

CLIMATE MIGRATION & SELF-DETERMINATION

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ABSTRACT

As the planet continues to warm, climate-induced migration is poised to become a global crisis. For the most vulnerable geographies—most prominently, low-lying island states—climate migration poses an immediate and existential threat. Without substantial adaptation, the lowest-lying island states are predicted to be uninhabitable by mid-century, necessitating wholesale migration and jeopardizing cultural identity, independence, and sovereignty.

Vulnerability to climate change is fundamentally shaped not only by environmental conditions, but by pre-existing social and political realities. Throughout Oceania, colonial legacies have induced climate vulnerability and impede effective adaptation. Colonial histories have left most Pacific Island states without the resources and capacity to pursue the type of intensive adaptation that could enable their survival. Meanwhile, dominant narratives portray the loss of islands to rising seas as a foregone conclusion and climate migration as inevitable, further foreclosing possibilities for adaptation. This accepted loss of whole nations represents a continuing strand of colonial narratives that cast islands and their peoples as peripheral and, therefore, expendable.

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Such colonial dynamics are no longer commensurate with modern commitments to equity, justice, and human rights. International law safeguards the ability of all peoples to exist and to maintain sovereignty and self-governance through the fundamental human right of self-determination. In repudiation of the structural injustices produced by colonialism, self-determination was first codified as a right vesting exclusively in colonized peoples and continues to carry special force with respect to decolonizing peoples today. Yet unless persistent colonial dynamics are challenged, climate migration threatens to permanently extinguish the self-determination of Oceanic states, reproducing and exacerbating past injustices. The fate of islands has global consequence. Currently on the frontlines of climate change, the situation in islands today foreshadows the future of other decolonizing geographies as climate impacts intensify.

This Article will suggest that decolonizing states can leverage colonial histories to protect their self-determination in light of climate change. Taking the Republic of the Marshall Islands—one of the island states most imminently threatened by climate change—as a case study, this Article will first share Marshallese perspectives demonstrating that migration is not an acceptable response to climate change. Next, this Article will advance a novel climate justice theory, connecting colonial conduct to the threat of climate migration to establish that international human rights and decolonization norms vest colonial powers with moral and legal obligations to assist their former colonies with self-determination-preserving adaptation strategies. Finally, this Article will concretize this theory, suggesting specific legal strategies that Marshallese and similarly situated communities might pursue.

TABLE OF CONTENTS

Introduction	186
I. Perspectives on Climate Migration from the Republic of the Marshall Islands.....	192
A. Climate Migration Threatens Identity and Sovereignty	194
B. Commitments to Adapting in Place	198
C. Intersections of Climate and Nuclear Forced Migration	200
II. Colonialism & Climate Vulnerability.....	203
A. Impacts of Colonialism on Climate Vulnerability	204
B. Climate Adaptation at the Metropole & Periphery.....	215
III. Climate Migration & Self-Determination.....	222
A. The Right to Self-Determination.....	224
1. Self-Determination in the Context of Decolonization.....	229
B. Moral Responsibilities.....	234
C. Legal Responsibilities	239
D. An Avenue to Justice for the Marshall Islands	245
Conclusion.....	252

INTRODUCTION

As the impacts of climate change grow increasingly severe, the concept of climate migration—or the displacement of peoples from their homelands due to climate change—has become a major focus of policymaking, research, and reporting. In each of these spheres, a single narrative tends to dominate: that climate change will inevitably render certain geographies—most prominently the low-lying states of Oceania¹—uninhabitable and their displaced peoples “climate refugees.”²

Climate change undeniably poses a grave threat worldwide. For low-lying Oceanic states this threat is immediate and existential. Without adaptation, the most vulnerable islands are anticipated to be uninhabitable by mid-century.³

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.⁴ 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.⁵

The general presumption that migration is inevitable for all island states is grounded more in persistent colonial narratives than empirical fact. First, this blanket prescription to migrate

1. This class of nations is better known as the Pacific “Small Island Developing States.” Following Epeli Hau’ofa, however, I aim, to the best of my ability, to employ the terms “Oceania” and “Oceanic,” which contest the marginalizing depiction of islands—foisted on them by colonial powers—as “tiny isolated dots in a vast ocean.” The term “Oceania” instead connotes islander ontologies about their home region as an expansive “sea of islands.” Epeli Hau’ofa, *Our Sea of Islands*, in *A NEW OCEANIA: REDISCOVERING OUR SEA OF ISLANDS* 2, 3–5 (Eric Waddell, Vijay Naidu & Epeli Hau’ofa eds., 1993).

2. See Carol Farbotko & Heather Lazrus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 *GLOBAL ENVTL. CHANGE* 382, 386 (2012).

3. See Curt Storlazzi et al., *Most Atolls Will Be Uninhabitable by the Mid-21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding*, 4 *SCI. ADVANCES* 1, 3–6 (2018).

4. Siri Erikson et al., *Reframing Adaptation: The Political Nature of Climate Change Adaptation*, 35 *GLOBAL ENVTL. CHANGE* 523, 525–27 (2015); Farbotko & Lazrus, *supra* note 2, at 382.

5. Erikson, *supra* note 4, at 525–27.

homogenizes a diversity of states, each facing different risks and holding different priorities.⁶ It also discounts the agency of Oceanic peoples, many of whom wholly reject the idea of climate migration and are actively fighting for the survival of their culture and sovereignty.⁷ Finally, this narrative belies the reality that adaptation strategies that could enable long-term survival of even the most vulnerable places remain technically feasible.⁸ The accepted loss of islands reflects imperial narratives that portray islanders as passive victims and islands as peripheral places fit for sacrifice. By contrast, states at the metropole facing comparable climate impacts do not view migration as an acceptable option.⁹

6. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING AT 1.5 DEGREES CELSIUS A.3.3, B.2.3, B.6, D.3.1 (2018) [hereinafter IPCC 2018] (stating that while increased warming increases risks associated with rising sea levels for island nations, there are adaptation options—some of which are already occurring—that can partially preserve ecosystems and limit human migration from vulnerable spaces, including options that reduce disaster risk and provide sustainable development; benefits which can occur in regions with adaptation to 1.5°C of global warming).

7. Jon Barnett & Elissa Waters, *Rethinking the Vulnerability of Small Island States: Climate Change and Development in the Pacific Islands*, in THE PALGRAVE HANDBOOK OF INTERNATIONAL DEVELOPMENT, 731, 738 (J. Grugel & D. Hammond, eds., 2016); Leonard A. Nurse et al., *Small Islands*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, PART B: REGIONAL ASPECTS 1613, 1618 (2018) (“Although these small islands nations are by no means homogeneous politically, socially, or culturally, or in terms of physical size and character or economic development, there has been a tendency to generalize about the potential impacts on small islands and their adaptive capacity.”); Jon Barnett, *The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries*, 58 ASIA PAC. VIEWPOINT 3, 4–6 (2017).

8. See Karen E. McNamara & Carol Farbotko, *Resisting a ‘Doomed’ Fate: An Analysis of the Pacific Climate Warriors*, 48 AUSTRALIAN GEOGRAPHER 17, 23–24 (2017); see also *infra* Part II.

9. See, e.g., NETHERLANDS, IMPLEMENTING WITH AMBITION: IMPLEMENTATION PROGRAM 2018–19 (2018) (explaining the efforts that the Netherlands is making to ensure that the country adapts to threats posed by climate change); NETHERLANDS, ADAPTING WITH AMBITION: NETHERLANDS NATIONAL CLIMATE ADAPTATION STRATEGY (2016) (outlining the Netherlands’ strategy for adapting to anticipated effects of climate change); CITY OF N.Y., A STRONGER, MORE RESILIENT NEW YORK 5–7 (2013) (outlining plans to make New York City more resilient to risks from climate change, as then-Mayor Michael Bloomberg’s foreword states that it is “a coastal city—and we cannot, and will not, abandon our waterfront”); *MOSE System: The Mobile Barriers for Protection of Venice from High Tides*, CONSORZIO VENEZIA NUOVA (2018), <https://www.mosevenezia.eu/project/?lang=en> [<https://perma.cc/Y66V-WM3G>] (describing a system designed to protect the Venetian Lagoon from rising water levels). See also

Narratives matter in Oceanic states because colonial legacies shape climate vulnerability and limit the ability of islanders to exercise autonomy over their own adaptation strategies. Imperial powers orchestrated economic dependency in their territories, while colonial dispossession, exploitation, and assimilation compromised natural defenses and social capital, leaving Oceanic states and other decolonizing geographies with less capacity to adapt than locales at the metropole that face similar environmental risks.¹⁰

Indeed, while states at the metropole are able to inject billions of dollars into cutting-edge adaptation projects, states at the periphery, lacking commensurate wealth and capacity, must rely on outside funders to adapt.¹¹ To date, funders have only supported short-term, small-scale adaptation in island states, viewing the type of intensive adaptation already underway elsewhere as economically irrational for such “small” and “remote” places.¹² Resource constraints and resulting power differentials between funders and the funded thus limit the ability of islanders to pursue the adaptation strategies that could ensure their survival. Given this situation, persistent colonial dynamics risk turning the narrative of inevitable loss for Oceanic states into a self-fulfilling prophecy.

The persistence of such colonial dynamics sit in tension with modern commitments to equality, justice, and human rights. 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 make free and genuine choices about their status and future.¹³ Along with loss of habitable territory,

SASHA DAVIS, *THE EMPIRES' EDGE: MILITARIZATION, RESISTANCE, AND TRANSCENDING HEGEMONY IN THE PACIFIC* 52–69 (2015); Epeli Hau'ofa, *Our Sea of Islands*, in *A NEW OCEANIA: REDISCOVERING OUR SEA OF ISLANDS* 2, 3–5 (Eric Waddell, Vijay Naidu & Epeli Hau'ofa eds., 1993).

10. See *infra* Part III.A.

11. Carola Betzold, *Aid and Adaptation to Climate Change in Pacific Island Countries* 4–16 (Australian Nat'l Univ. Crawford Sch. Pub. Policy, Development Policy Centre, Discussion Paper No. 46, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815307 [<https://perma.cc/4VXP-GYR7>].

12. Carola Betzold, *Adapting to Climate Change in Small Island Developing States*, 133 *CLIMATIC CHANGE* 481, 488 (2015); Autumn Bordner, Caroline Ferguson & Len Ortolano, *Colonial Dynamics Shape Climate Adaptation Financing in the Republic of the Marshall Islands*, *GLOBAL ENVTL. CHANGE* (forthcoming 2020); Hau'ofa, *supra* note 9, at 4–5.

13. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶61, 54–55 (Oct. 16).

displaced peoples would lose their independence, sovereignty, and self-government—all core aspects of self-determination.¹⁴ The right to self-determination was first codified in international law as the end-goal of decolonization in explicit repudiation of the impediment to freedom, autonomy, and human dignity imposed by colonialism.¹⁵ Though now recognized as a universal right, self-determination carries special weight with respect to decolonizing peoples, who continue to grapple with the structural violence born of colonialism.¹⁶ 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.¹⁷

14. *E.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

15. U.N. Charter art. 73–76; G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960); *see also* MIKULAS FABRY, *RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776*, at 147 (2010) (“The colonial idea was thoroughly displaced by the belief, repeatedly enunciated at various global for a and most notably in United Nations General Assembly Resolution 1514(XV), that the dependent peoples have a right to self-determination and independence.”).

16. *E.g.*, Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. at 31–36; G.A. Res. 65/119, Third International Decade for the Eradication of Colonialism (Jan. 20, 2011).

17. Within nations, communities are also facing internal forced dislocation due to climate change, with marginalized communities disproportionately affected. *See, e.g.*, Andrea Thompson, *Wave of Climate Migration Looms, But It Doesn't Have to Be a Crisis*, *SCI. AM.* (Mar. 23, 2018), <https://www.scientificamerican.com/article/wave-of-climate-migration-looms-but-it-doesnt-have-to-be-a-crisis/> [<https://perma.cc/S3CZ-ABP6>]. The intra-nation threat of climate migration is an important environmental justice issue that requires serious attention. However, such an inquiry is beyond the scope of this article, which instead focuses on the loss of entire nations due to climate change and resultant loss of self-determination. Though there are serious human rights implications of forced migration in general, internal displacement of sub-national groups does not implicate self-determination in the same way. Internally displaced groups remain citizens of their countries and their countries maintain sovereignty and independence.

That said, sovereignty is implicated with respect to the forced displacement of Native communities in the United States, which are recognized as “domestic dependent nations”—sovereign peoples subject to the plenary power of Congress. *Talton v. Mayes*, 163 U.S. 376, 382 (1896). Many Native communities are on the frontlines of climate change. *See* Coral Davenport & Campbell Robertson, *Resettling the First American ‘Climate Refugees,’* *N.Y. TIMES* (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate->

By inducing climate vulnerability and constraining adaptation possibilities, colonialism continues to impair self-determination. However, the link between colonialism and climate vulnerability also suggests potential remedies. Under the international decolonization regime, colonial powers have “accept[ed] as a sacred trust the obligation” to protect and promote the self-determination of their territories;¹⁸ obligations that persist even after formal independence.¹⁹ International and domestic precedents suggest that these duties not only carry significant moral weight, but are legally enforceable.²⁰ As such, decolonizing states threatened by climate migration may have cognizable claims against their former colonizers to (1) redress past violations of their obligations; and (2)

refugees.html (on file with the *Columbia Human Rights Law Review*); Amy Martin, *An Alaskan Village is Falling into the Sea. Washington Is Looking the Other Way*, PUBLIC RADIO INT’L (Oct. 22, 2018), <https://www.pri.org/stories/2018-10-22/alaskan-village-falling-sea-washington-looking-other-way> [<https://perma.cc/6JCV-CCGL>]. Tribes are able to exercise limited civil and criminal jurisdiction over their reservations and natural resources (see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. U.S.*, 450 U.S. 544 (1981)), meaning loss of this land and forced migration due to climate change would abrogate exercise of their sovereignty. On the other hand, because the limited sovereignty of tribes flows from federal recognition rather than territory, tribes likely will be able to maintain their limited sovereign status, continue government-to-government relations with the United States, and practice self-governance over their own members in light of forced migration (and in the case of Alaskan Native Communities, to the extent Native peoples have sovereignty at all, it is not bound to territory). See *Poodry v. United States*, 85 F.3d 874, 880 (2d Cir. 1996); U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-121, REGIONAL ALASKAN NATIVE CORPORATIONS: STATUS 40 YEARS AFTER ESTABLISHMENT, AND FUTURE CONSIDERATIONS (2012), <https://www.gao.gov/assets/660/650857.pdf> [<https://perma.cc/XLG7-ULQZ>]. Moreover, the legal effect of such forced migration would likely be governed by federal law rather than international law, which is beyond the scope of this article. *American Indian Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/american_indian_law [<https://perma.cc/T4TS-JGLJ>].

Moreover—for many Native communities—as well as for island peoples—the prospect of climate migration represents a repetition of past forced migrations at the hands of their colonizers. And as for island peoples, the prospect of forced migration is particularly devastating because of the deep connection between tribal culture and identity and their land.

18. U.N. Charter art. 73 ¶ 1; G.A. Res. 1654 (XVI), *The Situation Regarding the Implementation of the Declaration on the Granting of Independence to Colonized Peoples* (Nov. 27, 1961).

19. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Judgment, 1992 I.C.J. Rep. 615 (June 26).

20. See *infra* Part III.C.

actively continue to promote decolonization and self-determination. These claims could provide a viable pathway for Oceanic states and other decolonizing peoples to reclaim autonomy over their climate adaptation strategies, thereby safeguarding their rights and preventing catastrophic losses.

This Article will use the example of the Republic of the Marshall Islands—one of the low-lying island nations most immediately threatened by climate change—to demonstrate the nexus of colonialism, climate vulnerability, and self-determination. First, Part I will draw upon fieldwork conducted in the Marshall Islands to demonstrate that, for the Marshallese, migration is not an appropriate response to climate change because it existentially threatens identity and sovereignty. Migration would be particularly painful for many Marshallese due to the history of forced migration caused by U.S. nuclear testing there. Next, Part II will consider the link between colonialism and climate vulnerability, demonstrating that colonial history both induces climate vulnerability and constrains the range of available adaptation strategies, presumptively leaving no option but to migrate. Part III will then lay out the international law of self-determination, explaining that this sacrosanct norm vests colonial powers with moral and legal obligations to assist their former colonies in adapting to climate change. To conclude, Part III will sketch a potential claim that plaintiffs from the Marshall Islands could bring against their former colonizer, the United States.

The example of the Marshall Islands and similarly positioned nations throughout Oceania has global consequence. The Marshall Islands is on the frontlines of climate change today, but unless entrenched colonial dynamics are challenged, the existential threats facing the Marshall Islands are likely to manifest in other decolonizing geographies as climate change impacts intensify.²¹ This

21. IPCC, Special Report on the Ocean and Cryosphere in a Changing Climate B9.2 (2019) (“High to very high risks are approached for vulnerable communities in coral reef environments, urban atoll islands and low-lying Arctic locations from sea level rise well before the end of this century in case of high emissions scenarios. This entails adaptation limits being reached, which are the points at which an actor’s objectives (or system needs) cannot be secured from intolerable risks through adaptive actions (high confidence). Reaching adaptation limits (e.g., biophysical, geographical, financial, technical, social, political, and institutional) depends on the emissions scenario and context-specific risk

Article seeks to elucidate what is at stake in discourse around climate migration and to suggest pathways forward that avoid repetition of past injustices, moving instead towards the more just and equitable world promised by our international human rights and decolonization frameworks.

I. PERSPECTIVES ON CLIMATE MIGRATION FROM THE REPUBLIC OF THE MARSHALL ISLANDS

The Republic of the Marshall Islands (“RMI”) is an island nation located roughly half-way between Hawai’i and Australia. Originally settled more than 2,000 years ago, the Marshall Islands fell under colonial rule in the 19th century, passing from Spanish, to German, to Japanese hands.²² The United States initially gained military control over the Marshall Islands in 1944. And in 1947, the United States began formally administering the Marshall Islands as part of a strategic trust territory through the United Nations Trusteeship System.²³ In 1946, the United States selected two inhabited atolls—Bikini and Enewetak—as proving grounds to test nuclear weapons, forcibly removing the inhabitants. Over the next 12 years, the United States tested 67 nuclear weapons in the Marshall Islands, causing environmental contamination, serious health

tolerance, and is projected to expand to more areas beyond 2100, due to the long-term commitment of sea level rise.”)

22. See generally FRANCIS X. HEZEL, STRANGERS IN THEIR OWN LAND: A CENTURY OF COLONIAL RULE IN THE CAROLINE AND MARSHALL ISLANDS (1995) (providing a comprehensive account of the colonial history of the Marshall Islands).

23. *Id.* at 253–57; see generally S.C. Res. 21 (April 2, 1947) (originally published as S/318) (describing the relevant United Nations Charter articles permitting the Trusteeship system, allowing for the termination and transfer of Trusteeship, and enumerating responsibilities under the Trusteeship System as applicable to the United States’ control of the Marshall Islands). The U.N. Trusteeship System was established with promulgation of the U.N. Charter in 1945. The objective of the Trusteeship System was to provide a framework for the governance of non-self-governing territories, with the ultimate goal of their self-determination. Administering powers held “as a sacred trust the obligation to promote” the welfare and ultimate self-determination of their territories. U.N. Charter art. 73–76. The strategic trusteeship was a unique arrangement that has never been replicated. It gave the United States an unprecedented control over the islands.

consequences, and additional forced migrations that continue to impact Marshallese life today.²⁴

The Marshall Islands gained independence in 1986, becoming the Republic of the Marshall Islands, a sovereign nation “freely associated” with the United States.²⁵ Within this relationship, the United States maintains military control in the islands and the right to be consulted in Marshallese foreign affairs decisions.²⁶ The United States also provides significant aid to the Marshall Islands and Marshallese citizens are able to travel to the United States and remain indefinitely as non-immigrant residents.²⁷ Many Marshallese have come to the United States under this favorable immigration pathway to seek jobs, healthcare, and educational opportunities.²⁸ Comprised entirely of low-lying atolls (chains of coral islands), RMI is now considered one of the most climate-vulnerable geographies on the planet.²⁹ Without intensive adaptation, RMI faces the threat of a second forced migration due to climate change.³⁰

This Subpart will briefly report on interviews conducted by the author and their research partner over four short field trips from August 2018 to March 2019. We conducted 22 semi-structured interviews with national and local (atoll) leaders in Majuro, the capital of the Marshall Islands, as well as 14 semi-structured interviews with Marshallese community members in the Marshall Islands (Majuro, Ejit Island, and Kili Island) and in Springdale, Arkansas, which is home to the largest Marshallese community outside the islands. Five of our interview participants were forced to migrate as children due to U.S. nuclear weapons testing. Of the thirty-six interview participants, twenty (55.5%) identified as women.

