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# Historic Rights in African State Practice?

Edwin Egede\*

## Abstract

Historic rights in the Law of the Sea has assumed prominence in recent times with China's publication of the so-called nine-dash map, which highlighted its claims to maritime zones and certain disputed islands in the South China Seas allegedly based on Historic claims. This paper seeks to explore the State Practice of African States in order to determine whether African States acknowledge and recognise Historic rights as being in line with contemporary international law.

### **1. Introduction**

Historic rights in the Law of the Sea has assumed prominence in recent times, especially ever since China's publication of the so-called nine-dash line map,<sup>1</sup> which highlighted its claims to maritime zones and certain disputed islands in the South China Seas allegedly based on Historic rights. The notability of China's historic rights claims could be traced to the two Note Verbales sent by China in 2009 to the United Nations (UN) Secretary-General in response to the joint submission by Malaysia and Vietnam in the Southern part of the South China Seas, as well as the sole submission of Vietnam to the Northern part made to the Commission on the Limits of the Continental Shelf (CLCS).<sup>2</sup> Both Note Verbales, accompanied by an attached map, requested the CLCS not to consider the joint submission of Malaysia and Vietnam, as well as the sole submission of Vietnam, insisting as follows:

“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map). The above

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<sup>1</sup> Also known by other names such as U-Shaped Line, Nine dotted Line, Tongue-shaped line etc. See Masahiro Miyoshi, “China's “U-Shaped Line” Claim in the South China Sea: Any Validity Under International Law?”(2012)43(1) *Ocean Development and International Law*, pp.1-17; Nguyen-Dang Thang & Nguyen Hong Thao, “China's Nine Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes Between the Philippines and China,” (2012) 43(1) *Ocean Development & International Law*, pp.35-56 and Zou Keyuan “China's U-Shaped Line in the South China Sea Revisited,” (2012) 43(1) *Ocean Development & International Law*, pp.18-34 at 18.

<sup>2</sup> See Commission on the Limits of the Continental Shelf (CLCS) Submissions, Joint submission by Malaysia and Viet Nam - in the southern part of the South China Sea [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) and Viet Nam - in North Area (VNM-N), [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf)

position is consistently held by the Chinese Government, and is widely known by the international community.”<sup>3</sup>

This U-shaped line in the attached map to the Note Verbales, which is generally referred to as the nine-dash line because the line is broken into nine segments, constitutes China’s supposed claim over waters and islands in the South China Seas. In its Note Verbales in 2011 to the UN Secretary-General, again in response to the aforementioned submissions to the CLCS, China appeared to set out more clearly the basis of its claim to islands and adjacent waters within the nine-dash line in the South China Seas as follows:

“China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China’s sovereignty and related rights and jurisdiction in the South China Sea are *supported by abundant historical and legal evidence.*” (Italics mine for emphasis)<sup>4</sup>

There has been some debate on whether China’s historic claim over the Islands and waters within the so-called nine-dash line is consistent with international law. Some have argued, amongst other things, that this claim of China is inconsistent with international law as it is outside the framework of the United Nations Convention on the Law of the Sea(UNCLOS) 82, to which China is a State Party,<sup>5</sup> which makes extensive provisions for recognised maritime zones claims. It has also been argued that the UNCLOS 82 makes rather limited specific references to historic titles, namely as regards the provisions of Article 10 not applying to ‘historic’ bays and relating to Article 15, which provides that the general rule governing the delimitation of overlapping territorial seas would not apply in instances of ‘historic title or other special circumstances.’<sup>6</sup> The latter argument point to the limited coverage of historic titles under the UNCLOS 82, which applies more to near shore waters of the Coastal Claimant State and argue that this does not apply to the claim of China as regards the South China Seas.<sup>7</sup> On the other hand, some scholars argue that China historic claim is

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<sup>3</sup> Ibid, see CML/17/2009 and CML/18/2009

<sup>4</sup> See CML/8/2011,

[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf)

<sup>5</sup> China became a Party to UNCLOS 82 on the 7<sup>th</sup> of June 1996. See

[http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf)

<sup>6</sup> See Articles 10(6) and 15 of UNCLOS 82. See also Art.298 (1) (a) of UNCLOS 82.

<sup>7</sup> See for instance, Office of Ocean and Polar Affairs, United States Department of State Bureau of Oceans and International and Scientific Affairs, Limits in the Seas, No.143 China: Maritime Claims in the South China Sea, December 5, 2014,pp.8-10 and 15-22, <https://www.state.gov/documents/organization/234936.pdf> and Florian Dupuy and Pierre-Marie Dupuy, “A Legal Analysis of China’s Historic Rights Claim in the South China Sea,” (2013)107(1) *American Journal of International Law*, pp.124-141 at 138-139

valid and consistent under international law.<sup>8</sup> Although, there are a variety of arguments raised by scholars in support of China's claim, a particularly intriguing argument, which in this author's view is relevant, with regard to the present paper, is the argument that opines that even if historic claims are not specifically regulated by the UNCLOS 82, these claims are arguably governed by the rules and principles of general international law, which ostensibly permits such types of claims.<sup>9</sup> Scholars adopting the latter argument rely on the preamble of UNCLOS 82, which indicates that this crucial treaty is both codification and progressive development of the law of the sea, and affirms 'that matters not regulated by this Convention [UNCLOS 82] continue to be governed by the rules and principles of general international law.'<sup>10</sup> Of course, it should be noted that the Vienna Convention on the Law of Treaties (VCLT) 1969 states that the context for interpreting a treaty shall of course include the preamble.<sup>11</sup> The question therefore is whether sufficient States Practices could be discerned that would establish that historic claims, such as that of China over the South China Seas, are indeed part of General (Customary) International Law.<sup>12</sup> Fortunately, the task in this article is not cumbersome, as the author does not seek to extrapolate the States Practices from all regions of the world, but rather have the rather limited and specific mandate of exploring State Practice as it relates to the African region. This article aims to explore the State Practice of only African States in order to determine whether African States acknowledge and recognise historic rights claims as being in line with General (Customary) International Law. The article would be divided into three substantive sections. The first section would briefly explore the concept historic title in maritime waters under international law. Thereafter, the second section would briefly engage with the issue of State Practice under international law with a view to identifying the evidence one would explore in seeking to identify historic rights in African State Practice. The third section would then seek to identify if there are any

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<sup>8</sup> See for instance, Fu Ying and Wu Shicun, "South China Sea: How we got to the stage", *National Interest Magazine*, May 9, 2016, <http://nationalinterest.org/feature/south-china-sea-how-we-got-stage-16118> and see also readings mentioned in note 1 above.

