

Nuclear Justice:
Interview with Tony deBrum and Bill Graham

Nabil Ahmed

In the long fifty years from 1946 to 1996, France, the United States, and the United Kingdom conducted more than 315 nuclear tests in the Pacific Ocean. Their combined impacts, the people's resistance, and their search for justice are parts of an ongoing story at the intersection of colonial power, environmental violence, and international law. In Micronesia, the Republic of the Marshall Islands was left with destroyed islands and lagoons and widespread radiological contamination from sixty-seven atmospheric nuclear weapons tests conducted by the United States between 1946 and 1958. The most powerful of these was Castle Bravo, the largest thermonuclear device ever detonated by the United States, carried out on March 1, 1954, at Bikini Atoll. Its immense power produced a second sun over the Pacific Ocean. The inhabitants of Bikini and Enewetak were evacuated prior to the test. The wind, however, carried the nuclear fallout eastward to Rongelap, Rongerik, Ailinginae, and Utirik Atolls. The people of Rongelap were exposed to deadly levels of radioactivity and beta burns, resulting in acute radiation sickness. Within a few days following the Bravo test, the people of both Rongelap and Utirik were evacuated from their atolls. The US government instantly set out to carry out a secret medical study code-named Project 4.1 on the effects of radiation on the exposed residents. Eventually the residents of Rongelap were resettled on Ejit yet returned three years later with the assurance that their atoll was safe to inhabit. It was not until as late as 1985 that the community relocated to Mejjatto Island, in Kwajalein Atoll, with the help of Greenpeace as evidence mounted that their atoll remained heavily contaminated. Bikini, Rongelap, and parts of Enewetak remain uninhabitable, and the Marshallese have some of the highest rates of cancer in the Pacific Islands.

On October 21, 1986, under a formal agreement, the United States accepted "the responsibility for compensation owing to citizens of the Marshall Islands ... for loss or damage to property and person ... resulting from the nuclear testing program."¹ The Marshall Islands Nuclear Claims Tribunal (NCT) was established in 1987 with the jurisdiction to award compensation to victims of the tests. The hearings of the NCT set a precedent for seeking reparations for the loss of land and social relations and the displacement associated with environmental damage from nuclear testing. The much more powerful party to the agreement, the US government, ensured, however, that its terms favored US interests rather than those of the Marshallese. In concrete terms, the

tribunal has never had the funds to fully compensate for the damage done, and the quest for reparations for past injustices continues.

In 2014, in a landmark case of planetary activism, the Republic of the Marshall Islands filed the Nuclear Zero lawsuits at the International Court of Justice (ICJ) against nine states that currently possess nuclear weapons, seeking to hold them accountable for their failure to abide by the 1968 Nuclear Non-Proliferation Treaty (NPT), aiming to prevent the spread of nuclear weapons. The lawsuits demonstrate the moral imperative of the Pacific state to draw attention to the catastrophic consequences of the use of nuclear weapons and to support their prohibition.

During a research visit to the Marshall Islands in April 2017 for my project INTERPRT (Inter-Pacific Ring Tribunal), which aims to organize a series of ecocide tribunals as alternative platforms for Pacific-centered communities, I interviewed two of the main protagonists of the historical and contemporary legal challenges brought by the Marshall Islands: Tony deBrum, ambassador on climate change of the Republic of the Marshall Islands, who died on August 22, 2017, and Bill Graham, public advocate at the NCT from 1988 to 2009. Together they discuss how a Pacific Island state is attempting to defy empire, an effort that began in the atomic age but has taken a new turn with the advent of climate change. Many Pacific communities, including the Marshall Islands, are now facing the existential threat of rising sea levels, with the associated risk of losing their land and culture. It is climate change that gives an additional contemporary context to the unresolved environmental violence of nuclear testing in the Pacific Ocean. This interview took place in Majuro on April 6, 2017.

Nabil Ahmed: Both the NCT and the ICJ Nuclear Zero Lawsuits set a precedent for legal activism in the Pacific region and internationally. The ICJ lawsuit further helped revitalize the current debates around the demand for the elimination of all nuclear weapons. What are the parallels and differences between the two legal strategies?

