

## Indigenous values in international law and politics: The perpetual state of Tuvalu

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**Abstract:** A South Pacific low-lying atoll state Tuvalu has taken innovative steps to secure its continuous statehood against the existential threat of climate change, by combining Indigenous cultural values and knowledge with an innovative interpretation of existing international law. This paper examines Tuvalu's new foreign policy and the 2023 constitution amendments in the context of the modern state system from the perspective international law and Tuvaluan and Pacific relational cosmologies, analysing how traditional values and principles, as well as the Oceanian worldview, have been introduced into Tuvalu's foreign affairs and constitutional law to ensure the state's existence in 'perpetuity'. By uniquely combining relational cultural values as well as Christian political theology with the modern state, Tuvalu is attempting to guarantee its continuous statehood and sovereign rights, even if the worst-case scenario – a complete inundation of land – becomes a reality.

**Keywords:** Indigenous values, international law, political theology, relational cosmology, small state, small island state, sovereignty, statehood, Tuvalu

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### Introduction

Our right as the people of Tuvalu both present and future, to a full, free and secure life, and to moral, spiritual, personal and material welfare, is affirmed as one given to us by God. (The Constitution of Tuvalu, 2023, p. 10).

Tuvalu, Kiribati and the Marshall Islands in the Pacific, as well as the Maldives in the Indian Ocean, are low-lying atoll states. They have become global symbols of rising seas and the fight against the adverse, irreversible impacts of climate change. An increasing amount of literature in law, international relations, political geography and migration studies, to mention but few fields, have looked at the prospects of these communities in the face of climatic existential threat. Solutions proposed by politicians and academics vary from the migration with dignity (Tong, 2016) to statehood *ex-situ* (Burkett, 2011). Meanwhile, the island countries themselves are looking at ways in which they could utilise existing frameworks of international law and evolving state practice to protect their future as sovereign entities and guarantee the rights of their people (ILC, 2023; PIFS, 2021; PIFS, 2023; Strating and Wallis, 2022).

In 2020, Tuvalu published *Te Sikulagi*, a new ambitious foreign policy in which the government introduced its plans to ensure the continuity of the Tuvaluan state, now threatened by rising seas. Facing various challenges due to global warming – sea level rise, increased likelihood and intensity of severe weather events such as cyclones and droughts, saltwater intrusion and coastal erosion – the country of merely 11.000 inhabitants is preparing for the 'worst-case scenario'; the inundation of its entire landmass to the ocean and the forced relocation of its population (Kofe, 2021). The values such as communality (*olaga fakafenua*),

shared responsibility (*kaitasi*) and being a good neighbour (*fale pili*) are enshrined in *Te Sikulagi*, which thereby ‘indigenises’ the country’s approach to foreign affairs (Kitara et al., 2024, p. 2). As a step further, the constitutional reform of 2023 crystallises the centrality of the Indigenous values of Tuvaluan society by recognising the balancing act required between universal human rights constructed in the Western individualistic terms, and Tuvalu’s community-based culture (Kofe and Mariccio, 2023). Furthermore, the 2023 constitution responds to the challenge of the worst-case scenario by declaring the state of Tuvalu ‘*perpetual*’. This can be construed as a controversial statement because, while the *continuity* of the state is *assumed* by international law, declaring the state *perpetual* suggests something more profound; and something that deserves further investigation.

To understand the proposal of the perpetuity of the Tuvaluan state, one must unpack the relational hermeneutics and political theology underlining it, as well as critically evaluate how the principles such as *feitutolu*, the mutual connectedness of spiritual and secular (Lusama, 2022, p. xxviii), can operate within the modern world of international politics and law. The aim of this paper is to explore how the Indigenous concepts, values and norms expressed in both the foreign policy and the 2023 constitution can be considered compatible with the norms of an arguably secular international legal order. Here, the author must acknowledge her positionality as a non-Tuvaluan, non-Pacific islander and scholar, who merely lives in and learns from the region as an international political theorist educated in the West. Any misreading of these cultural concepts and values remains the sole responsibility of the author, and she claims no ownership or expertise in a deeper understanding of these ideas. To minimise the risk of misunderstanding, references are made throughout this paper to the Pacific scholars from Tuvalu and the region. The paper derives from a deep appreciation of Oceanian philosophy and cosmology of which the author herself is a mere student.

The paper continues as follows: the first section discusses the 2020 *Te Sikulagi* foreign policy, and an accompanying *Te Ataeao Nei Project* (Future Now) as pathways to constitutional reform. The second section looks at the 2023 constitution and particularly the ways in which it establishes the perpetuity of Tuvalu in the face of climatic existential threats to the sovereignty and territorial integrity of the state. The third section looks at the perpetuity of the state from the perspective of two principles of international law: the presumed continuity of statehood and the right to self-determination. Here, the idea of the perpetual state is compared with the modern legal order to highlight the uniqueness of articles in Tuvalu’s constitution. In the fourth and final section, the paper discusses Tuvaluan (Pacific) relational ontology, hermeneutics and theology, proposing ways in which these are compatible with – and complimentary to – Western concepts of statehood and sovereignty at a time of climate-related existential threats.

