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Searching for Support: Preserving the Records of the Nuclear Claims Tribunal

Just after World War II, the United States started testing nuclear weapons in the Marshall Islands, an island country located in the North Pacific Ocean. As a result, four atolls became uninhabitable and severe damage was done to both the environment and the health of its inhabitants. To determine the level of compensation a Nuclear Claims Tribunal was established, but the records of its sessions are now under threat. In this article Trudy Huskamp Peterson will discuss the Nuclear Claims Tribunal records, the difficulties that come with this documentation, and the current struggle to preserve them for future generations.

The first of March 1954, dawned twice on Rongelap atoll in the Marshall Islands: first in the west and then in the east. The unusual sunrise in the west, which a man living on the island later remembered as ‘truly beautiful with many colours – red, green and yellow’, was in fact the fireball from the United States detonation of an atomic bomb on the island of Bikini some 100 miles away.¹ This ‘day of two suns’ is symbolic of all 67 above ground nuclear tests that the U.S. conducted between 1946 and 1958 in the Marshall Islands, at that time a U.S. Trust Territory.

Background

The environmental and health consequences of the tests were deadly. Six atolls (Bikini, Enewetak, Rongelap, Rongerik, Utrik and Ailinginae)

1 Jane Dibbin, *Day of Two Suns: U.S. Nuclear Testing and the Pacific Islanders* (New York: New Amsterdam Books, 1988), 25. It was a thermonuclear hydrogen bomb which, at 15 megatons explosive equivalent, was the most powerful weapon ever detonated by the U.S.

became uninhabitable. People sickened, some died, some suffered long-term illnesses. Women miscarried. Water became undrinkable. The land absorbed radiation, and that in turn poisoned plant life, which also was affected by the radioactive particles that drifted down on it. Inhabitants of the affected atolls were relocated, sometimes more than once. Many remain displaced to this day.²

After nearly a decade of negotiation, in 1986 the United States and the people of the Marshall Islands entered into a Compact of Free Association, establishing sovereignty in the Republic of the Marshall Islands. As part of the Compact, the United States accepted:

‘responsibility for compensation owing to citizens of the Marshall Islands [...] for loss or damage to property and person of the citizens [...] resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.’³

The U.S. provided a \$150 million trust fund, the proceeds from which were ‘to be paid and distributed in accordance with [a] separate agreement [...] and shall provide the services and programs set forth in this separate agreement.’⁴

- 2 The literature on the atomic tests in the Pacific is voluminous. The Embassy of the Republic of the Marshall Islands in the United States maintains a very useful website, providing a chronology of events and a select bibliography: <http://www.rmiembassyus.org/Nuclear%20Issues.htm>. The U.S. Department of Energy maintains a website devoted to the Marshall Islands program, which also has a chronology plus a massive number of images of U.S. documents related to the tests. <http://www.hss.energy.gov/HealthSafety/IHS/marshall/marshall.htm>.
- 3 <http://www.rmiembassyus.org/Compact/Compact%20Public%20Law%20108-188.pdf>, Section 177 (a).
- 4 *Ibid.*, Section 177(c). The financial arrangement is exceedingly complicated. The \$150 million was to be invested by the Marshall Islands in ‘bonds, notes and other instruments of investment grade and United States nationality’, with the aim of ‘producing for each year of the existence of the Fund average annual proceeds of at least \$18 million (Annual Proceeds) for disbursement in accordance with this Agreement.’ From this annually the Government of the Marshall Islands was to receive \$2 million for health care for the people of the four atolls and \$1 million for medical surveillance and radiological monitoring; the Bikini community \$5 million, Enewetak \$3.25 million, Rongelap \$2.5 million, Utrik \$1.5 million, the Tribunal half a million for operations and between \$2.25 and \$3.25 for payment of awards for successful claims. The annual funds were to be paid in quarterly installments. In fact, the investments did not produce the revenue foreseen and the principal of the trust fund had to be invaded routinely in order to make the required distributions.

