Comments to OHCHR's Report on Addressing the Challenges and Barriers to the Full Realization and Enjoyment of the Human Rights of the People of the Marshall Islands Stemming from the State's Nuclear Legacy

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1. Introductory Remarks

Between 1 July 1946 and 18 August 1958, the United States (US) conducted an extensive nuclear testing program in the northern Marshall Islands, with devastating and long-lasting impacts on land, health, and livelihoods. The present-day enjoyment of human rights by the people of the Marshall Islands is profoundly shaped by the legacy of US nuclear testing and by the legal framework established to address its consequences. These comments aim to clarify whether and, eventually, to what extent the US may still bear legal obligations toward the Republic of the Marshall Islands (RMI) arising from the nuclear testing program. The analysis is framed around the law of State responsibility, as reflected in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[1] Section 2 examines the applicable legal framework at the time of the nuclear testing program (primary rules) with the aim of assessing whether the US breached any international legal obligations. Section 3 focuses on secondary rules, exploring whether the remaining requirements for holding the US responsible for the nuclear testing are satisfied (rules of attribution and absence of circumstances precluding wrongfulness), and the consequences of violations of primary rules.[2] The legal effects of the Compact of Free Association between the US and the RMI are then discussed, with particular attention to the 'changed circumstances' provision included in the Compact (section 4). Finally, issues related to victims' participation are examined (section 5).

2. Applicable Legal Framework at the Time of US Nuclear Testing

According to the general principle of intertemporal law (*tempus regit actum*), first enunciated in the 1928 *Island of Palmas* case (*Netherlands v United States*),[3] the lawfulness of a given conduct must be assessed in light of the rules in force at the time the conduct occurred.[4] The principle is fundamental for safeguarding legal certainty and has been reiterated on several occasions by the International Court of Justice (ICJ).[5] The rule was also accepted by the *Institut de Droit International* in its 1975 resolution[6] and is now reflected in Article 13 of the ARSIWA.[7]

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[1] UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 (28 January 2002) (annex: *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA)).

[2] On the distinction between primary and secondary norms of international law, see G. Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014) 97 *Rivista di diritto internazionale* 981.

[3] See Arbitral Tribunal, *Island of Palmas case* (*Netherlands v United States*) *(Award)* (4 April 1928) 2 RIAA 829, 845: «[a] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled».

[4] On this principle see, *e.g.*, P. Tavernier, 'Relevance of the Intertemporal Law' in J. Crawford, A. Pellet and S. Olleson (eds) *The Law of International Responsibility* (OUP 2010) 397 ff.

[5] ICJ, *Minquiers and Ecrehos (France v United Kingdom) (Judgment)* (17 November 1953) ICJ Rep, 1953, 47, 53-54; ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Judgment)* (10 October 2002) ICJ Rep 2002, 303, paras 31-38; ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment)* (3 February 2012) ICJ Rep 2012, 99, para. 58.

[6] Institut de Droit International, 'The Intertemporal Problem in Public International Law' (1975) 56 *Annuaire de l'Institut de Droit International* 536, Art. 1.

[7] ARSIWA, Art. 13: «[a]n act of State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs». In the literature see *e.g.* R. Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 *ICLQ* 501.

Between 1 July 1946 and 18 August 1958, the US was not bound by any multilateral conventions specifically prohibiting the use[8] or testing of nuclear weapons,[9] nor by any dedicated multilateral conventions on human rights or environmental protection. Nevertheless, the nuclear experiments conducted in the area arguably violated the law of military occupation, the Trusteeship Agreement (UN SC Resolution 21 (1947)) and the UN Charter.

In July 1946, when the US conducted two nuclear weapon tests at Bikini Atoll (Operation Crossroads), the Marshall Islands were under US military administration following their capture from Japan in 1944 during the Second World War.[10] As an occupying power, the US was bound by the law of military occupation, as codified in the 1907 Hague Regulations annexed to Hague Convention IV, to which it was a party[11] and which are widely regarded as reflecting customary international law. According to Art. 43 of the Hague Regulations, the occupying power «shall take all the measures in his power to restore, and ensure, as far as possible, *public order and safety*, while respecting, unless absolutely prevented, the laws in force in the country».[12] Furthermore, Art. 46(2) of the Hague Regulations states that «private property cannot be confiscated», while Art. 55 provides that «[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, […] belonging to the hostile State, and situated in the occupied country […]».

