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## Climate Law and Litigation Blog – Issue No. 3 (2026)

### Falepili Union Treaty and Statehood of De-territorialised States

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Inspired by the concept of *Falepili*, that is the traditional value of good neighbourliness, duty of care and mutual respect<sup>1</sup>, Australia and Tuvalu recently entered into the Falepili Union Treaty ('FUT').<sup>2</sup> This is the first treaty of its kind, addressing the relations between a small island developing State ('SID') facing the threat of inhabitability or complete submergence due to climate change induced sea-level rise, and a third State. The immediate concern of SIDs is the protection of persons, their culture and identity and continuation of statehood despite de-territorialisation. FUT represents a significant progress towards the protection of persons, their culture and identity through climate cooperation, whereby the parties agree to provide necessary support to allow the people of Tuvalu to stay in their homes with safety and integrity.<sup>3</sup> Equally, Australia has undertaken the obligation to "arrange for a special human mobility pathway for citizens of Tuvalu to access Australia which shall enable citizens of Tuvalu to: (a) live, study and work in Australia; (b) access Australian education, health, and key income and family support on arrival."<sup>4</sup> Australia has become the first State to host people displaced due to sea-level rise. The arrangement ushers a future with social and economic security for Tuvalu citizens.<sup>5</sup> Movement of up to 280 people each year with freedom of unlimited travel is envisaged under the treaty. This is the most extensive access providing for rapid access and integration of Tuvalu citizens into Australia, as compared to the arrangements with people from other States in the Pacific.<sup>6</sup> The arrangement for human mobility with dignity can address the concern of statelessness, persons from SIDs may face due to de-territorialisation – an issue expressed with concern by the International Law Commission ('ILC') and the International Law Association ('ILA') in their study reports and by scholars.

The noteworthy achievement of FUT is the acknowledgement of continuation of statehood and sovereignty of Tuvalu, despite its imperilling de-territorialisation. Through Article 2 (2) (b), both Australia and Tuvalu recognize that:



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“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”.

### Continuation of statehood: Whether a ‘union’?

Already in 2023, Tuvalu enacted a new constitution, *inter alia*, driven by the “imminent existential threat of Climate Change and sea-level rise to the security and survival of Tuvalu” and specifically declared that its statehood would remain in perpetuity, unaffected by the impacts of climate change or other causes that may result in the loss of physical territory.<sup>7</sup> This declaration accords with the demands of SIDs for continuation of statehood, as affirmed in the 2023 Pacific Islands Forum Declaration on the Continuity of Statehood, the Protection of Persons in the Face of Climate Change-related Sea-level Rise<sup>8</sup> and at other forums.<sup>9</sup> Statehood can ensure continuity of the cultural heritage of the people and the continuity of their identity. It is natural for SIDs to insist on continuation of statehood despite de-territorialisation. The recognition of this demand by a third State through a treaty is the affirmation of this demand, especially by a State willing to host the people of a potentially de-territorialised State.

The recognition of statehood of Tuvalu after de-territorialisation is proposed to be the rejection of the argument that absence of territory shall not result into loss of statehood, at least for de-territorialised States.<sup>10</sup> The recognition of continuation of statehood and the manner of the formulation of the treaty text of FUT can inspire future legal efforts bilaterally and multilaterally. At the moment, however, FUT does not address the manner in which the statehood could be exercised and enforced in the situation of the loss of territory.

The FUT starts out by stating that its purpose is to “establish a Falepili Union”.<sup>11</sup> The treaty does not provide anything further. In international law, a union can take various forms, including but not limited to merger and dissolution whereby one or more of the States joining the Union lose their identity as a State. Considering the consistent position of SIDs to protect their statehood, it is unlikely that they would prefer such an outcome. The silence of FUT on the nature of the union certainly does not mean that Tuvalu has lost its statehood. To the contrary, the specific reference to the continuation of its statehood indicates that the so-called union under FUT does not compromise statehood of Tuvalu.

Questions persist about the nature of the union. In international law, several types of union exist and the nature and implications of the union depend on the nature of the arrangement between the States that constitute the union. It is not possible to draw general conclusions from the fact of presence of a union.<sup>12</sup> The so-called establishment of a union is not indicative of the precise political relationship between Tuvalu and Australia. As the treaty presently stands, the union is limited to the free movement of persons, assistance in case of emergency and control of Australia over



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security and foreign policy of Tuvalu. It does not influence, either present or future statehood of Tuvalu and its relationship with Australia.

