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# Reflections on the *Nicaragua v. Colombia* case (2022): From the perspective of traditional fishing rights

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With respect to the *Nicaragua v. Colombia* case in 2022, whether Colombian fishermen in the San Andrés Archipelago, particularly the Raizales, have traditional fishing rights in the Nicaraguan Exclusive Economic Zone (EEZ) is one of controversial issues. Since Colombia is not a party to the United Nations Convention on the Law of the Sea (UNCLOS), the International Court of Justice (the Court or the ICJ) embodied customary international law as applicable law. It adopted a two-step method to examine Colombian claims and found that their fishermen did not enjoy traditional fishing rights. The Court found that affidavits of Colombian fishermen as major evidence were too sparse to prove the existence of a long-standing fishing practice. In light of a series of statements from the Nicaraguan President, there was a neither express nor implied recognition of traditional fishing rights of Colombian fishermen. This study reviews the ICJ's judgment from three aspects. First, the paper will evaluate the Court's (in)flexibility about the time requirement when examining the spanning period of a long-standing practice relating to traditional fishing activities. Second, concerning whether or in which circumstances the traditional fishing rights of a particular community can survive the establishment of the EEZ of another State, the Court found it unnecessary to examine this issue, the paper will also appraise potential legal impacts at this regard. Third, the Court did not identify Colombian claims of traditional fishing rights as indigenous rights, particularly for the Raizales. An increasing number of scholars of the law of the sea call for applying human rights norms to UNCLOS provisions, but the Court takes a cautious attitude in this regard. The paper will make more comments on the interaction between human rights law and the law of the sea.

## KEYWORDS

traditional fishing rights, EEZ, indigenous rights, Nicaragua, Colombia, the UNCLOS, customary international law

## 1 Introduction

On April 21, 2022, the ICJ issued its merits judgment concerning alleged violations of sovereign rights and maritime spaces in the Caribbean Sea in *Nicaragua v. Colombia*.<sup>1</sup> The complete judgment consists of jurisdictional and merits issues. Normally, “the ICJ has been their ‘natural’ jurisdiction thanks to broad competence clauses included in regional dispute settlement treaties such as the Pact of Bogota” (Arévalo-Ramírez, 2022a). However, in this case, from Colombia’s perspective, according to Articles 31 and 56 of the Pact of Bogotá, the Court lacks jurisdiction *ratione temporis* with respect to the facts that occurred between the two States when the convention ceased to apply to Colombia on 27 November 2013 after Colombia withdrew from it.<sup>2</sup> However, the Court examined relevant incidents before and after that date, and found that they gave rise to “the question whether Colombia has breached its international obligations under customary international law to respect Nicaragua’s rights in the latter’s exclusive economic zone, a question which concerns precisely the dispute over which the Court found it had jurisdiction in the 2016 Judgment”.<sup>3</sup> Thus, the Court has jurisdiction *ratione temporis* over “Nicaragua’s claims relating to those alleged incidents”.<sup>4</sup>

In the southwestern Caribbean Sea, within Nicaragua’s EEZ, the activities of Colombian warships in the encounter, the authorization of fishing activities and marine scientific research, and “the integral contiguous zone” established by Colombian presidential decrees constituted a violation of Nicaraguan sovereign rights and jurisdiction in its EEZ, and lacked due regard for its obligations.<sup>5</sup>

With regard to the issue of artisanal fishing rights claimed by Colombia, the ICJ did not recognize that Colombian fishermen in the San Andrés Archipelago, particularly the Raizales,<sup>6</sup> enjoy

traditional fishing rights in Nicaragua’s EEZ.<sup>7</sup> The straight baseline system established by Nicaragua’s legislation infringed upon Colombia’s rights in the Nicaragua’s EEZ, thus, was found illegitimate.<sup>8</sup> In addition, the ICJ has identified a series of provisions of UNCLOS as customary international law.<sup>9</sup>

Although wide-ranging topics have been addressed by the Court, this study merely takes the debate concerning historic fishing rights of Colombian fishermen into account. This paper contains three sections in which the ICJ’s ruling concerning traditional fishing rights is assessed. The first examines the Court’s ruling on whether, in Nicaragua’s EEZ, it was inaccessible to Colombian inhabitants of the San Andrés Archipelago and they were unable to exploit traditional fisheries. In light of international cases and state practice, the second section critically delves into the judgment and outlines its repercussions on the Caribbean Sea. Concluding remarks are presented in the final section.

## 2 The ICJ’s judgment concerning traditional fishing rights in *Nicaragua v. Colombia*

On November 15th, 2017, the Court issued an order, accepting only that Colombia’s counterclaims on the artisanal fishing rights of residents of San Andrés Islands and legality of Nicaragua’s straight baselines system were admissible.<sup>10</sup> As adjudicated by the Court in 2012, in the southwestern Caribbean Sea, Colombia had sovereignty

1 International Court of Justice. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*): The Court finds that Colombia has violated Nicaragua’s sovereign rights and jurisdiction in the latter’s EEZ. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20220421-PRE-01-00-EN.pdf>.

2 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 34.

3 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 46.

4 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 47.

5 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, paras. 195-199.

6 “The Raizales are the descendants of the enslaved Africans and the original Dutch, British and Spanish settlers. They are the result of the amalgamation of all these different groups, but have acquired through the

centuries their own specific culture. The name of this ancestral community, quite appropriately, comes from the word “raiz” which means “roots” in Creole. Since time immemorial, they have navigated all of the Southwestern Caribbean in search of resources, such as fish and turtles. The Raizales represent more than a third of the inhabitants of the Archipelago and constitute approximately 90 percent of the population of Providencia and Santa Catalina. Their culture is clearly recognizable. They speak Creole,

7 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 231.

8 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 260.

9 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 261.