24. HEZEL, *supra* note 22, at 270–72; *see generally* HOLLY M. BARKER, BRAVO FOR THE MARSHALLESE: REGAINING CONTROL IN A POST-COLONIAL, POST-NUCLEAR WORLD (2012) (providing a comprehensive account of the history of U.S. nuclear weapons testing in the Marshall Islands).

25. Compact of Free Association, Marsh. Is.-U.S., Jun. 25, 1983, T.I.A.S. No. 04,501 [hereinafter Marshall Islands Compact of Free Association].

26. *Id.*

27. *Id.*; Compact of Free Association, U.S.-F.S.M., art. IV, Oct. 1, 1982, T.I.A.S. No. 04,625 (as amended May 14, 2003) (entered into force Nov. 13, 1986) [hereinafter F.S.M. Compact of Free Association].

28. Jessica Schwartz, *Marshallese Cultural Diplomacy in Arkansas*, 67 AM. Q. 781, 781–85, 788 (2015); Pearl Anna McElfish, *Marshallese COFA Migrants in Arkansas*, 112 J. ARK. MED. SOC. 259, 259–62 (2015).

29. *See, e.g.*, Barnett, *supra* note 7, at 3.

30. *Id.* at 4.

Interview protocols were approved by Stanford University's Institutional Review Board. Informed consent was obtained from all participants both to be interviewed and for their names and perspectives to be shared. Audio of interviews were recorded and transcribed. Where feasible, quotes were reviewed with interview participants prior to publication to assure that their perspectives are represented accurately.

In this Part, I share long-form quotes from these interviews accompanied by minimal narration. I employ this in an attempt to avoid speaking for Marshallese, striving instead to amplify their voices in spaces of privilege and power. Though perhaps unconventional in legal scholarship, this effort to foreground community voices is, I feel, "necessary in the interests of advancing, even if only minutely, the enormous imperative of climate justice."³¹ While these interviews provide useful context, they are not representative of all Marshallese perspectives and should not be taken as such.

A. Climate Migration Threatens Identity and Sovereignty

Our interviews suggest that many Marshallese oppose climate migration because wholesale migration away from the islands would result in the loss of Marshallese identity and sovereignty. First, many interview participants explained that climate migration is unacceptable—and unthinkable—because of the deep connection they feel with the islands. Numerous interviewees discussed the link between the islands and individual identity. In the words of Angeline Heine, a national energy planner in Majuro,

[P]eople talk about migration, but for me personally, I cannot picture myself living anywhere else. . . . I don't allow my brain to even entertain that thought because the core of what I am is these islands . . . and just the whole topic of land for a Marshallese . . . it's your identity, right? It's who you are. When you ask

31. Farbotko & Lazrus, *supra* note 2, at 384 (discussing the authors' objective in sharing perspectives from Tuvalu regarding climate change impacts and the prospect of forced migration, which both "contributes to and attempts to critique climate change discourse about Tuvalu.") The authors note that "[c]limate exposed populations, including Tuvaluans, are magnets for media and researchers, often from the industrialised world," which tend to write about these populations rather than engaging with them, understanding their perspectives, and amplifying their voices. *Id.*

someone, when you ask a Marshallese, ‘Who are you?’ [you say], ‘What island are you from?’ . . . I mean, can you imagine not having these islands? How do you describe yourself? You just become invisible.³²

Others discussed identity in a collective sense. Peterson Jibas, a councilperson from Bikini Atoll explained that climate migration would entail “moving a community, a culture, a language, a[n] identity to a completely different world. . . . You’re talking about losing a Marshallese way of life.”³³ This sentiment was echoed by James Matayoshi, mayor of Rongelap Atoll: “[L]et’s say 100 percent of the Marshallese people move into the U.S. And the clock starts ticking. And let’s say within 20 years every Marshallese become a U.S. citizen. I mean that is a huge impact of transition there, losing your identity and your homeland due to climate change.”³⁴

Likewise, Chris Belos, a Marshallese climate activist living in Arkansas, explained that Marshallese culture, *manit*, cannot be fully practiced outside the islands: “The islands are part of our *manit*—our culture, our way of life. The islands are a part of us . . . any people that have that connection to land would understand how unique that love is . . . there’s so little [of our culture] that we can keep here [in Arkansas] because it’s just so different.”³⁵ And Angeline Heine concisely summarized, “if we lose our land, we lose our custom.”³⁶

32. Interview with Angeline Heine, in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

33. Interview with Peterson Jibas, Councilperson, in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018). Climate migration is a devastation resulting from nuclear testing because nuclear testing has severely inhibited adaptive capacity. *See infra* Part II.A.

34. Interview with James Matayoshi, Mayor of Rongelap Atoll, in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

35. Interview with Christopher Belos, Climate Activist in Springdale, Ark. (Nov. 2018).

36. Interview with Angeline Heine, *supra* note 32. She also provided a specific example: “[M]y grandfather is from the shark clan and on . . . Pinglep . . . is where the members of that clan they were buried. [T]hey used coral reefs as headstones and with climate change . . . this graveyard is shifting away. . . . [P]art of the culture is passing down stories . . . How do you tell your grandchildren, ‘These are your ancestors’? . . . With that [the loss of the graveyard], the story’s gone. So without stories, there’s nothing to pass down and nothing to teach about the culture.” *Id.*

Our interviewees also rejected the idea of climate migration because the islands are “home sweet home.”³⁷ According to Mayor John Kaiko of Utirik Atoll, “there is nothing special in the Marshall Islands, just that it is our home. We were born. We grew up. And that is where we [want to] die. . . . It’s as simple as that.”³⁸ Miriam de Brum, the assistant director of a Marshallese NGO, Women United Together Marshall Islands (“WUTMI”), further explained: “relationships are very important and [especially] the relationships with the land. We belong to the land, not the other way around.”³⁹ And Bikinian cultural leader Alson Kelen shared a Marshallese saying with us: “*kabit boken aelon*,” which means “we’d rather die on our soil, on our own homeland so our flesh will bless the soil.”⁴⁰

Interview participants living in Arkansas expressed the same connection to the islands. Faith Laukon, a Marshallese woman who was born, raised, and currently resides in the United States, explained that, for her, the Marshall Islands is home: “if you’re Marshallese and you go back to the Marshall Islands, you’re always going to feel like you’re at home. And that’s exactly how I felt. I did not even once feel like I was an outsider even though I didn’t speak the language.”⁴¹ Winona Kisino, a young Marshallese woman who has also spent most of her life in the United States, likewise, feels that “when you’re on the islands, you live off the environment. When you move to somewhere foreign . . . you don’t feel like you’re home . . . even though I grew up in the states, the Marshall Islands is my home.”⁴² Finally, Jomar Dela Pena, a young man who has lived most of his life in the United States and plans to remain there long term, explained that, nevertheless, RMI remains his home: “[I]t’s a special place. It’s home to me and a lot of the Marshallese that are in the states and it’s always gonna be home to us.”⁴³ This sentiment was echoed in nearly all of our conversations.

37. Interview with John Kaiko, Mayor of Utirik Atoll, in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

38. *Id.*

39. Interview with Miriam de Brum, Assistant Director of WUTMI in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

40. Interview with Alson Kelen, Cultural Leader, in Majuro Island, Majuro Atoll, Marsh. Is. (Mar. 2019).

41. Interview with Faith Jibas in Springdale, Ark. (Nov. 2018).

42. Interview with Winona Kisino, in Springdale, Ark. (Nov. 2018).

43. Interview with Jomar Dela Pena in Springdale, Ark. (Nov. 2018).

Despite the deep connection between Marshallese people and their islands, many Marshallese have moved to the United States. However, as Eldon Alik, the Marshallese Consul General in Springdale explained, climate change is not a motivation: “People hear about [climate change], but we’ve lived near the ocean for so many years that it doesn’t threaten us. I think if we had real good jobs and good schools, we’d all still be back there despite the ocean rising because we’ve seen it all . . . I do miss the ocean. I miss it a lot.”⁴⁴

Deep concerns about the sovereignty implications of climate migration also permeated many of our conversations. Though often difficult to distill, several interview participants captured this worry poignantly. First, Bikinian Councilperson Peterson Jibas explained that, with climate migration, “you’re talking about going to a completely different government. And we are a sovereign nation here in the Marshalls, so I don’t think we can stand to lose that sovereignty. I don’t think anyone would want to lose their sovereignty.”⁴⁵ Mayor Matayoshi of Rongelap further explained the importance of Marshallese sovereignty: “You have your own pace, you have your identity, a form of government that is part of the international community. You get to experience dealing with the ambassadors and presidents, even though we’re a small country. People in [the U.S. territory of] Guam have lost a lot of their identity and . . . [t]hey have to go through Washington to deal with the global community.”⁴⁶ Finally, Miriam de Brum of WUTMI described the commitment of the Marshall Islands national government to preserving the nation’s sovereignty: “[W]ithout our land and our place, where would our sovereignty be? So that’s what the government is planning for, to make sure that even if the rest of the Marshall Islands will be underwater, there would be a few raised islands where the people will be able to live and survive and maintain their sovereignty of the Marshall Islands.”⁴⁷

Loss of sovereignty and identity represents an existential threat to RMI. As RMI’s Chief Secretary and Climate Change

44. Interview with Eldon Alik, Consul Gen., Marsh. Is. Consulate Gen. Office, Springdale, Ark. (Nov. 2018).

45. Interview with Peterson Jibas, Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

46. Interview with James Matayoshi, *supra* note 34.

47. Interview with Miriam de Brum, *supra* note 39.

Advisor, Ben Graham, explained, “we have to keep fighting and be vocal about it and be visible as champions for our rights. It really is about our rights, and it’s about justice and our ability to continue to determine our own future.”⁴⁸

B. Commitments to Adapting in Place

Given the existential threat posed by climate migration, the Marshallese national government, local governments, and many individuals are committed to adapting to climate change in the Marshall Islands. The Marshall Islands’ National Adaptation Plan—like those of many other Pacific Island states—avows firm commitment to adapting in place, citing the loss of statehood and sovereignty that would accompany loss of a habitable homeland.⁴⁹ To that end, the national government is exploring radical adaptation options that could preserve the islands. Ben Graham explained that “to remain as a sovereign country, a member of the global community . . . requires that we look at these more radical approaches to adaptation: reclamation, elevation, consolidation.”⁵⁰

Local governments are also committed to fighting for the survival of their islands. Bikinian Councilperson Peterson Jibas explained that the Bikinian government is searching for any option to avoid migration for their people: “there’s a lot of people, they don’t want to move. They would rather stay here and fight for their right to survive . . . this local council is trying to look at any options—every other option—they can to make sure that these people can survive. . . . You know, we may be small, but we will fight.”⁵¹

48. Interview with Ben Graham, Chief Sec’y and Climate Change Advisor, Republic of the Marsh. Is., Majuro Island, Majuro Atoll, Marsh. Is. (Mar. 2019).

49. REPUBLIC OF THE MARSH. IS., NAT’L CLIMATE ADAPTATION POLICY FRAMEWORK 5–6 (2011), https://www.sprep.org/attachments/Climate_Change/RMI_NCCP.pdf [<https://perma.cc/CJU8-JYYN>]; *see also, e.g.*, REPUBLIC OF NAURU, FRAMEWORK FOR CLIMATE CHANGE ADAPTATION AND DISASTER RISK REDUCTION 2 (2015), https://reliefweb.int/sites/reliefweb.int/files/resources/NRU_2015_RONAdapt_Framework.pdf [<https://perma.cc/D6EA-ZYUV>]; TUVALU, TE KANIVA: TUVALU CLIMATE CHANGE POLICY 1, 3–4 (2012), https://reliefweb.int/sites/reliefweb.int/files/resources/TUV_2012_Te_Kaniva_CCpolicy.pdf [<https://perma.cc/3AUZ-M387>] (detailing Tuvalu’s commitment to remaining in place and adopting a comprehensive climate change adaptation policy).

50. Interview with Ben Graham, *supra* note 48.

51. Interview with Peterson Jibas, *supra* note 33.

Mayor Matayoshi of Rongelap also believes that, “like the Maldives,” which is taking drastic measures to adapt in place, the people of the Marshall Islands should “have the option of living in [their] home country instead of migrating to the U.S. or other places.”⁵² He supports the type of radical adaptation proposed by the national government, explaining that “in 50 years, people are saying that we will be underwater because of climate change and part of the solution in this development concept is to do landfill. Imagine the lagoon here off this atoll. We want to close it out and create more lands and elevate the land.”⁵³ For Mayor Matayoshi, such drastic efforts are necessary to ensure Marshallese survival. As he put it: “would you rather sink underwater or risk some compromise to the environment by creating higher land elevation? I mean, you choose. When you are on a sinking boat, how do you survive?”⁵⁴

Mayor John Kaiko of Utirik Atoll also rejects the idea of migrating away from the Marshall Islands: “I don’t think there was any discussion like that so far [regarding migration]. I don’t think that people, either the government or the people, they don’t like to go away. They don’t see how they can do. They would rather fight the climate change rather than accept[] it.”⁵⁵ For Mayor Kaiko, migration is not a choice: “adaptation, yeah, we got to do something like that because we have no other choice.”⁵⁶

Likewise, Nikka Wase, the mayor of Likiep Atoll, rejects the idea of migrating away. She is fully focused instead on making a better life for her people on Likiep: “I’m more interested in tourism, ecotourism and all that. [W]e have to . . . look into the future, create more jobs, upgrade the health facilities that we have there and bring in more doctors.”⁵⁷ In order to realize these goals long-term, she is “trying to build something on the reef site so they [her people] don’t lose any more land, with the high sea level going up.”⁵⁸

Marshallese individuals in both RMI and Springdale are also committed to adapting in place. Arkansas-based Winona Kisino

52. Interview with James Matayoshi, *supra* note 34.

53. *Id.*

54. *Id.*

55. Interview with John Kaiko, *supra* note 37.

56. *Id.*

57. Interview with Nikka Wase, Mayor of Likiep Atoll, in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

58. *Id.*

explained that she plans to return to RMI to work on climate change issues because “I don’t really believe in migrating from climate change. I believe in making it stop so that we don’t have to migrate . . . I don’t think that’s a choice.”⁵⁹ In Majuro, we spoke to several young women who had recently returned for this reason. For example, Francyne Wase-Jacklick explained that she returned to the islands after receiving her education in the United States “for my kids. I would want them to have the same life, this island life . . . It’s scary thinking about it with all these climate change issues. But that’s why we’re striving to work so hard, so that they can have a better future here.”⁶⁰ And for Angeline Heine, “it’s the love of my island, it’s the love for my family, that gives me that drive to stay here and do the best that I can.”⁶¹

C. Intersections of Climate and Nuclear Forced Migration

In the Marshall Islands, the prospect of climate migration cannot be separated from the history of forced migration caused by U.S. nuclear testing there. The idea of migrating in response to climate change is particularly painful for communities who are still in exile from their radioactive homelands. One such community is the people of Bikini Atoll, whose islands were used by the United States to test 23 nuclear weapons.⁶² Bikinians were resettled on Kili, a small, isolated island that the Marshallese have always viewed as uninhabitable.⁶³ The United States promised to remediate and return Bikini to the displaced islanders,⁶⁴ but today Bikini remains too radioactive to support human habitation.⁶⁵ Bikinians have remained

59. Interview with Winona Kisino, *supra* note 42.

60. Interview with Francyne Wase-Jacklick, in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

61. Interview with Angeline Heine, *supra* note 32.

62. Jon Nordheimer, *29 Years After U.S. Moved Them, Bikini Natives Sue for Safe Return*, N.Y. TIMES (Oct. 17, 1975), <https://www.nytimes.com/1975/10/17/archives/29-years-after-us-moved-them-bikini-natives-sue-for-safe-return.html> (on file with the *Columbia Human Rights Law Review*).

63. HEZEL, *supra* note 22 at 273; Interview with Peterson Jibas, *supra* note 33; Interview with Alson Kelen, *supra* note 40.

64. See Nordheimer, *supra* note 62.

65. Kimberly M. S. Cartier, *Marshall Islands Nuclear Contamination Still Dangerously High*, EOS (July 16, 2019), <https://eos.org/articles/marshall-islands-nuclear-contamination-still-dangerously-high> [<https://perma.cc/6PKS-4TXC>].

in exile on Kili for 73 years.⁶⁶ Kira, an elder who was one of those displaced from Bikini, explained the impact of the first forced migration: “Since leaving our islands, we’ve been living in exile, like nomads. There really isn’t anything for us here.”⁶⁷ Kira wishes to return to Bikini, but remains committed to staying in the islands rather than migrating due to climate change: “We’re here waiting for them to bring us back [to Bikini], or we’ll be here for the high tide [referring to sea level rise].”⁶⁸

Bikinian Councilperson Peterson Jibas shares Kira’s sentiments. He explained that, for his people, climate migration would constitute a continuation of their nuclear forced displacement: “I think that would be [the] second devastation or third from the nuclear testing on Bikini. . . . If we moved from Kili, that’d be the second part of our dislocation. I mean, when will this end? What did we do wrong? . . . If we have to dislocate these people, by God so be it. But nobody wants to do that.”⁶⁹

Nuclear testing impacted the whole country. Enewetak Atoll was also used as a testing ground for 44 nuclear weapons and its people forcibly removed, as were exposed populations on Utirik and Rongelap Atolls. Likewise, the people of Kwajalein Atoll were dislocated to make way for a military support base. Nuclear forced migrations “tor[e] the fabric of [Marshallese] society,” while widespread radioactive fallout caused severe and long-lasting health and environmental consequences throughout the islands.⁷⁰

66. Each year on Kili, Bikinians hold a commemoration of the day on which they were removed from their homeland. I attended in 2019, when the slogan of the day was “73 years in exile is long enough. We want to go home.” See, e.g., Marshall Islands National Telecommunications Authority, *Bikini Day 2019*, FACEBOOK (Mar. 10 2019), <https://www.facebook.com/mhnta/videos/vb.1524949674426335/297243870968225/?type=2&theater> [<https://perma.cc/Z2GZ-E8TA>] (video footage of the 2019 Bikini Day commemoration ceremony).

67. Interview with Kira, in Ejit Island, Majuro Atoll, Marsh. Is. (Aug. 2018).

68. *Id.*

69. Interview with Peterson Jibas, *supra* note 33.

70. *Interview: Tony de Brum*, COLUMBIA K=1 PROJECT CENTER FOR NUCLEAR STUDIES (Aug. 15, 2016), <https://k1project.columbia.edu/news/interview-tony-de-brum> [<https://perma.cc/YBD7-B4J8>]; see also Steven L. Simon et al., *Radiation Doses and Cancer Risks in the Marshall Islands Associated with Exposure to Radioactive Fallout from Bikini and Enewetak Nuclear Weapons Tests: Summary*, 99 HEALTH PHYS. 105, 110-15 (2010) (finding that nuclear weapons tests conducted at Bikini and Enewetak exposed current residents of the

The current threat of climate migration threatens to reproduce the devastation caused by nuclear testing. This continuity was not lost on our interview participants. Chris Belos described the motivation behind his climate activism: “Hopefully not to repeat history because it [nuclear testing] did force a few peoples, a few islands from their traditional homeland. Now we’re talking about the whole country, which is the scary part for me.”⁷¹ Ben Graham, RMI’s Chief Secretary and National Climate Advisor, explained, “fundamentally, this is history repeating itself: we are being impacted by an outside force that threatens our way of life, environment, health, and overall well-being and security. Just like the nuclear legacy, the climate change legacy is going to be massively disruptive and unfair; it will displace our people internally and externally, and it is unlikely that we will ever be made whole again. So, it is very much about justice/injustice and survival.”⁷² Likewise, Bikinian cultural leader Alson Kelen sees nuclear testing and climate change as the “same animal”: “different era, different name, the same animal. In the 40s and the 50s it was called The Atomic Bomb and now, into the future, it’s called Climate Change.”⁷³

But as Kelen reminded us, this continuity also underscores the resiliency and strength of Marshallese people, who have survived on the islands for thousands of years, survived colonization, and survived nuclear testing: “For our future, I would look at what happened in the past, and we’ve been warriors. We’ve been strong, strong people . . . We’re adapters. We adapt to the harshest living conditions since the creation of time . . . And even when the first animal came to this country, the first thunder, the atomic tests, we survived. Our mothers had abnormal kids. Jellyfish kids and scary stories. But we survived . . . If we can survive the atomic test, I’m sure we will survive the climate change. We’ll adapt.”⁷⁴

Marshall Islands to radioactive fallout); *see generally* BARKER, *supra* note 24 (summarizing the history of U.S. nuclear weapons tests in the Marshall Islands and discussing the impact of these tests on the Marshallese).

