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Abstract

Climate change-induced displacement is not only a possibility but a present reality. This problem affects marginalized communities everywhere, but Indigenous peoples, particularly those in disappearing States, are especially climate-vulnerable and often at risk of losing their ancestral lands forever due to climate change. Despite the inevitability and urgency of this issue, there are currently no legal frameworks specifically designed to address the issue of Indigenous sovereignty amidst climate-change induced displacement. Thus, this paper seeks to identify and examine the legal frameworks that can be used and extended to protect Indigenous sovereignty when environmental displacement occurs. The only protections Indigenous peoples can currently utilize flow from consultation and participatory rights, such as the duty to consult, and the right to free, prior, and informed consent under ILO Convention 169 and the UNDRIP, respectively. On the other hand, for internally displaced peoples, the relevant legal frameworks are the UN Guiding Principles on Internal Displacement and the Kampala Convention, which are not designed to address environmental displacement either. This Article critiques the existing international legal frameworks for their roots in colonialism and argues for the need to overhaul the entire international system in the face of complex, global problems like climate change, environmental displacement, and Indigenous sovereignty rights. This Article argues that these challenges can be addressed by having Indigenous peoples be the key decision-makers of their own destinies, rather than mere procedural consultants, particularly in future negotiations about relocation and resettlement from their ancestral lands due to climate change.

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Introduction

The image of Minister Simon Kofe of Tuvalu, addressing the Conference of the Parties (COP) 26 on the need for immediate climate action while standing thigh-deep in the ocean water covering Tuvalu's coastal land, demonstrates the urgency for Indigenous peoples in addressing the climate crisis.[1] The effects of anthropogenic climate change, such as rising sea levels, drought, and extreme weather events (like super typhoons and more frequent once-in-a-century wildfires), are displacing and will continue to displace many communities around the globe.[2] Environmental scholars and activists are thus calling for governments to be proactive in protecting current and future climate refugees.[3] Not only do extant international and domestic laws fail to properly address the rights and

1. Stefica N. Bikes, *Tuvalu Looking at Legal Ways to Be a State if It Is Submerged*, REUTERS (Nov. 9, 2021, 10:25 AM), https://perma.cc/MEA3-E9RM.

2. FANNY THORNTON, CLIMATE CHANGE AND PEOPLE ON THE MOVE: INTERNATIONAL LAW AND JUSTICE 23 (Oxford Univ. Press, 2018).

3. Kelly Carson, *The Water is Coming: How Policies for Internally Displaced Persons Can Shape the U.S. Response to Sea Level Rise and the Redistribution of the American Population*, 72 HASTINGS L.J. 1279, 1310 (2021).

protections that ought to be guaranteed for environmentally displaced persons, but there is also a noticeable lack of attention to how tribal sovereignty can and should be retained through the processes of relocation and resettlement. The world's Indigenous peoples are on the frontlines of the climate crisis, with many of their ancestral lands situated in "disappearing" or "threatened" States in the South Pacific, the Arctic Circle, and beyond.[4] Indigenous peoples have already been suffering the consequences of environmental displacement, and in the relatively near future ever more States with large Indigenous populations will face similar problems.[5]

Indigenous peoples have historically faced injustices with respect to "colonization and the dispossession of their lands, territories, and resources," and as a result, their political identities are very much tied to ancestral lands and waters.[6] To be Indigenous in the modern age is to be a descendant of one of those non-dominant communities that has retained its social, cultural, and political identity throughout colonization and maintained a "strong link" to a territory since time immemorial.[7] Indigenous communities exist in a diaspora, yet are still largely defined by their ties to ancestral lands and their identities as stewards of the land, since land is seen as a source of religious and cultural sanctity. Accordingly, Indigenous peoples in disappearing States like Marshall Islands are facing complex and ultimately terrifying questions about the future of their people and identity, where solutions like international relocation and resettlement from ancestral lands are seen as a disastrous "last resort."[8]

Indigenous peoples are facing many difficult challenges while also constantly negotiating their rights, sovereignty, and autonomy with their respective settler-colonial States.[9] Many Indigenous groups exist not as traditional nation-states but as legally distinct entities with treaty rights within settler States like the U.S., Canada, Australia, or New Zealand.[10] Furthermore, these same groups are likely to be displaced within the borders of their settler nation-states, as opposed to crossing international borders.[11] Accordingly, laws on internal displacement will likely be another important framework in understanding how Indigenous sovereignty will be protected in the face of climate change-induced displacement.

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4. Thornton, *supra* note 2, at 37.

5. Carson, *supra* note 3, at 1283-1293 (detailing different examples of Indigenous displacement in Alaska and Louisiana).

6. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at Annex ¶ 6 (Sept. 13, 2007).

7. *Indigenous Peoples, Indigenous Voices Factsheet*, U.N. PERMANENT F. ON INDIGENOUS ISSUES (last visited Oct. 29, 2021), https://perma.cc/X2C6-7QEW.

8. Joshua McDonald, *Rising Sea Levels Threaten Marshall Islands' Status as a Nation, World Bank Report Warns*, THE GUARDIAN (Oct. 16, 2021, 3:00 PM), https://perma.cc/W6DA-G8SH.

9. Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC., & SOC'Y 1, 5 (2012).

10. *Id.* at 7.

11. Michele Klein Solomon & Koko Warner, *Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks*, *in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 243, 246 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

This Article will analyze the existing international legal frameworks and mechanisms for protecting both the rights of Indigenous peoples and those of internally displaced persons. Specifically, it will diagnose where the International Labour Organization (ILO) Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) fall short as participatory rights, the former being too narrowly focused on consultation in a colonial structure and the latter not being legally binding. It will also outline the limitations of current internal displacement policies under the UN Guiding Principles on Internal Displacement and the Kampala Convention. This Article will also outline how free, prior, and informed consent (FPIC) has been interpreted in international courts, such as the Inter-American Court on Human Rights (IACtHR), and how FPIC can be expanded by including the power to temporarily withhold consent through a veto.

Given the gravity and urgency of the problem and the shortcomings of current international law, this Article will argue that Indigenous-centered decision-making should be determinative in all instances where Indigenous peoples are subject to possible relocation and resettlement, rather than being expressed through the mere procedural afterthoughts of consultation and participatory rights. This Article argues that placing Indigenous peoples in charge of their own destiny in the face of climate change, rather than forcing them into settler-colonial structures with only a duty to consult or only FPIC without a veto, is an essential ethical paradigm shift to mitigate the effects of climate change.