<sup>9</sup> See Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status and Implications,"(2013)107(1) *American Journal of International Law*, pp.98-124 at 123

<sup>10</sup> See Preamble 7 and 8.

<sup>11</sup> Article 31(2). See Anthony Aust, *Handbook of International Law*, 2<sup>nd</sup> edition, (Cambridge University Press, 2010), pp.83-85

<sup>12</sup> General International Law is generally regarded as synonymous with Customary International Law. See Ian Brownlie, "Problems concerning the unity of International Law" in A. Giuffre (ed.), *International Law in the Time of its Codification: Essays in Honour of Roberto Ago* (1987) Vol.I, p.154 who talks about "customary (or general) international law. Aust, Ibid. p.9 points out that General International Law '...is a rather vague reference to the corpus of international law, and therefore includes those treaty principles or rules that have become accepted as also customary international Law.'" However, see also Grigory Tunkin, "Is General International Law Customary Law Only?"(1993) 4 EJIL, pp534-541.

evidence from the practices of African States and relevant regional organisations that indicate historic rights claims over maritime waters in the African region. Finally, the article would then end with some brief remarks on the findings.

## **2. Historic rights in Maritime Waters under International Law**

It is important to be clear on the different variants of historic claims in maritime waters under international law. The reason is that in the discourse on the issue, especially in relation to the South China Seas, there occasionally are ambiguity on this. It is sometimes not clear if the point being raised is, on the one hand, an assertion that China's proclamation of historic title is a claim of sovereignty, based on historical evidence, over all the waters falling within the ambit of the nine-dash line, which ordinarily under the UNCLOS 82 would not fall within the realm of China's sovereignty (i.e. historic waters); or, on the other hand, if its assertion of rights over the South China Seas falling short of an actual claim to territorial sovereignty (i.e. historic rights).<sup>13</sup> The former is obviously more controversial than the latter. According to Dupuy and Dupuy:

“The recent turmoil created by the competing sovereignty claims of several countries over islands and waters in the South China Sea has caused the resurgence of the concept of “historic rights”[ ]. Although the term *historic rights* (sometimes confusingly used in this context in combination with other germane notions, such as *historic waters* and *historic title*) has often been imbued with a certain degree of confusion and controversy in international law ...”<sup>14</sup>

Zou Keyuan, acknowledging this confusion in one of his studies on historic rights, states as follows:

“...there are a number of legal terms in the historical context, such as “right”, “Title” and “consolidation”, [ ] which may cause confusion. It is even more complicated when one tries to explore so-called historic rights in the maritime area, particularly when the term is used along with other related terms such as historic waters and historic bays.”<sup>15</sup>

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<sup>13</sup> See Clive R. Symmons, “Historic Waters and Historic Rights in the South China Sea: A Critical Appraisal,” in *The South China Sea UNCLOS and State Practice Conference Proceedings: October 24-25, 2013, Haikou, China*, organized by National Institute for South China Sea Studies and Collaborative Innovation Centre of South China Sea Studies, Nanjing University, pp. 22-49 and Florian Dupuy and Pierre-Marie Dupuy, “A Legal Analysis of China's Historic Rights Claim in the South China Sea”, (2013) 107(1) *American Journal of International Law*, pp.124 at 124 and 134-136.

<sup>14</sup> Dupuy and Dupuy, “A Legal Analysis of China's Historic Rights Claim in the South China Sea”, (2013) 107(1) *American Journal of International Law*, pp.124-141 at 124 and 134-136.

<sup>15</sup> Zou Keyuan, “Historic Rights in International Law and in China's Practice,” (2001) 32(2) *Ocean Development & International Law*, pp.149-168 at 149

The confusion as regard the terminologies is further accentuated when one reads different literature on this issue, but what, however, comes out clearly is that there are two broad aspects to this, which must be clarified for a more coherent engagement with relevant State Practice. For instance, Dupuy and Dupuy point out that ‘[o]ne should ... distinguish between a historic “title” of full territorial sovereignty (whether or not consolidated by State conduct) and historic “rights”, which may include rights falling short of sovereignty, such as exceptional fishing rights or the right of passage.’<sup>16</sup> They then go on to identify that in the law of the sea historic “title” amounting to a claim of sovereignty would fall into the category of “historic waters.”<sup>17</sup> Keyuan Zou, on his part, stressing the dual nature of these rights, points out that historic rights, include historic waters and also covers ‘certain special rights without involving a claim of full sovereignty, such as historic fishing rights, which a State might have acquired in particular areas of the high seas.’<sup>18</sup> The Tribunal in the South China Sea Arbitration sought to clarify the various use of terminologies as regards historic claims by stating as follows:

“The term ‘historic rights’ is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. ‘Historic title’, in contrast, is used specifically to refer to historic sovereignty to land or maritime areas. ‘Historic waters’ is simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea ... Finally, a ‘historic bay’ is simply a bay in which a State claims historic waters.”<sup>19</sup>

It, however, vital to also point out that the Arbitral Tribunal on the South China Sea Arbitration was of the view that with the coming into force of UNCLOS 82 and the ratification of the treaty by China that any historic rights it was claiming within the ‘nine-dash line’ were superseded by the new maritime zones introduced by UNCLOS.<sup>20</sup> It is, however, interesting to note that the Tribunal, despite referring to the preamble of the

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<sup>16</sup> At p.137

<sup>17</sup> Ibid

<sup>18</sup> See note 11 above at p.152

<sup>19</sup> Para.225, South China Sea Arbitration Award of 12 July 2016, <https://www.pcacases.com/web/sendAttach/2086> See also para 100 of *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18 at pp. 73-74

<sup>20</sup> Paras.261 to 263, South China Sea Arbitration Award of 12 July 2016. For an interesting analysis see Sophia Kopela, “Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration”, (2017) 48(2) *Ocean Development & International Law*, pp.181-207

UNCLOS 82 in various places of its judgement on the merits,<sup>21</sup> did not specifically engage with the aspect of the preamble affirming ‘that matters not regulated by this Convention continue to be governed by the rules and principles of general international law.’<sup>22</sup> The Tribunal in so doing appears to have missed the opportunity to engage with the rather convincing argument raised by certain scholars, such as Gao and Jia, that UNCLOS 82, relying on this particular preamble, had preserved the Customary International Law (CIL) on the concept of historic title claims.<sup>23</sup>

It would therefore be important to engage with State Practice on historic rights’ claims in maritime waters with the understanding that States may claim historic waters, on the one hand, or historic rights falling short of a claim for sovereignty, on the other hand, such as fishing rights, the rights to harvest oysters etc. A notable definition of historic waters is that provided by Bouchez, who defines the concept as:

“Waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of State”<sup>24</sup>.