### **Tuvaluan values: the ethical foundations of new foreign policy**

The first steps on a new, bold path were taken by Tuvalu in the 2020 foreign policy *Te Sikulagi*. According to this government document, Tuvalu’s foreign policy is based on the idea of multilateralism and guided by three ‘main agendas that highlight consensus and *global well-being* rather than competition and self-interest’ (Department of Foreign Affairs, 2020, p. 2, emphasis added). According to the policy, this approach is ‘(1) values-based, (2) region-oriented, and (3) future-looking’ (*ibid.*). Importantly, the new foreign policy is explicitly based on Pacific cultural heritage and values such as the appreciation of communal context, political decision-making built on consensus, and the Christian faith (*ibid.*, pp. 2-3). Furthermore, the foreign policy is region-oriented with aspirations to build strong institutions supporting the Blue Pacific Continent (PIFS, 2022) as well as future-looking with its preparedness for

forthcoming challenges, whether these are pandemics or climate-induced disasters (Department of Foreign Affairs, 2020, p. 3).

In terms of security, *Te Sikulagi* maintains that while Tuvalu is not facing many traditional security concerns (such as armed conflict or terrorism), there are other existential threats that the country must be prepared for. As stated in the policy, to comprehensively protect the people of Tuvalu from threats such as climate change, pandemics and environmental harm – which all ‘threaten the security and prosperity of the Tuvaluan people’ – the country is committed to provide protection to citizens at home and abroad as well as to ensure the territorial integrity of the nation (Department of Foreign Affairs, 2020, p. 12).

Importantly, *Te Sikulagi* stipulates that ‘Tuvalu insists 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’ (Department of Foreign Affairs 2020, p. 16, emphasis mine). It is this paragraph that is crucial for the following analysis, together with the acknowledgement of climate change as the single greatest existential threat of the country in line with the several declarations made by the Pacific Islands leaders (Department of Foreign Affairs 2020, p. 22; PIFS, 2018; 2021; 2023).

As stated in the policy:

Tuvalu *insists* that its *statehood must be recognised* and respected regardless of whether its *population is displaced*, or it *loses land territory* due to climate change (Department of Foreign Affairs, 2020, p. 22, emphasis mine).

The next steps on Tuvalu’s path to secure its continuous existence as a state were taken with the launch of *Te Ataeao Nei Project* (Future Now) in October 2021. The purpose of the project, as explained by the then Foreign Minister Simon Kofe, is to take a proactive stance towards the worst-case-scenario in terms of sea level rise: the physical disappearance of Tuvalu’s landmass by inundation (Kofe, 2021). *Te Ataeao Nei* is based on four initiatives, all designed to guarantee the continuity of Tuvalu as a state and the rights of Tuvaluans as a political community.

The first is the promotion of diplomacy and foreign policy based on Tuvaluan values of *olaga fakafenua* (communal living systems), *kaitasi* (shared responsibility), and *fale pili* (being a good neighbour). These, according to *Te Ataeao Nei*, provide the foundation for motivating the world to take a firm action against climate change.

The second and third initiatives are more pragmatic and aim at answering the worst-case-scenario in practice by providing guidelines for future political action.

The second initiative is to engage with *all* domestic, regional and international legal measures to ensure that ‘Tuvalu’s existing maritime boundaries and claims will remain intact, and Tuvalu will still be recognised as sovereign’. These include seeking a *bilateral recognition* from other states of Tuvalu’s permanent existence, as well as supporting regional initiatives such as the Pacific Islands Forum’s (PIF) declaration to secure maritime boundaries (Kofe, 2021). In 2021, PIF – a regional body of South Pacific Island states, Australia and New Zealand – published the *Declaration on preserving maritime zones in the face of climate change-related sea-level rise*. Acknowledging that the consequences of sea level rise were not considered when the United Nations Convention on the Law of the Sea (UNCLOS) was originally negotiated,

PIF recalls the rights of island states to their maritime entitlements and calls for urgent collective action to secure them. According to the PIF *Declaration*, UNCLOS ‘imposes no affirmative obligation to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations’ (PIFS, 2021). A controversial (e.g. Kitara, 2024) *Falepili Union Treaty* between Australia and Tuvalu, similarly, acknowledges that:

the statehood and sovereignty of Tuvalu *will continue... notwithstanding* the impact of climate change related sea level rise (Australia-Tuvalu Falepili Union Treaty, 2023, emphasis mine).

The third initiative of *Te Ataeao Nei* is the development of a ‘digital nation’ which, according to Kofe:

would involve creating a digital government administrative system that could, in the very worst-case scenario, allow Tuvalu to shift its government operations to another location and continue to fully function as a sovereign state (Kofe, 2021).

The digital nation refers to both governmental capacities and the state as an institution. In addition to preserving the functions of the state, such a digital nation would also entail historical archives that preserve important elements of cultural heritage.<sup>1</sup> Through these digitalised resources, the country ‘could ostensibly shift to another location and continue to fully function as a sovereign nation’ (Department of Foreign Affairs, 2021). The third initiative also includes establishing the domain DotTV to provide not only for the digital existence of the state but also revenue for the future (Department of Foreign Affairs 2020, pp. 31-32).

