

# TRUST ISSUES: MILITARIZATION, DESTRUCTION, AND THE SEARCH FOR A REMEDY IN THE MARSHALL ISLANDS

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## INTRODUCTION

*“Ebeye was where birds went to crap and where we buried our dead.”* – Minister Kitlang Kabua<sup>1</sup>

“[T]he slum of the Pacific”<sup>2</sup> and an “overcrowded ghetto”<sup>3</sup> are among the terms usually used when describing Ebeye,<sup>4</sup> an island located in the Republic of the Marshall Islands.<sup>5</sup> As Minister Kabua’s

1. Minister Kitlang Kabua, paraphrasing Marshallese perceptions of the condition of Ebeye Island prior to the mass relocation of Marshallese to the island under U.S. rule. Telephone Interview with Kitlang Kabua, Marshall Islands Minister of Education, Sports, and Training and Member of the Nitijela [Marshallese Parliament] (Jan. 30, 2020).

2. Dan Zak, *A Ground Zero Forgotten*, WASH. POST (Nov. 27, 2015), <https://www.washingtonpost.com/sf/national/2015/11/27/a-ground-zero-forgotten> (on file with the *Columbia Human Rights Law Review*) (explaining the historical description of Ebeye as “the slum of the Pacific”). While this Note does not condone the use of the word “slum” or “ghetto” to describe Ebeye, the fact that many reporters and academics have chosen this term to describe Ebeye indicates just how shocking the living conditions are, especially in comparison to Kwajalein. *See, e.g.*, Ray Kania, *South Pacific’s Paradise Lost: Ebeye Has Become Slum in the Marshall Islands*, ORLANDO SENTINEL (Apr. 23, 1989), <https://www.orlandosentinel.com/news/os-xpm-1989-04-23-8904235448-story.html> [<https://perma.cc/SH8J-2QQK>] (describing Ebeye as the slum of the Pacific); *Pacific Slum District A ‘Health Risk’*, SYDNEY MORNING HERALD (July 23, 2010), <https://www.smh.com.au/world/pacific-slum-district-a-health-risk-20100723-10o4t.html> [<https://perma.cc/7Z64-8TAN>] (referring to Ebeye as a “Pacific slum district” as recently as 2010).

3. Howard W. French, *Dark Side of Security Quest: Squalor on an Atoll*, N.Y. TIMES (June 11, 2001), <https://www.nytimes.com/2001/06/11/world/dark-side-of-security-quest-squalor-on-an-atoll.html> (on file with the *Columbia Human Rights Law Review*).

4. Kwajalein Atoll, the Marshallese atoll on which this paper will focus, is located 3,936 kilometers from Honolulu, 4,124 kilometers from Tokyo, and 5,121 kilometers from Manila in the Pacific Ocean. GREG DVORAK, CORAL AND CONCRETE: REMEMBERING KWAJALEIN ATOLL BETWEEN JAPAN, AMERICA, AND THE MARSHALL ISLANDS 3 (2018). Kwajalein Atoll comprises 97 islands and islets, the largest of which is Kwajalein Island—home to the United States Army Garrison-Kwajalein Atoll (“USAG-KA” or “USAKA”). *Id.* at 56. The United States currently controls 10 other islands (which encircle the lagoon and have the most usable land in the atoll) and has placed 13 others off-limits to the Marshallese. *Id.* For the purposes of this Note, “Kwajalein” will refer to Kwajalein Island (the location of the Army base), unless “Kwajalein Atoll” (the whole set of islands, which includes Ebeye) is specified.

5. The Republic of the Marshall Islands (“RMI” or “Marshalls”), a former colony and Trust Territory of the United States, is located in the Micronesian region of the central and western Pacific, just north of the Equator. The Micronesian region is composed of Guam and the Commonwealth of the Northern Mariana Islands—both U.S. insular possessions—Nauru and Kiribati—both independent

statement above indicates, Ebeye is an island that the Marshallese traditionally did not consider livable prior to the United States displacing them from their home islands and forcibly relocating them there.<sup>6</sup> Now Ebeye supports a population density<sup>7</sup> higher than Manhattan<sup>8</sup> or Hong Kong<sup>9</sup>—*without* any high-rise buildings. Meanwhile, just three miles away by ferry, the U.S. military base on Kwajalein island is often described as “almost heaven.”<sup>10</sup> Ebeye, which

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nations—and the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands—independent nations who have signed Compacts of Free Association with the United States. *Micronesian Culture: Cultural Region, Pacific Ocean*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Micronesia-cultural-region-Pacific-Ocean> [<https://perma.cc/QM53-F4QS>].

6. Interview with Kitlang Kabua, *supra* note 1. The United States forcibly relocated Minister Kabua’s family from their home island in the Mid-Atoll Corridor to Ebeye in order to make way for the U.S. missile testing program. *Id.* For more on this displacement, see *infra* Section I.B.

7. Following the suggestion of Minister Kabua, Interview with Kitlang Kabua, *supra* note 1, this Note will use the most recent Marshall Islands census data, which places the population of Ebeye island at 9,614 people, making the population density 80,177 people per square mile. ECON. POL’Y, PLAN., AND STAT. OFF., OFF. OF THE PRESIDENT, THE RMI 2011 CENSUS OF POPULATION AND HOUSING SUMMARY AND HIGHLIGHTS ONLY 7 (2012), [doi.gov/sites/doi.gov/files/migrated/oia/reports/upload/RMI-2011-Census-Summary-Report-on-Population-and-Housing.pdf](https://doi.gov/sites/doi.gov/files/migrated/oia/reports/upload/RMI-2011-Census-Summary-Report-on-Population-and-Housing.pdf) [<https://perma.cc/5P25-LKLLK>] [hereinafter RMI CENSUS]. The population estimate for Ebeye is often significantly higher than the figure used here. See French, *supra* note 3 (estimating the population at 15,000 in 2001); Catherine Layton, *U.S. Army Kwajalein Atoll Shopping Policy to Change*, KWAJALEIN HOURGLASS, June 4, 2011, at 5 (quoting Col. Joseph Gaines, U.S. Army Kwajalein Atoll Commander, estimating the population at 15,000); CTR. FOR NATION RECONSTRUCTION & CAPACITY DEV., *EBEYE 2023: COMPREHENSIVE CAPACITY DEVELOPMENT MASTER PLAN 3* (2012) (estimating the population at 11,000 in 2012); Giff Johnson, *Power Service Stabilizes in Marshalls’ Ebeye Island*, RADIO N.Z. (Dec. 2, 2019), <https://www.rnz.co.nz/international/pacific-news/404605/power-service-stabilises-in-marshalls-ebeye-island> [<https://perma.cc/8XCE-M8U2>] (estimating the population at 12,000 in 2019). The aforementioned population estimates would place Ebeye’s population density somewhere in between 91,666 and 125,000 people per square mile.

8. Manhattan’s population density is approximately 71,434 people per square mile. U.S. CENSUS BUREAU, QUICKFACTS: NEW YORK COUNTY (MANHATTAN BOROUGH), NEW YORK, <https://www.census.gov/quickfacts/fact/table/newyork-countymanhattanboroughnewyork/PST045218#PST045218> [<https://perma.cc/8LYP-HJJEJ>] (relaying census data as of September 9, 2020).

9. Hong Kong has a population density of approximately 17,311 per square mile. H.K. SPECIAL ADMIN. REGION GOV’T INFO. SERV. DEP’T, HONG KONG: THE FACTS (2015).

10. Lauren Hirshberg, *Home Land (In)security: The Labor of U.S. Cold War Military Empire in the Marshall Islands*, in MAKING THE EMPIRE WORK: LABOR

has a habitable land mass of approximately 0.10 square miles,<sup>11</sup> houses around ten thousand Marshallese people (around a thousand of whom work on the U.S. Army base on neighboring Kwajalein). Meanwhile, the base on Kwajalein houses approximately 1,250 people (mainly contractors and their families) spread out over 1.17 square miles.<sup>12</sup> But Ebeye is more than just a residential community for the Marshallese base laborers: many Marshallese moved there when the United States removed them from their home islands to facilitate an American nuclear weapons testing program, an ongoing missile testing program, and the construction of a military base and other military facilities.<sup>13</sup> As this Note will explain in greater depth, the forced displacements are only the beginning of the human rights violations—historic and ongoing—that the United States has inflicted upon Ebeye.

This Note argues that the United States neglected the obligations it owed to the Marshall Islands under the U.N. Trusteeship System and consequently owes a duty to the people of Ebeye to provide a remedy for the harm its historic and ongoing activities on Kwajalein Atoll have caused. This Note also analyzes the ways in which U.S. law, Marshallese law, and the Compact of Free Association (“Compact”)—a bilateral treaty between the United States and the Marshall Islands—have deprived the Marshallese of a meaningful remedy for this historic and ongoing harm. Furthermore, this Note explores the ways in which these same intersecting legal frameworks have failed to provide the Marshallese workers on Kwajalein and the residents of Ebeye with legal protection for future violations of their basic rights to property, work, and health. Given that the Compact is currently being renegotiated—well in advance of its 2023 expiration date and with little public scrutiny—this Note also suggests changes to the Compact that are crucial to address the injustices discussed herein.

Part I of this Note gives an overview of the Marshall Islands under U.S. colonial rule and Trusteeship. This Part explains how U.S. mismanagement led to the overcrowding, health crises, and

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AND UNITED STATES IMPERIALISM 335, 345 (Daniel E. Bender & Jana Lipman eds., 2015).

11. RMI CENSUS, *supra* note 7, at 7.

12. This makes the population density of Kwajalein 1,069 per square mile. Chris Mooney & Brady Dennis, *The Military Paid For a Study on Sea Level Rise. The Results Were Scary*, WASH. POST (Apr. 25, 2018), <https://www.washingtonpost.com/news/energy-environment/wp/2018/04/25/climate-change-could-make-thousands-of-tropical-islands-uninhabitable-in-coming-decades-new-study-says/> (on file with the *Columbia Human Rights Law Review*).

13. DVORAK, *supra* note 4, at 56.

environmental degradation that Ebeye struggles with today. Part II of this Note then outlines the legal duties—set forth both in the U.N. Charter and in the binding Trusteeship Agreement—that the United States owed to the Marshallese people and articulates the ways in which the United States breached those duties. Section II.A provides an overview of the ways in which the United States undermined the Marshallese independence movement and made a strategic, concerted effort to render the Marshall Islands economically dependent on the United States. Next, Section II.B argues that, in spite of the duty the United States owes to the people of Ebeye, the overlapping legal frameworks—U.S. law, Marshallese law, and the Compact—leave workers on Kwajalein and residents of Ebeye susceptible to and without remedy for the human rights violations discussed in Part I.

#### I. UNITED STATES PRESENCE IN THE MARSHALL ISLANDS: HISTORICAL HARM AND CURRENT CRISES

*“There are only 90,000 people out there. Who gives a damn?”* – Quote attributed to Henry Kissinger<sup>14</sup>

The U.S. government and military paid little regard to the well-being of the Marshallese people throughout the colonization and administration of the Marshall Islands.<sup>15</sup> U.S. control over the Marshall Islands began in 1944 when the United States captured the islands one-by-one from the Japanese during WWII.<sup>16</sup> For the next

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14. Sasha Davis, *The US Military Base Network and Contemporary Colonialism: Power Projection, Resistance and the Quest for Operational Unilateralism*, 30 POL. GEOGRAPHY 215, 221 (2011). As Davis explains, “the denial of rights to people in Micronesia, the erasure of their social histories, and the portrayal of their islands by military planners as ‘anchored aircraft carriers’ lacking any social worth beyond locations for power projection and weapons testing, has been remarkably consistent from World War Two to the present.” *Id.*

15. Four different world powers have colonized the Marshall Islands: Spain, Germany, Japan, and the United States. Spain, which had claimed the Mariana Islands as Spanish territory in 1565, extended its colonial administration to include what would later become the islands of Micronesia in the late nineteenth century. Spain sold its possessions in the Pacific to Germany in 1899, but the Germans did not maintain control over the islands for very long. At the outset of World War I in 1914, Japan captured Germany’s island possessions, with the European Allied Powers recognizing the legitimacy of the occupation. After the war, the Treaty of Versailles placed the islands under Japanese mandate. IGARASHI MASAHIRO, ASSOCIATED STATEHOOD IN INTERNATIONAL LAW 169 (2002).

16. MICR. SUPPORT COMM., MARSHALL ISLANDS: A CHRONOLOGY: 1944–1981, 5 (1992).

decade, the United States would rule over the Marshall Islands, and in 1954 the United Nations officially condoned U.S. administration of this territory by way of the Trusteeship System—a system enshrined in the U.N. Charter. This Part provides a brief overview of the Marshall Islands' long and complicated relationship with the United States since WWII. It then explains how the United States' forced displacement of Marshallese people from their home islands led to Ebeye's overcrowding and the ways in which these overcrowded conditions stand in stark contrast to the quality of life on Kwajalein. Finally, this Part traces the historical roots of the environmental and health crises that currently plague Ebeye back to U.S. military presence on Kwajalein.

A. New Name, Same Game: U.S. Colonization Becomes U.S. Trusteeship in the Marshalls

*“Prima facie it is evident that the United States, the nation-state that has determined the history of the Marshall Islands since WWII, is responsible for the current state of affairs.”* – Dr. Seiji Yamada, MD, MPH<sup>17</sup>

The United States was highly critical of Japan's military build-up on the islands in the years preceding World War II, as well as its use of the Marshallese as a slave labor force.<sup>18</sup> However, immediately after the United States captured Kwajalein and the other atolls in the Marshall Islands, it established a labor camp on Kwajalein for Marshallese laborers to begin the post-war clean-up effort and begin construction of a U.S. military base.<sup>19</sup> In 1946, after the end of WWII, the U.S. military tested two atomic bombs on Bikini Atoll (each approximately the same size as the atomic bomb the United States dropped on Nagasaki) after U.S. military officials lied to the island's inhabitants in order to secure their cooperation in evacuating the island.<sup>20</sup>

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17. Seiji Yamada et al., *Ethical Responsibility for the Social Production of Tuberculosis*, 13 J. BIOETHICAL INQUIRY 57, 62 (2016).

18. RUTH DOUGLAS CURRIE, *KWAJALEIN ATOLL, THE MARSHALL ISLANDS AND AMERICAN POLICY IN THE PACIFIC* 79 (2016).

19. MICR. SUPPORT COMM., *supra* note 16, at 5.

20. *Id.* at 7. The Bikinians were relocated to Rongerik Atoll, which was uninhabitable due to the absence of drinkable water, edible coconuts, and non-poisonous fish. After years of starvation, they eventually became internally displaced refugees, with many Bikinians ultimately being forced to relocate to

In 1947, three years *after* the United States dropped the first bomb on Bikini Atoll, the United Nations named the United States the administrator entrusted to look after the welfare and development of the Trust Territory of the Pacific Islands (TTPI)—the islands that had been previously under Japanese mandate prior to WWII.<sup>21</sup> The Trusteeship System placed certain obligations on the United States with respect to its administration of the Marshall Islands.<sup>22</sup> As discussed at length in Part II of this Note, the United States failed to pursue these objectives in good faith throughout its administration of the Marshall Islands as a Trust Territory.<sup>23</sup> Capitalizing on a lack of international oversight,<sup>24</sup> the United States continued to use the

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Kili—an island without a lagoon (which means that fishing is unsafe and massive waves frequently flood the island) and whose highest point is only nine feet above sea level (making it one of the most susceptible islands to climate-induced sea level rise and king tides). Some Bikinians would ultimately settle on Ebeye over the course of the following decades. *Id.*

21. *Id.* at 4. The Trust Territory consisted of the territories that would eventually become Guam, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands. *Id.*

22. The basic objectives of the Trusteeship System were (1) “to further international peace and security,” (2) “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence,” (3) “to encourage respect for human rights and for fundamental freedoms for all without distinction as to race,” and (4) “to ensure equal treatment in social, economic, and commercial matters.” U.N. Charter art. 76.

