

ARTICLES

AFFORDING ORAL TRADITION EVIDENCE DUE WEIGHT BEFORE THE INTERNATIONAL COURT OF JUSTICE

by
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Oral traditions are irreplaceable sources of historical information, particularly with regard to Indigenous Peoples' histories and cultures. However, when states have submitted oral traditions as evidence of historical practices, events, and circumstances in cases before the International Court of Justice ("Court"), the Court has been reluctant to afford them significant weight. This Article, which is the first detailed study on the Court's treatment of oral traditions, examines whether the Court is failing to provide them due or appropriate weight. Based on historical, archaeological, and anthropological research, it establishes that oral traditions can be as reliable as written documents for reconstructing the past. This Article then argues that, although oral traditions can provide reliable and relevant information, the Court's general approach to assessing the probative value of evidence is based on sweeping generalizations concerning hearsay and other factors that, as applied, systematically encourage the undervaluation of all oral tradition evidence. This Article also advances that by denying oral tradition evidence due weight, the Court can hinder

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parties' success on the merits. Grounded on the concepts of equity and the sound administration of justice, the Article ends with a call for the Court to reform its evidentiary practices so that oral tradition may be provided due weight. Starting from the position that oral tradition can have significant evidentiary weight, it proposes a flexible, culturally sensitive approach whereby the Court would assess each oral tradition submitted to it based on the infinitely variable circumstances that may surround such evidence.

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INTRODUCTION

The assessment of evidence is a fundamental function of the International Court of Justice (“Court” or ICJ) in its settlement of legal disputes between sovereign states.¹ States that invoke the Court’s contentious jurisdiction commonly submit a voluminous amount of evidence to support their claims and arguments.² It is the Court’s duty to evaluate the evidence to “establish a factual foundation upon which to base legal determinations.”³ Its approach to evaluating the evidence can be outcome determinative.⁴

Since the Court’s judgments are legally binding, final, and not subject to an appellate procedure,⁵ a well-reasoned and transparent approach to evaluating evidence is thus critical to the just resolution of its cases.⁶ Despite this, ICJ judges and commentators have identified shortcomings in the Court’s approach to assessing evidence.⁷ For example, Judge Al-Khasawneh and Judge Simma have critiqued the

¹ See Markus Benzing, *Procedure, Evidentiary Issues*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1373, 1373 (Andreas Zimmerman & Christian J. Tams eds., 3d ed. 2009); James Devaney, *Evidence: International Court of Justice*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 1–2 (2018) [hereinafter Devaney, *Evidence*], <https://opil.oup.com/display/10.1093/law-mpeipro/e3430.013.3430/law-mpeipro-e3430>.

² Devaney, *Evidence*, *supra* note 1, ¶ 7 (“[T]he ICJ has often been deluged with information, with parties at times submitting thousands of pages of written submissions and corresponding annexes and expert reports.”).

³ JAMES DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE 14 (2016) [hereinafter DEVANEY, FACT-FINDING BEFORE THE ICJ]; see also Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 167 (Feb. 3) (“The existence of the alleged facts must be established before applying the relevant rules of international law.”); H.E. Rosalyn Higgins, President, Int’l Ct. of Just., Speech at the 58th Session of the International Law Commission 9 (July 25, 2006), https://legal.un.org/ilc/sessions/58/pdfs/english/icj_president.pdf.

⁴ See Benzing, *supra* note 1, at 1373.

⁵ See Statute of the International Court of Justice arts. 59–60, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

⁶ See Anna Riddell, *Evidence, Fact-Finding, and Experts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 848, 850–51 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014); see also Peter Tomka & Vincent-Joël Proulx, *The Evidentiary Practice of the World Court*, in LIBER AMICORUM: IN HONOUR OF A MODERN RENAISSANCE MAN HIS EXCELLENCY GUDMUNDUR EIRÍKSSON 361, 361, 363 (Juan Carlos Sainz-Borgo ed., 2017).

⁷ See Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, 108, ¶¶ 3–17 (Apr. 20) (joint dissenting opinion by Al-Khasawneh & Simma, JJ.); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 225, ¶¶ 30–39 (Nov. 6) (separate opinion of Higgins, J.). See generally Simone Halink, *All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case*, 40 N.Y.U. J. INT’L L. & POL. 13 (2008); Siyuan Chen, *Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying Its Discretion to Exclude Evidence*, 13 INT’L COMMENT. ON EVIDENCE 1 (2015).

Court's "persist[ence] in resolving complex scientific disputes without recourse to outside expertise in an appropriate institutional framework," and reasoned that this approach "deprives [the Court] of the ability fully to consider the facts submitted to it."⁸

Additionally, Simone Halink has asserted that the Court's "very open-ended, discretionary evidentiary framework. . . . leaves . . . parties with little guidance in the process of ascertaining the facts . . . result[ing] in inefficient proceedings."⁹ This commentator has also advanced that "[b]ecause it often remains unclear what evidentiary standards the Court applies, it is difficult for parties to challenge the Court's factual conclusions and the legal conclusions based thereon."¹⁰ This Article queries whether the Court's treatment of oral tradition, a topic that has been neglected in the considerable literature on the Court's evidentiary practices, is another evidentiary shortcoming.

Oral tradition connotes both a process and its products.¹¹ The products "are oral messages based on previous oral messages, at least a generation old,"¹² that are "spoken, sung, or called out on musical instruments."¹³ The process "is the transmission of such messages by word of mouth over time until the disappearance of the message."¹⁴ Along the chain of transmission, informants or oral tradition-bearers rely on information passed down to them and are not eyewitnesses.¹⁵

Moreover, oral tradition is an important historical source.¹⁶ It is the primary means through which many Indigenous Peoples have preserved and transmitted their historical and cultural information across generations.¹⁷ Nonetheless, in contentious cases, when parties have submitted oral tradition as evidence of historical practices, events, and political circumstances, the ICJ, including Chambers of the

⁸ *Arg. v. Uru.*, 2010 I.C.J. at 108, ¶ 13.

⁹ Halink, *supra* note 7, at 25.

¹⁰ *Id.*

¹¹ JAN VANSINA, ORAL TRADITION AS HISTORY 3 (1985) [hereinafter VANSINA, ORAL TRADITION].

¹² *Id.*

¹³ *Id.* at 27.

¹⁴ *Id.* at 3. Conscious intent to record history is not a necessary part of the process. P. M. Mercer, *Oral Tradition in the Pacific: Problems of Interpretation*, 14 J. PAC. HIST. 130, 130 (1979).

¹⁵ Joseph A. Dibia & Ezekwesiri O. Nwosu, *Oral Tradition and Historical Reconstruction in Igbo Land, South East Nigeria*, 9 INT'L J. DEV. & MGMT. REV. 89, 90 (2014).

¹⁶ John Borrows, *Listening for a Change: The Courts and Oral Tradition*, 39 OSGOODE HALL L.J. 1, 34 (2001).

¹⁷ See Cathay Y. N. Smith, *Oral Tradition and the Kennewick Man*, 126 YALE L.J. 216, 219 (2016).

Court (“Chambers”),¹⁸ has been reluctant to afford it much weight.¹⁹ Often, as has also been seen in its consideration of other evidentiary matters,²⁰ the Court has neglected to provide detailed reasoning for its decisions to disregard oral tradition.²¹ The Court has generally preferred, or reflected greater comfortability with, documents written close in time to the events they concern.²²

Since there is no scientific basis to treat written documents as inherently more reliable than oral traditions,²³ the Court’s approach merits reconsideration. Failing to provide a reasonable and appropriate amount of weight under the circumstances of a particular case (or due weight) to oral tradition could improperly silence historical accounts and perspectives of Indigenous Peoples, whose rights and interests can be implicated in ICJ cases.²⁴ Additionally, in cases in which a party’s claims or arguments are dependent on an oral tradition, failing to afford it due weight could unfairly disadvantage the party and cast doubt on the Court’s conclusions of fact and law.

Thus, in determining whether the Court’s treatment of oral tradition is an evidentiary shortcoming, this Article probes which factors contribute to the Court’s lukewarm reception of oral tradition, whether these factors hinder the affordance of due weight to it, and whether the Court’s general evidentiary approach is liable to unfairly disadvantage parties that rely on it.

This Article proceeds in four Parts. Part I elaborates on the meanings of “Indigenous Peoples” and “oral tradition,” describes common features of Indigenous Peoples’ oral traditions, and expounds on oral traditions’ distinct importance in Indigenous societies with oral-based knowledge systems (“oral-knowledge societies”). Building on Part I, Part II establishes that, while oral tradition may have some limitations, it is capable of accurately recording and conveying historical information.

¹⁸ Articles 26 and 29 of the ICJ Statute empower the Court to form chambers, composed of a subset of ICJ judges. Statute of the International Court of Justice arts. 26, 29, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

¹⁹ See, e.g., *Kasikili/Sedudu Island (Bots./Namib.)*, Judgment, 1999 I.C.J. 1045, ¶¶ 71–73, 76–78 (Dec. 13); *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554, ¶ 120 (Dec. 22).

²⁰ See *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 225, ¶¶ 2, 30–34 (Nov. 6) (separate opinion of Higgins, J.).

²¹ See, e.g., *Bots./Namib.*, 1999 I.C.J. ¶¶ 71–73, 76–78; *Burk. Faso/Mali*, 1986 I.C.J. ¶¶ 47, 120.

²² See Halink, *supra* note 7, at 22; see also DEVANEY, *FACT-FINDING BEFORE THE ICJ*, *supra* note 3, at 31–32.

²³ See David Milward, *Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence*, 14 INT’L J. EVIDENCE & PROOF 287, 325 (2010); Max Virupaksha Katner, *Native American Oral Evidence: Finding a New Hearsay Exception*, 20 TRIBAL L.J. 20, 23 (2021).

²⁴ See W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT’L L. 350, 354 (1995).

It also demonstrates that historical written documents are not intrinsically superior to oral tradition for reconstructing the past.

Part III pivots to the Court's evidentiary framework and practice. It shows that oral tradition is admissible as evidence before the Court and that particular oral traditions can be relevant to legal claims in inter-state disputes. Additionally, Part III advances that the Court has guiding evidentiary principles that orchestrate the denial of due weight to oral tradition evidence. Finally, the conclusion of this Article emphasizes that the Court's undervaluation of oral tradition evidence is unreasonable and unfair to ICJ litigants that wish to rely on it. To remedy this shortcoming, it proposes reforms to the Court's approach to assessing oral tradition evidence that would better advance equity and the sound administration of justice.

Throughout this Article, there is an emphasis on Indigenous Peoples' oral traditions because international law vests Indigenous Peoples with particularized rights, and ICJ cases can have implications for their rights, despite their voices rarely being heard at the ICJ.²⁵ This emphasis is also based on oral tradition's distinct importance in Indigenous oral-knowledge societies, and the fact that a substantial portion of the oral tradition research identified is specific to Indigenous Peoples' oral traditions.²⁶

I. GENERAL CONCEPTS: INDIGENOUS PEOPLES AND ORAL TRADITION

Before delving into a discussion of the ICJ's treatment of oral tradition in Part III, it is necessary to elaborate on the meanings of the foundational terms "Indigenous Peoples" and "oral tradition," and to explain oral tradition's distinct importance in Indigenous oral-knowledge societies.²⁷

A. Defining "Indigenous Peoples"

While national legislation in some states set forth formal definitions of "Indigenous Peoples,"²⁸ there is no precise or universal definition of this term under

²⁵ See discussion *infra* Section III.A.

²⁶ See discussion *infra* Part I.

²⁷ Note that each society's oral traditions have unique features. See Hope M. Babcock, *[This] I Know from My Grandfather: The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19, 24 (2012).

²⁸ See Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, INTER-AM. CMM'N ON HUM. RTS., ¶ 27, OEA/Ser.L/V/II, Doc. 47/15 (Dec. 31, 2015); Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), Comm. on Hum. Rts., *Human Rights and Indigenous Issues*, ¶ 93, U.N. Doc. E/CN.4/2002/97 (Feb. 4, 2002).

international law.²⁹ This reflects that due to the “immense diversity” of Indigenous Peoples, a “strict and closed definition will always risk being over- or under-inclusive.”³⁰ Nevertheless, international legal instruments, international courts, and human rights treaty bodies have set forth objective and subjective criteria for determining which individuals or groups may be considered Indigenous for purposes of international law.

Regarding objective criteria, the African Commission on Human and Peoples’ Rights has considered that there is an “emerging consensus” that, in order to be considered as “peoples,” a group of individuals should have “a common historical tradition, [a common] racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy.”³¹ Under the International Labour Organization Indigenous and Tribal Peoples Convention (ILO Convention 169),³² whether a group descends from a society that precedes colonization, conquest, or the establishment of contemporary state boundaries is also relevant.³³

As for subjective criteria, the ILO Convention 169,³⁴ the United Nations Declaration on the Rights of Indigenous Peoples,³⁵ and judgments of the Inter-American Court of Human Rights (“Inter-American Court”)³⁶ stress that self-identification is fundamental. In summary, “all attempts to define the concept of [I]ndigenous [P]eoples recogni[z]e the linkages between peoples, their land, and

²⁹ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, No. 276/03, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 147 (Nov. 25, 2009) [hereinafter *Centre for Minority Rights Development v. Kenya*] (“As far as ‘[I]ndigenous [P]eoples’ are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances.”).

³⁰ Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources, INTER-AM. COMM’N ON HUM. RTS., ¶ 25, OEA/Ser.L/V/II, Doc. 56/09 (Dec. 30, 2009).

³¹ *Centre for Minority Rights Development v. Kenya*, No. 276/03, ¶ 151.

³² International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991).

³³ *Id.* art. 1(1).

³⁴ *Id.* art. 1(2).

³⁵ G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 33 (Sept. 13, 2007).

³⁶ See, e.g., *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 37 (Aug. 24, 2010) (“[T]he Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.”).

culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.”³⁷

B. *General Parameters of Oral Tradition*

This Article adopts ethnohistorian Jan Vansina’s approach of distinguishing between “oral history” and “oral tradition” because it has been widely adopted in the history field. In his seminal work *Oral Tradition as History*, Vansina asserts that while “oral traditions are no longer contemporary,” oral history concerns “reminiscences, hearsay, or eyewitness accounts about events and situations . . . [that] occurred during the lifetime of the informants.”³⁸ Nonetheless, Indigenous Peoples generally do not make the same rigid distinctions as non-Indigenous scholars, such as Vansina, whose views have long dominated discourse in relevant academic disciplines. Indigenous historian Nepia Mahuika considers that Indigenous Peoples’ oral tradition is “very much overlapping and often interchangeable and not separate from oral history at all.”³⁹ With this in mind, this Section proceeds to highlight some general parameters of oral tradition.

Across cultures, there are many types of oral traditions, which can be divided into distinct classes: memorized speech, such as spells, prayers, poems, and other recitations; accounts, such as personal reminiscences, group accounts, historical gossip, genealogies, and origin stories; epics; and tales, proverbs, and sayings.⁴⁰ In addition, oral traditions can be factual or fictional and either official or private.⁴¹

Official traditions generally concern the history of the community or group that keeps them.⁴² They may, for example, consist of royal genealogies and traditions establishing rights over land.⁴³ Via public performance and other social practices, their official character is (or was) apparent to all community members.⁴⁴

³⁷ Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, No. 276/03, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 151 (Nov. 25, 2009).

³⁸ VANSINA, ORAL TRADITION, *supra* note 11, at 12–13.

³⁹ NEPIA MAHIKA, RETHINKING ORAL HISTORY AND TRADITION: AN INDIGENOUS PERSPECTIVE 14, 17 (2019); *see also* Winona Stevenson, *Indigenous Voices, Indigenous Histories Part I: The Othering of Indigenous History*, 50 SASK. HIST. 22, 26 (1998).

⁴⁰ VANSINA, ORAL TRADITION, *supra* note 11, at 13–27; *see also* Babcock, *supra* note 27, at 22; Kerry Hull, *The Ch’orti’ Maya Myths of Creation*, 30 ORAL TRADITION 3, 3 (2016). However, “many scholars are moving away from genre typologies and the concept of fixed and ‘pure’ types” Mario Katić, *Oral Tradition Emplaced in the Landscape: The Skakava Monastery in Bosnia*, 126 FOLKLORE 20, 23 (2015).

⁴¹ VANSINA, ORAL TRADITION, *supra* note 11, at 98.

⁴² *See id.*; Jan Vansina, *Once Upon a Time: Oral Traditions as History in Africa*, 100 DAEDALUS 442, 456 (1971) [hereinafter Vansina, *Once Upon a Time*].

⁴³ *See* Vansina, *Once Upon a Time*, *supra* note 42, at 456.

⁴⁴ *See* VANSINA, ORAL TRADITION, *supra* note 11, at 98.

Furthermore, community members would commonly consider official traditions to be authoritative truth.⁴⁵

In comparison, private traditions, which do not have to conform to, or agree with, official traditions,⁴⁶ are typically less formalized than official traditions.⁴⁷ They generally include histories that families maintain concerning their ancestry and individualized accounts of past events or practices.⁴⁸ For example, in assessing Akan oral traditions, Kwame Daaku describes that in Akan society:

[i]t is expected of every citizen to be able to recount the history of his clan and family. Whoever is unable to quote history and traditions to support his claim to particular property, especially to land, may soon see his patrimony taken away by one who can make a better historical claim.⁴⁹

Despite having various distinguishing features, all types of oral tradition can provide insights on historical situations.⁵⁰ Accounts, the primary type of oral tradition that directly testifies to past events,⁵¹ can furnish factual details on group migrations and lineage, culturally significant lands,⁵² group economic activities, such as trading patterns and agricultural practices,⁵³ and a group's customary laws.⁵⁴ In comparison, tales, proverbs, and sayings, which are not often objectively true, can reveal a group's historical values, mentalities, and cultural norms.⁵⁵ Joseph Dibia and Ezekwesiri Nwosu emphasize that "[e]ven when some of the tales that appear in oral tradition are said to be imaginary, fictional or superstitious[,] their reality could be located in the fact that they are all intellectual construct of the people of

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.* at 98–100.

⁴⁸ See *id.*

⁴⁹ Kwame Y. Daaku, *History in the Oral Traditions of the Akan*, 8 J. FOLKLORE INST. 114, 122 (1971).

⁵⁰ VANSINA, ORAL TRADITION, *supra* note 11, at 32.