Tony deBrum: The Marshall Islands brought the ICJ Nuclear Zero Lawsuits because of the parallels that the nuclear issue has with the impacts of climate change that we are all trying to grapple with now. However, there is a big difference between the mandate of the NCT and the ICJ case. The ICJ is a request for compliance with article VI of the NPT. We are saying you made a promise, we joined the treaty on the basis of that promise, and the promise has not been kept. Even as small countries, we have a voice in the nuclear disarmament

issue. In the case of the tribunal, what we try to bring to the forefront is the fact that the United States would not come clean with us on vital information that we needed in order to make informed decisions on how to proceed further with seeking reparations, having discovered that what was set aside as a fund for the tribunal to work with was grossly inadequate. Nevertheless, the ICJ lawsuits and the NCT do support each other. We should keep international attention on what the tribunal has done in spite of all the obstacles thrown in our way. It is really nothing short of amazing.

Ahmed: The Republic of the Marshall Islands remains one of the few countries to have sought financial compensation for health and environmental damage caused by the actions of the United States. What has led to its success, at least in terms of setting precedents and challenges? On what grounds was the Marshall Islands able to bring forward an attempt at legal redress against the United States?

Bill Graham: The Marshall Islands had a certain advantage over French Polynesia and other places where nuclear testing was done. Since it is a UN trust territory under the administration of the United States, the Marshall Islands has access to US courts. But before reaching any determination as to the ultimate political status of the trust territory and in particular to what the Marshall Islands district would be, they would need to have some settlement on the nuclear issues. The negotiations concluded in an agreement that was declared here in Majuro in June 1983, called the Section 177 Agreement. The Nuclear Claims Tribunal was established as part of that settlement agreement, but there were some major flaws in that agreement, to the advantage of the United States. The overall settlement agreement guaranteed a total of \$270 million in distributions, \$18 million per year for the fifteen-year period between 1986 and 2001. Of this sum, \$45.75 million was set aside for payment of compensation for the awards that were anticipated to be made by the tribunal. Over the course of seventeen years, from 1991 to 2008, the tribunal however awarded more than \$96 million in compensation, more than twice the amount that had been earmarked in the settlement agreement, to more than 2000 individuals. Unfortunately, because the funding wasn't there, it was able to pay only \$73 million out of the \$96 million awarded, so there's \$23 million still owed to more than 2000 individuals who received personal injury compensation. For the property damage claims the tribunal held very intense adjudicatory adversarial proceedings with the defender of the fund and the office of the tribunal, having the financial support necessary to hire its own experts, land valuation experts, and claimants bringing their attorneys and their experts.

Ahmed: What is the current mandate of the Nuclear Claims Tribunal since the funding was exhausted and the balance remains outstanding? The work of seeking justice is not done.

Graham: For the last five years the primary activity of the tribunal has been the scanning and digitization process. The national parliament and the national government of the Marshall Islands have recognized that closing that office sends a message, in particular to the US government, that looks like we are giving up. So nominally our office was kept open even before the records preservation project began in early 2012, with support from the parliament, to continue to accept people's claims for the record.

Ahmed: The Nuclear Claims Tribunal not only awarded personal-injury claims but also adjudicated land-rights claims. Aside from legal contexts and definitions of land as property, land also equates to culture, and loss of land is a cultural loss. What has been the cumulative impact of losing the right to live on their own land due to the protracted environmental violence committed in the Marshall Islands for the communities?

deBrum: Take Enewetak, for example. The United States claims that Enewetak has been cleaned up. But Enewetak has not been cleaned up. There were two clans, the Dri-Enewetak and the Dri-Enjebi, that occupied separate parts of that beautiful atoll for thousands of years. When the Americans were cleaning up Enewetak, they discovered that they could clean up only that part of the atoll where the Dri-Enewetak lived but that the Dri-Enjebi would be forever deprived of access to their homeland—and that literally means deprived—so that to this day Enewetak is still not resettled. The community of Bikini is forever split, and their homeland is still millions of light-years away from being resettled. We are not sure that we, as a government, can in fact be satisfied that allowing people to move back there would be prudent.