23. While the other 10 trust territories fell under the jurisdiction of the Trusteeship Council of the General Assembly, the United States argued for the TTPI to be administered as a “strategic trust,” emphasizing the islands’ recent use in war and the need for the islands to be maintained for strategic defense. CURRIE, *supra* note 18, at 79. This classification of the TTPI as a strategic trust allowed the United States to establish areas of the TTPI that could be closed-off to the Marshallese people for security reasons. MASAHIRO, *supra* note 15, at 178. This would be the legal basis for the United States’ forced removal and long-term exclusion of Marshallese people from Kwajalein and other atolls. *Id.* Marshallese people are only allowed on Kwajalein if they work on the base, and they must leave quickly after their shift by way of a ferry that takes them to Ebeye. Telephone Interview with Carlon Jajok Zackhras, Ebeye resident and graduate of the school system on USAG-KA (Feb. 3, 2020). As will be discussed in Section I.C., there are significant restrictions placed on the Marshallese workers, including a prohibition on bringing any food items from Kwajalein back to Ebeye. *Id.*

24. The TTPI was the only trust territory under the oversight of the U.N. Security Council, and because the United States held a permanent seat on the Security Council where its concurring vote would be needed for any action, the United States essentially had complete control over the TTPI without international oversight. CURRIE, *supra* note 18, at 79. In 1949, the Security Council eventually

Marshall Islands for its nuclear weapons testing program.<sup>25</sup> All in all, the United States would test sixty-seven nuclear weapons in the Marshall Islands between 1946 and 1958, the vast majority of which were stronger than the bombs dropped in WWII and the largest of which was one thousand times more powerful than the bomb dropped on Hiroshima.<sup>26</sup> The widespread health and environmental impacts of this testing will not be discussed at length in this Note, but the story of Ebeye is inextricable from this nuclear legacy.<sup>27</sup>

In 1979, the Marshall Islands claimed independence from the United States with the passage of its Constitution; however, the United States continued to occupy the islands illegally.<sup>28</sup> As will be discussed in Part II of this Note, the United States engaged in a carefully crafted (and ultimately successful) campaign to ensure the Marshall Islands' continued economic dependence on the United States and to undermine efforts to pursue a truly independent Marshallese state.<sup>29</sup> In 1983, the Marshall Islands ultimately signed the Compact

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delegated oversight over the TTPI to the Trusteeship Council, but reserved security matters—including nuclear testing—for its oversight. *Id.*

25. In 1954, from March to May, the United States conducted Operation CASTLE on Bikini and Enewetak. This operation included the CASTLE-Bravo test—a 15-megaton hydrogen bomb blast—and five other tests. MICR. SUPPORT COMM., *supra* note 16, at 6. The CASTLE-Bravo test, conducted on March 1, contaminated the islands of Ailinginae, Ailuk, Bikar, Likiep, Rongelap, Rongerik, Taka, Wotho, Utirik, Jemo, and Mejit. *Id.* On Rongelap, within three to four hours of the blast, approximately two inches of radioactive dust accumulated, contaminating the food and the drinking water on the island. The Rongelapese began to experience severe vomiting and diarrhea. *Id.* The United States never gave the Rongelapese an official warning about the test or how to prepare for the fallout. *Id.*

26. Kashmiri Gander, *Marshall Islands, Where U.S. Ran 67 Nuclear Weapon Tests, More Contaminated Than Fukushima and Chernobyl*, NEWSWEEK (July 16, 2019), <https://www.newsweek.com/marshall-islands-u-s-nuclear-weapons-tests-contaminated-fukushima-chernobyl-1449463> [<https://perma.cc/G4GE-VPHJ>].

27. Though the nuclear testing was only conducted on particular atolls, nearly all of the atolls in the Marshall Islands received measurable fallout from the large tests, including CASTLE-Bravo. Yamada et al., *supra* note 17, at 58. Furthermore, many islanders displaced by the nuclear testing program ultimately relocated to Ebeye. *Id.*

28. MARTHA SMITH-NORRIS, *DOMINATION AND RESISTANCE: THE UNITED STATES AND THE MARSHALL ISLANDS DURING THE COLD WAR* 119 (2016).

29. This, combined with the ongoing occupation of the islands, put the Marshallese in a difficult bargaining position as the United States sought to enter into a Compact of Free Association with the Marshallese. JULIAN AGUON, *WHAT WE BURY AT NIGHT* 33 (2008).

with the United States.<sup>30</sup> This agreement allows Marshallese people to migrate freely to the United States without a visa,<sup>31</sup> to serve in the U.S.

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30. *U.S. Relations with the Marshall Islands: Bilateral Relations Fact Sheet*, U.S. DEP'T OF STATE (July 15, 2018), <https://www.state.gov/u-s-relations-with-marshall-islands/> [<https://perma.cc/43ZQ-QRNP>]; Compact of Free Association, Marsh. Is.-U.S., Jun. 25, 1983, T.I.A.S. No. 04-501 [hereinafter Compact of Free Association].

31. Reporters, academics, and policymakers often point to Marshallese people's out-migration to the United States as an opportunity to seek better healthcare and overall quality of life than is available anywhere in the Marshalls. See, e.g., HAWAII APPLESEED CTR. FOR LAW AND ECON. JUST., *BROKEN PROMISES, SHATTERED LIVES: THE CASE FOR JUSTICE FOR MICRONESIANS IN HAWAII* 5 (2011) (“[F]amilies and individuals from these Pacific islands choose to come to the United States access health care, education and employment that are non-existent in their islands because of the legacy of U.S. militarization and weapons testing and decades of failed U.S. trusteeship and oversight.”); Shanna N McClain et al., *Migration with Dignity: A Case Study on the Livelihood Transition of Marshallese to Springdale, Arkansas*, 21 J. OF INT'L MIGRATION AND INTEGRATION 847, 848 (2019) (“[M]any moved to the area with the expectation of higher paying jobs and improved access to education and health care.”); Susanne Rust, *They Came Here After the U.S. Irradiated Their Islands. Now They Face an Uncertain Future*, L.A. TIMES (Dec. 31, 2019), <https://www.latimes.com/world-nation/story/2019-12-31/marshall-islands-uncertain-future-us-marshallese-spokane> (on file with the *Columbia Human Rights Law Review*) (quoting a U.S.-based Marshallese minister describing the Marshallese living in Spokane as “justifiably worried” about the prospect of having the leave the U.S. if the migration provisions of the Compact are not renewed). However, Marshallese people living in the United States face their own set of issues when it comes to receiving affordable care. They pay taxes, but they are denied basic social services including Supplemental Nutrition Assistance Program (SNAP) benefits, Social Security, and other safety net programs designed to help refugees and immigrants. *Id.* Though these were once available to Compact residents, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (President Clinton's welfare reform law) now prohibits them from receiving these benefits. *Id.* Marshallese people living in the United States thus need to rely solely on the safety nets that their particular state can offer, with vastly different benefits available from state to state. *Id.* Marshallese people living in the United States were also ineligible for Medicaid until a Congress passed an amendment to PRWORA in December 2020. Anita Hofschneider, *How Decades of Advocacy Helped Restore Medicaid Access To Micronesian Migrants*, HONOLULU CIVIL BEAT (DEC. 23, 2020), <https://www.civilbeat.org/2020/12/how-decades-of-advocacy-helped-restore-medicaid-access-to-micronesian-migrants/> [<https://perma.cc/JDZ7-PLJC>]. In addition to inadequate access to social safety net programs, Marshallese migrants' legal status makes them vulnerable to exploitation. See, e.g., Tracy Neal, *Marshallese Make Adoption-Plot Arrest*, ARK. DEMOCRAT GAZETTE (Mar. 28, 2019), <https://www.arkansasonline.com/news/2019/mar/28/marshallese-make-adoption-plot-arrest-2/> [<https://perma.cc/GF6P-FVHD>] (describing an illegal adoption trafficking ring in Arkansas that targeted Marshallese expectant mothers in the United States and abroad); Mary Babic, *Big Poultry Finds Workers in an Immigrant Community Known for its Culture of*

military,<sup>32</sup> and to obtain the protection of the U.S. military. In exchange, the United States has control over RMI's territorial waters for military purposes, and the United States has the power to establish military bases in RMI subject to the Military Use and Operating Rights Agreements (MUORAs) that the U.S. military makes with the RMI government.<sup>33</sup> The Compact, which the United States and the Marshall Islands renewed in 2003, and which the United States is currently pushing to renegotiate well in advance of its 2023 expiration date, is the current framework under which the U.S. and RMI governments operate.<sup>34</sup> Part II explains the Compact and its effect on access to justice for the Marshallese in further depth.

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*Forgiving*, OXFAM (Nov. 18, 2015), <https://www.oxfamamerica.org/explore/stories/big-poultry-finds-workers-in-an-immigrant-community-known-for-its-culture-of-forgiving/> [<https://perma.cc/HVP4-LSND>] (explaining that Marshallese working at Tyson Foods in Arkansas are exploited due to unfamiliarity with U.S. laws, workers' rights, and cultural norms); Jack Healy, *They Crossed an Ocean to Butcher Pigs. It Was No American Dream*, N.Y. TIMES (Oct. 13, 2019), <https://www.nytimes.com/2019/10/13/us/iowa-pork-micronesia-workers.html> (on file with the *Columbia Human Rights Law Review*) (describing how Compact residents had been trafficked to work at a pork processing plant in Iowa where they had their passports seized and could not afford flights home); REBECCA STOTZER, UNIV. OF HAWAII AT MĀNOA MYRON B. THOMPSON SCH. OF SOC. WORK, RESEARCH BRIEF: BIAS AGAINST MICRONESIANS IN HAWAII (2019), [http://www.hawaii.edu/sswork/wp-content/uploads/Research-Report-Stotzer-2019\\_3.pdf](http://www.hawaii.edu/sswork/wp-content/uploads/Research-Report-Stotzer-2019_3.pdf) [<https://perma.cc/URK3-3QVS>] (finding that 1 in 4 Micronesian/Marshallese respondents had experienced discrimination at work because they are Micronesian, 1 in 10 reported experiencing discrimination in medical or social services settings, 1 in 13 experienced discrimination in public accommodation, and 1 in 20 had been the victim of a bias crime due to their Micronesian identity).

32. Compact residents serve in the U.S. military at a per capita rate twice as high as do residents of any U.S. state. They have also died at a higher per capita rate than have residents of any U.S. state in the wars in Iraq and Afghanistan. See HAWAII APPLESEED CTR. FOR LAW AND ECON. JUST., *supra* note 31, at 3, 7–8 (2011); see also *U.S. Relations with the Marshall Islands: Bilateral Relations Fact Sheet*, *supra* note 30 (noting that Marshallese “serve in the U.S. military, volunteering at per capita rates higher than many U.S. states”); Justin Novel, *A Micronesian Paradise—for U.S. Military Recruiters*, TIME (Dec. 31, 2009), [<https://perma.cc/D4ZG-LXF3>] (explaining that Compact residents died at a higher rate, per capita, in Iraq and Afghanistan than Americans died).

33. Davis, *supra* note 14, at 221. This Compact also affords the U.S. “strategic denial,” meaning that no other military can gain access to the entire Micronesian region, even where the United States does not have a base. *Id.*

34. Chad Blair, *Interior Official Pushing To Renew COFA Treaties This Year Despite Obstacles*, HONOLULU CIVIL BEAT (Mar. 28, 2020), <https://www.civilbeat.org/2020/03/interior-official-pushing-to-renew-cofa-treaties-this-year-despite-obstacles/> [<https://perma.cc/AP3S-AWDU>] (quoting a U.S. Department of the Interior official as saying “at least for the RMI and FSM, we

B. Slums and Suburbs: Displacement, Overcrowding, and the Creation of the “Ebeye Problem”

“Land means a great deal to the Marshallese. . . . It is the very life of the people. Take away their land and their spirits go also.” – Petition from the Marshallese People Concerning the Pacific Islands to the U.N. Trusteeship Council<sup>35</sup>

The United States simultaneously displaced both the people of Kwajalein and the people of Ebeye when the U.S. military ordered over five hundred Marshallese people to move from a Kwajalein labor camp—where they were working to construct the U.S. base—to Ebeye in 1951.<sup>36</sup> Tony de Brum, a former Marshallese senator and foreign affairs minister, was on Kwajalein for a visit with his grandfather on the day the Marshallese laborers were removed.<sup>37</sup> He recalled that the United States did not obtain consent in any form from the Marshallese, including the Kwajalein landowners: “They didn’t explain. They didn’t have to and they didn’t try to.”<sup>38</sup> Military officials expected these 559

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would very much like to try to get that done this year if at all possible”); *United States Holds Second Round of Compact Consultations with the Federated States of Micronesia and the Republic of Palau*, HAW. FREE PRESS (July 14, 2020), <http://www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/25976/COFA-United-States-Holds-Second-Round-of-Compact-Consultations.aspx> [https://perma.cc/YTL7-T6D9] (announcing that, by mid-July 2020, U.S. negotiators had already finished a second round of consultations with Micronesians leaders).

35. Petition from the Marshallese People Concerning the Pacific Islands, U.N. TCOR 14th Sess., 561st plen. mtg. T/PET.10/28, at 2 (May 6, 1954), <https://digitallibrary.un.org/record/3824667?ln=en> [perma.cc/QS2X-5ACT].

36. MICR. SUPPORT COMM., *supra* note 16, at 11.

37. Lauren Hirshberg, *Nuclear Families: (Re)producing 1950s Suburban America in the Marshall Islands*, 26 OAH MAG. HIST., no. 4, 2012, at 39, 40.

38. *Id.* There was no compensation for these landowners at the time and no concrete plan for how they would be made whole in the future. CURRIE, *supra* note 18, at 87–88. The negotiation of post-displacement land agreements proved to be a significant source of tension between Marshallese landowners and the U.S. government. In 1962, over a decade after the forced relocation of the Kwajalein landowners to Ebeye, the Trust Territory Attorney General and Marshallese officials reached a settlement for the U.S. military’s land use of Kwajalein. They arrived at a formula of \$500 per acre, which would mean \$375,000 for 18 years of past use, plus 7 years future use, for 750 acres in Kwajalein Atoll and Dalap Island in Majuro Atoll. *Id.* at 95. Landowners did not feel adequately compensated by these agreements, and a series of protests, sail-ins, and re-occupations of Kwajalein by the landowners ensued in the 1960s and 1970s. The Kwajalein landowners have continued to advocate for higher compensation. SMITH-NORRIS, *supra* note 28, at 118. By 1982, the protest movement called “Operation Homecoming” had grown to

people to live in a “low-budget village of bungalows . . . that was meant to house 370 people,” meaning that Ebeye was overcrowded from the very beginning of the U.S. military occupation of Kwajalein.<sup>39</sup> The United States currently occupies the eleven most usable islets in Kwajalein atoll and has placed thirteen additional islets off-limits due to missile testing activities; all of the displaced people from these islands were forced to move to Ebeye.<sup>40</sup> Today the population of Ebeye

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over a thousand Marshallese, hundreds of whom were arrested for “trespassing” on the off-limits missile impact areas of the atoll. Glenn H. Alcalay, *Nuclear Hegemony: America in Micronesia*, in *THIRD WORLD AFFAIRS* 1987, 236, 247 (Raana Gauhar ed., 1987).

39. DVORAK, *supra* note 4, at 171–72. These buildings—“haphazardly constructed of scrap metal, lumber, and canvas”—were not built to withstand the tough elements of a tropical island climate and soon fell into disrepair. See JACK A. TOBIN, *EBEYE VILLAGE: AN ATYPICAL MARSHALLESE COMMUNITY* 7 (1954). Jack Tobin, an anthropologist, compared Ebeye to a sharecropper’s camp in the rural United States, commenting on the extent of the overcrowding as the most jarring issue. *Id.* at 16. This overcrowding made Ebeye a fire hazard and a “fertile breeding ground for disease.” SMITH-NORRIS, *supra* note 28, at 105. When Tobin observed these overcrowded conditions in 1954, there were only 981 people living on Ebeye. TOBIN, *supra* note 39, at 16. This population would grow sharply in the decade to come and would continue to grow significantly into the twenty-first century. DVORAK, *supra* note 4, at 172.