Perhaps the most authoritative juridical definition of historic water is the provided by the International Court of Justice (ICJ) in *the Fisheries Case*,<sup>25</sup> a definition endorsed by the same court over 40 years later, in *the Case concerning Land, Island and Maritime Frontier Dispute, in relation to the Gulf of Fonseca*, which defined it as ‘waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.’<sup>26</sup>

The requirements that must be satisfied in order to successfully establish a valid historic waters’ claim is proof of long-established activities and the continuous exercise of these activities with the acquiescence of other states.<sup>27</sup> It is also interesting to note that the same

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<sup>21</sup> See for instance, paras 245, 421, 515 and 939, South China Sea Arbitration Award of 12 July 2016.

<sup>22</sup> See preamble 8

<sup>23</sup> See Gao and Jia, “The Nine-Dash Line in the South China Sea: History, Status and Implications”, op.cit at p.123 and Kopela, “Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration”, op.cit at pp.184-187.

<sup>24</sup> Bouchez, L.J. *The Regime of Bays in International Law*, (Sythoff Leyden, 1964) at p.281

<sup>25</sup> *UK v. Norway*, Judgement of December 18, 1951, *I.C. J. Reports 1951*, p.116 at p.130

<sup>26</sup> *El Salvador v. Honduras: Nicaragua intervening*, Judgement of September 11, 1992, Para.384, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>

<sup>27</sup> See UN Report, “Juridical Regime of Historic Waters, including Historic Bays”, UN Doc.A/CN.4/143, at pp.13 and 16 and Keyuan, “Historic Rights in International Law and in China’s Practice,” op.cit at p.151

burden of proof is required to establish a claim of limited historic rights falling short of a claim of sovereignty, as well.<sup>28</sup>

Although, certain scholars from China have argued that the claim of China over the South China Seas Water is a claim of historic waters, some other Chinese scholars are rather wary of this position. The latter scholars would prefer to utilise the relevant historic evidence to establish China's sovereignty over the contested islands in the South China seas and argue that under the UNCLOS such islands generate their own maritime zones. Furthermore, these scholars appear to focus more on arguing that China has historic rights falling short of a sovereignty claim over areas in the South China Seas, which have been preserved under CIL.<sup>29</sup> The position of government of China appears to be more consistent with the latter view. For instance, in a statement dated 12 July 2016 issued by the Chinese Foreign Minister rejecting the award of the Arbitral Tribunal in the South China Sea Arbitration it was stated: "China has sovereignty over Nanhai Zhudao (the South China Sea Islands); China has internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf based on its sovereignty over Nanhai Zhudao; and China has historic rights in the South China Sea."<sup>30</sup>

### **3. State Practice and International Law**

Due to the nature of the international system, as a horizontal, decentralised one lacking a single centralised legislator, with Sovereign States as the main subjects, the activities of States (or State Practices) play a crucial role in creating, elucidating and determining what the international law actually is in a particular area, which would regulate the subjects operating within this anarchical system.<sup>31</sup> Dixon, whilst acknowledging that any attempted definition of State Practice would not be exhaustive provides a guideline as to what one should look out for in seeking to discern State Practice.<sup>32</sup> He points out that these include "actual activity (acts and omissions), statements made in respect of concrete situations or disputes, statements of legal principle made in the abstract (such as those preceding the adoption of a resolution in

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<sup>28</sup> See Case Concerning the Continental Shelf (Tunisia v. Libya), Judgement, 24 February, 1982, *I.C.J. Reports 1982*, p. 18 at 72-73, paras.98 to 100

<sup>29</sup> Gao and Jia, "The Nine-Dash Line in the South China Sea: History, Status and Implications," op.cit. pp.108-122 and Keyuan, "Historic Rights in International Law and in China's Practice," op.cit at pp.151-163

<sup>30</sup> See Remarks by Chinese Foreign Minister Wang Yi on the Award of the So-called Arbitral Tribunal in the South China Sea Arbitration, 2016/07/12, [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1380003.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380003.shtml)

<sup>31</sup> See generally Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (with forewords by Stanley Hoffman and Andrew Hurrell), 4<sup>th</sup> edition, (Palgrave Macmillan, 2012)

<sup>32</sup> Martin Dixon, *Textbook on International Law*, 6<sup>th</sup> edition, (Oxford University Press, 2007) at p.31



the General Assembly), national legislation and the practice of international organisations.”<sup>33</sup> He further points out that certain scholars take the view that any activity of a State may amount to State Practice with obviously varying weights given to the different State Practices.<sup>34</sup> Shaw, whilst acknowledging that certain scholars do take the viewpoint that State Practice could not be discerned from mere statements of States, but rather from its activities involving such State actually taking action, points out that this is a minority view.<sup>35</sup> He then proceeds to endorse the broad definition of Akehurst to the effect that ‘state practice covers any act or statements by a state from which views about customary international law may be inferred’ as being substantial correct.<sup>36</sup> Churchill, on his part, also acknowledges that State Practice is ‘a broad and flexible term’ that may include the following:

“legislation enacted by national authorities, decisions of domestic courts, statements made by Government ministers and their legal advisers as to what they believe international law on a particular question to be, diplomatic correspondence between States, protests by States against the acts of other States that are considered to infringe international law and so on.”<sup>37</sup>

He further added that State Practice in a broader sense could also include treaties, as well as “collective State actions within international organisations.”<sup>38</sup> In exploring African State Practice on Historic Rights in the subsequent section, I would be adopting a rather broad definition of State Practice by exploring a wide-range of activities of African States to discern what the African State Practice is on historic rights.

It must be mentioned briefly here before progressing to the next section that there are two main impacts that State Practice may have in international law. First, it is a key element, along with *opinio juris*, in seeking to discern whether there is sufficient State practice to establish CIL, in this case CIL on historic maritime claims. Obviously, as regards, establishing CIL, since the focus is on a particular region, the African region, it is doubtful that the State Practice, if any at all, on such historic titles would by itself suffice to establish

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<sup>33</sup> Ibid

<sup>34</sup> Ibid.

<sup>35</sup> Malcolm Shaw, *International Law*, 8<sup>th</sup> edition, (Cambridge University Press, 2017) at p.62

<sup>36</sup> See Shaw, *ibid*, citing Michael Akehurst, “Custom as a source of International Law”, (1976) 47(1) *British Year Book of International Law*, pp.1-53 at pp.1-2.

