

AN UNTHINKABLE QUESTION: TUVALU AND THE FALEPILI UNION

*Joshua Kemp Whimp**

On 10 November 2023, Australia and Tuvalu announced the Falepili Union, a bilateral treaty which seeks to establish a climate-related special human mobility pathway, a security guarantee and recognition of Tuvalu's continuing sovereignty—even if it loses its land to climate-induced sea-level rise. The signing of the Union generated significant media attention, with commentators heralding the agreement as "groundbreaking", "innovative" and a "world first".

This article contends that the Union is not as novel as this media reporting suggests. Exploring the origins of this treaty, this article contextualises the Union within a sequence of legislative, policy and constitutional developments in Tuvalu and the Pacific more generally. It demonstrates that in negotiating the Union, Tuvalu has advanced several of its longstanding foreign policy, climate and security-related goals. In doing so, this article challenges the dominant discourse surrounding the Union which has emphasised the role of Australia and its interests in shaping the Union—an emphasis which has largely ignored Tuvalu's agency in the creation of the Union.

Life is changing
Make the right decisions
You are now part of a global village
Go with confidence
And don't panic
Never look back!

—Tuvaluan farewell song performed for citizens relocating to New Zealand in 2005.¹

* Submitted for the LLB (Honours) Degree, Faculty of Law, Te Herenga Waka—Victoria University of Wellington, 2024. I would like to extend my deepest gratitude to the people who made this paper possible. To my mother Sarah Kemp and my father Matthew Whimp – thank you for your tireless and unwavering support, encouragement and assistance. To Sylvia Chong, William Koko, Shanay Talopau, William Morrison, Atanas Tomovski, Cornelia Sartie, Olivia Overfield, Larissa Wilkinson and Lucia Young, thank you for your kindness, guidance and for always being in my corner. Finally, to Emeritus Professor Tony Angelo KC, thank you for being both a supervisor and a mentor throughout this process. Your passion for the Pacific is infectious and your kindness, engagement and vast knowledge made writing this paper a real highlight of my degree.

¹ Julie Bayer and Josh Salzman "Time and Tide" (24 July 2006) YouTube <www.youtube.com>.

I INTRODUCTION

No national leader in the history of humanity has ever faced this question. ... I ask you to pause and ask yourself, what would you do?

—Rt Hon Enele Sopoaga, Prime Minister of Tuvalu in 2014.²

As the effects of climate change continue to worsen,³ low-lying island nations are being forced to answer an unthinkable question: faced with the loss of land to rising sea levels, what is the correct course of action for a country to take? In late 2023, Tuvalu—a small island state comprising nine low-lying atolls in the South Pacific⁴—provided its answer to that question, joining with Australia to announce an unprecedented bilateral agreement: the Falepili Union.⁵

On 10 November 2023, as discussions at the 52nd Pacific Islands Forum Leaders Meeting drew to a close,⁶ the Prime Ministers of Australia and Tuvalu (the Parties) announced the signing of the Falepili Union (the Union), a bilateral treaty lifting the nations' "bilateral partnership" to a "more advanced, integrated and comprehensive partnership".⁷

Broadly speaking, the Union concerns "three pressing matters ... climate change adaptation, collective security, and a new human mobility pathway".⁸ Touted as the "world's first climate

-
- 2 Enele Sopoaga, Prime Minister of Tuvalu "Statement Presented by Prime Minister Honourable Enele Sose Sopoaga" (speech to the 20th Conference of Parties to the UN Framework Convention on Climate Change, Lima, 9 December 2014) at 2–3.
 - 3 See Frank Jotzo and Mark Howden "It can be done. It must be done": IPCC delivers definitive report on climate change, and where to now" (21 March 2023) *The Conversation* <www.theconversation.com>; Clare Nullis "Climate change indicators reached record levels in 2023: WMO" (19 March 2024) *World Meteorological Organization* <www.wmo.int>; and The Intergovernmental Panel on Climate Change "Climate change widespread, rapid, and intensifying" (9 August 2021) *IPCC Newsroom* <www.ipcc.ch>.
 - 4 Tauisi Taupo, Harold Cuffe and Ilan Noy "Household vulnerability on the frontline of climate change: the Pacific atoll nation of Tuvalu" (2018) 20 *Environ Econ Policy Stud* 705 at 707.
 - 5 Australia–Tuvalu Falepili Union (signed 9 November 2023, entered into force 28 August 2024).
 - 6 Jess Marinaccio "The Australia–Tuvalu Falepili Union: Tuvaluan values or Australian interests?" (14 November 2023) *Devpolicy Blog* from the Development Policy Centre <www.devpolicy.org>.
 - 7 Anthony Albanese and Kausea Natano "Joint statement on the Falepili union between Tuvalu and Australia" (press release, 10 November 2023).
 - 8 Szymon Kucharski "Limited Success: Reflections on the Falepili Union Treaty" (21 November 2023) *Verfassungsblog* <www.verfassungsblog.de>.

resettlement treaty",⁹ and the "world's first bilateral agreement on climate mobility",¹⁰ the Union establishes a special visa arrangement for Tuvaluan citizens to "live, work, and study" in Australia.¹¹ This arrangement provides Tuvaluans a migration pathway "should climate change render the islands uninhabitable".¹²

Since its announcement, the Union has attracted significant media attention and scrutiny.¹³ Much of this coverage has focused on art 2.2 (which recognises Tuvalu's perpetual statehood despite the effects of climate change), art 4 (relating to security)¹⁴ and Australia's "transactional" motivations for entering into the arrangement.¹⁵ However, there has been little discussion on the connection between the Union and recent political, legal and constitutional developments in Tuvalu.¹⁶

This article contextualises the Union, placing it within a sequence of legislative, policy and constitutional developments in Tuvalu and the Pacific more generally. Specifically, it connects key provisions contained in the Union to a series of domestic and regional initiatives which preceded it. When understood in this context, the Falepili Union can be seen as only one part of a much wider strategy of Tuvalu to align its foreign policy, cultural values and climate-related interests.

As such, this article challenges the dominant discourse surrounding the Union and its emphasis on the role of Australia and its interests in shaping the Union. This emphasis has at best minimised, and at worst ignored, Tuvalu's agency in the creation of the Union, and the advancement of Tuvaluan foreign policy and climate-related interests by the Union. Part II of this article provides a brief overview of Tuvalu's history from independence, and in particular the evolution of its constitution.

9 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! <www.ejiltalk.org>.

10 Jane McAdam "Australia's offer of climate migration to Tuvalu residents is groundbreaking—and could be a lifeline across the Pacific" (13 November 2023) UNSW Newsroom <www.unsw.edu.au>.

11 Australian Government Department of Foreign Affairs and Trade "Australia–Tuvalu Falepili Union factsheet" Department of Foreign Affairs and Trade <www.dfat.gov.au>.

12 Taukiei Kitara and Carol Farbotko "Tuvalu, Australia, and the Falepili Union" (24 November 2023) Australian Institute of International Affairs <www.internationalaffairs.org.au>.

13 Clive Schofield and Frances Anggadi "The Australia-Tuvalu Falepili Union Treaty: Opportunities and Controversies" (2024) 9 *Asia-Pacific Journal of Ocean Law and Policy* 85 at 90; and Liam Moore "A dysfunctional family: Australia's relationship with Pacific Island states and climate change" (2024) 78 *Australian Journal of International Affairs* 286 at 296.

14 Marinaccio, above n 6.

15 Kitara and Farbotko, above n 12; and Euan Graham and Bec Shrimpton "The defence and security implications of the Australia–Tuvalu treaty" (23 November 2023) *The Strategist* <www.aspistrategist.org.au>.

16 Marinaccio, above n 6.

Part III explores Tuvalu's "extreme vulnerability" to climate change impacts and sea-level rise,¹⁷ together with the prominent position Tuvalu has assumed in the international conversation around climate change. Part IV then examines key provisions of the Union and their connection to earlier legislative, policy and constitutional developments in Tuvalu. Finally, Part V looks to the future. It identifies potential options to amend the Union to further advance Tuvalu's interests and better reflect the Parties' expressed intent.

II HISTORY

A A Separate and Independent Tuvalu

Tuvalu, formerly known as the Ellice Islands, formed part of the British Gilbert and Ellice Islands Colony, which administratively linked Tuvalu with its neighbour Kiribati (formerly the Gilbert Islands) from 1916 until 1975.¹⁸ With its significantly larger population (86 per cent of the total population),¹⁹ Kiribati represented the majority culture in the Colony.²⁰ As a result, in the mid-late 20th century, concerns arose as to Tuvalu's ability to "preserve its unique culture and values" under this political arrangement.²¹

Tuvaluan dissatisfaction with the political arrangement mounted in 1967,²² when the United Kingdom introduced a constitution for the Gilbert and Ellice Islands Colony, which established an elected House of Representatives.²³ Under this Constitution, Tuvalu contributed only four members to the House, compared with Kiribati's 19 members.²⁴ The 1967 constitution convinced many

17 Ilan Noy "To leave or not to leave? Climate change, exit, and voice on a Pacific Island" (paper presented to Migration and Climate Change CESifo Workshop, Venice, 2016) at 6.