40. DVORAK, *supra* note 4, at 56. The United States also displaced the landowners on these other islands, as well as all of the landowners on 13 additional islets in the Mid-Atoll Corridor, which ongoing U.S. missile testing renders off-limits for the displaced inhabitants and their descendants. Fifty Marshallese people were forcibly removed from Roi-Namur—an island north of Kwajalein that would become the site for a missile launch facility—and a group of Marshallese were forcibly removed from Lib—an island south of Kwajalein that was designated an impact zone for U.S. inter-continental ballistic missile (ICBM) testing—and relocated to Ebeye. SMITH-NORRIS, *supra* note 28, at 108. These people were not compensated upon their dislocation. *Id.* In 1964, when the U.S. military cleared the Mid-Atoll Corridor of the atoll for missile testing, they forcibly relocated 1,470 Marshallese people to Ebeye. *Id.* at 109. These displaced people were relocated to Ebeye with promises that the United States would provide housing and services for them, but these promises were not fulfilled. After years of negotiations and protests, residents of the Mid-Atoll Corridor were finally allowed limited gardening and burial privileges on their home islands in 2017. Jason Cutshaw, *US, RMI, Sign Agreement Granting Access to Mid-Atoll Islands*, *KWAJALEIN HOURGLASS* (Aug. 5, 2017), <https://api.army.mil/e2/c/downloads/495192.pdf> [<https://perma.cc/TU3F-RVPH>]. They can access their islands at least 126 days per year, but they cannot return there to live. *Id.* Throughout the 1960s and 1970s, deteriorating conditions on Ebeye became a “textbook study of ‘development’ gone awry and all that was wrong with American strategic politics toward the postwar Pacific.” DVORAK, *supra* note 4, at 171–72. By 1977, there were 8,000 people living in 588 homes on Ebeye, with 14 people sleeping in one room on average. *Id.* at 172.

is estimated to be between around 10,000 to 15,000, while the population of Kwajalein is around 1,250.<sup>41</sup>

“As bad as Ebeye is it becomes infinitely worse by comparison with Kwajalein.”<sup>42</sup> This quote, from an editorial in the *Pacific Daily News*, refers to the gross disparity between increasingly overpopulated and unlivable Ebeye and ever-increasingly developed Kwajalein.<sup>43</sup> As one long-time Kwajalein resident explained, life on Kwajalein is “a very nice life, largely unavailable to most Americans living in the States.”<sup>44</sup> Self-described “Kwaj kids” reminisce about growing up on an island with a “1950s smalltown feel, a tropical ‘Leave it to Beaver’ setting where everyone knew one another.”<sup>45</sup> The slogan plastered across most Kwajalein memorabilia, “Almost Heaven, Kwajalein,” encapsulates Kwajalein’s idyllic, utopian feel.<sup>46</sup> Access to electricity and water are

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41. *Welcome to USAG-KA!*, U.S. ARMY (July 8, 2015), <https://www.army.mil/a/149373/sr> [<https://perma.cc/S2DN-YFPT>].

42. SMITH-NORRIS, *supra* note 28, at 117.

43. As the 1960s saw more scientists and contractors move to Kwajalein, in addition to durable aluminum housing built to withstand the elements, the military and its contractors began installing shops, a kindergarten-through-high school education system, swimming pools, a golf course, sports fields, and a movie theater. DVORAK, *supra* note 4, at 173. These improvements on Kwajalein, in combination with the aforementioned overcrowding on Ebeye, created a harsh juxtaposition between the two neighboring islands:

[O]n Ebeye, the separation of the two cultures is cruelly and harshly visible, just inches apart—and with the shame of it made all the more damning because the islands—the entire atoll, the neighboring islands, the entire republic—make up the country that is the birthright of the very people who are now being denied access to it.

SIMON WINCHESTER, *PACIFIC: SILICON CHIPS AND SURFBOARDS, CORAL REEFS AND ATOM BOMBS, BRUTAL DICTATORS, FADING EMPIRES, AND THE COMING COLLISION OF THE WORLD’S SUPERPOWERS* 26 (2015).

44. DVORAK, *supra* note 4, at 188–89.

45. Hirshberg, *supra* note 38, at 41.

46. Hirshberg, *supra* note 10, at 345. The opening paragraph of USAG-KA’s welcome guide gives a good indication of the quality of life for the Americans who live on Kwajalein:

Did you ever want to relax in a beach chair and watch one of the Air Force Global Strike Command’s Minuteman III intercontinental ballistic missiles re-enter the Earth’s atmosphere? Ever want to go sailing to uninhabited tropical islands to do some camping and stare at night skies not washed out in light pollution? . . . How about the idea of clocking out of work at 4:30 p.m. and descending to 60 feet of water during a scuba dive only a half hour later? . . . Love the concept of no vehicle traffic and no long commutes to work? Do you love to ride bikes, watch vibrant sunsets over the Pacific Ocean and live in a

just two examples of the shocking disparity in development between the neighboring islands. The United States built a massive power plant to provide electricity to Kwajalein,<sup>47</sup> while in contrast Ebeye *still* suffers from regular and extended power outages.<sup>48</sup> Similarly, facilities on Kwajalein were “meticulously constructed” to ensure constant flows of potable water and adequate wastewater treatment, but the people of Ebeye did not benefit from these efforts.<sup>49</sup> The stark contrast in quality of life exemplifies that the United States has the ability to create more livable conditions on Ebeye.

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warm, windy climate? Great. Welcome to U.S. Army Garrison-Kwajalein Atoll. You're going to love it here.

*Welcome to Kwajalein Atoll*, KWAJALEIN HOURGLASS (Fall 2017), <https://api.army.mil/e2c/downloads/495931.pdf> [<https://perma.cc/LBB6-8SR8>].

47. DVORAK, *supra* note 4, at 173.

48. Giff Johnson, *Marshalls Urban Centre Facing Power Shortages*, RADIO N.Z. (Aug. 26, 2019), <https://www.rnz.co.nz/international/pacific-news/397490/marshalls-urban-centre-facing-ongoing-power-shortages> [<https://perma.cc/D2XU-9TLK>].

49. DVORAK, *supra* note 4, at 173. As Marshall Island Foreign Affairs Minister Tony de Brum once suggested in testimony before U.S. Congress in 2008: [T]he separation of the Marshallese population from our American friends is a vestigial remnant of the unenlightened policies of the forties and fifties. It does not fit in today's world. Integrating power, water, and communications systems, the building of a land connection between Ebeye and Kwajalein . . . will result in immediate improvement.

*Id.* at 191. Such integration of systems never occurred, and this separation has had significant consequences for Marshallese health and human development.

C. Environmental Harm and its Impact on Human Health in Ebeye

*“You destroyed our land. You destroyed where we go and get our fish, where we grow our taro and vegetables. You changed our way of living. We’re not fishing in the morning. Instead, we’re eating canned goods sent by the USDA—canned chicken, canned fruits and vegetables, Spam. ‘Eat these, because they’re safer for you.’”* – Dr. Sheldon Riklon, MD<sup>50</sup>

The environmental harms the United States has caused in the Marshall Islands are numerous and also constitute significant threats to human health and safety. Life expectancy at birth in the Marshall Islands was just 71.8 years of age in 2011, compared to 78.7 in the United States in the same year.<sup>51</sup> More generally, the most obvious environmental harm to the Marshall Islands has resulted from the nuclear testing program, which continues to have devastating and intergenerational effects on the health of the Marshallese people and on the environment.<sup>52</sup> The United States’ National Cancer Institute

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50. Dr. Sheldon Riklon, MD, an Arkansas-based Marshallese doctor and researcher, explaining the causation between U.S. militarization in the Marshall Islands and the dietary shift toward processed foods. Kenneth Brower, *The Atolls of Arkansas: Doomed by Climate Change, Marshall Islanders Find a New Home in Springdale*, SIERRA CLUB (Dec. 27, 2018), <https://www.sierraclub.org/sierra/2019-1-january-february/feature/atolls-arkansas-marshall-islands-marshallese> [<https://perma.cc/8HBD-VB9Q>].

51. World Health Organization [WHO], *Marshall Islands—WHO Country Cooperation Strategy 2018–2022*, WPRO/2017/DPM/012 (2017). Based on 2011 census data, the U.N. World Population Prospects projected 2019 life expectancy in the Marshall Islands to be 74.1 years, while RMI’s four former colonizers boasted significantly higher life expectancies in 2019: Spain, 83.6 years; Germany, 81.3 years; Japan, 84.6 years; and the United States, 78.9 years. *Life Expectancy at Birth (years)*, U.N. DEV. PROGRAMME, <http://hdr.undp.org/en/indicators/69206#a> (on file with the *Columbia Human Rights Law Review*).

52. For example, because the United States told Bikinians that it was safe for them to return to their island when it was not in fact safe for them to do so, many Bikinians were exposed to dangerous amounts of radiation. SMITH-NORRIS, *supra* note 28, at 63. One study conducted between 1970 and 1975 found that Bikinians had 10 times as much plutonium in their bodies as the average New Yorker, and the food they ingested had 100 times as much plutonium as the food available in the United States. *Id.* Additionally, the U.S. government used the Rongelapese—the islanders that were exposed to massive amounts of radiation when the United States failed to evacuate them before it conducted the CASTLE-Bravo Test—as test subjects in the years following the test in order to study the horrific effects of nuclear weapons on the human body. *Id.* at 81. In 1968, the U.S.

conducted a study in 2004—one year *after* the 2003 renewal of the Compact—which found that as much as 9% of all cases of cancers expected to develop among Marshallese people alive between 1948 and 1970 are likely attributable to radiation exposure from the nuclear tests.<sup>53</sup> More information continues to emerge regarding the extent of the environmental and health impacts of the nuclear testing program. The United States military claimed to have engaged in a complete clean-up of the radioactive debris between 1977–1980. They contained the debris inside of Runit Dome, which holds more than 3.1 million cubic feet of U.S.-produced radioactive soil and debris—some of which

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military also tested the casualty area associated with a biological weapon meant to sabotage enemy food supplies (an enhanced version of staphylococcus aureus) a dozen times in an area encompassing Enewetak Atoll and 40–50 km of ocean. *See* SPECIAL ASSISTANT TO THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS) FOR GULF WAR ILLNESSES, MEDICAL READINESS & MILITARY DEPLOYMENTS, U.S. DEP'T OF DEF., FACT SHEET: PROJECT SHIPBOARD HAZARD AND DEFENSE (SHAD) (2002); *see also* Susanne Rust, *How the U.S. Betrayed the Marshall Islands, Kindling the Next Nuclear Disaster*, L.A. TIMES (Nov. 10, 2019), <https://www.latimes.com/projects/marshall-islands-nuclear-testing-sea-level-rise/> (on file with the *Columbia Human Rights Law Review*) (explaining that the biologically-enhanced staphylococcal enterotoxin B that was tested is considered “one of the most potent bacterial superantigens”). Information regarding this testing was not released until the early 2000s, and the U.S. military continues to suppress the full extent of this biological weapons testing within classified Department of Defense records. *Id.*

53. *Rep. of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, ¶ 23, A/HRC/21/48/Add.1 (Sept. 3, 2012). The report found that 530 “excess cancers” were likely to be found and attributable to the nuclear testing, and it estimated that half of these malignancies had yet to be detected. *Id.* The Special Rapporteur undertook a mission to the Marshall Islands in 2012 to explore the results of the U.S. nuclear testing program. *Id.* ¶ 1. He found that fallout from the nuclear testing contaminated local food supplies, which led to widespread illnesses and ultimately also led to the stigmatization of these foods. *Id.* ¶ 28. As a solution, the United States provided imported canned foods and instructed the Marshallese people not to eat local foods. *Id.* ¶ 28. This would play into a larger issue of growing dependence on imported processed foods and its devastating health consequences in terms of obesity, hypertension, and diabetes. *Id.* ¶ 28. Beyond their food sources, the Marshallese drinking water sources were also contaminated, as were the supplies of coconuts—another primary source of fresh water for the Marshallese. *Id.* ¶ 28. The radiation led to miscarriages and birth defects—which the Marshallese call jellyfish babies—and the radiation was also found in the breast milk of women exposed to the testing. *Id.* ¶ 30. The Bikinians and Rogelapese remain in exile because their islands are still too contaminated to return. Susanne Rust, *Radiation in Parts of the Marshall Islands is Far Higher than Chernobyl, Study Says*, L.A. TIMES (July 15, 2019) <https://www.latimes.com/nation/la-na-marshall-islands-radiation-20190715-story.html> (on file with the *Columbia Human Rights Law Review*).

the U.S. government had previously shipped from Nevada to the Marshall Islands *without* the Marshallese's knowledge.<sup>54</sup> Worse still is the fact that, according to a Department of Defense report, the radioactive material contained in Runit Dome may begin to leak due to climate change.<sup>55</sup> Though the U.S. nuclear and biological weapons testing did not occur on Kwajalein Atoll, the nuclear legacy is still an inextricable component of the Ebeye story. First and foremost, studies suggest that *all* islands in the RMI likely received an unsafe amount of radiation exposure from the testing program, either through initial fallout or later food contamination, with some areas currently experiencing radiation levels higher than Chernobyl.<sup>56</sup> Furthermore, the nuclear testing program displaced Marshallese from numerous islands, exacerbating the aforementioned issue of internally displaced persons throughout the country.

In addition to the more generalized environmental harm caused throughout the Marshall Islands, the U.S. military has specifically contaminated Kwajalein Atoll and Ebeye. Its activities on Kwajalein have historically caused significant pollution of the lagoon, and the United States' ongoing base activities continue to threaten the health of the environment and, consequently, the health of the Marshallese people.<sup>57</sup> Numerous U.S. Army studies of the lagoon around Kwajalein and Ebeye between 2004 and 2019 yielded alarming results regarding the presence of polychlorinated biphenyls (PCBs) in

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54. Rust, *supra* note 52. This debris—about the size of 35 Olympic-regulation swimming pools—contains lethal amounts of plutonium. *Id.* The United States withheld information regarding this transfer of nuclear waste leading up to the signing of the Compact in 1986 and its renewal in 2003. *Id.*

55. CURT D. STORLAZZI ET AL., U.S. GEOLOGICAL SURV., THE IMPACT OF SEA-LEVEL RISE AND CLIMATE CHANGE ON DEPARTMENT OF DEFENSE INSTALLATIONS ON ATOLLS IN THE PACIFIC OCEAN 107 (2017) (“Although recent surveys have shown the concrete Runit Dome is stable, island overwash events will occur with increasing frequency in the coming decades, negatively impacting the concrete cap and its ability to contain long-lasting radionuclides from being released into the environment.”).

56. Rust, *supra* note 52.

57. For example, the missiles targeted at the test site on Kwajalein and allowed to plummet into the lagoon were historically ballasted with depleted uranium, which was both radioactive and toxic. SMITH-NORRIS, *supra* note 28, at 109; *see also* ENVTL. STANDARDS AND PROC. FOR U.S. ARMY KWAJALEIN ATOLL (USAKA) ACTIVITIES IN THE REPUBLIC OF THE MARSHALL ISLANDS 17 (14th ed. 2016) [hereinafter ENVTL. STANDARDS] (finding hazardous and toxic wastes generated at USAG-KA “include solvents, acids, photographic processing wastes, ignitable wastes, lead acid batteries, and polychlorinated biphenyl (PCB) transformer oils”).

the fish throughout the atoll stemming from leakages on the base<sup>58</sup>—something Kwajalein Senator David Paul deemed “a public health concern of epic proportion.”<sup>59</sup> In July 2019, a U.S. Army report confirmed that the arsenic and PCB contamination had rendered fish from many locations near Kwajalein dangerous for human consumption.<sup>60</sup> Exposure to PCBs, which are likely carcinogens, has been linked to liver disease, adult-onset jaundice, low birth weight,

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58. U.S. ARMY INST. OF PUB. HEALTH, DRAFT SOUTHERN U.S. ARMY GARRISON–KWAJALEIN ATOLL FISH STUDY 6 (2014) [hereinafter FISH STUDY]. The most recent (2019) update to this line of fish studies found that long-term near daily consumption of reef/bottom fish from the areas studied increase the risk of cancer and other harmful health impacts, and that children and pregnant or nursing mothers should not eat fish from any of the areas evaluated in this study. U.S. ARMY INST. OF PUB. HEALTH, UPDATE TO THE KWAJALEIN ATOLL FISH CONSUMPTION ASSESSMENT (2019) [hereinafter 2019 UPDATE]. The contamination primarily resulted from waste from industrial vessel operations in the Army’s port and leaching from the landfill on Kwajalein. Giff Johnson, *Fish at Kwaj Dangerous to Eat*, MARSH. IS. J. (July 18, 2019), <https://marshallislandsjournal.com/fish-at-kwaj-dangerous-to-eat/> [https://perma.cc/54GY-KWPY]. As of 1977, PCBs were no longer permitted to be imported to or manufactured in the United States. Hyun S. Lee, *Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT’L L. & POL’Y 399, 409 (1998). The transformers thought to be the primary source of PCB leakage on Kwajalein were brought to the Marshall Islands at some point during the Trust Territory administration, though it is unclear precisely when. *Id.* at 408–09. Some of these transformers were then buried or abandoned on atolls in the Marshall Islands and in the 1990s were eventually found to be leaking PCBs into the soil and the water. *Id.*

59. Giff Johnson, *Report of Toxic Fish in Kwajalein Lagoon Brings Calls to Action from RMI*, MARIANAS VARIETY (June 9, 2016), <http://www.pireport.org/articles/2016/06/09/report-toxic-fish-kwajalein-lagoon-brings-calls-action-rmi> [https://perma.cc/987Q-RYNC]. These 2014 findings renewed a fishing ban that had largely been in place since 2004 due to findings of dangerous levels of toxins found by studies conducted in 2004, 2009, and 2014. FISH STUDY, *supra* note 58, at 6. Senator Paul also said, “Let me characterize it this way: It is like telling people to stop breathing, when you tell people to stop eating fish it’s like stop breathing, that’s how significant this thing is.” Jo O’Brien, *Many Marshallese Advised to Give Up Fish*, RADIO N.Z. (June 17, 2016), <https://www.rnz.co.nz/international/programmes/datelinepacific/audio/201804804/many-marshallese-advised-to-give-up-fish> [https://perma.cc/FUE6-8Ezd].

