

# FINDING *FONUA*: DISAPPEARING PACIFIC ISLAND NATIONS, SEA LEVEL RISE, AND CULTURAL RIGHTS

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*For many Pacific Islands, complete territorial loss due to sea level rise is not a question of if but when. Despite the urgency of the issue, however, legal discourse and international instruments have only analyzed such loss through a narrow construction of adaptation and mitigation efforts. In particular, climate change and the accompanying national and international responses are typically viewed through an exclusively scientific, political, and financial lens. Even the framing of climate change through a human rights framework has been limited to discussions of political, social, and civil rights, ultimately neglecting a discussion of cultural rights. Therefore, this Essay proposes that analyzing the impacts of climate change on the cultural rights of Pacific Islanders will help to more fully conceptualize the dire human rights consequences on the disappearing islands in the Pacific. In emphasizing cultural rights, the Author submits that freezing territorial baselines under the United Nations Convention on the Law of the Sea (“UNCLOS”) offers a mechanism to protect traditional and cultural practices once lands have disappeared. Additionally, to survive the real threat of cultural extinction, the people of the Pacific Islands must engage in a different type of adaptation—cultural adaptation—in order to sustain an identity away from their homelands.*

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## INTRODUCTION

In Tonga, special events are marked by the wearing of a *ta'ovala*.<sup>1</sup> The garment is a woven mat made out of natural fibers and typically worn during significant occasions like weddings or more ubiquitous gatherings like church.<sup>2</sup> At its inception, the legend goes, voyagers arrived on the island and were not dressed appropriately to meet the Tongan king.<sup>3</sup> The voyagers then took their most valued possession, the sails woven with dried fibers from their *wa'a* or canoe, and wrapped it around their bodies.<sup>4</sup> The *ta'ovala*'s cultural value has not diminished over the years. Indeed, as one member of the royal family remarked, “history is written, not in books, but in our mats.”<sup>5</sup> To wear the *ta'ovala* is to “legitimize[] one’s ancestral past by encoding into the mat its social history, genealogy, and linkage with affine groups as remote as from Samoa” and is the physical embodiment of love and respect.<sup>6</sup> To wrap the *ta'ovala* around our bodies is to wrap both the land and the people around us. It is *fonua*.<sup>7</sup>

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1. Officially known as the Kingdom of Tonga, this Pacific nation consists of some 170 islands that are divided into three main island groups. As of 2019, it holds a population of approximately less than 100,000 people. Sophie Foster, *Tonga*, BRITANNICA (Oct. 21, 2019), <https://www.britannica.com/place/Tonga/History>. The garment is a combination of two words, *ta'o* which means to press down and *vale* which means skirt. Robert Trumbull, *In Tonga, It's a Sign of Respect*, N.Y. TIMES (July 4, 1970), <https://www.nytimes.com/1970/07/04/archives/in-tonga-its-sign-of-respect.html>.

2. Jehanne Teilhet-Fisk, *Clothes in Tradition: The “Ta'ovala” and “Kiekie” as Social Text and Aesthetic Markers of Custom and Identity in Contemporary Tongan Society Part II*, 6 PAC. ARTS 40, 45–47 (1992).

3. Trumbull, *supra* note 1. Tonga is the last remaining monarchy in the South Pacific. George E. Marcus, *The Nobility and the Chiefly Tradition in the Modern Kingdom of Tonga*, 1 J. POLYNESIAN SOC'Y 2 (1978).

4. See Trumbull, *supra* note 1.

5. Teilhet-Fisk, *supra* note 2, at 58.

6. See *id.* at 57.

7. “*Fonua* . . . is defined as land, but also, the land and its people, the physical and sociocultural environment. This concept of ‘land and its people’ is further established in the word *fonua*, as *fonua* is also defined as the placenta and the afterbirth.” Brian Kāfakafa Dawson, *Car(ry)ing Tongan: Ideologies from Tongan Punake on Language, Land, and Tauhi Vā* 13 (May 2016) (unpublished M.A. thesis, University of Hawai'i) (on file with author).

This concept of *fonua* is not isolated to Tonga but is at the cultural epicenter of islands that span the Pacific Ocean.<sup>8</sup> In fact, other islands share variations of the same word, including *whenua* and *henua*.<sup>9</sup> In whatever form it may take, *fonua* is about the interconnectedness of people to their ancestral homelands. In the Pacific, “place breathes life, people, culture, and spirit.”<sup>10</sup> But what happens when an element of what it means to be a Pacific Islander disappears? Can *fonua* exist if land no longer exists? If any number of the 25,000 individual islands disappear, will culture disappear as well?<sup>11</sup>

Peoples of the Pacific will be forced to confront these questions as climate change and sea level rise become even more devastating. Unfortunately, for some islands, questions about survivability have already washed over their shores.<sup>12</sup> In Fiji, for example, 4 villages have already relocated due to sea level rise with 80 other communities earmarked for future relocation.<sup>13</sup> These islands have been referred to as the “canary in the coalmine”—signaling to the world the threats of sea level rise.<sup>14</sup> While the islands contribute little to greenhouse gases (“GHGs”) and other forms of pollution, they bear a disproportionate share of the burden.<sup>15</sup> Kiribati’s former president best described this discrepancy in GHG emissions stating, “The islands are ants and the industrialized nations are elephants.”<sup>16</sup> The impacts on the islands are particularly devastating because of their geographic isolation, reliance on climate-sensitive sectors like agriculture, limited natural resources, and fragile economies.<sup>17</sup> Compounding these threats are the islands’ limited financial,

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8. Shawn Malia Kana’iaupuni & Nolan Malone, *This Land is My Land: The Role of Place in Native Hawaiian Identity*, 3 HŪLILI 281, 284 (2006).

9. *Id.* As another example, in the Kiribati language, the word for “land” and “people” is one in the same. Kennedy Warne, *Rising Seas Threaten These Pacific Islands but Not Their Culture*, NAT’L GEOGRAPHIC (Nov. 2015), <https://www.nationalgeographic.com/magazine/2015/11/rising-seas-threaten-kiribati-pacific-islands/>.

10. Kana’iaupuni & Malone, *supra* note 8, at 284.

11. See Elizabeth Thomas, *Protecting Cultural Rights in the South Pacific Islands Using UNESCO and Marine Protected Areas to Plan for Climate Change*, 29 FORDHAM ENVTL. L. REV. 413, 415 (2018).

12. Annah Piggott-McKeller et al., *Fiji’s Climate Change Refugees: Four Communities Have Already Had to Relocate—and More Are Set to Follow*, NEWSWEEK (Apr. 30, 2019), <https://www.newsweek.com/fiji-climate-change-refugees-relocate-1409518>.