<sup>37</sup> Robin R. Churchill, “The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention”, in Alex G. Oude Elferink, ed. *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, (Martinus Nijhoff, 2005), pp.91-143 at 92

<sup>38</sup> Ibid

CIL.<sup>39</sup> However, if there is sufficient evidence of such State Practice in the African region, it may be explored along with State Practices in other regions of the world to seek to determine whether CIL already existed prior to the UNCLOS 82 or whether it subsequently emerged after the UNCLOS 82 was adopted.<sup>40</sup>

Second, State Practice may be used as an element in treaty interpretation, in this particular case as an element to seek to clarify the position of UNCLOS 82 as regards historic titles.

Article 31 of the Vienna Convention on the Law of the Treaties (VCLT) 1969 states:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. ...

3. There shall be taken into account, together with the context:

(a) ...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.”

#### **4. African State Practice on Historic Rights**

Africa consists of 55 States,<sup>41</sup> of which 40 are coastal States, with the remaining being landlocked States.<sup>42</sup> In relation to the principles of modern law of the Sea African States are relatively new comers in engaging with this very important area of international law since most them became independent sovereign States fairly recently.<sup>43</sup> Very few of these States participated in the 1958 First United Nations Conference on the Law of the Sea (UNCLOS I), which led to the adoption of the 1958 Conventions.<sup>44</sup> Eventually, at the time of the Third

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<sup>39</sup> The best that could happen if at all there is sufficient regional State practice on this, along with opinio juris is to establish a regional customary international law. See *Asylum Case (Columbia v. Peru)*, I.C.J. Rep.1950, p.266

<sup>40</sup> See Preamble 8 of UNCLOS 82

<sup>41</sup> Note that the Republic of South Sudan became the newest African State, when it became independent on the 9<sup>th</sup> of July 2011 and has since become a member of both the African Union and the United Nations. Also, note the Saharawi Arab Democratic Republic, which became independent on 27 February 1976, though a member of the African Union is not currently a member of the United Nations and there are still some issues on its recognition as a State, notably by Morocco. Morocco withdrew in 1984 from the Organisation of African Unity because of its recognition of the Saharawi Arab Democratic Republic, but was readmitted in 2017 to the African Union.

<sup>42</sup> The landlocked countries in Africa are Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe.

<sup>43</sup> Most African States became independent sovereign States in by the 1950s (actually only a few such as Ghana, Guinea, Sudan and Tunisia), with most of becoming independent in the 1960s.

<sup>44</sup> Conventions on the Territorial Sea and Contiguous Zone; the High Seas; the Continental Shelf and the Fishing and Conservation of the Living Resources of the High Seas. The Second United Nations Conference on the Law of the Sea (UNCLOS II) convened in 1960 did not produce any Conventions.

United Nations Conference on the Law of the Sea (UNCLOS III), which eventually led to the adoption of the UNCLOS 82, even more African States participated, having since gained their independence. In fact, it would be right to say that African States played a crucial role in instigating the UNCLOS III.<sup>45</sup> Although, there are historic evidence on Africa's participation in the sea predating colonialism, the colonial experience has clouded such engagement with the sea with the related opacity on African historic evidence as it relates to the sea.<sup>46</sup> Thus certain African States were rather suspicious of the Eurocentric nature of pre-UNCLOS III law of the sea, including the whole notion of historic rights. For instance, the representative of Guinea, Mr Diallo, at the UNCLOS III is reported to have stated as follows:

“With regard to ‘historic rights,’ ... the concept was nothing other than a manifestation of the right of the strongest and a vestige of colonialism, which [Guinea] would oppose in all its forms. To perpetuate those rights would be a grave injustice to the young States that we’re struggling not only for political but also for economic independence.”<sup>47</sup>

Nonetheless, there are some evidence of State Practices in Africa that relate to historic rights in maritime waters. The first case in point, that would be explored is the African States Regional Seminar held in Yaoundé on 20-30 June 1972, which adopted, amongst other things, the following recommendations on "'Historic Bays' and 'Historic Rights':" <sup>48</sup> The Yaoundé Seminar's recommendations stated as follows:

“(1) That the "historic rights" acquired by certain neighboring African States in a part of the Sea which may fall within the exclusive jurisdiction of another State should be recognized and safeguarded.  
(2) The impossibility of an African State to provide evidence of an uninterrupted claim over a historic bay should not constitute any obstacle to the recognition of the rights of that State over such a bay.”

While this appears to be an indication of recognition of the concepts of ‘historic bays’ and ‘historic rights’ by certain African States, this instrument, unfortunately does not provide any definition of these concepts. We are thus not clear whether the reference in this instrument is to historic waters or perhaps to historic rights falling short of the assertion of sovereignty. Conceivably, one could interpret the mention of historic bays in paragraph 2 as a reference to

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<sup>45</sup> Egede, E., *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, (Heidelberg, Springer, 2011) at pp.1-30;

<sup>46</sup> *Ibid* at pp.1-2

<sup>47</sup> UNCLOS III, Official Records, Vol.III, First Committee A/CONF.19/8, 18<sup>th</sup> Meeting, 1974, para.6

<sup>48</sup> Para. I (b) A/AC.138/79, reprinted in *International Legal Materials* Vo.XII (1) January 1973, p.210. The Seminar was attended by 16 States: Cameroon, Central African Republic, Dahomey(now Republic of Benin), Egypt, Equatorial Guinea, Ethiopia, Ivory Coast(now Cote d’Ivoire), Kenya, Mauritius, Nigeria, Senegal, Sierra Leone, Tanzania, Togo, Tunisia and Zaire(Democratic Republic of Congo).

historic waters encapsulating sovereignty over such waters, whilst the allusion to historic rights in the context it is used in paragraph 1 as a reference to such rights that fall short of a claim to sovereignty. However, what is perhaps interesting is a clear intention to limit in paragraph 2 the burden of proof that would be imposed on African States as regard evidence to be provided for such historic waters claim. It stresses that the ‘impossibility of an African State to provide evidence of an uninterrupted claim over a historic bay’ should not be an obstacle to the recognition of the historic rights of such African State over such a bay. By so doing, it would appear here that the instrument was claiming an exception to the usual burden of proof to establish such historic title, at least as regards historic bays. Goldie in his seminal article on historic bays in international law sought to explain this exception by a reference to the African Continent’s colonial past. He said as follows:

“The exception, in paragraph two above, of the practice in former colonial areas pursued by the former colonial power refers to the problem of how much credence should be given to the formulations and policies arising from a former colonial occupation. A major maritime colonial power may, in the pursuit of vindicating a policy giving the freedom of the high seas the widest possible geographical extent, have determinedly refrained from championing a subject community's previously acquired, or possible inchoate, historic rights in order to remain consistent in its global policy. Or, alternatively, it may have refrained from enforcing such historic rights against third states in order to give a quid pro quo for the opening up to the access of the world community by such third states of their enclosed seas. Such a consistency of policy, the African Regional Seminar indicates, would have been bought at too high a price and should not be permitted to continue to provide a ruling principle in the post-colonial age.”<sup>49</sup>

It is, however, not clear from this instrument if this limitation of the burden under paragraph 2, based on the Continent’s colonial past, should be regarded as also applying to historic rights claim falling short of a claim for sovereignty, since the burden required for historic waters under international law are meant to be the same as that required by the former.