Part I will define terms and discuss how anthropogenic climate change is driving environmental displacement. Part II will provide a series of case studies for internal displacement of Indigenous peoples due to climate change. Part III will review the relevant international law protecting Indigenous peoples and internally-displaced persons. Part IV will describe Indigenous views of climate justice, critiques of consultation and participatory rights regimes, and concerns of perpetuating settler-colonial structures. Part V will then specify which actions should be taken moving forward in protecting Indigenous sovereignty in the face of climate change-induced displacement, namely the honoring of international agreements, properly utilizing FPIC via Indigenous-centered decision-making, and adopting reconciliatory policies towards Indigenous peoples.

I. The Scope of the Problem: Climate Change-Induced Displacement

Anthropogenic climate change is a devastating reality; it is "unequivocal that human influence" has led to global warming and the "widespread and rapid changes" that have occurred as a result.[12] Scientific studies suggest that the issue of internal displacement in countries, including the United States, will be so massive that "no state will be untouched,"[13] and that "over thirteen million

12. Intergovernmental Panel on Climate Change, *IPCC Sixth Assessment Report Working Group 1: The Physical Science Basis, Summary for Policymakers*, at A.1 (2021), https://perma.cc/EQ26-RH25.

13. Carson, *supra* note 3, at 1284.

Americans might be susceptible to sea-level induced migration by 2100."[14] There is no doubt that anthropogenic climate change will lead to environmental, often internal, displacement for communities everywhere, not just the U.S.

There is "rapidly developing" scientific research that "seeks to establish linkages" between climate change and the migration of vulnerable groups by looking at different "drivers of movement," such as rising sea levels and extreme weather events.[15] For example, the Probabilistic Event Attribution (PEA) uses "increasingly sophisticated assessments" to estimate the contribution of greenhouse gas emissions to local weather events.[16] PEA assessments are "more certain for slow-onset events (such as sea-level rise)" but are less certain for "some rapid onset or extreme events (e.g., heatwaves more than precipitation)."[17] Evidence of climate change as a driver for migration is growing, despite certainty being limited by interactions with other factors (such as non-environmental or pre-existing factors) and by the differences in slow versus rapid onset events.[18]

Despite the growing evidence that climate change drives migration, there is currently no official, legal definition of environmental migrants or of climate change-displaced persons.[19] The International Organization for Migration (IOM) proposed a definition of environmental migrants as:

> persons, or groups of persons, who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.[20]

Though promising, this definition is not legal status, and is merely an academic proposal to be used to inform policy. However, in the international sphere, climate change-induced displacement has been recognized by the United Nations Framework Convention on Climate Change (UNFCCC); the link between mobility and climate change "is framed as a *phenomenon to be managed*."[21] Furthermore the phrase "climate change induced displacement" was used in paragraph 14(f) of the Cancun Adaptation Framework, which was adopted in 2010 at COP16.[22] Paragraph 14(f) "invites all Parties to enhance action on adaptation under [the Framework]" with respect to their "common but differentiated responsibilities," including "measures to enhance understanding, coordination, and cooperation with regard to climate change induced displacement."[23] While this is

14. *Id*.
15. Thornton, *supra* note 2, at 23-24.
16. *Id*. at 23.
17. *Id*.
18. *Id*. at 24.
19. Solomon & Warner, *supra* note 11, at 249.
20. *Id*. at 249-50.
21. *Id.* at 279 (emphasis in original).
22. United Nations Framework Convention on Climate Change Cancun Conf. of the Parties, at ¶ 14(f), FCCC/CP/2010/7/Add.1 (Dec. 10, 2010), https://perma.cc/ZPV4-CVSL.
23. *Id*.

not legally binding language ("invites" assures that actions remain optional for each signee), it does establish climate change induced displacement as an internationally recognized phenomenon.

II. Relocation Case Studies

To illustrate the gravity of the problem, this Part will outline different examples of Indigenous relocation throughout the U.S. and the Pacific due to climate change displacement. Although the potential issues faced by environmentally displaced Indigenous peoples are myriad and highly case-specific, these examples will demonstrate some of the shared struggles between Indigenous nations (e.g., Fiji and Micronesia) and Indigenous communities with a subordinate relationship to settler governments (e.g., Native Americans and Alaska Natives in the U.S.).

A. Relocation Efforts of Indigenous Nations in the Pacific

Island nations and territories in the Pacific face unique issues of climate change displacement due to rising sea levels threatening to submerge their islands permanently.[24] One such nation confronting the issue directly and preemptively is Fiji, where the government, as of 2017, has a "list of forty-two villages slated for possible relocation" due to rising sea levels.[25] Fiji has previously achieved successful relocation efforts for two villages, Denimanu and Vunidogoloa, by emphasizing the need for participation from the group being relocated.[26] Studies in Fiji indicated that participation from the villagers in "the planning and execution" of relocation is essential for success; a participatory mechanism improves "cultural and social cohesion and the shared sense of community" when the group "feels that they have a choice."[27] This need for a participatory mechanism in relocation efforts will be revisited throughout this Article, particularly in the sections about FPIC for Indigenous peoples.

Tuvalu is one nation looking at every legal avenue to "retain [their] ownership of maritime zones [. . . and] retain . . . recognition as a state under international law."[28] Tuvalu is experiencing "a lot of coastal erosion;" some residents are prepared to leave, but "some of the older generation say they are happy to go down with the land."[29] Similarly, the Marshall Islands is potentially facing whole islands being submerged and some cities being at least 40% percent underwater.[30] The country has expressed concern about "losing its vast exclusive maritime zone" if their statehood is at risk of "being challenged by sea level rise."[31] As a result, the Marshall Islands is looking to increase funding for "serious

24. Julian Aguon, *To Hell with Drowning*, THE ATLANTIC (Nov. 1, 2021), https://perma.cc/9SGD-UAJ3.
25. *Id.*
26. Carson, *supra* note 3, at 1302-03.
27. *Id*.
28. Bikes, *supra* note 1.
29. *Id*.
30. McDonald, *supra* note 8.
31. *Id*.

adaptation measures . . . such as raising floor levels, raising land levels, or relocating buildings inland."[32]

Other nations are planning even further ahead. In 2014, Kiribati "entered into a purchase agreement with the Anglican Church for more than 5,000 acres in Fiji, paying nearly $9 million" in anticipation of climate change-induced displacement.[33] Some, like Vanuatu, are seeking future judicial remedies; the country is petitioning the International Court of Justice for "an advisory opinion on the rights of present and future generations to be protected from climate change."[34] Though not binding, the hope is that an advisory opinion would "assist with climate litigation cases."[35]

Island nations are also working together in multilateral initiatives; for example, the Marshall Islands leads the Climate Vulnerable Forum, "a group of forty-eight countries that works to amplify voices that have long been marginalized in the climate realm."[36] Furthermore, the Marshall Islands, along with Kiribati, Tokelau, Tuvalu, and the Maldives, have joined together as "coral-atoll nations to advocate for the financial resources necessary to adapt to climate change."[37] Though the funding this coalition has secured has only been sufficient for projects like seawalls and early-warning systems,[38] the coalition's existence is itself promising and demonstrates that climate-vulnerable nations are advocating for creative adaptations to the climate threats ahead.

