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Safeguarding Maritime Traditions: Proving Traditional Fishing Rights Under International Law

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Abstract

One of the most controversial sources of public international law is customary international law, whose identification by international courts remains a significant challenge for both doctrine and jurisprudence. This difficulty arises from the absence of a clear standard for assessing the existence of a customary norm, as well as the lack of a precise and systematic methodology for determining the value of the elements that constitute it. Traditional fishing rights were part of the customary international law governing the law of the sea before the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS). However, the adoption of this treaty raised questions about the legal nature of these rights and their continued recognition in the international legal framework. Proving traditional fishing rights as customary international law is a complex challenge, as it requires demonstrating both the existence of a consistent and widespread practice over time and its recognition as a legally binding obligation (*opinio juris*). In this context, this article will focus on analysing customary international law and its identification before the International Court of Justice, with the aim of examining how this court assesses evidence of customary international law and determining the most suitable types of proof to substantiate the customary nature of traditional fishing rights.

Keywords: customary international law, identification of international custom, evidence before international tribunals, standard of proof, traditional fishing rights, UNCLOS

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Protegiendo las tradiciones marítimas: la prueba de los derechos de pesca tradicionales en el derecho internacional

Resumen

Una de las fuentes más controversiales del derecho internacional público es la costumbre internacional, cuya identificación por parte de los tribunales internacionales sigue representando un gran desafío para la doctrina y la jurisprudencia. Esto se debe a la ausencia de un estándar claro para evaluar la existencia de una norma consuetudinaria, así como a la falta de una metodología precisa y sistemática para determinar el valor de los elementos que la componen. Los derechos tradicionales de pesca formaban parte de la costumbre internacional que regía el derecho del mar antes de la entrada en vigor de la Convención de las Naciones Unidas sobre el Derecho del Mar (CONVEMAR). Sin embargo, la adopción de este tratado generó cuestionamientos sobre la naturaleza jurídica de estos derechos y su permanencia en el ordenamiento internacional. Probar los derechos tradicionales de pesca como norma consuetudinaria es un reto complejo, ya que requiere demostrar tanto la existencia de una práctica constante y generalizada a lo largo del tiempo como su reconocimiento como obligación jurídica (*opinio iuris*). En este contexto, el presente artículo se centrará en analizar la costumbre internacional y su identificación ante la Corte Internacional de Justicia, con el objetivo de examinar cómo este tribunal valora la evidencia de la costumbre internacional y determinar qué tipo de prueba resulta más idónea para acreditar el carácter consuetudinario de los derechos tradicionales de pesca.

Palabras clave: derecho internacional consuetudinario, identificación de la costumbre internacional, prueba ante tribunales internacionales, estándar de prueba, derechos de pesca tradicionales, CONVEMAR

1. Introduction

Proving traditional fishing rights as international custom is one of the most significant challenges that currently encounter contemporary international law. Taking into consideration the cultural sphere of this practice, the protection of these rights is transcendental, especially when disputes arise over them. However, this protection is quite difficult and complex, insofar as with the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS), it may seem that due to the emerging of the Economic Exclusive Zone (EEZ) these kinds of rights are extincted. In that light, some States appeared before international tribunals with the aim of having these rights recognized, with different outcomes. Under this scenario, States may deny their existence and others, when trying to seek their protection do not manage to prove effectively the existence of these rights, due to the lack of clarity that exists in doctrine and jurisprudence.

This article is based on the hypothesis that traditional fishing rights have customary international law as their source, and therefore their proof relies on the existence of a continuous and sustained practice over time, as well as the understanding that this practice constitutes an international legal obligation (*opinio juris sive necessitatis*). In this sense, for the respective proof of its elements, it is convenient to analyse international jurisprudence, specifically the International Court of Justice, which has a wide discretion in the assessment of evidence and through its rulings has been establishing certain standards for the proof of customary international law. For this reason, this paper will begin by referring to international custom as a source of law and the proof of its elements (section 2). Then, emphasis will be placed on the notion of traditional fishing rights in international law (section 3). Finally, it will consider the evidentiary criteria that should be adopted in order to establish the existence of a traditional fishing rights as a customary rule (section 4).

2. The customary international law and its evidentiary value in international law

Customary international law (hereinafter CIL) is a principal source of international law, as referred to in Article 38 of the Statute of the International Court of Justice (hereinafter ICJ), which defined it as evidence of a practice generally accepted as law and it is mainly compose by unwritten rules in international law.

According to Diez de Velazco, CIL is "the expression of a practice followed by international subjects and generally accepted by them as law" (2013, p. 136). From this definition, two constituent elements can be deduced for the formation of CIL, on the one hand the general practice (material element) and on the other hand, the understanding that the practice is binding (psychological element).

That is to say, the material element is embodied in the repeated behaviour of States, which consists in what States have done or abstained from doing (Wood & Sender, 2024, p. 120), so, it will always be part of the will of States, since the conduct of States is carried out for a specific purpose and by State organs. Moreover, the psychological element is composed of the belief that such behaviour constitutes a legal obligation, this element is also better known as *opinio juris sive necessitatis*, that represents an existing obligation, not future or desirable, but concrete in the minds of States when they engaged in acts or practices (Thirlway, 2019, p. 91)

This two-element approach has been taken up by pronouncements of the ICJ in various cases, for example, in the *Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons*, the ICJ has stated that "the substance of customary international

law must be looked for primarily in the actual practice and *opinio juris* of States" (ICJ, 1996, para.64). In the same line, in *Jurisdictional immunities of the State (Germany v. Italy; Greece intervening)* it stated that "the existence of a customary international rule requires that 'established practice' and *opinio juris* come together" (ICJ, 2012, para. 55).

However, when the ICJ hears a dispute concerning to the existence of CIL, it should be noted that there is currently no precise methodology for determining the existence, content and scope of CIL. Furthermore, there is no established standard of proof for the Court's interpretation and articulation of the evidence presented. Consequently, the content of CIL and its identification remain among the most significant challenges in international law, primarily due to its indeterminacy and the difficulty in ascertaining its nature; this inherent ambiguity renders this source of international law more susceptible to interpretation compared to other sources (Banteka, 2018, p. 307).

2.1. Identification of customary international law

Traditionally, the ICJ would apply the two-element approach for the identification of CIL. As Judge Tanaka elucidated, determining whether the two fundamental elements of the formative process of customary law are present or not is a delicate and intricate matter, each fact must be evaluated in a relative manner, considering the diverse circumstances and occasions (Wood & Sender, 2024, p. 80).

This approach entails two operations: first, to ascertain the existence of a "general practice," and second, to determine whether this general practice is "accepted as law."

However, it is important to note that this approach is not always applied, some scholars argue that the ICJ may employ the inductive method, which involves collecting facts of State practice and suggesting the dispensation of the *opinio juris* as an element of CIL; also, there is the deductive method, which focuses on the abstract aspects and deduces CIL from general statements or rules rather than particular practice (Banteka, 2018, pp. 303-304). In this regard, Talmon has observed that the ICJ does not employ a single methodology to ascertain customary norms, but rather employs a combination of induction, deduction, and most recently by declaration (2015, p. 443).

