



INTERNATIONAL HUMAN RIGHTS CLINIC
HUMAN RIGHTS PROGRAM AT HARVARD LAW SCHOOL

Submission to the *Nitijela*'s Standing Committee on Foreign Affairs and Trade

Regarding Resolution 46 on the Treaty on the Prohibition of Nuclear Weapons

June 2018

Harvard Law School's International Human Rights Clinic (IHRC) appreciates the opportunity to make this submission to the Standing Committee on Foreign Affairs and Trade regarding Resolution 46. The Resolution requests the Republic of the Marshall Islands (RMI) to sign and ratify the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW).

IHRC was deeply involved in the negotiations of the TPNW. Since then, we have issued multiple publications about the interpretation and implementation of the TPNW, including its provisions on victim assistance and environmental remediation. In March 2018, we visited the RMI to discuss the TPNW with government officials, civil society members, and individuals affected by testing.

Based on our analysis of the TPNW and our conversations in the RMI, we encourage the *Nitijela* to adopt Resolution 46, and the country to sign and ratify the treaty. These steps will both reinforce the RMI's support for nuclear disarmament and directly benefit the RMI by opening the door to new sources of assistance. Furthermore, despite the concerns of some Marshallese, an RMI decision to join the TPNW can be understood as compatible with existing obligations under its 2003 Compact of Free Association (Compact) with the United States (US).

Support for Nuclear Disarmament

The TPNW aims to avert the catastrophic consequences caused by nuclear weapons. The treaty recognizes the suffering of people affected by these inhumane weapons and highlights the disproportionate impacts felt by indigenous peoples. To prevent future harm, the treaty prohibits a wide range of acts involving nuclear weapons. It also requires parties to address ongoing harm from past use and testing, such as that which affected the RMI, regardless of whether the US and other user states have signed on.

In July 2017, the RMI joined 121 other countries voting in favor of the TPNW at the United Nations. Its vote was consistent with its past support for nuclear disarmament. It has adopted anti-nuclear positions in the UN General Assembly, sometimes diverging with the US. In 2014, the RMI sued all nine nuclear armed states, including the US, at the International Court of Justice for not complying with their obligations to pursue nuclear disarmament under the Nuclear Non-Proliferation Treaty and customary international law. The next year, the RMI endorsed the Humanitarian Pledge, which led to negotiations resulting in the TPNW. By becoming a full state

party to the TPNW, the RMI would significantly advance the cause of nuclear disarmament. The RMI would serve as a model for other Pacific and affected states,¹ bolster the influence of the TPNW, and help stigmatize nuclear weapons even among states not party.²

Benefits for the RMI

The RMI would also receive direct benefits from the TPNW if the country joined. The TPNW's provisions addressing the impacts of nuclear testing have the potential to improve the situation of the Marshallese affected by testing and reduce environmental contamination.

Article 6 of the treaty provides for a range of assistance to affected individuals, including medical care, psychological support, and measures to ensure victims are included in society. Rather than being treated as a form of charity, victim assistance should ensure that survivors can realize their human rights. Implementation programs should include victims in the decision-making that affects their lives.

Article 6 further requires measures to reduce the environmental harm caused by nuclear weapons. Environmental remediation involves the removal or containment of contamination. It should also encompass steps to reduce exposure to radiation, such as warning signs, fencing, and risk education programs for local communities. While Article 6 does not presume that heavily contaminated environments will be returned to a pre-detonation state, it mandates "necessary and appropriate measures" toward remediation.

The TPNW spreads responsibility for victim assistance and environmental remediation across the countries that are party to the treaty. Affected states parties bear primary responsibility, meaning that if the RMI signed and ratified, it would take the lead on these activities. This approach protects the sovereignty of affected countries like the RMI. It recognizes that they are in the best position to understand the needs of their people and their environment and to administer programs to address those needs. It also follows the precedent of past disarmament treaties and international human rights law, including the two international covenants the RMI joined in March 2018.³

The RMI would not bear this responsibility alone, however. Although not mentioned in Resolution 46, Article 7 of the TPNW would entitle the RMI to seek and receive assistance from other countries that have joined the treaty. States parties in a position to do so would, in turn, be obligated to provide financial, material, technical, and other support to help the RMI assist its victims and clean its environment. Given the range of possible assistance, all states parties should be in a position to provide some support.

