

# Sinking States' open questions: Continuity of statehood and human rights protection of forcibly displaced people. The case of Tuvalu in light of the *Falepili Union Treaty*\*

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## Abstract

This article explores the legal issues facing sinking island States due to sea-level rise, through the lens of the *Falepili Union Treaty* between Tuvalu and Australia. It first examines whether land loss entails the end of statehood and argues for the possibility of continued sovereignty. Secondly, it discusses the 'human face' of the sea-level rise, i.e. the legal protection granted to people affected by this phenomenon. The treaty affirms Tuvalu's ongoing statehood and provides a human mobility pathway to Australia, ensuring the right to remain as well. It offers significant guarantees for Tuvaluans, including permanent residency and access to healthcare, while preserving their cultural identity. The article also addresses criticism of a clause giving Australia influence over Tuvalu's foreign policy in security matters, mitigated by a clarifying memorandum. The treaty is presented as a landmark model for future climate displacement responses, combining state continuity, rights protection, and regional cooperation.

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\* The present paper was presented at the first conference of the MCC Project (*Mer et Changements climatiques*) in Lyon on October 18<sup>th</sup>, 2024.

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**Keywords:** Sinking States, climate mobility, climate migrants, Falepili Union Treaty, legal protection, sovereignty.

## 1. Introduction

Tuvalu is an island country in the South Pacific Ocean with a total area of only 26 square kilometres and around 11 thousand citizens, with half the population living on the atoll of Funafuti. It is one of the smallest States in the world and consists of nine inhabited islands and a series of atolls, many of which are barely two metres above sea level.

Tuvalu has recently gained attention among scholars of international law because it fits perfectly into the definition of ‘sinking States’, being deeply threatened by climate change and, in particular, by sea-level rise. According to the UN Development Programme, by 2050 half the capital, Fongafale, will be flooded by tidal waters, and it is predicted that 95 per cent of Tuvalu’s territory will be submerged by routine high tides by 2100 if no action is taken,<sup>1</sup> becoming a real lost paradise. On the other hand, under all future scenarios and without further protection, a sharp increase in the frequency and severity of episodic flooding is estimated for Tuvalu in the 21<sup>st</sup> century, reaching a threshold of more than 100 days of flooding per year.<sup>2</sup>

For these obvious and urgent reasons, the Tuvaluan government began to undertake a series of initiatives, both operational and diplomatic, in order to preserve its existence.

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1. UN Development Programme, Arthur Web et al., *Notes from Tuvalu: Leading the way in adapting to sea-level rise*, 19 July 2023, available at <<<https://www.undp.org/blog/notes-tuvalu-leading-way-adapting-sea-level-rise>>>.

2. NASA Sea Level Change Team, *Assessment of Sea Level Rise and Associated Impacts for Tuvalu*, Technical Report, N-SLCT-2023-01, June 2023.

In this spirit, firstly, the *Tuvalu Coastal Adaptation Project* was launched in 2017, which involved the implementation of several measures aimed at reducing exposure to coastal hazards on three target islands among those inhabited to date, including beach nourishment, concrete and rock revetments, and seawalls. The overall objective of the project is to develop a long-term coastal adaptation strategy, adopting an ecosystem approach, strengthening the capacity of national and local authorities to manage the phenomenon and investing in young people as future stewards of the country.<sup>3</sup>

Moreover, Tuvalu is a member of the United Nations and several other international organizations.<sup>4</sup> In response to its precarious situation, the country has been particularly proactive in building bilateral and multilateral networks, especially with other Pacific developing countries, in order to unite their efforts and strengthen their position in international fora, with particular attention to the challenges posed by climate change.<sup>5</sup>

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3. The first phase of the Project (2017-2024), co-financed by the Green Climate Fund and the Government of Tuvalu and implemented by the UN Development Programme in partnership with Tuvalu, was concluded in May 2024, achieving good results in comparison with its initial objectives. The second phase of the Project was launched in September 2024, with financial contributions provided also by Australia and New Zealand. For further details see <<<https://tcap.tv/>>> (project website); UN Development Programme, *Australia and New Zealand back a second phase of the Tuvalu Coastal Adaptation Project to beat sea level rise*, 18 September 2024, available at <<<https://www.undp.org/pacific/press-releases/australia-and-new-zealand-back-second-phase-tuvalu-coastal-adaptation-project-beat-sea-level-rise>>>.

4. Tuvalu belongs to several international organisations, including the United Nations, the International Monetary Fund, the World Bank, the Pacific Community, and the Secretariat of the Regional Environmental Programme.

5. Tuvalu is a member of the Pacific Island Forum <<<https://forumsec.org/pacific-islands-forum>>> and is a co-founder, along with Antigua and Barbuda, of the Commission of Small Island States on Climate Change and International Law <<<https://www.cosis-ccil.org/>>>. Furthermore, Tuvalu is a member of the Alliance of Small Island States <<<https://www.aosis.org/>>> and regularly participates in the International Conference on Small Island Developing States <<<https://sdgs.un.org/conferences/sids2024>>>.

