

*Jodik:*  
A Creative Proposal for Seeking Justice  
through *Āneen Kio* (Wake Island)

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# I. *KADKAD IN* (INTRODUCTION)

*Jodik*: to invade; to land; to raid; to protest (modern).<sup>1</sup>

In Marshallese, *jodik* is the word many leaders use to describe the demonstrations staged by thousands of people from the late 1960s to the early 1980s at Kwajalein to protest the American use of the atoll without proper compensation

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<sup>1</sup> TAKAJI ABO ET AL., MARSHALLESE–ENGLISH DICTIONARY 130 (1976); GREG DVORAK, CORAL AND CONCRETE XXVI (2020). Unless otherwise noted, Marshallese language (including English translation and gloss) is my own. With respect towards the Marshallese Language Orthography (Standard Spelling) Act, 2010 P.L. 2010-4 (RMI) (requiring conformity with the new Marshallese orthography as set out by ABO ET AL.), for the ease of English readers I generally follow the convention of Dvorak in adopting a compromise between the “old” and “new” orthographies of the Marshallese Language (*kajin Majeļ*), using the older spellings for major place names and personal names, and the new orthography for specifically Marshallese (*Ri-Majeļ*) concepts, identities, and places. DVORAK, *supra*, at XIV. For this reason, I have opted to use *Āneen Kio*, what the *Opij eo an Kajin im Manit* (Customary Law & Language Commission) has confirmed to be the new orthography for the Marshallese name of Wake Island. Various spellings—including *Enen Kio*, *Enenkio*, *Enen-kio*, & *Eneen-kio*—have been employed in the past as the diacritics of the new orthography are often replaced by ad hoc spellings using more common characters. See ABO, ET. AL., *supra*, at IX-XI. The English “E” roughly approximates the sound of the Marshallese “Ā”.

for their land . . . [T]hese protests were meant in one way or another to be a counter-invasion that would give the Americans a taste of their own medicine. The *jodiks*<sup>2</sup> were never violent; in fact, they emulated many of the democratic tactics of free speech gleaned from the American civil rights movement . . . Always with the intention of protesting that they were not being properly compensated for the use of their land, starting in 1969 the landowners used civil-disobedience strategies like “sail-ins” and “sit-ins” in an attempt to get the attention of both Marshallese national leaders and American authorities who could improve the situation.<sup>3</sup>

Dr. David Hanlon, historian and former director of the University of Hawai‘i at Mānoa Center for Pacific Islands Studies, has warned against a simplistic reading of hegemony and domination in Micronesia; rather he urges the consideration of how Islanders have made sense of their “subjugation” under colonial rule in “creative and powerful ways.”<sup>4</sup> Whether in terms of nuclear testing or climate change, the tendency of writing off the Marshall Islands as nothing more than a tragic outcome, a “big mistake of colonialism,” results in painting *Ri-Majeļ* (Marshall Islanders),<sup>5</sup>

more and more like pitiful, passive victims who (even foolishly) put up with one misfortune after another, victims who, in the long run, only exist in the fatalistic . . . narrative to show “us” (in the “developed” world) the consequences of our mistakes so that we can “wise up” before we destroy ourselves.<sup>6</sup>

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<sup>2</sup> This is an anglicization of the Marshallese word to make it plural; whereas in English an “s” is added to a noun to change it from singular to plural, in Marshallese the determiner “*ko*” is added. See BYRON W. BENDER ET AL., MARSHALLESE REFERENCE GRAMMAR 185-86 (2016). In proper Marshallese, “*jodik*” (protest) becomes “*jodik ko*” (protests); like Dvorak, I adapt Marshallese words to become plural by adding an “s” when used in English sentences for the ease of English readers.

<sup>3</sup> DVORAK, *supra* note 1, at 208.

<sup>4</sup> *Id.* at 186 (quoting DAVID HANLON, REMAKING MICRONESIA: DISCOURSES OVER DEVELOPMENT IN A PACIFIC TERRITORY, 1944-1982 131 (1998) [hereinafter HANLON, DISCOURSES OVER DEVELOPMENT]).

<sup>5</sup> In Marshallese, adding the prefix “*ri-*” to a word adds the meaning “person from” or “person who.” ABO ET. AL., *supra* note 1, at 251. Thus *Kuwajleen* (Kwajalein Atoll) becomes *Ri-Kuwajleen* (person from Kwajalein) and *al* (to sing) becomes *ri-al* (person who sings, or singer).

<sup>6</sup> DVORAK, *supra* note 1, at 187.

Throughout the history of the Marshall Islands' interaction with *ri-pāles* (foreigners),<sup>7</sup> the coral atolls of the Central Pacific have been viewed by outsiders as little more than an afterthought.<sup>8</sup> Yet what Dvorak so powerfully argues about Kwajalein is true of the Marshall Islands writ large; they are not the middle of nowhere, they are the middle of “now” and “here”—“[t]hough [they] may sit amidst the vastest ocean on Earth, [these] atoll[s] h[ave] been a major intersection—if not an epicenter—of Oceania and indeed the whole world.”<sup>9</sup> Adopting a myopic and nihilistic view discounts *Ri-Majeļ* agency and the major role that the Republic of the Marshall Islands (“RMI”) has played in the international community since its independence. As has been recently written by three prominent Micronesian scholars:

[T]he Marshall Islands has proven again and again, and perhaps more spectacularly than any country on earth, that smallness is a state of mind. From securing global consensus in the lead-up to the Paris Agreement to suing the Nuclear Nine in the International Court of Justice to stewarding the Climate Vulnerable Forum, the Marshall Islands has given us so many reasons to be proud.<sup>10</sup>

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<sup>7</sup> This inauspicious history begins with Europeans deciding to name the *Rālik* and *Ratak* chains after the captain of a prison transport. FRANCIS X. HEZEL, *THE FIRST TAINT OF CIVILIZATION: A HISTORY OF THE CAROLINE AND MARSHALL ISLANDS IN PRE-COLONIAL DAYS* 64-65 (1983) [hereinafter HEZEL, *First Taint of Civilization*]. While there have been meager proposals to use the term *Lolelaplap* (which refers to the sea between the *Rālik* and *Ratak* Chains) as an indigenous replacement for the colonial moniker, there has never been a fixed term in the Marshallese language that encompasses all the atolls which today make up the RMI. Dirk H.R. Spennemann, *The Sea - The Marshallese World*, DIGITAL MICRONESIA-AN ELECTRONIC LIBRARY & ARCHIVE (Dirk H.R. Spennemann ed., 2000), <https://marshall.csu.edu.au/Marshalls/html/culture/SeaNavigation.html> [hereinafter Spennemann, *The Marshallese World*]. As such, I use the more familiar and widely used term “Marshall Islands.”

<sup>8</sup> This ideology dates back to the 19th century when La Société de Géographie in Paris branded them as “tiny islands” (Micronesia). DAVID HANLON, *MAKING MICRONESIA: A POLITICAL BIOGRAPHY OF TOSIWO NAKAYAMA* 16-17 (2014) [Hereinafter HANLON, *POLITICAL BIOGRAPHY OF TOSIWO NAKAYAMA*]. In the 20th century, Henry Kissinger infamously exclaimed, “[t]here are only 90,000 people out there. Who gives a damn?” WALTER J. HICKEL, *WHO OWNS AMERICA?* 208 (1971). Even in the 21st century, the U.S. Congress included the “Trust Territory of the Pacific Islands” rather than “Republic of the Marshall Islands” in the Real ID Act despite two decades of RMI independence prior to passage of the Act. See REAL ID Act Modification for Freely Associated States Act, H.R. 3398, 115th Cong. (2017).

<sup>9</sup> DVORAK, *supra* note 1, at 2.

<sup>10</sup> Katerina Teaiwa, Vicente M. Diaz & Julian Aguon, *Micronesian reflections on the state of Pacific regionalism*, NEW OUTRIGGER (Mar. 6, 2021), <https://thenewoutrigger.com/2021/03/06/micronesian-reflections-on-the-state-of-pacific-regionalism-2/>.

As Dvorak writes, the type of nihilism that so often obscures *Ri-Majeļ* creativity and power “would seem entirely to condemn the Marshall Islands as uninhabitable, worthless, futureless, just like land the U.S. military condemned throughout Kwajalein atoll in an effort to avoid paying for it.”<sup>11</sup> The *jodiks* of the *Ri-Kuwajleen*, who were displaced by the American military, are a “perfect example of [the] kind of creative diplomacy” described by Hanlon,<sup>12</sup> and have also provided a potential roadmap for the resolution of the dispute over *Āneen Kio*.

*Āneen Kio*, Wake Island, is a coral atoll in the central Pacific.<sup>13</sup> Although the atoll is geologically, climatically, and oceanographically the northernmost part of the Marshall Islands,<sup>14</sup> sovereignty over the atoll is disputed between the United States<sup>15</sup> and RMI. While the size of Wake is

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<sup>11</sup> DVORAK, *supra* note 1, at 188.

<sup>12</sup> *Id.* at 186.

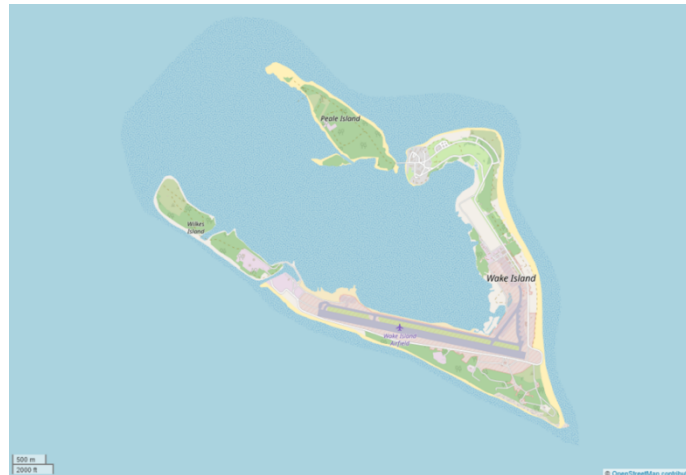
<sup>13</sup> Located at 19°18'N 166°38'E. Dirk H.R. Spennemann, *The United States Annexation of Wake Atoll, Central Pacific Ocean*, 33 J. PAC. HISTORY 239, 239 (1998) [hereinafter Spennemann, *Annexation of Wake*]. Generally, I use term the “Wake” to frame a western point of view and “*Āneen Kio*” to highlight a Marshallese viewpoint.

