

Steps Toward a “Dignified” Climate-Migration for Pacific Peoples

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I. INTRODUCTION

In 2016, Ioane Teitiota, a Kiribati¹ citizen, made waves when he filed a complaint to the United Nations Human Rights Committee (“UNHRC”) against the New Zealand government after the country failed

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¹ Kiribati is an island country in the central Pacific Ocean, comprised of thirty-three widely scattered islands—twenty of which are inhabited. Most of the islands are low-lying coral atolls. *Kiribati*, COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/kiribati> (last visited Mar. 8, 2023).

to grant him asylum as a “climate refugee.”² A year prior, Teitiota had argued that the New Zealand Immigration and Protection Tribunal’s decision to deport him from New Zealand to Kiribati “violated his right to life” under Article 6 of the International Covenant on Civil and Political Rights (“the Covenant”).³ Teitiota testified that climate change impacts such as sea-level rise, environmental degradation, and freshwater scarcity had rendered Kiribati uninhabitable for residents like him. UNHRC determined that Teitiota’s deportation did not amount to a denial of justice at the time of the facts, and found that, despite the nation’s precarious situation, Kiribati implemented sufficient adaptive measures to build resilience to climate change detriments.⁴

Although Teitiota’s personal asylum efforts proved unsuccessful, his argument helped to establish a global precedent. The landmark judgment underscored that countries have a legal responsibility to protect people whose lives are threatened by the climate crisis while creating a pathway for potential future refugee claims on the basis of climate change.⁵ “Without robust national and international efforts,” UNHRC reasoned that “the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states.”⁶

A year after UNHRC’s decision,⁷ the 2017 United Nations Climate Change Conference (“COP23”) paved the way for new, innovative solutions.⁸ For example, New Zealand’s then-Climate Minister and co-

² *Teitiota v. Chief Exec. of the Ministry of Bus., Innovation and Emp.* [2015] NZSC 107 SC 7/2015 at [2] (N.Z.).

³ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1996) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

⁴ *Teitiota*, NZSC 107 SC 7/201, at [9]-[12].

⁵ Mélissa Godin, *Climate Refugee Cannot Be Forced Home, U.N. Panel Says in Landmark Ruling*, TIME (Jan. 20, 2020, 1:04 PM), <https://time.com/5768347/climate-refugees-un-ioane-teitiota/>.

⁶ *Teitiota*, NZSC 107 SC 7/201, at [6]; G.A. Res. 2200A (XXI), *supra* note 3 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”). “Non-refoulement” is a refugee’s right not to be expelled from one state to another, especially to one where his or her life or liberty would be threatened. BLACK’S LAW DICTIONARY (11th ed. 2019).

⁷ See Matt Richtel, *Everyone Needs to Act: What to Expect From Climate Talks in Morocco*, N.Y. TIMES (Nov. 3, 2016).

⁸ Several Pacific “climate refugee” cases following *Teitiota* contributed to New Zealand’s relatively developed body of law on climate change and refugees, including AC (Tuvalu) [2014] NZIPT 800517-520 (N.Z.) (holding that the negative impacts were not a result of persecution based on Refugee Convention grounds when a Tuvaluan family sought refugee status because of the effects of climate change in their home nation) and

leader of the Green party, Mr. James Shaw, announced a world first:⁹ an “experimental humanitarian visa” category for Pacific Islanders¹⁰ displaced by climate change (“climate visa”).¹¹ The program would allow 100 people per year affected by climate change to enter New Zealand for a limited trial period of six years.¹² New Zealand sought to demonstrate global leadership in tackling the climate crisis and its commitment to serving its Pacific neighbors through the “pilot” visa. The media quickly illustrated New Zealand’s proposition as a mark of national rectitude and proactivity.¹³

Six months later, the plan fell through.¹⁴ Pacific communities and governments pushed back against the idea of mass relocation as a foregone

AD (Tuvalu) [2014] NZIPT 501370-371 (N.Z.) (granting a Tuvaluan family visas to remain in the country due to the adverse effects of climate change on their home nation under general humanitarian provision).

⁹ OFF. OF THE MINISTER FOR CLIMATE CHANGE, CABINET ENV’T, ENERGY AND CLIMATE COMM., FRAMEWORK FOR CLIMATE CHANGE POLICY AND KEY UPCOMING DECISIONS 7 (2018); Nina Hall, *New Zealand: A Global Leader on Climate Change and Displacement?*, ASIA & PAC. POL’Y SOC’Y (June 25, 2019), <https://www.policyforum.net/new-zealand-a-global-leader-on-climate-and-displacement/>.

¹⁰ The Pacific region, as discussed in this paper, is comprised of thousands of islands and territories throughout the Central and South Pacific Ocean. As such, the exact number of countries in this group is often contested. Here, I use the expression, “Pacific Ocean States” (“POS”) and “Pacific communities” to refer to those Pacific Island countries that are member nations of the Pacific Island Forum, which include Australia, Cook Islands, the Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu. They also include Tokelau as an associate member. *The Pacific Islands Forum*, <https://www.forumsec.org/who-we-are-pacific-islands-forum/> (last visited Mar. 8, 2023).

¹¹ The proposed visa was posited as a “humanitarian visa” but is often—especially in media coverage of the topic—interchangeably referred to as a “climate refugee visa.” Helen Dempster & Kayly Ober, *New Zealand’s “Climate Refugee” Visas: Lessons for the Rest of the World*, CTR. FOR GLOBAL DEV., (Jan. 10, 2020) <https://www.cgdev.org/blog/new-zealands-climate-refugee-visas-lessons-rest-world>.

¹² James Shaw, *Green Party to Welcome 5,000 Refugees to New Zealand*, GREEN PARTY AOTEAROA N.Z. (June 20, 2017, 12:00 AM), <https://www.greens.org.nz/green-party-welcome-5000-refugees-new-zealand> (“The Green Party will increase the refugee quota to 4,000 places over six years, provide an additional 1000 places for church and community sponsorship, and create a new humanitarian visa of up to 100 Pacific people displaced by climate change every year.”); Mattea Mrkusic, *As New Zealand Considers a Climate Migration Visa, Pacific Islanders Fight to Stay*, WORLD:, (Nov. 3, 2017, 3:30 PM), <https://theworld.org/stories/2017-11-03/new-zealand-considers-climate-migration-visa-pacific-islanders-fight-stay>.

¹³ Rick Noack, *A Proposal in New Zealand Could Trigger the Era of Climate Change Refugees*, WASH. POST, (Oct. 31, 2017, 7:27 AM) <https://www.washingtonpost.com/news/worldviews/wp/2017/10/31/a-proposal-in-new-zealand-could-trigger-the-era-of-climate-change-refugees/>.

¹⁴ Hall, *supra* note 9; Nina Hall, *Six Things New Zealand’s New Government Needs to Do to Make Climate Refugee Visas Work*, CONVERSATION (Nov. 29, 2017 8:59

conclusion,¹⁵ demanding that Global North countries meaningfully consider proposed alternate solutions generated collectively by Pacific ocean states (“POS”).¹⁶ Those who objected the climate visa referred to the 2008 Niue Declaration on Climate Change, which recognizes “the importance of retaining the Pacific’s social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries.”¹⁷ The declaration represents an outcry against the concept of a “visa fix” that echoed across the Pacific, as individuals and groups emphasized the importance of approaches to climate-induced migration crafted by Pacific communities themselves and thus better suited to serve the region’s particular social, cultural, and environmental requirements.¹⁸ The New Zealand government was receptive to this response and changed tack accordingly: “The climate migration issue looks like it’s much broader than us coming up with a visa. Tuvaluans want to continue to be Tuvaluans.”¹⁹

One might argue that the backlash against a New Zealand-issued climate visa directly contradicts the sentiments behind Teitiota’s plea for asylum in 2016. Although this may be the case, the provision of “climate refugee” status would have been premature without carefully considering its implications for environmental justice on affected communities. Climate displacement begs the question: how might Pacific communities assert their resilience and strength, rather than vulnerability, in the face of environmental devastation?

This paper uses an expanded restorative environmental justice²⁰ approach, inspired by Professors Eric Yamamoto and Melody Kapilialoha

PM), <https://theconversation.com/six-things-new-zealands-new-government-needs-to-do-to-make-climate-refugee-visas-work-87740>.

¹⁵ Presentation by Geraldine Coutts with speaker Professor Walter Kaelin, Nansen Initiative (May 29, 2013) (transcript available at <https://reliefweb.int/report/world/climate-change-migrants-reluctant-leave-homes>).

¹⁶ Dempster & Ober, *supra* note 11.

¹⁷ Pac. Islands F. *Niue Declaration on Climate Change*, (2008), <https://www.forumsec.org/2008/02/21/the-niue-declaration-on-climate-change/>.

¹⁸ Lofa Totua, *Why the Pacific Climate Warriors Are Fighting for Climate Action in the Pacific*, NZ HERALD: VIVA, (Sept. 16, 2020), <https://www.viva.co.nz/article/culture-travel/pacific-climate-warriors-2020/>; see also Julian Aguon, *To Hell With Drowning*, ATLANTIC (Nov. 1, 2021), <https://www.theatlantic.com/culture/archive/2021/11/oceania-pacific-climate-change-stories/620570/>; Nathan Ross, *Climate Migrants Will Need More Than ‘Dignity’*, NEWSROOM (Nov. 21, 2017), <https://www.newsroom.co.nz/@future-learning/2017/11/19/61589/climate-migrants-will-need-more-than-dignity>.

¹⁹ Thomas Manch, *Humanitarian Visa Proposed for Climate Change Refugees Dead in the Water*, STUFF (Aug. 29, 2018, 18:29 PM), <https://www.stuff.co.nz/environment/106660148/humanitarian-visa-proposed-for-climate-change-refugees-dead-in-the-water>.