Finally, the fourth initiative establishes a proactive climate policy, ensuring advocacy at regional and global levels across important sectors to promote ambitious international climate action.

Both *Te Sikulagi* and *Te Ataeao Nei* aim at preserving the state and collective identity of Tuvaluans in the case of inundation and relocation. Both policy documents provide not only innovative ways to interpret contemporary international law, as will be discussed in detail below, but also make a strong ethical argument for the value of preserving the communal identity of Tuvaluans as a people and the state of Tuvalu as a sovereign entity. Both initiatives are at the same time inward- and outward-looking, proposing domestic, international and regional policies while building on already-existing domestic adaptation initiatives such as the Tuvalu Climate Adaptation Project (TCAP).

Furthermore, what is crucially important regarding both *Te Sikulagi* and *Te Ataeao Nei* for the present analysis is the way in which both policy initiatives are indigenising the foreign policy of Tuvalu. The values expressed in these policy documents are foundational in the customary Tuvaluan way of life (Kitara et al. 2024) and reflect the relational hermeneutics of the Tuvaluan and Pacific worldview (*feitulagi*). *Olaga fakafenua* reflects the importance of *fenua*, Indigenous community, to the Tuvaluan way of life. As explained by Lusama (2022, pp. xxvii-xxviii, emphasis added), *fenua* in Tuvaluan is:

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<sup>1</sup> The distinction between the state and the government in relation to the digital nation, and the various intriguing aspects of the digital nation from the perspective of international politics and law, deserve further elaboration. As Tuvalu’s digital nation is still very much a work-in-progress, theoretical and practical commentaries will likely expand in the future. For an important opening on the subject, see Rothe et al. (2024).

not identical to similar Polynesian words that refer to land (*vanua*, *whenua*, *fonua*, *hanua*, etc.) but is derived from the Tuvaluan understanding, *which is not confined to “land”* as in a piece of land in the middle of the ocean, but is *inclusive* of the land, people, trees, animals, birds, rocks, the sea, fish, corals and so on. It also includes the spirits of the ancestors and *te Atua* [God].

While most Tuvaluans identify themselves as members of the *fenua* as the Indigenous homeland (Kitara et al., 2024, p. 7), the concept of *fenua* is holistic, inclusive and has a multidimensional meaning expanding beyond the physical territory. For our forthcoming discussion about the state and God in the 2023 constitution, it is important to note already here that *fenua* can also be ‘viewed as a space of mutual engagement, where *te Atua* moves into the *fenua*, and becomes part of the *fenua* (Lusama, 2022, p. xxviii).

*Fale pili*, in turn, relates to ‘looking after one’s neighbour as if they were family’ (Kitara et al., 2024, p. 8). As explained by Kitara (2020) – who here refers to the comments made by the Minister Kofe in relation to *Te Sikulagi* – *fale pili* has a deep and unique meaning for Tuvaluans that shapes everyday life (also Kitara et al., 2024, p. 8). In terms of foreign policy, *fale pili* emphasises a mutually respectful relationship between countries and it is no coincidence that *fale pili* was chosen as the name for the bilateral treaty between Tuvalu and Australia that values ‘good neighbourliness, duty of care and mutual respect (Australia-Tuvalu Falepili Union Treaty, 2023). While an indigenised approach to security and foreign affairs might seem ‘new’ in terms of contemporary international relations, it is ‘ancient if considering how *fale pili* has been practiced and valued in Tuvalu and throughout the Pacific through generations of ocean voyaging’ (Kitara et al., 2024, p. 9).

Finally, *kaitasi*, sharing everything amongst family members (Kitara, 2020), emphasises global responsibility at a time when the world is facing several existential threats from nuclear weapons to climate change. It envisions a world interconnected during these multiple crises and highlights the importance of unified urgent action. Underlining *kaitasi* is the concept of *relationality*, ‘the core foundational value that has been and continues to be the primary hermeneutical key to life and wellbeing in many people and spaces called the Pacific (Vaai, 2017, p. 17). In the Pacific cultures, ‘relationality encompasses most if not all of life’ (*ibid.*, p. 27). As explained by Vaai (2017, p. 26):

Because God is relational, everything is relational. All of life is an ‘assemblage of relationality’, meaning that it is structured according to relationality. The organisations, systems, social fabrics, land, ocean, people are all structured relationally. Relationality encompasses all. It creates harmony. It reciprocates love. It is not a system *per se*. It is life. All of reality is constituted by relationality, by dynamic flows of relationships in an infinite multiplicity of becoming.

Both *Te Sikulagi* and *Te Ataeao Nei* are deeply embedded in relational hermeneutics that emphasise familial relationships, community and responsibility to one another. At the same time, their focus is in securing the future of Tuvalu in the face of the worst-case climate scenario through proposing ways of ensuring the continuity of the Tuvaluan state. What is unique about both policy iterations is that they are not focused on different relocation alternatives in response to climate change – and therefore differ, for instance, from the former i-Kiribati President Anote Tong’s idea of migration with dignity. Instead, they call for local, international and regional action that could guarantee the possibility of remaining. As illustrated by several authors

studying (im)mobility in the Tuvaluan and Pacific contexts, staying home is often the preference of the people (Farbotko and Lazarus, 2012; Farbotko and McMichael, 2019; Farbotko and Campbell, 2022) and these policies have taken this into account. In the words of Lusama (2022, p. 159):

Rather than abandoning the land, our first priority should be to save the land. Saving the land is saving the people.