60. Giff Johnson, *U.S. Army Report: Reef Fish at Marshalls Atoll Are Toxic*, RADIO N.Z. (July 23, 2019), <https://www.rnz.co.nz/international/pacific-news/395041/us-army-report-reef-fish-at-marshalls-atoll-are-toxic> [https://perma.cc/CB34-Y3NE]. Aldrin, dieldrin, and PCBs were detected in fish tissue at high enough concentrations to warrant a risk assessment for human consumption. This risk assessment found that there would be health concerns if multiple species of fish common to the lagoon were consumed regularly, and thus the ban continued. FISH STUDY, *supra* note 58, at 5–6.

thyroid disease, and compromised immunity.<sup>61</sup> PCB exposure can also lead to depression, fatigue, and other mental health-related issues as well.<sup>62</sup> Further, there is also heightened risk for pregnant and nursing mothers and children,<sup>63</sup> which is especially concerning on Ebeye, where 43% of the population is under age fourteen.<sup>64</sup>

Beyond the lethal effects that nuclear and bioweapons testing, missile testing, and PCB contamination have had on human health in the Marshall Islands, the overcrowding on Ebeye has also led to consistent epidemics due to inadequate sanitation, the residual impact of the nuclear testing, and a lack of access to clean water and nutritious food.<sup>65</sup> Tuberculosis, hepatitis B, and syphilis are endemic in RMI, and

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61. Johnson, *supra* note 60.; *see also Fish Study Team Shares Findings with Kwajalein Atoll Community*, KWAJALEIN HOURGLASS (Sept. 28, 2019), <https://www.smdc.army.mil/Portals/38/Documents/Publications/Hourglass/2019/09-28-19Hourglass.pdf> [<https://perma.cc/8RL3-FFJD>] [hereinafter *Fish Study Team*] (“The study confirmed that long-term consumption of reef fish caught near industrial or recreational sites poses increased risks of cancer and other negative health effects to adults, including pregnant and nursing mothers and children.”). Chlordane, another contaminant found in the lagoon around Kwajalein, has been linked to blood disorders and is also a neurotoxin that can cause issues with memory, learning, cognition, sleep, personality changes, depression, headaches, and numbness in the bodily extremities. FISH STUDY, *supra* note 58, at 40. Lead is also present in the fish in Kwajalein Harbor in levels several orders of magnitude higher than the levels considered acceptable by the World Health Organization. *Id.* at 45–46. This places Marshallese children at risk of ingesting harmful levels of lead, which can inhibit cognitive development, increase cardiovascular disease, and increase blood pressure. *Id.* at 46.

62. U.S. DEPT OF HEALTH AND HUM. SERVS., TOXICOLOGICAL PROFILE FOR POLYCHLORINATED BIPHENYLS (PCBS) 5 (2000).

63. *Fish Study Team*, *supra* note 61.

64. Henry M. Ichiho et al., *An Assessment of Non-Communicable Diseases, Diabetes, and Related Risk Factors in the Republic of the Marshall Islands, Kwajalein Atoll, Ebeye Island: A Systems Perspective*, HAW. J. MED. & PUB. HEALTH, May 2013, at 77, 77–78.

65. Under the Trust Territory administration, hepatitis and amoebiasis were rampant and, due to the dumping of raw sewage into the lagoon, the lagoon had bacteria counts 25,000 times higher than the U.S. Public Health Service’s and U.N. World Health Organization’s minimum safety standards allowed. SMITH-NORRIS, *supra* note 28, at 116–17. During a 1976 briefing of Congress, Marshallese leaders explained that Ebeye had approximately 5% of the country’s population but accounted for 12.2% of the recorded cases of amoebiasis and 14.4% of recorded cases of hepatitis. *Id.* at 105. In 1963, a severe polio epidemic swept through Ebeye after an American brought the disease to Kwajalein, leaving more than 190 people severely paralyzed. This was eight years after the polio vaccine was available to all Americans. GIFF JOHNSON, COLLISION COURSE AT KWAJALEIN: MARSHALL ISLANDERS IN THE SHADOW OF THE BOMB 20 (1984). Two American children contracted the disease on Kwajalein, compared to 192 Marshallese, mostly children

outbreaks of cholera and dengue are quite common.<sup>66</sup> Hansen’s disease, more commonly known as leprosy, is still diagnosed with regularity.<sup>67</sup> The rate of active tuberculosis in the Marshall Islands is one in every two hundred persons.<sup>68</sup> These infectious disease outbreaks are not the only epidemics to infect Ebeye: non-communicable disease (NCD) epidemics are often considered the most pressing issue facing Ebeye today.<sup>69</sup> Diabetes and heart disease are the leading causes of death in the Marshall Islands, and NCD-related deaths account for over 80% of total deaths in the country;<sup>70</sup> in fact, a 2014 study suggested that

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but ranging in age to adults, with 11 deaths. CURRIE, *supra* note 18, at 109. Americans on Kwajalein have continued to bring diseases to the base on Kwajalein, threatening the health of the Marshallese on Ebeye. Most recently, in October 2020, two American workers infected with COVID-19 arrived on Kwajalein. Reese Oxner, *Remote Marshall Islands Record First Confirmed Coronavirus Cases*, NPR (Oct. 29, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/29/929110650/remote-marshall-islands-record-first-coronavirus-cases> [<https://perma.cc/3VUC-W43L>]. The Marshall Islands had closed its borders in March 2020 (including to its own citizens seeking to return from abroad) in an effort to stave off the pandemic—something the country was successful in doing until the two infected Americans arrived on a military flight. *Id.*

66. Sheldon Riklon et al., *The “Compact Impact” in Hawai’i: Focus on Health Care*, HAW. MED. J., June 2010, at 7, 7. A 2000 cholera epidemic infected more than four hundred people and killed six. Yamada et al., *supra* note 17, at 58. The dengue outbreak in 2019 lasted over two months and has led to the closure of schools; it is likely that public health crises will continue to disrupt Ebeye’s already-fledgling education system in the future. Jenny Meyer, *Marshall Islands State of Emergency to Tackle Dengue Outbreak*, RADIO N.Z. (Aug. 21, 2019), <https://www.rnz.co.nz/international/programmes/datelinepacific/audio/2018709683/marshall-islands-state-of-emergency-to-tackle-dengue-outbreak> [<https://perma.cc/KCV7-AHFR>]. The most recent dengue outbreak, which began in Ebeye in July 2019, spread to other parts of the country, and had claimed three lives as of February 8, 2020. Giff Johnson, *Dengue Fever Outbreak Claims Two More Lives in the Marshall Islands*, RADIO N.Z. (Feb. 8, 2020), <https://www.rnz.co.nz/international/pacific-news/409073/dengue-fever-outbreak-claims-two-more-lives-in-the-marshall-islands> [<https://perma.cc/4BCH-4W2J>]. A senior advisor at the U.S. Centers for Disease Control expressed “appreciation from afar for the amazing work” of the local doctors and nurses, as a U.S.-based volunteer organization dispatched a doctor and several nurses to assist Marshallese medical professionals *six months* after the outbreak began. Giff Johnson, *Marshalls Gets US Medical Team Support with Dengue Treatment*, RADIO N.Z. (Feb. 3, 2020), <https://www.rnz.co.nz/international/pacific-news/408749/marshalls-gets-us-medical-team-support-with-dengue-treatment> [<https://perma.cc/H7WJ-4M9Q>].

67. Riklon et al., *supra* note 66, at 7.

68. Yamada et al., *supra* note 17, at 57.

69. Telephone Interview with Giff Johnson, author and editor of the *Marshall Islands Journal* (Jan. 22, 2020).

70. Ichihō et al., *supra* note 64, at 78.

approximately 42% of tuberculosis cases in the Pacific can actually be attributed in part to diabetes.<sup>71</sup>

While Americans stationed at Kwajalein in the 1960s joked that the Marshallese had developed “expensive tastes” for foods like spam, the shift from a traditional diet to processed foods imported from abroad has actually had dire consequences on the people of Ebeye.<sup>72</sup> The traditional Marshallese diet is nutritionally rich and composed of breadfruit, coconut, pandanus, taro, fish caught from the lagoon, and locally-raised chicken and pork.<sup>73</sup> Raising animals or maintaining a subsistence garden is “close to impossible” on Ebeye’s overcrowded concrete.<sup>74</sup> Furthermore, as previously discussed, PCB contamination and ongoing missile testing have rendered large portions of the lagoon

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71. Yamada et al., *supra* note 17, at 59.

72. CURRIE, *supra* note 18, at 89. Between 2007–2009, 82% of Marshallese deaths on Ebeye listed diabetes as a secondary or tertiary cause. Ichiho et al., *supra* note 64, at 78. Studies have found astronomical rates of diabetes among islanders who have migrated to the United States as well. One study of the Marshallese community in Arkansas found that 46.5% of Marshallese people living in Arkansas have diabetes, and 21.4% have pre-diabetes. A study in Hawai’i found that 44.2% of Marshallese adults in Hawai’i have type 2 diabetes. Pearl Anna McElfish, et al., *Family Model of Diabetes Education with a Pacific Islander Community*, DIABETES EDUC., Dec. 2015, at 706, 707. As Dr. McElfish, co-director of the Center for Pacific Islander Health at the University of Arkansas for Medical Sciences Northwest Regional Campus, explained, “Do we know that nuclear testing affected diabetes? One-hundred percent . . . It disrupted a healthy food system, and it created a subsidized and unhealthy food system. That unhealthy food system perpetuated diabetes and hypertension and other cardiovascular and metabolic diseases, no question.” Her team is currently exploring whether or not the nuclear fallout has had this impact at a genetic level. Gaby Galvin, *From the Islands to the Ozarks*, U.S. NEWS & WORLD REP. (Mar. 6, 2019), <https://www.usnews.com/news/healthiest-communities/articles/2019-03-06/marshall-islands-migrants-face-health-challenges-in-arkansas> (on file with the *Columbia Human Rights Law Review*). One doctor who works with Marshallese people in Iowa estimated that nearly 80% of the clinic’s Marshallese patients have kidney disease. These diet-related diseases are in addition to the rashes, birth defects, and high cancer rates that also afflict the Marshallese at high rates. Dan Diamond, *They Did Not Realize We Are Human Beings*, POLITICO (Jan. 26, 2020), <https://www.politico.com/news/magazine/2020/01/26/marshall-islands-iowa-medicaid-103940> [<https://perma.cc/MZQ4-QLRY>].

73. Ichiho et al., *supra* note 64, at 78.

74. DVORAK, *supra* note 4, at 177–78. This involuntary shift in diet has since taken root in Marshallese culture, with dire consequences for the health of Marshallese people in RMI and the United States. Brower, *supra* note 50 (“[T]he canned stuff becomes seen as traditional food. Rice and Spam are now seen as cultural Marshallese foods.”).

where islanders used to fish either unusable or inaccessible;<sup>75</sup> consequently, the people of Ebeye are the Marshallese sub-population most dependent on imported food sources.<sup>76</sup> As University of Hawai'i researchers succinctly stated, "[t]he military use of the Marshall Islands, the displacement and crowding of peoples, and their growing dependence on imported foodstuffs contribute to obesity, which in turn contributes to diabetes, which in turn contributes to tuberculosis."<sup>77</sup> In other words, a causal chain exists between U.S. destruction of the environment and traditional sources of food and the numerous ongoing epidemics—communicable and non-communicable—that plague Ebeye.

While it might seem logical that Ebeye's close proximity and access to U.S.-occupied Kwajalein would be the main driver in continuing to fuel the health issues that accompany a western diet, it is actually the *lack* of access to Kwajalein that exacerbates these nutrition issues for people living on Ebeye. While the Americans living on Kwajalein have access to fresh fruits and vegetables that are flown in regularly from California and Hawai'i,<sup>78</sup> the Marshallese who work on Kwajalein are not allowed to shop at the island's grocery store and

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75. Given the space constraints on Ebeye and the toxic pollution of the lagoon, it is unsurprising that only 10% of Ebeye households rely on local sources of protein and 9% rely on locally grown fruits and vegetables, while the rest rely on food imported from abroad. Ichiho et al., *supra* note 64, at 78.

76. *Id.*

77. Yamada et al., *supra* note 17, at 62. The authors of the study also point to evolutionary geneticist Richard Lewontin's assertion that "[a]lthough one may say that the tubercle bacillus causes tuberculosis, we are much closer to the truth when we say that it was the conditions of unregulated nineteenth-century competitive capitalism, unmodulated by the demands of labor unions and the state, that was the cause of tuberculosis" as shedding light on the social, non-biological causes of the tuberculosis crisis in the Marshall Islands. *Id.* (citing RICHARD LEWONTIN, *BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA* (1992)). Though exposure to the bacillus is certainly required for transmission, Lewontin and the authors of the study citing him suggest that the *epidemic* results from different forces. In the case of tuberculosis on Ebeye, the authors suggest that it is well within the capacity of the U.S. Department of Defense and its contractors to coordinate the logistics of bringing in mobile units and healthcare teams to Ebeye to address the tuberculosis epidemic: they simply choose not to do so. *Id.* at 63. The authors also highlight practical considerations that *should* drive the United States to act against this particular epidemic, including a desire to protect the Americans living on Kwajalein and a necessity to prevent Marshallese people—who do not need to pass a TB screening test in order to enter the United States—from causing TB crises in the United States. *Id.*

78. *Welcome to Kwajalein Atoll*, *supra* note 46.

are limited to certain dining establishments on the island.<sup>79</sup> The stores on Ebeye are financially unable to offer the same tax-free, subsidized food to their customers that the stores on Kwajalein do; furthermore, their customers cannot afford to buy imported produce at Ebeye's high, unsubsidized prices.<sup>80</sup> Consequently, the people of Ebeye rely on cheaper alternatives, including white rice, canned meat, and canned fish,<sup>81</sup> resulting in the aforementioned "alarming increase in the prevalence of diabetes."<sup>82</sup> In this way, though the pollution of the lagoon affects both the Marshallese living on Ebeye and the Americans living on Kwajalein, the health impact on the Marshallese community is astronomically higher due to overcrowding and poor sanitary conditions on Ebeye, as well as to disparate access to affordable healthy alternatives to toxic fish.<sup>83</sup>

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79. Hirshberg, *supra* note 10, at 345. Because these goods are subsidized for the American families living on base, Marshallese workers are not allowed to remove any food items from the island, and anyone caught with 'contraband,' such as a bag of apples, is subject to investigation, impoundment of the goods, and suspension or permanent expulsion from the island. Either of the latter would effectively terminate a Marshallese person's employability on the island. *Id.* Kwajalein has a security checkpoint that all workers must pass through as they enter and leave the island, which is primarily meant to deter any workers from bringing purchased goods off the island. *Id.* For the same reason, Marshallese workers are frequently subject to searches by military personnel and security contractors looking to catch 'contraband.' *Id.* These searches were the subject of a 1981 lawsuit, which Kwajalein landowners filed against the Secretary of the Army. The Court held that the Army had the power to carry out such a search and seizure policy, citing security concerns, even though these searches were conducted solely to inhibit Marshallese from bringing goods that they purchased or received as gifts home to Ebeye." JOHNSON, *supra* note 65, at 23.

