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Preliminary communication

Davor Muhvić, Associate Professor

Faculty of Law, Josip Juraj Strossmayer University of Osijek, Croatia

E-mail: dmuhvic@pravos.hr

ORCID ID: 0000-0003-1261-5398

Mira Lulić, Full Professor

Faculty of Law, Josip Juraj Strossmayer University of Osijek, Croatia

E-mail: miral@pravos.hr

ORCID ID: 0000-0003-3478-5099

AUSTRALIA-TUVALU “FALEPILI UNION” TREATY: INTERNATIONAL LAW IMPLICATIONS FOR THE STATEHOOD OF TUVALU

ABSTRACT

On 28 August 2024, the so-called "Falepili Union" Treaty between Australia and Tuvalu, signed by the two state parties on 9 November 2023, has entered into force. This treaty is significant in that it is the first international legally binding agreement related to the problem of small Pacific island states facing the loss of territory and other existential problems due to the climate change and (natural) disasters. The "Falepili Union" Treaty regulates climate cooperation between the two state parties, enabling human mobility with dignity for citizens of Tuvalu to Australia and cooperation between two states in security matters. The Treaty contains several important implications for international law of which the impact of this Treaty on international law on statehood stands out. With its provision on preserving the sovereignty and statehood of Tuvalu, this Treaty marks the possible beginning of a change in state practice regarding possessing territory as one of the necessary elements of statehood and, related to that, changing of the relevant norm of general customary international law. However, there is a justified fear for the survival of the ethnic and cultural identity of the Tuvaluans if their displacement from native territory occurs.

Keywords: *“Falepili Union” Treaty, international law, climate change, statehood, displacement*

1. INTRODUCTION

*„When you relocate a whole country,
cross border into another country,
their distinctiveness and their identity
will be lost. You know, they will
become second, third or even fourth
class citizens and assimilate into a
totally different culture which is not
theirs. And that's a reality. Tuvalu as a
nation, as a people, will disappear.“
(Reverend Tafue Lusama, 2018¹)*

The incentive for writing this article entry into force of „the world's first climate resettlement treaty“,² the „Falepili Union“ Treaty between Australia and Tuvalu on the 28 August 2024.³ This Treaty is already marked as international legal instrument that „sets a groundbreaking precedent“⁴ and which represents „a profound step forward for Small Island States threatened by rising sealevels“⁵ not only in the context of climate resettlement issues, but also in the context of their state continuity. The aim of this paper is to consider the possible implications of this Treaty on the statehood and sovereignty of Tuvalu in the context of the impact of climate change and (natural) disasters on the territory of Tuvalu as a small Pacific island state and the existing rules of international law on statehood. The question arises as to what will happen to the people of this small oceanic state when further life and survival on the island becomes impossible, and this will happen even before the entire island disappears beneath the surface of the ocean.

¹ Stewart, I., *Importance of Indigenous Views on Climate Change Stressed*, 2 October, 2018, Radio New Zealand, <https://www.rnz.co.nz/international/programmes/datetimepacific/audio/2018665052/importance-of-indigenous-views-on-climate-change-stressed>, 10 March, 2025.

² Guilfoyle, D.; Green, A., *The Australia-Tuvalu Falepili Union Treaty: Security in the face of climate change ... and China?*, EJIL Talk!: Blog of the European Journal of international Law, November 28, 2023, para. 1., <https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/>, 1 March, 2024.

³ Australia-Tuvalu Falepili Union of 9 November 2023. The text is available at the official pages of the Australian Government - Department of Foreign Affairs and Trade, <https://www.dfat.gov.au/sites/default/files/australia-tuvalu-falepili-union-treaty.pdf>, 20 February, 2025.

⁴ Green, A.; Guilfoyle, D., *The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change*, American Journal of International Law, year 118, 4/2024, p. 684.

⁵ Kucharski, Sz., *Limited Success: Reflections on the Falepili Union Treaty*, 21 November 2023, para. 1, Verfassungsblog, <https://verfassungsblog.de/limited-success/>, 14 March 2025.

Therefore, if climate change and environmental degradation continue at this pace and intensity, Tuvalu will be the first nation to lose its territory, and then statehood in modern times, the first state to disappear due to climate change. This paper will contribute to the discussion of what will happen to the independence, sovereignty and, in general, statehood of Tuvalu when a large part of the population moves out due to the impossibility of living on the island.

What can generally be said in the context of international law is that in the context of the above challenges, legal norms are insufficient, and existing international and regional institutions are insufficiently prepared, as are states. The solutions are mostly not planned but improvised. The relevance of this topic is evidenced, among other things, by the current procedure for giving advisory opinion of The International Court of Justice on the Obligations of states in respect of climate change. which, among other, includes the question, of the legal consequences for states who have „caused significant harm to the climate system and other parts of the environment, with respect to [...] small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change“.⁶ Due to the limitations of its scope, this paper cannot address all international legal aspects of climate change, but only issues of maintaining the statehood of states whose territory is threatened by climate change and (natural) disasters, such as Tuvalu. This particular topic is very challenging given that it impinges on the most sacred concepts of international law: the state and statehood.

After the introduction (1), chapter 2 will review the impact of climate change and (natural) disasters on migration/displacement of people in order to gain insight into the broader context of the circumstances in which Tuvalu and its population find themselves. In chapter 3, the facts about Tuvalu as a small Pacific island State on the verge of disappearing will be presented in order to understand the specific challenges that the country is facing. This is necessary to understand the reasons for the conclusion of the "Falepili Union" Treaty and what it brings or could bring to Tuvalu in the future. Chapter 4 is dedicated to the most prominent provisions of that Treaty. Chapter 5 will analyse the issue of the fate of Tuvalu's statehood and sovereignty after the conclusion of the "Falepili Union" Treaty due to the possible loss of that state's territory.

⁶ Request for Advisory Opinion, International Court of Justice, Obligations of States in respect of Climate Change, transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, 14 April 2023, p. 8. Available at: <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf>, 14 March, 2025.

2. THE IMPACT OF CLIMATE CHANGE AND (NATURAL) DISASTERS ON MIGRATION/DISPLACEMENT OF PEOPLE

It is a well-known fact today that changes in temperature, predominantly, but not solely, as a result of the extremely high increase in greenhouse gases on Earth, have led to a number of harmful consequences for the survival of humans and other living beings, as well as the preservation of nature and the environment in general. Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems.⁷ In this regard, there are also extremely complex problems such as melting of polar ice, rising tide levels, dying ocean currents, acid rains, deforestation and forest destruction, water salinization, famines, fearsome and destructive winds and storms, accumulation of waste, to list only the most alarming, but not the only, problems that humanity faces today. Coral reefs are being massively destroyed, plant and animal species are dying out and biodiversity is decreasing, and extremes have become everyday life in various parts of the world (e.g. from expanding deserts to massive floods).⁸ These are all examples of the consequences of catastrophic climate change and man's careless treatment of the nature around us.⁹

Climate change and natural disasters are intertwined and connected, affecting each other and cannot be viewed separately. Climate change is causing increased and significantly more dramatic natural disasters, just as long-lasting natural disasters can permanently alter the environment and cause climate change. According to Borges, the mentioned problems are "interconnected, cross-disciplinary, and cross-boundary". Some are the result of natural causes (storms, tornados, volcanic eruptions, earthquakes), while others are human-induced (environmental pollution, the construction of river dams, the logging of tropical forests, chemical warfare).¹⁰ In this regard, it is possible that it is more adequate to use the term „disaster“ rather than „natural disaster“ to acknowledge that risk is influenced by

⁷ IPCC, Summary for Policymakers, in: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, IPCC, Geneva, p. 5.