13. *Id.*

14. Jane McAdam, ‘Disappearing States’, *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 105, 105 (Jane McAdam ed., 2010). There are approximately 60 Small Island Developing States (SIDS) found in three geographical regions—the Caribbean; the Pacific; and the Atlantic, Indian Ocean, and South China Sea. Ori Sharon, *Tides of Climate Change: Protecting the Natural Wealth Rights of Disappearing States*, 60 HARV. INT’L L.J. 95, 96 (2019).

15. Ann Powers, *Sea-Level Rise and Its Impact on Vulnerable States: Four Examples*, 73 LA. L. REV. 151, 166 (2012).

16. Warne, *supra* note 9.

17. Powers, *supra* note 15, at 152–53.

technological, legal, and human resource capacities for mitigation and adaptation initiatives.<sup>18</sup>

Mitigation or adaptation efforts consist of international, domestic, and local efforts to combat climate change.<sup>19</sup> The primary focus of mitigation is to slow, stop, or reverse climate change by reducing GHG emissions.<sup>20</sup> However, mitigation alone will not quell the very tangible harms climate change has caused or will cause despite mitigation efforts.<sup>21</sup> Adaptation, therefore, seeks to design and institute policies, programs, and even physical structures to reduce the climate change impacts on, *inter alia*, humans and ecosystems.<sup>22</sup> Adaptation practices can be proactive, like crop diversification, or reactive, like population relocation efforts.<sup>23</sup>

Legal scholars are increasingly analyzing adaptation and mitigation efforts through a human rights lens, acknowledging that impacts are not evenly distributed among populations.<sup>24</sup> According to the Intergovernmental Panel on Climate Change (“IPCC”), people who are “socially, economically, culturally, politically, institutionally, or otherwise marginalized are especially vulnerable,” which is a product “of intersecting social processes that result in inequalities in socio-economic status and income, as well as in exposure.”<sup>25</sup> The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), Universal Declaration of Human Rights (“UDHR”), and the International Covenant on Civil and Political

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18. Leonard A. Nurse et al., *Small Islands*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY: PART B: REGIONAL ASPECTS 1613, 1640 (Vicente R. Barros et al. eds., 2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartB\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartB_FINAL.pdf).

19. The Conference of the Parties (“COP 13”) in Bali to the United Nations Framework Convention on Climate Change (“UNFCCC”) outline four central pillars: 1) mitigation, 2) adaptation, 3) innovation and technology transference, and 4) finance and investment. *Report of the Conference of the Parties on Its Thirteenth Session*, U.N. Doc. FCCC/CP/2007/6/Add.1, at 3–5 (Mar. 14, 2008), [https://www.unisdr.org/preventionweb/files/5526\\_BaliActionplan.pdf](https://www.unisdr.org/preventionweb/files/5526_BaliActionplan.pdf).

20. Julian David Hunt & Edward Byers, *Reducing Sea Level Rise with Submerged Barriers and Dams in Greenland*, 24 MITIGATION & ADAPTATION STRATEGIES FOR GLOB. CHANGE 779, 780 (2018).

21. James E. Parker-Flynn, *The Intersection of Mitigation and Adaptation in Climate Law and Policy*, 38 ENVIRONS ENVTL. L. & POL’Y J. 1, 7–8 (2014) (“[T]he organized sectors involved in mitigation may be more resistant to widespread mitigation policies and—because of their political and financial clout—more able to contest policy initiatives.”).

22. Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT’L L. 309, 315 (2012).

23. *Id.* at 326.

24. See, e.g., Seth Johnson, *Climate Change and Global Justice: Crafting Fair Solutions for Nations and Peoples*, 33 HARV. ENVTL. L. REV. 297, 300 (2009) (“[A] human rights approach can shift people’s thinking about climate change, refocusing the terms of the debate from science to human impacts . . . [C]larifying the link between human rights and climate change can serve a valuable role.”); Armin Rosencranz, Shubham Janghu & Pratheek Reddy, *The Evolution and Influence of International Environmental Norms*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10125, 10126–27 (2019).

25. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 54 (Rajendra K. Pachauri et al. eds., 2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/SYR\\_AR5\\_FINAL\\_full.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf).

Rights (“ICCPR”) similarly categorized human rights into five categories: civil, political, economic, social, and cultural rights.<sup>26</sup> However, human rights discourse and its relationship to climate change often fail to give cultural rights the same breadth of analysis and critical discussion as the other four categories.

Sea level rise on the Pacific Islands has sweeping implications on all aspects of human rights. However, failure to acknowledge the impacts on culture downplays the full weight of climate change, especially for the most vulnerable.<sup>27</sup> Civil, political, economic, and social rights are extrinsic and create a framework—largely concerned with process and procedure—that determines how individuals, communities, and in this case islands, engage with others. Cultural rights, however, are inherently intrinsic. More than just identity, cultural rights are concerned with how a group connects with its past and how it honors relationships with others and nature.<sup>28</sup> In order to provide a more robust understanding of the detrimental impact of sea level rise, including the complete disappearance of Pacific Island nations, international law should take into consideration the often-missing piece in human rights discourse—cultural rights.

Part I will provide a deeper understanding of the relevance of cultural rights and its role in international law. Part II makes the connection between sea level rise and its implications on cultural rights for the peoples of the Pacific. Finally, Part III presents freezing baselines around the Pacific Islands as one normative adaptation approach to preserve cultural rights. In addition to external measures, this Part will encourage cultural adaptation in light of changing environmental circumstances as a means of ensuring cultural longevity.

## I. CULTURAL RIGHTS

The relatively slow development of cultural rights in legal discourse can be attributed to its amorphous concept.<sup>29</sup> Professor Janusz Smonides described these

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26. Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 63 (Asbjörn Eide et al. eds., 1995).

27. Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A *STAN. J. INT’L L.* 3, 4–5 (2007) (“[I]nhabitants of low-lying island nations face potentially catastrophic consequences because of sea level rise . . . . The effects of increased global temperature are forcing these inhabitants and other indigenous cultures to shoulder the burden of the rest of the world’s development, with no corresponding benefit.” (internal quotations omitted)).

28. See Joakim E. Parker, *Cultural Autonomy: A Prime Directive for the Blue Helmets*, 55 *U. PITT. L. REV.* 207, 214 (1993) (“The fundamental nature of the cultural rights expressed in the International Bill of Rights is manifest in the number of treaties that guarantee these rights. From treaties on discrimination to regional agreements . . . , nations have agreed repeatedly that there are rights to culture.” (footnotes omitted)).

29. Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights: Rep. of Farida Shaheed*, ¶¶ 4–5, U.N. Doc. A/HRC/14/36 (Mar. 22, 2010) (“There is no official definition of cultural rights . . . . Human rights instruments being living instruments, it is essential to preserve sufficient room for new developments and interpretations to arise, based on the emergence of ‘new situations, demands, or foci of oppression. It is not the intention of the independent expert to attempt to define culture. This is not necessary, and may be inappropriate.”).

rights as “neglected or underestimated,” which results in them being “treated as ‘poor relatives’ of other human rights.”<sup>30</sup> As a preliminary matter, cultural rights cannot be defined without first understanding the term “culture.” Culture is so dynamic and multidimensional that in a 1952 study, there were 164 definitions of culture proposed by anthropologists.<sup>31</sup> Indeed, culture has been described as an “ethical imperative,” as a “fundamental freedom,” and as human relations that are “inseparable from the quality of being human.”<sup>32</sup>

Acknowledging the evolving nature of culture, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) provides the most helpful definition to guide this Essay.<sup>33</sup> Accordingly, culture is a “set of distinctive spiritual, material, intellectual and emotional features of society or a social group and . . . encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, [and] traditions and beliefs.”<sup>34</sup> UNESCO’s definition has been adopted by other United Nations (“UN”) organizations and human rights treaty bodies, including the International Labor Organization (“ILO”) and the Human Rights Convention.<sup>35</sup>

The ILO, for example, adopted the UNESCO definition to inform its Convention Concerning Indigenous and Tribal Peoples in Independent Countries (“Convention No. 169”).<sup>36</sup> In particular, Article 13 of Convention No. 169 requires governments to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . .”<sup>37</sup> Further, Article 23 highlights the relationship of “hunting, fishing, trapping and

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30. Janusz Symonides, *Cultural Rights: A Neglected Category of Human Rights*, 158 INT’L. SOC. SCI. J. 559, 559 (1998).

31. See Suzan Wright, *The Politicization of “Culture,”* 14 ANTHROPOLOGY TODAY 7, 7 (1998).

32. ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND 107 (Hurst Hannun ed., 2007); Athanasios Yupsanis, *The Concept and Categories of Cultural Rights in International Law – Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties*, 37 SYRACUSE J. INT’L L. & COM. 207, 215 (2010).

33. See UNESCO, UNIVERSAL DECLARATION ON CULTURAL DIVERSITY ANNEX I (2001).

34. *Id.* In addition to the above definition, culture has also been given other “levels.” For example, it is also defined in a “material sense, as product, as the accumulated material heritage of mankind, either as a whole or part of particular human groups, including but not limited to monuments and artifacts.” STAMATOPOULOU, *supra* note 32, at 109. Moreover, culture is also defined in terms of “process of artistic or scientific creation, i.e. the emphasis being placed on the process and on the creator(s) of culture.” *Id.*

35. Yupsanis, *supra* note 32, at 215–16.

36. Heidi Kai Guth, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples—Examining the Maori Fisheries Settlement*, 24 U. HAW. L. REV. 179, 230 (2001).

37. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention 169 art. 3, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

gathering” to the “maintenance of [Indigenous peoples’] cultures and . . . their economic self-reliance and development.”<sup>38</sup>

International human rights law regulates relationships between the state and individuals or groups, and imposes negative and positive state obligations.<sup>39</sup> In the cultural rights context, international law creates the negative obligation not to interfere with cultural freedoms and a positive obligation to protect cultural groups.<sup>40</sup> Three international instruments have broadly codified human rights laws including cultural rights—the UDHR, the ICCPR, and the ICESCR.<sup>41</sup> These treaties simultaneously provide a framework for how states should engage with their citizens, support states in crafting international cooperation in protecting categories of peoples, and outline a process to address violations from a party state.<sup>42</sup> For example, the ICCPR states, “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>43</sup>

Additionally, while not legally binding, the United Nation Declaration of the Rights of the Indigenous Peoples (“UNDRIP”) incorporates protection of traditional lands, indigenous practices, and natural resources as key components to indigenous cultural rights and highlights the interconnectivity between the environment and cultural identity.<sup>44</sup> Article 8 of the UNDRIP, for example, states, “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”<sup>45</sup> Article 11 affirms that indigenous peoples “have the right to practice and revitalize their cultural traditions and customs.”<sup>46</sup> Important in the development of cultural rights is the shift from recognizing it as not just an individual right but also a collective right.<sup>47</sup>

Other subgenres of human rights, like political and civil rights, frame *how* Pacific Islanders are to exist within the modern political landscape and are concerned with issues such as equal rights or equal access. Cultural rights, however, explain *why* people of the Pacific exist. It is about their relationship with themselves, their community, and the environment around them. For instance, culture and cultural rights are implicated when groups are wanting to preserve access to natural

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38. *Id.* at art. 23, ¶ 1.

39. STAMATOPOULOU, *supra* note 32, at 110.

40. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1213 (2004).

41. Thomas, *supra* note 11, at 428.

42. *Id.* at 428–29. When a party to the ICCPR, for example, violates an individual’s human rights as articulated under the ICCPR, the individual may bring their case to the Human Rights Committee (“HRC”) to determine the appropriate remedy. *Id.*

43. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 173 [hereinafter ICCPR].

44. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at arts. 26–30, 32 (Sept. 13, 2007) [hereinafter UNDRIP].

45. *Id.* at art. 8, ¶ 1,

46. *Id.* at art. 11, ¶ 1.

47. Elise Huffer, *Cultural Rights in the Pacific—What They Mean for Children*, UNICEF 3 (Oct. 30, 2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.460.1494&rep=rep1&type=pdf>.

resources for ceremonial or spiritual purposes as well as traditional activities such as hunting or fishing.<sup>48</sup> These types of cultural rights are directly impacted by climate change, and in particular, by sea level rise.

## II. CLIMATE CHANGE AND THE IMPLICATION ON THE PACIFIC ISLANDS

### A. Impacts of Sea Level Rise

Sea level rise is not theoretical.<sup>49</sup> Ask anyone from Tuvalu, a Polynesian country that is the fourth smallest nation in the world with 11,000 people, and they will be quick to echo the local catch-all phrase “Tuvalu is sinking.”<sup>50</sup> In fact, scientists have predicted that Tuvalu will be uninhabitable in 50 to 100 years.<sup>51</sup> According to the Fifth Assessment Report to the IPCC: “[N]ear-complete loss of the Greenland ice sheet would occur over a millennium or more, contributing up to seven meters of global mean sea level rise.”<sup>52</sup> Other estimates claim that by the end of the century, the sea level will rise between 18 and 59 centimeters or as much as 30 centimeters to 2.5 meters.<sup>53</sup> Another report estimates that sea level rise affects certain regions more acutely.<sup>54</sup> The western tropical Pacific region, for instance, experienced sea level rise at a rate of three to four times larger than the global mean between 1993 and 2010.<sup>55</sup> Because of the dynamic nature of climate change and the various levels of mitigation and adaptation efforts, more research is needed.<sup>56</sup>

48. See Human Rights Comm., General Comment No. 23, *The Rights of Minorities*, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1 (1994).