In the supplemental Agreement, the two governments created a Claims Tribunal to ‘render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program, and disputes arising from distributions’ of funds to the local communities that were specified in the Agreement.⁵ The Agreement stated that its provisions constituted ‘the full settlement of all claims, past present and future.’⁶

The Nuclear Claims Tribunal

The Nuclear Claims Tribunal (NCT) was established by Marshall Islands legislation in 1987. The Tribunal operated as a court, with three judges and two opposing sides, the Public Advocate representing the claimants and the Defender of the Fund. It had the power to decide both on claims seeking compensation for loss or damage to a person or property (Section 23 Claims), which eventually totalled around 7,500 cases. It also adjudicated challenges to the distribution schemes that were developed by the ‘Local Distribution Authorities’ that received and distributed funds on behalf of the communities of Bikini/Kili, Enewetak/Ujelang, Rongelap and Utrik; these were known as Section 24, 25, 26, 27 and 28 Claims, of which there were 22 cases. The act required both the Tribunal and the Local Distribution Authorities to create and maintain records.⁷

The Tribunal began operating in Majuro, the capital city, in 1988 and continued for over twenty years. It held hearings in various locations, some of them public, some closed. As part of the claims process, the Tribunal hired scientists to investigate and report on topics; those reports were incorporated in the claims files. A medical team was employed by the Tribunal to review each medical claim and prepare a report with supporting documentation for incorporation in the claims file. Most claims have been adjudicated, but not all of them, particularly those that were filed late in the life of the Tribunal.

If the Tribunal decided that an individual should be compensated for an existing medical condition (the overwhelming majority of the individual

5 Agreement between the Government of the United States and the Government of the Marshall Islands for the implementation of Section 177 of the *Compact of Free Association*, <http://www.nuclearclaimstribunal.com/177text.htm>, Article IV.

6 Ibid, Article X, Section 1.

claims), it would issue a formal Award Order and make an initial partial payment which ranged from as high as 55 percent for new awards made during 1996 to five percent for awards approved beginning October 1, 2006. Additional payments were made on each award on an annual pro rata basis, as required by the terms of the settlement agreement. Those payments were made in varying percentages every year from 1991 through 2005. The Tribunal is now out of funds. No claim has been fully paid and more than half of the personal injury awardees have died without having received the full amount of compensation awarded. The Tribunal asked the United States to provide more funds, but so far the U.S. pocketbook has remained closed.

The United Nations Human Rights Council has a Special Rapporteur on human rights and hazardous wastes.⁸ He visited the Marshall Islands in the spring of 2012 and reported his findings at the Council's meeting in Geneva, Switzerland, in September 2012. He recommended that the United States:

‘grant full access of the Marshall Islands to United States information and records regarding the environmental and human health ramifications of past and current United States military use of the islands, as well as full access to United States medical and other related records on the Marshallese, in accordance with the right to information and the principle of transparency.’⁹

He also urged the United States to provide ‘full funding for the Nuclear Claims Tribunal to award adequate compensation for past and future claims.’¹⁰ So far the United States has not provided additional funds.

The Records

In April 2010 I received an email from Barbara Rose Johnston, an environmental anthropologist who was the expert witness in the claim of the people of Rongelap atoll for property and consequential damages. She was worried about the preservation of the records of the Tribunal because it was scheduled to close at the end of June 2010, and the Advocate and the Chief Justice asked her to locate technical assistance and funds to preserve

7 *Marshall Islands Nuclear Claims Tribunal Act 1987* [P.L. 1987-24, Section 1].

8 The formal title is ‘Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.’

9 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-48-Add2_en.pdf.

10 *Idem*.

the archives. I knew of her work from a previous project in Guatemala, and I immediately agreed to help.

In fact, the Tribunal did not completely close that June, but it became moribund. It maintains its office and has two part-time employees. However, no compensation awards are being made. During the remainder of 2010 and throughout 2011 Dr. Johnson, Advocate Bill Graham and I made inquiries of foundations about possible support for at least an assessment of the preservation needs. Bill Graham applied to the Elsevier Foundation for money to support the purchase of scanning equipment and software and got a small fund. That was the only success.

By late 2011 I was sure that I needed to take a look at the records to see what condition they were in and what needed to be done. I went to the Tribunal for a week each in March and September 2012.

