

New Developments in National Practices of the Protection of Human Rights of Climate Migrants and Their International Law Analysis: A Case Study of the Australia-Tuvalu Falepili Union Treaty

JIANG Xiaoyi* & LIANG Ke'er**

Abstract: *Climate change poses a severe and urgent threat to human rights, with small island states bearing a disproportionate share of this adverse impact. Although the international community is addressing this issue through the dual pathways of climate change law and human rights law, the effectiveness remains relatively limited, leaving the human rights of climate migrants in a predicament of lacking adequate protection. The Australia-Tuvalu Falepili Union Treaty reached between Australia and Tuvalu at the end of 2023 represents the latest practical development in this field. The emergence of the Treaty has promoted further interaction and integration between the two systems of climate change law and human rights law, filling the gap in international law regarding the protection of human rights of climate migrants to a certain extent. However, while the provisions in the Treaty that cede sovereign rights in exchange for human rights protection possess a certain degree of legality, they run counter to climate justice and lack a foundation of legitimacy. In essence, such provisions not only do not contribute to the improvement of international rule of law but also exacerbate the conflicting relationship between human rights protection and sovereign independence. The geopolitical considerations reflected in the Treaty may push the protection of human rights of climate migrants toward becoming a security issue with political attributes, thereby affecting the geopolitical pattern of the Pacific region and hindering cooperation between China and small island states in relevant fields. China should assess the possible development trends and potential impacts of the Treaty, promote the coordinated governance of the human rights law and climate change law systems under the guidance of a holistic and systematic perspective, carry out targeted cooperation with small island states on the basis of respecting sovereignty, and build China's independent system for protecting the human rights of climate migrants.*

Keywords: climate migrants ♦ human rights protection ♦ Australia-Tuvalu Falepili Union Treaty ♦ sovereign rights ♦ small island states

* JIANG Xiaoyi (蒋小翼), Professor at the China Institute of Boundary and Ocean Studies, Wuhan University.

** LIANG Ke'er (梁可儿), Ph.D. Candidate at the China Institute of Boundary and Ocean Studies, Wuhan University. This paper is a phased achievement of the major project of the National Social Science Fund of China, "Research on the Coordination of Domestic Rule of Law and Foreign-related Rule of Law in Global Environmental Governance" (Project Approval Number 23&ZD166), and is funded by the Fundamental Research Funds for Universities.

Climate change is exacerbating the vulnerability of human rights and reshaping global patterns of population mobility. It is projected that by 2100, slow-onset changes such as sea-level rise will further erode coastal and agricultural lands, displacing tens of millions to hundreds of millions of people.¹ Small island states are among the regions most vulnerable to the impacts of climate change, with Tuvalu, Kiribati, and the Maldives, among others, disproportionately bearing these adverse effects. As sea levels continue to rise, their entire territories risk submersion, facing the prospect of relocation of entire populations or national resettlement. Against this backdrop, the protection of the human rights of climate migrants has become an unavoidable issue in international law. The *Australia-Tuvalu Falepili Union Treaty* (hereinafter referred to as the Treaty), signed in November 2023, represents the latest practice in international law in this field. It introduces a series of novel arrangements concerning climate cooperation and human rights protection, and is regarded as the world's first treaty on the resettlement of climate migrants.²

As the most recent development, the Treaty, on the one hand, explicitly recognizes the issue of human mobility induced by climate change and seeks, through bilateral arrangements, to facilitate the realization of relevant human rights for Tuvaluan citizens, such as the right to residence and the right to mobility. On the other hand, the Treaty deeply links climate and human rights issues to national security concerns, compelling small island states like Tuvalu to adopt measures that trade sovereign rights for climate asylum. From the perspective of human rights protection, the Treaty is commendable on its face; however, state practices that cede sovereign rights in exchange for human rights protection may raise a host of complex issues in international law. Accordingly, this paper attempts to use the human rights issues in the Treaty as a starting point to explore the associated questions of international law. It aims to conduct an in-depth analysis of the substance, legality, and legitimacy of the human rights provisions at the normative level. Building on this analysis, the paper will further examine the implications of this development for the international rule of law governing the human rights protection of climate migrants, as well as the challenges posed by the potential proliferation of this cooperation model to China and corresponding strategies.

I. The Development of National Practices in the Protection of the Human Rights of Climate Migrants

Over the past decade, climate-related disasters have significantly altered habitable environments, leading to the displacement of about 21.6 million people per year³ and triggering a global wave of climate migration. However, both the theory

¹ International Organization for Migration (IOM), "People on the Move in a Changing Climate: Linking Policy, Evidence and Action," accessed June 5, 2024,

<https://publications.iom.int/books/people-move-changing-climate-linking-policy-evidence-and-action>.

² Li Mingjie and Zhang Haiwen, "Practices and Impacts of Major Countries' Climate Assistance to Small Island States: Perspectives from the Treaty," *Pacific Journal* 4 (2024): 32.

³ International Organization for Migration (IOM), "People on the Move in a Changing Climate: Linking Policy, Evidence and Action," accessed June 5, 2024,

and practice of international law have yet to provide a clear definition for the concept and scope of “climate migrants.” To avoid legal uncertainties arising from ambiguity of concepts, this paper adopts a scholarly definition of “climate migrants” for discussion, specifically referring to “individuals who are compelled to leave their original places of residence immediately or in the near future due to sudden or slow-onset changes in the natural environment caused by climate change.”⁴ This term encompasses both domestic migrants (also referred to as internally displaced persons) and cross-border migrants.⁵

A. The dilemma of international law in protecting the human rights of climate migrants

Currently, climate change-induced migration poses severe challenges for low-lying small island states. Given the close relationship between climate change and human rights protection, the legal process addressing this issue is unfolding along dual tracks: human rights law and climate change law.⁶ First, the challenges posed by climate change within the human rights legal framework. Under the human rights law approach, addressing climate change has become an inherent requirement for states to fulfill their human rights protection obligations. However, the international legal status of climate migrants remains unclear within the existing system, making it difficult for the international community to recognize them as refugees or stateless persons, and thus to provide protection under the *UN Convention Relating to the Status of Refugees* (hereinafter the *Refugee Convention*) or the *Convention Relating to the Status of Stateless Persons*. In light of this, UN human rights protection bodies and regional human rights courts have sought legal basis for the human rights protection of climate migrants within international law through expansive interpretations of the existing system.⁷ For instance, the UN Human Rights Council explicitly stated in its *General Comment No. 36 on the Right to Life* that climate change posed one of the most urgent and serious threats to the right to life as stipulated in the *International Covenant on Civil and Political Rights*, and that states’ obligations to respect and protect the right to life included measures to address climate change.⁸ The Office of the United Nations High Commissioner for Human Rights, in its report *Climate Change, Displacement and Human Rights*, pointed out that state measures to mitigate greenhouse gas emissions and expand adaptation financing are viable pathways for protecting the human rights of displaced persons in the context of climate change.⁹ In judicial practice, the Dutch Supreme Court ruled in

<https://publications.iom.int/books/people-move-changing-climate-linking-policy-evidence-and-action>.

⁴ Frank Biermann and Ingrid Boas, “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees,” 10 *Global Environmental Politics* 1 (2010): 67.

⁵ Shi Xueying and Liu Han, “Dilemmas and Countermeasures in the International Law Protection of Climate Migrants,” *Nankai Journal (Philosophy and Social Sciences Edition)* 6 (2016): 74.

⁶ Li Jiang, “Legal Status and Human Rights Protection of Climate Migrants under the International Covenant on Civil and Political Rights,” *Human Rights* 3 (2020): 146.

⁷ Genevra Le Moli, “The Human Rights Committee, Environmental Protection and the Right to Life,” 69 *International & Comparative Law Quarterly* 3 (2020): 735-752.

⁸ Human Rights Committee (HRC), “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life”, CCPR/C/GC/36 (2018): para. 62.

⁹ United Nations High Commissioner for Refugees (UNHCR), “Climate Change, Displacement and Human Rights,” March 2022, page 2, accessed May 17, 2024, <https://www.unhcr.org/sites/default/files/legacy-pdf/6242ea7c4.pdf>.

the *Urgenda Foundation v. the State of the Netherlands* case that the state has an obligation to adequately and effectively address climate change (including through mitigation and adaptation) to protect citizens' right to life and right to respect for private and family life under Articles 2 and 8 of the *European Convention on Human Rights*.¹⁰ However, in practice, UN human rights bodies and regional human rights courts sometimes issue inconsistent interpretations, and cases are highly fact-specific, making it difficult for expansive interpretation methods to address the increasingly complex issues of climate migration.

