

# 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

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*Roughly forty percent of the United States population lives in an area threatened to be underwater by 2100 due to climate change. There are little to no infrastructural and policy frameworks to handle this problem. This Note explores existing U.S. frameworks for disaster response—namely, the Federal Emergency Management Agency (FEMA), the Small Business Administration (SBA), and the Department of Housing and Urban Development (HUD)—as well as early-stage initiatives to relocate entire communities within the United States. It then examines domestic and international policies for handling internally displaced persons (IDPs), including the United Nations Guiding Principles on Internal Displacement, the U.S. Agency for International Development Assistance to Internally Displaced Persons Policy and Implementation Guidelines, and the Kampala Convention. The Note then suggests specific applications of these policy frameworks to the issue of environmentally displaced persons (EDPs) in the United States, finding that a more proactive approach including codified liability for private actors, economic incentives for retreat, and a centralized agency to handle EDPs will provide the United States with a strong foundation to handle the unique challenges facing the growing number of EDPs within its borders.*

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## INTRODUCTION

Densely populated coastal areas susceptible to rising sea levels are home to about forty percent of the U.S. population.<sup>1</sup> As a result, scientists predict massive population displacement of millions of Americans along the coasts in the coming decades, with reverberating impacts on inland areas.<sup>2</sup> The United States is unprepared for this crisis. In fact, the effects of sea level rise have already begun to permanently displace large numbers of Americans from their homes,<sup>3</sup> disproportionately affecting indigenous communities.<sup>4</sup> This problem requires an immediate, thorough, and proactive response.

This Note addresses how U.S. disaster relief and relocation policies can be improved to accommodate the unique and growing needs of environmentally displaced persons (EDPs).<sup>5</sup> It will reveal how the United States has failed to meet its responsibilities under the U.N. Guiding Principles on Internal Displacement in regard to its treatment of EDPs, who should receive the same protections as IDPs. It will also reveal how policy directives from the U.N. Guiding Principles and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa should factor into U.S. policy towards EDPs. This Note will demonstrate that the United States should take a proactive approach to the relocation and reintegration of EDPs, including economic stimulus incentives, the creation of an agency dedicated to the protection and treatment of EDPs, the codification of liability for private actors who have contributed to sea level rise and population displacement, and expansive centralized reporting on equity issues in relocation initiatives.

Part I will provide a detailed discussion about projected sea level rise and population displacement. Part II will describe the limited infrastructure and reactive nature of current U.S. policies addressing coastal retreat and disaster relief. Part III will explain existing national and international policy frameworks for the treatment of internally displaced persons (IDPs)—persons displaced within their own country by violence, human rights violations, or disaster,<sup>6</sup>

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1. *Is Sea Level Rising?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://oceanservice.noaa.gov/facts/sealevel.html> (last visited Apr. 19, 2021).

2. See Mathew E. Hauer, *Migration Induced by Sea-Level Rise Could Reshape the US Population Landscape*, 7 NATURE CLIMATE CHANGE 321, 321 (2017).

3. See *infra* Part II (discussing displacement related to both major weather events and progressive sea level rise).

4. See *infra* Part IV.A.1 (discussing protection of indigenous communities).

5. EDPs “are people ‘who are displaced from or who feel obligated to leave their usual place of residence because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climate processes and events.’” Casey B. McCormack, *America’s Next Refugee Crisis: Environmentally Displaced Persons*, 32 NAT. RES. & ENV’T 8, 9 (2018) (quoting CAMILLO BOANO, ROGER ZETTER & TIM MORRIS, REFUGEE STUD. CTR., ENVIRONMENTALLY DISPLACED PEOPLE: UNDERSTANDING THE LINKAGES BETWEEN ENVIRONMENTAL CHANGE, LIVELIHOODS AND FORCED MIGRATION 8 (2008), [www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf](http://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf)).

6. See U.N. Off. for the Coordination of Humanitarian Affs., *Guiding Principles on Internal Displacement*, at 1, U.N. Doc. OCHA/IDP/2004/01 (Oct. 2004), <https://www.unhcr.org/43ce1cff2.pdf> [hereinafter *U.N. Guiding Principles*]; *infra* Part III (discussing the definition of IDPs).

drawing parallels between EDPs and IDPs. Part IV will then explain how national and international policy regarding IDPs gives strong insight into how the United States should address EDPs within its borders.

### I. SEA LEVEL RISE AND POPULATION DISPLACEMENT IN THE UNITED STATES

On average, sea levels rose between eight and nine inches between 1880 and the present, with roughly a third of that occurring since 1993.<sup>7</sup> The effects of global warming, coinciding with a major acceleration of greenhouse gas emissions since the 1990s, have contributed to the melting of ice sheets and glaciers as well as the thermal expansion of existing ocean water.<sup>8</sup> The oceans absorb over ninety percent of heat increases in the Earth's atmosphere caused by the emission of greenhouse gases,<sup>9</sup> and sea levels are projected to rise between 12 inches and 8.2 feet above 2000 levels by 2100, depending on the rate of greenhouse gas emissions in the immediate future.<sup>10</sup> If global emissions trends remain the same as they are today, carbon dioxide concentrations in the Earth's atmosphere will more than triple over preindustrial levels by 2100, with catastrophic effects on sea level rise.<sup>11</sup>

As a result of rising sea levels, coastal areas are already experiencing more frequent nuisance flooding and more devastating storm surge.<sup>12</sup> As sea levels rise, the average height of high tide in coastal areas and seasonal king tides—the highest tides of the year—become more disruptive.<sup>13</sup> Eventually, daily high tides will rise as high as king tides.<sup>14</sup> In many susceptible areas, high tide flooding occurred twice as often between May 2019 and April 2020 when compared to the same period in 2000 to 2001.<sup>15</sup> Moreover, high tide flooding is expected to develop into a chronic, rather than a sporadic issue.<sup>16</sup>

Rising sea levels, compounded by the effects of high tide flooding and storm surge during major weather events, have affected large numbers of

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7. Rebecca Lindsey, *Climate Change: Global Sea Level*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 25, 2021), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>.

8. *Id.*

9. *Is Sea Level Rising?*, *supra* note 1.

10. Lindsey, *supra* note 7.

11. S. Pacala & R. Socolow, *Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies*, 305 SCI. 968, 968 (2004).

12. *Is Sea Level Rising?*, *supra* note 1.

13. *King Tides and Climate Change*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/cre/king-tides-and-climate-change> (last visited Apr. 19, 2021).

14. *Id.*

15. NAT'L OCEANIC & ATMOSPHERIC ADMIN., 2019 STATE OF U.S. HIGH TIDE FLOODING WITH A 2020 OUTLOOK, at v (2020), [https://tidesandcurrents.noaa.gov/publications/Techrpt\\_092\\_2019\\_State\\_of\\_US\\_High\\_Tide\\_Flooding\\_with\\_a\\_2020\\_Outlook\\_30June2020.pdf](https://tidesandcurrents.noaa.gov/publications/Techrpt_092_2019_State_of_US_High_Tide_Flooding_with_a_2020_Outlook_30June2020.pdf) [hereinafter 2019 STATE OF U.S. HIGH TIDE FLOODING]; *see also* NAT'L OCEANIC & ATMOSPHERIC ADMIN., 2018 STATE OF U.S. HIGH TIDE FLOODING WITH A 2019 OUTLOOK (2019), [https://tidesandcurrents.noaa.gov/publications/Techrpt\\_090\\_2018\\_State\\_of\\_US\\_HighTideFlooding\\_with\\_a\\_2019\\_Outlook\\_Final.pdf](https://tidesandcurrents.noaa.gov/publications/Techrpt_090_2018_State_of_US_HighTideFlooding_with_a_2019_Outlook_Final.pdf).

16. *See* 2019 STATE OF U.S. HIGH TIDE FLOODING, *supra* note 15, at 12.

Americans, displacing both individual families and entire communities.<sup>17</sup> Since the beginning of the twenty-first century, America has seen a large number of internal EDPs. Historically destructive Hurricanes Katrina, Wilma, and Rita in 2005 led to the migration of over a million people from the Gulf Coast, Louisiana, and Texas.<sup>18</sup> The unprecedented flooding, evacuation, and loss of life resulting from these storms coincided with the rapid acceleration of sea level rise near the end of the twentieth and beginning of the twenty-first century.<sup>19</sup> Historians likened the “disaster-spurred migration” to the migration resulting from the Dust Bowl during the 1930s.<sup>20</sup> After Hurricane Maria devastated Puerto Rico in 2017, over 100,000 people left the island after just five months, with experts predicting that as much as half of the island’s population will follow.<sup>21</sup> Subtropical Storm Theta, the 2020 Atlantic hurricane season’s 29th named storm, broke the 2005 record of twenty-eight named storms in one season.<sup>22</sup>

Increasingly devastating hurricanes are not the only aspect of climate related sea level rise causing displacement. Entire coastal communities across the United States are facing permanent displacement due to the effects of progressive sea level rise.<sup>23</sup> Louisiana’s Isle de Jean Charles, a Native American island community connected to the mainland by a single, frequently flooded road, has seen a ninety-eight percent loss of land since 1955.<sup>24</sup> Isle de Jean Charles, along with at least seventeen other (largely Native American or Alaskan) communities, are attempting to relocate entire populations as the sea consumes their localities, making them uninhabitable.<sup>25</sup> On the eastern coast of the United States, Virginia’s Tangier Island has seen two-thirds of its land disappear to sea level rise and coastal erosion.<sup>26</sup> Experts predict that the entire island will fall to the sea over the next fifty years, displacing almost five hundred

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17. See Michael Isaac Stein, *How to Save a Town from Rising Waters*, WIRED (Jan. 25, 2018, 8:00 AM), <https://www.wired.com/story/how-to-save-a-town-from-rising-waters/>.

18. McCormack, *supra* note 5, at 10.

19. See *id.* at 9–10.

20. *Id.* (quoting Petula Dvorak, *As Hurricane Harvey Slams Texas, a Look at the Most Devastating Storms in U.S. History*, WASH. POST (Aug. 26, 2017, 5:30 AM), <https://www.washingtonpost.com/news/retropolis/wp/2017/08/25/as-texas-braces-for-a-huge-hurricane-a-look-at-the-most-devastating-storms-in-u-s-history/>).

21. *Id.* at 12.

