

**OCEAN CULTURES, THE ANTHROPOCENE AND  
INTERNATIONAL LAW:  
CULTURAL HERITAGE AND MOBILITY LAW AS  
IMAGINATIVE GATEWAYS**

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*This article argues that international legal responses to the Anthropocene cannot be adequately designed or implemented unless peoples' cultural relationships with the ocean are taken into account. Drawing on the voices of Pacific peoples and their descriptions of the ocean as territory and a source of identity, we debunk the idea of the ocean as a static or transient place, arguing instead that it is a core element of 'territory', place and belonging. International cultural heritage law offers a pathway for leveraging these narratives into international legal regimes, including the development of international mobility regimes. To the extent that Pacific peoples are set to bear the brunt of the costs of the Anthropocene, and because their relationships with the ocean provides innovative ways of rethinking the design and implementation of international law, it is imperative that their voices are brought to the fore.*

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[T]he sea is our pathway to each other and to everyone else, the sea is our endless saga, the sea is our most powerful metaphor, the ocean is in us.<sup>1</sup>

We are the sea, we are the ocean...<sup>2</sup>

I INTRODUCTION

There is a burgeoning literature on the impacts of the Anthropocene on international law.<sup>3</sup> As Davor Vidas, Jan Zalasiewicz and Mark Williams explained in their seminal article on the subject:

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<sup>1</sup> Epeli Hau'ofa, 'The Ocean in Us' (1998) 10(2) *Contemporary Pacific* 392, 409.

<sup>2</sup> Epeli Hau'ofa, 'Our Sea of Islands' (1994) 6(1) *Contemporary Pacific* 148, 160.

The conditions of the Anthropocene will bring a fundamental shift of the context in which international law operates — a shift in which the challenges are increasingly recognized as the consequences of natural, not only political, change. This may aggravate existing tensions between the territorial integrity of states and territorial claims — coupled with immense geopolitical differences, on the one hand, and the sovereign equality of states as the founding postulate of international law, on the other hand.<sup>4</sup>

International law research to date has examined diverse matters, including the implications of the Anthropocene for ocean baselines and the law of the sea;<sup>5</sup> the capacity of international law to protect people displaced in the context of climate change and disasters;<sup>6</sup> and even the international legal principles regarding statehood.<sup>7</sup> These are fundamental issues for the future development of international law, and, by extension, for the physical, social and economic security of communities directly affected. However, a technical focus on legal rules — and thus, predominantly, on states — at times seems disconnected from the more human impacts of systemic climate change: people’s relationships with land, culture and each other.

<sup>3</sup> The Anthropocene describes the present geological period in which human activity has become the predominant influence on the environment and climate: see, eg, Karen N Scott, ‘International Law in the Anthropocene: Responding to the Geoengineering Challenge’ (2013) 34(2) *Michigan Journal of International Law* 309; Davor Vidas, Jan Zalasiewicz and Mark Williams, ‘What Is the Anthropocene — and Why Is It Relevant for International Law?’ (2015) 25(1) *Yearbook of International Environmental Law* 3; Ellen Hey, ‘International Law and the Anthropocene’ (2016) 5(10) *ESIL Reflections* 1.

<sup>4</sup> Vidas, Zalasiewicz and Williams (n 3) 4.

<sup>5</sup> See, eg, International Law Association, ‘Baselines under the International Law of the Sea (Sydney Report, 2018)’ in Coulter G Lathrop, J Ashley Roach and Donald R Rothwell (eds), *Baselines under the International Law of the Sea: Reports of the International Law Association Committee on Baselines under the International Law of the Sea* (Brill, 2019) 62 and sources cited therein; the work of the International Law Association’s Committee on International Law and Sea Level Rise (see, eg, Davor Vidas, David Freestone and Jane McAdam (eds), *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill, 2018); ‘Committees’, *International Law Association* (Web Page, 2017) <<https://www.ila-hq.org/index.php/committees>>, archived at <<https://perma.cc/N383-8P7R>>); International Law Commission, ‘Analytical Guide to the Work of the International Law Commission: Sea-Level Rise in relation to International Law’, *International Law Commission* (Web Page, 25 January 2021) <[https://legal.un.org/ilc/guide/8\\_9.shtml](https://legal.un.org/ilc/guide/8_9.shtml)>, archived at <<https://perma.cc/PMJ9-N6WH>>; International Law Commission, *Sea-Level Rise in relation to International Law*, 73<sup>rd</sup> sess, UN Doc A/CN.4/752 (19 April 2022).

<sup>6</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012); Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press, 2020); United Nations High Commissioner for Refugees, *Legal Considerations regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* (1 October 2020); International Law Association, ‘Sydney Declaration of Principles on the Protection of Persons Displaced in the context of Sea Level Rise: Commentary’ in Vidas, Freestone and McAdam (n 5) 43.

<sup>7</sup> See the ongoing work of the International Law Association and International Law Commission. See also Jenny Grote Stoutenburg, ‘When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States’ in Michael B Gerrard and Geoffrey E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 57; Tom Sparks, ‘Statehood in an Era of Sinking Islands’ in Tahseen Jafry, (ed), *Routledge Handbook of Climate Justice* (Routledge, 2019) 83; Alejandra Torres Camprubi, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff, 2016).

The issue of culture (and cultural heritage as markers of culture) has been largely absent from these studies, and at best marginal.<sup>8</sup> ‘Culture’, for the purposes of this article, is the set of social norms and practices that define group identity and belonging. ‘Cultural heritage’, under UNESCO standard-setting instruments, comprises manifestations of culture as varied as monuments and sites,<sup>9</sup> cultural objects,<sup>10</sup> shipwrecks and other underwater artefacts and installations,<sup>11</sup> buildings or groups of buildings,<sup>12</sup> archives,<sup>13</sup> landscapes<sup>14</sup> and manifestations of living heritage known as intangible cultural heritage (comprising social rituals, dance, music, festivals, legal systems and other ways of knowing nature and the universe).<sup>15</sup> Inevitably, culture and cultural heritage have also been omitted from international legal responses to the Anthropocene, which privilege the movement of people as biological units, rather than as cultural beings. In this article, we argue that such exclusion is a mistake and that cultural heritage law and laws concerning mobility are vehicles through which Pacific understandings and relationships with the ocean can enter the international legal imaginary and prompt better legal responses. If we are to respond to the consequences of the Anthropocene upon human communities, human culture must be considered. Indeed, taking culture seriously in this space enables unique insights into the meaning of self-determination, which goes to the heart of people’s identity. As Jane McAdam has observed in the context of coerced relocations of Pacific communities:

loss of home is not just about loss of place and personality. It is — at its heart — about the loss of self-determination. ‘Home’ is not just an emotional or esoteric construct but incorporates land, rights, sovereignty and power — the power to shape one’s destiny.<sup>16</sup>

Foregrounding culture and cultural heritage provides a crucial perspective to ensure that international legal responses to the Anthropocene do not simply impose a new form of colonial violence to replace that generated by the Anthropocene itself. In particular, international cultural heritage law can broaden the possibilities of legal responses to the Anthropocene beyond recognition of culture as resilience, affecting, among other things, responses to mobility.

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<sup>8</sup> See our discussion in Part 2 below.

<sup>9</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) art 1 (‘WHC’).

<sup>10</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 1 (‘1970 Convention’).

<sup>11</sup> *Convention on the Protection of the Underwater Cultural Heritage*, opened for signature 2 November 2001, 2562 UNTS 3 (entered into force 2 January 2009) art 1(1) (‘UCHC’).

<sup>12</sup> WHC (n 9) art 1.

<sup>13</sup> 1970 Convention (n 10) art 1(j).

<sup>14</sup> United Nations Educational, Scientific and Cultural Organization, *Recommendation on the Historic Urban Landscape, including a Glossary of Definitions* (Report, 10 November 2011) [8].

<sup>15</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) art 2 (‘ICHC’).

<sup>16</sup> Jane McAdam, ‘Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change’ (2014) 49(3) *Journal of Pacific History* 301, 319.