²⁰ This paper’s analytic framework is influenced by Professor Eric Yamamoto’s “social justice through healing” framework which draws insights from social psychology,

MacKenzie, that recognizes Pacific Islanders' spiritual, social, and cultural connections to the islands that climate change may soon steal.²¹ A holistic approach to restorative environmental justice seeks to “involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”²² As the legal world grapples with the unprecedented challenges of climate change, any discourse around climate migration for communities that unevenly bear the brunt of the climate crisis—so much so that some now face actual statelessness²³—

theology, political theory, law, economics, and indigenous healing practices to put forth an analytical framework for reparatory initiatives using the “Four Rs”: recognition, responsibility, reconstruction, and reparation. ERIC YAMAMOTO, *HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY* 72 (2021) [hereinafter JEJU TRAGEDY]. The analytic framework also incorporates elements of Melody Kapilialoha MacKenzie and others' Native Hawaiian “restorative environmental justice” variation of Yamamoto's traditional “environmental justice” model, which is typically applicable to broader indigenous peoples' claims for repair of the harms of western expansion. See Melody Kapilialoha MacKenzie, et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, in 21 NAT. RES. & ENV'T 37, 38 (2007) (“For many indigenous peoples, environmental justice is thus largely about cultural and economic self-determination as well as about belief systems that connect their history, spirituality, and livelihood to the natural environment.... [R]estorative environmental justice is in large part about doing justice through reclamation and restoration of land and culture. A new environmental justice framework thus expands the focus beyond discrimination and ill health to integrate community history, political identity, and socioeconomic and cultural needs in defining environmental problems and fashioning remedies.”); see also Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 311 (2001).

²¹ Restorative justice aims to transform how society evaluates reconciling wrongful acts with an emphasis on repairing injustice. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 162 (2007) (assessing criticisms of restorative justice); see also MacKenzie, *supra* note 20, at 38 (explaining that for indigenous people, restorative justice “is in large part about doing justice through reclamation and restoration of land and culture.”). See generally SHEILA M. MURPHY & MICHAEL P. SENG, eds., *RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH* (2015).

²² Widely known as “the grandfather of restorative justice,” American criminologist, Dr. Howard Zehr contributed significantly to the development and implementation of restorative justice across the world. Notably, his influence inspired New Zealand's reorganization of its juvenile justice system into a family-focused, restorative justice-based structure. See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 37 (2002); see also MURPHY & SENG, *supra* note 21.

²³ See Sebastien Malo, *Rising Seas Submerge Five Pacific Islands, Researchers Find*, REUTERS (May 9, 2016, 5:07 PM), <https://www.reuters.com/article/climatechange-islands-submerged/rising-seas-submerge-five-pacific-islands-researchers-find-idINKCN0Y107G>; Betsy Reed, *Tuvalu Seeks to Retain Statehood if It Sinks Completely as Sea Levels Rise*, GUARDIAN (Nov. 10, 2021, 7:49 PM), <https://www.theguardian.com/world/2021/nov/11/tuvalu-seeks-to-retain-statehood-if-it-sinks-completely-as-sea-levels-rise>.

demands scrupulous examination and incorporation of environmental justice and self-determination²⁴ principles.

This comment will demonstrate how the 2017 provision of New Zealand's climate "humanitarian" visa and subsequent rejection by Pacific communities and governments can guide future international decisions concerning climate-vulnerable countries in the Pacific. To benefit and empower climate-vulnerable communities facing displacement, polluting countries should initiate climate visa programs in consultation with POS in a manner that neither prevents polluting countries from adhering to their climate commitments nor encourages paternalistic attitudes toward potential climate migrants. An analytical framework inspired by the Tuvaluan government's values-based approach to climate diplomacy, and in close alignment with Oceania cultural values and self-determination efforts, will provide a culturally relevant and robust analysis of the climate visa's implications for Pacific peoples' access to environmental justice and ability to preserve and facilitate environmental sovereignty.²⁵ This framework represents a necessary deviation from the status quo, which fails to adequately reflect such values and cultural nuance in international environmental legal analysis and policies.

Part II will elaborate on issues of climate inequity and then dissect the existing legal framework and requirements underpinning international environmental refugee status and its shortcomings in the face of impending mass climate-induced migration. Part III will explain the contextual legal framework utilized in this paper's analysis and introduce a modified, Oceania-centered, and values-based approach. Following that will be a discussion of the complexities of imposing a climate migration scheme for the Pacific and an investigation into legal approaches to climate migration that may cultivate a climate-just and autonomous transition for those displaced.²⁶ Finally, Part IV will conclude by summarizing considerations for implementing future international climate migration policies.

²⁴ See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) (outlining the indigenous right to environmental self-determination).

²⁵ See DEP'T OF FOREIGN AFF., MINISTRY OF JUST., COMMC'N & FOREIGN AFF., GOV'T OF TUVALU, *TE SIKULAGI TUVALU FOREIGN POLICY 2020* [hereinafter *TUVALU FOREIGN POLICY*]; Simon Kofe, *Tuvalu's Future Now Project: Preparing for Climate Change in the Worst-Case Scenario*, DEVPOLICY BLOG (Nov. 10, 2021), <https://devpolicy.org/tuvalu-preparing-for-climate-change-in-the-worst-case-scenario-20211110/> [hereinafter *Tuvalu's Future Now Project*].

²⁶ IPCC, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (SUMMARY FOR POLICYMAKERS) 11 (2022) [hereinafter *SUMMARY FOR POLICY MAKERS*], <https://www.ipcc.ch/report/ar6/wg2/> (explaining that climate justice is "justice that links development and human rights to achieve a rights-based approach to addressing climate change.").

II. WHAT ARE WE FIGHTING FOR?

A. *The Environmental Wrong*

Global warming causes changes in the Earth's climate system with disproportionate impacts on the Blue Pacific,²⁷ often making the region a *cause célèbre* for those involved in climate science, media, and politics.²⁸ Notably, scholars widely recognize POS as the “frontlines of climate change,” “canaries in the coalmine,” or “hot spots of climate change.”²⁹

²⁷ Coined by Samoa's then-Prime Minister Tuilaepa Sailele at the United Nations Oceans Conference in 2017, the concept of the “Blue Pacific” is an attempt to reframe Pacific Island countries as “large ocean states, rather than “small island states.” Grant Wyeth, *Paying Attention to the Blue Pacific*, DIPLOMAT (Oct. 30, 2018), <https://thediplomat.com/2018/10/paying-attention-to-the-blue-pacific/>. Many Pacific Island countries have Exclusive Economic Zones (EEZs) that cover expansive spreads of the Pacific Ocean, “collectively making them the dominant custodians of the region's marine life and ocean health.” *Id.* In his announcement, Sailele underscored how the Pacific Ocean “is core to the region's way of life and how it has shaped the cultural and historical identity of these nations, creating an ‘inseparable link between our ocean, seas, and Pacific Island peoples: their values, traditional practices and spiritual connections.’” *Id.* I refrain from using the descriptor “Small Island Developing States” (SIDS)—except when they appear in inserted quotations from other works—as the concept of “developing” and “developed” nations purports a pejorative and western-imposed framework for hierarchizing entire societies and regions.

²⁸ See generally Olufémi O. Táiwò & Patrick Bigger, *The Global South Is Calling for Climate Reparations*, NATION (Apr. 22, 2022), <https://www.thenation.com/article/environment/climate-reparations/>; Dominic Davis, *Island Nations on Climate Crisis Frontline ‘Not Sitting Idly By’*, UN NEWS: CLIMATE & ENV'T (Sept. 26, 2019), <https://news.un.org/en/story/2019/09/1047652>; Rachel Ramirez, *Pacific Islanders Have Been Fighting Environmental Crises for Centuries, If Only the World Would Notice*, GRIST: FIX SOLS. LAB (Jun. 1, 2021), <https://grist.org/fix/pacific-islands-climate-change-innovations/>; Aniruddha Ghosal, *‘Thin’ Pacific Island Teams at COP26 Spark Fears of Inequity*, DIPLOMAT (Oct. 28, 2021), <https://thediplomat.com/2021/10/thin-pacific-island-teams-at-cop26-spark-fears-of-inequity/>; Daphne Psaedakis & Michelle Nichols, *‘Death Sentence’: Low-Lying Nations Implore on Climate at U.N.*, REUTERS (Sept. 24, 2021, 6:50 AM), <https://www.reuters.com/business/environment/death-sentence-low-lying-nations-implore-faster-action-climate-un-2021-09-23/> (discussing Pacific countries' demands for stronger political commitments to support climate action); Mark Howden, *IPCC Report: Pacific Island Nations to Bear Full Brunt*, RNZ: MORNING REP. (Aug. 10, 2021, 6:12 AM), <https://www.rnz.co.nz/national/programmes/morningreport/audio/2018807538/ipcc-report-pacific-island-nations-to-bear-full-brunt> (stating that the Pacific Island nations will disproportionately suffer the impacts of climate change in the coming decades).

²⁹ Adelle Thomas et al., *Climate Change and Small Island Developing States*, 45 ANN. REV. ENV'T & RES. 1, 2 (2020) (citing Ines de Agueda Corneloup et al., *Small Island Developing States and International Climate Change Negotiations: The Power of Moral ‘Leadership’*, 14 INT. ENV'T. AGMTS-POL. L. & ECON. 281, 289 (2014)); Adelle Thomas et al., *Small Island Developing States and 1.5°C*, 18 REG'L. ENV'T. CHANGE 2197, 2199 (2018); Nick O'Malley, *Pacific Nations Refuse to Be the Canary in the Climate Coal Mine*, SYDNEY MORNING HERALD (Oct. 6, 2021, 7:30 PM), <https://www.smh.com.au/environment/climate-change/pacific-nations-refuse-to-be-the-canary-in-the-climate-coal-mine-20211006-p58xrn.html>.

They and other “climate-vulnerable”³⁰ communities are “set to suffer first and worst,” despite their negligible contributions to the climate crisis thus far.³¹ Emerging scholarship attempts to temper this paradox by emphasizing that climate vulnerability—or “susceptibility to damage—is fundamentally shaped not only by physical exposure to environmental harms, but by pre-existing power dynamics as well as social, political, and economic realities.”³²

As early as 2001, the Intergovernmental Panel on Climate Change (“IPCC”) explained how “the countries with the fewest resources are likely to bear the greatest burden of climate change in terms of loss of life and relative effect on investment and economy.”³³ Later evidence suggested that climate change will unduly devastate two groups: the poor and those living in island states.³⁴ Therein lies the moral crux intrinsic to the climate issue: climate change presents not only an environmental crisis, but an inequality crisis on multiple levels—that is, access among citizens of a given state will likely be unequally distributed based on socioeconomics, geographic location, gender, age, health conditions, and disaster preparedness.³⁵

The islands of the Pacific region are prone to hazards due to their shared geographic and geological exposure to hydrometeorological events such as floods, storm surges, droughts, and tropical cyclones; and geophysical phenomena such as earthquakes, volcanic eruptions, and

³⁰ The IPCC defines vulnerability as “the propensity or predisposition to be adversely affected and encompasses a variety of concepts and elements, including sensitivity or susceptibility to harm and lack of capacity to cope and adapt.” SUMMARY FOR POLICYMAKERS, *supra* note 26, at 7.