Second, the dilemma of human rights protection within the climate change legal framework. Within the climate change law system, respecting and protecting human rights has become an important component of states' climate change "adaptation" and "mitigation" efforts. The *Cancun Agreements* of 2010 for the first time required parties to "respect human rights in all climate change-related actions." Furthermore, in the section on "enhanced action on adaptation," it urged states, regions, and the international community to strengthen understanding, coordination, and international cooperation regarding displacement, migration, and planned relocation induced by climate change.¹¹ The preamble to the *Paris Agreement* of 2015 explicitly mentions that parties should, when taking action to address climate change, respect and promote, and consider their obligations regarding the rights of indigenous peoples, migrants, and others, as well as the right to health. Concurrently, robust "adaptation" measures to address climate change have developed alongside "mitigation" measures as two key approaches for human rights protection in the context of climate change. Thus, the *Paris Agreement* became the first international climate agreement to explicitly acknowledge the human rights of climate migrants.¹² However, accepting climate migrants involves complex political and economic issues, with significant divergence among parties. Progress within the climate change law framework has been slow, making it difficult to provide timely protection for the human rights of climate migrants.

B. Existing national practices for the protection of the human rights of climate migrants

Although the human rights law and climate change law frameworks have touched upon issues related to the protection of the human rights of climate migrants, they have yet to provide effective pathways for rights remediation. Consequently, in practice, small island states generally tend to rely on regional support or external assistance to address migration issues caused by climate change.¹³ First, the New Zealand's Pacific Access Category (PAC) Resident Visa and Samoan Quota (SQ) Resident Visa schemes. Under these schemes, New Zealand allocates an annual quota of residency places for citizens of Tuvalu, Kiribati, and Samoa wishing to settle in

¹⁰ Jonathan Verschuuren, "The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce its Greenhouse Gas Emissions," 28 *Review of European, Comparative & International Environmental Law* 1 (2019): 95.

¹¹ "The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention," FCCC/CP/2010/7/Add.1, 5.

¹² Bai Guimei, ed., *Human Rights Jurisprudence*, 3rd ed. (Beijing: Peking University Press, 2023), 362-364.

¹³ Chen Xiaochen, "Leveraging External Forces and Climate Governance in the Pacific Island Region," *China International Studies* 4 (2021): 121.

New Zealand.¹⁴ However, these programs impose numerous restrictions related to age, language proficiency, and income, among other criteria. As a result, the number of migrants who actually qualify is far fewer than the allocated quotas,¹⁵ and the human rights protection measures provided are extremely limited. In response to the increasingly urgent needs of climate migrants, the New Zealand government issued the *Pacific Climate Change-related Displacement and Migration: A New Zealand Action Plan* in 2018, which recommended creating a dedicated humanitarian visa for people displaced by climate change in the Pacific region. Nevertheless, New Zealand has not yet taken any concrete actions to implement this plan.¹⁶

Second, the Pacific Australia Labour Mobility (PALM) scheme. In efforts to enhance the climate adaptation capacities of small island states, Australia has established labor mobility schemes similar to New Zealand's. Australia launched the Northern Australia Worker Pilot Program (NAWPP) in 2016, providing migration quotas for citizens of Kiribati, Nauru, and Tuvalu, and implemented this through the PALM scheme in 2018.¹⁷ The governments of New Zealand and Australia generally argue that such schemes provide citizens of small island states with opportunities for cross-border employment, helping them increase their incomes, thereby enhancing their adaptive capacity and indirectly strengthening the climate resilience of their home countries.¹⁸

Third, Argentina's humanitarian visa program for displaced migrants. In May 2022, the Argentine government established a new humanitarian visa program allowing citizens from Mexico, Central America, and the Caribbean who have been displaced by climate-related disasters to obtain a three-year residence permit in Argentina. After three years, these climate migrants become eligible for permanent residency. This program explicitly protects migration as a human right, regardless of whether the legal status of climate migrants is defined under international law. However, the program only applies to populations displaced by existing natural disasters and does not address climate migration resulting from slow-onset events such as sea-level rise.¹⁹

Although small island states like Tuvalu, Kiribati, and Tonga have entered into a limited number of migration access agreements with Australia and New Zealand, allowing for the voluntary mobility of individuals and families primarily as labor migrants,²⁰ which somewhat alleviates the urgent pressure on these states, it is evident that New Zealand and Australia do not treat climate migrants as a distinct group requiring independent protection. Instead, they are viewed as a labor resource,

¹⁴ "2024 Immigration Quota Details: Maximum 1,650 Samoan citizens, 250 Tongan citizens, 250 Fijian citizens, 75 Kiribati citizens, and 75 Tuvaluan citizens."

¹⁵ Cathrine Dyer and Andreas Neef, "The Evolution of Aotearoa New Zealand's Policy Discourses on Pacific Climate Mobilities from 2006-2021," *Frontiers in Climate* 4 (2023): 8-9.

¹⁶ *Ibid.*

¹⁷ Eka Higuchi, "Climate Change Policies and Migration Issues of New Zealand and Australia," December 2019, accessed May 21, 2024, https://www.spf.org/en/global-data/opri/perspectives/prsp_002_2019_higuchi_en.pdf.

¹⁸ Cathrine Dyer and Andreas Neef, "The Evolution of Aotearoa New Zealand's Policy Discourses on Pacific Climate Mobilities from 2006-2021," 8-9.

¹⁹ Samuel Huckstep and Thomas Ginn, "A Look Back at Climate Migration Policy in 2022," January 19, 2023, accessed May 26, 2024, <https://www.cgdev.org/blog/look-back-climate-migration-policy-2022>.

²⁰ John Campbell and Olivia Warrick, "Climate Change and Migration Issues in the Pacific," August 2014, page 2, accessed May 18, 2024, <https://webapps.ilo.org/dyn/migpractice/docs/261/Pacific.pdf>.

and their mobility is strictly constrained by the demands of employers in the destination countries. This approach fails to address the actual needs of climate migrants; the temporary and mobile nature of labor migration makes it difficult to fully protect a range of human rights.²¹ Furthermore, Argentina's climate migrants program only applies post-disaster and does not provide optional and dignified migration channels before climate disasters occur. Therefore, it can be concluded that the existing international legal framework and national practices have not effectively advanced the protection of the human rights of climate migrants.

C. New developments in the protection of the human rights of climate migrants

As climate change issues become more pronounced, the demand for addressing climate migration by small island states has grown increasingly urgent. Differing from current approaches that primarily facilitate labor mobility and resettlement, the Treaty represents a preliminary response to the shortcomings of existing practices, driving new developments in state practice regarding the protection of the human rights of climate migrants. (1) The Treaty explicitly acknowledges that climate change endangers the fundamental human rights of Tuvaluan citizens, including the right to mobility with dignity and the right to residence. Furthermore, climate migrants have the autonomy to decide whether to relocate, free from the constraints of destination-country employer demands. (2) For climate migration in the context of climate change, its drivers include not only sudden-onset environmental disasters but also slow-onset environmental events such as sea-level rise. The Treaty recognizes that slow-onset environmental events are a primary cause of climate migration in the Pacific region, and that enhancing adaptive capacity and facilitating cross-border migration can serve as effective pathways for protecting the human rights of climate migrants. Regarding the former, Australia will assist Tuvalu with climate adaptation projects, including land reclamation, to strengthen in-situ settlement and avoid unnecessary displacement, thereby protecting the right to residence. Regarding the latter, Australia will provide mobility pathways, allowing Tuvaluan citizens to seek admission into Australia on the grounds of climate change, protecting their right to mobility with dignity.²² In summary, as the world's first treaty specifically addressing the resettlement of climate migrants, the Treaty seeks to mitigate the adverse impacts on human rights through climate change response measures. It promotes further integration of the climate change law and human rights law systems and, to some extent, addresses the uncertainties in protecting climate migrants under international law and existing practices, marking a significant step forward in the protection of the human rights of climate migrants.

II. An International Law Interpretation of the Human Rights

Provisions in the Treaty

Although the entry into force of the Treaty still requires ratification by the

²¹ D. Manou and A. Mihr, *Climate Change, Migration and Human Rights*, 1st ed. (New York: Routledge, 2017), 179-183.