18 Barrie MacDonald "Review: *Tuvalu: A History* by Simati Faaniu et al" (1985) 19 *New Zealand Journal of History* 89 at 89; and Nicola Manghi "Putting the State in its Place. An Ethnographic Look at Tuvalu's Sovereignty in the Context of the Ecological Crisis" (2024) 158-159 *Journal de la Société des Océanistes* 23 at 25.

19 Barrie MacDonald "The Separation of the Gilbert and Ellice Islands" (1975) 10 *The Journal of Pacific History* 84 at 84; and Noatia P Teo "Colonial Rule" in Hugh Laracy (ed) *Tuvalu: a History* (Institute of Pacific Studies, University of the South Pacific, Suva, 1983) 127 at 129.

20 Department of Foreign Affairs and Ministry of Justice, Communication and Foreign Affairs "Te Sikulagi—Tuvalu Foreign Policy 2020" (2020) [TFP 2020] at [4].

21 At [4].

22 Tito Isala "Secession and Independence" in Hugh Laracy (ed) *Tuvalu: A History* (Institute of Pacific Studies, University of the South Pacific, Suva, 1983) 153 at 153–155.

23 Stephen Levine "Constitutional Change in Tuvalu" (1992) 27 *Australian Journal of Political Science* 492 at 492.

24 Isala, above n 22, at 155.

Tuvaluans "that they would never be able to influence government policy, that their islands would be starved of funds, and their people denied opportunities" if they remained tied to Kiribati.²⁵

Tensions culminated in 1974,²⁶ when the question of separation from Kiribati was put to referendum.²⁷ Over 90 per cent of Tuvaluans voted in favour of separation.²⁸ Following this, the Tuvaluan Order 1975 (UK) was made and Tuvalu became a separate political unit, although still a British dependency.²⁹ Exactly three years later, on 1 October 1978, Tuvalu formally gained independence from the United Kingdom.³⁰

Following its separation from Kiribati, Tuvalu received no share of the Colony's reserves and was allocated only one of its ships.³¹ Tuvalu's post-separation economic outlook was described by Prime Minister Rt Hon Tomasi Puapua as "grim".³² To address this, in 1984 Tuvalu proposed establishing a publicly owned investment fund: the Tuvalu Trust Fund.³³ This Fund would have three interrelated objectives: covering budget shortfalls, underpinning economic development and supporting Tuvalu's financial autonomy.³⁴ In 1985, New Zealand pledged NZD 500,000 for the Fund and indicated it would invest a further NZD 7,500,000 if other donors, particularly Australia and the United Kingdom, would match that.³⁵ With both countries acceding to New Zealand's proposal, the Fund was established in 1987.³⁶ Since then, the Fund's value has significantly increased, to AUD 164.9 million

25 Barrie Macdonald "Secession in the Defense of Identity: The Making of Tuvalu" (1975) 16 *Pacific Viewpoint* 26 at 33–35, as cited in Levine, above n 23, at 492–493.

26 Isala, above n 22, at 158–159.

27 The Ellice Islands (Referendum) Order 1974 (UK).

28 Barrie Macdonald *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (Australian National University Press, Canberra, 1982) at 256.

29 Tuvaluan Order 1975 (UK).

30 Levine, above n 23, at 493.

31 Michael Goldsmith "The big smallness of Tuvalu" (2015) 8 *Global Environment* 134 at 141.

32 Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty "Report of the Tuvalu Constitutional Conference, London, February 1978" (paper presented to Parliament of the United Kingdom, March 1978) at 19.

33 Tuvalu Trust Fund Board of Directors "Tuvalu Trust Fund: 30th Anniversary Profile (1987–2017)" (2017) at 4.

34 At 6.

35 At 4.

36 At 4.

in 2017.³⁷ The Fund today is Tuvalu's greatest financial asset and has served as a model for similar funds in the Pacific.³⁸

B The 1978 "Independence Constitution"

The Tuvaluan Order provided Tuvalu with its own constitution.³⁹ Three years later, the Tuvalu Independence Order 1978 then provided a new constitution for an independent Tuvalu,⁴⁰ albeit for the most part reflecting existing arrangements.⁴¹ This became known as the "Independence Constitution".⁴²

Over time, dissatisfaction with the Independence Constitution grew. It was criticised for being "largely of British inspiration" and providing an inadequate legal framework for "the national lifestyle".⁴³ In response, a parliamentary select committee was established in 1982 to improve the Constitution.⁴⁴ Following criticisms during public consultation, the Committee opted to produce a new constitution rather than "attempt to introduce an extensive set of amendments".⁴⁵ The product of that process was the 1986 Constitution.⁴⁶

C The 1986 Constitution

On 1 May 1986, the Constitution of Tuvalu Ordinance 1986 was passed,⁴⁷ establishing the 1986 Constitution,⁴⁸ which remained in place for over 30 years.⁴⁹

37 At 1.

38 At 1.

39 Tuvaluan Order 1975.

40 Tuvalu Independence Order 1978 (UK), s 1(2).

41 Levine, above n 23, at 493.

42 At 493.

43 At 494.

44 At 493.

45 At 494.

46 Eselealofa Apinelu "Societal Culture and Constitutions: The case of Tuvalu" (paper presented to Melbourne Forum on Constitution Building in Asia and the Pacific, Colombo, October 2018) at 1.

47 Constitution of Tuvalu Ordinance 1986 (TV).

48 Schedule 1.

49 The Constitution of Tuvalu Act 2023 (TV), preamble.

The 1986 Constitution sought to better reflect Tuvalu and the will of the Tuvaluan people.⁵⁰ Unlike the Independence Constitution,⁵¹ the 1986 Constitution placed significant emphasis on Tuvaluan culture, values and traditions.⁵² This emphasis has been described as its "paramount feature".⁵³ For the authors of the Constitution, it was "Tuvalu's values", not the "document itself", which was most important.⁵⁴ Indeed, Apinelu suggested Tuvalu's constitutional recognition of island culture had no equivalent in any other Pacific island's constitution.⁵⁵

D 2010 Constitutional Amendment

The case of *Teonea v Pule o Kaupule of Nanumaga* explored the balance between the 1986 Constitution's protections of "Tuvaluan stability and culture" and individual freedoms contained in the Constitution's Bill of Rights.⁵⁶ This case concerned a resolution made by the *falekaupule*⁵⁷ of Nanumaga, which ordered the removal of the Brethren Church and its pastor.⁵⁸ The Pastor sought declarations that this resolution breached the Constitution's guarantees of freedom of belief, expression, association and freedom from discrimination.⁵⁹ The *falekaupule* in turn defended its resolution, arguing the Church constituted a "threat to the values and culture" of Nanumaga.⁶⁰

Despite acknowledging the "unusual lengths" the 1986 Constitution went to in preserving "Tuvaluan values and culture",⁶¹ and notwithstanding s 29(4) of the Constitution (which permitted the Courts to "place some restrictions" on the exercise of constitutional freedoms where they "threaten Tuvaluan values or culture"),⁶² the Court found in favour of the applicant by a 2:1 majority.⁶³ Fisher

50 Levine, above n 23, at 507.

51 At 492.

52 *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2 at [21] per Tompkins JA.

53 Levine, above n 23, at 494.

54 At 498.

55 Apinelu, above n 46, at 2.

56 *Teonea*, above n 52, at [122] per Fisher JA.

57 Traditional village council.

58 Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at [9.15].

59 *Teonea*, above n 52, at [17] per Tompkins JA.

60 At [21] per Tompkins JA.

61 At [107] per Fisher JA.

62 Constitution of Tuvalu Ordinance, s 29(4)(b).

63 Natalie Baird "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2013) 19 *Canta LR* 80 at 92.

JA, for the majority, asserted the scales should not "always ... be weighted in favour of Tuvaluan stability and culture at the expense of constitutional freedoms".⁶⁴

The outcome in *Teonea* was controversial.⁶⁵ It revealed "a misguided societal understanding" among Tuvaluans that their customs and traditions were "protected by the Constitution" and took precedence over individual rights.⁶⁶ In response, Tuvalu's Parliament passed the Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010,⁶⁷ negating the decision in *Teonea*. The purpose of this Act was to provide "the powers necessary to make laws to restrict the exercise of certain constitutional freedoms" and to "provide legal recognition for the traditional practices of island communities".⁶⁸ In doing this, Tuvalu's Parliament demonstrated the significant weight it placed on Tuvaluan customs and tradition.⁶⁹

E The 2023 Constitution

In November 2016, Tuvalu initiated a review of its 30-year-old Constitution.⁷⁰ Four years later, in July 2020, it established a Constitutional Review Parliamentary Select Committee to commence work on an entirely new constitution.⁷¹ The Constitution of Tuvalu Act 2023 established the new constitution and subsequently came into effect in October 2023 with unanimous parliamentary approval.⁷²

Arguably the most significant contribution of the new 2023 Constitution is s 2(1). This asserts that:⁷³

The State of Tuvalu within its historical, cultural, and legal framework shall remain in perpetuity in the future, notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu.

64 *Teonea*, above n 52, at [128].