³¹ Maxine Burkett, *Climate Reparations*, 10 MELB. J. INTL. L. 1, 1 (2009) [hereinafter *Climate Reparations*].

³² Autumn Bordner, *Climate Migration & Self-Determination*, 51 COLUM. HUM. RTS. L. REV. 183, 186 (2019) (“In Oceanic states and other decolonizing geographies, colonial legacies have created vulnerability by perpetuating harmful narratives, reducing resiliency to climate impacts, and circumscribing the range of adaptation possibilities.”).

³³ AFR. DEV. BANK ET AL., POVERTY AND CLIMATE CHANGE: REDUCING THE VULNERABILITY OF THE POOR THROUGH ADAPTATION 5 (2003) (citing IPCC, Rep. of Working Grp. II on *Climate Change 2001: Impacts, Adaptation and Vulnerability* (2001)).

³⁴ *Climate Change and the Poor: Adapt or Die*, ECONOMIST: INT’L (Sept. 11, 2008), <https://www.economist.com/international/2008/09/11/adapt-or-die>.

³⁵ Tony Weir et al., Social and Cultural Issues Raised by Climate Change in Pacific Island Countries: An Overview, 17 REG’L ENTL. CHANGE 1017-1028, 1024 (2017); *See Social Dimensions of Climate Change*, WORLD BANK, <https://www.worldbank.org/en/topic/social-dimensions-of-climate-change#1> (last visited Feb. 22, 2023, 6:26 PM) (describing climate change as inextricably linked to global inequality); *see also* Jamey Anderson, “People Are More Important”: A Conversation with Aote Tong, CONSERVATION INT’L, (June 7, 2017), <https://www.conservation.org/blog/people-are-more-important-a-conversation-with-aote-tong> (explaining that Kiribati’s President Tong believes climate change “to be the greatest moral challenge facing humanity at this time — at any time.”).

tsunamis.³⁶ While these events are not new to Pacific countries, climate change is recognized as a “threat multiplier”³⁷ that can exacerbate pre-existing extreme weather patterns and other challenges affecting POS, such as limited access to natural resources, physical remoteness from major markets, and small geographic size.³⁸ This domino-like cascade of climate events is already having a major impact on POS’ society, economies, and ecosystems.³⁹

Increased carbon dioxide emissions in the atmosphere severely threaten the stability of the region’s ecosystems and communities.⁴⁰ Rising temperatures resulting from higher carbon concentrations contribute to severe changes in rainfall, with resultant impacts on water supply for society, agriculture, and ecosystems.⁴¹ Together, rapid melting of ice sheets and tropical glaciers,⁴² and subsequent sea-level rise introduce a host of problems such as the depletion of freshwater supplies and food sources, degradation of coastal and oceanic environments, and human

³⁶ ASIAN DEV. BANK, *Moving from Risk to Resilience: Sustainable Urban Development in the Pacific*, 1 (2013), <https://www.adb.org/sites/default/files/publication/30367/moving-risk-resilience.pdf>; J. Scott Hauger, *Climate Change Challenges to Security in the Pacific Islands Region and Opportunities for Cooperation to Manage the Threat*, in REG’LISM, SEC., & COOP. IN OCEANIA 147, 147 (Rouben Azizian et al. eds., 2015).

³⁷ Isabelle Caltabiano, *U.S. Intelligence Community Recognizes Climate Change in Worldwide Threat Assessment*, WOODROW WILSON INT’L CTR. SCHOLARS: ENV’T CHANGE & SEC. PROGRAM (Feb. 5, 2019), <https://www.newsecuritybeat.org/2019/02/u-s-intelligence-community-recognizes-climate-change-worldwide-threat-assessment/> (depicting the 2019 Worldwide Threat Assessment of the US Intelligence Community’s characterization of climate change as a threat that is “likely to fuel competition for resources, economic distress, and social discontent through 2019 and beyond.”).

³⁸ *Climate Change Recognized as a ‘Threat Multiplier’*, UN Security Council Debates Its Impact on Peace, UN NEWS: CLIMATE & ENV’T (Jan. 25, 2019), <https://news.un.org/en/story/2019/01/1031322>.

³⁹ See Secretariat of the Pacific Regional Environment Programme (SPREP), *Factsheet: Pacific Climate Change*, at 2, SPREP Factsheet No. PF-003 (Aug. 2008), <https://www.sprep.org/attachments/Publications/FactSheet/pacificclimate.pdf> (listing current climate change impacts such as: sea-level rise; intensified weather events; water shortages; increases in drought; health issues; unstable levels of food production; and ecological disturbances to the Pacific’s biodiversity); see also Kristi Eaton, *Global Warming is a Matter of Survival for Pacific Islander Women*, NBC NEWS: ASIAN AMERICA (Mar. 28, 2017, 9:13 AM), <https://www.nbcnews.com/news/asian-america/global-warming-matter-survival-pacific-islander-women-n739581> (“Environmental disasters can increase the severity of violence in an abusive relationship because women are separated from support networks that offer protection.”).

⁴⁰ SUMMARY FOR POLICYMAKERS, *supra* note 26, at 4.

⁴¹ *Id.* at 6.

⁴² *Sea Level, Vital Signs of the Planet*, NASA, <https://climate.nasa.gov/vital-signs/sea-level/> (last updated Feb. 21, 2023).

displacement.⁴³ For low-lying atoll nations like Kiribati, Tuvalu, and the Republic of the Marshall Islands, rising sea levels constitute an immediate and existential threat to these nations' inhabitability.⁴⁴

The social cohesion and cultural existence of climate change-affected Pacific communities are also at risk. Dr. John Campbell, who has researched population and environmental issues in Pacific Island countries since the 1970s, aptly points to the "essential link" between Pacific Island people and their land, which poses major problems not only for those forced to leave but also for communities within the region that may be required to give up land for relocatees.⁴⁵ Pacific Islanders largely see not only their wealth, but their identity, rooted in—and inseparable from—the land. In fact, for some Pacific nations, the word for placenta is the same as soil (which many islands share in variations, including "*fenua*," "*fonua*," "*fanua*," or "*whenua*").⁴⁶ The island and islander are one, and the connection between the two entities constitutes a spiritual and reciprocal bond reliant on the other's physical existence; the bond shapes nearly every aspect of a Pacific person's individual and collective identity. Likewise, land and *culture* are inextricably linked, so being forced to migrate to another's land or to another country represents a "threat to the continued identity and culture of a people."⁴⁷

B. *Existing Refugee Framework and its Inadequacy in the Face of Climate Migration*

Climate-induced migration functions as perhaps one of the strongest indicators of the current international legal system's unpreparedness to achieve climate justice.⁴⁸ Large-scale climate migration presents an unprecedented legal hurdle that lays bare the inadequacies and gaps in our

⁴³ Sabira Coelho, *How Climate Change Affects the Pacific*, blog in MIGRATION DATA PORTAL: TYPES OF MIGRATION, <https://www.migrationdataportal.org/blog/how-climate-change-affects-pacific> (last updated on Dec. 20, 2019).

⁴⁴ Hauger, *supra* note 36.

⁴⁵ John Campbell, *Climate Change Migration in the Pacific*, 26 THE CONTEMP. PAC. 1-28, 28 (2014).

⁴⁶ Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011) [hereinafter *The Nation Ex-Situ*]; Brian Kāfakafa Dawson, *Car(ry)ing Tongan: Ideologies from Tongan Punake on Language, Land, and Tauhi Vā* 13 (May 2016) (M.A. thesis, University of Hawai'i) (on file with author) ("*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.").

⁴⁷ Weir et al., *supra* note 35, at 7.

⁴⁸ Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and New Theory of Justice*, 53 HARV. C.R.-C.L. REV. 445, 462 (2018) [hereinafter *Behind the Veil*].

current international refugee and environmental law frameworks.⁴⁹ Whether unevenly tilting the international bargaining table or being copiously harvested from fossil fuels, issues of power and the industrialized North's historical contributions to the climate crisis particularly relate to climate migration.⁵⁰

Cross-border movement will necessitate a pronounced expansion of laws and related institutions capable of both protecting displaced persons and increasing the capacity of host countries and populations.⁵¹ A cross-border migration may also precipitate heavy input from multiple areas of international law, including human rights law, property law, indigenous rights, environmental law, and refugee law.⁵² The broad scope of involvement from so many relevant fields of law demands intensified coordination and exposes a “crippling compartmentalization of related legal regimes at a time when convergence is peculiarly necessary.”⁵³

Though often referred to as “climate refugees,”⁵⁴ the situation facing environmentally uprooted individuals and communities does not typically resemble those of political refugees⁵⁵ because the definition of “refugee” under the U.N. Refugee Convention requires both the demonstration of persecution and that the persecution be perpetrated based on a specific characteristic.⁵⁶ Legal scholars largely agree that international refugee law “does not provide protection in spirit or in language”⁵⁷ per se. Climate migration may allow for a climate migrant to be granted asylum: (1) if individuals are denied assistance or protection from authorities based on their race, nationality, religion, or identification with a certain group when sudden- or slow-onset events occur and are subjected to persecution; or (2) if dwindling natural resources gave rise to persecution targeting members of the above classifications during periods of violence, conflict, or

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Media representations of environmental displacement often describe displaced persons a “climate refugees”. See, e.g., Tanja Dreher and Michelle Voyer, *Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific*, 9 ENV'T COMM'N 58, 60 (2015).

⁵⁵ See U.N. Conf. of Plenipotentiaries on the Status of Refugees & Stateless Persons, *Final Act and Convention Relating to the Status of Refugees*, U.N. Doc. A/CONF.2/108 (July 28, 1951) (defining “refugee”).

⁵⁶ *Id.* at art. 1(2) (persecution due to race, religion, nationality, members of a particular social group or political opinion.).