⁵¹ *Id.*

⁵² See *id.* at 120; Aron L. Crowell & Wayne K. Howell, *Time, Oral Tradition, and Archaeology at Xakwnoowí, A Little Ice Age Fort in Southeastern Alaska*, 78 AM. ANTIQUITY 3, 3 (2013).

⁵³ See Philip D. Curtin, *Oral Traditions and African History*, 6 J. FOLKLORE INST. 137, 145 (1969); see also K. VijayaKumari, *Oral Tradition as Source of Construction of History of Pre Literate Societies*, 7 ASIAN REV. SOC. SCI. 140, 141 (2018) ("Subjects as diverse as astronomy, agronomy, medicine, meteorology, and rudimentary engineering and technology are encompassed in the oral tradition."); Daaku, *supra* note 49, at 125.

⁵⁴ See Babcock, *supra* note 27, at 33.

⁵⁵ See VANSINA, ORAL TRADITION, *supra* note 11, at 31–32; Margaret Field & Jon Meza Cuero, *Kumeyaay Oral Tradition, Cultural Identity, and Language Revitalization*, 27 ORAL TRADITION 319, 319, 321–22 (2012).

the past, used . . . either to regulate the moral conduct of the people or to entertain them.”⁵⁶

C. *Oral Tradition in Indigenous Oral-Knowledge Societies*

Oral tradition has a special function in Indigenous oral-knowledge societies in which “almost all knowledge was [or is] conveyed orally”⁵⁷ For these societies, oral tradition is the primary source of historical knowledge, and society members consider it an authoritative historical record.⁵⁸ In addition, in Indigenous oral-knowledge societies, oral traditions are permeated with and reinforce their spiritual beliefs, ideology, morality, and values,⁵⁹ and inform how they maintain cultural ties to their ancestral lands.⁶⁰ As such, oral tradition is inextricably connected to many Indigenous communities’ identity.⁶¹ Recognizing this, the Inter-American Court has emphasized in its judgments that Indigenous Peoples’ oral traditions contain cultural information “critical to [their] survival as a separate people from their colonizers.”⁶² This all leads to the conclusion that in Indigenous oral-knowledge societies, “the purpose of repeating oral accounts from the past is broader than the role of written history in [W]estern societies.”⁶³

⁵⁶ Dibia & Nwosu, *supra* note 15, at 94.

⁵⁷ VijayaKumari, *supra* note 53, at 140; Smith, *supra* note 17, at 219 (“For several thousand years, oral tradition has been the primary vehicle for Native Americans in North America to record facts and events.”).

⁵⁸ Jimmy Peterson, *Judicial Treatment of Aboriginal Peoples’ Oral History Evidence: More Room for Reconciliation*, 42 DALHOUSIE L.J. 483, 485 (2019) (quoting Clay McLeod, *The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past*, 30 ALBERTA L. REV. 1276, 1279 (1992)).

⁵⁹ See Jolie Liston & Melson Miko, *Oral Tradition and Archaeology: Palau’s Earth Architecture*, in PACIFIC ISLAND HERITAGE: ARCHAEOLOGY, IDENTITY & COMMUNITY 181, 181 (Jolie Liston, Geoffrey Clark & Dwight Alexander eds., 2011) (“[Oral traditions] promote a continuation of norms, ideas and values from past to present, enabling members of modern communities to identify with their ancestors.”); VijayaKumari, *supra* note 53, at 141 (“[O]ral tradition represents the essence of their culture. . . . The normative standards that sustain the social system are embedded in the corpus of knowledge and beliefs transmitted by oral traditions.”).

⁶⁰ Katner, *supra* note 23, at 22; cf. Maria Nieves Zedeño, Evelyn Pickering & François Lanoë, *Oral Tradition as Emplacement: Ancestral Blackfoot Memories of the Rocky Mountain Front*, 21 J. SOC. ARCHAEOLOGY 306, 309, 311–12 (2021) (“Napi stories specifically bring into perspective a keen awareness of local and regional environments, as well as human inventions [and] are encoded in geological, paleontological, and archaeological localities . . .”).

⁶¹ MAHUIKA, *supra* note 39, at 1.

⁶² Babcock, *supra* note 27, at 33–34; see discussion *infra* Section I.A.3.i; see also VijayaKumari, *supra* note 53, at 140 (“Oral traditions contain cultural information about the past carefully preserved and handed down from generation to generation within a tribe.”).

⁶³ ROYAL COMM’N ON ABORIGINAL PEOPLES OF CAN., LOOKING FORWARD, LOOKING BACK 33 (1991), https://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-1-eng.pdf.

To transmit traditions from generation to generation, these societies may employ informal or formal methods.⁶⁴ Formalistic traditions may be “wound together” and “reinforced” by “pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing, and the use and importance of place and geographic space.”⁶⁵ In comparison, informal methods may entail parents and grandparents passing down individualized historical accounts to their children or grandchildren.⁶⁶

A common thread amongst many Indigenous communities is that certain respected individuals are often responsible for safeguarding and passing down oral traditions.⁶⁷ These individuals may be elders (persons knowledgeable in traditional culture based on their lived experiences), community leaders, such as chiefs,⁶⁸ or socially recognized specialists, such as poets, chanters,⁶⁹ singers,⁷⁰ and priests.⁷¹ For example, ethnohistorian Gordon Day describes that Abenaki and eastern Algonquian traditions “have been passed on by an aged person carefully and deliberately training young children until some of them knew the old stories verbatim.”⁷²

Across Indigenous communities, the contents of oral traditions also have similar features. The traditions typically “invoke a world and a cosmology filled with spirits and mythical creatures that are completely foreign to the [W]estern secular thought”⁷³ Additionally, Indigenous communities’ traditions are often

⁶⁴ VANSINA, *supra* note 11, at 95–96.

⁶⁵ Borrows, *supra* note 16, at 8.

⁶⁶ See Rachel Awan, *Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?*, 118 PA. STATE L. REV. 697, 702 (2014); John D. Waiko, “Head” and “Tail”: *The Shaping of Oral Traditions Among the Binandere in Papua New Guinea*, 5 ORAL TRADITION 334, 334–35, 352 (1990).

⁶⁷ See Borrows, *supra* note 16, at 9; Lori Ann Roness & Kent McNeil, *Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts*, 39 J. WEST 66, 67 (2000).

⁶⁸ Sione Latukefu, *Oral Traditions: An Appraisal of Their Value in Historical Research in Tonga*, 3 J. PAC. HIST. 135, 135 (1968).

⁶⁹ See James J. Fox, *Remembering and Recreating Origins: The Transformation of a Tradition of Canonical Parallelism Among the Rotenese of Eastern Indonesia*, 31 ORAL TRADITION 233, 234 (2017).

⁷⁰ Field & Cuero, *supra* note 55, at 320 (“In all of the Kumeyaay community . . . , singers are important repositories of traditional oral literature, as stories are typically not only told but also embodied in song cycles.”); see also VANSINA, *supra* note 11, at 37–38.

⁷¹ Patrick Vinton Kirch, *Voices on the Wind, Traces in the Earth: Integrating Oral Narrative and Archaeology in Polynesian History*, 127 J. POLYNESIAN SOC’Y 275, 275 (2018) (“The Polynesian peoples have long been noted for their propensity to encode the rich traditions of their ancestors in oral narrative accounts, often memorised by priests or other specialists, and passed down orally from generation to generation.”).

⁷² Gordon M. Day, *Oral Tradition as Complement*, 19 ETHNOHISTORY 99, 103 (1972).

⁷³ Babcock, *supra* note 27, at 43; see also *id.* at 34 (“Gods, mythic contacts with them, and symbols occupy important places in the cosmology of indigenous peoples and hence in their stories.”).

associated with their lands,⁷⁴ which can be “understood as the fundamental basis for their culture, spiritual life, wholeness, [and] economic survival.”⁷⁵ Tsilhqot’in people’s traditions exemplify this. They teach “how the land was formed; the need to respect the land and all it has to offer; the bond between plants, animals and people; . . . [and] places and events that shape the lives of Tsilhqot’in people”⁷⁶ Geographic landmarks also have an important role in their traditions.⁷⁷

Finally, traditions’ contents are not necessarily accessible to all community members. Some Indigenous communities have sacred traditions that are held in secret and selectively passed down to privileged individuals or groups entrusted with safeguarding the sacred information.⁷⁸ For example, in some Australian Aboriginal societies, certain traditions are only known to men who have completed initiation rituals.⁷⁹

II. ORAL TRADITION AS RELIABLE HISTORICAL EVIDENCE

This Part undertakes the pivotal task of establishing that oral tradition is a valid class of historical evidence, and that historical written documents are not inherently superior.

A. *The Value of Oral Tradition*

Oral tradition is a valuable historical source because traditions “can remain quite consistent through generations of time and thus be reliable for providing a good explanation of past events.”⁸⁰ Studies have demonstrated that oral traditions

⁷⁴ *Id.* at 34 (“Often these stories are tied to a community’s traditional territory, such as certain landmarks, revealing such a strong connection to the land that one could say they are in fact ‘imprinted on the land.’” (quoting Alexander Reilly, *The Ghost of Truganini: Use of Historical Evidence as Proof of Native Land*, 28 FED. L. REV. 453, 468 (2000))).

⁷⁵ *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 131 (June 17, 2005); *see also* MAHUIKA, *supra* note 39, at 1 (indicating that traditions “narrat[e] relationships across time and space to land, sea, sky, and each other.”). The Inter-American Court has emphasized that Indigenous Peoples have a special attachment to their lands or territories, and that “land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values.” *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 154.

⁷⁶ *Tsilhqot’in Nation v. British Columbia*, 2007 B.C.S.C. 1700, para. 131 (Can.).

⁷⁷ *Id.* para. 653.

⁷⁸ VANSINA, *supra* note 11, at 96–97; *see also* Katner, *supra* note 23, at 24.

⁷⁹ *See* *Narrier v. State of Western Australia* [2016] FCA 1519 (16 Dec. 2016) 35–36 (Austl.); *see also* Nicholas Buchanan & Eve Darian-Smith, *Introduction: Law and the Problematics of Indigenous Authenticities*, 36 L. & SOC. INQUIRY 115, 121 (2011).

⁸⁰ Borrows, *supra* note 16, at 10; *see also* Paul Thompson, *Oral Evidence in African History: A Note on Some Common Problems*, 2 ORAL HIST. 65, 65 (1974).

“sometimes display[] only negligible divergences from anthropological, archaeological, or historical conclusions.”⁸¹

Oral traditions’ reliability over long periods can be attributed to cultural practices, such as group testimony on ritual occasions, and cultural and political institutions that help to preserve them.⁸² For example, Bands of Cree people tasked individuals recognized as specialists in their society with maintaining remembrances of the signing of a treaty between the Cree and the British Monarchy, and instituted ceremonies to protect the information.⁸³ The specialists “had apprentices who had to learn all the songs and ceremony attached to that knowledge before they could take over the keeping task, and before they were allowed to tell the story, and that process takes years.”⁸⁴

In addition to their reliability, oral traditions are valuable because they can bring to the forefront the perspectives of groups, such as Indigenous Peoples, whose voices and historical perspectives are generally neglected in historical written documents.⁸⁵ Since outside observers have failed to capture many aspects of Indigenous Peoples’ cultures and histories, oral tradition can also paint a more detailed and intimate picture of them.⁸⁶ Gordon Day highlights that “[a]ll through the period of discovery, exploration, and colonization [Europeans] caught only glimpses of the [Indigenous Peoples’] attitudes, motivations, and understanding of the situation, and they were obviously not in a position to observe many events which were witnessed by [Indigenous] observers.”⁸⁷ Vansina adds that “[o]ne cannot emphasize enough . . . that [oral traditions] are irreplaceable, not only because information would otherwise be lost, but because they are sources ‘from the inside.’”⁸⁸

The remainder of this Section highlights that oral tradition has been considered probative of historical facts in the fields of history and archaeology and in dispute resolution fora. It also examines some challenges that can arise when using oral

⁸¹ Milward, *supra* note 23, at 288.

⁸² See Borrows, *supra* note 16, at 10. “Practices such as group testimony on ritual occasions, schools for teaching traditional lore and recitations on taking office can preserve exact texts through centuries, even including archaisms after they have ceased to be understood.” Thompson, *supra* note 80, at 65.

⁸³ Stevenson, *supra* note 39, at 26.

⁸⁴ *Id.*

⁸⁵ See Donna L. Akers, *Removing the Heart of the Choctaw People: Indian Removal from a Native Perspective*, 23 AM. INDIAN CULTURE & RSCH. J. 63, 63–64 (1999); Mercer, *supra* note 14, at 153.

⁸⁶ See Day, *supra* note 72, at 99; Roness & McNeil, *supra* note 67, at 67 (“[W]here written records do exist, they often do not contain adequate information on Aboriginal use and occupation of land and tend to be tainted by the European perspective of the persons who produced them.”); VANSINA, ORAL TRADITION, *supra* note 11, at 198.

⁸⁷ Day, *supra* note 72, at 99.

⁸⁸ VANSINA, ORAL TRADITION, *supra* note 11, at 197.

tradition to prove historical facts, while making clear that challenges exist for all types of evidence.

1. *Oral Tradition in the Discipline of History*

Many historical studies have demonstrated oral tradition's ability to prove facts.⁸⁹ In 1981, Thomas Spear determined that Mijikenda peoples' traditions "contain an accurate historical narrative over four centuries and continue to describe accurately institutions which have not existed for over 130 years."⁹⁰ In 1976, Andrew Roberts noted that "the histories of several kingdoms in east-central Africa have been traced back through traditions to the 16th and even the 15th centuries."⁹¹ In 1972, Day highlighted that the Abenaki people's historical traditions contained information dating back to 1637, and that some of the traditions concerned the 17th century Iroquois wars.⁹²

In addition to their conclusions concerning oral tradition's reliability, historians have expressed that incorporating oral tradition into historical inquiry can help make interpretations of the past "more culture-specific, less anachronistic and ethnocentric."⁹³ In short, for historians, "oral traditions are veritable tools in historical reconstruction,"⁹⁴ and can provide important historical information "about people[,] especially minority groups, who were excluded from mainstream publications or did not leave behind written primary sources."⁹⁵ Without oral tradition, "we would know very little about the past of large parts of the world."⁹⁶ "Oral tradition is not only a major source for African history but in the absence of written material is the leading source for the three-and-a-half centuries before 1840."⁹⁷

⁸⁹ See Kirch, *supra* note 71, at 290–92; Mercer, *supra* note 14, at 151–53.

⁹⁰ Thomas Spear, *Oral Traditions: Whose History?*, 16 J. PAC. HIST. 133, 136 (1981).

⁹¹ Andrew Roberts, *The Use of Oral Sources for African History*, 4 ORAL HIST. 41, 49–50 (1976).

⁹² Day, *supra* note 72, at 107.

⁹³ VANSINA, ORAL TRADITION, *supra* note 11, at 198.

⁹⁴ VijayaKumari, *supra* note 53, at 141.

⁹⁵ Nwankwo Uchenna Martins, *The Position of Oral Tradition (Myths, Mythology and Legends) in Historical Records*, 34 IPEDR 159, 160 (2012). Archaeologist Louise Tolson has similarly stated that "[f]or those studying peoples whose voices are largely absent from the historical documentary record, oral sources represent a particularly important evidence base." Louise Tolson, *Toward a Methodology for the Use of Oral Sources in Historical Archaeology*, 48 HIST. ARCHAEOLOGY 3, 3 (2014).

⁹⁶ VANSINA, ORAL TRADITION, *supra* note 11, at 198.

⁹⁷ Mercer, *supra* note 14, at 135–36.

2. *Oral Tradition in the Discipline of Archaeology*

Archaeologists have used oral tradition to better understand how people in the past experienced historical sites, landscapes, and archaeological materials.⁹⁸ To elaborate:

Oral traditions are an alternative data set for interpreting archaeological expressions of social organization, distinguishing temporal relationships and associating a location, feature or artefact with historical or legendary figures. They can provide a social context for material remains that is unobtainable in archaeological investigations by identifying symbolic, social and ideological values. As an independent source of evidence, traditional narratives can correct or challenge archaeological interpretations and provide an interpretive framework for developing models to be tested against the material-culture record.⁹⁹

Aron Crowell and Wayne Howell's research reveals that some Indigenous communities' oral traditions can "correlate with datable geological events and archaeological evidence, sometimes of considerable antiquity, suggesting a degree of stability across many centuries."¹⁰⁰ For example, "oral tradition has proven relevant in describing paleolandscapes that have changed (e.g., Dundas Bay [in Alaska] at the height of the Little Ice Age) or may no longer exist (such as vanished S'é Shuyee, the pre-surge proglacial terrain of lower Glacier Bay [in Alaska]), but which provide essential context for understanding the archaeological record."¹⁰¹

As an illustration, the Tsilhqot'in people's oral traditions describe their communities' displacement from what is known today as Glacier Bay, Alaska over two hundred to three hundred years ago. In 1972, Susie James, a Tsilhqot'in tradition-bearer who was born in 1890, recounted, in part, that:

Suddenly people said, "What's wrong with the glacier? It's growing much!" They used to see it w-a-a-a-a-y up the bay. But now it was near, getting closer, the way it was moving, people said. . . . At the same time Glacier Bay was murky. People said it was like diluted milk. Down there the one growing through the sand behaved that way. [The glacier] was churning up from the

⁹⁸ See Siân Jones & Lynette Russell, *Archaeology, Memory and Oral Tradition: An Introduction*, 16 INT'L J. HIST. ARCHAEOLOGY 267, 267, 273–74 (2012); Zedeño, Pickering & Lanoë, *supra* note 60, at 309, 312 ("North American archaeologists have successfully integrated oral traditions into projects addressing the last 2,000 years."); J. Ako Okoro, *Reflections on the Oral Traditions of the Nterapo of the Salaga Area*, 35 HIST. AFRICA 375, 376 (2008) ("Iron Age archeologists in Ghana have had to resort to oral traditions.").

⁹⁹ Liston & Miko, *supra* note 59, at 181 (internal citation omitted).

¹⁰⁰ Crowell & Howell, *supra* note 52, at 5; *see also id.* at 3; Smith, *supra* note 17, at 221–22 ("[S]cientists and geologists have . . . proven the accuracy of oral tradition in recalling environmental changes . . . , catastrophes . . . , and other prehistoric and historic occurrences."); Zedeño, Pickering & Lanoë, *supra* note 60, at 309, 312.