Even though, the Yaoundé Regional Seminar recommendations touches on historic rights, when one looks at the number of States that participated in the Seminar, 16 in number, this is comparatively low in relation to the total number of States in the African continent. It is also interesting to note that the subsequent 1974 Organisation of African Unity (OAU), an African wide Declaration on the Issues of the Law of the Sea adopted by the OAU Council of Ministers at its 21st ordinary session was silent on historic rights and titles.<sup>50</sup>In the preamble

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<sup>49</sup> L.F.E. Goldie, “Historic Bays in International Law: An Impressionistic Overview”, (1984)11(2) *Syracuse Journal of International Law & Commerce*, pp.211-273 at 264

<sup>50</sup> OAU Doc. A/CONF.62/33 1974; UN *UNCLOS III Official Records* (1974) III 63-65.

of the Declaration, the OAU (now the African Union), affirmed that it was its ‘responsibility to harness the natural and human resources of [the African continent] for the total advancement of [the African] peoples in all spheres of human endeavour’ and that ‘African countries have a right to exploit the marine resources around the African continent for the economic benefit of African people’.<sup>51</sup> Yet the Declaration did not mention historic rights and titles, though it engaged with important areas of the law of the sea, such as: the territorial sea and straits; the regime of islands; the exclusive economic zone (EEZ) concept (including the exclusive fishery zone); regional arrangements; fishing activities in the high seas; the transfer of technology; scientific research; the preservation of the marine environment, as well as the international regime and international machinery for the seabed and ocean floor and subsoil beyond the limits of national jurisdiction.<sup>52</sup> The notable absence of a mention of historic rights in this African wide Declaration on the Law of the Sea, especially since it was adopted about two years after the Yaoundé Seminar, would appear to suggest a lack of consensus, even amongst African States, on the applicability of the concept under international law.

Another notable illustration of African State Practice on historic rights is the Gulf of Sidra claim by Libya. In 1973, the Libyan government circulated a note claiming the Gulf of Sidra (also known as Sirte or Surt) as a historic and vital bay and thus part of its internal waters.<sup>53</sup> The aim of the claim was to seek to enclose the waters of this purported historic bay within a straight line of approximately 300 miles connecting the two parts of the coast at the cities of Benghazi and Misurata at a latitude of 32 degrees and 30 minutes north.<sup>54</sup> That same year the Libyan government notified the United States of America (USA) and the United Nations of this claim. Interestingly, we see this claim of Libya justified on two important grounds - firstly, based on its vital ‘security interests’ and secondly, on the basis of sovereign rights and possession exercised over the waters the Gulf for a long period of time. It would appear that this assertion by Libya was a claim based on the Gulf as historic waters. It further put in place a regime requiring foreign vessels navigating in the Gulf to request prior

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<sup>51</sup> Ibid at 63 par 1 and 9.

<sup>52</sup> Ibid at 63-65.

<sup>53</sup> See Declaration of October 10, 1973, reprinted in John M. Spinnato, “Historic and Vital Bays: An Analysis of Libya’s Claim to the Gulf of Sidra”, (1983) 13 *Ocean Development & International Law*, p.65 at 67-68. Also, see United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas No.112, United States Responses to Excessive National Maritime Claims, March 9, 1992, pp.8-9 and 17-18, <https://www.state.gov/documents/organization/58381.pdf>.

<sup>54</sup> Francesco Francioni, “The Status of the Gulf of Sirte in International Law”, (1984) 11(2) *Syracuse Journal of International Law & Commerce*, pp.311-326 at 312-313

mandatory authorisation from the Libyan government. The USA filed in 1974 a protest against the Libyan claim. It then subsequently took steps to challenge this claim by conducting military manoeuvres in the contested area, which eventually escalated into a military conflict between the two States that led to the downing of two Libyan jets by American fighter jets.<sup>55</sup> In its protest, the USA took the view that the claim of the Libyan government was inconsistent with the international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the applicable Convention at that time. In addition, it asserted that the claim on historic grounds did not ‘meet the international law standards of past, open, notorious and effective exercise of authority, continuous exercise of authority and acquiescence of foreign nations.’<sup>56</sup> Recently, the USA has also made freedom of navigation operational assertions as regard the Libyan historic waters claim over the Gulf of Sidra.<sup>57</sup> Furthermore, other western States, as well as the former USSR have also challenged the claim of Libya.<sup>58</sup> It has been said that the crucial problem with Libya’s claim was its failure to adduce any real historical evidence in support of its claim and the absence of acquiescence by other nations.<sup>59</sup> Blum in his analysis of the Gulf of Sidra incident appeared to suggest that while old claims to historic waters that predate the 1958 Geneva Conventions and the UNCLOS 82 may be accepted by the international community if the claimant State satisfies the burden of proof for such claim, it may not be accepted in respect of new claims made post the aforementioned Conventions applicable to the sea, especially when made by newly independent developing States. Writing before the UNCLOS 82 came into force, noted as follows:

“Claims to historic waters in general (and to historic bays in particular) are relics of an older and by now largely obsolete legal regime. It will thus be readily understood that, while the international community may still be willing to

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<sup>55</sup> Ibid at 311, 313-314

<sup>56</sup> Ibid at 313

<sup>57</sup> See U.S. Department of Defence (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2015, [http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON\\_Report\\_FY15.pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FON_Report_FY15.pdf) ; U.S. Department of Defence Freedom of Navigation Report for Fiscal Year 2014, <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/20150323%202015%20DoD%20Annual%20FON%20Report.pdf>; U.S. Department of Defence (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2013, <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY2013%20DOD%20Annual%20FON%20Report.pdf> ; U.S. Department of Defence (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2000 <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY2000%20DOD%20Annual%20FON%20Report.pdf> and U.S. Department of Defence (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 1998 <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY1998%20DOD%20Annual%20FON%20Report.pdf>