⁸ Lulić, M.; Muhvić, D.; Rešetar Čulo, I., *In Support of the Debate on the Terminology Related to the Terms Climate Refugees, Climate Migrants, Environmentally Displaced Persons and Similar Terms, EU and Comparative Law Issues and Challenges Series*, year 7, 1/2023, p. 2.

⁹ *Loc. cit.*

¹⁰ Borges, I.M., *Environmental Change, Forced Displacement and International Law From Legal Protection Gaps to Protection Solutions*, Routledge, Oxon, New York, 2019, pp. 19-20.

both a) geophysical hazards as well as b) social, economic, and political vulnerability.¹¹ Additionally, not only does climate change contribute to making hazard events more frequent and intense, but it also contributes in (in)direct ways toward increasing exposure and vulnerability of people and systematic and irreversible environmental degradation.¹²

The impact of climate change on human rights is particularly pronounced.¹³ Such changes threaten people's health and lives; destroy their private property, especially homes and habitats. In this regard, they make private and family life impossible by separating families, that is, they make it impossible to achieve an adequate standard of living. Climate change often irreversibly destroys nature itself, as well as cultural and other material goods, as well as existing natural resources. Local communities and peoples are left without food and water, the movement of people is prevented, and potentially their return to their homes. Due to the dramatic and often irreversible changes that climate change brings, not only local communities but also entire nations and states are threatened with the inability to live in peace, security and dignity.

Because of all of the above, climate change and natural disasters lead to human migration. Migrations of people have occurred before throughout history, both due to sudden-onset climate events (e.g. extreme storms and floods) and more gradual conditions of change (e.g. protracted droughts).¹⁴ Migrations due to climate change are often connected with humanitarian, political, social or economic reasons.¹⁵ There is often "a combination of a number of threats - floods, droughts, rising sea levels, destructive winds and the like, global warming in general, difficult economic conditions, and possibly armed conflict, violence, and instability".¹⁶ Because of this multiple triggers which may prompt a decision to

¹¹ Van Geelen, T.; Wewerinke-Singh, M., *Vanuatu Protecting the Rights of Vulnerable Groups during Evacuation: A Case Study of Cyclone Pam and Mataso Island in Vanuatu*, in: Scott, M.; Salamanca, A. (eds.), *Climate Change, Disasters, and Internal Displacement in Asia and the Pacific, A Human Rights-Based Approach*, Routledge, Oxon, New York, 2021, p. 106.

¹² Scott, M.; Salamancas, A., *Internal Displacement in the Context of Disasters and Climate Change in Asia and the Pacific: Introduction to the Volume*, in: Scott, M.; Salamanca, A. (eds.), *Climate Change, Disasters, and Internal Displacement in Asia and the Pacific, A Human Rights-Based Approach*, Routledge, Oxon, New York, 2021, p. 3.

¹³ See generally on connection of climate change and human rights: Savaresi, A., *Environment and Human Rights*, December 2023, Max Planck Encyclopedias of International Law, Oxford University Press, paras. 22-27, <https://opil.ouplaw.com/home/mpi>, accessed with subscription 7 March, 2025.

¹⁴ McLeman, R., *Climate Change Migration, Refugee Protection, and Adaptive Capacity-Building*, McGill International Journal of Sustainable Development Law and Policy, year 4, 1/2008, p. 7.

¹⁵ Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 8.

¹⁶ *Ibidem*, p. 5.

move, it is often difficult to distinguish between "forced displacement" and "voluntary mobility".¹⁷ In addition to forced and voluntary, migrations can be temporary and permanent; they can include displacement within the home state or migration abroad. All this is connected with enormous and complex economic and financial costs and losses, but also destabilization of society and the state, which can lead to instability, as well as violence and even armed conflict.¹⁸

International law in its current form does not provide adequate and sufficient legal solutions to this problem. Treaties related to climate change, such as the 1992 Framework Convention on Climate Change,¹⁹ the 1997 Kyoto Protocol²⁰ and the 2015 Paris Agreement,²¹ „are mostly concerned with mitigating and adapting to climate change and are focused on reducing greenhouse gas emissions, rather than protecting people or nations already affected by climate change.“²² On the other hand, the 1951 Convention relating to the Status of Refugees²³ with its 1967 Protocol²⁴ protects people fleeing their state for political reasons only (political refugees).²⁵ According to its definition of the refugee (Art. 1, A of the Convention, Art. I of the Protocol), "fleeing from natural disasters [...] or economic crisis do not fall within the scope of the Refugee Convention".²⁶ There are some regional treaties²⁷ and international soft law documents²⁸ which, in contrast to the Refugee Convention, offer protection to „persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of [...] „natural or human-made disasters“, but this protection extends exclusively to displacements within a certain state (thus the term „internally displaced persons“).

¹⁷ Price, S., *Introduction*, in: Price, S.; Singer, J., *Global Implications of Development, Disasters and Climate Change Responses to Displacement from Asia Pacific*, Routledge, Oxon, New York, 2016, p. 6.

¹⁸ Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 5.

¹⁹ United Nations Treaty Series, Vol. 1771, p. 107.

²⁰ United Nations Treaty Series, Vol. 2303, p. 162.

²¹ United Nations Treaty Series, Vol. 3156, p. 79.

²² Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 11.

²³ United Nations Treaty Series, Vol. 189, p. 137.

²⁴ United Nations Treaty Series, Vol. 606, p. 267.

²⁵ Andrassy, J.; Bakotić, B.; Seršić, M.; Vukas, B., *Međunarodno pravo I*, 2nd edition, Školska knjiga, Zagreb, 2010, p. 367.

²⁶ Kugelmann, D., *Refugees*, March 2010, Max Planck Encyclopedias of International Law, Oxford University Press, para. 4, <https://opil.ouplaw.com/home/mpi>, accessed with subscription 5 March, 2025.

²⁷ The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), available at the official web pages of the African Union <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>, 6 March, 2025.

²⁸ The 1998 UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2.