¹⁰¹ Crowell & Howell, *supra* note 52, at 19.

bottom of the bay. Whirlpools churned over to the surface like the tide. Where the glacier was moving, it behaved that way. . . . This was when people became frightened. Why was it? Wasn't there any way to stop it?¹⁰²

Other Tsilhqot'in storytellers and scientific evidence corroborate that a glacier surged forward in the 18th century and displaced Glacier Bay communities.¹⁰³

3. *Oral Tradition Before Courts and Tribunals*

i. *Abyei Arbitration*

At least one international arbitration tribunal adjudicating claims based on international law has afforded weight to oral tradition evidence. In *Government of Sudan v. Sudan People's Liberation Movement/Army (Abyei Arbitration)*, the parties, by agreement, tasked the tribunal with reviewing whether experts of a boundary commission had exceeded their mandate when delimiting the territory of the Abyei Area.¹⁰⁴ This area was "defined as the area of the nine Ngok Dinka chiefdoms^[105] transferred to [the former province of Sudan named] Kordofan in 1905."¹⁰⁶ The parties also requested that the tribunal delimit the area if it determined the commission had exceeded its mandate.¹⁰⁷ Since the tribunal concluded that the commission exceeded its mandate when delimiting the Abyei Area's eastern and western boundaries, it proceeded to delimit those boundaries to reflect the perimeter of the lands that the Ngok Dinka tribe used and occupied in 1905.¹⁰⁸

In undertaking its analysis, the tribunal highlighted that documentation of the lands was scant and incomprehensive and that defining the boundaries was a difficult task due to the region's remoteness and limited administrative presence there

¹⁰² HAA SHUKÁ, OUR ANCESTORS: TLINGIT ORAL NARRATIVES 249–51, 253, 257 (Nora Marks Dauenhauer & Richard Dauenhauer eds., 1987).

¹⁰³ See *id.* at 261–92, 407–33. See generally Cathy Connor, Greg Strelever, Austin Post, Daniel Monteith, & Wayne Howell, *The Neoglacial Landscape and Human History of Glacier Bay, Glacier Bay National Park and Preserve, Southeast Alaska, USA*, 19 THE HOLOCENE 381 (2009).

¹⁰⁴ *Government of Sudan v. Sudan People's Liberation Movement/Army (Abyei Arbitration)*, 30 R.I.A.A. 145, 168–69, 197 (Perm. Ct. Arb. 2009).

¹⁰⁵ The *Abyei Arbitration* Award describes that:

The Ngok Dinka, one of the 25 tribes which comprise the Dinka people, are reportedly a highly cohesive tribal unit of an estimated 300,000 people, with a well-defined, centralized political structure. They are divided into nine Chiefdoms Each Chiefdom has an area of permanent habitation and seasonal grazing areas. They cultivate the land and, through tribal law and custom, grant individuals and families exclusive right to use certain lands.

Id. at 197, 200 (citing Protocol Between the Government of Sudan (GOS) and the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of Abyei Conflict, § 1.1.2, May 26, 2004 [hereinafter *Abyei Protocol*], https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/abyei_05262004.pdf).

¹⁰⁶ *Id.* at 168–69.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 393–95.

in 1905.¹⁰⁹ “There is no map from 1905, or indeed later years, which provides the specific coordinates of the western and eastern limits of the area occupied by the nine Ngok Dinka Chiefdoms transferred in 1905.”¹¹⁰ Additionally, the history of the Ngok Dinka, who “are said to have a spiritual connection with the land through their tribes’ ancestors,”¹¹¹ is largely recorded in their oral traditions.¹¹²

In support of its position regarding the location of the disputed boundaries, the Sudan People’s Liberation Movement/Army (SPLM/A) submitted, among other evidence, oral traditions of the Misseriya, a nomadic people who have historically occupied the Abyei area during the dry season, and oral traditions of the Ngok Dinka that were reported over a number of years by various sources.¹¹³ In particular, SPLM/A submitted historical studies published by anthropologists and other commentators in the 20th century that recorded oral traditions of the Misseriya and the Ngok Dinka,¹¹⁴ 26 written witness statements of Ngok Dinka elders and chiefs prepared for the *Abyei Arbitration*, which occurred during 2008 and 2009,¹¹⁵ and a Ngok Dinka elder’s oral testimony during the arbitration’s oral proceedings.¹¹⁶

The oral traditions described matters such as Ngok Dinka burial and seasonal cattle-grazing locations, as well as the locations and character of Ngok Dinka settlements in the Abyei Area around 1905.¹¹⁷ For example, one Ngok Dinka elder attested that he and other tribesmen “would take cattle to Dhony Dhoul, where there were [Ngok Dinka] settlements, further north to Angareib and then onwards, though [they] would not reach Deinga,” and that his “father, grandfather and those before him would follow this route.”¹¹⁸ Additionally, one Ngok Dinka chief attested:

I was probably born sometime around 1946 . . . My grandfather and great-grandfather were born in Miding . . . Our main settlements included Miding . . . All of these places were permanent settlements of the Achaak

¹⁰⁹ See *id.* at 370–71, 394. British colonial officials around 1905 were not “fully aware of the seasonal character of the Ngok Dinka’s movements and land use patterns and therefore did not have a comprehensive understanding of the extent of Ngok Dinka territory.” *Id.* at 371.

¹¹⁰ *Id.* at 394.

¹¹¹ *Id.* at 200.

¹¹² *Id.* at 404.

¹¹³ See *id.* at 200, 404; Memorial of Sudan People’s Liberation Movement/Army, Government of Sudan v. Sudan People’s Liberation Movement/Army, Case No. 2008-07, Pleadings, ¶¶ 42, 86–87, 119 (Perm. Ct. Arb. Dec. 18, 2008) [hereinafter SPLM/A Memorial].

¹¹⁴ See, e.g., SPLM/A Memorial, Case No. 2008-07, ¶¶ 124, 876, 1032 n.1714 (citing DAVID C. COLE & RICHARD HUNTINGTON, BETWEEN A SWAMP AND A HARD PLACE 58 (1997) (“Ngok migrated to Abyei long ago from the east, from the Upper Nile area.”)).

¹¹⁵ See *id.* ¶ 1015.

¹¹⁶ See Transcript of *Abyei Arbitration*, Apr. 22, 2009, at 56–57.

¹¹⁷ See SPLM/A Memorial, Case No. 2008-07, ¶¶ 1020–34, 1047, 1066–68.

¹¹⁸ See *id.* ¶ 1068 n.1800.

Chieftdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived . . . [People of my chieftdom] would spend the rainy season on high ground cattle campsites near our settlements . . . when Miding was full of water we would go to a place called the *tooc* Miding, which was higher ground north of Miding At the time of my great-grandfather, we also took the cattle to a high place named Niag, and there were also [Ngok Dinka] settlements in this area.¹¹⁹

SPLM/A asserted that the traditions were largely consistent in describing the Ngok Dinka's occupation and use of the Abyei Area.¹²⁰ Additionally, SPLM/A advanced that the oral traditions not only corroborated the limited documentary evidence, but "provide[d] a more detailed and comprehensive description of the Ngok Dinka during the early 20th century (including their occupation and use of less accessible parts of the Abyei region) than is otherwise available."¹²¹

In opposition to SPLM/A, the Government of Sudan averred that oral tradition evidence had "virtually no evidentiary value."¹²² It took particular issue with the written witness statements, in part, because some witnesses attested to information for which they lacked direct or firsthand knowledge.¹²³

The tribunal rejected the Government of Sudan's position. The tribunal reasoned that it had "a duty to render its decision on the basis of what it considers . . . the best available evidence."¹²⁴ It further reasoned that there is no general presumption privileging any particular source of evidence, and that "what constitutes the best available evidence on a particular point of fact must be determined in light of all circumstances, and not whether it is in written or oral form."¹²⁵

While noting that it can be difficult to date oral tradition evidence and that other challenges may exist, such as lack of precision,¹²⁶ the tribunal declared that depriving the witness statements of the Ngok Dinka elders and chiefs containing oral traditions "*per se* of all probative value would be unjustifiable."¹²⁷ It considered that "[w]hen defining the historic area of a tribe . . . it is reasonable, and indeed quite logical, to seek information from the tribe members themselves."¹²⁸

¹¹⁹ *Id.* ¶ 1032 n.1714.

¹²⁰ *See id.* ¶¶ 124–25, 884–87, 893.

¹²¹ *Id.* ¶¶ 1015, 1017.

¹²² Counter-Memorial of the Government of Sudan, *Government of Sudan v. Sudan People's Liberation Movement/Army*, Case No. 2008-07, Pleadings, ¶ 10 (Perm. Ct. Arb. Feb. 13, 2009).

¹²³ *See* *Government of Sudan v. Sudan People's Liberation Movement/Army* (Abyei Arbitration), 30 R.I.A.A. 145, 292–93 (Perm. Ct. Arb. 2009).

¹²⁴ *Id.* at 394–95.

¹²⁵ *Id.*

¹²⁶ *Id.* at 395–96, 404.

¹²⁷ *Id.* at 395–96.

¹²⁸ *Id.*

Accordingly, the tribunal admitted the oral tradition evidence, and committed to duly take into account the evidence, particularly if scholarly and documentary evidence corroborated it.¹²⁹ Ultimately, in delimiting the boundary of the Abyei area, the tribunal primarily relied on the evidence of two anthropologists, one of which relied on oral traditions in his report on the Ngok Dinka.¹³⁰ The tribunal also afforded weight to the witness evidence proffered by SPLM/A, finding that it corroborated the anthropological reports and testimony.¹³¹

ii. Indigenous Peoples' Rights Litigation in National Courts

National-level courts in Australia,¹³² Belize,¹³³ Norway,¹³⁴ Malaysia,¹³⁵ South Africa,¹³⁶ the United States,¹³⁷ and Canada¹³⁸ have determined that oral traditions can be probative of facts in Indigenous Peoples' rights cases. These types of cases commonly entail Indigenous communities' petitioning for the legal recognition of their title to their ancestral lands, as well as their rights to use certain lands for traditional practices or subsistence activities, such as hunting, fishing, or foraging.¹³⁹

To prove these claims under national laws, Indigenous claimants are commonly required to prove their Indigenous identity or that they descend from a particular Indigenous People¹⁴⁰ and that they have occupied or used the claimed lands

¹²⁹ *Id.* at 404; *cf.* *Barbados v. Trinidad and Tobago*, 27 R.I.A.A. 147, 221–22 (Perm. Ct. Arb. 2006) (describing Barbados's oral tradition evidence as “distinctly, fragmentary and inconclusive”).

¹³⁰ *See Abyei Arbitration*, 30 R.I.A.A. at 396–97, 404; *see also* Memorial of Sudan People's Liberation Movement/Army, Government of Sudan v. Sudan People's Liberation Movement/Army, Case No. 2008-07, Pleadings, ¶ 893 (Perm. Ct. Arb. Dec. 18, 2008) [hereinafter SPLM/A Memorial].

¹³¹ *See Abyei Arbitration*, 30 R.I.A.A. at 404.

¹³² *See Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 CLR 422, ¶¶ 62–63 (Austl.).

¹³³ *See Aurelio Cal v. Att'y Gen. of Belize*, [2007] S.C. Claim Nos. 171 & 172, ¶ 62 (Belize) (“I am satisfied that extensive documentary evidence, expert reports and Maya oral tradition, establish that the Maya communities presently in Southern Belize exist in areas that had formed part of the ancestral and historic territory of the Maya people since time immemorial, and certainly since prior to Spanish and later British assertions of sovereignty.”).

¹³⁴ *See Inge Sirum v. Esslan Reindeer Pasturing Dist.* [2001], S.C. No. 4B/2001 (Nor.).

¹³⁵ *See* RAMY BULAN & AMY LOCKLEAR, LEGAL PERSPECTIVES ON NATIVE CUSTOMARY LAND RIGHTS IN SARAWAK 18 (2008).

¹³⁶ *See Alexkor Ltd. v. Richtersveld Cmty.* 2004 (5) SA 460 (CC) paras. 47–63 (S. Afr.); *see also* *Salem Party Club v. Salem Cmty.* 2018 (3) SA 1(CC) paras. 37, 63–74 (S. Afr.).

¹³⁷ *See* *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607, 616 n.12 (1987); *Cree v. Flores*, 157 F.3d 762, 773–74 (9th Cir. 1998); *Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 505 (1964).

¹³⁸ *See Mitchell v. Minister of Nat'l Revenue*, [2001] 1 S.C.R. 911, paras. 37–38 (Can.).

¹³⁹ *See* Awan, *supra* note 66, at 706–07.

¹⁴⁰ *See id.* at 707.

or resources for an extensive time period.¹⁴¹ For example, under Canadian law, an Indigenous community “asserting [an aboriginal title] claim must establish that it occupied the lands in question at the time at which the [United Kingdom] asserted sovereignty over the land subject to the title.”¹⁴² However, it is nearly impossible for many Indigenous communities to prove extensive use or occupation with written documents due to the communities’ being oral-knowledge based and due to incomplete, erroneous, or biased accounts of Indigenous Peoples recorded by early settlers, explorers, or colonial authorities.¹⁴³

In the Canadian case *Mitchell v. Minister of National Revenue*, in which Indigenous elders supplied oral traditions to establish an aboriginal right under Canadian law, the Supreme Court of Canada recognized that Indigenous claimants are faced with “demonstrat[ing] features of their pre-[European contact] society, across a gulf of centuries and without the aid of written records.”¹⁴⁴ To avoid rendering their rights illusory, the court declared that Indigenous oral traditional evidence must be given “due weight,” including independent weight where appropriate, and placed on equal footing with written documents.¹⁴⁵

However, the *Mitchell* Court qualified that oral tradition evidence should not “be artificially strained to carry more weight than it can reasonably support,” or “interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law.”¹⁴⁶ It also noted that “[c]laims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities.”¹⁴⁷

Although United States federal courts have generally been more hesitant with respect to oral tradition evidence than Canadian courts, the United States Court of Claims, which had jurisdiction over certain monetary claims against the U.S. federal government,¹⁴⁸ provides an example of the successful use of oral tradition evidence. In *Zuni Tribe of New Mexico v. United States*, the Zuni Tribe sought just compensation for the unlawful expropriation of its lands and successfully proved its actual, exclusive, and continuous use and occupancy of its ancestral lands partly based on

¹⁴¹ See Babcock, *supra* note 27, at 27–29; Roness & McNeil, *supra* note 67, at 66–67.

¹⁴² Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 144 (Can.).

¹⁴³ Erin Hanson, *Oral Traditions*, UNIV. OF B.C.: FIRST NATIONS & INDIGENOUS STUD., https://indigenousfoundations.arts.ubc.ca/oral_traditions/ (last visited Apr. 10, 2025).

¹⁴⁴ *Mitchell v. Minister of Nat’l Revenue*, [2001] 1 S.C.R. 911, para. 27 (Can.). The Supreme Court of Canada is the highest court in the Canadian judicial system. *Frequently Asked Questions (FAQ)*, SUP. CT. CAN., <https://www.scc-csc.ca/contact/faq/qa-qf-eng.aspx#> (last visited Apr. 10, 2025).

¹⁴⁵ See *Mitchell*, 1 S.C.R. paras. 37–39; see also *Delgamuukw*, 3 S.C.R. para. 82.

¹⁴⁶ *Mitchell*, 1 S.C.R. paras. 38–39.

¹⁴⁷ *Id.* para. 39.

¹⁴⁸ *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607, 607 (1987).

oral tradition evidence submitted as depositions.¹⁴⁹ The Court of Claims accepted that “[t]he ancient ties of Zuni people to their land is presently manifest in the tribal oral tradition about Zuni origin and migration.”¹⁵⁰ It also accepted that “Zuni tradition and religion preserved the knowledge of [the] exact locations [of places of significance to the Zuni people within their claimed lands] by the use of oral tradition memorized by rote or in song and prayer, and passed from one generation to another without deviation.”¹⁵¹

iii. *Inter-American Court of Human Rights*

Although the Inter-American Court has not directly addressed the probative value of oral tradition evidence, it has expressly admitted documents based on oral tradition in a contentious case concerning an Indigenous community’s property rights under the American Convention on Human Rights, a legally binding treaty.

In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Commission on Human Rights (“Commission”), on behalf of the Awas Tingni Community, submitted legal claims to the Inter-American Court concerning Nicaragua’s failure to demarcate and formally recognize the community’s title to their ancestral lands.¹⁵² The Commission submitted an anthropologist’s ethnographic study of the Awas Tingni Community and its territory to show that the Awas Tingni Community had a community property right to the lands and natural resources thereon based on traditional patterns of use and occupation over a prolonged period.¹⁵³

The anthropologist, serving as an expert witness, attested that his study’s findings on the community’s ancestral possession of the territory before 1990 were based on oral traditions, and that, after consulting other experts and referencing other research studies, he found no data that contradicted the oral traditions.¹⁵⁴ He also asserted that “[t]he only evidence that can be used to determine the existence of the Community before 1990 is oral tradition.”¹⁵⁵

Nicaragua challenged the submission of the study.¹⁵⁶ A Nicaraguan government official who served as a witness expressed that “[t]here ha[d] been criticism of the [ethnographic study], . . . as it favored oral sources and did not compare them

¹⁴⁹ See *id.* at 616–17, 616 n.12, 631, 641. See generally Andrew Wiget, *Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case*, in *ZUNI AND THE COURTS: A STRUGGLE FOR SOVEREIGN LAND RIGHTS* 173 (E. Richard Hart ed., 1995).

¹⁵⁰ *Zuni Tribe*, 12 Cl. Ct. at 616.

¹⁵¹ *Id.* at 631.

¹⁵² *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua* (Awas Tingni v. Nicar.), Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 140 (Aug. 31, 2001).

¹⁵³ See *id.* ¶¶ 64, 75, 83(c), 83(f), 140, 151.

¹⁵⁴ See *id.* ¶ 83(c).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* ¶ 93.

to archaeological sources.”¹⁵⁷ The witness also opined that the “study was inconclusive regarding the ancestral nature of occupation of the area claimed.”¹⁵⁸

Despite Nicaragua’s concerns, the Inter-American Court admitted the evidence, declaring that it “believe[d] it useful to admit [the study] into evidence.”¹⁵⁹ Since the court expressed that “the purpose of evidence is to demonstrate the veracity of the facts alleged” and employed a flexible approach to evaluating evidence,¹⁶⁰ its admission of a study based on oral tradition arguably indicates that it finds it plausible that oral tradition can be probative of facts.