We have had the experience of moving people back before and getting them exposed to radioactivity. This decision seems to be motivated by an intense desire on the part of Brookhaven and Livermore Laboratories to study the effects of radionuclides on the human body and the passage of radionuclides through the human gut wall. So even during the time when it seemed that anthropological and medical attention was being paid to these displaced people, it was based on the desire of the United States to study them under what is known as Project 4.1.

Kwajalein is where the US military is testing missiles now, and its people have also been displaced. People from different islands have been evacuated and are no longer living on their homelands, and the community-

clan-chief relationship is not there anymore. Instead they share the rental as if it were a product of the land. This has replaced the traditional sharing and what kept communication and societal norms and customary duties in check. There have been many disruptions. This is not as easily measured as the physical destruction of the environment, but it is there.

Ahmed: There seems to be a cover-up of the public truth at work. Especially when taking into account the possible intentionality on the part of the US government and national laboratories in using Marshallese men, women, and children as radiological-impact test subjects. In fact, these were still weapons of war that were being tested in peacetime. Did anyone at any point consider attributing criminal responsibility to the US government? So it would be a question not of financial compensation for claims and not of compliance but of criminal responsibility?

deBrum: I think the Section 177 Agreement wipes out that possibility, because contractors of the United States would be covered under that espousal. But it did arise during the original discussion of the agreement, that not just the US military but also the Atomic Energy Commission and its contractors should be targeted. However, it has never been part of the thinking of those people who have represented the four atolls or of others to bring this up as a criminal issue. It was briefly discussed in the period just prior to the approval of the compact itself, by the Marshall Islands Atomic Testing Litigation Project, but was not followed up further by our government.

Ahmed: The Section 177 Agreement, why was it signed? Was there any opportunity to get out of it? How did it come to be that it was agreed upon?

deBrum: You have to remember that when we were talking about termination of trusteeship, unlike other former trust territories, Micronesia was a strategic trust and therefore subject to the veto of the Security Council. Any termination of that trust had to be approved by the Security Council, unlike the other ten trust territories, where only a resolution of the General Assembly was required, on recommendation of the trusteeship council. The United States had taken the position long before that it would prefer that these islands remain as close as possible, even having territorial status if possible, so as to guarantee that they would always be available for American use and that nobody else would use them.

Graham: Strategic denial.

deBrum: Strategic denial. It was at a time when we were all under pressure, the United States as well as the colonies. On our part there was pressure to seek independence; on the part of the United States there was pressure to divest. There was pressure from all sides. Our reasoning was that if it becomes really clear that the terms of the agreement are not adequate, we can always change it. That was something that our first president, Amata Kabua [1979–96], was convinced of by the American negotiators. The instructions were that it is better to have something that we can distribute to the people now rather than wait another hundred years. But I think the most important thing was that the United States stood behind us like a schoolmaster with an umbrella.

Graham: On a segment of the ABC TV program *Prime Time* called “Paradise Lost,” which aired in 1990, a reporter during an interview with Kabua asked basically the same question: “Why did you accept this settlement agreement?” Kabua, sitting in his office, replied, “When your big brother slaps you, what are you going to do? How can you fight back?”

Ahmed: Moving to the more recent ICJ case, it struck me that the Marshall Islands could leverage the international forum of the ICJ to mobilize (customary) international law to try to hold accountable some of the most powerful states over the use of nuclear weapons. It is truly a new configuration of what international law can try to achieve, whether it attains global justice or not.

deBrum: We have exhausted all other means of bringing the issue to the attention of the world. But why the ICJ? Because it was there and because at that point we had enough legal and financial resources pledged by mostly NGOs and individuals—no governments—to provide us with the legal and financial wherewithal to carry those out. Our ICJ issue is a compliance issue, and it’s one that says, Look, you are now planning to spend again trillions of dollars on the upgrade of nuclear weapons. With one side of your mouth you’re saying, “We believe there should be no more nuclear arms,” and at the same time you’re upgrading everything you’ve got to be able to annihilate the universe at the push of a button. That doesn’t make any sense, so we need for you to sit down and start talking about disarmament. Since we have a history of a nuclear legacy, we have a right and a standing to bring this before you.

