

**International Bar Association Human Rights Law Committee submission to OHCHR call for input:
Addressing the challenges and barriers to the full realisation of the human rights of the people of
the Marshall Islands stemming from the state's nuclear legacy**

31 January 2026

Introduction

The International Bar Association (IBA) Human Rights Law Committee welcomes the opportunity to provide input into the Office of the United Nations High Commissioner for Human Rights report on addressing the challenges and barriers to the full realisation and enjoyment of the human rights of the people of the Marshall Islands stemming from the state's nuclear legacy. This submission has been prepared by the IBA Human Rights Law Committee, with inputs from individual IBA committee officers and legal experts, and support from the IBA Environment, Health & Safety Committee and IBA Legal Policy & Research Unit (LPRU).¹

The IBA is the world's leading international organization of legal practitioners, bar associations, and law societies. As the 'global voice of the legal profession', the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in assisting the global legal community.

The IBA Human Rights Law Committee aims to promote human rights in all areas of the legal profession, as well as in the broader community.²

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² For more information about the IBA Human Rights Law Committee, see:

www.ibanet.org/unit/Section+on+Public+and+Professional+Interest/committee/Human+Rights+Law+Committee/3260

Executive summary

This report responds to the Office of the UN High Commissioner for Human Rights' Call for Input concerning the challenges and barriers to the full realisation of the human rights of the people of the Marshall Islands arising from the state's nuclear legacy. It examines the enduring health, environmental and intergenerational harms caused by the US' Nuclear Testing Program in the Marshall Islands between 1946 and 1958 and evaluates the principal legal and non-legal avenues available to the Marshall Islands to seek accountability, redress and remediation.

Between 1946 and 1958, the US conducted 67 nuclear detonations in the Marshall Islands, resulting in widespread radioactive contamination, forced displacement and severe long-term health consequences. These impacts persist today, as evidenced by elevated cancer rates, congenital abnormalities and the continued uninhabitability of Bikini Atoll. Despite acknowledgement of responsibility and the provision of compensation under the 1986 Compact of Free Association, the harms suffered by the Marshallese have not been adequately remedied.

This report analyses a range of prospective legal avenues for pursuing justice. These include: petitions to the US Congress based on changed circumstances; seeking the enforcement of awards issued by the Nuclear Claims Tribunal, which was established by the Compact of Free Association; pursuing litigation in US federal courts pursuant to the Federal Tort Claims Act; proceedings before the International Court of Justice and treaty-based claims under instruments such as the Convention against Torture and the Treaty on the Non-Proliferation of Nuclear Weapons; pursuing claims against corporate actors that enabled nuclear testing in the Marshall Islands; seeking justice through engaging with research institutions that participated in or supported the Marshall Islands Nuclear Testing Program; or resorting to arbitration under the Compact.

Among these options, renewed engagement with the US Congress through a petition grounded in changed circumstances emerges as the most viable pathway for securing additional funding to address ongoing health and environmental harms. Other avenues – such as international adjudication or arbitration – face legal obstacles that will demand creative legal planning and innovative strategies to overcome.

This report further considers mechanisms for pursuing justice beyond the state level, including potential claims against corporate actors and research institutions involved in the Nuclear Testing Program. Although avenues for pursuing legal liability against these actors are limited, affected communities may seek reparative justice through acknowledgement, apology and participation in remediation and research initiatives. This report recognises that the Marshallese conception of justice extends beyond judicial outcomes and includes truth-telling, acknowledgement and measures of satisfaction.

In conclusion, this report finds that the Marshall Islands continues to face legal obstacles in obtaining full and effective redress for the harms caused by nuclear testing. Addressing this enduring legacy requires a multifaceted legal approach that combines legal advocacy at both the US and international levels with sustained political engagement. Only through such concerted efforts can the nuclear legacy be addressed in a manner consistent with human rights standards, the right to an effective remedy and the dignity of the Marshallese people.

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1 Overview

Following the report of the Office of the UN High Commissioner for Human Rights ('OHCHR') on the nuclear legacy of the Marshall Islands,³ OHCHR issued a Call for Input to support the preparation of a second report examining the challenges and barriers to the full realisation and enjoyment of the human rights of the people of the Marshall Islands.⁴ In response to that Call for Input, this Report is submitted to assist the UN High Commissioner for Human Rights in identifying and addressing the human rights challenges and barriers arising from the Marshall Islands' nuclear legacy.

