

Input: Addressing the challenges and barriers to the full realization of the human rights of the people of the Marshall Islands stemming from the State's nuclear legacy

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I. The United States' abdication of its duty to decolonize and undermining of the Marshallese people's right to self-determination has caused the unremedied nuclear legacy that persists in the Marshall Islands today.

The United States took control of the Marshall Islands from the Japanese during World War II. In 1947, *after* the U.S. military had already begun displacing thousands of people in the Marshall Islands to facilitate nuclear weapons testing and the construction of bases, the United Nations legitimized the United States' colonization of the region by naming the United States the Trustee granted authority over the Trust Territory of the Pacific Islands.²

The United States exposed the Marshallese people to the equivalent of 1.6 Hiroshima-sized explosions per day over the course of a 12-year period – detonating 67 nuclear bombs in the Marshall Islands between 1946 and 1958.³ Marshallese living throughout the country between 1948 and 1970 demonstrated higher cancer rates attributable to radiation exposure from the nuclear testing, with cancer rates doubling in the most exposed areas.⁴ The Marshallese people that the U.S. military displaced to facilitate its testing program still cannot return to their home islands, as the radiation levels remain higher than Chernobyl and Fukushima.⁵

In the 1960s and 1970s, the United States faced increased scrutiny for its nuclear testing program and its increasingly apparent mismanagement of the Trust Territory. Though the Trusteeship Agreement required the United States to promote the political and economic advancement of the Trust Territory toward self-government and independence, the U.S. officials responded to growing calls for independence and international pressure to decolonize by engaging in a concerted effort to undermine self-determination efforts⁶ and make the islands economically dependent on the United

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² Trusteeship Agreement for the Former Japanese Mandate Islands, *adopted* April 2, 1947, art. 6, 8 U.N.T.S. 190, 192 (entered into force July 18, 1947).

³ Dan Zak, *A ground zero forgotten*, The Washington Post, https://www.washingtonpost.com/sf/national/2015/11/27/a-ground-zero-forgotten/?utm_term=.98a1dfa79fd0.

⁴ National Cancer Institute, *Dose Estimation and Predict Risk for Marshall Islands Residents*, <https://dceg.cancer.gov/research/how-we-study/exposure-assessment/nci-dose-estimation-predicted-cancer-risk-residents-marshall-islands>.

⁵ Columbia University, *Radiation in Parts of Marshall Islands Higher Than Chernobyl*, <https://news.columbia.edu/news/marshall-islands-nuclear-radiation-chernobyl>.

⁶ The Solomon report: America's ruthless blueprint for the assimilation of Micronesia, <https://archive.org/details/TheSolomonReportAmericasRuthlessBlueprintForTheAssimilationOf/mode/1up>.

States.⁷ It was against this coercive historical backdrop that the Marshall Islands entered into a Compact of Free Association with the United States.

To add insult to injury, in 1977, U.S. soldiers collected contaminated soil and debris from Enewetak Atoll and placed it under a concrete dome, called Runit Dome, which scientists and Marshallese officials are concerned is in danger of leaking due to rising sea levels.⁸ Also contained in the dome are debris from biological weapons tests and 130 tons of irradiated soil shipped from Nevada to the Marshall Islands – neither of which the United States disclosed until after they signed the 1986 Compact of Free Association releasing the United States from legal liability for all claims related to the nuclear testing program and its lasting impacts.

II. The United States has used the Compact of Free Association to evade legal liability for its nuclear testing in the Marshall Islands and prevent access to justice and remedy.

By the time the Compact of Free Association between the United States and Marshall Islands was ratified in 1986, the Enewetakese, Rongelapese, and Bikinians had already filed multi-million-dollar lawsuits against the United States in U.S. federal district court, and they opposed the approval of the Compact because it would moot their current lawsuits and foreclose their avenues to relief in U.S. courts. Within a year of the Compact taking effect, U.S. federal courts dismissed fourteen lawsuits amounting to \$11 billion in health and property damage resulting from the nuclear testing program.⁹

The Compact contains a provision, Section 177, wherein the United States took some responsibility for the harm the nuclear testing program caused¹⁰ and allocated \$150 million to the establishment of a Nuclear Claims Tribunal.¹¹ However, the Marshallese citizens who attempted to assert claims arising from the U.S. nuclear testing program then denied access to justice in U.S. courts because Section 177 constituted “full and final” settlement of nuclear claims,¹² the treaty relationship

⁷ Shannon Marcoux, *Trust Issues: Militarization, Destruction, and the Search for a Remedy in the Marshall Islands*, Columbia Human Rights Law Review Online, footnote 112, <https://hrlr.law.columbia.edu/hrlr-online/trust-issues-militarization-destruction-and-the-search-for-a-remedy-in-the-marshall-islands/#post-1603-footnote-112>.