For the most part though, Indigenous communities are not satisfied with the progress made by their governments. In Papua New Guinea, one such group is coastal women who formed Tuele Pueisa (Halia for "sailing the waves on our own") with the goal of addressing their potential relocation with an eighteen-point plan.[39] The group's plan includes meeting with potential host communities in nearby places, securing "several tracts of arable land," and farming that land with cocoa trees and other local species.[40] This example of a non-governmental group trying to plan and execute its own relocation plan will track with the following U.S. examples, where the vulnerable Indigenous groups do not have the same autonomy and sovereignty as the island nations.

B. Relocation Efforts of Indigenous Communities in the U.S.

Climate-vulnerable communities in the U.S. have already been pursuing assistance from the government or private companies for individual buyouts.[41] For example, the Biloxi-Chitimacha-Choctaw tribe in Louisiana have lost over 98% of their island, Isle de Jean Charles, and routine flooding has eroded the single road

32. McDonald, *supra* note 8.
33. Aguon, *supra* note 24.
34. McDonald, *supra* note 8.
35. *Id*.
36. Aguon, *supra* note 24.
37. *Id*.
38. *Id*.
39. Aguon, *supra* note 24.
40. *Id*.
41. Carson, *supra* note 5, at 1291-93.

that connects their island to the mainland.[42] The U.S. government is providing funding at a level of over $400,000 per-person to accomplish the wholesale relocation of the community to somewhere more inland, though progress has been slow due to the logistical challenges of finding a place that will accommodate the tribe's economic and cultural needs (e.g., peace and quiet and sense of community).[43]

Another Indigenous village in Newtok, Alaska, similarly secured per-person funding from the U.S. government ($15 million total) to finance its relocation as a result of rapid loss of land caused by erosion and thawing permafrost.[44] Though the community has successfully acquired land to relocate to, the overall costs will likely exceed what it has been able to secure so far, evidence of the great expense of relocation plans.[45] The Newtok example illustrates the importance of community participation to retain social and cultural cohesion, especially when balanced against other cases, like that in Diamond, Louisiana. There, the Shell Oil Company offered individual buyouts to the local community that had suffered from chemical leaks and explosions, but the buyouts ended up decimating the historically Black community because it was not a planned, community-centered relocation.[46]

Indigenous communities in the U.S. have also sought judicial remedies, though to no avail. The community of Kivalina, Alaska, home to about 400 Inupiat, sued ExxonMobil and other fossil fuel companies for the loss of the sea ice formations that provided protection for the village from coastal storms.[47] Kivalina claimed that the fossil fuel companies, who were responsible for the rise in emissions and resulting melting of sea ice, should be required to pay $400 million in damages to finance the village's relocation.[48] Sadly, the case was dismissed in the Ninth Circuit due to the political-question doctrine, a perceived lack of standing (causation was thought too attenuated between fossil fuel companies' conduct and the injury suffered by Kivalina), and because federal common law was preempted by the Clean Air Act.[49]

Similarly, the Inuit, another Arctic Indigenous group, sought remedies for the violation of their fundamental rights due to "the acts and omissions of the U.S." that caused climate change.[50] Examples of their violated fundamental rights include: the right to use and enjoy their traditional lands, their personal property, their cultural intellectual property, and the right to health, life, and residence and movement of the home, and to their own means of subsistence.[51] Some of the remedies sought by the Inuit included the establishment and implementation of

42. *Id*. at 1291.
43. *Id*. at 1292.
44. *Id*.
45. Carson, *supra* note 5, at 1292.
46. *Id*. at 1293.
47. *Id*.
48. Carson, *supra* note 3, at 1293.
49. *Id*. at 1294.
50. Petition to the InterAmerican Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 5 (Dec. 7, 2005), https://perma.cc/LF4N-3YB5.
51. *Id*. at 5-6.

plans to protect Inuit culture and resources and assistance for adaptation plans.[52] The Inuit Petition was aimed at the U.S. (as opposed to a private party like Kivalina), but no judicial remedy could be granted, given that the U.S. does not recognize the jurisdiction of the IACtHR and thus cannot be haled into court.[53] However, the Petition proved powerful as a "bridge between nation-states and civil society" and to inform the global community of the remedies needed for communities like the Inuit who cannot sue their settler governments outright.[54] The Inuit Petition also serves as a commanding example of the value of international law and systems in dealing with climate change-induced displacement of Indigenous peoples.

III. Relevant International Law

In trying to find solutions for environmentally displaced Indigenous persons, two different spheres of international law apply: laws regarding Indigenous peoples and laws regarding internally displaced persons.

A. Laws Regarding Indigenous Peoples

1. Free, Prior, and Informed Consent

A central right that Indigenous peoples have fought for is FPIC. Full consent, defined here as a form of participation and representation in the political process, requires the presence of all three elements; consent must be free, prior, and informed.[55] Free consent is about discursive control, where the Indigenous group is not dominated but is a co-responsible, equal partner in the decision-making process.[56] The prior element denotes that consent must be given prior to any project or action that affects the Indigenous community; "prior" also has been interpreted to suggest that it is "concerned with sustaining respectful relations over time" in regard to revisions to agreements.[57] Informed consent provides protection against potential harms or violations of rights by guaranteeing that necessary information is disclosed in a way that is flexible and tailored to the group.[58] Thus, FPIC, is a valuable tool for Indigenous peoples when any State and private actions affect them and their lands. The following sub-sections will trace the development of FPIC through international law and how FPIC has been interpreted.

52. *Id*. at 7-8.

53. Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675, 690 (2007).

54. *Id*. at 687.

55. S.J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW, AND FREE, PRIOR AND INFORMED CONSENT 406 (2014).

56. *Id.* at 402.

57. *Id*. at 404.

58. *Id*. at 405.