Graham: If not the people of the Marshall Islands, who have suffered as a result of these weapons being detonated in their environment, who? If not now, when? How much longer should we wait before we bring to the attention of the world how devastating the consequences of the use of these weapons can be?

Ahmed: In facing such a powerful adversary, the people and the sovereign state of the Marshall Islands have continually shown tremendous courage, political maneuvering, and determination. The first nuclear-free and independent Pacific conference, held in Suva, Fiji, April 1–5, 1975, was a bellwether of popular resistance to the nuclear testing in the Pacific Ocean.

I want to move on to solidarity in the Pacific. What has been the history of solidarity when it comes to nuclear testing, given what has happened in the Marshall Islands, in French Polynesia, and then in sites of British nuclear testing in Kiribati and beyond? And what lies in the future?

deBrum: Very little, in terms of actual coordination between and among the populations that were most directly affected. Only recently have some things been surfacing about Christmas Island and the contamination of Kiribati. We knew about it, but nobody had actually put documentation and figures on it, until very recently. The Australia experience was never shared with anyone. We knew that they were testing there. We never knew much more than that. The Treaty of Rarotonga [1985], which set out to create a nuclear-free zone in the South Pacific, considered including us, but that was not formalized, as the United States had some reservations. The Pacific Forum has shown support but very little in terms of direct coordination.

Early on we tried to share information with Micronesia because we knew there were issues that they should have been involved in, for example, how much contamination affected Pohnpei. There were Micronesians working on cleanup projects on Enewetak and Bikini. They were subject to the same kind of exposure that many military and Marshallese workers were subjected to. So we tried to share that information with them as well.

I thought that there would be more coordination between Fiji, Kiribati, and the Marshall Islands around the contamination in Kiribati. I don’t think it’s going to be easy to reestablish contact with the people of French Polynesia. Guam and Saipan are now making noise about exposure, not just from the tests themselves but also from the wash-down of equipment, ships, and airplanes that could not be cleaned in Kwajalein and were therefore taken to Guam, where they didn’t tell the people what they were washing.

The representatives of the territories—including Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands—in the US Congress have always been our allies when it comes to that, and of course the majority of the Pacific Northwest and California and some of our Midwest communities have played a role in keeping the interest alive. Today we have a big problem with Congress, since people who have institutional memory of what happened here are long gone. It will be a matter for others to take up the issue in the future, to reeducate the people in the United States with whom we must continue to deal.

Graham: I think there's a gradual dawning on people that there is a greater need for solidarity throughout the Pacific on these issues, with anyone who has been affected or anyone who is willing to stand with those who were affected.

Ahmed: This brings me to my final question, on the nexus of the nuclear issues and climate change. Though conducted in peacetime, nuclear testing assigns a direct causality between perpetrator and victim. Climate change, in contrast, might seem more characteristic of a diffused causality, in which responsibility is not as easily assigned to one nation-state or another. At the same time it is also the diffused causality and the very real and existential threat that connects the struggles of coastal countries such as Bangladesh and small Pacific Island states such as the Marshall Islands. How do you see the relationship of the nuclear legacy—even though the word *legacy* seems misleading since it is by no means over—to rising sea levels. What is the relationship between the nuclear “past” and the current fight against climate change?

deBrum: First, the fact that we are affected already, that climate change is impacting us, is an existential problem for us, and it means survival. If we don't deal with it, we're gone. So we have a voice; we have a cause; we have a mandate. Second, we are of no threat to anybody, and we therefore have access and can gain an audience and exchanges with some of the most difficult characters in the climate-change arena: the Indians, the Chinese, the Americans. In the UN Framework Convention on Climate Change, within its jurisdiction, we formed what is known as the High Ambition Coalition, an alliance of one hundred countries pushing for a legally binding global deal on climate change, which we chair. This has been a crucial part of an extremely important period leading to the approval of the 2015 Paris Agreement.

The parallels between that and the nuclear issue are remarkable. As with the nuclear issue, we are affected, but we had nothing to do with the causes. The metropolitan powers that do have the key to resolving it also have the science and the resources to deal with it, but they lack the political will to take one more step over the line.