²² "Joint Statement of the Government of Tuvalu and the Government of Australia on Commitment to the Falepili Union," May 9, 2024.

domestic procedures of both parties, the overall framework and basic content have been confirmed by both parties' signatures. The Treaty consists of eight articles, primarily covering the purposes of the parties, climate cooperation, human mobility with dignity, cooperation for security and stability, consultation and responses, settlement of disputes, as well as treaty amendment, entry into force, duration and termination.²³ Among these, the content pertaining to human rights protection is mainly reflected in the first four articles. Therefore, the analysis of the substance, legality, and legitimacy of the human rights provisions will focus on the core content of these four articles and the institutional design they embody.

A. The essence of the human rights provisions in the treaty

1. The core content of the human rights provisions in the treaty

Due to ambiguities in the concept and undefined legal status of “climate migrants” since its inception, the Treaty does not directly legislatively affirm the environmental rights, right to residence, or right to mobility of Tuvaluan citizens. Instead, it incorporates human rights protection content from the frameworks of human rights law and climate change law by establishing normative obligations. For instance, in terms of legal form, the human rights provisions frequently employ terms such as “shall” and “committed to,” setting general normative obligations for both parties to enhance human rights protection.

First, the clause on “human migration with dignity.” Human dignity constitutes the foundation and purpose of human rights protection.²⁴ Both UN and regional human rights conventions accord great importance to human dignity. The Treaty continues this guiding principles, adopting comprehensive measures to protect the fundamental human rights of climate migrants. Its Article 1 stipulates that ensuring Tuvaluan citizens' “mobility with dignity” is one of the purposes of concluding this agreement. To implement this purpose, Article 3 elaborates specific provisions across multiple aspects.²⁵ For example, Article 3 (1) clarifies the responsible entity and specific safeguard measures, requiring that “Australia shall arrange for a special human mobility pathway for citizens of Tuvalu to access Australia,” enabling them to live, study, and work in Australia, and to access Australian education, health, and key income and family support on arrival. Clause 2 sets a cooperation obligation for Tuvalu, requiring it to improve its immigration and passport-related systems to facilitate migrant passage; Clause 3 further stipulates that Australia should provide assistance to Tuvalu to enable it to meet its obligations under Clause 2. This means that the Treaty provides a forward-looking, voluntary migration plan for Tuvaluan citizens before the negative impacts of climate change fully materialize, rather than being a remedial protection measure after damage has occurred. This is crucial for protecting the right to migration with dignity of climate migrants. As some scholars emphasize, when addressing displacement issues in the Pacific region, forward-looking voluntary migration plans are more aligned with “migration with dignity.”²⁶

²³ *Australia-Tuvalu Falepili Union Treaty*, Articles 1-8 (2024).

²⁴ Qu Xiangfei, “Human Dignity and Human Rights Protection”, *Human Rights* 2 (2013): 29.

²⁵ *Australia-Tuvalu Falepili Union Treaty*, Articles 1 and 3 (2024).

²⁶ Harriet Farquhar, “Migration with Dignity: Towards a New Zealand Response to Climate Change Displacement

Second, the “residence with dignity” clause. For many citizens of Tuvalu and Kiribati, land symbolizes “home,” intrinsically linked to ethnicity, language, and culture. Consequently, even given migration opportunities, many are reluctant to relocate.²⁷ Therefore, to improve local living conditions and protect Tuvaluan citizens’ right to residence, Article 2 (3) of the Treaty stipulates that “the Parties commit to work together to help the citizens of Tuvalu to stay in their homes with safety and dignity.”²⁸ To this end, Australia will provide financial and technical assistance to help Tuvalu enhance its adaptive capacity and even undertake land reclamation to protect the right to residence.

Third, the “right to self-determination and right to development” clause. The right to self-determination and the right to development are human rights essential for human existence.²⁹ The right to self-determination means the Tuvaluan people have permanent sovereignty over their natural resources and the right to develop these resources according to their own development policies; and the right to development refers to the right of the Tuvaluan people to freely pursue their economic, social, and cultural development. The Treaty recognizes the potential harm climate change may cause to Tuvalu’s natural resources, culture, and right to development. Article 2 (2) involves special protection for this right.³⁰ This article states that the parties recognize the profound connection of the Tuvaluan people to their land and sea, and that without the ability to use their ancestral lands, they cannot fully exercise their cultural rights. Accordingly, the parties commit to work together to help the citizens of Tuvalu to stay in their homes for as long as possible, preserving their connection to the land and sea. Furthermore, even if Tuvalu’s terrestrial territory were to be completely submerged by seawater in the future, Australia recognizes that Tuvalu’s statehood and sovereignty will continue to exist, and the Tuvaluan people have the right to continue exercising their inherent rights,³¹ including the development rights over natural resources in their territorial sea, exclusive economic zone, and continental shelf, thereby upholding the Tuvaluan people’s right to self-determination and right to development.

Fourth, the clause on “human rights protection in situations endangering national security.” Unlike the first three clauses that directly protect human rights, Article 4 of the Treaty focuses on protecting state interests,³² thereby indirectly providing human rights protection. Article 4 (1) stipulates that when Tuvalu faces a major natural disaster, a public health emergency of international concern, or the use or threat of force, it may request Australia to provide assistance. Natural and human-made disasters endanger state security and have extensive and profound negative impacts on human rights. Accordingly, states have an obligation to take measures to mitigate or

in the Pacific,” 46 *Victoria University of Wellington Law Review* 1 (2015): 29.

²⁷ Nikita Perumal, “‘The Place Where I Live is Where I Belong’: Community Perspectives on Climate Change and Climate-related Migration in the Pacific Island Nation of Vanuatu,” 13 *Island Studies Journal* 1 (2018): 45.

²⁸ *Australia-Tuvalu Falepili Union Treaty*, Article 2 (2024).

²⁹ Xu Xianming, ed., *International Human Rights Law* (Beijing: Law Press • China, 2004), 420-434.

³⁰ *Australia-Tuvalu Falepili Union Treaty*, Article 2 (2) (2024).

³¹ “Explanatory Memorandum: Falepili Union Between Tuvalu and Australia,” May 8, 2024, accessed May 27, 2024,

<https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf>.

³² *Australia-Tuvalu Falepili Union Treaty*, Article 4 (2024).

eliminate the damage disasters cause to human rights, including requesting and accepting international assistance.³³ Article 4 (3) and (4) further stipulate that, for safeguarding Tuvalu's national security and thereby promoting human rights protection, provided that advance notice is given by Australia, Tuvalu shall provide Australia rights to access, presence within, and overflight of Tuvalu's territory. However, it should be noted that national security matters are closely related to a state's internal affairs. The scope and extent of Tuvalu's internal affairs in which Australia is permitted to participate under the Treaty are not clearly defined. Whether this might indirectly exacerbate inequality between the two parties, or more directly, whether putting human rights issues under the context of security is more beneficial for human rights protection, is a question worthy of further discussion.

2. The essence of the human rights provisions: Cede sovereign rights in exchange for human rights protection

As emerging global environmental issues become increasingly severe, the traditionally indivisible principle of "absolute" sovereignty is also being challenged. To address global environmental challenges, international environmental law imposes requirements for ceding sovereign rights. Ceding sovereign rights refers to a state, in appropriate domains and through joining international organizations or treaties, transferring part of its sovereign rights to be exercised by another state or an international organization, in order to maximize national interests.³⁴ Currently, within the field of global environmental governance, ceding sovereign rights to relevant international organizations is a more common phenomenon, while state practices involving cession to another state to achieve environmental objectives are relatively rare, with only a few major countries like the United States and New Zealand having signed relevant agreements with a limited number of states. For example, to effectively combat illegal fishing activities and restore marine ecosystems, the United States has signed *Shiprider Agreements* (a maritime law enforcement agreement) with several Pacific Island Countries since 2010. Under these agreements, the Pacific Island Countries cede jurisdiction over certain maritime areas to the United States Coast Guard, which conducts law enforcement activities to enhance environmental law enforcement levels in the Pacific region.³⁵

The Treaty represents another practice in international law within this field. Similar to the *Shiprider Agreements*, according to the provisions of Article 4 (4) of the Treaty, Tuvalu effectively cedes participation rights related to domestic security matters to Australia, facilitating its disaster reduction and climate change response activities, thereby aiming to achieve the goal of human rights protection. However, this kind of exchange involves complex political motivations; its fundamental objective may not genuinely be to enhance regional climate cooperation and promote

³³ Hope Lewis, "Human Rights and Natural Disaster: The Indian Ocean Tsunami," 33 *Human Rights* 4 (2006): 12-16.