⁵⁷ *Behind the Veil*, *supra* note 48, at 465.

deprivation of human rights.⁵⁸ Because climate change effects (e.g., global warming) typically cannot be traced to a single perpetrator, characterizing them as a form of persecution may not be possible within the existing international refugee law framework.⁵⁹ The category of climate migrants as “refugees” remains undefined in international law and those affected are without legal protections to which they can appeal.⁶⁰

Statelessness for POS pose an especially perplexing challenge, as those most at risk of losing their lands—where their children were born, and their ancestors laid to rest—lack legal recourse for potential territorial loss. The Convention on the Status of Stateless Persons defines a “stateless person” as one “who is not considered as a national by any State under the operation of its law.”⁶¹ On its face, the Convention does not indicate whether the status of statelessness could apply to an entire POS’ population. Nor does it proffer guidance regarding admittance to another country.⁶² As such, the legal “safety net” for climate migrants—both in terms of definition and effective implementation—remains virtually non-existent,⁶³ and the international legal regime stands grossly ill-equipped to effectively address the emerging crisis of climate-induced migration.

The adoption of a hard law principle that can bind state parties is desperately wanting, but international legal and policy responses to climate migration have been slow to emerge.⁶⁴ Climate-vulnerable communities waited twenty years after the IPCC’s first statement on climate change and human mobility for the United Nations Framework Convention on Climate Change (“UNFCCC”) to explicitly confront the issue.⁶⁵ A proposal to include a “climate change displacement facility” in the Paris Agreement negotiations was rejected due to opposition from Australia, which elected

⁵⁸ See Div. of Int’l Prot., U.N. High Comm’r for Refugees, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, at 13-16, U.N. Doc. PPLA/2012/01 (Feb. 2012); see also, Graeme Hume, *Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES (Jane McAdam ed. 2010) (arguing that climate change will not only induce population displacement, but also affect existing migration patterns).

⁵⁹ See Div. Of Int’l Prot., *supra* note 58, at 13-16; Hume, *supra* note 58.

⁶⁰ *Behind the Veil*, *supra* note 48, at 464.

⁶¹ U.N. High Comm’r of Refugees, Convention Relating to the Status of Stateless Persons, art. I(1), 360 U.N.T.S. 117 (Sept. 28, 1954).

⁶² *Behind the Veil*, *supra* note 48, at 467.

⁶³ *The Nation Ex-Situ*, *supra* note 46, at 350.

⁶⁴ *Id.* at 465.

⁶⁵ *Id.* (citing Conf. of the Parties to the U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session*, U.N. Doc. FCCC/CP/2010/7/Add.1, at 5 (Mar. 15, 2011) [hereinafter UNFCCC]).

to “work closely with [their] Pacific partners on these important issues.”⁶⁶ Instead, the Paris Agreement, a non-binding decision, called for a task force to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”⁶⁷ Overall—and with the exception New Zealand and its proposed climate visa⁶⁸—governments are not expeditious in establishing climate migration policies.

III. A VALUES-BASED ANALYTICAL FRAMEWORK

This paper employs a contextual framework that seeks to uplift a values-based approach by utilizing it as an analytic framework that is in alignment with Pacific cultural values. In Tuvalu’s 2020 Foreign Policy,⁶⁹ Tuvaluan Minister for Justice, Communication and Foreign Affairs, Simon Kofe points to the colonial imposition of Western frameworks that underlie current foreign affairs, and the attendant erasure of Pacific traditional diplomatic systems which shaped relations between tribes and clans pre-Western contact.⁷⁰ He calls for a “paradigm shift toward more responsible and ethical foreign affairs” and a “balanced” framing of POS that recognizes its strength and resilience.⁷¹

One important component of this shift includes the promotion of a values- or culture-based approach to diplomacy based on three Tuvaluan values: *tu tokotasi* (self-determination or independence), *kaitasi* (shared ownership of responsibility), and *fale pili* (moral responsibility or being a

⁶⁶ Oliver Milman, *UN Drops Plan to Help Move Climate-Change Affected People*, GUARDIAN: ENV’T (Oct. 6, 2015, 8:20 PM), <https://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people> (discussing how the U.S., British, and French governments—Australia’s tradition “allies”—indicated they were open to the idea.).

⁶⁷ UNFCCC, Adoption of the Paris Agreement, para. 50, U.N. Doc. FCCC/CP.2015/L/9/Rev.1 (2015).

⁶⁸ Alex Randall, *New Zealand Proposes Humanitarian Visa for ‘Climate Refugees’*, MEDIUM: DIPLOMAT MAG. (NOV. 30, 2017), <https://medium.com/alex-randall/new-zealand-proposes-humanitarian-visa-for-climate-refugees-b78687d853cf>.

⁶⁹ Tuvalu, formerly known as the Ellice Islands, is a country in the west-central Pacific Ocean composed of nine small atolls. A member of the South Pacific Forum, Tuvalu is a constitutional monarchy within the Commonwealth and is governed under a parliamentary democracy. *Tuvalu*, COMMONWEALTH, <https://thecommonwealth.org/our-member-countries/tuvalu> (last visited Apr. 10, 2023).

⁷⁰ TUVALU FOREIGN POLICY, *supra* note 25; see Salā George Carter et al., *Oceanic Diplomacy: An Introduction* 1-2 (Australian Nat’l Univ., Working Paper, In Brief doi: 10.25911/T84Y-DG87).

⁷¹ TUVALU FOREIGN POLICY, *supra* note 25, at 2 (proposing a “paradigm shift where ideas of Tuvalu as vulnerable, financially incapable, and small are balanced with recognition of the innovation, creativity, and strength that have emerged from these ‘disadvantages.’”).

good neighbor).⁷² Tuvalu's 2020 Foreign Policy emphasizes these particular values as a means of motivating industrialized nations to recognize their shared responsibility to combat climate change and sea-level rise for the well-being of humanity.

Tuvalu's cultural values overlap with those of many other countries in the Pacific region and can be loosely classified under the major themes of interdependence, consensus and non-confrontation, and hospitality. However, such communal themes are unique when compared to Western cultures and systems of diplomacy, which are often characterized by individualism, open confrontation, and, in some cases, secularism.⁷³

By asserting communal—and even religious or spiritual—values in international diplomatic engagements, Tuvalu hopes to “reverse the inward-looking and nation-centered approaches that have allowed climate change to so decisively take hold of and threaten us all.”⁷⁴ Adoption of these approaches is conducive to establishing a world in which morality and cooperation prevails, and the oneness of humanity is recognized and manifested through justice. In truth, nothing short of a unified vision can serve as the foundation upon which sustainable societies can be built and existential environmental crises averted.

A values-based approach to domestic and international relations has long existed in Tuvalu and other POS, but Australia-based Pacific researchers and individuals like Salā George Carter have recently formalized the concept as “ocean diplomacy.”⁷⁵ They argue that “the existence and contemporary significance of [Pacific] diplomatic ideas and practices have been underexplored and undervalued,”⁷⁶ and emphasize the importance of connectedness, culture, and kinship in Indigenous diplomacies and non-Western diplomatic systems.⁷⁷

Using an analytical framework that is consistent with the restorative justice and self-determination efforts of POS, the next section of this paper will expand on the implications of each of the three values and apply them to the issue of climate migration. *Kaitasi* and *fale pili* are both centered around the theme of “responsibility” and will therefore be discussed in tandem, with an emphasis on those characteristics and implications that overlap.

As thematic undercurrents for this analysis, I refer to elements of frameworks introduced by two influential legal scholars of restorative

⁷² *Id.* at 10-11.

⁷³ Kofe, *supra* note 25.

⁷⁴ *Id.* at 2.

⁷⁵ Carter et al., *supra* note 70, at 1.

⁷⁶ *Id.*

⁷⁷ *Id.*

justice: Yamamoto's⁷⁸ "social healing through justice" framework⁷⁹ and MacKenzie's⁸⁰ "environmental restorative justice."⁸¹ These undercurrents will be used to analyze the implications of New Zealand's 2017 climate visa provision and to explore how international legal decisions about climate migration could more efficiently further environmental justice and facilitate environmental self-determination for Pacific Islanders facing displacement.

A. *Tu Tokotasi: Self-Determination and Environmental Justice in the Context of Climate Change and Climate-Induced Migration*

Tu tokotasi is a peoples' prerogative to determine their own fate that our international legal system consecrates as the fundamental right to self-determination.⁸² *Tu tokotasi* entitles all peoples to make free and genuine decisions about their status and future.⁸³ Recognized as a "precondition for the enjoyment of other human rights,"⁸⁴ self-determination is predominantly accepted as *jus cogens*, a preemptory norm of international

⁷⁸ Eric K. Yamamoto is the Fred T. Korematsu Professor of Law and Social Justice at the University of Hawai'i at Mānoa, William S. Richardson School of Law. Professor Yamamoto is known for his legal work and scholarship on racial justice, with particular emphasis on redress for historic injustice, redress, and reconciliation.

⁷⁹ JEJU TRAGEDY, *supra* note 20.

⁸⁰ Melody Kapilialoha MacKenzie is a Professor of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian Law, University of Hawai'i at Mānoa, William S. Richardson School of Law. Professor MacKenzie's scholarship primarily focuses on Native Hawaiian and Indigenous rights through the lens of restorative justice.

⁸¹ MacKenzie et al., *supra* note 20.

⁸² The right is codified in the first article of both fundamental international human rights conventions, the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights. G.A. Res. 2200A (XXI) International Convention on Economic, Social and Cultural Rights art. 1, 993 (Dec. 16, 1966 [hereinafter ICESCR]; G.A. Res. 2200A (XXI) International Covenant on Civil and Political Rights, art. 1, 999 (Dec. 16, 1966) [hereinafter ICCPR]. It was also recognized in the U.N. Charter, multiple U.N. resolutions, International Court of Justice (ICJ) decisions, and in various regional instruments and tribunals. *E.g.*, U.N. Charter art. 74; East Timor (Port. V. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 I.C.J. 240, 243 (June 26); G.A. Res. 25/2625, Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, at 122-24 (Oct. 24, 1970).

⁸³ Sahara Occidental, Advisory Opinion, 1975 I.C.J. 12, ¶ 51 (Oct. 16) ("through successive resolutions which recommend that the population should be consulted as to its own future, the General Assembly has recognized the right of the people of Western Sahara to exercise free and genuine self-determination....").