71. Interview with Christopher Belos, *supra* note 35.

72. Interview with Ben Graham, *supra* note 48.

73. Interview with Alson Kelen, *supra* note 40.

74. *Id.* This commitment to fight for survival is also reflected in the Marshall Islands Constitution, which reads:

This society has survived, and has withstood the test of time, the impact of other cultures, the devastation of war, and the high price paid for the purposes of international peace and security. All we have and are today as a people, we have

While not representative of all Marshallese perspectives, these interviews suggest that migrating away from the islands is not an appropriate or acceptable response to climate change for the Marshall Islands, as migration existentially threatens identity and sovereignty. Climate migration would also represent a repetition and exacerbation of past injustices caused by U.S. nuclear testing. Given these threats, Marshallese are committed to adapting in place at the national, local, and individual level.

II. COLONIALISM & CLIMATE VULNERABILITY

Though committed to adapting in place, the Marshall Islands faces serious barriers to implementing the type of adaptation that could ensure the nation's survival. Low-lying areas from the Marshall Islands and Bangladesh to Venice and New York City face severe climate change impacts, including flooding, inundation, and increasingly extreme weather events.⁷⁵ In each of these places, major adaptation will almost certainly be required to maintain habitability over the next century and into the future.⁷⁶ Despite facing similar physical hazards, the Marshall Islands and other least developed countries (i.e., decolonizing states) and territories are far more vulnerable than developed nations (i.e., colonial powers).

Colonial history is a major factor in shaping this dichotomy. Colonial powers exploited—and, in many cases, continue to exploit—their territories for economic, military, and strategic gain, with disastrous consequences for native peoples. This conduct has induced climate vulnerability in the colonized world by weakening resiliency to climate impacts and constraining capacity to independently adapt.⁷⁷ Thus, today, even as developed nations take

received as a sacred heritage which we pledge ourselves to safeguard and maintain, valuing nothing more dearly than our rightful home on the islands within the traditional boundaries of this archipelago.

RMI Const., Preamble (accessed Nov. 5, 2019), <https://rmiparliament.org/cms/constitution.html> [<https://perma.cc/X9HV-B3ZZ>].

75. INTER-GOVERNMENTAL PANEL ON CLIMATE CHANGE, AR5 CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, A.1, B.3 (2014) [hereinafter IPCC 2014].

76. IPCC 2018, *supra* note 6, at B.6.

77. Limits to climate adaptation are primarily economic, financial, and social rather than technical. And these dimensions are directly informed by colonial histories. IPCC, Special Report on Oceans and Cryosphere C3.1 (2019)

drastic steps to adapt in place, their former colonies face the prospect of climate migration and accompanying loss of identity and sovereignty. This Part will first explore the long-lasting impacts of colonialism on climate vulnerability in the Marshall Islands before charting the ways that colonial legacies have propagated differences in climate adaptation options at the metropole and the periphery. Though the focus of this Part is on the Marshall Islands, similar stories of colonial dispossession, contamination, and broken promises pervade in other states throughout Oceania, and in decolonizing geographies more broadly.⁷⁸

A. Impacts of Colonialism on Climate Vulnerability

The Marshall Islands is exceptionally vulnerable to climate change. Though this is in part due to the innate physical characteristics of the low-lying coral atolls that comprise the Marshall Islands, the nation's climate vulnerability is fundamentally shaped by its colonial history.⁷⁹ First, colonial activities impaired natural defenses to climate impacts. Healthy coral reefs are perhaps the most important of these defenses in the Marshall Islands and other atoll states.⁸⁰ The paleoclimate record indicates that atolls with healthy reefs remained afloat even through dramatic (> 4 meter) sea-level-rise events in previous millennia.⁸¹ And healthy reefs, which are capable of absorbing up to 95% of incoming wave force, have helped

(“The higher the sea levels rise, the more challenging is coastal protection, mainly due to economic, financial and social barriers rather than due to technical limits (high confidence).”); Siri Erikson et al., *Reframing Adaptation: The Political Nature of Climate Change Adaptation*, 35 GLOBAL ENVIRONMENTAL CHANGE 523, 526 (2015) (“environmental vulnerability is shaped by intersecting processes of social relations, divisions of labor, political economies, and environmental conditions.”).

78. Sasha Davis, *The Empire's Edge: Militarization, Resistance, and Transcending the Hegemony in the Pacific* 43 (2015).

79. Barnett & Waters, *supra* note 7, at 734–36; *see also* Erikson et al., *supra* note 4, at 525–27 (reviewing literature on the relevance of social and political processes to explain adaptation and vulnerability to climate change).

80. Paul Kench et al., *Coral Islands Defy Sea-level Rise Over the Past Century: Records from a Central Pacific Atoll*, 43 GEOLOGY 515, 516–17 (2015); *see also* Borja Reguero et al., *Comparing the Cost Effectiveness of Nature-based and Coastal Adaptation: A Case Study from the Gulf Coast of the United States*, PLOS ONE, Apr. 8, 2018, at 1, 15 (discussing how coral reefs may help nations adapt to risks associated with climate change).

81. Rob Dunbar, *Climate Change: An Earth Systems Perspective*, Lecture at Stanford University, Stanford, CA (Oct. 18, 2018) (notes on file with author).

islanders cope with extreme weather events for thousands of years.⁸² Simply put, “if the reefs are kept healthy, these islands will survive.”⁸³

Most reef systems in the Marshall Islands, and throughout greater Oceania, are not healthy, a trend that—while certainly driven by climate change impacts including ocean acidification and rising sea temperatures—is also a product of colonial conduct.⁸⁴ Colonial powers made use of the islands for resource exploitation and military activities deemed too risky for the metropole. These activities devastated terrestrial and marine ecosystems, including reefs.⁸⁵ Meanwhile, colonial assimilative policies concentrated islanders in dense urban centers, where overpopulation, overfishing, and poor sanitation infrastructure have combined to create pollutive waste streams that severely stress reef systems.⁸⁶ Lacking the protection of a healthy reef, these dense population centers routinely experience severe flooding and storm surge.⁸⁷

82. *Id.*; Michael W. Beck et al., *The Global Flood Protections Provided by Coral Reefs*, 9 NATURE COMM., 2018, at 2–4; Filippo Ferrario et al., *The Effectiveness of Coral Reefs for Coastal Hazard Risk Reduction and Adaptation*, 5 NATURE COMM., 2014, at 1, 3–6.

83. Dunbar, *supra* note 81.

84. IPCC, Special Report on Oceans and Cryosphere A6.4 (2019).

85. See Silvia Pinca et al., *The State of Coral Reef Ecosystems of the Marshall Islands*, in THE STATE OF CORAL REEF ECOSYSTEMS OF THE UNITED STATES AND PACIFIC FREELY ASSOCIATED STATES 373, 378 (2005); see also Sylvia C. Frain, ‘Make America Secure’: Media, Militarism and Climate Change in the Marianas Archipelago, 24 PAC. JOURNALISM REV. 218, 224 (2018) (discussing the cost necessary to remedy environmental contamination at Department of Defense locations in Hawai‘i, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands); Peter Jacob, *The Status of Marine and Reef Systems in Nauru*, in CORAL REEFS IN THE PACIFIC: STATUS AND MONITORING, RESOURCES AND MANAGEMENT, 193, 196–97 (2002) (discussing threats to coral reef biodiversity, including the impact of phosphate mining, in Nauru); Amber Pariona, *How Has Phosphate Mining on Nauru Led to an Environmental Catastrophe?*, WORLD ATLAS (Nov. 3, 2017), <https://www.worldatlas.com/articles/how-phosphate-mining-in-nauru-has-led-to-an-environmental-catastrophe.html> [<https://perma.cc/2ELL-6NTG>] (discussing the legacy of colonization and pollution resulting from phosphate mining in Nauru).

86. See CHARLOTTE MORITZ ET AL., STATUS AND TRENDS OF CORAL REEFS IN THE PACIFIC 72–83 (Charlotte Moritz et al. eds., 2018).

87. See IPCC 2014, *supra* note 75 at SPM.2 tbl. 2; Coral Davenport, *The Marshall Islands Are Disappearing*, N.Y. TIMES (Dec. 2, 2015), <https://www.nytimes.com/interactive/2015/12/02/world/The-Marshall-Islands-Are-Disappearing.html> (on file with the *Columbia Human Rights Law Review*); Ibbey

Forced migration further limited the adaptive capacity of affected communities. For example, Bikini Atoll is comprised of large islands surrounded by an expansive lagoon and reef system.⁸⁸ These attributes provide robust natural defenses to climate change and enabled Bikinians to live on the atoll for thousands of years.⁸⁹ However, the option of living on Bikini and adapting to climate change there is foreclosed because U.S. nuclear testing rendered the atoll dangerously radioactive.⁹⁰ Bikinians were displaced to tiny, isolated Kili Island, known locally as “prison island.”⁹¹ Kili has always been considered uninhabitable by the Marshallese because, unlike Bikini Atoll, Kili is exceptionally low lying, has limited freshwater, and lacks a lagoon and reef system, meaning it offers virtually no coastal protection.⁹² In the words of Bikinian Councilperson Peterson Jibas, “[p]eople didn’t live there for a reason, you know, it’s because Kili is one of the worst islands to live on. It doesn’t have a lagoon, it can take months for a boat to build a dock

Caputo & Danielle Gross, *Rising Seas Are Washing Away Graves in the Marshall Islands*, PRI (June 1, 2017) <https://www.pri.org/stories/2017-06-01/rising-seas-are-washing-away-graves-marshall-islands> [https://perma.cc/8S6Z-XNVV]; Interview with Jack Niedenthal, *Majuro Island, Majuro Atoll, Republic of the Marshall Islands* (Aug. 2018) (explaining that King Tides flood Majuro every year in the spring, “like clockwork”).

88. Sam Scott, *What Bikini Atoll Looks Like Today*, STAN. MAG. (Nov. 20, 2017), <https://medium.com/stanford-magazine/stanford-research-on-effects-of-radioactivity-from-bikini-atoll-nuclear-tests-on-coral-and-crab-dna-48459144020c> [https://perma.cc/8QG7-VCD4]; see also Rob Jordan, *Radiated Corals of Bikini Atoll May Hold Insights on Cancer*, STAN. EARTH (June 28, 2017), <https://earth.stanford.edu/news/radiated-corals-bikini-atoll-may-hold-insights-cancer> [https://perma.cc/3E74-TS9R] (describing the potential for insights into human cancer from studying how coral reefs have “recolonized the radiation-filled bomb craters” in Bikini Atoll).

89. See generally BARKER, *supra* note 24 (discussing history, geography, and climate of the Marshall Islands); see also *About, BIKINI ATOLL LOCAL GOV’T*, <https://www.bikiniatoll.online/> (on file with the *Columbia Human Rights Law Review*) (same).

90. Autumn S. Bordner et al., *Measurement of Background Gamma Radiation in the Northern Marshall Islands*, 113 PROC. NAT’L ACAD. SCI. U.S. 6833, 6833–34, 6837 (2016).

91. Interview with Peterson Jibas, *supra* note 33; see also HEZEL, *supra* note 22, at 273 (“[T]he luckless Bikinians were moved to Kili Island in the southern Marshalls, where many have remained to the present.”).

92. Interview with Peterson Jibas, *supra* note 33; Interview with Miriam de Brum, *supra* note 39; Interview with Ange Saunders in Majuro Island, Majuro Atoll, Marsh. Is. (Aug. 2018); Interview with Angeline Heine, *supra* note 32.

there. And [it] floods from the middle up regularly.”⁹³ Climate change aggravates these innate vulnerabilities. Indeed, each year since 2015, King Tides have caused widespread flooding on Kili, causing temporary internal dislocation.⁹⁴

In Enewetak, another atoll used by the United States to test nuclear weapons, the nuclear legacy induces climate vulnerability in different ways. Like Bikinians, the Enewetakese were forcibly displaced to make way for U.S. nuclear testing. After concerted efforts by the people of Enewetak, the United States remediated one island in the atoll by stripping away—but not replacing—the radioactive top soil.⁹⁵ Populations displaced from Enewetak were resettled on this cleaned island.⁹⁶ However, the other islands in the atoll—which are part of the traditional homeland and essential sources of natural resources for the Enewetakese—remain contaminated.⁹⁷ Moreover, Enewetak houses the Runit Dome, a nuclear waste repository that the U.S. military constructed by filling an unlined bomb crater with high level radioactive waste and sheathing it with a concrete cap.⁹⁸

93. Interview with Peterson Jibas, *supra* note 33.

94. *Id.* A similar example is the Chagos Archipelago. In contrast to dense urban population centers, the island of Diego Garcia in the Chagos Archipelago—which sits a mere 60 centimeters above sea level—has remained virtually unaffected by sea level rise due to its incredibly healthy reef. The reef is thriving in part because Diego Garcia has been uninhabited for more than 50 years, since the British government forcibly removed native inhabitants to make way for a U.S. military base. In the absence of human stressors, the reef has even been able to rapidly recover from mass bleaching events. See Charles Sheppard et al., *Reefs and Islands of the Chagos Archipelago, Indian Ocean: Why It Is the World's Largest No-Take Marine Protected Area*, 22 AQUATIC CONSERVATION 232, 237–42 (2012); Charles Sheppard et al., *Archipelago-Wide Coral Recovery Patterns Since 1998 in the Chagos Archipelago, Central Indian Ocean*, 362 MARINE ECOLOGY PROGRESS SERIES 109, 115–17 (2008).

95. Bordner et al., *supra* note 90, at 6833; Mary Mitchell, *Offshoring American Environmental Law: Land, Culture, and Marshall Islanders' Struggles for Self-Determination During the 1970s*, 22 ENVTL. HIST. 209, 216–24 (2017).

96. Mitchell, *supra* note 95, at 224.

97. See Bordner et al., *supra* note 90, at 6833; Interview with Peterson Jibas, *supra* note 33. Enewetakese must visit radioactive islands to gather food because the United States did not replace contaminated topsoil on the cleaned island, making growing food very difficult, and ships bringing imported food seldom pass.

98. TERRY HAMILTON, LAWRENCE LIVERMORE NAT'L LAB., A VISUAL DESCRIPTION OF THE CONCRETE EXTERIOR OF THE CACTUS CRATER CONTAINMENT STRUCTURE 8, 40–42 (Oct. 2013), https://marshallislands.llnl.gov/ccc/Hamilton_LLNL-TR-648143_final.pdf [<https://perma.cc/F4MJ-5Y23>].

The Dome, which is currently leaking, poses a constant threat to the people living on Enewetak.⁹⁹ Climate change-induced sea level rise is anticipated to exacerbate leakage from the dome, and intensifying storms threaten to breach the concrete cap and release the waste within.¹⁰⁰ The combination of nuclear waste and climate change poses a unique threat to the continued habitability of Enewetak and the Marshall Islands more broadly.

Colonialism has also induced social maladies that render decolonizing populations more vulnerable to the physical impacts of climate change. Forced displacements in the Marshall Islands decimated Marshallese society, dismantling political, economic, and cultural institutions based around land tenure and natural resources.¹⁰¹ Efforts to assimilate or “civilize” islanders represented further assaults on native institutions.¹⁰²

Further, many displaced populations were removed to small, resource-limited islands, producing over-crowded, “slum”-like population centers with inadequate physical and social infrastructure.¹⁰³ Limited resources in these population centers,

99. See Kyle Swenson, *The U.S. Put Nuclear Waste Under a Dome on a Pacific Island. Now It's Cracking Open*, WASH. POST (May 20, 2019), <https://www.washingtonpost.com/nation/2019/05/20/us-put-nuclear-waste-under-dome-pacific-island-now-its-cracking-open/> (on file with the *Columbia Human Rights Law Review*); Michael B. Gerrard, *America's Forgotten Nuclear Waste Dump in the Pacific*, SAIS REV. INT'L AFF. Winter–Spring 2015, at 87, 92–94; Susanne Rust & Carlyne Cole, *High Radiation Levels Found in Giant Clams Near U.S. Nuclear Dump in Marshall Islands*, L.A. TIMES (May 28, 2019), <https://www.latimes.com/science/environment/la-me-marshall-islands-dome-is-leaking-radiation-20190528-story.html> [<https://perma.cc/S6P9-3CX4>].

100. Gerrard, *supra* note 99, at 92–94.

101. E.g., Sophie Yeo, *The Carbon Brief Interview: Tony de Brum*, CARBON BRIEF (May 15, 2015), <https://www.carbonbrief.org/the-carbon-brief-interview-tony-de-brum> [<https://perma.cc/2EFD-VEF6>]; *Interview: Tony de Brum*, *supra* note 70.

102. Hezel, *supra* note 22, at 276–96; see generally DAVID HANLON, REMAKING MICRONESIA: DISCOURSES OVER DEVELOPMENT IN A PACIFIC TERRITORY, 1944–1982 (1998) (discussing U.S. policies to assimilate and “civilize” Marshall Islanders and others in the Trust Territory of the Pacific Islands, and the damage done to native institutions).

103. Ruth Oldenziel, *Islands: The United States as a Networked Empire*, in ENTANGLED GEOGRAPHIES: EMPIRE AND TECHNOCRACY IN THE GLOBAL COLD WAR 13, 23 (Gabrielle Hecht ed., 2011); see also Dan Zak, *On the Island of Ebeye, a Nuclear Past and Ballistic Present*, PULITZER CENTER (Dec. 18, 2015), <https://pulitzercenter.org/reporting/island-ebeye-nuclear-past-and-ballistic-present>

coupled with U.S. assimilative policies, induced dependency on unhealthy imported foods. As a result, Marshallese experience amongst the highest global burdens of non-communicable diseases, including diabetes, heart disease, and obesity.¹⁰⁴ Poor living conditions, a high-burden of immune-weakening non-communicable diseases, and inadequate health care also induced infectious diseases that did not exist in the islands prior to colonization, including tuberculosis, leprosy, and hepatitis.¹⁰⁵ Moreover, Marshallese suffer elevated rates of various cancers and thyroid disease due to widespread exposure to radioactive fallout from U.S. nuclear testing.¹⁰⁶ Similar patterns can be seen throughout Oceania, down to the history of nuclear testing.¹⁰⁷

[<https://perma.cc/P8JV-KVWU>] (discussing poor conditions at Mejato and Ebeye such as unemployment, disease, and overcrowding).

104. See, e.g., Tim Dye et al., *Critical Medical Ecological Perspectives on Diabetes in the Pacific Islands: Colonialism, Power, and Balance in Human-Environment Interaction over Time*, 6 LANCET GLOBAL HEALTH S36 (2018) (discussing the diabetes epidemic in Pacific Island nations resulting from colonial history); A. McLennan & S. Ulijaszek, *Obesity Emergence in the Pacific Islands: Why Understanding Colonial History and Social Change is Important*, 18 PUB. HEALTH NUTRITION 1499, 1499–1505 (2015).

105. E.g., Asghar Shah et al., *Addressing Social Contexts and Determinants of Health in Marshallese Communities*, 19 LANCET: INFECTIOUS DISEASES 358 (2019); Patricia Woodall et al., *Hansen Disease Among Micronesian and Marshallese Persons Living in the United States*, 17 J. EMERGING INFECTIOUS DISEASES 1202, 1202–03 (2011); Seiji Yamada et al., *Ethical Responsibility for the Social Production of Tuberculosis*, 13 J. BIOETHICAL INQUIRY, 57, 57–64 (2016).