B. Common Challenges When Using Oral Tradition as a Historical Source

As demonstrated above, oral tradition can reliably preserve information on past events and practices over extensive time periods.¹⁶¹ Nonetheless, like any historical source, it has limitations¹⁶² which must be fully appreciated to effectively use it as evidence.¹⁶³

One of the challenges of using Indigenous Peoples’ oral traditions as a historical source is that they reflect Indigenous Peoples’ worldviews¹⁶⁴ and cosmologies, which commonly contain elements that are difficult for outsiders to fully comprehend.¹⁶⁵ Indeed, an Indigenous community may have distinct conceptions of space and historical truth.¹⁶⁶ For example, P.M. Mercer found that Trobriand Islanders determined the truth of their traditions based on whether their ancestors characterized them as truthful, regardless of whether the event described in the tradition could

¹⁵⁷ *Id.* ¶ 83(m).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ¶ 93.

¹⁶⁰ *Id.* ¶¶ 87, 89.

¹⁶¹ Katić, *supra* note 40, at 23; *see also* Latukefu, *supra* note 68, at 136, 140–43 (“The voices of men such as Robert Lowie, who once declared that he could not ‘attach to oral tradition any historical value whatsoever under any conditions whatsoever’, and of B. Malinowski and his fellow functionalists, no longer seem to receive a sympathetic hearing.”); Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AM. ANTIQUITY 405, 412–13 (2002) (“[E]thnohistorians have now long realized that oral traditions contain a great deal of consistently reported information, with strong internal standards of verifiability.”).

¹⁶² Okoro, *supra* note 98, at 376; *see also* Borrows, *supra* note 16, at 13.

¹⁶³ VANSINA, ORAL TRADITION, *supra* note 11, at 186.

¹⁶⁴ “Worldview is a representation of ultimate reality in all its aspects visible and invisible. It includes views about the creation of the world, about the kinds of beings that are in it and their taxonomies, on its layout, and on its functioning.” *Id.* at 133.

¹⁶⁵ *See* Babcock, *supra* note 27, at 43 (“Even with respect to the spiritual realm, the Western cosmologies could not be more different from indigenous ones.”); Mercer, *supra* note 14, at 139.

¹⁶⁶ Mercer, *supra* note 14, at 139 (“Such fundamental categories as time, space, and historical truth may be very differently perceived by members of different cultures.”); *see also* VANSINA, ORAL TRADITION, *supra* note 11, at 125–26.

have objectively occurred.¹⁶⁷ As such, to effectively use Indigenous oral tradition as evidence, it is critical to have a thorough understanding of the culture of the community whose traditions are under consideration.¹⁶⁸

A second challenge is that oral traditions frequently feature symbolic and metaphorical elements,¹⁶⁹ as well as spirits, mythological beings and creatures, and magical events.¹⁷⁰ In the past, these features led some scholars to assert that traditions are “timeless myths” rather than historical accounts.¹⁷¹ However, their misplaced, ethnocentric views are not predominant. Contemporary historians and archaeologists recognize that the presence of mythological features does not detract from the fact that oral traditions “contain genuinely historical components that are readily usable in interpreting the past.”¹⁷²

A third challenge is that oral traditions rarely reference precise or absolute dates¹⁷³ or conform to the linear, chronological concept of time, common in Western societies and scientific disciplines.¹⁷⁴ Many Indigenous Peoples regard time as a series of recurrent cycles, an undifferentiated long ago, or a tripartite categorization of historical periods (e.g., a cosmogenic era, a middle era, and a more recent era).¹⁷⁵ For example, Liston and Miko explain that:

Palauan society conceptuali[z]es time as a dynamic process, with the past, present and future being interrelated perspectives that feed off one another. . . . [W]hen recounting histories [in Paulau society], ‘eras’ are used as linguistic markers to frame the story; but these must be understood as ‘duration, continued existence, and the nature of this existence’, not as forming a

¹⁶⁷ Mercer, *supra* note 14, at 143; *see also* VANSINA, ORAL TRADITION, *supra* note 11, at 129 (“In many cultures truth is what is being faithfully repeated as content and has been certified as true by the ancestors. But sometimes truth does not include the notion that x and y really happened.”).

¹⁶⁸ *See* Mercer, *supra* note 14, at 136; Latukefu, *supra* note 68, at 137 (noting the importance of cultural fluency in building rapport and avoiding unintentional faux pas).

¹⁶⁹ *See* Jones & Russell, *supra* note 98, at 272.

¹⁷⁰ *See* Babcock, *supra* note 27, at 43; Whiteley, *supra* note 161, at 407.

¹⁷¹ Kirch, *supra* note 71, at 280, 300.

¹⁷² Whiteley, *supra* note 161, at 412–13; *see also* Kirch, *supra* note 71, at 300.

¹⁷³ *See* VijayaKumari, *supra* note 53, at 142; Crowell & Howell, *supra* note 52, at 6.

¹⁷⁴ Crowell & Howell, *supra* note 52, at 3, 6 (“[S]equences of events tend to be elided and compressed along the chain of testimonies between successive generations.”); Jones & Russell, *supra* note 98, at 272 (“Archaeologists became increasingly aware that oral traditions rarely conform to the linear chronological, evidence-based frameworks of scientific archaeology.”). P.M. Mercer asserts that:

The scientific conception of time as linear advancement without cyclical repetition is basic to our current mode of thinking about society and the universe. Yet this concept is a recent development (concomitant with the 17th century scientific revolution and the growth of secularization) and not a necessity of thought.

Mercer, *supra* note 14, at 139.

¹⁷⁵ *See* Roberts, *supra* note 91, at 50; Mercer, *supra* note 14, at 139–40.

chronological sequence. For example, *Er a Ititiumd* refers to 'the Mossy Past' or 'Time of the Gods'—an era outside of the foundation of time, and hence not clearly seen or understood.¹⁷⁶

Although a lack of "standard" calendrical accounting can make it difficult to sequence events recorded in oral traditions,¹⁷⁷ in some instances events and other data recorded in oral traditions can be rearranged into chronological order using various techniques,¹⁷⁸ such as cross-referencing archaeological and historical research.¹⁷⁹ Additionally, for historical reconstruction, absolute dates are not necessary, as chronology can consist of "a relative sequence of events and situations only."¹⁸⁰

A fourth challenge is that oral traditions can contain distortions¹⁸¹ and be influenced by contemporary circumstances.¹⁸² Legal, socio-political, economic, didactic and artistic factors are the most typical contributors to modification in oral tradition.¹⁸³ For instance, oral tradition can be distorted to validate a religion or to ennoble a certain clan or family.¹⁸⁴ Polynesian societies are illustrative, as there are instances where Polynesian genealogies of ancestors have been intentionally altered "so that a socially rising family can claim succession to an inherited position such as [a] chieftainship."¹⁸⁵

Distortions may arise from both internal and external influences. For example, European accounts of certain oral-knowledge societies have seeped into those societies' traditions. This can make it difficult to distinguish between a society's original traditions and information introduced from external sources.¹⁸⁶ Mercer highlights

¹⁷⁶ Liston & Miko, *supra* note 59, at 185.

¹⁷⁷ See Spear, *supra* note 90, at 142.

¹⁷⁸ Mercer, *supra* note 14, at 142.

¹⁷⁹ See Katja Hrobat, *Use of Oral Tradition in Archaeology: The Case of Ajdovščina Above Rodik, Slovenia*, 10 EUR. J. ARCHAEOLOGY 31, 48 (2007).

¹⁸⁰ VANSINA, ORAL TRADITION, *supra* note 11, at 173.

¹⁸¹ See Crowell & Howell, *supra* note 52, at 5–6; Babcock, *supra* note 27, at 44.

¹⁸² Borrows, *supra* note 16, at 10.

¹⁸³ Mercer, *supra* note 14, at 144; see also Spear, *supra* note 90, at 134 ("[O]ral traditions were seen as functional, carefully articulated with other aspects of the society and frequently adjusted to reflect changes in institutions.").

¹⁸⁴ VijayaKumari, *supra* note 53, at 142; see also Mercer, *supra* note 14, at 144 ("The political function of tradition is apparent when the claims of interest groups manipulate the testimony . . ."); Okoro, *supra* note 98, at 377 ("When considered useful for achieving political or social goals, it [has] been easy for early traditions to be added or new ones created to fill perceived gaps in the corpus of the contemporary oral tradition.").

¹⁸⁵ Mercer, *supra* note 14, at 145–46.

¹⁸⁶ See *id.* at 147–48 ("[I]n New Zealand certain Pakeha (European) theories have become accepted by both Pakeha and Maori as original traditions." (citing P. M. Mercer & C. R. Moore, *Melanesians in North Queensland: The Retention of Indigenous Religious and Magical Practices*, 11 J.

that “[t]he incorporation of biblical elements into traditions recorded after the arrival of . . . missionaries . . . is a common feature in the Pacific, making it . . . often almost impossible to discern whether biblical similarities are remarkable convergences or disguised borrowings.”¹⁸⁷

Although some distortions can be difficult to assess, various methods, such as cross-checking traditions with other sources, can be employed to uncover distortions.¹⁸⁸ Nonetheless, it should not be assumed that all traditions are rife with distortions because distortions do not affect all oral traditions to the same degree.¹⁸⁹ “[R]ecent oral tradition—one or two generations beyond the eldest living members in a community—suffers only small damage.”¹⁹⁰ Distortions are a more significant concern for oral traditions that are at least 100 years old.¹⁹¹ In conclusion, even though oral traditions have limitations, they are not innately unreliable¹⁹² and can provide reliable historical evidence.¹⁹³

C. Written Document Challenges

Oral tradition’s limitations do not lead to the conclusion that written documents are inherently superior sources for uncovering reliable historical information. “Written methods of conveying the historical past are themselves not immune to methodological constraints and difficulties, and to conveying inaccurate or mistaken depictions of the past.”¹⁹⁴

“[W]ritten documents can be forged or amended or re-written after being signed onto” or finalized.¹⁹⁵ Due to developments in applications of artificial intelligence (AI), manipulation and forgery of written text is an ever-increasing challenge.¹⁹⁶ Using easily accessible AI-powered tools, individuals with little to no

PAC. HIST. 66, 87 (1976); J. B. W. Robertson, *The Evaluation of Maori Tribal Tradition as History*, 71 J. POLYNESIAN SOC’Y. 293, 294 (1962))).

¹⁸⁷ *Id.* at 148 (internal quotation marks omitted).

¹⁸⁸ See VANSINA, ORAL TRADITION, *supra* note 11, at 123 (“[W]here suspicious congruences are detected it is possible to see whether the tradition was altered and, if so, how.”); *id.* at 192.

¹⁸⁹ See *id.* at 192–93.

¹⁹⁰ *Id.* at 192–93; see also Curtin, *supra* note 53, at 139.

¹⁹¹ See VANSINA, ORAL TRADITION, *supra* note 11, at 192–93.

¹⁹² *Id.* at 197.

¹⁹³ Martins, *supra* note 95, at 161; see also Latukefu, *supra* note 68, at 140–43.

¹⁹⁴ Milward, *supra* note 23, at 288.

¹⁹⁵ Katner, *supra* note 23, at 23.

¹⁹⁶ See generally *Increasing Threat of Deepfake Identities*, U.S. DEP’T OF HOMELAND SEC. (2021), https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf (discussing the emergent danger of deep fake technology); *Deepfake, Phase 2: Mitigation Measures*, U.S. DEP’T OF HOMELAND SEC. (2022), <https://www.dhs.gov/sites/default/files/2022-10/AEP%20DeepFake%20PHASE2%20FINAL%20corrected20221006.pdf> (highlighting how even unsophisticated actors can create realistic forgeries).

technical skills can create highly realistic forged text and documents that can be very difficult to detect.¹⁹⁷

Moreover, author bias can distort written documents.¹⁹⁸ Consequently, the meaning of written documents “must be understood in their context based on who wrote it, for whom, and why.”¹⁹⁹ In employing such an approach, biases in written records can be illuminated,²⁰⁰ and biases are particularly evident, and sometimes egregious, in many non-Indigenous persons’ historical accounts of Indigenous Peoples.

Since many Indigenous Peoples did not create written records, written historical accounts of them, including in government records, were often “formulated by Europeans, using records or accounts written by other Europeans, many of whom had relatively limited familiarity with the . . . cultures and languages they were describing.”²⁰¹ These foreign observers chose topics of interest from their foreign point of view, “which they follow[ed] in attributing various activities and qualities to the populations they describe[d].”²⁰² Thus, historical written documents are commonly shaped by the perspectives of the non-Indigenous outsiders who produced them.²⁰³

The 17th century written observations of Puritans who settled in what is now the Northeast United States illustrate this. They believed the Indigenous Peoples they encountered “worshipped devils, that [Indigenous] religious practitioners were witches, and that the [people] themselves were bewitched.”²⁰⁴ Anthropologist Williams Simmons found that:

These beliefs appear as matter-of-fact assumptions in the vocabulary of all the [Puritans] who wrote about [Indigenous] culture, whether they wrote from a sympathetic or hostile perspective and whether they were informed or ignorant of ethnographic facts. . . . Puritan commitment to the devil-and-witchcraft theory of [Indigenous] culture intensified rather than diminished with experience.”²⁰⁵

¹⁹⁷ See *Increasing Threat of Deepfake Identities*, *supra* note 196.

¹⁹⁸ See VANSINA, ORAL TRADITION, *supra* note 11, at 191 (“Every person who speaks or writes chooses information, orders it, colors it.”).

¹⁹⁹ Peterson, *supra* note 58, at 501; *see also* Milward, *supra* note 23, at 306.

²⁰⁰ See Mercer, *supra* note 14, at 149; Dibia & Nwosu, *supra* note 15, at 95.

²⁰¹ R. David Edmunds, *Native Americans, New Voices: American Indian History, 1895–1995*, 100 AM. HIST. REV. 717, 721 (1995).

²⁰² VANSINA, ORAL TRADITION, *supra* note 11, at 197.

²⁰³ See Roness & McNeil, *supra* note 67, at 67; Edmunds, *supra* note 201, at 721; VANSINA, ORAL TRADITION, *supra* note 11, at 197.

²⁰⁴ William S. Simmons, *Cultural Bias in the New England Puritans’ Perception of Indians*, 38 WM. & MARY Q. 56, 56 (1981).

²⁰⁵ *Id.*

Thus, many historical written documents concerning Indigenous Peoples must be considered with caution.

In short, it is an illusion to consider written documents per se more reliable than oral traditions,²⁰⁶ especially in relation to Indigenous Peoples' histories. Additionally, if courts were to eliminate every material that could be subject to distortion, they would have few materials on which to base their factual findings.²⁰⁷ Every type of material or source can present evidentiary challenges.²⁰⁸

III. ORAL TRADITIONS AS EVIDENCE BEFORE THE ICJ

This Part turns to the core inquiry of how the Court treats oral tradition evidence in contentious cases. The Statute of the ICJ (ICJ Statute), the ICJ's constitutive instrument, and the subsidiary Rules of Court²⁰⁹ govern the extent to which oral traditions may be used as evidence. The Court's *jurisprudence constante* clarifying the Court's evidence rules and setting out guiding evidentiary principles is also relevant. Although the doctrine of stare decisis is not applicable to the Court's judgments,²¹⁰ the Court generally strives for consistency in its jurisprudence.²¹¹

Under the ICJ Statute and Rules of Court, evidence may be submitted on parties' initiative.²¹² In addition, the Court may call upon parties to produce evidence that it "consider[s] to be necessary for the elucidation of any aspect of the matters in issue, . . . may itself seek information for such purpose," and may, if necessary, independently arrange for an expert opinion or witness testimony.²¹³

²⁰⁶ Dibia & Nwosu, *supra* note 15, at 95.

²⁰⁷ *Cf. id.*; Latukefu, *supra* note 68, at 136.

²⁰⁸ See Mercer, *supra* note 14, at 149; Dibia & Nwosu, *supra* note 15, at 95.

²⁰⁹ Rules of Court, 1978 I.C.J. Acts & Docs. 93. The Court promulgated the Rules of Court using the powers it is granted under the ICJ Statute. The Court has also adopted non-binding Practice Directions, but they are not pertinent here. See Practice Directions, 2024 I.C.J. Acts & Docs. 163.

²¹⁰ Article 59 of the ICJ Statute stipulates that a "decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

²¹¹ See, e.g., Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 I.C.J. 266, ¶ 64 (Apr. 21) ("[T]he Court will be guided by its jurisprudence on questions of proof."); *id.* ¶ 41 ("[A]pplying its settled jurisprudence . . ."). See also Joan E. Donoghue, President, I.C.J., Speech to the Sixth Comm.: The Roles of International Judge and Foreign Ministry Lawyer (Oct. 29, 2021) ("[W]e attach great importance of the consistency of our jurisprudence, which we usually describe using the French expression—a *jurisprudence constante*.").

²¹² See Statute of the International Court of Justice art. 43; Rules of Court, 1978 I.C.J. Acts & Docs. 125, 133.

²¹³ See Rules of Court, 1978 I.C.J. Acts & Docs. 133; Statute of the International Court of Justice arts. 49–50.

Nevertheless, the ICJ's judgments reflect that production of evidence is primarily the parties' responsibility. It is well established that the litigant seeking to establish a fact generally bears the burden of proving it with evidence.²¹⁴ This is commonly referred to as the *onus probandi incumbit actori* principle, and the Court has consistently applied it to assertions of fact by both applicants and respondents.²¹⁵

An implication of the *onus probandi incumbit actori* principle is that oral tradition would likely only be submitted to the Court if a party submits it. Furthermore, since the ICJ Statute only entitles states, rather than Indigenous Persons and communities, to submit claims to vindicate their legal rights and interests,²¹⁶ oral tradition will generally only come before the Court if a state considered it would support its claims or arguments.

Nonetheless, it can be in a state's interest to substantiate its claims with oral tradition, including in cases where the historical written record may be sparse, biased, or contested.²¹⁷ In addition, Indigenous Peoples' rights and interests have been, and can be, implicated in inter-state disputes,²¹⁸ and in such disputes, oral traditions could be the best or only available information of pertinent historical circumstances.