Moreover, the *Martens Clause*,[13] enshrined in the Preambles to the 1899 and 1907 Hague Conventions,[14] is also relevant in this context. First, the clause is generally understood to operate in situations of international armed conflict, including military occupation. Second the US and Japan were parties to the 1907 Hague Convention IV, thereby meeting the requirement established in Art. 2 for the Convention's application (*si omnes*).[15] The *Martens Clause*, whose customary status is now firmly established,[16] ensures that, in all circumstances, both combatants and civilians remain under the protection of the principles of international law derived from custom, the laws of humanity, and the dictates of public conscience.[17] The clause is intended to address potential gaps in the codification of International Humanitarian Law (IHL) and to secure a minimum normative framework even where parties denounce humanitarian law treaties.[18] Its inherently interpretive function thus rejects the existence of a general rule of residual freedom for States,[19] according to which any conduct not expressly prohibited would be lawful.[20] Accordingly, within *ius in bello* the clause serves as a

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[8] See also ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (8 July 1996) ICJ Rep 1996, 226, paras 54-57.

[9] See *e.g.* Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (adopted 5 August 1963, entered into force 10 October 1963); Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entered into force 22 January 2021); Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996).

[10] D. Richard, *United States Naval Administration of the Trust Territory of the Pacific Islands: The Wartime Military Government Period, 1942-1945* (US Office of Chief Naval Operations, 1957) 329 ff.

[11] See https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/state-parties?utm.

[12] Italics added.

[13] The *Martens Clause* states: «[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience».

[14] See Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 (adopted 18 October 1907, entered into force 26 January 1910), 205 CTS 277 preambular para. 8 and Hague Convention (II) with respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900), TS No 403 preambular para 8. On the clause see T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 *AJIL* 78 ff.

[15] According to Art. 2 of the 1907 Hague Convention (IV): «[t]he provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention».

[16] ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (8 July 1996), ICJ Rep 1996, 226, paras 78-79; see among others, R. Falk, 'Toward a Legal Regime for Nuclear Weapons' (1983) *McGLJ*, 519 ff., 527.

[17] See again ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 16) para. 78. See T. Meron, *The Martens Clause, the Principles of Humanity, and Dictates of Public Consciences*, in *AJIL*, 2000, 78 ff.

[18] N. Ronzitti, *Diritto internazionale dei conflitti armati* (5th edn, Giappichelli 2014) 155.

[19] R. Kolb, 'La nécessité militaire dans le droit des conflits armés. Essai de clarification conceptuelle', in *La nécessité en droit international. Colloque de Grenoble* (Pedone 2007) 151 ff., 162.

[20] PCIJ, *S.S. 'Lotus' (France v Turkey) (Judgment)* (7 September 1927) PCIJ Series A No. 10, 18 ff. On the principle see Kolb, *La règle résiduelle de liberté en droit international public ("tout ce qui n'est pas interdit est permis"). Aspects théoriques*, in *RBDI*, 2001, 100 ff.

benchmark for assessing the legality of weapons (and, more generally, conducts) not specifically regulated by IHL.[21]

From 2 April 1947 to 21 October 1986, the Marshall Islands were officially part of the Trust Territory of the Pacific Islands, a strategic UN trust territory administered by the US. As the Administering Authority, the US was required, *inter alia*, to act in accordance with the UN Charter and to promote the social advancement of the inhabitants, including by protecting their rights and fundamental freedoms and safeguarding their health.[22] Even assuming that the 'strategic trusteeship' allowed for broad military uses of the territory – based on Art. 84 of the UN Charter and Art. 5 of the Trusteeship Agreement – this was not a free pass. The Trusteeship Agreement expressly required the Administering Authority to protect the inhabitants against the loss of their lands and resources (Art. 6(2)) and to protect their health (Art. 6(3)). More generally, the trusteeship system's basic objectives include encouraging respect for human rights and fundamental freedoms for all without distinction (Art. 76(c) of the UN Charter), which Art. 83(2) makes applicable to strategic areas as well. Nuclear experiments in the area may therefore be argued to have breached positive obligations under the Trusteeship Agreement. More precisely:

a) nuclear tests carried out between 1 July 1946 and 1 April 1947 may be argued to constitute a breach of the law of military occupation, in particular of Articles 46(2) and 55 of the 1907 Hague Regulations annexed to Hague Convention IV, as well as of the principles reflected in the *Martens Clause*;

b) nuclear tests carried out between 2 April 1947 and 18 August 1958 in the Trust Territory of the Pacific Islands administered by the US may be argued to breach the Trusteeship Agreement adopted with SC Resolution 21 (1947) and to be inconsistent with the objectives set out in Art. 76 of the UN Charter, where they i) entailed, or were reasonably foreseeable to entail, significant radiological exposures; and/or ii) involved forced relocations and a prolonged loss of access to, or use of, lands and resources; and iii) were conducted without adequate precautionary and monitoring measures for an ultra-hazardous activity. For example, it has been reported that, at times, evacuations occurred only after the tests had been carried out (*e.g.* on Rongelap, Ailinginae and Utrok) despite prior knowledge that, absent evacuation, radiation doses to the civilian population would exceed established permissible limits.[23] In other instances, inhabitants were not evacuated at all (*e.g.* on Ailuk), reportedly due to an underestimation of the health risks involved.[24]