10 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*), Counter-Claims. Order of 15 November 2017, I.C.J. Reports 2017, para. 251.

over the San Andrés Archipelago, which had been accorded significantly reduced weight in determining the boundary between two States, whereas Nicaragua was fully entitled to 200 NM Exclusive Economic Zone (EEZ).<sup>11</sup> It has been commented that, the ICJ in the 2012 judgment “reconfigures the maritime delimitation in the region” (Arévalo-Ramírez, 2022b) and “may affect those with oil, gas, or fishery interests in the Caribbean Sea” (Khan and Rains, 2013). In the current case, Colombia argued that the Raizales’ alleged traditional fishing rights arose as a matter of local custom.<sup>12</sup> Even if partial fishing areas where Colombian fishermen usually appeared fall within Nicaragua’s EEZ, such rights couldn’t be affected by the ICJ’s maritime delimitation ruling.<sup>13</sup> In addition, Colombia contended that, with respect to the local custom developed by Colombia through long-standing fishing practice, Nicaragua expressly or implicitly recognized that it survived the establishment of Nicaragua’s EEZ.<sup>14</sup> Through relevant acts (i.e., several declarations of the Head of State), Nicaragua acknowledged artisanal fishermen’s rights to fish in Nicaraguan waters without prior authorization or bilateral arrangements, and the delimitation of maritime boundaries did not affect the exercise of traditional rights.<sup>15</sup> However, these acts should not be understood as “a defense of historical fishing rights” (Brotóns, 2018). It is further asserted that, the text and background of relevant provisions under the UNCLOS, the negotiating history and international jurisprudence, clearly demonstrated that as a result of the establishment of the EEZ regime, traditional fishing rights, including artisanal rights, no longer existed.<sup>16</sup>

## 2.1 Colombia failed to prove the existence of traditional fishing practices for many centuries

The Court first examined whether the element of “traditional” has been fulfilled by Colombian fishing practice in Nicaragua’s EEZ. An established tradition usually refers to a practice that has been practiced for generations or for an extended period of time (Chinese Society of International Law, 2018). Colombia bears the burden of proof that, “the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically practised artisanal fishing in areas’ that fall in Nicaragua’s EEZ and whether formed an “uncontested local customary norm” or to “customary rights of access and exploitation” that survived the establishment of Nicaragua’s EEZ.<sup>17</sup> To prove that residents of San Andrés Archipelago, especially Raizales people, have long-term artisanal fishing practices, the evidence offered by Colombia is 11 affidavits of fishermen; however, the Court was cautious about witness affidavits provided by one party.<sup>18</sup>

After review, the Court found that there is no evidence that such activities took place continuously over many decades or centuries as Colombia claims, or that there was a continuous practice of artisanal fishing over such a long period.<sup>19</sup> Some fishermen claimed to have fished outside the Colombian Archipelagos only a few times a year, while others claimed to have been fishing in these areas since the 1980s and 1990s. In Colombia’s case, it claimed that the span of time was insufficient to support its claim of “local customs” or “local customary rights of artisanal fishing,” and that such fishing activities did not constitute a long-standing practice in the circumstances of this case.<sup>20</sup> Furthermore, most fishermen state they are operating in the waters around Colombian Archipelagos or in fishing grounds located within Colombian TS, not in Nicaraguan EEZ.<sup>21</sup> Above all, the 11 affidavits submitted by Colombia cannot prove that the residents of the San Andrés Archipelago, especially

11 Territorial and Maritime Dispute (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2012, para. 251.

12 International Court of Justice. Counter Memorial of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20161117-WRI-01-00-EN.pdf>, para. 5.56. International Court of Justice. Additional Pleading of the Republic of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, p. 140 (Ch. 3, argument heading D(1)).

13 International Court of Justice. Counter Memorial of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20161117-WRI-01-00-EN.pdf>, para. 3.98.

14 International Court of Justice. Counter Memorial of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20161117-WRI-01-00-EN.pdf>, para. 3.107.

15 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 206.

16 International Court of Justice. Additional Pleading of the Republic of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, para. 2.4.

17 International Court of Justice. Additional Pleading of the Republic of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, para. 2.46. International Court of Justice. Counter Memorial of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20161117-WRI-01-00-EN.pdf>, para. 5.56.

18 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 218.

19 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

20 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

21 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

Raizales people, have been engaged in historic fishing activities in the “traditional fishing grounds” located in the waters that now fall in Nicaragua’s EEZ for a long time.<sup>22</sup>

Apart from fishermen’s affidavits, Colombia referred to evidence from “statement before the International Labour Organization’s (ILO) Committee of Experts on the Application of Conventions and Recommendations,” and “Resolution No. 0121 of Colombia’s General Maritime Directorate of 28 April 2004.” The Colombian General Confederation of Labour (CGT), which spoke on behalf of the fishermen, twice stated that the 2012 ruling had negatively impacted traditional fishing.<sup>23</sup> They stated that, “the 2012 Judgment had negative implications for traditional fishing, as ‘Raizal fishers have no longer been able to fish with the tranquillity that they did ancestrally’ and that ‘[they] have to cross Nicaraguan maritime territory, which is reported to give rise to difficulties and the payment of fines’.”<sup>24</sup> Colombian government stated that, the Ministry of Labour indicated that “the artisanal fishermen of the San Andrés Archipelago could not have been impacted by the 2012 line”, however, it failed to “provide even a shred of evidence to support its assertion that the traditional fishing sites were precisely located in the vicinity of areas not affected by the decision”.<sup>25</sup> Apparently, what Colombian Ministry of Labour has said is in contrast to what the CGT has said. From the Court’s viewpoint, these official statements further undermine Colombian submissions that traditional fishing rights continue to exist.<sup>26</sup>

Finally, the Court examined an official report submitted by Colombia. The Court declared that this report concerns the impact

of the 2012 judgment on industrial rather than artisanal fishing.<sup>27</sup> Furthermore, the report depicts locations of traditional fishing areas that artisanal fishermen usually stay near Colombian Archipelagos and rarely enter Nicaragua’s EEZ.<sup>28</sup> The Court concluded that this report further undermines the existence of long-standing traditional fishing practices of Colombia in Nicaragua’s EEZ.