There is not, despite numerous proposals, even a single clearly accepted term or definition for this category of people. There is an abundance of the terms used in the literature, including „climate(-change) refugees“, „environmental (eco-) refugees“, „(forced) climate migrants“, „environmental migrants“, „survival migrants“ and „environmentally displaced persons“.²⁹ This kind of human mobility obviously “blurs the traditional distinctions between refugees, internally displaced people, and international immigrants.”³⁰ Terms such as „climate refugees“ or „environmental refugees“ are clearly not in line with positive international law and official (international) legal terminology“ and terms such as „climate migrants“, „environmental migrants“ or „survival migrants“ are „imprecise and misleading“.³¹ Namely, although the term "migrant" in this context, unlike the term "refugee", is not incorrect, it is too broad since „includes equally reasons of persecution and various natural or man-made threats, economic necessities, but also purely voluntary and unforced reasons.“³² More importantly, the term is not formally defined by international law³³ and no specific international legal rights derive from it, in addition to the general rules on human rights and alien protection.³⁴ Given that the term "displaced persons" is already used in international documents in the context of persons who are *forced to move*,³⁵ the most adequate term, which is increasingly used also under the auspices of the United Nations,³⁶ is the term “environmentally displaced persons”. However, it should be emphasized that the term “environmentally displaced persons”, at least for now, does not confer on such persons any additional specific rights under international law.³⁷

The aforementioned absence of adequate legal regulation, and even consensus on the relevant terminology, creates a “legal hole” in which people who are forced to move across borders due to climate change are denied legal remedies for legally

²⁹ For an overview of relevant literature in which certain terms are used, see: Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, pp. 12-15.

³⁰ Borges, *op. cit.* note 10, p. 17.

³¹ Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 27.

³² Lulić, Muhvić, Rešetar Čulo, *op. cit.* note 8, p. 23.

³³ With the exception of the term „migrant worker“ from the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Art. 2(1)), United Nations Treaty Series, Vol. 2220, p. 3.

³⁴ See Kugelmann, D., *Migration*, March, 2009, Max Planck Encyclopedias of International Law, Oxford University Press, paras. 21-23, <https://opil.ouplaw.com/home/mpi>, accessed with subscription 5 March, 2025.

³⁵ See Francis, A.R., *Migrants Can Make International Law*, Harvard Environmental Law Review, year. 45, 1/2021, p. 107.

³⁶ Compton, B., *The Rising Tide of Environmental Migrants: Our National Responsibilities*, Colorado Natural Resources, Energy & Environmental Law Review, year 25, 2/2014, p. 365.

³⁷ *Loc. cit.*

entering another state and the corresponding legal status in such a state.³⁸ Further problems include disappearing of the entire nations' territory under water, losing claim to self-determination and the ability to maintain their culture.³⁹ The international community has so far mostly only detected the problem of dramatic climate changes causing displacement of people. There is still no specialized multilateral treaty for this area and in general too little has been done to protect the rights of people displaced by climate change. For now, the only area of international law that provides specific legal mechanisms for these individuals to protect their rights is international human rights law with its individual complaints mechanisms.⁴⁰ The question arises to what extent these endangered categories of population and nations can find their protection within the existing network of international human rights law regulations, i.e. to what extent and at what speed the existing norms can be adapted to new threats to human rights.

3. TUVALU – SMALL PACIFIC ISLAND STATE ON THE VERGE OF DISAPPEARING

One of the most critical areas in the world affected by climate change and ecosystem degradation are the archipelagic ocean states in the Pacific region. This region has suffered and is still suffering dramatic negative consequences of climate change, especially low-lying atolls and coral islands due to rising sea levels.⁴¹ The list of the most endangered small Pacific island states includes the very fragile Tuvalu and Kiribati, because both of these states have a very low average elevation of just 1.5 metres, and rising sea levels could threaten not only the very existence of territories but also of its people.⁴² Namely, it is not only those residents who live along the coast that are affected, the entire population of those islands and archipelagos, or rather an entire nation, is affected. In addition to Tuvalu and Kiribati, the Marshall Islands, but also Fiji, Tonga, Samoa, Vanuatu, the Solomon Islands, Nauru and Palau suffer exceptional damage in that part of the Pacific Ocean. These are also economically poor states, which cannot fight alone against

³⁸ Kent, A.; Behrman, S., *Facilitating the Resettlement and Rights of Climate Refugees An Argument for Developing Existing Principles and Practices*, Routledge, Oxon, New York, 2018, p. 7.

³⁹ *Loc. cit.*

⁴⁰ See *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020.

⁴¹ Gemenne, F.; Blocher, J.; de Longueville, F.; Perrin, N.; Vigil, S.; Zickgraf, C.; Ozer, P., *How Climate Extremes are Affecting the Movement of Populations in the Asia Pacific Region*, in: Price, S.; Singer, J., *Global Implications of Development, Disasters and Climate Change Responses to Displacement from Asia Pacific*, Routledge, Oxon, New York, 2016, p. 34.

⁴² *Loc. cit.*

the more harmful consequences of climate change and natural disasters, but try to maintain themselves with international help, especially from the United Nations and other states in the region and beyond.⁴³

As a small oceanic island nation located in the Pacific Ocean, Tuvalu is the fourth smallest state in the world by territory.⁴⁴ The area of Tuvalu is only 26 km², but it has, compared to its mainland, an enormously large exclusive economic zone of approximately one million km².⁴⁵ Tuvalu consists of nine small coral islands, five of which are atolls, formed in a chain from northwest to southeast over a distance of more than 670 km.⁴⁶ It is located approximately halfway between Australia and Hawaii, and its neighbours are Kiribati to the north and Fiji to the south. The capital, Funafuti, is located on the largest atoll, where half of Tuvalu's population lives.

The official languages are Tuvaluan (a Polynesian language group) and English. The latter is not surprising, given that Tuvalu is a former British colonial possession that gained independence from the United Kingdom in 1978 in the process of decolonization. However, the ties with the former colonial power remained, Tuvalu is a parliamentary monarchy, and the British king is the head of state. It is a member of the Commonwealth.⁴⁷ The Government is a parliamentary democracy with a unicameral legislature, and there are no political parties.⁴⁸ Interestingly, Tuvalu only has 16 members of parliament.⁴⁹ Tuvalu became a

⁴³ See e.g. investments of the World Bank in Tuvalu to support Tuvalu's financial management of and resilience to climate-related disasters, New World Bank Grant to Enhance Tuvalu's Climate Financing, Disaster Response, and Resilience, World Bank, Press Release, March 3, 2025, na <https://www.worldbank.org/en/news/press-release/2025/03/03/new-world-bank-grant-to-enhance-tuvalu-s-climate-financing-disaster-response-and-resilience/>, 14 March, 2025.

⁴⁴ List of the World's Largest Countries and Dependencies by Area, Britannica, <https://www.britannica.com/topic/list-of-the-total-areas-of-the-worlds-countries-dependencies-and-territories-2130540>, 14 March, 2025.

⁴⁵ The United Nations in Tuvalu, The United Nations country team website of Fiji, Solomon Islands, Tonga, Tuvalu and Vanuatu, https://pacific.un.org/en/about/tuvalu#_ftn1/, 14 March, 2025.

⁴⁶ Tuvalu is comprised of atolls and reefs islands. The atolls - Nanumea, Nui, Nukufetau, Funafuti and Nukulaelae - have islets encircling a shallow lagoon; the reef islands - Nanumanga, Niutao, Vaitupu and Niulakita - are compact with a fringing reef. Macdonald, B.K., Tuvalu, Britannica, February 2025, <https://www.britannica.com/place/Tuvalu/>, 14 March, 2025.