106. Steven L. Simon et al., *supra* note 70.

107. MIRIAM KAHN, TAHITI BEYOND THE POSTCARD: POWER, PLACE AND EVERYDAY LIFE 73 (2013); Julia B. Edwards, *Phosphate Mining and the Relocation of the Banabans to Northern Fiji in 1945: Lessons for Climate Change-forced Displacement*, 138–39 J. SOC. OCEANISTES 121, 122–26 (2014); Nic Maclellan, *The Nuclear Age in the Pacific Islands*, 17 CONTEMPORARY PACIFIC 363, 363–72 (2005); Janice Cantieri, *Our Heart Is on Banaba: Stories From “The Forgotten People of the Pacific,”* NAT’L GEOGRAPHIC (Oct. 14, 2017), <https://blog.nationalgeographic.org/2015/10/14/our-heart-is-on-banaba-stories-from-the-forgotten-people-of-the-pacific/> [<https://perma.cc/N8V4-TNC3>]; Nic Maclellan, *Grappling With The Bomb: Britain’s Nuclear Testing In Kiribati*, PAC. ISLANDS REP. (Mar. 7, 2017), <http://www.pireport.org/articles/2017/03/14/grappling-bomb-britain%E2%80%99s-nuclear-testing-kiribati> [<https://perma.cc/R3MY-H9V5>]; *France’s Nuclear Testing Programme*, PREPARATORY COMMISSION FOR THE COMPREHENSIVE NUCLEAR TEST BAN TREATY ORGANIZATION, <https://www.ctbto.org/nuclear-testing/the-effects-of-nuclear-testing/frances-nuclear-testing-programme/> [<https://perma.cc/HR7G-ERXG>]; *Interview: Tony de Brum*, *supra* note 70.

High disease rates, overcrowding, damaged social institutions, and limited infrastructure all increase Marshallese vulnerability to climate impacts.¹⁰⁸ Moreover, after attaining independence in 1986, the Marshall Islands was faced with pressing concerns such as grappling with the legacy of nuclear testing, and reconstructing the political and social institutions destroyed by colonialism.¹⁰⁹ Consequently, as a young country, the Marshall Islands has had limited opportunity to develop the institutional capacity and technical expertise needed to implement robust climate adaptation strategies, even if resources to do so were readily available.

And such resources are lacking. The self-sufficiency of territories—nominally an aim of the international decolonization regime¹¹⁰—is in tension with the strategic interests of colonial powers. Maintaining control in their colonial outposts, even after formal independence, enables these empire states to project power in geopolitically important regions worldwide.¹¹¹ To that end, colonial powers have further limited adaptive capacity in their territories by fostering economies of dependency.

Beginning in the 1960s, the United States crafted a deliberate policy to “bind” the Marshall Islands to the United States after it eventually attained independence.¹¹² The United States executed this

108. See IPCC 2018, *supra* note 6, at B.6; Barnett & Waters, *supra* note 7, at 739.

109. Interview with Ben Graham, *supra* note 48; *Interview: Tony de Brum*, *supra* note 70.

110. *E.g.*, U.N. Charter, art. 73–76; G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

111. Oldenziel, *supra* note 103, at 16; *see also* Davis, *supra* note 9, at 34–51 (2015) (discussing the U.S.’s actions to maintain hegemony and military colonialism in the Marshall Islands); ANTHONY M. SOLOMON, A REPORT BY THE U.S. GOVERNMENT SURVEY MISSION TO THE TRUST TERRITORY OF THE PACIFIC ISLANDS 5 (1963) (“Micronesia is said to be essential to the United States for security reasons”) [hereinafter SOLOMON REPORT]; FRENCH MINISTRY OF DEFENSE, FRANCE AND SECURITY IN THE ASIA-PACIFIC 14 (2017); Catherine Lutz, *The Political Economy and Political Aesthetics of Military Maps, in* SPACES OF SECURITY: ETHNOGRAPHIES OF SECURITYSCAPES, SURVEILLANCE, AND CONTROL 184, 201–02 (Mark Maguire ed., 2019) (describing how the United States’ military maps of Guam erases the humanity of its population and the consequences of the military buildup on the island).

112. SOLOMON REPORT, *supra* note 111, at 5; *see also* FRIENDS OF MICRONESIA, THE SOLOMON REPORT; AMERICA’S RUTHLESS BLUEPRINT FOR THE ASSIMILATION OF MICRONESIA 3–4 (1971) (discussing the plan of the United

policy objective by injecting huge amounts of aid into the territory while simultaneously obstructing opportunities for local self-sufficiency.¹¹³ By manufacturing reliance on U.S. aid and curtailing economic development, the United States ensured that the Marshall Islands was denied “any opportunity to learn how to walk on its own.”¹¹⁴ This strategy persists today through the Compact of Free Association, the treaty that established the Marshall Islands as a sovereign nation, “freely associated with the United States.”¹¹⁵ Under the Compact, the Marshall Islands’ economy remains heavily dependent on U.S. aid while the United States continues to enjoy tight military and foreign affairs control in the islands.¹¹⁶

The United States has not been unique in orchestrating economic dependency. France, for example, requires its Pacific territories to utilize a colonial currency, the *Colonies Françaises du Pacifique* (“French Colonies of the Pacific”) Franc.¹¹⁷ The currency is wholly controlled by the Central French Bank, thereby disabling French territories from setting their own monetary policies or engaging with trade partners other than France itself.¹¹⁸ And like the

States to essentially acquire Micronesia as a territory) [hereinafter FRIENDS OF MICRONESIA].

113. See also Francis X. Hezel, *The Creation of a Colony: The Paradox of Economic Aid to Micronesia* (1968), <http://www.micsem.org/pubs/articles/economic/frames/creatcolofr.htm> [<https://perma.cc/FQ63-2JEV>] (“At the same time, however, the magnitude of the U.S. investment has put the cost of maintaining their government well beyond the reach of Micronesia’s own economic capacity, just as it has occasioned a number of other problems that threaten to complicate the territory’s maturation process.”); see generally SOLOMON REPORT, *supra* note 111 (discussing the relationship between the United States and Micronesia); FRIENDS OF MICRONESIA, *supra* note 112 (discussing the economic plan of the United States as it relates to Micronesia).

114. Hezel, *Creation of a Colony*, *supra* note 113.

115. Marshall Islands Compact of Free Association, *supra* note 25.

116. *Id.* § 123.

117. *Franc Pacifique, Monnaie Coloniale*, SURVIE (Nov. 20, 2017), <https://survie.org/billets-d-afrique/2017/272-novembre-2017/article/franc-pacifique-monnaie-coloniale> [<https://perma.cc/5VV3-3PN7>].

118. JULIAN AGUON, JULIE HUNTER, & AUTUMN BORDNER, ENDURING COLONIZATION 16 (2019); cf. Ndongo Samba Sylla, *The CFA Franc: French Monetary Imperialism in Africa* (July 12, 2017), <http://blogs.lse.ac.uk/africaatlse/2017/07/12/the-cfa-franc-french-monetary-imperialism-in-africa/> [<https://perma.cc/5HT7-B9KK>] (discussing the CFA Franc, which is the colonial currency instilled by France in Africa, and noting that in countries that gained independence, maintenance of the colonial currency is associated with economic stagnation whereas adoption of independent currency is associated with economic growth).

United States, France has further fostered dependency by injecting money into its territories while stymying self-sufficiency.¹¹⁹ Consequently, “a dynamic private sector providing economic growth has been virtually absent for a long time.”¹²⁰ Britain, too, adopted a policy of zero economic development under the slogan “not a nail is to be made in the colonies,” to ensure that the territories remained the empire’s primary producers and exporters of raw materials.¹²¹ Due to such policies, many decolonizing states have remained within the sphere of influence of their former colonizers and have struggled to develop self-sufficient economies. Institutionalized economic dependency creates “a more subtle variety of political domination” that persists even after formal independence.¹²²

In the climate change context, this entrenched dependency constrains decolonizing peoples from exercising autonomy over their own adaptation strategies. Lacking the resources to independently implement the adaptation projects of their choosing, decolonizing states must instead rely on outside funders to respond to climate change at all.¹²³

Given the close similarities between the CFA franc and the CFP franc (their distinction is almost entirely geographical), the same pattern should be expected in the Pacific.

119. CARLYLE CORBIN, ASSESSMENT OF SELF-GOVERNANCE SUFFICIENCY IN CONFORMITY WITH INTERNATIONALLY-RECOGNISED STANDARDS: FRENCH POLYNESIA 48–49 (June 25, 2013) (“The autonomy practiced today does not allow us to map out a path to economic autonomy . . . nothing has been developed , except for a few planning documents, to create an economy that could replace the economy built around the Nuclear Testing Centre.”); see also Lorenz Gonschor, *French Polynesia*, 30 CONTEMP. PAC. 156, 159 (2018) (“French subsidies to the local government and other monetary transfers from Paris remain the lifeline of the country.”).

120. Gonschor, *supra* note 119, at 159.

121. *Ten Point Plan for Reparatory Justice*, CARICOM (2018), <https://www.caricom.org/caricom-ten-point-plan-for-reparatory-justice/> [<https://perma.cc/J24B-M689>]; see also David Meredith, *The British Government and Colonial Economic Policy, 1919–39*, 28 ECON. HIST. REV. 484, 485 (1975) (referring to a policy by the British government that sought to preserve access to raw materials); Waden Narsey, *Fiji’s Colonial Development and Underdevelopment: A Critique of the Knapman Thesis*, 2 CONTEMPORARY PACIFIC 208, 209 (1990) (discussing the state of Fiji’s economy related to its colonial past).

122. *E.g.*, *Marshall Islands*, CIA WORLD FACTBOOK (2018), <https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html> [<https://perma.cc/CT9P-GFD3>].

123. Betzold, *supra* note 12, at 488; Barnett, *supra* note 7, at 6.

Despite the challenges stemming from colonialism, the Marshall Islands and other decolonizing nations throughout Oceania have made great strides since achieving independence. The Marshallese people elected to operate as a sovereign nation¹²⁴ and this choice is recognized by the international community.¹²⁵ The Marshall Islands has also enacted autonomous legal and political institutions that, while influenced by colonial administrations, reassert native practices.¹²⁶ For example, the Marshallese governance structure recognizes the autonomy of individual atolls, which operated as independent sovereigns prior to colonization and whose identities and sovereignty were denied during colonial rule.¹²⁷ Islanders have also reasserted their cultural identity both nationally and regionally by, among other things, reinstating customs and contesting the false colonial notion that they are “too small, too poor,

124. Others have chosen a different path. For example, the Commonwealth of the Northern Mariana Islands (“CNMI”) elected to remain a dependency of the United States rather than seek independence. To the extent that this decision was made freely, the decision to remain a dependency, too, constitutes exercise of the self-determination right. Compare Marshall Islands Compact of Free Association, *supra* note 25, with Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 (1976).

125. *Member States*, UNITED NATIONS, <https://www.un.org/en/member-states/> [<https://perma.cc/AH37-5GQA>]; *Small Island Developing States*, UNITED NATIONS, <https://sustainabledevelopment.un.org/topics/sids/list> [<https://perma.cc/3HR6-SPPZ>].

126. Authority has been returned to traditional leadership. Marsh. Is. Const., art. 3; see also *Council of Chiefs*, REPUBLIC OF PALAU, <https://www.palaugov.pw/executive-branch/council-of-chiefs/> [<https://perma.cc/Q7Z7-JWYK>]. Tribunals have been established to adjudicate traditional legal claims. *The Judiciary’s Courts and Personnel*, REPUBLIC OF THE MARSH. IS. JUDICIARY, <http://rmicourts.org/the-judiciarys-courts-and-personnel/> [<https://perma.cc/X8AJ-BTL6>]; see also *Land Court*, MAGISTERIAL SERV. OF PAPUA N.G., <http://www.magisterialservices.gov.pg/land-court.aspx> [<https://perma.cc/AW9V-9WST>]; *Island Court*, JUDICIARY OF THE REPUBLIC OF VANUATU, <https://courts.gov.vu/about-us/island-court> [<https://perma.cc/REP6-RVG3>].

127. The Marshall Islands, while maintaining a strong national government, also allows for the self-rule of the 24 inhabited atolls, which operated independently from one another pre-colonization. *Marshall Islands Mayors*, MARSH. IS. GUIDE (Jan. 24, 2016), <https://www.infomarshallislands.com/the-mayors-of-the-marshalls/> [<https://perma.cc/N6XF-T3ER>]; see also Davis, *supra* note 9, at 54–55 (describing the colonial structure in the Marshall Islands as “seeing like an empire” and overlooking local indigenous governance structures).

and too remote to exercise any meaningful autonomy.”¹²⁸ For example, the Marshall Islands and many other Oceanic states have rejected the moniker of “small islands” placed upon them by colonial powers in favor of the label “large ocean states.”¹²⁹ The Marshall Islands and other Oceanic states are also global leaders on climate change, punching above their weight on the international stage to successfully advocate for ambitious climate goals that make the possibility of *in situ* adaptation far more achievable, not only for low-lying ocean states, but for the world.¹³⁰ Further, the Marshall Islands

128. Hau’ofa, *supra* note 9. See Program Description, CANOES OF THE MARSHALL ISLANDS – WAAN AELŌN IN MAJEL, <http://www.canoesmarshallislands.com/program/> [<https://perma.cc/6BL8-8ASU>]; Amata Kabua, *Forever Marshall Islands (National Anthem)*, EMBASSY OF THE REPUBLIC OF THE MARSH. IS. TO THE U.S., <http://www.rmiembassyus.org/index.php/about/marshall-islands/national-anthem> [<https://perma.cc/U5F8-CZ6C>]; *About the Festival*, FESTIVAL OF PACIFIC ARTS, GUAM 2016, <https://festpac.visitguam.com/visiting-the-festival/about-the-festival> [<https://perma.cc/BZ6G-UEZD>]; Red Robot - Intelligent Distribution, *27 Pacific Island Nations Come Together for FestPac 2016*, YOUTUBE (May 24, 2016), https://www.youtube.com/watch?v=tkUWi_3YANI (on file with the *Columbia Human Rights Law Review*); MICROGAMES (2018), <https://athletics-oceania.com/event/micro-games-2018/> [<https://perma.cc/72ZB-8P9F>]; *Who We Are*, PACIFIC ISLANDS FORUM, <https://www.forumsec.org/who-we-are-pacific-islands-forum/> [<https://perma.cc/QBJ8-X9J4>].

129. Nicholas Chan, “Large Ocean States”: *Sovereignty, Small Islands, and Marine Protected Areas in Global Oceans Governance*, 24 *Global Governance* 537, 540-42 (2018) (charting the emergence of the “large ocean state” identity). See also Hau’ofa, *supra* note 9 (“it was continental men, Europeans and Americans, who drew imaginary lines across the sea, making the colonial boundaries that, for the first time, confined ocean peoples to tiny spaces. These are the boundaries that today define the island states and territories of the Pacific.”)

130. Frank Bainimarama & Hilda C. Heine, *To Truly Fight Climate Change, We Need to Set Our Sights Higher*, CNN (Oct. 3, 2018), <https://www.cnn.com/2018/10/03/opinions/climate-change-marshall-islands-fiji-bainimarama-heine/index.html> [<https://perma.cc/FX9A-3HNX>]; Climate Vulnerable Forum, *CVF: StepUp2018 to Survive & Thrive* (Jun. 24, 2018), <https://www.youtube.com/watch?v=QySTpA08LX8> (statement of Hilda C. Heine, Republic of Marsh. Is. President) (on file with the *Columbia Human Rights Law Review*); Lisa Friedman, *Tony de Brum, Voice of Pacific Islands on Climate Change, Dies at 72*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/world/tony-de-brum-dead-climate-change-advocate.html> (on file with the *Columbia Human Rights Law Review*); see also Maxine Burkett, *Small Island States and the Paris Agreement*, WILSON CENTER (Dec. 21, 2015), <https://www.wilsoncenter.org/article/small-island-states-and-the-paris-agreement> [<https://perma.cc/RLZ3-PT4L>] (“Islands predominated in the Paris COP negotiations.”); Susannah Willcox, Book Review, 25 *EUR. J. INT’L L.* 343, 343 (2014) (reviewing THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING

has recently been elected to the U.N. Human Rights Council, in which capacity Marshallese leadership is committed to representing the voices of the most vulnerable communities and asserting “the role of small nations on the global stage.”¹³¹

Reclaiming cultural identity, establishing self-government, and engaging with the international community of nation-states: all these are expressions of self-determination. Still, by inducing climate vulnerability, colonialism continues to challenge newly asserted self-determination, with climate migration threatening to permanently abrogate the right. In the words of Ben Graham, Chief Secretary and National Climate Advisor of the Marshall Islands: “We’re not like most of the countries where now as a nation-building exercise, you’re trying to develop your human capital and grow as a country. You have the SDGs [Sustainable Development Goals] for example, but there’s no SDG that says survive as a country and as a people or survive the nuclear legacy that was such an impact on you.”¹³²

B. Climate Adaptation at the Metropole & Periphery

The impact of colonialism on climate vulnerability can also be observed by comparing adaptation at the metropole and the periphery. At the metropole, adapting to climate change means adapting in place; abandoning places perceived as central is not an option. Instead, equipped with the resources to do so, powerful states are investing billions of dollars towards drastic adaptation to ensure the long-term survival of their homelands. These adaptation projects deploy cutting-edge technology and are highly tailored to optimize adaptation at the local level.

For example, the Netherlands—most of which sits below sea level and faces complete inundation within the next century—has

SEAS AND A CHANGING CLIMATE (Michael B. Gerrard & Gregory E. Wannier eds., 1993)).

131. Louella Losinio, *Marshall Islands Elected to UN Human Rights Council*, PNC Guam (Oct. 18, 2019), <https://pncguam.com/marshall-islands-elected-to-un-human-rights-council/> (quoting Marshall Islands president Hilda Heine “Building on our campaign, we will work tirelessly at the Human Rights Council to ensure the voices of the most vulnerable communities are heard, regardless of the politics. We will ensure that more attention is given to Small Island Developing States, and we will work with others to boost the vital role of small nations on the global stage.”)

132. Interview with Ben Graham, *supra* note 48.

developed and implemented detailed adaptation plans at both the regional and provincial levels.¹³³ These plans have produced innovative solutions, such as floating mega-cities and massive floodgates, to ensure cities like Rotterdam and their inhabitants can remain in place as seas continue to rise.¹³⁴ Venice, too, is predicted to “go under” in less than a century without drastic adaptation.¹³⁵ In response, Italy is investing in “megaproject” MOSE: a flood barrier of unprecedented size and sophistication to protect the Venice lagoon from encroaching seas.¹³⁶ Likewise, in New York City, where climate change is anticipated to result in “devastating” inundation, land loss, and storm surge,¹³⁷ a \$19.5 billion adaptation plan is already underway.¹³⁸ And to protect London, which is considered at high risk of “sinking” absent robust adaptation, the U.K. has constructed the “Thames Barrier”—a massive engineering feat that will protect the Greater London area from inundation.¹³⁹

133. NETH. MINISTRY OF INFRASTRUCTURE AND THE ENVIRONMENT, ADAPTING WITH AMBITION (2016); NETH. MINISTRY OF INFRASTRUCTURE AND WATER MANAGEMENT, IMPLEMENTING WITH AMBITION: IMPLEMENTATION PROGRAMME 2018–19 (2018).

134. Amanda Froelich, *Dutch Engineers Unveil ‘Floating Island’ to Combat Rising Sea Levels*, INHABITAT (Aug. 8, 2017), <https://inhabitat.com/dutch-engineers-test-floating-island-to-combat-rising-sea-levels/> [<https://perma.cc/34FW-2LP8>]; Michael Kimmelman, *The Dutch Have Solutions to Rising Seas. The World Is Watching.*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/interactive/2017/06/15/world/europe/climate-change-rotterdam.html> (on file with the *Columbia Human Rights Law Review*).

135. Peter Walker, *Venice Will Vanish Underwater Within a Century if Global Warming is Not Stalled, Climate Change Study Warns*, INDEPENDENT (Mar. 6, 2017), <https://www.independent.co.uk/news/world/europe/venice-will-vanish-within-a-century-study-warns-a7614591.html> [<https://perma.cc/Y6PZ-PZ5U>].

136. *MOSE System: The Mobile Barriers for Protection of Venice from High Tides*, CONSORZIO VENEZIA NUOVA (2018), <https://www.mosevenezia.eu/project/?lang=en> [<https://perma.cc/RWJ2-QSZJ>].