<sup>14</sup> A.R.G. Price & J.E. Maragos, *The Marshall Islands*, in SEAS AT THE MILLENNIUM: AN ENVIRONMENTAL EVALUATION: VOLUME II. 773-89 (C.R.C. Shepard ed., 2000).

<sup>15</sup> With the rapid imperial expansion of the United States of America at the dawn of the 20th century, some felt that “[t]he term ‘United States of America’ has ceased to be an accurate description of the countries over which the Stars and Stripes float . . . Like ‘United Kingdom,’ it applies merely to the central and dominating body, the seat of empire; and Greater America comprises almost as wide a range of governments as Greater Britain itself.” DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE* 74 (2019). I have generally adopted the convention of those turn of the century authors who felt that the term “United States” no longer captured the nature of their country in light of its ongoing colonial project that has aggrandized territory not destined for statehood. *See generally id.* at 73-87; *Boumediene v. Bush*, 553 U.S. 723, 757, 128 S. Ct. 2229, 2254 (2008) (discussing the judicial fiction of territorial incorporation, “under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.”); *See also* Susan K. Serrano, *Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL OF RTS. J. 501, 505 (2018) (discussing acceptance by the Federal Courts of a “twisted civil-rights paradigm that ignores the history of colonization and discounts the difference between concepts of equality and Indigenous self-determination”); Julian Aguon, *On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 UCLA ASIAN PAC. AM. L.J. 47, 64-65 (2010) (“[T]he United States, through the judicial branch, still cannot come up with a satisfactory legal justification for maintaining modern colonies—territories deemed not to be a part of the United States, but instead merely possessions of the United States. Compounding the interpretive violence done to the text of the U.S. Constitution in the name of the colonial enterprise is the psychic violence inflicted on folks who must find our way in a country that neither wants us nor wants to let us go.”). As such I use term “America” in place of the “United States” unless clarity dictates otherwise. Much like Dvorak, I feel my attempt

miniscule by Western standards, *Āneen Kio* accounts for a significant portion of the land “within the traditional boundaries of the archipelago of the Marshall Islands.”<sup>16</sup> This clash of perspectives is important to understand in framing the territorial dispute between the United States and Marshall Islands. To Americans it is insignificant, to *Ri-Majeļ* it is paradigmatic—“Land was, and still is, the fundamental basis of Marshallese culture and society.”<sup>17</sup>

Figure 1: *Āneen Kio* with Islet Names (English)<sup>18</sup>

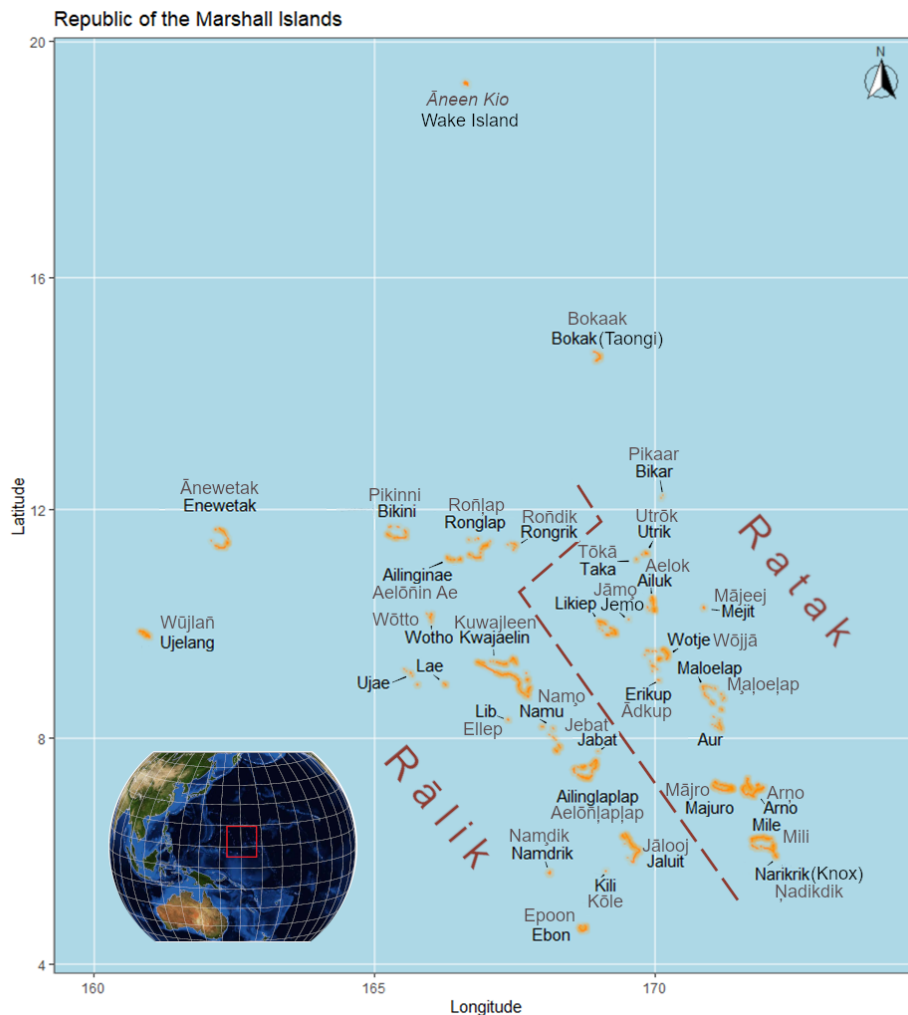


to balance multiple and contradictory American and *Ri-Majeļ* perspectives leaves me like “an *alap* (designated clan representative) with more than one *irooj* (chief).” See *supra* note 1, at 15. I have taken to heart the advice that “[Y]our job is to tell those different truths as you see them. You tell the truth the way you see it to all your chiefs—not because you dislike them, but because you *love* them.” See *id.*

<sup>16</sup> CONSTITUTION OF THE REPUBLIC OF THE MARSHALL ISLANDS art. X. § 1(4). In terms of relative land area, *Āneen Kio* accounts for a little more than four percent of the land in the Marshall Islands. See Dirk H.R. Spennemann, *Traditional and Nineteenth Century Communication Patterns in The Marshall Islands*, 4 MICR. J. HUMAN. & SOC. SCI 25, 26 (2005) [hereinafter Spennemann, *Traditional Communication Patterns*]. In relative terms this would be roughly equivalent to Hawai‘i losing Moloka‘i (4.06 percent, calculated from HAW. DEP’T BUS. ECON. DEV. & TOUR., Data Book 2014, <https://files.hawaii.gov/dbedt/economic/databook/2014-individual/06/060414.pdf>); Japan losing Iwate Prefecture (4 percent via Geog. Surv. Inst. Japan (2016), <https://www.gsi.go.jp/common/000136114.pdf>); Australia losing Victoria and Tasmania (3.9 percent via Geosciences Australia, *Land areas of States and Territories*, <https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories>), or America losing North and South Dakota (4.1 percent via U.S. Census Bur., *United States Summary: 2010* 43 <https://www.census.gov/prod/cen2010/cph-2-1.pdf>).

<sup>17</sup> Leonard Mason, *Tenures from Subsistence to Star Wars*, in LAND TENURE IN THE ATOLLS 4 (R.G. Crocombe ed., 1987).

<sup>18</sup> OPENSTREETMAP FOUNDATION, Standard Style Map, a produced work using

Figure 2: Map of the RMI<sup>19</sup>

The lack of attention to detail paid to this “epicenter of the whole world” may now be weaponized by the Marshall Islands if it is able to

OpenStreetMap data under the Open Database License.

<sup>19</sup> Created by the author. Robert J. Hijmans, Boundary, Marshall Islands, 2015. [Shapefile]; UC Berkeley Museum Vertebrate Zoology. ;<https://maps.princeton.edu/catalog/stanford-hz835sg3112>; SPC Statistics for Development Division, 2011\_Marshall\_Islands\_PHC\_Admin\_Boundaries. [Shapefiles] [https://pacificdata.org/data/dataset/2011\\_mhl\\_phc\\_admin\\_boundaries](https://pacificdata.org/data/dataset/2011_mhl_phc_admin_boundaries) ; RMI Ministry of Foreign Affairs, Declaration of baselines & Maritime Zones outer limits (2016) [https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mh1\\_mzn120\\_2016\\_2.pdf](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/mh1_mzn120_2016_2.pdf) ; NASA Earth Observations, BLUE MARBLE: NEXT GENERATION +TOPOGRAPHY AND BATHYMETRY (2004), <https://neo.gsfc.nasa.gov/view.php?datasetId=BlueMarbleNG-TB>.

leverage this carelessness into a cognizable claim under international law and access a forum where it can gain relief as it continues to seek justice. In Part I, this article explores the history of *Āneen Kio* and competing claims to sovereignty over Wake and the rest of the Marshall Islands. A careful reading of this history reveals that due to careless colonial administrations, Wake was inadvertently placed into the Trust Territory of the Pacific Islands (“TTPI”) following World War II. The TTPI, consisting of “the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations,” was created in 1947 by a resolution of the United Nations Security Council.<sup>20</sup> Part II of this article will show that, under international law, by establishing the boundaries of the TTPI through this incorporating reference, the Security Council failed to exclude Wake. This oversight has potentially ground shifting consequences for the RMI—the United Nations, through its Trusteeship Council,<sup>21</sup> and not the United States, should have ultimate jurisdiction over Wake Island. Part III explores how the RMI may bring its claim to *Āneen Kio* before the United Nations, and Part IV of this article further proposes how the creative diplomacy and *jodik* of the displaced landowners of Kwajalein Atoll may serve as a model for resolving the dispute over *Āneen Kio*. However, to understand *bwe ewōr an jimwe bwe en wōr an* (the claim), *jikin eo emman im ekkar* (the venue), or *wāween kajimwe jorrān ko* (the remedy), it is first crucial to understand *naan ko rōmool im jimwe* (the facts).