2 Factual background

2.1 Nuclear Testing from 1946 to 1958

Between 1946 and 1958, the US conducted an extensive Nuclear Testing Program in the Marshall Islands, comprising 67 nuclear detonations, including the 'Castle Bravo' test – the largest nuclear test ever carried out by the US.⁵ The repercussions of these tests for both the population and the environment of the Marshall Islands were profound and enduring, resulting in widespread radioactive contamination of atolls and severe health consequences, including elevated rates of cancer, congenital abnormalities, infertility and thyroid disorders.⁶

2.2 1986 Compact of Free Association

In 1986, the US and the Marshall Islands entered into a Compact of Free Association ('Compact'), pursuant to which the US acknowledged responsibility for the consequences of its Nuclear Testing Program and agreed to provide financial compensation.⁷ The Compact established a Nuclear Claims Tribunal and a Reparations Fund, with Section 177 providing that the Fund would receive \$150 million. The Compact also created a legal framework governing US economic assistance in areas including health, education and infrastructure for the period from 2004 to 2023, and provided for the US military presence in the Marshall Islands. The Compact was subsequently

³ Office of the UN High Commissioner for Human Rights, Report on the nuclear legacy of the Marshall Islands, UN Doc. A/HRC/57/77.

⁴ Office of the UN High Commissioner for Human Rights, Call for Input on the challenges and barriers to the full realization and enjoyment of human rights in the Marshall Islands, issued pursuant to UN Doc. A/HRC/57/77.

⁵ See, for example, Office of the UN High Commissioner for Human Rights, Report on the nuclear legacy of the Marshall Islands, UN Doc. A/HRC/57/77.

⁶ *Id.*

⁷ Compact of Free Association between the Government of the U.S. and the Government of the Marshall Islands, 25 June 1983, entered into force 21 October 1986.

amended in 2003 to provide additional financial assistance and to address related matters, including migration rights.⁸

2.3 2023 Compact of Free Association

On 16 October 2023, the US and the Marshall Islands signed a new Compact, which provides for US assistance of \$50 million annually beginning in fiscal year 2024, \$200 million over a 20-year period for joint health care programmes and a new joint strategic health initiative, and additional funding for technical assistance and expertise to address climate-related impacts that threaten the existence of the low-lying islands, as well as for environmental programmes. The Compact also allocates \$700 million to a repurposed trust fund to support priorities identified by the Marshall Islands, in accordance with procedures to be mutually agreed.⁹

In addition, the US will grant \$50,000 to \$73,000 per annum between 2024 and 2043 (for an average total of \$1.2 million) as part of continued economic assistance to several sectors, including education, health and public infrastructure. Pursuant to Section 261(e) to (i), the US also commits to provide further financial assistance to specific sectors through:

- additional educational assistance (\$22 million);
- additional environmental assistance (\$30 million);
- US Supplemental Health Fund and Joint Health Dialogue (\$20 million);
- Climate Fund and Working Group (\$20 million); and
- Kwajalein Development Plan Fund (\$132 million) to ‘facilitate resilience and healthy communities throughout Kwajalein Atoll’.

The only reference to the Nuclear Testing Program appears in Article VI, Section 261(j) (Grants), which provides for ‘Nuclear Testing Transparency’ and the establishment of a museum. Under this provision, the US commits to provide a \$10 million grant ‘to improve the accessibility of documents and information previously provided to the Government of the Republic of the Marshall Islands relating to the United States Nuclear Testing Program, including waste disposal, in the Republic of the Marshall Islands’.¹⁰

Three principal issues relating to the aftermath of nuclear testing remain unresolved:

- The Marshall Islands maintains that the US should provide additional funding to address the continuing health and environmental harms caused by the nuclear

⁸ Agreement Amending the Compact of Free Association Between the Government of the U.S. and the Government of the Marshall Islands (2003).

⁹ *Id.*; see also related implementing arrangements governing trust fund administration.

¹⁰ Art. VI, § 261(j) Compact, as amended.

tests.¹¹ Although the 2023 Compact establishes a \$700 million trust fund and includes various additional funding commitments, these allocations are not expressly linked to nuclear testing-related reparations but instead constitute general assistance.

- Bikini Atoll remains uninhabitable due to persistently elevated levels of radiation.¹²
- The Runit Dome, which contains approximately 111,000 cubic yards of radioactive waste, has begun to deteriorate, raising concerns regarding structural integrity and environmental containment.¹³

3 Prospective legal avenues

The following provides an overview of prospective avenues that the Marshall Islands may wish to pursue:

3.1 Changed circumstances petition to the US Congress

3.1.1 Overview

If changed circumstances regarding injuries resulting from the Nuclear Testing Program occur and warrant the allocation of additional funds, the Marshall Islands may file a petition before the US Congress.¹⁴ Changed circumstances that could constitute a valid reason for an additional fund allocation could include leakage from the Runit Dome or the emergence of severe congenital deformities not foreseen at the time the Compact was originally negotiated.

3.1.2 2000 and 2001 petition rejected

Changed circumstances petitions have had mixed results, entail protracted proceedings and do not guarantee a positive result.

In September 2000 and in November 2001, the Marshall Islands submitted a request seeking approximately \$3.3 billion based on changed circumstances. The Marshall Islands argued that there was new information since the enactment of the Compact,

¹¹ See OHCHR, Report on the nuclear legacy of the Marshall Islands, UN Doc. A/HRC/57/77.

¹² 'How the U.S. betrayed the Marshall Islands, kindling the next nuclear disaster,' *LA Times* (10 Nov. 2019), available at < www.latimes.com/projects/marshall-islands-nuclear-testing-sea-level-rise>.

