



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

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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.¹ Section 121 recognizes the RMI's sovereign right to "conduct foreign affairs."² 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 experienced by victims of nuclear testing and the disproportionate impact of testing on indigenous peoples.

¹ 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.

² 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.

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.³

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

³ Radioactive materials intended for weapons use should be understood as components of nuclear weapons and thus be subject to the TPNW’s prohibitions.

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.⁴ 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 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

⁴ 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.

the RMI's decision on the TPNW. The US should therefore not withhold assistance on the grounds that the RMI joined the TPNW.⁵ 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).⁶

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,⁷ and the Philippines has already signed the TPNW, signifying that it did not find the TPNW incompatible with such US defense responsibility.

⁵ 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.

⁶ 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.

⁷ 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 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."

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.⁸

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.

⁸ 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.