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Dear Committee Secretary,

### **Submission on the Australia–Tuvalu Falepili Union**

As the Director of the Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney, I am pleased to provide a short submission relating to the *Australia–Tuvalu Falepili Union* ('treaty').

The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

A core area of the Centre's areas of expertise is mobility in the context of climate change and disasters. I have led and participated in key policy processes at the international, regional and national levels on climate mobility, including as the lead drafter of the initial text of the *Pacific Regional Framework on Climate Mobility* (adopted by Pacific Leaders in November 2023). As such, this submission primarily addresses the human mobility aspects of the treaty.

#### *Special human mobility pathway (article 3)*

Article 3 of the treaty provides that Australia will create a special visa arrangement to allow Tuvaluan citizens to live, study and work in Australia. It will allow up to 280 Tuvaluans per annum<sup>1</sup> (from a population of around 11,200) to migrate to Australia if they so choose –

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<sup>1</sup> Prime Minister Anthony Albanese, '[Strengthening Regional Ties through the Pacific Islands Forum](#)' (Media release, 10 November 2023).

presumably on a permanent basis. They will be able to access Australian education, health, and key income and family support on arrival.

In my view, the mobility provision is a welcome development that will provide people with both legal and psychological security. Our region is already experiencing some of the most drastic effects of climate change. Pacific communities are showing enormous innovation and resilience in the face of these challenges, but as a matter of international solidarity and climate justice, additional support and cooperation is needed.

To be clear, this is not a protection visa: rather, it provides a 'special human mobility pathway' for people to migrate which falls outside the standard skills, education, family and humanitarian schemes.

Furthermore, the visa is not contingent on people experiencing the adverse impacts of climate change and disasters: it could be utilized by anyone wishing to move for any reason. However, the impacts of climate change are implicit in its creation.<sup>2</sup> That is why I have described it as the world's first bilateral agreement to create a dedicated mobility pathway in the context of climate change.<sup>3</sup>

Even so, scholars Taukiei Kitara and Carol Farbotko sound an important note of caution:

The treaty should not be interpreted as an indication that the worst-case scenario has arrived or is imminent. An additional migration pathway is simply another way in which Tuvaluan people can diversify their livelihood options and access more resources for tackling climate change, such as by increased remittances and the gaining of skills through increased education and training opportunities. We expect the new migration pathway to Australia to operate circularly for many of those who do take it up, a continuation of participation by Tuvaluan workers in offshore employment over many decades: in the mines of Nauru and Banaba, in commercial seafaring, and in the labour mobility schemes of Australia and New Zealand.<sup>4</sup>

#### *Why are migration pathways important for the Pacific?*

In the context of climate change, migration can be a crucial form of adaptation and a long-term risk management strategy.<sup>5</sup> This is reflected in multiple frameworks, including the *Global Compact for Safe, Orderly and Regular Migration* (which commits States to considering the development of 'coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters'<sup>6</sup>) and the *Agenda for Sustainable Development* (which calls on States to '[f]acilitate orderly, safe, regular and

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<sup>2</sup> While article 3 itself does not reference climate change, it is implicit in article 2 and the Preamble.

<sup>3</sup> Jane McAdam, '[Australia's Offer of Climate Migration to Tuvalu Residents is Groundbreaking – and Could Be a Lifeline Across the Pacific](#)', *The Conversation* (11 November 2023).

<sup>4</sup> Taukiei Kitara and Carol Farbotko, '[This is Not Climate Justice: The Australia-Tuvalu Falepili Union](#)' (Toda Peace Institute, 13 November 2023).

<sup>5</sup> See eg Nansen Initiative on Disaster-Induced Cross-Border Displacement, [Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change](#), vol 1 (2015), paras 76–93, 117–20. As the *Kaldor Centre Principles on Climate Mobility* state: 'Well-managed migration pathways can facilitate adaptation and relieve pressure on affected communities, potentially averting future displacement': see Jane McAdam and Tamara Wood, [Kaldor Centre Principles on Climate Mobility](#) (2023), Principle 4.

<sup>6</sup> [Global Compact for Safe, Orderly and Regular Migration](#), UNGA Res 73/195 (19 December 2018), Objective 2, para 18(I).

responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'<sup>7</sup>).

The *Pacific Regional Framework on Climate Mobility*, adopted by Pacific Leaders in November 2023, recognizes 'the critical role that rights-based migration – whether internal or cross-border – can play in enabling people to move safely and on their own terms in the context of climate change',<sup>8</sup> including to enable 'Pacific people to access, health, alternative livelihoods, develop new skills, build networks and remit money back home.'<sup>9</sup> The *Kaldor Centre Principles on Climate Mobility* expressly recommend that States '[e]stablish or expand targeted migration pathways, bilateral agreements and/or regional frameworks that facilitate migration as an adaptation tool for communities most at risk in the context of climate change and disasters';<sup>10</sup> the treaty is an example of this.