⁴⁷ Member Countries, The Commonwealth, <https://thecommonwealth.org/our-member-countries>, 14 March, 2025.

⁴⁸ The Constitution of Tuvalu Act 2023, Revised Edition. CAP. 1.02., available at: https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/1986-0001_2.pdf, 14 March, 2025.

⁴⁹ Tuvalu, IPU Parline, Global Data on National Parliaments, <https://data.ipu.org/parliament/TV/TV-LC01/election/TV-LC01-E20240126/>, 14 March,

member of the United Nations in September 2000 as the 189th member state, and is very active in that international organization on issues related to climate change and sustainable development.⁵⁰

In terms of population, the people of Tuvalu are predominantly Polynesian (96%) and a minority of them are Micronesians (4%). The majority of the population belongs to the Christian Church of Tuvalu (97%).⁵¹ The Tuvaluan language is closely related to Samoan.⁵² Around 67% are urban population.⁵³ As much as a third of Tuvalu's population is under 15 years old (32%), which tells us about the high birth rate, while only 12% of the population is over 60 years old.⁵⁴ For comparison, about 100 years ago, Tuvalu had only 3,457 inhabitants, the highest number was in 2012 (10,782), and in recent years the population has been steadily declining.⁵⁵ Unfortunately, in 2025, the total population had dropped significantly and, according to the Tuvalu Central Statistics Division, there were an estimated just over 9,800 people living in Tuvalu.⁵⁶

Since Tuvalu does not have its own army, Australia and New Zealand are responsible for its security.⁵⁷ As Tuvalu does not have its own central bank, it does not have its own currency, but instead uses Australian dollars as its official currency.⁵⁸ In addition to the transfer of defence and financial matters to Australian authorities, Australia and New Zealand also assist Tuvalu in maintaining

2025 and Tuvalu, Inter-Parliamentary Union, <https://www.ipu.org/parliament/TV/>, 14 March, 2025.

⁵⁰ Secretary-General Welcomes Tuvalu as New Member of United Nations Family, United Nations Press Release SG/SM/7530, <https://www.un.int/tuvalu/fr/activities/press-release-sgsm7530-secretary-general-welcomes-tuvalu-new-member-united-nations-family>, 14 March, 2025.

⁵¹ Tuvalu Population and Housing Mini-census 2017, Preliminary Report, Ministry of Finance, Economic Planning and Industries, Funafuti, Tuvalu, 2017, p. 3, https://finance.gov.tv/wp-content/uploads/2022/05/Mini-Census-2017-Preliminary-Report.pdf?utm_source=chatgpt.com, 14 March, 2025.

⁵² Macdonald, *loc. cit.* note 46.

⁵³ *Loc. cit.*

⁵⁴ Tuvalu Population and Housing Mini-census 2017, *op. cit.* note 51, p. 3.

⁵⁵ *Ibidem*, p. 6.

⁵⁶ Tuvalu Central Statistics Division, at <https://stats.gov.tv/>, 14 March, 2025.

⁵⁷ For more information on Tuvalu-New Zealand relations, see the official website of New Zealand Foreign Affairs and Trade, New Zealand Government, <https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/tuvalu#bookmark2/>, 14 March, 2025. For more information on Australia-Tuvalu relations, see the official website of the Department of Foreign Affairs and Trade, Australian Government, <https://www.dfat.gov.au/geo/tuvalu/>, 14 March, 2025. See also The United Nations in Tuvalu, *loc. cit.* note 45.

⁵⁸ Macdonald, *loc. cit.* note 45, also Tuvalu, the official website of the Department of Foreign Affairs and Trade, Australian Government, *loc. cit.* note 57. See also The United Nations in Tuvalu, *loc. cit.* note 45.

diplomatic relations, as Tuvalu has a limited number of embassies abroad.⁵⁹ Since it has such a small population, it has no university or colleges, so students go either to neighbouring islands (e.g. Fiji) or to Australia and New Zealand, especially if they receive scholarships. Finally, Tuvalu is also limited in terms of healthcare. It has only one hospital located in Funafuti, but there are not enough medical staff so residents are forced to go to other, neighbouring states or, again, Australia or New Zealand.⁶⁰

Tuvalu, like other small oceanic states in the Pacific, is not economically developed and self-sufficient, in fact, it depends on imports and aid from other states and international organizations. Because it has very limited natural resources and is so small in area, any natural disaster results in dramatic consequences for their economy. Tuvalu has ongoing problems with drinking water, for example, in 2011 a state of emergency was declared due to lack of potable drinking water.⁶¹ The soils are porous, agriculture is very limited and the islands are depended on imported food,⁶² which has been linked to serious health problems, including diabetes.⁶³ However, interestingly, Tuvalu is generating serious revenue from the internet domain *.tv, which is of great interest to foreigners.⁶⁴

As the highest point on Tuvalu is currently only 4.6 m above sea level, it is clear how devastating even the lowest sea level rise or some natural disaster, such as strong storms, tsunamis and cyclones that lead to coastal erosion, landslides, floods and strong salinization of drinking water, can be. All of this not only destroys coastal areas, but also generally destroys plant life and infrastructure. Rising sea levels threaten drinking water sources on the islands, as seawater mixes with salt water, which additionally affects plant life that cannot grow in a salty environment. Due to increased soil salinity, combined with ocean acidification, the natural coral ecosystem is threatened. Tuvalu is therefore at the same time exposed

⁵⁹ Tuvalu, official website of the Department of Foreign Affairs and Trade, Australian Government, loc. cit. note 57. See also The United Nations in Tuvalu, loc. cit. note 45.

⁶⁰ Tuvalu, World Health Organization, Country Cooperation Strategy at a glance, 2018, <https://www.who.int/publications/i/item/WHO-CCU-18.02-Tuvalu>, 14 March, 2025.

⁶¹ Tuvalu declares emergency over water shortage, 3 October, 2011, BBC News, <https://www.bbc.com/news/world-asia-pacific-15147043>, 14 March, 2025.

⁶² Macdonald, loc. cit. note 46.

⁶³ Shen, S.; Gemenne, F., *Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand*, (2011) 49(S1) International Migration, year 49, S1/2011, p. 226, citation according to Ross, N.J., *Low-lying States, Climate Change-induced Relocation, and the Collective Right to Self-Determination*, A thesis submitted to the Victoria University of Wellington in fulfilment of the requirements for the degree of Doctor of Philosophy in Law, 2019, p. 9.

⁶⁴ See Tuvalu is a tiny island nation of 11,000 people. It's cashing in thanks to Twitch, The Washington Post, <https://www.washingtonpost.com/video-games/2019/12/23/tuvalu-is-tiny-island-nation-people-its-cashing-thanks-twitch/>, 14 March, 2025.

to severe droughts and extreme heat due to extreme climate change.⁶⁵ There are no rivers, rain catchment and wells provide the only fresh water.⁶⁶ Tuvaluans therefore depend heavily on rainwater, and droughts further threaten water supplies.