Moreover, it is noteworthy that over time and with the advancement of international society, the ICJ has undergone a transformation in its approach to the determination of CIL. An early approach accorded significant weight to consistent practice over an extended period. This is evident in *Right of passage over Indian territory (Portugal v. India)*, where the Court analysed whether an international custom had been established, granting Portugal the right of passage of persons, goods, and armed

forces into Indian territory. The Court concluded that there existed a customary rule of *right of passage* for civilians and goods, based on centuries of unwavering practice that had acquired the status of an international obligation; conversely, in the case of armed forces, there was no international custom, as they necessitated prior authorization of passage by England and subsequently by India (ICJ, 1960, pp. 40-43).

In the same vein, in *Right of Asylum (Colombia v. Peru),* the predominance of the objective element or State practice was again emphasized. This case highlighted a contradiction between State practice and the *opinio juris* concerning diplomatic asylum, which derives from the Court's consideration of the will of States as a factor in the creation of customary norms, as well as a condition for obligation (ICJ, 1950, para. 11). Therefore, in the absence of clarity, contradiction and discrepancy in the exercise of diplomatic asylum, and the fact that this practice has been influenced by much political expediency, the ICJ concluded that it was not possible for the Court to establish a customary rule without a constant and uniform practice accepted as an obligation (ICJ, 1950, p. 276).

Years later, with the *North Sea Continental Shelf (Germany v. Denmark; Germany v. The Netherlands)*, the ICJ adopted a second approach that would become the prevailing standard in its jurisprudence. In this case, the Court states that for the establishment of a rule of customary law two assumptions must be fulfilled, not only the requirement of a constant State practice, but also this practice must be exercised in a manner that demonstrates a belief that it is an enforceable legal obligation (ICJ, 1969, para. 77). Consequently, it is no longer sufficient to prove only one element as in the initial approach; rather, greater weight will now be accorded to *opinio juris*.

It must be noted that one of the most crucial factors in evaluating the existence of CIL is the role of the International Law Commission (hereinafter ILC) and its relationship with the work conducted by the ICJ. As Talmon emphasizes when determining the existence of a customary norm, the ICJ does not always conduct a comprehensive examination of the two-element approach. Instead, depending on the case, the ICJ may not undertake this analysis to the extent that it considers sufficient for the establishment of CIL the statements made by the State in the dispute or that this CIL has already been recognized as such by the ILC (2014, p. 437).

When referring to the material element Novak and García-Corrochano indicate that, it requires the continuity over time, the constant acceptance by States, and the generality in space, which means that it must be adopted by at least two States in the international community (2016, pp. 86-91). From this, some questions may arise such as the number of States required to affirm the existence of this practice, unfortunately, until now there is no precise rule or numerical threshold. However, the ICJ

in the *North Sea Continental Shelf* established the criterion of "representativeness" as a guiding principle, considerate sufficient for the establishment of a customary norm the number of States whose interest are affected by CIL and those that are actively participate in shaping it (ICJ, 1969, para. 74). Similarly, the ICJ did not give significant weight to the time factor in determining whether a practice is customary law, even without a substantial period of time elapsing, if a very extensive and representative practice has existed, it can generate a customary rule (ICJ, 1969, para. 73).

Consequently, the Court has two main approaches to this first element of CIL: on the one hand, the Court is stricter in the *North Sea Continental Shelf* case, where it required state practice to meet the threshold of being extensive and uniform; on the other hand, in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* it opted for a more flexible standard whereby it was sufficient to consider State conduct as generally consistent (Cárdenas, 2020, p. 17).

The ILC in its 2018 Report refers to the leading position of States in the formation or expression of customary norms, while also acknowledges the importance of practice in international organization on this matter (ILC, 2018, para. 22). That is why when looking for the establishment a general practice, one must cover any act and behaviour of the State, especially because States may exercise their powers through different conducts (Wood & Sender, 2024, p. 121).

In short, State practice is understood as State conduct carried out in the exercise of its functions, through internal organs (executive, legislative and judicial). It may be conduct vis-à-vis another subject of international law or vis-à-vis its citizens; with regard to the number of States, it may be an individual or joint practice and, as a general rule, this practice must be public and known to other States (ILC, 2018, para.22). It should be pointed out that the ILC listed some ways in which the practice can be verifiable on the basis of facts, for example, when between two States there is an exchange of diplomatic correspondence; the attitude that States have towards treaties, evidenced in the process of negotiation and conclusion of such treaty; the State conduct towards resolutions of an international body, circumscribed in the negotiation and implementation of the same especially when they are not considered as binding; legislative and administrative acts emanating from its public authority; among others (ILC, 2018, para. 22).

On the other hand, the ILC has established that an international custom cannot exist without its subjective component. In other words, it cannot have only one element, a practice without acceptance as a norm is merely an action of non-binding use, and the belief that something is a norm without the respective practice is merely an aspiration. (2018, p. 126)

This psychological element of CIL, *opinio juris sive necessitatis*, is controversial and complex. It refers to a belief that must endow a general practice with a legal sense or obligation, and this sense of obligatory nature must distinguish from usages or habits. In the *North Sea Continental Shelf*, *opinio juris* is understood as "a notion that States must feel that they are complying with a legal obligation" (ICJ, 1969, para.77). As far as differentiation is concerned, the Court in the same dispute explained that the frequency of certain acts is not sufficient proof to determine obligatoriness, since there are ceremonial and protocol acts that are performed constantly, but for reasons of courtesy or tradition, but not because it is a legally binding practice (ICJ, 1969, para. 77).

Consequently, a stringent standard of proof has been established for the recognition of "*opinio juris*", therefore, it is utmost to consider the grounds upon which they are legally binding. For example, in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* requested by the United Nations General Assembly, the ICJ delved into the role of UN General Assembly resolutions and their correlation with the development of international custom, concluding that for the recognition of "*opinio juris",* it is necessary to scrutinize the content and circumstances of resolution adoption, as well as to assess whether a series of resolutions can demonstrate a gradual evolution of "*opinio juris*" (ICJ, 1996, para. 70).

However, as De Lucia develops, this approach has been changing recently and the ICJ has tended to lower the standard by considering that a widespread and uniform practice generates a presumption of *opinio juris* (2023, p.1), which has been reflected in *Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia),* where the Court affirmed the existence of *opinio juris* "even if such practice were motivated in part by considerations other than a sense of legal duty" (ICJ, 2023, para. 77).

In parallel, the ILC considers *opinio juri*s as that element which gives a general practice a legal meaning or legal obligation. Thus, *opinio juris* evidence can also take a variety of forms, including public statements on behalf of a State on certain practices that may be considered as international custom, either accepting or denying it, which may be made in multilateral or internal debates or within an international process; official publications, understood as documents made on behalf of a State; diplomatic correspondence between States; some national laws may be taken into account if they contain evidence of a practice accepted as law; State conduct on resolutions of international bodies, whether there is acceptance, objection or implementation; among others (ILC, 2018, para. 22).