65 Baird, above n 63, at 93; and Susan Glazebrook, Justice of the Supreme Court of New Zealand "Custom, human rights and Commonwealth constitutions" (Sir Salamo Injia Lecture 2018, University of Papua New Guinea, Port Moresby, 15 December 2018) at 15.

66 Apinelu, above n 46, at 3.

67 Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010 (TV).

68 Section 4(b) and (c).

69 Apinelu, above n 46, at 2.

70 Jess Marinaccio and Simon Kofe "Tuvalu Constitution updated: culture, climate change and decolonisation" (20 September 2023) Devpolicy Blog from the Development Policy Centre <www.devpolicy.org>.

71 Marinaccio and Kofe, above n 70.

72 Marinaccio and Kofe, above n 70.

73 Constitution of Tuvalu Act, s 2(1).

With s 2(1), Tuvalu became the "first country in the world to constitutionally entrench the recognition and the perpetuity of its Statehood from climate change impact".⁷⁴ Section 2(1) is consistent with the Constitutional Review Select Committee's report in 2022, which recognised the need to "define Tuvalu's stance on any potential future impacts of climate change in the supreme law of the country so as to strengthen Tuvalu's legal standing on climate change".⁷⁵

The Committee also specifically recognised a need to "acknowledge climate change in the Constitution given the already significant threats it poses to Tuvalu".⁷⁶ Consistent with this, the 2023 Constitution's Preamble expresses Tuvalu's deep concern:⁷⁷

... with the imminent existential threat of Climate Change and sea-level rise to the security and survival of Tuvalu, and the urgent need for meaningful work with the rest of the world to protect and save Tuvalu.

Moreover, in s 2(5)(b), Tuvalu commits to responding to climate change "which threatens the security and survival of its people and its land".⁷⁸ With the inclusion of these provisions, Tuvalu joined 11 other countries which have dedicated climate constitutional provisions.⁷⁹

Finally, "the position of culture and values" is also strengthened in the 2023 Constitution.⁸⁰ Section 43 introduces the "Charter of Duties and Responsibilities", which outlines "the core values of Tuvaluan society" and the "duties and responsibilities" Tuvaluans have to uphold them.⁸¹ Pursuant to s 43(3), Tuvaluan courts are expressly required to consider the Charter when interpreting the Constitution,⁸² further elevating the legal standing of values and culture in Tuvalu.

74 Jess Xavier "EDO's expert assistance to Tuvalu Constitutional Reform Project: Interview with Dr Bal Kama" (21 September 2023) Environmental Defenders Office <www.edo.org.au>.

75 Simon Kofe and others "Final Report: Constitutional Review Parliamentary Select Committee" (Ministry of Justice, Communication and Foreign Affairs, 2022) at 10.

76 At 10.

77 Constitution of Tuvalu Act, preamble.

78 Section 2(5)(b).

79 Karla Martinez Toral and others "The 11 nations heralding a new dawn of climate constitutionalism" (2 December 2021) Grantham Research Institute on Climate Change and the Environment <www.lse.ac.uk>.

80 Kofe and others, above n 75, at 42.

81 Constitution of Tuvalu Act, s 43.

82 Section 43(3).

III TUVALU'S VULNERABILITY TO CLIMATE CHANGE

A Tuvalu and the Threat of Climate Change

Tuvalu is "extremely vulnerable to sea-level rise and other climatic events".⁸³ Comprising only nine low-lying atolls,⁸⁴ "Tuvalu is topographically flat with an average elevation of one metre above sea-level with its highest peak only at 5 metres above sea-level".⁸⁵ Because of this, Tuvalu is at increased risk from "sea level rise, coastal erosion, increased incidence of drought, coral bleaching, and storm surges".⁸⁶ Increased soil salinity from frequent flooding, seawater and coastal erosion is already affecting Tuvalu's crop production.⁸⁷

While the precise magnitude of sea-level rise in the 21st century remains unknown,⁸⁸ estimates suggest that by 2050, half the land area of Tuvalu's capital Funafuti (where over half the population live) will be flooded daily by tidal waters.⁸⁹ Indeed, sea-level rise at Funafuti was three times above the global average between 1950 and 2009.⁹⁰ Over 80 per cent of Funafuti's residents have migrated from Tuvalu's outer islands "in search of job opportunities, better access to health facilities, and better education".⁹¹ As a result, most residents have limited access to property ownership, thus exacerbating their vulnerability.⁹²

83 Shawn Shen and François Gemenne "Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand" (2011) 49 *International Migration* e224 at e226.

84 Taupo, Cuffe and Noy, above n 4, at 707.

85 Shen and Gemenne, above n 83, at e226.

86 Carol Farbotko and Heather Lazrus "The first climate refugees? Contesting global narratives of climate change in Tuvalu" (2012) 22 *Global Environmental Change* 382 at 382.

87 Shen and Gemenne, above n 83, at e228.

88 Arthur P Webb and Paul S Kench "The dynamic response of reef islands to sea-level rise: Evidence from multi-decadal analysis of island change in the Central Pacific" (2010) 72 *Global and Planetary Change* 234 at 241.

89 Tuvalu Coastal Adaptation Project "Tuvalu unveils Long-Term Adaptation Plan at COP27, a vision for a safe, climate-resilient future" (14 November 2022) <www.tcap.tv>.

90 Melanie Becker and others "Sea level variations at tropical Pacific islands since 1950" (2012) 80–81 *Global and Planetary Change* 85 at 85.

91 Taupo, Cuffe and Noy, above n 4, at 707.

92 At 707.

B Tuvalu's Role in International Climate Change Discourse

Despite its small population, Tuvalu has taken a prominent role in international discourse on climate change.⁹³ As Michael Goldsmith observes, Tuvalu has established "an astonishing grip on Western imaginings of the topic of climate change".⁹⁴ Characterised as "the type-case of climate change vulnerability",⁹⁵ and a "canary of global warming",⁹⁶ Tuvalu has come to "epitomize the approaching environmental catastrophe of worldwide climate change and sea-level rise".⁹⁷

Tuvalu has assumed "a symbolic role" and a reputation for being outspoken on climate change issues "created jointly by its own leaders and commentators from outside".⁹⁸ As Goldsmith claims, publicising climate change issues is one of the most important duties of any Tuvaluan Prime Minister.⁹⁹

Former Prime Minister Rt Hon Enele Sopoaga has been described as one of the most vocal spokespeople for the Pacific on climate change.¹⁰⁰ In 2004, Mr Sopoaga proposed that climate warming be included as part of the United Nations Security Council reform agenda.¹⁰¹ He argued climate change should be considered a security issue given its potential to threaten the survival of Tuvalu.¹⁰² At least one scholar has credited him for influencing global consciousness on climate change.¹⁰³

93 Carol Farbotko "Tuvalu and climate change: Constructions of environmental displacement in the Sydney Morning Herald" (2005) 87 *Geografiska Annaler: Series B, Human Geography* 279 at 279.

94 Goldsmith, above n 31, at 135.

95 At 135.

96 Shen and Gemenne, above n 83, at e225.

97 Anne Favre Chambers and Keith Stanley Chambers "Five Takes on Climate and Cultural Change in Tuvalu" (2007) 19 *The Contemporary Pacific* 294 at 294.

98 Goldsmith, above n 31, at 135.

99 At 149.

100 Isabelle Zhu-Magurie "A portrait of a climate champion: Who is Enele Sopoaga?" *The Interpreter* <www.lowyinstitute.org>.

101 Wesley Morgan, Salā George Carter and Fulori Manoa "Leading from the Frontline: A History of Pacific Climate Diplomacy" (2024) *The Journal of Pacific History* 1 at 11.

102 Ali Arshad and others "The Alliance of Small Island States (AOSIS) during the COP 18 negotiations" (2019) 13 *European Journal of International Management* 678 at 686.

103 Zhu-Magurie, above n 100.

In 2021, Tuvalu made headlines following a video it produced for the COP26 conference.¹⁰⁴ This video featured a government minister delivering his address from a partially submerged podium in the ocean.¹⁰⁵ Tuvalu also attracted international attention with its proposal to "digitise" their nation, by recreating its likeness in the metaverse, as a means of preserving Tuvalu in the event of sea-level rise.¹⁰⁶

IV THE FALEPILI UNION IN CONTEXT: LEGISLATIVE, CONSTITUTIONAL AND POLICY DEVELOPMENTS

A Background

According to the Explanatory Memorandum of May 2024, the Falepili Union was initiated by a proposal from former Tuvaluan Prime Minister Rt Hon Kausea Natano to Australia in August 2023.¹⁰⁷ On 28 August 2024, both Parties confirmed they had ratified the treaty and announced the entry into force of the Union.¹⁰⁸

Surprisingly, the Union has no Tuvaluan translation, with the text being available in English only.¹⁰⁹ It was also reported that there was no public consultation with Tuvaluan communities prior to the announcement of the Union in November 2023.¹¹⁰ In his "Statement of Priorities for the New Government" in February 2024, Tuvaluan Prime Minister Rt Hon Feleti Teo acknowledged "the absence of transparency and consultations in socializing and informing the public in Tuvalu of such an important and groundbreaking initiative" and vowed to "address those process issues".¹¹¹ Upon the Union's entry into force, Teo confirmed that his administration had conducted "extensive public consultations".¹¹²

104 The Guardian "Tuvalu minister to address Cop26 knee deep in water to highlight climate crisis and sea level rise" (11 August 2021) The Guardian <www.theguardian.com>.