<sup>58</sup> See Z.Keyuan, “Historic Rights in International Law and in China’s Practice,” op.cit. at p153

<sup>59</sup> Yehuda Z. Blum, “The Gulf of Sidra Incident”, (1986)80(3) *American Journal of International Law*, pp.668-677 at 674-676

consider, in exceptional circumstances, the validity of already existing claims of this kind, it has firmly rejected any attempts to establish any new maritime claims of an extravagant character. This approach is dictated by the realization that any such claims - if successful - clearly encroach on what otherwise would be considered the common domain of the international community.”<sup>60</sup>

Furthermore, he pointed out as follows:

“...the current law of the sea has frozen the existing situation in regard to historic bays, with a view to preventing the emergence of new “historic” claims. At first sight, this approach may appear to operate unfairly to the advantage of the “old” (essentially European) states that over the years were able to establish such privileged claims in their favor. In contrast, according to this view, the “new” states of Asia, Africa and Latin America owing to the relative brevity of their statehood, have been unable to build up such time-honored claims, unless they were formerly asserted on their behalf by the colonial power.”<sup>61</sup>

It is interesting to note that in making the two statements quoted above, Blum did not refer to any significant authority in support of his assertion of the distinction between “old” historic claims essentially made by “old”, mostly European, States and “new” claims made by relatively “new” States, including those from Africa. This distinction and trend of arguments on historic waters claims raises some concerns. First, it would perpetuate the inherent inequality in the law of the sea that pushed developing States to push for the third United Nations Conference on the Law of the Sea (UNCLOS III) to fashion out a new law of the sea Convention.<sup>62</sup> It is argued that in the interest of equality of States and fairness, the concept of historic water claims should apply to all States or it should not apply at all. Second, the so-called distinction appears to be justified by the rather erroneous assumption that relatively “new” States including those from Africa could not possibly have historic evidence that predates the colonial era. As has been pointed out somewhere above, this is simply not correct, as there are historical evidence available in public domain that affirms that peoples in Africa, some of whom are now part of the so-called “new” States, had engaged with the sea, even prior to the colonial period.<sup>63</sup> It is interesting to note that in December 1986, when the U.S Department of State, Bureau of Public Affairs, published "Navigation Rights and the

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<sup>60</sup> Ibid at 671

<sup>61</sup> Ibid at 676. See for instance, the award of the Arbitral Tribunal in the Eritrea v. Yemen Arbitration, Phase I Territorial Sovereignty and Scope of Dispute, Paras. 448-449 and 489 identifying some difficulties with historic claims vis-à-vis colonialism <https://www.pcacases.com/web/sendAttach/517>

<sup>62</sup> Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, op.cit. at pp.8-10

<sup>63</sup> Ibid at pp.1-3. See also *Continental Shelf (Tunisia v.Libya)*, Judgement, 24 February, 1982, *I.C.J. Reports 1982*, p. 18 at 72-73, paras.98-99 and *Eritrea v.Yemen Arbitration*, Second Stage, Delimitation at p.13

Gulf of Sidra," in GIST, a reference aid on U.S Foreign relations, it actually referred to the history of U.S responses, dating back to the 18th century, to the attempts by North African States [perhaps this should read as 'peoples'] to restrict navigation in these waters.<sup>64</sup> Surely, the reference to evidence from the 18th century would seem to indicate the willingness of the U.S. and other States to consider historic evidence that predates colonial era. In *the Continental Shelf (Tunisia v.Libya) case*, it is noted that Tunisia in seeking to establish its historic rights referred to periods predating colonialism. In the judgment, the court stated as follows:

“Tunisia claimed to have exercised sovereignty over these areas, and cited in support legislative acts and other indicia of the exercise of supervision and control dating back to the time "whereof the memory of man runneth not to the contrary". There is insistence on Tunisia's part that these rights have been recognized for centuries by other States.”<sup>65</sup>

It is precisely for this reason, as identified by Goldie above, that the African States Regional Seminar held in Yaoundé on 20-30 June 1972, in its in its recommendations on "'Historic Bays' and 'Historic Rights,' included the exception to the burden of proof'. Clearly, if the evidence during the colonial era contradicts credible historical evidence predating colonialism, because of the likelihood of the colonial power not necessarily seeking the interest of the colonised peoples, such colonial evidence should be discountenanced in determining uninterrupted claim. It simply would be untenable to accept in contemporary law of the sea an application of a concept of historic rights that puts certain States, especially African States, at a disadvantage due to their unfortunate colonial experience.

Apart from the Gulf of Sirtra claim of Libya, there are certain African States that have claimed historic rights, with some including the concept of historic rights in their national legislation. It must be underscored that this is a rather limited number of African States. For instance, Kenya in its Maritime Zones Act Cap.371 of 1989 states that ‘[f]or the purpose of Article 7 of [the UNCLOS 82] Ungwana Bay (formerly known as Formosa Bay) shall be deemed to be and always to have been an historic bay; and the Minister may, by notice published in the Gazette, declare any other bays or waters to be historic bays or waters.’<sup>66</sup>

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<sup>64</sup> See J. Ashley Roach and Robert W. Smith (eds), *Excessive Maritime Claims*, 3<sup>rd</sup> edition, (Martinus Nijhoff Publishers, 2012) at pp.46-47

<sup>65</sup> Judgement, 24 February, 1982, *I.C.J. Reports 1982*, p. 18 at 72, para.99

<sup>66</sup> Section 3(3)



Kenya had closed the Bay in 1960.<sup>67</sup> As far back as June 1969, the Kenyan government further issued a declaration declaring the bay as an historic one in order to ‘safeguard the vital interests of the inhabitants of the coastal region and to confirm the practice which has always existed.’<sup>68</sup> The United States of America has refused to recognise this claim and in 1990 and 1998 conducted freedom of navigation operational assertions as regard the bay.<sup>69</sup> Mauritius, also in its previous Maritime Zones Act No.13 of 1977 referred to historic waters. This legislation conferred on the Prime Minister the power to adopt regulations specifying the limits of the historic waters and stated “[t]he sovereign right of Mauritius extends and has always extended, to the historic waters and to the seabed and subsoil underlying, and the airspace over, the historic waters.”<sup>70</sup> The Act No.13 of 1977 was repealed and replaced by the Mauritius Maritime Zone Act, No. 2 of 2005.<sup>71</sup> The latter legislation under the interpretation section indicates that the Maritime zones of Mauritius includes ‘historic waters’ and that “Historic waters means the historic waters of Mauritius prescribed under section 11.”<sup>72</sup> Section 11 of the legislation states that: “[t]he Prime Minister may, by regulations, prescribe the limits of the historic waters of Mauritius.” In a 2005 Regulations, Mauritius also describes an historic bay closing line for Mathurin Bay on the island of Rodrigues. In addition, in a recent regulation made by the relevant Minister of Mauritius pursuant to their Maritime Zone Act, the Maritime Zones (Conduct of Marine Scientific Research) Regulations 2017, in its interpretation section stressed that the Mauritius ‘National Jurisdiction’ includes historic waters.<sup>73</sup> This claim has been challenged by the USA as not meeting the criteria of an historic bay.<sup>74</sup> It, however, does not appear that the Mauritius government has taken any actual steps to implement and enforce its historic waters claim despite the extant legislation and regulations. Another point worth noting is that it has been noted by a renowned scholar, writing on the development of fisheries in Mauritius, that though it is not specifically