2.2. Standard of proof in customary international law

In addition to the two-element approach, as Wood and Serden affirm, one question remains unaddressed: what would be the "possible standard of proof for the identification of a rule of CIL or the rules on evidence that may be employed in doing so" (2024, p.95). Despite the subject's prominence among scholars, neither the ILC nor the ICJ considerate it into the scope of its labours.

Generally, proceedings before the ICJ operate under the principle of freedom of evidence or the free admissibility of evidence. As Devaney points out, this principle can be explained because States typically voluntarily submit to the Court's jurisdiction (2018, para.9). Consequently, sovereignty grants States the freedom to present evidence that they assert. However, it is important to note that this matter has not been extensively regulated by the Statute, the Rules of Procedure, or the Practice Directions of the Court in the manner typically found in national systems.

In this regard, the Statute provides a general definition of evidence and, in Article 48, only specifies that the Court shall take "the necessary measures for the taking of evidence." As Tomka and Proulx have noted, in principle, there are no rules regulating the presentation and administration of evidence, and there is no restriction whatsoever on the types of evidence that parties may present in a proceeding (2015, p. 3).

Therefore, it is presumed that the Court will accept any type or form of evidence presented by the parties within the context of a proceeding. Furthermore, as Kamto has noted, the Court possesses discretion in each process, not only in the case of the evidence presented, which it freely appreciates, but also in considering both the applicable law and the specific circumstances of each case (2006, p. 259). Consequently, there is no hierarchy among the types of evidence presented, as they are all analysed equitably based on their relevance and probative value.

In terms of identifying rules of CIL, the evidence must be meticulously assessed to ensure its accuracy in determining the actions and statements of States; however, the absence of evidence may be significant in some cases for the establishment of CIL (Wood & Sender, 2024, p.86). The ICJ has recognized that, in certain instances, it may be necessary to review the history and evolution of a rule to determine its status as CIL. For instance, the ICJ found the Truman Proclamation useful in developing a rule of CIL in the *North Sea Continental Shelf* (Wood & Sender, 2024, pp. 88-89).

Nevertheless, when a dispute arises concerning rules of international customary law, the international tribunal may choose to state the law without a prior analysis, as it believes that the Court possesses the necessary judicial knowledge. For example, in *Fisheries Jurisdiction* (Germany v. Iceland), the ICJ established that the Court's

competence is to determine and apply the applicable law to the case. Therefore, it is not for State parties to guide the conduct of the proceeding regarding the applicable law of evidence, as the Court is the authority on the law (ICJ, 1974, para. 18).

It is also notable that the ICJ does not give so much weight to the legal doctrine with the exception of the ILC, for instance when analysing the existence of a rule of CIL, they tend to rely on treaties, consent or resolutions of international institutions, as a way to highlight its impartiality, however, this does not mean that it's the only manner to identify CIL, as the Court also considers the progressive development of international law, as well as its precedents of CIL (Petersen, 2017, p. 385).

In conclusion, it has been established that the approach taken by the International Court of Justice to evidence of international custom has varied with respect to the weight given to each element. While the first approach considered the establishment of a state practice sustained over time to be sufficient, a second approach added greater weight to the subjective element, so that it is also required that the exercise of this practice be conceived as obligatory for States. So, having established what international custom is and having analysed how the test of each of its elements is carried out, it is now time to start with the application of these concepts to traditional fishing rights.

3. Traditional fishing rights in international law

To begin with, it is important to clarify that scholars tend to use the terms 'historic rights' and 'traditional rights' interchangeably, and although the distinction between the two concepts is minimal, an erroneous application could lead to undesired effects. In this sense, it is established that the term 'historic rights' is quite broad and is used to describe those rights that a State may possess that could not normally be acquired according to the rules of international law, in other words, these are rights that can be acquired under certain circumstances through historic consolidation (Gupta, 2019, p. 239). They may comprise sovereign rights such as historic bays or waters; as well as non-sovereign rights, which include traditional fishing rights, the right of passage, among others.

It is thus established that the terms 'historic rights' and 'traditional rights' are not the same, as they are in a relationship of gender to specie. However, it is useful to state that the main distinction between the two terms is that historic rights can be exercised exclusively and indivisibly, implying a claim to sovereignty, and do not allow a third State to act (Gupta, 2019, p.230); whereas traditional rights are exercised non-exclusively, are not intended to vindicate sovereignty (Symmons, 2019, p. 9),

and therefore allow for the exercise by a third party (Gupta, 2019, p.230). On the latter, the Permanent Court of Arbitration, hereinafter PCA, has ruled in the *South China Sea Arbitral Award (Philippines v. China),* indicating that historical rights do not necessarily have a connotation that implies a sovereignty claim over the given area as, for example, in traditional fishing rights (PCA, 2016, para.268). In the same vein, as Wang and Xue reaffirm, these traditional rights do not imply any kind of claim linked to sovereignty but are more related to the preservation and continued exercise of existing rights, so it would be wrong to assert that an acquisition of new rights would be configured (2023, p. 5).

This differentiation has also been highlighted by the international courts. In the *South China Sea Arbitral Award*, the PCA chose to refer to "traditional fishing rights" in a manner that avoided confusion with the historical rights claimed by the Philippines in line 9. This distinction allowed the PCA to emphasize the interrelationship between fishing rights and the customs or traditions of a local community (Kopela, 2019, p. 6). This connection is further emphasized in the *Arbitral Award concerning the first stage of the Territorial Sovereignty and Scope of the dispute (Eritrea v. Yemen),* where it states that fishing activity reflected deep-rooted cultural patterns, leading to the establishment of a legal practice that permitted fishermen from both States to continue their activities without any limitations throughout the area (PCA, 1998, para. 128).

In brief, traditional rights are a subdivision of historical rights.The former term is used because the practice it seeks to encompass is closely interrelated with a long duration and a cultural character. Having clarified the distinction between historical and traditional rights, the primary concept of the research will be defined below.

3.1. Definition of traditional fishing rights

As a concept, traditional fishing rights are rather intricate in the law of the sea, as evidenced by the absence of an explicit definition of the term in either international instruments or doctrine (Tseng & Ou, 2010, p. 270). Despite this, it was a matter of discussion during the initial two United Nations Law of the Sea Conferences, as it represented a concern for coastal and archipelagic states. However, the discussion did not progress due to the emergence of the concept of *'exclusive economic zone',* resulting in a superficial inclusion of the issue in the final text of UNCLOS (Tseng & Ou, 2010, p. 274).

Thus, UNCLOS has provisions on traditional fishing rights but conferred only to archipelagic States. Non-navigable rights and third-party interests, such as existing agreements, traditional fishing rights, and existing submarine cables, are protected

by Articles 47(6) and 51, respectively. These provisions have different scopes and effects, article 51, for instance, protects rights derived from existing agreements with other states in a general sense. It also guarantees the traditional right to fish and 'legitimate activities' of 'immediately adjacent neighbouring States' that may have existed or arisen before the establishment of archipelagic waters. Consequently, Article 51 has a broader scope and is open to new invocations of rights. On the other hand, Article 47(6) also applies to 'immediately adjacent neighbouring States,' but it does so to regulate existing legal situations. This can be inferred from its wording by using terms like 'traditionally exercised.'