3. Secondary Rules in Force during the Nuclear Testing Program

a) Rules of attribution. The attribution of the conduct to the US does not appear problematic, as the nuclear tests were largely planned and carried out by State organs (US federal bodies, the armed forces, the US Atomic Energy Commission) or by individuals or groups of individuals, acting on the instructions of, or under the direction or control of the State in carrying out the conduct. The rules on attribution in such cases, now reflected in Articles 4 and 8 of the ARSIWA,[25] were, at least in their essential elements, already accepted in general international law in the early twentieth century.[26] No issue of retroactivity arises with respect to the application of the attribution rules contained in Part One, Chapter II of the ARSIWA.

b) Circumstances precluding wrongfulness. Circumstances precluding wrongfulness under Chapter V of the ARSIWA (Articles 20-25) may justify or excuse the breach of an international obligation only for as long as the relevant circumstance subsists. In particular, *necessity*, now codified in Art. 25 ARSIWA, is subject to very strict and cumulative conditions. Although States have invoked necessity

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[21] L. Salvadego, *Struttura e funzioni della necessità militare nel diritto internazionale* (Giappichelli 2016) 63-65.

[22] See SC Res 21 (2 April 1947), Articles 6(2) and 6(3).

[23] T. Kunkle and B. Ristvet, *Castle Bravo: Fifty Years of Legend and Lore: A Guide to Off-Site Radiation Exposures*, Defense Threat Reduction Agency, Kirtland, 2013.

[24] Advisory Committee on Human Radiation Experiments, *Final Report* (Washington 1995) 590, https://ehss.energy.gov/ohre/roadmap/achre/report.html.

[25] See P. Palchetti, 'Article 4', in P.G. Teles and P. Bodeau-Livinec (eds), *Commentary on the Articles on Responsibility of States for Internationally Wrongful Acts* (OUP, forthcoming); S. Forlati and L. Salvadego, 'Article 8', ibid.

[26] On the issue see M. Roscini, 'Establishing State Responsibility for Historical Injustices: The Armenian Case' (2014) 14 *Intl Crim L Rev* 291, 310 fn 82; see also *Charles S. Stephens and Bowman Stephens (United States) v United Mexican States* (1927) 4 RIAA 265, 267. On the history of the rules of attribution, see J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *NYU J Intl L & Politics* 265.

at least since the early twentieth century,[27] its conditions were clearly articulated by the International Law Commission (ILC) in 1980,[28] its status as a rule of general international law in a stringent formulation was authoritatively confirmed by the ICJ in *Gabčíkovo-Nagymaros* case (1997),[29] and subsequently codified in the ARSIWA. Subsequent case law has also reaffirmed its customary character.[30] This modern narrowly circumscribed plea of necessity as codified in Article 25 ARSIWA has replaced the earlier and broader doctrine of State self-preservation – under which conduct otherwise inconsistent with specific international obligations was claimed to be justified in order to safeguard essential interests such as national security, territorial integrity, and the protection of nationals – which was invoked by States until the early twentieth century as a 'doctrine' or 'right' of necessity, at times in an instrumental manner.

Against this contemporary legal framework, cumulative conditions established under Art. 25 ARSIWA for invoking necessity cannot be met with respect to US nuclear tests. While the US might argue the tests were deemed necessary to safeguard an essential interest of the State (*e.g.* national security) within a Cold War deterrence policy, the texts were not the 'only way' for the US to protect that essential interest against a grave and imminent peril (Art. 25(1)(a)),[31] given the choice of location, scale, and modalities of the nuclear experiments. International law excludes reliance on necessity if other (lawful) means are available, even if they may be more costly or less convenient.[32] Moreover, the tests risked seriously impairing essential interests of the State or States towards which the obligation existed, or of the international community as a whole (Art. 25(1)(b)), due to its potential long-lasting, widespread and transboundary effects. Finally, the requirement that the State must not have contributed to the situation would also be difficult to satisfy (Art. 25(2)(b)).[33]

c) The obligation of a State to provide 'full reparation'. As one of the legal consequences of an internationally wrongful act, the obligation of a State to provide 'full reparation' for injury caused by its internationally wrongful conduct is undisputed.[34] Reparation may take the form, *inter alia*, of restitution, formal apologies and/or the compensation for damage resulting from conduct which, at the time it occurred, constituted a breach of an international obligation binding on that State.