For example, in 2020, Tuvalu joined Vanuatu and other countries to establish an international campaign calling for a *Fossil Fuel Non-Proliferation Treaty*, identified as the leading cause of the climate crisis.<sup>6</sup>

In 2021, in collaboration with the Marshall Islands, Tuvalu established the *Rising Nation Initiative*, which aims to protect the statehood and sovereignty of Pacific atoll countries and safeguard the rights and heritage of affected populations.<sup>7</sup>

It is worth mentioning that it was the *Small Island States Commission on Climate Change and International Law*, co-founded by Tuvalu and Antigua and Barbuda, that made a formal request in December 2022 for an advisory opinion to the International Tribunal for the Law of the Sea on the content and scope of the obligations of States Parties to the United Nations Convention on the Law of the Sea (UNCLOS, 1982) to prevent, reduce and control marine pollution and to protect and preserve the marine environment, in both cases in relation to climate change.<sup>8</sup>

It is in this context that the *Falepili Union Treaty* – a historic agreement signed by Tuvalu and Australia on 9 November 2023 – can be framed, and it will be analysed in the present paper.

In particular, the treaty will be examined in relation to two specific aspects, which reflect the two main questions that the case of sinking States raises under international law and are the object of the current work of the International Law Commission (ILC) in relation to the topic ‘sea-level rise’. They concern, on the one hand, the debate on the continuity or loss of statehood and, on the other hand, the need to protect

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6. Adam Morton, *Pacific nations push for global backing of fossil fuel non-proliferation treaty* (March 2023) The Guardian, available at <<<https://www.theguardian.com/world/2023/mar/17/pacific-nations-push-for-global-backing-of-fossil-fuel-non-proliferation-treaty>>>.

7. For more details see <<<https://sdgs.un.org/partnerships/rising-nations-initiative>>>.

8. *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No 31, ITLOS, 21 May 2024.

human rights and preserve the cultural heritage of local communities forced to migrate.

Before going deeper into the analysis of the agreement, a general and preliminary overview of these two issues will be briefly offered in the following paragraphs.

## **2. Does the disappearance of land imply the loss of statehood?**

Although there is no generally recognised legal definition of ‘State’ in international law, the territory has been traditionally considered a constitutive element of statehood, along with two other elements, namely ‘permanent population’ and ‘government’.

The question has therefore legitimately been raised as to whether the physical disappearance of territory – an unprecedented circumstance, now become realistic due to climate change – could lead to the extinction of a State.<sup>9</sup>

Two different and opposite theses have been elaborated in literature to try to resolve this dilemma, which currently has no clear answer but is the subject of a lively and ongoing debate, both in the academic and institutional fields.

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9. ‘State extinction’ has so far been considered and admitted with reference to the loss of government effectiveness and/or independence, leading to situations that can be qualified as dissolution, merger or absorption of one State into another. Never in relation to the loss of land. This circumstance is relatively new in the international law framework, but the doctrine has begun to take an interest in the subject given the potential effects of climate change. See James Ker-Lindsay, ‘Climate Change and State Death’ (2016) *Survival*, n. 58 (4), 73-94; Ori Sharon, ‘State Extinction through Climate Change’, in Alexander Zaher and Benoit Mayer (eds.), *Debating Climate Law* (CUP 2021) 349-364; Andrea Caligiuri, ‘Sinking States: The statehood dilemma in the face of sea-level rise’ (2022) *Questions of International Law*, n. 91, 23-37.

The first one, referred to by Green and Guilfoyle as ‘the austere view’,<sup>10</sup> is based on a restrictive and literal interpretation of the criteria of statehood established by the 1933 *Montevideo Convention on the Rights and Duties of States*. According to this view, if a State loses one of them (land in the present case), it necessarily ceases to exist as a State.<sup>11</sup>

However, this perspective has been criticised in several respects by other scholars, according to whom the statehood of sinking States is not in question despite their partial or total loss of territory due to sea-level rise.

First of all, it has been argued that the Montevideo criteria refer to the first acquisition of statehood and not to the maintenance of it.<sup>12</sup> In other words, although it is necessary and desirable to avoid the proliferation and premature recognition of States (to begin to exist as subjects of international law, they must satisfy the Montevideo requirements),

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10. Douglas Guilfoyle and Alex Green, ‘The Australia-Tuvalu Falepili Union Treaty: Security in the Face of Climate Change...and China?’ (28 November 2023) EJIL:TALK!, 2023, available at <<<https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/>>>.

11. James R. Crawford, *The creation of States in International Law* (OUP 2007) 671; Lilian Yamamoto and Miguel Esteban, ‘Vanishing Island States and Sovereignty’ (2010) *Ocean and Coastal Management*, Vol. 53, Issue 1, 1-9; Sarah Lok, ‘Sinking States, Sunken Statehood? The Recognition of Submerged States under International Law’ (2023) *Cambridge Law Review*, Vol. 8, Issue 2, 31-55, 41; Ori Sharon, ‘To Be or not to Be: State Extinction through Climate Change’ (2021) *Environmental Law*, Vol. 51(4), 1041-1065; UN. Doc. A/CN.4/774, International Law Commission, Seventy-fifth session, Geneva, 29 April–31 May and 1 July–2 August 2024, *Sea-level rise in relation to international law*, United Kingdom of Great Britain and Northern Ireland Submission, according to which: “With regard to recognition of statehood, the United Kingdom’s general practice has been to consider whether a State has, and seems likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in its external relations”.