137. Andra J. Garner et al., *Impact of Climate Change on New York City’s Coastal Flood Hazard: Increasing Flood Heights from the Preindustrial to 2300 CE*, 114 PROC. NAT’L ACAD. SCI. 11861, 11865 (2017); *Impacts of Climate Change in New York*, N.Y. DEP. ENVTL. CONSERVATION (2018), <https://www.dec.ny.gov/energy/94702.html> [<https://perma.cc/YD3L-DMYU>]; Andrew Rice, *This is New York in the Not-So-Distant Future*, N.Y. MAG. (Sept. 5, 2016), <http://nymag.com/intelligencer/2016/09/new-york-future-flooding-climate-change.html> [<https://perma.cc/AZ47-A8Y7>].

138. CITY OF N. Y., *supra* note 9, at 401–02, 404 (2013).

139. *The Thames Barrier*, U.K. ENV’T AGENCY (Dec. 20, 2018), <https://www.gov.uk/guidance/the-thames-barrier> [<https://perma.cc/DCA3-UEAM>].

Those living at the periphery in decolonizing states also view climate migration as an unacceptable option.¹⁴⁰ And for Oceanic states, the potential loss associated with failure to adapt is much more severe—implicating the continued survival of whole cultures and nations.¹⁴¹ Just like at the metropole, long-term *in situ* adaptation remains technically feasible for even the most vulnerable island states.¹⁴² Indeed, the October 2018 Inter-governmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5 Degrees Celsius, which synthesizes tens-of-thousands of peer-reviewed studies and represents the cutting edge of climate science and risk assessment, concluded with high confidence that *in situ* adaptation in the islands remains technically feasible under 1.5 and 2 degree Celsius warming scenarios.¹⁴³ Moreover, even assuming warming dramatically exceeds 2 degrees Celsius, projections of impacts and adaptive capacity are so uncertain that it is

140. See Yeo, *supra* note 101 (“If you were to take the Marshallese community as it is now and say, we’re going to move you someplace else, that’s the end of a culture and a people and a tradition. That’s tantamount to even worse atrocities in the past in destroying the soul of a society.”); see also Enele S. Sopaga, Prime Minister of Tuvalu, Tuvalu Statement at the High Level Segment of COP19 (Nov. 21, 2013), https://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_tuvalu.pdf [<https://perma.cc/6VJW-U5H5>] (“Some have suggested that the people of Tuvalu can move elsewhere. Let me say in direct terms. We do not want to move. Such suggestions are offensive to the people of Tuvalu. Our lives and culture are based on our continued existence on the islands of Tuvalu. We will survive.”).

141. See *supra* Part I.A.

142. See *infra* notes 143–145 and accompanying text.

143. IPCC 2018, *supra* note 5, at A.3.3, B.2.3, B.6, D.3.1; see generally LILIAN YAMAMOTO & MIGUEL ESTEBAN, ATOLL ISLAND STATES AND INTERNATIONAL LAW: CLIMATE CHANGE DISPLACEMENT AND SOVEREIGNTY (2014) (discussing specific engineering projects that could be implemented to build long-term local resiliency to climate change in the Pacific islands); Nurse et al., *supra* note 7, at 1618 (discussing a range of adaptation options Pacific island nations could pursue to build resiliency in place); Martina Grecequet et al., *Many Small Island Nations Can Adapt to Climate Change with Global Support*, CONVERSATION (Nov. 15, 2017), <https://theconversation.com/many-small-island-nations-can-adapt-to-climate-change-with-global-support-86820> [<https://perma.cc/4ZQ6-L8SB>] (“If the international community can agree on ways to limit greenhouse gas emissions and aggressively pursue local adaptation, it may be possible to preserve many island nations and cultures.”).

impossible—and thus inappropriate—to conclude that *in situ* adaptation is infeasible for island states.¹⁴⁴

A suite of *in situ* adaptation strategies could be implemented even in the Marshall Islands, which, comprised entirely of coral atolls, is *the* geography most vulnerable to climate change.¹⁴⁵ Possibilities include raising islands, filling lagoons, bolstering natural defenses such as coral reefs, and integrating traditional knowledge that has enabled islanders to cope with harsh environmental conditions for thousands of years.¹⁴⁶ As RMI's National Climate Advisor, Ben Graham explained, “[I]t’s not rocket science. I mean China is building islands by the [a]cre every day as we speak and fortifying them . . . Denmark is going to build nine artificial islands to put . . . a new Silicon Valley type of development there. And we’ve done lots of reclamation here too [specifically referencing the U.S. military base, Kwajalein]. . . . [S]o it’s not new but it is expensive and it’s environmentally damaging.”¹⁴⁷

The U.S. military is likely to implement such adaptation strategies to ensure the continued survival of its installment on Kwajalein Atoll in the Marshall Islands. Curt Storlazzi, a United State Geological Survey researcher who was commissioned by the U.S. Department of Defense to study climate impacts on Kwajalein, put it frankly: “We’re engineers. With enough money we can build almost anything. So, in these places with expensive military infrastructure [referencing Kwajalein, which is in the Marshall Islands] we can make the investment to adapt in place. But in places

144. Barnett, *supra* note 7, at 8; Nurse et al., *supra* note 7, at 1634. See also IPCC, SPECIAL REPORT ON OCEANS AND CRYOSPHERE IN A CHANGING CLIMATE B9.2 (2019) (explaining that considering all aspects of adaptation limits, (e.g., financial, technical, social, political, and institutional), “some island nations are *likely* to become uninhabitable due to climate-related ocean and cryosphere change (medium confidence), but habitability thresholds remain extremely difficult to assess.”).

145. Storlazzi, *supra* note 3, at 1.

146. See Yamamoto & ESTEBAN, *supra* note 143 at 121–74 (outlining the adaptation strategies available to even the lowest-lying atoll states, if they had the financing); Nurse et al., *supra* note 7, at 1634–38. See also IPCC, *supra* note 144, at A7 (“Adaptation efforts have benefited from the inclusion of Indigenous knowledge and local knowledge (high confidence)”).

147. Interview with Ben Graham, *supra* note 48.

like the Marshall Islands . . . places without a big GDP, that's probably not possible."¹⁴⁸

The ability to adapt and, thus, to survive requires sufficient resources. Indeed, as Ben Graham puts it, the survival of the Marshall Islands hinges on acquiring resources to adapt, even more than on aggressive global climate change mitigation: "There was a joke going around, this whole idea of '1.5 to Stay Alive' . . . [that] we need to contain global warming to 1.5 degrees . . . we need to flip that to . . . '\$1.5 billion to Stay Alive.'"¹⁴⁹

The Marshall Islands has plans to adapt in place. However, due to its colonial history, the Marshall Islands lacks the resources to independently implement the type of extensive adaptation measures currently underway at the metropole.¹⁵⁰ Instead, the Marshall Islands is dependent on aid from outside funders to implement even modest climate adaptation projects.¹⁵¹ Because funders wholly control the resources, they also have ultimate power to set the climate adaptation agenda.¹⁵² As such, the future survival of the Marshall Islands and similarly situated Oceanic states appears to rest, not with islanders, but with outside actors.

While adaptation funding organizations may be well-intentioned, the power differential between funders and the funded

148. Curt Storlazzi, *Coral Reefs, Climate Change, and Atoll Sustainability: Will Micronesians Become the US's First Climate Change Refugees?*, Environmental Engineering Seminar Series, Stanford University, Stanford, CA (Apr. 22, 2019) (notes on file with author).

149. Interview with Ben Graham, *supra* note 48.

150. Indeed, compare the GDP of a Pacific Island state, which ranges from \$42.5 million for Tuvalu to \$5.4 billion for Fiji, with the \$19.5 billion adaptation plan for New York City. *2018 GDP: Pacific Island Small States*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=S2&view=map> [<https://perma.cc/98S7-6REF>]. See also IPCC, *supra* note 144, at C1.4 (discussing how financial and institutional barriers sometimes make implementation of adaptation strategies difficult for the communities that need them the most).

151. Barnett & Waters, *supra* note 7, at 739–41; Nurse et al., *supra* note 7, at 1640; see also REPUBLIC OF THE MARSHALL ISLANDS, NATIONAL CLIMATE ADAPTATION POLICY FRAMEWORK 5–6 (2011), https://www.adaptation-undp.org/sites/default/files/downloads/rmi_nccp_2011.pdf [<https://perma.cc/898L-LPJT>] (outlining RMI's climate adaptation policy); TUVALU, TE KANIVA: TUVALU CLIMATE CHANGE POLICY 3 (2012) (outlining Tuvalu's climate adaptation policy); REPUBLIC OF KIRIBATI, *Kiribati Adaptation Program* (2016), <http://www.climate.gov.ki/category/action/adaptation/kiribati-adaptation-program/> [<https://perma.cc/X8K6-4MUG>] (outlining Kiribati's climate adaptation policy).

152. Betzold, *supra* note 12, at 487.

has led climate adaptation finance throughout Oceania to be described as “thoroughly if unknowingly colonised by international actors.”¹⁵³ Colonial administration of the Pacific Islands was characterized by a pattern of outside powers assuming active roles while discounting islander agency.¹⁵⁴ These dynamics persist in the climate adaptation process today. Local adaptation plans are often discounted by outside actors under the perception that funders have the technical expertise and sophistication that islanders lack.¹⁵⁵ This attitude embraces and reinforces false imperial narratives that cast islands and islanders as unsophisticated and insignificant while ignoring the reality that islanders have been adapting to environmental changes under harsh conditions for centuries.¹⁵⁶

The persistence of such colonial dynamics risks maladaptation. In lieu of islanders’ own adaptation plans, funders in the Marshall Islands tend to import strategies from other locales that do not address local needs and may even be inappropriate.¹⁵⁷ Relatedly, most funds allocated for climate adaptation in Oceania are

153. Barnett, *supra* note 7, at 6. *See also* Warwick E. Murray & John Overton, *The Inverse Sovereignty Effect: Aid, Scale and Neoliberalism in Oceania*, 52 ASIA PACIFIC VIEWPOINT 272, 282 (2011) (discussing how the conditionality of aid donors to state building projects can compromise sovereignty).

154. *See generally* Davis, *supra* note 9 (describing the United States’ colonization of Bikini Atoll); Hau’ofa, *supra* note 9 (describing colonial practices that belittled indigenous communities in Oceania).

155. *See, e.g.*, Interview with Angeline Heine, *supra* note 32 (explaining that effective adaptation is impeded by “that barrier of donors coming in with their own objectives and agenda . . . the most . . . stressful part of my job is trying to convince people that although they are experts in their area, they’re not expert[s] here. . . . It’s very . . . disheartening,” and adding “we have a plan, people! Don’t just come in with your plan. We do have a plan.”); Interview with Ange Saunders, *supra* note 92; *see also* Bordner et al., *supra* note 12 (discussing how outside funders adopt colonial attitudes in discounting locally proposed solutions for climate adaptation).

156. Hau’ofa, *supra* note 9, at 6–7; Barnett, *supra* note 7, at 6.

157. Interview with Jack Niedenthal, *supra* note 87 (“[Funders] say okay, we did this in the Philippines, [so let’s] do this in the Marshall Islands. And . . . sometimes it’s just so inappropriate. Inappropriate technology is almost like a way of life out here for us. We’ve seen it millions of times.”); Interview with Angeline Heine, *supra* note 32 (explaining that funders will not support infrastructure projects that are desperately needed, but prefer to fund unnecessary solar projects that are more visible); Interview with Ben Graham, *supra* note 48 (“I love solar panels, but they don’t work underwater.”); *see also* Bordner et al., *supra* note 12, at 10–13.

not directed towards country-specific adaptation at all, but rather region-wide initiatives that have limited efficacy in addressing the needs of any single community.¹⁵⁸ The perception of islands as remote and unimportant also inhibits outside support for the type of intensive adaptation that could ensure the islands' survival. Despite the immediacy of the threats they face, island states receive only a tiny share of global adaptation aid, with that fraction in steady decline.¹⁵⁹ Moreover, outside actors have, to date, supported only short-term, small-scale adaptation in the Marshall Islands and other island states, viewing the type of intensive, long-term adaptation already under way elsewhere as economically irrational in places perceived as peripheral. As Ben Graham puts it, "there are those who say . . . 'your population is too small to spend half a billion dollars on it. Just relocate. It's not worth . . . keeping your culture and your sovereign status.'"¹⁶⁰ This value judgment reflects dominant global narratives that have already accepted the loss of islands to the rising seas.¹⁶¹

The perception of the islands as "lost causes"¹⁶² has been so vigorously mainstreamed that, contrary to the wishes of many affected communities, migration is increasingly viewed by outsiders not as a failure to adapt, but as an appropriate adaptation strategy for islanders.¹⁶³ The blanket prescription to migrate homogenizes a

158. See JOHN CAMPBELL & JOHN BARNETT, CLIMATE CHANGE AND SMALL ISLAND STATES: POWER, KNOWLEDGE AND THE SOUTH PACIFIC 21 (2010) (explaining that such discourse "mask[s] the heterogeneity of island environments and of their social systems"); Barnett, *supra* note 7, at 6–7; Betzold, *supra* note 12, at 487.

159. Betzold, *supra* note 11, at 21.

160. Interview with Ben Graham, *supra* note 48.

161. Barnett, *supra* note 7, at 5; see, e.g., Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 349 (2009) ("Climate change will force millions of people to flee their homes over the coming century. Rising sea levels threaten to envelop small island states."); Caputo & Gross, *supra* note 87; Davenport, *supra* note 87; Lyn Mettler, *13 Islands that Will Disappear in the Next 80 Years*, READERS DIG. (May 29, 2018), <https://www.rd.com/advice/travel/islands-will-disappear-80-years/> [<https://perma.cc/649E-GCPF>] ("You're running out of time to see these beauties before they disappear into the deep blue sea.").

162. Barnett, *supra* note 7, at 8.

163. See Mariya Gromilova, *Finding Opportunities to Combat the Climate Change Migration Crisis: The Potential of the "Adaptation Approach,"* 33 PACE ENVTL. L. REV. 105, 108 (2016) (describing the "adaptation approach" to climate crises in island communities); RICHARD CURTAIN ET AL., PACIFIC POSSIBLE 34

diversity of states and forecloses meaningful engagement with possibilities for adaptation in place—possibilities that remain technically feasible.¹⁶⁴

In sum, while states at the metropole are taking drastic measures to adapt in place, their former (and current) island territories—lacking resources and capacity to do the same—are prescribed wholesale migration. This dichotomy, which asks certain peoples to sacrifice their cultures, homelands, and sovereignty, suggests the continuance of colonial narratives that casts islands as small, remote, unimportant, and, therefore, expendable for the convenience of larger, more powerful countries.¹⁶⁵ Indeed, the accepted loss of the Marshall Islands to rising seas, even as colonial powers continue to consume carbon-intensive resources, is reminiscent of the United States' decision to sacrifice Marshallese lands and bodies to its nuclear project.

III. CLIMATE MIGRATION & SELF-DETERMINATION

The preceding Parts have demonstrated that colonial legacies threaten the continued survival of island nations, like the Marshall Islands. However, the loss of whole nations—particularly while alternatives remain possible—is no longer commensurate with modern commitments to equity, justice, and human rights. Our international legal system protects the ability of peoples to maintain

(2016) (arguing for open migration of climate-threatened islanders to Pacific countries); Ben Doherty & Eleanor Ainge Roy, *World Bank: Let Climate-Threatened Pacific Islanders Migrate to Australia or NZ*, *GUARDIAN* (May 8, 2017), <https://www.theguardian.com/environment/2017/may/08/australia-and-nz-should-allow-open-migration-for-pacific-islanders-threatened-by-climate-says-report> [<https://perma.cc/VN9U-JJTF>].

164. Campbell & Barnett, *supra* note 158, at 111–38 (explaining that the vast array of states encompassed by this narrative are incredibly diverse along environmental, social, and cultural dimensions, making generic claims about island vulnerability and the necessity of migration “empirically impossible to sustain.”); *see also* Nurse et al., *supra* note 7, at 1635 (“Islands are heterogeneous in geomorphology, culture, ecosystems, populations, and hence also in their vulnerability to climate change.”).

165. Davis, *supra* note 9, at 69 (describing the narrative justifying colonialism in the Pacific that “some people’s places matter and other people’s places, bodies, cultures, and environments do not matter not at all”); Hau’ofa, *supra* note 9, at 6 (describing persistent colonial valuation of Oceanic states as “too small, too poor and too isolated to develop any meaningful degree of autonomy”).

habitable homelands and sovereign status through the fundamental human right of self-determination. This right carries special force with respect to decolonizing peoples, who were denied freedom and autonomy while under colonial rule. Ironically, it is only decolonizing peoples, like the Marshallese, who now face the permanent loss of their self-determination due to climate change.

The connection between colonialism and climate vulnerability also suggests potential remedies. International law requires colonial powers to safeguard the self-determination of their former colonies. In the climate change context, this means that colonial powers may have obligations to assist their former colonies in pursuing the adaptation strategy of their choice—whether building resiliency in place or migrating away.¹⁶⁶ These duties not only carry substantial moral weight, there is a strong case that they are legally binding.

This Part will begin laying out the self-determination implications of climate migration. Then, this Part will propose a novel climate justice theory grounded in colonial powers' moral and legal obligations to promote self-determination, before employing this new theory to outline a potential claim that Marshallese plaintiffs might bring against their former colonizer, the United States. A legal strategy centered on the right to self-determination offers a new avenue for climate justice. Previous efforts focused on assigning blame for greenhouse gas emissions have failed, while existing mechanisms for addressing the loss and damage associated with climate change are voluntary, have limited efficacy and, in any case, are insufficient to address the structural violence that underlies climate vulnerability.¹⁶⁷

166. To the extent practical. There may come a time when adapting certain places to climate change becomes cost prohibitive or infeasible. However, we are not at that stage yet. Also, it may be inappropriate to talk about prohibitive costs when the other side of the ledger includes loss of sovereignty and culture. Regardless, within the bounds of what is feasible, I argue that colonial powers have obligations to assist their former colonies such that they can continue to lead dignified lives in light of climate change.

167. Margaretha Wewerinke-Singh & Diana Hinge Salili, *Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change*, CLIMATE POLICY at 1, 5 (2019) (forthcoming) (“While negotiations on loss and damage give the appearance of some progress at nearly every COP (and some intersessionals), the overall picture since Paris is one of stagnation.”); see also *id.* at 7 (describing past failed efforts to seek ICJ advisory opinions on responsibility for GHG emissions and corresponding harm in island states).

A. The Right to Self-Determination

A people's prerogative to choose their own fate is enshrined in our international legal system as the fundamental human right to self-determination.¹⁶⁸ This right guarantees to all peoples the ability to make free and genuine choices about their status and future.¹⁶⁹ A collective right, self-determination has been recognized as a "precondition for the enjoyment of other human rights."¹⁷⁰ Self-determination also holds *jus cogens* status, making it one of a select few sanctified international law principles—along with prohibitions on torture, genocide, and slavery—that are legally binding on all states and from which no derogations are permitted.¹⁷¹

Climate migration would abrogate the right to self-determination for displaced peoples.¹⁷² Not only would wholesale

168. The right is codified in the first article of both fundamental international human rights conventions, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. ICCPR, *supra* note 14, art. 1; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. It has also been recognized in the U.N. Charter, numerous U.N. resolutions, 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); African Charter of Human and Peoples Rights, *adopted* June 27, 1981, art. 20, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 21(1) O.A.S.T.S. No. 36, 1144 U.N.T.S. (entered into force July 18, 1978); African Commission on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 199 (May 26, 2017), https://www.escri-net.org/sites/default/files/caselaw/ogiek_case_full_judgment.pdf.

169. Sahara Occidental, Advisory Opinion, 1975 I.C.J. 12, ¶ 51 (Oct. 16).

170. U.N. GAOR, 68th Sess., 3d Comm., 40th mtg., U.N. Doc. GA/SHC/4085 (Nov. 5, 2013), <https://www.un.org/press/en/2013/gashc4085.doc.htm> [<https://perma.cc/V8FL-RDWH>].

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

172. IPCC, SPECIAL REPORT ON OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE, SUMMARY FOR POLICY MAKERS 39, fig. SPM.5 (noting that forced

forced migration necessarily deny displaced peoples' autonomy over their own futures, it would obstruct two essential components of self-determination: political self-determination and permanent sovereignty over natural resources ("PSNR").