The principle of 'full reparation' was first stated by the Permanent Court of International Justice (PCIJ) in the 1927 *Factory at Chorzów* case *(Germany v Poland)*,[35] and was later incorporated in Art. 31 ARSIWA. The reparation must, as far as possible, wipe out all the consequences of the wrongful conduct and restore the situation that in all likelihood would have existed if the conduct had not been committed.[36] In its advisory opinion on the *Wall in the Occupied Palestinian Territory*,[37] the ICJ recognised that the principle of full reparation is also applicable with respect to relations between States and individuals whenever the violation of international obligations protecting individual interests is at

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[27] Permanent Court of Arbitration, *Russian Claim for Interest on Indemnities (Russia v Turkey) (Final Award)* (11 November 1912) PCA Case No. 1910-02, RIAA vol. XI, 421 ff.

[28] See Draft Article 33, adopted on first reading in 1980, A/CN.4/476 and Addendum.

[29] ICJ, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* (25 September 1997) ICJ Rep 1997, 7 ff., paras 51-52.

[30] See *e.g.* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (9 July 2004), ICJ Rep 2004, 136 ff., paras 140-142; ITLOS, *The M./V. 'Saiga' No. 2 (Saint Vincent and the Grenadines v Guinea) (Admissibility and Merits) (Judgment)* (1 July 1999), ITLOS Rep 1999, 10 ff., para. 134 and ICSID, *CMS Gas Transmission Company v Argentine Republic (Award)* (12 May 2005) ICSID Case No. ARB/01/8, 44 ILM 1205 (2005), para. 317.

[31] See ILC, *YILC* (2001) vol II(2) Art. 25(2).

[32] Ibid. 83 para. 15.

[33] For an analysis of the conditions established in Article 25 ARSIWA see again L. Salvadego, *Struttura e funzioni della necessità militare nel diritto internazionale* (n. 21) 14-17.

[34] See Art. 34 ARSIWA.

[35] PCIJ, *Factory at Chorzów (Germany v Poland) (Jurisdiction)* (26 July 1927) PCIJ Series A No 9, 21: «[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form».

[36] PCIJ, *Factory at Chorzów (Germany v Poland) (Merits)* (13 September 1928) PCIJ Series A No 17, 47: «reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed».

[37] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (n. 30).

stake,[38] also in the light of the *erga omnes* character of the latter obligations.[39] The right to 'adequate, effective and prompt' reparation for the harm suffered is expressly affirmed for victims of gross violations of human rights and serious violations of IHL in the Principles adopted by the UN General Assembly on December 2005.[40] Although the existence of an individual right to reparation appears to be uncontroversial under current general international law as regards the violation of international obligations protecting individual interests,[41] it is worth noting that even the 2005 Principles do not resolve the issue of the non-retroactivity of secondary rules of international law.[42] Moreover, States find it preferable to address reparation at the interstate level rather than through direct State-individual relations.[43] This remains relevant to the settlement of claims between the US and the RMI. Although the Marshall Islands were not sovereign at the time of the nuclear tests, the RMI was later regarded by the US as the appropriate interlocutor for negotiating a settlement of claims on behalf of the Marshallese people.

4. The Legal Effects of the Compact of Free Association between the US and the RMI

The US and the RMI addressed the settlement of claims arising from this common history in a Compact,[44] which marked the Marshall Islands' transition to independence and statehood,[45] and, more specifically, in the Agreement for the Implementation of Section 177 (Sec. 177 Agreement),[46] signed in 1983, and entered into force in 1986. Although the Agreement's Preamble acknowledges «the sacrifices made by the people of the Marshall Islands in regard to the Nuclear Testing Program», it does not mention the rights of the Marshallese people. The US «accepted the responsibility for compensation owing to citizens of the Marshall Islands» for «loss or and damage to property and person of the citizens of the Marshall Islands [...] resulting from the nuclear testing program» (Compact, Sec. 177 (a)).