22. Emily Shapiro & Daniel Manzo, *How the 2020 Hurricane Season Just Set a New Record*, ABC NEWS (Nov. 10, 2020, 5:51 AM), <https://abcnews.go.com/US/2020-hurricane-season-set-record/story?id=73168263>; see also Jonathan Erdman, *Eta Becomes the Record-Tying 28th Storm in the 2020 Atlantic Hurricane Season*, WEATHER CHANNEL (Nov. 2, 2020), <https://weather.com/storms/hurricane/news/2020-10-05-atlantic-hurricane-season-nearing-2005-record-storms>; Allison Chinchar, *All the Ways Hurricane Delta Is a Historic Storm*, CNN (Oct. 8, 2020), <https://www.cnn.com/2020/10/07/weather/historic-storm-hurricane-delta/index.html>. Storms are named if they become strong enough to qualify as a tropical storm. *What Are Hurricanes?*, NASA (Sept. 3, 2014), <https://www.nasa.gov/audience/forstudents/k-4/stories/nasa-knows/what-are-hurricanes-k4.html>.

23. See Stein, *supra* note 17.

24. *Id.*; see also *infra* Part II.B.1 (discussing Isle de Jean Charles).

25. See Stein, *supra* note 17; see also McCormack, *supra* note 5, at 8.

26. McCormack, *supra* note 5, at 11; see also *infra* Part II.B.4 (discussing Tangier Island).

people.<sup>27</sup> Similarly, scientists predict that, “even if humanity were to stop all [sea-level rise inducing] carbon emissions today, at least 414 towns, villages, and cities across the country would face relocation.”<sup>28</sup>

According to some studies, over thirteen million Americans might be susceptible to sea level induced migration by 2100.<sup>29</sup> According to scholar Mathew Hauer, displacement is “likely to have profound effects on future population landscapes,” drastically reshaping the national population distribution.<sup>30</sup> The coming decades will likely see “hundreds of thousands of homes on US coasts” inundated with chronic floods.<sup>31</sup> By 2100, if global greenhouse gas emissions and the resulting sea level rise are not drastically mitigated, “southern Florida, chunks of North Carolina and Virginia, much of Boston, [and] all but a sliver of New Orleans” will be consumed by the sea.<sup>32</sup> More and more powerful hurricanes will continue to plague those coastal areas remaining above water.<sup>33</sup>

The resulting effects of migration will not only be felt on the coasts, but also in inland areas “unprepared to accommodate this wave of coastal migrants.”<sup>34</sup> Studies suggest that the western half of the country will see a population increase of over ten percent in the next fifty years.<sup>35</sup> While those with the means to relocate will likely do so on a rolling basis, others may become “trapped” with dwindling resources, creating subsections of “involuntar[ily] immobi[le]” populations.<sup>36</sup> The vast majority of urban centers across the United States will likely feel the impact of the migration.<sup>37</sup> “The sheer magnitude of places affected” will leave “no state . . . untouched.”<sup>38</sup> Despite the imminence of this problem, “infrastructure challenges of accommodating millions

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27. McCormack, *supra* note 5, at 11.

28. Stein, *supra* note 17.

29. Hauer, *supra* note 2, at 321.

30. *Id.*

31. Oliver Milman, *'We're Moving to Higher Ground': America's Era of Climate Mass Migration Is Here*, GUARDIAN (Sept. 24, 2018), <https://www.theguardian.com/environment/2018/sep/24/americas-era-of-climate-mass-migration-is-here>.

32. *Id.*

33. *Id.*

34. Hauer, *supra* note 2, at 321.

35. Milman, *supra* note 31 (citing Qin Fan, Karen Fisher-Vanden & H. Allen Klaiber, *Climate Change, Migration, and Regional Economic Impacts in the United States*, 5 J. ASS'N ENV'T & RES. ECONOMISTS 643 (2018)). The figures from this study include projections of Americans who will be displaced by other climate related events such as a decrease in the arability of farmland in the Midwest. *See id.*

36. Hauer, *supra* note 2, at 324.

37. *Id.* at 323 (discussing migration impacts on Core Based Statistical Areas); *see also Core-Based Statistical Areas*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/housing/housing-patterns/about/core-based-statistical-areas.html> (last visited Apr. 19, 2021)). Core-Based Statistical Areas, defined by the Office of Management and Budget, represent urban areas with adjacent territories with “a high degree of social and economic integration with the core as measured by commuting ties.” *Id.*

38. Hauer, *supra* note 2, at 324.

of . . . migrants in largely unprepared inland municipalities is virtually unexplored.”<sup>39</sup>

## II. CURRENT U.S. FRAMEWORK: DISASTER RESPONSE AND COMMUNITY RELOCATION

America’s current framework for handling climate related displacement falls mostly within the category of disaster response, a largely reactive system that historically has only responded after a major weather event has already occurred.<sup>40</sup> There have been a handful of federally funded relocation projects for some coastal communities, a more proactive approach to moving whole populations from areas immediately threatened by sea level rise.<sup>41</sup> Neither of these models for relocation are equipped to adequately address the needs of an already large number of people facing permanent displacement. Below, I will describe these disaster recovery and community relocation models as they exist today.

### A. DISASTER RESPONSE

The federal disaster response framework consists of four main components: the Federal Emergency Management Agency (FEMA) buyout and support programs, the Department of Housing and Urban Development (HUD) insurance and grant programs, the Small Business Administration (SBA) relief loans, and the National Flood Insurance Program.

#### 1. FEMA Buyout Program

Under the Stafford Act, which governs disaster relief and emergency assistance,<sup>42</sup> FEMA is the primary federal entity responsible for coordinating emergency disaster relief.<sup>43</sup> FEMA responds after a formal request from a state, tribe, territory or insular area,<sup>44</sup> and an emergency declaration from the president.<sup>45</sup> FEMA assists local jurisdictions in rebuilding infrastructure,

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39. *Id.*

40. See Tim McDonnell, *The Refugees the World Barely Pays Attention to*, NPR: GOATS & SODA (June 20, 2018, 11:25 AM), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to>.

41. See Stein, *supra* note 17; see also Rachel Waldholz, *Newtok to Congress: Thank You for Saving Our Village*, ALASKA PUB. MEDIA (Mar. 27, 2018), <https://www.alaskapublic.org/2018/03/27/newtok-to-congress-thank-you-for-saving-our-village/>.

42. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 (2018).

43. Rocio Cara Labrador & Amelia Cheatham, *U.S. Disaster Relief at Home and Abroad*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounders/us-disaster-relief-home-and-abroad> (Sept. 21, 2020). FEMA operates under the Secretary of Homeland Security. U.S. DEP’T OF HOMELAND SEC., NATIONAL RECOVERY FRAMEWORK 35 (4th ed. 2019), [https://www.fema.gov/sites/default/files/2020-04/NRF\\_FINALApproved\\_2011028.pdf](https://www.fema.gov/sites/default/files/2020-04/NRF_FINALApproved_2011028.pdf).

44. *Natural Disaster Response and Recovery*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/recovery> (last visited Apr. 19, 2021).

45. Labrador & Cheatham, *supra* note 43.

providing emergency housing, and offering financial assistance.<sup>46</sup> The Agency also offers some tailored support to individuals and families affected by presidentially-declared disasters.<sup>47</sup>

Significant for the purposes of this Note, FEMA also administers a managed retreat program through which local officials may request funding to “buy out” homes or neighborhoods prone to hazardous or repetitive flooding.<sup>48</sup> Until very recently, FEMA was completely reactive, offering no proactive solutions.<sup>49</sup> In August 2020, FEMA and HUD announced unprecedented funding for managed retreat designed to move communities from flood zones before the next major weather event occurs.<sup>50</sup> Still, even with this new funding and a shifted focus to proactive relocation, states and local governments must continue to rely on the buyout framework.<sup>51</sup> The limitations of this framework are described below.

Under the buyout system, state and local governments are responsible for determining which homes or areas are eligible for a buyout, which often include residential properties located in areas designated by FEMA as “Special Flood Hazard Areas.”<sup>52</sup> If FEMA agrees with the state’s and/or local government’s determination, it will usually require the state or municipality to contribute 25% of the property acquisition costs, with FEMA supplying the remaining 75%.<sup>53</sup> Eligible homeowners are offered “pre-disaster fair-market value” for the

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46. *Id.*

47. See *Programs to Support Disaster Survivors*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/assistance/individual/disaster-survivors> (Jan. 25, 2021).

48. Press Release, Fed. Emergency Mgmt. Agency, For Communities Plagued by Repeated Flooding, Property Acquisition May Be the Answer (May 28, 2014), <https://web.archive.org/web/20180417114512/https://www.fema.gov/news-release/2014/05/28/communities-plagued-repeated-flooding-property-acquisition-may-be-answer>.

49. See McDonnell, *supra* note 40.

50. Christopher Flavelle, *U.S. Flood Strategy Shifts to ‘Unavoidable’ Relocation of Entire Neighborhoods*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/climate/flooding-relocation-managed-retreat.html>. It should also be noted that the federal government has pushed local officials to exercise eminent domain to force resistant homeowners from their property in flood-prone areas or forfeit federal assistance with relocation efforts. Christopher Flavelle, *Trump Administration Presses Cities to Evict Homeowners from Flood Zones*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/climate/government-land- eviction-floods.html> [hereinafter Flavelle, *Trump Administration Presses Cities to Evict Homeowners from Flood Zones*].

51. Flavelle, *Trump Administration Presses Cities to Evict Homeowners from Flood Zones*, *supra* note 50; see also *Building Resilient Infrastructure and Communities (BRIC)*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities> (last visited Apr. 19, 2021).

52. Press Release, Fed. Emergency Mgmt. Agency, Fact Sheet: Acquisition of Property After a Flood Event (Nov. 13, 2018), <https://web.archive.org/web/20200706012204/https://www.fema.gov/news-release/2018/11/13/fact-sheet-acquisition-property-after-flood-event> [hereinafter *FEMA Fact Sheet*]. A Special Flood Hazard Area has “special flood, mudflow or flood-related erosion hazards” and appears in a designated zone on FEMA’s Flood Hazard Boundary Map or Flood Insurance Rate Map. *Special Flood Hazard Area (SFHA)*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/glossary/special-flood-hazard-area-sfha> (July 7, 2020).

53. Press Release, *supra* note 48.

home,<sup>54</sup> which is then typically razed and the land is subsequently “restored to open space” to buffer the coastal area from future flooding.<sup>55</sup>

On average, it takes over 5.5 years from the time of the disaster for a FEMA buyout to close.<sup>56</sup> According to a study of recent buyouts, the affected residents have long ago had to relocate and stabilize before seeing any compensation for the property.<sup>57</sup> Between 1989 and 2017, FEMA funded over 43,000 buyouts for properties prone to chronic flooding, but the number of properties included in each buyout purchase has steadily decreased.<sup>58</sup> The result is a piecemeal retreat from coastal flood zones, “miss[ing] opportunities to more strategically restore floodplains and reduce overall flood risk.”<sup>59</sup>

The buyout system has also faced criticism for perceived inequities.<sup>60</sup> As discussed above, municipalities must initiate and administer the buyout process, and states and municipalities are expected to contribute 25% of the costs.<sup>61</sup> Studies suggest that localities with higher average income and education levels are more likely to administer buyouts, likely due to both funding issues and local government capacity to initiate and administer the buyout.<sup>62</sup> Some warn that poor, rural communities without strong governmental infrastructure are particularly vulnerable to the risks associated with remaining in high flood areas.<sup>63</sup>

In fact, the populations of communities deemed most vulnerable to climate disasters by the Centers for Disease Control are, on average, 81% minority.<sup>64</sup> Within the counties that administer buyouts, the properties involved are usually in lower-income, racially diverse areas.<sup>65</sup> While this could mean that marginalized populations are benefitting more from the buyouts, it could also mean that counties are using the buyouts to selectively remove these communities. According to a study of recent FEMA buyouts, it is unclear “whether white residents are relocating away from areas of racial diversity or whether people of color are relocated.”<sup>66</sup> Because FEMA does not keep data of

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54. *FEMA Fact Sheet*, *supra* note 52.