80. Protection of fair competition for businesses on Ebeye is often cited as the reason for these shopping restrictions. *See* Layton, *supra* note 7, at 5. The median household income on Ebeye is only \$17,321, which is significantly lower than the average income of Americans on Kwajalein.

81. TOBIN, *supra* note 39, at 18.

82. Ichiho et al., *supra* note 64, at 78.

83. Beyond the disparity in health impact, there is also gross inequality in access to healthcare with respect to Ebeye and Kwajalein. The healthcare system on Ebeye is often too overwhelmed by the sheer number of patients requiring care to be able to function properly. CTR. FOR NATION RECONSTRUCTION AND CAPACITY DEV., *supra* note 7, at 18. The hospitals in the Marshall Islands—both on Ebeye and on Majuro, RMI's capital—struggle to meet the healthcare demands in emergencies, which recent emergency weather and health crises exemplify. Susanne Rust, *Huge Waves and Disease Turn Marshall Islands into 'a War Zone,' Health Official Says*, L.A. TIMES (Dec. 5, 2019), <https://www.latimes.com/environment/story/2019-12-05/marshall-islands-waves-flooding-disease-war-zone> (on file with the *Columbia Human Rights Law Review*). In early December 2019, as massive waves flooded the islands, the country was dealing with over 1,000 cases

II. FAILED OBLIGATIONS AND DISREGARDED RIGHTS: KWAJALEIN  
AND EBEBE UNDER INTERNATIONAL AND U.S. LAW

*“We have the trust and they have the territory.” –  
Senator Ataji Balos of Kwajalein<sup>84</sup>*

Ebeye is a clear example of the United States’ failure to meet its legal obligations as the administrator of the Trust Territory and to respect basic human rights in the Marshall Islands. Because of its role in the creation and facilitation of poor living, health, and environmental conditions on Ebeye, which stand in gross contrast with

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of dengue fever—the nation’s largest recorded outbreak—and a “severely virulent form of influenza-A.” Jack Niedenthal, the nation’s secretary of health, described the country as “a war zone,” as the hospitals were completely overrun. *Id.* Even though the hospital on Ebeye is in severe disrepair, Marshallese people cannot access the hospital on Kwajalein, except for in acute emergencies, when they are still not guaranteed access. Justina R. Langidrik et al., *Republic of the Marshall Islands Assessment for a Continuing Health Care Professional Development Program*, 14 DEVELOPING HUM. RES. FOR HEALTH PAC. 81, 82 (2007). During a gastroenteritis outbreak on Ebeye during the Trust Territory period, one doctor explained the military’s unwillingness to allow children to be treated at the hospital on Kwajalein:

The Ebeye hospital ran out of the intravenous fluids needed to sustain the lives of the Marshallese children severely dehydrated from profuse vomiting and diarrhea. I took one Marshallese child who was very ill and put her on a skiff and motored four miles to Kwajalein . . . I wanted to take her to Kwajalein hospital for treatment . . . We were stopped at the beach by an American guard who would not let the child enter the island . . . The Marshallese nurse pleaded with the guard that the child was dying and she could not receive appropriate therapy on Ebeye. The guard did not permit the child onto the island. She died on her way back to Ebeye. Five children died during that epidemic.

JOHNSON, *supra* note 65, at 19. Though this kind of unchecked callousness is less common now, admissions to the hospital on Kwajalein for the average Ebeye resident are still considered the exception. For a Marshallese person to use the hospital on Kwajalein in an emergency, they would need special permission from the Commander of USAG-KA. Interview with Carlon Jajok Zackhras, *supra* note 23. Ebeye patients who require further care for their conditions are generally referred to hospitals in Honolulu or the Philippines for care, which carries hefty costs, especially considering that Micronesians were ineligible for Medicaid until December 2020. Ichiho et al., *supra* note 64, at 79; *see also* Hofschneider, *supra* note 31 (explaining the 2020 restoration of Medicaid to Compact migrants). In this way, the United States is not only the cause of many of the health crises the people of Ebeye face, but the U.S. Army also refuses to provide access to a potential remedy in the form of medical care available on Kwajalein.

84. Senator Ataji Balos of Kwajalein. Alcalay, *supra* note 38, at 247.

those on Kwajalein, the United States owes a legal and moral duty to remedy the harm that it has caused. This Part sets forth the legal obligations the United States has under international law that are relevant to Ebeye. Next, this Part explores the overlapping legal frameworks—U.S. law, Marshallese law, and the Compact—and how the gaps in these frameworks leave the residents of Ebeye remediless for the human rights violations laid out in Part I and vulnerable to continued violations of their basic rights by the United States, its military, and its private contractors.

#### A. The United States Failed to Meet its Obligations Under the Trusteeship System

The Trusteeship System, which the Charter of the United Nations established, created certain binding obligations for the Administrators with respect to the Trust Territories. As laid out in the U.N. Charter, the primary objectives of the Trusteeship System were “to further international peace and security,”<sup>85</sup> “to promote the political, economic, social, and educational advancement of the inhabitants . . . and their progressive development towards self-government,”<sup>86</sup> and “to encourage respect for human rights and for fundamental freedoms for all without distinction as to race.”<sup>87</sup> Though this language—and its incorporation into the Trusteeship Agreement for the Former Japanese Mandate Islands, which was also binding upon the United States—arguably did not necessarily require the United States, as the Administrator entrusted with “the development of the inhabitants of the Trust Territory toward self-government or independence,”<sup>88</sup> to ensure that these objectives were *fully achieved*,<sup>89</sup>

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85. U.N. Charter art. 76, ¶ a.

86. *Id.* ¶ b.

87. *Id.* ¶ c.

88. Trusteeship Agreement for the Former Japanese Mandate Islands, art. 6, *adopted* Apr. 2, 1947, T.I.A.S. No. 1665, 8 U.N.T.S. 190, 192 (entered into force July 18, 1947) [hereinafter Trusteeship Agreement].

89. While it may be argued that these objectives are not intended to be binding because they do not carry the same framing of ‘obligations’ as articulated in Chapter XI of the U.N. Charter, it should be understood that these objectives do in fact imply binding obligations in relation to the administering authorities of the Trust Territories. HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 636 (2000). In fact, because the U.N. Trusteeship Council and Security Council were not to approve any trusteeship agreements that did not conform with the objectives outline in Article 76, and because the United States included these obligations in its Trusteeship Agreement for the Former Japanese Mandate Islands (the agreement governing the Trust

it *did* bind the United States to pursue these objectives in good faith throughout its administration of the Trust Territory.<sup>90</sup> Instead, the United States acted with blatant disregard for these objectives throughout its administration of the Trust Territory, specifically in regard to Ebeye, and it owes a duty to the Marshallese to remedy the ongoing harm it has caused.

While the United States' use of Kwajalein Atoll as a missile testing site violated the duty to use the Trust Territory in furtherance of international peace and security,<sup>91</sup> the clearest breach of duty was

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Territory of the Pacific Islands), these "objectives" should certainly be understood as binding obligations with respect to the United States' administration of the Trust Territory. *Id.*; see also W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231, 237 (1989) (citing the U.N. Trusteeship System as one of few instances in international law where certain states are recognized as subordinate to other states and describing the objectives set out in Article 76 of the U.N. Charter as "special obligations" imposed upon the states who exercise authority over the subordinate territories).

90. Trusteeship Agreement, *supra* note 88, at 192 ("The Administering Authority . . . shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as specified . . . apply the objectives of the International Trusteeship System . . ."). The classification of the Marshall Islands as part of a "strategic trust" meant that the United States had slightly different obligations imposed by the United Nations than the administrators of non-strategic trust territories, and this also meant that the Security Council—not the Trusteeship Council or General Assembly—oversaw and evaluated the United States' implementation of its Trustee obligations. U.N. Charter art. 83 ("All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council."); Harry G. Prince, *The United States, The United Nations, and Micronesia: Questions of Procedure, Substance, and Faith*, 11 MICH. J. INT'L L. 11, 23 (1989) ("[D]espite the undeniable primacy accorded to its security concerns, the United States ultimately made a binding commitment to make the advancement of the Micronesian peoples the basic or paramount objective in the administration of the Trust Territory."). Article 83 of the Charter also provided that the United States was able to seek assistance from the Trusteeship Council as needed in fulfilling its Trustee obligations with respect to political, economic, social, and educational matters, but the Trusteeship Council could not actually hold the United States accountable for its failure to fulfill these obligations. The oversight instead was supposed to come from the U.N. Security Council, where the United States had veto power and thus operated with impunity. See KIMI HARA, *COLD WAR FRONTIERS IN THE ASIA-PACIFIC: DIVIDED TERRITORIES IN THE SAN FRANCISCO SYSTEM* 103 (2007).

91. Though the United States was within its rights under the U.N. Charter and the Trusteeship Agreement to establish military bases and station forces in the Marshall Islands, this power was only to be exercised in line with its obligations under Articles 76(a) and 84 of the U.N. Charter and pursuant to the "maintenance

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of international peace and security.” Trusteeship Agreement, *supra* note 88, art. 5. Although Article 5 of the Trusteeship Agreement enabled the United States to fortify certain parts of the Marshalls for security reasons, this did not absolve the United States of its obligation to pursue the objectives set out in Article 76. U.N. Charter art. 83, ¶ 2 (“The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.”). However, the United States did not administer the Trust Territory in a manner that furthered international peace and security as mandated by the U.N. Charter. The U.S. nuclear testing program constituted a clear violation of this duty. The 67 nuclear bombs that the United States detonated in the Marshall Islands constitute nearly 80% of *all* the atmospheric tests the United States has *ever* conducted. *An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed?: Hearing Before the Subcomm. on Asia, the Pac., and the Glob. Env’t of the H. Comm. on Foreign Affs.*, 110<sup>th</sup> Cong. 1 (2007) (statement of Rep. Faleomavaega, Chairman, Subcomm. on Asia, the Pac., and the Glob. Env’t). The language of the Treaty on the Non-Proliferation of Nuclear Weapons suggests that the U.S. nuclear testing program could not possibly be considered as furthering the goal of international peace. Treaty on the Non-Proliferation of Nuclear Weapons, Preamble, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169, 169 (entered into force Mar. 5, 1970) (“[c]onsidering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples”). This language suggests that the U.S. nuclear testing program should not be interpreted as deterring violence but instead as increasing the probability of war. *Id.* (“[b]elieving that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war”). The Treaty also strikes a consistent distinction between the development of nuclear technology for the creation of weapons and the development of nuclear technology for peaceful purposes, which indicates that the U.S. nuclear testing, which was for the purpose of creating weapons, would not be considered a valid purpose in the pursuit of international peace. *See, e.g., Id.* art. III(1) (“with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices”). With respect to Kwajalein more specifically, the ICBM testing program also stands in violation of the duty to promote international peace and security. The U.S. military pursued a more active weapons development plan during the Cold War nuclear arms race. SMITH-NORRIS, *supra* note 28, at 105–06 (explaining that U.S. missile testing was a direct response to the USSR’s—and eventually China’s—technological developments in weaponry); OWEN WILKES, MEGAN VAN FRANK & PETER HAYES, CHASING GRAVITY’S RAINBOW: KWAJALEIN AND US BALLISTIC MISSILE TESTING 53, 167–68 (1991) (explaining the use of Kwajalein for Cold War posturing and technological showmanship). In 1968, the Marshallese began publicly condemning and questioning the U.S. missile testing, though no one heeded their calls for an end to the missile testing on Kwajalein. In a submission to the Congress of Micronesia, the Marshallese stated, “the value of testing missiles to the maintenance of peace and security is . . . a questionable matter. We believe in peace and love, not in the display of power to destroy mankind.” *A Petition from the People of the Mid-Corridor Islands, Kwajalein Atoll*, introduced in the House of Representatives of the Congress of Micronesia by Representative Atland Anien on Aug. 2, 1968 and by Senator Amata Kabua in the Senate of the Congress of Micronesia on Aug. 3 1968, 91st Cong. Sess. 1 (Aug. 4,

the United States' failure to promote the political, economic, social, and educational advancement of the Marshallese people.<sup>92</sup> In furtherance of its duty to promote economic advancement and self-sufficiency, the United States was obligated to “regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication.”<sup>93</sup> As discussed in Part I, the displacement of Marshallese people from their home islands prevented them from cultivating natural resources on land for their own benefit, which inhibited the growth of larger-scale agriculture in the area. Furthermore, not only did restrictions on fishing in huge swaths of the lagoon due to missile testing and PCB contamination from leakages on the U.S. military base (U.S. Army Garrison at Kwajalein Atoll [USAG-KA]) constitute a gross violation of the United States' Trustee obligation to protect the Marshallese people and their natural resources, but they also rendered the goals of establishing fisheries and agriculture effectively impossible—both during the Trusteeship and for decades thereafter.

Pursuant to Article 76(b) of the Charter, the United States was also obligated to “protect the rights and fundamental freedoms of all elements of the population without discrimination” and “protect the

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1969). Not only was the United States' testing in violation of its Trust obligation to pursue international peace, but the United States' forcible displacement of thousands of Marshallese people in order to accommodate its missile testing also violated the United States' obligations to “encourage respect for human rights and for fundamental freedoms for all.” U.N. Charter art. 76, ¶ c.

92. The United States was obligated to “promote the political, economic, social, and educational advancement of the inhabitants of the trust territories” with the goal of their “progressive development towards self-government or independence.” U.N. Charter art. 76, ¶ b.

93. Trusteeship Agreement, *supra* note 88, at 192. Though it is not a central argument of this Note, the United States also failed to fulfill its obligation to improve transportation and the means of transportation (required by art. 6(1) of the Trusteeship Agreement). Under Japanese rule Ebeye and Kwajalein were linked to power stations and Marshallese living on the islets near Ebeye and Kwajalein also benefitted from electricity and telecommunications lines connecting them to the central stations; these connections fell apart under U.S. control and the United States made no effort to ensure that Ebeye was connected to its power grid or telephone lines. DVORAK, *supra* note 4, at 173. This lack of telecommunications infrastructure is one of the many long-lasting impacts of the United States' miscarriage of its Trust Territory obligations. As of 2018, only 10% of the Marshall Islands' population had internet connectivity, and that 10% largely lives in Majuro—the capital. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, MARSHALL ISLANDS 2018 HUMAN RIGHTS REPORT 5 (2018).

health of the inhabitants.”<sup>94</sup> As articulated in Part I, Ebeye’s overcrowding—a condition that U.S.-induced displacement of Marshallese people from other islands on the Atoll created—led to health epidemics that consistently plague the island.<sup>95</sup> Electricity, sanitation, and water systems—all of which the United States was responsible for constructing pursuant to its Trust obligations—were increasingly inadequate to meet the needs of the population.<sup>96</sup> Though the United States was required to “protect the rights . . . of all elements of the population without discrimination,”<sup>97</sup> Marshallese people lacked access to adequate healthcare<sup>98</sup> and were not allowed to use the clean, well-staffed, and well-resourced hospital on Kwajalein.<sup>99</sup> The poor conditions at the hospital on Ebeye, rooted in the mismanagement of the Trust Territory government, have persisted and continue to stand in stark contrast to the conditions of the hospital on Kwajalein<sup>100</sup>—a violation of the United States’ duty to protect the health of the Marshallese people without discrimination. In addition to the various outbreaks of infectious disease and lack of adequate health infrastructure, U.S. administration of the Marshall Islands would lay the groundwork for what has continued to be a non-communicable disease epidemic in the Marshall Islands.<sup>101</sup> Food prices on the island

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94. Trusteeship Agreement, *supra* note 88, at 192.