## II. NAAN KO RŌMOOL IM JIMWE (THE FACTS)

"Our landscapes and seascapes are . . . cultural as well as physical. We cannot read our histories without knowing how to read our landscapes (and seascapes)."<sup>22</sup>

### A. Jinoin Laḷ in (*The Beginning of this World*)

The Marshall Islands consist of thirty coral atolls and five low lying coral islands running in two parallel chains—the *Ratak* (sunrise) to the east and *Rālik* (sunset) to the west.<sup>23</sup> According to *Ri-Majeḷ bwebwenatos* (stories or legends), in the beginning there were four pillars which fell to

<sup>20</sup> S.C. Res. 21, art. 1 (Apr. 2, 1947).

<sup>21</sup> As discussed *infra* Part IV, as currently constituted, the Trusteeship Council is essentially indistinguishable from the Security Council.

<sup>22</sup> Epeli Hau‘ofa, *Pasts to Remember*, in REMEMBRANCE OF PACIFIC PASTS 466 (Robert Borofsky ed., open access ed. 2000).

<sup>23</sup> Robert C. Kiste, *Marshall Islands*, in ENCYC. BRITANNICA (2021), <https://www.britannica.com/place/Marshall-Islands> (counting 29 atolls by excluding *Āneen Kio*); Dirk H.R. Spennemann, *Information on individual atolls*, DIGITAL MICRONESIA-AN ELECTRONIC LIBRARY & ARCHIVE (Dirk H.R. Spennemann ed., 2000), <https://marshall.csu.edu.au/Marshalls/html/atolls/geography.html> (counting 30 atolls by including *Āneen Kio*).

create the eastern, southern, western, and northern skies.<sup>24</sup> Then there appeared two men from the sky, one was named Ȫowa, who made the islands, reefs, rocks, land, and people with his voice.<sup>25</sup> The other man, ȪōmȪal, created the sea with his voice, as it flowed out to the east, south, west, and finally north.<sup>26</sup> Like many Pacific people, *Ri-MajeȪ* did not view the sea as a barrier, but a unifying force.<sup>27</sup> The *Ri-MajeȪ* world—the ocean and atolls within it—was divided into at least six sections surrounding a central marine area called ȪoȪeȪapȪap.<sup>28</sup> The northernmost of these divisions was *Joiiaenkan*,<sup>29</sup> a place “rippling with seamounds, geysers, fish-gathering swells and gyres, and continuously emerging, submerging, and re-emerging islets,”<sup>30</sup> that contained *Āneen Kio*.<sup>31</sup>

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<sup>24</sup> JACK A. TOBIN, STORIES FROM THE MARSHALL ISLANDS 11 (2002).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

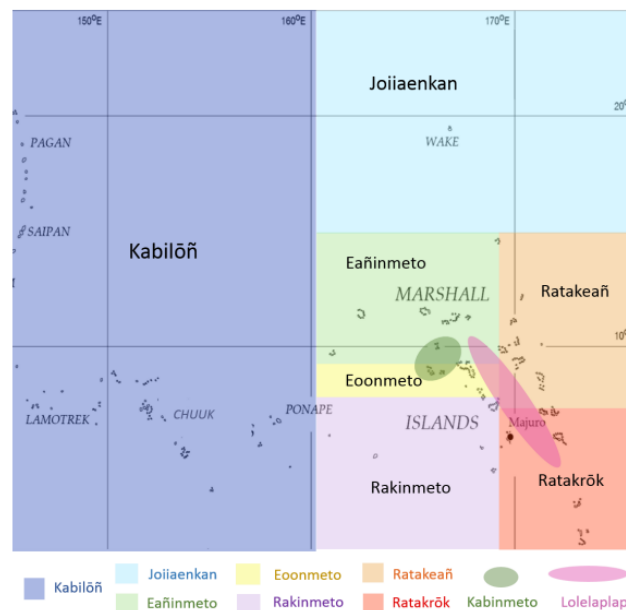
<sup>27</sup> See Epeli Hau‘ofa, *Our Sea of Islands*, 6 CONTEMP. PAC. 148, 153 (1994); cf. Constitution of the Federated States of Micronesia, pmbl. (“The seas bring us together, they do not separate us.”).

<sup>28</sup> Spennemann, *The Marshallese World*, *supra* note 7, at 37; Ingrid A. Ahlgren, *The Meaning of Mo: Place, Power, and Taboo in the Marshall Islands* 62 (2016), <http://hdl.handle.net/1885/116113> (Ph.D. thesis, Australian National University). To be sure, *Ri-MajeȪ* possess “a number of alternative indigenous ways of dividing the land, sea and sky, and at both broad and fine scales.” *Id.*

<sup>29</sup> This seems to be the spelling in the old orthography; unfortunately, this lack of diacritics somewhat obscures the meaning of the word, and the Marshallese-English Dictionary contains no definition. See generally ABO ET AL., *supra* note 1. A possible etymology may be “ȪȪ” (at) “eān” (north) “kaȪ” (those things close to neither of us); or “at those far northern [places].”

<sup>30</sup> Ahlgren, *supra* note 28.

<sup>31</sup> Spennemann, *The Marshallese World*, *supra* note 7.

Figure 3: Division of the *Ri-Majeļ* World<sup>32</sup>

The current consensus of modern geologists is that the Marshall Islands first emerged as high volcanic islands 70-80 million years ago, and over millennia, the volcanic islands slowly subsided while coral reefs along the shoreline grew.<sup>33</sup> True atolls eventually formed, with a reef enclosing a central lagoon, leaving only the coral islands and islets that had been deposited along the reef.<sup>34</sup> Modern radiocarbon dating suggests the Austronesian speaking voyagers who are the ancestors of today's Marshallese population had reached the *Rālik* and *Ratak* chains by at least 2,000 years before present, likely having sailed north from Vanuatu and the Solomons.<sup>35</sup>

*Āneen Kio* consists of three islets comprising 2.85 square miles of land; this accounts for about four percent of the land area in the Marshalls.<sup>36</sup>

<sup>32</sup> Reproduced from Ahlgren, *supra* note 28 at 63. Part of ANU Open Access Theses made available under a Non-Exclusive Distribution License.

<sup>33</sup> James P. Terry & Randolph R. Thaman, *Physical Geography of Majuro Atoll and the Marshall Islands*, in *THE MARSHALL ISLANDS ENVIRONMENT, HISTORY AND SOCIETY IN THE ATOLLS* 1, 5 (James P. Terry & Frank R. Thomas eds., 2008).

<sup>34</sup> *Id.* at 5-6.

<sup>35</sup> Michiko Intoh, *Human Dispersals into Micronesia*, 105 *ANTHROPOL. SCI.* 15, 15-28 (1997).

<sup>36</sup> See Spennemann, *Traditional Communication Patterns*, *supra* note 16. While four percent sounds insignificant, only four states in the Union account for more than four percent of the total land area of the United States. U.S. Census Bureau. *Id.*

Although Wake is geologically, climatically, and oceanographically a part of the Marshall Islands,<sup>37</sup> it is often excluded from discussion of the Marshall Islands by English language sources. This obscures the physical proximity of *Āneen Kio* to the other atolls in the *Rālik* and *Ratak* chains; it lies approximately 340 miles north of the undisputed Marshallese territory of Bokak Atoll, and north of the irradiated Bikini and Enewetak atolls by 520 and 600 miles respectively.<sup>38</sup> Due to a lack of reliable rainfall or ground water, Wake was seen as an unappealing site for permanent settlement by both Micronesians and *ri-pālles* prior to the 20th century.<sup>39</sup> The human history of Wake begins with *bwebwenatoon etto* (legends or oral histories) where *Ri-Majeļ* told of voyages, prior to European contact, to *āne eñ kio* (“island of the kio flower”).<sup>40</sup> While oral traditions vary by atoll regarding the ritual importance of the voyages, scholars seem to agree that for pre-European contact *Ri-Majeļ*, *Āneen Kio* was a source of seabird feathers, the rare kio flower, and the prized wing bones of the albatross from which *kein eo* (tattooing chisels) could be made.<sup>41</sup> “Bringing these items to the home atolls implied that the navigators had been able to complete the feat of finding the atoll using traditional navigation skills of stars, wave patterns and other ocean markers.”<sup>42</sup> According to Dwight Heine<sup>43</sup> and his co-author, under the *Ri-Majeļ* land tenure system *Āneen Kio* has always been claimed by the *Irooj* (chief) of the northern *Ratak* chain.<sup>44</sup> *Āneen Kio* was treated

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<sup>37</sup> Price & Maragos, *supra* note 14.

<sup>38</sup> Calculated using *Latitude/Longitude Distance Calculator*, NAT’L HURRICANE CTR. AND CENT. PAC. HURRICANE CTR., <https://www.nhc.noaa.gov/gccalc.shtml>; latitude and longitude taken from Spennemann, *Traditional Communication Patterns*, *supra* note 16. The distance between Bokak and *Āneen Kio* has additional significance under the Law of the Sea because when all the islands claimed by a country are within 400 miles of another island claimed by that country it results in a continuous exclusive economic zone. See Sherry Broder and Jon Van Dyke, *Ocean Boundaries In The South Pacific*, 4 U. Haw. L. Rev. 1, 24 (1982); U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Part V [hereinafter UNCLOS]; *infra* Figure 8, note 497.

<sup>39</sup> Dirk H.R. Spennemann, *The Wreck of the Libelle and other early European Visitors to Wake Island*, 4 MICR. J. HUMAN. & SOC. SCI. 108, 108-9 (2005) [hereinafter Spennemann, *Wreck of the Libelle*].

<sup>40</sup> Dwight Heine & Jon A. Anderson, *Enen-kio Island of the Kio Flower*, 14 MICR. REP. 34, 34-37 (1971). *Kio* means “orange” in *kajin Majeļ*.

<sup>41</sup> Spennemann, *Wreck of the Libelle*, *supra* note 39, at 108.

<sup>42</sup> *Id.*

<sup>43</sup> Heine was the first Micronesian to graduate from an American university and held various positions including president of the Marshall Islands Congress, speaker of the Congress of Micronesia, District Administrator of the Marshall Islands, and special consultant to the Trust Territory High Commissioner. Floyd K. Takeuchi, *Dwight Heine, Micronesian leader, dies at 65*, Honolulu Advert., Nov. 17, 1984.