³⁴ Zhang Yanqiang, "Analysis of Maritime Law Enforcement Issues under Jurisdictional Transfer," *Asia-Pacific Security and Ocean Studies* 6 (2022): 36; Wang Dong and Xu Xiangmin, "Research on the Path of Sovereignty Regulation in International Environmental Law: From Sovereignty Transfer to Acceptance of Constraints," *Journal of Beijing University of Aeronautics and Astronautics (Social Sciences Edition)*, November 16, 2023, 1.

³⁵ Zhang Yanqiang, "Analysis of Maritime Law Enforcement Issues under Jurisdictional Transfer," *Asia-Pacific Security and Ocean Studies* 6 (2022): 42.

migrant resettlement, but rather to set thresholds for Tuvalu's cooperation with other countries or entities,³⁶ potentially developing into a geopolitical tool serving Australia's pursuit of its own interests. Specifically, through Article 4 of the Treaty, Australia will gain participation rights in Tuvalu's internal and foreign affairs, as well as influence and consultation rights regarding Tuvalu's establishment of cooperative relationships with other contracting parties. This will weaken Tuvalu's position in negotiations with other countries or entities in the fields of climate response and security cooperation.³⁷ Furthermore, the targeting of the term "other States" in the provisions is quite evident. After the signing of the Treaty, some Western scholars explicitly pointed out that the Treaty aims to counter and offset China's influence in the region.³⁸ Even more alarming is that the proliferation of this cooperation model in the Pacific region could turn cooperation with small island states into a domain open only to a few major countries.

On the surface, the Treaty aims to address three urgent issues for Tuvalu: enhancing adaptive capacity to climate change, providing mobility pathways for climate migrants, and safeguarding the common security of Tuvalu and Australia. However, in essence, the Treaty grants Australia extensive participation rights in matters such as Tuvalu's foreign relations, to some extent eroding Tuvalu's sovereign rights. Simultaneously, Australia may seek to use climate and human rights issues to safeguard its geopolitical interests, hindering cooperation between external states like China and the Pacific small island states. This, in substance, does not benefit international cooperation for human rights protection.

B. The legality of the human rights provisions in the treaty

From a macro perspective, the Treaty itself is a bilateral treaty. Therefore, assessing the legality of its human rights provisions requires judgment based on the validity requirements for treaty conclusion stipulated in the *Vienna Convention on the Law of Treaties* of 1969 (hereinafter the "VCLT"), primarily including the treaty-making capacity of the subjects, freedom of consent, and conformity with international *jus cogens*.³⁹ These will be analyzed sequentially as follows. First, Australia and Tuvalu possess full capacity to conclude treaties. According to Article 6 of the VCLT, "Every State possesses capacity to conclude treaties." In the

³⁶ The term "entity" here may specifically refer to the Taiwan region of China. On one hand, in international law, "entity" is generally used to denote a region that can exercise a certain degree of autonomous behavior in the international community, but legally still belongs to a specific sovereign state. For example, in Malcolm N. Shaw's *International Law*, the Taiwan region of China is described as a "sui generis territorial entity" (See Shaw, Malcolm N., *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008). On the other hand, the Treaty deliberately emphasizes the term "entity" in Article 4 (4), reflecting deep geopolitical considerations. Currently, Tuvalu maintains so-called "diplomatic relations" with the Taiwan region of China, and in recent years, the two have frequently interacted in areas such as maritime law enforcement and climate cooperation. Australia may, based on the Treaty, further encourage Tuvalu to strengthen cooperation with the Taiwan region of China, thereby preventing Tuvalu from turning to China.

³⁷ "Explanatory Memorandum: Falepili Union Between Tuvalu and Australia," May 8, 2024, accessed May 27, 2024, <https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf>, page 3.

³⁸ Douglas Guilfoyle and Alex Green, "The Australia-Tuvalu Falepili Union Treaty: Security in the Face of Climate Change...and China?" November 28, 2023, accessed May 27, 2024, <https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/>.

³⁹ Li Haopei, *Treaty Law Theory* (Beijing: Law Press • China, 1987), 237-238.

international community, sovereign states are the most important subjects of international law and thus the most common subjects concluding treaties. As independent sovereign states, Australia and Tuvalu meet the treaty-making capacity required by international law, and the bilateral treaty they concluded satisfies the first substantive requirement.

Second, the human rights provisions in the Treaty were formulated by Australia and Tuvalu based on mutual and free consent, without involving coercion or threats that would violate freedom of consent. Currently, the VCLT explicitly specifies, from a negative perspective, four situations that violate the genuine mutual consent of the parties: error, fraud, corruption, and coercion. The occurrence of any of these situations would render the relevant provisions invalid.⁴⁰ Among them, “error” refers to a party concluding a treaty based on a mistaken belief about a fact or law; “fraud” involves a party inducing another to conclude a treaty through misrepresentation; “corruption” refers to bribing the representative of another party to conclude a treaty. Focusing on the human rights provisions of the Treaty, they were established against the backdrop of significant threats posed by climate change to human rights, based on a clear consensus between Australia and Tuvalu regarding the rights and obligations stipulated in the Treaty, and do not involve the first three situations mentioned above. The most contentious aspect in current practice regarding the Treaty is whether its provisions involving the “cede sovereign rights in exchange for human rights protection” constitute coercion of a small state by a big one. This refers to whether the agreement, reached due to the big country’s advantages in military, economic, and political aspects, is an unequal treaty where one party enjoys rights without undertaking obligations, thus meeting the requirement of “coercion” and rendering the treaty invalid. According to Article 51 of the VCLT, coercion means acts or threats applied to a representative of a State. Threats include the use or threat of force. Although the Treaty involves Tuvalu ceding sovereign rights, such as in defense, in exchange for external assistance and human rights protection, and the international community’s sensitivity to sovereignty makes the Treaty appear somewhat unequal, reminiscent of “colonialism,” available negotiation records indicate that this cession was based on Tuvalu’s voluntary consent, does not violate the principle of freedom of consent, and Australia did not resort to coercion, duress, or threats of force – acts contrary to international law – during the conclusion process. Furthermore, the Treaty is not an unequal one where Australia exclusively enjoys rights and Tuvalu bears only obligations. Specifically, although Tuvalu has ceded some sovereign rights, Australia likewise undertakes obligations to provide climate adaptation funding and technology, accept climate migrants from Tuvalu, and provide disaster assistance.

Finally, the human rights provisions of the Treaty do not clearly conflict with a peremptory norm of general international law (hereinafter *jus cogens*). According to Article 53 of the VCLT, a peremptory norm is “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same

⁴⁰ Ibid., 251.

character.” Furthermore, the article stipulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Although the VCLT explicitly introduces the concept of *jus cogens*, it does not directly specify its scope, and the abstract nature of its wording leads to difficulties in identifying and applying *jus cogens*. In practice, the international community generally refines the understanding of the content of *jus cogens* through the jurisprudence of the International Court of Justice (ICJ). To date, the ICJ has expressed opinions on peremptory norms in only a few cases. For instance, in the *Nicaragua v. United States* case, the ICJ recognized the prohibition of the illegal use of force as a peremptory norm.⁴¹ In *Mauritius v. United Kingdom* (Chagos Archipelago case), the ICJ determined that “respect for the right to self-determination” constitutes an *obligation erga omnes*, which the international community and all states have an obligation to respect.⁴² Reviewing the existing judicial practice of the ICJ, it has primarily recognized the following categories of human rights-related norms as constituting *jus cogens*, including rules related to *obligations erga omnes*, the prohibition of the use of force, torture, genocide, and the murder or enslavement of civilians in occupied territories, among others.⁴³ Examining the human rights provisions of the Treaty, they reflect the genuine intent of the parties and do not violate peremptory norms of international law, thus meeting the substantive requirements for the conclusion of a treaty. In conclusion, its human rights provisions are valid.

C. Analysis of the legitimacy of the human rights provisions in the treaty

Although an international consensus has formed on the need to strengthen the protection of the rights of climate migrants, the question of how this protection should be provided, and whether the Treaty represents the optimal or legitimate approach, is an issue worthy of deeper discussion. Currently, the negative impacts of climate change on human rights are not evenly distributed; small island states on the geographical “frontline” of climate change are disproportionately affected. Failing to place the human rights protection of these small island states at the core would be profoundly contradictory and unjust.⁴⁴ Therefore, climate justice has become an unavoidable key issue in the context of human rights protection under climate change.