95. SMITH-NORRIS, *supra* note 28, at 111.

96. *Id.*

97. Trusteeship Agreement, *supra* note 88, at 192.

98. One of the U.N. visiting missions tasked with investigating U.S. administration of the Trust Territory found the hospital on Ebeye to be “manifestly inadequate,” SMITH-NORRIS, *supra* note 28, at 111, while a *Pacific Daily News* article called Ebeye at “biological time bomb.” *Id.* at 117. In 1975, the Chief of the Communicable Disease Control Division for the Trust Territory arrived on Ebeye to address an influenza outbreak that had affected 3,500 of Ebeye’s residents and found what he called “deplorable sanitary conditions.” *Id.* at 115. He reported overflowing dumpsters, out-of-control rat and fly populations, raw sewage being dumped directly into the lagoon, water from the [Ebeye] hospital’s roof leaking into surgical rooms, and drinking water that contained high levels of fecal coliform contamination.” *Id.* at 115–16.

99. Justina R. Langidrik et al., *supra* note 83, at 82.

100. CTR. FOR NATION RECONSTRUCTION & CAPACITY DEV., *supra* note 7, at 21 (explaining how the hospital in Ebeye has an insect problem, limited staff, and a lack of resources that the hospital on Kwajalein has, including emergency supplies and oxygen tanks).

101. As articulated in Part I, because much of the lagoon is still either off-limits or contaminated, imported goods such as canned meat and canned fish constitute the majority of most Marshallese people’s diets, and because water quality is poor and water supply unreliable, many turn to soda as a safer alternative. SASHA DAVIS, *THE EMPIRES’ EDGE: MILITARIZATION, RESISTANCE, AND TRANSCENDING HEGEMONY IN THE PACIFIC* 40–41 (2014).

are disproportionately high relative to the subsidized prices on Kwajalein and all of the food is imported because the United States' presence and oversight created overcrowding, land displacement, and toxic contamination, which destroyed local sources of food and led to the obesity and non-communicable diseases issues discussed in Part I.<sup>102</sup>

Article 76(b) of the U.N. Charter also required the United States to “promote the educational advancement of the inhabitants,”<sup>103</sup> but the educational opportunities on Ebeye during the Trust Territory era were far from adequate.<sup>104</sup> Elementary schools on Ebeye only had capacity to serve one-third of the eligible Marshallese students.<sup>105</sup> While American students on Kwajalein had access to education from kindergarten through twelfth grade, there was only one secondary school in the entire Marshall Islands throughout the Trust Territory administration.<sup>106</sup> It was located in Majuro, which was a flight away from Ebeye.<sup>107</sup> The United States' failure to promote education created lasting effects still felt today—the high school on Ebeye still struggles to provide adequate education to a large number of students, while the

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102. SMITH-NORRIS, *supra* note 28, at 117.

103. Trusteeship Agreement, *supra* note 88, art. 6(3).

104. The Solomon Report, a secret U.S. government report that was uncovered and published by the Friends of Micronesia, the *Micronesian Independent*, and Tia Belau in 1971, showed that the United States viewed the Marshallese as undeserving of the basic right to education and saw education as a potentially destabilizing force in the region: “Modern education, particularly secondary education, will create a demoralizing unemployment problem as graduates refuse to return to their primitive outlying lands to the extent that they are not aided to continue on the [*sic*] college.” FRIENDS OF MICR. ET AL., THE SOLOMON REPORT: AMERICA’S RUTHLESS BLUEPRINT FOR THE ASSIMILATION OF MICRONESIA 17 (1971) [hereinafter SOLOMON REPORT].

105. SMITH-NORRIS, *supra* note 28, at 117. This changed slightly in the 1970s and early 1980s, when the United States saw the primary education system as an opportunity to propagate the message of U.S. benevolence in advance of the Marshallese people deciding whether or not to maintain an ongoing relationship with the U.S. SOLOMON REPORT *supra* note 104, at 15.

106. SMITH-NORRIS, *supra* note 28, at 117.

107. DVORAK, *supra* note 4, at 173. Ebeye did not have a high school until the 1990s (after the end of the Trusteeship), and the United States' neglect of its Trusteeship obligations with regard to education continue to be felt today. *Id.* Students must take an exam in order to enter high school, but there are not enough spots available in the high schools for the students who pass the exams to attend. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEPT OF STATE, *supra* note 93, at 9.

high school on Kwajalein boasts small class sizes and regular admissions to elite U.S. universities.<sup>108</sup>

Perhaps the most important obligation of the United States and all other Trustees as part of the Trusteeship System was the duty to “promote the development of the inhabitants of the Trust Territory toward self-government or independence as may be appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned.”<sup>109</sup> During the period of international decolonization in the 1960s, the United States faced international pressure to usher its own colonial holdings down the path to independence.<sup>110</sup> While the United States wanted to answer growing

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108. The high school on Kwajalein boasts a program that allows Marshallese students from Ebeye to come to school on Kwajalein. Though the Americans flaunt this program as a major community relations effort, very few Marshallese students are actually permitted to partake. In his class of 35–40 students at the high school on Kwajalein, Carlon Jajok Zackhras was one of only five Marshallese students. Interview with Carlon Jajok Zackhras, *supra* note 23. Marshallese students are selected in kindergarten and continue through to twelfth grade. *Id.* Zackhras indicated that there are now only four, or even three, students accepted per grade and also explained that the Marshallese students sometimes feel discriminated against in the classroom at Kwajalein schools. *Id.* Both Zackhras and Minister Kabua were among the lucky few who attended school on Kwajalein and described their experience as living a double life or inhabiting two different worlds. *Id.*; Interview with Kitlang Kabua, *supra* note 1. Despite the opportunity for social mobility that an education on Kwajalein can provide for a student from Ebeye, more often than not, the students admitted are from landowning or otherwise prominent families. See Douglas S. Hepler, Post-High School Outcomes of the Marshallese Graduates of the Kwajalein Jr-Sr High School, Kwajalein, Marshall Islands, at 76 (Oct. 2016) (Ph.D. Dissertation, Univ. of Nebraska) (on file with the *Columbia Human Rights Law Review*). Furthermore, these students often face many challenges such as affording meals and tuition, dealing with ill-treatment from some American teachers, and striking a nearly impossible balance between schoolwork, extracurricular activities, household chores, family obligations, and a long commute. *Id.* at 75–76. This balancing act is exacerbated by limited access to water, electricity, technology, and internet for Marshallese students. *Id.* at 77.

109. Trusteeship Agreement, *supra* note 88, art. 6(3). There was no set timeline for this obligation, but the United States—which actively undermined the process of realizing the right to self-determination in the Marshall Islands—was nonetheless in clear violation of this Trust obligation.

110. Timothy Gaffaney, *Linking Colonization and Decolonization: The Case of Micronesia*, PAC. STUD., June 1995, at 23, 49–50; Kimie Hara, *Micronesia and the Postwar Remaking of the Asia Pacific: “An American Lake”*, 5 ASIA-PAC. J., No. 8, 2007, at 1, 20 (“The major factor inducing this change in US policy [to begin planning for the future political status of the TTPI] was the independence movement of various UN trust territories that was developing then.”). The 1961 Visiting Mission to Micronesia, the first such mission to devote detailed attention to Micronesia, was “sharply critical of American administration,” highlighting

demands for independence, it did not want to relinquish its military interests in the region.<sup>111</sup> These goals of maintaining the respect of the international community and maintaining military dominance in the Pacific were in direct conflict with one another, a fact which drove the administrators of the Trust Territory to begin formulating and implementing a strategy to make the island nations economically dependent on the United States.<sup>112</sup> This failure to develop the islands was in direct violation of the United States' obligations as a Trustee, and it drew criticism from the international community for its complete failure in this regard.<sup>113</sup>

After a period without meaningful investment from the United States stretching from the 1940s until the 1960s, a second period of U.S. economic involvement—throughout the late 1960s and 1970s—entailed very strategic financial inflows from the U.S. government.<sup>114</sup>

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issues with “poor transportation; failure to settle war damage claims; failure to adequately compensated for land taken for military purposes; poor living conditions at the American missile range in the Marshalls; inadequate economic development; inadequate education programs; and almost nonexistent medical care.” DONALD MCHENRY, *MICRONESIA-TRUST BETRAYED* 23 (1975). The U.S. Government and military also received criticism at home in *The New Yorker* and the *Saturday Evening Post*. *Id.* at 24.

111. Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Island Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L. L.J. 257, 258 (1990); see also SOLOMON REPORT, *supra* note 104, at 2 (“We cannot give the area up, yet time is running out for the US in . . . that we will soon be the only nation left administering a trust territory. The time could come, and shortly, when the pressure in the UN . . . could become more than embarrassing.”).

112. The first period of U.S. administration of the region—from the late 1940s to the early 1960s—consisted of effectively no economic or social development efforts on the part of the military overseers, as has been explained at length throughout Part I and in the preceding paragraphs. E. ROBERT STATHAM, JR., *COLONIAL CONSTITUTIONALISM: THE TYRANNY OF THE UNITED STATES' OFFSHORE TERRITORIAL POLICY AND RELATIONS* 130 (2002); see also SOLOMON REPORT, *supra* note 104, at 1 (“In the almost twenty years of US control, physical facilities have further deteriorated in many areas, the economy has remained relatively dormant and in many ways retrogressed while progress toward social development has been slow.”). In fact, per capita Micronesian incomes were three times as high under Japanese control than they were when the Solomon Report was published. *Id.* at 7. The United States argued that this lack of U.S. economic investment was intended to protect the Marshallese people from Western influence, but the reality was that the military administrators had no economic development plan and instead focused on their strategic interests in the islands. CARL HEINE, *MICRONESIA AT THE CROSSROADS: A REAPPRAISAL OF THE MICRONESIAN POLITICAL DILEMMA* 21 (1974).

113. STATHAM, *supra* note 112, at 131.

114. *Id.*

However, this money was not targeted toward meaningful investments that would promote economic, social, and political development on the islands.<sup>115</sup> In fact, as calls for independence increased throughout the Trust Territories and criticism from the international community grew more forceful,<sup>116</sup> the United States engaged in a concerted effort to make the Trust Territories—including the Marshall Islands—economically dependent on the United States.<sup>117</sup> By creating conditions of economic dependency, the United States could induce the Marshallese people to “choose” to enter into a permanent relationship with the United States.<sup>118</sup> If the United States could effectively trick the Marshallese into thinking that it had the islands’ best interests in mind by achieving “minimum but satisfactory social standards in education, public health, etc.”<sup>119</sup> in the years leading up to the plebiscite, it hoped the Marshallese people’s memories would be short enough to forget the complete lack of development efforts that preceded this short spurt in investment.<sup>120</sup> The U.S. government knew that its

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115. *Id.*

116. “We cannot give the area up, yet time is running out for the [United States] in the sense that we will soon be the only nation left administering a trust territory. The time could come, and shortly, when the pressures in the U.N. for a settlement of the status of Micronesia could become more than embarrassing.” SOLOMON REPORT, *supra* note 104, at 2.

117. STATHAM, *supra* note 112, at 131.

118. The Solomon Report illustrated this purposeful economic regression. SOLOMON REPORT, *supra* note 104, at 2. One of the memoranda highlighted in the report called for an “accelerated development of the area to bring its political, economic and social standards into line with an eventual permanent association [between the United States and the Trust Territories].” *Id.* at 2. That same memorandum recommended that the United States move forward with the “minimum capital investment and operating program needed to insure a favorable vote in the plebiscite” and give the Micronesians “a sense of progress to replace the deadly feeling of economic dormancy.” *Id.* at 7.

119. SOLOMON REPORT, *supra* note 104, at 4.

120. The Solomon Report also highlighted other elements of the Micronesian problem that would require agreement between Congress and the President in order to address. The first issue the report highlighted in this regard was that the United States, in moving counter to the anti-colonial movement with which the rest of the international community was engaged, would also be “breaching its own policy since World War I of not acquiring new territorial possession if it seeks to make Micronesia a US territory.” *Id.* at 4. The second consideration was that the Trust Territory of Micronesia would be the *only 1* of the 11 trust territories that would not conclude with either independence or integration into a contiguous country; it would be the only trust territory that would be taken over by its administrator. *Id.* The third consideration was that the Security Council would be overseeing and approving the termination of the Trusteeship, which meant that “the US might have to decide to proceed with a series of actions that would make

actions to undermine the development, education, and economic independence of the islands throughout its time as Trustee had left the islands completely financially dependent on the United States, and it knew that this would be the case for years to come.<sup>121</sup> In this way, the United States' violation of its obligation to promote economic development went hand-in-hand with its violation of its obligation to promote self-government, independence, and self-determination.

#### B. The Compact of Free Association and U.S. Law Deprive the Marshallese of a Remedy and Allow for Continued Human Rights Violations

As discussed in the prior Section, with respect to the people of Ebeye, the United States breached its duty—imposed by both the U.N. Charter and the binding Trusteeship Agreement—as a Trustee of the Marshall Islands. The Marshallese people have not had an adequate remedy for the harm these breaches caused. This Section explains how, unfortunately, the legal frameworks currently binding the relationship between the United States and RMI inhibit the potential for an actual adequate remedy.<sup>122</sup> In particular, this Section explores how the

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the Trusteeship Agreement a dead issue, at least from the Micronesian viewpoint.” *Id.*

121. The United States saw this influx in spending as necessary to ensure a favorable plebiscite result amid growing discontentment with U.S. administration of the territory. SOLOMON REPORT, *supra* note 104, at 7 (calling for the “*minimum* capital investment and operating program needed to insure a favorable vote in the plebiscite” (emphasis added)). However, the U.S. government’s investments were only intended to “replace the deadly feeling of economic dormancy,” not to promote actual or sustainable economic growth. *Id.* In fact, the U.S. government knew these capital investments would foster economic dependence on the United States that would last far beyond the plebiscite. As the Solomon Report indicates, U.S. officials knew the Micronesian islands “will remain now in the foreseeable future, a deficit area to be subsidized by the U.S.” *Id.* at 4. Even after the Marshall Islands attained political independence, international aid interventions have further entrenched this state of economic dependency, which renders the Marshallese economically unable to undertake important infrastructure improvement projects—such as climate adaptation measures—without heavy reliance on outside aid. Autumn Bordner et al., *Colonial Dynamics Limit Climate Adaptation in Oceania: Perspectives from the Marshall Islands*, 61 GLOBAL ENV. CHANGE 1, 4 (2020).

122. The Universal Declaration of Human Rights, which the United States has ratified, requires that “all are equal before the law and are entitled without any discrimination to equal protection of the law.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 7, 74 (Dec. 10, 1948) [hereinafter UDHR]. The structure of the Compact, however, and its interaction with American and Marshallese law, leaves the Marshallese on Ebeye without the same equal protection as the Americans living on Kwajalein.

intersections of three legal frameworks—the Compact, U.S. law, and Marshallese law—undermine the Marshallese people’s ability to obtain a remedy for past harm and prevent future displacement, environmental degradation, health crises, and workers’ rights violations.

### 1. Displacement

The United States’ occupation of Marshallese land and fishing areas constitutes a violation of basic principles of human rights. The Universal Declaration of Human Rights (UDHR) asserts that “one shall not be arbitrarily deprived of his property”<sup>123</sup> and that “everyone has the right to freedom of movement and residence within the borders of each State.”<sup>124</sup> The taking of Marshallese land without consent or adequate compensation, as well as the bans the United States has instituted over many islands in the Mid-Atoll Corridor and much of the lagoon, violates these rights to property and movement.<sup>125</sup> Finally, the Compact dictates that the United States has a right to obtain

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123. UDHR, *supra* note 122, art. 17. The guarantee against being arbitrarily deprived of one’s property is also contained in several regional agreements, including the American Declaration of the Rights and Duties of Man (Article XXIII), the American Convention on Human Rights (Article 21), the African Charter on Human and Peoples’ Rights (Article 14), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1). Erin Creegan, *The Extraterritorial Constitutional Rights of Aliens in the Federal Circuit*, 19 FED. CIR. B. J. 273, 292 (2009).