12. Abhimanyu G. Jain, ‘The 21st Century Atlantis: The International Law of Statehood and Climate Change-induced loss of Territory’ (2014) *Stanford Journal of International Law*, Vol. 50(1), 1-52; Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024) 225–229.

once States exist, they benefit from a general presumption of continuity,<sup>13</sup> even if one or more of their constitutive elements diminish or completely disappear in the most critical circumstances.

Secondly, this thesis (a more ‘flexible view’) seems to be supported by positive precedents in State practice, which demonstrate that Montevideo requirements can be interpreted in a nuanced manner: the reference is to the cases of ‘deterritorialised States’<sup>14</sup> and of ‘governments in exile’<sup>15</sup>.

However, irrespective of the legitimacy or validity of this thesis under international law, there are other reasons why the continuity of statehood of sinking States seemed to be considered the most equitable and sustainable option.

On one side, it undoubtedly preserves the stability of international legal order and international relations.<sup>16</sup>

It is also an issue strictly connected to citizenship. Although the question is controversial, the presumption of continuity of statehood has practical rather than theoretical implications, as it avoids the concrete risk of statelessness of citizens of the State concerned.<sup>17</sup> In this sense, it

**13.** Michel Rouleau-Dick, ‘Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?’ (2021) *Melbourne Journal of International Law*, Vol. 22(2), 357–382; Derek Wong, ‘Sovereignty Sunk? The Position of ‘Sinking States’ at International Law’ (2013) *Melbourne Journal of International Law*, Vol. 14(2), 362–364.

**14.** As well known, the form of “deterritorialized States” has been already recognised in the case of the Holy See and the Order of St John.

**15.** UN Doc. A/CN.4/752, International Law Commission, Seventy-third session, Geneva, 18 April–3 June and 4 July–5 August 2022, *Sea-level rise in relation to international law. Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law*, paras 138–154.

**16.** Sue Farran, ‘Seeking a pragmatic and creative solution to the challenge of sea-level rise: The case of Tuvalu’ (2022) *Questions of International Law*, n. 91, 99–111, 104.

**17.** The principle of prevention of statelessness in international law is indeed a corollary to the right to a nationality, protected by the 1961 *Convention on the Reduction of Statelessness*. See Alejandra Torres Camprubí, *Statehood Under Water: Challenges of Sea-level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 203.

would allow such citizens to maintain their relationship, their ancestral link with their country of origin as the State of nationality, with direct and important consequences on identity and in a perspective also in line with the principle of self-determination of people.

Finally, the loss of statehood due to sea-level rise would represent a manifestly unfair outcome: the consequences of a global phenomenon (climate change) would be reflected on those international actors (sinking States, which in most cases are small island developing countries) that have contributed the least to the causation of the phenomenon itself.

In any case, the idea that a State can continue to operate as such and exercise its functions despite the absence of territory definitively requires the identification of practical solutions to this end. In this context, some innovative hypotheses have already been put forward, such as those relating to the transition to a ‘virtual State’,<sup>18</sup> while other more traditional possibilities are currently under discussion within the work of the ILC.<sup>19</sup>

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18. Farran (n 16). On this issue it seems interesting to report the declaration of Tuvalu Foreign Minister Simon Kofe during released at COP27, according to which: “Tuvalu could be the first country in the world to exist solely in – but if global warming continues unchecked, it won’t be the last” (see Nick Kelly and Marcus Foth, ‘An entire Pacific country will upload itself to the metaverse. It’s a desperate plan – with a hidden message’ (16 November 2022) *The Conversation*, available at <<<https://theconversation.com/an-entire-pacific-country-will-upload-itself-to-the-metaverseits-a-desperate-plan-with-a-hidden-message-194728>>>). The reference is to *Future Now Project*, a Tuvalu’s initiative with the aim to build up a ‘digital nation’, to be implemented through a digital platform which will offer a series of services to citizens.

19. UN Doc. (n 15), paras 198-226.

### 3. The protection of people affected by sea-level rise

The other big theme underlying the case of sinking States is the so-called ‘human face’<sup>20</sup> of sea-level rise, concerning the legal protection granted to people affected by this phenomenon.

The starting point should be the recognition of a lacuna in this regard: to date, there is no international law-binding instrument or separate legal status specifically relating to this category of people, who can be included in the still precarious definition of ‘climate migrants’. Consequently, as a temporary solution to fill the gap, it seemed necessary and appropriate to explore legal frameworks potentially applicable to persons affected by sea-level rise although not specifically dedicated to them.

In this sense, international human rights law is certainly relevant and pertinent and can offer a first form of protection through an evolutionary interpretation of the single provisions taken into consideration, even in the absence of a specific mention to climate change or sea-level rise.