Is it, however, realistic to save the land *and* the state, given the very real possibility of the worst-case scenario? According to the Tuvaluan lawmakers, it is.

### **The 2023 constitution for the perpetuity of the Tuvaluan state**

As stated in the tagline of *Te Ataeao Nei*, the focus of the new foreign policy is to ‘prepare today to secure tomorrow’. One of the most intriguing ways in which the Tuvalu government has prepared today to secure tomorrow is its response to the potential inundation of Tuvalu’s complete landmass, which, in turn, could lead to what I have elsewhere called a ‘state-extinction’ (Vaha, 2015). The second goal of *Te Ataeao Nei*, as discussed above, is to utilise *all* available legal avenues to guarantee the continuous existence of Tuvalu as a state. To do so, in 2022, the government of Tuvalu proposed significant changes to the country’s 2008 constitution –changes that relate directly to the continuity of the state and the threat of ‘state-extinction’.

The previous Tuvaluan constitution defines the geographical territory of the state in *terrestrial* terms:

The area of Tuvalu *consists of the land areas* referred to in subsection (2), together with (a) *the territorial sea* and the inland waters as declared by law, the land beneath them, and the air space above; and (b) such additional lands and waters as are declared by law to be part of the land area of Tuvalu’ (The Constitution of Tuvalu, 2008, p. 11, emphasis mine).

The 2008 constitution follows the required characteristics of statehood stipulated by the 1933 *Montevideo Convention* according to which the state must have (1) a permanent population, (2) a *defined territory*, (3) a government and (4) the capacity to enter relations with other states (Montevideo Convention, 1933, p. 3). Here, the ‘defined territory’ traditionally refers to the territory *on land*.

In contrast, the new 2023 constitution, which was adopted by the Tuvalu parliament in December 2022, directly addresses climate change and the existential threat it poses to the country’s future in terms of inundation and offers some quite radical ideas from the perspective of modern international law. According to Article 2 of the 2023 constitution, 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* (The Constitution of Tuvalu, 2023, p. 11, emphasis mine).

Furthermore, Article 2 defines the territoriality of Tuvalu as the area consisting of:

*all areas bounded by baseline coordinates including maritime zones measured from such baseline coordinates* (The Constitution of Tuvalu, 2023, p. 11, emphasis mine).

The 2023 constitution, therefore, declares permanent *both* Tuvalu's maritime boundaries *and* the state itself (Kofe and Marinaccio, 2023).

The Tuvaluan government also emphasises the right of the state to exist in perpetuity in its recent submission to the International Court of Justice advisory opinion on state obligations with reference to climate change. In its oral statement before the Court in December 2024, the Tuvaluan delegation noted that:

International law protects statehood even as 'governments, constitutions, territories and populations change'. The right for the statehood and sovereignty of states to continue despite the impact of climate change was declared by the leaders of the Pacific Island Forum last year. Tuvalu's constitution affirms that its statehood will remain perpetuity notwithstanding any loss to its physical territory (International Court of Justice, 2024a, p. 58).

The government of Tuvalu itself here argues that while 'governments, constitutions, territories and populations' change over time, they are all *permanent* features of an *already existing* state, providing for statehood in perpetuity. While the existing territory may become uninhabitable due to saltwater intrusion or sea level rise, or the citizens relocate to a territory of another state before such inundation due to worsening living conditions, its statehood remains intact. Arguably, detaching statehood from physical territory is a unique response to the 'terrestrial bias' (de Carvalho and Leira, 2023) of our modern international legal order, which defines territory on land-based terms. Yet, this proposal is far from unproblematic.

The international law of the sea is crucial when we consider the territoriality of island states. According to Article 2 of UNCLOS (United Nations, 1982, p. 27, emphasis added):

The *sovereignty* of a coastal state extends, *beyond its land territory* and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

Every state, as further established in Article 3 has 'the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention' (United Nations, 1982, p. 27). A normal baseline according to UNCLOS is 'the low-water line along the coast' (Article 5) (*ibid.*). In the case of archipelagic states, UNCLOS stipulates that they may 'draw straight archipelagic baselines joining the outermost points of the outermost islands... provided that within such baselines are included the main islands...' (*ibid.*, p. 40).<sup>2</sup> The archipelagic baseline further forms the basis for the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf (Article 48) (*ibid.*, p. 40), thereby defining the outer limits of maritime entitlements of island states.

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<sup>2</sup> In addition to the normal baseline and the archipelagic baseline, UNCLOS also defines straight baselines via Article 7 (United Nations, 1982, p. 28).