55. Katharine J. Mach, Caroline M. Kraan, Miyuki Hino, A.R. Siders, Erica M. Johnston & Christopher B. Field, *Managed Retreat Through Voluntary Buyouts of Flood-Prone Properties*, 5 *SCI. ADVANCES*, Oct. 2019, at 1, 1.

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 2.

59. *Id.* at 6.

60. *Id.* at 1.

61. Press Release, *supra* note 48.

62. Mach et al., *supra* note 55, at 3.

63. *Id.* at 6.

64. Thomas Frank, *Population of Top 10 Counties for Disasters: 81% Minority*, E&E NEWS: CLIMATEWIRE (June 8, 2020), <https://www.eenews.net/climatewire/2020/06/08/stories/1063347205>.

65. Mach et al., *supra* note 55, at 6.

66. *Id.*

homeowner identity, it is challenging to meaningfully analyze these equity issues.<sup>67</sup>

The recent buyout study warns that “when social equity is not explicit [in buyout programs], inequitable implementation practices . . . may occur.”<sup>68</sup> These can include political pressures to allocate resources to the privileged instead of marginalized people, perceptions of coercion among buyout recipients, “deliberate findings of substantial damage in socially vulnerable areas, or relocations to areas with equal flood risk and greater social vulnerability.”<sup>69</sup> The study urges that closer evaluation of administered buyout programs is essential to ensuring that buyouts are equitable going forward.<sup>70</sup>

Additionally, because of the increase in frequency and magnitude of natural disasters, FEMA has seen unprecedented demand over the last decade, with eight of its most expensive years occurring between 2009 and 2019.<sup>71</sup> Many argue that FEMA has awarded too much support for small scale disasters which states and local governments were well-equipped to handle on their own, leaving a shortage of resources and personnel when major disasters strike.<sup>72</sup> For example, when Hurricanes Irma, Harvey, and Maria hit the United States in 2017, “almost half of the agency’s emergency workforce was tied up when the first sheets of rain began to inundate large parts of Texas,” a pattern that FEMA admits is a continuing issue.<sup>73</sup> Limitations on FEMA’s ability to respond to multiple disasters at once are bound to continue as natural disasters become more and more frequent and destructive.

Relatedly, the cost to buy out all thirteen million Americans in flood-prone areas could cost the government up to \$13 trillion.<sup>74</sup> And while not all thirteen million people are in immediate danger, the number of displaced persons will continue to climb as coastal communities experience more severe high tide flooding and catastrophic storm surge resulting from rising sea levels.<sup>75</sup> The Department of Homeland Security anticipates that “disaster survivors may have recovery needs that cannot be fully met by traditional government programs due to eligibility or program limitations.”<sup>76</sup> In response, it has created the Unmet Needs Committee to centralize private organizations that can assist recovery

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Gabrielle Canon, *The US Won't Be Prepared for the Next Natural Disaster*, GUARDIAN (Jan. 18, 2019), <https://www.theguardian.com/world/2019/jan/18/natural-disaster-preparation-fema-hurricanes>.

72. Thomas Frank, *Why the U.S. Disaster Agency Is Not Ready for Catastrophes*, SCI. AM. (Aug. 20, 2019), <https://www.scientificamerican.com/article/why-the-u-s-disaster-agency-is-not-ready-for-catastrophes/>.

73. *Id.*

74. Milman, *supra* note 31.

75. *Id.*

76. U.S. DEP'T OF HOMELAND SEC., NATIONAL DISASTER RECOVERY FRAMEWORK 34 (2d ed. 2016), [https://web.archive.org/web/20201130202448/https://www.fema.gov/media-library-data/1466014998123-4bec8550930f774269e0c5968b120ba2/National\\_Disaster\\_Recovery\\_Framework2nd.pdf](https://web.archive.org/web/20201130202448/https://www.fema.gov/media-library-data/1466014998123-4bec8550930f774269e0c5968b120ba2/National_Disaster_Recovery_Framework2nd.pdf).

where the government is unable.<sup>77</sup> However, there are no guarantees that private organizations can or will fill the voids left by a federal system strapped by growing demand.

## 2. HUD Program

HUD offers both a mortgage insurance program and a community grant program to the disaster response framework. HUD offers mortgage insurance to “lenders against the risk of default on mortgages to qualified disaster victims.”<sup>78</sup> For those whose homes are located in a presidentially designated disaster area, “[i]nsured mortgages may be used to finance the purchase or reconstruction of a one-family home that will be the principal residence of the homeowner.”<sup>79</sup> These Federal Housing Administration (FHA) insured mortgages enjoy at least a ninety-day moratorium on foreclosures to assist borrowers during disaster recovery, and may be eligible for a waiver of other late fees.<sup>80</sup>

Additionally, after a presidentially declared disaster, “Congress may appropriate additional funding for the Community Development Block Grant (CDBG),” which provides flexibility to local and state governments for a range of recovery efforts, especially for low-income areas.<sup>81</sup> However, receiving funding through CDBG can be slow, because the program was not created as a permanent disaster relief mechanism.<sup>82</sup> As a result, HUD must “essentially design a new program from scratch” for each new disaster related grant.<sup>83</sup> Congress introduced legislation in 2019 to make the HUD disaster relief program permanent to help alleviate this problem.<sup>84</sup>

## 3. Small Business Administration Program

The SBA can also provide funding for disaster relief to both businesses and private individuals.<sup>85</sup> SBA offers low-interest, long-term loans to affected individuals who cannot qualify for credit elsewhere.<sup>86</sup> Loans up to \$200,000 are available for repair or replacement of primary homes, and loans up to \$40,000

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77. *Id.*

78. *Mortgage Insurance for Disaster Victims Section 203(H)*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/housing/sfh/ins/203h-dft](https://www.hud.gov/program_offices/housing/sfh/ins/203h-dft) (last visited Apr. 19, 2021).

79. *Id.*

80. *Disaster Relief Options for FHA Homeowners*, U.S. DEP’T OF HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/housing/sfh/nsc/qaho0121](https://www.hud.gov/program_offices/housing/sfh/nsc/qaho0121) (last visited Apr. 19, 2021).

81. *Community Development Block Grant Disaster Recovery Program*, HUD EXCH., <https://www.hudexchange.info/programs/cdbg-dr/> (last visited Apr. 19, 2021).

82. Christopher Flavell, *As Disasters Multiply, Billions in Recovery Funds Go Unspent*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/climate/federal-hurricane-wildfire-disaster-funds-unspent.html>.

83. *Id.*

84. *Id.*

85. *Home and Property Disaster Loans Program Description*, U.S. SMALL BUS. ADMIN., <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/4477> (Sept. 15, 2020); *see also Business Disaster Loans Program Description*, U.S. SMALL BUS. ADMIN., <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/4479> (Sept. 15, 2020).

86. *Home and Property Disaster Loans Program Description*, *supra* note 85.

are available to replace personal property after a disaster.<sup>87</sup> SBA also offers loans up to \$2 million to businesses and nonprofits for disaster-related “losses not fully covered by insurance or other means.”<sup>88</sup> Economic Injury Disaster Loans may be offered regardless of whether the business suffered any physical damage, and could be used to fortify the business against the risk of future disaster related damage.<sup>89</sup>

#### 4. National Flood Insurance Program

Another federal avenue for individual relief is the National Flood Insurance Program, which “provides flood insurance to property owners, renters and businesses . . . [and] works with communities required to adopt and enforce floodplain management regulations.”<sup>90</sup> Despite the availability of this program, “roughly one-third of American homeowners in flood-prone cities have flood insurance.”<sup>91</sup> Many cite the cost of flood insurance as a prohibitive factor.<sup>92</sup> Even those who do have insurance are often left with inadequate compensation.

For example, after the disastrous Hurricane Katrina hit New Orleans in 2005, Louisiana estimated that the average homeowner received almost \$6 thousand less than the value of their insurance claim.<sup>93</sup> This led “to an extra \$900 million [in] losses for 160,000 families,” a sizeable bill that the federal government was unable (or unwilling) to foot.<sup>94</sup> Unable to recover, many residents never returned to the city.<sup>95</sup> A year after Katrina hit, the population of New Orleans had decreased from 484,674 to roughly 230,172—a population loss of over 50%.<sup>96</sup> The National Flood Insurance Program is ill-equipped to fill the gap in flood insurance coverage and claims payouts, operating at an average net loss of \$1.4 billion per year.<sup>97</sup>

#### B. COMMUNITY RELOCATION EFFORTS

While many communities face retreat because of destructive coastal storms, others—mostly Native American and Alaskan communities—face the permanent and inevitable loss of their land.<sup>98</sup> However, only two, Isle de Jean Charles in Louisiana and Newtok in Alaska, have received support from the

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87. *Id.*

88. *Business Disaster Loans Program Description*, *supra* note 85.

89. *Id.*

90. *Flood Insurance*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/flood-insurance> (Jan. 8, 2021).

91. Labrador & Cheatham, *supra* note 43.

92. *Id.*

93. Leslie Eaton & Joseph B. Treaster, *Insurance Woes for Hurricane Katrina Victims*, N.Y. TIMES (Sept. 2, 2007), <https://www.nytimes.com/2007/09/02/business/worldbusiness/02iht-orleans.4.7353442.html>.

94. *Id.*

95. Allison Plyer, *Facts for Features: Katrina Impact*, DATA CTR. (Aug. 26, 2016), <https://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/>.

96. *Id.*

97. Canon, *supra* note 71.

98. Stein, *supra* note 17.

federal government.<sup>99</sup> As a result, localities have attempted a number of other responses to relocation, including attempts to hold private actors accountable for costs, as well as attempts at infrastructural fixes to delay the necessities of relocation.