49. See generally Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 WASH. J. ENVTL. L. & POL’Y 1, 12 (2014).

50. *Id.* at 12 (“Tuvalu, like other small island states, is at risk of total submergence due to sea level rise associated with climate change . . . [T]hese small island states are at the risk of losing everything they have, including their territory, culture, sovereignty, and the entire population.”); Eleanor Ainge Roy, *‘One Day We’ll Disappear’: Tuvalu’s Sinking Islands*, GUARDIAN (May 16, 2019), <https://www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu-sinking-islands-rising-seas-climate-change>.

51. Roy, *supra* note 50.

52. Christopher B. Field et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability: Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1, 12 (2014), [http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5\\_wgII\\_spm\\_en.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf).

53. See Powers, *supra* note 15, at 152; see also Rebecca Lindsey, *Climate Change: Global Sea Level*, NOAA (Nov. 19, 2019), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>.

54. M. Becker et al., *Sea Level Variations at Tropical Pacific Islands Since 1950*, 80–81 GLOB. & PLANETARY CHANGE 85, 85 (2012).

55. *Id.*

56. See Robert E. Kopp et al., *Usable Science for Managing the Risks of Sea-Level Rise*, 7 EARTH’S FUTURE 1235, 1240 (2019) (“Despite significant progress, there remain important unanswered questions that affect the usability of mean sea level projections.”); Jonathan Watts, *Rising Sea Levels Pose Threat to Homes of 300M People – Study*, GUARDIAN (Oct. 29, 2019), <https://www.theguardian.com/environment/2019/oct/29/rising-sea-levels-pose-threat-to-homes-of-300m-people-study> (“[T]he calculations could still underestimate



The Pacific Islands have an extremely high level of biodiversity and are some of the most unique ecological areas of the world.<sup>57</sup> Although home to one of the most culturally diverse populations, with more than 9.3 million people, Pacific Islanders are “homogenous in their deep concern for land stewardship and their strong ties to their environment.”<sup>58</sup> Three-fourths of the population live in rural settings and rely heavily on agriculture as one of their main sources of subsistence.<sup>59</sup> Even if sea level rise does not completely submerge an island, it may nonetheless make it uninhabitable because of saltwater intrusion into fresh water supplies, coastal erosion, and destruction of agricultural lands.<sup>60</sup>

For Pacific Islands, many of which continue to suffer from the long-term harms of colonization, impacts of climate change represent another challenge to their self-determination.<sup>61</sup> The Marshall Islands, for example, were forced to be the nuclear testing ground for the United States between 1946 and 1958, resulting in the pollution and destruction of ancestral lands and the displacement of its indigenous people.<sup>62</sup> Today, the Marshallese are yet again faced with displacement, this time because of rising sea levels.<sup>63</sup> With a population of 55,000 people, the Marshall Islands must consider their adaptation options with the limited resources and avenues for continued survival that they currently have.<sup>64</sup> In some estimates,

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the dangers because they are based on standard projections of sea level rise in a scenario known as RSCP2.6, which assumes emissions cuts in line with the promises made under the Paris agreement. Countries are currently not on course to meet these pledges.”).

57. See Randy Thaman, *Threats to Pacific Island Biodiversity and Biodiversity Conservation in the Pacific Islands*, 58 DEV. BULL. 23, 23–24 (2002).

58. Scott Fitzpatrick, *The Pacific Islands: At the Confluence of Cultural Preservation and Climate Change*, GEO. J. INT’L AFFAIRS (Feb. 20, 2018), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/2/20/the-pacific-islands-confluence-of-cultural-preservation-and-climate-change>; see Thomas, *supra* note 11, at 415.

59. Fitzpatrick, *supra* note 58.

60. Jonathan Adams, *Rising Sea Levels Threaten Small Pacific Island Nations*, PAC. ISLANDS BROAD. ASS. (May 4, 2007). In Tuvalu, as one example, the country is completely reliant on rainwater, as droughts occur with alarming frequency. Roy, *supra* note 50.

61. See Otto Heim, *Island Logic and the Decolonization of the Pacific*, 19 INTERVENTIONS 914, 915–16 (2017) (“Decolonization in the Pacific is an ongoing concern. . . . The decolonization of the Pacific Islands has occurred piecemeal, on a case-by-case basis, when and as it suited the colonial power.”); Jane Kelsey, *World Trade and Small Nations in the South Pacific Region*, 14 WTR KAN. J.L. & PUB. POL’Y 247, 249 (2005) (“The Pacific Islands remain heavily dependent on former colonial powers, especially Australia, New Zealand, the United Kingdom and the US, for export markets, imports, investments and aid.”).

62. Davor Prevec, *The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People*, 35 DENV. J. INT’L L. & POL’Y 221, 221, 225–26 (2006).

63. Jon Letman, *Rising Seas Give Island Nation a Stark Choice: Relocate or Elevate*, NAT’L GEOGRAPHIC (Nov. 19, 2018), <https://www.nationalgeographic.com/environment/2018/11/rising-seas-force-marshall-islands-relocate-elevate-artificial-islands/>.

64. *Id.*

scientists predict the Marshall Islands will disappear faster than any other island in the Pacific.<sup>65</sup>

In certain cases, certain regions' disparate ability to adapt to the harms of climate change have compounded the issue, causing a type of "adaptation apartheid."<sup>66</sup> Empirical research has revealed that climate change not only emphasizes the disparities in terms of environmental vulnerability but also demonstrates that adaptative capacity is "distributed unevenly along the lines of age, class, ethnicity, gender, and religion."<sup>67</sup> Adaptation highlights the dissonance between the Global North and the Global South.<sup>68</sup> Furthermore even among the islands, adaptation costs differ, which illustrates the varying degrees of economic and infrastructural stability across the Pacific.<sup>69</sup> The World Bank estimates adaptation costs per person over a 30-year period to be \$18,500 in the Marshall Islands, \$11,000 in the Solomon Islands, and \$1,500 for Samoa.<sup>70</sup> The costs are alarming considering that the reported 2018 gross national income ("GNI")<sup>71</sup> was \$4,860 in the Marshall Islands,<sup>72</sup> \$2,020 in the Solomon Islands,<sup>73</sup> and \$4,020 in Samoa.<sup>74</sup> To better contextualize this apartheid, in 2018, the GNI was \$63,200 in the United States,<sup>75</sup> \$53,250 in Australia,<sup>76</sup> and \$41,100 in New Zealand.<sup>77</sup>

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65. Thomas, *supra* note 11, at 414.

66. Hall & Weiss, *supra* note 22, at 336.

67. *Id.*

68. The Global North, which occupy mainly temperate and arctic climates and ecosystems, covers the West and the developing world including the United States, Canada, Australia, New Zealand, and the developed part of Asia. Kamal Uddin, *Climate Change and Global Environmental Politics: North-South Divide*, 47 ENVTL. POL'Y & L. 106, 106 (2017). Meanwhile, the Global South are primarily located in tropical or subtropical ecosystems consisting of what are considered to be developing countries. *Id.* The division between the Global North and Global South is often characterized by geographical, political, and economic factors. *Id.* at 106–07.