¹³ 'The U.S. put nuclear waste under a dome on a Pacific island. Now it's cracking open,' *The Washington Post* (20 May 2019), available at < www.washingtonpost.com/nation/2019/05/20/us-put-nuclear-waste-under-dome-pacific-island-now-its-cracking-open>.

¹⁴ Article IX, § 177 Compact.

including declassified Department of Energy Records that indicate ‘a wider extent of radioactive fallout than previously known or disclosed’.¹⁵

A November 2004 US State Department Bureau of East Asian and Pacific Affairs Report evaluating the request held that the request did not fall within the ‘changed circumstances’ provision of the Section 177 Settlement Agreement.¹⁶ In January 2005, the US State Department argued that the request did not provide evidence of ‘changed circumstances’ within the meaning of Article IX of Section 177, though the State Department noted that ‘some of the Republic of the Marshall Islands’ requests for additional programme assistance ‘might be desirable’.¹⁷

3.1.3 2007 petition granted

In 2007, the Marshall Islands again requested additional assistance from the US in relation to the Nuclear Testing Program. This request resulted in a 2010 grant authorised under the Supplemental Nuclear Compensation Act, providing \$4.5 million per fiscal year from 2009 through 2023, for a total of approximately \$70 million.¹⁸

3.1.4 Observations

Past experience demonstrates that petitions premised on changed circumstances are often protracted, and that the US Congress has historically been reluctant to recognise or act upon such claims. Moreover, while the 2023 Compact allocates substantial additional funding, Congress may characterise these appropriations as responsive to changed circumstances. Nonetheless, these funds are expressly directed toward technical assistance, education, environmental management and development objectives, rather than toward addressing the unforeseen health and environmental consequences arising out of nuclear testing. As such, they should not be treated as satisfying or precluding a petition based on changed circumstances.

Accordingly, petitioning the US Congress for additional funding within the framework of the Compact and through congressional engagement – grounded in the extraordinary and unforeseen health and environmental harms caused by nuclear testing, and framed in terms of the foundational values of the US and its long-term interest in a strong partnership with the Marshall Islands – represents a prudent and robust first course of action. Only if such efforts fail should escalation to arbitration, domestic litigation or

¹⁵ Hearing before the Committee on Energy and Natural Resources, United States Senate, One Hundred Ninth Congress, First Session, S. Hrg. 109-178 (19 July 2005).

¹⁶ ‘Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America,’ Bureau of East Asian and Pacific Affairs (2004), p. 2.

¹⁷ Senate Report of 2010 on Supplemental Nuclear Compensation Act, p. 5.

¹⁸ See Supplemental Nuclear Compensation Act; *see also* related congressional appropriations and implementing measures.

international fora, including the United Nations or the International Court of Justice, be contemplated.

3.2 Nuclear Claims Tribunal

3.2.1 Limited role of the Claims Tribunal

An independent Claims Tribunal was established with jurisdiction to ‘render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program, and disputes arising from distributions under Articles II and III’ of the Compact.¹⁹ Notwithstanding this broad jurisdictional mandate, the Claims Tribunal lacks jurisdiction over the US, or over its agents, employees, contractors, citizens or nationals, with respect to claims brought by the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program.²⁰

The Compact is best understood as establishing a tribunal empowered to indemnify claims brought by nationals of the Marshall Islands, while simultaneously precluding any form of legal liability on the part of the US Marshallese victims could therefore submit claims seeking reparation for harm suffered as a result of the Nuclear Testing Program. The Claims Tribunal, however, was not authorised to issue awards against the US itself; rather, any compensation awarded was payable exclusively from a reparations fund funded by the US.²¹

The Claims Tribunal awarded approximately \$2.3 billion in compensation to the Marshallese for damages arising from the Nuclear Testing Program. Notwithstanding these awards, the total amount of indemnification payable was capped, in the aggregate, at \$150 million, corresponding to the funding allocated to the Reparations Fund in the Compact.²² To this extent, the US maintains that the \$150 million provided to the Reparations Fund²³ constituted a full and final settlement²⁴ of all nuclear testing-related claims, and that the approximately \$600 million subsequently paid for resettlement and

¹⁹ Article IV, § 177 Compact.

²⁰ Article IV Compact.

²¹ Art. IV, § 177 Compact (establishing the Nuclear Claims Tribunal and Reparations Fund as the exclusive mechanism for compensation).

²² Article IX, § 177 Compact.

²³ Article 1(c), § 177 Compact.