The relationship between climate justice and human rights protection is now receiving significant international attention. The International Bar Association (IBA), in its report *Achieving Justice and Human Rights in an Era of Climate Disruption*, clearly defined this relationship, stating that climate justice aims to enable communities, individuals, and governments to enjoy a safe, clean, healthy, and sustainable environment, and to take mitigation and adaptation measures in a manner that respects human rights.⁴⁵ Thus, the relationship can be understood from two

⁴¹ ICJ Reports, General List No. 70, “Case Concerning Military and Paramilitary Activities in and against Nicaragua” (*Nicaragua v. United States of America*), (1986): 90, para. 190.

⁴² ICJ Reports, General List No. 169, “Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,” Advisory Opinion, (2019): paras. 177-178.

⁴³ Deng Hua, “The Development of Jus Cogens by the International Court: Rules and Methods,” *Nanjing University Law Journal* 3 (2020): 80-82.

⁴⁴ Ryan Mitra and Sanskriti Sanghi, “The Small Island States in the Indo-Pacific: Sovereignty Lost?” 31 *Asia Pacific Law Review* 2 (2023): 435.

⁴⁵ The International Bar Association’s discussion on climate justice in *Achieving Justice and Human Rights in an*

dimensions. First, the equitable allocation of emission reduction responsibilities promotes the fair enjoyment of human rights. Currently, due to the weak legal character of climate change law, major developed countries like the United States have not yet assumed mandatory emission reduction responsibilities, and their per capita carbon emissions remain high. The resulting human rights harms caused by excessive greenhouse gas emissions are directly borne by small island states. This leads to the situation where the states with the smallest responsibility for emissions find it most difficult to enjoy equitable human rights.⁴⁶ Consequently, taking mitigation measures to curb greenhouse gas emissions is typically a core demand of small island states for protecting their human rights. Second, assuming responsibility for the losses and damages caused by climate change is central to the equitable enjoyment of human rights. The losses and damages suffered by small island states due to climate change are extensive and profound, involving severe harm to life, health, and the environment and requiring enormous costs for population resettlement and coastline reinforcement. According to the principle of climate justice, these losses should be shared by the international community.⁴⁷ Accordingly, targeted support should be provided to small island states, with financial and technical assistance being crucial for the full protection of human rights. Furthermore, this assistance relationship should be unidirectional, not requiring reciprocal benefits.

Examining the human rights provisions of the Treaty against these dimensions reveals legitimacy dilemmas. First, the human rights protection measures in the Treaty unilaterally emphasize adaptation while neglecting mitigation. As mentioned, the root cause of human rights violations due to climate change lies in global greenhouse gas emissions. Therefore, proactive mitigation measures to curb emissions are the fundamental response. The Treaty, however, does not address Australia's historical responsibility for its greenhouse gas emissions. Instead, it focuses on resettlement plans as a last resort after all risk reduction methods are exhausted. This approach appears to evade the core issue and is unlikely to prevent the creation of climate migrants at its source. Second, the human rights provisions in the Treaty lack substantive protective content. The Treaty formally acknowledges the issue of human mobility induced by climate change and mentions the necessity of bilateral cooperation to facilitate the mobility of Tuvaluan citizens. However, in its wording, it neither explicitly frames this obligation as "protecting the human rights of climate migrants" nor stipulates specific legal protection measures or human rights remedy channels, merely making a commitment to "promote human mobility with dignity." This confines the Treaty's focus on human rights protection more to the level of

Era of Climate Disruption, The English original text is as follows: "To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial system and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights". International Bar Association, "Achieving Justice and Human Rights in an Era of Climate Disruption," July 2014, page 24, accessed May 27, 2024, <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04>.

⁴⁶ John H. Knox, "Linking Human Rights and Climate Change at the United Nations," *Harvard Environmental Law Review* 33 (2009): 494.

⁴⁷ Cheng Yu, "Natural Rights Remedies for Climate Refugees and Their Institutional Development," *Pacific Journal* 9 (2020): 104.

political or moral obligation, rather than embedding it in substantive legal provisions. Finally, the human rights protection in the Treaty reflects formal rather than substantive equality. Although the Treaty provides targeted protection and assistance to Tuvalu, a vulnerable state, and its citizens through climate adaptation measures and a climate migration plan, according to its provisions, Australia stands to gain benefits far exceeding its assistance. For example, Australia can enter and remain in Tuvaluan territory by fulfilling certain procedural obligations and has the right to participate in Tuvalu's foreign and security affairs. This practice actually places Tuvalu in a passive and unequal position, distorting the relationship between human rights protection and sovereign independence, and suffers from a legitimacy deficit.

III. The Impact of the Treaty on the International Rule of Law for the Protection of the Human Rights of Climate Migrants

The Treaty was signed against the backdrop of large-scale displacement caused by climate change, which poses serious threats to fundamental human rights and the inadequate protection offered by existing international law.⁴⁸ On the positive side, the Treaty establishes an institutional framework for climate migration with dignity, promoting new developments in international law practice. However, from the perspective of the concept of international rule of law, this cooperation model merely perpetuates the fragmented nature of international law, and its approach of exchanging sovereign rights for human rights protection will also have multifaceted negative impacts on the international rule of law.

A. Developments in promoting the practice of international law for protecting the human rights of climate migrants

As mentioned earlier, the *Guiding Principles on Internal Displacement* only address the protection of the human rights of internally displaced persons, the *Refugee Convention* struggles to encompass climate migrants, and both international human rights law and climate change law face certain applicability obstacles, creating difficulties for multilateral mechanisms protecting the human rights of climate migrants.⁴⁹ As neighboring and proximate states in the region, Australia and Tuvalu have negotiated a long-term climate migration plan, preliminarily establishing a bilateral mechanism for protecting the human rights of climate migrants, which has generated some positive impacts.

First, the Treaty innovates pathways for human rights remediation for climate migrants. Currently, climate migrants attempt, on one hand, to legally resettle in other countries through climate litigation. However, examining existing judicial cases reveals that climate change itself is not yet sufficient grounds for climate migration or the right to residence. For example, in the pioneering climate migration application case — *Ioane Teitiota v. New Zealand* — both the New Zealand High Court and Supreme Court rejected the applicant's request to resettle in New Zealand due to

⁴⁸ D. Manou and A. Mihr, *Climate Change, Migration and Human Rights*, 1-100.

⁴⁹ Shi Xueying and Liu Han, "Dilemmas and Countermeasures in the International Law Protection of Climate Migrants," 70-73.

climate change.⁵⁰ This indicates that although climate litigation is increasing, significant variations among countries and regions mean there is a risk that expectations of obtaining rights protection through judicial channels may not be fulfilled. Furthermore, as the international community has not yet established clear remedial paths for issues such as the preservation of international legal personality for states losing their territory or the continuity of relevant maritime rights, small island states in practice can only resort to “self-help” by reaching regional mobility agreements with countries like New Zealand and Australia. However, as previously mentioned, these labor-oriented mobility plans are seasonal, temporary, and short-term, unable to fundamentally resolve the issue of climate migration. Against the backdrop of climate change, the Treaty, through a bilateral agreement, explicitly identifies climate migration and climate adaptation as key measures for human rights protection, mitigating the impact of global carbon emissions on small island states⁵¹ and, to some extent, filling a gap in the international law protecting the human rights of climate migrants.

Second, the Treaty protects multiple rights of climate migrants through the comprehensive support plan. For instance, Article 2 (2) aims to protect the “right to residence with dignity” and the “right to self-determination and development” of climate migrants, while Article 3 protects the “right to migration with dignity.” Additionally, Australia will establish mechanisms for identity acquisition and skills training during the resettlement phase to help Tuvaluan citizens integrate into communities more quickly and reintegrate into society more effectively. Specifically: first, Tuvaluan citizens can apply for Australian citizenship while retaining their Tuvaluan citizenship, without hindering their ability to apply for and receive assistance and benefits provided by the international community as Tuvaluan citizens. Second, Tuvaluan citizens migrating to Australia will be able to live, study, and work there, enjoying numerous human rights including the right to education, the right to health, and the right to social security. Third, Australia will facilitate livelihood diversification for climate migrants through capacity-building and training programs.⁵²

B. Using the protection of the human rights of climate migrants to dilute emission reduction responsibilities

Currently, taking action to address climate change in order to fulfill human rights protection obligations has been confirmed by numerous international law practices. The Treaty follows this trend and also explicitly requires both parties to deepen climate cooperation to fulfill their human rights protection obligations. However, in its specific institutional design, the Treaty’s provisions on the parties’ obligations to address climate change to protect human rights are unclear, and it only involves

⁵⁰ Simon Behrman and Avidan Kent, “The Teitiota Case and the Limitations of the Human Rights Framework,” *Questions of International Law* 75 (2020): 29.