## 2.2 Nicaragua does not explicitly recognize the existence of traditional fishing rights of Colombia in Nicaragua’s EEZ

With regard to several statements made by Nicaraguan President Ortega, as viewed by Colombia, “there are a number of explicit recognitions when it comes to the traditional fishing rights of the Raizales to artisanal fishing in waters that now fall within Nicaragua’s EEZ”.<sup>29</sup> In light of the Court, President Ortega’s speeches emphasize that a fishing permit or authorization from Nicaragua is required to continue artisanal or industrial fishing in the Raizales community or the inhabitants of the Archipelago.<sup>30</sup> Nicaragua contended that, according to the 2012 judgment, for Nicaraguan and Colombian fishermen to be able to operate in waters that fall within Nicaragua’s EEZ, certain mechanisms needed to be put in place. As a result, President Ortega proposed “the creation of a commission ‘to work [to delimit] where the Raizal people can fish in [the] exercise of their historic rights’; the elaboration of ‘an agreement between Colombia and Nicaragua to regulate [the] situation’; or the establishment of ‘a Nicaraguan consular section’ on the San Andrés island ‘to solve the issue of the fishing permits for the [R]aizal community’”.<sup>31</sup> There is a Court

22 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, paras. 220–221.

23 The CGT “submitted information on behalf of the Raizal Small-Scale Fishers’ Associations and Groups of the Department Archipelago of San Andrés, Providencia and Santa Catalina to the International Labour Organization’s Committee of Experts on the Application of Conventions and Recommendations concerning the application by Colombia of the International Labour Organization’s indigenous and Tribal Peoples Convention of 1989”. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 222.

24 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 222.

25 These fishermen are from the Archipelago of San Andrés, Providencia and Santa Catalina. International Court of Justice. Rejoinder of the Republic of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20181115-WRI-01-00-EN.pdf>, 5.56. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 223.

26 The official is the head of the Office of Co-operation and International Relations of Colombia’s Ministry of Labour. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 223.

27 This report was issued by the Comptroller General’s Office of the Department Archipelago of San Andrés, Providencia and Santa Catalina. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 224.

28 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 224.

29 International Court of Justice. Counter Memorial of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20161117-WRI-01-00-EN.pdf>, para. 3.93.

30 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 227.

31 International Court of Justice. Reply of the Republic of Nicaragua. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20180515-WRI-01-00-EN.pdf>, para. 6.71. International Court of Justice. Additional Pleading of the Republic of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, para. 2.31. International Court of Justice. Rejoinder of the Republic of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20181115-WRI-01-00-EN.pdf>, para. 5.31.

opinion that the statements fail to support Colombia's argument that Nicaragua has recognized or acknowledged the right of the Raizales to fish within Nicaragua's EEZ without the latter's previous authorization, through declarations of its Head of State.<sup>32</sup> In the case of determining whether President Ortega's unilateral statement creates a legal undertaking granting rights to the artisanal fisherman, the Courts referred to the determination of whether the unilateral statement of a state official constitutes a legal commitment.<sup>33</sup>

In addition to the challenges Colombia is facing in implementing the 2012 judgment, Nicaraguan authorities are aware of the problems involving fishing activities of the inhabitants of the Archipelago. Colombian government has expressed an interest in reaching an agreement on the appropriate mechanisms and solutions for overcoming these challenges, which will give Colombia adequate time to adjust its domestic legislation to conform to the Court's 2012 decision.<sup>34</sup> This is of a different nature than the legal commitment to grant rights to individual fishermen. Therefore, taking the aforementioned political background into account, the Court did not concur with Colombia's contention.<sup>35</sup>

In summary, the Court has concluded that Colombia has failed to establish the existence of artisanal fishing rights for the inhabitants of the San Andrés Archipelago, especially the Raizales, in Nicaragua's EEZ, or that Nicaragua has recognized or accepted their traditional fishing rights or has legally committed to respect them through unilateral statements made by its Head of State.<sup>36</sup> The Court proposed that there should be an agreement to be negotiated

between two States regarding the Raizales community's access to fisheries in Nicaragua's EEZ.<sup>37</sup> According to the Court, other states have a right to take advantage of the freedom of navigation in the EEZ in accordance with customary international law and UNCLOS Article 58.<sup>38</sup> Consequently, the inhabitants of the Archipelago, including the Raizales, have free access to Nicaragua's EEZ, including when traveling between inhabited islands and fishing areas on Colombia's side.<sup>39</sup>

### 3 Reflections on the ICJ's judgment concerning traditional fishing rights in *Nicaragua v. Colombia*

The Court's judgment on traditional fishing rights was nearly unanimous, whereas only Judge *ad hoc* McRae issued a dissenting opinion. This study analyzes the Court's legal standards for determining the existence of traditional fishing rights. Moreover, Judge Xue's separate opinion provides enlightening discussions in this regard.

#### 3.1 The Court's legal standards to determine the existence of traditional fishing rights

Some scholars have summarized two elements of identifying the existence of traditional fishing rights: The continuous exercise of rights over a long period of time and the acknowledgment or acquiescence of states concerned (Ding and Yang, 2020). As a result of these factors, it is generally accepted that the traditional fishing rights have been effectively established in a particular area (Ding and Yang, 2020). It is also worth mentioning that in the case at hand, the Court adopted both of these criteria to examine whether the Raizales, who represent the indigenous population of the San Andrés Archipelago, are entitled to traditional fishing rights.