As the Human Rights Council has recognised on several occasions,<sup>21</sup> it is a matter of fact that climate change in general, including sea-level rise, can have an adverse and significant impact on the enjoyment of the most basic human rights, such as the right to life, adequate housing, food, potable water, cultural identity, self-determination, and nationality (as a prevention of statelessness).

For what concerns the identification of the State responsible for granting the full enjoyment of these rights, with specific reference to people affected by sea-level rise, the general rule should be that States are obliged

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20. Patricia Galvao Teles, ‘The “Human Face” of Sea-Level Rise: Protection of persons Affected’ (2023) *American University Law Review*, Vol. 38(3), 693-700.

21. HRC, Resolution 7/23, *Human rights and climate change*, 28 March 2008; HRC, Resolution 10/4, *Human rights and climate change*, 25 March 2009; HRC, *Human rights and climate change*, Resolution A/HRC/RES/26/27, 15 July 2014.

to provide protection and assistance to people residing in their territories and/or under their jurisdiction.<sup>22</sup>

It is evident that in the context of calamities due to climate change, people tend to migrate from one country to another (generally the nearest safe place), and thus different orders of responsibility may emerge on behalf of different States. When people remain in the territory of the State affected by sea-level rise, the responsibility of that State can include a duty to mitigate, adapt, and prevent natural disasters.

This duty involves the implementation of various measures, such as, to name but a few, the reduction of greenhouse gas emissions or water desalination plans, all aimed at making the territory of the State habitable for as long as possible, thus respecting the citizens' "right to remain".<sup>23</sup>

Another aspect that may involve the responsibility of the State directly threatened by climate change refers to the duty to act promptly and adequately to save people's lives when natural disasters occur or are about to occur. This could imply evacuation or relocation plans to avoid storms, floods, or other extreme natural events.<sup>24</sup> However, this duty must be considered subsidiary to the first mentioned and should only be activated in the most urgent cases.<sup>25</sup>

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22. 2018 *Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise*, Principle 1.

23. This duty is also recalled by Article 7 of the 2015 *Paris Agreements*.

24. ECtHR, *Budayeva and Others v. Russia*, App. No. 15339/02, 11673/02, 15343/02, 20058/02, 21166/02, Judgement of 20 March 2008, para 152.

25. On 23 September 2022, the UN Human Rights Committee ruled in favour of a group of eight Torres Strait Islanders, concluding that Australia's decision to forcibly relocate them to another region as a consequence of insufficient or too late adoption of mitigation measures to combat climate change violated their rights to enjoy their culture (Article 27 of the International Covenant on Civil and Political Rights) and their right to private and family life (Article 17 of the International Covenant on Civil and Political Rights). See Human Rights Committee, *Billy and Others v. Australia*, Communication No. 3624/2019, Decision of 22 September 2022. According to this precedent, only if the primary duty to mitigate, adapt and prevent natural disasters has been adequately and efficiently implemented, can the subsidiary duty to save people's lives through emergency measures (such as evacuation plans) be legitimately activated.

On the other hand, still in the framework of international human rights obligations, when people affected by sea-level rise decide to move to another country – voluntarily or not but due to climate change – also the responsibility of the State of destination may arise.

In particular, the principle of *non-refoulement* could be triggered in this respect: the State concerned has the duty not to return a person when the push-back to the country of origin implies a risk of irreparable harm. In this specific context, irreparable harm could be identified with the deprivation of a series of basic social, economic, and cultural rights as a consequence of climate change, leading to a general impossibility to conduct a ‘decent life’.<sup>26</sup>

Turning to another regime, with regard to the protection potentially available under international refugee law, it should be clarified, as a preliminary point, that the definition of ‘refugee’ established by the Geneva Convention is not applicable in general terms to climate migrants and

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26. HRC, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, Decision of 7 January 2020. For more details, see Amina Maneggia, ‘Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or ‘Responsibility to Protect’? The Teitiota Case Before the Human Rights Committee’ (2020) *Diritti umani e diritto internazionale*, 2/2020, 635-643; Jane McAdam, ‘Climate Refugees Cannot Be Forced Back Home’ (20 January 2020) *The Sydney Morning Herald*, available at <<<https://www.smh.com.au/environment/climate-change/climate-refugees-cannot-be-forced-back-home-20200119-p53sp4.html>>>; Kate Shuetze, ‘A Groundbreaking Ruling on Climate Refugees Puts the World on Notice’ (23 January 2020) *The Spinoff*, available at <<<https://thespinoff.co.nz/society/23-01-2020/a-groundbreaking-ruling-on-climate-refugees-puts-the-world-on-notice/>>>; Marie Courtoy, ‘Une décision historique pour les “réfugiés climatiques”? Mise en perspective’ (2020) *Cahiers de l’EDEM*, available at <<<https://www.uclouvain.be/fr/instituts-recherche/juri/cedie/news/comite-des-droits-de-l-homme-des-nations-unies-constatations-relatives-a-la-communication-n-2728>>>; Vernon Rive, ‘Is an Enhanced Non-refoulement Regime under the ICCPR the Answer to Climate Change-related Human Mobility Challenges in the Pacific? Reflections on *Teitiota v New Zealand* in the Human Rights Committee’ (2020) *Questions of International Law*, n. 75, 7-24; Emanuele Sommario, ‘When climate change and human rights meet: A brief comment on the UN Human Rights Committee’s *Teitiota* decision, in *Questions of International Law*’ (2021) n. 77, 51-65.