The geographical focus of our article is the Pacific region — both land *and* sea. The myths, legends, oral traditions and cosmologies of Oceanic<sup>17</sup> peoples show that the two are inherently intertwined. Pacific scholar, Epeli Hau‘ofa, famously wrote that the ancestors ‘viewed their world as “a sea of islands” rather than “islands in the sea”’.<sup>18</sup> Thus, far from being a vast and empty space, the ocean is a lived and living cultural space and a central part of human activity, connection and aspirations.<sup>19</sup>

To understand the Pacific Ocean as a cultural space, and as heritage itself, adds important nuance to contemporary international law discussions about climate change adaptation, resilience, mobility, sovereignty and self-determination. Our analysis thus focuses on the ways in which the Pacific Ocean is understood as a space by peoples of the region and the implications of these cultural connections for how we think about the ocean in the context of the Anthropocene. In this endeavour, two of us (Lixinski and McAdam) are conscious of our position as outsiders and one of us (Tupou) is speaking from a diasporic Tongan perspective. We are also mindful of the ongoing colonial legacy of Pacific Island peoples and countries being written about as (passive) objects, and Pacific histories being framed in reference only to the interests of European, Asian or American powers crossing, exploiting and colonising the region in the pursuit of their own economic and imperial projects.<sup>20</sup> In writing this article, our aim is not to claim a new scholarly space for ourselves, but rather to draw attention to a gap that can only be properly filled by Pacific voices.

Our objective is to show that Pacific peoples are in an optimal position to highlight the cultural stakes of the ocean, whereby relationships with the ocean are not just driven by the idea of the ocean as an outer limit to territory (on which identity is commonly based), but as territory — and therefore another source of identity — itself. Pacific peoples’ cultural relationships with the ocean should not be dismissed or ignored as not having the global appeal that concerted action

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<sup>17</sup> See Hau‘ofa, ‘Our Sea of Islands’ (n 2) 152–3. Hau‘ofa prefers the term ‘Oceania’ to ‘Pacific Islands’, the latter denoting ‘small areas of land sitting atop submerged reefs or seamounts’.

<sup>18</sup> Ibid 153. Hau‘ofa challenges the prevailing view in the social sciences that the people of Oceania live in ‘tiny confined spaces’, arguing that ‘the idea of smallness is relative; it depends on what is included and excluded in any calculation of size’ (which should not just be about land surface): at 152. For an interesting reflection from the perspective of international law, see Annelise Riles, ‘The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law’ (1995) 6(1) *Law and Critique* 39, 45–6.

<sup>19</sup> Emma Scanlan and Janet Wilson, ‘Pacific Waves: Reverberations from Oceania’ (2018) 54(5) *Journal of Postcolonial Writing* 577, 578:

The oceanic framing of this new regionalism appears in the continuities of islands, oceanic linkages between island locations, journeys across waterways, and the transmission of indigenous oral cultures and cosmographies, aimed at overturning the colonial cartographical concepts of scattered land masses, fragmentation and global insignificance.

<sup>20</sup> See especially Hau‘ofa, ‘Our Sea of Islands’ (n 2) 148, who forcefully argues that the space has been constructed by academics and consultants who

tend to overlook or misinterpret grassroots activities because they do not fit with prevailing views about the nature of society and its development. Views of the Pacific from the level of macroeconomics and macropolitics often differ markedly from those from the level of ordinary people.

against the effects of the Anthropocene requires, but rather valued as a key means to connect international law back to the human elements that should, in essence, drive it. We do not seek to set up Pacific cultural relationships with the ocean as a pathway to drive more sustained responses to the Anthropocene for the benefit of all of humankind; that angle, even if incidentally true, when foregrounded repeats colonial violence and turns those Pacific perspectives into tools for a non-Pacific goal. Rather, we seek to centre and engage Pacific voices as an end in itself, since Pacific peoples are disproportionately affected by the Anthropocene, and one cannot fully comprehend that harm, let alone suggest solutions, without a better understanding of their relationships with the ocean. We acknowledge that the authority of such voices may be at odds with the traditional biases of international law, as has been seen in the engagement of Indigenous epistemologies in other areas of international lawmaking.<sup>21</sup> Third World Approaches to International Law ('TWAAIL') scholarship has also attempted to fill similar gaps by adding the voices of the oppressed to conversations about international law-making. This article, while indebted to TWAAIL's call, relies more on the parallels to Indigenous epistemologies, in the sense of rebuilding a view of international law centred on Pacific epistemologies, rather than (justified) critiques of colonial harm. Centring epistemologies contributes to the realisation that international law suffers from a disciplinary bias towards doctrinal analysis that draws on a limited array of (written) sources.<sup>22</sup> As Katerina Teaiwa notes:

Depending on the nature of colonial history, land alienation, cultural loss or maintenance, and degrees of settler colonialism, resistance is expressed through a wide range of acts of land stewardship, self-determination, sovereignty and creative resilience ...<sup>23</sup>

A related issue is that membership of international law organisations pursuing progressive approaches is generally confined to international lawyers, which impede the direct input of a broad range of Pacific voices — and often any Pacific voice at all.

Methodologically, we rely on literature about Pacific worldviews, for the most part written by Pacific thinkers and scholars. We leverage these voices alongside international legal scholarship (doctrinal and critical) in the fields of international cultural heritage law, the Anthropocene and mobility. To ensure that this article does not reproduce the same bounded colonial logics which it critiques, it is essential to appropriately reference the work of Indigenous Pacific scholars who have written on ocean, territory, land and identity over the past few decades. As such, we do not restrict ourselves to any one specific methodology in this article, except for our commitment to highlighting Pacific voices and

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<sup>21</sup> See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

<sup>22</sup> For a different approach, see 'Okusitino Māhina, *The Tongan Traditional History Tala-ē-Fonua: A Vernacular Ecology-Centred Historico-Cultural Concept*' (PhD Thesis, Australian National University, 1992), regarded by Hau'ofa as arguing 'very strongly that ecologically based oral traditions are as valid sources for "academic history" as are written documents': Epeli Hau'ofa, *We Are the Ocean: Selected Works* (University of Hawai'i Press, 2008) 64.

<sup>23</sup> Katerina Teaiwa, 'On Decoloniality: A View from Oceania' (2020) 23(4) *Postcolonial Studies* 601, 602.

epistemologies as a pathway to start a conversation about reinterpreting the boundaries of international legal arguments and responses to the Anthropocene.

In order to make our case, the article proceeds as follows: Part 2 highlights the relationship between culture and the Anthropocene, seen from the perspective of key international responses to it. Part 3 focuses on the construction of the ocean as an eminently cultural space, at least from the perspective of Pacific peoples and their histories. Part 4 highlights the possibilities of the Pacific ‘oceanscape’ as heritage and how a cultural understanding of the ocean affects international law in the Anthropocene. Part 5 concludes.

## II CULTURE AND THE ANTHROPOCENE

Many international organisations have devoted increasing attention to the Anthropocene, issuing myriad reports on different facets of its effects, actual or projected, as well as outlining potential solutions.<sup>24</sup> These documents and action plans, however, do not engage with culture or heritage in any meaningful way. Even the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’), with mandates in both science and culture, neglects the latter and primarily focuses on the former in its discussions of the Anthropocene.<sup>25</sup>

This gap can be either an absence or a demonisation of culture. After all, it was human activity that caused the Anthropocene. While such activity is usually couched in economic terms (industrialisation, rapid development, etc), human activity is also fundamentally cultural. In disregarding or demonising human connections, we fall short of fully grasping the levers that can lead to fundamental social behavioural changes.

More recently, scholars and international organisations have engaged more positively with culture and heritage in the context of the Anthropocene. But even these points of contact tend to focus more on culture as a form of resilience,<sup>26</sup> or specific examples of heritage practices that can contribute to the management of climate change adaptation.<sup>27</sup>

In international law, cultural heritage is a broad and fairly fragmented category. The main binary that fragments international legal understandings of heritage is probably the division between tangible and intangible cultural

<sup>24</sup> See, eg, United Nations Development Programme, *The Next Frontier: Human Development and the Anthropocene* (Human Development Report, 2020); United Nations Environment Programme, *Environmental Displacement: Human Mobility in the Anthropocene* (Frontier Report, 2017); David R Boyd, *Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN GAOR, 74<sup>th</sup> sess, UN Doc A/74/161 (15 July 2019).

<sup>25</sup> Hee-Eun Kim, ‘Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage’ (2011) 18(3) *International Journal of Cultural Property* 259, 270–1. A recent issue of the UNESCO Courier, the organisation’s premier public outreach vehicle, was dedicated to the Anthropocene. It does not mention cultural heritage at all and refers to social and cultural aspects only inasmuch as they relate to impacts of the Anthropocene on geophysical features: see UNESCO, ‘Welcome to the Anthropocene!’ (April–June 2018) *UNESCO Courier*.