First, with respect to the time element, traditional fishing rights are the rights that "acquired by long-standing usage" (Cogliati-Bantz, 2015). From the Colombian evidence, the fishermen's testimony spans the period from the 1980s to the present, however, the Court held that "a few times a year" is not sufficient

32 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 227.

33 Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, paras. 43-45; para. 48. Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, paras. 46-48; para. 50. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, para. 71. Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, para. 39. Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v. Chile*), Judgment, I.C.J. Reports 2018 (II), p. 555, paras. 146-147. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, paras. 228-229.

34 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 230.

35 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 230.

36 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 231.

37 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 232.

38 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 233.

39 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 233.

to qualify as “a long-standing practice”.<sup>40</sup> Witness testimony needs to have clear records of specific fishing activities. The Court deemed that affidavits from Colombian fishermen would not provide it with sufficient and contemporary evidence of what exactly happened centuries ago, especially when their culture has not been written down.<sup>41</sup> The Court determined that the testimony of Colombian fishermen was rejected.<sup>42</sup> Notably, The Court did not find the evidence acceptable solely because it failed to mention fishing that occurred two hundred years ago. Additionally, “traditional fishing practices alleged to have taken place over many decades may not have been documented in any formal or official record, which calls for some flexibility in considering the probative value of the affidavits submitted by Colombia”.<sup>43</sup> The key issue is whether there are sufficient proof that fishermen have actually engaged in fishing activities.

Judge Xue commented that “two principal elements have been mentioned in jurisprudence for the establishment of traditional fishing rights: first, traditional fishing rights had to be borne out by “artisanal fishing”, and secondly, such fishing activities continued consistently for a lengthy period of time”.<sup>44</sup> Nonetheless, there can be no fixed number of years to measure the duration of fishing activities, but they must be sufficiently long to reflect such a tradition and culture.<sup>45</sup> In short, there may be a need for some flexibility regarding the types of evidence and the length of time required to support a claim.<sup>46</sup> In this regard, Judge Xue actually seems not to have pursued a very strict time condition.

Second, regarding the acknowledgment or acquiescence, the Court examined a series of statements by Nicaraguan President Ortega and did not find that there was an express or implied

recognition of traditional fishing rights of Colombian fishermen, particularly the Raizales, in Nicaragua’s EEZ. In the *Gulf of Maine* case, the Court defined acquiescence as “tacit recognition manifested by unilateral conduct which the other party may interpret as consent.” Normally, it is important to note that there are two types of historic rights: the first consists of historic rights short of sovereignty that are characterized by quasi-territorial or zonal impact beyond the TS (Kopela, 2017; Kopela, 2019). A second type is non-exclusive rights that relate to activities that do not have a zonal impact, and would be recognized in another state’s maritime zone (Kopela, 2019). In *Nicaragua v. Colombia*, traditional fishing rights of Colombian fishermen are non-exclusive since these rights lie in Columbia’s EEZ. Some scholars argue that, “in the case of non-exclusive historic rights, acquiescence is not necessarily a constituent element for the formation of the rights” (Gupta, 2019; Kopela, 2019). It may explain why Judge Xue did not discuss the element of acquiescence. Nicaragua’s President proposed the creation of a commission “to work [to delimit] where the Raizal people can fish in [the] exercise of their historic rights”.<sup>47</sup> In other words, he admitted the existence of historic fishing rights of the Raizales, but two States has to delimit the geographic scope of fishing areas for Colombian fishermen. However, the Court simply referred to it but did not make further comments on it. The Court should have elaborated further and reduced ambiguities.

### 3.2 Whether traditional fishing rights as pre-existing rights are extinguished by the EEZ regime of the UNCLOS

Is it possible for traditional fishing rights to continue to exist in another state after a new EEZ is established? This issue is very controversial in academia. Some scholars highlight that according to UNCLOS and international practice, historic rights are not denied, but rather recognized and respected under general international law (Talmon, 2016; Talmon, 2018; Qu, 2021; Talmon, 2022a; Yee, 2016; Zou, 2016; Kopela, 2017; Wang, 2017; Whomersley, 2017; Chinese Society of International Law, 2018; Ma, 2018; Liu, 2019; National Institute for South China Sea Studies, 2020; Ding and Yang, 2020; Kopela, 2021). However, Some scholars argue that, a State’s claim to historical fishing rights within EEZ of another State is subject to the latter’s exclusive fishing rights in those waters (Bernard, 2021). After the adoption of UNCLOS, historic/traditional fishing rights do not coexist with the EEZ regime under UNCLOS (Ndi, 2016; Rossi, 2017; Tanaka, 2017; Proelss, 2018; Egede, 2019). Although the Court avoided the issue in this case, Judge Xue’s separate opinion is informative in examining the relationship between two distinct issues.

Judge Xue upheld the Court’s judgment that the Colombian government was unable to prove that artificial fishing constitutes a

40 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

41 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

42 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

43 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 220.

44 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 16.

45 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 16.

46 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 16.

47 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, para. 227.

traditional practice, but did not support Nicaragua's claim that traditional fishing rights "extinguished" after UNCLOS established the EEZ system. Judge Xue declared that customary international law recognizes and protects traditional fishing rights.<sup>48</sup> If Colombia were party to UNCLOS, the position would not be different. In this case, Colombian fishermen carried out artisanal fishing which is generally traditional fishing instead of habitual fishing or traditional industrial fishing. Judge Xue has examined the negotiating history of two United Nations Conferences on the Law of the Sea, particularly Articles 51 (1) concerning the traditional fishing rights of the immediately adjacent neighbouring States in the archipelagic waters and 62 (3) concerning habitual fishing. The negotiating history has shown that, "the negotiating States did not intend to settle the relationship between historic rights and the regimes of exclusive economic zone and continental shelf" (*Chinese Society of International Law, 2018*). No unanimous agreement has been reached among negotiating parties at this regard (*Chinese Society of International Law, 2018*). Therefore, customary international law as part of general international law still remains able to deal with traditional fishing rights.