105 The Guardian "'We are sinking': Tuvalu minister gives Cop26 speech standing in water to highlight sea level rise" (11 September 2021) YouTube <www.youtube.com>.

106 Kalolaine Fainu "Facing extinction, Tuvalu considers the digital clone of a country" (27 June 2023) The Guardian <www.theguardian.com>.

107 Paulson Panapa and Penny Wong "Explanatory memorandum - Falepili Union between Tuvalu and Australia" (press release, 8 May 2024) at 1.

108 Anthony Albanese and Feleti Teo "Entry into force of historic Australia-Tuvalu Falepili Union" (press release, 28 August 2024).

109 Kitara and Farbotko, above n 12.

110 Kucharski, above n 8.

111 Simon Kofe (@Simon_Kofe) "Pleased to share the government's statement of priorities" <https://x.com/Simon_Kofe/status/1762659820459769899>.

112 Albanese and Teo, above n 108.

The Union itself is brief, comprising a preamble and eight articles.¹¹³ The Explanatory Memorandum groups its provisions under three thematic headings: "Sovereignty", "Mobility with Dignity" and "Cooperation for Security and Stability".¹¹⁴ The following analysis considers the Union under those same headings.

B Sovereignty

1 Preserving statehood in the face of climate change

Arguably, the most legally significant provision of the Union is art 2(2)(b). In this provision, both Parties recognise "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". The preamble also affirms the Parties' "sovereignty, territorial integrity, and political independence", foreshadowing art 2(2)(b).

Article 2(2)(b) has been heralded as a "profound step forward" in relation to "state practice on recognising the continued existence of geographically threatened states from climate induced sea level rise",¹¹⁵ and declared the world's first "binding rejection by any State of the view that inhabitable land is necessary for State continuity".¹¹⁶

While significant, preserving Tuvalu's statehood in perpetuity, despite the impacts of climate change, is not a novel concept. Indeed, this concept has been a prominent feature of Tuvalu's recent policy, constitutional and legislative developments. It has also been identified as a priority in earlier Pacific Islands Forum (PIF) declarations and communiqués. As such, art 2(2)(b) can be viewed as simply the most recent manifestation of Tuvalu's efforts to assert its continuing statehood.

2 Pacific Islands Forum declarations

Article 2(2)(b) follows a series of earlier PIF declarations and communiqués on continuing statehood notwithstanding the impacts of climate change. The 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise.¹¹⁷

113 Falepili Union, above n 5.

114 Panapa and Wong, above n 107, at 1–3.

115 Kucharski, above n 8; and Rashmi Raman and Daniel Pakpahan "Falepili Union Treaty, statehood and protection of persons in light of sea-level rise: state practice of preserving the status quo?" Centre for International Law: National University of Singapore <www.cil.nus.edu.sg>.

116 Guilfoyle and Green, above n 9.

117 Pacific Islands Forum "Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise" (Annex D to the "Fifty-Second Pacific Islands Forum Communiqué", Rarotonga, Cook Islands, 6–10 November 2023) at [13].

Declare[d] that 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.

Notably, art 2(2)(b) of the Union adopts the same language as this PIF Declaration.¹¹⁸

Earlier PIF declarations and communiqués have also recognised continuing statehood as a priority for Pacific Island nations. The 2021 PIF Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise called for "urgent and collective action to secure maritime zones of Forum Members ... against sea-level rise and climate change".¹¹⁹ Likewise, the 50th PIF Communiqué in 2019 asserted PIF Members' "maritime zones could not be challenged or reduced as a result of sea level rise and climate change".¹²⁰

While these earlier PIF statements already recognise continuing statehood, they are not legally binding.¹²¹ Therefore, the inclusion of art 2(2)(b) in the Union represents a significant step in securing binding legal recognition of this concept.

3 *The Future Now project and Tuvalu foreign policy*

Securing international recognition of Tuvalu's perpetual statehood was also a key priority in Tuvalu's Future Now Project (the Project).¹²² Launched by Tuvalu's Ministry of Justice, Communications and Foreign Affairs in 2021,¹²³ the Project outlines three future-focused, Government initiatives (with several "activities" under each).¹²⁴ These future-focused initiatives are intended to proactively address "the potential worst-case scenario for Tuvalu under climate change—Tuvalu's threatened disappearance as sea levels rise".¹²⁵

118 Falepili Union, above n 5, art 2(2)(b).

119 Pacific Islands Forum "Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise" (Attachment to the "Fifty-First Pacific Islands Forum Communiqué", Virtual, 6 August 2021) at 2.

120 Pacific Islands Forum "Fiftieth Pacific Islands Forum" PIF (19)14, Funafuti, Tuvalu, 13–16 August 2019, at [14].

121 Meg Keen and Henry Ivarature "Evolving Security Framing in the Pacific: Connecting the Local with the Regional" in Deon Canyon (ed) *Strategic Competition & Security Cooperation in the Blue Pacific* (Daniel K Inouye Asia-Pacific Center for Security Studies, Honolulu, 2022) 91 at 92.

122 Ministry of Justice, Communication and Foreign Affairs *The Future Now Project: Preparing Today to Secure Tomorrow* (Government of Tuvalu, Funafuti, 2021) at 1.

123 Simon Kofe "Tuvalu's Future Now Project: preparing for climate change in the worst-case scenario" (10 November 2021) Devpolicy Blog from the Development Policy Centre <www.devpolicy.org>.

124 Ministry of Justice, Communication and Foreign Affairs Tuvalu, above n 122, at 1.

125 Kofe, above n 123.

Of relevance to art 2(2)(b) is the Project's second initiative; to "secure international recognition of Tuvalu's Statehood as permanent and its existing maritime boundaries as fixed despite the effects of sea level rise and climate change on Tuvalu's land territory".¹²⁶ The activities identified to achieve this initiative are:¹²⁷

- incorporating a provision in Tuvalu Foreign Policy (TFP) stipulating "that Tuvalu will only form new bilateral relations with nations that recognize Tuvalu's Statehood and existing maritime boundaries as permanent";
- "reaffirming existing relations via joint communiqués that provide for bilateral recognition of Tuvalu's Statehood"; and
- amending legislation to recognise Tuvalu's statehood as permanent despite the effects of sea-level rise.

Consistent with the second initiative, the TFP incorporates a provision, at [9.2.3], requiring that all countries forming relations with Tuvalu "recognise the statehood of the nation as permanent and its existing maritime boundaries as set, even if Tuvalu loses its land territory due to sea level rise".¹²⁸ At [12.1.2] the TFP reiterates that Tuvalu's "statehood must be recognised and respected regardless of whether its population is displaced or it loses land territory due to climate change".¹²⁹

With the inclusion of art 2(2)(b), Tuvalu has secured Australia's recognition of its continuing sovereignty.¹³⁰ This advances the objectives expressed in both the TFP and the Project. While art 2(2)(b) makes no mention of Tuvalu's maritime boundaries, it can be inferred from the Preamble, which affirms the "territorial integrity" of the Parties, that the Union also recognises Tuvalu's maritime boundaries as permanent.

4 Constitutional recognition

With its 2023 Constitution, Tuvalu became the first country in the world to constitutionally entrench the recognition and perpetual nature of its statehood notwithstanding the impacts of climate change.¹³¹ With this constitutional reform, Tuvalu realised another key activity outlined in the Project, namely amending Tuvalu law to recognise the nation's statehood as permanent.¹³² Section 2(1) of the

126 Ministry of Justice, Communication and Foreign Affairs Tuvalu, above n 122, at 1.

127 At 1.

128 TFP 2020, above n 20, at [9.2.3].

129 At [12.1.2].

130 Raman and Pakpahan, above n 115.

131 Xavier, above n 74.

132 Ministry of Justice, Communication and Foreign Affairs, above n 122, at 1.

2023 Constitution provides that the State of Tuvalu "shall remain in perpetuity in the future, notwithstanding the impacts of climate change".¹³³

In many ways, s 2(1) of the 2023 Constitution can be viewed as the precursor of art 2(2)(b) of the Union. There are some minor differences in language between the two, for example the Union refers to continuing statehood,¹³⁴ as opposed to the Constitution's stronger assertion of Tuvaluan statehood remaining "in perpetuity".¹³⁵ However, in essence, both provide for the same thing: that Tuvalu shall continue as a state, even if it loses land to sea-level rise.

In summary, preserving Tuvalu's statehood in perpetuity is not a novel concept. Art 2(2)(b) can be viewed as only the most recent initiative, in a series of domestic and regional initiatives, which recognise Tuvalu's continuing statehood notwithstanding climate change. However, unlike its predecessors, the Falepili Union is a binding agreement,¹³⁶ and thus represents a significant step towards securing bilateral, legal recognition of this concept.