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<sup>67</sup> See Natalino Ronzitti, “Is the Gulf of Taranto an Historic Bay?(1984) 11(2) Syracuse Journal of International Law & Commerce, p.275 at 276

<sup>68</sup> See Symmonds, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, (Martinus Nijhoff Publishers, 2008) at p.102

<sup>69</sup> See U.S. Department of Defence (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 1998, <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY1998%20DOD%20Annual%20FON%20Report.pdf> and U.S DOD 2005.I.M-Navy JAG, <http://www.jag.navy.mil/organization/documents/mcrm/Kenya2014.pdf>

<sup>70</sup> See section 8. Also, see section 2.

<sup>71</sup> Section 29

<sup>72</sup> See section 1

<sup>73</sup> See Section 2(e)

<sup>74</sup> See United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs: *Limits in the Seas*, No.140 – Mauritius: Archipelagic and other Maritime Claims and Boundaries, July 8, 2014 at p.6, <https://www.state.gov/e/oes/ocns/opa/c16065.htm> This claim was challenged by the USA as not meeting the criteria of an historic bay.

legislated for, Mauritius claims traditional fishing rights over the northern and distant Saya de Malha bank complex. The scholar argues that this is presumably incorporated in the provisions of the relevant legislation on historic waters.<sup>75</sup> It is difficult to agree with this assumption, as this would tend to obfuscate the distinction between historic waters and other historic rights falling short of a sovereignty claim under international law.

In addition, Seychelles in its Maritime Zones Act no.15 of 1977 referred to historic waters as follows:

- “1) The President may, by Order published in the *Gazette*, specify the limits of the historic waters.
- (2) The sovereign rights of Seychelles extends, and has always extended, to the historic waters and to the seabed and subsoil underlying, and the air space over, the historic waters.”<sup>76</sup>

The United States of America commenting on the Seychelles 1977 had indicated that it claims authority to designate historic waters.<sup>77</sup> There is no indication that other States have challenged this legislation. Perhaps, it is because there is no evidence that the Seychelles government has actually designated any part of the seas as constituting its historical waters. This point is now a moot because the subsequent Seychelles legislation - Maritime Zones Act, 1999 (Act No. 2 of 1999) - which repealed the 1977 legislation, does not mention historic waters and merely refers to “maritime zone” as meaning:

- “(a) The internal waters;
- (b) The archipelagic waters;
- (c) The territorial sea;
- (d) The contiguous zone;
- (e) The exclusive economic zone; or
- (f) The continental shelf.”<sup>78</sup>

On historic rights falling short of a claim for sovereignty, we see Tunisia, an African State, claiming historic rights to fishing activities, which it maintained was derived from the long-established interests and activities of its population in exploiting the fisheries of the bed and

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<sup>75</sup> Erik C. Paul, *Fisheries Development and the Food Needs of Mauritius* (A.A. Balkema, Rotterdam/Boston, 1987) at pp. 4- 5.

<sup>76</sup> Section 8. See also sections 2, 11 and 15 for reference to historic waters, <http://extwprlegs1.fao.org/docs/pdf/sey2120.pdf>

<sup>77</sup> United States Department of State Bureau of Ocean and International Environmental and Scientific Affairs, Limits in the Seas No.36, National Claims to Maritime Jurisdictions, 8<sup>th</sup> Revision, March 25, 2000 at p.138, <https://www.state.gov/documents/organization/61543.pdf>

<sup>78</sup> Section 32(2) of Act No.2 of 1999

waters of the Mediterranean off its coasts, as well as the exploitation of the shallow inshore banks for fixed fisheries for the catching of swimming species, and of the deeper banks for the collection of sedentary species, namely sponges.<sup>79</sup> According to the ICJ:

“It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law. The first régime is based on acquisition and occupation, while the second is based on the existence of rights 'ipso facto and ab initio". No doubt both may sometimes coincide in part or in whole, but such coincidence can only be fortuitous, as in the case of Tunisia where the fishing areas cover the access to its continental shelf, though only as far as they go. While it may be that Tunisia's historic rights and titles are more nearly related to the concept of the exclusive economic zone, which may be regarded as part of modern international law, Tunisia has not chosen to base its claims upon that concept.”<sup>80</sup>

In the *Eritrea v. Yemen Arbitration*, Eritrea, another African State claimed historic rights based on the Eritrean people's historic use of the resources around the waters around the islands of Hanis and Zugar as well as the islands of Jabal al-Tayr and the Zubayr, including fishing, trading, shell and pearl diving, guano and mineral extraction, and all associated activities on land including drying fish, drawing water, religious and burial practices, and building and occupying shelters for sleep and refuge.<sup>81</sup> The Tribunal described this practice as follows:

This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. Equally, the persons sailing for fishing or trading purposes from one coast to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature<sup>82</sup>

The *Eritrea/Yemen* Tribunal declared that the recognition of each party's sovereignty over various islands was not inimical to the historic fishing rights of the other State within the adjacent waters of the respective islands. According to the Tribunal:

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<sup>79</sup> *Continental Shelf (Tunisia v.Libya)*, Judgement, 24 February, 1982, *I.C.J. Reports 1982*, p. 18 at 72-73, paras.98-99 and *Eritrea v.Yemen Arbitration*, Second Stage, Delimitation at p.13

<sup>80</sup> *Ibid* para 100

<sup>81</sup> *Eritrea v.Yemen Arbitration*, Second Stage, Delimitation at p.13

<sup>82</sup> Para 128, Phase I Territorial Sovereignty and Scope of Dispute, <https://www.pcacases.com/web/sendAttach/517>

“This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar islands and the islands of Jebel al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.”<sup>83</sup>