In light of the law of the sea, traditional fishing is usually characterized by artisanal methods that occur and have been practiced for centuries.<sup>49</sup> Nicaragua considers that, as stated in Article 51(1) of the UNCLOS, traditional fishing rights of neighboring states in waters of archipelagic states are explicitly stated, which is the only exception to preserve traditional fishing rights in the UNCLOS. However, Judge Xue disagreed with this interpretation. In terms of the drafting history of Part IV concerning archipelagic States, Judge Xue considered that the particular article as a result of the negotiations among States to recognize archipelagic states.<sup>50</sup> It is confined to a "special régime" that merely addresses traditional fishing rights in the waters of an archipelago.<sup>51</sup>

The existence of traditional fishing rights under other circumstances is not precluded by international law.<sup>52</sup> Article 62

(3) prescribes that, "in giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors".<sup>53</sup> Nicaragua argued that except the recognition of habitual fishing right, "none of the articles in Part V expressly or impliedly preserves historic rights in the EEZ" and "the absence of a provision preserving traditional fishing rights was plainly intentional".<sup>54</sup> Judge Xue considered Nicaragua's conclusion as "apparently over-sweeping".<sup>55</sup> Judge Xue stated that there was no presumption in Article 62(3) of UNCLOS that all situations related to traditional fishing rights are covered by the article.<sup>56</sup> Additionally, habitual fishing in the EEZ and historic rights are two different concepts, which should not be confused with each other within the framework of the UNCLOS. As part of UNCLOS negotiation process, the text related to habitual fishing in the EEZ of another State was worded differently in different proposals, but none involved historical rights.<sup>57</sup>

Judge Xue's view has been supported by the ICJ's international case law. In *Tunisia/Libya, North Continental Shelf, Nicaragua v. United States of America*, according to customary international law, the pre-existing rights will continue to exist as long as they are not explicitly denied as a result of treaty law or new customary law (*Chinese Society of International Law, 2018*). In the *Nicaragua v. Colombia* case, the ICJ's jurisprudence is also applicable. Before the adoption of the UNCLOS, traditional fishing rights as the pre-existing rights continue to exist since neither UNCLOS provisions nor new customary rules clearly negate such rights. Just as

53 UNCLOS, Article 62. Relevant factors "include *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks".

54 International Court of Justice. Reply of Nicaragua. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20180515-WRI-01-00-EN.pdf>, paras. 6.16-6.17.

55 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 8.

56 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 8.

57 *Tunisia/Libyan Arab Jamahiriya*. Judgment, I.C.J. Reports 1982, para. 24.. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*. Judgment, I.C.J. Reports 1969, para. 71. *Nicaragua v. United States of America, Jurisdiction and Admissibility*. Judgment, I.C.J. Reports 1984, para. 73. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*. Judgment, I.C.J. Reports 1986, para. 176.

48 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 2.

49 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 2.

50 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 7.

51 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 7.

52 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 7.

concluded by Judge Xue, according to the UNCLOS, the establishment of the EEZ regime is not by itself the end of traditional fishing rights that may be found to exist in accordance with customary international law.<sup>58</sup> Accordingly, general international law will continue to govern the matter at any time a case arises.<sup>59</sup> Similarly, state practice recognizes the existence of traditional fishing rights independent of treaty rules such as the UNCLOS. Judge Xue reviewed some bilateral agreements between States party to the UNCLOS, and remarked that the contracting parties have repeatedly recognized, by means of bilateral agreements, the historic and traditional fishing rights that existed before the conclusion of the UNCLOS.<sup>60</sup>

With reference to prior international cases addressing traditional fishing rights, international courts and tribunals recognize such rights and do not reject their *sui generis* legal nature when the regime of EEZ is established in the UNCLOS. In *Tunisia/Libya*, the Court observed that in customary international law, there are distinct legal regimes applied to the notion of historic rights or waters, as well as that of the continental shelf.<sup>61</sup> Additionally, the Court acknowledged that Tunisia's claim based on historical rights was different from a claim on account of the EEZ regime.<sup>62</sup> In *Eritrea/Yemen*, the Arbitral Tribunal make a distinction between the traditional fishing regime and the Convention's territorial sea provision, finding that "by its very nature, it[the traditional fishing regime] is not qualified by the maritime zones specified under UNCLOS".<sup>63</sup> "The traditional fishing regime operates throughout those waters beyond the

territorial waters of each of the Parties, and also in their territorial waters and ports."<sup>64</sup> The existence and protection of this regime does not depend on the drawing of an international boundary by the Tribunal.<sup>65</sup> From the perspective of Nicaragua, the Court in the *Gulf of Maine* case has determined that "the adoption by the United States and Canada of exclusive fisheries zones extinguished any existing historic fishing rights".<sup>66</sup> However, the judgment in that case did not concern the issue of traditional fishing rights, in this authors' view, the Court reached no conclusion on the relationship between traditional fishing rights and the EEZ regime. Therefore, UNCLOS provisions including the regime of EEZ, cannot extinguish the existence of traditional fishing rights that are governed by general international law. For example, Indonesia-Australia Memorandum of Understandings (MOU) on Indonesian Traditional Fishing Right in 1986, 1988, 1989, and the EEZ Delimitation Treaty in 1997, have affirmed traditional fishing activities and rights of Indonesian traditional fishermen in the Australian EEZ (Djalal, 2001; Dyspriani, 2011).<sup>67</sup> Subsequent practice after the adoption of UNCLOS demonstrates that "historical or habitual fishing may also be protected through ongoing access agreements or arrangements" (Goodman, 2022). In the authors' view, Judge Xue followed Articles 31 and 32 of Vienna Convention on the Law of Treaties (VCLT) to interpret certain UNCLOS provisions.<sup>68</sup> Judge Xue examined the *travaux préparatoires* of UNCLOS, relevant state practice and international case law to draw a conclusion that the EEZ regime did not extinguish traditional fishing rights as matters governed by customary international law. Furthermore, "the regime of traditional or artisanal fishing rights should coexist with the EEZ regime introduced by UNCLOS" (Ma, 2021).