²⁴ Camilla Pohle, *See ‘Ashes of Death’: The Marshall Islands Is Still Seeking Justice for US Nuclear Tests,’ The Diplomat* (1 March 2024), available at <<https://thediplomat.com/2024/03/ashes-of-death-the-marshall-islands-is-still-seeking-justice-for-us-nuclear-tests>>.

health care assistance was sufficient to address the harms caused by the Nuclear Testing Program.²⁵

In November 2004, the US Department of State's Bureau of East Asian and Pacific Affairs issued a Report that asserted the following:

the U.S. Government played no role in the establishment of the [Nuclear Claims Tribunal]'s award eligibility criteria, which embrace persons and compensable conditions not recognized under U.S. radiation injury compensation programs. Nor has the U.S. Government played any role in fund management or the investment decisions affecting the proceeds generated by the trust fund.²⁶

The US additionally maintained that it had 'provided to the Marshall Islands Government \$150,000,000 to create an independent nuclear claims fund, the proceeds from which were to be distributed in accordance with the Section 177 Settlement Agreement',²⁷ which Congress regarded as a 'lump sum settlement of \$150 million'.²⁸ The report also challenged the substantive basis of certain awards issued by the Nuclear Claims Tribunal, arguing that 'the scientific community has not found transference of nuclear effects to the second generation in humans,' and thus disputing compensation awarded to the biological children of exposed mothers.²⁹

The Nuclear Claims Tribunal effectively ceased operations in 2011 after the exhaustion of its funds and the US government's decision not to provide additional financial resources.

3.2.2 Inadequacy of funds

The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, in a report on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, refers to Article 2(3) of the International Covenant on Civil and Political Rights and to General Comment No. 31 of the Human Rights Committee concerning the right to an accessible and effective remedy. The report

²⁵ See 'U.S. Relations With Marshall Islands,' U.S. Department of State (6 December 2024), available at < www.state.gov/u-s-relations-with-marshall-islands>.

²⁶ 'Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America,' Bureau of East Asian and Pacific Affairs (2004), p. 2.

²⁷ See 'U.S. Relations With Marshall Islands,' U.S. Department of State (6 December 2024), available at < www.state.gov/u-s-relations-with-marshall-islands>.

²⁸ *Id.*

²⁹ *Id.*

observes that the Nuclear Claims Tribunal was ‘grossly underfunded’³⁰ and therefore unable to provide effective redress. In his recommendations, the Special Rapporteur accordingly called on relevant actors to:

[g]uarantee the right to effective remedy for the Marshallese people, including by providing full funding for the Nuclear Claims Tribunal to award adequate compensation for past and future claims, and exploring other forms of reparation, where appropriate, such as restitution, rehabilitation, and measures of satisfaction, and consider the establishment of a truth and reconciliation mechanism, or similar alternative justice mechanisms.³¹

3.2.3 Challenging the inadequacy of funds in US Federal Court

The Compact obligates the US to respect environmental standards and to protect the environment of the Marshall Islands.³² Accordingly, the Marshall Islands ‘may bring an action for judicial review of any administrative agency action or any activity of the Government of the United States ... for enforcement of the obligations of the Government of the United States arising thereunder’.³³ The designated forums for such claims are the United States District Court for the District of Hawaii and the United States District Court for the District of Columbia. Civil actions are available, though punitive damages and criminal claims are excluded.³⁴

On this basis, an action could potentially be brought for the US’s failure to provide adequate funding to the Nuclear Claims Tribunal, which resulted in the Tribunal becoming inactive. The Marshallese could seek recovery of the approximately \$2 billion in unpaid and unfunded property damage awards and over \$23 million in unpaid and unfunded personal injury awards.³⁵ However, there is a significant risk that a US district court could decline to adjudicate such a claim, or refuse to review congressional action, on the grounds that it presents a nonjusticiable political question.³⁶

3.2.4 Challenging at the ICJ the inadequacy of funds

³⁰ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu, A/HRC/21/48/Add.1 (3 September 2012), p. 12.

³¹ *Id.*, p. 18.

³² § 161(a) Compact.

³³ § 162 Compact.

³⁴ § 162(a) Compact.

³⁵ Nuclear Claims Tribunal, Final Determinations and Awards.

³⁶ *See, for example, Baker v. Carr*, 369 U.S. 186 (1962) (political question doctrine).

The Marshallese may also consider challenging the enforceability of the Compact under international law by examining whether an agreement remains valid when a materially stronger party induces a weaker party to waive its right to bring claims in reliance on the promise of an effective claims-resolution mechanism, only for that mechanism to later prove largely illusory, grossly underfunded and manifestly inadequate to provide reparations commensurate with the harm suffered. The Marshall Islands could seek an advisory opinion from the International Court of Justice on this question. In practice, such an opinion would be requested by the United Nations General Assembly on the Marshall Islands' behalf, pursuant to Articles 65–68 of the Statute of the International Court of Justice, which govern the Court's advisory jurisdiction and procedures.³⁷

3.3 Federal Tort Claims Act

The Federal Tort Claims Act ('FTCA')³⁸ is a US federal statute that permits private parties to sue the US in a federal court for most torts committed by persons acting on behalf of the US. The FTCA constitutes a limited waiver of US sovereign immunity, allowing individuals to pursue specified tort claims against the federal government.