⁸ Susanne Rust, *How the U.S. betrayed the Marshall Islands, kindling the next nuclear disaster*, Los Angeles Times, <https://www.latimes.com/projects/marshall-islands-nuclear-testing-sea-level-rise/>.

⁹ *Ibid.*

¹⁰ Compact of Free Association, Title II, § 177 (“The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands for loss or damage to property and person resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.”).

¹¹ Agreements with and other provisions related to the Marshall Islands, 48 U.S.C. §1903(f).

¹² *See* People of Enewetak, Rongelap, and Other Marshall Islands Atolls v. U.S., 864 F.2d 134 (Fed. Cir. 1988) (upholding dismissal of takings claim arising from nuclear testing on the grounds that the Compact withdrew the Claims Court’s jurisdiction); *Juda v. U.S.* 13 Cl.Ct. 667 (Fed. Cl. 1987) (holding that the Compact implicitly withdrew the U.S.’ consent to be sued in Claims Court on Bikinian plaintiffs’ takings and breach of contract claims arising from the U.S.’ nuclear testing program).

meant such claims raised non-justiciable political questions,¹³ or the Compact withdrew the United States' consent to be sued under the U.S. Federal Tort Claims Act.¹⁴

Therefore, far from providing redress for the victims of nuclear testing, the United States has used the Compact of Free Association to shield itself from legal liability – violating nuclear testing victims' access to justice and right to a remedy.

III. The United States must pay outstanding Nuclear Claims Tribunal awards and provide funds to pay out future eligible claims.

The \$150 million the United States allocated to claims awarded by the Nuclear Claims Tribunal (NCT) proved “manifestly inadequate” according to former U.S. Attorney General Thornburgh, whom the Marshall Islands retained to conduct an independent evaluation of the NCT's processes.¹⁵ The NCT's awards – which the Thornburgh Report concluded “were the result of reasonable, fair and orderly processes that are entitled to respect” – amounted to approximately \$2.3 billion.¹⁶ This left more than \$23 million in personal injury awards and \$2.2 billion in property damage awards unpaid when the NCT ran out of funds in 2009.¹⁷ Due to the insufficiency of funds, some claims—such as the claims of islanders from Ailuk and Likiep, who suffered from radioactive contamination after the United States failed to evacuate them during the Bravo test—have never been heard by the NCT.¹⁸

Declassified files revealed in 1994 that the Reagan Administration had failed to disclose the full extent of the radioactive fallout and corresponding health impacts when initially negotiating the 1986 Compact, but the changed circumstances petition the Marshall Islands made to the U.S. Congress in 2000 in light of this information remains unanswered.¹⁹

¹³ *People of Bikini v. U.S.*, 77 Fed.Cl. 744 (Fed. Cl. 2007) (holding that the court's lack of jurisdiction and the political question doctrine precluded the court's review of plaintiffs' claims arising from U.S. nuclear testing on Bikini Atoll), *aff'd* 554 F.3d 996 (Fed. Cir.2009); *John v. U.S.*, 77 Fed. Cl. 788 (Fed. Cl. 2007) (dismissing claims of the people of Enewetak Atoll on the same grounds), *aff'd* *People of Bikini v. U.S.*, 554 F.3d 996 (Fed. Cir. 2009).

¹⁴ *Antolok v. U.S.*, 873 F.2d 369, 374 (App. D.C. 1989) (finding that Section 177 of the Compact withdrew the jurisdiction of the federal courts over claims arising from the U.S. nuclear testing program in the Marshall Islands and that such claims could not be brought under the Federal Tort Claims Act).

¹⁵ Dick Thornburgh, *The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of Its Decision-Making Processes* (January 2003), <https://www.bikiniatoll.com/ThornburgReport.pdf>.

¹⁶ International Center for Advocates Against Discrimination, *Compacts of Free Association (COFA): Balancing the Scales in Negotiations Between the United States and the Federated States Of Micronesia (FSM) And the Republic of the Marshall Islands (RMI)*, <https://icaad.ngo/2020/10/05/compacts-of-free-association-cofa-strategic-assessment/>.

¹⁷ Marshall Islands National Nuclear Commission, *Nuclear Justice for the Marshall Islands: A Strategy for Coordinated Action FY2020-FY2023*, <https://rmi-data.sprep.org/resource/nuclear-justice-marshall-islands-coordinated-action-justice>.

¹⁸ Amicus Curiae Brief Opposing Set-off of Lost-use Damages, NCT No. 23-06103; Claims for Compensation on Behalf of the People of Likiep Atoll, NCT No. 23-06980-B.