Based on the principles of 'good neighbourliness, duty of care and mutual respect' (Preamble),<sup>11</sup> the treaty purportedly stemmed from a request by the government of Tuvalu to support and assist its efforts on climate change, security and human mobility. It follows perennial requests for special visa pathways or relocation to Australia made by Pacific governments over the past two decades.<sup>12</sup>

That said, most Pacific peoples do not want to leave their homes.<sup>13</sup> Pacific identities are deeply enmeshed with land and sea, and being dislocated from home is one of the greatest forms of loss and damage that people can suffer, leading to financial and cultural losses, as well as intergenerational trauma. This is recognized in article 2 of the treaty, which acknowledges '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 the parties' joint 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' (article 2). Importantly, the treaty also explicitly recognizes Tuvalu's continuing statehood and sovereignty 'notwithstanding the impact of climate change-related sea-level rise' (article 2).<sup>14</sup>

Kitara and Farbotko argue that whether or not migration to Australia will substantially benefit the Tuvaluan people

will depend on a range of factors, including the Tuvaluan diaspora community in Australia having access to resources to sufficiently support new arrivals; the extent to which issues such as brain drain in Tuvalu are successfully managed; and equitable access to the migration pathway for the most vulnerable.<sup>15</sup>

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<sup>7</sup> [Transforming Our World: The 2030 Agenda for Sustainable Development](#), UNGA Res 70/1 (25 September 2015), Target 10.7.

<sup>8</sup> *Pacific Regional Framework on Climate Mobility*, para 28, Annex C to the Pacific Islands Forum, [Forum Communiqué](#) (52nd Pacific Islands Forum, November 2023).

<sup>9</sup> *Ibid*, para 29.

<sup>10</sup> *Kaldor Centre Principles* (n 5) Principle 4 rec (g).

<sup>11</sup> For a critique of this, see Taukiei Kitara and Carol Farbotko, '[Tuvalu, Australia, and the Falepili Union](#)', *Australian Outlook* (Australian Institute of International Affairs, 24 November 2023), who argue that 'falepili is an act of giving to neighbours without expecting anything in return. ... Demanding the handover of sovereign decision-making capability in exchange for migration rights reads more like an ultimatum, not a friend helping those in need'.

<sup>12</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 144–46.

<sup>13</sup> For Tuvalu specifically, see Kitara and Farbotko (n 4).

<sup>14</sup> See also 2023 *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 *Forum Communiqué* (n 8).

<sup>15</sup> Kitara and Farbotko (n 11).

In particular, they note that the very small Tuvaluan diaspora community in Australia may struggle to assist 280 new arrivals each year without considerable support. They also query what support will be provided to nurture Tuvaluan culture within Australia.<sup>16</sup>

*How does the treaty's mobility pathway differ from existing ones for the Pacific?*

There are a range of existing mobility streams for Pacific peoples, but the treaty will operate differently from these other arrangements.

For example, New Zealand's special relationship with its 'realm' nations of Niue, Tokelau and the Cook Islands means that people from those countries are New Zealand citizens and can move there if they wish to do so. The United States' [Compacts of Free Association](#) with the Marshall Islands, the Federated States of Micronesia and Palau enable eligible citizens of those countries to enter the United States visa-free and live and work there indefinitely. However, those who move do not have access to many government benefits and can easily 'fall through the cracks'.

In terms of migration pathways, New Zealand has long had its [Pacific Access Category](#) and [Samoa Quota Resident Visa](#) schemes which together enable around 2,400 people to move from the Pacific to New Zealand on a permanent basis each year. Australia recently created a similar visa, the [Pacific Engagement Visa](#), which will enable workers and their families from the Pacific and Timor-Leste to move to Australia permanently.<sup>17</sup> By contrast, the treaty does not tie mobility to work opportunities: on its face, it provides a pathway for anyone who wishes to move, including older people, who would not qualify for existing Pacific schemes.

*(Lack of) consultation within Tuvalu*

It is important to acknowledge the significant concern within the Tuvaluan community about the lack of consultation about the treaty prior to its announcement last November,<sup>18</sup> despite the (then) Tuvaluan Prime Minister's assurances that he had consulted with the community.<sup>19</sup>

There was particular community concern about the security provision in the article 4(4) of the treaty, which requires Tuvalu to 'mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-related matters'. This has been said to come 'at a significant cost to Tuvalu's sovereignty' because 'Australia has acquired veto power over Tuvalu's security interests going forward'.<sup>20</sup>

According to former Prime Minister, Enele Sopoaga:

In effect Tuvalu has given away its future to Australia. Australia continues to export coal at an alarming rate and this agreement is now placed to buy Tuvalu's silence

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<sup>16</sup> Ibid.

<sup>17</sup> See further Stephen Howes and Athaulla Rasheed, '[How to Enter the Pacific Engagement Visa Ballot](#)', *Devpolicy* blog (20 April 2024).

<sup>18</sup> Kitara and Farbotko (n 4); Lydia Lewis, '[Ex-Tuvalu PM Running for Office in 2024 Will "Throw Away" Falepili Treaty](#)', *RNZ* (29 November 2023); Jess Marinaccio, '[Tuvalu's Parliament Debates the Falepili Union](#)', *Devpolicy* blog (29 November 2023).