<sup>44</sup> This area includes the atolls of Aur, Maloelap, Wotje, Ailuk, and Utrik. Heine

like the other uninhabited northern atolls which

[W]ere never divided up among the people, with a lot of small land claims, as is true of the inhabited islands of the Marshalls. Instead, they are reserved—like a game preserve—for turtles and sea birds, and are considered a source of food. They belong to the chief, meaning that they belong to all of the people.<sup>45</sup>

These *āneenbao* (bird islands) were considered *m̧* (taboo) land, forbidden to anyone but the *Irooj* or those they authorized.<sup>46</sup>

#### B. *E Waļ̧k Ri-Pālle (Foreigners Appear)*

Sixteenth century Spanish sailors were likely the first Europeans to see the *Rālik* and *Ratak* chains (including *Āneen Kio*)<sup>47</sup> and Spain was the first European power to claim these islands.<sup>48</sup> Yet curiously, both Wake and the Marshall Islands bear the name of the Englishmen who were credited with their “rediscovery”—John Marshall (1788)<sup>49</sup> and William Wake (1792).<sup>50</sup> One historian notes that, while well known to American whalers, Wake never became a major port of call likely because of its lack of water

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& Anderson, *supra* note 40, at 35. The nature of the claims of others with traditional ties to *Āneen Kio*—such as *Ri-Pikinni*—are less clear. See Wendie McAllaster and Joy Davidson, *Historic American Landscapes Survey: Wake Island*, HALS No. UM-1 9 (2011) <http://lcweb2.loc.gov/master/pnp/habshaer/um/um0000/um0061/data/um0061data.pdf> (referencing unpublished Spennemann report reviewing Marshallese oral traditions of voyages to *Āneen Kio* originating from Lae, Namorik, and Bikini). The title of *Irooj* is held by men, however the *Ri-Majel* system of inheritance for *jowi* (clan membership) and land rights is matrilineal. J.E. Tobin, *Land Tenure in the Marshall Islands*, 11 ATOLL RES. BULL. 1, 5-6 (1952). Thus, the *Irooj* title and land rights are usually passed down the *bwij* (matrilineal lineage) to men who act like a “trustee.” Women hold the title of *Lerooj* and are very powerful chiefs in their own right, as the position affords them “tremendous power” to negotiate on “behalf of her matriline.” DVRORAK, *supra* note 1 at 86; see also note 463 *infra* discussing the central role of women in *manit in Majel*. When referring to a group, I use *Irooj* to include *Lerooj*, especially in the case of Kwajalein and the late *Lerooj* Likwor Litokwa.

<sup>45</sup> Heine & Anderson, *supra* note 40, at 35.

<sup>46</sup> Tobin, *Land Tenure in the Marshall Islands*, *supra* note 44, at 12, 23-24 (1952).

<sup>47</sup> HEZEL, FIRST TAINT OF CIVILIZATION, *supra* note 7, at 17; Spennemann, *Wreck of the Libelle*, *supra* note 39, at 109.

<sup>48</sup> Spain’s claims in the Pacific were legion, beginning with Balboa purporting to claim the entire Pacific Ocean and all adjoining lands. See Franz Lidz, *Tracking Balboa*, 44 SMITHSONIAN INST. 32, 32-36 (2013). The most plausible basis for a Spanish claim on the Marshalls is likely rooted in the 1529 Treaty of Zaragoza concluded with Portugal. See Jean Brown Mitchell, *European Exploration*, in ENCYC. BRITANNICA (2020), <https://www.britannica.com/topic/European-exploration>.

<sup>49</sup> HEZEL, FIRST TAINT OF CIVILIZATION, *supra* note 7, at 64.

<sup>50</sup> Spennemann, *Wreck of the Libelle*, *supra* note 39, at 109.

and its treacherous reefs.<sup>51</sup> The first detailed descriptions and map of Wake were made by an American Exploring Expedition under Commander Charles Wilkes in 1840.<sup>52</sup>

The Marshalls were among the last places in Micronesia where Europeans gained a permanent foothold and, as late as the 1850s, were regarded as dangerous territory.<sup>53</sup> It wasn't until the introduction of Christianity in 1857, and the concomitant decrease in traditional cultural practices, that a permanent European trading presence was established in the *Rālik* chain.<sup>54</sup> Nowhere was it truer that "[t]he missionary is the merchant's pioneer" than in the Marshalls.<sup>55</sup> Thanks to missionary schools and the labor of Hawaiian missionaries, the rapid spread of Christianity paved the way for German trading companies to obtain a virtual monopoly on trade in the *Rālik* and *Ratak* chains.<sup>56</sup> At the urging of German traders, a newly unified Germany signed a Treaty of Friendship with the *Iroojlaplap* (Paramount Chief) of the *Rālik* Chain in 1878.<sup>57</sup> With the spread of Christianity,<sup>58</sup> foreign influence, and an increased reliance on foreign trade goods, regular voyages by *Ri-Majeļ* to *Āneen Kio* ceased around the mid-eighteen hundreds.<sup>59</sup>

### C. *E Jutak Bōļeak an Ri-Jāmane (The German Flag is Raised)*

The rapidly expanding empire of Germany first clashed with the declining Spanish empire, and the two European powers were brought to

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<sup>51</sup> *Id.* at 111.

<sup>52</sup> Despite bald faced assertions by various early 20th century authors, there is no evidence to support a claim that Wilkes formally annexed Wake on behalf of the United States. *Id.* at 112. Furthermore, when officially articulating its claim to Wake, the U.S. State Department did not rely on the actions of Wilkes. *See infra* note 164 and accompanying text.

<sup>53</sup> This was for good reason. There had been more attacks on ships and shore parties in the Marshalls than in the Palau, Yap, Chuuk, and Pohnpei groups combined. HEZEL, *FIRST TAINT OF CIVILIZATION*, *supra* note 7, at 200. The sentiment of *Iroojlaplap* Kaibuke of *Rālik Rak* (southern *Rālik* chain)—who swore that he would kill all the *ri-pālle* he could out of revenge for an older brother—seems to have been rather representative. *Id.*

<sup>54</sup> *See id.* at 197-226.

<sup>55</sup> *Id.*

<sup>56</sup> For example, the Hanover-born Adolph Capelle became the father of the copra industry in Micronesia; Capelle married the daughter of an *Irooj*, and his company eventually purchased Likiep Atoll outright. *Id.* at 212-26.

<sup>57</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 239.

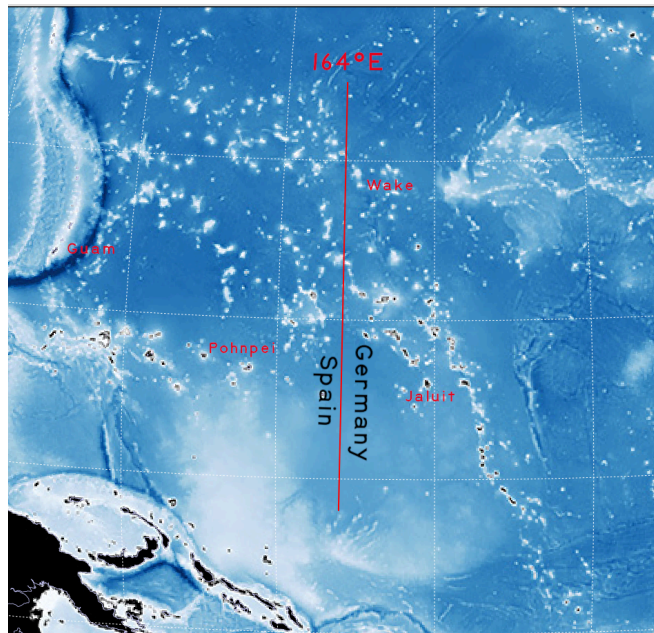
<sup>58</sup> Including a related decrease in *eo* (tattoo) and other traditional practices. *See e.g.*, Heine & Anderson, *supra* note 40, at 35.

<sup>59</sup> *Id.*

the brink of war over their competing territorial claims in Micronesia.<sup>60</sup> While Spain purported to claim all of Micronesia by virtue of the 1529 Treaty of Zaragoza and claims made by its sailors, it did virtually nothing to oppose the increasing influence of Germany in the Marshalls; however, for over 300 years, Spain viewed the Caroline Islands (“Carolines”) as an integral part of the Spanish Empire.<sup>61</sup> In early 1885, Germany seemed poised to formally annex the Carolines along with the Marshalls, and the backlash was as swift and harsh as it was unexpected—when news broke that the German flag had been raised over Yap, tens of thousands of angry Spaniards took to the streets across Spain.<sup>62</sup> Rioters in Madrid stormed the German embassy.<sup>63</sup> Chancellor Otto van Bismarck quickly reevaluated the situation, stating, “They are not worth it. The islands would not repay one week of preparation for war.”<sup>64</sup>

In September of 1885, the Kaiser and the King of Spain requested that the Pope arbitrate the dispute over Micronesia.<sup>65</sup> The final agreement, signed at the Vatican on December 17th, 1885, resulted in Spain selling all its rights to islands east of the 164th meridian east, including Wake, to Germany.<sup>66</sup> This was a mere formality as it related to the Marshalls, as evidenced by the treaty of annexation between the German Empire and five *Irooj* from the *Rālik* chain signed two months before the Vatican agreement.<sup>67</sup> The treaty was later acceded to by the eleven *Irooj* of the *Ratak* chain.<sup>68</sup>

Figure 4: The 164th Meridian East<sup>69</sup>



<sup>69</sup> Created by author using NASA Goddard Institute G.Projector; NASA visible

In an attempt to further legitimize its de facto and de jure claim to the Marshalls, Germany sought an agreement with Great Britain, the world's greatest naval power.<sup>70</sup> The 1886 declaration between the two governments recognized each other's respective spheres of influence, drawing a line of demarcation between Mili and Buitaritari atolls at roughly a 45-degree angle that turned north at the 173rd meridian east,<sup>71</sup> with Wake again falling on the German side of the line.

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earth Bathymetry (2005) <https://visibleearth.nasa.gov/images/73963/bathymetry/739641>.