Upon a party's submission of an oral tradition, the Court would be charged with determining its admissibility, relevance, and probative value, as well as whether

²¹⁴ Application of International Convention for Suppression of Financing of Terrorism & of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed'n), Judgment, 2024 I.C.J. 1, ¶ 79 (Jan. 31); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392, ¶ 101 (Nov. 26); *see also* Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. 61, ¶ 68 (Feb. 3) ("As the Court has said on a number of occasions, the party asserting a fact as a basis of its claim must establish it."). However, proof of a fact will not be required where case parties are in agreement as to the fact. *Benzing*, *supra* note 1, at 1377.

²¹⁵ *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 162 (Apr. 20). This is a general rule that may have exceptions under certain circumstances. The Court has reasoned:

It would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, Judgment, 2010 I.C.J. 639, ¶ 54 (Nov. 30).

²¹⁶ Rules of Court, 1978 I.C.J. Acts & Docs. 115.

²¹⁷ *See* discussion *infra* Section III.B.

²¹⁸ *See generally* G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007).

the applicable standard of proof has been satisfied.²¹⁹ While the Court's approach to admissibility and relevance do not raise concerns, this Part advances that the Court's application of several guiding principles pertaining to the probative value of evidence is unfavorable for affording due weight to oral tradition.

A. *Admissibility of Oral Tradition*

The ICJ Statute and Rules of Court do not instruct the Court to apply a specific admissibility standard. Their limited instructions pertaining to admissibility stipulate that, to prove their factual assertions, parties may submit, within Court-specified time limits, evidence that is originally in or translated to English or French—the Court's official languages.²²⁰ Thus, the Court has broad discretion in determining the admissibility of evidence, and has generally admitted any evidence that parties have produced.²²¹ It has admitted video recordings,²²² audio recordings and transcripts,²²³ photographs,²²⁴ reports produced by non-governmental and intergovernmental organizations,²²⁵ press articles,²²⁶ and many other types of

²¹⁹ *Arg. v. Uru.*, 2010 I.C.J. ¶ 168.

²²⁰ See Statute of the International Court of Justice arts. 39(1), 48, 52, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; Rules of Court, 1978 I.C.J. Acts & Docs. 131, 133. Article 39(3) of the ICJ Statute provides that “[t]he Court shall, at the request of any party, authorize a language other than French or English to be used by that party.” Statute of the International Court of Justice art. 39(3). Article 51 of the Rules of Court stipulates that documentary evidence that is not in one of the official languages of the Court (English and French) must be translated into one of these languages. Rules of Court, 1978 I.C.J. Acts & Docs 125–27. Under Article 70 of the Rules of Court, oral, in-person testimony that will not be provided in an official language of the Court must be translated by interpreters. *Id.* at 137.

²²¹ See ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 152–53 (2009); Maurice Kamto, *Les Moyens de Preuve Devant la Cour Internationale de Justice à la Lumière de Quelques Affaires Récentes Portées Devant Elle*, 49 GER. Y.B. INT’L L. 259, 262 (2006).

²²² See, e.g., Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 45, 250, 289 (Feb. 26).

²²³ See, e.g., Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 I.C.J. 266, ¶¶ 65–67, 69 (Apr. 21) (discussing audio recorded and transcribed by the Nicaraguan and Colombian militaries).

²²⁴ See, e.g., Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 206 (Dec. 16); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, ¶¶ 90, 93, 95 (Oct. 10).

²²⁵ See, e.g., Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶¶ 458–59 (Feb. 3) (discussing a report of the Special Rapporteur of the Commission on Human Rights and a Human Rights Watch report).

²²⁶ See, e.g., Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 60 (Nov. 6).

documentary evidence.²²⁷ Additionally, although documentary evidence is the most common type of evidence submitted and relied upon,²²⁸ the Court has heard and considered witness and expert testimony.²²⁹ It has allowed parties to decide the form in which they submit such testimony (e.g., during oral proceedings or as written statements).²³⁰

While the Court has had an opportunity to consider oral tradition evidence, the Court has not explicitly admitted it.²³¹ *Kasikili/Sedudu Island (Botswana/Namibia)*, in which Botswana and Namibia requested that the Court determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the island's legal status, reflects the Court's silence on this issue.²³²

Namibia presented the testimony of local Masubia peoples to prove they had occupied and used the island for a long time period.²³³ Some of the testimony was "not only from personal knowledge but also [from] what [witnesses] had heard from their parents and grandparents."²³⁴ Namibia considered this testimony significant for its argument that the Masubia tribal peoples' occupation and use of the island was an expression of Namibia's governance of the island through Masubia chiefs.²³⁵ The Court acknowledged that Namibia submitted witness statements,²³⁶ and accepted the "long-standing, unopposed, presence of Masubia tribespeople on Kasikili/Sedudu Island."²³⁷ However, the Court did not specifically or expressly evaluate the oral tradition evidence in its judgment.²³⁸

In comparison, Chambers, whose judgments are "considered as rendered by the Court" under Article 27 of the ICJ Statute, have more clearly engaged with oral

²²⁷ See, e.g., *id.* ¶¶ 58–59 (involving satellite images); *Kasikili/Sedudu Island (Bots./Namib.)*, Judgment, 1999 I.C.J. 1045, ¶¶ 76–77, 81 (Dec. 13) (involving maps).

²²⁸ RIDDELL & PLANT, *supra* note 221, at 231; see also Devaney, *Evidence*, *supra* note 1, ¶ 17.

²²⁹ See Tomka & Proulx, *supra* note 6, at 365–67; Devaney, *Evidence*, *supra* note 1, ¶¶ 25–26, 43. Witness testimony includes testimony during oral proceedings subject to cross-examination, as well as affidavits and written statements. See Benzing, *supra* note 1, at 1390–92.

²³⁰ The Court has expressed that it "leaves the parties free to determine the form in which they present this type of evidence." *Croat. v. Serb.*, 2015 I.C.J. ¶ 196.

²³¹ See Minquiers & Ecrehos (U.K. v. Fr.), Judgment, 1953 I.C.J. ¶ 164 (Sept. 23); Counter-Memorial of Malaysia, Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon./Malay.), 2000 I.C.J. Pleadings, Appendix 1, 13–14 (Aug. 2, 2000).

²³² *Bots./Namib.*, 1999 I.C.J. ¶¶ 2, 93; see also Memorial of Republic of Namibia, *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1997 I.C.J. Pleadings ¶ 208 (Feb. 28, 1997).

²³³ *Bots./Namib.*, 1999 I.C.J. ¶ 71; see also *Bots. v. Namib.*, 1997 I.C.J. Pleadings ¶ 208.

²³⁴ *Bots. v. Namib.*, 1997 I.C.J. Pleadings ¶ 208.

²³⁵ *Bots./Namib.*, 1999 I.C.J. ¶¶ 71, 94.

²³⁶ See *id.* ¶¶ 71–73, 76–77, 98.

²³⁷ *Id.* ¶ 73.

²³⁸ See *id.* ¶¶ 71–73, 98.

tradition evidence.²³⁹ In *Land, Island & Maritime Frontier Dispute (El Salvador/Honduras)*, El Salvador and Honduras, pursuant to a special agreement, requested that a Chamber determine the boundary between the two states' respective land territories and the juridical status of disputed islands and maritime spaces.²⁴⁰ Both states agreed that the *uti possidetis juris* principle applied to the determination of the land boundary.²⁴¹ Put differently, they agreed that the boundary should be that which existed in 1821 at the moment El Salvador and Honduras, which were distinct administrative divisions of the Spanish colonies, acceded to independence.²⁴²

Neither state was able to proffer any evidence formally defining the location of the 1821 boundary, such as Spanish colonial authority legislation or decrees.²⁴³ The states instead submitted other types of documents issued by colonial authorities from which the boundary could be inferred, including titles recording grants of lands to Indigenous communities.²⁴⁴

For example, Honduras advanced that lands of San Miguel de Sapigre, a village that disappeared sometime after 1734, fell within the Spanish administrative division it succeeded and that the historic boundary between this village and a neighboring village represented one of the boundary points between Honduras and El Salvador.²⁴⁵ To support its claim, Honduras submitted: a village council document drafted in 1789 and an 1803 land survey document, both of which recorded an oral tradition regarding the location of the boundary between the two villages;²⁴⁶ a witness statement based on a family oral tradition that provides that San Miguel de Sapigre was located in the colonial administrative division that Honduras succeeded;²⁴⁷ and statements delivered in 1896 by elders at a Honduran village council meeting expressing that the lands of San Miguel de Sapigre were traditionally

²³⁹ Statute of the International Court of Justice art. 27, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

²⁴⁰ *Land, Island & Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, Judgment, 1992 I.C.J. 351, ¶ 1 (Sept. 11).

²⁴¹ *Id.* ¶ 40. "The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign." *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554, ¶ 23 (Dec. 22).

²⁴² *See El Sal./Hond.: Nicar. intervening*, 1992 I.C.J. ¶¶ 40–43.

²⁴³ *Id.* ¶ 44.

²⁴⁴ *See id.* ¶ 44.

²⁴⁵ *See id.* ¶ 270.

²⁴⁶ *See id.* ¶ 273.

²⁴⁷ *See id.* ¶ 276.

regarded as Honduran.²⁴⁸ The Chamber evaluated the weight of these materials, so it arguably admitted them as evidence.²⁴⁹

Frontier Dispute (Burkina Faso/Mali) is also informative.²⁵⁰ In this case, Burkina Faso and Mali, pursuant to a special agreement, requested that the Chamber delimit their common land border.²⁵¹ The two states were French colonies before acceding to independence in 1960. They agreed that their land boundary tracked the administrative boundary of the colonies they succeeded as it existed just prior to their independence.²⁵² However, they disagreed on how the boundary should be drawn.²⁵³

To support their competing descriptions of the boundary, the two states submitted various colonial authority documents.²⁵⁴ The Chamber found that “neither the legislative and regulative texts, nor the relevant administrative documents, contain[ed] any complete description of the course of the boundary.”²⁵⁵ To fill gaps in the colonial administrative record, Mali submitted oral traditions of local populations that lived near the disputed frontier.²⁵⁶ Similar to in *El Salvador/Honduras*, the Chamber assessed the probative value and relevance of Mali’s oral tradition evidence, which suggests the Chamber admitted this evidence.²⁵⁷ Therefore, at least two ICJ judgments support that the ICJ Statute and Rules of Court permit the admission of oral tradition evidence. The general admissibility of oral tradition evidence can also be inferred from the Court’s flexible approach to admitting evidence.

Under the ICJ’s permissive admissibility standard, parties can submit oral traditions in oral or documentary form. For example, a party may proffer knowledgeable community members to testify during oral proceedings, written statements, affidavits, audio, or audiovisual materials of knowledgeable community members, or other materials that memorialize oral traditions. Notably, witness testimony and orations of oral tradition that have been transcribed or recorded outside of the Court have a dual character.²⁵⁸ In its substance it is oral testimony, but its form is of a

²⁴⁸ See *id.*; Reply of Honduras, Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), 1990 I.C.J. 688 (Jan. 12).

²⁴⁹ *Id.* ¶¶ 276–77.

²⁵⁰ See generally *Burk. Faso/Mali*, 1986 I.C.J. 554.

²⁵¹ *Id.* ¶ 1.

²⁵² *Id.* ¶¶ 19–21, 33. The Chamber determined that “the boundaries of [the pertinent colonies] at the time of [their] accession to independence in 1960 remained those which had existed on 5 September 1932.” *Id.* ¶ 51.

²⁵³ *Id.* ¶¶ 19–21, 33.

²⁵⁴ *Id.* ¶¶ 51–52.

²⁵⁵ *Id.* ¶ 51.

²⁵⁶ *Id.* ¶¶ 120, 126.

²⁵⁷ *Id.*

²⁵⁸ See JUAN JOSÉ QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE 382, 414 (2015).

documentary nature.²⁵⁹ For purposes of assessing the Court's approach to oral tradition evidence, this Article includes this dual character evidence under the rubric of oral tradition evidence and distinguishes it from all other written documents.

B. *Relevance of Oral Tradition*

Even if “the Court can be seen to admit everything proffered by parties, . . . [it] is not obliged to consider any materials which are irrelevant.”²⁶⁰ In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court pronounced that “findings of fact necessarily entail an assessment of the evidence,”²⁶¹ and that it examines whether evidence submitted by parties is relevant to the elements of their respective claims.²⁶² Thus, the Court will only rely upon an item of oral tradition evidence if it is relevant in a particular case.

While the Court has not directly addressed oral tradition's relevance, the Chamber's reasoning in *Burkina Faso/Mali* indicates that oral tradition can be relevant. The Chamber speculated that an oral tradition could have helped clarify the location of geographic features referred to in an ambiguous document describing the boundary between two states.²⁶³

In any case, there are undoubtedly inter-state disputes where oral tradition evidence can be relevant. For example, it can be relevant in cases concerning alleged breaches of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁶⁴ maritime delimitation under customary international law or the United Nations Convention on the Law of the Sea (UNCLOS),²⁶⁵ territorial delimitation under customary international law, disputes concerning attribution of territory under customary international law, and purported historic fishing rights of a third party in a coastal state's exclusive economic zone (EEZ).²⁶⁶

Under ICERD, a state party to the treaty that engages in acts or practices of racial discrimination against Indigenous Persons with regard to their enjoyment of economic, social, and cultural rights, including the right to property, could breach its international obligations.²⁶⁷ In alleging ICERD violations before the ICJ, oral

²⁵⁹ *Id.*

²⁶⁰ RIDDELL & PLANT, *supra* note 221, at 158; *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 58 (Dec. 19).

²⁶¹ *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. ¶ 58–59.

²⁶² *Id.*

²⁶³ *Burk. Faso/Mali*, 1986 I.C.J. ¶¶ 126, 173.

²⁶⁴ International Convention on the Elimination of All Forms of Racial Discrimination art. 22, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD]. ICERD includes a compromissory clause that provides for dispute resolution before the ICJ. *Id.*

²⁶⁵ *Barbados v. Trinidad and Tobago*, 27 R.I.A.A. 147, 192, 209 (Perm. Ct. Arb. 2006).

²⁶⁶ *Id.* at 150.

²⁶⁷ ICERD, *supra* note 264, arts. 2, 5.

tradition could help establish the Indigenous identity of a person, the cultural significance of sites adversely impacted by state-sanctioned discrimination, or the existence and extent of ancestral lands impacted by discriminatory property regimes.

Under UNCLOS and customary international law, equitable access to natural resources can be a relevant consideration in exceptional circumstances when delimiting coastal states' EEZs.²⁶⁸ In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, the Chamber indicated that it may be appropriate to adjust a provisional delimitation if the line is otherwise "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" of a coastal state subject to the Chamber's delimitation.²⁶⁹ Thus, a state seeking an equitable adjustment of a provisional line may wish to submit oral traditions documenting a coastal community's long-established dependence on maritime resources for their livelihoods and cultural and spiritual practices.

For example, in *Barbados v. Trinidad and Tobago*, an arbitral dispute under annex VII of UNCLOS, Barbados argued that, in delimiting the respective EEZs appertaining to Barbados and Trinidad and Tobago, the tribunal should find an equitable solution, taking into account that Bajan "fisherfolk ha[d] traditionally fished for flyingfish off Tobago for centuries."²⁷⁰ To prove the Bajan fisherfolk's alleged historic fishing practices, Barbados submitted witness affidavits that recounted oral traditions. Barbados averred that:

"Although there can be no doubt that fishermen from Barbados have fished off Tobago for centuries, there is a dearth of direct evidence to this effect for the period from the early 19th century to the mid-20th century. One must therefore rely on other evidence and the oral tradition that has passed down through the generations."²⁷¹

Moreover, in determining the *uti possidetis juris* land boundaries of post-colonial states, the conduct of colonial authorities can serve as "proof of the effective exercise of territorial jurisdiction in the [pertinent] region during the colonial period."²⁷² Since the oral traditions of many Indigenous communities memorialize

²⁶⁸ See Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 223 (Nov. 19) ("The Court . . . considers that the present case does not present issues of access to natural resources so exceptional as to warrant it treating them as a relevant consideration."); Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. 61, ¶ 198 (Feb. 3); see also Yusra Suedi, *Man, Land and Sea: Local Populations in Territorial and Maritime Disputes before the International Court of Justice*, 20 LAW & PRACTICE INT'L COURTS & TRIBUNALS 30, 32–34 (2021).

²⁶⁹ Delimitation of Maritime Boundary in Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 237 (Oct. 12).

²⁷⁰ *Barbados v. Trinidad and Tobago*, 27 R.I.A.A. at 216–17, 221–22.

²⁷¹ *Id.* at 216 (quoting Memorial of Barbados, *Barbados v. Trinidad & Tobago*, Case No. 2004-02, Pleadings, ¶ 58 (Perm. Ct. Arb. Oct. 30, 2004)).

²⁷² Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 63 (Dec. 22).

various encounters with colonial authorities, including their attempts to exploit and control Indigenous communities' territories and resources,²⁷³ traditions could potentially offer evidence of colonial-era land boundaries. As discussed above, in *El Salvador/Honduras*, El Salvador submitted documents of colonial land grants to Indigenous communities to establish the boundary between its land territory and Honduras' territory.²⁷⁴ In the absence of these documents, it may have been possible to present Indigenous oral traditions preserving records of these land grants.

In respect of cases concerning sovereignty over disputed territories, questions may arise concerning whether Indigenous communities' occupation and use of land are, or are pursuant to, exercises of state authority.²⁷⁵ For example, in *Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks & South Ledge (Malaysia/Singapore)*, the Court determined that the "nature and degree" of the authority of the Sultan of Johor over the Orang Laut, an ethnic group "who inhabited [disputed] islands in the Straits of Singapore, and who made this maritime area their habitat, confirm[ed] the ancient original title of the Sultanate of Johor to [disputed] islands."²⁷⁶ In such cases, an Indigenous communities' oral traditions could help illuminate their historic relationships with state authorities.

Lastly, although whether historic fishing rights of third parties may exist in foreign EEZs is arguably an unsettled question under international law,²⁷⁷ oral tradition may be the only available proof of historic fishing practices, where the primary fisherfolk are from Indigenous communities. For example, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Colombia asserted that the inhabitants of certain relatively remote Colombian islands, including some of which it characterized as Indigenous Peoples, have historic fishing rights in Nicaragua's EEZ based on their alleged long established practice of fishing there.²⁷⁸ In assessing Colombia's claim and evidence, the Court acknowledged that the "traditional fishing practices alleged to have taken place over many decades may not have been documented in any formal or official record."²⁷⁹

²⁷³ *Id.* ¶ 120.