⁵¹ Philip G. Dabbagh, “Compact of Free Association-Type Agreements: A Life Preserver for Small Island Sovereignty in an Era of Climate Change?” 24 *Hastings Environmental Law Journal* 2 (2018): 460.

⁵² “Explanatory Memorandum: Falepili Union Between Tuvalu and Australia,” May 8, 2024, accessed May 27, 2024, <https://www.dfat.gov.au/sites/default/files/explanatory-memorandum-falepili-union-between-tuvalu-australia.pdf>, page 2.

adaptation measures, artificially severing the complementary relationship between “adaptation” and “mitigation” measures in the field of human rights protection, thus failing to effectively achieve the protection of the human rights of climate migrants.

Specifically, Article 2 of the Treaty only mentions enhancing Tuvalu’s climate adaptation capacity through the latest technological developments, without addressing cooperation between the parties in the field of mitigation and emission reduction. Although fulfilling adaptation obligations can, to some extent, promote and protect human rights, the essence of “mitigation” measures is for the parties to prevent global warming by reducing greenhouse gas emissions or increasing greenhouse gas sinks,⁵³ which are source control measures to prevent the creation of climate migrants. Moreover, in practice, strengthening the emission reduction responsibilities of various countries has always been a core demand of small island states, which hope to clarify the emission reduction shares of major emitting countries through multiple pathways such as international negotiations and international judicial procedures. However, as a traditional energy power, Australia’s attitude toward emission reduction can hardly be described as positive; it does not support the global methane reduction pledge nor the phased elimination of all fossil fuels. It can be predicted that the Treaty’s avoidance of Australia’s emission reduction obligations, failing to align with the path that equally emphasizes “adaptation” and “mitigation” under the climate change law system, will be unlikely to achieve genuine climate cooperation effects. Consequently, it cannot reduce the rate of sea-level rise at the source, leading to a break in the chain of human rights protection norms and preventing the thorough resolution of the climate migration issue. When this happens, the contradiction between the limitations of the Treaty’s provisions and the urgency of human rights protection will become even more acute.

More seriously, the trend of expanding this cooperation model may turn accepting climate migrants into yet another means for developed countries to weaken and evade their emission reduction responsibilities. For instance, developed countries like Australia may promote accepting climate migrants as an option to offset their emission reduction responsibilities under the UN climate change negotiation framework, thereby weakening and reducing their emission reduction obligations. Simultaneously, by leveraging the dependence of small island states on their economic assistance and migration channels, they could pressure these states to shift their positions and subsequently demand that developing major countries like China and Brazil undertake greater emission reduction obligations.

C. Exacerbating the tension between human rights protection and state sovereignty

Human rights protection is highly political, intricately intertwined with complex domestic issues such as religion, history, and culture within a state, and inherently falls under the domain of national jurisdiction. Therefore, the state is the primary entity responsible for realizing human rights protection.⁵⁴ Only by fully respecting

⁵³ Leonel J. R. Nunes, “The Rising Threat of Atmospheric CO₂: A Review on the Causes, Impacts, and Mitigation Strategies,” 10 *Environments* 4 (2023): 66.

⁵⁴ Liu Zhiqiang, ed., *Research on State Obligations in Human Rights Law* (Beijing: Law Press • China, 2015), 47-49.

state sovereignty and the principle of non-interference in internal affairs can the protection and ultimate realization of human rights be genuinely advanced.⁵⁵ However, when sea-level rise caused by climate change submerges entire territories, uncertainty arises as to whether small island states can continue to function as sovereign states and fulfill their human rights protection obligations. Although the Treaty, at a normative level, acknowledges that Tuvalu will continue to exist as a sovereign state, seemingly offering a viable path to resolve the conflict between human rights protection and sovereign existence, a positive analysis reveals that this path requires Tuvalu to pay the price of ceding sovereign rights, thereby exacerbating the erosion of state sovereignty. The proliferation of this model of cooperation not only fails to advance the synergistic development of human rights and sovereignty but, more alarmingly, strikes at the very root of human rights protection under international law.

On one hand, the clauses involving the ceding of sovereign rights in exchange for human rights protection distort the relationship between protecting the human rights of climate migrants and upholding sovereignty. The alienation of human rights issues, that is, their politicization, refers to the tendency and process whereby actors in international relations address human rights matters with a stance of political pragmatism, driven by specific political motives, using human rights as a tool to achieve certain political interests.⁵⁶ The political nature of human rights protection is particularly evident in the Treaty. Specifically, the assistance provided by Australia under the Treaty is not based on moral grounds or the fulfillment of climate aid obligations under the United Nations Framework Convention on Climate Change (UNFCCC) framework, but is conditional upon Tuvalu's sacrifice of certain sovereign rights. Shortly after the signing of the Treaty, Australia entered into a similar climate aid and security cooperation agreement with Papua New Guinea.⁵⁷ The European Union also aims to deepen climate cooperation with small island states through the "EU-Pacific Green-Blue Alliance."⁵⁸ The expansion of this trend may provide developed countries with a pretext, under the guise of human rights protection, to interfere in the internal affairs of developing countries, undermine their sovereignty, and advance their own national or regional interests.

On the other hand, the clauses involving the ceding of sovereign rights in exchange for human rights protection undermine the very foundation for protecting the human rights of climate migrants. According to the criteria for statehood outlined in the *Montevideo Convention on the Rights and Duties of States*, submerged small island states may completely lose their territory and permanent population, ceasing to

⁵⁵ Yang Zewei, "On the International Protection of Human Rights and State Sovereignty," *Law Science (Journal of Northwest University of Political Science and Law)* 6 (2003): 95-104.

⁵⁶ China Society for Human Rights Studies, "US Politicization of Human Rights Erodes Foundations of Human Rights Governance," *People's Daily*, accessed June 12, 2024, <http://paper.people.com.cn/rmrb/images/2021-12/28/17/rmrb2021122817.pdf>.

⁵⁷ James Batley, "One Year, Three Agreements: Shaping Thinking on Regional Security," January 15, 2024, accessed June 4, 2024,

<https://devpolicy.org/one-year-three-agreements-shaping-thinking-on-regional-security-20240115/>.

⁵⁸ Frédéric Grare and Manisha Reuter, "More than Just a Climate Deal: The Australia-Tuvalu Falepili Union Treaty and the EU's Potential Contribution to the Pacific," December 6, 2023, accessed June 4, 2024, <https://ecfr.eu/article/more-than-just-a-climate-deal-the-australia-tuvalu-falepili-union-treaty-and-the-eus-potential-contribution-to-the-pacific/>.

meet the constitutive requirements of a “sovereign state” and facing the risk of extinction of their international legal personality.⁵⁹ This implies that Tuvalu would struggle to continue protecting and promoting human rights as a sovereign state. In recent years, the UN International Law Commission has recognized the challenges posed by sea-level rise to the continuity of state sovereignty and has issued several working reports to guide solutions. Among these, “preserving the international legal personality of the state” has been identified as a primary response. Australia and Tuvalu have followed this approach, explicitly stipulating in the Treaty that Australia recognizes Tuvalu’s statehood and sovereignty as unaffected by sea-level rise caused by climate change, and that Tuvalu’s inherent rights and obligations will be maintained.

Accordingly, it is foreseeable that when Tuvalu’s entire land territory is submerged below sea level, the two parties may adopt two pathways to transform the Treaty’s normative prescriptions for preserving sovereignty to protect human rights into positive realization. First, as the impacts of climate change intensify, de facto merger of Tuvalu and Australia may occur. Tuvalu’s maritime zones might be ceded to the “host country” (Australia in the Treaty),⁶⁰ and the majority of its citizens would effectively be “compelled” to relocate to Australia, with the Australian government protecting their human rights pursuant to its domestic law. Second, the Tuvaluan government could continue to exist as a “government-in-exile,” thereby maintaining its capacity to fulfill obligations to respect and protect human rights. However, considering the integrity of the host country’s territorial sovereignty, the exercise of state powers by a “government-in-exile” residing in another nation would inevitably be constrained,⁶¹ pending determination through negotiations between the two states. Examining the Treaty, Tuvalu is clearly the weaker party in negotiations. As its dependence on Australia deepens, Australia’s autonomy in addressing issues such as climate migration and human rights protection will expand, whereas Tuvalu’s voice on related matters will be further diminished.