69. See PAC. POSSIBLE PROGRAM & WORLD BANK, CLIMATE AND DISASTER RESILIENCE 30–34 (2016), <http://pubdocs.worldbank.org/en/720371469614841726/PACIFIC-POSSIBLE-Climate.pdf>.

70. *Id.* at 32

71. "GNI per capita (formerly GNP per capita) is the gross national income, converted to U.S. dollars using the World Bank Atlas method, divided by the midyear population." *GNI Per Capita, Atlas Method*, WORLD BANK, <https://datacatalog.worldbank.org/gni-capita-atlas-method-current-us-3> (last updated July 2, 2020).

72. *Marshall Islands*, WORLD BANK, <https://data.worldbank.org/country/marshall-islands?view=chart> (last visited Aug. 4, 2020).

73. *Solomon Islands*, WORLD BANK, <https://data.worldbank.org/country/solomon-islands?view=chart> (last visited Aug. 4, 2020).

74. *Samoa*, WORLD BANK, <https://data.worldbank.org/country/samoa?view=chart> (last visited Aug. 4, 2020).

75. *United States*, WORLD BANK, <https://data.worldbank.org/country/united-states?view=chart> (last visited Aug. 4, 2020).

76. *Australia*, WORLD BANK, <https://data.worldbank.org/country/australia?view=chart> (last visited Aug. 4, 2020).

77. *New Zealand*, WORLD BANK, <https://data.worldbank.org/country/new-zealand?view=chart> (last visited Aug. 4, 2020).

***B. The Provocative Role of UNCLOS: Intensifying an Already Intense Situation***

Known as the “Constitution of the Oceans,” the United Nations Convention on the Law of the Sea (“UNCLOS”)<sup>78</sup> is a legally binding international instrument considered to be “a de facto part of customary international law because of its wide adoption—either via ratification of the Convention itself or via unilateral laws modeled after the Convention.”<sup>79</sup> UNCLOS, which consists of 320 articles, is most noted for its determination of maritime boundaries.<sup>80</sup> It splits the ocean into five main zones or boundaries—internal waters,<sup>81</sup> territorial sea,<sup>82</sup> contiguous zone,<sup>83</sup> exclusive economic zone (“EEZ”),<sup>84</sup> and the high seas<sup>85</sup>—which comes with a determined legal status in relation to the nearest sovereign and the international community at large. The extent of a sovereign’s reach into the ocean diminishes as it goes farther out, with the defined starting line being the baseline.<sup>86</sup> According to UNCLOS, the baseline is measured at the low-water line of a coastal state, and for islands situated on atolls or with fringing reefs, the baseline is measured at the seaward low-water line of the reef.<sup>87</sup>

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78. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter UNCLOS].

79. John Larkin, *UNCLOS and the Balance of Environmental and Economic Resources in the Arctic*, 22 GEO. INT’L ENVTL. L. REV. 307, 313–14 (2010). “This means that UNCLOS, as a binding instrument, imposes obligations on States that are provided under other instruments, consequently enabling a reflexive binding effect to those other international and regional instruments.” Luisa Cortat Simonetti Gonçalves & Michael Gerbert Faure, *International Law Instruments to Address the Plastic Soup*, 43 WM. & MARY ENVTL. L. & POL’Y REV. 871, 894 (2019).

80. See Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 934 n.389 (2002). Considered to be the “polestar of maritime law,” UNCLOS is a comprehensive multilateral treaty that “not only establishes general normative standards of conduct, but also governs the extent of national maritime sovereignties.” See Parker Cole, *Implications of Global Warming on State Sovereignty and Arctic Resources Under the United Nations Convention on the Law of the Sea: How the Arctic Is No Longer Communis Omnium Naturali Jure*, 8 RICH. J. GLOBAL L. & BUS. 195, 195 (2008).

81. UNCLOS, *supra* note 78, at art. 8.

82. *Id.* art. 3. The territorial sea is 12 nautical miles measured from the baseline or low water mark of a state. *Id.* arts. 3, 5.

83. The contiguous zone is measured from the baseline outward to 24 nautical miles. *Id.* art. 33.

84. The EEZ extends 200 nautical miles from the baseline. *Id.* art. 57. A coastal state has sovereign rights within the EEZ to explore, exploit, conserve, and manage natural resources. *Id.* art. 56.

85. Beyond the 200 nautical miles, all states, whether coastal or land-locked, have the freedom to navigate, lay submarine cables and pipelines, construct artificial islands and other installations, fish, and conduct scientific research. *Id.* art. 87.

86. *Id.* at arts. 2–16.

87. *Id.* at arts. 5–6.

A major concern of UNCLOS is its arguably ambulatory treatment of maritime boundaries.<sup>88</sup> While UNCLOS is unconcerned with sea level rise, legal and maritime scholars have interpreted the Convention's language to conclude that a state's sovereignty over its waters is diminished as landmass recedes.<sup>89</sup> In fact, not only was "[t]he prospect of sea-level rise and its effect on maritime space and borderlines . . . not specifically addressed by the 1982 Convention" but "during the Conference this was not a major concern."<sup>90</sup> As such, any loss of land, including as a direct result of sea level rise, will change boundaries of key areas like the EEZ.<sup>91</sup> Looking at Kiribati's EEZ, which totals 3.5 million square kilometers compared to the 811 square kilometers of landmass, it is easy to see how devastating receding maritime baselines can be.<sup>92</sup> Just as alarming as the loss of maritime boundaries is the fact that 90% of all fish stocks are within a coastal state's EEZ, which is key to food security and economic and cultural survivability of the Pacific Islands.<sup>93</sup> Losing EEZ access results in the conversion of natural and cultural resources to the high seas, allowing other sovereigns to reap its benefits.<sup>94</sup>

### *C. Why the Impacts on Cultural Rights Are Devastating and Should Be Analyzed*

The loss of land and, as a result, the diminishment of maritime boundaries has the "very real prospect" of "potential cultural annihilation" for peoples of the Pacific.<sup>95</sup> But the notion of losing culture can seem abstract, even metaphysical and philosophical. Both the independent country Samoa and its American sibling, a U.S. territory, provide helpful context in analyzing the cultural impact of sea level rise.

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88. See Hayashi Moritaka, *Islands' Sea Areas: Effects of a Rising Sea Level*, REV. ISLAND STUD. 1, 2 (2013), <https://www.spf.org/islandstudies/research/a00003.html>. "When coastal States' baselines retreat landward with no overlapping maritime claims, the coastal State would lose part of its territory. . . . This has implications on sovereign rights: innocent passage, freedom of navigation, fishing rights, etc." Sarra Sefrioui, *Adapting to Sea Level Rise: A Law of the Sea Perspective*, in THE FUTURE OF THE LAW OF THE SEA 3, 10 (Gemma Andreone ed., 2017).

89. See Rosemary Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States*, 9 U. NEW SOUTH WALES FAC. L. RES. SERIES 3 (2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1412028](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412028).