<sup>26</sup> Melathi Saldin, ‘Heritage as Resilience’ in Claire Smith (ed), *Encyclopedia of Global Archaeology* (Springer, 2<sup>nd</sup> ed, 2020) 4928.

<sup>27</sup> For a fuller list of examples: see UNESCO, ‘A Network of Intangible Cultural Heritage and Sustainable Development Goals’, *Dive into Intangible Cultural Heritage: Climate Action* (Web Page) <[https://ich.unesco.org/dive/sdg/?focus=sdg\\_13](https://ich.unesco.org/dive/sdg/?focus=sdg_13)>, archived at <<https://perma.cc/B4N4-HUQ3>> (‘Climate Action’).

heritage. Tangible heritage is comprised of physical markers of culture, whereas intangible heritage describes social and cultural practices that do not require (or cannot attain) fixation in a medium. More broadly, intangible heritage is also the relationships between people and their culture and cultural identities, which means that, in a sense, all heritage is intangible (since we value heritage because of our emotional connections to it), but the binary persists in legal classification. Over time, newer instruments have been designed (and older ones have been revised through their implementation guidelines) so as to focus increasingly on living cultures, which have both a tangible dimension (the connection that people feel to sites and objects) and an intangible one (social practices that may or may not involve physical heritage).<sup>28</sup> Intangible heritage perspectives are often associated with non-Western epistemologies,<sup>29</sup> thereby being particularly appropriate in the Pacific context as a means to foreground Pacific worldviews in leveraging international legal categories.

UNESCO activity with respect to heritage has often gained momentum in relation to major human-induced change. The first treaty under its aegis, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* ('1954 Hague Convention'),<sup>30</sup> responds directly to the pillage and destruction of cultural heritage during World War II.<sup>31</sup> Likewise, the *Convention concerning the Protection of the World Cultural and Natural Heritage* ('WHC') gained international diplomatic momentum for its adoption, in no small part because of the flooding of Venice and Florence.<sup>32</sup> Therefore, the evolution of the international legal safeguarding of cultural heritage is closely tied with crises caused by human action, and attempts at protecting heritage and human culture in the face of change.

One of the effects of this tie is that several UNESCO instruments contain specific language that protect heritage in difficult times. The *WHC*, for instance, includes specific language on disasters, and creates as a special mechanism a 'List of World Heritage in Danger'.<sup>33</sup> This list is meant to further galvanise international action to safeguard heritage threatened by major changes in human

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<sup>28</sup> Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013).

<sup>29</sup> *Ibid* 22–5.

<sup>30</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956) ('1954 Hague Convention').

<sup>31</sup> See generally Lynn H Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (Papermac, 1995).

<sup>32</sup> Rodney Harrison, *Heritage: Critical Approaches* (Routledge, 2013) 61.

<sup>33</sup> *WHC* (n 9) art 11(4):

The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of *List of World Heritage in Danger*, a list of the property appearing in the *World Heritage List* for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. ... The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by ... the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the *List of World Heritage in Danger* and publicize such entry immediately.

societies (even if, in recent practice, it has been more often than not perceived as simply a ‘naming and shaming’ device).<sup>34</sup> In protecting heritage, however, these regimes can often exclude the communities that create and maintain it, or turn them into objects in the process of safeguarding culture.<sup>35</sup> One effect of this exclusion is that communities’ own narratives about what their culture means and why it matters are often pushed aside in favour of universal and state-centric accounts. In other words, even regimes aimed at capturing culture can often fall short of allowing for the voices of those creating it to be heard, a dynamic that replicates the fundamental tension of the Anthropocene with which this article grapples.

Specifically on international heritage law’s engagement with the Anthropocene, threats to heritage brought about by the Anthropocene effectively split heritage into two large domains: heritage that is inextricably, and as a matter of fact, tied to territory (such as world heritage and underwater heritage), and heritage that is not in reality tied to territory (such as movable and intangible heritage). This categorisation matters because responses will be very different: heritage tied to territory is at the mercy of changes brought about by the Anthropocene, whereas other heritage can, at least in theory, be displaced in response to changes.<sup>36</sup> This classification is fairly superficial, however, and assumes that the contingencies behind the formation of cultural practices can be easily replicated elsewhere. While that assumption is true in some instances, as seen through diasporic heritage communities,<sup>37</sup> it cannot be taken for granted. This classification also assumes a land-centric definition of territory, which aligns with a particular Western-centric reading of cultural heritage in international law.

Setting these tensions aside for a moment (we will revisit them in the next part), it is worth highlighting in more detail how international cultural heritage law has engaged with the Anthropocene, as this provides further insights into legal perceptions of the place of culture in relation to the Anthropocene, as well as the role of communities. For these purposes, the intangible cultural heritage regime is of special relevance for two related reasons. First, it is the newest UNESCO heritage regime (and therefore sets the high watermark in terms of safeguarding practices). Secondly, and as part of it taking newer understandings of heritage into account, the regime also expressly includes communities in the heritage safeguarding process.<sup>38</sup> Of course, this inclusion is not without its shortcomings, and it is limited by state sovereignty in many respects, despite

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<sup>34</sup> Mechtild Rössler, ‘Between Exclusion and Inclusion: On the Challenges Facing World Heritage Preservation Efforts’ (2017) 3(2) *Santander Art and Culture Law Review* 33.

<sup>35</sup> Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press, 2019).

<sup>36</sup> Lucas Lixinski, ‘Moving Cultures: Engaging Refugee and Migrant Culture Rights in International Heritage Law’ (2018) 16(1) *Indonesian Journal of International Law* 1.

<sup>37</sup> For a collection of essays on the work and effects of diasporic heritage: see Alexandra Dellios and Eureka Henrich (eds), *Migrant, Multicultural and Diasporic Heritage: Beyond and Between Borders* (Routledge, 2021).

<sup>38</sup> *ICHC* (n 15) art 15.

many improvements to UNESCO's implementation of this regime since it was adopted in 2003.<sup>39</sup>

Nonetheless, intangible cultural heritage has been the object of specific analysis in the context of climate change, with suggestions that stronger safeguarding of (intangible) cultural heritage is needed in countries more exposed to climate impacts.<sup>40</sup> Because of the conceptual connection between intangible heritage and living communities (after all, intangible cultural heritage is also known as 'living heritage'), it stands to reason that this form of heritage may have a role to play in relation to the Anthropocene. Among the elements of intangible heritage currently recognised by UNESCO as being connected to climate change, they oscillate between recognising intangible heritage as a victim of the Anthropocene, to intangible heritage as a pathway for adaptation. The latter mode of engagement, in particular, is worth exploring in more detail.

At the time of writing, there are 13 elements on the intangible cultural heritage lists created by the treaty (out of 584)<sup>41</sup> that specifically respond to climate change.<sup>42</sup> These include construction techniques, water conservation techniques, dispute resolution systems to manage scarce resources, less resource-intensive traditional agricultural practices and religious rituals to ameliorate droughts. They reinforce the role of culture as a form of resilience, as noted above, and focus on these communities' worldviews as a pathway to resolve an externally-created problem and as exemplars of behaviours for the outside world's consumption. Specifically, all these elements make the point of showcasing awareness of changes to the climate, and adaptive, resilient strategies to deal with them. In doing so, community voices, which are necessary for the inscription of these heritage elements, are made relevant as performances of adaptation that in some ways define, for the purposes of heritage inscription,

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<sup>39</sup> Janet Blake and Lucas Lixinski, 'Conclusions: Tightropes of the Intangible Cultural Heritage Convention' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press, 2020) 494, 494–5.

<sup>40</sup> Kim (n 25) 277.

<sup>41</sup> 'Browse the Lists of Intangible Cultural Heritage and the Register of Good Safeguarding Practices', *UNESCO Intangible Cultural Heritage* (Web Page) <<https://ich.unesco.org/en/lists>>, archived at <<https://perma.cc/4GKT-MJBH>>.