<sup>61</sup> *Id.* at 306. It is difficult to find terms that are both devoid of colonial connotations and avoid anachronistic references to modern entities foreign to the indigenous conceptualization of the region. *Las Islas Carolinas* were named for Spain's Carlos II; the "Carolines" encompass the island groups of Palau, Yap, Pohnpei, Chuuk, and Kosrae. *Id.* at 47.

<sup>62</sup> *Id.* at 309-11.

<sup>63</sup> The rioters stole the German coat of arms, broke out the windows, and left graffiti on the walls. *Id.* at 311.

<sup>64</sup> *Id.* at 311-12.

<sup>65</sup> HEZEL, FIRST TAINT OF CIVILIZATION, *supra* note 7, at 312.

<sup>66</sup> *Id.* at 312-13; U.S. STATE DEP'T, *Papers Relating to the Foreign Relations of the United States*, 1886 776-778 (1887), <https://heinonline.org/HOL/P?h=hein.forrel/frusgc0002&i=846>; Spennemann, *Annexation of Wake*, *supra* note 13, at 239 (Providing English interpretation of Protocol between the German Empire and the Kingdom of Spain, Dec. 17, 1885).

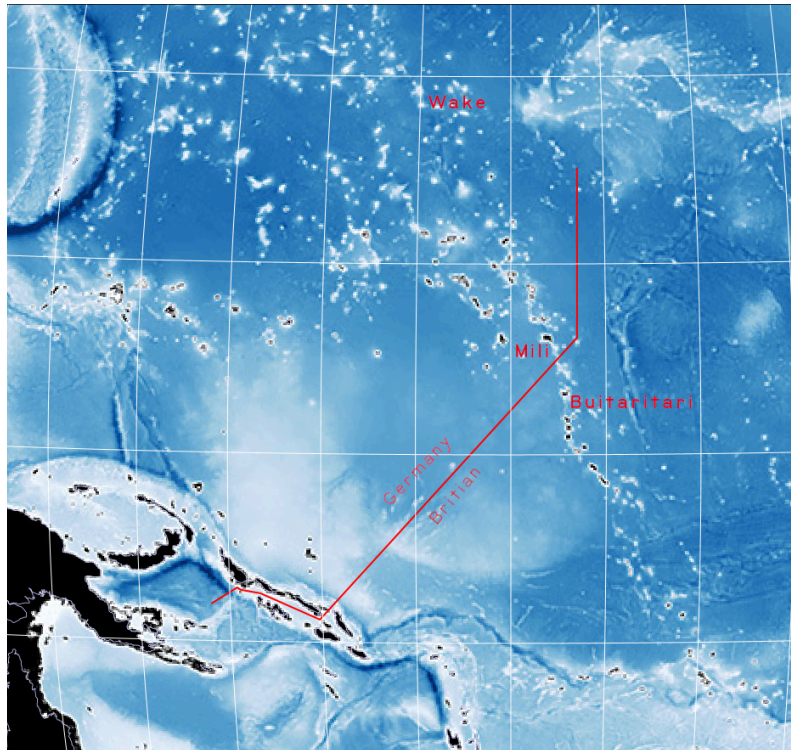
<sup>67</sup> Treaty of friendship between the Marshallese chiefs and the German Empire, Oct. 15, 1885, Auswärtiges Amt, Kolonial-Abteilung [Foreign Office, Colonial Department] (Original German and Marshallese text, with English translation available at: <http://marshall.csu.edu.au/Marshalls/html/history/Treaty1885.html>). While the treaty was billed as a treaty of "friendship," it provided that the *Iroojs* "will not provide any part of their land to any foreign power without permission by His Majesty, the German Emperor, nor will they enter into treaties with foreign powers without prior permission by His Majesty, the German Emperor." *Id.* § 2. Furthermore, a treaty of friendship had already been signed in 1878. *See supra* note 57 and accompanying text.

<sup>68</sup> *Id.* § 7. This included the *Iroojs* of Maloelap and Aur—Murijel, Lebaia, and Lebukin—who likely claimed *Āneen Kio* as part of *Ratak Eañ* (Northern *Ratak*). *See infra* note 76 and accompanying text.

<sup>69</sup> Created by author using NASA Goddard Institute G.Projector; NASA visible earth Bathymetry (2005) <https://visibleearth.nasa.gov/images/73963/bathymetry/739641>.

<sup>70</sup> Richard G. Brown, *Germany, Spain, and the Caroline Islands, 1885-1899* 151 (1976) (Ph.D. thesis, University of Southern Mississippi) (Accessed via ProQuest Dissertations & Theses Global).

<sup>71</sup> It is precisely a line between 8°50'S, 159°50'E; 6°N, 173°30'E; and 15°N, 173°30'E. Declaration between the Governments of Great Britain and the German Empire

Figure 5: The Line Demarcating German and British Spheres of Influence<sup>72</sup>

In 1888, the German colonial government purported to assume ownership over the real property on all ‘uninhabited’ islands in the Marshalls, with the exclusive rights to economic exploitation granted to the Jaluit *Gesellschaft* (Jaluit Company) as a perpetual lease.<sup>73</sup> As the Jaluit Company had accepted the responsibility for administering the Marshalls Protectorate<sup>74</sup> this resulted in it essentially deeding the entirety of Bokak and Bikar atolls to itself.<sup>75</sup> However as Spennemann has argued,

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relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific, Apr. 6, 1886, 77 BSP 42.

<sup>72</sup> Created by author using NASA Goddard Institute G.Projector; NASA visible earth Bathymetry (2005) <https://visibleearth.nasa.gov/images/73963/bathymetry/73964/>; latitude and longitude from Declaration *supra* note 71.

<sup>73</sup> Dirk H. R. Spennemann, *Japanese poaching and the enforcement of German Colonial Sovereignty in the Marshall Islands*, 33 J. PAC. HIST. 51-67, 53 (1998) [hereinafter Spennemann, *German Colonial Sovereignty*].

<sup>74</sup> HEZEL, *First Taint of Civilization*, *supra* note 7, at 305-6; see also Agreement between the Jaluit-Gesellschaft and the Reich, Jan. 21, 1888, translated in DIGITAL MICRONESIA-AN ELECTRONIC LIBRARY & ARCHIVE (Dirk H.R. Spennemann ed., 2000) <http://marshall.csu.edu.au/Marshalls/html/history/JaluitContract.html> (agreement between Jaluit Company & Foreign Office).

<sup>75</sup> Spennemann, *German Colonial Sovereignty*, *supra* note 73, at 53. The fact that

German commercial ownership of these islands was tenuous at best. Bikar. . . had been bought by A. Capelle & Co. from the chiefs (*irooj*) Jurtaka and Jocular of Maloelap effective 27 Jan. 1880 and from the chiefs Ladjike and Tanura of Utirik effective 19 Jan., thereby recognising the multiple rights to the atoll and its resources. The property was then transferred on 18 Dec. 1883 from Capelle & Co. to [D.H.P.G.]. Despite the sale of the land, the property documents expressly allow the people from Uterik (and Maloelap) to go to Bikar to catch turtles and to collect birds eggs.<sup>76</sup>

There are multiple recorded accounts of *Irooj*s from *Ratak Eañ* exercising their rights to harvest in the northern atolls in the face of the Jaluit Company's claim to exclusive rights.<sup>77</sup> According to Tobin, the *Iroojlaplaps* of the *Ratak* chain have maintained that the German claims were invalid because they held personal title to Bikar and Bokak as *mō* land.<sup>78</sup>

The Spanish-American War saw the complete collapse of the Spanish Empire and a subsequent agreement that Germany would purchase from Spain all of its territorial claims in the Pacific that were not ceded to America in the 1898 Treaty of Paris.<sup>79</sup> As the island of Guam was the only island ceded to America from Spain's holdings in Micronesia,<sup>80</sup> the result was that at the end of 1898 the entirety of the Marshalls, including Wake,

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the Jaluit company did not execute a deed to Wake does not necessarily negate the German claim to sovereignty over it, other "uninhabited" locales such as Jemo Island and Erikup Atoll remained firmly within the protectorate without being deeded to the Jaluit company. See Spennemann, *Foreign Land holdings in the German Marshall Islands*, DIGITAL MICRONESIA-AN ELECTRONIC LIBRARY & ARCHIVE (Dirk H.R. Spennemann ed., 2000), <http://marshall.csu.edu.au/Marshalls/html/german/property.html>.

<sup>76</sup> Spennemann, *German Colonial Sovereignty* *supra* note 73, at 61 n. 44.

<sup>77</sup> See e.g., *id.* at 54 (discussing *Iroojlaplap* Labareo sending a group to Bokak Atoll to collect birds, feathers, and eggs in the absence of any reservation of gathering rights in the Jaluit Company's deed). Furthermore, when Labareo learned Japanese bird hunters were on Bokak, he attempted to dispatch a delegation aboard his *wa* (sailing vessel) to exert his traditional authority over the atoll's resources but was stymied by the German district administrator. *Id.* at 55.

<sup>78</sup> Tobin, *Land Tenure in the Marshall Islands*, *supra* note 44, at 12.

<sup>79</sup> FRANCIS X. HEZEL, STRANGERS IN THEIR OWN LAND: A CENTURY OF COLONIAL RULE IN THE CAROLINE AND MARSHALL ISLANDS 94-95 (1995) [hereinafter HEZEL, STRANGERS IN THEIR OWN LAND].

<sup>80</sup> Treaty of Peace (Treaty of Paris), Sp. U.S., Dec. 10, 1898, 30 Stat. 1754.

was unequivocally in German possession in the eyes of Spain, Great Britain, and Germany.<sup>81</sup>

Figure 6: Inset from the German Colonial Atlas showing Wake as part of the Marshall Islands Protectorate (Schutzgebietes)<sup>82</sup>



While Germany eventually obtained most of Spain's colonial possessions in the Pacific without recourse to war, it soon found itself in a proxy war with America over its expanding Pacific empire.<sup>83</sup> What has come to be known as the Second Samoan Civil War saw rival Samoan factions backed by imperial powers vying for control of the Samoan

<sup>81</sup> For instance, Wake was included as part of the Marshalls in Langan's German Colonial Atlas. See PAUL LANGHANS, DEUTSCHER KOLONIA-ATLAS 30 (1897) (available at <https://www.davidrumsey.com/luna/servlet/s/670rc8>).