From the perspective of low-lying atoll states such as Tuvalu, the territorial challenge is that the baseline (whether normal, straight *or* archipelagic) is traditionally considered *ambulatory*, meaning that it reflects the changes in *shoreline*. In short, territorial entitlements at sea are dependent on the existence of land (hence the terrestrial bias). Climate change is altering baselines through both erosion and sea level rise and threatening the territorial sovereignty of island states (as well as other coastal countries) by changing their maritime boundaries. Rising seas are consequently undermining the UNCLOS system of existing maritime entitlements, which seem to be based on fixed notions of territorial (terrestrial) sovereignty (Strating and Wallis, 2022, p. 3).

As a response to this existential threat, the new 2023 constitution of Tuvalu in Article 2 provides that:

the baseline coordinates... *shall remain unchanged, notwithstanding any regression of the low water mark or changes in geographical features of coasts or islands, due to sea-level rise or other causes, until and unless otherwise prescribed by an Act of Parliament* (The Constitution of Tuvalu, 2023, p. 12, emphasis added).

The article continues by explicitly discussing the impact of climate change, noting that Tuvalu is committed to:

(5) a. Protecting and conserving its land area, territorial waters and airspace as included in subsection (2) and retaining its statehood as included in subsection (1); and  
b. *Responding to climate change, which threatens the security and survival of its people and its land.*

(6) The commitment of Tuvalu to responding to the threat of climate change *recognizes all relevant regional and international law relating to climate change mitigation and adaptation*, as well as *the common but differentiated responsibilities of all states*, sectors, organizations and individuals and the need for international co-operation to address climate change and to protect those that are most affected (The Constitution of Tuvalu, 2023, p. 12, emphasis mine).

The article defining the state of Tuvalu finishes by expressing that perpetual statehood is the *popular will of the people* and should therefore be respected. As we can see, the new constitution introduces significant qualifications to the traditional understanding of the continuity of the state. First, it contests the ambulatory character of baselines; as has PIF regionally in its two declarations (PIFS, 2021; 2023).

It is worth noting that the International Law Commission's Study Group on sea level rise has also recently stated that, while there is not yet sufficient evidence of new state practice evolving regarding the requirement for updating baselines due to changes in shorelines, both permanent and ambulatory approaches seem viable and legal according to UNCLOS (ILC, 2023, p. 93). This suggests that the legal interpretation taken by Tuvalu does not necessarily contradict existing international law of the sea.

Second, the 2023 constitution declares the perpetuity of the state of Tuvalu, thereby contesting the climate change-induced 'state-extinction' in the first place. To declare the state perpetual is, to say the least, controversial. Perpetuity, I would suggest, implies a longer durability than mere continuity of the state traditionally discussed in international law.



Perpetuity, in a sense, *elevates* the future existence of Tuvalu above general considerations of the historical ‘lifespan’ of states. As explained by Crawford in his foundational book on the creation of states (2007, p. 667), while international state practice indeed assumes the continuity of states, these entities are not fixed or static and do change – and have changed – significantly along with their territories over time. Concurrently, as also noted by Crawford (2007, p. 700):

a state is not *necessarily extinguished* by substantial changes in territory, population, or government [the Montevideo criteria], or even, in some cases, by a combination of all three (emphasis added).

In contrast, international state practice relies on a strong presumption of continuity and, in fact, ‘disfavours the extinction of an established state’ (*ibid.*, p. 701).<sup>3</sup>

Tuvalu’s 2023 constitution seems to suggest that once created, the state of Tuvalu does not only *factually exist forever*, but that it also has a *moral entitlement* for such permanent existence, indicating more than a mere state continuity. Perpetuity, Tuvalu’s new constitution proposes, could be guaranteed even in cases in which ‘*other causes resulting in loss to the physical territory of Tuvalu occur*’ (The Constitution of Tuvalu, 2023, p. 11). Here, the emphasis is to be given on two issues: First, causes other than climate change might create existential threats to the continuity of the state, and even in those cases the perpetuity of Tuvalu *must* be guaranteed. Perpetuity, thus, is not limited to climatic existential threat. Second, these changes are such that they have an impact on ‘physical territory of the state’ (the land), indicating that land-based ontologies and understandings of territoriality and territorial sovereignty are not sufficient for the constitution of the state.

Consequently, according to the 2023 constitution, the perpetuity of the state is not only guaranteed on land but also at sea. As stated in the constitution, ‘*the baseline coordinates shall remain unchanged notwithstanding [...]*’ (The Constitution of Tuvalu, 2023, p. 12). This part of the new constitution is in line with Pacific aspirations to guarantee the maritime boundaries of all states in the region, regardless of physical changes to their baselines. While these declarations are – for the time being – soft law at best, they express a regional position particularly important to low-lying atoll states and can be viewed as significant calls for justice. In a recent paper, Armstrong and Corbett look at the kind of rights, if any, that potentially displaced persons and communities should have to their maritime zones after their territories become uninhabitable (Armstrong and Corbett, 2021, p. 91). Drawing on global justice literature, they argue that justice requires these communities have access to and maintain sovereignty over their maritime territories, especially the EEZs, even in the case of complete inundation (*ibid.*, p. 92). According to Armstrong and Corbett, this is not only consistent with the demands of justice but also what the affected communities *themselves* are calling for – as demonstrated by the PIF declarations.