According to Dyspriani, traditional fishing rights are defined as the activity carried out by fishers from any specific State who have habitually fished in international waters for an extended period (2011, p. 2). These rights are classified as non-exclusive historical rights, based on a legal practice that arise from the exercise of freedom of fishing on the high seas (Kopela, 2019, p. 698); in other words, their development and/or exercise of fishing activities do not adversely affect any maritime area of another coastal State. This implies that such rights may be recognized even within the exclusive maritime zones of a third State, as they are not sovereign in nature and can therefore coexist with the rights of the coastal State in the same maritime zone (Kopela, 2019, p. 697).

Similarly, the acquisition of these rights, as Fitzmaurice rightly points out, is structured when the fishing vessels of a particular State have a longstanding custom (perpetuated over an extended period) of fishing in a specific area under the assumption that this area constitutes the high seas and, consequently, is a common and accessible resource for the entire world (1953, p. 51). For instance, in the *Arbitral Award concerning the second phase of Maritime Delimitation (Eritrea v. Yemen),* the acquired rights are evident as the fishermen of the Red Sea have historically relied on traditional fishing as their primary means of sustenance, this activity has been passed down through generations, transforming it into a right to continue fishing in the manner of their ancestors (PCA, 1999, para. 104). Furthermore, in the *South China Sea Arbitral Award*, the PCA affirmed that these rights can only be exercised in a traditional manner, as it has been done for years; therefore, industrialized methods cannot be employed (PCA, 2016, p. 768).

Overall, traditional fishing rights are comparable to historical rights, as they are a practice that has been exercised by a group of fishermen for an extended period and within a specific maritime area. From this definition, the elements that comprise it can be deduced and will be developed below.

3.2. Elements of Traditional Fishing Rights

As Symmons points out, traditional fishing rights require the same conditions for establishment as historical rights: continuous exercise and acquiescence of States, adding the "artisanal fishing" as a main characteristic of the activity; however, unlike historical rights, these rights do not belong to a State but to individuals (2019, p. 27). In the same vein, the arbitral awards pertaining to the initial stage concerning *Territorial Sovereignty and the Scope of the Dispute (Eritrea v. Yemen);* and the subsequent stage concerning *Maritime Delimitation (Eritrea v. Yemen)* of 1998 and 1999 respectively, have elucidated the fundamental components of traditional fishing rights, which are characterized by artisanal fishing and a consistent fishing activity pattern over an extended period (PCA, 1998, para. 129; 1999, para. 103). Therefore, the essence of traditional fishing rights is also recognized as the *"presence of deeply ingrained common patterns of conduct"* (PCA, 1998, para. 129).

Through the advancement of jurisprudence, it has become possible to identify the elements that constitute traditional fishing rights: on the one hand, it encompasses the concept of traditional or artisanal fishing; secondly, it is a practice that has been sustained over time; and, finally, it is a private practice that is exclusively owned by individuals.

3.2.1. Traditional or Artisanal Fishing

The PCA, in the *South China Sea Arbitral Award*, acknowledged the absence of a consensus on the definition of "artisanal fishing." However, it defined it as a "specific practice" that varies by region according to local customs and encompasses the concept of small-scale fishing utilizing tools and methods historically employed within the community (2016, para. 797).

Similarly, bilateral agreements on traditional fishing rights have also established definitions. For instance, the *Memorandum of Understanding between the Republic of Indonesia and the Commonwealth of Australia (1974) and the Torres Strait Treaty between Australia and Papua New Guinea (1978)* defined artisanal fisheries as those fishing activities conducted by community dwellers utilizing ancestral boats and tools in areas determined by traditional practice. Furthermore, the *1989 Pacific Islands Treaty between Papua New Guinea and the Solomon Islands*, Article 1(d), referred to artisanal fisheries as those carried out by traditional inhabitants employing methods such as nets, bows, spears, and which are conducted for their own consumption or for use in other traditional activities where the natural resources of the sea are accessible.

However, a pertinent issue emerged with these definitions: what would occur when fishing methods evolved due to intergenerational practice? In this matter, the

Declaration of Judge Xue in the *Case Concerning the Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* hereinafter the *Declaration of Judge Xue*, recognizes artisanal fishing as a practice that has endured for centuries, unaffected by advancements in navigation, communication, or fishing techniques; generally, the term "artisanal" distinguishes it from regular or industrial fishing (ICJ, 2022, para. 4-16). Similarly, in the *South China Sea Arbitral Award*, the PCA employed the criterion of "artisanal fishing" in contrast to "industrial fishing" (PCA, 2016, para. 797).

3.2.2. Practice sustained over time

As elucidated by Wang and Xue, the exercise of a right must be durable and consistent, necessitating its continuous maintenance over an extended period to solidify its status as a right (2023, p. 5). Furthermore, the concept of rights as "traditional" implies that their acquisition was achieved through prolonged and sustainable utilization over time. (Cogliati-Bantz, 2015, p. 308). Additionally, Barsh points out that the "traditional" character does not lie so much in antiquity, but rather in how the practice is acquired and maintained over time; that is, it focuses more on that social process of acquisition through learning and sharing which is unique to each culture (1999, p. 74).

Something that must be highlighted concerning this element, it is that it does not have a fixed span of years nor has international law and jurisprudence succeeded in establishing a standard in this regard. For instance, in the *Second Stage of the Eritrea-Yemen Arbitral Award*, the PCA states that historical rights are based on continuous community practice over the years (1999, para. 104). However, the PCA in the *Arbitral Award between Barbados and Trinidad and Tobago* rejected the argument of Barbados that they have an allegedly traditionally fished for flyingfish off Tobago, as a tradition cannot be originate within a six to eight-year period. (PCA, 2006, para. 266). Conversely, the ICJ in the *Case concerning Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* did not consider it sufficient that the Raizales have allegedly maintained sustained fishing for at least 40 years and dismissed the argument (ICJ, 2022, para. 220).

So far, only flexibility has been recognized in the number of years the fishery must last, so that the duration must be long enough to evidence the existence of a tradition and culture (ICJ, 2022, para.16). However, such a general standard has failed to provide answers to such controversial issues as traditional fishing rights.

3.3.3. Private practice and belonging to individuals

Regarding the last element, as Symmons states, instead of belonging to a state, as historical rights do in the strict sense, traditional rights belong to individuals (2019, p.27), since ownership is held by the communities that have been exercising such rights for a long time.

In this regard, in the *South China Sea Arbitral Award*, the PCA reached the same conclusion that "traditional fishing rights are private rights that belong to individuals and their communities but not to the State" (PCA, 2016, para. 799). Furthermore, as Kopela argues, these rights can also be considered hybrid, in the sense that they belong to the State and to the nationals themselves, taking into account that, in the PCA's pronouncements, the nationality of the fishermen and the relationship they have with their community have been used as criteria (2019, p. 700).