Subpart 1 below describes the government-supported relocations of Isle de Jean Charles and Newtok. Subpart 2 describes a private buyout administered by Shell following widespread chemical contamination in Diamond, Louisiana. Subpart 3 describes the unsuccessful attempt to hold private actors liable for relocation costs in Kivalina, Alaska. It then gives a short description of ongoing efforts to utilize public nuisance law to hold private actors accountable. Subpart 4 briefly describes the predicament facing Tangier Island, Virginia, where infrastructural costs of remaining on the island will likely prove prohibitive. These attempts to relocate or fortify communities, and the challenges posed by each, illustrate the need to develop a comprehensive governmental approach to relocation.

*1. Government Relocations: Isle de Jean Charles, Louisiana, & Newtok, Alaska*

Isle de Jean Charles is a town of about ninety-nine<sup>100</sup> members of the Biloxi-Chitimacha-Choctaw Native American tribe.<sup>101</sup> Since 1960, the island has lost over ninety-eight percent of its land.<sup>102</sup> The only road connecting the town to the mainland—and critical emergency services and infrastructure—has become completely exposed to water on either side.<sup>103</sup> What used to be thick marsh has washed away, leaving the small island's escape route susceptible to immediate flooding with any substantial storm event.<sup>104</sup> The island, which became home to the Biloxi-Chitimacha-Choctaw because of the violent Indian Removal Act, will soon be uninhabitable.<sup>105</sup> The Indian Removal Act forced Native American tribes to relocate and forfeit millions of acres of their land.<sup>106</sup> Now, due to the devastating effects of climate change-induced sea level rise, the Biloxi-Chitimacha-Choctaw face the injustice of having to relocate once again. Through the Isle de Jean Charles Resettlement Project (“the Project”), the United States is funding and administering the wholesale relocation of the island

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99. *Id.*; see also Waldholz, *supra* note 41.

100. Though some estimates put the population count much lower. See Jenny Jarvie, *On a Sinking Louisiana Island, Many Aren't Ready to Leave*, L.A. TIMES (Apr. 23, 2019, 5:00 AM), <https://www.latimes.com/nation/la-na-jean-charles-sinking-louisiana-island-20190423-htlmlstory.html>.

101. Stein, *supra* note 17.

102. Jarvie, *supra* note 100.

103. Stein, *supra* note 17.

104. *Id.*

105. *Id.* The rapid sea level changes to Isle de Jean Charles were compounded by irresponsible dredging practices by oil and gas companies and poor management of natural water flow due to levee construction. *Id.*

106. *Indian Treaties and the Removal Act of 1830*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/indian-treaties> (last visited Apr. 19, 2021).

community to a more inland location.<sup>107</sup> HUD granted \$48.3 million dollars to the Project following its application to the National Disaster Resilience Competition in 2014.<sup>108</sup>

The Project's goal is to "construct[] a brand-new town and fill[] it with the displaced occupants and culture of Isle de Jean Charles."<sup>109</sup> While the government has provided the funding, at the cost of about \$487,000 per person, logistical challenges have prevented Isle de Jean Charles from making substantial progress.<sup>110</sup> Finding a new location that will provide enough of an economy to support the residents is a major challenge, especially because peace and quiet, and retaining a sense of community, are paramount to the island's residents.<sup>111</sup> Implementing a plan or process has proven difficult, raising the question of "whether government-backed community resettlements will be feasible for the hundreds of communities that are approaching similar dissolutions."<sup>112</sup>

Unlike Isle de Jean Charles, the town of Newtok, Alaska, has a fairly concrete plan for its relocation.<sup>113</sup> Newtok, home to about 315 residents,<sup>114</sup> had plans well underway by the time it received federal assistance.<sup>115</sup> "[R]apidly losing land to a combination of erosion and thawing permafrost," it is expected to become uninhabitable "within a matter of years."<sup>116</sup> The town traded land with the U.S. Fish and Wildlife Service in 2003 for a site further inland from the existing village, and plans to use retrofitted military barracks to reduce construction costs.<sup>117</sup> The 2018 federal budget bill allocated \$15 million dollars to the Denali Commission,<sup>118</sup> an independent federal agency created in 1998 to bolster Alaska's infrastructure and utilities and provide economic support.<sup>119</sup> The funding will help Newtok to build twenty-eight houses at the new location, but the total cost of relocation is estimated to exceed \$100 million, and the \$15 million in funding is only a one-time provision that will not renew.<sup>120</sup>

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107. Stein, *supra* note 17.

108. *Id.* HUD administered the competition looking for projects focused on proactively planning and preparing for natural disasters. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Waldholz, *supra* note 41.

114. *Newtok, AK*, CENSUS REP., <https://censusreporter.org/profiles/16000US0253820-newtok-ak/> (last visited Apr. 19, 2021).

115. Waldholz, *supra* note 41.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Denali Commission Story*, DENALI COMM'N, <https://www.denali.gov/> (last visited Apr. 19, 2021).

120. Waldholz, *supra* note 41.

## 2. Individual Buyouts: Diamond, Louisiana

Isle de Jean Charles and Newtok are exceptional in that most “prior resettlements . . . have largely followed a model of individual buyouts.”<sup>121</sup> In the case of Diamond, Louisiana, the Shell Oil Company, whose chemicals factory caused leaks and explosions for decades, provided a buyout deal that offered a lump-sum payment for residents to move elsewhere.<sup>122</sup> “One by one, the residents of Diamond took the money and left,” resulting in the total disembodiment of the historically Black community there.<sup>123</sup> The loss of Diamond highlights the “difference between saving a community and saving its individual members,”<sup>124</sup> the difference between individual buyouts and wholesale relocation of communities.<sup>125</sup> Furthermore, private entities are unlikely to be a dependable option, as illustrated by the prolonged litigation surrounding the relocation of Kivalina, Alaska.

## 3. Public Nuisance Claims: Kivalina, Alaska

The Native Inupiat village of Kivalina, Alaska, home to roughly 400 residents, has historically depended on formations of sea ice to protect it from coastal storms.<sup>126</sup> The sea ice has become progressively less durable, forming later and melting earlier each season.<sup>127</sup> *Native Village of Kivalina v. ExxonMobil Corporation* explains that this diminished protection, when combined with sea level rise and progressive erosion, results in “future storms threaten[ing] buildings and critical infrastructure in [Kivalina] with imminent devastation.”<sup>128</sup> In 2008, Kivalina filed suit against several fossil fuel companies, seeking damages of \$400 million for relocation of the village.<sup>129</sup> The complaint alleged that the companies’ emissions of greenhouse gases contributed considerably to global warming and caused “substantial and unreasonable interference” with their right “to use and enjoy public and private property in Kivalina.”<sup>130</sup>

In a motion to dismiss, the defendants argued that the plaintiffs raised claims involving nonjusticiable political questions.<sup>131</sup> They also argued that Kivalina lacked standing because the requisite causal link between the injuries

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121. Stein, *supra* note 17.

122. *Id.*

123. *Id.*

124. *Id.*

125. See Annah E. Piggott-McKellar, Karen E. McNamara, Patrick D. Nunn & Seci T. Sekinini, *Moving People in a Changing Climate: Lessons from Two Case Studies in Fiji*, 8 SOC. SCI. 133, 142 (2019) (studying community cohesion in the relocations of Denimanu and Vunidogoloa villages in Fiji)

126. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

127. *Id.*

128. *Id.* at 853–54.

129. *Kivalina Lawsuit (Re Global Warming)*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/kivalina-lawsuit-re-global-warming> (last visited Apr. 19, 2021).

130. *Native Vill. of Kivalina*, 696 F.3d at 854.

131. *Id.*

to Kivalina and the defendants' emissions was too attenuated.<sup>132</sup> The district court agreed with both arguments and granted the motion.<sup>133</sup> The Ninth Circuit affirmed the dismissal on different grounds.<sup>134</sup> Relying on the Supreme Court's holdings in *Massachusetts v. EPA* and *American Electric Power v. Connecticut*,<sup>135</sup> the Ninth Circuit held that Kivalina's federal common law claim had been displaced by the Clean Air Act, which empowers the EPA to regulate emissions of greenhouse gases.<sup>136</sup> It concluded that the existing regulatory framework occupied the field, precluding federal common law nuisance claims.<sup>137</sup> The Supreme Court declined to hear the final appeal in 2013.<sup>138</sup> Nonetheless, many of these nuisance claims have moved to state court.

*a. Continuing Efforts at Court-Awarded Compensation*

The challenges of federal preemption and of proving causation in common law public nuisance claims will continue to pose roadblocks to court-awarded compensation to relocate. Plaintiffs' attorneys have begun bringing nuisance claims in state court in an attempt to work around federal displacement issues.<sup>139</sup> In California, the cities of San Francisco and Oakland brought state law public nuisance claims against major oil companies seeking compensation for projected infrastructural costs incurred due to rising sea levels.<sup>140</sup> The cases were consolidated and removed to federal court, where they were dismissed.<sup>141</sup> The court held that plaintiffs' state law claims were controlled by federal common law because of their "international scope," and because "the anticipated coastal flooding is uniquely federal" since it involves the flooding of "the navigable waters of the United States."<sup>142</sup> In the dismissal order, Judge Alsup of the Northern District of California explained that the claims "undoubtedly implicate the interests of countless governments, both foreign and domestic," and as a

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132. *Id.*

133. *Id.*

134. *See id.* at 858.

135. *See Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (holding that the "Clean Air Act authorizes the EPA to regulate greenhouse gas emissions"); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (holding that "the Clean Air Act and the Environmental Protection Agency action the Act authorizes . . . displace" federal common-law public nuisance claims).

136. *Native Vill. of Kivalina*, 696 F.3d at 857–58.

137. *Id.*

138. *Native Vill. of Kivalina v. Exxon Mobile Corp.*, 569 U.S. 1000 (2013) (denying certiorari); *see also Kivalina Lawsuit (Re Global Warming)*, *supra* note 129.

139. Kurtis Alexander, *San Francisco, Oakland Sue Major Oil Companies over Rising Seas*, S.F. GATE (Sept. 20, 2017, 9:15 PM), <https://www.sfgate.com/bayarea/article/San-Francisco-Oakland-sue-major-oil-companies-12215044.php>.

140. *Id.*

141. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1019, 1028–29 (N.D. Cal. 2018) (granting motion to dismiss).

142. *Id.* at 1021.

result deserve “a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.”<sup>143</sup>

Despite this judicial treatment, attorneys for three localities in California have brought separate actions in state court against big oil companies under creative new theories of nuisance, negligence, and products liability.<sup>144</sup> In 2018, Judge Chhabria granted remand after defendants removed the cases to federal court, concluding that “federal common law does not govern the plaintiffs’ claims” and “does not preclude them from asserting the state law claims in these lawsuits.”<sup>145</sup> It is possible that creative lawyering may nudge the courts toward awarding relief for climate related damages. However, the long-term success of public nuisance suits to remedy the damages associated with climate change and sea level rise remains unclear. Nor can any future victories in the courts guarantee relocation for the most marginalized populations, or that any sense of cultural cohesion will be retained. As such, the problem requires other avenues for immediate relief.