In their discussion on the sovereign will of affected communities, Armstrong and Corbett further draw from regional declarations adopted *prior* to the 2021 PIF *Declaration* on maritime boundaries, such as the 2015 *Taputapuātea Declaration* by the Polynesian Leaders Group, and the 2018 *Delap Commitment* by the Parties to the Nauru Agreement. Interestingly, the language of perpetuity can already be found here; the *Delap Commitment* (signed by the representatives

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<sup>3</sup> Whether or not the state – as a corporate entity – can become extinct *at all* is an interesting theoretical question which deserves further reflection.

of low-lying Pacific atoll states of the Marshall Islands, Kiribati and Tuvalu) calling for recognition of established baselines “to remain *in perpetuity* irrespective of the impacts of sea level rise” (Armstrong and Corbett, 2021, p. 103, emphasis mine). As stated in the 2023 constitution:

the intent for perpetual statehood ... and the area of Tuvalu ... constitutes the sovereign will of the people of Tuvalu (The Constitution of Tuvalu, 2023, p. 12).

According to Armstrong and Corbett, because this is an *expressed* will of Pacific communities, it adds to justifications for such interpretation of international law.

### **Perpetual statehood in the context of contemporary international order**

As we have seen so far, both the foreign policy initiatives and the new constitution have a central goal: to guarantee the security and survival of Tuvalu under any circumstances. The 2023 constitution indicates the key reason why Tuvalu has passed such an extraordinary new bill of rights: the existential threat of climate change is jeopardising the future of both the state and Tuvaluan society. Tuvalu’s constitutional approach, I propose, provides two distinct ways to guarantee the survival and security of the state. The first is through bilateral agreements in which Tuvalu, on a country-by-country basis, seeks recognition for its perpetual statehood. The second is through the establishment of a digital nation created to guarantee the continuity not only of state institutions but also cultural heritage and thereby contribute to the self-determination of Tuvaluan people.

While statehood might not be dependent on the act of recognition, recognition is an important element of modern international state practice, especially in cases in which such recognition is contested. In the words of Crawford (2007, p. 718):

Recognition and, equally importantly, other state practice relating to or implying a judgement as the status of the entity in question are important. Apart from its evidential value such recognition may render particular situations opposable to recognising states, at least in the absence of any issues of the legality of those situations in accordance with peremptory norms of general international law. This is ... particularly the case with problems of identity and extinction, where the general criteria tend to be equivocal and unhelpful.

Because climate-induced state-extinction is unique (Wong, 2013), the act of recognition, arguably, becomes critical for the continuity of the state. Stoutenburg has proposed that the international community has a *moral duty* to continue to recognise island states as sovereign entities despite inundation. She bases her argument on the legal principles of effectiveness and legality and maintains that because the potential extinction of island states is not due to any breach of international norms by these states *themselves*,

consideration of international justice and solidarity provide if not a legal, *then at least a moral imperative for the continued recognition of ‘deterritorialised’ island states* (Stoutenburg, 2013, p. 59, emphasis mine).

Tuvalu’s foreign policy strategy seeks to guarantee recognition through bilateral agreements. So far, the government has secured more than a dozen such recognitions through bilateral memorandums of understanding (Vaha et al., 2024, p. 89), yet the recognition of

perpetual statehood can be challenged both legally and politically by future state practice. If the worst-case scenario indeed becomes a reality, the situation in which Tuvalu and its people will find themselves is no doubt drastic and full of uncertainty. It is, however, unclear whether bilateral recognition would be sufficient for the continuity of the state if contested by a high enough number of other states. From a purely normative perspective, one can without hesitation confirm that the rights of people to determine their future should be taken seriously in international law, and that other states might indeed have a moral duty, as proposed by Stoutenburg, to continue to recognise Tuvalu. Under current international order, however, this duty can be contested.

The perpetual statehood in the new constitution, as was discussed above, is expressed as the sovereign will of the people (The Constitution of Tuvalu, 2023, p. 12). Here, the argument for perpetuity made by Tuvalu moves from the one of territorial integrity and recognition of sovereignty to the right to self-determination of Tuvaluan people, which, I propose, might provide a stronger legal argument in this case. The need to preserve the self-determination is also enshrined in the idea of digital nation, which aims at maintaining not only the state of Tuvalu for perpetuity but also to protect the cultural heritage and communal values of Tuvaluan people, regardless of where they might be in the future (Rothe et al., 2024).

Moore (2016) has proposed that it is indeed the globally recognised legal right of all peoples to self-determination that could be developed to address the worst-case inundation scenario. The right to self-determination is one of the key principles of the post-colonial world order but was not originally developed to answer to the existential threat of climate change. Instead, the right to self-determination was formalised to acknowledge the struggles of colonised peoples and particularly their rights to natural resources in the postcolonial era. In time, it has become the cornerstone of international human rights law, as illustrated by the Common Article 1 of the two key United Nations human rights treaties: the *International Convention on the Civil and Political Rights* and the *International Convention on the Economic, Social and Cultural Rights* (United Nations, 1966a, 1996b):

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Being the central articulation of decolonisation, Common Article 1 sets the foundations of self-governance. However, as warned by Moore (2016, p. 107), Common Article 1 and the wider international framework of legal recognition of self-determination:

does not readily apply to the case of small island states faced with inundation, whereby the people of an already existing state have the right to self-determination.