The inhabitants and the government of Tuvalu resist the idea of resettlement and do not want to leave Tuvalu, because it is clear to them that their “humane resettlement” may also represent the end of their separate ethnic identity. They are active on the international scene on the topic of climate change. They seek help from states and international organizations, and try to sensitize the regional and international public to the problems they face. They are extremely active at conferences and world forums in demanding stricter sanctions for those states that do not reduce CO₂ emissions.⁶⁷

To preserve the territory, the Government of Tuvalu is working actively on a series of activities that would enable and extend the stay and stay of the population in Tuvalu. First and foremost, given that the option of retreating to higher ground is not possible, it is creating 7.3 hectares of new and raised land. This artificial elevation of the territory and the relocation of the population to the new, raised land could prolong their stay on the islands for decades to come and help to withstand large storms under higher sea levels.⁶⁸ Secondly, they are working to build concrete walls as solid barriers to protect against waves, coastal erosion and flooding, thus ensuring the safety and future of their citizens.⁶⁹ Third, the Government of Tuvalu is thinking innovatively about building artificial islands, as well as specific floating structures that would replace artificial islands, all in order to gain more living space. Such ideas are already being worked on extensively in other parts of the world.⁷⁰ However, in addition to the need to take into account

⁶⁵ The United Nations in Tuvalu, *loc. cit.* note 45.

⁶⁶ Macdonald, *loc. cit.* note 46.

⁶⁷ See e.g. Sinking nation Tuvalu calls for treaty ending fossil fuel use at COP27, November 11, 2022, Climate Action, the World Economic Forum, <https://www.weforum.org/stories/2022/11/tuvalu-calls-for-treaty-ending-fossil-fuel-use-cop27/>, 14 March, 2025.

⁶⁸ Notes from Tuvalu: Leading the way in adapting to sea-level rise, July 19, 2023, UNDP, <https://www.undp.org/blog/notes-tuvalu-leading-way-adapting-sea-level-rise>, 14 March, 2025.

⁶⁹ With US\$36 million in financing from the Green Climate Fund; US\$2.9 million in co-financing from the Government of Tuvalu, and \$1.34 million in co-financing from Australia's Department of Foreign Affairs and Trade, the 8.5-year Tuvalu Coastal Adaptation Project is focused on strengthening the resilience of one of the world's most vulnerable countries to climate change and sea-level rise. Tuvalu Coastal Adaptation Project (TCAP), <https://tcap.tv/>, 14 March, 2025 and Tuvalu Coastal Adaptation Project, Climate Change Adaptation, UNDP, <https://www.adaptation-undp.org/projects/tuvalu-coastal-adaptation-project/>, 14 March, 2025.

⁷⁰ See e.g. Maldives Floating City, a benchmark for vibrant communities, Waterstudio.NL,

how such construction would affect the existing environment, such realizations are particularly technologically and constructionally challenging, as well as financially demanding. Finally, coral reef restoration and natural protection are also important for saving the territory of Tuvalu.⁷¹

However, Tuvalu is also preparing for evacuation and migration. As stated by the Government of Tuvalu, „Tuvalu has no choice but to start planning for this worst-case scenario“.⁷² Also, at COP27 (2022), Tuvaluan Minister Simon Kofe announced that Tuvalu will become the First Digital Nation: „that it would digitally recreate its land, archive its rich history and culture, and move all governmental functions into a digital space“.⁷³ The aim of this digitalization is, *inter alia*, to preserve its history and heritage, but also its statehood and territory by creating a virtual replica of Tuvalu.

4. “FALEPILI UNION” TREATY: THE FIRST CLIMATE-RESETTLEMENT TREATY

The Australia-Tuvalu Falepili Union Treaty (further in the text: Treaty)⁷⁴ was signed on 9 November 2023 and entered into force on 28 August 2024.⁷⁵ On 8 May 2024 the two state parties also concluded an Explanatory Memorandum⁷⁶ along with the Treaty in which they, although it is not a legally binding text, „commit to implement the Falepili Union in line with this document, including

<https://www.waterstudio.nl/projects/maldives-floating-city-a-benchmark-for-vibrant-communities-beyond-the-waterfront/>, 14 March, 2025; Dutch Docklands, <https://www.dutchdocklands.com/>, 14 March, 2025; The Seasteading Institute, <https://www.seasteading.org/>, 14 March, 2025. See also Navigating urban futures: The Floating Cities, UN-Habitat, 2024, <https://unhabitat.org/news/15-may-2024/navigating-urban-futures-the-floating-cities>, 14 March, 2025.

⁷¹ See e.g. Coral Restoration Foundation, an organization that deals with the restoration of coral reefs, which is extremely important for the protection and survival of the archipelago, Coral Restoration, <https://coralrestoration.org/>, 14 March, 2025 and Reef Resilience, coral reef conservation and restoration program, Reef Resilience, <https://reefresilience.org/>, 14 March, 2025.

⁷² Tuvalu, the First Digital Nation, <https://www.tuvalu.tv/about/>, 14 March, 2025.

⁷³ *Loc. cit.*

⁷⁴ See *supra* note 3.

⁷⁵ Australia-Tuvalu Falepili Union treaty, the official pages of the Australian Government - Department of Foreign Affairs and Trade, <https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>, 20 February, 2025.

⁷⁶ Explanatory Memorandum – Falepili Union between Tuvalu and Australia, the official pages of the Australian Government - Department of Foreign Affairs and Trade, <https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf>, 20 February, 2025.

where relevant in interpretation of the Treaty".⁷⁷ The text of the Treaty is short; it consists of preamble and only eight articles. Already in the preamble of the Treaty, "the special and unique circumstances faced by Tuvalu and that climate change is Tuvalu's greatest national security concern" were recognized. The name of the Treaty comes from „the concept of Falepili which connotes the traditional values of good neighbourliness, duty of care and mutual respect“ (preamble of the Treaty). Despite the term "Union" in the title of the Treaty, it is not about establishing a union between two states in the true sense of the word – the Treaty is „limited to matters of climate change, human mobility, and security“. ⁷⁸ After the indication of the Purpose of the Treaty (Art. 1), separate articles are devoted respectively to: Climate cooperation (Art. 2), Human mobility with dignity (Art. 3), Cooperation for security and stability (Art. 4), Consultation and responses (Art. 5), Settlement of disputes (Art. 6), Amendment (Art. 7) and Entry into force, duration and termination (Art. 8).

The purpose of the Treaty is defined in Art. 1 in three elements. The first element of the purpose of the Treaty is to „establish a Falepili Union based on values of good neighbourliness, care and mutual respect and elevate the Parties' relationship to one which is advanced, integrated and comprehensive“ (a). The second element is providing „the citizens of Tuvalu with a special human mobility pathway to access Australia underpinned by a shared understanding and commitment to ensuring human mobility with dignity“ (b). And finally, the third element is to „protect and promote each Party's and the Parties' collective security and sovereignty“ (c).