²⁷⁴ See *supra* text accompanying notes 244–49.

²⁷⁵ *Kasikili/Sedudu Island (Bots./Namib.)*, Judgment, 1999 I.C.J. 1045, ¶¶ 94, 98 (Dec. 13) ("[I]t has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities.").

²⁷⁶ *Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malay./Sing.)*, Judgment, 2008 I.C.J. 12, ¶ 75 (May 23).

²⁷⁷ See generally Sourabh Gupta, *Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?*, 7 KOR. J. INT'L & COMPAR. L. 226 (2019).

²⁷⁸ See *Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea (Nicar. v. Colom.)*, Judgment, 2022 I.C.J. 266, ¶¶ 15, 213–14 (Apr. 21).

²⁷⁹ *Id.* ¶¶ 213, 221; cf. *Dispute Regarding Navigational & Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J. 213, ¶ 141 (Jul. 19) ("The Court observes that the practice, by its

In summary, on a case-by-case basis, the Court must assess the relevance of each oral tradition submitted to it. Since it is apparent that oral tradition evidence can be relevant, the relevance requirement does not significantly contribute to the Court's disregard of oral tradition evidence.

C. *Probative Value of Oral Tradition*

In addition to its relevance, the Court assesses the probative value of admitted evidence.²⁸⁰ Since the ICJ Statute and the Rules of Court do not establish a hierarchy of evidence or provide guidance on how to determine the probative value of evidence, the Court has great freedom in undertaking this assessment.²⁸¹ In practice, when examining the alleged facts relevant to each element of the parties' respective claims, the Court has "identif[ied] the [evidence] relied on and ma[de] its own clear assessment of their weight, reliability and value."²⁸² As the Court has commonly applied certain guiding evidentiary principles, there is a degree of predictability to the Court's approach to assessing probative value.²⁸³

In applying these guiding principles, the ICJ has not declared that oral tradition may not be given any weight.²⁸⁴ In *Burkina Faso/Mali*, the Chamber even found it plausible that oral tradition could have probative value. To establish the final segment of the boundary between Burkina Faso and Mali, the Chamber had to determine the position of "the heights of N'Gouma."²⁸⁵ This is because an erratum to a 1927 colonial administrative order fixing the boundaries of the colonies that Mali and Burkina Faso succeeded referenced this geographical feature.²⁸⁶ However, the erratum and order did not depict on a map which elevations bore the name "heights of N'Gouma" in 1927, and thus, their location was unclear and disputed.²⁸⁷

To resolve this issue, the Court had to decide whether to rely on an unofficial map that colonial authorities published in 1925, or a map developed in the 1960s that Mali submitted and favored.²⁸⁸ The Chamber rejected Mali's map, and in

very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record.").

²⁸⁰ Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶¶ 180, 191 (Feb. 3).

²⁸¹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶ 60 (June 27).

²⁸² Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 59 (Dec. 19).

²⁸³ See *Croat. v. Serb.*, 2015 I.C.J. ¶ 180–99.

²⁸⁴ See *supra* Section III.A.

²⁸⁵ Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶¶ 165–67 (Dec. 22).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* ¶¶ 166, 172–73.

setting out its reasoning, it demonstrated a willingness to afford weight to oral tradition when interpreting the erratum and order. It reasoned:

[H]owever reliable the cartographic techniques used in 1960, and however thorough the investigations carried out on the ground with a view to establishing an accurate toponymy for that precise time, these efforts would only be of value for the purpose of interpreting the 1927 Order and erratum if they had uncovered an oral tradition dating back at least to 1927 which was at variance with the indications given by the maps and documents of that earlier period.²⁸⁹

Even so, when the Court's relevant judgments are examined holistically, it is revealed that the Court applies certain of its guiding evidentiary principles in a manner that is averse to affording oral tradition significant and due weight. For clarity, this Section does not cover all the considerations that may arise in the Court's evaluation of the probative value of an oral tradition. Instead, it focuses on the Court's most relevant guiding principles, such as those pertaining to hearsay, contemporaneity, specificity, impartiality, and contradictory evidence.

1. Hearsay

The Court has consistently considered evidence from persons with direct knowledge of information to be more probative and credible than from those with indirect knowledge.²⁹⁰ Furthermore, the Court has reasoned that statements based only on hearsay are not of much weight.²⁹¹ *Croatia v. Serbia* is demonstrative of this.

In this case, Croatia claimed that Serbia was responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide, and submitted statements of individuals describing alleged genocidal acts.²⁹² The Court recalled that witness testimony based on hearsay was of limited weight.²⁹³ It then proceeded to determine that it would afford weight to statements that were not eyewitness accounts "only where they ha[d] been confirmed by other witnesses, either before the Court or before the [International Criminal Tribunal for the former Yugoslavia (ICTY)], or where they ha[d] been corroborated by credible evidence."²⁹⁴

²⁸⁹ *Id.* ¶ 173.

²⁹⁰ See *Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea (Nicar. v. Colom.)*, Judgment, 2022 I.C.J. 266, ¶ 64 (Apr. 21); *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 61 (Dec. 19).

²⁹¹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 68 (June 27); *Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 197 (Feb. 3).

²⁹² *Croat. v. Serb.*, 2015 I.C.J. ¶¶ 49–51, 198–99.

²⁹³ *Id.* ¶ 197.

²⁹⁴ *Id.* ¶ 199.

This reasoning, which reflects the Court's guiding principle on hearsay, extends to oral tradition evidence. Oral tradition is information that one person has communicated to another and may be transmitted across a long chain of persons across generations.²⁹⁵ An old oral tradition may be transmitted through hundreds of intermediaries over hundreds of years. Put simply, a person presenting an oral tradition before the Court would generally not have direct knowledge of the information recorded in the tradition, be an eyewitness, or be able to identify every person along the chain of the oral tradition's transmission.²⁹⁶ In addition, the person who originally made the message upon which the oral tradition is founded would be deceased and unable to testify in court.

While oral tradition is hearsay, treating it like all other types of hearsay such that oral tradition lacking corroboration would be denied significant independent value is unreasonable. This assumes that all types of hearsay, whether out of court gossip or oral tradition, are deficient. However, it has been established that oral tradition is capable of reliably preserving historical information, and has unique qualities based on its fundamental importance in many Indigenous communities.²⁹⁷

Moreover, it is illuminating that the International Criminal Tribunal for Rwanda (ICTR) and the ICTY, which both relied heavily on witness evidence and sentenced convicted individuals to life imprisonment, have hearsay rules that are more permissive than the Court's approach. These two tribunals' appeals chambers have established that hearsay evidence is not per se of limited weight and that it is permissible to base a criminal conviction on it.²⁹⁸ They have also emphasized that "the fact that the evidence regarding a specific event is hearsay evidence does not in itself suffice to render it not credible or unreliable,"²⁹⁹ or "necessarily deprive it of probative value."³⁰⁰

²⁹⁵ See Awan, *supra* note 66, at 705.

²⁹⁶ See VANSINA, ORAL TRADITION, *supra* note 11, at 6.

²⁹⁷ See Kamto, *supra* note 221, at 262; Borrowes, *supra* note 16, at 8, 10; Babcock, *supra* note 27, at 22 ("Tribal stories are not equivalent to the utterances barred under the hearsay rule.").

²⁹⁸ Muvunyi v. Prosecutor, Case No. ICTR-00-55A-A, Appeals Judgment, ¶ 70 (Aug. 29, 2008); Karera v. Prosecutor, Case No. ICTR-01-74-A, Judgment, ¶¶ 39–41 (Feb. 2, 2009); Prosecutor v. Popovic, Case No. IT-05-88-A, Judgment, ¶ 1276 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Aleksovski, Case No. IT-95-14-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999).

²⁹⁹ Karera, ICTR-01-74-A, ¶ 41.

³⁰⁰ Aleksovski, IT-95-14-T, ¶ 15.

2. Contemporaneity

The Court generally prefers evidence from sources contemporaneous with pertinent events and periods.³⁰¹ In *Croatia v. Serbia*, the Court recalled that it “has recognized that ‘in some cases evidence which is contemporaneous with the period concerned may be of special value.’”³⁰² The Court has also indicated that even if a witness observes an event firsthand, their testimony may be of limited value and treated with caution if a long period passes between their observation of the event and the recording of the witness’s attestation.³⁰³

For example, the Court opined in *Territorial & Maritime Dispute between Nicaragua & Honduras in the Caribbean Sea (Nicaragua v. Honduras)* that “[a]ffidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred.”³⁰⁴ The Court applied similar reasoning in *Oil Platforms*, in which the United States alleged that Iran breached its international obligations by conducting a missile attack on a U.S. flagged vessel.³⁰⁵ To prove that the missile was fired from Iranian-held territory, the U.S. submitted the testimony of a Kuwaiti military officer, “who claims to have observed the flight of the missile overhead, and thus to be able to identify the approximate bearing on which it was travelling.”³⁰⁶ The Court assessed that this testimony could not be relied upon partly because it was not provided until ten years after the pertinent incident.³⁰⁷

³⁰¹ See *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 61 (Dec. 19); *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶ 213 (Feb. 26).

³⁰² *Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 197 (Feb. 3) (quoting *Territorial and Maritime Dispute between Nicaragua & Honduras in Caribbean Sea (Nicar. v. Hond.)*, Judgment, 2007 I.C.J. 659, ¶ 244 (Oct. 8)).

³⁰³ See *Application of International Convention for Suppression of Financing of Terrorism & of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed’n)*, Judgment, 2024 I.C.J. 1, ¶ 177 (Jan. 31); see also *Croat. v. Serb.*, 2015 I.C.J. ¶ 199 (considering that “[c]ertain statements present[ed] difficulties in that they fail to mention the circumstances in which they were given or were only made several years after the events to which they refer.”); *id.* ¶ 229 (“The Court notes that many statements provided by Croatia were made several years after the events . . . are alleged to have taken place and accordingly may be given only limited evidential weight.”). But see *id.* ¶ 304 (“Although some of these statements were made several years after the events in question, they are by victims or eyewitnesses of acts of ill-treatment, torture and rape. The Court gives evidential weight to these statements.”).

³⁰⁴ *Nicar. v. Hond.*, 2007 I.C.J. ¶ 244.

³⁰⁵ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 20 (Nov. 6).

³⁰⁶ *Id.* ¶ 58.

³⁰⁷ *Id.*; see also *Croat. v. Serb.*, 2015 I.C.J. ¶ 229 (“The Court notes that many statements provided by Croatia were made several years after the events in *Bogdanovci* are alleged to have taken place and accordingly may be given only limited evidential weight.”).

Moreover, the Court's application of its guiding principle on contemporaneity to oral tradition evidence is reflected in *Burkina Faso/Mali*. Mali advanced that a segment of the *uti possidetis juris* boundary between it and Burkina Faso traversed a "mosque-shaped" natural enclosure.³⁰⁸ Mali invoked an oral tradition obtained from elders of a village near the disputed frontier, who Mali claimed were a "repository of an ancient oral tradition."³⁰⁹ The tradition, which was not transcribed until 1985, originated from a 1913 meeting between a French colonial administrator and native chiefs.³¹⁰

In 1985, the village elders recited that attendees at the meeting included: "Mamadou Yoro, chef de canton de Boni; Akougna Adième, chef de village de Diounouga; Samba Hama Boni, chef de village de Madougou ou Managou; Adinè Sounmone, chef de village de Diguél[; and] Sidi Amadou Diadié, chef de canton de Baraboulé" ³¹¹ The elders also indicated that:

During this meeting, the European indicated to the native chiefs the administrative boundaries separating the cantons of Boni and Baraboulé. The boundaries pass through the following landmarks: a point located at the top of Tondigaria opposite the enclosure, Tiofi (Voltaic Fulani hamlet on the Tondigaria), N'Gougnougagna (pool common to the two cantons in the center of which is fixed a large stone serving as a border marker), a point located about 3 kilometers south of the Kounian pond (Sudanese pond), a baobab tree located south of Selba at the foot of which is a cement marker.³¹²

Mali averred that this evidence was deserving of weight because oral tradition can provide useful information regarding a group's conduct with respect to landmarks, and local populations are well placed to understand the extent of their villages and the space in which they could exercise their rights.³¹³ In opposition, Burkina Faso posited that oral traditions are very vague and not probative of fact.³¹⁴

While the Chamber did not deny the relevance of the tradition, it questioned the tradition's reliability and accuracy. Doubting the elders' memories, it emphasized that the tradition described a meeting that occurred decades in the past and

³⁰⁸ Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶¶ 119–20 (Dec. 22).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ Memorial of Mali, Frontier Dispute (Burk. Faso/Mali), 1985 I.C.J. Pleadings 147 (Oct. 3).

³¹² *Id.*

³¹³ *Id.* at 89–90.

³¹⁴ See Counter-Memorial of Burkina Faso, Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Pleadings 57, 110 (Apr. 2); Verbatim Record 1986, Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. Pleadings 141 (June 16, 1986) ("On n'établit pas une frontière sur la base de vagues allégations de notables, si respectables soient-ils, et quelle que soit la précision de leurs souvenirs!") ["We do not establish a border on the basis of vague allegations from notables, however respectable they may be, and whatever the precision of their memories!"]; see also *id.* at 134.

Mali had not produced any minutes or other written evidence of that meeting.³¹⁵ Based on this, the Chamber concluded that the tradition did not deserve much weight and was inadequate to prove that the boundary traversed the mosque-shaped enclosure.³¹⁶ The Chamber reached this outcome even though it understood that local populations may have unique knowledge of the disputed frontier region. It had highlighted that there were significant gaps in the documentary record partly because “the disputed frontier lay in a region of Africa largely inhabited by nomads and little known [during the pertinent period] by people not indigenous to the region, in which transport and communications were very sketchy.”³¹⁷

Judge ad hoc McRae’s dissenting opinion in *Nicaragua v. Colombia* reflects similar reservations about oral tradition. He stressed that “it is unrealistic to expect that evidence of what happened centuries ago can be gleaned from the affidavits of contemporary fishers, particularly when their culture is not a written one.”³¹⁸

In short, the ICJ’s judgments reflect a distrust of humans’ capacity to remember past events without error.³¹⁹ Since preserving historical information via memory is a fundamental aspect of oral tradition,³²⁰ the Court’s application of its guiding principle on contemporaneousness directly hinders affording oral tradition evidence due weight. Although an individual’s contemporaneous account of an event or situation can become an oral tradition that is accurately transmitted across generations, it will often not have been contemporaneously recorded in writing or another tangible format.

For clarity, the Article does not reject contemporaneousness as a relevant consideration when evaluating probative value. Rather, it finds that the Court’s approach is restrictive and lacks sufficient nuance to accommodate reliable oral traditions that may be decades old.

3. *Specificity*

The *Nicaragua v. Colombia* and *El Salvador/Honduras* judgments reflect that the ICJ affords limited weight to evidence that is vague or lacks some minimum level of detail or specificity. In *Nicaragua v. Colombia*, Colombia claimed that the population of the San Andrés Archipelago in Colombia had historically enjoyed fishing rights in areas now within Nicaragua’s EEZ and that their rights survived the establishment of Nicaragua’s EEZ.³²¹ To prove the population’s purported “long-standing practice” of fishing in those areas, Colombia submitted 11 affidavits

³¹⁵ *Burk. Faso/Mali*, 1986 I.C.J. ¶¶ 55–56, 120.

³¹⁶ *Id.*

³¹⁷ *Id.* ¶ 64.

³¹⁸ Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 I.C.J. 266, 435, ¶ 66 (Apr. 21) (dissenting opinion of Judge ad hoc McRae).

³¹⁹ See Kamto, *supra* note 221, at 283.

³²⁰ See Jones & Russel, *supra* note 98.

³²¹ *Nicar. v. Colom.*, 2022 I.C.J. ¶¶ 213–14, 218.

of fishermen of the San Andrés Archipelago.³²² The fishermen, some of which were older than 80 years old, primarily attested to fishing practices during their lifetimes.³²³

Some fishermen provided information on the fishing practices of their parents, grandparents, and other relatives of their parents' and grandparents' generations, but generally without enough details to discern exactly when their relatives' practices occurred.³²⁴ One fisherman also attested that the people of the San Andrés Archipelago had traditionally shared the sea with Nicaraguans and that his parents taught him that the sea was part of the ancestral Indigenous territory of the people of the archipelago.³²⁵

The Court critiqued the affidavits' lack of specificity, "not[ing] that the affidavits [did] not establish with certainty the periods during which [fishing] activities took place, or whether there was in fact a constant practice of artisanal fishing spanning many decades or centuries, as claimed by Colombia."³²⁶ Therefore, the Court concluded "that the 11 affidavits submitted by Colombia [did] not sufficiently establish its claim that the inhabitants of the San Andrés Archipelago . . . have been engaged in a long-standing practice of artisanal fishing in 'traditional fishing banks' located in waters now falling within Nicaragua's exclusive economic zone."³²⁷

In the territorial delimitation case *El Salvador/Honduras*, the Chamber similarly disregarded evidence due to insufficient specificity. Honduras submitted statements made in the 19th century to establish that the village of San Miguel de Sapigre was located within the colonial administrative division that Honduras succeeded.³²⁸ One individual "interviewed in 1879 stated that, according to family tradition, [certain] lands were Honduran, being the 'property of San Miguel de Sapigre belonging to the department of Comayagua'"³²⁹ In 1896, other witnesses stated before a Honduran town council that "the abandoned village of San Miguel de Sapigre belonged to Honduras, being situate[d] on the southern boundary of the plain of

³²² *Id.* ¶¶ 218–19.

³²³ See, e.g., Counter-Memorial of Colombia (Vol. II), Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colomb.), 2016 I.C.J. Pleadings, annexes 62–72 (Nov. 17, 2016).

³²⁴ See *id.* annex 62 ("It was my father who discovered North East Bank"); *id.* annex 65 ("My great-uncle used to sail from Quitasueño to Providencia on a 14 ft. catboat when fishing."); *id.* annex 66 ("My father died at 96 years of age and he had been fishing in those waters until that time."); see also *id.* at annex 64.

³²⁵ See *id.* annex 71.