⁸⁴ Press Release, General Assembly, Self-Determination Integral to Basic Human Rights, Fundamental Freedoms, Third Committee Told as It Concludes General Discussion, U.N. Press Release GA/SHC/4085 (Nov. 5, 2013).

law, accompanying prohibitions on torture, genocide, and slavery that are legally binding on all states and leave no room for derogation.⁸⁵

The U.N. Declaration on the Rights of Indigenous Peoples (“UNDRIP”) proffers no definition of self-determination⁸⁶ but applies this right specifically to the context of indigenous groups.⁸⁷ Article 3 states, “Indigenous 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.”⁸⁸

UNDRIP also affirms that native peoples hold the right to “practice and revitalize their cultural traditions and customs... includ[ing] the right to maintain, protect and develop the past, present and future manifestations of their cultures.”⁸⁹ By mandating legal protection of the values central to Indigenous peoples’ experiences, UNDRIP serves as a means by which decision-makers may actualize restorative justice, especially with respect to climate change and potential climate migration.⁹⁰ Professor Rebecca Tsosie, a leading scholar tracing the harmful impact of climate change on Indigenous peoples, explains that UNDRIP “articulates a basis for recognizing a right of environmental self-determination that preserves the relationship between indigenous peoples and their traditional lands for cultural and moral reasons.”⁹¹ This resonates with the concept of *tu tokotasi* in that a POS’ ability to exercise self-determination is dependent on the existence of a healthy natural environment⁹² and maintaining “permanent

⁸⁵ Int’l L. Comm’n., Rep. on the Work of Its Sixty-sixth Session, U.N. Doc. A/69/10, annex (2014) (providing a non-exhaustive list of *jus cogens* norms “that are clearly accepted and recognized include[ing] the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”).

⁸⁶ For the purposes of this commentary, self-determination can be defined as the right “to be full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.” Cultural Survival, *The U.N. Declaration on the Rights of Indigenous Peoples Turn 14* (Sept. 3, 2021) <https://www.culturalsurvival.org/news/un-declaration-rights-indigenous-peoples-turns-14>.

⁸⁷ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, (III), U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter G.A. Res. 61/295].

⁸⁸ *Id.*

⁸⁹ *Id.* at (XI).

⁹⁰ D. Kapua‘ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV’T. L. J. 158, 195 (2016) (“One starting point is to look at the restorative justice values for native peoples that are embodied in the human rights principles of self-determination.”).

⁹¹ Tsosie, *supra* note 24, at 1665.

⁹² See Tekau Frere et al., *Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati*, 129 YALE L. J. 648

sovereignty over their natural resources.”⁹³ As Tsosie observed, “[I]ndigenous peoples and the lands that sustain them are closely linked through ancient epistemologies that organize the universe quite differently than Western epistemology does.” The loss of habitable territory would strip displaced peoples of their “independence, sovereignty, and self-government—all core aspects of self-determination.”⁹⁴

The concept of environmental self-determination underlying *tu tokotasi* also includes the enjoyment of other core human rights such as economic, social, and cultural development—all severely threatened by climate change. A 2015 UNHRC meeting acknowledged this sentiment when senior United Nations (“U.N.”) officials joined high-level delegates from POS on the frontline of the battle against the climate crisis to assess the possibly devastating effects of climate change on human rights.⁹⁵ The meeting—attended by Kiribati’s President Anote Tong and Tuvalu’s Prime Minister Enele Sopoaga—opened with an intervention by Deputy U.N. High Commissioner for Human Rights Flavia Pansieri, who emphasized that man-made climate change compromises “the rights to health, to food, to water and sanitation, to adequate housing and—for the people of small island states and coastal communities—even the right to self-determination.”⁹⁶ Another UNHRC spokesperson, Rupert Colville, pointed out that if the islands of Kiribati and Tuvalu are to disappear, “gone with them will be all the trappings of a modern state—government buildings, courts, hospitals and schools. That will undermine those States’ peoples’ right to self-determination.”⁹⁷

1. Environmental Self-Determination: Participatory and Democratic Decision-Making Processes

Tu tokotasi emphasizes the required implementation of a democratic and participatory process by which decisions about Indigenous people’s futures can be made as a key component of the right to self-determination.⁹⁸

(2020) (examining the nexus of climate change and self-determination, particularly for low-lying atoll states and other entities at the front lines of climate change).

⁹³ Bordner, *supra* note 32, at 188 (“To the extent Oceanic peoples do not wish to abandon their homelands, climate migration would abrogate their fundamental human right to self-determination: the right to free and genuine choices about their status and future.”).

⁹⁴ *Id.*

⁹⁵ *Climate Change ‘Threatens Self-Determination’ of Citizens in Island States, UN Rights Council Told*, UN NEWS (Mar. 6, 2015), <https://news.un.org/en/story/2015/03/492752>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. J. INT’L L. 155-190 (2006) (arguing that indigenous sovereignty is inclusive of participatory rights in decision-making

In the epoch of the democratic governance model, “good governance demands proactive citizens and civil society that can *participate and contribute to the decision-making process*.”⁹⁹ The importance of such a process is reflected in Article 18¹⁰⁰ and 27 of UNDRIP.¹⁰¹

Professor D. Kapua‘ala Sproat, an expert in Native Hawaiian rights, Indigenous rights, and natural resource protection and management, explains that for Indigenous peoples, the concept of democracy (and decentralized government) correspond with principles of cultural integrity to create a “*sui generis* self-government norm.”¹⁰² This norm “upholds the accommodation of spheres of governmental or administrative autonomy for indigenous communities, while at the same time upholding measures to ensure their *effective participation* in all decisions affecting them left to the larger institutions of government.”¹⁰³ Applied here, Sproat’s view acknowledges the need for POS to be vanguards of decision-making processes related to climate-induced transboundary movements and to be empowered as such. Adequate representation and democratic participation of POS in climate migration discussions ensures that their self-determination interests are meaningfully brought to the negotiating table in a way that fosters trust and transparency between all parties involved.

2. The Role of Free, Prior, and Informed Consent in Facilitating Environmental Self-Determination

Under UNDRIP principles, the facilitation of a democratic and participatory decision-making process involving Indigenous peoples explicitly invokes the right to free, prior, and informed consent (“FPIC”), a

processes—especially in matters related to culture and life).

⁹⁹ Rashwet Shrinkhal, “*Indigenous Sovereignty*” and *Right to Self-Determination in International Law: A Critical Appraisal*, 17 ALTERNATIVE, 71 (2021).

¹⁰⁰ G.A. Res. 61/295, *supra* note 87, at (XVIII) (“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights....”).

¹⁰¹ *Id.* (emphasis added) (“States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open, and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”).

¹⁰² Sproat, *supra* note 90, at 199 (quoting S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 355 (1994) (explaining the importance of international human rights norms of self-determination for indigenous people and Native Hawaiians in particular)); *Sui generis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“of its own kind or class; unique or peculiar”).

¹⁰³ *Id.*

derivative of the right to self-determination.¹⁰⁴ At a fundamental level, FPIC exists to protect the rights of Indigenous peoples in any decision that may affect their lands, territories or livelihoods.¹⁰⁵ It safeguards their right to give or withhold consent to these activities without fear of intimidation or coercion, within a timeframe suited to their own culture, and with the resources necessary to make informed decisions.¹⁰⁶ FPIC is:

not simply a decision-making process or a veto mechanism for the community, but a tool to ensure that outside people and organizations engage indigenous communities in a culturally appropriate way, so that their development priorities, needs, and desires can be met. A true FPIC process includes not only consultation *but also the space* for a community to give or withhold their consent to a project.¹⁰⁷

Article 6 of the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO 169”)¹⁰⁸ expands on UNDRIP’s call for FPIC when relocating Indigenous communities.¹⁰⁹ ILO 169 imposed the duty to consult Indigenous peoples on national governments for activities such as mining within Indigenous

¹⁰⁴ U.N. Comm’n on Human Rights, Sub-Comm. on the Promotion and Prot. of Hum. Rts. Working Grp. on Indigenous Populations, *Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, ¶ 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005).

¹⁰⁵ Theresa Buppert & Adrienne McKeethan, *Guidelines for Applying Free, Prior and Informed Consent: A Manual for Conservation International* (2013) https://www.conservation.org/docs/default-source/publication-pdfs/ci_fpic-guidelines-english.pdf?sfvrsn=16b53100_2.

¹⁰⁶ *Id.* at 9.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ The International Labour Organization (ILO) developed the first international convention concerning indigenous peoples in 1957. Although this treaty is influential, it was only ratified by twenty-three countries. Signatories of ILO 169 include Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, Central African Republic, Germany, Luxembourg, Denmark, Dominica, Guatemala, Ecuador, Fiji, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and Venezuela. Buppert & McKeethan, *supra* note 105, at 10. This convention, however, is deemed problematic due to its “State-centric view” of development and its focus on assimilating indigenous peoples into the larger society. *Id.* ILO Convention No. 169 is an international treaty that becomes legally-binding upon States through ratification. Int’l Lab. Off., *Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (2013) [hereinafter *ILO Handbook*].

¹⁰⁹ G.A. Res. 61/295, *supra* note 87, at (X) (“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior, and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”).

peoples' traditional territories.¹¹⁰ This duty included the requirement to consult with Indigenous peoples prior to relocation and alienation or transmission of traditional lands outside their own communities.¹¹¹ A broad interpretation of ILO 169 leaves room for application to the context of climate-induced relocation and the development of international climate migration visa schemes. The application of ILO 169 also upholds self-determination for Pacific peoples and other Indigenous groups. For example, it obligated governments to consult with tribal and Indigenous peoples "whenever consideration is being given to legislative or administrative measures which may affect them directly."¹¹² This includes the mandate to engage in bilateral consultation "in good faith"¹¹³—a necessary component for building trust, confidence, and ultimately consensus on a solution. Furthermore, ILO 169 mandates consultation with tribal and Indigenous peoples concerned "whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community."¹¹⁴ Such negotiations call for parties to understand rights and obligations based on the intention behind them, thereby ensuring space for reflection on why geographical location is indispensable to Indigenous identity and self-determination pursuits. Should climate change impacts necessitate future cross-border relocation of Indigenous peoples or permanent relinquishment of their lands, one possible approach is the adoption of such mandates by host and receiving countries that emphasize the importance of consultation and consensual agreement in charting a path forward.

3. Yamamoto's Conception of Recognition as a Restorative Justice Tool

An inclusive, consultation-based approach to climate migration—rooted in international law and self-determination principles—would not only comport with modern international commitments and instruments that protect Indigenous peoples, it would also provide the opportunity for international parties to implement meaningful, transformative steps towards "social healing through justice."¹¹⁵ Professor Yamamoto explains that the

¹¹⁰ ILO Handbook, *supra* note 108, at 38. Notably, Article 13 of Convention No. 169 requires governments to "respect the special importance for the cultures and spiritual values of the people concerned of their relationship with the lands or territories..." This, too, could help impose positive state obligations for the protection of indigenous peoples' self-determination.). *Id.* at 37.