In Art. 2 on „climate cooperation“ the state parties „commit to work together in the face of the existential threat posed by climate change“ (para. 1). Two very important things are highlighted in this article. The first one is „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“ (para 2(a)). This provision is a reflection of, as noted in the literature, „a continued lack of appetite on the part of States affected by sea level rise for 'solutions' to sea-level rise that envision accession or merger with larger entities“. ⁷⁹ In the context of this expressed priority of continuing to live in their own territory, the state parties committed themselves

⁷⁷ The aforementioned Memorandum should be viewed as part of the context of the Treaty "for the purpose of the interpretation of a treaty" because it is an „instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty“ according to the Art. 31(2)(b) of the 1969 Vienna Convention on the Law of Treaties (United Nations Treaty Series, vol. 1155, p. 331).

⁷⁸ Green, Guilfoyle, *op. cit.* note 4, p. 692.

⁷⁹ Guilfoyle, Green, *op. cit.* note 2, para 6.

to cooperation in terms of helping the citizens of Tuvalu „to stay in their homes with safety and dignity“ (para. 3) and have taken into account „more recent technological developments“ which could „provide additional adaptation opportunities“ (para. 2(c)). This could include, for example, Australia's assistance to Tuvalu in „combatting sea-level rise including by way of land reclamation and artificial island building within its existing maritime zones“.⁸⁰ Already at the time of signing the Treaty, Australia announced the investment of 16.9 Australian dollars to support the innovative Tuvalu Coastal Adaptation project (TCAP).⁸¹ The second important element of this article is that „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“ (para 2(b)). This is „the first publicly binding rejection by any State of the traditional view that inhabitable land is necessary for State continuity“,⁸² This provision has the potential to contribute to state practice that deviates from the established rule of customary law on territory as a necessary element of statehood.⁸³ This solution, in combination with the guarantee of a “human mobility pathway”, also represents a kind of response to the arguments of sceptics who expressed views that the recognition of statehood despite the loss of territory of island states would result in the refusal to accept environmentally displaced persons by states in a similar position as Australia.⁸⁴

In the provision of Art. 3 on „human mobility with dignity“ Australia commits itself to the establishment of the so-called “special human mobility pathway” which will enable citizens of Tuvalu to “live, study and work in Australia” (para. 1(a)) and „access Australian education, health, and key income and family support on arrival“ (para 1(b)). In this context, Tuvalu, with the support of Australia (para. 3), undertakes to ensure “that its immigration, passport, citizenship and border controls are robust and meet international standards for integrity and security and are compatible with and accessible to Australia”. (para. 2). In the Explanatory memorandum is specified in more detail which exactly Australian supports would „genuine Tuvaluan citizens“ which apply for mobility pathway enjoy. It is also specified that the annual allocation will be introduced at the beginning of up to

⁸⁰ Hobbs, H.; Rothwell, D., *Towards a Legal Era of Islands: the International and Constitutional Legal status of Island Territories*, International and Comparative Law Quarterly, year 73, 3/2024, p. 637.

⁸¹ Barnett, J.; Farbotko, C.; Kitara, T.; Aselu, B., *Migration as Adaptation? The Falepili Union between Australia and Tuvalu*, Wiley Interdisciplinary Reviews: Climate Change, year 16, e924, 2025, p. 3.

⁸² Green, Guilfoyle, *op. cit.* note 4, p. 694. See also Schofield, C.; Anggadi, F., *The Australia-Tuvalu Falepili Union Treaty: Opportunities and Controversies*, Asia-Pacific Journal of Ocean Law and Policy, year 9, 1/2024, p. 88-89.

⁸³ Kucharski, *op. cit.* note 5, para. 10.

⁸⁴ Guilfoyle, Green, *op. cit.* note 2, para. 7.

280 visas that could be mutually adjusted each program year. Despite the fact that this is a pioneering international treaty regarding climate resettlement, there are already similar, even broader regional programs, such as the one of New Zealand that enables 2,400 people from Pacific islands to move to its territory annually.⁸⁵ Despite the positive humanitarian aspects of the climate resettlement according to this model, certain concerns/criticisms have been expressed, such as that of creating „stigma for those who do choose to migrate“ and that this solution is „a sign that the Tuvaluan government is giving up its fight on climate change“. ⁸⁶ Concerns have also been expressed that the annual visa quota is too high, which will negatively affect the priority previously expressed in the Treaty of insisting on the continuation of Tuvaluan life on their own territory.⁸⁷ The question also arises „whether the new human mobility scheme will limit the possibility of Tuvaluans to apply for international protection“ from other states that could use this mechanism as an excuse that the Tuvaluans already have an adequate opportunity to settle in another territory.⁸⁸ What can certainly be said is that this Treaty introduces „a new category of migrants eligible for residence permits“ and fills a „legal lacuna concerning climate migrants in the Pacific context“. ⁸⁹

Art. 4 related to „cooperation for security and stability“, also brings different obligations of the State parties. Thus, at the request of Tuvalu, Australia is obliged, in accordance with its international law obligations and domestic processes, to „provide assistance to Tuvalu in response to: (a) a major natural disaster; (b) a public health emergency of international concern; (c) military aggression against Tuvalu“ (para. 1). On the other hand, Tuvalu undertakes to “mutually agree with Australia” regarding “any partnership, arrangement or engagement with any other State or entity on security and defense-related matters“, e.g. on defence, policing, border protection, cyber security and critical infrastructure (para. 4). Tuvalu also commits, „provided that advance notice is given by Australia“, to „provide Australia rights to access, presence within, and overflight of Tuvalu’s territory, if the activities are necessary for the provision of assistance requested by Tuvalu under this agreement“ (para 3.). The issue of the possible negative impact of Art. 4, para. 4 on Tuvalu's independence has already been noticed in the literature, given Australia's *de facto* veto power over various aspects of Tuvalu's conduct of foreign policy.⁹⁰ This solution is the result of balancing the interests of Tuvalu and

⁸⁵ Schofield, Anggadi, *op. cit.* note 82, p. 89.

⁸⁶ Barnett, J. *et al.*, *op. cit.* note 81, p. 3.

⁸⁷ See *ibidem*, p. 3-4.

⁸⁸ Similarly, Kucharski, *op. cit.* note 5, para. 15.

⁸⁹ Kucharski, *op. cit.* note 5, para. 5.

⁹⁰ See Green, Guilfoyle, *op. cit.* note 4, pp. 696-702, Schofield, Anggadi, *op. cit.* note 82, p. 90-91, Hobbs, Rothwell, *op. cit.* note 80, p. 638 and Barnett, J. *et al.*, *op. cit.* note 81, p. 3.

Australia during the negotiations regarding the conclusion of this Treaty, where Australia also had to get something in return, primarily in terms of security related to the growing influence and presence of China in the Pacific region.⁹¹

Among other provisions of the Treaty, it is worth highlighting the one on the establishment of a Joint Committee that will meet periodically (at least every 12 months) and as needed in order to discuss matters arising under Treaty (Art. 5). Also important is the one on the settlement of disputes according to which every dispute related to the interpretation and application of the Treaty „shall be settled by consultation or negotiation between the Parties, and shall not be referred to any national or international tribunal or court or any other third party for resolution“ (Art. 6, para. 1). The rest of the Treaty contains provisions of the technical character on amendment (Art. 7), entry into force, duration and termination (Art. 8) of the Treaty.