The question of self-determination in such a case seems to be different from and beyond the calls for decolonisation, although, as I have argued elsewhere, not providing continuous recognition in this case would potentially be a manifestation of neo-colonialism (Vaha, 2021, pp. 129-131).

Moore (2016, p. 108) looks at the alternative in which self-determination over maritime resources such as fisheries could continue regardless of continuity of the state. The right to self-determination, he proposes, could have a role in enabling islanders to enjoy sovereign rights over their natural resources. The basis of Moore's argument is that the right to self-determination is enjoyed by people, not by states, and this right is an inalienable *erga omnes* norm of international human rights law, 'entailing non-derogable general obligations' (*ibid.*, p. 112). The right to self-determination, therefore, entails the idea of permanent sovereignty over natural resources (Moore, 2016, pp. 113-114). The norm of self-determination, Moore proposes, can be interpreted to be present in UNCLOS as well, and therefore a claim can be made for permanent sovereignty over maritime resources, '*possibly beyond statehood*' (Moore, 2016, p. 114, emphasis mine). According to Moore, the articles on ambulatory nature of baselines in UNCLOS that determine the maritime boundaries of states should not simply replace the right to self-determination:

If [UNCLOS] is silent on the point of small island states threatened by climate change, it is then subject to interpretation, in the sense that the regime of islands is not only designed to establish rights but *is also concerned with maintaining them once established*. In light of this, Articles 55, 56 and 121 should not justify *taking away rights* previously enjoyed under [UNCLOS], particularly the right to self-determination, including 'inalienable' sovereign rights over natural resources (Moore, 2016, p. 114, emphasis added).<sup>4</sup>

By articulating the perpetuity of the state through the sovereign will of people, the 2023 Tuvalu constitution emphasises the right to self-determination, even if the constitution does not use this language explicitly. The constitution recognises that it is:

our right as the people of Tuvalu, both present and future, to a full, free and secure life, and to moral, spiritual, personal and material welfare, is affirmed as one given to us by God (The Constitution of Tuvalu, 2023, p. 10).

Following the argument of Armstrong and Corbett, the constitution expresses the will of an affected population to guarantee its self-determination, including over its territory beyond that on land, and this must be respected through the recognition of the perpetuity of the state of Tuvalu. Doing otherwise would violate the self-determination of Tuvaluans.

In its submission to the ICJ advisory opinion hearings on state obligations in respect to climate change, the Tuvalu government emphasises the impact of climate change on its right to self-determination. According to the submission, the principle of self-determination is inherently linked to the principle of territorial integrity *and* the natural resources of the state (International Court of Justice, 2024a, p. 54). The submission further maintains, with a reference to the earlier judgement of the Court in its *Nuclear Weapons* case, that there is an

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<sup>4</sup> Moore here might be stretching the maritime entitlements provided by UNCLOS too far; one should not read more into the Treaty than was originally intended. As stipulated by Article 2 of UNCLOS, the sovereignty of the state extends only to the outer limits of its territorial sea (United Nations, 1982, p. 27). It is not clear if Moore (2016) limits the permanent sovereignty over maritime resources within these 12 nautical miles. My argument here is that the right to self-determination generally justifies the perpetual existence of the state. The specific extent to which Tuvalu has the right to continue enjoying its current natural resources in perpetuity is a separate conversation and beyond the scope of this paper.

obligation of states to prevent state-extinction. This duty, according to Tuvalu's submission, is *erga omnes* (*ibid.*, p. 55).

In its oral submission, Tuvalu refers to Common Article 1 and emphasises the right to self-determination of Indigenous peoples. The submission further states that 'international law recognises that the rights of the people constituting the population of a state are directly linked to the territorial integrity of that state', thereby connecting the two forms of argument for the perpetuity of the state discussed in this section. This interconnectedness between the right to self-determination and the territorial integrity are enshrined, Tuvalu argues, by the previous rulings of the Court itself (referring to the *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965* case), as well as by UN organs (International Court of Justice, 2024b, pp. 25-26).

### **Perpetual Tuvalu in terms of Pacific relational hermeneutics**

This paper has argued that the foreign policy initiatives of *Te Sikulagi* and *Te Ataeao Nei* and the 2023 constitution provide innovative ways to think about statehood, sovereignty and the rights of Tuvaluans at the time of climate crisis. In this final section, I will discuss how relational cosmology has influenced these documents, as well the role that political theology in particular plays in Tuvalu's approach to its perpetual existence. To use perpetuity, instead of state continuity, in the 2023 constitution, I suggest, emphasises the role of Christianity in the modern Tuvaluan society as well as the interconnectedness of spirituality and politics, traditional values and relational cosmology.

'Perpetual' as a word has its origins in Latin *perpetuâlis*, referring to 'universal'. 'Perpetual' can be defined as:

never ceasing; continuing forever in *future time*; destined to be *eternal*; as a *perpetual covenant*; a perpetual statute (Webster's 1828 Dictionary, emphasis mine).