thus to persons affected by rising sea levels.<sup>27</sup>

However, in some exceptional cases, the combination of climate change-induced effects and other related political, social and economic factors may lead to the fulfilment of the requirements for refugee status and thus enable the person concerned to apply for and be granted international protection.<sup>28</sup>

Therefore, although the landscape offered by international law is still uncertain and constantly evolving, other possibilities of protection for people affected by rising sea levels can be found in the practice of States.

For example, several States have decided to set up visas and humanitarian permits specifically dedicated to people forced to leave their country due to climate change and/or natural disasters.<sup>29</sup>

However, the implementation of these measures differs widely between countries in terms of timing and modality of release of the permit, the requirements to be met, and the content and duration of the protection offered.<sup>30</sup>

Lastly, with regard to inter-state relations in this field, several regional instruments and programmes have been adopted over the past

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27. Jane McAdam, 'Moving beyond Refugee Law: Putting Principles on Climate Mobility into Practice' (2022) *International Journal of Refugee Law*, Vol. 34 (3-4), 440–448.

28. See UNHCR, *Legal Considerations regarding Claims for International Protection Made in the context of the Adverse Effects of Climate Change and Disasters*, 1 October 2020, para 2, according to which: "The adverse effects of climate change and disasters are often exacerbated by other factors such as poor governance, undermining public order; scarce natural resources, fragile ecosystems, demographic changes, socio-economic inequality, xenophobia, and political and religious tensions, in some cases leading to violence. As a result of these negative impacts of climate change and disasters, combined with social vulnerabilities, people may be compelled to leave their country and seek international protection".

29. UN Doc. (n 15), para. 344.

30. *Ibid.*, paras 345-347.

decade,<sup>31</sup> and specific ‘human mobility pathways’ have been established between two or more States through bilateral agreements (which is exactly the model followed by the *Falepili Union Treaty*).

## 4. The *Falepili Union Treaty*

### 4.1 Background

On 9 November 2023, the Prime Minister of Australia, Anthony Albanese, and the Prime Minister of Tuvalu, Kausea Natano, signed the *Falepili Union Treaty*, which has been mentioned as a “historic climate refugee and security pact”<sup>32</sup> and “the world’s first climate resettlement treaty”.<sup>33</sup>

The treaty is (or should be) inspired by the traditional Tuvaluan concept of *falepili*, which, according to the preamble, means “good neighbourliness, duty of care and mutual respect”.<sup>34</sup> In Tuvaluan culture, *falepili* means caring for one’s neighbours as if they were family and symbolises the act of giving without expecting anything in return. Among some Tuvaluans, however, there is a perception that Australia has not en-

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31. These regional instruments and programmes on protection of people affected by climate change and/or sea-level rise include, for example: *The Nansen Initiative* (Geneva, 12–13 October 2015); *Regional Guidelines on Protection and Assistance for Persons Displaced across Borders and Migrants in Countries affected by Disasters of Natural Origin* (South American Conference on Migration, 2018); *Kampala Ministerial Declaration on Migration, Environment and Climate Change* (Intergovernmental Authority on Development, the East African Community, and States of the East and Horn of Africa, 29 July 2022); *Pacific Regional Framework on Climate Mobility* (Rarotonga, Cook Islands, 10 November 2023).

32. Ben Wescott, ‘Australia Signs Historic Climate Refuge and Security Pact With Tuvalu’ (10 November 2023) TIME USA, available at <<<https://time.com/6333731/australia-climate-refuge-pact-tuvalu/>>>.

33. Guilfoyle and Green (n 10).

34. *Australia-Tuvalu Falepili Union*, Preamble.

gaged in the true spirit of the *falepili* concept because, as is obvious and as will be explained below, it has made certain demands and obtained related concessions from Tuvalu for the conclusion of the treaty itself.<sup>35</sup>

The main purposes of the agreement are to strengthen the bilateral relationship between Tuvalu and Australia into one that is more advanced, integrated, and comprehensive, provide Tuvalu's citizens with a human mobility pathway to be implemented with dignity, and protect and promote the collective security and sovereignty of each Party.<sup>36</sup>

As already noted, the agreement was first signed in November 2023, but after the Tuvaluan national general elections, held in January 2024, the new Prime Minister Feleti Teo formally reaffirmed his support for the principles and objectives of the treaty but acknowledged “the absence of transparency and consultations in socialising and informing the public in Tuvalu of such an important and groundbreaking initiative”.<sup>37</sup> The newly formed government therefore pledged to work on this shortcoming and remedy it before the treaty ratification.<sup>38</sup>

In May 2024, the two governments signed a Joint Statement<sup>39</sup> on commitment to the *Falepili Union Treaty*, and, more significantly, an Explanatory Memorandum<sup>40</sup> was adopted. This document represents

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35. Taukiei Kitara and Carol Farbotko, ‘Tuvalu, Australia, and the Falepili Union’ (24 November 2023) Australian Institute of International Affairs, available at <<<https://www.internationalaffairs.org.au/australianoutlook/tuvalu-australia-and-the-falepili-union/>>>.