The FTCA, however, bars claims based on conduct or injury occurring outside US territory, irrespective of the claimant's nationality. Accordingly, to invoke FTCA jurisdiction, a claimant would need to demonstrate that the relevant injury occurred within US territory and that it is causally linked to the Marshall Islands Nuclear Testing Program. By way of example, the birth in the US of a child with congenital defects to a Marshallese expatriate residing in the US could, in principle, satisfy the territorial requirement, subject to proof of causation and the applicability of other FTCA exceptions.

Even if these jurisdictional requirements could be satisfied, the US would likely challenge any such claim on the ground that the Marshall Islands, through the Compact, waived on behalf of its government, citizens and nationals the right to bring claims against the US arising from the Nuclear Testing Program. The Compact expressly provides that it:

constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Programme, and which are against the United States, its agents, employees, contractors, and citizens and nationals.³⁹

³⁷ Arts. 65–68 Statute of the International Court of Justice; see also John Balouziyeh, *Public International Law: Conventions, Cases and Commentaries*, Kluwer Law International (2025), pp. 11–15.

³⁸ 28 U.S.C. § 1346 (1946).

³⁹ Article X, § 177 Compact.

A claim brought by a Marshallese national against the US that directly relates to the Nuclear Testing Program would therefore likely be deemed inadmissible.⁴⁰

To overcome this obstacle, any FTCA claim could not be brought by the government, citizens or nationals of the Marshall Islands. By contrast, a claim brought by a US national of Marshallese origin who has renounced Marshallese citizenship and nationality, and who suffered harm attributable to the consequences of the Nuclear Testing Program, would not be barred on this basis, as the Compact does not purport to waive the rights of non-Marshallese citizens or nationals.

While this pathway offers some prospect of viability, it would apply to only a small subset of victims who have renounced their Marshallese citizenship and nationality, leaving justice fragmented and incomplete.

3.4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

3.4.1 Territorial scope and jurisdiction

An alternative avenue would be to institute proceedings before the International Court of Justice alleging that nuclear testing in the Marshall Islands constituted a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) ('Convention against Torture').⁴¹ The Convention applies an 'effective control' standard to the extraterritorial application of its obligations, providing that each 'State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.⁴²

On this basis, the prohibition of torture under Article 2 of the Convention may apply to conduct occurring outside a state's formal territory where that state exercises jurisdiction through effective control. Accordingly, the prohibition could extend to nuclear testing carried out by the US in the Marshall Islands, provided that the US exercised effective jurisdictional control over the territory at the relevant time.

3.4.2 Elements of torture

⁴⁰ This is confirmed by § 178(e), which stipulates that 'this Compact, as amended, or its related agreements, neither the Government of the United States, its instrumentalities, nor any person acting on behalf of the Government of the United States, shall be named a party in any action based on, or arising out of, the activity or activities of a recipient of any grant or other assistance provided by the Government of the United States'.

⁴¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984.

⁴² Article 2.1 Convention against Torture.

Article 1.1 of the Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or *for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.

A claim filed by the Marshall Islands would argue that the nuclear testing and medical experimentation conducted on the Marshallese constituted acts by which severe physical or mental pain or suffering was intentionally inflicted on the Marshallese based on discrimination and that such pain or suffering was inflicted by or with the consent or acquiescence of US public officials or other persons acting in an official capacity. To prevail in such a claim, the Marshallese would need to prove the following elements:

(i) Severe physical or mental suffering

The Marshallese must show that nuclear testing and medical experimentation caused severe physical or mental suffering. It is well documented that the effects of US nuclear testing in the Marshall Islands were profound, long-lasting and among the most severe human consequences of nuclear testing anywhere in the world. Symptoms documented shortly after exposure included hair loss, skin burns, nausea and vomiting and eye lesions. Long-term health consequences include elevated thyroid cancer rates and increased incidence of leukaemia, breast cancer, stomach and colon cancers, miscarriages, stillbirths, severe congenital deformities (sometimes described as ‘jellyfish babies’) and chronic psychological trauma and anxiety linked to radiation exposure.⁴³

With respect to human experimentation, evidence suggests that the Marshallese were unknowingly involved in human radiation experimentation. According to the Marshall Islands National Nuclear Commission (‘NNC’), ‘a US secretive medical experimentation program had been put in place to extract body parts and fluids (blood, teeth, urine) from radiation-affected populations and control groups without the consent of these populations’.⁴⁴ The NNC position on human radiation experiments has been supported

⁴³ Office of the UN High Commissioner for Human Rights, Report on the nuclear legacy of the Marshall Islands, UN Doc. A/HRC/57/77, pp. 8 ff.

⁴⁴ Elli Louka, ‘Marshall Islands Nuclear Claims Tribunal,’ Oxford Public International Law (Sept. 2023), available at <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3799.013.3799/law-mpeipro-e3799>>.

partially by the conclusions of the US Advisory Committee on Human Radiation Experiments ('ACHRE'), which located 'two examples of research in the Rongelap and Utrik populations that appear to have been intended to learn lessons about the effects of radiation ... This has "contributed to [a] sense of being treated as guinea pigs" and has led to [the Marshallese's] distrust of the US medical programme'.⁴⁵ The human experimentation claim is further supported by documentation in relation to Project 4.1, a medical study and experiment conducted by the US of residents of the Marshall Islands exposed to radioactive fallout from the 1 March 1954 Castle Bravo nuclear test at Bikini Atoll.