The Tribunal's office now consists of two office rooms and a storage area on the second floor of a building in Majuro; all three rooms hold records of the NCT. One room is air conditioned when the part-time employees come to the office, but the other rooms have no temperature controls, leaving the records in high humidity conditions most of the time, a significant problem on a Pacific island near the Equator. The building is quite substantial, and I saw no evidence of rain damage in the offices. The doors to the three rooms are locked, but neither doors, nor locks are sturdy and a break-in would be easy. The storeroom, which houses unused office equipment, medical supplies, and an automobile tire, as well as a filing cabinet and shelves and cartons of records, has considerable evidence of the presence of rats and termites; I picked up one carton and a lizard ran out over my hand. The most serious danger to the records, however, is the constant threat of tropical storms and tsunamis and, in the long term, generally higher water as global warming causes the ocean to rise.¹¹

The records consist of case files; records of the judges, the Advocate, the Defender, the Office of Medical Diagnostics, the clerk, and the administrative officer; and reference materials, including thousands of copies of declassified U.S. government records relating to the nuclear tests. The records are largely in paper; all the case files are paper, as are almost all of the records of the judges, the Advocate and the Defender. In addition, there are more than 450 audio tapes and about fifty video tapes of hearings. The Tribunal staff members used computers, but the staff members with whom

11 The mean height of the land in the Islands is about 7 feet above sea level. <http://www.rmiembassyus.org/Geography.htm>.

I talked said that all important documents and emails were printed and filed (and I found many printed email messages in the files). The primary financial information is electronic, stored on one computer, but paper copies of financial documents abound.

The claims case files are all in the room that is intermittently occupied and are stored either in file cabinets or in boxes, or in stacks on the cabinets. They are labeled, have a control register, and are generally in good order. Most other records are in the storeroom; some records of the Advocate are in the second office that is used by Bill Graham.¹² Much of my first visit was spent shifting boxes and crates and equipment in the storeroom to see what was there. Any records of the judges or Defender or Advocate that I found we hauled to the occupied office and stacked on the floor. During my second visit we bought twenty records cartons from a local supply store; using those cartons, I then boxed the Medical Officer's records that had been on open shelves in the storeroom and also stacked those boxes in the office area. Remaining in the storeroom are the voluminous day-to-day finance records and a file cabinet and dozens of boxes of copies of declassified U.S. government documents that the Tribunal had acquired via the U.S. Department of Energy.

Between the two visits I prepared a draft appraisal report on what I had seen, and a draft list of fonds . During my second visit I began arranging the records of the judges and creating basic International Standard Archival Descriptions (ISAD(G)) for the fonds and more detailed descriptions for the records in the fonds of the judges. The two staff members of the Tribunal began making lists of the audiovisual materials and packing them for shipment. They also listed the reports of the Local Distribution Authorities accounting for expenditures, reports of auditors, and scientific reports.

The Search for Support

The Marshallese want the original records to remain on the Islands; however, they have concluded that for preservation purposes a copy must be made and stored in a safe location outside the Islands.¹³

After my initial visit I talked with Joan Boadas i Raset, the archivist of the

12 The boxes are usually cartons that equipment or supplies came in, are of many different sizes, and weakly constructed.

13 Where the Tribunal records will ultimately be located is not determined.

city of Girona, Spain, and the director of its world-class audiovisual archives, about the problem of preservation of the Tribunal's audiovisual materials. He talked with the Girona city government and secured its agreement to have the Girona archives copy all the audiovisual materials free of charge, store and preserve a security copy, and return the originals and a digital copy to the Tribunal. All the paperwork for that extremely generous arrangement was signed in the summer of 2012. Then we needed to find some way to get the tapes to and from Girona. Fortunately, Bill Graham attended the September 2012 Human Rights Council hearing in Geneva, and he carried half of the sound recordings with him, making a detour from Geneva to Girona to drop them off. As of this writing, the other half of the audio and all of the video recordings have yet to be delivered to Girona.

The next goal is to scan all the case files and supporting documentation (including scientific studies) and the records of the judges, Advocate, Defender, and Medical Officer. The project will not scan the voluminous paper financial records other than those that show the payment status of each claim. A decision is still to be made as to whether the declassified records from the U.S. government that were obtained in support of the NCT work will be scanned or not; that would roughly double the scanning volume.