In addition to this, it must be established that traditional fishing rights are not exclusive to indigenous communities, the term 'traditional' refers to the fact that these rights are closely linked to the exercise of an activity that has been sustained over a long period of time, for many reasons such as traditional, cultural or religious; and it has become a constant practice that can be recognized and protected under general international law.

This criterion that has already been taken up by the PCA in the *Abyei Arbitral Award*, establishing that indigenous communities can be holders of traditional fishing rights, as well as all populations (PCA, 2009, para.763). In the *South China Sea Arbitral Award*, the PCA recognized that there is a close relationship between fishing rights and livelihoods linked to a community's traditions and customs (PCA, 2016, para.798). It also determined that these rights should enjoy special protection, as it considers traditional livelihoods and cultural patterns to be fragile in the face of development (PCA, 2016, para. 794). Regarding their relationship to culture and ways of life, that is not a determining factor in establishing the enjoyment of a traditional right, as the basis for access to fishing in maritime areas lies in a historical consolidation of a constant practice sustained over time. As Kopela reaffirms factors such as methods, religious connotations, type of instruments, art or traditions are not relevant to establish this right (2019, p. 701).

In conclusion, the three elements that compose traditional rights, namely, artisanal fishing, sustained practice over time as well as belonging to individuals, is the main standard used in the doctrine, which as presented, is also supported by jurisprudence.

4. Traditional fishing rights as customary international law and its proof

Issues relating to traditional fishing rights have emerged as an important and controversial topic in international law, so it is necessary to delve into the legal nature of these rights. Thus, on the one hand, it is essential to analyse the grounds that support the legitimacy of these rights; and, on the other hand, it is relevant to examine the question of their proof before international tribunals, to be able to make a small contribution in this regard.

4.1. Legal nature of traditional fishing rights

The entry into force of UNCLOS introduced novel fishing regimes, notably the exclusive economic zone (EEZ), which expanded the jurisdictional authority of coastal states. However, this development also raised concerns among states whose inhabitants previously exercised their fishing rights in areas formerly regarded as the high seas. Two distinct positions emerged from this concern: on the one hand, the acceptance and coexistence of traditional fishing rights with UNCLOS; and on the other hand, the abolition of traditional fishing rights following the implementation of UNCLOS.

UNCLOS serves as a common starting point for both positions, as the concern of states to establish sovereignty over their adjacent seas' dates to the 20th century. During this period, states proposed various solutions to address fishing rights. For instance, at the inaugural conference in 1958, the United States proposed recognizing 6 miles of territorial sea and an additional 6 miles of exclusive fishing zone, while simultaneously acknowledging existing fishing rights for states that had habitually fished beyond the initial 6 miles and for the past 5 years (Tseng & Ou, 2010, p. 272). However, this proposal failed to garner sufficient votes at the conference.

A similar scenario occurred at the second conference in 1960, where the joint Canadian-United States proposal for traditional fishing rights also failed to garner the necessary votes (Tseng & Ou, 2010, p. 273). This conference also addressed the issue of traditional fishing rights within the context of the territorial sea regime, which was justified by the unilateral expansion of this regime into previously considered high seas, thereby allowing fishing by nationals of different states (Kopela, 2019, p. 706).

Regrettably, with the convening of the third conference in 1973, the idea of considering traditional fishing rights waned, particularly as the notion of the 'exclusive economic zone' gained prominence and influence. Furthermore, there were concerns among certain states regarding the potential impact of jurisdiction extension on existing fishing practices (Japan and Spain intervened), as well as the limited capacity

of developing states to fully exploit the resources offered by the newly established EEZ (Kopela, 2019, p. 706). For instance, at the Caracas Conference in 1974, traditional fishing rights were included, along with gradual reduction mechanisms and the EEZ; however, at the Geneva Conference in 1975, only the EEZ was retained, while traditional fishing rights were excluded (Tseng & Ou, 2010, p. 275).

In bilateral practice, respect for and recognition of traditional fishing rights have been well-documented long before the entry into force of UNCLOS. For instance, in 1974, Indonesia and Australia signed a Memorandum of Understanding (MOU) with the objective of enabling traditional fishing by Indonesian settlers in Ashore Reef and Cartier Island. Specifically, Article 1 of the MOU provides for access and the exercise of traditional fishing rights in the exclusive fishing zone and on the Australian continental shelf. It clarifies that access is limited to 12 miles, and Article 3 establishes that fishing rights will only be exercised by Indonesian artisanal fishermen in accordance with the traditional practices established over decades. Furthermore, the instrument incorporates provisions related to the preservation of maritime areas of living resources, such as the prohibition of fishing for turtles, molluscs, sea sponges, and other species.

There are also treaties signed after the entry into force of UNCLOS, such as the *1982 Jakarta Treaty* between Indonesia and Malaysia. This treaty safeguards Malaysia's traditional fishing rights in certain archipelagic waters and within Indonesia's economic zone. Among its provisions, Article 13.1 stipulates that Indonesia shall continue to respect the traditional fishing rights attributable to Malaysian fishermen in the designated fishing zone, while Malaysia shall take appropriate measures to ensure that such traditional activities do not interfere with fishing by Indonesians or with the exploitation and exploration of seabed resources. Consequently, Article 13.2 provides that, in order to respect traditional fishing rights, Indonesia and Malaysia must enter into fisheries agreements. This facilitates the development and regulation of the notions of proper and rational fishing practices, as well as the management of future transgressions.

As the state practice shows traditional fishing rights have existed for an extended period long before the entry into force of UNCLOS, as it has always been an emerging topic at international conferences, and States, in the absence of multilateral conventions, have celebrated bilateral treaties to regulate the matter. This demonstrates that their existence is independent of UNCLOS and that these rights cannot only be conferred based on a state's categorization as an archipelagic state. As Judge Xue has already stated with regard to article 51(1) of the Convention, "there is no provision in international law that would preclude the existence of traditional fishing rights

under other circumstances" (ICJ, 2022, para. 7), thereby opening the possibility that these rights could also be recognized by coastal states.

Conversely, there are also a position against the existence of traditional fishing rights. For instance, Bernard argues that in the Exclusive Economic Zone coastal states have an exclusive right to fish and access other marine resources within 200 nautical miles, and this provision has effectively invalidated the freedom to fish beyond the territorial sea and open fishing on the high seas (2021, p.167). Furthermore, he contends that Part V of UNCLOS was drafted in such a manner, that the economic rights it confers, hold greater significance than certain other rights derived from international custom; consequently, any claim to traditional fishing rights is incompatible with the EEZ (Bernard, 2012, p. 7). Therefore, he posits that traditional fishing rights that have "outlived" the provisions of UNCLOS can only be granted when a coastal state provides access to surplus fish or through bilateral agreements between the concerned States (Bernard, 2021, p. 177).