90. Catherine Redgwell, *UNCLOS and Climate Change*, 106 CONFRONTING COMPLEXITY, 406, 408 (2012) (quoting Jose Luis Jesus, *Rocks, New-Born Islands, Sea Level Rise and Maritime Space*, in NEGOTIATING FOR PEACE—LIBER AMICORUM TONO EITEL 601 (Jochen Frowein et al. eds., 2003)).

91. Powers, *supra* note 15, at 163.

92. Philip G. Dabbagh, *Compacts of Free Association-Type Agreements: A Life Preserver for Small Island Sovereignty in an Era of Climate Change*, 24 HASTINGS ENVTL. L.J. 431, 437–38 (2018).

93. See James Kraska, *The Lost Dimension: Food Security and the South China Sea Disputes*, HARV. NAT'L SECURITY J. 1, 1 (2015), <https://harvardnsj.org/2015/02/the-lost-dimension-food-security-and-the-south-china-sea-disputes/>.

94. See Thomas, *supra* note 11, at 419.

95. Trevelyan Wing, *Submerging Paradise: Climate Change in the Pacific Islands*, CLIMATE INST. 1, 2 (Dec. 2017), [http://climate.org/wp-content/uploads/2017/12/Submerging\\_Paradise.pdf](http://climate.org/wp-content/uploads/2017/12/Submerging_Paradise.pdf).

While Samoa and American Samoa are legally distinct, they are identical in cultural values and norms.<sup>96</sup>

Central to the Samoan identity are the tenets of *fa'a Samoa*<sup>97</sup>—“*aiga* (family), *matai* (system of chiefs and leaders), and communal lands.”<sup>98</sup> *Fa'a Samoa* has been fittingly described as an ‘*ie toga* or also known as an ‘*ie Samoa*, loosely translated to mean a fine mat, which holds significant ceremonial, political, and social value.<sup>99</sup> Like the ‘*ie toga*, if any thread of *fa'a Samoa* is unraveled, “the whole pattern of the Samoan way of life will be forever destroyed.”<sup>100</sup>

The American Samoa High Court echoed this sentiment in a case which sought to address whether Samoans could limit the alienation of land to only those of Samoan blood.<sup>101</sup> In *Craddick v. American Samoa*, the Court declared that “[I] and to the American Samoan is life itself.”<sup>102</sup> In fact, land is so critical that American Samoans continue to fight against citizenship for fear of foreign intrusion.<sup>103</sup>

96. Kenneth E. Galea‘i, *Social Welfare in the Samoan Islands*, in *SOCIAL WELFARE IN EAST ASIA AND THE PACIFIC* 204 (Sharlene Furuto ed., 2013) (“There are two distinct political entities of Samoa: the unincorporated U.S. territory American Samoa and the Independent State of Samoa. . . . While these two regions share the same ocean, culture, and language, they differ in governance and approach.”).

97. Translated to “the Samoan way”—the concept is described as “the essence of being Samoan” and includes a “unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their experience as a distinct race.” Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 *GONZ. J. INT’L L.* 35, 37, 41–42 (1999–2000).

98. See LINE-NOUE MEMEA KRUSE, *THE PACIFIC INSULAR CASE OF AMERICAN SAMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES* 89 (2018).

99. See *Decision of the Intergovernmental Committee: 14.COM 10.B.31*, UNESCO, <https://ich.unesco.org/en/decisions/14.COM/10.B.31>; Soli Wilson, *Ie Toga Recognised as International Icon*, SAMOA OBSERVER (Dec. 20, 2019), <https://www.samoaoobserver.ws/category/article/54990>.

100. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 424 (1989); see Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 *HASTINGS CONST. L.Q.* 71, 78 (2013) (“Institutionally, it is a mutually dependent relationship between the *aiga* (family), the *matai* (chiefs), and the communally held land.”).

101. *Craddick v. Territorial Registrar of Am. Samoa*, 1 *Am. Samoa* 2d 10, 11 (1980).

102. *Id.* at 13 (quoting *Haleck v. Lee*, 4 *Am. Samoa* 519 (1964)).

103. Morrison, *supra* note 100, at 82–83 (explaining that Samoans fear citizenship will open *fa'a Samoa* to attack by the Equal Protection Clause of the Fourteenth Amendment). The question of citizenship is currently on appeal from a 2019 decision in which a federal district court ruled that anyone born in American Samoa should be recognized as a U.S. citizen. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019); Vanessa Romo, *American Samoans’ Citizenship Status Still in Limbo After Judge Issues Stay*, NPR (Dec. 13, 2019), <https://www.npr.org/2019/12/13/787978353/american-samoans-citizenship-status-still-in-limbo-after-judge-issues-stay>; see also *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (dismissing an action brought by U.S. nationals born in American Samoa seeking citizenship based on the Equal Protection Clause).

Outside the context of land, cultural fishing practices are another integral part of Samoan society.<sup>104</sup> Not only is fishing necessary in capturing a critical protein source but also it is “intricately tied to a cultural heritage that developed over a period of three thousand years since Samoans first settled the islands.”<sup>105</sup> With the disappearance of land, the EEZ, and access to natural resources, Samoans will no longer be able to use their traditional practices in the same environment—both on land and in the water—that has nurtured generations and become the center of their identity. It raises the real questions of what is a Samoan and what is *fa’a Samoa* without land.

One does not need to hypothesize about the risks of cultural degradation in connection to sea level rise to understand its massive impacts. As one example, the Inuit Circumpolar Conference (“ICC”) on December 5, 2005, filed a 167-page petition with the Inter-American Commission on Human Rights of the Organization of American States (“OAS”) on the basis that the “magnitude” of climate change “ultimately could destroy the Inuit culture.”<sup>106</sup> The Inuit accused the United States of violating internationally recognized human rights by failing to curb GHG emissions and instead fueling global warming.<sup>107</sup>

The petition properly contextualizes the effects of climate change to include the direct impacts on cultural rights.<sup>108</sup> The Inuit petition highlights that the retreating of sea ice and the shifting ecosystems have made access to vital resources more difficult, directly affecting their ability to hunt and fish.<sup>109</sup> As a direct result of climate change, the “threats to the environment on which their physical and cultural lives depend” on cannot be overstated.<sup>110</sup>

Sheila Watt-Cloutier, Chair of the ICC, who submitted the petition on behalf of herself, 62 other individuals, and all other Inuit within the United States and Canada, explained:

[T]he hunt[ing] and eating of our country food personifies what it means to be Inuit. It is on the land that our values and age-old

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104. Kamaile Turcan, *Fisheries Management in American Samoa and the Expanding Application of Parens Patriae Standing to Challenge Federal Administrative Action*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 13 (2019).