Political self-determination encompasses the people's right (1) to determine their own political status, including the decision to operate as an independent, sovereign nation; and (2) to exercise self-government.¹⁷³ Territorial sovereignty, considered the "privileged vehicle for the collective self-determination of peoples," is key to exercising both aspects of political self-determination.¹⁷⁴ First, under international law, sovereign territory is a requirement of independent statehood.¹⁷⁵ Second, sovereign territory provides a unique space where a polity is free to practice self-government unencumbered by foreign interference.

Climate migration would abrogate political self-determination by extinguishing territorial sovereignty. There is no modicum of habitable land on earth that is not already under the jurisdiction of an existing state; "no uninhabited territories lying around that states can 'discover' and 'occupy.'"¹⁷⁶ Thus, if island peoples' homelands are rendered uninhabitable by climate change, they will be forced to seek refuge within the sovereign territory of another nation.¹⁷⁷ Under the current Westphalian conception, loss of sovereign territory would extinguish displaced peoples' claims to independent statehood.¹⁷⁸ Drawing on examples of "stateless quasi-sovereigns" such as the Holy

displacement would result in loss of livelihoods and sovereignty and that it raises "complex humanitarian questions on livelihoods, human rights, and equity").

173. ICCPR, *supra* note 15, art. 1.1; ICESCR, *supra* note 168, art. 1.1; U.N. Charter, art. 76 (1945).

174. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1515 (2019); *see also* East Timor (Port. v. Austrl.), Judgment, 1995 I.C.J. Rep. 90, 94 (June 30) (holding that "territorial integrity and unity" is fundamental to the self-determination right); G.A. Res. 1514 (XV), Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

175. Montevideo Convention on the Rights and Duties of States, art. 1(b), Dec. 26, 1934, 165 L.N.T.S. 19.

176. Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 WASH. J. ENVTL. L. & POL'Y 1, 19 (2014).

177. *See, e.g.*, Maxine Burkett, *The Nation Ex-Situ*, 2 CLIMATE L. 345, 349 (2011) ("[W]hile displacement within and across borders may be a compulsory journey for many 'climate migrants', small-islanders will be on the move absent a country—with all of its attendant legal, economic, and cultural markers—to which to return.").

178. *Id.*

See, the idea of “de-territorialized statehood” has been put forth as a means to preserve “limited statehood” or “partial sovereignty” for displaced peoples.¹⁷⁹ Such proposals notwithstanding, displaced peoples’ inability to realize the political status of their choice—full statehood—remains a fundamental abrogation of political self-determination. Fundamentally, it is the disruption of displaced peoples’ ability to exercise free and genuine choice that divests them of self-determination.¹⁸⁰

Moreover, forced to reside within the sovereign territory, and thus under the jurisdiction of another nation, displaced peoples would be unable to practice meaningful self-government. Here too, some scholars have suggested that this aspect of self-determination could be preserved if host states recognize the internal sovereignty of migrant peoples.¹⁸¹ But even assuming host states would be willing to acknowledge immigrant communities as autonomous self-governing entities—already a tenuous proposition—it is improbable that displaced peoples would be empowered to practice true self-rule. The

179. *E.g., id.* at 363–69; Rosemary Rayfuse & Emily Crawford, *Mapping the Impact of Climate Change on International Law*, in *INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE* 3, 8–12 (Rosemary Rayfuse & Shirley V. Scott eds., 2012). Such partial solutions, while well-meaning, may run contrary to the spirit of self-determination. For example, Maxine Burkett’s leading proposal, the “Nation Ex-Situ,” envisions reinstating the U.N. Trusteeship System—the system through which colonial powers formerly administered dependent territories, including most of the Pacific Islands—to provide a governance structure for what she terms “endangered states” once they become de-territorialized. She distinguishes from the original system by requiring that citizens of ex-situ nations would elect their own trustees, with the U.N. and member states providing “support rather than oversight.” Burkett, *The Nation Ex-Situ*, *supra* note 177, at 363–69. Nevertheless, loss of sovereign territory coupled with a return to administration under the U.N. system suggests a deterioration of the decolonization process. In addition, while the purpose of the original trusteeship system was to promote the well-being and self-determination of colonized peoples, these objectives were disregarded by administering powers who exploited their territories for economic and strategic gain at the expense of inhabitants. The ill-treatment many experienced under the original trusteeship system may make the proposal unpalatable or even insulting.

180. *E.g.,* Legal Consequences of Separation of Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 169, ¶ 167 (Feb. 25); Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶ 51 (Oct. 16); G.A. Res. 1514 (XV), Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

181. *E.g.,* Shaina Stahl, *Unprotected Ground: The Plight of Vanishing Island Nations*, 23 N.Y. INT’L L. REV. 1 (2010).

settler-colonial world is replete with examples demonstrating that such “sovereignty within [national] sovereignty”¹⁸² arrangements severely limit the autonomy of indigenous peoples living under the ultimate sovereignty of their colonizers.

Federally recognized Indian tribes in the United States, for example, are considered “domestic dependent nations,” possessing inherent sovereignty subject to the plenary power of Congress.¹⁸³ In other words, because tribes are within the territorial sovereignty of the United States, Congress has ultimate power to expand, contract, or extinguish tribal exercise of sovereignty and self-rule.¹⁸⁴ Native peoples that lack federal recognition are precluded from exercising even limited self-government.¹⁸⁵ Similarly, in New Zealand and Australia, though seats in national parliaments are reserved for indigenous representatives and limited native title is acknowledged, indigenous communities are not themselves recognized as self-governing.¹⁸⁶

182. Cf. *Emmanuel Macron Makes First Visit to New Caledonia*, RADIO NEW ZEALAND (May 4, 2018), <https://www.radionz.co.nz/international/programmes/datetimepacific/audio/2018643504/emmanuel-macron-makes-first-visit-to-new-caledonia> [<https://perma.cc/66UC-6B62>].

183. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“[T]he fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (“[tribes] may, more correctly, perhaps, be denominated domestic dependent nations”); see also *United States v. Lara*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”).

184. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978) (“[T]he Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. ‘[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.’” (quoting *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823))).

185. See *Office of Federal Acknowledgement*, BUREAU OF INDIAN AFFAIRS (2018), <https://www.bia.gov/as-ia/ofa> [<https://perma.cc/BT7C-KB5P>]; see also *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016) (describing legal fallout from the Hawai’i Legislature’s passage of legislation to “implement the recognition of Native Hawaiian people”). Unlike tribes on the continent, the United States does not recognize the inherent sovereignty of native Hawaiians. *Id.*

186. See Kelly Buchanan, *Indigenous Rights in New Zealand: Legislation, Litigation, and Protest* (Nov. 18, 2016), <https://blogs.loc.gov/law/2016/11/indigenous-rights-in-new-zealand-legislation-litigation-and-protest/> [<https://>

The examples of the United States, New Zealand, and Australia are pertinent for the Marshallese and other Pacific peoples facing climate migration. These nations represent the most likely “host nations” due to a combination of pre-existing (colonial) relationships, favorable immigration pathways, and geographical proximity (including, in the case of the United States, Hawai‘i and the U.S. territories of Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa).¹⁸⁷ The limited self-government afforded indigenous groups in these nations should be considered “best-case scenarios” for climate migrants. The indigenous peoples of these places have claims to sovereignty predating those of current national governments.¹⁸⁸ By contrast, there is no precedent for granting any measure of self-government to immigrant communities and no basis to presume that nations like the United States would be willing to establish such arrangements for incoming “climate refugees.”¹⁸⁹

perma.cc/5LHZ-JQCF]; Mick Dodson, Asmi Wood & Peter Bailey, *Indigenous Self-Determination and International Law*, AUSTRALIAN OUTLOOK (May 27, 2017), <https://www.internationalaffairs.org.au/australianoutlook/indigenous-self-determination-international-law/> [https://perma.cc/WH9H-WTTL].

187. *E.g.*, Marshall Islands Compact of Free Association, *supra* note 25, art. IV; Compact of Free Association, U.S.-Palau, art. IV, January 10, 1986, T.I.A.S. 7502; F.S.M. Compact of Free Association, *supra* note 27; Niue, N.Z. FOREIGN AFFAIRS & TRADE, <https://www.mfat.govt.nz/en/countries-and-regions/pacific/niue/> [https://perma.cc/U4AT-DNUQ]; Cook Islands, N.Z. FOREIGN AFFAIRS & TRADE, <https://www.mfat.govt.nz/en/countries-and-regions/pacific/cook-islands/> [https://perma.cc/V89W-LTFW]; *see also* Stephanie Lawson, *Australia, New Zealand and the Pacific Islands Forum: A Critical Review*, 55 COMMONWEALTH & COMP. POL. 214, 214 (2017) (explaining that New Zealand and Australia are commonly viewed as the “big brothers” of the Pacific Islands).

188. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 322–33 (1978) (“The powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished.’ Before the coming of the Europeans, the tribes were self-governing sovereign political communities.”) (quoting F. Cohen, *Handbook of Federal Indian Law* 122, 1945); *cf. Puerto Rico v. Shell Co.*, 302 U.S. 253, 264–266 (1937) (distinguishing the authority of territorial governments from the authority of tribal governments in that, while tribal sovereignty is inherent and predates the constitution, the sovereignty of territorial governments is delegated from the federal government). In territories, as on the continent, indigenous peoples exercised sovereignty and self-rule long before the U.S. seized these lands as “belonging to the United States, but not part of the United States.” *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

189. Immigrants to the United States are regularly treated with hostility. *See* Kate Jastram, *Warm World, Cold Reception: Climate Change, National Security, and Forced Migration*, 15 VT. J. INT’L L. 752, 753–54 (2014).

Climate migration would also abrogate displaced peoples' permanent sovereignty over natural resources. Per the U.N. General Assembly, PSNR guarantees all peoples the right to, "for their own ends, freely dispose of their natural wealth and resources" within their territory.¹⁹⁰ Clearly, if Oceanic states are rendered uninhabitable, islanders will lose access to and control over their land-based resources. Loss of the islands would also result in loss of ocean-based resources, both legally—because sovereignty over resources within territorial waters, exclusive economic zones, and the extended continental shelf is predicated on maintenance of a habitable territory¹⁹¹—and practically, because displaced islanders would be unable to access their oceans and the resources within. Loss of access to the island environment would be particularly devastating for peoples like the Marshallese, whose cultures and identities are tightly bound up with their lands and oceans.¹⁹²

1. Self-Determination in the Context of Decolonization

Abrogation of a right as fundamental as self-determination would be catastrophic for any people, but particularly so for a decolonizing people like the Marshallese. Self-determination was first recognized as a right vesting in colonized peoples, in explicit repudiation of the structural injustices produced by colonization.¹⁹³

190. ICCPR, *supra* note 14, art. 1.2; ICESCR, *supra* note 166, art. 1.2; G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources (Dec. 14, 1962).

191. United Nations Convention on the Law of the Sea, pt. II, V, VI, VIII Dec. 10, 1982, 1833 U.N.T.S. 397. Here, too, solutions have been proposed to preserve formal sovereignty over the waters currently under the jurisdiction of island nations should they be rendered uninhabitable. *See, e.g.*, Rosemary Rayfuse, *Sea Level Rise and Maritime Zones*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 167, 180–82 (Michael Gerrard & Gregory Wannier, eds., 2013) (describing various proposals for how states rapidly losing coastline could ensure their territorial sovereignty, such as drawing from rules governing archipelago or delta baselines). These proposals do not, however, preserve PSNR over land-based resources nor the practical problem of lack of access to the oceans that would accompany loss of the islands.

192. *See supra* Part I.A.

193. *See, e.g.*, *Legal Consequences of the Separation of the Chagos Archipelago*, 2019 I.C.J. 169 ¶¶ 87, 147, 148 (Feb. 25) (describing the International Court of Justice's recognition that protecting self-determination was one of the foundational purposes of United Nations and the U.N. Charter and that the General Assembly had consistently played a role in seeking to end colonialism).

With the creation of the United Nations in 1945, decolonization became, and continues to be, a primary objective of the modern international legal regime.¹⁹⁴ In the same year, self-determination was first formally codified with the promulgation of the U.N. Charter as the end-goal of the new normative push for decolonization.¹⁹⁵ Though self-determination is now recognized as a universal human right,¹⁹⁶ it continues to carry special force with respect to decolonizing peoples who were actively denied freedom, autonomy, and human dignity by colonial powers.¹⁹⁷

Under the U.N. framework, decolonization and self-determination are one and the same.¹⁹⁸ Decolonization is not achieved at the moment a colonized people attain formal independence, but when they realize self-determination through unencumbered enjoyment of “the inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,” as well as the ability to “freely pursue their economic, social and cultural

194. The U.N. Charter established the international trusteeship system, the objective of which was to promote the decolonization of non-self-governing trust territories. U.N. Charter art. 73–76. These objectives were subsequently adopted with respect to all non-self-governing territories in the U.N. Declaration on the Granting of Independence to Colonized Peoples. G.A. Res. 1514 (XV) (Dec. 14, 1960); *see also The United Nations and Decolonization*, UNITED NATIONS, <https://www.un.org/en/decolonization/history.shtml> [<https://perma.cc/YVM4-7JTW>] (detailing the U.N.’s efforts to promote decolonization).

195. U.N. Charter art. 73–76; *see also* MIKULAS FABRY, *RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776*, at 12 (2010) (“Reflecting the global normative consensus that developed in the 1950s that colonialism was no longer tolerable, international society defined, for the first time, specific peoples entitled to sovereignty: the populations who dwelt within the inherited boundaries of non-self-governing and trust territories.”).

196. ICCPR, *supra* note 14, art. 1; ICESCR, *supra* note 166, art. 1.

197. *E.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 883, ¶ 49–52 (July 4); *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶ 31–36 (Oct. 16); G.A. Res. 65/119, *Third International Decade for the Eradication of Colonialism* (2011–2021) (Dec. 10, 2010); *Special Committee on Decolonization*, UNITED NATIONS, <https://www.un.org/en/decolonization/specialcommittee.shtml> [<https://perma.cc/YVZ4-U2JJ>].

198. Gentian Zyberi, *Self-Determination Through the Lens of the International Court of Justice*, 56 NETH. INT’L L. REV. 429, 432 (2009) (“[T]he process of decolonization hinge[s] on the proper implementation of the right of peoples to self-determination.”).

development.”¹⁹⁹ In this sense, decolonization is an ongoing process that remains incomplete while formally independent states remain politically and economically subordinate to colonial powers.²⁰⁰ Moreover, the decolonization process can be “suspended” when a decolonizing people’s exercise of self-determination is impaired.²⁰¹

Not only does self-determination have singular import with respect to decolonizing peoples, colonial powers hold particular responsibilities to promote and protect the right. The U.N. Trusteeship System—under which the Marshall Islands and many other Oceanic states were administered as non-self-governing territories²⁰²—vests colonial powers with “sacred trust” obligations to effectuate the decolonization of their territories by ensuring “political, economic, social, and educational advancement,” aiding territories in “develop[ing] self-government,” “tak[ing] due account of the political aspirations of the peoples,” and “assist[ing] them in the progressive development of their free political institutions.”²⁰³ In short, under the Trusteeship System, colonial powers held fiduciary duties to promote the self-determination of their territorial ‘wards.’²⁰⁴ Under the modern decolonization regime, the duty to promote self-determination vests in all colonial powers, not only those operating under the Trusteeship System.²⁰⁵ The International Court of Justice (“ICJ”) has

199. G.A. Res. 1514 (XV), Granting of Independence to Colonized Peoples, (Dec. 14, 1960).

200. See Achiume, *supra* note 174, at 1509–10.

201. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 883, ¶¶ 49–52 (July 4).

202. *Trusteeship Council*, DAG HAMMARSKJOLD LIBRARY (July 6, 2018), <https://research.un.org/en/docs/tc/territories> [<https://perma.cc/DM5B-CY8C>].

203. U.N. Charter art. 73–74.

204. U.N. Charter art. 73 (providing that colonial powers “accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories” by promoting their self-determination).

205. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Rep. 1971 ¶ 52 (“the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them”); see also G.A. Res. 1654 (XVI), *The Situation Regarding the Implementation of the Declaration on the Granting of Independence to Colonized Peoples* (Nov. 27, 1961) (establishing the Special Committee on Decolonization to oversee all colonial powers in carrying out their trust responsibilities with respect to their non-self-governing territories); G.A. Res. 1514 (XV), *Granting of Independence to Colonized Peoples* (Dec. 14, 1960).

clarified that, in keeping with the conception of self-determination as the end-goal of decolonization, the obligations of colonial powers persist after their territories attain formal independence.²⁰⁶

When the principles of decolonization and self-determination were first codified in international law, they carried little practical force. Following World War II, previous pledges made by global powers to usher in an age of independence and autonomy for all peoples were replaced by new commitments to universal human rights.²⁰⁷ Some scholars have convincingly argued that this pivot to human rights served to ensure that the same powers could continue their colonial conduct unchecked.²⁰⁸ And indeed, as Part II elucidated, colonial powers flagrantly disregarded their responsibilities to protect and promote self-determination under the U.N. Trusteeship System.

Whatever their origins, the principles of decolonization and self-determination have evolved to carry meaningful normative and legal force, in no small part due to the efforts of colonized peoples advocating for their rights.²⁰⁹ As touched upon above, self-determination is now among the most sacrosanct norms of international law, codified in the joint first article of the two foundational and legally binding human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.²¹⁰ These covenants also reaffirm the obligations of colonial powers to effectuate self-determination of their colonies, providing: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and

206. Certain Phosphate Lands in Nauru (Nauru v. Australia), Judgment, 1992 I.C.J. Rep. 615 (June 26).

207. Mark Philip Bradley, *Approaching the Universal Declaration of Human Rights*, in THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY 329–31 (2012); Samuel Moyn, *The Human Rights Revolution: An International History*, NATION (Aug. 11, 2010), <https://www.thenation.com/article/human-rights-history/>[<http://perma.cc/DJV4-NSMF>].

208. *E.g.*, Bradley, *supra* note 207, at 331–33; Moyn, *supra* note 207; *but see* Gary J. Bass, *The Old New Thing*, NEW REPUBLIC (Oct. 19, 2010), <https://newrepublic.com/article/78542/the-old-new-thing-human-rights> [<https://perma.cc/Q9UH-9EZP>].

209. Bradley, *supra* note 207, at 334–39 (describing evolution of human rights and self-determination law, including legal efforts by colonized and decolonizing peoples to achieve meaningful enforcement of these principles).

210. ICCPR, *supra* note 15, art. 1; ICESCR, *supra* note 165, art. 1.

shall respect that right, in conformity with the provisions of the Charter of the United Nations.”²¹¹ The ICJ has also repeatedly affirmed the legal force behind the principle of self-determination, particularly when it comes to decolonizing peoples.²¹²

Perhaps of equal import, the norms of decolonization and self-determination have garnered widespread political support.²¹³ The United Nations has decreed 1990–2000, 2000–2010, and 2010–2020 International Decades for the Eradication of Colonialism.²¹⁴ Moreover, though colonial conduct certainly continues to quietly persist, particularly in islands,²¹⁵ colonialism is now widely condemned as morally repugnant and the word ‘empire’ has come to have a negative connotation.²¹⁶

211. ICCPR, *supra* note 15, art. 1; ICESCR, *supra* note 165, art. 1.

212. See, e.g., Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16) (recognizing, in a dispute between Spain, Morocco, and Mauritius regarding sovereignty over the non-self-governing territory of Western Sahara that it is the prerogative of the peoples of Western Sahara, by virtue of their right to self-determination, to freely and genuinely choose their own political status); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, 94 (June 30) (recognizing that self-determination is an *erga omnes* norm, legally enforceable against any party infringing on that right, and reinforcing the fact that “territorial integrity and unity” is fundamental to the self-determination right); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 883 (July 9) (applying previous case law to evaluate Israel’s construction of a wall within Palestine, and determining that because the wall forced “the departure of Palestinian populations from certain areas” it “severely impedes the exercise by the Palestinian people of its right to self-determination,” in violation of “Israel’s *erga omnes* obligation to respect the right”). The Palestine case has been characterized as one of “interrupted decolonization,” a designation that applies squarely to the climate migration context. See Zyberi, *supra* note 198, at 429, 441.

213. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 679, ¶ 70 (July 8).

214. G.A. Res. 65/119, Third International Decade for the Eradication of Colonialism (2011–2020) (Jan. 20, 2011); G.A. Res. A/RES/60/120, Second International Decade for the Eradication of Colonialism (2001–2010) (Dec. 8, 2005); G.A. Res. 43/47, International Decade for the Eradication of Colonialism (1990–2000) (Nov. 22, 1988).