¹⁹ International Center for Advocates Against Discrimination, *Compacts of Free Association (COFA): Balancing the Scales in Negotiations Between the United States and the Federated States Of Micronesia (FSM) And the Republic of the Marshall Islands (RMI)*, <https://icaad.ngo/2020/10/05/compacts-of-free-association-cofa-strategic-assessment/>.

The United States must pay all outstanding unpaid NCT awards and provide funds for compensation of eligible awards not yet decided by the NCT. The United Nations and the international community, which facilitated U.S. colonization of the Marshall Islands and has to date failed to hold the United States accountable for its gross human rights violations therein, must pressure the United States to fulfill this obligation and/or provide monetary support to fulfill nuclear testing victims' right to a remedy.

IV. The nuclear legacy fits within a broader pattern of ongoing U.S. colonization and human rights abuses in the Marshall Islands that warrants the international community's attention.

In addition to the ongoing health, environmental, and human rights impacts of U.S. nuclear testing, the United States' colonization of the Marshall Islands continues – as does its perpetration of human rights abuses therein.²⁰ For example, the U.S. military forcibly displaced residents from over two dozen islands in the Marshall Islands to facilitate the construction and operation of its Ronald Reagan Missile Defense Site on Kwajalein Atoll. Many of these people were relocated to Ebeye, an overcrowded island located just three miles from the idyllic U.S. base on Kwajalein. On Ebeye, upwards of 10,000 people reside on 0.10 square miles of land, and many residents lack access to clean water, proper sanitation, and a stable electricity supply.²¹ In addition to the harm arising from displacement, the base on Kwajalein has leaked dangerous levels of the hazardous and slow-to-degrade chemicals polychlorinated biphenyls (PCBs) into the lagoon – rendering the fish on which Ebeye residents previously relied for sustenance unsafe to eat.²² The U.S. military's seizure of farmable land and contamination of marine resources from the 1940s onward has heavily restricted the availability of affordable nutritious food,²³ which has led to astronomical rates of diabetes and other non-communicable diseases in the Marshall Islands.²⁴

As it has done with respect to nuclear justice, the United States has used the Compact of Free Association to evade legal liability for the harm it causes in the Marshall Islands.²⁵ The Compact terms currently authorize the United States to establish bases throughout the Marshall Islands but do not provide the Marshall Islands a corresponding enforceable right to demand particular environmental,

²⁰ Autumn Bordner, *Climate Migration & Self-Determination*, Columbia Human Rights Law Review, <https://hrlr.law.columbia.edu/hrlr/climate-migration-self-determination/>.

²¹ Shannon Marcoux, *Trust Issues: Militarization, Destruction, and the Search for a Remedy in the Marshall Islands*, Columbia Human Rights Law Review Online, <https://hrlr.law.columbia.edu/hrlr-online/trust-issues-militarization-destruction-and-the-search-for-a-remedy-in-the-marshall-islands/#post-1603-footnote-112>.

²² Giff Johnson, *US Army Report: Reef fish at Marshalls atoll are toxic*, RNZ, <https://www.rnz.co.nz/international/pacific-news/395041/us-army-report-reef-fish-at-marshalls-atoll-are-toxic>. See also, e.g. “No-Fishing Areas”, The Kwajalein Hourglass (Jan. 22, 2022), page 10, <https://home.army.mil/kwajalein/about/the-kwajalein-hourglass>.

²³ Seiji Yamada, MD, MPH & Neal Palafox, MD, MPH, *On the biopsychosocial model: the example of political economic causes of diabetes in the Marshall Islands*, Family Medicine (2001), 33(9):702-704.

²⁴ Pearl A. McElfish, PhD et al, *Assessment of Diabetes-Related Health Disparities among the Marshallese Living in the Republic of the Marshall Islands*, Hawai'i Journal of Health & Social Welfare, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8504294/>.

²⁵ Shannon Marcoux, *Trust Issues: Militarization, Destruction, and the Search for a Remedy in the Marshall Islands*, Columbia Human Rights Law Review Online, <https://hrlr.law.columbia.edu/hrlr-online/trust-issues-militarization-destruction-and-the-search-for-a-remedy-in-the-marshall-islands/#post-1603-footnote-112>.

human rights, or labor standards for the bases – allowing for the United States to continue committing human rights abuses without recourse for victims.

Because the bilateral treaty between the United States and Marshall Islands prevents access to justice and remedy, the international community must take action to protect Marshallese citizens from future human rights abuses perpetrated on Marshallese territory by the United States and must ensure access to justice and remedy for past human rights violations – whether associated with nuclear testing or arising from ongoing abuses.