<sup>42</sup> These are: Al Aflaj, traditional irrigation network system in the UAE, oral traditions, knowledge and skills of construction, maintenance and equitable water distribution (United Arab Emirates); Art of dry stone walling, knowledge and techniques (Croatia, Cyprus, France, Greece, Italy, Slovenia, Spain, Switzerland); Avalanche risk management (Austria, Switzerland); Biocultural programme for the safeguarding of the tradition of the Blessed Palm in Venezuela (Venezuela (Bolivarian Republic of)); Craft of the miller operating windmills and watermills (Netherlands); Irrigators' tribunals of the Spanish Mediterranean coast: the Council of Wise Men of the plain of Murcia and the Water Tribunal of the plain of Valencia (Spain); Knowledge and skills of the water measurers of the foggaras or water bailiffs of Touat and Tidikelt (Algeria); Suri Jagek (observing the sun), traditional meteorological and astronomical practice based on the observation of the sun, moon and stars in reference to the local topography (Pakistan); Traditional agricultural practice of cultivating the 'vite ad alberello' (head-trained bush vines) of the community of Pantelleria (Italy); Traditional knowledge of the jaguar shamans of Yuruparí (Colombia); Traditional skills of building and sailing Iranian Lenj boats in the Persian Gulf (Iran (Islamic Republic of)); Transhumance, the seasonal droving of livestock along migratory routes in the Mediterranean and in the Alps (Austria, Greece, Italy); Yaokwa, the Enawene Nawe people's ritual for the maintenance of social and cosmic order (Brazil). See Climate Action (n 27).

their experience: these communities adapt to climate change imposed on them and pursue their own adaptive solutions, which international law recognises through heritage-listing mechanisms. Recognition through heritage listing comes part of the way to foreground their voices, but the regime itself is not designed by communities. Rather, communities leverage a pre-existing regime that gives them the space to centre their ways of seeing the world and the universe and which creates regulatory freedom for the performance of those worldviews.

Despite such possibilities, for the most part these heritage elements assume a ‘territoriality of heritage’ and its practices which is primarily ground-based. An exception is the listing in 2011 of *Traditional skills of building and sailing Iranian Lenj boats in the Persian Gulf*, which notes people’s engagement with the ocean and navigational techniques and how they are embedded in a specific sense of community and continuity tied to the water.<sup>43</sup> This is the closest the regime gets to the idea of untying heritage from land.

Nonetheless, the challenge of legal recognition of culture and identities not bound to territory rests not with what is possible as a matter of fact, but rather as a matter of law. Because of the (Euro- and) state-centric paradigm in international law, heritage is conceptualised and safeguarded in its ties to a territorial state, ignoring other epistemologies. So, movable heritage is closely tied to national identity and existing instruments prevent its movement across borders without the authorisation of the territorial state.<sup>44</sup> Intangible heritage is safeguarded only within the boundaries of the state party that recognises such heritage as important.<sup>45</sup>

This close tie to territory is a product of UNESCO standard setting, and it does not match pre-UNESCO practice with respect to movable heritage, in particular. As documented by Andrzej Jakubowski, there is abundant state practice prior to relevant UNESCO treaties that suggests that a people’s cultural heritage follows the people first and the territory second.<sup>46</sup> It was with the advent of UNESCO, and the decolonisation process in Africa and Asia, that heritage was once again tied to (artificial)<sup>47</sup> territorial boundaries. An unintended consequence of this tie is an entire set of regimes under UNESCO that replicate and reinforce territoriality and matching statehood at the expense of ties that people may have to their own culture. We argue that intangible cultural heritage can, in theory, open a gateway to thinking again about culture as deterritorialised and following people(s) instead, even if one must beware of the formal requirements of the treaty.<sup>48</sup>

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<sup>43</sup> ‘Traditional Skills of Building and Sailing Iranian Lenj Boats in the Persian Gulf’, *United Nations Educational, Scientific and Cultural Organizational: Intangible Cultural Heritage* (Web Page) <<https://ich.unesco.org/en/USL/traditional-skills-of-building-and-sailing-iranian-lenj-boats-in-the-persian-gulf-00534>>, archived at <<https://perma.cc/TM6B-48K6>>.

<sup>44</sup> *1970 Convention* (n 10) arts 6–7.

<sup>45</sup> *ICHC* (n 15) art 11.

<sup>46</sup> Andrzej Jakubowski, *State Succession in Cultural Property* (Oxford University Press, 2015) 323.

<sup>47</sup> Makau wa Mutua, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’ (1995) 16(4) *Michigan Journal of International Law* 1113, 1114–15.

<sup>48</sup> Gül Aktürk and Martha Lerski, ‘Intangible Cultural Heritage: A Benefit to Climate-Displaced and Host Communities’ (2021) 11(3) *Journal of Environmental Studies and Sciences* 305, 307, 312.

If heritage belongs with peoples — rather than territory — land may matter less. As Hau‘ofa explained, ‘[o]ur landscapes and seascapes are ... cultural as well as physical’.<sup>49</sup> Further, even if we assume a territorial link, territory can also mean different things in culturally-specific contexts. Therefore, decoupling heritage from land can be possible both through its connection to people, and a deconstruction of what territory means. If culture is separated from land in this way, we are in a better position to comprehend fully the impacts of the Anthropocene on communities which relate differently to territory, such as those in the Pacific. The law tends to stymie these understandings because of its own contingencies, but the recognition of heritage like that of the Iranian Lenj boats underscores that being at sea is itself an important part of identity, and the sea, rather than land, can be a site for the formation and perpetuation of identity. As the Pacific experience shows, the ocean can indeed be territory and a site for cultural practices.

### III OCEANS AS LIVED AND LIVING CULTURAL SPACES: PACIFIC HISTORIES AND PRESENTS

International heritage law’s inability to capture different forms of territory as the basis for cultural recognition is evident when one considers how peoples of the Pacific relate to the ocean. The ocean is part of territory, and, as such, is not a divider but a connector.<sup>50</sup> In recent years, this realisation has led to ‘a reframing of Oceania as the “Blue Pacific”’ in official discourse and policy, which ‘is about the small Pacific Islands across a significantly large oceanic continent [being] united in one voice in response to the demographically and economically larger and politically more powerful nation-states around the Rim’.<sup>51</sup>

Through a selection of Pacific voices, this part shows that there are more forms of engaging with culture and identity than those grounded on territory-as-land. Territory-as-ocean is an integral part of Pacific identities, and this shift in perspective has several important consequences for how international law should engage with responses to the Anthropocene. Underscoring the limitations of our own understanding of the material anchors of identity allows us to imagine an international law that serves those identities, rather than captures them to pursue purportedly neutral agendas set by ongoing forms of colonial violence.

Pacific peoples have always been highly mobile, yet international law’s grounding on fixed territoriality, and, particularly, territory-as-land makes it hard to capture that existence. Land is also a determinant of nationality, which affects people’s ability to move abroad given restrictions imposed by national

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<sup>49</sup> Epeli Hau‘ofa, ‘Epilogue: Pasts to Remember’ in Robert Borofsky (ed), *Remembrance of Pacific Pasts: An Invitation to Remake History* (University of Hawai‘i Press, 2000) 453, 466:

Populations seem always to be in flux and so were the dispositions of land, providing much of the flexibility and motion to the operation of Oceanian societies. All of these are recorded in narratives inscribed on the landscape. Our natural landscapes then are maps of movements, pauses, and more movements.

<sup>50</sup> Matt K Matsuda, *Pacific Worlds: A History of Seas, Peoples, and Cultures* (Cambridge University Press, 2012); David Iglar, *The Great Ocean: Pacific Worlds from Captain Cook to the Gold Rush* (Oxford University Press, 2013). See also David Armitage and Alison Bashford (eds), *Pacific Histories: Ocean, Land, People* (Palgrave Macmillan, 2014).

<sup>51</sup> Teaiwa (n 23) 602.

immigration regimes (such as visas).<sup>52</sup> As Bruce Burson, Richard Bedford and Charlotte Bedford write:

Navigating the ‘bloodlines’ of culture, history and tradition, far more than seeking permission to cross the invisible international borders that are a legacy of colonialism, lies at the heart of much short-term population mobility within the region.<sup>53</sup>

Further, as indicated above, legal regimes dedicated to safeguarding identities tend to wrongly assume that mobility will automatically lead to a diminution of culture. This is partly a factor of their inability to observe mobile identities: they assume that heritage requires a territorial, rather than human, context and that heritage will be better off in the territory of origin, rather than tied to a population of origin (wherever located). While we must be careful not to make assumptions devoid from history and context,<sup>54</sup> Pacific histories showcase rich and nuanced mobile identities that are not only not diminished, but in fact reinforced and developed by mobility itself.<sup>55</sup> As Cornelius Holtorf argues, a migrant’s relationship to heritage is ‘not inherently inhibited as a result of dislocation and loss, but can also be enhanced due to an acquired capacity to absorb disturbance and continue to develop’.<sup>56</sup> Indeed, the physical relocation of the Banaban community from Ocean Island in the Gilbert Islands (present-day Kiribati) to Rabi in Fiji in 1945 arguably intensified a desire to preserve (and forge) a unique identity<sup>57</sup> — a phenomenon observed by John Connell more generally in the Pacific.<sup>58</sup> As Pacific communities face an existential challenge in the form of the Anthropocene, international law would do well to understand these ever-changing dynamic relationships with territory, land and sea.