C Mobility with Dignity

1 The human mobility pathway

A key aim of the Falepili Union is to "provide 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".¹³⁷

The human mobility pathway provisions are outlined in art 3. Under art 3(1), Australia is obliged to "arrange for a special human mobility pathway for citizens of Tuvalu to access Australia" which will enable Tuvaluans to "live, study and work in Australia" and to "access Australian education, health, and key income and family support on arrival". To support the implementation of the pathway, art 3(2) requires Tuvalu 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". Finally, art 3(3) obliges Australia to "provide assistance to Tuvalu" to enable Tuvalu to meet its obligations under art 3(2).

The Union itself provides little detail around what form this mobility pathway will take or what rights it will confer on Tuvaluans.¹³⁸ However, the subsequent Explanatory Memorandum provides

¹³³ Constitution of Tuvalu Act, s 2(1).

¹³⁴ Falepili Union, above n 5, art 2(2)(b).

¹³⁵ Constitution of Tuvalu Act, s 2(1).

¹³⁶ Albanese and Teo, above n 108.

¹³⁷ Falepili Union, above n 5, art 1(b).

¹³⁸ Kucharski, above n 8.

further details on the pathway, named the "*Falepili* visa".¹³⁹ Specifically, upon arrival in Australia, *Falepili* visa holders will be entitled to similar rights as Pacific Engagement Visa (PEV) holders.¹⁴⁰ This includes the right to apply for Australian citizenship; to enrol in Medicare and to study at schools, universities and vocational facilities at the same subsidisation as Australian citizens.¹⁴¹ Beyond these benefits, *Falepili* visa holders will also be entitled to indefinite permanent residency, with freedom to travel to and from Australia without limitation.¹⁴² Up to 280 visas, allocated through random ballot, will be available annually.¹⁴³ The pathway will also be available to Tuvaluans with disabilities, special needs and chronic health conditions.¹⁴⁴ This term is significant, as all other Australian visas (excluding the visa for New Zealanders wishing to move to Australia) discriminate on the basis of disability.¹⁴⁵ As Clarke and Howes explain, the *Falepili* visa provides Tuvalu the second closest migration relationship with Australia, after New Zealand.¹⁴⁶

2 *Earlier efforts*

Although the Union's mobility scheme has been heralded as an "innovative concept",¹⁴⁷ and a world first,¹⁴⁸ Tuvalu has in fact been "quietly exploring" opportunities to establish a climate-related migration scheme for many years.¹⁴⁹ Indeed, the *Falepili* Union was not the first time Tuvalu approached Australia with such a proposal.¹⁵⁰ In 2003, reports emerged of an unsuccessful proposal to settle Tuvaluan citizens on an uninhabited island in the Great Barrier Reef.¹⁵¹ Four years later,

139 Panapa and Wong, above n 107, at 2.

140 At 2.

141 At 2.

142 At 2.

143 At 2.

144 At 2.

145 Stephen Clarke and Finn Howes "Tuvalu's amazing migration deal" (7 April 2024) Devpolicy Blog from the Development Policy Centre <www.devpolicy.org>.

146 Clarke and Howes, above n 145.

147 Kucharski, above n 8.

148 Guilfoyle and Green, above n 9.

149 Kathryn Louise Paton "At Home or Abroad: Tuvaluans Shaping a Tuvaluan Future" (Master of Development Studies, Victoria University of Wellington, 2009) at 120.

150 At 121.

151 At 121; and David Fickling "Islanders consider exodus as sea level rises" (19 July 2003) *The Guardian* <www.theguardian.com>.

Tuvaluan officials reportedly visited Canberra with another migration proposal, which was similarly unsuccessful.¹⁵²

Tuvalu has also explored the potential for a relocation scheme with Niue. Discussions were held in 2004 proposing Niue as a potential "outlet for Tuvaluan forced migration", following the successful resettlement of 100 Tuvaluans there some years earlier.¹⁵³ By 2005, Niue indicated a willingness "to encourage Tuvaluans to move to the island"; although no progress appears to have been made on this.¹⁵⁴

Likewise, the Falepili Union is not the first time Australian political leaders have entertained a migration scheme with Tuvalu.¹⁵⁵ In 2006, the Australian Labor Party released a policy document titled, "Our Drowning Neighbours" outlining a strategy of assisting the full evacuation of low-lying Pacific Island countries like Tuvalu.¹⁵⁶ It is noteworthy that, despite no action being taken on this for 17 years, following the Policy's co-author Anthony Albanese becoming Australia's Prime Minister, there is now a renewed push for such a scheme.

The Tuvaluan Government has also previously outlined the need to explore climate-related migration options in various policy documents. Tuvalu's National Strategy for Sustainable Development 2005–2015 identified "improving migration schemes and investigating new offshore employment opportunities" as a strategic policy priority.¹⁵⁷ Its 2016–2020 successor highlighted the potential of international labour mobility to help Tuvaluan households manage risks posed by climate change.¹⁵⁸ In addition, the Tuvalu Climate Change Policy 2012 identified the need for a Special

¹⁵² Paton, above n 149, at 121.

¹⁵³ At 121.

¹⁵⁴ Radio New Zealand "Niue looks again at attracting immigrants from Tuvalu" (27 June 2005) RNZ <www.rnz.co.nz>; see also Xinhua News Agency (XNA) "Niue to 'import' citizens from Tuvalu" (16 January 2004) ReliefWeb <www.reliefweb.int>.

¹⁵⁵ Paton, above n 149, at 121.

¹⁵⁶ Australian Marine Environment Protection Association [AUSMEPA] "Launch of ALP Climate Change Policy for Island States" (2006) 143 *Australian Maritime Digest* at 3.

¹⁵⁷ Carol Farbotko and others "A climate justice perspective on international labour migration and climate change adaptation among Tuvaluan workers" (2022) 2 *Oxford Open Climate Change* 1 at 7. See Ministry of Finance, Economic Planning and Industries *Te Kakeega II: National Strategy for Sustainable Development 2005–2015* (Government of Tuvalu, Funafuti, 2005).

¹⁵⁸ Farbotko and others, above n 157, at 7. See Ministry of Finance, Economic Planning and Industries *Te Kakeega III: National Strategy for Sustainable Development 2016 to 2020* (Government of Tuvalu, Funafuti, 2016).

Pacific Access Category visa for "Tuvaluans considering climate change vulnerability and forced climate migrants" as a policy priority.¹⁵⁹

3 *Relocation or in situ adaptation?*

These policies and past proposals demonstrate that Tuvalu has long been interested in establishing a climate-related migration scheme with its Pacific neighbours. However, interestingly, Tuvalu appears to have now changed its stance on migration as a climate adaptation strategy. The "political emphasis" in Tuvalu has shifted away from exploring migration options towards planning for in situ adaptation.¹⁶⁰

This preference for "in situ adaptation" over relocation is evident in political narrative and policy.¹⁶¹ In 2013, Prime Minister Enele Sopoaga called for an end to talk of relocating people as a climate change solution, describing them as "self-defeating".¹⁶² Significantly, both the TFP and the Future Now Project assert that Tuvalu "stands against relocation as a solution to the climate crisis",¹⁶³ as Tuvalu is "a sovereign country, and its population has the right to live, develop, and prosper on its own land".¹⁶⁴ The TFP describes relocation as a "quick fix" which fails "to address the root causes of the climate crisis".¹⁶⁵ Tuvalu's preference is to address "land-loss and land-degradation issues".¹⁶⁶ Within this context, the Union appears to be at odds with Tuvalu's policy statements, which reject relocation as a climate change solution.

Professor Ilan Noy suggests Tuvalu's changed stance on relocation is an intentional effort on Tuvalu's part to "Voice", which he defines as "the advocacy of expressing one's wish for change".¹⁶⁷ Noy explains that "Voice" is often a deliberate choice, which may be preferred to relocation.¹⁶⁸ For Tuvalu, if relocation is ruled out as a legitimate option, "Voice is more credible, and therefore

159 Ministry of Foreign Affairs, Trade, Tourism, Environment and Labour *Te Kaniva: Tuvalu Climate Change Policy 2012* (Government of Tuvalu, Funafuti, 2012) at 26.

160 Farbotko and others, above n 157, at 8.

161 Carol Farbotko and Celia McMichael "Voluntary immobility and existential security in a changing climate in the Pacific" (2019) 60 *Asia Pacific Viewpoint* 148 at 150.

162 Radio New Zealand "Relocation for climate change victims is no answer, says Tuvalu PM" (9 March 2013) RNZ <www.rnz.co.nz>.

163 Ministry of Justice, Communication and Foreign Affairs, above n 122; and TFP 2020, above n 20, at [12.1.2.4].

164 At [12.1.2.4].

165 At [12.1.2.4].

166 At [12.1.2.4].

167 Noy, above n 17, at 5.

168 At 5.

potentially more effective".¹⁶⁹ Applying Noy's logic, Tuvalu's representations that it is opposed to relocation may be overstated and could be seen as part of a larger effort to advocate for climate change mitigation.

While the Union provides for a climate-related mobility scheme,¹⁷⁰ it also expressly acknowledges Tuvalu's preference for in-situ adaptation over relocation and binds Australia to assist Tuvalu in its adaptation efforts.¹⁷¹ Article 2(2)(a) recognises "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", and art 2(2)(c) acknowledges "that more recent technological developments provide additional adaptation opportunities". Article 2(3) then commits the Parties:

... to work together to help the citizens of Tuvalu to stay in their homes with safety and dignity, including by promoting Tuvalu's adaptation interests to other countries, including through regional and international forums.