2. ILO Convention 169

Under the Indigenous and Tribal Peoples Convention of 1989, the ILO adopted ILO Convention 169, which significantly pushed the discourse on Indigenous human rights into its current participatory direction.[59] It is a legally binding agreement for the twenty-four countries that have ratified it, all of which can be held accountable for violations and can also seek out supervisory mechanisms as part of their ratification.[60]

Article 6 of the Convention requires States to consult with "the peoples concerned" and to "establish means by which these peoples can freely participate . . . at all levels of decision-making."[61] This duty to consult is a guaranteed procedural right for Indigenous peoples' participation but not an actual substantive power over decision-making.[62] This lack of decision-making power undermines Indigenous autonomy to operate as a distinct sovereign, and instead offers participation only as a way to assimilate Indigenous peoples into Western forms of power and discourse.[63]

Similarly, under Article 7, Indigenous peoples have the "right to decide their own priorities" in "development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy," but noticeably, this language is about the decision to choose their priorities, not an overarching control over negotiations or discussions.[64] Of note here is section 4 of Article 7, where governments are legally bound to "protect and preserve the environment of the territories" of Indigenous peoples and to work "in co-operation with the peoples concerned."[65] Because governments under this section are legally bound to protect and preserve the environment of Indigenous territories, such governments could be held accountable as climate change continues to change the quality of those environments. If the enforcement mechanisms are in place, this section could be a valuable legal basis for Indigenous peoples to sue the settler governments with which they have treaty agreements. Though this is still only a participatory right rather than decision-making power, this section could provide a human-rights basis to force ratifying countries to mitigate climate change.

Under Article 15, the Convention establishes that "the rights of the peoples concerned to [sic] the natural resources pertaining to their lands shall be specially safeguarded" and thus echoes the sentiments of Indigenous peoples being uniquely and spiritually tied to their ancestral lands.[66] Again, this Article focuses on the right

59. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 28383 Preamble [hereinafter ITPC].

60. ILO, *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (June 23, 2021), https://perma.cc/V57X-JFRU; ITPC, *supra* note 59, at art. 38.

61. ITPC, *supra* note 59, at art. 6.

62. Kylah Staley, *The Extraction Industry in Latin America and the Protection of Indigenous Land and Natural Resource Rights: From Consultation Toward Free, Prior, and Informed Consent*, 73 HASTINGS L.J. 1145, 1150 (2022).

63. *Id*. at 1151.

64. ITPC, *supra* note 59, at art. 7.

65. *Id*.

66. *Id.* at art.15.

to "participate in the use, management and conservation" of their own resources, rather than giving Indigenous peoples sole, autonomous control. [67]

Under Article 16, section 1, Indigenous peoples "shall not be removed from the lands which they occupy" and under section 2, such "relocation of these peoples" may only occur when "considered necessary as an exceptional measure" and "shall only take place with their free and informed consent."[68] Of note here is the requirement for "free and informed consent," despite the Convention not actually establishing FPIC and instead, weakly relying on a duty to consult as the main participatory right.[69]

Additionally, under section 4, "when such return [to their traditional land] is not possible," Indigenous peoples "shall be provided in all possible cases with lands of quality and legal status at least equal" to their prior lands, and if they express "a preference for compensation in money or in kind, they shall be so compensated."[70] Though the Convention mainly provides narrow versions of participatory rights, this section, if ratified by all nations, would provide significant protections for Indigenous peoples subject to displacement. While it could guarantee reparations in the form of compensation and equal status of land for relocation, it, again, does not necessarily guarantee autonomous Indigenous decision-making power. However, the charge for "free and informed consent" during relocations is a promising foundation for future steps in the right direction.

3. UN Declaration on the Rights of Indigenous Peoples

The UNDRIP was adopted by the General Assembly in 2007 by a 144-State majority, with four initial votes against it by the U.S., Canada, Australia, and New Zealand (though all four have since expressed support for the declaration).[71] The UNDRIP was a landmark agreement in the movement for Indigenous peoples' rights because it established "a universal framework of minimum standards" for Indigenous human rights.[72] The Declaration's twin emphases on self-determination and FPIC are woven throughout its articles and are what differentiate it from the ILO Convention's focus on the duty to consult. Article 3 specifically states that "Indigenous peoples have the right to self-determination" and that they thus can "freely determine their political status," and Article 4 establishes a "right to autonomy" for "internal and local affairs."[73] Similarly, Article 18 establishes a "right to participate in decision-making in matters which would affect their rights."[74] Under a regime of participatory rights, the right to self-determination goes beyond the duty to consult by presupposing a broader decision-making power

67. Staley, *supra* note 62, at 1150-52.
68. ITPC, *supra* note 59, at art. 16.
69. *Id*.; Staley, *supra*, note 62, 1150.
70. ITPC, *supra* note 59, at art. 16.
71. U.N. DEP'T ECON. & SOC. AFF., *United Nations Declaration on the Rights of Indigenous Peoples* (Oct. 29, 2021), https://perma.cc/CX7F-3XTK [hereinafter Declaration on the Rights of Indigenous Peoples].
72. *Id*.
73. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, at art. 3-4 (Sept. 13, 2007).
74. *Id*. at art. 18.

for Indigenous peoples. This need for a broader decision-making power in relation to climate change-induced displacement of Indigenous peoples will be discussed in Part V.

Under Article 19, the Declaration establishes the vital FPIC language: "States shall consult and operate in good faith" with Indigenous peoples "in order to obtain their free, prior, and informed consent" in "legislative or administrative" matters that concern them.[75] Article 32 further states the same requirement upon States to consult with Indigenous peoples "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories."[76] FPIC as a stricter participatory requirement allows for stronger Indigenous decision-making, and the language in these articles can be interpreted as encompassing actions resulting from climate change, such as displacement, within the categories of "legislative or administrative actions" or "project[s] affecting their lands."[77] However, despite the potential for FPIC, the Declaration is not a legally binding agreement like the ILO Convention. Thus, there is no current enforcement mechanism to ensure that FPIC practices are honored. Regardless, the Declaration is important because of the potential it holds to become customary international law, meaning that the Declaration could someday become an established, general, and consistent international practice, even if it is not technically a legal obligation today.[78]

Article 10 is particularly significant because it establishes that "Indigenous peoples shall not be forcibly removed from their lands" and that "no relocation shall take place without the free, prior, and informed consent of the indigenous peoples concerned" with an "agreement on just and fair compensation, and, where possible, with the option to return."[79] Were this to become customary international law or legally binding through treaty law, then Indigenous peoples who are at risk of environmental displacement would have significantly broader protections; they would be able to maintain at least some decision-making power through the FPIC requirement in Article 10. The stronger participatory right of FPIC, when honored and utilized properly, provides some opportunity for true Indigenous decision-making rather than the right serving as a procedural justification for a State or private action. This, however, requires a broad interpretation of FPIC.