36. *Australia-Tuvalu Falepili Union*, Article 1.

37. Statement of Priorities for the New Government of Tuvalu after the National General Elections on 26 January 2024. Released on Wednesday 28<sup>th</sup> February 2024, available at <<[https://psc.gov.tv/?page\\_id=1136](https://psc.gov.tv/?page_id=1136)>>.

38. *Ibid.*

39. *Joint Statement on commitment to the Falepili Union*, available at <<<https://www.dfat.gov.au/sites/default/files/joint-statement-commitment-falepili-union.pdf>>>.

40. *Explanatory Memorandum – Falepili Union Between Tuvalu And Australia*, available at <<<https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf>>>.

an important interpretation tool and clarifies many of the treaty's most critical and discussed points. The treaty finally entered into force on 28 August 2024.

## 4.2 The human mobility pathway

What has certainly made the *Falepili Union Treaty* innovative, and the reason for its considerable media coverage, is the protection offered by Australia to the citizens of Tuvalu, who face the existential threat of sea-level rise. It is indeed the first bilateral treaty to provide a response to climate mobility.<sup>41</sup>

First of all, it seems important to underline the express recognition in the text of the agreement of “the desire of Tuvalu’s people to continue to live in their territory where possible and Tuvalu’s deep, ancestral connections to land and sea”.<sup>42</sup>

The perspective adopted by the treaty is therefore to support the State of Tuvalu in its resilience process in the first instance (so that it can continue to exist as a safe and liveable space for its citizens) while offering Tuvaluans the option of relocating to Australia only if they so wish and/or if living conditions in Tuvalu become objectively untenable.

Moreover, the special mobility pathway established by the treaty, emphasised for its dignified nature, provides for Tuvaluan citizens to enter Australia to live, study, or work there while also accessing Australian education, health, and key income and family support on arrival.<sup>43</sup>

The treaty does not provide more specific information on this aspect. The provision in question (Article 3) contains vague and general state-

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41. Clare Francis, ‘Kaldor Centre calls for support for Tuvaluans settled under treaty’ (9 July 2024), UNSW, available at <<<https://www.unsw.edu.au/news/2024/07/Kaldor-Centre-calls-for-support-for-Tuvaluans-settled-under-treaty>>>.

42. *Australia-Tuvalu Falepili Union*, Article 2.2(a).

43. *Ibid.*, Article 3.

ments, with no reference to other elements such as the quotas of Tuvaluan nationals admitted each year, the timing and management of arrival, and the specific content and duration of the protection offered.

However, the Explanatory Memorandum therefore specified most of these points. In particular, it establishes an initial annual allocation of a maximum of 280 visas (a mutually adjustable number each programme year) allocated through a random ballot, administered by Australia.

Another clarification is that Falepili visa holders would be eligible to apply for Australian citizenship on the same basis as other permanent residents, and, eventually, Australian citizenship will not affect Tuvaluan citizenship. This confirms a particular sensitivity to the importance of Tuvaluans maintaining their close ties with their country of origin even in terms of nationality.

It has also been specified that Falepili visas provide for permanent residence for an indefinite period, with unlimited freedom to travel from Australia to Tuvalu and vice versa. This is a remarkable passage, as all other permanent residency visas issued by Australia include a ‘use it or lose it’ clause.<sup>44</sup>

According to the Memorandum, Tuvaluan citizens could apply for the special pathway from anywhere in the world and would be free to secure work of their choice. Moreover, the pathway would be open to all Tuvaluan citizens and not only to people with a specific job or skill. This means there is no risk of brain drain, which is particularly relevant for a country as small and sparsely populated as Tuvalu.<sup>45</sup>

Finally, the pathway would be open to Tuvaluan citizens with disabil-

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<sup>44</sup>. This kind of clause means that one person can stay in Australia for as long as he/she wants as a permanent resident, but if he/she leaves the country for too long he/she cannot re-enter, at least not after five years of being granted the visa. See Stephen Howes and Finn Clarke, ‘Falepili Union treaty: Tuvalu’s amazing migration deal’ (5 July 2024) DevPolicy Blog, available at <<<https://devpolicy.org/tuvalu-amazing-deal-20240705/>>>.

<sup>45</sup>. Francis (n 41).

ities, special needs and chronic health conditions who could join the Australian National Disability Insurance Scheme. This is another crucial recognition, because any other type of visa issued by Australia, except the one that allows New Zealanders to move to Australia, implies forms of discrimination towards people with disabilities.<sup>46</sup>

In sum, the protection offered by Australia to Tuvaluan citizens seems to be very broad and complete, also in comparison to other bilateral agreements concluded by Australia with other countries on the same issues and, more generally, to its attitude on the matter.