Signing and ratifying the treaty would in no way preclude the RMI from pursuing other forms of assistance or redress from the US, even if the US does not join the treaty in the foreseeable

¹ Palau, another Pacific island state, which has a similar Compact with the US, has already signed and ratified the TPNW.

² Past disarmament treaties, such as the Mine Ban Treaty and Convention on Cluster Munitions, have increased the stigma against banned weapons, influencing the conduct of states not party.

³ The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

future. The treaty would, however, offer the RMI access to a new source of aid to deal with the impacts of nuclear testing that would not depend on the US.

For further information on the interpretation and implementation of Articles 6 and 7, see IHRC's April 2018 briefing papers on victim assistance and environmental remediation available at: <http://hrp.law.harvard.edu/staff/understanding-victim-assistance-and-environmental-remediation-under-the-treaty-on-the-prohibition-of-nuclear-weapons/>.

Compatibility with the Compact of Free Association

Some Marshallese are understandably concerned about the treaty's relationship with the Compact of Free Association with the US. While Title Three of the Compact grants the US "full authority and responsibility for security and defense matters in or relating to" the RMI, IHRC's analysis finds that that Compact's provisions can be understood as compatible with the TPNW. If the US contended otherwise, it would be failing to honor its commitment in the Compact to respect the RMI's sovereign right to act in the interests of its people. The Compact should therefore not be seen as an insurmountable legal obstacle to joining a treaty that would benefit the Marshallese people and environment.

First, the RMI has the power to sign and ratify new legal instruments, and it has exercised that power on many occasions, including with regard to nuclear weapon treaties.⁴ Section 121 of the Compact recognizes the RMI's sovereign right to "conduct foreign affairs."⁵ In particular, the country possesses the capacity to enter into treaties and engage in conduct related to "any matters specially benefiting its individual citizens." Joining the TPNW falls within the scope of Section 121 on both counts.

Second, despite the extent of the US's authority under the Compact, Title Three need not stand in the way of the RMI signing and ratifying the TPNW. Section 313 states that the RMI "shall refrain from actions" that the US, after consultation with the RMI, "determines . . . to be incompatible with its authority and responsibility for security and defense matters." While the TPNW and Title Three might at first glance seem at odds, a close reading shows that the two instruments are not *per se* contradictory.

A primarily humanitarian treaty, the TPNW aims to end the human suffering caused by nuclear weapons and includes obligations designed to mitigate the ongoing impacts associated with past use and testing. The decision to sign and ratify the TPNW should therefore be treated as a humanitarian matter under the RMI's foreign affairs power.

As a party to the TPNW, the RMI could not knowingly help another country engage in nuclear weapon-related activities or allow the stationing of nuclear weapons on its territory. It could, however, assume these treaty obligations without infringing on the US operations that the Compact permits. Section 312 allows the US to conduct activities "necessary" to exercise its

⁴ For example, the RMI acceded to the Nuclear Non-Proliferation Treaty in 1995. It ratified the Comprehensive Test Ban Treaty in 2009, after agreeing to the 2003 Compact. The US has signed but not ratified the latter.

⁵ Section 123 obliges the RMI to consult with the US on its foreign affairs conduct, but it does not require the RMI to receive US approval. In this case, the US is already well aware of the RMI's consideration of the TPNW, and its ability to weigh in based on its security authority is discussed below.

authority and responsibility, but activities involving nuclear weapons should not be viewed as necessary for the US to defend the RMI or take advantage of its options to foreclose third-party access to the RMI or to establish military bases on Marshallese territory. Section 314 limits US storage of “radioactive materials . . . intended for weapons use” to narrow circumstances and includes the phrase “unless otherwise agreed,” meaning the Compact leaves the door open for the prohibition on storage to be strengthened.