As Guilfoyle and Green observe, these provisions reflect Tuvalu's "continued lack of appetite" for relocation.¹⁷²

In summary, Tuvalu's desire for a climate-related migration scheme can be traced back to the early 2000s. At first blush, the Union's provision of a human mobility pathway may appear contrary to Tuvalu's stance against relocation. However, Tuvalu's opposition to relocation could be explained as part of a larger effort to "Voice" its concern over climate change. Regardless, the Union expressly acknowledges and commits Australia to support Tuvalu's clear preference for in-situ adaptation.

D Security and Stability

Another important feature of the Union is its provisions relating to security. The prominence of security is reflected in art 1, which identifies protecting and promoting "each Party's and the Parties' collective security and sovereignty" as a "main purpose" of the agreement.¹⁷³

The provisions pertaining to security and defence are mainly found in art 4 of the Union, aptly titled "Cooperation for security and stability". Article 4(1) requires Australia to "provide Tuvalu assistance in response to" major natural disasters, public health emergencies of international concern or "military aggression against Tuvalu". With art 4(2), both Parties agree to enter into an instrument establishing the "conditions and timeframes applicable to Australian personnel operating in Tuvalu's territory". This instrument will be developed under the direction of the Joint Committee (the body

¹⁶⁹ At 19.

¹⁷⁰ Falepili Union, above n 5, art 3(1).

¹⁷¹ Kucharski, above n 8.

¹⁷² Guilfoyle and Green, above n 9.

¹⁷³ Falepili Union, above n 5, art 1(c).

responsible for resolving disputes under the agreement).¹⁷⁴ Article 4(3) then obliges Tuvalu to provide Australia with "rights to access, presence within, and overflight of Tuvalu's territory", on the condition that such access is "necessary for the provision of assistance requested by Tuvalu" under art 4(1) of the agreement.¹⁷⁵ These rights are predicated upon Australia providing advance notice to Tuvalu.¹⁷⁶ However, the Union is silent as to whether Tuvalu must consent to Australia accessing its territory. Finally, art 4(4) requires Tuvalu to "mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-related matters". These matters include "defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure".¹⁷⁷

I A transactional arrangement?

Media and academic coverage of the Union has framed the security provisions in art 4 as being in Australia's national and security interests, rather than Tuvalu's.¹⁷⁸ Much of the discourse has portrayed the agreement as "transactional",¹⁷⁹ with the "security guarantee" being Australia's end of the bargain and the mobility scheme Tuvalu's.¹⁸⁰ Howes characterised the arrangement as one where Tuvalu obtains "greater migration opportunities in relation to Australia" in return for "concessions in relation to security".¹⁸¹ Moore describes the Union in similar terms, with Tuvalu receiving "280 visas annually" in return for entering "into a strict security agreement with Australia".¹⁸²

The characterisation of the Union's security provisions as a concession on Tuvalu's part suggests that the security aspects of the treaty are contrary to Tuvalu's objectives and understanding of security. To an extent this is correct, insofar as the Union is concerned with "traditional" security issues. A traditional view of security is one "viewed through the prism of state survival and conceived mainly in terms of interstate military conflict".¹⁸³ In contrast, a non-traditional view of security is concerned

174 Panapa and Wong, above n 107, at 3; and Falepili Union, above n 5, art 5.

175 Joint Standing Committee on Treaties *National Interest Analysis: Category 1 Treaty Australia–Tuvalu Falepili Union* (Government of Australia Department of Foreign Affairs and Trade, Report 219, 21 August 2024) at [12].

176 At [12].

177 Article 4(4).

178 See Marinaccio, above n 6; Graham and Shrimpton, above n 15; and Clarke and Howes, above n 145.

179 Kitara and Farbotko, above n 12.

180 Moore, above n 13, at 296.

181 Stephen Howes "Submission to the Australia-Tuvalu Falepili Union Inquiry" (2023) at 1.

182 Moore, above n 13, at 295.

183 Shahar Hameiri and Lee Jones "The Politics and Governance of Non-Traditional Security" (2013) 57 *International Studies Quarterly* 462 at 462.

with "mostly transnational issues, including terrorism, environmental degradation and climate change, infectious disease, transnational crime, and illegal migration".¹⁸⁴

Although the language is not explicit, art 4 appears to place an emphasis on traditional security issues. Article 4(1) obliges Australia to act if there is "military aggression against Tuvalu". Although art 4(2) does not clarify what is meant by "Australian personnel" operating in Tuvalu, presumably this refers to military personnel. Finally, art 4(4) applies only to "security and defence-related matters" which includes "defence, policing, border protection, cyber security and critical infrastructure", all of which arguably fall within the definition of traditional security concerns.¹⁸⁵

The emphasis on traditional security in the Union appears inconsistent with Tuvalu's policy objectives outlined in the TFP. The TFP, at [7.4], explicitly states that Tuvalu remains "largely unaffected by traditional security concerns, such as war and terrorism", and is more concerned with issues like "climate change, health threats, and environmental exploitation, among other issues" which threaten the "security and prosperity of the Tuvaluan people".¹⁸⁶ Furthermore, the TFP describes the "complex security issues" facing Tuvalu as "climate change, disaster, health, ocean management and protection, and transnational crime and border security".¹⁸⁷

Arguably, the Union's security provisions are centred on Australia's priorities and interests. Australia has been described as "preoccupied with traditional security threats",¹⁸⁸ with a "securitised understanding of the Pacific Islands".¹⁸⁹ Moore explains that, from an Australian perspective, "Australian security hinges on a stable Pacific region".¹⁹⁰ As such, Pacific regional security is viewed as "second only to Australia's own".¹⁹¹ Australia's 2017 White Paper noted the "limited capacity" of states in the Pacific to respond to security challenges and Australia's intention to continue to support and co-operate with regional actors to ensure regional security.¹⁹² Within this context, Australia's

184 At 462.

185 Hameiri and Jones, above n 183, at 462.

186 TFP 2020, above n 20, at [7.4].

187 At [12].

188 Mark Beeson "Australia's strategic culture and climate change" (Griffith Asia Institute, 2021) at 9.

189 Maima Koro and others "Tā, Vā, and Lā: Re-imagining the geopolitics of the Pacific Islands" (2023) 105 *Political Geography* 1 at 3.

190 Moore, above n 13, at 288.

191 At 288.

192 Australian Government Department of Foreign Affairs and Trade "2017 Foreign Policy White Paper" (November 2017) at 103.

assistance on "core security areas" can be seen as advancing Australia's "own priorities and interests".¹⁹³

Commentators have also identified a connection between the "geopolitical competition between Western and Eastern powers for influence in the Pacific" and Australia's desire for a security guarantee within the Union.¹⁹⁴ Howes contends it was the "security elements of the Falepili Union" that "pushed Australia to embrace Tuvalu in this way".¹⁹⁵ Similarly, Graham and Shrimpton suggest "Australia's immediate motivations for offering Tuvalu a defence guarantee appear to be to deny China influence gains and a security foothold there".¹⁹⁶ Thus, insofar as the Union concerns traditional security issues and Australia's geopolitical agenda, it can be viewed as being in Australia's interests and inconsistent with Tuvalu's.

However, I contend that the characterisation of the security aspects of the Union as being wholly in Australia's interests (and thus inconsistent with Tuvaluan interests) is overstated. In fixating on art 4 and the inclusion of traditional security concerns, the discourse has largely ignored the way in which the Union endorses a broader "expanded concept of security"—one which includes climate change and human security within its definition.¹⁹⁷ The promotion of an expanded concept of security is clearly consistent with Tuvalu's foreign policy and climate objectives. It also reflects a broader regional push to evolve beyond a "traditional notion of security" to one which addresses "emerging and contemporary security issues which directly impact upon the wellbeing of Pacific peoples".¹⁹⁸

2 *An expanded concept of security*

The Falepili Union includes multiple provisions where climate change is framed as a security issue. The Preamble recognises "the special and unique circumstances faced by Tuvalu" and declares climate change "Tuvalu's greatest national security concern". There the Parties commit to "responding to current and emerging security challenges, such as climate change", and further, in art 2(1), the Parties, "in the spirit of ... support for enduring shared interests, including ... security" commit to work together in the face of the existential threat posed by climate change.

The recognition of climate change as a security issue signifies a shift for Australia. As Beeson explains, Australia has resisted expanding its traditional security agenda to include environmental

193 Joanne Wallis and others "Security cooperation in the Pacific Islands: architecture, complex, community, or something else?" (2022) 23 *International Relations of the Asia-Pacific* 263 at 271.

194 Moore, above n 13, at 288.

195 Don Wiseman "Falepili Union: 'Australia is providing a type of citizenship to Tuvaluans' - academic" (10 July 2024) RNZ <www.rnz.co.nz>.