### 4.3 Tuvalu's continuation of statehood and political cooperation

Regarding the question of the continuation or loss of statehood by Tuvalu due to its *sinking* nature, the viewpoint embraced by the treaty is extremely clear.

Article 2(2) of the agreement provides that “[t]he Parties recognize (...) the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise”.<sup>47</sup>

This statement binds Australia for the present and the future and seems extremely significant for the overall development of the international relationship between the two States. On the other hand, from Tuvalu's perspective, it “confirms the ongoing lack of appetite on the part of States affected by sea-level rise for ‘solutions’ that envision merger with larger political communities”,<sup>48</sup> such as, for example, Australia.

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46. Howes and Clarke (n 44).

47. *Australia-Tuvalu Falepili Union*, Article 2(2)(b).

48. Alex Green and Douglas Guilfoyle, ‘The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change’ (2024) *American Journal of International Law*, Vol. 118, Issue 4, 684-703, 695.

Another section of the same provision also mentions the importance of the latest technological developments in providing additional adaptation opportunities to sea-level rise.<sup>49</sup> The reference is undoubtedly to the *Tuvalu Coastal Adaptation Project* – mentioned in the introduction and partially funded by the Australian government – but also to the realisation of other future initiatives, should further advances in the field make them feasible.

Again, the perspective adopted by the treaty is to support Tuvalu's existence for as long as possible, including through the use of financial resources for this purpose.

This provision is also linked to another one relating to political co-operation between the Parties, according to which Australia, at Tuvalu's request, will provide assistance in the event of natural disasters, health emergencies of international concern, or in the event of military aggression against Tuvalu.<sup>50</sup>

This represents certainly a further positive outcome of the agreement, as it opens up the possibility that Australia's financial support to Tuvalu will not only be limited to the prevention and/or management of the consequences of climate change (as is already the case) but also to other circumstances, not necessarily related to this aspect.

#### 4.4 *Falepili* or no *Falepili*?

##### The price of Australian commitment

The most controversial section of the treaty is certainly Article 4(4), which explicitly states:

Tuvalu shall mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-re-

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<sup>49</sup>. *Australia-Tuvalu Falepili Union*, Article 2(2)(c).

<sup>50</sup>. *Ibid.*, Article 4(1).

lated matters. Such matters include but are not limited to defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure.<sup>51</sup>

This provision has been interpreted as a substantial threat to Tuvalu's independence,<sup>52</sup> as it would confer upon Australia a 'potential veto power' on a series of issues related to Tuvaluan foreign policy.<sup>53</sup> Precisely because of this clause, some commentators have gone so far as to define the overall agreement as a 'neo-colonial security pact', primarily driven by Australia's objective of countering China's influence in the Pacific.<sup>54</sup>

It is important to note that similar concerns were initially raised by the Tuvaluan opposition leader, Enele Sopoaga, at the time of the first agreement's conclusion,<sup>55</sup> and subsequently reiterated by the newly elected Tuvaluan Prime Minister, Feleti Teo, who assumed office in January 2024. In particular, he emphasised the necessity of obtaining guarantees from Canberra that the landmark treaty with Australia would not compromise Tuvaluan sovereignty in any way.<sup>56</sup>

In response to this request, the Explanatory Memorandum adopted in May 2024 also addressed this aspect, specifying that:

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51. *Ibid.*, Article 4(4).

52. Kitara and Farbotko (n 35).

53. Guilfoyle and Green (n 33).

54. John Braddock, 'Australia strikes neo-colonial "security" pact with Tuvalu to counter China in Pacific' (13 November 2023), WWSWS, available at <<<https://www.wsws.org/en/articles/2023/11/13/vouf-n13.html>>>.

55. Enele Sopoaga, 'Australia-Tuvalu Falepili Union 'shameful' – Former Tuvalu PM' (27 November 2023) Radio New Zealand, available at <<<https://www.rnz.co.nz/international/pacific-news/503354/australia-tuvalu-falepili-union-shameful-former-tuvalu-pm>>>.

56. Prianka Srinivasan, 'Tuvalu prime minister calls on Australia for sovereignty 'guarantees' over treaty' (16 March 2024) *The Guardian*, available at <<<https://www.theguardian.com/world/2024/mar/17/tuvalu-prime-minister-calls-on-australia-for-sovereignty-guarantees-over-treaty>>>.

Tuvalu does not need permission from Australia before it starts to talk with other partners. Article 4(4) does not diminish Tuvalu's standing in global fora. It will not preclude other partners supporting Tuvalu's economic and development interests such as education, health, waste, climate adaptation, gender, disability, trade or granting fishing licences.<sup>57</sup>

It is therefore evident that a *de facto* Australian veto power exists; however, this power has been clarified and circumscribed by the Explanatory Memorandum.

Primarily, it has been reiterated that this power pertains exclusively to security and defence-related matters. Consequently, Tuvalu is at liberty to engage in discussions and conclude agreements with other Parties on any other field.

Secondly, in relation to matters covered by the veto, Tuvalu retains the ability to initiate negotiations with any country without having to seek and obtain authorisation from Australia, but will, in fact, have to agree with Australia on the conclusion of any eventual agreement.