¹¹¹ *Id.* at 17(2).

¹¹² International Labour Office, C169 – Indigenous and Tribal Peoples Convention, 1989, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

¹¹³ *Id.* at 6(2).

¹¹⁴ *Id.* at 17(2).

¹¹⁵ JEJU TRAGEDY, *supra* note 20, at 75.

first component of the social healing process is recognition, which requires that groups identify the “justice grievance” or “the larger framing and the details of the historical injustice as well as the present-day claims for rectification.”¹¹⁶ He writes:

These sometimes directly, sometimes covertly communicated grievances are rooted not only in suffering around a singular event but also in collective perceptions of how one’s own group has been historically wronged by another group with greater power. . . . This kind of assessment would encompass an examination of multiple accounts of events, consequences, and social and political forces at play. . . . At bottom, *recognition* prompts two collaborative inquiries by stakeholders. It asks each participant to see into the woundedness of self and others (then and now). And it asks participants to undertake critical interrogation to fully and fairly assess the specific circumstances and larger historical context of the justice grievances undergirding present-day tensions.¹¹⁷

Environmental justice, especially for POS, demands recognition of the past and present-day environmental wrongs that resulted in the endangerment of Pacific Islanders’ homelands, safety, and wellbeing. This could be achieved using a collaborative approach to repairing the damage.

New Zealand’s 2017 proposed climate humanitarian visa provides useful insights about the importance of process in restoring environmental justice for Pacific nations threatened by climate change. Regardless of intent, neglecting to partner with other Pacific Island countries signaled a familiar disregard for the region’s actual interests and needs at the time. Integrating environmental self-determination principles with consultative approaches that identify and respect traditional decision-making structures and mirror the spirit of FPIC is one way to transform how society—and industrialized countries, in particular—understands and responds to reconciling wrongful acts.¹¹⁸ For a scenario as sensitive as climate-induced displacement and migration, implementing a process to establish a mutually

¹¹⁶ *Id.* at 75.

¹¹⁷ *Id.* at 78.

¹¹⁸ In 2020, countries classified by the UN Framework Convention on Climate Change as Annex I nations (i.e., most industrialized countries) were responsible for 90% of excess greenhouse gas emissions. Jason Hickel, *Quantifying National Responsibility for Climate Breakdown: An Equity-Based Attribution Approach for Carbon Dioxide Emissions in Excess of the Planetary Boundary*, 4 LANCET PLANETARY HEALTH, e399 (2020) (illustrating “atmospheric colonization” by determining “which countries are responsible for causing existing climate damages”).

respected decision-making structure between two or more countries is paramount.

B. *Kaitasi: Shared Responsibilities in the Climate Change Era*

Like many Pacific Islander groups, the people of Tuvalu maintain a long-standing connection to their lands, embodied in their land tenure system, *kaitasi*. *Kaitasi* means to “eat as one”¹¹⁹ and represents a familial system of tenure where distinct clans jointly owned and maintained lands.¹²⁰ Based on the Pacific experience of communal living and shared ownership of land and resources (e.g., food, money) among extended family and community members,¹²¹ the *kaitasi* concept in international diplomacy represents all states’ responsibility to collectively address global issues like climate change.¹²²

In the context of the international climate change regime, POS have established themselves as “climate leaders”:¹²³ Vanuatu, as chair of the Alliance of Small Island States (“AOSIS”), spearheaded the negotiations that led to the adoption of the 1992 UNFCCC; Fiji was the first country to endorse the Kyoto Protocol in 1998 and the Paris Agreement in 2016; and the Marshall Islands was the first country to submit a second and more ambitious Nationally Determined Contribution (“NDC”)¹²⁴ in 2018.¹²⁵ POS

¹¹⁹ Carol Farbotko & Taukiei Kitara, *Urban-Rural Re-location as a Response to the COVID-19 Pandemic*, 106, TODA PEACE INST. 1 (Apr. 13, 2021), https://toda.org/assets/files/resources/policy-briefs/t-pb-106_farbotko-kitara.pdf [hereinafter *Urban-Rural Relocation*].

¹²⁰ Sandra McCubbin et al., *Where Does Climate Fit? Vulnerability to Climate Change in the Context of Multiple Stressors in Funafuti, Tuvalu*, 30 GLOB. ENV’T L. CHANGE, 43 (2015).

¹²¹ Traditionally, Tuvaluan land was held communally under customary tenure. Although a version of *kaitasi* or extended family communal ownership is codified in the nation’s land laws, the majority of Tuvaluan land is privately owned. *Batetebea Aselu, A Tuvaluan concept of well-being: reflection on national planning – Te Kakeega II* (2015) (M.A. dissertation, Auckland University of Technology) <https://core.ac.uk/download/pdf/56365333.pdf>.

¹²² TUVALU FOREIGN POLICY, *supra* note 25, at 11.

¹²³ *Majuro Declaration for Climate Leadership*, PAC. ISLANDS F. (Sep. 5, 2013), <https://www.forumsec.org/wp-content/uploads/2017/11/2013-Majuro-Declaration-for-Climate-Leadership.pdf>.

¹²⁴ Nationally Determined Contributions, or “NDCs” are non-binding, national climate targets for mitigating GHG emissions. They outline a country’s proposed climate actions, including climate related targets, policies, and strategies governments plan to implement in response to climate change and as a “contribution to global climate action. Central to the NDCs is the concept of national determination.” *NDC Spotlight*, U.N.: CLIMATE CHANGE, <https://unfccc.int/process/the-paris-agreement/nationally-determined-contributions/ndc-spotlight>.

¹²⁵ Margaretha Wewerinke-Singh & Sarah Mead, *Climate Change Law in the Pacific Islands*, in ENV’T LAW & GOVERNANCE IN THE PAC., 29 (Margaretha Wewerinke-

have also carried out vigorous climate action—both to mitigate greenhouse gas (“GHG”) emissions and to adapt to the adverse effects of climate change.¹²⁶ As several scholars point out, such leadership has not been matched by developed nations.¹²⁷ Consequently, POS must consider legal avenues outside of the climate treaty regime in an attempt to protect present and future generations of Pacific Islanders from the effects of climate change.

The international climate treaty regime is comprised of the UNFCCC,¹²⁸ the Kyoto Protocol,¹²⁹ and the Paris Agreement.¹³⁰ Pacific Ocean States have played a crucial role in designing the climate treaty regime and have steadfastly advocated that the pillars of equity and fairness uphold it.¹³¹ For example, in 1994 during the implementation of the Kyoto Protocol—an attempt to create internationally binding carbon emissions targets for Global North countries—AOSIS proposed a draft protocol requiring developed nations to reduce carbon dioxide emissions to twenty

Singh et al., eds. 2020).

¹²⁶ Adaptation is “the process of adjustment to actual or expected climate and its effects in order to moderate harm or take advantage of beneficial opportunities.” SUMMARY FOR POLICYMAKERS, *supra* note 26, at 7. Mitigation denotes a distinct but parallel process of implementing “activities that seek to reduce the emissions of GHGs into the troposphere.” Campbell, *supra* note 45, at 4.

¹²⁷ Wewerinke-Singh & Mead, *supra* note 125, at 29; e.g., Campbell, *supra* note 45, at 4 (characterizing the “failure” of developed countries to meet the commitments included in the Kyoto Protocol and the lack of political will amongst heavy GHG emitters); see *Climate Reparations*, *supra* note 31, at 7 (“Since the inception of UNFCCC [...] emissions trends have moved inversely. In other words, as the science has grown more specific and more dire, rates of emissions have increased [...] Despite knowledge of the consequences of increased carbon output and their specific obligations under the UNFCCC, emissions in the developed world increased significantly, with the US among the top increased emitters.”).

¹²⁸ UNFCCC, 1771 U.N.T.S. 107 (May 9, 1992).

¹²⁹ UNFCCC, Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc FCCC/CP/L7/Add1 (Dec. 11, 1997) [hereinafter Kyoto Protocol].

¹³⁰ Decision 1/CP.21, Adoption of the Paris Agreement, 21, U.N. Doc FCCC/CP/2015/10/Add1 (Jan. 29, 2016); Wewerinke-Singh & Mead, *supra* note 125, at 30. The UNFCCC establishes the rudimentary legal framework and principles for international climate change partnerships with the aim of reducing global GHG to avoid “dangerous anthropogenic interference with the climate system.” UNFCCC, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, (May 9, 1992). The Kyoto Protocol “operationalizes the [UNFCCC] by committing industrialized countries and economies in transition to limit and reduce GHG in accordance with agreed individual targets.” *What is the Kyoto Protocol?*, U.N.: CLIMATE CHANGE, https://unfccc.int/kyoto_protocol; See Kyoto Protocol, *supra* note 129.

¹³¹ Wewerinke-Singh & Mead, *supra* note 125, at 30.

percent below 1990 levels by 2005.¹³² Though the Protocol only committed developed countries to reduce emissions by at least five percent below 1990 levels from 2008 to 2012, AOSIS' proposal served as the impetus for such negotiations.¹³³

In 2015, parties to the Paris Agreement agreed to engage in the Talanoa Dialogue facilitated under the Fijian Presidency of COP23.¹³⁴ *Talanoa* is a Pacific dialogue framework and process whereby people come together to share personal views and reflections without any fixed agenda or expectation for consensus.¹³⁵ Ultimately, this also resulted in disappointment for POS, as the Dialogue produced a political declaration instead of a formal decision.¹³⁶ Nevertheless, the facilitation established POS' collective capacity to instigate international negotiations in ways that were also consistent with POS' cultural values and traditions.

POS have contributed to several other significant breakthroughs in the development of the climate treaty regime such as: the inclusion of a dedicated article on loss and damage, for which POS adamantly pushed to be a self-contained element, distinctive from adaptation;¹³⁷ the establishment of a strong regional network on climate change in the Pacific that produced an integrated regional framework on climate change and disaster risk management from 2015 to 2030; and the proposal for a Pacific Climate Treaty, commissioned by the Pacific Islands Development Forum ("PIDF") and the Pacific Islands Climate Action Network ("PICAN").¹³⁸

¹³² Association of Small Island States (AOSIS), *Draft Protocol to the United Nations Framework Convention on Climate Change on Greenhouse Gas Emissions Reduction* (1994).

¹³³ Kyoto Protocol, *supra* note 129, at Article 3(1).