This is literally true with respect to the decrees of the *Supreme Being*.

Here, the presence of a higher power, God, is clear in the definition of perpetual. Given the importance of *te Atua* in Tuvaluan cosmology, the use of perpetuity (instead of continuity) begins to make sense, regardless of its apparent mismatch with modern, allegedly secular world politics and law. Using perpetual in relation to statehood corresponds to the Pacific holistic spirituality. As explained by Vaai (2017, pp. 32-33, emphasis in original):

Because the flow and fluidity of relationality, the sacred is *in* the secular and vice versa. Because God is relational, God is *in* the world and the world is *in* God. We cannot divide the two. Once we miss this flow of the relationship of God to the world and back to God again, we fall back on the classical theistic theology shaped by the idea that God is found somewhere. As a result, we then define spirituality as something that is 'set apart' from ordinary life. This thinking has done more harm than good. A relational hermeneutical approach dwells on the fact that relational life 'is' spiritual life.

Similarly, the 2023 constitution recognises the presence of God in Tuvaluan society. Tuvalu was given to the people by God and the supreme law reaffirms their desire to constitute themselves as a 'free and democratic sovereign nation based on Christian principles' (The Constitution of Tuvalu, 2023, pp. 9-10). The preamble further establishes Tuvalu as a Christian

nation. Religious foundations for states are not uncommon in the modern world: over 40 states (20% of the total) have an official state religion; and another 40 stipulate a ‘preferred religion’ (Pew Research Centre, 2017). Religion is particularly important in the Pacific context in which post-colonial Christianity plays a complex role in relation to the existential threat of climate change (Farbotko, 2019, p. 253). Political, secular systems are in many ways intertwined with theological values in the Pacific Islands, with religion and churches informing the policies that respond to such threats. The climate change story, as illustrated in depth by Lusama (2022) is a story of faith, founded on the relational philosophy of Tuvaluan society.

Due to relational ontology and hermeneutics, the political *is* theological in the Pacific context. As explained by Huffer and Qalo (2004, pp. 102-103):

Pacific concepts are, by their nature, globalising (to avoid the overused term holistic) and not simply theological, educational, sociological, economic, or political. Because Pacific philosophies are based on relationships and interconnectedness, fundamental concepts cover a whole range of areas of life, beliefs, and ways of doing and being.

To understand the idea of perpetuity of the state in the 2023 constitution, or the emphasis on the Tuvaluan values of *olaga fakafenua*, *kaitasi*, and *fale pili* as the foundations of foreign policy, requires an understanding and appreciation of this relationality. This does not mean that the spiritual and the secular, the laws and the customs, can be unproblematically linked in the Pacific, as illustrated for example by Apinelu in her doctoral thesis examining the relationship between customary and Western approaches to human rights in the Tuvaluan context. Through her case studies, Apinelu (2022, p. 200) shows how *fenua*, the Tuvaluan Indigenous community, “is constantly evolving and adapting to accommodate the dictates of modernity”.

Similarly, the 2023 constitution as well as *Te Sikulagi* and *Te Ataeani Nei*, express the ways in which the modern state of Tuvalu is adapting to the challenges brought to it by the contemporary existential crises. By locating the Indigenous values and principles at the very heart of these political and legal initiatives, including the explicit presence of *te Atua* in the constitution, Tuvalu is reinforcing its self-determination and territorial sovereignty by contesting the common tropes of victimisation and ‘sinking islands’. Instead, it is proposing ways to respond to these challenges on its own terms (Rothe et al., 2024). As stated at the beginning of the 2023 Constitution laying out the foundational principles of the Bill of Rights:

While believing that Tuvalu must take its rightful place amongst the community of nations in search for peace and the general welfare, nevertheless the people of Tuvalu recognise and affirm, with gratitude to God, that the 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, including the vitality and the sense of identity of island communities and attitudes of co-operation, self-help and unity within and amongst those communities (The Constitution of Tuvalu, 2023, p. 10).

There is a risk of romanticising Indigenous values and approaches, and it remains uncertain at this stage how other states will respond to the plight of Tuvalu. Will international law and state practice ever recognise the perpetuity of the Tuvaluan state? Yet, finding support to legal and political initiatives from traditional values and principles, as well as political theology, has opened doors for Tuvalu in terms of assertive agency and global norm entrepreneurship (Vaha et al., 2024).

## Conclusion

This paper has explored the ways in which the low-lying atoll state of Tuvalu has mitigated the risks of climate change and rising seas by adopting innovative foreign policy and provocative constitutional amendments. It has illustrated how by indigenising both foreign policy and constitutional law, the state of Tuvalu has proposed ways to guarantee its continuous existence in the worst-case scenario of climate threat. The paper has evaluated these innovations through the contemporary international legal framework and the study of values and principles important to Tuvaluan society. It has proposed that while some initiatives offered by Tuvalu, such as the perpetuity of the state, might seem at odds with contemporary, secular international order, they nonetheless underline the importance of relational cosmology and political theology in countries such as Tuvalu where the Pacific holistic worldview guides politics and law-making as much as it guides everyday life.

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