Third, Section 352 of the Compact obliges the US, as it exercises its security and defense authority, to “accord due respect” to the RMI’s foreign affairs authority and responsibility to “assure the well-being of its people.” Given that joining the TPNW is a foreign affairs matter and that the RMI could reasonably decide the TPNW will benefit its people, the US should not oppose the RMI’s signature and ratification.

The obligation to accord due respect is also relevant to the Military Use and Operating Rights Agreement, adopted pursuant to the Compact. This agreement, *inter alia*, grants the US operating rights to Kwajalein Atoll, where the US has a missile test site. The test site could present a compliance problem with the TPNW’s prohibition on assisting development of nuclear weapons because it is used to test intercontinental ballistic missiles (ICBMs) designed to deliver nuclear warheads. Article IV of the Military Use and Operating Rights Agreement, however, obliges the US to exercise its operating rights consistently with Section 352 of the Compact. To accord due respect to the RMI’s foreign affairs authority and responsibility to its people, the US should, therefore, accept a decision by the RMI to join the TPNW, even if it required the RMI to prohibit the testing of ICBMs in its territory.

Finally, the Compact requires the US to provide a range of assistance to the RMI, including annual financial grants, contributions to a trust fund, and immigration-related benefits. The US should not withhold such assistance on the grounds that the RMI joined the TPNW.⁶ As discussed above, the TPNW can be understood as legally compatible with the US’s security authority, and the Compact’s due respect clause weights in favor of deferring to the RMI’s decision on signature and ratification. If the US nevertheless withheld assistance, the RMI could turn to the Compact’s dispute resolution process. An Arbitration Board creates a balanced mechanism that would help protect the RMI from losing the benefits of one instrument (the Compact) while pursuing the benefits provided by another (the TPNW).

For a more in-depth analysis of the relationship between the TPNW and the Compact, see IHRC’s June 2018 briefing paper, which is reprinted in the appendix and will be posted on IHRC’s website: hrp.law.harvard.edu.

Conclusion

The RMI, its people, and its environment have much to gain if the *Nitijela* votes to pass Resolution 46 and to sign and ratify the TPNW. In addition, by joining the treaty, the RMI can

⁶ The RMI has previously engaged in anti-nuclear activities without experiencing serious ramifications in the form of a loss of US assistance. For example, in 2014, it sued the US in US federal court and in the International Court of Justice for not complying with its obligations to pursue nuclear disarmament under the Nuclear Non-Proliferation Treaty and customary international law. In 2015, the RMI endorsed the Humanitarian Pledge that led to the negotiations resulting in the TPNW.

assume a leadership role in the Pacific region and among other affected countries. Finally, its signature and ratification would accelerate the treaty's entry into force, increase the stigma against nuclear weapons, and put greater pressure on nuclear armed states to completely eliminate nuclear weapons.

For more information, contact:

Bonnie Docherty

Associate Director of Armed Conflict and Civilian Protection

Lecturer on Law

International Human Rights Clinic

Harvard Law School

bdocherty@law.harvard.edu

APPENDIX



INTERNATIONAL HUMAN RIGHTS CLINIC

HUMAN RIGHTS PROGRAM AT HARVARD LAW SCHOOL

**The Treaty on the Prohibition of Nuclear Weapons and the Compact of Free Association
Between the Republic of the Marshall Islands and the United States**

June 2018

Joining the Treaty on the Prohibition of Nuclear Weapons (TPNW) offers significant benefits to the Republic of the Marshall Islands (RMI), one of the countries most affected by nuclear weapons testing. The treaty strives to prevent future harm by comprehensively banning activities related to nuclear weapons. It also seeks to address the ongoing harm caused by past use and testing by establishing a framework of shared responsibility for victim assistance and environmental remediation.