215. See generally Oldenzel, *supra* note 103 (detailing America’s hidden “island empire”); DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE (2019); Sylvia C. Frain, *supra* note 85, at 218, 224; Lutz, *supra* note 111.

216. See, e.g., Erin Blakemore, *What is Colonialism?*, NAT’L GEOGRAPHIC (Feb. 19, 2019), <https://www.nationalgeographic.com/culture/topics/reference/colonialism/> [http://perma.cc/3BAN-USRN] (“The history of colonialism is one of brutal subjugation of indigenous peoples.”); Eddie Izzard, *Do You Have a Flag?*,

At least since 1945, colonial powers have had responsibilities to enable the self-determination of their colonies. In the past, those obligations lacked the legal and political backing necessary for enforcement, enabling unchecked colonial violence with crippling effects for affected populations. However, international law and global ethics have evolved in the intervening years. While colonial dynamics persist in many ways, the norms of decolonization and self-determination now have sufficient legal and normative weight to provide tenable pathways for decolonizing states to hold their colonizers to account, thereby preventing past injustices from producing catastrophic loss in light of climate change.

B. Moral Responsibilities

Colonial powers' obligations to promote self-determination instill them with moral responsibilities to (1) provide reparations for past wrongs; and (2) continue to facilitate decolonization through self-determination. The moral case for colonial powers to redress historic wrongs is well-established. In short, colonialism unjustly enriched colonial powers. Colonial acts of violence and exploitation spurred the advancement of colonizers while crippling development of the colonized.²¹⁷ As a result, gross inequities persist along colonial lines after formal independence.²¹⁸ The need to address such structural violence is urgent, particularly in Oceanic states, where, as climate impacts worsen, resource constraints directly imperil the continued existence of nations and people. Reparations for colonial wrongs could "correct structural imbalance and subordination caused by

YOUTUBE (May 18, 2014), https://youtube.com/watch?v=_9W1zTEuKLY (on file with the *Columbia Human Rights Law Review*) ("We built up empires. We stole countries, that's what we did. That's how you build an empire. We stole countries with the cunning use of flags.")

217. See Daniel Butt, *Repairing Historical Wrongs and the End of Empire*, 21 SOC. & LEGAL STUD. 227, 233–39 (2012); Ediberto Roman, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369, 373–83 (2002); see also Chris Cunneen, *Restorative Justice and the Politics of Decolonization*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 32, 44–45 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 2002) (emphasizing the importance of creating restorative justice solutions that promote self-determination instead of merely "indigenizing" systems while maintaining the colonial power dynamic).

218. See generally Butt, *supra* note 217, at 239 (describing the unequal conditions of modern-day communities after independence).

colonialism” by reallocating unjustly acquired resources,²¹⁹ thereby enabling climate-vulnerable states to undertake adaptation that could preserve their sovereignty and self-determination.

Making the moral case tangible, the Caribbean Small Island Developing States have established a commission to seek reparations from their former colonizers.²²⁰ As in the Marshall Islands, “a substantial part of the backdrop . . . of the continuing socio-economic challenges of the nation-states of our Caribbean civilisation is the awful legacy of underdevelopment which European colonialism has bequeathed to us.”²²¹ Indeed, colonialism is “the primary cause of development failure in the Caribbean.”²²² The Caribbean states are, therefore, calling on colonial powers to help close the development gap.²²³ To that end, the commission’s 10-step reparations plan envisions colonial powers assisting with a variety of programs, including rehabilitating lands from which native peoples were dispossessed, building capacity to address public health and education insufficiencies, and transferring technology.²²⁴

Reparative justice arguments apply across decolonizing geographies, which, like the Caribbean, face serious colonialism-induced development challenges. The existential threat posed by climate change in Oceanic states (and in the Caribbean, for that matter) lends additional weight and urgency to calls for reparative justice. Meaningful implementation of the Caribbean commission’s development-oriented plan for restorative justice would allow islanders to reclaim agency over their own climate adaptation strategies. Rehabilitation of exploited lands, like Bikini, would help bolster natural defenses; building capacity would enable island states to independently implement the adaptation projects that they truly want and need; and technology transfer would help unlock the same

219. Achiume, *supra* note 174, at 1565; Catharine Lu, *Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress*, 19 J. POL. PHIL. 261, 262–63 (2011).

220. *Reparations Commission*, CARICOM (2018), [http://caricomreparations.org/\[https://perma.cc/V82V-AZT2\]](http://caricomreparations.org/[https://perma.cc/V82V-AZT2])

221. *10 Point Reparations Plan*, CARICOM (2018) <http://caricomreparations.org/caricom/caricoms-10-point-reparation-plan/> [<https://perma.cc/6QRA-N5BV>].

222. *Id.*

223. *Id.*

224. *Id.* The Commission’s plan also calls for the option of repatriation for the descendants of those forcibly taken from their homelands as part of the trans-Atlantic slave trade, emphasizing the importance of territorial sovereignty and sense of place to effectuating self-determination for decolonizing peoples.

sophisticated adaptation strategies already underway at the metropole.

Next, 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.”²²⁵ Thus, while the self-determination of decolonizing states remains in question, the duty of colonial powers to promote and protect their self-determination persists.²²⁶ The link between colonialism and the climate vulnerability currently threatening islanders’ self-determination only fortifies this claim.

In her recent article, “Migration as Decolonization,” E. Tendayi Achiume addresses colonial obligations to promote self-determination in the context of economic migration.²²⁷ According to Achiume, economic migrants from the colonized world—those migrating volitionally to seek a better life—are pursuing “personal decolonization” (“individual self-determination”) by escaping the development challenges caused by colonialism in their homelands.²²⁸ Because of colonial powers’ duties to promote decolonization and self-determination, Achiume posits, they should facilitate such attempts by opening their borders to migrants from their former colonies.²²⁹

In light of climate change, the nexus between migration and colonial obligations could be conceived more expansively. Whereas volitional migration may represent personal decolonization, by imperiling self-determination, forced migration represents the opposite: collective recolonization. Forced migration deprives displaced peoples of the choice of whether to leave or stay while stripping whole nations of their territory, sovereignty, and independence.²³⁰ Thus, to uphold their duties to promote self-determination, colonial powers should facilitate the migration *choice* of their former colonies. If decolonizing people wish to migrate, their

225. Achiume, *supra* note 174, at 45.

226. *See supra* Part III.A.

227. *See generally* Achiume, *supra* note 174.

228. *Id.* at 1522, 1550–53.

229. *Id.* at 1553, 1559–61.

230. *See supra* Part I.A.

former colonizers should open their borders; if, instead, they wish to remain in their homeland, colonial powers should provide assistance to ensure that choice can be effectuated.

The foregoing moral arguments are not unprecedented in the climate change context, though they have not been made along explicitly colonial lines. The principle of Common but Differentiated Responsibility (“CBDR”), which arose in the context of climate change mitigation, applies analogous reasoning to inject principles of equity and justice into global climate solutions.²³¹ Under CBDR, while all states share a responsibility to protect the global environment, that 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.²³² Moreover, recognizing that the growth of least developed countries has been hindered by the conduct of developed states (i.e., colonialism), least developed countries are afforded considerable leeway to increase emissions as they develop their economies.²³³ CBDR now “sits at the very heart” of the United Nations Framework Convention on Climate Change (“UNFCCC”) approach to climate change mitigation as the concept of “Common But Differentiated Responsibilities and Respective Capacities (“CBDR+RC”).²³⁴

The principle of CBDR+RC has also been extended to apply to climate adaptation efforts through the UNFCCC’s Climate Finance and Loss and Damage mechanisms.²³⁵ Broadening the principle in

231. Conference on Env’t & Dev., Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration].

232. *Id.*; see also *The Principle of Common but Differentiated Responsibilities*, CTR. FOR INT’L SUSTAINABLE DEV. LAW (Aug. 26, 2002), http://cisdl.org/public/docs/news/brief_common.pdf [<https://perma.cc/S3MG-J5H5>] (explaining the principle of CBDR and how it can work in practice).

233. Rio Declaration, *supra* note 231; *The Principle of Common but Differentiated Responsibilities*, *supra* note 232.

234. U.N. Framework Convention on Climate Change, art. 3, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; 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).

235. Carlarne & Colavecchio, *supra* note 233, at 135 (2019) (describing commitments to strengthen commitments for climate adaptation and finance in the Paris Accords); Margaretha Wewerinke-Singh & Diana Hinge Salili, *Between Negotiations and Litigation: Vanuatu’s Perspective on Loss and Damage from Climate Change*, CLIMATE POLICY at 2-5 (2019) (forthcoming).

this way is sensible. While developed countries have contributed the most to climate change, developing countries—particularly least developed countries and island states—are both worst affected and least able to adapt.²³⁶ However, the implementation of CBDR+RC in the climate adaptation context has had limited efficacy.²³⁷ Contributions to support adaptation are voluntary and, to date, have been insufficient, with developed countries preferring to focus on mitigation.²³⁸ Moreover, the UNFCCC mechanisms for CBDR+RC in climate adaptation and finance remain ill-defined and largely unactionable. This state of affairs is largely due to intractable difficulties and disagreements in determining precisely what the CBDR+RC principle requires—what, if any, duties do developed countries owe and to whom?²³⁹ For similar reasons, the loss and damage regime has been hotly contested. Stagnating negotiations have left this mechanism inefficacious even as vulnerable island states continue to sustain heavy losses.²⁴⁰

The principle of CBDR+RC could be narrowed and sharpened based on colonial relationships in order to catalyze meaningful action. First, partitioning of responsibility along colonial lines fits seamlessly into the framework of CBDR+RC and even helps to clarify its equity-driven objectives. The principles of equity and justice that undergird CBDR+RC suggest that colonial powers should assist their former colonies not only because they disproportionately contributed to greenhouse gas emissions and have greater capacity with which to act, but also because colonial conduct has exacerbated climate vulnerability and limited adaptive capacity. Second, by clearly defining the scope of country-specific responsibility, CBDR+RC would

236. IPCC 2014, *supra* note 75.

237. See e.g., Wewerinke-Singh & Salili, *supra* note 235, at 2-5 (describing the UNFCCC's mechanism for loss and damage financing and how it has been ineffective in helping climate-vulnerable states deal with the impacts of climate change); Chukwumerije Okereke & Philip Coventry, *Climate Justice and the International Regime: Before, During, and After Paris*, 7 WIREs CLIMATE CHANGE 834, 842-43 (2016).

238. See e.g. Carlarne & Colavecchio, *supra* note 233, at 125-128 (describing disagreements over the meaning of CBDR(+RC) under the UNFCCC framework); Okereke & Coventry, *supra* note 237, at 842-843.

239. See Carlarne & Colavecchio, *supra* note 233, at 125-128 (describing disagreements over the meaning of CBDR(+RC) under the UNFCCC framework).

240. Wewerinke-Singh and Salili, *supra* note 235, at 5 (“While negotiations on loss and damage give the appearance of some progress at nearly every COP (and some intersessionals), the overall picture since Paris is one of stagnation.”).

be transfigured into a more actionable principle. While acknowledging the negative consequences of colonial conduct may seem counterintuitive to the interests of developed states, this gloss would at least constrain their duties and obligations to a manageable subset of countries—those over which they exercised colonial rule. Moreover, bringing the norms, duties, and obligations of the international decolonization regime to bear would strengthen the moral imperative for developed countries to assist their developing counterparts in adapting to climate change.²⁴¹

C. Legal Responsibilities

Colonial powers may also have legally enforceable obligations to promote self-determination, and therefore, to assist their former colonies in adapting to climate change. Potential legal claims arise under the same principles as the moral obligations discussed above: redress for past wrongs and the continued duty to promote decolonization.

The ICJ opened the door to such claims in the 1992 case *Certain Phosphate Lands in Nauru (Nauru v. Australia)*.²⁴² From the end of World War I until 1968, Australia, Britain, and New Zealand jointly administered Nauru as a non-self-governing territory under the U.N. Trusteeship System.²⁴³ Australia spearheaded the administration, which focused less on fulfilling the colonial powers' obligations to promote the welfare and self-determination of Nauruans, than on exploiting the island's profitable phosphate deposits.²⁴⁴ Ultimately, colonial phosphate mining rendered a full

241. E.g., Mary J. Bortscheller, Comment, *Equitable but Ineffective: How the Principle of Common but Differentiated Responsibilities Hobbles the Global Fight Against Climate Change*, SUSTAINABLE DEV. L. & POL'Y, Winter 2010, at 49, 50–52.

242. *Certain Phosphate Lands in Nauru (Nauru v. Austrl.)*, Judgment, 1992 I.C.J. Rep. 616 (June 26).

243. Memorial of Nauru, Case Concerning Phosphate Lands in Nauru (*Nauru v. Austrl.*), 1990 I.C.J. Pleadings 20–24, 37–39 (Mar. 20, 1990); Iain Scobbie, *Case Concerning Phosphate Lands in Nauru (Nauru v. Australia) Preliminary Objections Judgement*, 42 INT'L & COMP. L.Q. 710, 710 (1993).

244. Memorial of Nauru, *supra* note 243, at 33–39; M.R. Islam, *The Dispute Between Nauru and Australia over Rehabilitation: A Test Case for Economic Self-Determination*, 9 QUEENSLAND U. TECH. L.J. 147, 150–52 (1992).

one-third of Nauru “totally useless for habitation, vegetation, agriculture, or any other economic utilisation.”²⁴⁵

Twenty-one years after attaining independence, Nauru filed suit in the ICJ, arguing that Australia’s aggressive phosphate mining (1) breached Australia’s trust obligations to promote the self-determination and well-being of Nauruans under the international decolonization regime; (2) caused current and forward-looking violations of Nauru’s rights to self-determination, particularly permanent sovereignty over natural resources (PSNR); and (3) that Australia’s failure to remediate the mined lands constituted a denial of justice.²⁴⁶ In other words, Nauru pressed legal charges for violations of precisely the same rights and obligations implicated by the threat of climate migration. As remedy, Nauru sought both monetary damages and equitable relief—remediation of damaged lands.²⁴⁷

Australia attempted, unsuccessfully, to have the case dismissed. First, Australia argued that any claims stemming from the colonial period had been extinguished when Nauru attained independence.²⁴⁸ The court quickly dispensed with this argument, holding that the “sacred” obligations Australia assumed as Nauru’s colonial overseer vested it with legally enforceable duties to effectuate Nauru’s decolonization.²⁴⁹ Moreover, recognizing that decolonization is only achieved when self-determination is actualized, the court held that Australia was not discharged of its duties when Nauru attained formal independence.²⁵⁰ In the alternative, Australia argued that Nauru’s claims were time-barred because the mining had occurred decades before.²⁵¹ The ICJ rejected this argument too, holding that the “nature of relations between Australia and Nauru” made the claim live, time delay notwithstanding.²⁵² The same logic applies in

245. Islam, *supra* note 244, at 151; *see also* Report of the Trusteeship Council 6 August 1946–22 July 1947 on its 4th sess., U.N. Doc. No.4 (A/933), at 74 (discussing how Nauru will be “worthless” after phosphate deposits are exhausted in seventy years).

246. Memorial of Nauru, *supra* note 243, at 97–160.

247. *Id.* at 235.

248. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 I.C.J. Rep. 615 (June 26), at 14–15.

249. *Id.* at 16–17, 20–22.

250. *Id.* at 17.

251. *Id.*

252. *Id.* at 18–19.

the climate change context. As in the *Phosphate* case, although the conduct that is today exacerbating climate vulnerability was carried out decades ago, colonial powers remain responsible for redress by virtue of their unextinguished duties to protect and promote self-determination.

Australia next argued that the claims were brought in bad faith because Nauru had not independently taken steps to rehabilitate the island prior to filing suit. Thus, Nauru's assertion that "the island must be completely rehabilitated if it is to remain habitable is without any foundation."²⁵³ The Court rejected this argument summarily, holding that Nauru need not have remediated the island itself and again stressing Australia's proactive duty to protect Nauru's self-determination.²⁵⁴

Finally, Australia argued that the case could not be tried without joinder of Britain and New Zealand, both of which had also destructively mined Nauru's lands.²⁵⁵ Disagreeing, the ICJ held that the fault of the other two did not preclude review of Australia's liability.²⁵⁶ A colonial power might likewise argue that it cannot be held liable for threats to self-determination posed by climate migration because climate change is caused by global carbon emissions, which are diffuse and cannot be attributed to a single actor. However, the *Phosphate* holding indicates that colonial powers can be held to account for their role in inducing climate vulnerability even though other drivers also contribute to the harm.

After its objections were dismissed, Australia opted to settle out of court rather than proceed on the merits.²⁵⁷ Although disclaiming liability, the settlement agreement provides—in seeming acknowledgement of the continuing harm to Nauru's self-determination and PSNR caused by Australia's conduct—that the funds compensate for the fact that "phosphate on Nauru is nearly

253. Case Concerning Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections of the Government of Australia, at 162, ¶ 404 (Jan. 16, 1991), <https://www.icj-cij.org/files/case-related/80/6663.pdf> [<https://perma.cc/87QF-HJ6G>].

254. Case Concerning Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. Rep. 615, 20–22.

255. *Id.* at 22–23.

256. *Id.* at 23–25.

257. Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, Austl.-Nauru, Aug. 10, 1993, 32 I.L.M. 1471, 1471–72.

mined out and Nauru now has to adjust to a post-phosphate future.”²⁵⁸

The *Phosphate* case represents the first instance in which an international tribunal has ruled on the legal weight of colonial obligations to promote self-determination *after* formal independence.²⁵⁹ In holding Nauru’s claims to be cognizable and admissible, this landmark case provides strong precedent that such claims are not only valid, but quite viable.

In its 2019 Advisory Opinion, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the ICJ reaffirmed the sanctity of the right to self-determination and the persistence of colonial powers’ legal obligations to uphold that right after formal independence.²⁶⁰ The *Chagos* case, like a potential climate migration claim, squarely implicates issues of forced migration and territorial integrity. In 1965, Britain detached the Chagos Islands from Mauritius, then a British colony, and expelled the islands’ residents, Chagossians—who themselves were brought to Chagos by French colonizers a century before—to make way for a U.S. military installment.²⁶¹ Subsequently, in 1968, Britain granted Mauritius independence while severing the Chagos Archipelago from the rest of the territory and retaining British sovereignty there.²⁶² Despite concerted efforts, Chagossians have never been permitted to return home and Mauritius has been denied sovereignty over this part of its territory.²⁶³ Britain appears set to retain control over Chagos into the future, having recently extended the U.S. military’s lease on the islands until 2036.²⁶⁴

258. *Id.* at 1472.

259. Anthony Anghie, *Certain Phosphate Lands in Nauru*, 87 AM. J. INT’L L. 282, 288 (1993) (noting that the *Phosphate* case positions the ICJ to address issues related to the legacy of colonialism that “have not as yet been subject to sustained consideration by the Court”).

260. 2019 I.C.J. Rep. 169, 42 (Feb. 25).

261. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of Mauritius (Mar. 1, 2018), <https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-00-EN.pdf> [<https://perma.cc/S2ZT-578K>].

262. *Id.* at 120–121.

263. *Id.*

264. Stephanie van den Berg, *World Court Weighs Britain’s Claim to Chagos Islands*, REUTERS (Sept. 3, 2018), <https://www.reuters.com/article/us-mauritius-britain-worldcourt/world-court-weighs-britains-claim-to-chagos-islands-idUSKCN1LJ0X0> [<https://perma.cc/J9FZ-LMGA>].