<sup>52</sup> Bruce Burson, Richard Bedford and Charlotte Bedford, ‘In the Same Canoe: Building the Case for a Regional Harmonisation of Approaches to Humanitarian Entry and Stay in “Our Sea of Islands”’ (Platform on Disaster Displacement, March 2021); Bruce Burson and Richard Bedford, ‘Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific’ (Technical Paper, Nansen Initiative on Disaster-Induced Cross-Border Displacement, 9 December 2013); Jane McAdam, ‘An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty’ (2011) 12(1) *Melbourne Journal of International Law* 27.

<sup>53</sup> Burson, Bedford and Bedford (n 52) 10.

<sup>54</sup> For instance, Pacific Leaders have emphasised ‘the importance of retaining the Pacific’s social and cultural identity, and the desire of the Pacific peoples to continue to live in their own countries, where possible.’: Pacific Island Forum Secretariat, ‘Thirty-Ninth Pacific Islands Forum: Alofi, Niue’ (Forum Communiqué No PIFS(08)6, Pacific Islands Forum, 19–20 August 2008) annex B, 23 <forumsec.org/wp-content/uploads/2017/11/2008-Forum-Communiqué\_-Alofi\_-Niue\_-19-20-Aug.pdf>, archived at <https://perma.cc/S8GE-T5LQ>.

<sup>55</sup> See, eg, Helen Lee and Steve Tupai Francis (eds), *Migration and Transnationalism: Pacific Perspectives* (ANU E Press, 2009); Carol Farbotko et al, ‘Transformative Mobilities in the Pacific: Promoting Adaptation and Development in a Changing Climate’ (2018) 5(3) *Asia and the Pacific Policy Studies* 393; Hazel Easthope, ‘Fixed Identities in a Mobile World? The Relationship between Mobility, Place, and Identity’ (2009) 16(1) *Identities: Global Studies in Culture and Power* 61.

<sup>56</sup> Cornelius Holtorf, ‘Embracing Change: How Cultural Resilience is Increased through Cultural Heritage’ (2018) 50(4) *World Archaeology* 639, 646.

<sup>57</sup> See also Jane McAdam, ‘“Under Two Jurisdictions”: Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations’ (2016) 34(2) *Law and History Review* 281, 328–32.

<sup>58</sup> He writes that such relocations have often ‘enhanced rather than diminished the retention of island identities in the face of difference’: John Connell, ‘Population Resettlement in the Pacific: Lessons from a Hazardous History?’ (2012) 43(2) *Australian Geographer* 127, 139.

Several considerations need to be foregrounded. First, when thinking about Pacific conceptions of place, home, land, sea, territory and space, the literature we canvassed brings both insider and outsider perspectives. The Pacific scholars who write on this topic come from a variety of disciplinary backgrounds, and as such, the literature referred to within this article speaks not only to a broad geographical range of Pacific voices but also reflects different types of academic training. While there is some literature on these issues from within the Pacific, there is not an abundance written by Pacific scholars themselves — although this is a growing area of discourse. Currently, much of the scholarship that does exist comes from Pacific scholars in the diaspora, which necessarily brings a different positioning. It is thus important to appreciate the positionality of those writing on these subjects and the wide range of experiences that inform understandings of identity. Fundamentally, '[t]here is not *one* Pacific'.<sup>59</sup> Second, there is a tension even within 'local' Pacific scholarship between those who have been educated abroad and returned with other knowledges and ways of seeing and perceiving place, and those with local educations (both formal and informal). Third, there is a distinction between how identities and culture are discussed by those writing within settler colonial contexts. There, place-based identity formation and assertion may be a political act of resurgence, compared to those writing about their home communities in more localised ways, displaying a more 'grounded' connection to land and people. This variation is particularly prominent in work that discusses the political structures that come to define identity, movement and connection. Finally, there is a gendered dynamic, particularly apparent with scholars working within a Trans-Indigenous feminist praxis.

In sum, there is a vast and varied literature that considers these questions from a range of different perspectives, whether they are the focus of analysis or more peripheral (but nonetheless integral) to it. As such, the literature drawn upon here ranges from storied, and even embodied, mappings and cartographies of place, through to scholarship that reflects on Pacific cultures and traditions through more institutionalised, global structures (such as sustainable development). All are connected through a shared Pacific Ocean which creates a Pan-Pacific 'way' of being and belonging,<sup>60</sup> and further emphasises that culture moves with people. Through literature produced from a range of lived experiences — by both Pacific peoples who live on their ancestral lands, and those in the diaspora — we see an engaged relationship with people and place, even if this is maintained across vast physical distances.

These accounts often reflect a tension between insider and outsider encounters and perspectives on Pan-Pacific identities. This is ideally illustrated by the story of Tupaia, the Tahitian master navigator who served as Captain James Cook's guide during much of his Pacific exploration, and on whose extensive knowledge the first European mapping of Polynesia relied. Christina Thompson relates how Captain Cook attempted to shoehorn Tupaia's knowledge into European ways of seeing the world, resulting in mapping inaccuracies that would have been avoided had Tupaia been allowed freer rein. Tupaia's knowledge was much more

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<sup>59</sup> Vaine Rasmussen, 'Our Pacific' in Borofsky (n 49) 399 (emphasis in original).

<sup>60</sup> See, eg, Tracey Banivanua Mar, *Decolonisation and the Pacific: Indigenous Globalisation and Ends of Empire* (Cambridge University Press, 2016).

dynamic and alive, based on navigation over static geographic landmarks.<sup>61</sup> He considered his relationship to place from wherever he was at a given time, meaning that it shifted continuously.<sup>62</sup> In this sense, his navigation was directly at odds with Mercator projections of navigation that rely on locating land via geographic points of north, south, east and west. His relationship with land and sea was much more akin to a living identity and culture, rather than based on static assumptions about territory (and fixed heritage). Cook's inability to come to terms with this approach is echoed today in international law's inability to grasp divergent understandings of identity and territory. As Holtorf notes, '[c]ultural heritage, just like nature, is a continuously evolving process, not a legacy in any part already complete'.<sup>63</sup>

Relatedly, Margaret Jolly argues that Pacific peoples' constructs of place vis-à-vis those of outsiders are 'not so much separate visions as they are "double visions," in the sense of both stereoscopy and blurred edges'.<sup>64</sup> In the Pacific, 'the relation between people and place is posited not as "ownership" or human possession but as mutual possession. ... [L]and is seen as active not inert, as possessed of people, living and dead'.<sup>65</sup> Through such representations, there are various 'continuities' and 'ruptures' which 'we might telegraphically encode as genealogy versus cartography'.<sup>66</sup> Jolly also demonstrates how Pacific peoples are shaped by the mappings of their region, but also continuously (re)imagine and (re)present their own spatiality in multidimensional ways, echoing Tupaia's vision of the ocean as relational and moving.

There are a number of features to this Pan-Pacific way of seeing the world, often tied to the region's long history of mobility.<sup>67</sup> Mobility has been a feature of Pacific life for over 4,000 years.<sup>68</sup> Since colonial times, it has been simultaneously disruptive and sustaining, resulting in a 'cross-fertilisation of ideas and the articulation of resistant politics, cultures and languages' among Pacific peoples,<sup>69</sup> with 'implications for agriculture, subsistence, genealogies, [and] cultural transmission'.<sup>70</sup> As Hau'ofa put it:

The world of our ancestors was a large sea full of places to explore, to make their homes in, to breed generations of seafarers like themselves. ... Theirs was a large world in which peoples and cultures moved and mingled, unhindered by boundaries of the kind erected much later by imperial powers. From one island to

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<sup>61</sup> Christina Thompson, *Sea People: The Puzzle of Polynesia* (Harper Collins Publishers, 2019) 96.