124. UDHR, *supra* note 122, art. 12.

125. The International Covenant on Civil and Political Rights, which the United States ratified and is consequently obligated to follow, prohibits restricting freedom of movement within a state. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 12, 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The International Convention on the Elimination of All Forms of Racial Discrimination also protects the rights to property, freedom of movement within a state’s borders, and housing. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 5, 660 U.N.T.S. 195, 220–21 (entered into force Jan. 4, 1969) [hereinafter ICERD]. The International Court of Justice has interpreted ICERD as applying outside of the violating state’s territory. Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Order, 2008 I.C.J. 353, 386 (2008) (“the Court consequently finds that these provisions [Articles 2 and 5] of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory”). ICERD, which the United States has also ratified, is particularly relevant given the race and nationality discrimination governing who may enter the military base and the disparity in access to housing between Americans on Kwajalein and Marshallese on Ebeye.

additional sites for defense purposes and places the burden on the Marshallese government to engage in the negotiations with Marshallese landowners to obtain those sites for U.S. military use.<sup>126</sup> Therefore, not only do the Marshallese lack a remedy for their past property seizure, but they could be subject to future forced displacement and property alienation under the current MUORA.

## 2. Environment and Health

In violation of the UDHR,<sup>127</sup> the Marshallese have been deprived of their right to health, and the law fails to provide a remedy. As explained in Part I, the United States has caused toxic PCB contamination in Marshallese waters, but under the Compact, the United States is not required to remedy this harm.<sup>128</sup> Pursuant to the

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126. See Compact of Free Association, Military Use and Operating Rights, U.S.-Marsh. Is., art. III, Apr. 30, 2003 T.I.A.S. 04-501 [hereinafter MUORA].

127. “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .” UDHR, *supra* note 122, art. 25.

128. The MUORA only requires that the U.S. Government “shall use its best efforts” to “minimize unnecessary adverse effects to the environment, including water areas,” which means that the United States is not actually legally liable for its environmental harm and that the United States does not need to minimize environmental harm for actions it deems necessary in conducting the military activities it provides pursuant to other sections of the MUORA. MUORA, *supra* note 126, art. IV. If PCB contamination had occurred in the United States, the U.S. Government or agency in charge of the activities leading to the contamination would be liable for the costs of clean-up efforts pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). In contrast, CERCLA does not apply extraterritorially, even where the United States, its agencies, and its contractors are the ones responsible for the PCB contamination. 42 U.S.C. § 9620 (2018); see also *Arc Ecology v. U.S. Dept. of Air Force*, 411 F.3d 1092, 1098 (9th Cir. 2005) (holding that even if CERCLA could be interpreted as applying to geographic areas such as foreign military bases, such an interpretation would still not provide a cause of action under CERCLA for foreign nationals). The USA-KA Environmental Standards call for a process similar to the one outlined in CERCLA for evaluating and potentially remediating sites contaminated from toxic material releases, though the actual requirements of CERCLA do not necessarily apply. See ENVTL. STANDARDS, *supra* note 57, at 17; see also Lee, *supra* note 58, at 427 (1998) (suggesting that it is, at best, unclear whether CERCLA could apply to the former Trust Territories for PCB contamination that occurred when the United States exercised jurisdiction over the islands). In the United States, PCBs are regulated by the EPA in accordance with the Toxic Substances Control Act (TSCA). 15 U.S.C. 2605 § 6(a). PCBs are also considered toxic pollutants under the Clean Water Act. 33 U.S.C. 1317(a). While the Compact calls for the United States to comply with standards “substantially similar” to those required by the TSCA, the TSCA itself does not apply extraterritorially. Compact of Free Association, Title

Compact, the National Environmental Policy Act of 1969 (NEPA) applies to all U.S. government and government contractor activities in the Marshall Islands, essentially requiring the government to conduct environmental assessments and author certain environmental impact statements (EISs) for actions that may have significant environmental impact, as well as to consider mitigation and harm reduction measures for potentially harmful projects.<sup>129</sup> For the activities that require an EIS under NEPA, the Compact states that the U.S. government must comply with standards that are *comparable* (not equivalent) to U.S. environmental statutes in assessing potential environmental harm—leaving significant discretion to the EIS preparer.<sup>130</sup> The environmental standards governing Kwajalein ban new uses of PCBs, but they do not provide recourse in the form of damages or required remediation for the longstanding prior PCB contamination that continues to pollute the lagoon.<sup>131</sup> More alarming still, as expressly

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One, Article VI, § 61(a)(3). On Kwajalein, the military and its contractors are bound to follow a Hazardous Materials Management Plan, which is incorporated into the Kwajalein Environmental Emergency Plan. DEPT OF THE ARMY, FINAL ENVIRONMENTAL ASSESSMENT/OVERSEAS ENVIRONMENTAL ASSESSMENT FOR FLIGHT EXPERIMENT 1, 3–79 (2017), <https://apps.dtic.mil/dtic/tr/fulltext/u2/1049542.pdf> (on file with the *Columbia Human Rights Law Review*).

129. ENVTL. STANDARDS, *supra* note 57, at 3–4.

130. These statutes include TSCA; RCRA; Marine Protection, Research, and Sanctuaries Act (MPRSA, Title I, which includes and is referred to as the “Ocean Dumping Act” (ODA)); CWA; Clean Air Act (CAA); and Endangered Species Act (ESA). ENVTL. STANDARDS, *supra* note 57, at 3–4. Though the United States is supposed to comply with comparable standards to those set forth by the aforementioned statutes, there is no enforcement mechanism or legal requirement that the United States actually comply with any particular set of standards. *Id.* Government agencies and contractors on Kwajalein must consider potential PCB contamination as part of every EIS; furthermore, all new uses of PCBs are prohibited, as is the introduction of new PCBs, PCB articles, or PCB items. *Id.* at 17. Hazardous wastes must be shipped off the island to an EPA-approved facility within 120 days after removal from service. *Id.* at 272.

131. In fact, the U.S. EPA has asserted that any past or future PCB remediation in the Marshall Islands is an act of goodwill from the United States and in no way constitutes a legal obligation. Lee, *supra* note 58, at 410, 422. Furthermore, the cleanup of PCB leakages has yet to have a meaningful impact on the presence of these toxic contaminants in the lagoon and fish population. Ongoing sources of PCBs and other toxic wastes on Kwajalein include power plants, vehicle maintenance areas, corrosion-prevention and painting operations (waste paint and solvents), dry cleaners, airfield operations, transformers, and pest management operations. ENVTL. STANDARDS, *supra* note 57, at 17. As the most recent study of existing PCB contamination found, in all reef areas studied, concentrations of common contaminants including PCBs in reef and bottom fish exceeded safe amounts set forth in the Environmental Standards. 2019 UPDATE, *supra* note 58. Instead of ensuring adequate action to stop all PCB usage on the base, the primary

stated in the Compact, the United States has *no obligation* to return the land on Kwajalein to its former condition upon returning it to the Marshallese.<sup>132</sup> Renegotiating this provision to require the United States to undertake restoration efforts and to set aside funds now to pay for these eventual restoration measures is especially crucial in light of the PCB contamination and the new information on nuclear radiation that continues to emerge. The renegotiated Compact must require the U.S. military and its contractors to meet the standards set forth in all relevant U.S. environmental statutes discussed herein; alternatively, Marshallese environmental statutes should be allowed to apply to U.S. military and U.S. contractor activities on Kwajalein.

Climate change will likely render many atolls in the Marshall Islands uninhabitable by the end of the twenty-first century.<sup>133</sup> As the climate crisis continues to threaten the Marshall Islands, Ebeye is especially vulnerable.<sup>134</sup> The United States dredged significant portions of the coral reef in order to make the lagoon more easily navigable for its ships. It is permitted to dredge pursuant to the MUORA,<sup>135</sup> but such dredging has harmful effects on the reefs, which are crucial for climate resilience.<sup>136</sup> The United States used the dredged reef as landfill for three of the islands over which it exercises control, making them larger and higher above sea level, and therefore more resilient to rising sea levels and king tides; Ebeye received no such benefit from this dredging.<sup>137</sup> The United States has spent

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measure the U.S. military has taken to safeguard Marshallese against harm from PCBs is to ban fishing in massive swaths of the lagoon around Ebeye and Kwajalein, as discussed in Part I.

132. MUORA, *supra* note 126, art. X(3) (“The Government of the United States shall have no obligation, so upon relinquishment, to restore defense sites to their former condition . . .”).

133. Curt D. Storlazzi et al., *Most Atolls Will Be Uninhabitable By the Mid-21<sup>st</sup> Century Because of Sea-level Rise Exacerbating Wave-Driven Flooding*, 4 SCI. ADVANCES, no. 4, at 1, 5 (2018).

134. Flooding events, which are expected to increase in frequency as the climate crisis worsens, will also increase in percentage of area inundated, meaning that during extreme weather events nearly the entire islands—90% of the land—will be flooded. ALESSIO GIARDINO ET AL., COASTAL RISK ASSESSMENT FOR EBEEYE: TECHNICAL REP. 134 (2017). Expected annual damages due to sea level rise on Ebeye are expected to increase from approximately \$2.5 million per year to over \$9 million per year by the end of the century. *Id.* at 135.

135. MUORA, *supra* note 126, art. III(b).

136. Autumn Bordner, *Climate Migration & Self-Determination*, 51 COLUM. HUM. RTS. L. REV. 183, 204–05 (2019).

137. This includes 205 acres of landfill on Kwajalein, 40 acres of landfill on Roi-Namur, and 18 acres of landfill on Meck. *See* MUORA, *supra* note 126, Annex A. Dredging is required in order to maintain the depths necessary for military ships

millions of dollars<sup>138</sup> to protect its multi-billion-dollar missile testing installation on Kwajalein.<sup>139</sup> However, Marshallese leaders are left to wonder if the United States would be willing to help the people of Ebeye by offering refuge on better-adapted Kwajalein as natural disasters become more frequent and severe.<sup>140</sup> As the U.S. military installations in the Marshalls become more resilient and fortified while Marshallese islands like Ebeye suffer from severe climate impacts, one can certainly picture Ebeye and Kwajalein as a clear manifestation of climate apartheid.<sup>141</sup> Given the increased likelihood and severity of flooding events and natural disasters combined with the gross disparity in access to climate adaptation measures between Ebeye and Kwajalein, the renegotiated Compact should expressly require access to Kwajalein for safety purposes during extreme weather events and guarantee access to its hospital for emergency medical procedures.<sup>142</sup>

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to navigate the lagoon, and it is a technique that has been regularly employed in order to maintain U.S. military operations in the area. U.S. ARMY STRATEGIC DEF. COMMAND, DRAFT ENVIRONMENTAL IMPACT STATEMENT: PROPOSED ACTIONS AT U.S. ARMY KWAJALEIN ATOLL 3–153 (1989).

138. This includes \$25 million allocated for a sea wall to protect Kwajalein. Interview with Kitlang Kabua, *supra* note 1 (explaining that the Marshallese were given less than half this amount by the World Bank to construct a sea wall for Ebeye that needs to be twice the size of the sea wall on Kwajalein).

139. Jon Letman, *Rising Seas Give Island Nation a Stark Choice: Relocate or Elevate*, NAT'L GEOGRAPHIC (Nov. 19, 2018), <https://www.nationalgeographic.com/environment/2018/11/rising-seas-force-marshall-islands-relocate-elevate-artificial-islands/> [<https://perma.cc/4TT6-LLN7>]; *see also* Defense Authorization Act (2017), 131 Stat. 1358 (2017) (referencing an Air Force radar installation in the Marshall Islands worth \$1,000,000,000).

140. Interview with Kitlang Kabua, *supra* note 1 (indicating the wariness of the Marshallese to trust that the Americans will be dependable in lending a helping hand in the event of future climate-related disasters, since the United States is not bound by the Compact to do so).

141. *See Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 50, U.N. Doc. A/HRC/41/39 (June 25, 2019) (warning of a climate apartheid scenario in which the wealthy who can afford to adapt to climate change survive while the poor, who cannot afford adaptation measures, suffer the worst of the impacts). Further, as Autumn Bordner explains, “colonial powers have further limited adaptive capacity in their territories by fostering economies of dependence.” Bordner, *supra* note 136, at 210. Bordner suggests that the United States actually owes a duty to the Marshall Islands to help the Marshallese adopt the climate adaptation strategy of their choice. *Id.* at 223.

142. Natural disasters and the climate crisis have already had a horrific impact on the Marshall Islands, and on Ebeye more specifically. Ninety-two percent of respondents in a recent survey of households in the Marshall Islands reported impacts of drought on their household, 47% of heatwaves, and 37% of king tides. *See* KEES VAN DER GEEST ET AL., THE MARSH. IS. CLIMATE AND MIGRATION PROJECT (MICMP), MARSHALLESE MIGRATION: THE ROLE OF CLIMATE CHANGE AND

### 3. Labor Conditions

The UDHR and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) guarantee a right to work and to favorable working conditions.<sup>143</sup> U.S. laws fail to protect foreign employees of U.S. companies on foreign soil—which includes Kwajalein. However, these same U.S. labor laws protect the American employees who also work for the same companies on Kwajalein. Marshallese labor laws fail to adequately protect workers' rights—a fact seemingly within the Marshallese government's power to change—but Marshallese law does not apply to the companies that employ Marshallese workers on Kwajalein due to a Compact provision.<sup>144</sup> Therefore, neither U.S. law nor Marshallese law protects Marshallese employees' rights.<sup>145</sup> Military contractors on Kwajalein treat the

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ECOSYSTEM SERVICES 66 (2019), [https://static1.squarespace.com/static/596d5a162e69cf240a0f043b/t/5f467533693e5f6ebae88c1c/1598453060819/marshall-islands-case-study-report-web-v5\\_compressed.pdf](https://static1.squarespace.com/static/596d5a162e69cf240a0f043b/t/5f467533693e5f6ebae88c1c/1598453060819/marshall-islands-case-study-report-web-v5_compressed.pdf) [https://perma.cc/P4UV-9YRC]. In 1991, tropical storm Zelda destroyed 60% of the houses on Ebeye leaving 6,000 Ebeye residents homeless. *Id.* at 33. In 2019, massive waves flooded Majuro for weeks as a dengue epidemic that began on Ebeye simultaneously spread throughout the country. *See* Rust, *supra* note 83 (describing “swells averaging more 15 feet spilled over the low-lying coral atoll, where the highest natural point is just 6 feet above sea level”).

143. UDHR, *supra* note 122, art. 23 (“Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”); ICERD, *supra* note 125, art. 5(e)(i) (“The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration . . .”). This is one of the articles of ICERD that the ICJ found to apply to actions outside of a state party's territory. *See supra* note 125 (discussing the ICJ's extraterritorial application of ICERD).

144. Compact of Free Association: Federal Programs and Services, Marsh. Is.-U.S., art. III(4), Mar. 23, 2004, TIAS 04-501.6. [hereinafter Federal Programs Agreement] (“In the employment of local hire personnel by the Federal agencies and United States contractors, the Government of the United States shall adopt measures consistent with the standards of local labor laws to the extent that they are compatible with laws, regulations and operational requirements of the United States.”). This provision means that Marshallese law does not apply to Marshallese employees who work for U.S. contractors or the U.S. military; instead, the U.S. government creates the labor regulations for Kwajalein. As the language suggests, the U.S. government shall adopt Marshallese labor standards only to the extent that it deems them compatible with the regulations set forth for Kwajalein and the operational needs of the military and its contractors.

145. Even if Marshallese law were guaranteed to be applied to Marshallese employees working for U.S. agencies or contractors on Kwajalein, Marshallese labor law leaves much to be desired in terms of workers' rights protections. Marshallese law allows for freedom of association, which includes a right to form unions, but

Marshallese workers as disposable because there are so many other unemployed people who would be willing to step in and take a fired employee's job.<sup>146</sup> Though the workers have a representative that can raise issues with the USAG-KA Commander, workers lack a legally protected ability to strike and bargain collectively. Most U.S. labor laws, including crucial anti-discrimination laws, either do not apply extraterritorially or only apply to U.S.-citizen employees of U.S. companies, not non-U.S.-citizen employees of the same companies.<sup>147</sup>

The UDHR also states that “everyone, without any discrimination, has the right to equal pay for equal work.”<sup>148</sup> Federal

there are so few employers on the islands that there are few opportunities for workers to organize. BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, *supra* note 93, at 11. There are no independent trade unions or NGOs dedicated to the promotion or protection of workers' rights. *Id.*

146. Interview with Kitlang Kabua, *supra* note 1. As a Marshallese worker on Kwajalein once explained, “the Americans control the biggest island in this atoll, and they decide who gets jobs, and how much we get paid, too. We know there is something wrong here, but we feel like a mouse up against an elephant. What can we do?” French, *supra* note 3.