Although it provided $150 million to establish a fund managed by the Government of the Marshall Islands – whose investment returns were expected to generate at least $18 million per year (Sec. 177 Agreement, Art. I, Sec. 1) –, and financed a health care program ostensibly intended to address radiation-related harm, the US did not issue a formal apology for the suffering caused. The Agreement also set up a Nuclear Claims Tribunal to adjudicate claims arising from the nuclear testing program, and allocated $45.75 million to fund awards over a 15-year period. However, the Tribunal ultimately assessed more than $2.3 billion in claims, with the result that victims were never fully compensated.

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[38] Ibid paras 152-153. The court ruled that Israel is obliged to pay compensation directly to the victims of the damage caused by the violation of IHL and human rights law. On the issue see P. D'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in P.M. Dupuy, B. Fassbender, M.N. Shaw, K.P. Sommermann (eds) *Essays in Honour of Christian Tomuschat* (Verlag 2006) 473-476.

[39] ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain) (Second Phase) (Judgment)* (5 February 1970) ICJ Rep 1970, 3 ff., para. 33. The notion of *erga omnes* obligation was clarified by international case law to the effect that, in such circumstances, the obligation is owed by States to the international community as a whole, and its breach gives rise to a legally protected interest to bring a claim against the responsible State, even in the absence of direct injury to the applicant State. On this issue, see G. Bartolini, *Riparazione per violazione dei diritti umani e ordinamento internazionale* (Jovene 2009).

[40] See 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147 para. 11.

[41] On the issue see S. Forlati, 'La riparazione per violazioni dei diritti umani, fra ruolo dello Stato e posizione della vittima: Riflessioni alla luce del caso Cipro c. Turchia (equa soddisfazione)' in *Studi in onore di Luigi Costato: i multiformi profili del pensiero giuridico* (Jovene 2014) 287, 296.

[42] The individual right to reparation in general international law is recognised using criteria that do not fully align with the principle of 'full reparation' but rather to considerations of equity: see ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation) (Judgment)* (19 June 2012) ICJ Rep 2012, 324 ff., para. 57; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Reparations) (Judgment)* (9 February 2022) ICJ Rep 2022, 13 ff., para. 106.

[43] See the State practice cited below in section 4. On the view that interstate agreements should be preferred over individual claims, see L. Salvadego, 'What 'reparations' for colonial 'crimes'?' (2024) 103 *QIL* 5.

[44] *Compact of Free Association of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia*: https://www.congress.gov/99/statute/STATUTE-99/STATUTE-99-Pg1770.pdf.

[45] The US trusteeship was, however, officially terminated by Security Council (SC) Resolution 683 (1990).

[46] Agreement between the Government of the US and Government of the Marshall Islands for the Implementation of Sec. 177 of the Compact of Free Association, https://www.doi.gov/sites/doi.gov/files/section-177-agreement.pdf.

Defining the arrangement as a «full settlement of all claims» (Sec. 177 Agreement, Art. X, Sec. 1) suggests that the payments were intended to bar any future claims.[47] This clause must also be read together with Art. XII, which provides that i) all claims related to the nuclear testing program shall be terminated; ii) no US court shall have jurisdiction over claims relating to the nuclear testing program; and iii) any such claims pending before US courts shall be dismissed (Sec. 177 Agreement, Art. XII, Sec. 1).

When the Compact was concluded, fourteen cases brought by RMI inhabitants were pending before the US Court of Claims, seeking damages arising from US nuclear weapons testing.[48] Although these cases were ultimately dismissed following the enactment of the special legislation addressing the issue, the Court did not clarify whether the settlement provided 'adequate' compensation consistent with the victims' right to an effective remedy.[49] While no specific issue of self-determination arises here,[50] it remains unclear whether the RMI's newly established authorities could validly waive future individual reparation claims by their naturalized citizens.[51] Funding for the health care mechanism was further reduced on the basis of the 2003 amendment to the Compact of Free Association (Compact II).[52]

The RMI called for further compensation on the basis of a change of circumstances claim, with no invocation of Art. 62 of the Vienna Convention,[53] but rather pursuant to Art. IX of the Sec. 177 Agreement.[54] In its 2000 Changed Circumstances Petition,[55] the RMI submitted that new damages had emerged, citing evidence that radioactive fallout had been wider than previously known or disclosed and later scientific findings lowering the thresholds at which radiation exposure is considered safe – developments that «could not reasonably have been discovered, or could not have been determined, prior to the effective date of the Compact». It further maintained that this new evidence rendered the Sec. 177 Agreement «manifestly inadequate to provide just and adequate compensation». A 2004 report released by the US Department of State concluded that these findings did not constitute 'changed

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[47] A full settlement clause is common in the final agreement reached through interstate negotiations to address the issue of nuclear tests. See for example the Agreement between UK and Australia concerning the Former UK Nuclear Test and Experimental Program Sites at Maralinga, the Monte Bello Islands and Emu Field, https://treaties.fcdo.gov.uk/data/Library2/pdf/1994-TS0022.pdf.