On the same basis, in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Nicaragua presented its memorial, asserting that if there were any traditional fishing rights of the Colombian inhabitants within the Nicaraguan EEZ, those rights were extinguished upon the entry into force of UNCLOS (Republic of Nicaragua, 2018, p. 122). Nicaragua further argued that this extinguishment is grounded in Part V of UNCLOS, specifically Article 56(1), which confers sovereign and exclusive rights on the coastal state. These rights are understood as granting the coastal state the authority to exercise complete discretion over the resources within its zone and exclude the presence of third states (Republic of Nicaragua, 2018, p. 123). Additionally, Nicaragua highlighted that during the preparatory work for UNCLOS, several states, including Australia, Japan, and the United States, demonstrated their support for the Convention's protection of existing traditional rights; nevertheless, a substantial number of developing African states, such as Kenya and South Africa, expressed opposition to the Convention, citing concerns that these rights were being exercised at their expense and as a result of their historical subjection to colonial regimes (Republic of Nicaragua, 2018, pp. 127-128).

This denialist position posits the alleged incompatibility of traditional fishing rights and the Exclusive Economic Zone, as the latter is typically understood as an area exclusively under the jurisdiction of the coastal state. However, it is crucial to emphasize that this position has not garnered significant support. In this regard, Judge Xue has elucidated the issue, clarifying that traditional fishing rights are not incompatible but continue to be regulated by international custom and coexist with

UNCLOS, as per its preamble states that matters not explicitly regulated by the treaty are governed by general international law (ICJ, 2022, paras. 9-10).

In conclusion, it has been demonstrated that the doctrine presents two opposing positions regarding the existence of traditional fishing rights. However, as explained above, the position against their existence is not widely replicated in legal doctrine or jurisprudence. Furthermore, the relevant jurisprudence has already clarified that the relationship between traditional fishing rights and UNCLOS does not render them incompatible but rather allows both regimes to coexist simultaneously.

4.2. Legal basis for traditional fishing rights

In the following, an analysis will be made of the fact that traditional fishing rights are indeed a customary norm, which is supported by the jurisprudential development of the issue in international tribunals such as the International Court of Justice and the Permanent Court of Arbitration, as well as continuous practice of States. It is important to note that the jurisprudence of the International Tribunal on the Law of the Sea will not be analysed, as to date it has not examined any case relating to traditional fishing rights.

As has been established above, traditional fishing rights are non-exclusive historic rights. The ICJ in the *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, the Republic of Tunisia claimed historic rights over the Gulf of Gabes, and stated that "it seems evident that the question [of historic/traditional rights] remains governed by general international law" (ICJ, 1982, para.100), fitting the concept into a customary norm. Likewise, in the *Case concerning Navigation and Related Rights (Costa Rica v. Nicaragua)*, the ICJ recognized the traditional fishing rights of the inhabitants of the San Juan River as an international custom; on the basis of long-standing and unalterable practice, it further stated that this traditional right was also granted for subsistence reasons and should therefore be respected by Nicaragua (ICJ, 2009, para. 141).

In the same vein, Judge Xue found that traditional fishing rights are indeed recognized and protected by customary international law (ICJ, 2022, para.16). She also clarified that the elements that compose them (artisanal fishing and sustained practice over time) have already been evidenced by other international judgments such as the *Chagos Marine Protected Area Case (United Kingdom v. Mauritius)* (ICJ, 2022, para. 16).

On the other hand, the Permanent Court of Arbitration in the *Arbitral Award concerning the first stage concerning the Territorial Sovereignty and Scope of the dispute (Eritrea v. Yemen)*, established that the legal basis for the protection of traditional

fishing rights derives from the acquired rights resulting from artisanal fishing exercised over a long period of time by generations of fishermen leading to a right to continue such fishing (PCA, 1998, para.104). Similarly, in the *South China Sea Arbitral Award*, it affirmed the existence of traditional Filipino and Chinese fishing rights in Scarborough Shoal acquired by individuals and communities engaged in traditional fishing, which are protected under customary international law (PCA, 2016, para. 812).

However, jurisprudence is not the only source that has expressly affirmed traditional fishing rights as customary law, this premise is also reflected in various bilateral treaties. For example, *the 1989 Memorandum of Understanding between Australia and Indonesia* granted the right to fish to Indonesian ancestral fishermen using ancestral methods and vessels that is consistent with tradition carried on for decades. Similarly, in the *1978 Torres Strait Treaty between Papua Guinea and Australia*, Article 1 grants protection in the exercise of traditional fishing rights to Australian and Papua New Guineans who maintain 'traditional customary associations' relating to their subsistence, livelihood or social, cultural or religious activities.

4.3. The proof of traditional fishing rights

As outlined previously, the existence of a rule of CIL must be substantiated through the two-element approach: the accreditation of a practice sustained over time and the recognition of its obligatory nature. As stipulated in Section 2, beyond these elements, there is no established standard regarding the type of evidence that should be presented in Court when a customary rule is challenged. Consequently, the assessment of evidence presented lies solely at the discretion of each judge.

In light of this, the PCA in the *South China Sea Arbitral Award* recognized that "traditional fishing rights constitute an area where evidentiary issues must be approached with sensitivity" (PCA, 2016, para. 805). Similarly, the ICJ in *Navigation and Related Rights (Costa Rica v. Nicaragua)* held that because of the nature of traditional fishing rights, it is unlikely to be able to find such a practice formally documented in any official record (ICJ, 2009, para. 141). Subsequently, of the few cases in which attempts have been made to prove the existence of these rights, international tribunals have been unable to assess and accept sufficient evidence to demonstrate their entrenchment.

For instance, while assessing the "continuous practice over time," in the *Yemen v. Eritrea Arbitral Award*, the PCA made frequent reference to historical and geographical sources, both ancient and modern. It admitted historical books on the Red Sea area as documentary evidence of traditional fishing activities (PCA, 1998,

paras.127-129). The PCA also accepted testimonial evidence, including statements from fishermen of both nationalities, which were presented jointly by the parties (PCA, 1998, para.315). The same Tribunal in the *South China Sea Arbitral Award* also admitted evidence such as old maps, books dating from 1953 to 1960 about the Scarborough Reef, and sworn testimonies of local fishermen dating back to 1972 (Republic of the Philippines, 2016, para. 6.41). In both cases, the PCA accepted the evidence and recognized the existence of traditional fishing rights, as both parties had asserted their existence, and the PCA understood this to be an "accurate and bona fide claim" (2016, para. 805).

As is evident from these two awards, there was no per se analysis of the elements of traditional fishing rights as it was not a matter in dispute between the parties. However, what happens when the existence of these rights is itself a dispute? For instance, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* the ICJ relying on the principle of *actori incumbit probatio* held that the burden of proof regarding the existence of traditional fishing rights as a customary norm rested with Colombia, as the party asserting such a right.

In that line, Colombia presented documentary evidence, including explorers' books dating back to 1855, as well as 11 affidavits containing testimonies from fishermen and declarations made by the President of Nicaragua. However, the Court deemed this evidence insufficient, as it did not specify the duration of the practices or indicate whether the alleged traditional activities were conducted within Nicaragua's exclusive economic zone, which was the focal point of the controversy (ICJ, 2022, paras. 220-221).