### **Practical arrangements for effectuating statehood: Path for future negotiations**

Since the globe does not have *terra nullis* to accommodate a de-territorialised State, SIDs will have to enter into arrangement with some States that would be in a position to host them. It is necessary to think of practical arrangements to preserve statehood despite de-territorialisation.<sup>13</sup>

The de-territorialised State and the host State may enter into an arrangement whereby a part of the territory of the host State would be transferred to the de-territorialised State through a sale or perpetual or long-term lease. This arrangement is not impossible, although ILC has declared it to be unlikely.<sup>14</sup> This is the most practical way to continue to exercise full sovereignty meaningfully. In such a situation, the location of the de-territorialised simply shifts to another location but all the powers associated with statehood and dependent on control over territory can be exercised. Limitations if any, will arise from the nature of the arrangement between the de-territorialised State and the hosting State. These limits will be very narrow and sometimes even absent based on the manner of transfer of territory.

All other situations, whereby the population of the de-territorialised State is hosted in a host State, demand novel and nuanced thinking based on practical considerations. In these situations, practical ways will have to be devised that would allow the de-territorialised State to retain statehood despite absence of territory. No doubt, as desired by the SIDs, statehood can continue, but it will have to adapt to the new situation. In other words, it would entail exercising all attributes of statehood except those contingent on effective control over territory. The often-cited examples of the Holy See and the Sovereign Order of Malta are an outcome of the treaty relationship between them and their host, the Italian Republic.<sup>15</sup> In the absence of effective control over territory, coupled with the prospect of not retrieving the territory in foreseeable future, appropriate arrangements with the host State are indispensable. Crawford's approach to statehood for de-territorialised States is practical and he calls them States for 'special reasons' and does not declare that under international law effective control over territory is inessential. ILA Committee adopts a similar practical approach.<sup>16</sup>

Multiple areas would arise while addressing the continuation of statehood in the absence of territory and exercising statehood on the territory of another State. The de-territorialised State and the hosting State will have to carefully negotiate these arrangements. Apart from negotiating these arrangements there is a need of necessary assurances for the continuation of those arrangements, either through guarantees or warranties provided by the hosting State and their monitoring to be undertaken by the international community. Three instances are discussed here:

First, the most important question is of control over the population of the de-territorialised State once they are in the host State. The possibility of dual control has been suggested in the studies of the ILC and ILA. In theory this is possible. In practice,

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it is necessary to identify the domains over which the de-territorialised State and the host State would exercise jurisdiction and control. There would be matters between the citizens of the de-territorialised State themselves or between citizens of de-territorialised State and the host State. The extent and limits of jurisdiction, after agreement between the de-territorialised State and the host State will have to be given effect to through appropriate legislations or regulations. The areas to determine may range from civil and criminal laws to issues of who will be able to exercise diplomatic protection and whether citizens under dual control would be treated as dual nationals or some other category. The treatment of citizens that accompany a government in exile in the host State can serve as guidance for these questions.

Second, SIDs have demanded continuation of their membership of United Nations and other international organisations despite loss of territory. SIDs can retain memberships and rights emanating thereby despite in the territory of another State. It is necessary that their freedom to exercise those rights is also maintained. Appropriate assurances from the host State would be necessary to allow them to independently exercise their rights arising from membership of United Nations and other international organisations.

Third, the existing treaties and future treaties will have to adapt to statehood in the absence of a territory. Questions remain as to the manner of enforcement and implementation that require effective control over territory. Due to their nature, certain types of treaties, such as security, military co-operation etc may require appropriate arrangements with the host State. FUT contains some provisions to this effect, which have been controversial and are addressed in the next section.

### **Arrangement without *quid pro quo*?**

Enthusiasm shall not make one ignore the practical underpinnings of arrangements between the potentially de-territorialised State and a host State. FUT alerts one to the *quid pro quo* for the arrangements of this kind. Experts claim that the geo-political constraints, efforts to retain influence in the Pacific and reduce the rising influence of China<sup>17</sup> are integral part of Australia's reasons to enter into the arrangement.<sup>18</sup> Article 4 of FUT on security and co-operation is cited as an example of compromising Tuvalu's statehood and sovereignty.<sup>19</sup> Indeed, in international law, the arrangement does not degrade from the status of statehood or sovereignty. Despite the constraints they impose on freedom of the State to conduct its affairs in the sphere of international relations, does not affect statehood for the purposes of international law.<sup>20</sup> Nevertheless, on the place of international relations they impact the position of the State and may compromise the freedom to exercise the attributes of statehood.

Article 4 gives 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" after prior consent of Tuvalu.<sup>21</sup> Since Tuvalu's prior consent is required, it does not pose serious challenges to the freedom of Tuvalu to exercise its sovereignty. However, Article 4 also provides that any partnership, arrangement or engagement that Tuvalu wishes to have with any other State on security on defence-related matters, shall be agreed mutually with Australia. The coverage of the matters related



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to security and defence “include but are not limited to defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure.”<sup>22</sup> This clause provides a broad range of areas. As a result of the securities arrangement and limits on conducting foreign relations, FUT also met with resistance from within Tuvalu.<sup>23</sup>

Putting aside the political motivations and consequences, the fact remains that there may be a *quid pro quo*: either apparent or not so apparent in arrangements between the potentially de-territorialised State and the host State. All the States facing the threat of de-territorialisation may not be able to provide anything in return for protection, except, probably, the rights over maritime areas, which may be retained post de-territorialisation. Or they may not be geo-strategically located making them attractive entities for engagement by States in a relatively stronger position than them.