The RMI was one of 122 states to adopt the TPNW in 2017, and the *Nitijela* (Parliament of the RMI) is now considering whether to sign and ratify the treaty. As of June 2018, the Standing Committee on Foreign Affairs and Trade was reviewing Resolution 46, which was sponsored by the Minister of Foreign Affairs and would approve those next steps.

During a March 2018 research trip to the country, Harvard Law School's International Human Rights Clinic (IHRC) spoke about the resolution and the treaty to RMI government officials, members of civil society, and Marshallese individuals affected by United States (US) nuclear testing. While most of these people told IHRC they supported joining the TPNW, some expressed concerns about the treaty's relationship with the 2003 Compact of Free Association (Compact) between the RMI and the US. In particular, they questioned whether the RMI would infringe on the US's authority over security and defense matters and therefore risk losing various forms of US assistance if it became party to the TPNW.

A close analysis of the TPNW and the Compact reveals that, from a legal perspective, the two instruments can be understood as compatible. If the US contended otherwise, it would be failing to live up to its commitment in the Compact to respect the RMI's sovereign right to act in the interests of its people.

The Compact recognizes the RMI's power over its foreign affairs, which includes the capacity to sign and ratify treaties, such as the TPNW. While the RMI may not engage in actions incompatible with the US's security authority, becoming party to the TPNW does not inherently run counter to that US authority. The Compact also requires the US to "accord due respect" to the RMI's foreign affairs authority and responsibility for its people's well-being. Finally, if the US withheld assistance from the RMI in response to its joining the TPNW, the RMI could appeal

to the dispute resolution process established by the Compact. The Compact itself, therefore, does not present an insurmountable legal obstacle to the RMI joining the TPNW and taking advantage of the benefits the treaty offers to states parties affected by nuclear testing.

The RMI's Foreign Affairs Authority

Title One of the Compact on governmental relations clearly states that the RMI has the power to sign and ratify a new legal instrument, and it has exercised that power on many occasions, including with regard to nuclear weapon treaties.⁷ Section 121 recognizes the RMI's sovereign right to "conduct foreign affairs."⁸ The country possesses, *inter alia*, the capacity to enter into treaties and engage in conduct related to "any matters specially benefiting its individual citizens." Joining the TPNW falls within the scope of Section 121 on both counts. The TPNW is an international treaty and, as will be discussed more below, it has the potential to benefit the Marshallese and their environment.

The Compact's provision on foreign affairs builds on principles laid out in its preamble. The preamble affirms the RMI's "right to enjoy self-government" and recognizes its "sovereign right to self-determination." While non-binding, a preamble can help guide the interpretation of an agreement's operative provisions.

Compatibility with US Security Authority

The questions about the RMI's freedom to join the TPNW arise mainly under Title Three of the Compact, which addresses security and defense relations. Section 311 grants the US "full authority and responsibility for security and defense matters in or relating to" the RMI. Section 313 states that the RMI "shall refrain from actions" that the US, after consultation with the RMI, "determines . . . to be incompatible with its authority and responsibility for security and defense matters." Despite the extent of the US's authority, Title Three need not stand in the way of the RMI's signing and ratifying the TPNW. While the TPNW and Title Three of the Compact might at first glance seem at odds, a close reading shows that the two instruments are not *per se* contradictory.

A Humanitarian Matter

The Compact gives the US authority over security and defense matters, but the TPNW is primarily a humanitarian rather than security treaty. The TPNW aims to end the human suffering caused by nuclear weapons and includes obligations designed to mitigate the ongoing impacts associated with past use and testing. The decision to sign and ratify the TPNW should therefore be treated as a humanitarian matter under the RMI's foreign affairs power.

The TPNW is the most recent in a line of "humanitarian disarmament" treaties, which seek to prevent and remediate the humanitarian harm caused by indiscriminate and inhumane weapons. The TPNW's preamble makes clear that its goal is to eliminate nuclear weapons in order to avert their "catastrophic humanitarian consequences." It specifically recognizes the suffering

⁷ For example, the RMI acceded to the Nuclear Non-Proliferation Treaty in 1995. It ratified the Comprehensive Test Ban Treaty in 2009, after agreeing to the 2003 Compact. The US has signed but not ratified the latter.