From this brief review of the provisions of the Treaty, it can be concluded that, along with the establishment of a special human mobility pathway, the most important contribution to international law is the insistence on the priority of providing assistance to the Tuvaluans so that they can remain living on their territory where possible, but also the recognition of statehood and sovereignty of the Tuvalu regardless of the fate of its territory. We will address the issues of the fate of Tuvalu's statehood and sovereignty in more detail in the next chapter.

5. TUVALU’S STATEHOOD AND SOVEREIGNTY AFTER “FALEPILI UNION” TREATY

The provision of the “Falepili Union” Treaty that „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“ creates legal consequences exclusively in bilateral relations between Tuvalu and Australia. Such entity which is „recognized by just one or several states“ Nicholson calls „state-in-context“ – an entity which is not a state properly so called, but still „category of state-like entities [...] that have personality in international law“.⁹² The question arises, however, what will happen if Tuvalu is left without territory in the context of general international law.

⁹¹ Green, Guilfoyle, *op. cit.* note 4, p. 684.

⁹² Nicholson, R., *Statehood and the State-like in International Law*, Oxford University Press, Oxford, 2019, pp. 5, 92.

The possibility of the collapse of the Tuvalu territory due to the previously described climate change related circumstances is very real and we already have a number of examples of the collapse of the territory that, admittedly, do not necessarily represent the territory of the entire state. Nauru has been a nearly ruined territory due to massive phosphate mining since the beginning of the 20th century, which has destroyed the island's entire ecosystem.⁹³ They have no agricultural land, must import most of their food and water, and are dependent on foreign aid. Over half of the island of Montserrat, a British overseas possession with the status of a UN non-self-governing territory,⁹⁴ was destroyed by a volcanic eruption (1995-1997). The southern two-thirds of the island with its infrastructure, including the capital, disappeared under ash and lava, leading to displacement of population.⁹⁵ Montserrat is the most illustrative example of the disappearance of (part of) territory due to natural disasters with the consequent loss of population.

According to the Art. 1. of the 1933 Montevideo Convention on Rights and Duties of States,⁹⁶ in order for an entity to be a state, as it is well known, four conditions must be met cumulatively: that it has a permanent population, defined territory, government and capacity to enter into relations with the other States. Although the provision of the Montevideo Convention on the elements of statehood is "often cited"⁹⁷ and is considered „the seminal definition of statehood“,⁹⁸ it is „not definitive“⁹⁹ and is „no more than a basis for further investigation“.¹⁰⁰ In this regard, an interesting opinion has been expressed according to which element of territory „operates less as an empirical observation as to the existence of an accepted factual condition, than again as a metaphorical assertion: the State must exist 'as if' it possessed territory with determinate boundaries“.¹⁰¹ However, there is still a consensus in theory regarding the element of territory that, although there is no rule on the required minimum area of the territory (as shown by examples of

⁹³ Gowdy, J.M.; McDaniel, C.N., *The Physical Destruction of Nauru: An Example of Weak Sustainability*, Land Economics, year 75, 2/1999, p. 333.

⁹⁴ Non-Self-Governing Territories, United Nations, <https://www.un.org/dppa/decolonization/en/nsrgt>, 14 March, 2025.

⁹⁵ Patullo, P., Montserrat, Britannica, <https://www.britannica.com/place/Montserrat-island-West-Indies>, 13 March 2025.

⁹⁶ League of Nations Treaty Series, Vol. 165, p. 19.

⁹⁷ Crawford, J., *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, Oxford, 2012, p. 128.

⁹⁸ Craven, M.; Parfitt, R., *Statehood, Self-determination, and Recognition*, in Evans, M. D., *International Law*, 5th edition, Oxford University Press, Oxford, 2018, p. 192.

⁹⁹ *Ibidem*, p. 194.

¹⁰⁰ Crawford, *Brownlie's Principles...*, *op. cit.* note 97, p. 128.

¹⁰¹ Craven; Parfitt, *op. cit.* note 98, p. 198.

micro-states such as Tuvalu and Nauru as members of the United Nations),¹⁰² there must be an exclusive control over *a certain* territory.¹⁰³ There is also an argument of the importance of recognition in international law according to which „the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria”.¹⁰⁴ The above considerations show that there is a certain measure of fluidity in the aforementioned rule, but it should also be emphasized that there is no obstacle to its change by, for example, changing of state practice and *opinio iuris*.

If the territory of Tuvalu disappears beneath the sea surface in the near future or life there is no longer possible due to rising sea levels, could Tuvalu be considered a state solely based on population, an independent but dislocated government, and the retention of old diplomatic relations with states from before the landmass disappeared? Could Tuvalu be considered a state-without-territory? Could it be a state-within-a-state (e.g. Australia)? For example, would the United Nations and other states in the international community continue to consider Tuvalu a legitimate and equal member? Would it remain a member of the United Nations and other international organizations? Would it transfer the entire management of foreign affairs to the host state? With the disappearance of the territory and the territorial sea, would it also be left without its, in relation to the surface of the territory, immense exclusive economic zone? These are extremely serious legal and political, as well as economic and humanitarian issues, and they represent a major challenge for the international community.

According to the existing rules of general international law on statehood, Tuvalu would lose its state status with the disappearance of its territory. However, the situation in which Tuvalu finds itself is unprecedented. Throughout history, states and empires have arisen and disappeared, lost population (migrations, wars, diseases, assimilation), new governments have emerged, existing ones have collapsed, organized governments have changed, but the disappearance of the entire territory of an existing state due to natural disasters is truly exceptional and specific. If, as a result of the disappearance of the territory, Tuvaluans move to Australia, Tuvalu could, in accordance with the provisions of the "Falepili Union" Treaty, become the "first state in exile", and not just a nation that has completely

¹⁰² See Crawford, J., *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford, 2006, pp. 46-47, Crawford, *Brownlie's Principles...*, *op. cit.* note 97, p. 129, Craven; Parfitt, *op. cit.* note 98, p. 195.

¹⁰³ See Crawford, *The Creation of...*, *op. cit.* note 102, p. 46, Crawford, *Brownlie's Principles...*, *op. cit.* note 97, p. 128 and Shaw, M.N., *International Law*, 7th edition, Cambridge University Press, Cambridge, 2014, p. 145.