It is recalled that, both states can be seen to engage in the *South China Sea* Arbitral Award within their pleadings. To invoke "rights vested in a small community of artisanal fishermen that live in an important but relatively remote region of the Southwestern

58 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 9.

59 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 10.

60 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Declaration of Judge Xue, para. 11.

61 *Tunisia/Libyan Arab Jamahiriya*. Judgment, I.C.J. Reports 1982, para. 99.

62 *Tunisia/Libyan Arab Jamahiriya*. Judgment, I.C.J. Reports 1982, para. 100.

63 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation). Decision of 17 December 1999, RIAA, Vol. XXII, para. 109.

64 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation). Decision of 17 December 1999, RIAA, Vol. XXII, para. 109.

65 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation). Decision of 17 December 1999, RIAA, Vol. XXII, para. 110.

66 The ICJ stated that, "until very recently ... these expanses were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries, and they were indeed fished by very many nationals of the latter. ... But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them. As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a situation of legal monopoly to the extent that the localities.

67 United Nations Maritime Delimitation Treaties Information Database. Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries, 14 March 1997. Available at <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1997EEZ.pdf>.

68 Vienna Convention on the Law of Treaties, Articles 31 and 32.



Caribbean Sea”, Colombia stressed that, “the matter of proof must be approached with common sense”.<sup>69</sup> Colombia criticized Nicaragua’s high threshold “for establishing the existence of those vested rights” in its reply and alleged that Nicaragua clearly contradicted “the practical considerations underpinning the consistent jurisprudence on this matter” in the *South China Sea Arbitration*.<sup>70</sup> In Nicaragua’s view, by invoking the *South China Sea Arbitration* Award on historic rights, “Colombia has not met its burden of showing the continuous exercise of the claimed right, as the affiants note that their primary fishing activities occurred around Colombian maritime features, not in Nicaragua’s EEZ”.<sup>71</sup> In addition, “it was not unlawful for fishermen from Colombia (or any other State) to fish in, for example, Luna Verde, as it was not yet a part of Nicaragua’s EEZ”.<sup>72</sup> Nicaragua contended that, “the exercise of freedoms permitted under international law cannot give rise to a historic right”.<sup>73</sup> Regarding the Colombian standard of proof for the existence of historical rights with common sense, Nicaragua disagreed and claimed that, the Arbitral Tribunal “never stated, however, that the standard of proof should be lower” and “it considered only that the absence of ‘official record[s]’ was not necessarily inconsistent with the existence of such rights”.<sup>74</sup> Concerning one of Colombian affiants’ statement that they “have been carrying out these activities since the 1980s and 1990s”, Nicaragua considered that period was not long to meet the time requirement of traditional fishing rights.<sup>75</sup> This is because the Arbitral Tribunal admitted “‘traditional fishing rights’ in an area

where fishing had been ‘carried out for generations’” in the *South China Sea Arbitration*.<sup>76</sup>

The *South China Sea Arbitration* remains the latest case that directly deals with the relationship between historic/traditional fishing rights and UNCLOS including the EEZ regime. The Arbitral Tribunal declared that, “the Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein”;<sup>77</sup> “Such right would have been superseded by the adoption of the Convention and the legal creation of the exclusive economic zone”<sup>78</sup>. But the *South China Sea Arbitration* Award is not free of controversy. Some commentators agree with the Tribunal’s interpretation. As a result of the Convention’s omissions regarding general historic rights, only those rights expressly mentioned in the Convention can continue to exist under the law of the sea (Murphy, 2017; Beckman, 2018; Schofield, 2019; Symmons, 2019; Batongbacal, 2020; Roach, 2020; Bernard, 2021; Nguyen, 2023). Some commentators notice that, some states, like Indonesia, cited the Award and affirmed the lack of historic rights in Indonesian EEZ and continental shelf (Honniball, 2021).

However, some commentators disagree with the Tribunal’s decision, arguing that UNCLOS does not conflict with historic rights governed by general international law and the EEZ regime cannot supersede such rights (Kopela, 2017; Wang, 2017; Whomersley, 2017; Chinese Society of International Law, 2018; Ma, 2018; Li, 2019; Wang, 2019; Ye, 2019; National Institute for South China Sea Studies, 2020; Li, 2021; Qu, 2021). Some scholars also contend that, there are certain nonexclusive, historic/traditional fishing rights that could remain within the EEZs of coastal states (Schoenbaum, 2016). “It seems odd that foreign fishermen should continue to enjoy such rights in the zone adjoining the coast, but not in the zone beyond that” (Whomersley, 2021). Although denying the existence of historic rights except those explicitly provided in the Convention, the Arbitral Tribunal “affirmed the existence of Filipino and Chinese traditional fishing rights based on historical practice around Scarborough Shoal” (Schoenbaum, 2016).<sup>79</sup> Moreover, “it does certainly seem logically strange that third-party historic rights in the more sovereign area of another state (territorial sea) should lead to greater rights for that third state, whereas such third-party-claimed rights in areas of lesser coastal state sovereign rights (eg, EEZs and continental shelves) should lead to no vested rights for

69 International Court of Justice. Rejoinder of the Republic of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20181115-WRI-01-00-EN.pdf>, para. 5.36.

70 International Court of Justice. Rejoinder of the Republic of Colombia. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20181115-WRI-01-00-EN.pdf>, para. 5.4.

71 International Court of Justice. Reply of the Republic of Nicaragua. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20180515-WRI-01-00-EN.pdf>, para. 6.59.