However, regardless of the pathway, each challenges the foundations of human rights protection under international law, contravenes the original intent of sovereignty preservation, and diminishes the reasonable expectations of climate migrants. Specifically, the national character of human rights issues cannot be overlooked. The fundamental purpose of the Treaty between Tuvalu and Australia is to preserve state sovereignty to protect the human rights, national identity, and cultural values of the small island state’s citizens. But when Tuvalu is constrained by threats induced by climate change, the obligation to protect human rights will be exercised by Australia, and climate migrants can only passively accept the human rights solutions provided by the Australian government. This runs counter to the original intent behind concluding the Treaty. For instance, after a potential merger, differences in human rights protection standards and evaluation criteria between the two countries might lead the Australian government to overlook the specific

⁵⁹ Jane McAdam, “Disappearing States, Statelessness and the Boundaries of International Law,” January 21, 2010, 5-10, accessed June 4, 2024, <https://ssrn.com/abstract=1539766>.

⁶⁰ Ryan Mitra and Sanskriti Sanghi, “The Small Island States in the Indo-Pacific: Sovereignty Lost?” 444.

⁶¹ *Ibid.*

vulnerabilities of climate migrants, potentially triggering tensions between local citizens and newcomers. Furthermore, although human rights protection in the context of climate change poses new challenges to traditional theories of state sovereignty, compelling the international community to re-examine the concept of state sovereignty, state practices where a foreign government assumes the primary duty for human rights protection strike at the very foundation of the international legal basis that places the duty of human rights protection primarily on the state of nationality, potentially leading to disorder in global human rights governance.

IV. China's Response under the New Developments in the Protection of the Human Rights of Climate Migrants

As the latest legal practice in this field, the Treaty, while presenting opportunities for the international rule of law in human rights protection, is underpinned by complex political motivations. Its impact extends far beyond the realm of protecting the human rights of climate migrants and may influence the geopolitical landscape of the Pacific region. Currently, to balance, offset, or even contain China's influence in the Pacific, the United States intends to implement its "Indo-Pacific Strategy," reaffirming alliances with countries like Australia and New Zealand to strengthen ties with small island states. By enhancing cooperation on climate and human rights, it aims to create exclusive circles that marginalize China. Given the potential widespread impact of the Treaty on China's cooperation with small island states in the region, China should thoroughly assess the current and future international dynamics surrounding climate and human rights issues, formulate forward-looking diplomatic strategies in advance, and provide Chinese wisdom and solutions for the protection of the human rights of climate migrants through pragmatic actions.

A. Potential impacts of the human rights provisions in the treaty on China

In recent years, with the expansion of initiatives like the Belt and Road Initiative in the South Pacific, cooperation between China and small island states has deepened across various fields, raising high alertness in the United States and its regional allies. From the *Shiprider Agreements* to the Treaty, the United States and Australia intend to leverage maritime law enforcement, climate security, and human rights protection to comprehensively hinder cooperation between China and small island states. The tendency toward "turning all issues into security issues" when it comes to climate and human rights concerns evident in the human rights provisions of the Treaty will produce multifaceted spillover effects.

First, the signing of the Treaty has deeply entwined the climate interests of Tuvalu and Australia. As Australia deepens its involvement in the internal and external affairs of Tuvalu and other small island states, the cooperation between these small island states and China may become constrained by Australia's national stance and strategic interests. This could place China in a passive position within multilateral processes addressing climate change and human rights protection. For example, Australia may leverage the existing climate negotiation leadership of small island states to promote its own positions and demands, significantly strengthening emission

reduction responsibilities imposed on China and pressuring China to increase its economic and technological assistance for addressing climate change. Second, Australia and its allies may exploit the current model of climate cooperation to covet the maritime rights and law enforcement authority of small island states, thereby constraining China's maritime activities. For instance, under the pretext of bilateral cooperation on climate change and human rights protection, Australia might frequently use the law enforcement privileges of small island states to disrupt China's normal fishing activities in the Pacific, squeezing the development space for China's distant-water fisheries. Third, Tuvalu is currently one of the few small island states maintaining so-called diplomatic relations with Taiwan region of China. Australia may utilize Article 4 of the Treaty to further promote cooperation between Tuvalu and Taiwan region of China in areas such as security, defense, and energy, aiming to isolate China and obstruct the process of unification. Currently, this model of cooperation between Australia and small island states shows a trend of expansion. Beyond the Treaty, Australia signed bilateral agreements with similar content with Vanuatu in December 2022 and Papua New Guinea in December 2023.⁶² The proliferation of such practices warrants vigilance.

B. Promoting synergistic governance of the human rights law and climate change law systems guided by a holistic systems approach

A holistic systems approach represents a new development in understanding the relationship between humans and the environment, insisting on viewing the relationship between humans and nature from a comprehensive, systematic, and coordinated perspective.⁶³ Climate change and human rights protection are closely intertwined, necessitating an integrated viewpoint that balances all factors to promote their synergistic governance. Based on this, China can advance the integration and interaction of climate change law and human rights law through the following pathways in its multilateral practice.

First, it is necessary for China to constructively participate in UN climate change negotiations and human rights governance processes, promoting the comprehensive coordination of issues related to protecting the human rights of climate migrants. Currently, the underlying reason why Tuvalu chose to sacrifice sovereign rights in exchange for human rights protection lies in the ineffectiveness of multilateral mechanisms. However, multilateral approaches are the core for solving global governance issues, with bilateral approaches serving as important supplements. Accordingly, China can use opportunities in multilateral negotiations to foster further integration of these two systems. Specifically, within the climate change law negotiation process, given the insufficient consideration of human rights protection in the *Paris Agreement*, China could propose concrete solutions in subsequent meetings addressing the resettlement of climate migrants, the protection of their human rights, and the implementation of human rights protection obligations within mitigation and

⁶² James Batley, "One Year, Three Agreements: Shaping Thinking on Regional Security," January 15, 2024, accessed June 4, 2024, <https://devpolicy.org/one-year-three-agreements-shaping-thinking-on-regional-security-20240115/>.

⁶³ Li Yiding, "Expression of Indigenous Residents' Rights in Protected Areas from a Holistic Systems Perspective," *Dongyue Tribune* 10 (2020): 172-173.

adaptation measures. This would refine the human rights clauses in the *Paris Agreement* and strengthen the international community's awareness of human rights protection in the context of climate change. For example, it could suggest incorporating climate migration provisions into the section on climate change response measures, linking them with other response actions to form a systematic solution model.⁶⁴ In the global human rights governance process, China can first dedicate itself to promoting a transformation of the discourse system of global human rights governance. Currently, the discourse power in human rights governance is still dominated by developed countries, and the conclusion of the Treaty is clearly intended to establish human rights protection standards favorable to the interests of developed countries. Therefore, China can use platforms such as the UN Human Rights Council and specialized convention committees to promote a discourse on human rights protection characterized by equality, inclusiveness, and respect for sovereignty. Furthermore, it should urge the UN Human Rights Council and the UN Committee on Economic, Social and Cultural Rights to further clarify the relationship between climate change and human rights protection, such as defining the specific human rights protection obligations and responsibilities that states should undertake in the context of addressing climate change.

Second, China needs to promptly summarize its domestic experience in synergistically advancing climate change response and human rights protection, and present these to states, international organizations, and the media in diplomatic settings and multilateral platforms at an appropriate time to enhance its institutional discourse power. Although "climate migrant" is a relatively new term, the phenomenon has long existed in China. As early as the 20th century, China had practices of relocating and resettling environmental migrants from the Xihai region in Ningxia, which met the basic survival needs of the local residents and effectively promoted the coordinated development of the population, resources, and the environment, enriching China's experience in migrant resettlement and human rights protection. In recent years, under the guidance of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, and to create a favorable living and residential environment while achieving the sustainable development of human rights, China has continuously improved its green development strategy, strengthened emission reduction efforts, researched and developed low-carbon energy technologies, and deepened human rights protection practices under climate change response measures. Based on this, China can promptly summarize innovative practices and successful experiences in the fields related to climate migrants and human rights protection, and introduce them to other countries, international organizations, and news media at suitable forums such as high-level global human rights governance forums and the South-South Human Rights Forum. This would enhance the international community's understanding of China's human rights endeavors and provide Chinese wisdom and solutions for the construction of the international rule of law regarding the protection of the human rights of climate migrants.