We also wanted to give the climate change issue a human face, which we have for the nuclear issue.

Graham: One of the affected areas from the US nuclear testing program is an island by the name of Runit, which contains more than a hundred thousand cubic yards of radioactive debris, soil, and other things that were scraped and removed from other islands and dumped in a crater created by the “Cactus” nuclear weapons test in 1958, known as the cactus crater, and covered with an eighteen-inch-thick concrete dome. The radioactivity is leaching through

the crater and into the lagoon. In late 2016, when the Marshall Islands government asked the US Department of Energy to assist in restricting access to Runit, it refused. This goes back to another area in the provision in the settlement agreement that says the United States can wash its hands of all responsibility for the affected areas. The United States is relieved of all responsibility, and the Marshall Islands is now and forever responsible for all of these affected areas.

deBrum: Bill and I, when I was still minister of foreign affairs, met with the United States on the nuclear issue. We asked, “Just how are you going to propose to examine for us if there is indeed a breach in Runit, and then how is that going to affect the rest of the atoll and the rest of the Marshalls, and the rest of the world, for that matter?” The response was very interesting, because they said, “Well, we've got all this equipment lined up; we're going to do bore drilling, but really, what we find in the dome is not that much different from what we find outside the dome.” So then I asked, “If that's the case, why did you build the dome in the first place?” His response was even stranger: “That's a very good question.”

Graham: Another implication of their response was that there is a huge ocean here. Whatever contaminated radioactive material exists in that dome, it could be totally breached, but it will dilute as it spreads out in the ocean, to the extent that it will have minimal impact on human life. Right, fine. It doesn't matter how much radioactivity is buried under that dome or how much it has leached into the lagoon already and from the lagoon into the ocean. You could take the whole thing and dump it anywhere you want; it will be diluted in a matter of weeks or months, and nobody will know any better.

deBrum: If the tide keeps rising, and if these nuclear tombs get inundated by saltwater and then those unholy places are breached, that may be an issue that is directly linked to the effects of climate change on small island communities.

Graham: The Marshall Islands is a canary in the coal mine when it comes to climate change. We are among the first to feel the effects, and if it continues to get worse, the rise in global sea levels could cause ecocide in and of itself.

Ahmed: Climate change is increasingly being recognized as an example of ecocide. Yet the challenge in demonstrating the responsibility of any particular state actor would be nearly impossible. So perhaps in order to establish criminal causality, we need to start with an easier case, one in which there's intentionality, a clearly identifiable perpetrator, and material evidence.

deBrum: And measurable damage.

Ahmed: Exactly, it is a strategic move. The work I'm doing is related to this. I am gathering evidence, particularly spatial evidence of environmental crimes, and proposing new forums for their presentation and for debate regarding political action.

Forensic evidence that has always been used by the state in criminal cases is increasingly used also to show environmental crimes. This bottom-up forensic practice is no longer the domain of the state but might involve the participation of civil society. It is also pushing law forward to expand what evidence might be admissible in future courts. Criminal accountability for environmental and climate-related crimes must address wider issues of environmental justice beyond economic remedies. I believe that, even though ecocide is not yet recognized in international law, these efforts can help test such a law and build awareness of the criminal responsibility in environmental crime and work against impunity.

Ecocide can also be the setting for applying the legal instrument of universal jurisdiction, which says that if a crime is universally recognized as among the worst of crimes in human society (genocide, crimes against humanity, war crimes, etc.), then it doesn't matter where the crime took place or who the perpetrator was; a criminal petition against the perpetrating parties can be submitted in a country where universal jurisdiction is recognized.

In other words, if it is possible to expand state and corporate accountability to include environmental crimes in international law, then this is a sort of a sea change for environmental justice. Lawmaking becomes an activist's tool. ≈

- 1) Compact of Free Association, section 177, as cited in 146 Cong. Record S8499 (September 13, 2000).

The interview was made possible through a research trip to the Marshall Islands supported by TBA21–Academy. The trip would not have been possible without the help of Senator J. Kalani English, Morean Watak, and Peter Anjain. I would like to thank Doreen deBrum, as well as Bill Graham for his comments.