4. Interpretation of FPIC and the Veto Power

The "prior" prong of FPIC raises questions about whether the consent must be either *ex ante*, before the proposed action, or *ex post*, after initial phases of the action have already taken place.[80] FPIC, in its most progressive interpretation, "provides indigenous peoples with a form of 'editorial control' over certain political decisions" when it is treated as a "principle with a continuous or ongoing

75. *Id*. at art. 19.
76. *Id*. at art. 32.
77. *Id*. at art. 19, 32.
78. Staley, *supra* note 62, at 1153.
79. Declaration on the Rights of Indigenous Peoples, *supra* note 71, at art. 10.
80. Rombouts, *supra* note 55, at 140.

relevance."[81] The UN Human Rights Council, in their study on FPIC "as enshrined in [UNDRIP],"[82] asserted that Indigenous peoples may "withhold consent" in situations where they find that "the proposal is not in their best interests," where they withhold temporarily due to "deficiencies in the process," or where they wish to "communicate legitimate distrust in the consultation process or national initiative."[83] However, the study also states that the "arguments of whether indigenous peoples have a 'veto'. . . appear to largely detract from and undermine the legitimacy of the [FPIC] concept" by taking attention away from the substance of the controversy and focusing instead on the technical question of whether withholding consent should be considered the legally equivalent to a "veto."[84] This section will next look at how FPIC and the respective veto issue have been interpreted by international bodies.

The ILO interpretation of FPIC is quite limited, given that the ILO focuses on a prior consultation right and does not use the language of FPIC. The ILO Committee of Experts on the Application of Conventions asserted that the Convention does not "create nor implicitly contain" any sort of veto power in the duty to consult, instead suggesting that the good faith requirement of the Convention should be enough.[85] As for the UN, former UN Special Rapporteurs on the Rights of Indigenous Peoples, James Anaya and Victoria Tauli-Corpuz, have each publicly stated that consultation rights are not "stand alone" procedural rights but are, instead, a "starting point" for the "substantive right to land and resources."[86] While encouraging signs of expanding recognition of consultation and consent rights, their statements are not legally binding.

FPIC and prior consultation (under the UNDRIP and ILO Convention, respectively) have been interpreted by international courts where the results are binding on countries that recognize the jurisdiction of such courts. The Inter-American Commission on Human Rights (IACHR) labels FPIC as a "heightened safeguard" and lays out three circumstances where FPIC would be mandatory: 1) displacement or required relocation of the Indigenous community, 2) deprivation of the community's lands and natural resources that are "necessary" for their survival, and 3) storage or disposal of hazardous materials on Indigenous lands.[87] Though the Inter-American Court on Human Rights (IACtHR) only applies to the Americas, other international bodies, such as the African Commission on Human and People's Rights, have "affirmed that the IACHR's [FPIC criteria] were now

81. *Id*.

82. U.N. Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, 2, U.N. Docs. A/HRC/39/62, (Aug. 10, 2018).

83. *Id*. at 8.

84. *Id*.

85. ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents* 13 (2013).

86. James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/21/47 at 12 (July 6, 2012); Victoria Lucia Tauli-Corpuz (Special Rapporteur), *Report of the Special Rapporteur on the Rights. of Indigenous Peoples*, U.N. Doc. A/HRC/45/34 at 13 (June 18, 2020).

87. INTER-AM. COMM'N H.R., *Indigenous and Tribal Peoples' Rights Over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 56/09 (2009) para. 333-334.

internationally recognized norms."[88] The African Commission, in its ruling in favor of the Indigenous community in *Endoris v. Kenya*, drew inspiration from the IACtHR's similarly disposed holding in *Saramaka v. Suriname* to come to a comparable conclusion: that "the State has a duty to not only consult with the community, but also to obtain their free, prior, and informed consent according to their customs and traditions."[89] Here, two different regional, international bodies interpreted FPIC as a procedural requirement for protecting Indigenous peoples' autonomy over their lands and resources; although, *Saramaka* intentionally did not go so far as to say that the Indigenous community had an absolute property right over their lands, only a procedural right to obtain FPIC.[90] These judicial interpretations suggest that FPIC would certainly be required in the case of displacement and relocation, though the right has its limitations, which could be tenuous for preventing actions that induce climate change-related displacement.

Lastly, both the ILO Convention and the UNDRIP fall short on the controversial veto issue under the "prior" prong of FPIC; there is a lack of consensus on whether FPIC can be "withheld temporarily because of deficiencies in the process" and thus effectively operate as a veto to the consultation process.[91] Utilizing the potential veto function of FPIC could significantly broaden Indigenous decision-making power and create leverage for Indigenous peoples in negotiations with State and non-State actors.[92] This "proper distribution of power"[93] between Indigenous peoples, the State, and non-State actors would be essential to negotiations on how to handle the climate change-induced displacement of Indigenous peoples and the protection of their sovereignty and autonomy when faced with such displacement.

B. Laws Regarding Internally Displaced Persons

Over the coming decades, much of impending environmental migration will happen within State borders, hence the need for analyzing internal displacement laws for climate change-induced displacement.[94] Additionally, as noted above, many Indigenous communities exist in and operate under nation-states where Indigenous peoples do not have full autonomy or sovereignty (usually rights flow from limited treaties with the settler nations, at best). Accordingly, this section will outline the UN Guiding Principles on Internal Displacement (UNGPID) and how the principles can provide a framework for environmentally displaced persons even if they do not cross international borders. Then, this section will show how the Principles have been codified in the Kampala Convention, and how that can inspire future international law to similarly address climate change displacement directly.

88. Rombouts, *supra* note 55, at 304.
89. *Id*. at 307-08.
90. Saramaka v. Suriname (Preliminary Objections, Merits, Reparations, Costs), Inter-Am. Ct. H.R. (ser. C) No. 172, (E.1) ¶ 127 (Nov. 28, 2007).
91. U.N. Human Rights Council, supra note 82, at 8.
92. Staley, *supra* note 62, at 1171.
93. *Id*.
94. Solomon & Warner, *supra* note 11, at 263.

1. UN Guiding Principles on Internal Displacement

The UNGPID were developed in the 1990s and presented in 1998 to the UN Commission on Human Rights as a framework based on existing international laws to address the issue of people being forcibly displaced within their own country's borders.[95] The UNGPID defines Internally Displaced Persons (IDPs) as "persons or groups . . . who have been forced or obliged to flee their homes" and "who have not crossed an internationally recognized State border," and lists particular situations where this may occur, including "violations of human rights or natural or human-made disasters."[96] This does not explicitly name climate change as a cause for internal displacement, but it does leave room for it under the term "human-made disasters."