According to Tuvalu's Prime Minister, Feleti Teo, this Australian 'intrusion' into Tuvaluan foreign policy has a reasonable explanation, which was discussed at length during the negotiation process.<sup>58</sup> Indeed, he recalled that under the terms of the treaty, Australia is obliged to provide security to Tuvalu,<sup>59</sup> so it is in Australia's interest to be aware of the potential implications of any agreement between Tuvalu and third Parties in this area. This is due to the fact that any such agreements could hinder Australia's capacity to fulfil its obligations under the treaty.

Furthermore, it should be considered that the agreement provides for certain safety valves for both Parties, which could be activated if, for ex-

57. Explanatory Memorandum (n 40).

58. Joint press conference – Pacific Islands Forum – Transcript, Wednesday 28 August 2024, available at <<<https://www.pm.gov.au/media/joint-press-conference-pacific-islands-forum>>>.

59. *Australia-Tuvalu Falepili Union*, Article 4(1).

ample, this veto power is used in a manner incompatible with the overall objectives of the treaty.

Indeed, if one Party feels that the other is not living up to the spirit of the treaty, it can open negotiations through the Joint Committee and at the same time suspend the fulfilment of one or more of its obligations under the treaty.<sup>60</sup>

On the other hand, if this process does not lead to any positive result, the Parties also have the possibility to terminate the agreement at any time by written notification.<sup>61</sup>

Finally, it has been correctly observed that, from this perspective, the *Falepili Union Treaty* appears less intrusive when compared to certain similar provisions included in the so-called 'Free Association Treaties'.<sup>62</sup> Consequently, despite the presence of Article 4(4), there is no doubt as to Tuvalu's maintenance of independence and international legal status.

## 5. Final remarks

The *Falepili Union Treaty* represents a relevant State practice for the future of sinking States. With regard to the protection of people affected by sea-level rise and forced to migrate, the guarantees offered by Australia to Tuvaluans appear broad, do not involve inequalities and provide for full respect of their right to remain in their country of origin (for as long as possible) and to maintain their cultural identity.

Indeed, although the text of the agreement does not include specific in-

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60. Ibid., Article 6(3).

61. Ibid., Article 8(4).

62. Green and Guilfoyle, (n 48), 698-702.

formation about the details of its mobility scheme,<sup>63</sup> this gap has been filled by the Explanatory Memorandum. This document clarified that the protection offered is considerable in terms of content, duration and quotas of visas admitted each year.

Even if this protection is offered by Australia only to Tuvaluans and does not apply to migrants of different nationalities who might be in the same situation – an aspect related to the bilateral nature of the agreement – it can certainly represent a good practice to follow. In this sense, given the current uncertainty of climate migrant protection standards within the framework of international law, which is reflected in a fragmentation of domestic legal systems on the subject, the treaty can be a positive model for the development of other bilateral or multilateral mobility pathways related to climate change.

In addressing the matter of statehood, the treaty follows a definitive direction and contains unambiguous statements. Indeed, Australia expressly pledges, for the present and the future, to recognise Tuvalu as a sovereign and independent State, notwithstanding the potentially devastating effects of sea-level rise and, consequently, irrespective of its potential partial or total loss of territory.

However, the agreement does not provide any practical solution to this end in the sense that it does not speculate or envisage what the concrete ways might be for Tuvalu to continue to exercise its functions in the absence of physical land, at least in the context of relations between the two States.

Conversely, the agreement actually provides for the much-criticised and discussed veto power. However, firstly, this power seems to be supported by a justification deemed legitimate by the Tuvaluan government itself. Moreover, the scope of this power has been specified and reduced

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63. Szymon Kucharski, 'Limited Success. Reflections on the Falepili Union Treaty' (21 November 2023) *Verfassungsblog*, available at <<<https://verfassungsblog.de/limited-success/>>>.

through the Explanatory Memorandum. Taking into account the aforementioned clarification, as well as the various security clauses present in the agreement, it seems difficult to identify a compromise of Tuvalu's sovereignty or independence.

On the other hand, even considering the political implications of the agreement and abstractly admitting that Australia's motivations for signing it lie in its desire to improve its reputation in the Pacific, the objective benefits it implies for Tuvalu and its people cannot be denied.<sup>64</sup> In this regard, the opportunity offered to Tuvaluan citizens to relocate to Australia, accessing a broad series of services, the financial support pledged and subsequently delivered by Australia for adaptation initiatives already in place (such as the Tuvalu National Adaptation Plan) and for future ones, and the economic support and assistance measures provided in relation to emergency situations, not necessarily resulting from climate change, should be regarded in a favourable light.

In conclusion, it is evident that the effective positive aspects of the treaty can only be ascertained or disproved at the time of its actual and future implementation.

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64. Clive Schofield and Frances Anggadi, 'The Australia-Tuvalu Falepili Union Treaty: Opportunities and Controversies' (2024) *Asia-Pacific Journal of Ocean Law and Policy*, Vol. 9, 85-115, 94.