#### 4. *Infrastructural Solutions: Tangier Island, Virginia*

Finally, many communities like Tangier Island, Virginia, have turned to infrastructural solutions to allow them to remain on their disappearing lands.<sup>146</sup> However, this option will all too frequently be cost prohibitive; the Army Corp of Engineers estimated that coastal engineering to provide a temporary fix would cost Tangier about \$30 million.<sup>147</sup> Costs continue to accrue while maintaining and repairing any temporary, infrastructural solution. And while smaller communities grapple with how and when to relocate, securing funding and making such decisions becomes more difficult “when sea-level rise knocks on the door of a major U.S. city like Miami,” says scholar Casey McCormack.<sup>148</sup> The Department of Homeland Security acknowledges that “[s]ome communities . . . may conclude that success requires relocating all or some portion of the community assets and restoring vacated areas to a more natural, predevelopment environment” rather than rebuilding in place.<sup>149</sup> Still, says Michael Isaac Stein, “despite its inevitability, there is no official framework [in the U.S.] to handle this displacement [and] no U.S. government agency, process,

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143. *Id.* at 1026, 1029. The Ninth Circuit vacated Judge Alsup’s order accepting federal subject matter jurisdiction over the claims on May 26, 2020 and remanded the case, directing the district court to reconsider whether other grounds exist to remove the cases to federal court. *City of Oakland v. BP PLC*, 960 F.3d 570, 585 (9th Cir. 2020); *see also City of Oakland v. BP PLC*, U.S. CHAMBER LITIG. CTR., [chamberlitigation.com/cases/city-oakland-v-bp-plc](http://chamberlitigation.com/cases/city-oakland-v-bp-plc) (last visited Apr. 19, 2021).

144. *See Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018); *see also Complaint* at 3–5, *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (No. Civ. 1704935).

145. *Cnty. of San Mateo*, 294 F. Supp. 3d at 937.

146. *See McCormack*, *supra* note 5, at 11.

147. *Id.*

148. *Id.*

149. U.S. DEP’T OF HOMELAND SEC., *supra* note 76, at 49.

or funding dedicated to confronting” the imminent mass migration of Americans as the sea continues to rise.<sup>150</sup>

Acknowledging the steep limitations inherent in the current U.S. approach to community relocation, this Note now turns to existing national and international policies toward internally displaced persons (IDPs). The Part below will emphasize aspects of IDP policy that may prove useful if meaningfully and proactively applied to environmentally displaced persons (EDPs).

### III. INTERNALLY DISPLACED PERSONS POLICIES

Governments and the United Nations have struggled with how to classify EDPs, who face displacement because of environmental factors.<sup>151</sup> The United Nations defines IDPs as those “who have been forced or obliged to . . . leave their homes . . . in order to avoid the effects of armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>152</sup> While natural disasters are included in this definition, most IDP policies focus on violence and human rights violations, and completely ignore IDPs facing displacement because of sea level rise or other permanent, but relatively slowly progressing, environmental factors.<sup>153</sup> So, while EDPs face many of the same challenges as IDPs—permanent relocation, economic instability, and loss of community—they do not fit neatly into international humanitarian conceptions.<sup>154</sup> For purposes of this Note, I will not argue which formalistic title should be applied to EDPs because, in McCormack’s words, these “technical, definitional nuances . . . are irrelevant to the millions of Americans” facing imminent relocation as a result of sea level rise and other climate related natural disasters.<sup>155</sup> Rather, I will examine how current domestic and international frameworks for handling IDPs can be useful to the situation in the United States, and where the United States needs to improve in order to meet its own commitments to IDPs and to achieve the goals provided by the U.N. Guiding Principles on Internal Displacement (“U.N. Guiding Principles” or “Principles”).<sup>156</sup>

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150. Stein, *supra* note 17.

151. See McCormack, *supra* note 5, at 9.

152. U.N. *Guiding Principles*, *supra* note 6, at 1. In this instance, “state” refers to an internationally recognized nation, country, or territory.

153. See *id.*

154. See McCormack, *supra* note 5, at 9.

155. *Id.*

156. See U.N. *Guiding Principles*, *supra* note 6.

## A. U.N. GUIDING PRINCIPLES

The U.N. Guiding Principles were originally created in 1998 under the direction of the U.N. High Commissioner for Refugees, and updated in 2004.<sup>157</sup> The Principles are intended to provide governments and international development and humanitarian agencies with standards for providing “protection and assistance during displacement, and [to] set forth guarantees for safe return, resettlement and reintegration,” regardless of whether the reintegration occurs in the original locale or in a new location within the State.<sup>158</sup> They identify the rights and guarantees that should be afforded to IDPs as well as the responsibilities of national governments to IDPs within their borders.<sup>159</sup> The Principles are not legally binding.<sup>160</sup> However, their content originates in binding concepts of international human rights, humanitarian law, and refugee law, and, according to the Brookings Institution, “they have come to acquire . . . a good deal of international standing and moral authority.”<sup>161</sup> Many countries and organizations, including the United States, have adopted some version of the Principles to guide policy choices.<sup>162</sup> The following paragraphs will highlight aspects of the principles significant to the analysis of how the United States should apply IDP policies to domestic EDPs.

First and foremost, the U.N. Guiding Principles are clear: “National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”<sup>163</sup> This sets the standard that national governments, rather than individuals or local governments, must lead the way in providing safeguards to IDPs. Authorities are to provide proper accommodation; safe conditions with proper nutrition, health and hygiene; and ensure that all possible steps are taken to prevent the separation of families.<sup>164</sup> The Principles state that authorities should involve the affected IDPs “in the planning and management of their relocation,” and provide an effective remedy for contested decisions.<sup>165</sup> Furthermore, the Principles say states are under a particular obligation to protect against the displacement of indigenous people, minorities, and other groups with a special dependency on and attachment to the land.<sup>166</sup>

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157. *Id.* at Introductory Note.

158. *Id.*

159. *Id.*

160. Roberta Cohen, *Introduction to the Guiding Principles on Internal Displacement*, BROOKINGS (Sept. 23, 2001), <https://www.brookings.edu/on-the-record/introduction-to-the-guiding-principles-on-internal-displacement-2/>.

161. *Id.*

162. *Id.*

163. *U.N. Guiding Principles*, *supra* note 6, princ. 3, cl. 1, at 2.

164. *Id.* princ. 7, cl. 2, at 4.

165. *Id.* princ. 7, cl. 3(d), at 5.

166. *Id.* princ. 9, at 5.

Importantly, IDPs have the right to “be protected against forcible return to . . . any place where their life, safety, liberty and/or health would be at risk.”<sup>167</sup> Authorities must allow IDPs voluntary return to their home, but must also facilitate their resettlement and integration elsewhere in the country.<sup>168</sup> These principles highlight the national government’s responsibility to allow IDPs the freedom to choose, while also providing them with a feasible alternative to returning to an uninhabitable area. This should include encouraging and supporting IDPs in seeking employment opportunities and engaging in gainful economic activity.<sup>169</sup> Finally, governments have a “duty and responsibility to assist” IDPs in recovering property and possessions or assist them in obtaining compensation or fair reparations for their losses.<sup>170</sup>

Although the U.N. Guiding Principles suggest policies to assist IDPs, the framework is fairly general and its application can mean many things. Below, I will briefly explain U.S. policy regarding IDPs before engaging with the African Union’s Kampala Convention, the “first binding multilateral instrument dedicated to the implementation of the Guiding Principles.”<sup>171</sup>

#### B. U.S. POLICY TOWARD IDPs

In response to the U.N. Guiding Principles, the U.S. Agency for International Development (USAID) created the *USAID Assistance to Internally Displaced Persons Policy* (“the U.S. Policy”) in 2004.<sup>172</sup> The U.S. Policy affirms many of the basic premises outlined in the U.N. Guiding Principles, recognizing the urgency of the global situation regarding IDPs and affirming the “ultimate goal . . . to enable IDPs to become fully productive contributors to economic and social progress in their local communities and countries.”<sup>173</sup> Strikingly, the U.S. Policy focuses almost, if not completely exclusively, on the issue of IDPs abroad, promising humanitarian and strategic support without mentioning the application of these processes domestically.<sup>174</sup> The document states that “USAID will encourage the governments of affected countries to fulfill their responsibilities to protect and assist their own citizens,”<sup>175</sup> perhaps suggesting that the document’s authors did not think IDP’s a significant policy problem for the U.S. The agency assigned to create the U.S. Policy, the Agency for *International Development*, suggests the same.

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167. *Id.* princ. 15, subsec. (d), at 8.

168. *Id.* princ. 28, cl. 1, at 14.

169. *Id.* princ. 22, cl. 1(b), at 12.

170. *Id.* princ. 29, cl. 2, at 15.

171. Werner Scholtz, *The Day After No Tomorrow? Persons Displaced Environmentally Through Climate Change: AU Laws to the Rescue?*, 35 S. AFR. Y.B. INT’L L. 36, 46 (2010).

172. See U.S. AGENCY FOR INT’L DEV., USAID ASSISTANCE TO INTERNALLY DISPLACED PERSONS POLICY (2004), <https://www.geneseo.edu/~iompres/USAIDidpPolicy.pdf>.

173. *Id.* at 7.

174. *See id.*

175. *Id.* at 6.

Nonetheless, the policy has some strengths. It identifies distinct phases of displacement: (1) the initial emergency phase, requiring immediate humanitarian aid for essential provisions of food, housing, and healthcare; (2) the care and maintenance phase, requiring access to legal documents, education, and tools to support self-reliance; (3) the transitional reintegration phase, requiring transportation and infrastructural support; and (4) the long-term development phase, requiring repairs and improvements to existing systems.<sup>176</sup>

The accompanying *USAID Assistance to Internally Displaced Persons Policy Implementation Guidelines* (“Implementation Guidelines”) give greater detail to the technical aspects of the policy framework.<sup>177</sup> The Implementation Guidelines identify an additional stage in the displacement process: the pre-emergency preparedness phase.<sup>178</sup> During this phase, “proper steps include early warning and monitoring systems, mechanisms for information exchange . . . [and] assessments and strengthening of response capacity.”<sup>179</sup>

The Implementation Guidelines encourage a number of interrelated approaches to all relocation phases.<sup>180</sup> One approach is community-based programming, emphasizing active participation in relocation efforts including “rehabilitation, social justice and reconciliation, social and economic wellbeing, good governance, and local democratic participation.”<sup>181</sup> Another approach is strategic planning, which includes establishing “provisions to prevent, address, and mitigate population displacements.”<sup>182</sup> A major strength of these aspects of the Implementation Guidelines is their emphasis on proactivity. They promote planning to allow the relocation process to be more informed and community-centric, and to minimize the potential negative effects of weather events on at-risk populations.<sup>183</sup> These are tangible policy directives that, if adapted to the unique issues faced by EDPs in the United States, provide a strong foundation to remedy the shortcomings of the U.S. framework for EDPs.