196 Graham and Shrimpton, above n 15.

197 Wallis and others, above n 193, at 274.

198 Pacific Islands Forum *Boe Declaration Action Plan* (Pacific Islands Forum Secretariat, Suva, 2019) at 9.

issues,¹⁹⁹ opting instead to "prioritise improbable traditional threats from other states, rather than the very real, immediate and increasingly visible danger posed by unmitigated climate change".²⁰⁰ Similarly, Moore contends that "while climate issues have been recognised as a security issue by key government agencies and actors" in Australia, "this has only been done in a 'partial and piecemeal' way".²⁰¹ As a result, there has been little done to integrate climate change concerns "into strategic outlooks, defence planning and activities or broader whole of government responses to advancing security".²⁰² With the Union, Australia has demonstrated its willingness to recognise an expanded view of security—a stance which, to date, it has been hesitant to take.

Notably, the TFP and the 2023 Constitution also frame climate change as a security issue. The TFP maintains that Tuvalu should "in all international venues" promote the message "that climate change is the single greatest existential threat Tuvalu faces, especially from a security standpoint".²⁰³ The Preamble of the Constitution prefaces "the imminent existential threat of Climate Change and sea-level rise to the security and survival of Tuvalu", and in s 2(5)(b) Tuvalu commits to respond to climate change, which "threatens the security and survival of its people and its land".

3 *The Boe Declaration*

Consistent with its provisions framing climate change as a security issue, the Union also expressly endorses the Boe Declaration on Regional Security.²⁰⁴

Published in 2018, the Boe Declaration (building on the earlier 2000 Biketawa Declaration) sought recognition of a broader definition of security.²⁰⁵ It committed to "strengthening the existing regional security architecture" in the Pacific to respond to the "increasingly complex regional security environment"²⁰⁶ and "the increasing array of challenges that have emerged in the Pacific Islands" – including transnational crime, illegal migration, HIV/AIDS, natural disasters, the effects of climate change, the over-exploitation of natural resources and domestic security issues.²⁰⁷ The Declaration

¹⁹⁹ Beeson, above n 188, at 3.

²⁰⁰ At 1.

²⁰¹ Moore, above n 13, at 295.

²⁰² Matt McDonald "After the fires? Climate change and security in Australia" (2021) 56 *Australian Journal of Political Science* 1 at 10, as cited in Moore, above n 13, at 295.

²⁰³ TFP 2020, above n 20, at [12.1.2.1].

²⁰⁴ Falepili Union, above n 5, preamble.

²⁰⁵ Pacific Islands Forum "Boe Declaration on Regional Security" (Annex 1 to the "Forty-Ninth Pacific Islands Forum", PIF (18)10, Yaren, Nauru, 6 September 2018) at preamble.

²⁰⁶ At [ii] and [ix].

²⁰⁷ Wallis and others, above n 193, at 275.

advanced an "expanded concept of security" which includes non-traditional challenges such as human security, transnational crime, cybersecurity, maritime security, environmental security and climate security.²⁰⁸

Significantly, the Boe Declaration elevated climate change as a standalone regional security priority.²⁰⁹ It asserts that "climate change remains the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific",²¹⁰ a statement which was subsequently echoed in both the TFP and the Union.

As with other PIF declarations, the Boe Declaration has no binding effect on its signatories.²¹¹ Conversely, the Falepili Union is a binding agreement.²¹² Therefore, the Union signifies a much stronger commitment by Australia to an expanded concept of security.

The Australian Joint Standing Committee on Treaties has described the Union as a:²¹³

... demonstration to the Pacific family of Australia's commitment, as a signatory to the Biketawa Declaration and the Boe Declaration on Regional Security, to finding Pacific solutions to our region's security challenges.

This strong affirmation of the Declaration is noteworthy given the accusations made against Australia in 2018 during the Declaration's development.²¹⁴ Tuvalu's Prime Minister Enele Sopoaga alleged a country "starting with a capital A" had objected to the inclusion of climate change within the concept of security,²¹⁵ which was subsequently corroborated by Vanuatu.²¹⁶

4 *Pre-existing security arrangements*

The traditional security concerns outlined in art 4 also "may not be as original as many suppose".²¹⁷

208 At 274.

209 Pacific Islands Forum "Action Plan", above n 198, at 9.

210 Pacific Islands Forum "Boe Declaration", above n 205, at [1].

211 Keen and Ivarature, above n 121, at 92.

212 Graham and Shrimpton, above n 15.

213 Joint Standing Committee on Treaties, above n 175, at [4].

214 Moore, above n 13, at 294.

215 At 294.

216 At 294.

217 Richard Herr "The Falepili Union and the question of Pacific sovereignty" (23 November 2023) The Strategist <www.aspistrategist.org.au>.

Pre-dating the Union by more than four decades, the 1979 United States and Tuvalu Treaty of Friendship already requires Tuvalu to consult with the United States "regarding any proposed use of Tuvaluan territory for military purposes by third parties".²¹⁸ Article 4(4) of the Union echoes this existing obligation, requiring Tuvalu to "mutually agree" with Australia any third-party arrangements pertaining to "security and defence-related matters".

Pre-dating the Union by some 13 years, the 2010 Tuvalu–New Zealand Visiting Forces Agreement also requires Tuvalu to permit a New Zealand contingent to enter "the territory of Tuvalu in vessels or aircraft, and remain on or over this territory" in the event "Tuvalu requests emergency assistance from New Zealand".²¹⁹ The obligation contained within art 4(3) of the Union which requires that Tuvalu provide Australia with "rights to access, presence within, and overflight of Tuvalu's territory" provided this access is "necessary for the provision of assistance requested by Tuvalu" bears a resemblance to this existing obligation between Tuvalu and New Zealand.

Given this, the Union's traditional security provisions are not unique. Tuvalu is already under obligations like those in the Union with other countries.²²⁰

In summary, the Union demonstrates Australia's willingness to endorse an expanded concept of security, signalling a shift away from its previous, traditional security agenda. An expanded concept of security is clearly in Tuvalu's interests and is wholly consistent with the Boe Declaration, the TFP and Tuvalu's 2023 constitutional reforms. While references to traditional security concerns in art 4 of the Union are not consistent with Tuvalu's priorities, Tuvalu is already under similar obligations with other countries. Furthermore, other provisions in the Union expressly recognise climate change as a security concern, together with Australia's commitment to support Tuvalu to respond to these threats.

E Climate Co-operation

Although climate change features prominently in the discourse surrounding the Falepili Union,²²¹ the agreement itself provides little detail as to how the Parties will respond to the challenges posed by the climate crisis.²²²

218 Treaty of Friendship, Tuvalu–United States of America 2011 UNTS 79 (signed 7 February 1979, entered into force 23 September 1983), art 3.

219 Agreement between the Government of New Zealand and the Government of the Independent State of Tuvalu concerning the temporary stay of members of the New Zealand Armed Forces on the territory of the Independent State of Tuvalu, Tuvalu–New Zealand 2899 UNTS 3 (21 June 2010), arts 4(1) and 12(2).

220 Herr, above n 217.

221 See Kucharski, above n 8; Guilfoyle and Green, above n 9; and Schofield and Anggadi, above n 13.

222 Kitara and Farbotko, above n 12.

The Union broadly outlines both Parties' intention to co-operate on issues of climate change and adaptation.²²³ Article 2(1) commits the Parties "to work together in the face of the existential threat posed by climate change". In art 2(2)(c), the Parties recognise that "more recent technological developments provide additional adaptation opportunities". Finally, art 2(3) reiterates the Parties' commitment to work together to "help the citizens of Tuvalu to stay in their homes with safety and dignity, including by promoting Tuvalu's adaptation interests to other countries, including through regional and international forums". However, the Parties are not bound to take any immediate, tangible steps towards addressing the climate crisis.²²⁴ This has led to criticism, especially from Tuvaluan climate activists, noting the Union's "failure to promote emissions reductions".²²⁵

Although not specified in the Union, Australia has pledged to invest AUD 38 million in the Tuvalu Coastal Adaptation Project.²²⁶ This project will assist Tuvalu to reclaim land in key locations,²²⁷ including the capital, increasing the surface area of Funafuti by six per cent.²²⁸

The climate change adaptation provisions in the Union continue Tuvalu's efforts to develop a "climate governance architecture".²²⁹ At the domestic level, Tuvalu has been amending laws and implementing policies to advance its climate change adaptation and disaster risk reduction objectives since early 2000.²³⁰ Calliari and Vanhala identify seven key "strategies" which comprise Tuvalu's "climate governance architecture".²³¹ These include the Climate Change and Disaster Survival Fund Act 2015 (TV) (which establishes a fund to support adaptation investment and climate change and natural disaster recovery) and the Climate Change Resilience Act 2019 (TV) (which incorporates Paris Agreement obligations into domestic law).²³²

Therefore, while the Union contains little detail around how the Parties will respond to the challenges of climate change, it signals a clear intent for subsequent activity and continues to advance Tuvalu's aim of developing a climate governance architecture.

223 Kitara and Farbotko, above n 12.

224 Kucharski, above n 8.

225 Kitara and Farbotko, above n 12.

226 Department of Foreign Affairs and Trade, above n 11.

227 Noy, above n 17, at 12.

228 Albanese and Natano, above n 7.

229 Elisa Calliari and Lisa Vanhala "The 'national turn' in climate change loss and damage governance research: constructing the L&D policy landscape in Tuvalu" (2022) 22 *Climate Policy* 184 at 188.