[48] For a detailed discussion of these cases, see *Juda v. United States*, 13 Cl. Ct. 667 (1987).

[49] Ibid. 686.

[50] See *e.g.* ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (25 February 2019) ICJ Rep 2019, 95 ff., paras 160-161 and 172 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* (21 June 1971), ICJ Rep 1971, 16 ff., para. 52.

[51] See *e.g.* the decision of the Korean Constitutional Court related to the 'Comfort Women' case. The Court determined that the government of the Republic of Korea had not taken sufficient measures to secure reparations for the violence suffered by its citizens, thereby violating the individual rights enshrined in the Korean Constitution. Consequently, the Korean Constitutional Court instructed the government to undertake all diplomatic channels to settle the interpretive disagreements concerning the terms of the peace treaty signed by the two States in 1965. Korean Constitutional Court, KCCR, 30.8.2011, 2006HunMa788/Unconstitutional.

[52] Agreement between the US and the RMI Amending the Agreement of June 25, 1983, concerning the Compact of Free Association, as Amended, signed at Majuro (30 April 2003), https://www.doi.gov/sites/doi.gov/files/04-501-marshall-island-amendment.pdf.

[53] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 62 reads: «1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty».

[54] Art. IX of the Sec. 177 Agreement reads: «[i]f loss or damage to property and person of the citizens of the Marshall Islands, resulting from the Nuclear Testing Program, arises or is discovered after the effective date of this Agreement, and such injuries were not and could not reasonably have been identified as of the effective date of this Agreement, and if such injuries render the provisions of this Agreement manifestly inadequate, the Government of the Marshall Islands may request that the Government of the United States provide for such injuries by submitting such a request to the Congress of the United States for its consideration. It is understood that this Article does not commit the Congress of the United States to authorize and appropriate funds». Despite its similar wording to the 'fundamental change of circumstances' clause in Art. 62 of the Vienna Convention, this provision has a different scope and does not preclude the application of the general regime under Art. 62 VCTL.

[55] See https://www.bikiniatoll.com/petition.html.

circumstances' within the meaning of the Agreement and that, consequently, no additional payments were due.[56] The US rejected any requests for additional compensation.

During the 2022 negotiations on a new Compact (Compact III), the RMI made additional compensation for the nuclear legacy a central priority. However, Sec. 206 of the 2024 Compact III reaffirms the 'full settlement' clause.[57] The existence of a treaty-based settlement does not automatically exhaust all issues concerning international responsibility. Although the law of State responsibility and the law of treaties are related, they are functionally distinct:[58] while States may negotiate agreements to settle claims, such agreements do not operate in a legal vacuum. Even where a 'full settlement' has been agreed, its negotiation and implementation remain subject to the overarching obligation of good faith,[59] which requires the parties «to deal honestly and fairly with each other»[60] throughout the negotiation, performance and implementation of the treaty. The inclusion of a 'change of circumstances' clause indicates that the parties envisaged the possibility that additional loss or damage to persons or property might later be identified or quantified. On that basis, it can be argued that the US should engage with the harm suffered in good faith and remain responsive where new scientific evidence or newly disclosed information substantiates a greater extent of damage. The RMI may seek to invoke the 'change of circumstances' clause included in the Compact again under Art. IX of the Sec. 177 Agreement.

More broadly, State practice in some mass-harm contexts suggests that 'full and final' settlements may later be supplemented by subsequent understandings when their insufficiency becomes apparent. One example is the 2015 subsequent bilateral understanding between Japan and the Republic of Korea on the 'comfort women' issue,[61] reached despite the 1965 agreement that had characterised the settlement of claims between these States as 'complete and final'.[62] Similarly, the 1981 Algiers Declarations between Iran and the US,[63] established a comprehensive framework for resolving claims arising from the Iranian Revolution, yet were later supplemented by additional lump-sum settlements covering specific categories of claims.[64] Following this approach, the US and the RMI would have different options. One option would be to build on the Nuclear Claims Tribunal's existing awards and findings by providing additional funding to enable further payments. Outside the Tribunal scheme, additional compensation could be provided in a variety of ways: i) the establishment of a US-backed fund, following models such as the 'Asian Women's Fund' set up by the Government of Japan in 1995 to solve the 'comfort women' issue;[65] ii) the creation of a domestic compensation fund, along the lines of the one established by Italy through Decree-Law No. 36/2022 to compensate victims of Nazi crimes;[66] iii) *ad hoc* discretionary payments (*ex gratia* payments), decided by the US Congress. This was the approach adopted by the UK both in the Australia's nuclear tests case[67] and in the Mau Mau case;[68] iv) the institution of a domestic committee to examine victims' claims, modelled on the French