While the United States has no federal laws regarding treatment of IDPs, representatives in the House and the Senate introduced the Climate Displaced Persons Act (“the Act”) in 2019.<sup>184</sup> The Act aims to create a new program separate from the federal refugee program to process a minimum of 50,000

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176. *Id.* at 7.

177. *Id.* at 8; *see also* U.S. AGENCY FOR INT’L DEV., USAID ASSISTANCE TO INTERNALLY DISPLACED PERSONS POLICY IMPLEMENTATION GUIDELINES, <https://www.usaid.gov/sites/default/files/documents/1868/200mbd.pdf> (last visited Apr. 19, 2021) [hereinafter IMPLEMENTATION GUIDELINES].

178. IMPLEMENTATION GUIDELINES, *supra* note 177, at 2.

179. *Id.*; *see also* Piggott-McKellar et al., *supra* note 125, at 145 (finding that long term monitoring and evaluation is beneficial to the adaptation process).

180. *See* IMPLEMENTATION GUIDELINES, *supra* note 177, at 3.

181. *Id.* at 4.

182. *Id.*

183. *Id.*

184. Alexander C. Kaufman, *House Democrats Set to Introduce First-of-Its-Kind Climate Refugee Bill*, GRIST (Oct. 26, 2019), <https://grist.org/article/house-democrats-set-to-introduce-first-of-its-kind-climate-refugee-bill/>.

climate migrants each year.<sup>185</sup> It would also require the State Department “to create a Global Climate Resilience Strategy,” bringing climate change issues to the forefront of U.S. foreign policy.<sup>186</sup> Furthermore, the Act would also call on the executive branch to keep data on the number of EDPs created by drought, sea level rise, and extreme weather conditions, to be reported annually to Congress.<sup>187</sup> While the Act is revolutionary in that it brings climate change directly into U.S. policy and forces acknowledgement of global EDPs, like the U.S. Policy toward IDPs, it focuses on EDPs from other countries and does little in the way of creating an infrastructure or response system for domestic EDPs.<sup>188</sup>

While these policy initiatives in the United States show stirrings around the idea of EDPs, they do little to provide for the growing number of environmentally displaced persons already in the United States, and for the many thousands more to come. Discouragingly, while the U.N. General Assembly adopted The Global Compact for Migration in December 2018 with approval by 152 countries, the United States voted against the accord, joining only three countries opposing.<sup>189</sup> The accord acknowledges the growing influence of climate change on migration patterns and is intended to provide “for safe, orderly and regular migration.”<sup>190</sup>

### C. KAMPALA CONVENTION

In 2009, the African Union adopted the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, also known as the Kampala Convention.<sup>191</sup> Africa has the largest population of IDPs in the world, and the Kampala Convention is the first binding multilateral legal instrument adopted for the purpose of effectuating the U.N. Guiding Principles on Internal Displacement.<sup>192</sup> The Kampala Convention is intended to address internal displacement from all causes, including natural disasters.<sup>193</sup> Despite critiques that the Kampala Convention lacks enforcement mechanisms, its

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185. *Id.*

186. *Id.*

187. *Id.*

188. See S. 2565, 116th Cong. (2019).

189. Israel, the Czech Republic, and Poland also voted “no” on the accord, with additional countries abstaining. See Edith M. Lederer, *UN General Assembly Endorses Global Migration Accord*, WASH. TIMES (Dec. 19, 2018), <https://www.washingtontimes.com/news/2018/dec/19/un-general-assembly-endorses-global-migration-acco/>.

190. *Global Compact for Migration*, U.N. REFUGEES & MIGRANTS, <https://refugeesmigrants.un.org/migration-compact> (last visited Apr. 19, 2021).

191. Scholtz, *supra* note 171, at 46–47.

192. *Id.* at 46.

193. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), pmbl., Oct. 23, 2009, <https://www.unhcr.org/en-us/about-us/background/4ae9bede9/african-union-convention-protection-assistance-internally-displaced-persons.html> [hereinafter Kampala Convention].

“innovative and interesting” provisions provide useful guidance in several areas.<sup>194</sup>

Like the U.S. Policy toward IDPs, the Kampala Convention embraces most of the core principles from the U.N. Guiding Principles.<sup>195</sup> The Kampala Convention affirms that each African state “bear[s] the primary duty and responsibility” to protect and assist IDPs, which includes a special responsibility to “communities with special attachment to, and dependency on land.”<sup>196</sup> Additionally, as stipulated in the U.N. Guiding Principles, the Kampala Convention makes states responsible for providing effective remedies for displacement, including “just and fair compensation and other forms of reparations . . . for damage incurred as a result of displacement.”<sup>197</sup> Furthermore, it provides that states should allow IDPs the free and informed choice of “whether to return, integrate locally or relocate” and should assist them “in finding sustainable solutions” following displacement.<sup>198</sup>

The more novel aspects of the Kampala Convention include a liability mechanism for private entities and a directive to adopt policies and create an authority to handle IDPs.<sup>199</sup> State parties are to “ensure the accountability of non-State actors . . . including multinational companies and private military or security companies,” as well as those “non-state actors involved in the exploration and exploitation of economic and natural resources leading to displacement.”<sup>200</sup> These liability mechanisms for non-state actors are novel to the discussion of IDP policy, especially as it concerns climate induced migration. Additionally, the Kampala Convention directs the states to codify the obligations of the Kampala Convention into their own laws, to “designate an authority or body” to protect and assist IDPs, and to “adopt . . . strategies and policies on internal displacement at national and local levels.”<sup>201</sup>

Below, I will analyze how these novel aspects of IDP policy, as well as the strengths of the policies shared among the U.N. Guiding Principles, the U.S. Policy on IDPs, and the Kampala Convention can inform a more robust, sustainable model for the treatment of EDPs in the United States.

#### IV. APPLYING IDP POLICIES TO CLIMATE DISPLACED PERSONS IN THE UNITED STATES

There are several ways in which the U.N. Guiding Principles and the Kampala Convention can fortify existing U.S. policy toward EDPs and inform new policies to handle the ever-growing number of people evacuating from the

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194. Scholtz, *supra* note 171, at 53.

195. See Kampala Convention, *supra* note 193; see also U.N. Guiding Principles, *supra* note 6.

196. Kampala Convention, *supra* note 193, art. 5, cl. 1, art. 4, cl. 5.

197. *Id.* art. 12, cl. 2.

198. *Id.* art. 11, cl. 2.

199. See *id.*

200. *Id.* art. 3, cl. 1(h)–(i).

201. *Id.* art. 3, cl. 2(b)–(c).

coasts. While EDPs may not fall neatly into the traditional concept of IDPs, they should be afforded the same protections as IDPs, and the United States should be proactive about relocation efforts in areas at high risk of sea level rise and storm related devastation. Subpart A below discusses ways in which the United States is not meeting its responsibilities to EDPs and suggests some potential solutions drawn from IDP policy. Subpart B, also drawing on IDP policy, provides more general recommendations for structuring the U.S. response to environmental displacement beyond meeting its express obligations under the U.N. Guiding Principles.

#### A. OBLIGATIONS UNDER U.N. GUIDING PRINCIPLES

There are several ways in which the United States is falling short of its obligations under the U.N. Guiding Principles. Namely, U.S. policy toward EDPs is lacking in its treatment of indigenous peoples, its efforts to effectively integrate EDPs into local economies, and in providing compensation to EDPs for their losses.

##### 1. *Protection of Indigenous People*

The United States is not meeting its obligations under the U.N. Guiding Principles to protect indigenous people, minorities, and those “with a special dependency on and attachment to their lands.”<sup>202</sup> Of the at least seventeen mostly native communities seeking permanent relocation in the United States,<sup>203</sup> only two have received any federal support. In both instances, the funding was given as a one-off. For Isle de Jean Charles, it came as a result of a one-time competition to create sustainable responses to climate change,<sup>204</sup> and for Newtok, the funding was a one-time grant through a federal agency.<sup>205</sup> Many of the challenges with these attempted relocations relate to building or finding an economy at potential new locations capable of supporting the populations while still retaining the cultural hallmarks that are sacred to the displaced people.<sup>206</sup>

The Kampala Convention recommends that relocation authorities should “consult internally displaced persons and allow them to participate in decisions relating to their protection and assistance.”<sup>207</sup> Studies of successful climate related relocations in Fiji suggest that a participatory process involving community members throughout both planning and execution is essential.<sup>208</sup> A case study involving the climate related relocations of Denimanu and Vunidogoloa, two villages in Fiji, shows that when residents feel that the community has made the choice to move, cultural and social cohesion and the

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202. *U.N. Guiding Principles*, *supra* note 6, princ. 9, at 5.

203. Stein, *supra* note 17.

204. *Id.*

205. Waldholz, *supra* note 41.

206. Stein, *supra* note 17.

207. Kampala Convention, *supra* note 193, art. 9, cl. 2(k).

208. Piggott-McKellar et al., *supra* note 179, at 145.

shared sense of community benefit.<sup>209</sup> The study also showed that relocating within lands owned by the same group or family, called mataqali, was important to cultural preservation.<sup>210</sup> This may suggest that relocations of indigenous people, or any other group that values cultural cohesion, may benefit from considering locations nearby to similar or related cultural resources. Additionally, the Fiji case study showed that allowing the community to self-identify its priorities improved livelihood outcomes.<sup>211</sup> As such, any policy towards EDPs going forward should include a participatory mechanism to actively engage relocating communities in each stage of the process.

## 2. *Economic Integration*

In regard to the maintenance and improvement of livelihoods, the United States is falling short of its obligation under the Guiding Principles to “facilitate the integration of returned or resettled internally displaced persons.”<sup>212</sup> IDPs have the right “to seek freely opportunities for employment and to participate in economic activities.”<sup>213</sup> This relates to the necessity of providing an economy willing and ready to accept displaced persons. For example, one of the principal challenges faced by the Isle de Jean Charles Relocation Project has been finding an area with enough economic activity to support the financial security of the displaced population.<sup>214</sup> To meet its obligation under the Guiding Principles, the United States will need to implement proactive solutions to facilitate economic integration for EDPs.

The Fiji case study discussed above finds that targeted livelihood planning can effectively protect and improve livelihoods in a new location and urges the importance of ensuring that the necessary economic infrastructure is available there.<sup>215</sup> According to the study, “in Vunidogoloa, the provision of livelihood alternatives . . . (such as pineapple plantations, fish ponds, and cattle) improved outcomes across natural and financial capital.”<sup>216</sup> In the United States, similar efforts at livelihood planning could look like the creation of New Deal-style work projects such as those contemplated in the Green New Deal for relocating communities and individuals.<sup>217</sup> The Green New Deal, a policy proposal brought forth by Alexandria Ocasio-Cortez in the House of Representatives and Edward

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209. *Id.* at 142.