<sup>82</sup> Id. at 81.

<sup>83</sup> Holger Droessler, *Colonialism by Deferral: Samoa Under the Tridominium, 1889-1899*, in RETHINKING THE COLONIAL STATE, 33 POLITICAL POWER AND SOCIAL THEORY 203-224, 209 (Søren Rud & Søren Ivarsson eds., 2017).

archipelago.<sup>84</sup> After the shelling of the German Consulate<sup>85</sup> and the landing of Anglo-American Troops to support their proxies,<sup>86</sup> a ceasefire was reached on May 13, 1899<sup>87</sup> with a subsequent peace treaty dividing Samoa between Germany and America.<sup>88</sup>

#### D. *A Brief American Interjection*

Following the Spanish-American War, the illegal overthrow of the Kingdom of Hawai‘i, and earlier machinations of seizing control of Samoa falling into place, America was poised to enter the 20th century as an imperial power and was in need of lines of communication and transportation across the Pacific.<sup>89</sup> Several American military ships that stopped at Wake while en route to the Philippines in the interlude between the wars with Spain and the Philippines<sup>90</sup> purported to “claim” the atoll; of

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<sup>84</sup> The precipitating event was the death of the ruler of Samoa, Malietoa Laupepa. DAVID RUSSELL LAWRENCE, *THE NATURALIST AND HIS "BEAUTIFUL ISLANDS": CHARLES MORRIS WOODFORD IN THE WESTERN PACIFIC* 164–168 (2014). Malietoa’s rule had been restored as a compromise supported by America, Germany, and Britain to end the First Samoan Civil War a decade prior. *Id.* His rival and challenger to the throne, Mata‘afa Iosefo, was returned from exile in the Marshall Islands aboard a German warship. Joseph Waldo Ellison, *The Partition of Samoa: A Study in Imperialism and Diplomacy* 8 PAC. HIST. REV. 259, 265 (1939). Both Malietoa and Mata‘afa spent time living in exile in the Marshall Islands before ascending to the throne, PATRICIA O'BRIEN, *TAUTAI: SAMOA, WORLD HISTORY, AND THE LIFE OF TA'ISI O. F. NELSON* 13 (2017), lending credence to the argument that the Marshalls have been at the epicenter of Oceania and the “whole world.” Dvorak, *supra* note 9, at 2 and accompanying text. Mata‘afa arrived from Jaluit at Apia on September 17, 1899. ROBERT MACKENZIE WATSON, *HISTORY OF SAMOA* 105 (1918). On January 1, 1899, Samoan troops backed by Germany began fighting in the streets of Apia against Loyalists supported by Britain and America. GEORGE C. KOHN, *DICTIONARY OF WARS* 479–80 (3d ed., 1986); O'BRIEN, *supra* at 15 (stating that Mata‘afa was declared ineligible to be king by a European court on the final day of 1898).

<sup>85</sup> During the Siege of Apia in March of 1899, American and British warships shelled positions controlled by German sympathizers; whether shelling the German consulate was intentional remains unclear. MALAMA MELEISEA, *THE MAKING OF MODERN SAMOA* 41 (1987); WILLIAM LAIRD CLOWES, *THE ROYAL NAVY: A HISTORY FROM THE EARLIEST TIMES TO THE PRESENT* 7, 457–59 (1903).

<sup>86</sup> John P. Mains & Louis Philippe McCarty, *The United States*, 23 STATISTICIAN & ECONOMIST 249 (1906); KOHN, *supra* note 84.

<sup>87</sup> KOHN, *supra* note 84.

<sup>88</sup> 31 Stat. 1878; TS 314; 1 Bevans 276. Britain surrendered any claim to Samoa in exchange for German recognition of its claims in Tonga and the Solomons. KOHN, *supra* note 84.

<sup>89</sup> See Spennemann, *Annexation of Wake*, *supra* note 13, at 241–42; Williamson B.C. Chang, *Darkness over Hawai‘i: The Annexation Myth Is the Greatest Obstacle to Progress*, 15 ASIAN PAC. L. & POL’Y J. 70 (2015).

<sup>90</sup> This portion of U.S. history is often overlooked. See generally IMMERWAHR, *supra* note 15, at 88–107. The Moro Rebellion, which was part of the larger Philippine-

these purported “claims” made on behalf of the American government, only the raising of the American flag on July 4, 1898, by F.V. Green was seen as having any potential validity by the American government.<sup>91</sup> Wake was viewed as ideal for a submarine cable relay station, and with American-German tensions simmering over Samoa, in late 1898 Commander Edward D. Taussig was ordered to formally annex Wake while en route to Guam aboard the *USS Bennington*.<sup>92</sup> When the German Ambassador in Washington D.C. was alerted by the press of the impending American annexation of Wake, he immediately informed his government of the infringement on German sovereignty.<sup>93</sup> The German government seemingly saw Wake as a potential pawn in the long-running dispute between Germany, America, and Britain over Samoa and did not wish to endanger any emerging agreement.<sup>94</sup> According to one author, Germany was prepared to trade use—but not necessarily ownership—of Wake, Bokak, or any other northern atoll for control of Samoa.<sup>95</sup> However, the question of ownership of Wake was never clarified in any formal agreement between America and Germany, including the treaty that ended their proxy war in Samoa.<sup>96</sup> According to official American sources,<sup>97</sup> the formal annexation of Wake occurred on January 17th, 1899, although evidence of Taussig’s formal annexation—including orders and reports in the U.S. Naval Archives and the *Bennington*’s logbooks—are “inexplicably missing.”<sup>98</sup>

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American war, lasted for fourteen years and only Afghanistan has eclipsed it as the longest war in American history. *Id.* at 107.

<sup>91</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 243. However, in articulating its claim to sovereignty over Wake in 1932, the U.S. State Department concluded “this act was evidently not regarded as affording a sufficient basis for a United States claim to the island.” U.S. STATE DEP’T LEGAL ADVISER’S OFF., THE SOVEREIGNTY OF ISLANDS CLAIMED UNDER THE GUANO ACT AND OF THE NORTHWEST HAWAIIAN ISLANDS MIDWAY AND WAKE, 935 (1932) [hereinafter SOVEREIGNTY OF ISLANDS CLAIMED].

<sup>92</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 240.

<sup>93</sup> *Id.* at 241. See also *Wake-Island*, PA AA, RZ 201, 19509, <https://politisches-archiv.diplo.de/invenio/direktlink/6cae1513-46ef-4d8d-a2f1-fa3862dfa9f5/> (German Political Archives digitized file for Wake Island, containing diplomatic telegrams and newspaper clippings).

<sup>94</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 242.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* For instance, the Tripartite Pact between Germany, Britain, and America that ended their proxy war and settled multiple territorial claims makes no mention of Wake. GEORGE HERBERT RYDEN, THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA 574-76 (1975).

<sup>97</sup> SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 934-35.

<sup>98</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 240-41.

America quickly opted for an alternative cable route via Midway in the Northern Hawaiian Islands, and Wake fell into obscurity.<sup>99</sup> It is likely due to this American neglect that Germany never pursued a formal understanding with the Americans. The American government did little to enforce its claim of sovereignty over Wake for the next 30 years, including turning a blind eye to the first semi-permanent residents of Wake in recorded history: citizens of the Empire of Japan.<sup>100</sup> Japanese bird hunters seemed to frequent Wake, relatively speaking, being observed in 1902 and 1904 by American ships.<sup>101</sup>

### 1. *Buford* Incident

In 1902, a minor international incident occurred when the *USAT Buford* first observed Japanese citizens on Wake, and her captain requested that the Secretary of the Navy take action.<sup>102</sup> The Navy referred the issue to the State Department, who “requested information on the details of Wake’s original annexation by the United States and whether the island at that time had been inhabited by Japanese or had shown any evidence of previous Japanese habitation.”<sup>103</sup> Before the State Department had made a decision, however, certain American newspapers began reporting on the impending deportation of the Japanese, forcing the Japanese ambassador to intervene. The Japanese government sent a diplomatic note to the Secretary of State indicating that it had “no claim whatever to make on the sovereignty of the island, but that if any subjects are found on the island, the Imperial Government expect[s] [sic] that they should be properly protected as long as they are engaged in peaceful occupations.”<sup>104</sup> After receiving the note, the Secretary of State considered the matter resolved and ruled that no deportation would occur. After a brief visit from the *USS Supply* in 1912,

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<sup>99</sup> *Id.* at 244.

<sup>100</sup> *Id.* at 244-46; Dirk H.R. Spennemann, *Japanese Economic Exploitation Of Central Pacific Seabird Populations, 1898-1915*, 21 PAC. STUD. 1, 12-15 (1998) [hereinafter Spennemann, *Exploitation of Seabird Populations*].

<sup>101</sup> Shacks and graves were also seen in 1906 and a carving on a wall indicated presence in 1908, although that would not be discovered by the Americans until 1923, as no Americans visited Wake between 1913 and 1921. America had no knowledge of potential inhabitants during that time. Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 12-13.

<sup>102</sup> *Id.* at 29-30.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* It was the presence of bird hunters on Minami-Tori-Shima (Marcus Island), 879 miles west of Wake, that provided Japan with the justification to annex that island, despite a competing American claim ten years prior under the Guano Islands Act, so the sincerity of this note is perhaps questionable. See AKITOSHI HIRAOKA, JAPANESE ADVANCE INTO THE PACIFIC OCEAN: THE ALBATROSS AND THE GREAT BIRD RUSH 16 (2012).

no American ship stopped at Wake again until 1922.<sup>105</sup> As one historian notes, “while confusion seems to have reigned in Washington, the inactivity also meant there was no political fall-out. It would appear that with the defeat of Germany in the First World War, the ownership question was conveniently forgotten.”<sup>106</sup>

#### E. *Nanyō Guntō: The South Seas Mandate*

##### 1. The Great War in the Pacific

From the day that the “Great War” broke out in 1914, Japan made repeated offers to assist in the campaign against the Germans in the Pacific that were rebuffed by Britain.<sup>107</sup> Reports of German raids on British ships convinced Britain to reconsider, and it eventually requested Japan’s help in running down the German navy in the Pacific, despite suspecting Japan had designs on Germany’s Pacific holdings.<sup>108</sup> The reports of German raids in the Pacific seemed to have been exaggerated and, after the British Navy caught and destroyed the German Pacific Fleet near Argentina, all that was left was a mad dash between the two allied powers to divide the spoils.<sup>109</sup> Japan dispatched naval forces to Yap, Palau, and the Marshalls while Britain grabbed German possessions in New Guinea and Samoa.<sup>110</sup> In October of 1914, Japan and Great Britain had reached a secret agreement making the equator the dividing line between the Japanese and British navies; by November of 1914, the war in the Pacific had ended only three months after it began, and Japan had turned to administering its empire in the Pacific.<sup>111</sup>

However, as the war in Europe continued, Japan started to worry about other powers recognizing its permanent possession of Micronesia.<sup>112</sup> On February 2, 1916, the Japanese ambassador in London presented a detailed memorandum to the British government concerning the German Pacific Islands, arguing that Britain had been given notice that, were Japan to enter the war, “the Japanese Nation would naturally insist upon the permanent retention of all the German islands north of the equator.”<sup>113</sup> The memorandum further argued that the prime ministers of Britain and

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<sup>105</sup> Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 13.