72 International Court of Justice. Reply of the Republic of Nicaragua. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20180515-WRI-01-00-EN.pdf>, para. 6.60.

73 International Court of Justice. Reply of the Republic of Nicaragua. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20180515-WRI-01-00-EN.pdf>, para. 6.60.

74 International Court of Justice. Additional Pleading of the Republic Of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, para. 2.24.

75 International Court of Justice. Additional Pleading of the Republic Of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, para. 2.52.

76 International Court of Justice. Additional Pleading of the Republic Of Nicaragua on Colombia’s Counterclaims. Available at <https://www.icj-cij.org/public/files/case-related/155/155-20190304-WRI-01-00-EN.pdf>, para. 2.52.

77 The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China), Award on Merits of 12 July 2016, PCA No. 2013–19, 2016, para. 278.

78 The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China), Award on Merits of 12 July 2016, PCA No. 2013–19, 2016, para. 631.

third states” (Symmons, 2018). Such an insistent conclusion will potentially undermine the Tribunal’s persuasiveness in addressing the relationship between historic rights and UNCLOS.

During the Commission on the Limits of the Continental Shelf (CLCS) reviewed Malaysian partial submission concerning the continental shelf beyond 200 NM in the South China Sea in 2019,<sup>80</sup> some neighbouring countries invoked the Arbitral Award to deny the existence of China’s historical rights claims<sup>81</sup>. Nonetheless, the CLCS did not directly take it as evidence (Gau, 2022) and determined to defer further consideration<sup>82</sup>. Therefore, China’s assertion of historic rights in the South China Sea<sup>83</sup> played a role in the CLCS review process and the CLCS adopted a different approach. The *Nicaragua v. Colombia* case in 2022 did not touch upon the issue concerning the relationship between traditional fishing rights as one category of historic rights and the EEZ regime under UNCLOS, various debates seem not to stop shortly in the future international adjudication. It is worthy to remind that, regarding the exploitation of fishery sources, “the key role of international courts and tribunals as guardians of the peaceful uses of oceans among all states, be they UNCLOS parties or not” (Tassin, 2017).

### 3.3 Whether Raizales’ fishing rights are analogous to indigenous rights

In recent years, “the question of the application of human rights to the maritime sphere has risen sharply up the agenda” (Whomersley, 2023). International scholars in the law of the sea

have examined how rules and norms under international human rights are applied in the law of the sea (Papanicolopulu, 2014; Ndiaye, 2019; Petrig and Bo, 2019; Maguire, 2020; Papastavridis, 2020; Haines, 2021; Klein, 2022; Petrig, 2022). One of academic focuses is the interaction between the law of the sea and indigenous peoples. Indigenous peoples’ right to their traditional resources is recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Vierros et al., 2020). This constitutes an important reason why Judge MacRae objected to the Court’s decision on traditional fishing rights. He agreed with Colombia’s definition of Raizales’ fishing rights from the perspective of “indigenous fishermen”. It is admitted that, “treating the situation of the Raizales as akin to that of indigenous peoples finds indirect support in the position of Nicaragua in the pleadings in this case and direct support in the statements of President Ortega”.<sup>84</sup> Nevertheless, many indicia of indigenusness have been met, suggesting that, at the very least, an analogy with indigenous rights should be considered.<sup>85</sup> In Judge MacRae’s view, President Ortega’s statements describe Raizales’ fishing rights in the “language of indigenous rights,” instead of traditional fishing rights, such as “Raizal people,” “native people,” “Raizal brethren,” “Original People,” and so on.<sup>86</sup> According to Judge MacRae, the Nicaraguan President’s position recognizes and validates the claim of a particular group of original peoples to continue fishing in the manner in which they have done in the past.<sup>87</sup> He believed that, President Ortega used language and imagery consistent with indigenous rights, and jurisprudence of the Inter-American Court affirms that indigenous people possess natural rights that have traditionally utilized.<sup>88</sup> Notably, under the UNDRIP, indigenous people “have the right to the lands, territories, and resources that they have traditionally owned, occupied, or otherwise used or acquired”.<sup>89</sup> Thus, Judge MacRae attributes fishing rights to one of indigenous rights.

80 Commission on the Limits of the Continental Shelf. Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial Submission by Malaysia in the South China Sea. Available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mys\\_12\\_12\\_2019.html](https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html).

81 Commission on the Limits of the Continental Shelf. Philippines Communication No. 00191. Available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_03\\_06\\_PHL\\_NV\\_UN\\_001.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf). Commission on the Limits of the Continental Shelf. Vietnam Communication No. 22/HC-2020. Available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/VN20200330\\_ENG.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf). Commission on the Limits of the Continental Shelf. Indonesia Communication No. 126/POL-703/V/20. Available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_05\\_26\\_IDN\\_NV\\_UN\\_001\\_English.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf).

82 Commission on the Limits of the Continental Shelf. Progress of work in the Commission on the Limits of the Continental Shelf. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/581/92/PDF/N2258192.pdf?OpenElement>.

83 Commission on the Limits of the Continental Shelf. China Communication No. 00191. Available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_04\\_17\\_CHN\\_NV\\_UN\\_003\\_EN.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_04_17_CHN_NV_UN_003_EN.pdf).

84 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge ad hoc McRae, para. 58.

85 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge ad hoc McRae, para. 58.

86 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge ad hoc McRae, paras. 59–60.

87 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge ad hoc McRae, para. 62.

88 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge ad hoc McRae, para. 64.