To launch the paper scanning project, I contacted U.S. colleagues with deep experience in scanning projects in archives and obtained technical requirements for hardware and software, which I provided to the Tribunal. The procurement is now underway. The Tribunal and the Government of RMI will provide the people to do the scanning, but we need a project adviser who will help the project set up the scanning system, prepare a manual or set of guidelines for the scanning project, install software (probably AtoM available without charge from the International Council on Archives) that will handle the ISAD(G) descriptions and link them to the scanned images, and check periodically to see that the project is staying on course. The advisor, preferably an archivist with experience in scanning projects, will have to be employed, ideally for four months, to be with the project in the Islands. So after the September visit I began a search for funds to support that.

The search has, so far, not been successful. First of all, a number of likely sources are not available. For example, the Endangered Archives Program of the Rausing Trust requires that a copy of all materials copied be deposited with the British Library and be made available to the public. Obviously,

with the medical and financial sensitivities in the Tribunal records, public access at this time is not possible. Major universities in the United States would want the copies immediately substantially available for use by their students and faculty, which also is not possible, given the privacy concerns. So I turned to foundations, big and small, with no luck. I went to bar associations, since these are a variety of legal records, with no success. I tried a corporation that works in the scanning field, the Department of State, a museum, several non-governmental organizations, a library group in the Pacific, and private individuals. I talked with several foreign government officials who saw it as a U.S. issue, not one for their countries. Without exception, the persons I contacted were sympathetic to the project but not able or willing to fund it: too much money, outside their scope of work, and so on. I continue to search.

A separate but related problem is preserving both the electronic financial records and a duplicate copy of the scanned items. Again, I turned to archivists in countries with a good record for electronic records preservation and a history of sympathy to human rights issues. The project will require one of their staff members to make or supervise the making of a copy of the central financial records and ensure that the results of the scanning and description project can be smoothly transferred to the archives that will provide the secure storage. Once again, I have not found that repository, although I have expressions of interest.

Looking ahead

In the long term, the Marshall Islands needs a trained staff to manage the NCT archives (both the original formats and the digital duplicates for reference purposes). The personal claims files include medical records that may be needed by individuals during their lifetimes, and future efforts to secure compensation for unpaid claims will require that the records have a demonstrably clear and secure chain of custody. Access protocols must be developed that will provide access to the records, at present primarily for scientific purposes, while protecting the rights of the thousands of claimants. Appropriate housing for the records must be found on the islands. These are not simple matters, and external and expert support will be needed.

As Joan Boadas suggests, these records should be nominated for Memory of the World status. While the United States was not the only country that tested atomic weapons above ground, these files provide a

uniquely comprehensive record of the aftermath of such explosions. No other set of records exists that includes the medical and scientific information plus the unique oral and visual record of the hearings – the lawyers and the clients in their own words, explaining what they suffered. The records document the attempt to deal with reparation, one of the four transitional justice processes commonly used in the wake of traumatic events, and they show a reparation approach that can at best be counted as a partial failure.¹⁴ The records are important sources not only for the history of the Republic of the Marshall Islands and the United States, but also for the history of nuclear tests and atomic power, their environmental consequences, and the medical impacts. The records of the Nuclear Claims Tribunal are unique, irreplaceable and endangered.

However, a Memory of the World nomination can wait. First things first: a security copy of the records must be made and stored safely off the Islands. I hope that by 2014, the sixtieth anniversary of the ‘day of two suns’, we will have achieved this goal. Then the sun can rise in the Marshall Islands on the original records, and the sun can rise again in Girona and in some other country where the duplicate electronic records are safely stored. That is a ‘day of two suns’ in which we can all rejoice.

14 The four methods of ‘dealing with the past’ are holding the perpetrators accountable (typically through judicial processes), ensuring that the harm will not be repeated, learning the truth of what happened, and providing reparations to those harmed. See, for example, the issue of *Politorbus*, the magazine of the Foreign Ministry of Switzerland, on dealing with the past and these four approaches: *Politorbis* no. 50, special issue ‘Dealing with the Past,’ 2010, <http://www.eda.admin.ch/politorbis>.