For effective protection and avoiding abuse of the vulnerable position of SIDs in light of the imminence and gravity of the threat, efforts at multilateral forum, particularly in the UN: if not at a treaty, nevertheless in the form of General Assembly resolutions, shall ensure that SIDs get the protection and sufficient assurances or guarantees to preserve statehood and continue their operationalization. The assurances of the hosting State and enforcement of those assurances by the international community. If SIDs negotiate collectively, that may also strengthen their position in the world of *realpolitik*.

### Conclusions

FUT is a welcome first step towards recognition of statehood of SIDs facing potential de-territorialisation. FUT can certainly serve as a template for future negotiations. There is however, a lot more that needs to be done to ensure that statehood is retained and practically implemented with the changed circumstances of loss of effective control over territory. Apart from the agreement between the host and the de-territorialised States, appropriate assurances and guarantees are necessary and the international community will have to be involved in the process. The process may take the form of resolutions of the General Assembly to begin with, and multilateral treaty framework in the future.

### Footnotes:

1 Preamble, Australia-Tuvalu Falepili Union.

2 Prime Minister of Australia, “Entry into force of historic Australia-Tuvalu Falepili Union” (available: <https://www.pm.gov.au/media/entry-force-historic-australia-tuvalu-falepili-union>) (accessed: 5 September 2025).

3 Article 2, Australia-Tuvalu Falepili Union.



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4 Article 3, Australia-Tuvalu Falepili Union.

5 The Guardian, 'A climate crisis, a ballot, and a chance at a new life in Australia' 20 June 2025 (available at: <https://www.theguardian.com/environment/2025/jun/20/tuvalu-climate-crisis-australia-visa-ballot>) (accessed: 5 September 2025).

6 Jane McAdam, 'Fresh details emerge on Australia's new climate migration visa for Tuvalu residents. An expert explains' The Conversation, 10 April 2025 (available: <https://theconversation.com/fresh-details-emerge-on-australias-new-climate-migration-visa-for-tuvalu-residents-an-expert-explains-254195>) (accessed: 5 September 2025).

7 Article 2 (1), The Constitution of Tuvalu Act 2023 (available: [https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/1986-0001\\_2.pdf](https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/1986-0001_2.pdf)) (accessed: 5 September 2025).

8 Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise, 9 November 2023. Available at <https://forumsec.org/publications/reports-communique-52nd-pacific-islands-leaders-forum-2023>.

9 For a summary of these statements see International Law Commission, 'Sea-level rise in relation to international law: Additional paper to the second issues paper (2022) by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law', pp. 7-11.

10 For summary of the arguments and latest literature see Alex Green and Douglas Guilfoyle, 'The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Fact of Anthropogenic Climate Change' (2024) 118 AJIL 684, 694-695.

11 Article 1 (a), Australia-Tuvalu Falepili Union.

12 James R Crawford, *The Creation of States in International Law* (2nd edn: Oxford University Press, 2007), pp. 479-81.



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13 For an overview of different alternatives see ILC, Second Issues Paper (note 12), pp. 49-56.

14 See *ibid*, p. 49.

15 Robert Jennings and Arthur Watts, *Oppenheim's International Law* (vol I, 9th edn: Oxford University Press, 2008), pp. 327-329; Crawford (note 12), pp. 221-233; Federico Marti, 'Short Notes on the International Status of Sovereign Order of Malta under International Law. Functional Limits and Dependence upon the Holy See in the light of the New Constitution of 3 September 2022' (2023) 9 *Stato, Chiesa E Pluralismo Confessionale* 73, 76-79.

16 International Law Association, 'Lisbon Conference (2022): International Law and Sea Level Rise' pp. 22-25.

17 Euan Graham and Bec Shrimpton, 'The defence and security implications of the Australia–Tuvalu treaty', *The Strategist*, 23 November 2023 (available at: <https://www.aspistrategist.org.au/the-defence-and-security-implications-of-the-australia-tuvalu-treaty/>) (accessed: 5 September 2025).

18 Green and Guilfoyle (note 10), 688-691.

19 John Braddock, 'Australia strikes neo-colonial "security" pact with Tuvalu to counter China in Pacific' 13 November 2023, *World Socialist Website* (available at: <https://www.wsws.org/en/articles/2023/11/13/vouf-n13.html>) (accessed: 5 September 2025).

20 Green and Guilfoyle (note 10), 698-702.

21 Article 4 (3), Australia-Tuvalu Falepili Union.

22 Article 4 (4), Australia-Tuvalu Falepili Union.



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23 For a summary of the debates see Green and Guilfoyle (note 10), 685.

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