without mentioning a particular hadith. Discussing the question of someone who digs out a well in barren land (*arḍ al-mawāt*), he confirms that this well has a *ḥarīm*, "because the Prophet (pbuh) defined a *ḥarīm* for the well, and the spring has a *ḥarīm* by

[132] Al-Dawsarī, "al-Ikhtiṣāṣ al-qaḍāʾī," 302.

[133] Al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 129.

[134] Khalilieh, *Islamic Law of the Sea*, 118.

[135] *Ibid*.

consensus, because he (peace be upon him) established a *ḥarīm* for every land."[136]

As we have seen, the *ḥarīm* of the sea has been specified by some scholars, but has not been mentioned by all of them. As these scholars have not quoted particular hadith in their discussions, we may conclude that they made use of analogy (*qiyās*) and *ʿurf* for the specific limit of the *ḥarīm*. The respective discussions clearly show that what is meant by *ḥarīm* of the sea is the landside, not the water side of the sea. This also becomes apparent from Khalilieh's mentioning of a legal case study discussed in Ibn Abī Zayd al-Qayrawānī's *al-Nawādir wa-l-ziyādāt* and the reference to the opinion of Ashhab ibn al-ʿAzīz al-Qaysī (140-204/757-820). The case discusses a (potential) protective (land) zone adjacent to the sea, not the sea adjacent to the land:

> A group of people settle near the seaside as voluntary guards, between them and the sea is a woodland area. They cultivate this area until it reaches the sea. Are they allowed to do so, or is it your opinion that the sea has a *ḥarīm*, because of the fear of the Romans [who could invade the country], or because of what the *murābiṭūn* (guards) benefit from it for their livestock? He [al-Qaysī] said: They are not forbidden from what they want from the woodlands, unless it is near a settlement and they harm the people living there. And I do not think that the sea has a *ḥarīm*.[137]

The Mālikī scholar does not opine for the existence of a *ḥarīm* of the sea; however, in the context of the above-mentioned case the meaning of *ḥarīm* of the sea clearly relates to the landside, not the waterside of it.

Conclusion

In summary, there are obvious differences between the concepts of *ḥarīm al-baḥr* in Islamic law and "territorial seas" in international law.

According to the scholars' discussions, what is meant by *ḥarīm al-baḥr* is the land side of the sea, starting from the highest point of

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[136] Al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, VI, 195. Khalilieh treats this passage as if a hadith from the Prophet (pbuh) existed and generalizes its validity to incorporate the shores; Khalilieh, *Islamic Law of the Sea*, 118.

[137] Al-Qayrawānī, *al-Nawādir wa-l-ziyādāt*, X, 251; Khalilieh, *Islamic Law of the Sea*, 120.

extension of the tide, not the water side.[138] Its institution follows the sources and mechanism of Islamic legal rules. *Ḥarīm* is conceptualized as a protective zone around a facility. The legislative rationale (*ʿillah*) of *ḥarīm*, although the scholars did not explicitly mention it, is apparently to ensure free access to using this facility. If the property (facility) around which a *ḥarīm* is legislated is private (like a house, tress, well – particularly if constructed on newly cultivated barren land), the proprietor must be able to use his/her property and nobody must hinder him or her. If it is public property, the general public must be able to use it and must not be hindered from access to it (whether river or sea). In this sense, the ruling governing the *ḥarīm* follows the ruling of whoever cultivated it.[139] The legislative wisdom (*ḥikmah*) lies in warding off harm (*daf*ᶜ *al-ḍarar*) in manifold variations, such as the prevention of monopoly, the protection of resources, the preservation of facilities from over-use, and to safeguard its functionality and cleanliness. The legislation of *ḥarīm al-baḥr* is to guarantee access to the sea from the landside for everyone and to curb monopolization, because the status of the sea in Islamic law is that it is communal property.

The *fiqh* concept of *ḥarīm al-baḥr* is apparently not a suitable concept to arrive at a similar conceptualization of territorial and international seas in Islamic and international laws.[140] The Islamic legal concept that does apply with regard to the status of the seas adjacent to or in between lands that are characterized as *dār al-Islām* is the extension of authority (*wilāyah*) or state sovereignty over the sea belt adjacent to its land. Some of the scholars quoted have explicitly given the open sea the status of *dār al-ḥarb*, whereas others have held that it pertains neither to *dār al-Islām* nor to *dār al-ḥarb*, based on the lack of authority (*wilāyah*) over it.