210. *Id.* at 135–36.

211. *Id.* at 145.

212. *U.N. Guiding Principles*, *supra* note 6, princ. 28, cl. 1, at 14.

213. *Id.* princ. 22, cl. 1(b), at 12.

214. Stein, *supra* note 17.

215. Piggott-McKellar et al., *supra* note 179, at 145.

216. *Id.*

217. See H.R. Res. 109, 116th Cong. (2019); see also Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html>. The Green New Deal is “a grand plan for tackling climate change” that “calls on the federal government to dramatically reduce greenhouse gas emissions, create high-paying jobs, ensure that clean air, clean water and healthy food are basic human rights, and end all forms of oppression.” *Id.*

J. Markey in the Senate, is designed to drastically reduce U.S. greenhouse gas emissions and stimulate the economy through clean energy work projects.<sup>218</sup> It sets out “to create millions of good, high-wage jobs in the United States” by forming work projects across the country to repair and upgrade existing infrastructure and build new, energy-efficient, and sustainable infrastructure.<sup>219</sup> Pairing Green New Deal employment projects with incentives to proactively relocate would benefit the preservation of livelihoods while addressing critical infrastructural weaknesses in coastal areas.<sup>220</sup> Another option might be to arrange contracts with existing employers in or near relocation sites to ensure that a sufficient number of jobs are available for relocating individuals.

### 3. *Compensation for Losses*

Finally, the United States is failing its responsibility under the U.N. Guiding Principles to assist IDPs to either recover their property or to receive “appropriate compensation or . . . just reparation” for their losses.<sup>221</sup> Those who do not receive FEMA buyouts must return to coastal areas with continuing risks to safety, property, and economic prosperity as rising sea levels and severe weather events continue to beleaguer coastal communities.<sup>222</sup> Relatedly, the shortcomings of the buyout program also implicate the U.N. Guiding Principles duty to protect IDPs from “forcible return” to an area “where their life, safety, liberty and/or health would be at risk.”<sup>223</sup> Despite these failures, the United States has indicated its commitment to IDPs abroad—“to enable IDPs to become fully productive contributors to economic and social progress,” and to assist in the long-term development phase of reintegrating IDPs into society.<sup>224</sup> Optimistically, with some changes, this commitment can be channeled towards the dire and growing situation for domestic EDPs.

## B. THE PATH FORWARD: POLICY RECOMMENDATIONS FOR MEANINGFUL PROTECTION OF EDPs

While there is no simple answer to the issue of EDPs, some workable solutions to their problems—namely, lack of funding for relocation and reparations, piecemeal relocation resulting in fractured communities, and the challenge of reintegrating EDPs as productive members of the economy—can be drawn from the existing policy frameworks for IDPs. The Subparts below discuss the potential benefits of codifying liability for corporate actors, focusing

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218. Friedman, *supra* note 217.

219. H.R. Res. 109.

220. I thank my classmate, Michael Gasbarro, for suggesting that the government “could incentivize people to relocate with some sort of benefit derived from green initiatives” in the Green New Deal. See *infra* Part V.B.2 for a discussion of economic incentives.

221. U.N. *Guiding Principles*, *supra* note 6, princ. 29, cl. 2, at 15.

222. See Milman, *supra* note 31.

223. U.N. *Guiding Principles*, *supra* note 6, princ. 15, cl. (d), at 8.

224. U.S. AGENCY FOR INT’L DEV., *supra* note 172, at 1.

existing agency efforts to provide economic incentives for relocation, and creating a centralized agency or authority that utilizes centralized reporting.

### *I. Funding and Codified Liability*

One of the ubiquitous challenges of relocating people, whether by individual buyouts or by wholesale relocation of a community, is funding. As discussed, FEMA's budget and resources continue to be stretched beyond its means, as does the National Flood Insurance Program, which operates at a major annual deficit.<sup>225</sup> Furthermore, as we saw from the *Kivalina* lawsuits, we cannot rely on private industry to help foot the bill, despite their disproportional contributions to global greenhouse gas emissions.<sup>226</sup> This is partly because the existing judicial structure for nuisance claims requiring the showing of a causal link is not well suited to the reality of aggregated emissions, and partly due to federal common law preemption, as discussed above.<sup>227</sup> The result is a glaring hole in holding private industry liable for their contributions to climate change. For example, according to the *New York Times*, we know that twenty of the largest international "fossil fuel companies are responsible for 35 percent of energy-related greenhouse gas emissions since 1965,"<sup>228</sup> and that the cement industry alone contributes roughly eight percent of the world's carbon dioxide emissions.<sup>229</sup> Allowing these multinational actors to escape liability severely hinders the federal government's ability to adequately compensate EDPs for their losses, at least without making major adjustments to federal budgetary choices.

The Kampala Convention offers a radical solution to the issue of funding. It asserts that States (nations within the African Union) are to "ensure the accountability of non-State actors . . . including multinational companies and . . . non-state actors involved in the exploration and exploitation of economic and natural resources leading to displacement."<sup>230</sup> Furthermore, it directs states to codify these obligations into their respective bodies of law.<sup>231</sup> Codifying liability and financial obligations for major contributors to climate change and sea level rise would provide relief to financially strained federal programs. It would remedy the issue that holding these actors liable does not fit neatly into existing civil liability frameworks.<sup>232</sup>

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225. See Canon, *supra* note 71.

226. See Stein, *supra* note 17.

227. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856–58 (9th Cir. 2012); *id.* at 867–68 (Pro, J., concurring).

228. John Schwartz, *New York Loses Climate Change Case Against Exxon Mobil*, N.Y. TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/climate/exxon-climate-lawsuit-new-york.html?smid=nytcore-ios-share>.

229. Lucy Rodgers, *Climate Change: The Massive CO2 Emitter You May Not Know About*, BBC NEWS (Dec. 17, 2018), <https://www.bbc.com/news/science-environment-46455844>.

230. Kampala Convention, *supra* note 193, art. 3, cl. 1(h)–(i).

231. *Id.* art. 3, cl. 2(a).

232. See *supra* Part II.B.3.a.

Applying this aspect of the Kampala Convention to the U.S. framework for EDPs would not only assist in relocation efforts, but would also help the United States fulfill its obligation to provide compensation or reparations for displacement related losses. While lawmakers will certainly face challenges in crafting laws to hold corporate actors responsible, they might begin by targeting those corporations whose actions have had a direct effect on the land in their immediate vicinities of operation. In the Isle de Jean Charles example, irresponsible dredging by nearby oil companies was a major contributor to the loss of wetlands and “freshwater vegetation that held the land together.”<sup>233</sup> Diamond, Louisiana, discussed above, provides another example.<sup>234</sup> There, Shell’s chemical leaks and explosions had a direct and immediate effect on the habitability of the surrounding area.<sup>235</sup> A path toward more expansive corporate liability may begin with codifying liability in similar situations where there is strong evidence of causation and tangible effects on local communities.

## 2. Existing Agencies and Economic Incentives for Relocation

As discussed above, a major aspect of any successful relocation is implementing strategies to ensure that EDPs can successfully integrate into or create new economies in their areas of relocation.<sup>236</sup> In the USAID framework for IDPs, this would likely fit into the long-term development phase.<sup>237</sup> Long-term economic stability will not be achieved simply by buying out individual homes or paying for the physical aspects of community relocation. It is not enough, even for the select few homeowners who are offered FEMA buyouts,<sup>238</sup> to be paid market value for their home, or to provide funding for the physical relocation of a community without providing for the economic infrastructure to sustain them in a new locale. These approaches do not account for the employment situations and financial stability that EDPs leave behind when they are displaced. In addition to the suggestions made above regarding livelihood planning and the Green New Deal,<sup>239</sup> there are a number of ways that the existing framework of disaster relief agencies can assist with economic integration by providing incentives.

For example, the SBA already offers loans to businesses following natural disasters, regardless of whether the business sustained any physical damage, to prepare the business for future disasters.<sup>240</sup> The SBA could expand this incentive to encourage businesses to move further inland, to open in localities where EDPs are resettled, and to offer employment opportunities to EDPs. This could

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233. Stein, *supra* note 17.

234. *See supra* Part II.B.2.

235. Stein, *supra* note 17.

236. *See supra* Part IV.A.2.

237. *See* IMPLEMENTATION GUIDELINES, *supra* note 177, at 3.

238. *See* Mach et al., *supra* note 55, at 2–6.

239. *See supra* Part IV.A.2.

240. *Business Disaster Loans Program Description*, *supra* note 85.

stimulate economic activity for EDPs and alleviate one of the major challenges of relocation. HUD could also have a hand in this economic stimulation. The existing CDBG, which funds the rebuilding process in disaster affected areas,<sup>241</sup> could be adjusted to offer similar services to communities that seek to proactively relocate. HUD could offer employment opportunities to assist in the construction and infrastructure projects required for relocation, rather than simply responding to areas that have already been severely impacted. This would both encourage inland retreat and stimulate the economies of struggling EDP populations.

Adjusting FEMA's role in environmental displacement may also prove beneficial. It is an important first step that FEMA has publicly announced its aim "to categorically shift the federal focus away from reactive disaster spending and toward research-supported, proactive investment in community resilience."<sup>242</sup> Still, even with this notable policy update and accompanying funding, individuals cannot apply directly to FEMA for a buyout; rather, they must wait for their locality to request a buyout, and then hope that the locality chooses them as a recipient.<sup>243</sup> Even more troubling is that studies show that wealthy areas are much more likely to participate in buyout programs, partially because the locality is responsible for twenty-five percent of the cost, and lower-income areas are not always equipped to provide the funding.<sup>244</sup> This serves to perpetuate issues of economic inequality, especially as they relate to EDPs.

Considering the limited funding and resources that FEMA must spread amongst an ever-growing number of disasters,<sup>245</sup> it is essential that FEMA, or any newly designated authority or agency, adopts a more proactive approach to mitigating the effects of natural disasters and sea level rise. Studies show that for "every \$1 spent on hazard mitigation," the nation can save "\$6 in future disaster costs."<sup>246</sup> Critical to a more proactive approach is incentivizing individuals and communities to relocate before catastrophic sea level rise and weather events ravage the area, using some of the strategies outlined above through HUD and SBA. Increased funding from a codified liability framework for private actors could strongly support such initiatives.

### 3. *Proactive Centralized Agency or Authority*

The Kampala Convention also suggests a policy solution to the issues created by piecemeal relocation, either by individual buyouts or by progressive

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241. See *Community Development Block Grant Disaster Recovery Program*, *supra* note 81.