⁸ Section 123 obliges the RMI to consult with the US on its foreign affairs conduct, but it does not require the RMI to receive US approval. In this case, the US is already well aware of the RMI's consideration of the TPNW, and its ability to weigh in based on its security authority is discussed below.

experienced by victims of nuclear testing and the disproportionate impact of testing on indigenous peoples.

The TPNW requires assistance for victims and remediation of environmental contamination caused by nuclear weapons use and testing. Article 6 assigns affected states parties primary responsibility for these activities for legal and practical reasons. The approach follows human rights and disarmament law precedent and acknowledges that affected states are in the best position to assess needs and provide assistance. At the same time, the TPNW entitles affected states parties, like the RMI, to receive help in implementing their victim assistance and environmental remediation obligations. Article 7 requires other TPNW parties in a position to do so to provide technical, material, and financial assistance to affected states parties; the range of forms such support may take should make it possible for every state party to help in some way.

The potential benefits of these so-called “positive obligations” provide the RMI incentive to become party to the TPNW. Article 7, in particular, would open the door to a new source of support to help the RMI deal with the effects of nuclear weapons testing. The Compact should be understood to allow the RMI to take advantage of these humanitarian provisions.

Reconcilable Provisions

Even if the RMI’s motivation for joining the TPNW was primarily humanitarian, the US might argue that the RMI’s new obligations would infringe on the US’s security authority. TPNW Article 1(1)(e) would prohibit the RMI from assisting, encouraging, or inducing the US to engage in activities prohibited by the treaty, such as developing, possessing, using, or threatening to use nuclear weapons. Section 311 of the Compact, which lays out the US’s authority, requires the US to defend the RMI and gives the US options to foreclose third-party access to the RMI for military purposes and to “establish and use military areas and facilities” in the RMI. From a legal perspective, these provisions of the TPNW and the Compact can be understood as compatible.

Activities involving nuclear weapons should not be viewed as “necessary” for the US to exercise the three prongs of its authority and responsibility. Section 312 permits the US to conduct “activities and operations necessary for the exercise of its” security and defense authority in the “lands, waters, and airspace” of the RMI. Given the US’s other military capabilities, it should be able to defend the RMI without engaging in activities involving nuclear weapons. The US should similarly be able to foreclose access to third parties without nuclear weapons. Finally, exercising the option to establish and use military bases on the RMI does not necessitate activities related to nuclear weapons. Therefore, in accepting the TPNW’s prohibition on assisting with prohibited acts, the RMI would not undermine US authority.

Section 314 of the Compact, the only provision of Title Three to mention nuclear weapons, should also not present an insurmountable hurdle to the RMI joining the TPNW. Section 314(a) establishes prohibitions on testing by detonation or disposing of nuclear weapons that resemble the TPNW’s prohibitions. Section 314(b) prohibits the US from storing radioactive materials “intended for weapons use” in the RMI, except under certain narrow circumstances.⁹

⁹ Radioactive materials intended for weapons use should be understood as components of nuclear weapons and thus be subject to the TPNW’s prohibitions.

While concerns exist regarding the consistency of Section 314(b)'s exception with the TPNW, it should not be viewed as irreconcilable with the TPNW's prohibition on assisting prohibited acts. First, the exception is quite limited. Section 314(b) prohibits the US from storing nuclear weapons in the RMI, except for "transit or overflight purposes"; during a US-declared national emergency or state of war; or if storage is necessary to defend the RMI, the Federated States of Micronesia, or the US from armed attack. Second, Section 314(b) includes the phrase "unless otherwise agreed," meaning the Compact leaves the door open for the prohibition to be strengthened. Third, based on the interpretation of past disarmament treaties, Section 314(b) would contravene the TPNW's prohibitions only if the RMI knowingly facilitated a prohibited nuclear weapon-related act by the US or allowed the US to station or deploy nuclear weapons on its territory.