89 United Nations Declaration on the Rights of Indigenous Peoples, Article 26 (1).

However, the Court's decision demonstrates that the claim of indigenous rights in Colombia was not discussed, and the Court still started with the traditional fishing rights. Judge *ad hoc* McRae admits a number of problems with this decision. First, it was impossible to achieve the standards established by the Court to establish traditional fishing rights.<sup>90</sup> Second, the Court see neither the link between the Raizales' claims and their statements, nor the relation between indigenous fishing rights claims and their right to fish in the EEZ.<sup>91</sup> The Court specifically hoped that the countries concerned would reach an agreement on the fishing activities of the Raizales instead of all the inhabitants in the San Andrés Archipelago.<sup>92</sup> This fact demonstrates that, at the very least, the Court's implicit treatment of the Raizales as a distinct group.<sup>93</sup>

Nevertheless, in *Nicaragua v. Colombia*, Judge *ad hoc* McRae's argument particularly focuses on Raizales rather than all the inhabitants of the San Andrés Archipelago. However, as the Court reasoned, other residents have equal need for fishing in Nicaraguan EEZ. The identification of Raizales as an indigenous group may not entirely satisfy the demand to fish for fishermen in the San Andrés Archipelago. If the Court identify Raizales as an indigenous group, it will have to identify whether other groups also constitute such groups. Consequentially, the Court may be too overloaded with groups in this case. There has been considerable discussion related to the relationship between fishing rights and indigenous rights, which reflects interactions between different legal regimes that relate to territorial boundaries and the rights of indigenous peoples, particularly those at the international and national levels (Moreira, 2020). In the opinion of some scholars, the right to fish is inherent in indigenous peoples' culture (Toki, 2010). They call for recognition of fishing rights of some indigenous groups, such as the Saami people in Norway, the Maori in New Zealand, and Chagossians in the Chagos Archipelago, since they have property rights over their territories including coastal areas under UNDRIP (Toki, 2010).<sup>94</sup> The law of the sea scholars suggest that "the coastal State can and should exercise its authority in relation to these resource rights in a way that also fulfills its

obligations under international human rights law as it pertains to indigenous peoples" (Enyew and Bankes, 2022). Some sociocultural scholars additionally point out that, "the framework for solving maritime disputes together with the existing body of rules and policies concerning coastal livelihood protection and the preservation of marine ecosystems, might require the judicial bodies to reconsider how such processes can take account of the environmental and human dimensions" (Chaves and Gupta, 2022). In this regard, the Court's proposal for two parties to negotiate an agreement concerning the access to fisheries in Nicaraguan EEZ should be taken into account. More broadly speaking, "sub-regional efforts at common enforcement and fisheries policy that are important regional pointers and the acceptance of an ecosystem-based management approach could help to ensure the sustainability of Caribbean fisheries" (Anderson, 2022).

## 4 Conclusion

After the 2012 judgment between Nicaragua and Colombia, some scholars expressed concerns over "the uncertainty as to the actual boundary impacts the fishermen in the region, inhabitants of the islands" (Otero, 2015). The Court in the 2022 judgment endeavored to resolve the bilateral fishery dispute, particularly the controversy over traditional fishing rights. The Court examined two decisive elements in identifying the existence of traditional fishing rights. In general, the Court's approach followed traditional methods in international case law, but the judgment presents several concerns. First, with respect to the time element, the Court rejected Colombian traditional fishing practice several centuries ago. The ICJ admitted that it was unrealistic for contemporary Colombian fishermen to provide sufficient evidence from many centuries ago. Nevertheless, Colombian fishermen affidavits were found wanting as evidence due to inability to prove a long-standing practice. Thus, it seems that the Court is strict about the time requirement but does not provide specific conditions. According to Judge Xue, a certain amount of flexibility may be needed regarding the types of evidence and duration of the proceedings.

Second, the Court avoided answering the relationship between traditional fishing rights and the EEZ regime under the UNCLOS. In *Nicaragua v. Colombia*, the ICJ missed an opportunity to interpret such a controversial issue. Notwithstanding, as Judge Xue highlighted, customary international law still recognizes traditional fishing rights in spite of the EEZ regime. In other words, "historic rights can arise and subsist even if UNCLOS does not indicate that it allows for them" (Orakhelashvili, 2022). From the perspective of leading scholars in the law of the sea, "a State can have rights other than those listed in article 58 of UNCLOS in the EEZ of another State if they derive from a pre-existing treaty or from customary international law applying in an area that has subsequently become part of that other State's EEZ and are compatible with UNCLOS" (Churchill et al, 2022). One type of these rights includes traditional fishing rights, and "such rights must be respected and preserved even under UNCLOS" (Talmon, 2022b). "The creation of the EEZ may not have impacted all claims made by other States", and "a balance has to be found with rights that other States may potentially have in the same area" (Margat, 2020).

90 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge *ad hoc* McRae, para. 66.

91 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge *ad hoc* McRae, para. 66.

92 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge *ad hoc* McRae, para. 71.

93 Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*). Judgment, I.C.J. Reports 2022, Dissenting opinion of Judge *ad hoc* McRae, para. 71.

94 Endalew Lijalem Enyew. The Chagos Marine Protected Area Arbitral Award and its Ruling on Fishing Rights. Available online: <https://site.uit.no/nclos/2015/06/04/the-chagos-marine-protected-area-arbitral-award-and-its-ruling-on-fishing-rights/>.

Third, the Court also dodged Colombian claims of traditional fishing rights as indigenous rights, particularly for the Raizales. Judge *ad hoc* McRae supported the Colombian claim, but a forthcoming question may concern how to deal with the indigenous status of other inhabitants in the San Andrés Archipelago. In the context of sea level rise resulting from climate change, indigenous island communities will be particularly influenced (Rothwell, 2022). From an evolutionary perspective, Raizales as well as other minority groups in the San Andrés Archipelago will be possibly affected in the foreseen future. Although a growing number of scholars call for the application of human rights norms to the law of the sea, the *Nicaragua v. Colombia* judgment seemingly indicates that the Court takes a cautious attitude toward this issue.

## Author contributions

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## Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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