The UNGPID is split into four sections: the first gives a general framing of the rights of IDPs; the second discusses the right of protection in diverse circumstances; the third relates to protection during displacement by ensuring rights to life, liberty, and personal security; and the fourth outlines conditions that must be met to allow for the "safe and dignified return" of IDPs.[97] Under Principle 7, section 1, the "authorities" in charge of dealing with IDPs before they become displaced (e.g. their home State) "shall ensure that all feasible alternatives are explored in order to avoid displacement altogether."[98] For climate change-induced displacement, this could mean that mitigation or adaptation measures should be adopted before resorting to relocation. Under section 3(c) of Principle 7, for situations other than emergencies, "free and informed consent of those to be displaced shall be sought."[99] While this lacks the "prior" prong of FPIC, this consent right, with its mandatory "shall" language placed on the State, is vital for Indigenous communities who face the potential for climate change displacement. This provides a strong legal basis for allowing Indigenous peoples who are climate-vulnerable to demand their consent to relocation, and hopefully creates a pathway for Indigenous peoples to decide for themselves how best to resettle and relocate following displacement.

Under Principle 9, there is an "obligation" placed on States to "protect against the displacement of indigenous peoples . . . and other groups with a special dependency on and attachment to their lands."[100] Here, with special attention paid to Indigenous peoples in the document, the UNGPID is significant as a legal tool to ensure Indigenous sovereignty is honored even during displacement. This is especially true given that the principles are based on existing international human rights and humanitarian law.[101]

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95. Roberta Cohen, *Introduction to the Guiding Principles on Internal Displacement*, BROOKINGS (Sept. 23, 2001), https://perma.cc/Y52A-3JPU.

96. U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, *Guiding Principles on Internal Displacement*, U.N. Doc. OCHA/IDP/2004/01, ¶ 2 (Oct. 2004).

97. Solomon & Warner, *supra* note 11, at 265-66.

98. U.N. Office for the Coordination of Humanitarian Affairs, *supra* note 96, at princ. 7.

99. *Id*. at princ. 4.

100. *Id*. at princ. 5.

101. Cohen, *supra* note 95.

Under Principle 15, IDPs "have the right to seek safety in another part of the country, leave their country . . . and be protected against forcible return to or settlement in any place where their life, safety, liberty, and/or health would be at risk."[102] By having a right to seek safety within the country's borders, or outside of its borders, and to have that right secured against forcible resettlement, Principle 15's language sets up a potential framework for environmentally displaced persons seeking refuge from the effects of climate change.

Under Principle 28, "competent authorities have the primary duty and responsibility" to make return possible, and "special efforts should be made to ensure the full participation of [IDPs] in the planning" of such return or resettlement.[103] This language could serve as a legal basis for arguing that Indigenous peoples should have similar participatory rights if they are environmentally displaced, and that the settler State that they are legally subordinate to has a responsibility to ensure such a right. By arguing for participatory rights, the hope is that it would lead to a more substantive right, such as a requirement to obtain consent or to give Indigenous peoples decision-making power. Though promising, the UNGPID are not legally binding, despite being based on existing international law.

2. Kampala Convention

Though the UNGPID themselves are not binding, the African Union created the first binding implementation of its principles in 2009.[104] The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) has been signed by forty countries and ratified by thirty-one countries as of June 2020, and went into effect December 2012.[105] The Kampala Convention places a primary responsibility on States to deal with IDPs, but it also includes liability for non-State actors and humanitarian organizations.[106] By ratifying, States commit to national legislation incorporating its obligations, the allocation of budgetary resources for protection and assistance, and the designation of an appropriate authority to coordinate national resources.[107] As a legally binding instrument, the Kampala Convention has powerful language for addressing the issue of climate change displacement of Indigenous peoples.

Under Article 4, section 2, "States shall devise early warning systems . . . in areas of potential displacement," raising the question of whether climate-

102. *Id.* at princ. 8.
103. *Id.* at princ. 14.
104. Carson, *supra* note 3, at 1300.
105. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) Oct. 23, 2009, https://perma.cc/W7UR-SHHP.
106. Michele Klein Solomon & Koko Warner, *Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks*, *in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 243, 270-71 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).
107. *Id.*

vulnerable areas would require such early warning.[108] Section 4 of the same article protects against "arbitrary displacement" such as "forced evacuations in cases of natural or human-made disasters," including "any act, event, factor, or phenomenon of comparable gravity" not already listed.[109] While this does not directly list climate change, it also does not explicitly exclude it. This leaves it unclear whether or not climate-related displacement may give rise to Article 4 obligations relating to protection from internal displacement.

Article 5, however, which deals with obligations related to protection and assistance, explicitly states climate change: "States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change."[110] While this language does not prohibit the actions that contribute to climate change, it does provide explicit language stating that people can be and are currently displaced internally by climate change and that such people are entitled to protection and assistance.

Under Articles 9 and 11, there is language to suggest that affected communities can and should have decision-making power. Article 9 mandates that States "guarantee the freedom of movement and choice of residence of internally displaced persons, except where restrictions on such movement and residence are necessary, justified, and proportionate to . . . maint[enance of] public security" and so forth.[111] While this contains some discretionary language for the State to determine appropriate circumstances, it does establish something of a "choice" for IDPs, which could be significant for Indigenous IDPs.

Furthermore, under Article 11, States "shall enable IDPs to make a free and informed choice on whether to return, integrate locally, or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions."[112] The language in Article 11 contains interesting possibilities; it mirrors some of the FPIC right by saying free and informed, yet goes beyond consent by suggesting that IDPs should have a "choice" on what relocation looks like for them. However, States should be "consulting" with IDPs on relocation options, rather than granting IDPs the role of decision-makers; this is reminiscent of the ILO Convention's duty to consult as a mere participatory right. This is echoed again in "ensuring [IDPs'] participation" where again, participation is seen as the right, but not as the substantive decision-making power. Despite these limitations, the language of Articles 9 and 11 encourage participation for IDPs that can be extended to Indigenous peoples, on top of the participatory rights discussed above that are guaranteed under the international laws relating to Indigenous peoples. Though the language for such rights clearly exists, this Article will now assess the strength of such language through the lens of Indigenous activist perspectives.

108. Kampala Convention, *supra* note 105, at art. 4, sec. 2.
109. *Id.* at art. 4, sec. 4
110. *Id.* at art. 5, sec. 4.
111. *Id.* at art. 9, sec. 2(f).
112. *Id.* at art. 11, sec. 2.

IV. Indigenous Perspectives on Climate Justice

The charge for Indigenous peoples to have stronger decision-making powers as self-determination is not only the argument of this paper but of many Indigenous climate activists, and no analysis on Indigenous rights is complete without Indigenous perspectives. Indigenous peoples are, however, not a monolith and do not necessarily agree on approaches. But their demands for climate justice nonetheless matter a great deal and some key ones will be outlined here.