Obligation to Accord Due Respect to Marshallese Authority and Responsibility

Section 352 of the Compact bolsters the argument that joining the TPNW should be understood as compatible with the US's security authority. The section requires the US, in exercising its security authority under Title Three, to "accord due respect" to the RMI's authority and responsibility to its people as a sovereign nation. The US could best comply with that obligation by deferring to the RMI's decision on the TPNW.

The requirement to show due respect pertains to two areas relevant to this analysis. First, Section 352 obliges the US to respect the RMI's "authority and responsibility . . . under Title[] One." The US should accept the RMI's signature and ratification of the TPNW as an exercise of Marshallese foreign affairs power under Section 121 of Title One. Second, Section 352 mandates that the US accord due respect to the RMI's responsibility "to assure the well-being of its people." Given that the RMI could reasonably decide the TPNW will benefit its people because of the provisions discussed above, the US should not oppose the RMI's signature and ratification.

Section 352 is also relevant to the Military Use and Operating Rights Agreement, which was adopted pursuant to Sections 321 and 323 of the Compact. This agreement elaborates on the US's option to establish military facilities under its security authority. It, *inter alia*, grants the US operating rights to Kwajalein Atoll, where the US has a missile test site. The test site could present a compliance problem with the TPNW's prohibition on assisting development of nuclear weapons because it is used to test intercontinental ballistic missiles (ICBMs) designed to deliver nuclear warheads. The Military Use and Operating Rights Agreement, however, obliges the US to exercise its operating rights consistently with Section 352 of the Compact.¹⁰ Therefore, to accord due respect to the RMI's foreign affairs authority and responsibility to its people, the US should accept a decision by the RMI to join the TPNW, even if it required the RMI to prohibit the testing of ICBMs in its territory.

Dispute Resolution Mechanism

The Compact obliges the US to provide a range of assistance to the RMI, including annual financial grants, contributions to a trust fund, and immigration-related benefits. Some

¹⁰ Compact of Free Association: Military Use and Operating Rights Agreement between the US and the RMI, signed April 30, 2003, art. IV. Article IV of this agreement also requires the US to "use its best efforts to" "avoid activities which would adversely affect the well-being of" RMI residents.

Marshallese told IHRC they were worried about losing that assistance if the RMI signed and ratified the TPNW. As discussed above, the TPNW can be understood as legally compatible with the US's security authority, and the Compact's due respect clause weighs in favor of deferring to the RMI's decision on the TPNW. The US should therefore not withhold assistance on the grounds that the RMI joined the TPNW.¹¹ If the US withheld assistance anyway, the RMI could turn to the Compact's dispute resolution process.

Although the Compact creates few allowances for withholding assistance, the US could contend that a decision by the RMI to join the TPNW would give it the power to withdraw money from a trust fund established under Title Two of the Compact, which covers economic relations. Article 21 of the Trust Fund Agreement permits the US to withdraw the present market value of its trust fund contributions as well as undistributed income should the RMI:

- 1) fail to fulfill its obligations under the separate agreement regarding mutual security concluded pursuant to sections 321 and 323 of the Compact [Mutual Security Agreement]; or
- 2) take any action which the [US] determines, after appropriate consultation with the [RMI], to be incompatible with the [US's] responsibility for security and defense matters in or relating to the [RMI], as set forth in such agreement(s).¹²

It is not entirely clear to what "such agreement(s)" in the second bullet refers. It could encompass the Compact and all agreements pursuant to it, such as the Military Use and Operating Rights Agreement. If so, joining the TPNW should not be understood as *per se* incompatible, for reasons already discussed.