230 At 188.

231 At 188.

232 At 188.

F Tuvaluan Culture and Tradition

Another important aspect of the Union, overlooked in much of the media coverage, "is the integration of Tuvalu's ... cultural values into the document".²³³

The Preamble declares the Union is "underpinned" by the traditional Tuvaluan concept of *falepili*. Article 1(a) maintains a key purpose of the Union 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".

The Union defines *falepili* as "traditional values of good neighbourliness, duty of care and mutual respect".²³⁴ In the joint statement, the Prime Ministers of Tuvalu and Australia elaborated further, explaining that the concept of *falepili* recognises "the importance of collective sovereignty, whereby a country's actions can impact on its neighbours. Each member of the neighbourhood has a duty to care for and protect its neighbours".²³⁵

Jess Marinaccio argues the Union has merged the Tuvaluan cultural values of *kaitasi* and *falepili* "under the term *falepili*".²³⁶ The concept of *kaitasi*—which literally translates as "oneness and interconnections"—involves "sharing everything amongst family members, sharing of land, decisions, development, resources".²³⁷ The concept of *falepili* connotes a "moral responsibility to care for, share with, and protect" one's neighbours.²³⁸ In the Union, references to "good neighbourliness" reflect *falepili*, whereas *kaitasi* arguably manifests itself in the values of "mutual respect" and the goal of elevating the Parties' relationship into one which is "integrated".²³⁹

The Union's integration of Tuvaluan values into the treaty aligns with Tuvalu's "values-based approach" to foreign policy,²⁴⁰ and advances several of the foreign policy objectives outlined in the Future Now Project.

233 Marinaccio, above n 6.

234 Falepili Union, above n 5, preamble.

235 Albanese and Natano, above n 7.

236 Marinaccio, above n 6.

237 Taukiei Kitara "Tuvalu's foreign policy and values" (6 August 2020) Devpolicy Blog from the Development Policy Centre <www.devpolicy.org>.

238 TFP 2020, above n 20, at [7.1.1].

239 Marinaccio, above n 6. See Falepili Union, above n 5, preamble and art 1(a).

240 TFP 2020, above n 20, at [8.2.1]; and Marinaccio, above n 66.

The first initiative of the Future Now Project involves promoting "the ethical and moral principles reflected in Tuvaluan cultural values so that these values will influence other nations and peoples".²⁴¹ In particular, the Project identifies *falepili* and *kaitasi* as Tuvaluan cultural values which will "motivate others to understand their shared responsibility to address international issues like climate change".²⁴²

The Union's integration of Tuvaluan values also aligns with the TFP's objectives.²⁴³ The TFP "seeks to promote a values-based approach" to foreign policy "rooted in Tuvaluan culture".²⁴⁴ Marinaccio explains that, with the TFP, Tuvalu has sought to interweave "Tuvaluan values into the practice of international relations".²⁴⁵

The TFP, at [7.1], declares the two all-encompassing cultural values of *falepili* and *kaitasi* are "uniquely suited to guiding international relations in today's interconnected world".²⁴⁶ As such, the TFP seeks to promote these values in all foreign policy activity undertaken by the Tuvaluan Government.²⁴⁷ Moreover, at [9.2.1], the TFP states that any efforts to enhance existing bilateral relations should also "align with TFP goals and Tuvaluan values".²⁴⁸

Given this, the integration of Tuvaluan values into the Union, a bilateral treaty with Australia, goes some way to advancing these objectives.

Finally, the Union's integration of Tuvaluan values also aligns with its supreme law. The preamble of the 2023 Constitution declares that "the People of Tuvalu ... desire to constitute [themselves] as a free and democratic sovereign nation based on Christian Principles, Tuvaluan values and culture and the Rule of Law".²⁴⁹ Under the Principles of the Constitution, which follows the preamble, it is acknowledged that "Tuvalu must take its rightful place amongst the community of nations". However it is also made clear that the people of Tuvalu recognise and affirm that the:²⁵⁰

241 Ministry of Justice, Communication and Foreign Affairs, above n 122.

242 Ministry of Justice, Communication and Foreign Affairs, above n 122.

243 Marinaccio, above n 6.

244 TFP 2020, above n 20, at 2.

245 Marinaccio, above n 6.

246 TFP 2020, above n 20, at [7.1].

247 Jess Marinaccio "Oceanic diplomacy and foreign-policy making in Tuvalu: a values-based approach" (2024) 45 *Third World Quarterly* 548 at 559.

248 TFP 2020, above n 20, at [9.2.2].

249 Constitution of Tuvalu Act, preamble.

250 Preamble.

... stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition ...

In summary, the integration of cultural values into the Union reflects the constitutional emphasis on Tuvaluan culture and values, and advances Tuvalu's efforts to interweave these into its foreign policy.

V LOOKING TO THE FUTURE: POSSIBLE AMENDMENTS TO THE UNION

Overall, the Union can—and should—be seen as a success story for Tuvalu. Tuvalu has advanced several of its foreign policy objectives and has pushed Australia to take a stronger position on issues of importance for Tuvalu and the Pacific. That said, the Union has shortcomings. Should Tuvalu wish to revisit the Union in the future, there are two key amendments that should be explored to better reflect the Parties' expressed intent.

First, Tuvalu should seek to have all references to traditional security concerns in the Union removed. These provisions are of little to no benefit to Tuvalu (as it is largely unaffected by traditional security concerns).²⁵¹ Moreover, these provisions are inconsistent with Tuvalu's concrete security priorities, such as climate change, natural disasters, health, ocean management and protection, and transnational crime and border security.²⁵² In addition, the inclusion of these provisions in the Union detracts from the emphasis on Tuvaluan values of *falepili* and *kaitasi*.²⁵³ If the Union truly embodied *falepili*, it would not "come with strings attached".²⁵⁴ A true understanding of *falepili* "would have offered migration opportunities without the need for a security guarantee".²⁵⁵

Secondly, Tuvalu should seek to have art 4(4) removed. This provision requires Tuvalu to "mutually agree" with Australia on any security partnership, arrangement or engagement it may wish to enter into with another state.²⁵⁶ This provision has been criticised as compromising Tuvalu's sovereignty.²⁵⁷ The Explanatory Memorandum attempts to alleviate these concerns by stressing that

251 TFP 2020, above n 20, at [7.4].

252 At [12].

253 Kitara and Farbotko, above n 15.

254 Moore, above n 13, at 296.

255 At 296.

256 *Falepili Union*, above n 5, art 4(4).

257 See Jess Marinaccio "Tuvalu's parliament debates the *Falepili Union*" (28 November 2023) Devpolicy Blog from the Development Policy Centre <www.devpolicy.org>; Radio New Zealand "Australia-Tuvalu *falepili union* 'shameful'—former Tuvalu PM" (27 November 2023) RNZ <www.rnz.co.nz>; Moore, above n 13, at 296; and Herr, above n 217.

art 4(4) would apply only in a "narrow set of circumstances".²⁵⁸ However, the scope of the clause remains largely unclear. In particular, it is unclear whether art 4(4) is solely intended to "head off any potential security arrangements between Tuvalu and China" or whether the scope of the agreement goes further.²⁵⁹ To avoid any confusion and to better reflect Tuvaluan interests, the removal of art 4(4) should be sought.

VI CONCLUSION

In the flurry of news articles, think pieces and blog posts released in response to the announcement of the Union, commentators were quick to praise the Union as "innovative", a "world-first" and "unprecedented",²⁶⁰ while at the same time they were quick to criticise Australia for being "neocolonial" and "transactional" in its dealings with Tuvalu.²⁶¹ Throughout all these discussions, what was overlooked was the significant work that Tuvalu had undertaken for many years that ultimately led to the creation of the Union.

This article has challenged the dominant discourse surrounding the Union and its emphasis on the role of Australia and its interests. This emphasis has largely ignored Tuvalu's agency in the creation of the Union, and the advancement of Tuvaluan foreign policy and climate-related interests.

With the Union, Tuvalu has achieved its goal of acquiring bilateral recognition of Tuvalu's permanent statehood, realised its longstanding desire to establish a climate-related migration pathway to Australia (while still voicing its preference for in situ adaptation), obtained endorsement of an "expanded concept of security" and successfully integrated Tuvaluan values into a binding bilateral agreement. In short, the Union has been years in the making. While far from perfect, with the Union, Tuvalu has accomplished several of its longstanding objectives. It is to Tuvalu's credit that it was able to secure such an arrangement.

Tuvalu has been faced with an unthinkable question: what is the appropriate course of action for a country to take, when faced with the loss of all its land to rising tides? With the Falepili Union, it has provided its answer.

258 Panapa and Wong, above n 107, at 3.

259 Stephen Dziezic "Australia, Tuvalu lay out terms of landmark climate and security pact" (9 May 2024) ABC News <www.abc.net.au>.

260 Kucharski, above n 8; Pat Conroy "The Falepili Union: A Pacific response to the greatest global challenges" (28 August 2024) The Lowy Institute <www.loyyinstitute.org>; and Clarke and Howes, above n 145.

261 Marinaccio "Tuvaluan values or Australian interests?", above n 6; and Kitara and Farbotko, above n 12.