105. *Id.*

106. Martin Wagner & Donald Goldberg, *An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change*, EARTHJUSTICE, [https://www.ciel.org/wp-content/uploads/2015/03/COP10\\_Handout\\_EJCIEL.pdf](https://www.ciel.org/wp-content/uploads/2015/03/COP10_Handout_EJCIEL.pdf) (last visited Jan. 13, 2020). For the complete petition filed to the OAS, see SHEILA WATT-CLOUTIER, PETITION TO THE INTER AMERICAN COMMISSION ON HUMAN RIGHTS (2005), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208\\_na\\_petition.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf) (last visited Sept. 15, 2020).

107. Wagner & Goldberg, *supra* note 106, at 1. (“The United States, the world’s largest emitter of greenhouse gases, has refused to take meaningful action to curtail its emissions. Climate change caused by these emissions has already had dangerous impacts in many regions of the world, most notably the Arctic.”).

108. *See id.*

109. *Id.* (“Indigenous Arctic people depend on polar bear, walrus, seals, caribou and other species, not only for food, but as the foundation of their cultural identity.”).

110. *Id.*

knowledge are passed down from generation to generation . . . . Hunting and eating the animals we hunt are spiritual and cultural activities. Rich mythologies, festivals, and animal ceremonies illustrate the deep social and spiritual relationships that indigenous people have with the Arctic.<sup>111</sup>

While the Inuit's climate petition ultimately failed due to insufficient evidence of harm, it represents an important shift in framing environmental harm through a human rights lens, and in particular, analyzing cultural identity and rights.<sup>112</sup> For the Pacific Islands, highlighting cultural rights can serve as what Dean Osofsky described as a "bridge between nation-states and civil society" by starting a dialogue on the protection of human rights.<sup>113</sup>

### III. NORMATIVE APPROACHES TO PROTECTING CULTURAL RIGHTS

This Section outlines two contemporaneous normative approaches that can help shield cultural rights from environmental impact or, at the very least, provide a framework for future human rights discourse. The first involves an external legal remedy, which uses UNCLOS to freeze maritime boundaries for disappearing Pacific Islands. The second calls for Pacific Islander communities to use the same cultural adaptation strategies their ancestors have engaged in as they traversed the largest ocean for millennia.

#### A. *External: UNCLOS and Freezing Maritime Boundaries*

It warrants mentioning that numerous legal scholars have debated and critically analyzed at length the implications of sea level rise and the loss of territorial sovereignty.<sup>114</sup> The question of whether a state retains sovereignty even after lacking a defined territory or permanent population is undoubtedly an

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111. Abate, *supra* note 27, at 35.

112. Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675, 676 (2006–2007).

113. *Id.* at 687. Professor Shi-Ling Hsu gives two reasons as to why the Inuit have a strong claim for damages for climate change. Shi-Lin Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 720–21 (2008). First, the "Inuit are a relatively discrete and identifiable plaintiff group." *Id.* "Second, the impacts of climate change on Inuit peoples are more specific, more certain, and more severe than those on other potential plaintiffs pleading damages from climate change." *Id.* at 721. These same two reasons can easily be applied to the people of the Pacific Islands.

114. E.g., Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans'*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 77 (2012) (proposing that UNCLOS be amended to endorse artificial islands to save statehood and maritime zones); Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011) (introducing a new international framework *Ex-situ* in which the full panoply of rights afforded to sovereign states will continue to exist even after a state has disappeared due to sea level rise).

undercurrent throughout this Essay.<sup>115</sup> However, it is outside the purview of this analysis, as this Essay is concerned with addressing cultural rights specifically. Freezing maritime boundaries is not viewed within a sovereignty lens. In fact, I contend that freezing boundaries for cultural purposes can be a legal placeholder until a more collective international effort is reached to determine the political fate of the disappearing Pacific Islands.

The drafters of UNCLOS did not contemplate or anticipate climate change.<sup>116</sup> When UNCLOS concluded in 1982, it was before the emergence of studies, reports, and public awareness campaigns that are ubiquitous today.<sup>117</sup> Ambulatory boundaries and the constant changing maritime boundaries contravene the very stability and predictability that UNCLOS sought to address.<sup>118</sup>

Textually, UNCLOS is arguably already aligned with fixed maritime baselines.<sup>119</sup> Article 76 requires that the determinations on the limits of the continental shelf beyond the 200 nautical miles be submitted “on the basis of equitable geographical representation.”<sup>120</sup> Considering the disproportionate harms the Pacific Islands are experiencing compared to more developed countries, freezing baselines can be considered “equitable geographical representation.”<sup>121</sup> In the same provision, UNCLOS also requires coastal states to deposit data about boundaries “permanently describing the outer limits of its continental shelf.”<sup>122</sup> Such a framing can be evoked by Pacific Islands in permanently fixing boundaries that are already legally binding.

By freezing baselines, UNCLOS supplements already existing human rights laws that protect cultural rights. Fixed baselines would allow “stateless populations to permanently retain rights to their historic maritime zones.”<sup>123</sup> Under Article 27 of the UDHR, “[e]veryone has the right freely to participate in the cultural life of the community . . . .”<sup>124</sup> The comments section of Article 27 clarifies that:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional

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115. Based on the UN criteria for statehood, there are four classical requirements: (1) defined territory; (2) permanent population; (3) government; and (4) capacity to enter into relations with other states. Shaina Stahl, *Unprotected Ground: The Plight of Vanishing Island Nations*, 23 N.Y. INT’L L. REV. 1, 16 (2010).

116. Sharon, *supra* note 14, at 105.

117. See Julia Lisztwan, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT’L L. 153, 161 (2012).

118. The “Cod Wars” and the conflict between a country unilaterally changing its exclusive fishing zone was the impetus for the forming of UNCLOS. See DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 769–70 (Robert C. Clark et al., eds., 5th ed. 2015).

119. UNCLOS, *supra* note 78, at art. 76 ¶ 8.

120. *Id.*

121. *Id.*

122. *Id.* ¶ 9.

123. Lisztwan, *supra* note 117, at 156.

124. G.A. Res. 217 A (III), Universal Declaration of Human Rights, at 27 (Dec. 10, 1948) [hereinafter UDHR].



activities as fishing or hunting and the right to live in reserves protected by law.<sup>125</sup>

Fixing baselines gives Pacific communities the opportunity to return to ancestral areas, whether submerged or not, for ceremonial, spiritual, and educational purposes and allows them the ability to continue to practice, hone, and share their traditional knowledge. Securing access to the EEZ can also help Pacific Islanders have a secure food source and provide a means of supporting themselves.<sup>126</sup>

Folding cultural rights into human rights discourse can help to expand current customary international law. The precautionary principle encourages states to take measures that minimize the environmental impacts of their actions regardless of whether scientific data has confirmed such impacts.<sup>127</sup> Additionally, while “cultural genocide” may not be recognized in customary international law, such harms may eventually be recognized since this area of law is continually evolving.<sup>128</sup> As such, customary law can be developed to better acknowledge: (1) the environmental impacts on culture; and (2) the difficulty in ascertaining such impacts if reliance is based solely on scientific information as opposed to more qualitative or anecdotal data, such as the data presented by the ICC in their petition.