Alternatively, "such agreement(s)" could refer only to the Mutual Security Agreement referenced in the first bullet, which comes into effect upon expiration or termination of Title Three of the Compact. Becoming a TPNW state party should not be understood as contravening that agreement either. Unlike the Compact, the Mutual Security Agreement limits the US's security and defense responsibilities to meeting an armed attack on the RMI or preventing third-party access to the RMI for military purposes. Nuclear weapons are not necessary for the US to meet these responsibilities. Furthermore, the Philippines has a mutual defense treaty with the US containing similar language to the Mutual Security Agreement,¹³ and the Philippines has already

¹¹ The RMI has previously engaged in anti-nuclear activities without experiencing serious ramifications in the form of a loss of US assistance. For example, in 2014, it sued the US in US federal court and in the International Court of Justice for not complying with its obligations to pursue nuclear disarmament under the Nuclear Non-Proliferation Treaty and customary international law. In 2015, the RMI endorsed the Humanitarian Pledge that led to the negotiations resulting in the TPNW.

¹² The Trust Fund was valued at approximately \$300 million in September 2016. *Trust Fund for the People of the Republic of the Marshall Islands: Fiscal Year 2016 Annual Report* (2017), https://www.doi.gov/sites/doi.gov/files/uploads/rmi_tf_fy16_annual_report_final_3.27.17_0.pdf (accessed June 18, 2018), p. 1.

¹³ Article III of the RMI and US Mutual Security Agreement states, "The [US and RMI] recognize that . . . any attack on the Marshall Islands would constitute a threat to the peace and security of the Pacific area and a danger to the United States. In the event of such an attack or the threat thereof, the [US] would take action to meet the danger to the United States and the Marshall Islands in accordance with its constitutional processes." Article IV of the Philippines and US Mutual Defense Treaty states, "Each Party recognizes that an armed attack in the Pacific Area

signed the TPNW, signifying that it did not find the TPNW incompatible with such US defense responsibility.

If the US withdrew money from the Trust Fund or withheld other forms of assistance in response to the RMI's joining the TPNW, the RMI could appeal to the Compact's dispute resolution process. Assuming no resolution to the disagreement was reached through good faith consultations, the RMI could refer the matter to the arbitration mechanism under Section 424. Arbitration is permissible for disputes arising exclusively under Title Two, Title Four, the first five articles of Title One, or related agreements. A dispute regarding the withdrawal of US assistance—notably immigration benefits (Title One, Article IV) and economic aid (Title Two)—would fall under the Arbitration Board's jurisdiction.¹⁴

The Compact's arbitration provision strives to create a fair mechanism for hearing disputes that levels the playing field. According to Section 424, the RMI and the US each appoint one member to the three-person Arbitration Board, and they choose the chairperson jointly. Each member has one vote, and the board is supposed to reach a decision by majority within 30 days of the conclusion of arguments. The board's decision, based on international law, shall be binding, unless the two countries mutually agree it should be advisory. The balanced nature of the arbitration mechanism would help protect the RMI from losing the benefits of one instrument (the Compact) while pursuing the benefits provided by another (the TPNW).

Conclusion

If the RMI decides to join the TPNW, it will be a reasonable exercise of its foreign affairs power to advance the well-being of its people. While the two instruments might initially seem at odds, the Compact should not be treated as a legal obstacle to the RMI's becoming party to the TPNW. The TPNW can be understood as compatible with the US's security authority under the Compact, and the Compact requires the US to accord due respect to the RMI's position in exercising that authority. If the US withheld assistance in response to the RMI's signature and ratification of the TPNW, the RMI could present a solid case before an Arbitration Board.

Given the potential benefits of the TPNW for the RMI, the IHRC, therefore, encourages:

- The RMI's *Nitijela* to adopt Resolution 46, approving the RMI's signature and ratification of the TPNW, at its next session. The RMI should complete the process of joining the TPNW as soon as possible after that.
- The US to accept the RMI's sovereign decision regarding the TPNW. The US should accord due respect to the RMI's foreign affairs authority and responsibility for its people's well-being and find the RMI's decision to join the TPNW compatible with the US's security authority under the Compact.

on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.”

¹⁴ The US could argue that the TPNW was a Title Three matter, which would trigger a discussion by a joint committee of US and Marshallese officials. Although Title Three matters are not subject to arbitration, the withdrawal of assistance after a decision of the joint committee should be.