In 2017, the U.N. General Assembly requested an ICJ advisory opinion on the legality of Britain's continued exercise of sovereignty over the Chagos Archipelago. In particular, the General Assembly asked the ICJ to determine whether the separation of Chagos violated Britain's responsibilities to effectuate decolonization and promote self-determination, and, if so, what legal consequences resulted.²⁶⁵ In referring the question, the General Assembly reaffirmed that by virtue of their right to self-determination "all peoples have an inalienable right to the exercise of their sovereignty and the integrity of their national territory," and that interference with that right constitutes a violation of international decolonization principles.²⁶⁶ The General Assembly also stressed that Britain, as colonial administrator, has particular obligations to effectuate the complete and sustained self-determination of Mauritius and that until full self-determination is achieved, the decolonization process remains incomplete.²⁶⁷

In 2019, the ICJ issued its advisory opinion, holding that Britain's separation of and retained sovereignty over the Chagos Archipelago violated Mauritius' right to self-determination and that Britain was legally obliged to rectify this situation.²⁶⁸ In reaching this conclusion, the court first reaffirmed that although self-determination is a universal human right, it carries particular force in the context of a decolonizing state, like Mauritius.²⁶⁹ The court then clarified that full "territorial integrity" and unity are an essential "corollary of the right to self-determination."²⁷⁰ As such, unless based on the "freely expressed and genuine will of the people of the territory concerned," any disruption of territorial integrity or unity constitutes a violation of the right to self-determination.²⁷¹ Under these principles, the ICJ determined that because Britain's separation of the Chagos Archipelago did not occur pursuant to the will of the people—to the contrary, resulting in the prolonged and forced exile of Chagossians

265. G.A. Res. 71/292, Request for an Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (June 22, 2017).

266. *Id.* at 1.

267. *Id.*

268. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, 2019 I.C.J. Rep. 169, ¶ 177 (Feb. 25).

269. *Id.* ¶¶ 87, 144–157.

270. *Id.* ¶ 160.

271. *Id.*

from their islands—this disruption of territorial integrity violated Mauritius’ right to self-determination.²⁷² And, because self-determination and decolonization are one and the same, while Mauritian self-determination remains impaired, the process of Mauritius’ decolonization remains necessarily incomplete.²⁷³

Having established that the separation of Chagos violated Mauritian self-determination and impaired its decolonization, the ICJ next turned to the resulting legal consequences. Under international decolonization and self-determination law, Britain’s separation of Chagos constituted “a wrongful act entailing the international responsibility of that state [Britain].”²⁷⁴ Moreover, Britain’s current exercise of sovereignty over Chagos constitutes “an unlawful act of a continuing character” by persistently impairing Mauritian territorial integrity, and therefore, self-determination.²⁷⁵ Reaffirming its holding in the *Phosphate* case that colonial powers have legally binding obligations to protect and promote self-determination and decolonization, the ICJ concluded that Britain is thus “under an obligation” to relinquish control over Chagos, “thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.”²⁷⁶

The *Chagos* case supplies additional support for a potential climate migration claim. Though as an advisory opinion the case is not legally binding, it nevertheless constitutes an authoritative declaration of law that can be relied upon.²⁷⁷ First, the opinion provides that territorial loss and population displacement impermissibly abrogate self-determination, further substantiating

272. *Id.*

273. *Id.* ¶¶ 160–61, 174.

274. *Id.* ¶ 177.

275. *Id.*

276. *Id.* ¶ 178.

277. Mariya Gromilova, *rescuing the People of Tuvalu: Towards an I.C.J. Advisory Opinion on the International Legal Obligations to Protect the Environment and Human Rights of Populations Affected by Climate Change*, 10 *Intercultural Human Rights L. Rev.* 233, 245 (2015) (explaining the benefits of an I.C.J. advisory opinion in clarifying the human rights dimensions of climate change.); see also Wewerinke-Singh & Salili, *supra* note 235, at 1, 8 (2019) (“Advisory opinions, while not binding, have the potential at least to clarify the rights and obligations of all states in connection with loss and damage. Increased clarity about states’ rights and obligations could in turn bolster the position of climate-vulnerable states in international climate negotiations.”).

the conclusion that climate migration—undertaken against the free and genuine will of the affected community—would violate displaced peoples’ self-determination right. Next, the case establishes that legal consequences flow from such a violation, at least in the context of decolonizing peoples. In the *Chagos* case, Britain’s conduct directly interfered with the territorial integrity of Mauritius, placing Britain under an obligation to take corrective action. Likewise, while perhaps less explicit, the political and economic subordination induced by colonialism directly imperils the self-determination of the Marshall Islands and other Oceanic states by constraining their ability to adapt to climate change and, therefore, to survive as nations and as peoples. The *Chagos* case thus suggests that, like Britain with respect to Mauritius, colonial powers are “under an obligation” to take action to prevent such foreclosure of self-determination, thereby enabling the complete decolonization promised by our international human rights and decolonization frameworks.

D. An Avenue to Justice for the Marshall Islands

As the foregoing Subparts have demonstrated, colonial powers may have live obligations to safeguard the self-determination of their former colonies. An advisory opinion on climate migration and self-determination may be an effective avenue to clarifying the law, thereby providing authority for subsequent legal action or political campaigns. In addition, for many island states imminently threatened by climate migration, contentious international legal claims against former colonizers might provide a viable means of acquiring the resources or technical assistance that could prevent a forced climate migration. For the Marshall Islands and other states harmed by U.S. colonialism, however, international litigation is probably not a viable option. This is because the United States does not consent to the jurisdiction of the ICJ or other international tribunals.²⁷⁸ However, the moral and legal principles established in the preceding Subparts could be imported to a domestic tribunal, the U.S. Court of Federal Claims, through a little-known statutory mechanism: a congressional reference case.²⁷⁹ This Subpart will concretize the moral and legal theories described above by outlining a

278. STEPHEN P. MULLIGAN, THE UNITED STATES AND THE “WORLD COURT” 1–2 (2018), <https://fas.org/srgp/crs/row/LSB10206.pdf> [<https://perma.cc/EW6X-Z7K2>].

279. 28 U.S.C. § 1492 (1992).

congressional reference case that the Marshall Islands might bring against their colonizer, the United States.

As discussed above, the United States contravened its “sacred trust” obligations to promote the welfare and self-determination of the Marshallese during its administration of the islands.²⁸⁰ The most flagrant breach of these obligations was the United States’ decision to use the Marshall Islands to test nuclear weapons, resulting in widespread dispossession, contamination, and sickness. The Marshallese have never been passive victims, but have consistently engaged in political and legal efforts towards justice, including a decades-long legal battles seeking adequate compensation for the damages caused by U.S. colonialism and nuclear testing.²⁸¹

In the early 1980s, Marshallese plaintiffs representing the inhabitants of the Marshall Islands brought suit against the United States in the U.S. Court of Federal Claims, the tribunal designated to hear claims against the United States based on, among other things, the U.S. Constitution and expressed or implied-in-fact contracts.²⁸² In their claims, the plaintiffs alleged that (1) the United States had breached its fiduciary duty to the Marshall Islands under the U.N. Trusteeship System; (2) that the United States had breached an implied-in-fact contract to protect the “health, well-being, and economic condition of the Marshallese people,” which had been made prior to the Trusteeship Agreement, when the U.S. seized naval

280. See *supra* Part III.A; BARKER, *supra* note 24, at 35.

281. During the testing period, Marshallese plaintiffs brought suit under the Alien Tort Statute to enjoin the United States from detonating any more bombs. *Pauling v. McElroy*, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff’d*, 278 F.2d 252 (D.C. Cir. 1960), *cert denied*, 364 U.S. 835 (1960). This was only the third time the Alien Tort Statute had been employed in history. Marshallese activists have also long been engaged in the fight for nuclear justice. See, e.g., Kathy Jetnil-Kijiner, *Fishbone Hair*, <https://jkijiner.wordpress.com/2016/03/25/fishbone-hair-full-poemvideo/> (accessed Nov. 5, 2019) (on file with the *Columbia Human Rights Law Review*); Mary X. Mitchell, *Offshoring American Environmental Law: Land, Culture, and Marshall Islanders’ Struggles for Self-Determination During the 1970s*, 22 ENVTL. HIST. 209, 216–24 (2017) (describing the successful efforts of the Enewetakese people to prevent further devastation of their islands through planned U.S. cratering experiments there); see generally GIFF JOHNSON, DON’T EVER WHISPER: DARLENE KEJU PACIFIC HEALTH PIONEER, CHAMPION FOR NUCLEAR SURVIVORS (2013) (describing the activism of Marshallese nuclear justice advocate Darlene Keju).

282. United States Court of Federal Claims, *About the Court* (accessed Nov. 5, 2019), <https://www.uscfc.uscourts.gov/about-court> [https://perma.cc/4ETR-AJ7H].

control of the Marshall Islands and initiated its nuclear testing program;²⁸³ and (3) that the United States had perpetrated an unlawful taking of Marshallese land, including “plant life, fish life, fishing rights, the land, the lagoon, the waters of the lagoon, and surrounding ocean of the atoll or island,” by contaminating them with radioactive fallout.²⁸⁴

On motions to dismiss filed by the United States, the Claims Court found that it lacked adjudicatory jurisdiction over claims brought under the Trusteeship arrangement, which it interpreted as a bilateral treaty between the United States and the United Nations. However, the court did state that the United States had assumed “moral obligations” under the Trusteeship System to “provide care for inhabitants of the trust territory.”²⁸⁵

Likewise, the court held that the plaintiffs did not allege facts sufficient to establish the existence of a contract implied-in-fact between the United States and the Marshall Islands.²⁸⁶ The court did, however, find that the plaintiffs alleged sufficient facts to establish a contract implied-in law based on the moral obligations of the United States.²⁸⁷ In reaching this conclusion, the court agreed with the plaintiffs’ arguments that “even to suggest that the United States would begin and carry on its nuclear test program without obligating itself to the health and safety of the Marshallese people and their property is repugnant to every principle for which the United States and its people stand” and that the United States “could not undertake the destruction and contamination of lands in their protective custody, and at the same time escape, in the Twentieth Century, an undertaking to reimburse the peoples of those lands.”²⁸⁸ Sitting in its adjudicatory capacity, the Claims Court lacks jurisdiction to review a claim against the United States based on contracts implied in-law.²⁸⁹ The court, therefore, had no choice but to dismiss the implied contract

283. The U.S. seized control of the Marshall Islands in 1944 and began its nuclear testing program in 1946. In 1947, the United States formally became administering power of the Trust Territory of the Pacific Islands, which incorporated the Marshall Islands.

284. *Nitoli v. U.S.*, 7 Cl. Ct. 405, 416 (1985).

285. *Id.* at 446.

286. *Id.* at 415-16.

287. *Id.* at 416.

288. *Id.*

289. *Id.* at 415-16.

claims, indicating that “compensation for such claims must be found in another forum.”²⁹⁰

By contrast, the Claims Court found that the takings allegations were viable and denied the United States’ motion to dismiss with respect to these claims.²⁹¹ Before proceedings commenced on the merits, however, the United States petitioned for and was granted a stay pending final negotiations of the Compact of Free Association—the treaty that established the Marshall Islands as an independent nation freely associated with the United States.²⁹² The Compact, which entered into force on November 3, 1986, contained a provision that provided \$150 million as a “full and final” settlement of claims arising from nuclear testing, extinguished all legal claims arising from nuclear testing, and stripped federal courts of jurisdiction to hear the same.²⁹³ The day after the Compact entered into force, on November 4, 1986, the United States filed for a motion to dismiss in the pendant litigation, arguing that the Compact had divested the Claims Court of jurisdiction.²⁹⁴ The court agreed and dismissed the case, a decision that was upheld on appeal.²⁹⁵

The battle was not over. The Compact also established the Nuclear Claims Tribunal (“NCT”), a quasi-judicial body capable of hearing nuclear testing claims if evidence came to light that the \$150 million settlement was “manifestly inadequate.”²⁹⁶ It quickly became

290. *Id.* at 416. The court did, however, find that the implied-in-fact contract claim was viable with respect to the people of Bikini and Enewetak Atolls, to whom the United States had expressly promised remediation and return of their homelands as soon as the testing program was completed; promises that plainly remained unfulfilled. *See Peter v. U.S.*, 6 Cl. Ct. 768, 779-81 (1984); *Juda v. U.S.*, 6 Cl. Ct. 441, 454-55, 458 (1984). These cases were ultimately dismissed as well pursuant to the Compact of Free Association. *See* notes 7-9 *infra* and surrounding text.

291. *Nitol*, 7 Cl. Ct. at 414-15.

292. *Juda v. United States*, 13 Cl. Ct. 667, 673 (1987), *appeal dismissed* *People of Bikini v. U.S.*, 859 F.2d 1482 (1989) (consolidating cases below—*Nitol*, *Juda*, and *Peter*—and describing procedural posture) [hereinafter *Juda II*].

293. Compact of Free Association, *supra* note 28; Exec. Order No. 12569, 51 C.F.R. 37171 (1986).

294. *Juda II*, 13 Cl. Ct. at 670.

295. *Juda II*, 13 Cl. Ct. at 690 ((holding that the Compact of Free Association implicitly withdrew the consent of the United States to be sued in the Claims Court).

296. Oversight on the Compact of Free Association with the Republic of the Marshall Islands (RMI): Medical Treatment of the Marshallese People, U.S.

evident that the settlement sum was grossly insufficient. By the early 2000s, the NCT had determined that the United States owes affected Marshallese populations several billion dollars.²⁹⁷ However, the NCT lacks enforcement power and—despite tireless political and legal efforts on behalf of the Marshallese—its judgments remain unfulfilled.²⁹⁸

Today, the United States' failure to remediate the islands or provide adequate compensation is directly impeding the ability of Marshallese to adapt to climate change.²⁹⁹ Adequate compensation for the harms wrought by U.S. colonialism would allow the Marshallese to implement the self-determination-preserving adaptation strategies they wish to pursue but cannot currently afford.

Though traditional legal avenues are foreclosed both internationally and in U.S. tribunals, Marshallese may still be able to seek justice through a congressional reference case ("CRC"). Ironically, a CRC is heard by the Claims Court, by way of referral by a single house of Congress.³⁰⁰ The purpose of the CRC is to determine liability for harms perpetrated by the United States.³⁰¹ Unlike traditional litigation, however, a CRC is a viable pathway to justice where claims are procedurally barred but equity or morality suggest that the plaintiff should at least be granted a hearing.³⁰² Indeed, "the very purpose of considering equitable claims in congressional reference cases is to remedy wrongs for which there is no legal

Nuclear Tests, Nuclear Claims Tribunal, Forced Resettlement, use of Kwajalein Atoll for Missile Programs and Land Use Development: Hearing Before the Subcomm. on Asia, the Pacific, and the Global Environment of the H. Comm. On Foreign Affairs, 111th Cong. (2010) (statement of Bill Graham, public advocate (retired)).

297. *Id.*; see also *People of Bikini v. United States*, 554 F.3d 996, 998 (Fed. Cir. 2009) (discussing NCT proceedings).

298. *E.g.*, *People of Bikini v. United States*, 77 Fed. Cl. 744 (2007) & *John v. United States*, 77 Fed. Cl. 788 (2007), consolidated on appeal *People of Bikini v. United States*, 554 F.3d 996, 998 (Fed. Cir. 2009), cert denied *People of Bikini v. United States*, 559 U.S. 1048 (2010) and *John v. U.S.*, 559 U.S. 1048 (2010); Graham, *supra* note 11.

299. See Part II, *supra*.

300. 28 U.S.C. § 1492 (1992).

301. *Id.*

302. See Stanley J. Purzycki, *The Congressional Reference Case in the United States Court of Claims*, 10 CATH. U. L. REV. 35, 37 (1961) (stating that congressional reference cases "arise from the recognition by Congress of the existence of a right that fails to meet strict legal standards, but nevertheless is of a moral or an equitable proportion.")

relief”³⁰³ Thus, any procedural or jurisdictional bars may be waived where “recovery should be allowed on either on legal, equitable, or *moral grounds*.”³⁰⁴ Equity and morality also feature prominently when the court evaluates the substance of a CRC. The CRC standard of review encourages the court to uphold “claims not otherwise cognizable but founded on [the] moral obligation[s]” of the United States.³⁰⁵ In particular, the court should place a thumb on the scale where the United States has been unjustly enriched.³⁰⁶ After hearing a CRC, the Claims Court issues an advisory opinion for Congress, which ultimately decides whether relief should be granted.³⁰⁷

Prior CRC determinations have led Congress to issue reparations for colonial wrongs, including breach of trust obligations. For example, in 2012, the court reviewed a CRC to determine if the United States was liable to the Quapaw Tribe of Oklahoma for breaching various treaty and trust obligations.³⁰⁸ Like the Marshallese, the Tribe had previously brought legal claims against the United States, which had been deemed outside the ambit of the Claims Court’s adjudicatory jurisdiction.³⁰⁹ Nevertheless, as a matter of equity and justice, the court was able to hear these claims through a CRC.³¹⁰ In 2015, the Claims Court held that the United States owed compensation to the Tribe and Congress made the recommended payments.³¹¹ Likewise, in 1993, the court received a CRC involving the termination of the Menominee Tribe’s federal trust from 1954 to

303. Bear v. United States, 122 Fed. Cl. 480, 485 (2013).

304. Purzycki, *supra* note 302, at 40. Emphasis added.

305. Matthew G. Bisanz, *The Honor of a Nation and the Mysterious Evolution of 28 U.S.C. § 2509 Jurisprudence*, 24 GEO. J. LEGAL ETHICS 461, 466 (2011) (quoting California Cannery & Growers Ass’n v. United States, 7 Cl. Ct. 69, 101 (1984)).

306. See Marion T. Bennett, *Private Claims Acts and Congressional References*, 9 A.F. L. REV. 9, 18 (1967) (noting that the Court of Claims has found “good cause” for waiving the bar of the statute of limitations in situations where the government was unjustly enriched).

307. Purzycki, *supra* note 302, at 38.

308. H.R. Res. 668, 112th Cong. § 1 (2012) (enacted).

309. Bear v. United States, 122 Fed. Cl. 480 (2013).

310. *Id.*

311. See Vidya Kauri, *Gov’t Must Pay Okla. Tribe for Funds Missing Since 1932*, LAW360 (Oct. 1, 2015), <https://www.law360.com/articles/709930/gov-t-must-pay-okla-tribe-for-funds-missing-since-1932> (on file with the *Columbia Human Rights Law Review*).

1973.³¹² In 1998, the court approved a \$32 million settlement of the case.³¹³

Through a CRC, Marshallese plaintiffs could advance similarly strong claims for relief. First, arguments based on the United States' moral obligations by virtue of its Trusteeship duties and colonial occupation of the Marshall Islands more generally have already been recognized by the Claims Court. Though deemed non-cognizable in ordinary litigation, claims based on these obligations would fall squarely within the competency of the Claims Court's CRC jurisdiction. Indeed, these claims are paradigmatic of the type of unjust enrichment that CRCs are intended to redress. The United States gained immense geopolitical status and power as a result of its colonial activity in the Marshall Islands—and indeed continues to benefit from its retained military control there—while the Marshallese suffer the ill effects. A CRC would also allow the court to adhere to its “sense of justice,” and review the takings claims precluded by the Compact.³¹⁴

The link between colonial harms and the ability of the Marshallese to adapt to climate change adds a compelling layer to the case against the United States. Under international decolonization law, the United States was obligated above all to promote the self-determination of the Marshallese. These obligations persist to the present under international decolonization norms. U.S. conduct has had the opposite effect. Not only did U.S. nuclear testing forcibly displaced islanders from their homes, U.S. colonialism shaped the vulnerability to climate change that now threaten a second forced migration—this time entailing permanent loss of the islands, and with them Marshallese self-determination.³¹⁵ With its justice-driven standard, the CRC provides a viable mechanism for Marshallese to seek reparations from the United States. Those reparations would help correct the structural imbalances currently impeding adaptation,

312. *Menominee Tribe of Wisconsin v. United States*, 41 Cl. Ct. 525 (1998) (mem. op.).

313. *Id.* at 526; *see also* S. Res. 1021, 106th Cong. (1999) (enacted).

314. In the final chapter of the nuclear testing litigation saga, the Court of Federal Claims rejected the Marshallese claims on procedural grounds, explaining that although the court's “sense of justice” made it “difficult to turn away,” the Compact's jurisdiction-stripping provision divested the court of authority to hear the claim. *People of Bikini v. United States*, 554 F.3d 996 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1048 (2010).

315. *See supra* Part II.

thus allowing Marshallese to overcome narratives of inevitable loss and reclaim agency over their own adaptation strategy.

CONCLUSION

This Article has attempted to demonstrate what is at stake when we talk about climate migration. If the global community is genuinely committed to the ideals of equality and autonomy enshrined in our international legal system, we must reject persistent colonial dynamics, which cast some peoples as less worthy of existence than others. No one should be forced to sacrifice their homes and self-determination while alternatives are possible. In the words of Kingsley Shacklebolt, “Every human life is worth the same, and worth saving.”³¹⁶

316. J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS 440 (2007).