[56] US Department of State, *Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America* (November 2004) https://2001-2009.state.gov/p/eap/rls/rpt/40422.htm.
[57] The 2024 Compact of Free Association Amendments Act, in force for the next 20 years, is part of the Consolidated Appropriations Act, https://www.congress.gov/bill/118th-congress/house-bill/4366/text.
[58] On the issue see S. Forlati, *Diritto dei trattati e responsabilità internazionale* (Giuffrè 2005), 18.
[59] Vienna Convention on the Law of Treaties (n. 53), Art. 26.
[60] M. Kotzur, 'Good Faith (Bona fide)', *Max Planck Encyclopedias of International Law*, 2009.
[61] The Joint statement between Japan and the ROK was concluded on 28 December 2015 and consists of two unilateral declarations. For the English translation, see www.mofa.go.jp.
[62] See the 1965 Agreement on the Settlement of Problems Concerning Property and Claims and the Economic Cooperation between Republic of Korea and Japan.
[63] Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration) 1 Iran-US CTR 3, https://iusct.com/foundingdocuments-2/#1691403326508-8e705e33-444c.
[64] See https://www.justice.gov/fcsc/completed-programs-iran.
[65] The Fund was a private structure financed by private donors, and for his reason it was criticized by the victims.
[66] See the Italian Decree-Law No. 36 (30 April 2022), enacted into Law No. 79 (29 June 2022), Art. 43.
[67] See the 1993 Agreement between UK and Australia concerning the Former UK Nuclear Test and Experimental Program Sites at Maralinga, the Monte Bello Islands and Emu Field, https://treaties.fcdo.gov.uk/data/Library2/pdf/1994-TS0022.pdf.
[68] In June 2013, the UK Government reached a settlement agreement concerning claims brought by Kenyan citizens relating to abuses committed by the British colonial administration during the Mau Mau insurrection (1952-1963). See Foreign Secretary's Statement to Parliament (6 June 2013), https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims.

compensation system of the Compensation Committee for Victims of Nuclear Tests in Algeria and French Polynesia[69]; and v) renewed bilateral negotiations.

Apart from compensation, reparations can take different forms and follow different processes.[70] First, symbolic forms of reparation may play an important role. In many post-colonial and mass-harm contexts, a formal apology to victims (and their heirs) is often presented as a key step toward reconciliation.[71] Apologies for nuclear testing remain rare. In 2016, during a visit to Tahiti, former French President, François Hollande, acknowledged that nuclear testing in French Polynesia had environmental impacts and health consequences.[72] Despite initiatives by individual members of the US Congress,[73] no formal apology has been adopted for the victims of US nuclear testing in the Marshall Islands. Second, as is often the case with nuclear testing,[74] concerned States should address continuing evidentiary gaps and controversies regarding the long-term effects of nuclear testing. A good faith approach would include an enhanced and systematic declassification effort to enable more reliable reconstruction of exposure and impacts.[75] The resulting material could be assessed by a joint expert commission, as France and Algeria recently did to work through their shared colonial past.[76] Finally, practice suggests that settlements framed as reconstruction or development programs may be perceived as insufficient where victims seek acknowledgement and reparative justice. This was the case with the amounts Germany committed to provide to Namibia in connection with the genocide of the Herero and Nama peoples during the colonial rule.[77]

5. Concluding Remarks on Victims' Participation in Reparation Agreements

Despite the growing acknowledgment of the role that individuals and affected groups can play in achieving reconciliation after mass atrocities,[78] international law confers on States alone the power to negotiate reparation agreements. As a result, the participation of victims' (or heirs') representatives in

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[69] The Committee is an administrative authority and was established by domestic law: Law No. 2010-2 of January 5, 2010 on the Recognition and Compensation of Victims of French Nuclear Tests (Loi Morin), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000021625586.

[70] See above section 3. In the literature see *e.g.* R. Marconi, 'States before their colonial past: Practice in addressing responsibility' (2024) 103 *QIL* 25.