A. Indigenous Demands at COP26

Following COP26, the International Indigenous Peoples Forum on Climate Change (IIPFCC) named significant issues and concerns that Indigenous climate activists had with Article 6 of the Paris Agreement.[113] Specifically, the IIPFCC argued that Indigenous rights are "at risk under a global carbon market and carbon accounting mechanism" proposed under Article 6.[114] The IIPFCC argued for "safeguards for human rights and the rights of Indigenous Peoples" under Article 6 by proposing "language changes to 6.4 and 6.8 that include Free, Prior, and Informed Consent and direct inclusion of Indigenous Peoples."[115] Activists believe that without such safeguards, "violations of Indigenous Peoples' rights will grow exponentially" as the climate crisis worsens.[116] Ultimately, the IIPFCC demanded that moving forward, signers of the Paris Agreement should respect Indigenous knowledge, maintain "proper consultation with Indigenous Peoples throughout the entirety of the process," and establish "an independent grievance mechanism" for accountability purposes.[117]

Similarly, in response to Section 70105 of the U.S.'s Build Back Better Act, which was touted by U.S. officials as essential to their Paris goals, Indigenous activists expressed the same concerns as at COP26.[118] Section 70105, known as the Native American Consultation Resource Center, raised concerns for Indigenous activists about the lack of mandated Indigenous consent for fossil fuel projects.[119] NDN Collective, a national coalition of Indigenous activists in the U.S., argued that the "future" of Indigenous and frontline communities "cannot be left to consultation, which is a colonial tool that largely negates consent by allowing U.S. officials to stamp a piece of paper saying they talked to tribal leaders, regardless of what actual conversations looked like."[120] This criticism illustrates the tensions between the limited duty to consult right under ILO Convention 169

113. *The Integrity of the Paris Agreement is at Stake: Indigenous Climate Action and NDN Collective statement on Article 6*, NDN COLLECTIVE (Nov. 11, 2021), perma.cc/XT7H-RHNQ.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Memo: How the 'Build Back Better Act' Can Meaningfully Mobilize Investment to Indigenous Communities & Uphold Free Prior and Informed Consent in the Process*, NDN COLLECTIVE (Nov. 3, 2021), perma.cc/4F2K-4GKR.

119. *Id.*

120. *Id.*

and the stronger FPIC right embodied under UNDRIP's self-determination focus. Lastly, NDN Collective, while attending the COP26 talks, publicly stated that their demands for U.S. policymakers were to start climate justice with "reconciliation with native tribes and implementing free prior and informed consent in all climate polices and action plans."[121] The following section will explain what is meant by "reconciliation."

B. Reconciliation

The phrase "reconciliation" in the context of Indigenous and settler-colonial relations was popularized in places like Canada and Australia.[122] Canadian scholars have defined reconciliation as a three-step process: 1) truth-telling, 2) acknowledging harm, and 3) providing justice as defined by the affected Indigenous community.[123] The process asks participants to "reflect on the past" and find "ways to specifically address previous wrongs done to Indigenous Peoples."[124] Reconciliation has been used to argue for better negotiations between national parks and Indigenous peoples because it offers participants "the opportunity to advance the inherent sovereignty of Indigenous nations."[125] This works only when reconciliatory discussions do not fall victim to "political expediency" and instead focus on providing Indigenous-defined justice.[126] Furthermore, the "end goal of any reconciliatory process" should not be to "incorporate Indigenous Peoples into settler-colonial structures and institutions;" this again highlights the tension between consultation versus consent, and thus why reconciliation is a vital philosophy for interactions between Indigenous peoples and the State.[127]

C. The Potential Cost of Ignoring Indigenous Demands

Since the dawn of colonization, Indigenous peoples have been in continuous conflict with the State over land rights and sovereignty.[128] These conflicts have often been ignored by the settler State and addressed only through police or military action.[129] However, because climate change is "life or death," the old methods of dealing with conflicts between Indigenous tribes and the State may cease to work, which may invite "mass blockades" (i.e., direct action, massive protests, and litigation).[130] The threat of climate change "will have a unifying

121. NDN COLLECTIVE (@NDNCollective), *A note to the weary (who have been following COP26)*, INSTAGRAM (Nov. 11, 2021), https://perma.cc/BW4K-UX8W.

122. Chance Finegan, *Reflection, Acknowledgement, and Justice: A Framework for Indigenous-Protected Area Reconciliation*, 9 INT'L INDIGENOUS POL'Y J. 1, 1 (2018).

123. *Id*.

124. *Id*.

125. *Id*. at 2.

126. *Id*.

127. *Id*. at 4.

128. Patrick C. Canning, *I Could Turn You to Stone: Indigenous Blockades in an Age of Climate Change*, 9 INT'L INDIGENOUS POL'Y J. 1, 3 (2018).

129. *Id*.

130. *Id*. at 2.

effect" on all frontline communities, and thereby lead to "solidarity, reciprocal, and sympathetic blockades" accompanying "Indigenous blockades."[131] Essentially, if Indigenous groups physically block access to native lands, especially with support from non-Indigenous actors who are also affected by climate change, valid questions are raised about who is the trespasser on Indigenous lands. One such example is the protest at Standing Rock against the transcontinental oil pipeline, which led to a slew of arrests of Indigenous climate activists.[132] Blockades are not always successful but are "desperate" actions with "steep" personal costs that arise after having tried everything; when it comes to climate change, "Indigenous peoples have tried everything else."[133] As the following section will argue, there is a "better way" that avoids triggering Indigenous blockades: utilizing FPIC veto power and developing Indigenous "decision-making systems that are as free from the bounds of colonialism as possible."[134]

V. Solutions

Climate change-induced displacement of Indigenous peoples is worsening by the day, with few official policies to address the problem. This section proposes two ways to better prepare for the upcoming problems associated with Indigenous displacement due to climate change: strengthening the FPIC power to recognize Indigenous-led decision-making and a fundamental paradigm shift from mere consultation to self-determination for all.