³²⁶ *Nicar. v. Colomb.*, 2022 I.C.J. ¶ 220.

³²⁷ *Id.* ¶ 221.

³²⁸ Land, Island & Mar. Frontier Disp. (El Sal./Hond.: Nicar. intervening), Judgment, 1992 I.C.J. 351, ¶ 276 (Sept. 11).

³²⁹ *Id.*

Monteca.”³³⁰ Without providing a detailed explanation, the Chamber concluded that the statements were “sparse” and not deserving of significant weight.³³¹

This specificity requirement is not as detrimental for oral tradition evidence as the Court’s guiding principles on hearsay and contemporaneity. Traditions can be detailed and specific, particularly regarding the recent past.³³² For example, in 2004, the oral tradition-bearer Matthew “Sitting Bear” Jones published an Otoe-Missouria Tribe oral tradition describing the Tribe’s meeting in 1804 with United States military expeditioners Meriwether Lewis and William Clark, and it consists of ten pages of detailed text.³³³

Nevertheless, a demand for specificity can create challenges. For instance, oral traditions do not commonly specify calendar dates or coordinates of past events.³³⁴ Additionally, where this information is provided, it may not be provided in terms of widely used scientific measurements that the Court is culturally accustomed to and on which it generally bases its conclusions. Many societies had or have their own systems for measuring space and time. For example, north-south designations are still not used to provide directions in some societies.³³⁵

Here, it is also relevant that “[e]ach culture has its own shared imagery that conveys meaning and emotional impact, as found in metaphors, stock phrases, stereotypes, and other clichés.”³³⁶ As this imagery may be foreign to an outsider, judges and opposing parties may gloss over the rich cultural meanings of words used in oral traditions. This could contribute to perceptions that oral traditions are not sufficiently detailed.³³⁷ In short, while specificity is not an unreasonable factor for

330 *Id.*

³³¹ *Id.*; see also *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 298 (Dec. 19) (determining that documents that purportedly relate eyewitness accounts of Congolese authorities providing political and military support for specific attacks against Ugandan territory were “vague and thus unconvincing”).

³³² See VANSINA, ORAL TRADITION, *supra* note 11, at 199.

³³³ See generally Matthew Jones, *Wahtohtana heda Niyut'achi Mahin Xanje Akipa: The Year the Otoe and Missouri Meet the Americans*, 19 WICAZO SA REV. 35 (2004).

³³⁴ See VijayaKumari, *supra* note 53, at 142; see also VANSINA, ORAL TRADITION, *supra* note 11, at 173–4.

³³⁵ See Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT'L & COMP. L. 1, 27 (2005) (discussing a witness in a case concerning genocide in Rwanda that "had difficulty giving directions in terms of north/south designations"); see also VANSINA, ORAL TRADITION, *supra* note 11, at 126 ("The Kuba, Fang, and Komo of Central Africa orient themselves by streams. Their major categories of space are 'upstream' and 'downstream' which Kuba and Fang also associate on the whole with east and west . . .").

³³⁶ Borrows, *supra* note 16, at 30.

³³⁷ See *id.*; HAA SHUKÁ, *supra* note 102, at 21–38.

assessing evidentiary weight, there is a risk that the Court will perceive oral traditions to lack detail simply based on a failure to appreciate cultural differences.

4. *Impartiality*

The Court prefers evidence from impartial sources.³³⁸ Regarding witness statements and affidavits, the Court has expressed that statements of a “disinterested witness—one who is not a party to the proceedings and stands to gain or lose nothing from its outcome”—are *prima facie* of “superior credibility.”³³⁹ *Nicaragua v. Colombia* illustrates the Court’s application of this guiding principle.

As discussed above, Colombia submitted into evidence Colombian fishermen’s affidavits, which Colombia specifically prepared to support its claim that a segment of the Colombian population had historic fishing rights in Nicaragua’s EEZ.³⁴⁰ The fishermen attested to fishing practices in areas now within Nicaragua’s EEZ and that Nicaragua’s failure to recognize their alleged historic rights obstructed their ability to fish.³⁴¹ Their statements made apparent that they had a direct interest in the case, and would benefit from the Court resolving the claims in favor of Colombia. Consequently, the Court concluded that the fishermen could “be considered as particularly interested in the outcome of the[] proceedings,” and that this would “have a bearing on the weight and probative value of [their statements].”³⁴² It is implied that the bearing would be adverse.

Thus, the Court’s guiding principle on impartiality prompts the Court to doubt the reliability of oral tradition evidence where it is proffered in support of claims aligned with oral tradition-bearers’ interests or the interests of their

³³⁸ See *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 227 (Feb. 26); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 60 (Nov. 6); *Application of International Convention for Suppression of Financing of Terrorism & of International Convention on Elimination of All Forms of Racial Discrimination* (Ukr. v. Russ. Fed’n), Judgment, 2024 I.C.J. 1, ¶ 177 (Jan. 31).

³³⁹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶ 69 (June 27); see also *Territorial and Maritime Dispute between Nicaragua & Honduras in Caribbean Sea* (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, ¶ 244 (Oct. 8); *Application of Convention on Prevention and Punishment of Crime of Genocide* (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶¶ 190–91 (Feb. 3).

³⁴⁰ *Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea* (Nicar. v. Colomb.), Judgment, 2022 I.C.J. 266, ¶¶ 218–19 (Apr. 21).

³⁴¹ See, e.g., *Counter-Memorial of Colombia* (Vol. II), *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicar. v. Colomb.), 2016 I.C.J. Pleadings, annexes 62, 64–72 (Nov. 17, 2016).

³⁴² *Nicar. v. Colomb.*, 2022 I.C.J. ¶ 219; see also *Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 65 (Dec. 19) (“[A] member of the government of a State engaged in litigation before this Court—and especially litigation relating to armed conflict—will probably tend to identify himself with the interests of his country.” (quoting *Nicar. v. U.S.*, 1986 I.C.J. ¶ 70)).

communities. This blanket approach is unreasonable given that oral tradition is likely to be most relevant and useful in cases that could affect the interests of local populations. For instance, when determining whether a Costa Rican population had a customary right to engage in subsistence fishing in Nicaragua's territory based on long established practice in *Dispute Regarding Navigational & Related Rights (Costa Rica v. Nicaragua)*, the Court "observe[d] that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record."³⁴³ In such cases, the pertinent population will likely be the only source of historical information.

5. *Contradictory Evidence*

When a party submits evidence that contradicts other evidence, the Court assesses their relative weight to establish the facts. The Court's determination of which item of contradictory evidence is most probative is influenced by the circumstances of the pertinent case, including the types of legal claims at issue and the types of facts the contradictory evidence is intended to prove.

For example, when presented with contradictory evidence in territorial delimitation cases requiring the application of the *uti possidetis juris* principle, such as *Burkina Faso/Mali*, the ICJ has afforded greater weight to official colonial administrative documents than other evidence types.³⁴⁴ In *Burkina Faso/Mali*, Mali submitted oral traditions of villagers and nomads of the disputed frontier region to prove that its frontier with Burkina Faso traversed a highly characteristic discontinuous outcrop of white stones called "Tondigaria."³⁴⁵ The oral traditions had unclear dates of origin and were not recorded in writing until after Mali and Burkina Faso acceded to independence in 1960.³⁴⁶ They also did not perfectly align with an official regulation that French colonial authorities issued in 1935 to define segments of the boundary between the colonies that Mali and Burkina Faso succeeded.³⁴⁷ The regulation does not mention Tondigaria, and instead indicates that the boundary was proximate to several villages.³⁴⁸

³⁴³ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J. 213, ¶ 141 (July 13).

³⁴⁴ See, e.g., *Frontier Dispute (Benin/Niger)*, Judgment, 2005 I.C.J. 90, ¶¶ 128, 140–41 (July 12); *Frontier Dispute (Burk. Faso/Niger)*, Judgment, 2013 I.C.J. 44, ¶¶ 78–79 (Apr. 16).

³⁴⁵ *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554, ¶ 125 (Dec. 22); see also *Memorial of Mali, Frontier Dispute (Burk. Faso/Mali)*, 1985 I.C.J. Pleadings 150 (Oct. 3); *Verbatim Record 1986, Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. Pleadings 235–36 (June 16, 1986).

³⁴⁶ See *Burk. Faso/Mali*, 1986 I.C.J. ¶ 26, 120.

³⁴⁷ *Id.* ¶ 126.

³⁴⁸ *Id.*

In finding that the regulation was deserving of greater weight than the oral traditions,³⁴⁹ the Chamber expressed that:

[Mali's] claim is based solely on an oral tradition unrelated to the written title constituted by [the regulation]. The Chamber cannot interpret the text of the [regulation] . . . as referring to a geographical or topographical feature, however characteristic, which is not mentioned in the text of the [regulation], and for which no evidence has been offered that it defines the southward boundary of the 'land depending' on the village [referred to in the regulation a boundary point].³⁵⁰

In other words, rather than undertaking a particularized evaluation of the oral tradition's reliability, the Chamber disregarded it because it did not comport with a written document. This reflects that the Chamber considered colonial administrator's written descriptions of colonial boundaries to be per se the most valuable, authoritative evidence when ascertaining the *uti possidetis juris* frontier that two states inherited from their prior colonial administrator.³⁵¹

In comparison, a separate section of the *Burkina Faso/Mali* judgment can be construed to suggest that, depending on the circumstances, certain oral traditions can prevail over other types of evidence. As discussed above, the Chamber speculated that Mali could have submitted an oral tradition preserving information on the heights of N'Gouma to challenge an unofficial colonial administration map's depiction of this geographic feature.³⁵² Nevertheless, this *obiter dictum* is of little practical consequence.

As long as the Court's guiding evidentiary principles tend to encourage the assignment of minimal value to all oral tradition while privileging written documents, it would only be the exceptionally rare case where an oral tradition would prevail over contradictory written text. Put simply, the Court's de facto approach privileges written documents over oral tradition. This is unsound. As a matter of fact, written documents are not intrinsically more reliable than oral traditions.³⁵³

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *See id.* ¶¶ 23, 29, 33 ("For both Parties, the problem is to ascertain what is the frontier which was inherited from the French administration, that is, the frontier which existed at the moment of independence."); *see also* Frontier Dispute (Benin/Niger), Judgment, 2005 I.C.J. 90, ¶¶ 140–41 (July 12); Frontier Dispute (Burkina Faso/Niger), Judgment, 2013 I.C.J. 44, ¶ 78–79 (Apr. 16). *See generally* Marcelo Kohen & Mamadou Hébié, *Territorial Disputes*, in *THE CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE* 332 (Carolos Espósito & Kate Parlett eds., 2023).

³⁵² *Burk. Faso/Mali*, 1986 I.C.J. ¶¶ 57, 173.

³⁵³ *See* VANSINA, ORAL TRADITION, *supra* note 11, at 199–200.

“At times, oral tradition may prompt significant revisions to the written record that have falsely misconstrued a past occurrence.”³⁵⁴

D. *Satisfying the Standard of Proof with Oral Tradition*

The Statute and Rules of Court do not prescribe a standard of proof, or a “measure by which . . . [to] decide[] which party has established the facts to a sufficient degree so that the entire case or a particular issue can be decided in its favor[.]”³⁵⁵ In filling this gap, the Court has indicated that general principles of judicial procedure guide its decisions on whether a fact has been proved.³⁵⁶

In practice, the Court has applied a variable standard of proof that is dependent on the seriousness of the acts alleged.³⁵⁷ In *Croatia v. Serbia*, the Court emphasized that “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”³⁵⁸ For less severe allegations (e.g., those not concerning genocide or attributions of armed attacks), the Court has applied a less demanding standard, such as a convincing evidence standard, or a balance of probabilities standard.³⁵⁹ In addition, whether the standard of proof has been satisfied in a given case requires an assessment of the quantity and quality of evidence.³⁶⁰

³⁵⁴ Borrows, *supra* note 16, at 19; *see also* Peterson, *supra* note 58, at 501. Researchers have used Rarotongan oral accounts to correct cultural bias in European records concerning historical events on Rarotonga Island. *See* Mercer, *supra* note 14, at 150 (citing H. E. Maude & M. Tuainekore Crocombe, *Rarotongan Sandalwood. An Ethnohistorical Reconstruction*, 71 J. POLYNESIAN SOC’Y. 32, 32 (1962)).

³⁵⁵ Aniruddha Rajput, *Standard of Proof*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 1 (2021), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3243.013.3243/law-mpeipro-e3243?rskey=Q7uoKY&result=1&prd=MPIL>; *see also* Benzing, *supra* note 1, ¶ 107.

³⁵⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 60 (June 27).

³⁵⁷ *See Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Reparations, Judgment, 2022 I.C.J. 13, ¶ 120 (Feb. 9); Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 L. & PRAC. INT’L COURTS & TRIBUNALS 119, 124 (2007).

³⁵⁸ *Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 178 (Feb. 3).

³⁵⁹ *See Application of International Convention for Suppression of Financing of Terrorism & of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed’n)*, Judgment, 2024 I.C.J. 1, ¶¶ 81, 170 (Jan. 31); *see also* Gian Maria Farnelli, *Consistency in the ICJ’s Approach to the Standard of Proof: An Appraisal of the Court’s Flexibility*, 21 L. & PRAC. OF INT’L COURTS & TRIBUNALS 98, 113–15 (2022); MOJTABA KAZAZI, *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 348 (1996); Halink, *supra* note 7, at 24.

³⁶⁰ *See* Rajput, *supra* note 355, ¶ 76.

Submitting large volumes of evidence will not in itself be sufficient. The relevant evidence must have sufficient probative value.³⁶¹

Since the Court's guiding evidentiary principles generally lead the Court to afford limited weight to oral tradition evidence, the Court is unlikely to find that it can prove facts without corroboration for allegations requiring a heightened standard of proof. This conclusion is supported by the Court's determination in *Croatia v. Serbia* that witness statements that were not firsthand accounts could not prove genocidal acts.³⁶²

The Court could potentially find that oral tradition evidence has proven a fact in a case where it flexibly applies a low standard of proof, remote populations' practices are of central importance, and there is no other evidence available. The Court suggested in *Nicaragua v. Colombia* that such situations call for "some flexibility."³⁶³ Nevertheless, due to the Court's tendency to afford oral tradition negligible weight, there is a significant risk that the Court could treat oral tradition evidence akin to press articles, which the Court has held are unable to independently prove facts and may only help corroborate other evidence.³⁶⁴

IV. STEPS TOWARDS AFFORDING DUE WEIGHT TO ORAL TRADITION EVIDENCE

Based on Part III's findings, this Part asserts that equity and the sound administration of justice demand that the Court employ a sounder approach to evaluating evidence to avoid systematically undervaluing oral tradition evidence. To this end, this Part also sets forth a transparent approach for assessing oral tradition evidence

³⁶¹ Riddell, *supra* note 6, at 860.

³⁶² In relevant part, the Court stated:

The only statement produced by Croatia in support of its allegation relating to the killings of 31 December 1991 is based on hearsay and does not, in the opinion of the Court, make it possible for the existence of the facts in question to be established. Consequently, the Court is unable to uphold the Applicant's claim that five Croats were killed on 31 December 1991.

Croat. v. Serb., 2015 I.C.J. ¶¶ 266, 288.

³⁶³ See *Alleged Violations of Sovereign Rights & Maritime Spaces in Caribbean Sea (Nicar. v. Colom.)*, Judgment, 2022 I.C.J. 266, ¶ 221 (Apr. 21) ("The Court is mindful that 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." (internal citations omitted)).

³⁶⁴ See *Ukr. v. Russ. Fed'n*, 2024 I.C.J. ¶ 178; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 62 (June 27) ("[T]he Court has been careful to treat [the press articles] with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.").

that would be more responsive to its particularities that the Court may institute consistently with the ICJ Statute and the Rules of Court.

A. *Appealing to Equity and the Sound Administration of Justice*

The maxim of sound administration of justice is intrinsically connected to the function of the Court as a court of justice.³⁶⁵ In contentious cases, it is to serve as a flexible justice-oriented guidepost for the Court when exercising the broad discretion it is afforded under the ICJ Statute and Rules of Court.³⁶⁶ This maxim necessarily extends to factfinding as “justice . . . imposes demands on the ways in which facts are found.”³⁶⁷

The concept of equity is closely related to this maxim.³⁶⁸ The Court has recognized that “[e]quity as a legal concept is a direct emanation of the idea of justice,” and that “[t]he Court whose task is by definition to administer justice is bound to apply it.”³⁶⁹ It has further recognized that “[w]hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.”³⁷⁰

Although equity has most commonly been discussed in ICJ judgments with respect to the application of substantive rules of international law, equity has both substantive and procedural dimensions.³⁷¹ As Judge Weeramantry reasoned in his separate opinion in *Maritime Delimitation in the Area between Greenland and Jan*

³⁶⁵ See Robert Kolb, *General Principles of Procedural Law*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 793, 808 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006); *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 306, ¶ 47 (Nov. 6) (separate opinion by Owada, J.).

³⁶⁶ See Kolb, *supra* note 365, at 807; Julien Cazala, *Good Administration of Justice*, in *MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW* ¶ 7 (2019), <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3448.013.3448/law-mpeipro-e3448?rkey=weO3CM&result=1&pr=MPIL>.

³⁶⁷ Dwight G. Newman & Danielle Schweitzer, Case Comment, *Between Reconciliation and the Rule(s) of Law: Tsilhqot'in Nation v. British Columbia*, 41 U.B.C. L. REV. 249, 270 (2008); see also Kolb, *supra* note 365, at 808.

³⁶⁸ This maxim is arguably derived from the concept of equity. See Francesco Francioni, *Equity in International Law*, in *MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW* ¶ 1 (2020), <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e1399?rkey=Aqp2ON&result=1&pr=MPIL> (“Equity is a polymorphous concept even in the narrow confines of legal language. In its most general meaning it refers to what is fair and reasonable in the administration of justice . . .”). See generally Robert Kolb, *Le Principe de la ‘Bonne Administration de la Justice’ dans la Jurisprudence Internationale*, in 27 *L’OBSERVATEUR DES NATIONS UNIES* 5 (2009) (Fr.).

³⁶⁹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. 18, ¶ 71 (Feb. 24).

³⁷⁰ *North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 88 (Feb. 20).

³⁷¹ See *Maritime Delimitation in Area Between Greenland and Jan Mayen (Den. v. Nor.)*, judgment, 1993 I.C.J. 38, 211 ¶ 25 (June 14) (separate opinion by Weeramantry, J.).