147. Such laws include crucial anti-discrimination laws such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963. The Ninth Circuit, for example, explicitly held that § 1981 and § 1983 claims under the Civil Rights Act did not apply to the Micronesian islands, even under the Trust Territory. *Temengil v. Tr. Territory of Pac. Islands*, 881 F.2d 647, 652 (9th Cir. 1989). However, the Fair Labor Standards Act (FLSA) provides one interesting example of a U.S. labor law that could and *should* apply to all employees of U.S. companies working on military bases. The FLSA originally contained a special provision that banned its extraterritorial application, but it also contained a special carve-out for Kwajalein. The provision reads as follows:

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; . . . Kwajalein Atoll; and Johnston Island.

29 U.S.C. § 213(f) (2018). This offered certain protections for employees of government agencies and government contractors working on Kwajalein. However, at least one federal court found that this carve out could not possibly have squared with congressional intent after the signing of the Compact and the declaration of Marshallese independence. *See Robinson v. Harbert Int'l*, 743 F. Supp. 797 (N.D. Ala. 1989) (citing *Temengil*, 881 F.2d at 650). Therefore, FLSA protections are no longer offered to employees—American or Marshallese—working on Kwajalein.

148. UDHR, *supra* note 122, art. 23. ICERD also requires each state party, which includes the United States, to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial

agencies and private contractors should *strive* to apply Marshallese labor protections to their employment practices on Kwajalein, but they are in no way *bound* to do so, as long as they can suggest that a given protection is inconvenient to base operations.<sup>149</sup> Even where Marshallese labor laws are applied, there is a disparity between American workers and Marshallese workers due to the different laws guiding their employment. Minimum wage is the clearest example of this disparity. American workers receive at least the U.S. federal minimum wage of \$7.25/hour, though Americans rarely work in low-skill minimum wage jobs on Kwajalein, while Marshallese workers receive at least the Marshallese minimum wage of \$3.00/hour.<sup>150</sup> It has

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discrimination wherever it exists.” ICERD, *supra* note 125, art. 2(c). This is another of the articles of ICERD that the ICJ has found to apply outside of a state party’s territory. *See supra* note 125 (discussing ICJ’s finding of ICERD’s extraterritorial application).

149. “In the employment of local hire personnel by the Federal agencies and United States contractors, the Government of the United States shall adopt measures consistent with the standards of local labor laws to the extent that they are compatible with laws, regulations and operational requirements of the United States.” Federal Programs Agreement, *supra* note 144, art. III(4). This non-binding language with respect to the rights of Marshallese employees stands in contrast to the strict language barring application of Marshallese law: “The laws and regulations of the Republic of the Marshall Islands shall not apply to the terms and conditions of employment of U.S. personnel by Federal agencies, or U.S. contractors.” *Id.* art. III(3). While on its face this provision seems to suggest that U.S. contractors do not need to follow Marshallese licensing laws or other laws stipulating employment conditions—and this is certainly part of it—this provision also means the Marshallese workers’ rights protections do not apply to American employees. This does not seem overly problematic, especially since American employees are protected by many U.S. employment laws, but the clear and obligatory language of the provision barring the application of Marshallese law to U.S. employers in hiring Americans sheds light on the far vaguer and looser provision meant to protect the rights of Marshallese workers employed by U.S. contractors.

150. Minimum Wage (Amendment) Act, P.L. 2018-77, 16 M.I.R.C. §403 (2018). In addition to different wages, perhaps the most obvious form of discrimination is the fact, explained in Part I of this Note, that the mostly-American contractors get free housing and access to all of Kwajalein’s facilities and services, while Marshallese workers are subjected to the high costs and low quality of living on Ebeye and are barred from accessing many facilities and services on Kwajalein. However, in recent years there have been increasing numbers of Marshallese people hired as contractor employees on the base, which means that they can live on Kwajalein. Interview with Giff Johnson, *supra* note 69 (“[I]f you went back in time to the 70s or 80s where there might have been one or two Marshallese living on Kwajalein island, there are now dozens of Marshallese . . . because they’ve been hired as contractor personnel.”). This is certainly an improvement, but this change has coincided with an overall decrease in the number of contractor employees on

also been suggested that employers encourage employees who are dual citizens of the Marshall Islands and the United States to file their paperwork using their Marshallese passport information so that the company does not need to provide them the same pay and benefits as they would need to if the employee filed as an American.<sup>151</sup> Similarly, anecdotal evidence suggests that employers pass up experienced Marshallese employees for promotions in favor of inexperienced Americans and then ask the Marshallese employees to train their now-supervisor.<sup>152</sup> These types of discrimination indicate the necessity for anti-discrimination labor laws of some sort to be built into the Compact since neither U.S. nor Marshallese law protects Marshallese workers on Kwajalein from discrimination.<sup>153</sup>

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Kwajalein, because most of the missile testing operations can now be conducted remotely from Redstone Arsenal in Huntsville, Alabama. *Id.* (explaining that with the connection of submarine fiberoptic cable, the military “can manage real time data flow on these tests, which before 2009 wasn’t a possibility. . . . But now, they can sit in Alabama or Washington, D.C. or at Lincoln Labs at MIT and watch the whole thing happening and in real time and be monitoring it . . .”). Because there are fewer Americans living on the base as contract workers, there are fewer Marshallese people being hired for cleaning services, childcare, and landscaping—the most common sources of employment for Marshallese. *Id.* (“The workforce declined from a high of maybe 1500 Marshallese down to about 900 6–7 years ago as part of this Army cutback . . .”). Johnson also pointed, however, to a recent gradual uptick since this significant job loss. *Id.* (“It’s going back up. It’s not up over a thousand and you know it’s gradually increasing and so from a Marshallese point of view that’s a good thing because there are more jobs, more people employed.”).

151. Interview with Kitlang Kabua, *supra* note 1 (citing anecdotal evidence from Marshallese workers on Kwajalein).

152. *Id.*

153. Like access to the hospital or other visiting privileges, most workers’ rights protections are subject to the whims of the Commander of USAG-KA. *See* Interview with Carlon Jajok Zackhras, *supra* note 23 (explaining that the Commander makes these determinations on a case-by-case basis); Interview with Giff Johnson, *supra* note 69 (explaining that the Commander position rotates every two years, which leads to great uncertainty and instability with regard to Marshallese access to Kwajalein and U.S. Army efforts to engage with the local community). The Marshall Islands Employment Equal Opportunity Act of 2017 sought to combat such discrimination in the workplace: “(1) It shall be the duty of any person or other entity doing businesses in the Republic of the Marshall Islands to offer all employees the same employee benefits. (2) Employee benefits shall include, medical, dental, vision and pharmaceutical insurance, life insurance, retirement and pension.” 16 MIRC.6 § 603. However, when asked how the implementation of this law would affect employer benefit responsibilities on Kwajalein, the USAG-KA Commander at the time said, “RMI medical and health benefits are contingent upon agreements made and agreed to by the RMI government in accordance with the Compact.” *Commander Talks Community at Town Halls, KWAJALEIN HOURGLASS* (Sept. 28, 2019), <https://www.smdc.army.mil/>

## CONCLUSION

*“For four bullets into a tree in Iraq, they could fix this entire place.”* – Jack Niedenthal<sup>154</sup>

The United States’ mismanagement and land-grabbing during the colonial and Trust Territory periods led to Ebeye’s overcrowding, health epidemics, grossly inadequate infrastructure, and apartheid-like inequality. The United States failed to fulfill its Trust obligations; instead, it committed numerous human rights violations throughout its tenure as administrator. The effects of these failures continue to

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Portals/38/Documents/Publications/Hourglass/2019/09-28-19Hourglass.pdf [https://perma.cc/E97J-NPH9] (quoting Col. Jeremy Bartel, USAG-KA commander). In essence, the law does not apply to American employers’ treatment of Marshallese employees pursuant to the Compact. One of the major concerns regarding labor rights on Kwajalein is that having too high a minimum wage or too good of benefits for Marshallese workers will lead to inequality and also brain drain from other parts of the country to Kwajalein. Interview with Kitlang Kabua, *supra* note 1. Instituting workers’ rights provisions through legislation instead of only in the Compact would alleviate some of these concerns while also protecting basic labor rights. However, this will only work if Marshallese labor laws bind American contractors on Kwajalein, which requires renegotiation of the Compact.

154. Jack Niedenthal, *quoted in* DAN ZAK, *ALMIGHTY: COURAGE, RESISTANCE, AND EXISTENTIAL PERIL IN THE NUCLEAR AGE* 277 (2016) (“You look at what they spend on Iraq and Afghanistan, and it’s billions upon billions. For four bullets into a tree in Iraq, they could fix this entire place.”). Niedenthal administers the Bikini people’s trust funds and believes the United States is going out of its way to “wash their hands of the Marshalls.” *Id.* Given that the United States spends \$8 billion per year on the missile testing program at Kwajalein, Yamada et al., *supra* note 17, at 58, and only \$15 million on compensation for Kwajalein landowners (a ratio less than \$500 to \$1), DAVIS, *supra* note 101, at 42, the United States can certainly offer more adequate financial remedies than it currently offers. In a 2007 congressional subcommittee hearing on the Compact between the United States and the Marshall Islands, the Compact funds were described as “grossly inadequate to provide for the health care, environmental monitoring, personal injury claims or even the land and property damages.” *An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed?*, *supra* note 91, at 1. In 2001, an independent nuclear claims tribunal awarded the Marshallese \$2.3 billion in health and property damages related to the nuclear testing, but there was no enforcement mechanism for to force the United States to pay it. Instead, the United States does not consider itself bound to pay any more than the \$150 million in the original settlement and Section 177 of the Compact disallows the Marshallese from bringing future claims related to the nuclear testing. ZAK, *supra*, at 277. The United States would need to spend relatively little money—“budget dust,” according to one resident—in order to mitigate some of the negative impacts of the missile defense testing program on the Marshallese people. DAVIS, *supra* note 101, at 42.

plague Ebeye in ways that are harmful to human health and well-being. Because of its failures to fulfill legally-imposed duties, the United States must provide a remedy for the harms that have resulted from its breach of its international legal duties. However, as this Note has explained, the legal frameworks meant to protect basic human rights fail to provide Marshallese nationals a remedy for past injustices and allow for the United States to continue committing human rights violations with impunity. This Note has sought to highlight problematic Compact provisions that must be amended in order protect some of the environmental, health, and labor rights that are currently being violated. These recommendations should be considered during the current Compact negotiations. Even though the Compact does not expire until 2023, the United States and the Marshall Islands have already begun initial rounds of negotiation, largely behind closed doors, and the United States has indicated that it would like to have renegotiations completed by the end of 2020 or shortly thereafter.<sup>155</sup> Outside of the Compact renegotiations, Congressional action can and should be taken to protect the rights to health and a non-toxic environment for Marshallese living both on Ebeye and in the United States.<sup>156</sup>

The United States violated its duties under the U.N. Charter and the Trusteeship Agreement and owes a duty to the Marshallese to remedy the harm it has caused. While an easy answer from a

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155. Chad Blair, *supra* note 34.

156. Congressional action offers another opportunity to remediate some of the environmental harm the United States has caused. For example, U.S. Congresswoman Tulsi Gabbard of Hawai'i secured a provision in the National Defense Authorization Act for the Fiscal Year 2020 that required the Department of Energy to report on the status of the Runit Dome to Congress within six months. National Defense Authorization Act for the Fiscal Year 2020, Pub. L. No. 116-92, §364 (2019). Similar action could be taken to demand a thorough report and remediation plan on PCB contamination from USAG-KA or perhaps on the living conditions on Ebeye. Autumn Bordner points to another possible Congressional action that she argues could allow for the Marshallese people to obtain reparations for the colonial harms the United States inflicted upon them. In recognition of the foreclosure of both international and domestic tribunals to the Marshallese with respect to the nuclear testing program, she suggests a Congressional Reference Case (which allows Congress to refer cases to courts, including claims that have been procedurally barred) as an avenue for justice for the Marshallese in the climate adaptation context. *See* Bordner, *supra* note 136, at 249–51. Given that the Compact provisions discussed in Part II have largely excluded the Marshallese from U.S. courts and from protection under U.S. law, a Congressional Reference Case could provide the Court of Federal Claims with the opportunity to review the United States' actions on Kwajalein in light of moral and legal duty, regardless of procedural issues. *Id.*

theoretical point of view is that the Marshallese should end the Compact with the United States, this does not account for the political, economic, and practical issues that underlie the relationship between the two nations.<sup>157</sup> It is also important to note that the situation on Ebeye and Kwajalein is constantly evolving.<sup>158</sup> Though the United

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157. The Marshallese by and large consider the United States an ally and a friend, and the United States is the Marshall Islands' largest economic supporter, with U.S. aid constituting around half of RMI's GDP. Interview with Kitlang Kabua, *supra* note 1. With the Compact up for renegotiation in 2023, some of the thirty thousand Marshallese currently living in the United States are afraid they will lose their right to live and work in the United States without a visa if RMI chooses not to renew the Compact. Mike Taibbi & Melanie Saltzman, *Marshall Islands: A Third of the Nation Has Left for the U.S.*, PBS (Dec. 16, 2018), <https://www.pbs.org/newshour/show/marshall-islands-a-third-of-the-nation-has-left-for-the-us> [<https://perma.cc/MR6L-WJE2>] (explaining that approximately one third of the Marshallese population currently resides in the United States); Susanne Rust, *They Came Here After the U.S. Irradiated Their Islands. Now They Face an Uncertain Future*, L.A. TIMES (Dec. 31, 2019), <https://www.latimes.com/world-nation/story/2019-12-31/marshall-islands-uncertain-future-us-marshallese-spokane> (on file with the *Columbia Human Rights Law Review*) (describing the uncertainty that Marshallese living in the United States feel with respect to their lawful residency status as negotiations between the United States and Marshall Islands progress). China has been making investments in infrastructure projects and gifts to the three Compact nations since 2006 and is now the largest bilateral investor in the region. Eric Baculinao et al., *Why Is This Tiny Pacific Ocean Nation Getting VIP Treatment in Beijing?*, NBC NEWS (Dec. 16, 2019), <https://www.nbcnews.com/news/world/why-tiny-pacific-ocean-nation-getting-vip-treatment-beijing-n1102546> [<https://perma.cc/GC5M-VU7F>]. Given this situation, the United States certainly has an interest in maintaining its strong diplomatic ties with the Marshall Islands (as well as the Federated States of Micronesia, whose Compact comes up for renegotiation the same year, and Palau, whose comes in 2024). Colin Packham, *Marshall Islands Head to Polls in Election Closely Watched by Washington*, REUTERS (Nov. 17, 2019), <https://www.reuters.com/article/us-marshallislands-election/marshall-islands-heads-to-polls-in-election-closely-watched-by-washington-idUSKBN1XS0F9> (on file with the *Columbia Human Rights Law Review*). Though some point to the Marshall Islands' strong ties with Taiwan as an indicator that it will resist China's advance, it is certainly possible that the Marshalls could join the ranks of the Solomon Islands and Kiribati, who abandoned diplomatic ties with Taiwan in favor of forging new relationships with Beijing. This is all to say that the Compact renegotiations will capture the U.S. government's attention in a way that they did not necessarily do in 2003.

158. See *supra* note 150 (explaining the shifts in the number and nature of jobs available on Kwajalein). There has been a massive uptick the amount of development projects on Ebeye in the last few years from donors like the World Bank, the Asian Development Bank, and Japan. Interview with Giff Johnson, *supra* note 69. The United States has also taken steps to provide better financial support for infrastructure development on Ebeye and to form a more respectful and harmonious relationship with the Ebeye community than it had in the past. *Id.* However, given the past history with the United States being unpredictable, the

States could (and should) offer more adequate financial compensation to the Marshallese, this does not address the gaps in legal protection that arise from the Compact, U.S. law, and Marshallese law. It is imperative that the rights and obligations discussed herein are solidified in either the Compact or U.S. law, because international law, moral obligations, and American goodwill have all failed the Marshallese. As Compact renegotiations continue, Marshallese negotiators must pay particular attention to the issues surrounding Kwajalein and Ebeye so that the law no longer sanctions the violation of very basic human rights.

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Marshallese are unsure of whether they can count on their “neighbors” on Kwajalein to provide such support in the long-run. Interview with Kitlang Kabua, *supra* note 1. This makes enshrining these obligations in law crucial—the Marshallese cannot rely only on American goodwill.