242. See *Building Resilient Infrastructure and Communities (BRIC)*, *supra* note 51.

243. Press Release, *supra* note 48.

244. See Mach et al., *supra* note 55, at 3; Press Release, *supra* note 48.

245. See Canon, *supra* note 71. According to FEMA, "[i]t is important to note that many flooded properties don't qualify for a buyout, funding is limited and requests for funding may exceed available resources." *FEMA Fact Sheet*, *supra* note 52.

246. Canon, *supra* note 71.

retreat at the individual's own behest.<sup>247</sup> As part of each state's obligation to assist IDPs to find sustainable solutions, the Kampala Convention suggests that states "designate an authority or body" for the task and "[a]dopt . . . strategies and policies on internal displacement at national and local levels."<sup>248</sup> This rather intuitive directive actually carries with it some significant policy implications. As discussed above, the responses of FEMA, HUD, and SBA are somewhat disaggregated, inefficient, and reactive. Designating a centralized authority to formulate policy and implement strategies for EDPs could be an effective way to consolidate existing frameworks in order to use resources more efficiently and expediently.<sup>249</sup> The Denali Commission, discussed above in relation to relocation efforts in Newtok, Alaska, provides a strong example for creating an independent agency.<sup>250</sup> The purpose behind its creation was to "provide critical utilities, infrastructure, and economic support" in Alaska and to acknowledge "the need for increased inter-agency cooperation and focus."<sup>251</sup> Similarly, a new agency focused on the needs of EDPs could help to consolidate existing agency efforts and allow for a more proactive focus on long-term, equitable economic integration and infrastructure.

Creating a new agency or authority dedicated to the handling of EDPs could remedy some of the accountability problems that occur when responsibility is spread among multiple agencies and entities.<sup>252</sup> A centralized agency or authority could prioritize a proactive response to displacement, encourage elective relocation for individuals and communities, and better organize the responses of existing agencies such as FEMA, HUD, and SBA. This authority could provide proactive analysis of potential vulnerabilities to coastal communities and help establish local mechanisms to monitor risks on an ongoing basis with both funding and expertise.<sup>253</sup> This is consistent with Implementation Guidelines suggestion to create an early monitoring system.<sup>254</sup> The authority could also provide similar support in the planning and

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247. See Hauer, *supra* note 2, at 322 ("When climate effects are integrated over long periods of time, it is likely that a combination of press and pulse events will spur migration across pre-existing migration pathways, leveraging established networks of social capital and kin networks in destination decisions.") (citations omitted).

248. Kampala Convention, *supra* note 193, art. 3, cl. 2(b)–(c).

249. Amanda Levinson, *Slouching Toward Bethlehem? US Policy Toward Internally Displaced Persons*, 15 LBJ J. PUB. AFFS. 39, 43 (2003).

250. See *Denali Commission Story*, *supra* note 119; see also *infra* Part II.B.1.

251. See *Denali Commission Story*, *supra* note 119.

252. *Id.*; see also Levinson, *supra* note 249, at 43 (suggesting a centralized agency for IDPs in the United States).

253. The San Francisco Bay Conservation and Development Commission's Adaptation Assistance Program provides a strong template for local monitoring mechanisms. See *San Francisco Bay Conservation and Development Commission (BCDC)*, ADAPTATION CLEARINGHOUSE, <https://www.adaptationclearinghouse.org/organizations/san-francisco-bay-conservation-and-development-commission-bcdc.html> (last visited Apr. 19, 2021). "The Adaptation Assistance Program (AAP) is one part of the Commission's Climate Change Program and was developed to increase Bay Area local governments' capacity for adaptation planning and implementing adaptation strategies." *Id.*

254. IMPLEMENTATION GUIDELINES, *supra* note 177, at 2.

implementation of relocation initiatives to offer expertise and to ensure that equitable considerations are addressed. A proactive agency could also encourage better management of floodplains and supplement the efforts of the National Flood Insurance Program.<sup>255</sup> Finally, a new authority could establish mechanisms to facilitate active participation of community members in the relocation process, consistent with the Implementation Guidelines.<sup>256</sup>

#### 4. *Centralized Reporting*

The directive to create a new authority would be well complemented by the proposed Climate Displaced Persons Act's suggestion that the executive branch provide Congress with an annual report "on people displaced by extreme weather, drought and sea level rise," and that the State Department create a Global Climate Resilience Strategy.<sup>257</sup> Any such strategy should include existing disaster response while providing additional support in planning and implementation on a local level.

The Kampala Convention directs states to "assess . . . the needs and vulnerabilities of internally displaced persons and of host communities."<sup>258</sup> To consider the needs of marginalized communities in relocation programs, as well as the infrastructural needs of the communities that will receive them, information must first be made available about existing trends and inequities. Centralized reporting and the study of relevant data would aid a new agency or authority to effectively execute existing strategies for disaster relief and to implement more proactive relocation strategies focused on retaining the essence of displaced communities, in contrast to the piecemeal relocation described above in Diamond, Louisiana.<sup>259</sup>

Furthermore, centralized reporting is essential to creating a more robust understanding of the equity issues involved with buyout programs. As discussed above, FEMA does not keep data on homeowner identity, making it challenging to understand exactly how buyouts are affecting marginalized communities.<sup>260</sup> A centralized reporting mechanism will allow for a more thoughtful, equitable approach to the relocation process, on small and large scales. Additionally, to maximize the utility of centralized reporting, any new agency or authority should include a team of experts committed to studying the data and incorporating equitable considerations into buyout and relocation projects.<sup>261</sup> A thorough understanding of existing data will be essential to creating successful strategies going forward.

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255. See *supra* Part II.A.4.

256. See IMPLEMENTATION GUIDELINES, *supra* note 177.

257. Kaufman, *supra* note 184.

258. Kampala Convention, *supra* note 193, art. 5, cl. 5.

259. See Stein, *supra* note 17.

260. Mach et al., *supra* note 55, at 6.

261. I thank my classmate, Allyssa Rose, for suggesting the creation of an environmental justice branch to ensure equitable relocation.

## CONCLUSION

While localities and states need to adopt plans and funding for the growing number of EDPs in the United States, in USAID's own words, "the primary responsibility for [the] welfare and protection [of IDPs] lies with the respective governing authorities" of affected countries.<sup>262</sup> The United States has a responsibility to the growing number of domestic EDPs. Applying existing frameworks for handling IDPs to disaster response and relocation initiatives already underway will serve as a strong starting point for the United States to develop an infrastructure to handle this massive problem and to provide EDPs with the essential tools to successfully reintegrate into inland areas, away from the ever-rising sea.

Given the inevitability of climate induced sea level rise, and the resulting changes to coastal areas in the United States, it is absolutely essential that the United States develop policies and infrastructural strategies to handle the millions of people who will continue to be permanently displaced from their homes and communities. The United States should be more proactive in its approach to EDPs. It should create an agency dedicated to the protection and treatment of EDPs that will centralize existing resources and disaster response. Furthermore, the United States should codify liability for private actors who have contributed to sea level rise and population displacement and provide economic stimulus incentives to assist with the relocation and reintegration of EDPs from coastal areas. These initiatives will make existing frameworks more efficient and ensure that the United States meets its responsibilities to EDPs as outlined in the U.N. Principles.

It remains for other scholars to explore what policies localities and states should adopt to accommodate sea level rise and migration. Important work also remains to address how fires and other natural disasters will contribute to the policy needs of EDPs in the United States, and what pressures climate migration will assert on the inland areas receiving EDPs.<sup>263</sup> In California, annual fire seasons have gotten progressively more destructive.<sup>264</sup> Early in the 2020 fire season, California had already broken the all-time record of 3.2 million acres burned.<sup>265</sup> According to the *New York Times*, some 28 million Americans are likely to be affected by similar megafires in the coming decades.<sup>266</sup> While this Note has addressed relocation mostly in the context of progressive sea level rise,

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262. U.S. AGENCY FOR INT'L DEV., *supra* note 172, at 1–4.

263. See Hauer, *supra* note 2, at 321 ("[U]nmitigated sea level rise is expected to reshape the U.S. population distribution, potentially stressing landlocked areas unprepared to accommodate this wave of coastal migrants . . ."). For an interactive map showing anticipated climate-induced migration in the U.S., see Abraham Lustgarten, *How Climate Migration Will Reshape America*, N.Y. TIMES (Sept. 15, 2020), <https://www.nytimes.com/interactive/2020/09/15/magazine/climate-crisis-migration-america.html>.

264. Priya Krishnakumar & Swetha Kannan, *The Worst Fire Season Ever. Again.*, L.A. TIMES (Sept. 15, 2020), <https://www.latimes.com/projects/california-fires-damage-climate-change-analysis/>.

265. *Id.*

266. Lustgarten, *supra* note 263.

EDPs from fires and other natural disasters will certainly require the same treatment and consideration. This is especially true considering that an estimated 11 million Californians, one out of every four, lives in a fire-prone area.<sup>267</sup>

Scholarship is also emerging as to the impacts of EDPs immigrating to the United States.<sup>268</sup> Some suggest that the United States should approach the issue of transborder EDPs from both a humanitarian and a national security standpoint, planning ahead to protect cultural identity and to ensure the expedient vetting of sudden influxes of EDPs from abroad following natural disaster events.<sup>269</sup> Finally, important work remains to establish international consensus about the treatment of EDPs.<sup>270</sup> Citing a “protection gap” for transborder EDPs due to the limitations of the U.N. definition of a refugee, scholar Jennifer Skinner suggests that the international community formally establish the application of the U.N. Guiding Principles to EDPs who are displaced internationally.<sup>271</sup> These will remain important areas for study as our understanding of the severity of the impacts of anthropogenic climate change and sea levels continue to rise.

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267. John W. Schoen & Jordan McDonald, *Warming Climate, Population Sprawl Threaten California's Future with More Destructive Wildfires*, CNBC (Nov. 9, 2020, 9:31 AM), <https://www.cnbc.com/2019/11/09/why-californias-wildfires-are-going-to-get-worse.html>.

268. Hauer, *supra* note 2, at 324 (“[I]t has been estimated that parts of the Middle East and North Africa (MENA) could become uninhabitable by the end of the century, potentially spurring an exodus of 500 million people.”) (citation omitted).

269. Emily Naser-Hall, *Square Pegs in Round Holes: The Case of Environmentally Displaced Persons and the Need for a Specific Protection Regime in the United States*, 22 TUL. J. INT’L & COMP. L. 263, 294–95, 297 (2014).

270. See Jennifer Skinner, Comment, *The State Responsibility in the Face of Environmentally Displaced Persons*, 4 WAKE FOREST J.L. & POL’Y 417, 430–32 (2014).

271. *Id.* at 418, 432.

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