C. Conducting targeted cooperation with small island states on the basis of

⁶⁴He Jingjing, "The Dimension of Human Rights Law in Climate Change," *Human Rights* 5 (2015): 98.

respecting sovereign independence

Currently, small island states are viewed by the United States as crucial pivots in its “Indo-Pacific Strategy.” Australia, as an active proponent of this strategy, strives to maintain the US-led regional order in all aspects and to obstruct or interfere with China’s cooperation with Pacific Island Countries across various fields. The Treaty is a vivid reflection of this diplomatic strategy. In light of this, it is necessary for China to strengthen cooperation with small island states in the areas of climate response and human rights protection. By providing them with tangible assistance, China can rebuild trust and alleviate geopolitical pressures.

First, China should maintain concern for the special circumstances faced by small island states and support their equal participation in global governance. Specifically, beyond continuing close dialogue with small island states within multilateral mechanisms such as the UNFCCC Conference of the Parties, the UN International Law Commission, and the International Court of Justice, as well as regional mechanisms like the Pacific Islands Development Forum and the International Conference on Small Island Developing States, China should express full sympathy and attention toward the challenges they face. On issues not touching upon China’s fundamental national interests, China can support proposals put forward by small island states. For example, it can support their repeated proposals for fixing baselines, freezing territorial claims, and preserving sovereign statehood. This would help them gain initiative in multilateral negotiations and boost their confidence in multilateral governance.

Second, China can provide targeted climate assistance to small island states. China and small island states face similar challenges in addressing climate change. For instance, receding coastlines may alter territorial sea baselines,⁶⁵ and sea-level rise threatens the right to life and residence of coastal inhabitants. However, compared to small island states, China possesses relatively stronger advantages in funding, resources, and technology. Next, based on these existing strengths and while respecting the independence, equality, and integrity of small island states’ sovereignty, China can carry out targeted assistance. This includes: 1) enhancing cooperation in low-sensitivity areas such as meteorological observation and early warning systems, agricultural production, and talent cultivation to improve the climate adaptation capacity of small island states; 2) appropriately incorporating content related to climate migrants into bilateral cooperation agreements reached with small island states, providing them with diversified resettlement options; 3) utilizing advanced technologies in land reclamation, dike reinforcement, and island and reef maintenance to help small island states preserve their territorial integrity, enabling their residents to remain in their homes with dignity and sustainability, thus avoiding displacement and becoming climate migrants.

D. Building China’s independent system for protecting the human rights of climate migrants

International cooperation has become a common approach for countries to

⁶⁵Jiang Xiaoyi and Liu Jiyun, “International Legal Issues and Implications of National Practices for Protecting Coastal Entities Against Sea-Level Rise,” *China Soft Science* 4 (2023): 7-8.

pursue development collectively. As the negative impacts of climate change intensify, in the short term, neighboring countries like Australia and New Zealand will likely be the preferred destinations for migrants from small island states. In the long term, however, China may engage in cooperation with small island states in related fields, necessitating advance strategic planning. Yet, China's current institutional system for human rights protection is not fully developed. For instance, China has not yet ratified the *International Covenant on Civil and Political Rights*, and there are legal gaps in the protection of the human rights of climate migrants. Accordingly, China should promptly improve its corresponding system for rights protection.

On one hand, building China's independent system for protecting the human rights of climate migrants first requires strengthening interdisciplinary research and collaboration. In terms of content, the construction of a national human rights protection system involves complex and multidisciplinary research, spanning fields such as law, politics, culture, economics, and religion, while also encompassing multiple relationships, including those between human rights and sovereignty, human rights and the environment, human rights and international cooperation, and human rights and economic development. Therefore, the process of refining China's human rights protection system must begin with clearly defining relevant concepts and clarifying the interactions and influences between these different relationships.⁶⁶ Only through in-depth research on human rights protection issues from an interdisciplinary perspective can a comprehensive, scientific, and fully protective human rights safeguard system be formed.

On the other hand, enriching the rule-of-law pathways for human rights protection is a concrete manifestation of China's independent system. Thus, it is essential to diversify the legal avenues for protecting human rights within the context of climate change. First, strengthen the institutional framework for protecting the human rights of climate migrants. Currently, many countries have already developed policies and regulations related to climate migrants. For example, the New Zealand government issued the *Pacific Climate Change-related Displacement and Migration: A New Zealand Action Plan* in 2018, and Vanuatu formulated its *National Policy on Climate Change and Disaster-Induced Displacement* the same year, providing some guidance for state-level handling of climate migration issues. Accordingly, China can use these more mature international policies as blueprints to formulate national guidelines addressing migration induced by climate change. Initially, these guidelines should offer principled directives, allowing for timely adjustments based on domestic and international developments. Such principled guidelines could cover the following: clarifying the aims and principles of China's acceptance of climate migrants, defining concepts related to climate migration, and, crucially, establishing a comprehensive mechanism for protecting the rights of climate migrants. This comprehensive rights protection mechanism could be structured around three stages: 1) During the pre-migration preparation stage, implement systems for information access and public participation to ensure climate migrants are informed about the relevant circumstances

⁶⁶Sun Pinghua, "On China's Human Rights Discourse System in Global Governance," *Journal of China University of Political Science and Law* 3 (2019): 127-128.

of the destination country and can express their migration intentions clearly. 2) During the formal migration stage, establish systems for financial assistance, safety guarantees, and risk prevention to protect migrants' ability to exercise their right to mobility with dignity. 3) During the resettlement and integration stage, utilize systems for social welfare, identity verification, and skills training to help migrants integrate into local society as quickly as possible. Second, positioning efforts around "human rights protection in the context of climate change," China can improve the judicial channels for human rights protection. Existing global and regional judicial practices demonstrate that climate litigation plays a pivotal role in upholding human rights and advancing climate justice. However, climate litigation in China is still in its early stages and faces numerous legal obstacles. In this regard, Chinese courts can, through exploration, draw upon and summarize relevant experiences from other countries and regions regarding climate litigation to refine the judicial channels for human rights protection. Courts could, when accepting climate litigation cases involving human rights, adopt a relatively broad scope for determining plaintiff standing, appropriately reduce the plaintiff's burden of proof, and provide effective avenues for rights remediation.

V. Conclusion

Unlike previous approaches in the Pacific region that primarily facilitated labor mobility and resettlement, the Treaty explicitly recognizes the issue of climate migration induced by climate change. It aims to promote the realization of relevant human rights for Tuvaluan citizens, such as the right to residence and the right to mobility, by streamlining pathways for climate migrants and increasing assistance for climate adaptation efforts. However, the Treaty deeply links issues of climate cooperation and human rights protection to security concerns, attempting to use these issues to enhance control over small island states. From the perspective of rights protection itself, the emergence of the Treaty provides a clear legal basis for protecting the human rights of climate migrants and creates an institutional framework for climate migration with dignity. Yet, from the standpoint of the concept of international rule of law, this cooperation model merely perpetuates the fragmented nature of the international human rights law system and does not fundamentally contribute to the improvement of the international rule of law. Moreover, the content involving the ceding of sovereign rights in exchange for human rights protection reflects Australia's deep-seated strategic interests, exacerbates the conflict between human rights protection and sovereign independence, potentially further increasing the cost for small island states to uphold human rights in the context of climate change, and may raise numerous international legal issues. Currently, this cooperation model shows a trend of proliferation in the Pacific region and may develop into a platform for developed countries to use human rights protection and climate cooperation as pretexts to interfere in the internal affairs of developing countries, erode sovereignty, and advance their own national interests while evading climate mitigation responsibilities. In response, China must therefore continuously monitor the impacts of the Treaty and prepare forward-looking strategies. Specifically, this

involves constructively participating in UN human rights affairs and climate-related negotiations, promoting further integration of the climate change law and human rights law systems, maintaining concern for the special circumstances of small island states, proactively offering support to them on the basis of respecting national sovereignty, and providing Chinese wisdom and solutions for addressing the protection of the human rights of climate migrants through pragmatic actions.

(Translated by *CHEN Feng*)