Additionally, the ICJ addressed whether the declarations made by the President of Nicaragua would constitute a recognition or acceptance of Nicaragua's traditional fishing rights and its willingness to establish a legal obligation. The Court ruled that in examining the unilateral declarations, it adopted a more restrictive interpretation. This was because the context of President Ortega's declarations was during a political protest against the previous pronouncement of this Court in 2012. The protest was aimed at reaching an agreement on the implementation of that pronouncement. Therefore, the Court cannot accept the Colombian argument that Nicaragua's presidential declarations constitute "respect for traditional fishing rights in Nicaragua's exclusive economic zone without prior authorization from Nicaragua" (ICJ, 2022, paras. 226-230). However, the Court considered the possibility that both States could conclude an agreement on the traditional fishing rights of the Raizales, given the political will of Nicaragua.

While it is true that, in this case, the evidence presented by Colombia was notably unpersuasive and lacked significant weight, as determined by the Court, certain questions remain unresolved. For instance, the ruling did not provide a detailed discussion on the burden of proof, or the specific evidentiary thresholds required to establish these rights—an issue commonly faced by international tribunals. This also might highlight a divergence between common law and civil law judges in their approach to evaluating evidence. Additionally, uncertainties persist regarding the types of historical evidence admissible before tribunals and the duration necessary for a practice to qualify as a long-standing and continuous traditional practice.

4.4. The need for an evidentiary standard for establishing traditional fishing rights

One of the key issues that emerges from the jurisprudence analysed in this paper is the methodology used to substantiate the existence of traditional fishing rights through evidence. While cases addressing this matter remain relatively scarce, a clear pattern has become evident: documentary evidence is generally limited, largely due to the inherent nature of traditional fishing rights. These rights are typically transmitted orally across generations rather than formally documented, making it challenging to present written records as proof. Although there are instances where traditional fishing rights have been documented, such cases often share two common characteristics: first, the dispute did not centre on the existence of such rights, as both states involved recognized them for their nationals; and second, as a result, both states possessed official records that attested to the practice.

Given these circumstances, it is imperative to *establish testimonial evidence as the primary evidentiary criterion*, with greater flexibility in its assessment compared to documentary evidence. Since potential witnesses are those who actively engage in traditional fishing, their knowledge and accounts may vary depending on the degree of continuity and preservation of the practice. Consequently, this evidentiary standard also imposes a preventive duty on states to formally document these practices through historical records, photographs, maps, oral testimonies, internal regulations explicitly recognizing the existence of such rights (e.g., licenses), and anthropological studies examining the relationship between traditional fishing and the cultural identity of its practitioners.

Moreover, this first evidentiary criterion necessitates *greater flexibility in the assessment of documentary evidence*. Given that obtaining official records is often a cumbersome and, in some cases, unfeasible task, it is essential to accommodate adjustments in evidentiary requirements. While such flexibility might be perceived as a potential threat to legal certainty, this concern is mitigated by the fact that disputes concerning

traditional fishing rights are relatively infrequent. The primary scenario where abuse of this evidentiary standard could arise relates to maritime delimitation disputes. However, as the ICJ ruled in the *Maritime Delimitation in the Gulf of Maine case (Canada v. USA, 1984, para. 233),* claims of traditional fishing rights cannot be invoked as a relevant circumstance in maritime boundary delimitation.

A second evidentiary standard pertains to the **temporal requirement necessary for establishing traditional fishing rights**. It is essential to define a minimum duration for a practice to qualify as a legally recognized custom. While the ICJ, in the *North Sea Continental* Shelf emphasized the flexibility of temporal requirements for the formation of customary international law (1969, para. 73), a more precise standard is necessary when dealing with traditional fishing rights. These rights involve a cultural component closely tied to the identity of their practitioners, making the broad standard of "sufficient length to demonstrate tradition and culture" inadequate for their analysis. A period of one to three years is unlikely to be persuasive in establishing a long-standing tradition, whereas a practice observed for at least a decade would carry greater evidentiary weight.

Ultimately, the assessment of both evidentiary standards falls within the discretion of international tribunals, which must exercise free evaluation of the evidence while taking into account the unique characteristics of traditional fishing rights. Given their customary nature and cultural significance, it is essential to afford these rights a degree of flexibility in evidentiary requirements, ensuring that their existence can be substantiated despite the inherent challenges in formal documentation.

5. Conclusion

The identification of international custom and its essential elements is crucial for understanding its application in legal proceedings. The International Court of Justice (ICJ) has developed criteria for recognizing customary international law, although there is no uniform standard. However, the Court consistently analyses both the material and subjective elements of custom, giving greater weight to *opinio juris*—the belief that a practice is legally obligatory. Without this subjective element, a practice cannot be considered legally binding under international law.

Traditional fishing rights, though lacking a universally accepted definition, have been shaped through legal doctrine and jurisprudence. These rights typically involve artisanal fishing based on long-standing traditions, a sustained practice over time, and private ownership that is linked to states through the nationality of the fishermen. Additionally, these rights are classified as non-exclusive historical rights, meaning

they do not constitute sovereignty claims but rather reflect the exercise of fishing rights by a third state.

As customary international law serves as the primary legal basis for traditional fishing rights, states are obligated to respect them. However, proving these rights before international courts remains a challenge. Jurisprudence and international agreements acknowledge them, yet tribunals have often avoided detailed rulings on their proof, leaving a gap in the standards of evidence. To address this, two key recommendations are proposed: first, greater flexibility in assessing documentary evidence due to the informal nature of these rights, with an emphasis on testimonial evidence given their oral and intergenerational transmission; and second, the establishment of a minimum duration standard for an activity to qualify as customary, a task that falls to international courts and the global legal community.

References

Banteka, N. (2018). A Theory of Constructive Interpretation for Customary International Law Identification, *Michigan Journal of International Law 39*(3), 301-341. https://repository.law.umich.edu/mjil/article/1934/

Barsh, R. L. (1999). Indigenous knowledge and biodiversity, in Indigenous Peoples, Their Environments and Territories. En D. A. Posey & Oxford Centre for the Environment, Ethics and Society (eds.), *Cultural and Spiritual Values of Biodiversity* (pp. 73-76). United Nations Environment Programme.

Bernard, L. (2012). The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation. En Scheiber, H. (Ed.) *LOSI Conference Papers "Securing the Ocean for the Next Generation"* (pp.1-20). Law of the Sea Institute of University of California.

Bernard, L. (2021). Historic Fishing Rights and the Exclusive Economic Zone. *Indonesian Journal of International Law, 18*(2), 161-182. https://scholarhub.ui.ac.id/cgi/viewcarticle=1234&

Cárdenas, F. (2020). ¿Un caso de "volver al ´futuro"?: Las Conclusiones sobre la Identificación del Derecho Internacional Consuetudinario de la Comisión de Derecho Internacional de la Organización de Naciones Unidas. *Vniversitas, 69*, 1-30. https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/30219

Cogliati-Bantz, V. (2015). Archipelagic states and the new law of the sea. En Del Castillo, L. (ed.), Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea (pp. 298-317). Brill / Nijhoff.