Medical experimentation undertaken without a subject's consent constitutes a serious human rights violation that is prohibited under international humanitarian law (Article 32 of Geneva Convention IV) and, when there is nexus to armed conflict, constitutes a war crime (Article 8(2)(a)(ii) Rome Statute). It leads to loss of bodily autonomy, fear of unknown harm and a sense of humiliation and powerlessness.⁴⁶

(ii) Intent

While there can be no question that the US intended to undertake nuclear testing and medical experimentation in the Marshall Islands, whether or not the consequent severe physical or mental suffering was intentional requires further investigation. In this respect, OHCHR has stated:

The Government of the United States, for its part, claims that human exposure to radiation was an accident caused by the Bravo test "far exceed[ing] the size expected" and a sudden shift in wind. However, the Government of the United States also maintains that Bravo's "yield was not a total surprise". Reports also show that, even prior to the test, the United States was aware of changing wind patterns and that, in any case, such a shift in the wind "contributed in no significant way to the fallout."⁴⁷

The OHCHR concluded that a truth mechanism 'could help determine, among others, accidental, negligent, or intentional forms of human exposure to radiation [and] assess claims of cruel, inhuman and degrading treatment'.⁴⁸ Unless and until such a mechanism

⁴⁵ *Id.*

⁴⁶ See Ruth R. Faden and Tom L. Beauchamp, *A History and Theory of Informed Consent*, Oxford University Press (New York: 1986), pp. 236-45; Robert J. Levine, *Ethics and Regulation of Clinical Research*, 2nd ed., Yale University Press (New Haven: 1988), pp. 23-30.

⁴⁷ Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, A/HRC/57/77, Human Rights Council, Fifty-seventh session (24 September 2024), p. 14, para. 64.

⁴⁸ *Id.*

is established, any claim against the US will necessarily require further investigation, archival research and, potentially, Freedom of Information Act requests to elucidate the intent underlying the nuclear tests and associated medical experimentation.

(iii) State actors

Nuclear testing in the Marshall Islands was directed by US state actors and carried out with their acquiescence.⁴⁹ This is confirmed by official US government statements acknowledging that it conducted nuclear testing in the Marshall Islands.⁵⁰

(iv) Prohibited purpose

The Torture Convention requires that the infliction of severe pain or suffering be carried out for a prohibited purpose, including obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind. It may be possible to demonstrate that the nuclear testing and associated medical experimentation were conducted on a discriminatory basis, which constitutes one of the enumerated purposes of torture under the Convention.

This argument was advanced as early as 1972 by Micronesian Representative Ataji Balos, who contended that the Marshallese were selected for nuclear testing because of their marginal status in the global south. He asserted that the US ‘chose to make guinea pigs out of our people because they are not white but some brown natives in some remote Pacific islands’.⁵¹

Similarly, the Marshall Islands has also strongly objected to what has been described as the use of discriminatory double standards when determining ‘safe’ levels of radiation. In a study sponsored by the US government, it was claimed that if the Runit Dome ‘were located in the United States,’ it would be ‘classified as a Low-Level Radioactive Waste Disposal Site ... subject to stringent site management and monitoring practices’.⁵² The Marshall Islands National Nuclear Commission has thus opposed the use, by the US Department of Energy, of the ‘general safety standard of 100 millirem a year in the Marshall Islands, instead of the standard of 15 millirem a year used by the United States

⁴⁹ Atomic Heritage Foundation, ‘Marshall Islands,’ Nuclear Museum, Washington, DC, available at <<https://ahf.nuclearmuseum.org/ahf/location/marshall-islands>>.

⁵⁰ See, e.g., U.S. State Department, testimony of Mr. Krawitz, Nuclear Testing Program in the Marshall Islands, Senate Subcommittee on Oversight and Investigations, U.S. Government Publishing Office, 109th Cong. (2006), available at <www.govinfo.gov/content/pkg/CHRG-109shrg24536/html/CHRG-109shrg24536.htm>.

⁵¹ ‘Project 4.1,’ Wikipedia, available at <https://en.wikipedia.org/wiki/Project_4.1#cite_note-6>.

⁵² Office of the UN High Commissioner for Human Rights, Report on the nuclear legacy of the Marshall Islands, UN Doc. A/HRC/57/77, p. 10.

Environmental Protection Agency,’ and points to this double standard as evidence of discrimination.

Whether these allegations of discriminatory purpose can be substantiated would require further investigation, archival research and, potentially, Freedom of Information Act requests to uncover the purpose behind the US decision to conduct nuclear tests and related medical experimentation in the Marshall Islands.