<sup>62</sup> Margaret Jolly, 'Imagining Oceania: Indigenous and Foreign Representations of a Sea of Islands' (2007) 19(2) *Contemporary Pacific* 508, 509.

<sup>63</sup> Holtorf (n 56) 644.

<sup>64</sup> Jolly (n 62) 509.

<sup>65</sup> *Ibid* 515.

<sup>66</sup> *Ibid* 532.

<sup>67</sup> See, eg, The Nansen Initiative, *Human Mobility, Natural Disasters and Climate Change in the Pacific* (Outcome Report, 21–24 May 2013).

<sup>68</sup> Elizabeth M DeLoughrey, *Routes and Roots: Navigating Caribbean and Pacific Island Literatures* (University of Hawai'i Press, 2007) 22.

<sup>69</sup> Banivanua Mar (n 60) 17.

<sup>70</sup> *Ibid* 36. See also David A Chang, *The World and All the Things upon It: Native Hawaiian Geographies of Exploration* (University of Minnesota Press, 2016).

another they sailed to trade and to marry, thereby expanding social networks for greater flows of wealth.<sup>71</sup>

Tarcisius Kabutaulaka explains that no matter how mobile he is, he ‘will always be just a guest or visitor in these other places because I have no roots there: no *peo* (sacred shrines or old alters), land or clan connections’.<sup>72</sup> Identity is connected to place, which is in turn tied to heritage, people, family and ancestors. There is always a connection to place, even if that connection is imagined or storied.<sup>73</sup> Unlike western conceptions of place as physical and fixed, in Pacific cultures, place operates outside of physical bounds. Crucially, Kabutaulaka explains how identity is strongly tied to responsibility: home is a place where he has responsibilities to uphold. Through the act of carrying out such responsibilities, connections to place are actively maintained.

Mobility thus affects identity, allowing for convergences. For Hau‘ofa, Pacific identity, though highly diverse, is ‘anchored in our common inheritance of a very considerable portion of Earth’s largest body of water, the Pacific Ocean’.<sup>74</sup> Land, sea and sky are all understood through their relationship to people. Identity is not tied to just one element, or even any surface. Boundaries can be blurred and changeable,<sup>75</sup> and Pacific concepts of identity — conceptualised through a sense of identity and place, and a history of mobility and encounter — are tied to places that are malleable, embodied, storied and integral to the continuation and passing on of Indigenous knowledge.<sup>76</sup> A commitment to place is central to establishing a sense of belonging and groundedness. Land sustains and feeds not just in a physical sense, but spiritually.<sup>77</sup> As Emalani Case explains, her ongoing connection to a *home* or a place of origin, even when living elsewhere, is based on the idea that ‘somewhere in Oceania is a piece of earth to which I belong’.<sup>78</sup> It is a ‘means of articulating who we are, where we come from, and where we are going as a people’.<sup>79</sup>

Pacific identities, in the words of Pacific scholars, are interconnected *but also* distinctive identities, rooted in genealogical conceptions of place (that cannot be

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<sup>71</sup> Hau‘ofa, ‘Our Sea of Islands’ (n 2) 153–4.

<sup>72</sup> Tarcisius Tara Kabutaulaka, ‘Tuhu Vera: My Journeys, Routes, Places and Identities’ in Judith A Bennett (ed), *Oceanian Journeys and Sojourns: Home Thoughts Abroad* (Otago University Press, 2015) 192, 193.

<sup>73</sup> See, eg, Tēvita O Ka‘ili, ‘Tauhi Vā: Nurturing Tongan Sociospatial Ties in Maui and Beyond’ (2005) 17(1) *Contemporary Pacific* 83; Katerina Martina Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Indiana University Press, 2015) 167.

<sup>74</sup> Hau‘ofa, ‘The Ocean in Us’ (n 1) 392.

<sup>75</sup> For example, Denning uses the beach as an ‘in-between’ space: a place of encounter and arrival, as well as a space of giving and receiving, connection and possibility: Greg Denning, ‘Performing on the Beaches of the Mind: An Essay’ (2002) 41(1) *History and Theory* 1.

<sup>76</sup> Emalani Case, ‘I ka Piko, To the Summit: Resistance from the Mountain to the Sea’ (2019) 54(2) *Journal of Pacific History* 166. See also Chang (n 70).

<sup>77</sup> Case (n 76). See also John Campbell, ‘Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 57.

<sup>78</sup> Case (n 76) 172, citing Hau‘ofa, *We Are The Ocean: Selected Works* (n 22) 76–7.

<sup>79</sup> Case (n 76) 174.

transferred like western land).<sup>80</sup> These identities, translated into culture, mean thinking of culture as non-static, which fits well with the narrative of intangible cultural heritage described in the previous section. Further, these diverse identities also mean that one cannot simply relocate people to other land across the Pacific.<sup>81</sup> This ambiguity, which plays down the role of land while also grounding identity in it, has been described as the ‘roots and routes’<sup>82</sup> of Pacific peoples: ‘a premise that suggests that Pacific histories and everyday life are underpinned by mobility (routes) across the region but that Pacific Islanders have strong place attachment (roots)’.<sup>83</sup> This ambiguous relationship to land reinforces the challenge to territoriality in international (cultural heritage) law we posed in the previous section. The reliance on ‘roots’ follows the tendency in current international law to ground legalities on territory, while ‘routes’ would challenge that same tendency.

The diversity of non-static identities, which nonetheless share commonalities, can be seen in the treatment of land in a number of Pacific nations. In Tonga, the word for land, *fonua*, also refers to the people of the land: ‘[f]onua encompasses the spiritual and genealogical oneness of land and its people, and, at the same time, the reciprocal exchanges between them’.<sup>84</sup> Likewise, in Papua New Guinea, ‘[l]and/place is regarded as an extension of the indigenous self and an integral component of indigenous identity — a sense of belonging through which identity itself is constructed’.<sup>85</sup> While in Western thought, land is an economic resource, Papua New Guineans see land as an extension of self and a place that can be both ‘metaphysically and spiritually’ inhabited.<sup>86</sup> These perspectives are largely irreconcilable.

Despite this blurring of the elements, the ocean still seems to act as the great connector of Pacific identities: for Vicente Diaz, ‘no island was ever an island to begin with’.<sup>87</sup> He insists that Indigenous epistemologies and cartographies, informing Indigenous

technologies and practices of movement and mobility, can help challenge prevailing assumptions that underwrite conventional apprehensions of land,

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<sup>80</sup> Anita Smith, ‘“Land Is a Very Limited Definition of Place”: Navigating Urban Heritage Conservation in the Pacific Island Nations’ in Kapila D Silva (ed), *The Routledge Handbook on Historic Urban Landscapes in Asia-Pacific* (Routledge, 2020) 598, 601:

Pacific Islander communities within these nation states may have a shared sense of national identity; but their cultural identity is defined by their genealogical connections to customary land and sea and to relatives elsewhere, in other islands and sometimes over vast distances across the Ocean.

<sup>81</sup> See, eg, Jane McAdam, ‘Self-Determination and Self-Governance for Communities Relocated across International Borders: The Quest for Banaban Independence’ (2017) 24(4) *International Journal on Minority and Group Rights* 428, 432; see also Daniel Fitzpatrick and Caroline Compton, *Law, Property and Disasters: Adaptive Perspectives from the Global South* (Routledge, 2021).

<sup>82</sup> Farbotko et al (n 55) 395. See also DeLoughrey (n 68).

<sup>83</sup> Farbotko et al (n 55) 395.

<sup>84</sup> Ka‘ili (n 73) 93.

<sup>85</sup> Regis Tove Stella, *Imagining the Other: The Representation of the Papua New Guinean Subject* (University of Hawai‘i Press, 2007) 29.

<sup>86</sup> *Ibid* 35.

<sup>87</sup> Vicente M Diaz, ‘No Island Is an Island’ in Stephanie Nohelani Teves, Andrea Smith and Michelle H Raheja (eds), *Native Studies Keywords* (University of Arizona Press, 2015) 90, 90.

indeed, of place and space, and political and cultural subjectivities conceptualized in relation to them.<sup>88</sup>

Diaz uses seafaring metaphors to challenge conventional analytical frameworks, forcing a questioning of boundaries.<sup>89</sup> For him, Pacific concepts of identity and place are an embodied practice written into histories of mobility and exploration.