Mayen (Denmark v. Norway), “The application of equitable procedures of enquiry is necessarily an important part of equity.”³⁷² Accordingly, equity should be embodied in procedural rules and principles, including those pertaining to evidence.

In this regard, the Court’s general approach to assessing the probative value of evidence falls short. Part III reveals that the Court’s general approach is based on sweeping generalizations concerning hearsay and other factors that, as applied, systematically encourage the undervaluation of all oral tradition evidence, which can be as reliable as written documents and provide unique historical information and perspectives. Given that it is primarily parties’ responsibility to prove the facts on which the Court bases its legal conclusions, the Court’s dismissiveness could ultimately restrict the chances of success on the merits of a party that relies on oral tradition. Put differently, the Court’s dismissive approach can hinder parties’ ability to advocate for and protect their legal rights and interests through peaceful means.

In short, it is apparent that a sounder approach to weighing evidence that affords oral tradition due weight would better facilitate substantive justice³⁷³ consistent with the sound administration and equity. The Court can institute such an approach without exceeding the limits of its judicial function or derogating from applicable law.³⁷⁴

For instance, equity can be applied as an attribute of the ICJ Statute and Rules of Court, which the Court has asserted are crafted to assure the sound administration of justice.³⁷⁵ The Court has previously exercised its discretion in contentious cases to “select from one of several possible interpretations of the law so as to achieve the most equitable result.”³⁷⁶ There is undoubtably sufficient discretion under, and permissible interpretations of, the ICJ Statute and Rules of Court regarding evidentiary matters to better accommodate oral tradition evidence.³⁷⁷

The ICJ Statute affords the Court wide discretion in developing its evidence rules. Article 30(1) of the ICJ Statute broadly states: “The Court shall frame rules

³⁷² *Id.*

³⁷³ See Dwight G. Newman, *Tsilhoot’in Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History*, 43 ALTA. L. REV. 433, 439–40 (2005); Benzing, *supra* note 1, ¶ 4.

³⁷⁴ *Den. v. Nor.*, 1993 I.C.J. ¶ 142 (separate opinion by Weeramantry, J.).

³⁷⁵ See *id.*; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶ 31 (June 27); see also Cazala, *supra* note 366, ¶¶ 3, 5–6; *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554, ¶ 28 (Dec. 22); CATHARINE TITI, *THE FUNCTION OF EQUITY IN INTERNATIONAL LAW* 84–85 (2021).

³⁷⁶ Ruth Lapidoth, *Equity in International Law*, 81 PROC. ANN. MEETING (AM. SOC’Y INT’L L.) 138, 143 (1987); see also TITI, *supra* note 375, at 85–86; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. 18, ¶ 71 (Feb. 24); *Burk. Faso/Mali*, 1986 I.C.J. ¶ 28.

³⁷⁷ See Kolb, *supra* note 365, at 824; Cazala, *supra* note 366, ¶ 9.

for carrying out its functions. In particular, it shall lay down rules of procedure.”³⁷⁸ The Rules of Court, that the Court has adopted pursuant to this provision, are broad, do not stipulate a preference for a particular type of evidence, and do not prescribe a standard of proof or a standard for weighing evidence.³⁷⁹ Accordingly, the Court has acknowledged “it has freedom in estimating the value of the various elements of evidence.”³⁸⁰

B. *Proposed Reforms*

This Section provides proposals on how the Court can institute an approach to evaluating oral tradition that would better advance equity and the sound administration of justice. It sets out criteria for assessing probative value that are more suitable for affording oral tradition evidence due weight. It also proposes factors for determining whether corroboration by other types of evidence should be required for oral tradition evidence to satisfy applicable standards of proof.

1. *Proposed Approach for Assessing Evidentiary Weight*

In cases in which a party proffers oral tradition evidence, the Court should expressly declare that it will provide this type of evidence due weight. This would be consistent with the ICJ Statute and Rules of Court, which do not set out an exhaustive list of means of proof, and build upon the Court’s pronouncement in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* that it will determine the facts of a case “on the basis of the evidence presented to it.”³⁸¹ Affording oral tradition evidence due weight would also help ensure that a party that relies on it has a fair opportunity to use the reliable information available to it to satisfy its burden of proof. Providing such an opportunity would be critical to a party’s success on the merits.

To afford oral tradition evidence due weight, the Court need accept that oral tradition is not per se deprived of significant probative value. This would be consistent with oral tradition’s acceptance as a valuable historical source in relevant academic disciplines and as reliable evidence in other dispute resolution fora. Moreover, the Court must not presume that historical written documents are intrinsically more probative of facts than oral traditions. As shown above, evidence’s form is not necessarily determinative of its reliability.³⁸²

³⁷⁸ International Court of Justice art. 30(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. For other relevant provisions, see *id.* arts. 43, 48.

³⁷⁹ See Rules of Court, 1978 I.C.J. Acts & Docs. 97, 113, 129–31, 133–35, 137, 143.

³⁸⁰ *Nicar. v. U.S.*, 1986 I.C.J. ¶ 60. See generally Rules of Court, 1978 I.C.J. Acts & Docs. 93.

³⁸¹ *Pulp Mills on River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 168 (Apr. 20).

³⁸² Cf. *Government of Sudan v. Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, 30 R.I.A.A. 145, 394–95 (Perm. Ct. Arb. 2009).

To operationalize these proposals, the Court would need to alter its guiding evidentiary principles that systematically undervalue and restrict the meaningful use of oral tradition evidence. For instance, oral tradition evidence will be denied due weight if the Court continues to assign very little weight to hearsay despite the fact that oral tradition is a type of hearsay that can be reliable. As such, the Article advocates for an approach to assessing the probative value of oral tradition that minimizes overgeneralizations and focuses on the particularities of each oral tradition submitted to the Court. Put simply, the Court should assess each oral tradition submitted to it based on the infinitely variable circumstances that may surround such evidence. Under this approach akin to the ICTR and ICTY approaches to evaluating the probative value of hearsay evidence,³⁸³ some items of oral tradition evidence will be reliable or deserving of significant weight, while others may not be. The remainder of this Section sets out six factors that should guide the Court's assessment of oral tradition evidence's probative value.

First, the Court should consider the source of the tradition. This would be equivalent to the Court's practice of evaluating the source of a written report to determine the report's probative value.³⁸⁴ For the tradition to be given weight, it is essential that the source has a demonstrated ability to know and reliably record or transmit the tradition and is impartial.³⁸⁵ For example, the fact that an individual is respected in the community from which the tradition originates as an oral tradition-bearer can be sufficient to demonstrate that they have the ability to know a tradition. Additionally, an individual's qualifications as an ethnohistorian or anthropologist could support that they are competent to reliably record a tradition that is, for example, gathered via research.

Regarding impartiality, the Court should consider whether a witness responsible for presenting an oral tradition is a member of a community for which oral tradition is of great cultural or spiritual importance. Where they are from such a community, the Court should presume that the witness would not intentionally distort an oral tradition for purposes of swaying the outcome of litigation, unless specific credibility concerns about the witness are raised. This would be consistent with the United States Court of Claims' reasoning that it would be improper to presume "gross or deliberate distortion" or deny oral tradition of all evidentiary value when it originates from an Indigenous community that places great weight on

³⁸³ See *Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgment, ¶ 39 (Feb. 2, 2009); *Prosecutor v. Popovic*, Case No. IT-05-88-A, Judgment, ¶ 1307 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); cf. *Abyei Arbitration*, 30 R.I.A.A. 394–95.

³⁸⁴ See Application of International Convention for Suppression of Financing of Terrorism & of International Convention on Elimination of All Forms of Racial Discrimination (*Ukr. v. Russ. Fed'n*), Judgment, 2024 I.C.J. 1, ¶ 175 (Jan. 31).

³⁸⁵ See *William v. British Columbia*, [2004] B.C.S.C. 148, para. 19 (Can.); cf. *Ukr. v. Russ. Fed'n*, 2024 I.C.J. ¶ 175.

the oral transmission of history.³⁸⁶ The Federal Court of Australia has similarly conveyed that there is no reason to assume that an Indigenous witness will not do their best to provide accurate and reliable testimony concerning their connection to lands claimed in Indigenous rights litigation.³⁸⁷

Where the source of the oral tradition is a community outsider, such as an anthropologist or ethnohistorian, the source's use of methodology that includes checks for minimizing bias could support their impartiality.³⁸⁸

Second, the format in which the oral tradition is conveyed to the Court—e.g., whether it is properly translated or conveyed as an affidavit, in-court oral testimony, or an audio or audiovisual format—is relevant. Each format has advantages and disadvantages, and their impact on the reliability of a particular item of evidence need be considered on a case-by-case basis. For example, oral traditions from some communities provided as a recording of ceremonial oration may be particularly probative as other knowledgeable or respected community members in attendance at the ceremony may customarily hold the orator responsible for accurately conveying the tradition.³⁸⁹ In addition, in some societies, certain oral traditions can only be told at particular places or events, so an audio, audiovisual, or written recording may be the only method of capturing the tradition for the Court, without it holding hearings outside of The Hague—the Court's seat.³⁹⁰

Moreover, given that elderly people are often important oral tradition-bearers and travelling to The Hague could be challenging for them, out-of-court recordings of their orations may be the best available format in some instances. Nonetheless, in a case in which material concerns about the impartiality of a particular source is raised, conveyance of the oral tradition before the Court, subject to questioning, could help ensure reliability and credibility.³⁹¹

Third, the Court should consider whether other evidence corroborates the oral tradition. Corroboration would support its reliability. Nevertheless, corroboration should not be required to assign oral tradition evidence significant weight. As the Supreme Court of Canada has declared, oral tradition evidence “would be consistently and systemically undervalued if it were never given any independent weight

³⁸⁶ See *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607, 616 n.12 (1987).

³⁸⁷ See *Narrier v. State of Western Australia* [2016] FCA 1519 (16 Dec. 2016) ¶¶ 122, 125 (Austl.).

³⁸⁸ Cf. *Ukr. v. Russ. Fed'n*, 2024 I.C.J. ¶ 175.

³⁸⁹ See Smith, *supra* note 17, at 226; Peterson, *supra* note 58, at 501 (citing Awan, *supra* note 66, at 703).

³⁹⁰ See International Court of Justice art. 22(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. Article 55 of the Rules of Court permits the Court to hold proceedings outside of The Hague. Rules of Court, 1978 I.C.J. Acts & Docs. 129.

³⁹¹ Cf. Rules of Procedure and Evidence, Int'l Crim. Trib. for the Former Yugoslavia, U.N. Doc. IT/32/Rev.50, R. 92, (Feb. 11, 1994) (as amended July 8, 2015).

but only used and relied upon where there was confirmatory evidence.”³⁹² The imperative of providing oral tradition due weight also necessitates recognition that an oral tradition may be corroborated by other oral traditions (e.g., originating from other communities or families), not just documents.

Fourth, the length of time between the relevant historical event and the recording of the oral tradition is relevant for determining its reliability. Since distortions are a more significant concern for oral traditions that are at least 100 years old, the Court should not detract value from oral traditions of a lesser age simply because they are not contemporaneous with the historical events or circumstances they describe.³⁹³ These “young” traditions can be very reliable. In contrast, the Court should examine older traditions with caution, but this is not to suggest that older traditions should be per se deprived of probative value. Some traditions older than 100 years old have been found to be reliable.³⁹⁴ Therefore, the determination of a particular oral tradition’s weight should be primarily based on its specific characteristics, including whether the community from which it originates is known to have traditions that are reliable over very long periods.

Fifth, the Court should evaluate the historical significance of oral tradition in the community from which the evidence originates.³⁹⁵ Oral tradition evidence originating from a community for which oral transmission has long been of great importance for transmitting historical information could be considered of superior quality than oral tradition evidence from a community that does not prioritize it.

Sixth, the Court should consider the character of the oral tradition. This should entail an evaluation of whether it is sufficiently detailed. In undertaking this analysis, as well as the analysis of other factors discussed in this Section, the Court should employ a culturally sensitive approach. Such an approach requires that an oral tradition not be deprived of all value simply because it contains some features unique to a particular community’s worldview, such as spiritual beings, and that an effort be made, with the assistance of parties, to appreciate potential cultural differences. For example, the Supreme Court of Canada has instructed subsidiary Canadian courts to “resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions” when evaluating the usefulness and reliability of oral tradition.³⁹⁶ This reaffirmed the Court’s precedent cautioning against rejecting an oral tradition simply because it “contain[s] elements that may be

³⁹² *Tsilhqot’in Nation v. British Columbia*, [2007] B.C.S.C. 1700, para. 152 (Can.) (internal quotation marks omitted) (quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 98 (Can.)).

³⁹³ See VANSINA, ORAL TRADITION, *supra* note 11, at 192–93.

³⁹⁴ See discussion *supra* Part II.

³⁹⁵ See Newman, *supra* note 373, at 445.

³⁹⁶ *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, para. 34 (Can.).

classified as mythology, lack[s] precise detail, embod[ies] material tangential to the judicial process, or [is] confined to the community whose history is being recounted.”³⁹⁷

Several international tribunal decisions are also informative. The ICTR arguably employed a culturally sensitive approach where Rwandan witnesses struggled to estimate distances in kilometers and provide north-south directions.³⁹⁸ Since their difficulties were partly due to cultural differences in accounting for time and space, the ICTR reasoned that the witnesses’ difficulties should not affect their testimony as a whole or their credibility.³⁹⁹ The *Abyei Arbitration* tribunal’s conclusion that it would be unjustifiable to per se deny oral tradition evidence of all probative value based on the fact that it can lack precision and be difficult to date also reflects cultural consciousness.⁴⁰⁰

In assessing these six factors case-by-case through a culturally sensitive lens, the Court, where appropriate, should consider appointing expert witnesses, such as individuals trained in ethnohistory or anthropology, to assist the Court in understanding, among other things, a community’s cultural imagery, the cultural meanings of words and phrases that may not be discernible to a foreigner, and a community’s oral tradition practices.⁴⁰¹ An appropriate case may be where the use of oral tradition is essential to render a sound judgment—e.g., a case requiring information on a community’s historical use of a natural resource in a remote area. There is Court precedent for appointing experts under Article 50 of the ICJ Statute, which states that “[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.”⁴⁰²

2. *Proposed Approach to Corroboration Requirements and Standard of Proof*

A corollary to the need to provide oral tradition evidence due weight is the need for the Court to recognize that oral tradition evidence can prove facts without corroboration.⁴⁰³ This does not preclude that, in some cases, the interests of justice may be best served by requiring corroboration. Indeed, a case-by-case

³⁹⁷ *Id.*

³⁹⁸ See *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, ¶ 230 (May 26, 2003); Bostian, *supra* note 335, at 27.

³⁹⁹ *Rutaganda*, ICTR-96-3-A, ¶ 230.

⁴⁰⁰ See *Government of Sudan v. Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, 30 R.I.A.A. 145, 395–96, 404 (Perm. Ct. Arb. 2009).

⁴⁰¹ See *Borrows*, *supra* note 16, at 30–31.

⁴⁰² International Court of Justice art. 50, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; see *Devaney, Evidence*, *supra* note 1, ¶¶ 43–44.

⁴⁰³ See *Tsilhqot’in Nation v. British Columbia*, [2007] B.C.S.C. 1700, para. 196 (Can.) (“If the oral history or oral tradition evidence is sufficient standing on its own to reach a conclusion of fact, I will not hesitate to make that finding.”).

determination, based on the circumstances of each case, would be most fitting. This Section proceeds to provide a non-exhaustive set of considerations to guide the Court's analysis.

In determining whether an oral tradition has satisfied the applicable standard of proof, it is critical to assess its probative value. An oral tradition lacking substantial probative value should generally be corroborated to prove a fact. In addition, the nature of the legal claims in the pertinent case is material. Since the Court requires fully conclusive evidence for charges of exceptional gravity and less stringent standards for less severe charges,⁴⁰⁴ the more severe charge, the greater the case for requiring corroboration. The Court should also consider the nature of the claims because equity may be best achieved by relying on uncorroborated oral traditions where the claims directly pertain to oral-knowledge communities' rights or livelihoods.

Finally, in evaluating whether an oral tradition has satisfied the applicable standard of proof, the Court should consider what type of fact the oral tradition was submitted to prove. For instance, there may be less need for corroboration where the oral tradition is submitted to establish facts concerning a community's Indigenous identity, a community's historical practices, or the general location of a community's culturally important sites. It could be highly prejudicial to require corroboration concerning these types of facts where pertinent Indigenous communities did not develop or keep written records, given that foreign documentarians often lacked a full or impartial understanding of the Indigenous Peoples they observed.

CONCLUSION

Given that "the production and management of evidence constitute the most crucial building blocks in ensuring a just and well-reasoned judicial outcome in a dispute between sovereign States,"⁴⁰⁵ the ICJ's evidentiary jurisprudence and practices remain a critically important area of study. This Article has sought to fill a gap in the literature and uncover why the Court has tended to disregard oral traditions submitted as evidence.

After establishing that oral traditions can be as reliable as written documents for reconstructing the past and preserve irreplaceable information on Indigenous Peoples' histories and culture, the Article proceeds to analyze the Court's treatment of them. It finds that although the ICJ has admitted oral traditions into evidence and oral traditions can provide information relevant to inter-state legal claims, the Court's general approach to assessing the probative value of evidence is deficient and encourages assigning all oral tradition evidence only negligible weight. The Article

⁴⁰⁴ See Halink, *supra* note 7, at 24.

⁴⁰⁵ See Tomka & Proulx, *supra* note 6, at 361.

further finds that by denying oral tradition evidence due weight, the Court can hinder parties' success on the merits.

Grounded on the concept of equity and the sound administration of justice, the Article ends with a call for the Court to update its evidentiary practices so that oral tradition may be provided due weight. Starting from the position that oral tradition can have significant evidentiary weight, this Article proposes a flexible, culturally sensitive approach whereby the Court would assess each oral tradition submitted to it based on the infinitely variable circumstances that may surround such evidence. While implementing the proposals herein could come with challenges, they offer practical steps for changing for the better a particular judicial culture that has yet to accept that there "is no reason to neglect oral traditions, or to denigrate them."⁴⁰⁶

⁴⁰⁶ VANSINA, ORAL TRADITION, *supra* note 11, at 200.