3.4.3 Dispute resolution procedures

The Convention establishes a mechanism for arbitration that, if unsuccessful, allows states to pursue claims at the International Court of Justice. Any dispute between two or more states parties concerning the application of the Convention that cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the form of the arbitration, any one of them may refer the dispute to the International Court of Justice, which will hold jurisdiction to resolve the dispute.⁵³

Each state may, at the time of signature, ratification or accession to the Convention, declare that it does not consider itself bound by the dispute-settlement clause referring disputes to the International Court of Justice.⁵⁴ The US entered the following reservation upon signature:

That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.⁵⁵

On this basis, the filing of an arbitral claim and a subsequent application to the International Court of Justice would not, in itself, establish the Court’s jurisdiction. Any such jurisdiction would depend on US consent, which the US may grant or withhold at its discretion.

3.5 Corporate liability

Another potential pathway to justice involves bringing claims against corporations, corporate officers, directors or other corporate actors that enabled or facilitated nuclear testing in the Marshall Islands by, *inter alia*, providing goods or services or otherwise acting as US government contractors during the testing programme. Such claims could

⁵³ Article 30.1 Convention against Torture.

⁵⁴ Article 30.2 Convention against Torture.

⁵⁵ ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,’ United Nations Treaty Collection, available at <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-9&chapter=4&clang=_en#13>.

be framed as actions for complicity in human rights violations or for environmental harms suffered by the Marshallese population.

A significant limitation of this pathway is that, under the Compact, the government of the Marshall Islands waived the right of its citizens and nationals to bring claims against US contractors arising out of the Nuclear Testing Program.⁵⁶ As a result, this avenue would be available only where the claimant is neither a Marshallese citizen nor a Marshallese national, or where the defendant is not a US person. The latter scenario is highly unlikely, as it is improbable that the US retained non-US corporations as contractors for the Nuclear Testing Program. Accordingly, this pathway would likely be viable only in the narrow circumstance where a claimant who is neither a Marshallese citizen nor a Marshallese national can nevertheless establish legally cognisable harm sufficient to confer standing.

3.6 Liability of research institutions

Another avenue that the Marshall Islands may wish to consider is pursuing engagement with research institutions that participated in or supported nuclear testing in the Marshall Islands. Research universities involved in the development of nuclear weapons included Princeton University,⁵⁷ Columbia University, the University of Chicago and the University of California at Berkeley and Los Alamos.⁵⁸ The extent of these institutions' involvement in the Nuclear Testing Program in the Marshall Islands may not have been sufficient to establish legal liability. Princeton University's role, for example, was reportedly limited to scientific observation and the collection of information about the bomb's nuclear effects.⁵⁹

Nonetheless, it may be possible to seek an apology or formal acknowledgement from such institutions, or to request their participation in research and other initiatives aimed at remediating the environmental and public health harms experienced by the Marshallese. The Marshallese hold a broader conception of justice that does not necessarily require a judicial determination; an acknowledgement, apology or declaratory statement may itself constitute a meaningful form of justice.⁶⁰

⁵⁶ Article X, § 177 Compact.

⁵⁷ 'Princeton Aids with Atomic Bomb,' *The Princeton Herald*, Vol. XXI, No. 40 (10 August 1945), available at <<https://nuclearprinceton.princeton.edu/princeton-and-manhattan-project>>.

⁵⁸ 'The Manhattan Project: An Interactive History,' U.S. Department of Energy, available at <www.osti.gov/opennet/manhattan-project-history/People/CivilianOrgs/university-of-california.html>.

⁵⁹ 'Atomic Bomb Testing at Bikini Atoll 1946,' Nuclear Princeton, available at <<https://nuclearprinceton.princeton.edu/pacific>>.

⁶⁰ The Republic of the Marshall Islands and National Nuclear Commission, 'Reply to Call for Inputs of the Special Rapporteur on Toxics and Human Rights: Access to Justice and Effective Remedies in the Context of Toxics,' Office of the UN High Commissioner for Human Rights, p. 7, available at

3.7 Treaty on the Non-Proliferation of Nuclear Weapons

The Marshall Islands may wish to consider filing a claim against the US before the International Court of Justice alleging that the US violated its obligations under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons ('NPT') by engaging in nuclear testing in the Marshall Islands. This course of action, however, is fraught with legal obstacles.

3.7.1 Jurisdictional limitation

The first and most fundamental obstacle is jurisdiction. On 7 October 1985, following *Military and Paramilitary Activities in and against Nicaragua*,⁶¹ the US terminated its declaration accepting the compulsory jurisdiction of the International Court of Justice pursuant to Article 36(2) of the Statute of the International Court of Justice. As a result, the International Court of Justice lacks jurisdiction over claims against the US absent its express consent.

Accordingly, in order to bring a claim against the US before the International Court of Justice, the Marshall Islands would require US consent, which the US has never provided with respect to claims arising from its nuclear legacy in the Marshall Islands. In theory, the Marshall Islands could seek to overcome this jurisdictional barrier by invoking the 1978 Rules of Court of the International Court of Justice, which permits reliance on *forum prorogatum*, or consent 'yet to be given'. The Rules provide as follows:

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List ... unless and until the State against which such application is made consents to the Court's jurisdiction.⁶²

This mechanism has been used successfully in proceedings brought by Djibouti and the Republic of the Congo against France. By contrast, when Argentina invoked *forum prorogatum* against the US in 2014, the US declined to respond.