¹⁰⁴ Shaw, *op. cit.* note 103, p. 150-151.

moved to another territory. It would not be the first time that, according to general international law, certain entities do not have all the elements and characteristics of statehood, but still have a certain international legal status. For example, the Vatican City State, closely linked to the Holy See (which itself enjoys international legal status), has a very small territory, a specific government, and no permanent, classical population (residents are diplomats, monks and priests). Despite this, it enjoys international legal status.¹⁰⁵ The Sovereign Order of Malta has also established relations with more than 100 states and enjoys an observer status at the United Nations, but has no territory other than its headquarters in Rome.¹⁰⁶ Palestine has its own government but its territory is partially disputed and under Israeli occupation. They also have permanent populations in the Gaza Strip and the West Bank and claim to be recognized by more than 140 states. However, it does not have full control over the entire territory and cannot exercise all functions of government.¹⁰⁷ At the United Nations, it only enjoys observer status. Somalia did not have an organized government for a long period from 1991-2012, but there was still no doubt that Somalia was a state.¹⁰⁸

With the "Falepili Union" Treaty as the first international treaty that, at least in a bilateral relationship between two states, guarantees the survival of statehood and sovereignty of a state faced with the disappearance of its territory, the aforementioned idea also found its way into certain declarations at the international level. Thus, the 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise of the Pacific Islands Forum, which brings together 18 Pacific states including Australia and New Zealand, expressed the similar position. According to it „the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise“.¹⁰⁹ The aforementioned initiative of the Pacific states was also recognized by the past president of The United States of America, Joe Biden, who stated: „We hear your calls for reassurance that you

¹⁰⁵ See Westdickenberg, G., *Holy See*, June 2006, Max Planck Encyclopedias of International Law, <https://opil.ouplaw.com/home/mpil>, accessed with subscription 13 March 2025.

¹⁰⁶ See Gazzoni, F., *Malta, Order of*, January 2009, Max Planck Encyclopedias of International Law, <https://opil.ouplaw.com/home/mpil>, accessed with subscription 13 March 2025.

¹⁰⁷ See Robinson, K., *Who Governs the Palestinians?*, Council on Foreign Relations, <https://www.cfr.org/background/who-governs-palestinians>, 13 March 2025.

¹⁰⁸ See Schmidt, J.A., *Somalia*, Conflict, June 2017, Max Planck Encyclopedias of International Law, <https://opil.ouplaw.com/home/mpil>, accessed with subscription 13 March 2025.

¹⁰⁹ Available at: <https://forumsec.org/sites/default/files/2024-05/2023%20Declaration%20on%20the%20Continuity%20of%20Statehood%20and%20the%20Protection%20of%20Persons.pdf>, 9 March 2025.

never, never, never will lose your statehood, or membership of the U.N. as a result of a climate crisis. Today, the United States is making it clear that this is our position as well."¹¹⁰ In the event that such positions are expanded and supported by other states and international organizations, it is also possible that the current rule of customary international law on the elements of statehood will change.¹¹¹ In theory, certain models already exist. Some authors, for example, write about „ex-situ nationhood“ as „a status continued existence of a sovereign state“ which would „protect the peoples forced from their original place of being by serving as a political entity that remains constant even as its citizens establish residence in other states“.¹¹² How realistic that is is another matter.

In practice, the relocation of Tuvaluans would initiate the right to self-determination in the territory of the host state in the sense of cultural autonomy, something that is today associated with, for example, minority rights. In the territory of another state, for example Australia, Tuvaluans could thus gain some kind of cultural and possibly political autonomy. Although states categorically resist granting the right to self-determination to minorities out of fear of possible secession of the territory, Australia would probably not consider itself threatened by granting the resettled people of Tuvalu a high level of political autonomy, when the number of a few thousand people certainly would not threaten the territorial survival of Australia as a state. Realistically, integration and assimilation would probably take their toll. Whether there will be the political will to ignore the facts (lack of territory), and perhaps even change the customary law rule on the elements of statehood, and leave Tuvalu with some kind of symbolic statehood, remains to be seen. However, since they are extremely small in number, we believe that, unfortunately, the loss of their cultural identity through collective relocation would be irreversible.

6. CONCLUSION

At this level of society and civilization, we can hardly expect that harmful climate change will be stopped in the near future, nor that the intensity of (natural) disasters related to climate change will be reduced and/or mitigated. Low-lying states, especially those consisting only of islands, are directly affected, exposed to numerous and increasingly complex challenges, unprecedented in this modern era.

¹¹⁰ US recognises Cook Islands, Niue as Biden hosts Pacific Island leaders, AlJazeera, <https://www.aljazeera.com/news/2023/9/25/us-recognises-cook-islands-niue-as-biden-hosts-pacific-island-leaders>, 9 March 2025.

¹¹¹ See Kucharski, *op. cit.* note 5, para. 10 and Guilfoyle, Green, *op. cit.* note 2, para. 8.

¹¹² Burkett, M., *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-climate Era*, Climate Law, year 2, 3/2011, p. 346.

Additionally, these are geographically isolated and economically less developed states, with weak(er) natural resources and underdeveloped infrastructure, which are largely dependent on the oceans and seas that surround them. These states do not have sufficient economic strength to independently prepare for the dramatic changes that have already begun, nor do they have the capacity to solve such complex and demanding problems on their own. Without the help of international and regional organizations, as well as the engagement and solidarity of states in the region and beyond, without awareness of how urgent it is to act to achieve sustainable development, it will be difficult for these states to achieve the necessary network of measures and policies to reduce the harmful consequences of climate change and (natural) disasters. Without prompt measures and actions, there is a danger that entire nations and even states will disappear. It is not enough to just (try to) stop climate change; financial and other assistance is necessary to repair the damage that has already occurred. These states are not responsible for all the changes that climate change is bringing to us, and they have become the biggest victims. Unfortunately, international justice, as well as empathy for these small nations, is lacking.

As sea levels rise, coasts erode, territory shrinks and disappears, and extreme weather events additionally destroy infrastructure and cause enormous damage to people and local communities, a series of states are threatened with the disappearance of their territory, and then the disappearance of their population (through resettlement and migration). In this way, the state actually loses two of the four criteria to survive as such under international law. The losses for that state are numerous and complex, and multiply over time. In addition to the complex political and legal issues that arise with the loss of territory and population displacement, there are also complex problems of cultural rights and the preservation of the identity of these peoples as groups, especially since most of these peoples are small in number. The question arises as to how to ensure sustainable development strategies, as well as the preservation of habitat biodiversity, but also the use of renewable energy sources in states that are sinking and rapidly disappearing below sea level.

Tuvalu, like other small archipelagic states, we fear, has passed the point of no return. It is likely that the Tuvaluans, about 10 thousand of them, will survive on their territory for only another decade or so, and after that they will no longer be able to live on their islands. Not only is the geographical position and structure of the archipelago not suitable for them, but migration from the island, especially of young people, is a process that is unstoppable and, unfortunately, leads to the disappearance of a nation. The future will show what the chances are for the survival of the Tuvaluan as a people (who have the right to self-determination and survival) and Tuvalu as a state to survive dislocated. However, practice to date has

shown that international law is flexible and tolerant (even) in some extreme situations and examples, so it will possibly adapt to the fact that a nation loses its territory, but has the ambition to continue to maintain its independence and sovereignty - just dislocated. The provisions of the "Falepili Union" Treaty are precisely on that track. In addition to recognizing the permanence of Tuvalu's statehood despite facing the loss of territory in relation to Australia, it also aims to influence the adaptation of the relevant rules of general international law.

Tuvalu will likely go down in history as the first state to become - a victim of climate change. The international community is late in reacting to the problems and challenges faced by these nations. Tuvalu as well as other states in a similar position, thus become a symbol of the failed fight and resistance to climate change, victims of extreme injustice and violations of collective human rights. Those states that have contributed the most to this climate crisis are especially responsible, and they bear the greatest responsibility to help at least these small states and nations to survive.

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