#### ***B. Internal: Freeze Boundaries, Not Culture***

As illustrated earlier, land, natural resources, familial bonds, and self-identity are tightly woven in Samoan culture, or are arguably one and the same.<sup>129</sup> However, if Pacific identities are to survive climate change, Pacific Islander culture too must engage in adaptation efforts. The Fijian Minister of Economy remarked that if relocations become necessary, “then we have to build in the holistic approach

125. Human Rights Comm., General Comment No. 23, *The Rights of Minorities*, ¶ 7, U.N. Doc. CCPR/C/21/Rev. 1 (1994).

126. See Robert Gillett & Mele Ikatonga Tauatu, *Fisheries of the Pacific Islands: Regional and National Information*, FOOD & AGRIC. ORG. 7 (2018), <http://www.fao.org/3/I9297EN/i9297en.pdf> (“Coastal fishing is of fundamental importance in the Pacific Islands. Much of the region’s nutrition, welfare, culture, employment, and recreation are based on the living resources in the zone between the shoreline and the outer reefs. The continuation of current lifestyles, the opportunities for future development, and food security are all highly dependent on coastal fishery resources.”).

127. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev. (Vol. I), annex I (Aug. 12, 1992). “The precautionary principle permits [states and] decisionmakers to avoid or minimize risks [in which the] consequences are uncertain but potentially serious by taking [preventative or] anticipatory action. The ‘catchphrase’ attached to this principle is: better safe than sorry.” Stephen G. Wood, Stephen Q. Wood & Rachel A. Wood, *Whither the Precautionary Principle? An American Assessment from an Administrative Law Perspective*, 54 AM. J. COMP. L. 581, 581 (2006). “Some legal commentators have argued that the precautionary principle has approached the level of customary international law.” Mary Stevens, *The Precautionary Principle in the International Arena*, 2 SUSTAINABLE DEV. L. & POL’Y 13, 14 (2002).

128. Claudia Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act*, 19 ST. JOHN’S J. LEGAL COMMENT. 111, 142–43 (2004).

129. See *supra* text accompanying notes 95–99.

too, for example, sustainable livelihood, new way of livelihood.”<sup>130</sup> Unfortunately, most island nations have yet to develop this holistic approach in responding to the loss of cultural rights in the indigenous context.<sup>131</sup>

Refocusing human rights and adaptation discourse on cultural rights can have transformative effects. Pacific peoples can, for example, adopt a precautionary principle-type approach to protect their cultural rights. The 1992 Framework Convention on Climate Change obliges parties “to take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects.”<sup>132</sup> Similarly, Pacific Islands should engage with their people to find ways cultural resources, values, and knowledge can withstand climate change. Indeed, some islands have already engaged in cultural precautionary approaches by incorporating traditional knowledge into modern times.<sup>133</sup> For example, Fiji plans to construct large traditional canoes called *drua* that are largely solar powered to replace reliance on coal powered ships.<sup>134</sup> The strength of culture is not in its static, ahistorical existence but in its fluidity.<sup>135</sup>

As Professor Rose Villazor describes, “Indigenous cultures are not exempt from the inevitability of change. Indeed, survival of indigenous groups has required them to adapt and, notably, international instruments recognize the protection not only of their traditional livelihoods but also ways in which they have had to adapt to modern life.”<sup>136</sup> Cultural adaptation efforts will require flexibility and creativity both culturally and legally.

If Pacific cultures are to survive the impending impacts of climate change, then they must take into account the implications of sea level rise on culture and identity in the same way cultures have responded to “globalization, liberalization, the internet, and diaspora.”<sup>137</sup> Indeed, “as engineers and architects of earthquake-proof buildings know, the more solid and entrenched an edifice is, the more likely it is to crumble. The buildings that survive are those that are designed to move, bend, or sway a little—they go with the flow.”<sup>138</sup>

130. *Fiji to Set Up Relocation Trust Fund for Villages Hit by Climate Change*, ASIA PAC. REP. (Apr. 17, 2019), <https://asiapacificreport.nz/2019/04/17/fiji-to-set-up-relocation-trust-fund-for-villages-hit-by-climate-change/>.

131. See Thomas, *supra* note 11, at 437–38.

132. Conference on Environment and Development: Framework Convention on Climate Change, 31 I.L.M. 849, 854, at art. 3, ¶ 3 (May 9, 1992).

133. Wing, *supra* note 95, at 7.

134. *Id.*

135. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 86–87 (2000) (“Repudiating the popular argument that today any quest for cultural distinctiveness is misguided, cultural studies emphasize the dynamic relationship between individuals and a culture: rather than being the mere receptors of cultural tenets, individuals are agents of social change within cultures, continually reinterpreting their cultural habitat.”). Historian Paul Gilroy best summarized this notion as a “changing rather than unchanging same.” PAUL GILROY, *THE BLACK ATLANTIC* 101 (1993).

136. Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 147 (2018).

137. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 497–98 (2001).

138. *Id.* at 500.

Pacific communities, for example, will be forced to reevaluate how they will define cultural roles such as *matai* titles or even broader concepts like *fonua* without the existence of traditional land. In addition, sea level rise will give Pacific Islanders the opportunities to revive other aspects of cultural norms to prepare and better adapt to environmental changes. This cultural resiliency in the face of climate impact is what some have claimed to be an “anti-colonial silver lining: namely, the opportunity to restore sustainable cultures through indigenous knowledge and the renewal of ancestral values.”<sup>139</sup>

### CONCLUSION

Adaptation efforts and human rights discourse that seriously consider the role of cultural rights will mark a significant step in fully capturing what climate change means for Pacific Island people. While numerous adaptation efforts exist, two in particular can help to mitigate, at least temporarily, the impacts of sea level rise. Freezing baselines and cultural adaptation, if done contemporaneously, can at the very least be legal placeholders until larger sovereignty and territorial issues can be resolved. International law has already recognized the norm of decolonization, and it can and should be responsive enough to support Pacific Islanders’ self-determination in developing their cultural resiliency. Small developing islands, like the Pacific Islands, are on the “climate frontlines” and have the opportunity to be “climate testbed[s]” to provide critical, global lessons for adaptation.”<sup>140</sup>

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139. Wing, *supra* note 95, at 2.

140. CHERYL L. ANDERSON, ANALYSIS OF INTEGRATING DISASTER RISK REDUCTION AND CLIMATE CHANGE ADAPTATION IN THE US PACIFIC ISLANDS AND FREELY ASSOCIATED STATES 1 (2012), <https://www.pacificrisa.org/wp-content/uploads/2013/02/Anderson-Analysis-of-Integrating-Disaster-Risk-Reduction-and-Climate-Change-Adaptation.pdf> (last visited Sept. 15, 2020).