A natural consequence of this acknowledgment of identity as living and moving is that the meaning of place changes as well. For David Gegeo, place is not just about physical location, but is intrinsically linked to genealogy, access to land, one's position in family and marriage, native fluency in language, assumptions of knowledge, kin obligations, a shared perspective and cultural models.<sup>90</sup> Thus, 'a person can be anywhere and still be inextricably tied to place';<sup>91</sup> it is an immovable foundation of culture and identity, but one which moves with, and through, people. This view of the relationship is further emphasised by Tongan scholar Tēvita Ka'ili, who explains that although two-thirds of Tongans now live outside the country, a sense of belonging and place is maintained through particular cultural practices that mediate time and space,<sup>92</sup> connecting the diaspora to their *fonua*. For instance, the recitation of land and people (that is, being able to relay one's village, island and even the names of grandparents) enables Tongans to connect with each other anywhere in the world, and even if they have never set foot on Tongan soil. This links back to histories of mobility that called for early Tongan navigators to keep their genealogical ties alive in order to maintain connections with home.<sup>93</sup>

These contingent and shifting identities are hard to capture in the law, particularly those created out of a system that sought to impose order (based on external categories) on a colonial project across vast parts of the world (including the Pacific region).<sup>94</sup> Hau'ofa explains how political institutions and colonial legacies have imposed a constructed regional identity on the Pacific, which Pacific peoples must reclaim.<sup>95</sup> International law largely does the same, partly as an extension of a colonial project that sought to create (a version of) 'civilisation'.<sup>96</sup> In other words, the insider–outsider tension that informs much of the thinking about the Pacific, discussed above, is also reflected in how international law operates, and in how identity is perceived for political and legal purposes. There is a disconnect between external imaginaries of Pan-Pacific

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<sup>88</sup> Ibid 90–1.

<sup>89</sup> Ibid 96.

<sup>90</sup> David Welchman Gegeo, 'Cultural Rupture and Indigeneity: The Challenge of (Re)visioning "Place" in the Pacific' (2001) 13(2) *Contemporary Pacific* 491, 493–4.

<sup>91</sup> Ibid 495.

<sup>92</sup> Ka'ili (n 73).

<sup>93</sup> Ibid 105.

<sup>94</sup> See generally Thompson (n 61).

<sup>95</sup> See, eg, Sue Farran, 'The Place of Law in the "Blue Pacific" Agenda' (2019) 26 *Revista General de Derecho Publico Comparado* 422108:1–17.

<sup>96</sup> For a recent general critique, see Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020). See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

identities and how identities are understood internally. For instance, Hau‘ofa writes:

The issue of what or who is a Pacific Islander would not arise if we considered Oceania as comprising people as human beings with a common heritage and commitment, rather than as members of diverse nationalities and races. Oceania refers to a world of people connected to each other. The term *Pacific Islands Region* refers to an official world of states and nationalities. John and Mary cannot just be Pacific Islanders; they have to be Ni-Vanuatu, or Tuvaluan, or Samoan first. As far as I am concerned, anyone who has lived in our region and is committed to Oceania is an Oceanian. This view opens up the possibility of expanding Oceania progressively to cover larger areas and more peoples than is possible under the term *Pacific Islands Region*. In this formulation, the concepts *Pacific Islands Region* and *Pacific Islanders* are as redundant as *South Seas* and *South Sea Islanders*. We have to search for appropriate names for common identities that are more accommodating, inclusive, and flexible than what we have today.<sup>97</sup>

He also notes, in direct reference to international legal regimes, that:

It is one of the great ironies of the *Law of the Sea Convention*, which enlarged our national boundaries, that it is also extending the territorial instinct to where there was none before. ... It is therefore essential that we ground any new regional identity in a belief in the common heritage of the sea. A realization of the fact that the ocean is uncontainable and pays no respect to territoriality should spur us to advance the notion, based on physical reality and practices that date back to the initial settlements of Oceania, that the sea must remain open to all of us.<sup>98</sup>

He concludes that ‘[a]s the sea is an open and ever-flowing reality, so should our oceanic identity transcend all forms of insularity, to become one that is openly searching, inventive, and welcoming’.<sup>99</sup> This legal–political reality flows from, but also translates into, culture, which can be the object of legal safeguarding, and through that process a pathway to articulate legal claims.<sup>100</sup> Hau‘ofa signals that:

All our cultures have been shaped in fundamental ways by the adaptive interactions between our people and the sea that surrounds our island communities. In general, the smaller the island the more intensive are the interactions with the sea, and the more pronounced are the sea’s influences on culture.<sup>101</sup>

International law largely fails to reflect these Pacific positions. As indicated above, concepts of statehood tied to territory-as-land fail to account for a relationship of territory-as-ocean, at least if we extend beyond the limits of the *Law of the Sea Convention* in terms of what counts as a territory’s ‘attached’ sea. Linking cultural heritage to territory fails to generate legal entitlements that match Pacific understandings of belonging. While international law scholarship

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<sup>97</sup> Hau‘ofa, ‘The Ocean in Us’ (n 1) 401–2.

<sup>98</sup> Ibid 405–6.

<sup>99</sup> Ibid 406.

<sup>100</sup> Lucas Lixinski, ‘Heritage Listing as a Tool for Advocacy: The Possibilities for Dissent, Contestation, and Emancipation in International Law through International Cultural Heritage Law’ (2015) 5(2) *Asian Journal of International Law* 387.

<sup>101</sup> Hau‘ofa, ‘The Ocean in Us’ (n 1) 403.

focuses on the rupture between people and territory (conceived as land), for Pacific peoples, that rupture goes much deeper: it is displacement from land *and* sea, an integrated ‘place’, which jointly shape identity, belonging and a sense of home.

If international law cannot accommodate such pluralist perspectives, it cannot develop authentically. Yet, its normative authority may lead it to be co-opted in tragically perverse ways. For instance, in the 1960s and 1970s, the relocated Banaban community in Fiji invoked the language of international law in a bid for political independence, exaggerating and even manufacturing aspects of a ‘unique’ identity as ‘a matter of political necessity to challenge exploitative colonial policies’.<sup>102</sup> As Sundhya Pahuja has explained, ‘asserting one’s existence as a nation state was the sole means of capturing legal personality in a global setting’,<sup>103</sup> and ‘self-determination could only be achieved at the cost of self-definition’.<sup>104</sup> Concepts such as sovereignty ‘push[ed] parties into antagonist positions and obscure[d] the possibilities that exist[ed] for the accommodation of their differences’.<sup>105</sup>

Cultural heritage recognition can help to leverage a broader understanding of territory in international law, and the recognition of heritage practices involving the sea-land link might therefore help undo the exclusive focus on land and expose the ocean *and* land as relevant for the population. The next section explores these possibilities in further detail.

#### IV OCEANS AS GATEWAYS: REIMAGINING INTERNATIONAL LAW IN THE ANTHROPOCENE

As discussed above, international heritage law presents certain possibilities for the recognition of diverse relationships with the ocean-as-territory, challenging some of the international legal paradigms that prevent Pacific worldviews from driving international legal responses to the Anthropocene. These possibilities untie heritage and identity from territory, and instead tie it back to peoples. In doing so, mobility can become an integral part of the conversation about how identities operate. At the same time, however, international (cultural heritage) law formally still assumes a connection to states as territorial units. This connection, however, can be a place both to create and exploit a productive fissure.

Specifically, the limited recognition of communities through regimes like the *Convention for the Safeguarding of Intangible Cultural Heritage* allows for a resignification of practices, and even an untying from territory, which works in favour of many Pacific epistemologies surveyed above. But the remaining ties to territory-as-land also allow us to recognise the ambiguity of Pacific

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<sup>102</sup> Teaiwa (n 73) 167 (citations omitted). She describes the deliberate, political construction of new ‘Banaban’ songs and dances in the 1960s: at 119–20, 142, 177. See parallels in Sally Engle Merry, ‘Law and Identity in an American Colony’ in Sally Engle Merry and Donald Brenneis (eds), *Law & Empire in the Pacific: Fiji and Hawai’i* (School of American Research Press, 2003) 123, 143–6.

<sup>103</sup> Pahuja (n 96) 57.

<sup>104</sup> *Ibid* 58, citing Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (Zed Books, 1997) 79.

<sup>105</sup> *Independent Commission of Inquiry into the Provisions of the Constitution of Kiribati Relating to the Banabans* (Report, September 1985) [35].

epistemologies themselves. In other words, rather than doing away with the connection to territory altogether, it may be more productive simply to play it down, and to acknowledge the existence of other forms of territoriality based on different geographic indicators, or, most usefully, on peoples' declared relationships, based on their identities and established cultural heritage practices, to different forms of territory.