¹³⁴ Decision 1/CP.21, Report of the Conference of the Parties on Its Twenty-First Session, UN Doc FCCC/CP/2015/10/Add.1 (Jan. 19, 2016), para 20; Decision 1/CP.22, U.N. Doc FCCC/CP/2016/10/Add.1 (Jan. 31, 2017), para. 16.

¹³⁵ Radilaite Cammock et al., *Strengthening Pacific Voices Through Talanoa Participatory Action Research*, 17 ALT. 120-129, 120 (2021); *see generally* Decision 1/CP.23, *Talanoa Dialogue Approach*, Annex II, U.N. Doc FCCC/CP/2017/L.13 (Nov. 18, 2017), at 7.

¹³⁶ *See* Decision 1/CP.24, U.N. Doc FCCC/CP/2018/10/Add.1 (March 19, 2019), para 37. For POS expectations, *see* Melchior Mataki, Ministry of Environment, Climate Change, Disaster Management & Meteorology, Solomon Islands, *Statement During the High-Level Segment at COP24*, (Dec. 12, 2019).

¹³⁷ Maxine Burkett, *Reading Between the Red Lines: Loss and Damage and the Paris Outcome*, 6 CLIMATE L. 118, 122 (2016); *Suva Declaration on Climate Change*, PAC. ISLANDS DEV. F. (Sept. 4, 2015), https://www.researchgate.net/publication/305424917_Reading_Between_the_Red_Lines_Loss_and_Damage_and_the_Paris_Outcome.

¹³⁸ Margaretha Wewerinke-Singh, Pacific Islands Climate Action Network (PICAN) and the Pacific Islands Development Forum (PIDF), *Thinking Globally, Acting Regionally: The Case for a Pacific Climate Treaty* (June 2016), <https://ssrn.com/abstract=3053729>; *see* Michael Slezak, *Pacific Islands Nations Consider World's First Treaty to Ban Fossil Fuels*, GUARDIAN (July 14, 2016), <https://www.theguardian.com/>

The purpose of the proposed treaty is to “achieve sustainable development while strengthening national, regional and global responses to the threat of climate change.”¹³⁹ Among other commitments, the proposed treaty outlines a Pacific Framework for Climate Mobility to “facilitate internal and cross-border movement in the context of climate change. . . . In the face of increasing concerns regarding the potential legal implications of loss of territory as a result of climate change, it also affirms POS’ sovereignty, stating that the ‘territories of [POS] shall forever belong to present and future generations of Pacific Island peoples.’”¹⁴⁰ In 2022, representatives of 16 Pacific Island Member States¹⁴¹ of the Framework discussed areas for improving the document, emphasizing the need to “address the impacts of internal displacement” and affirming relocation as a “last resort.”¹⁴²

Regional cooperation amongst Pacific Islanders will “serve an important function in terms of climate and displacement.”¹⁴³ Although international proposals for addressing climate migration are still few and far between, there may be some glimmerings of hope for future collaboration around climate migration. One example includes the International Organization for Migration (“IOM”) and its partners, which launched an initiative in 2019 called “Enhancing Protection and Empowerment of Migrants and Communities Affected by Climate Change and Disasters in the Pacific Region.” Building on the Pacific Climate Change and Migration Project (“PCCM”)¹⁴⁴ (targeting Kiribati, Tuvalu, Vanuatu, the Marshall

world/2016/jul/14/pacific-islands-nations-consider-worlds-first-treaty-to-ban-fossil-fuels.

¹³⁹ Wewerinke-Singh, *supra* note 138, art. 2, at 10.

¹⁴⁰ Wewerinke-Singh & Mead, *supra* note 125, at 39 (citing Wewerinke-Singh, *supra* note 138, art. 7, at 15).

¹⁴¹ Member States of the Pacific Framework for Climate Mobility include Nauru, Niue, Palau, Federated States of Micronesia (“FSM”), Kiribati, Papua New Guinea, Samoa, Tuvalu, Tonga, Solomon Islands, Cook Islands, Fiji, Vanuatu, New Caledonia, Australia, and New Zealand. Angelica Neville, *High-level Dialogue on the New Regional Framework on Climate Mobility Concludes*, ILO NEWS (June 24, 2022), http://www.ilo.org/suva/public-information/WCMS_850454/lang--en/index.htm.

¹⁴² *Id.*

¹⁴³ Wewerinke-Singh & Mead, *supra* note 125, at 39; *see* Polynesian Leaders Grp., *Amatuku Declaration on Climate Change and Oceans by the Polynesian Leaders Group*, para. 11 (June 29, 2018), [https://www.sprep.org/sites/default/files/documents/executive_board/2018/Information%20Paper%202\(b\)%20-%20Amatuku%20Declaration%20on%20Climate%20Chance%20and%20Oceans_FINALsigned.pdf](https://www.sprep.org/sites/default/files/documents/executive_board/2018/Information%20Paper%202(b)%20-%20Amatuku%20Declaration%20on%20Climate%20Chance%20and%20Oceans_FINALsigned.pdf) (calling for “the establishment of a ‘Grand Coalition of Pacific Leaders of Climate Change Displacement and Migration’ to find regional solutions to the issue of climate change displacement and migration. This Grand Coalition should consist of leaders from government, churches and other civil society organizations and should be tasked with finding workable and socially acceptable options for addressing climate change displacement and migration in our region.”). Margaretha Wewerinke-Singh is an international lawyer specializing in climate change, human rights, and state responsibility.

¹⁴⁴ *See* U.N. Economic and Social Commission for Asia and the Pacific (ESCAP),

Islands, and Fiji), this initiative intends to “support a regional human security-based response to climate change and disaster-related migration, displacement and planned relocation.”¹⁴⁵

C. *Fale Pili: Moral Responsibilities and International Cooperation*

The concept of *fale pili* directly translates to “houses that are in close proximity to one another”¹⁴⁶ and stems from the idea that one must treat a neighbor’s problem as his or her own. In essence, *fale pili* is a customary duty to actionably regard another person or entity as a family member, thus moving beyond the mere extension of empathy and amicable relations.¹⁴⁷ In Tuvaluan tradition, *fale pili* facilitated the sharing of lands and resources between members and non-members of family alike. At the outset of the COVID-19 pandemic, Minister Simon Kofe called for the Pacific and international community to embrace this concept:¹⁴⁸ “If you have a neighbor, you treat them well. You share your fishing catch with them. You let them in your house as if they are members of your family, and you help them look after their children and old people.”¹⁴⁹

The incentive for devoting time, energy, and resources into a climate-vulnerable country lies not in an economic return on investment, but general moral responsibility. In the context of climate change and climate-induced displacement, this sentiment offers a refreshing perspective on the way countries should engage with each other. At the heart of the *fale pili* concept is the understanding that the entire village (or region) benefits when the individual or individual family is cared for. The morality component demands States’ recognition of a peoples’ identity, value-system, and existence in its own right—and compels them to help protect it against severe threats and challenges. As Professor Maxine Burkett, an expert in climate change law and policy, contends: “[A]ny strategy that can address the injustice faced by the climate vulnerable with appropriate effect must center and draw on moral argument.”¹⁵⁰

Pacific Climate Change and Migration Project (2013), <https://www.unescap.org/subregional-office/pacific/pacific-climate-change-and-migration-project>.

¹⁴⁵ Immigration Organization for Migration (IOM), *Climate Change and Migration Project Launched to Protect, Empower Pacific Communities* (Mar. 26, 2019), <https://www.iom.int/news/climate-change-and-migration-project-launched-protect-empower-pacific-communities>.

¹⁴⁶ TUVALU FOREIGN POLICY, *supra* note 25, at 10.

¹⁴⁷ *Urban-Rural Relocation*, *supra* note 119, at 6.

¹⁴⁸ Taukiei Kitara, *Tuvalu’s Foreign Policy and Values*, DEV POLICY BLOG (June 9, 2020), <https://devpolicy.org/tuvalus-foreign-policy-and-values-20200609-2/>.

¹⁴⁹ *Id.*

¹⁵⁰ *Climate Reparations*, *supra* note 31, at 13.

1. Deconstructing Bordner's Reparative Justice Approach to Colonial Moral Obligations¹⁵¹

The moral case for polluting countries to redress historic wrongs—and to address current ones—is well-established.¹⁵² In her investigation of climate migration and its implications for identity and sovereignty in the Marshall Islands, Autumn Bordner¹⁵³ connects colonial conduct to the threat of climate migration, establishing that international and decolonization norms confer colonial powers with moral and legal responsibilities to develop and implement strategies that preserve self-determination while adapting to climate change.¹⁵⁴ Bordner uses the United States' World War II capture of the Marshall Islands and subsequent legacy of biochemical and missile testing as a contextual foundation to reject migration as an “acceptable response” to the climate crisis.¹⁵⁵ Self-determination, which, Bordner explains, was inaugurated as an “end-goal”¹⁵⁶ of decolonization, “carries special weight with respect to decolonizing peoples, who continue to grapple with the structural violence born of colonialism. Yet it is only decolonizing peoples—most immediately low-lying island states—that now face an existential threat to their self-determination due to forced climate migration.”¹⁵⁷

Bordner turns to a reparative justice approach when identifying moral obligations of colonial powers to promote self-determination, arguing that: “reparations for colonial wrongs could ‘correct structural imbalance and subordination caused by colonialism’ by reallocating unjustly acquired resources, thereby enabling climate-vulnerable states to undertake adaptation that could preserve their sovereignty and self-determination.”¹⁵⁸ Citing to an example in the Caribbean Small Island Developing States,

¹⁵¹ Reparations can be broadly defined as describing “programs that are justified by past harms and are also designed to assess and correct the harm and improve the lives of the victims into the future.... On the one hand, reparations often seek to identify and compensate for an exact past harm. On the other hand, forward-looking relief recognizes that past harm has current and continuing effect and, rather than an exact calculation of monetary payment based on those current harms, reparations seek compensation to improve lives into the future.” *Id.* at 15 (citing ALFRED BROPHY, REPARATIONS: PRO AND CON (2006)).

¹⁵² Bordner, *supra* note 32, at 234.

¹⁵³ Autumn Bordner is a graduate of Stanford Law School and works at the nexus of international ocean law and nuclear justice.

¹⁵⁴ Bordner, *supra* note 32, at 184.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 189.

¹⁵⁷ *Id.* at 190.