<<https://www.ohchr.org/sites/default/files/documents/issues/toxicwastes/cfis/justice-remedies/subm-access-justice-effective-sta-republic-marshall-islands-ssion.pdf>> ('For the Marshallese people, while acknowledging that justice can mean different things to different people, ultimately it is about healing themselves and their land in the pursuit of 'Nuclear Justice,' indicating a broader conception that includes non-judicial remedies).

⁶¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986.

⁶² Article 38(5) Rules of Court of the ICJ (1978).

If the Marshall Islands were to invoke *forum prorogatum*, the US would likely similarly decline to engage. Even so, such an invocation may serve an important non-judicial function. It would place the US formally on notice of alleged breaches of international law and would publicly articulate, before the international community, the grievances arising from the nuclear testing programme.

3.7.2 *Ex post facto* law hurdle

Even if the Marshall Islands were able to overcome the jurisdictional barrier, it would still face a significant temporal obstacle rooted in the principle against *ex post facto* application of treaty law. The US ratified the NPT and deposited its instrument of ratification in March 1970. By contrast, nuclear testing in the Marshall Islands occurred between 1946 and 1958, more than a decade before the NPT entered into force internationally on 5 March 1970.

Accordingly, in order to establish US liability for violations of obligations contained in the NPT, the Marshall Islands would need to demonstrate that those obligations already existed as binding norms of customary international law prior to the treaty's entry into force. Alternatively, the Marshall Islands would need to confine its claims to conduct occurring on or after 5 March 1970, including any post-entry-into-force nuclear-related activities or medical experimentation attributable to the US

3.8 Arbitral claim pursuant to the Compact

A final pathway to justice is the pursuit of an arbitral claim pursuant to the Compact. The Compact establishes an Arbitration Board with jurisdiction to hear and render final determinations on 'all disputes arising exclusively under Articles I, II, III, IV, and V of Title One, Title Two, Title Four, and their related agreements'.⁶³ Although this jurisdiction does not extend to claims concerning US responsibility for nuclear testing, arbitration may nonetheless be invoked pursuant to Section 178(b) for non-tort claims against federal agencies of the Government of the US that administer grants to the Marshall Islands in the areas of education, health and the environment under Title Two of the Compact governing economic relations.

In this limited context, the Arbitration Board may serve as a forum for the Marshall Islands to pursue claims seeking the recovery of funds that were promised but not disbursed. The Compact, however, does not provide an arbitral mechanism for claims seeking compensation for nuclear testing-related harms beyond those addressed through the Compact's grant framework. Accordingly, any attempt to initiate arbitration pursuant to the Compact as a means of obtaining redress for nuclear testing-related damages is unlikely to succeed. This avenue should therefore be considered only as a

⁶³ § 424(b) Compact.

potential mechanism for recovering funds that the US agreed to provide but failed to disburse.

4 Conclusion

The foregoing analysis demonstrates that the Marshall Islands' pursuit of justice for the enduring harms arising from the US Nuclear Testing Program is constrained not by the absence of injury or responsibility, but by a dense web of jurisdictional, temporal and political barriers that have systematically limited access to effective remedies. While multiple legal pathways formally exist – ranging from domestic litigation and arbitral mechanisms under the Compact, to proceedings before the International Court of Justice – each is encumbered by structural limitations that render meaningful relief uncertain or symbolic.

Among the available avenues, renewed engagement with the US Congress through a petition based on changed circumstances remains the most viable path for securing additional resources to address ongoing health, environmental and intergenerational harms. Past experience underscores the possibility of success through this route, particularly where new evidence, deteriorating environmental conditions and unforeseen public health consequences can be demonstrated. By contrast, litigation in US federal courts, arbitral proceedings under the Compact and claims grounded in international treaties such as the Convention against Torture or the Treaty on the Non-Proliferation of Nuclear Weapons face jurisdictional and justiciability hurdles, and in some cases depend on US consent, which is not guaranteed.

At the same time, this study highlights the limits of a purely adjudicatory conception of justice. For the Marshallese, justice has never been reducible to monetary compensation alone. Truth, acknowledgement, apology and meaningful participation in remediation and research efforts constitute integral components of a broader reparative framework. In this respect, engagement with international human rights mechanisms, research institutions and civil society actors may serve important complementary functions by documenting harms, preserving historical memory and exerting sustained normative and reputational pressure on responsible actors.

Ultimately, legal as well as political engagement will be necessary to address the persistence of unresolved health risks, environmental contamination and structural vulnerability more than seven decades after the first nuclear detonation in the Marshall Islands. The international community, and the US in particular, bear an ongoing responsibility to ensure that the legacy of nuclear testing in the Marshall Islands is addressed in a manner consistent with contemporary human rights standards, the right to an effective remedy and the dignity of the Marshallese people.

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