In order to do this, Pacific countries would need to participate more in UNESCO heritage recognition processes. UNESCO has long been aware of the need to include more Pacific voices, but with very limited success because of financial and legal obstacles.<sup>106</sup> But now, knowing that Pacific epistemologies are not only valid as a representational matter, but also have the power to shift other pillars of international legal architecture through their recognition in international heritage processes, there is an incentive — both for Pacific states and UNESCO — to invest more attention to, and time and resources in, the inclusion of Pacific states in heritage processes and lists. The inclusion of Pacific worldviews in international heritage lists could create pathways that, even if not necessarily transformative of the architecture of international legal regimes, could at least shift their implementation in productive ways.

One problem with the resilience narrative is that it may transfer responsibility for the preservation of culture — and, more importantly, its loss — on to those who move. Investment in cultural heritage has been largely absent from climate policies,<sup>107</sup> and as Gül Aktürk and Martha Lerski note, precisely whose heritage survives 'depends on how resettled groups are integrated in receiving communities'.<sup>108</sup> These narratives can be shifted through greater inclusion of Pacific voices and worldviews in heritage processes, by making it clear that those moving are not diminishing or losing culture, but transforming it on the basis of an ongoing and productive relationship not (only) with territory, but also with an ocean that connects and enlivens these cultures.

There is a pathway, therefore, for Pacific peoples to be more integral in how we implement international legal responses to the Anthropocene. Pacific worldviews are valuable especially in thinking about the meaning and import of mobility and resilience. The 2018 *Global Compact for Safe, Orderly and Regular Migration* reflects a political commitment by states to develop 'adaptation and resilience strategies' to counter the impacts of climate change, 'taking into account the potential implications for migration'<sup>109</sup> and 'promoting sustainable outcomes that increase resilience and self-reliance'.<sup>110</sup> The *Commentary to the Sydney Declaration of Principles on the Protection of*

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<sup>106</sup> Lucas Lixinski, 'Heritage Law in Pacific Island States: The Legacies of Colonialism and the Elusive Possibilities of Cultural Emancipation', in Margaretha Wewerinke-Singh and Evan Hamman (eds), *Environmental Law and Governance in the Pacific: Climate Change, Biodiversity and Communities* (Routledge, 2020) 215.

<sup>107</sup> Victoria Herrmann, 'Climate Change Poses a Threat to Cultural Heritage', *Scientific American* (Blog Post, 16 May 2019) <<https://blogs.scientificamerican.com/observations/climate-change-poses-a-threat-to-cultural-heritage/>>, archived at <<https://perma.cc/9JA4-3LJ4>>.

<sup>108</sup> Aktürk and Lerski (n 48) 309.

<sup>109</sup> *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195, UN GAOR, 73<sup>rd</sup> sess, 60<sup>th</sup> plen mtg, Agenda Items 14 and 119, UN Doc A/RES/73/195 (11 January 2019, adopted 19 December 2018) annex para 18(i).

<sup>110</sup> *Ibid* annex para 18(k).

*Persons Displaced in the Context of Sea Level Rise*, adopted by the International Law Association in 2018, highlights the capacity of migration *itself* as a form of adaptation and resilience-building.<sup>111</sup> What these frameworks do not do, however, is acknowledge how different cultural identities and epistemologies inform these findings and how they should shape their implementation.

Likewise, resilience is a key objective of international disaster risk reduction and frameworks, which could be framed differently depending on views on culture and heritage, and the role of resilience in changing the implementation of these regimes. The *Sendai Framework for Disaster Risk Reduction* prioritises investment ‘to enhance the economic, social, health and cultural resilience of persons, communities, countries and their assets, as well as the environment’,<sup>112</sup> including to ‘protect or support the protection of cultural and collecting institutions and other sites of historical, cultural heritage and religious interest’.<sup>113</sup> It also encourages policies ‘addressing disaster-induced human mobility to strengthen the resilience of affected people and that of host communities’,<sup>114</sup> and recognises that ‘[m]igrants contribute to the resilience of communities and societies, and their knowledge, skills and capacities can be useful in the design and implementation of disaster risk reduction’.<sup>115</sup> Indeed, Holtorf suggests that ‘migrants often have an *enhanced* capability to become aware of and embrace cultural change in new and hybrid forms’.<sup>116</sup> The connection between resilience and heritage in this framework is important, as it reminds us that heritage is not (only) a victim of disasters, but it is also part of the solution; therefore, heritage, and the identities and epistemologies that come with it, should be part of the implementation of these frameworks.

Scholars, too, have argued that preserving cultural practices among displaced or migrant communities can enhance resilience by supporting ‘collective identity and self-esteem’.<sup>117</sup> In that context, Carol Farbotko et al argue that a strong ‘place attachment’ to home can be an asset, rather than a hindrance, to successful resettlement if community activities and practices are maintained.<sup>118</sup> Some Pacific peoples, though, are choosing to ‘be immobile in a changing climate and to stay on Indigenous lands for cultural and spiritual reasons’, viewing climate change as ‘an existential threat to Indigenous culture, identity, and connections to land and sea’.<sup>119</sup> These varying attitudes reflect the ambivalent connection between territory and land that we have underscored above and, as we suggested, they can be focal points of productive fissures in international legal responses. But international law should not become, by mere path dependency, a reason

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<sup>111</sup> Vidas, Freestone and McAdam (n 5) 61. See also Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* (Report, December 2015) vol 1, 8–9.

<sup>112</sup> *Sendai Framework for Disaster Risk Reduction 2015–2030*, GA Res 69/283, UN GAOR, 69<sup>th</sup> sess, 92<sup>nd</sup> plen mtg, Agenda Item 19(c), UN Doc A/RES/69/283 (23 June 2015, adopted 3 June 2015) annex II para 29.

<sup>113</sup> *Ibid* annex II para 30(d).

<sup>114</sup> *Ibid* annex II para 30(l).

<sup>115</sup> *Ibid* annex II para 36(a)(vi).

<sup>116</sup> Holtorf (n 56) 646 (emphasis added).

<sup>117</sup> *Ibid* 640. See also Aktürk and Lerski (n 48).

<sup>118</sup> Farbotko et al (n 55) 400.

<sup>119</sup> *Ibid* 398 (citations omitted).

why these arguments receive a greater weight than others that posit mobility as possible and welcome. Instead, what this teaches us is that it is the position of peoples, rather than territories, that matters most. That at times peoples and territories align is irrelevant, even if consequential.

Legal responses to movement should embrace culture as part of the change and implementation of mobility frameworks, rather than seeing culture and cultural heritage as victims. We note that some disruption will exist, seen through the ambiguous relationships to land we documented in the previous sections, but ultimately Pacific epistemologies teach those on the outside that we are too quick to victimise populations and their culture based on outsiders' own understandings of territory, and there is more to adaptation and resilience if those in charge of designing and implementing these legal frameworks allow those affected by the regimes to lead the way.

Our argument, of course, does not provide an authorisation to disregard the risks to culture. Rather, our point is that the key is to allow peoples to manifest their views through their own epistemologies. In other words, Pacific voices are important not with an eye to fitting existing preconceptions of how international legal regimes can or should operate. Instead, they can and should change existing frameworks to better serve their needs and interests.

## V CONCLUDING REMARKS

Pacific epistemologies are currently missing from international legal responses to the Anthropocene. International cultural heritage law helps us find a path for different relationships with the ocean to influence the ways in which we perceive the boundedness of international legal categories. Pacific histories and voices show that territory is not just land and can be the ocean itself, paving the way for reimagining mobility and resilience — key pieces in legal frameworks that respond to the Anthropocene. As we reimagine these categories, one lesson is clear: current international legal categories that constrain the way we interact with the world have not reflected all worldviews, and without concerted action, will continue to fail to do so. It is imperative, therefore, that Pacific peoples themselves can inform the implementation of regimes affecting them, without being bounded by colonial understandings of their territories, identities and mobilities. To do otherwise would be a missed opportunity to create and implement better legal responses to challenges of cultural heritage-safeguarding, mobility and resilience. Foregrounding and engaging Pacific voices and epistemologies will help us undo some of the colonial violence of international law — a violence we cannot afford to perpetuate as different populations enter, in their unevenly distributed and unique yet shared ways a new, Anthropocene future.