A. Strengthening FPIC and Indigenous-led decision-making

For current existing international law to possibly succeed in addressing the climate crisis for Indigenous peoples, FPIC must be strengthened and redefined. First, the duty to consult must be expanded to require FPIC in all international agreements. The duty to consult "is rooted in coloniality" in how it denies "the exercise of Indigenous Peoples' self-determination: they can participate in the process but not oppose state decisions."[135] Consulting with Indigenous peoples to fulfill procedural requirements provides far too much leeway for Indigenous perspectives to be ignored. The emphasis on only achieving procedural consultation rights could lead to a disregard for substantive rights, such as territorial land rights.[136] However, procedural consultation rights are only one piece of Indigenous self-determination, and land rights are the actual central goal.[137] Therefore, FPIC must be guaranteed in all interactions with Indigenous peoples to fulfill the promise of self-determination for Indigenous peoples. Additionally, FPIC must be redefined in international agreements as explicitly

131. *Id*. at 14.
132. *Id*.
133. *Id*. at 17-18.
134. *Id*. at 20-21.
135. Roger Merino, *Laws and politics of Indigenous self-determination: the meaning of the right to prior consultation*, *in* INDIGENOUS PEOPLES AS SUBJECTS OF INTERNATIONAL LAW 120, 135 (Irene Watson ed., 2018).
136. *Id.*
137. *Id.*

including a veto power in the prior prong so that FPIC is incorporated throughout the entire process, not just at the beginning. By including the right to temporarily withhold consent at any stage of the process, Indigenous peoples are guaranteed the right to express their self-determination and to make the necessary decisions to protect their sovereignty.[138]

Furthermore, Indigenous peoples must be empowered to do more of the work they are already doing. As shown in the case studies above, Indigenous nations and Indigenous groups within settler nations are already addressing climate change displacement in their own communities through adaptation measures, relocation plans within and outside of their own borders, trading access to exclusive economic zones for land, seeking financial assistance, demanding judicial remedies, and more.[139] In Fiji, relocation of whole communities was more successful with community input to preserve cultural cohesion, even if the act of relocating itself will still be an act of "wailing as they walk" away from their ancestral homes.[140] As the most climate-vulnerable band together, the world must finance and fund their efforts (whether through reparations or some other means) and allow Indigenous peoples to plan and execute their own relocation or adaptation to climate change in the face of potential displacement.

B. Paradigm Shift to Move Away from Colonial Structures

Letting Indigenous communities lead will require significant paradigm shifts in relations between Indigenous groups and the State. One potential shift would be to utilize reconciliation in every interaction between Indigenous peoples and the State. This would respect Indigenous knowledge and experiences, but such a process would not necessarily happen through an easy or amicable shift; reconciliation will likely be a messy process and may occur only after further protests or "blockades" like that in Standing Rock.

In working with Indigenous peoples, reconciliation alone will not be enough; recognition of self-determination will also be required. The "*foundational right*"[141] of self-determination is "grounded in the idea that all are equally entitled to control their own destinies."[142] Former UN Special Rapporteur James Anaya notes that self-determination is not meant to be conceived as a right to independent statehood for Indigenous groups, but rather to empower Indigenous decision-making over their own fates.[143] Though independent statehood is a possible remedy for the historic violations that colonization wrought on Indigenous peoples, it is a concept rooted in Westphalian nationhood and thus seeks to incorporate Indigenous peoples into existing colonial structures.[144] Instead, this paper advocates for something different, a world where Indigenous rights are respected and Indigenous knowledge honored. For Indigenous peoples, statehood is not necessarily the goal;

138. *Id*. at 136.
139. McDonald *supra* note 8; Aguon *supra* note 24; Carson *supra* note 3.
140. Aguon, *supra* note 24.
141. Merino, s*upra* note 135, at 136 (emphasis in original).
142. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 75 (1996).
143. Anaya, s*upra* note 143, at 80.
144. *Id*.

rather, the goal is to recognize that "land, sovereignty, and cultural continuity are inseparable for Indigenous Peoples,"[145] and that the connection to land is about "a relationship of specific responsibilities."[146] Such recognition of the Indigenous connection to land and honoring their self-determination is a necessary paradigm shift for dealing with all climate change frontline communities.

Some may wonder how far along we are in this shift. To some degree, the world is more open to the self-determination of Indigenous peoples than ever before. The U.S. has its first Native American Secretary of the Interior, FPIC is included in the Green New Deal, and protests like that in Standing Rock are becoming more commonplace and popular. But considering the gravity of the problem of climate change-induced displacement, and the lack of international agreements ensuring stronger FPIC rights, the world is still a far cry away from truly recognizing and protecting Indigenous sovereignty.

Conclusion

With sea levels rising, polar ice caps melting, and the world still failing to adequately respond, Indigenous peoples on the frontlines of the climate crisis need solutions right now to be ready for the worst to come. For Indigenous peoples who are in danger of being environmentally displaced, the possibility of relocation and resettlement and losing their ancestral lands forever is, in effect, world-ending. The international legal community cannot take this type of loss lightly, yet our current international legal frameworks are woefully ill-equipped to address the complexity of retaining tribal sovereignty for environmentally displaced Indigenous peoples. What should their sovereignty look like in a new place? Who should decide where they go?

By utilizing FPIC as more than just a participatory right but instead as a necessary substantive power, Indigenous peoples can lead the decision-making process on what measures are needed to protect their sovereignty in the face of climate change-induced displacement. Such self-determination can look like deciding against certain development projects, raising or reclaiming land on sinking island nations, consolidating populations into more climate-safe geographic areas, getting reparations from the worst emitters to cover relocation costs, and so forth.[147]

However, current mechanisms for enforcing FPIC are limited. ILO Convention 169 only has a duty to consult, which by itself is only a procedural right and therefore not enough to secure Indigenous-centered State policies. Even Article 16, which requires consent for necessary relocation, is only binding on those who ratify the ILO Convention, and there are only twenty-four ratifying nations to date. Additionally, the UNDRIP, which is more sweeping in the rights it guarantees and has a potential for ensuring a veto power within the FPIC framework, is not legally binding despite being widely supported. Furthermore,

145. Finegan, s*upra* note 122, at 2.

146. Richard M. Wheelock, *Powerful Parallels: Deep Ecology and the Writings of Vine Deloria Jr.*, *in* INDIGENOUS ENVIRONMENTAL JUSTICE 21, 27 (Karen Jarratt-Snider & Marianne D. Nielsen eds., 2020).

147. McDonald, *supra* note 8.

enforcement mechanisms for FPIC under IACtHR and similar international courts are stripped of much of their power when settler-colonial superpowers like the U.S. do not recognize their jurisdiction. For the world to be ready for the inevitability of environmentally displaced Indigenous peoples, major-emitting settler countries like the U.S. need to ratify the ILO Convention 169, honor the UNDRIP as customary international law, and recognize the jurisdiction of international courts– all to make FPIC a more effective tool for protecting Indigenous sovereignty.

Future research is needed to determine what enforcement mechanisms could make the above actions work, whether that comes through codifying FPIC locally in legislation, or improving the access to information in the information prong of FPIC through international agreements. Ultimately, an ethical paradigm shift towards self-determination, and making Indigenous peoples the key decision-makers, would make FPIC a more effective tool in protecting Indigenous sovereignty, and perhaps the best tool in deciding how environmentally displaced Indigenous peoples can redefine their identity and world in the face of climate change. As Indigenous leaders have said, "there is no future for life itself without Indigenous consent."[148]

148. NDN COLLECTIVE, s*upra* note 118.