<sup>106</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 243.

<sup>107</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 79, at 147.

<sup>108</sup> *Id.* Britain already had its own plans for the German Possessions in New Guinea, Samoa, and Micronesia. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 147-48.

<sup>111</sup> *Id.* at 149.

<sup>112</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 79, at 153-54.

<sup>113</sup> IAN H. NISH, ALLIANCE IN DECLINE: A STUDY IN ANGLO-JAPANESE RELATIONS 1908-23, 206-7 (1972).

Australia had accepted this view of permanent Japanese possession in the spring of 1916.<sup>114</sup> Three days after the memorandum was delivered, the British War Cabinet observed that “the possible entry into the war of the United States increased the necessity of an early decision in regard to Japan . . . and the occupied islands north of the equator in order to avoid negotiations on the subject with another power.”<sup>115</sup> On February 16, 1917, Britain agreed to support Japan’s claim to German islands north of the equator in exchange for reciprocal support of British claims to the south.<sup>116</sup> On February 20, Japan approved the Anglo-Japanese Secret Treaty.<sup>117</sup> With the British agreement in hand, Japan obtained subsequent agreements from France, Russia, and Italy supporting its claims to Micronesia.<sup>118</sup>

## 2. America: Antagonist in Chief

When America entered World War I (“WWI”) in April of 1917, on the side of the Allies, Japan felt it had no obligation to convey any information about these agreement to its chief antagonist.<sup>119</sup> As one historian writes, a “cluster of antagonisms” had emerged between Japan and America over the five years prior to WWI, and “American phobias about Japan—the racial stereotypes, the issue of Japanese immigration, the continuing babble about the Yellow Peril—had deepened antagonisms on both sides of the Pacific.”<sup>120</sup> The Japanese were wary of the increasing American presence in the Pacific with the opening of the Panama Canal and America’s goal of achieving naval supremacy by building a navy “second to none.”<sup>121</sup> For their part, the Americans were wary of the Northern Marianas pointing like a dagger at the American naval station in Guam, and the Marshalls and Carolines strewn “across the path of any American force moving toward the

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<sup>114</sup> *Id.* at 207.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (quoting Telegram from Balfour to Grene (Feb. 14, 1917), 371 FO 2950:

His Majesty's Government accede with pleasure to the request of the Japanese Government for an assurance that they will support Japan's claims in regard to disposal of Germany's . . . possessions in Islands North of Equator on occasion of Peace Conference, it being understood that Japanese Government will, in eventual peace settlement, treat in same spirit Great Britain's claims to German Islands South of Equator.)

<sup>117</sup> *Id.* at 208.

<sup>118</sup> HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 79, at 153-54.

<sup>119</sup> MARK R. PEATTIE, NAN'YŌ: THE RISE AND FALL OF THE JAPANESE IN MICRONESIA, 1885-1945 47-48 (1988).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 48.

Philippines.”<sup>122</sup> For the next thirty years, Japanese occupation of Micronesia was an international issue, and the “remote flecks of land” assumed global significance; the disposition of Micronesia became an “intense diplomatic tug-of-war” between America and Japan.<sup>123</sup> As one historian summarized, “Once settled, [it] left a legacy of suspicion and resentment between the two great naval powers of the Pacific.”<sup>124</sup>

### 3. Spoils of War

When the Allies gathered in Paris to discuss a postwar settlement after hostilities in Europe had ceased, Micronesia had essentially been a Japanese colony for the prior five years.<sup>125</sup> While the Treaty of Versailles stipulated that, “Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions,”<sup>126</sup> the Americans, led by President Woodrow Wilson, vehemently opposed outright annexation of German territory ceded to the Allies.<sup>127</sup> The Americans instead proposed that mandates be created under the newly formed League of Nations.<sup>128</sup> Ironically, it was the British dominions of Australia and New Zealand that pushed hardest for annexation and full sovereignty over the former German possessions.<sup>129</sup> A compromise was reached where all conquered German territory would be placed into League of Nations mandates but allowed for the designation of a “Class C” mandated territory, which was defined as those which, “owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization . . . can best be administered under the laws of the Mandatory as integral portions thereof.”<sup>130</sup> At the insistence of Wilson, the mandatories would be forbidden from constructing fortifications of any kind in the mandated territory.<sup>131</sup> On May 7, 1919, the Supreme Council of the Allied Powers agreed that the former German islands north of the equator should be awarded to Japan as a Class C mandate, pending final

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> PEATTIE, *supra* note 119, at 48.

<sup>125</sup> *Id.* at 50.

<sup>126</sup> Treaty of Peace between the Allied and Associated Powers and Germany, art. 119, Jun. 28, 1919, 113 BSP 112.

<sup>127</sup> PEATTIE, *supra* note 119, at 54.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 55.

approval by the Council of the League of Nations.<sup>132</sup> The League of Nations Charter was signed on June 28, 1919, with Article 22 officially creating the mandate system and establishing a Permanent Mandates Commission.<sup>133</sup>

#### 4. The Yap Controversy

However, before the League of Nations could approve the final terms of the Japanese mandate, America was already disputing whether Yap was included within the mandate. When the Americans scraped plans of installing a cable to the Philippines via Wake, they had opted instead for a station in Yap.<sup>134</sup> Apparently cognizant of the American interests in Yap, President Wilson mentioned excluding the island from the Japanese mandate, yet when the time came in May of 1919 to award the mandates, he failed to voice any objections and the record was completely silent on any American reservations to the agreement.<sup>135</sup> When Wilson testified before the U.S. Senate's Foreign Relations Committee, he confidently stated that he had reserved the question of the island from the discussion at Paris.<sup>136</sup> When pressed by the Committee, who some say were seeking reasons to deny Senate ratification of the peace treaty, Wilson could only argue that he *assumed* Yap had been excluded from the Japanese mandate.<sup>137</sup> With Wilson's plan for peace unraveling, the Secretary of State made a desperate<sup>138</sup> plea to the Allies to support America's claim on Yap.<sup>139</sup> Japan responded that "[s]ince the decision under consideration says on the one hand "German Islands" and on the other does not make any exception of Yap, the Imperial Government regard it as perfectly clear that the ex-German Pacific islands north of the [equator] with no exception whatever

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<sup>132</sup> PEATTIE, *supra* note 119, at 55. See also U.S. STATE DEP'T, *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume V* Doc. 50 (Joseph V. Fuller ed., 1946), <https://history.state.gov/historicaldocuments/frus1919Parisv05/d50> ("Notes of a Meeting Held in the Conference Room of the Supreme War Council.").

<sup>133</sup> U.S. STATE DEP'T, *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XIII* 93-104 (Joseph V. Fuller ed., 1947), <https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1>.

<sup>134</sup> Spennemann, *Annexation of Wake*, *supra* note 13, at 244.

<sup>135</sup> PEATTIE, *supra* note 119, at 55-56.

<sup>136</sup> *Id.* at 56.

<sup>137</sup> *Id.*

<sup>138</sup> The 1,500-word telegram was ten times longer than the average telegram sent in the U.S. at the time. See DAVID HOCHFELDER, *THE TELEGRAPH IN AMERICA, 1832-1920* 79 (2012).

<sup>139</sup> U.S. STATE DEP'T, *Papers Relating to the Foreign Relations of the United States, 1921, Volume II* Doc. 264. (Joseph V. Fuller ed., 1936), <https://history.state.gov/historicaldocuments/frus1921v02/d264> (hereinafter *For. Rel. U.S., 1921, Vol. II*).

all belong to the mandatory territories allocated to Japan.”<sup>140</sup> The other allied powers, bound by their secret agreements, also sided with Japan.

On December 17, 1920, the Council of the League of Nations approved the Japanese mandate and defined it without reservation, stating that “[t]he islands over which a Mandate is conferred upon His Majesty the Emperor of Japan . . . comprise *all* the former German islands situated in the Pacific Ocean and lying north of the Equator.”<sup>141</sup> President Wilson, “bitter and obstinate” to the end, “refused to let go.”<sup>142</sup> In one of his last official acts, he denied that America had ever consented to the disposition of Yap and declared the award of the entire Japanese mandate invalid.<sup>143</sup>

The next American administration took a somewhat less hardline on the Japanese mandate and engaged with the Japanese government on the subject.<sup>144</sup> In a June 3, 1921, meeting between the Japanese ambassador and the American Secretary of State, the ambassador brought up Yap. He “referred to the fact that the mandate covered other islands north of the Equator, and inquired whether the United States claimed an interest in these islands.”<sup>145</sup> The secretary replied that America only claimed an interest in Yap, stating:

[T]he United States had no desire . . . of obtaining territory or of increasing its possessions, but merely for the purpose of protecting its interests. . . . So far as the other islands north of the Equator were concerned, he was not advised that we [America] had any interest with respect to which we desired to make representations, but that Yap was in a strategic position and that we [America] should have the same rights and privileges there that were enjoyed by the other Powers.<sup>146</sup>

By 1922, Japan had essentially agreed to accept all of the American demands.<sup>147</sup> These concessions were formalized by a treaty signed on February 11, 1922; in exchange, the United States finally consented to “the

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<sup>140</sup> Fuller, *supra* note 139, at Doc. 272.