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[138] The only scholar who seems to have referred to something on the water side is Fursuṭāʾī, and he refers explicitly to anchor place or moorage on natural rocks or sandbanks in the sea; al-Fursuṭāʾī, *al-Qismah*, 538 ff.

[139] See al-Riyāmī, "al-Ḥarīm wa-aḥkāmuhū," 116.

[140] Khalilieh arrives at the conclusion that "It can safely be deduced that the modern concept of the territorial sea is duly compatible with the Islamic tradition, given that its seaward breadth does not encroach upon the high sea and state sovereignty is limited to a breadth of several miles." (*Islamic Law of the Sea*, 165). I cannot completely refute the result, but neither can I agree to his argumentation and methodology.

State authority of *dār al-Islām* extends over the coastal sea belt, as well as over any seas surrounded by Islamic territory; correspondingly, the coastal belt adjacent to *dār al-kufr* would be regarded as territory belonging to *dār al-kufr*. This zone may be defined according to the need, and in agreements and treaties with other states. The *maʾman* or point of safe refuge can be considered as a marker where this extension of authority ends. Historically, checkpoints to demarcate territorial waters did exist. State authority does extend over a ship: the captain may take over legal functions in Islamic law. Many legal cases and their treatment in the *fiqh* compendia, such as those involving questions of taxes, *amān*, piracy, and so forth, as well as existing historical contracts, illustrate that this has been a reality at sea for centuries.

There is apparently no difference, in the scholars' discussions, between a sea or land border with regards to *amān* and taxation of goods. Islamic authorities can therefore demand taxes for right of passage, grant or deny entry into ports, and claim their coastline to prevent foreign military or pirate attacks. The high seas are, first, communal property and need to be accessible for all. They are obviously not under Islamic control (*wilāyah*) unless surrounded by *dār al-Islām*, but the captain of a ship may –depending on legal interpretation and the powers with which the head of state has invested him– exercise certain legal functions on the high seas.

Rather than being based on an elusive "Natural Law" or "Islamic Law of Nature,"[141] the initial concept of using the seas is that of *taskhīr*, the subservience of "whatever is available in the heavens and the earth" (Q 31:20). It is this shared concept which led Muslim rulers to defy upcoming territorial claims of European powers in the 16th century.[142] This original subservience and permissibility of things needs to be delineated through specific evidence in the main Islamic sources of legislation, the Qurʾān and Sunnah. If seen from the perspective of property, original ownership of anything belongs to the Creator, while human beings are permitted to make use of things in the sense of the

[141] Khalilieh, *Islamic Law of the Sea*, 215. Natural law concepts and their relation to Islamic legal theory and discussion in contemporary literature need a thorough study and cannot be diligently discussed here. Suffice it to say that the Lawgiver in Islamic Law is, by unanimous agreement of all Muslim scholars, Allah Almighty.

[142] See Khalilieh, *Islamic Law of the Sea*, 8; see also Yatim, "Law of the Sea in Relation to Malaysia," 88.

rights and responsibilities that accompany trusteeship. Water resources generally (be they lakes, rivers, wells, or seas) are considered public or communal property (*milkiyyah ʿāmmah*), not private property, based on the often-quoted hadith ("People share in three things; water, meadows and fire.").[143] A specific evidence may overrule this general one.

The division of the seas in international law into territorial and open seas is the result of historical developments and based on the accepted sources of international law, with its specific conceptualization. Islamic legal concepts of the seas are derived from Islamic legal sources. An Islamic state entity could, subject to the *ijtihād* of its head of state, agree to this division under international contracts, but it is not required to do so.

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[143] Abū ʿAbd Allāh Muḥammad ibn ʿAlī ibn Muḥammad al-Ḥawlānī al-Shawkānī, *Nayl al-awṭār: Sharḥ Muntaqá l-akhbār min aḥādīth Sayyid al-akhyār* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1983), V, 305-306; cf. Abū l-Wafāʾ, *Aḥkām al-qānūn al-duwalī*, II, 68 ff. and al-Fursuṭāʾī, *al-Qismah,* 59, 238.

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