During the UNCLOS III, there did not seem to be a consensus amongst African States on whether historic rights falling short of a claim to sovereignty was still applicable, especially in the light of the introduction of new maritime zones, such as the Exclusive Economic Zone (EEZ). For instance, Zaire (now the Democratic Republic of Congo), appeared to suggest in the UNCLOS III that despite the emergence of the concept of the EEZ that based on ‘the principle of regional solidarity’ that ‘some geographically disadvantaged States had a legitimate claim to certain historical rights’ in the EEZ of another State.<sup>84</sup> This may be contrasted with the position of another African State, South Africa, at the same meeting. It took the view that although under the EEZ concept a Coastal State, unable to exploit its fisheries fully may allow other States to share in the exploitation of those resources on a non-discriminatory basis, it stressed that this would be done ‘without necessarily recognizing the so-called traditional fishing rights of foreign States in the zone’.<sup>85</sup> The South African delegation insisted that such right to exploit the fisheries resources should be left to the sole discretion of the Coastal State to which the EEZ appertains.<sup>86</sup>

It is quite fascinating to note that the African Union, as the collective body representing the 55 States in Africa,<sup>87</sup> in its more recent engagement with the issue of the Oceans and seas in the African Maritime Domain under the broad auspices of the so-called African Blue/Ocean Economy does not directly address the issue of historic rights. For instance, the recent 2050 Africa’s Integrated Maritime Strategy (2050 AIM Strategy) which is intended to provide an African-driven long-term and reasonably comprehensive strategy on Africa’s engagement with the maritime space of Africa does not specifically mention historic rights and titles.<sup>88</sup>

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<sup>83</sup> Ibid at para. 526

<sup>84</sup> Para.13, A/CONF.62/C.2/SR.30, Summary records of meetings of the Second Committee 30<sup>th</sup> Meeting, Extracts from the Official Records of UNCLOS III, Vol.II, [http://legal.un.org/diplomaticconferences/1973\\_los/vol1.shtml](http://legal.un.org/diplomaticconferences/1973_los/vol1.shtml)

<sup>85</sup> Paras.2 and 3, Ibid

<sup>86</sup> See Articles 61 and 62 of UNCLOS 82.

<sup>87</sup> See <https://au.int/en/memberstates>

<sup>88</sup> For AIM Strategy see [http://cggrps.org/wp-content/uploads/2050-AIM-Strategy\\_EN.pdf](http://cggrps.org/wp-content/uploads/2050-AIM-Strategy_EN.pdf) The Strategy was adopted on 31 January 2014 by African Union Assembly, AU ‘Decision on the adoption and implementation of the 2050 Africa’s Integrated Maritime Strategy (2050 AIM Strategy)’ (AU Doc. Assembly/AU/16(XXII) Add.1 2014. For an analysis of certain gaps in the strategy see Edwin Egede, “Institutional gaps in the 2050 Africa’s

The Strategy under the heading ‘Maritime Boundaries/Delineation’ states that: ‘Member States are further urged to accept and fulfil all those responsibilities *that emanate from the establishment of maritime zones as foreseen by UNCLOS and the IMO SOLAS Convention.*’<sup>89</sup>(Italics provided by this author for emphasis) This rather ambiguous provision is not helpful in clarifying the issue of historic rights and titles under international law, and whether African States practice recognises this as legal under international law. On the one hand, it could be argued that neither UNCLOS 82 and the IMO SOLAS Convention obviously ‘foresees’ the application of historic rights and titles because they do not specifically and explicitly address these concepts.<sup>90</sup> Moreover, the AIM Strategy does not specifically refer to CIL or General International Law to give room for African States to claim historic rights or titles under CIL or General International Law. It should be noted that the South China Sea Arbitral Tribunal had stated: “...the system of maritime zones created by the Convention [UNCLOS 82] was intended to be comprehensive and to cover any area of sea or seabed.”<sup>91</sup> On the other hand, it could be argued that the references in certain places in UNCLOS 82 to historic rights and titles, though this was not expatiated on, and the explicit incorporation of general international law in the preamble of UNCLOS, it could be argued that UNCLOS does ‘foresee’ and incorporates such CIL rules on historic titles.<sup>92</sup>

Neither does the recent African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter), which was adopted in 2016(though yet to come into force) under the auspices of the African Union, with the awareness ‘of the geostrategic importance of the seas, oceans and inland waterways in the socio-economic development of Africa and of their role in sustainable development of the continent,’<sup>93</sup> explicitly engage with the issue of historic rights. However, it is intriguing to note that in defining maritime zones, the Charter states that this means ‘maritime zones as defined in the United Nations Convention on the Law of the Sea (UNCLOS) adopted on 10 December 1982.’<sup>94</sup> It is worthy of note that it does not include the additional phrase such as ‘and under general international law’ which could have given room for incorporating maritime zones that have or may emerge under customary international law. The implication of this would appear to indicate that the Charter would only recognise maritime zones

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Integrated Maritime Strategy,” (2016) 1 *Iilwandle Zethu: Journal of Ocean Law and Governance in Africa*, pp.1-27

<sup>89</sup> Para.59, AIM Strategy, *Ibid.*

<sup>90</sup> Except of course in relation to Articles 10 and 15 of UNCLOS 82

<sup>91</sup> Para.245. Also see Paras.231 & 253.

<sup>92</sup> See notes 6, 9, 10 and 22 above

<sup>93</sup> See Preamble 15 of the Charter, <https://au.int/en/treaties/african-charter-maritime-security-and-safety-and-development-africa-lom%C3%A9-charter>

<sup>94</sup> See Art.1 of the Charter

in Africa that are explicitly defined under the UNCLOS 82 and arguably, this would exclude historic titles since these are not explicitly defined in UNCLOS.

### **5. Concluding remarks**

The issue of whether historic rights in maritime waters are still valid rights under modern international law is still a rather debatable point. This chapter has sought to explore various African State Practice, using State Practice in a broad sense, as regard historic waters claims and claims to historic rights falling short of sovereignty claims. The review of African State Practice on historic rights reveals that although there are some State Practice in Africa on such historic titles and claims, the practices are rather limited and not sufficiently widespread or uniform enough to amount to an agreed African interpretation of the UNCLOS or sufficiently extensive practice that could validly contribute, along with other States Practices in other regions, to support a contention of the existence of parallel rules of customary international law, which compliments the rather meagre UNCLOS 82 provisions on historic titles and rights.<sup>95</sup>

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<sup>95</sup> See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), Judgement on Merits, ICJ Rep. 1986, p.14 which states as regards use of force and self-defence in international law as follows: “There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter.” Para.34.