<sup>19</sup> Prime Minister Kausea Natano: 'Yes, all the people of Tuvalu are looking forward to this Treaty and also looking forward to working together with Australia. ... '[O]ur eminent persons group did really good research and consultation with our people to come up with a strong message and also arguments that Australia can consider from their end. And definitely the eminent group did a really good job that the Cabinet endorsed before we propose an approach to the Government of Australia.' See '[Transcript, Press Conference – Rarotonga, Cook Islands](#)' (10 November 2023).

<sup>20</sup> Kitara and Farbotko (n 11).

against these coal exports. It basically says that we don't care if Tuvalu disappears, we will be able to live in Australia. This is shocking, a complete divestment of national interests. A classic example of neo-colonialism.<sup>21</sup>

Sopoaga also expressed concerns about the mobility provision (article 3), but they seemed to relate to a misapprehension of its nature and purpose: it is neither framed nor conceived of as a 'refugee' pathway.<sup>22</sup>

### *Dual citizenship and franchise*

There are no safeguards in the treaty for dual nationality or ongoing franchise (voting rights) for Tuvaluans who move to Australia.<sup>23</sup> While both Australia and Tuvalu permit dual nationality, Tuvalu may revoke the citizenship of a naturalized citizen if they do not intend to make Tuvalu their permanent home.<sup>24</sup> Furthermore, if Tuvaluans wish to vote in Tuvalu's elections, they must return home to do so.<sup>25</sup> This would impose a financial and practical barrier for many, in practice depriving them of the opportunity to vote.

Domestic laws governing the loss, retention, and acquisition of nationality, and the right to vote externally, will determine the extent to which people from Tuvalu can maintain their formal legal connection to home. If Tuvaluans in Australia risk losing their nationality, and/or cannot vote from abroad, this could have profound implications over time for Tuvalu's retention of its 'population' and 'government',<sup>26</sup> which are core elements of statehood.

While these issues are primarily a matter for the government of Tuvalu to resolve, they are relevant to Australia's commitments under the treaty. Article 2 of the treaty commits both parties 'to work together in the face of the existential threat posed by climate change' and to ensure that 'the statehood and sovereignty of Tuvalu will continue'. Australia should encourage Tuvalu to review its domestic nationality and franchise laws, and offer financial and technical support to facilitate external/absentee voting.

### *Recommendations*

Providing migration pathways and humanitarian grounds for admission and stay is crucial. It is part of the toolbox of responses needed to address climate mobility in all its forms. Pacific peoples need dignified pathways to move, when they so wish, as well as support and assistance to remain in place, when they so wish. At all times, the choice, agency and dignity of affected communities must be front and centre. For these reasons, I support the special human mobility pathway in the treaty.

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<sup>21</sup> Enele Sopoaga, '[Australia–Tuvalu Falepili Union “Shameful” – Former Tuvalu PM](#)', *RNZ* (23 November 2023).

<sup>22</sup> *Ibid.*

<sup>23</sup> As a matter of international law, these are of vital importance for Tuvalu's ability to retain a population and government over the longer term. See further Jane McAdam, 'Preserving Statehood through Population and Government: Safeguarding Nationality and Franchise in the context of Sea-Level Rise and Mobility' (2022) 20 *New Zealand Yearbook of International Law* (forthcoming 2024); Michelle Foster, Nicola Hard, Hélène Lambert and Jane McAdam, [The Future of Nationality in the Pacific: Preventing Statelessness and Nationality Loss in the context of Climate Change](#) (Kaldor Centre for International Refugee Law, Peter McMullin Centre on Statelessness and UTS, 2022).

<sup>24</sup> [Citizenship Act 2008](#) (Tuvalu) ss 6(4), 7(6); Foster and others (n 23) 23.

<sup>25</sup> See Foster and others (n 23) 31.

<sup>26</sup> See Bruce Burson, Walter Kälin and Jane McAdam, '[Statehood, Human Rights and Sea-Level Rise: A Response to the International Law Commission's Second Issues Paper on Sea-Level Rise in relation to International Law](#)' (2021) 4 *Yearbook of International Disaster Law* 265, 272–73; McAdam (n 23).

However, some further clarifications would be welcome:

1. It is not explicit in the treaty text whether people who move would acquire permanent residence (leading to citizenship). Ideally, this would be expressly stated; at the very least, it must be clear in subsequent law and policy.
2. It is unclear what access to Australian education, health, and key income and family support Tuvaluan migrants would receive beyond 'arrival'. It is essential that such assistance is available to those who need it over the longer term, especially since Tuvaluans in Australia will likely be a core source of support for subsequent groups of migrants. This relates to point 1 above: if the mobility pathway results in permanent residence (and, in due course, citizenship), then access to entitlements is clearer.
3. The lack of safeguards in the treaty for dual nationality and external/absentee voting for Tuvaluans who move to Australia should be given further consideration, especially in light of article 2.

Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely,

Professor Jane McAdam AO