De Lucia, V. (2023, 3 de agosto). *On the Question of opinio juris in Nicaragua vs. Colombia (Judgement 13 July 2023). EJIL: Talk! Blog of the European Journal of International Law*. https://www.ejiltalk.org/on-the-question-of-opinio-juris-in-nicaragua-vs-colombia-judgement-13-july-2023/

Devaney, J. (2018). Evidence: International Court of Justice (ICJ). *The Max Planck Encyclopedias of International Law*, (*5*), 1-27. https://opil-ouplaw-com.oclc.org/display/10.3430/law

Diez de Velasco, M. y otros (2013). La Costumbre Internacional y actos unilaterales. En Diez de Velasco, M. *Instituciones de Derecho Internacional Público* (pp. 136-148). Editorial Tecnos.

Dyspriani, P. (2011). Traditional Fishing Rights: Analysis of State Practice. The United Nations Office of Legal Affairs.

Fitzmaurice, G. (1953). The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law. *British Yearbook of International Law, 30*.

Gupta, S. (2019). Historic Fishing Rights in Foreign Exclusive Maritime Zones Preserved or Proscribed by UNCLOS*? Korean Journal of International Law, 7*, 226-248. https://brill-com.peacepalace.idm/journals/kjic/7/2/article-p226_8

International Law Commission (2018). *Draft conclusions on identification of customary international law, with commentaries.* (Informe A/73/10) https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

Kamto, M. (2006). Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle. *German Yearbook of International Law, 49*, 259-292. http://www.jstor.org/stable/j.ctv1q69vb9.11

Kopela, S. (2019). Historic fishing rights in the law of the sea and Brexit. *Leiden Journal of International Law, 32*(4), 695-713. https://doi.org/10.1017/S0922156519000438

Novak, F. & García-Corrochano, L. (2016). *Derecho Internacional Público Tomo I: Introducción y Fuentes*. Fondo Editorial de la Pontificia Universidad Católica del Perú.

Petersen, N. (2017). The International Court of Justice and the Judicial Politics of Identifying Customary International Law. *The European Journal of International Law 28*(2), pp. 357-385.

Republic of Nicaragua (2018, May 15). *Reply of the Republic of Nicaragua [in the context of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)]*. International Court of Justice. https://www.icj-cij.org/case/155/written-proceedings

Symmons, C. (2019). *Historic Waters and Historic Rights in the Law of the Sea*. Brill /| Nijhoff. https://brill-com.oclc.org/view/book/9789004377028/front-4.xml

Talmon S. (2015). Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion. *European Journal of International Law, 26*(2), 417-443. https://doi-org.peacepalace.idm.oclc.org/10.1093/ejil/chv020

Thrilway, H. (2019). *Custom as a Source of International Law*. En H. Thirlway, *The Sources of International Law* (2ª ed, pp. 60-104). Oxford University Press.

Tomka, P. & Proulx, V. (2015). The Evidentiary Practice of The World Court. *National University of Singapore, Faculty of Law Working Paper Series, 10*, 1-26. https://law.nus.edu.sg/010_2015_Vincent-Proulx_Tomka.pdf

Tseng, H. & Ou, C. (2010). The Evolution and trend of the traditional fishing rights. *Ocean and Costal Management 53*(*1*), 270-278. https://doi.org/10.1016/j.ocecoaman.2010.02.002

Wang, W. & Xue, G. (2023). Revisiting Traditional Fishing Rights: Sustainable Fishing in the Historic and Legal Context. *Sustainability*, *15*(16), 1-12. https://www.mdpi.com/2071-1050/15/16/12448/

Wood, M. & Sender, O. (2024). *Identification of Customary International Law*. Oxford University Press. https://academic.oup.com/book/58973

International Norms

Agreement between the Government of Papua New Guinea and the Government of the Solomon Islands concerning the administration of special areas, 25 January 1989. https://faolex.fao.org/docs/pdf/bi-67011.pdf

Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia concerning the operations of Indonesian Traditional Fishermen in areas of the Australian Exclusive Fishing Zone and Continental Shelf, 7 November 1974. https://faolex.fao.org/docs/pdf

Rules of Procedure of the International Court of Justice, 1978, https://www.icj-cij.org/sites/default/files/rules-of-court//rules-of-court-es.pdf

Statute of the International Court of Justice 1978. https://www.un.org/es/about-us/un-charter/statute-of-the-international-court-of-justice.

Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as the Torres Strait and related matters, 18 December 1978. http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html

International Jurisprudence

International Court of Justice (1950). Case concerning the Colombian-Peruvian Asylum case (Peru v. Colombia). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/7.

International Court of Justice (1960). Case concerning the Right of Passage over Indian territory (Portugal v. India). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/32.

International Court of Justice (1974). Case concerning the Fisheries Jurisdiction (Germany v. Iceland). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/56.

International Court of Justice (1969). Case concerning the North Sea Continental Shelf (Germany v. Denmark/ Germany v. The Netherlands). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/52.

International Court of Justice (1982). Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/fr/affaire/63

International Court of Justice (1984). Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/67

International Court of Justice (1986). Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/70.

International Court of Justice (1996). Advisory Opinion on Legality of the Threat or Use of nuclear weapons. Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case-related/95

International Court of Justice (2012). Case concerning Territorial and Maritime Dispute (Nicaragua v. Colombia). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/124

International Court of Justice (2012). Case concerning the jurisdictional immunities of the State (Germany v. Italy: Greece intervening). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/143

International Court of Justice (2022). Case concerning the alleged violations of sovereign rights and maritime spaces in the Caribbean Sea (Nicaragua v. Colombia). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/155.

International Court of Justice (2023). Case concerning the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia). Reports of Judgments, Advisory Opinions and Orders. https://www.icj-cij.org/case/154

Permanent Court of Arbitration (1998). Case No. 1996-04, Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen - Territorial Sovereignty and Scope of the Dispute (State of Eritrea v. Republic of Yemen). https://pca-cpa.org/en/cases/81/.

Permanent Court of Arbitration (1999). Case No. 1996-04, Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen - Maritime Delimitation (State of Eritrea v. Republic of Yemen). https://pca-cpa.org/en/cases/81/.

Permanent Court of Arbitration (2006). Case No. 2004-02, Award of the Arbitral Tribunal (Barbados v. The Republic of Trinidad and Tobago). https://pca-cpa.org/en/cases/104/

Permanent Court of Arbitration (2009). Case No. 2008-07, Award of the Arbitral Tribunal in Abyei Arbitration (The Government of Sudan v. Sudan People's Liberation Movement/Army). https://pca-cpa.org/en/cases/92/

Permanent Court of Arbitration (2015). Case No. 2011-03, Award in the matter of The Chagos Marine Protected Area Arbitration (The Republic of Mauritius v. The United Kingdom of the Great Britain and the Northern Ireland). https://pca-cpa.org/en/cases/11/.

Permanent Court of Arbitration (2016). Case No. 2013-19, Award of the Arbitral Tribunal in South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China). https://pca-cpa.org/en/cases/7/

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