[71] Among the few apologies for conducts committed during the colonial rule see *e.g.* King Philippe's expression of 'deepest regrets' for the suffering caused by the Belgian colonial enterprise in Kinshasa in 2020, https://www.bbc.com/news/world-europe-53232105. In 2023, King Charles III expressed his 'greatest sorrow and deepest regret' for the atrocities suffered by Kenyans during their struggle for independence from British colonial rule, https://www.reuters.com/world/africa/britains-king-charles-visits-kenya-with-colonialisms-scars-focus-2023-10-31/.

[72] The recognition did not include an assumption of legal responsibility, https://www.france24.com/en/20160222-hollande-address-nuclear-test-victims-polynesia-trip.

[73] See H.J.Res.202 – Formally apologizing for the nuclear legacy of the US in the RMI and affirming the importance of free association between the Government of the United States and the Government of the Marshall Islands, https://www.congress.gov/bill/118th-congress/house-joint-resolution/202/text.

[74] Only recently has the UK Government begun releasing documents relating to Australia's nuclear tests: https://www.internationalaffairs.org.au/australianoutlook/uk-government-begins-to-release-australias-nuclear-tests-documents-after-75-years/.

[75] In 2001, the US Department of Energy made publicly available over 14,000 Marshall Islands records in hard copy and on CD-ROM, and also made a further set of information available through its OpenNet database, which has been updated over time, https://www.osti.gov/opennetadmin/index.jsp. Despite these efforts, US declassification policies and processes have been widely criticized as outdated and insufficiently resourced. See the US Public Interest Declassification Board, *Declassification of Records Relating to Nuclear Weapons Testing and Cleanup Activities in the Marshall Islands. Feasibility Study* (August 2022), https://www.archives.gov/files/pidb/recommendations/marshall-islands-feasibility-study-2022-.pdf.

[76] In 2022, France and Algeria agreed to establish a joint commission of French and Algerian historians to examine France's colonial history in Algeria and to work through the archives of both countries, including by improving access to relevant French archival materials from that period. See https://elysee.fr/emmanuel-macron/2022/08/27/declaration-dalger-pour-un-partenariat-renouvele-entre-la-france-et-lalgerie.

[77] Joint Declaration by the Federal Republic of Germany and the Republic of Namibia 'United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of The Future' (15 May 2021). In the literature see R. Marconi, 'Il passato (coloniale) che non passa: la Dichiarazione congiunta di riconciliazione fra Germania e Namibia del 2021' (2022) 16 *Diritti umani e diritto internazionale* 400.

[78] See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General to the Security Council*, S/2011/634 (12 October 2011); *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence Fabián Salvioli on Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice*, UN Doc A/HRC/45/45 (9 July 2020).

treaty negotiations depends on State consent, and their exclusion does not affect the validity or legal effectiveness of a treaty.[79] At the same time, developments in transitional justice[80] have increasingly shaped the views expressed by certain UN bodies on victim participation.[81] In the context of post-colonial reparations for indigenous peoples,[82] this tendency is illustrated by the joint communication sent in 2023 by seven UN Special Rapporteurs to the German and Namibian governments,[83] which criticised the process surrounding the 2021 Joint Declaration between Germany and Namibia, intended to address all matters relating to the Herero and Nama genocide.

[79] Vienna Convention on the Law of Treaties (n. 53), Articles 7 and 42 ff.

[80] Transitional justice is defined as «[t]he full range of processes and mechanisms associated with a societies' attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation». See Report of the Secretary-General to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (23 August 2004) para. 8.

[81] See 'Report of the Special Rapporteur on the Rights of Indigenous Peoples'', UN Doc A/72/186 (21 July 2017) para. 22. In the literature, see A. Bufalini, 'The Participation of Indigenous Peoples and Victims in Treaty-Making' (2024) 103 *QIL* 63.

[82] Indigenous peoples are accorded a specific political participation as an expression of the right to self-determination. The UN Declaration on the Rights of Indigenous Peoples (UNGA Res A/61/25 (13 September 2007)) provides that indigenous peoples have the «right to participate in decision making in matters which would affect their rights» (Art. 18) and the State has the obligation to «consult and cooperate in good faith with the indigenous peoples […] in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them» (Art. 19).

[83] See 'Joint Communication from the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence; the Special Rapporteur in the Field of Cultural Rights; the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context; the Special Rapporteur on the Rights of Indigenous Peoples; the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Special Rapporteur on Violence against Women and Girls, Its Causes and Consequences' Doc AL DEU 1/2023 (23 February 2023) and Doc AL NAM 1/2023 (23 February 2023).