¹⁵⁸ *Id.* at 235 (quoting E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1515 (2010) at 45).

where a commission was established to seek reparations from their former colonizers, she argues:

Precisely because climate migration imperils self-determination, colonial powers have moral responsibilities to aid their former colonies in pursuing the adaptation strategy of their choice. Under the international decolonization framework, self-determination is ‘pursued within the relationship (notwithstanding its bloody past) rather than presumed at its formal termination through national independence from colonial rule.’ The link between colonialism and the climate vulnerability currently threatening islanders’ self-determination only fortifies this claim.¹⁵⁹

Bordner’s analysis lends itself to the notion that the provision of a climate migration visa, absent meaningful reparative justice measures, is a wholly inadequate means of accepting responsibility. The burden rests upon colonial powers to not only compensate for past environmental harms, but also to acknowledge current and future effects of those harms and compensate toward the improved lives of current and future generations. The forward-looking nature of reparations presupposes that colonial and polluting powers recognize the corrosive effect climate migration would have on a sovereign peoples’ ability to self-govern, and earnestly support formerly colonized countries’ endeavors to implement only adaptation strategies they themselves deem appropriate. The “relationship” between colonized and colonizer, as Bordner describes, sets the stage for the former to make such reparative claims, and for the latter to set things right.

New Zealand’s contributions as a polluting country are evident even without it acknowledging its colonial power.¹⁶⁰ In 2021, New Zealand was “one of the world’s worst performers on emissions increases,”¹⁶¹ with a fifty-seven percent increase between 1990 and 2018, constituting the second-greatest increase of all industrialized countries. Since then, New Zealand has made several announcements about its proposed commitments to climate action and the apparent gap between the government’s rhetoric on climate and actual climate policies.

The nexus between migration and the obligations of both colonial power and polluter begs deeper consideration. Climate migration strips

¹⁵⁹ *Id.*

¹⁶⁰ Betsy Reed, *New Zealand Pledges to Halve Greenhouse Gas Emissions by 2030*, GUARDIAN (Oct. 30, 2021), <https://www.theguardian.com/world/2021/oct/31/new-zealand-pledges-to-halve-greenhouse-emissions-by-2030> (stating that while New Zealand’s contribution to global greenhouse gas emissions is small, its gross emissions per capita are high).

¹⁶¹ *Id.*

entire nations of their territory, independence, and sovereignty.¹⁶² Thus, as a means of upholding their duties to advance self-determination, polluting colonial powers should “facilitate the migration *choice* of their former colonies.”¹⁶³ If groups affected by man-made climate change wish to migrate, *then*—and only then—would it be acceptable for former colonizers and polluting nations to open their borders; if, however, they wish to remain in their homelands, colonial and industrialized powers should “provide assistance to ensure that choice can be effectuated.”¹⁶⁴

In her final chapter, Bordner proposes a legal strategy that Marshallese and similarly situated communities might pursue as a means of injecting moral reasoning into global climate solutions.¹⁶⁵ The principle of Common but Differentiated Responsibility (“CBDR”) holds that “all states share a responsibility to protect the global environment,” but that the “responsibility is differentiated between developed and developing states in recognition of the fact that developed states are largely responsible for environmental degradation and have greater capacity to fund solutions.”¹⁶⁶ CBDR is incorporated in the UNFCCC approach to climate change mitigation under the name “Common But Differentiated Responsibilities and Respective Capacities” (“CBDR+RC”).¹⁶⁷ Bordner suggests that the principle of CBDR+RC could be utilized as a tool for catalyzing “meaningful action”¹⁶⁸ by basing it on colonial relationships. She reasons that this approach would help clarify CBDR+RC’s “equity-driven objectives”¹⁶⁹ by emphasizing the principles of justice that implicate colonial powers’ responsibility to assist their former colonies.¹⁷⁰ This is followed by the argument that scoping a country-specific responsibility would transfigure CBDR+RC into a “more actionable principle.”¹⁷¹

Although Bordner’s argument is constructed against a backdrop of colonial legacy, a similar approach could be conceived for countries like New Zealand that do not necessarily fit within the “colonizer” category, but

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Bordner, *supra* note 32, at 237.

¹⁶⁵ *Id.* at 237.

¹⁶⁶ *Id.*

¹⁶⁷ UNFCCC, art. 3, 1771 U.N.T.S. 107 (May 9, 1992); Cinnamon P. Carlarne & JD Colavecchio, *Balancing Equity and Effectiveness: The Future of International Climate Change Law*, 27 N.Y.U. ENV’T L.J. 107, 116 (2019).

¹⁶⁸ Bordner, *supra* note 32, at 238 (arguing that the apportionment of responsibility along colonial lines “fits seamlessly” into the CBDR+RC framework).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 239.

instead operate as significant contributors to environmental harm. Integral to Bordner's approach is the idea that present and future climate impacts should not be unduly borne by those still endeavoring to rid themselves of the muck of historical injustice.¹⁷² Instead, the onus must be on the perpetrator of the environmental harm to both *acknowledge* historical power and *accept responsibility* as a matter of morality and law.¹⁷³

2. Yamamoto's Responsibility Inquiry

As part of his social healing through justice framework, Yamamoto presents the concept of responsibility as an inquiry that looks to both "an acknowledgment of the harms generated by the misuse of 'power over others' and an acceptance of responsibility for repairing the damage inflicted."¹⁷⁴ Here, responsibility can manifest in four different ways: (1) through direct participation in the abuse; (2) through knowledge of and complicity in the abuse (even without direct participation); (3) from receipt of benefits from the transgressions of others' rights (even without direct participation or knowing complicity); and (4) through membership in a democratic polity itself damaged by its overriding mistreatment of communities within it (healing the larger society by repairing the damages to those it has harmed).¹⁷⁵

Yamamoto purports that individuals and groups that "directly participated" in harmful behavior toward another warrant a straightforward obligation to "officially acknowledge the victims' suffering and participate in repairing the damage."¹⁷⁶ Complicity in an individual or group's wrongdoing of another, however, calls for a more complex, multi-layered analysis.¹⁷⁷

Yamamoto's description of responsibility is especially compelling when applied to the case of New Zealand's 2017 climate visa provision. Indeed, the provision can be linked to both the first and second levels of responsibility, therefore sharing characteristics of a harm generated by misuse of power. The government initiated a process that ostensibly resembled an earnest attempt to assist fellow POS in response to an urgent climate crisis at a time when adequate international responses were largely absent,¹⁷⁸ but the visa provision was not developed in collaboration or

¹⁷² JEJU TRAGEDY, *supra* note 20, at 71.

¹⁷³ *Id.* at 81 (expanding on the "Responsibility" inquiry, which asks participants to assess the dynamics of group power).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 79.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 80.

¹⁷⁸ See Jacinda Arden, Prime Minister, Address to the Paris Institute of Political Studies: Climate change – challenges and opportunities – a Pacific perspective (Apr. 16,

consultation with Pacific peoples.¹⁷⁹ Nor did it show any trace of thorough and proactive analysis as to whether Pacific peoples' self-determination interests would be positively (or negatively) affected.¹⁸⁰

By obliging to retract the visa, the government demonstrated to the Pacific region and world an awareness of its own power and privilege—and a sense of the responsibility that comes with commitments to both act and “repair”¹⁸¹ the damage inflicted upon people and communities by an imposed and assumptive provision.¹⁸² Applying Yamamoto’s responsibility analysis renders these facts somewhat irrelevant because a crucial aspect “is acknowledging, not denying or ignoring, responsibility for past injustices”¹⁸³ and accepting collective responsibility—which is exactly how the New Zealand government responded just six months after announcing the visa.¹⁸⁴ That New Zealand exhibited no hesitation in admitting its mistake, and even offered future steps that could better facilitate self-determination for Pacific peoples,¹⁸⁵ signals a divergence from what Yamamoto identifies as a “Western ethic of individualism” that “militates against the acceptance of collective responsibility.”¹⁸⁶

Despite questionable execution, New Zealand’s swift accession in response to public concerns about process, reputation of Pacific peoples, and the socio-political implications of abandoning precious homelands indicated a readiness to engage in meaningful processes through which restorative and just decisions could one day be made. In his discussion of how a government’s acceptance of responsibility might facilitate social healing, Yamamoto emphasizes:

Responsibility is broader than a group’s obligation to remedy the harm its members inflict on others. It means a commitment to assist in healing another’s wounds, even wounds inflicted principally by groups [or entities] outside the immediate relationship, not necessarily for purposes of

2018) (emphasizing that New Zealand is part of the Pacific “family” and works “in partnership with our Pacific neighbors” as they face climate threats).

¹⁷⁹ Manch, *supra* note 19.

¹⁸⁰ *Id.*

¹⁸¹ JEJU TRAGEDY, *supra* note 20, at 81.

¹⁸² *Id.* at 80.

¹⁸³ *Id.* at 71.

¹⁸⁴ Noack, *supra* note 13.

¹⁸⁵ *Id.* (quoting Climate Change Minister James Shaw’s commitment to considering a humanitarian visa category as “a piece of work that we intend to do in partnership with the Pacific islands.”).

¹⁸⁶ JEJU TRAGEDY, *supra* note 20, at 80.

redress but for purposes of community building.¹⁸⁷

IV. CONCLUSION

The 2017 provision of New Zealand's climate "humanitarian" visa and subsequent rejection by Pacific communities and governments can provide helpful insights as to how international decisions about climate vulnerable and post-colonial countries in the Pacific should be made. Pacific communities asserted their right to determine their preferred futures and to demand accountability from polluting countries in ways that resonated with their cultural values and served their national interests marking a pivotal moment in history. While many considered New Zealand's provision of a climate visa to be an act of leadership and goodwill, several Pacific Island governments, including Tuvalu, Samoa, and Fiji, condemned the arrangement as one that wholly misaligned with Pacific interests—and a convenient way for polluting countries to sidestep their responsibility of drastically reducing greenhouse gas emissions. In this case, they reiterated their wish to remain in their homelands and their demand for accountability.

Future climate change law begs scrupulous consideration of the means by which POS and other climate-vulnerable populations can safeguard their rights to self-determination; the role of morality in designating responsibility and inspiring international cooperation; and the importance of representation, consultation, and consensus in crafting climate solutions. It also underscores the crucial need for the international legal regime to recognize the cultural values of those most immediately impacted by climate change as *integral* instruments to the formulation of climate migration law, and not merely guiding principles. By retracting the visa, New Zealand exemplified commitment to addressing issues of self-determination and equality in future negotiations around climate migration, and invoked the need for restorative, just, and collaborative approaches in responding to the climate crisis.

¹⁸⁷ *Id.* at 82.