<sup>141</sup> *Mandate for the Former German possession in the Pacific Ocean Lying North of the Equator*, 2 League of Nations Off. J. 87, art. I (1921) (emphasis added).

<sup>142</sup> PEATTIE, *supra* note 119, at 58.

<sup>143</sup> *Id.* at 58-59.

<sup>144</sup> *Id.* at 59.

<sup>145</sup> For. Rel. U.S., 1921, Vol. II, *supra* note 139, at Doc. 278.

<sup>146</sup> *Id.*

<sup>147</sup> This included allowing American access to Yap, use of the cables, American rights of residence and property, the right of free entrance into Micronesian territorial waters by American commercial vessels and extending the provisions of their treaty of commerce and navigation to the mandate. PEATTIE, *supra* note 139, at 60.

administration by Japan, pursuant to the aforesaid mandate, of all the former German Islands in the Pacific Ocean, lying north of the Equator.”<sup>148</sup> At the Washington conference that same year, Japan, Britain, America, France, and Italy concluded a naval disarmament treaty.<sup>149</sup> The Five Power Treaty secured an “Open Door” in southeast Asia, and through limitations on naval tonnage, allowed America to build the world’s largest navy, but it also put a freeze on all insular fortifications in the Pacific west of Hawai‘i.<sup>150</sup>

### 5. The Interwar Period

For the next decade, tensions between Japan and America eased to the point that former Secretary of the Navy Franklin Roosevelt wrote that the two countries “have not a single valid reason, and won’t have as far as we can look ahead, for fighting each other.”<sup>151</sup> Perhaps these good feelings explain the seeming irony of why, after prolonged maneuvering and browbeating, America never exercised its treaty rights anywhere in Micronesia nor attempted to use the communication facilities on Yap.<sup>152</sup> Yet this détente was always uneasy: Japan seemed “obsessed with notions of secrecy,”<sup>153</sup> while the American press reported on the fictive construction of secret submarine bases.<sup>154</sup>

As part of this distrust, in 1922, the American Navy dispatched the *USS Beaver* to Wake, the first American craft to set eyes on the island since 1912, to begin surveying the atoll for a naval base.<sup>155</sup> The following year, the minesweeper *USS Tanager* carried an expedition led by the Smithsonian and Bishop Museums to Midway, Johnston, and Wake to ostensibly gather scientific data.<sup>156</sup> Yet, it would still be more than ten years before America

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<sup>148</sup> Convention between the United States of America and Japan, art. 1, Feb. 11, 1922, 42 Stat. 2149.

<sup>149</sup> PEATTIE, *supra* note 119, at 60.

<sup>150</sup> *Id.* The “Open Door” policy referred to the principle that all countries should have equal access to any of the ports open to trade in China. *Open Door policy*, in ENCYC. BRITANNICA (2021), <https://www.britannica.com/event/Open-Door-policy>. The treaty designated by name the capital ships which each country could retain, resulting in the aggregate tonnage retained by the U.S. (525,850) being larger than that of Britain (558,950), France (221,170), Italy (182,800), and Japan (301,320). *Five-Power Naval Limitation Treaty*, in ENCYC. BRITANNICA (2021), <https://www.britannica.com/event/Five-Power-Naval-Limitation-Treaty>.

<sup>151</sup> PEATTIE, *supra* note 119, at 61.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 241.

<sup>154</sup> *Id.* at 243.

<sup>155</sup> MARK J. RAUZON, ISLES OF AMNESIA 164 (2016).

<sup>156</sup> *Id.* at 164-65. Despite their scientific mission, the *Tanager* expedition—aboard an American Naval vessel—charted the anchorages, channels, and harbors for what would

put Wake to any use; instead, it was Japanese bird hunters who seemed to have returned to the atoll following WWI.<sup>157</sup>

Eventually Japan's secrecy in the mandate, coupled with its military actions on the Asian mainland, drove a final wedge between the two powers. In 1928, both Japan and America became parties to the Kellogg-Briand Pact, renouncing war as a tool of national policy.<sup>158</sup> In 1930, the naval disarmament treaty was renewed between Japan, Britain, and America; but when Japan's efforts in the 1930s to invoke an Asian corollary to the American Monroe Doctrine was rejected by the international community, the treaty system intended to avoid war between the world's naval powers began to fall apart.<sup>159</sup> In 1933, Japan's delegate theatrically walked out of the League of Nations, with Japan subsequently announcing its intention to permanently quit the League, yet insisting that membership was not necessary for Japan to continue as mandatory in Micronesia.<sup>160</sup> Japan continued providing yearly reports to the Permanent Mandates Commission, but "[a]fter 1933, for all practical purposes, Japan's position in Micronesia was whatever Japan said it was."<sup>161</sup>

By this time, the Americans were sure, despite any hard evidence to the contrary, that Japan had thoroughly fortified its mandates in violation of its treaty obligations.<sup>162</sup> In 1932, the U.S. State Department produced a nearly 1000-page document articulating all its claims to sovereignty over islands, including Wake.<sup>163</sup> The Legal Adviser's Office in the State Department concluded:

Wake Island is also claimed by the United States, and, according to the records found, is not claimed by any other country. The United States took formal possession of the island in 1899, and had already some basis for a claim to it in 1898, but since that time it appears to have been *unoccupied and unused* by either American citizens or

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eventually become American military bases. *Id.* For their part, Japan was also making military plans, but likely did not put them into motion until 1935. *See* PEATTIE, *supra* note 119, at 245.

<sup>157</sup> RAUZON, *supra* note 155, at 165.

<sup>158</sup> Treaty Between the United States and Other Powers Providing for the Renunciation of War as an instrument of National Policy, art. I, Aug. 27, 1928, 46 Stat. 2343.

<sup>159</sup> R.P. Anand, *Family of Civilized States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, 5 J. HIST. INT'L L. 1, 43-53 (2003).

<sup>160</sup> PEATTIE, *supra* note 119, at 243-44.

<sup>161</sup> *Id.* at 244.

<sup>162</sup> *Id.* at 244-45.

<sup>163</sup> RAUZON, *supra* note 155, at 165.

interests, or by the Government. Furthermore no legislation regarding Wake Island has been enacted. Under the United States Constitution, some legislation is thought to be necessary in order to acquire territory. However, under international law, the claim of the United States to sovereignty over Wake Island would appear to be valid *in the absence of any evidence of a claim, or basis for a claim, by another country*.<sup>164</sup>

On December 29, 1934, the newly elected president, Franklin D. Roosevelt, issued an executive order placing Wake under the jurisdiction of the Navy.<sup>165</sup> When the *USS Nitro* arrived on March 8, 1935, to secure and survey Wake,<sup>166</sup> the American and Japanese empires had gained one more “valid reason” for fighting each other.

#### F. *Prelude to War: Dispensing with Pretense*

On March 12, 1935, the Secretary of the Navy gave Pan-American Airlines permission to construct a facility at Wake, to serve as a way station for flying ships between Midway and Guam.<sup>167</sup> While officially a civilian endeavor, a Navy lieutenant was dispatched along with the crew.<sup>168</sup> For their part, the Japanese were wary of this American “commercial” expansion; in the 1930s, the Imperial Navy had a firm conviction that “the United States might try the most rapid and feasible means to launch a surprise attack by naval and air forces on the Japanese industrial and urban heartland.”<sup>169</sup> By the middle of the 1930s, the Japanese combined fleet “became convinced that the American expeditionary force would attempt to establish island air bases at Wake Island.”<sup>170</sup> In 1936, the Japanese Consul General in Honolulu stated frankly that, “[i]f the time comes to fight, then Japan will fight, the odds be what they may . . . [T]he clipper ship has bases at Midway, Wake and Guam. . . this is what makes the people of Japan nervous.”<sup>171</sup> Japanese

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<sup>164</sup> SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 939-40 (emphasis added).

<sup>165</sup> RAUZON, *supra* note 155, at 165.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 166.

<sup>168</sup> *Id.*

<sup>169</sup> DAVID C. EVANS & MARK PEATTIE, KAIGUN: STRATEGY, TACTICS, AND TECHNOLOGY IN THE IMPERIAL JAPANESE NAVY 1887-1941 290-91 (1997).

<sup>170</sup> *Id.* at 291.

<sup>171</sup> U.S. STATE DEP'T, *Foreign Relations of the United States Diplomatic Papers, 1936, The Far East, Volume IV* Doc. 129 (Matilda F. Axton et al. eds. 1954), <https://history.state.gov/historicaldocuments/frus1936v04/d129>. The State Department received a copy of this statement from the War Department on May 28 as an enclosure to

apprehension over these “civilian” air strips were not unfounded—a 1936 confidential memo from the Navy instructed Pan-Am pilots to gather intelligence along their routes.<sup>172</sup>

With the expiration in 1937 of the treaty system that began with the Washington conference, both America and Japan began openly preparing for war in the Pacific.<sup>173</sup> The Marco Polo Bridge Incident on July 7, 1937, between Japan and China set off a chain of events that culminated with Japan’s coordinated strike on British, Dutch, and American colonies on December 8, 1941.<sup>174</sup> The Japanese abandoned all pretense in 1939 as they began openly fortifying the mandate and ceased reporting to the mandate commission; by late 1940, the first sizable naval detachments had moved into Micronesia.<sup>175</sup> America continued to fortify the Philippines and Hawai‘i,<sup>176</sup> and in January of 1941, they began installing military fortifications at Wake.<sup>177</sup> The following month, the Japanese fourth fleet moved its headquarters to Chuuk Lagoon.<sup>178</sup> In July, the Americans recalled Douglas MacArthur to active duty<sup>179</sup> and froze Japanese assets in response to Japan obtaining airfields in French Indochina through an agreement with Vichy France.<sup>180</sup> The American Oil embargo imposed on Japan on August 1, 1941, was a strong measure and perhaps the penultimate domino to fall.<sup>181</sup>

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a report from Lt. Col. George S. Patton, who stated it was “indicative of a changing attitude in part of the Japanese.” *Id.*

<sup>172</sup> RAUZON, *supra* note 155, at 170-71. The confidential memo suggested that this intelligence would be of value in a future conflict with Japan. *Id.* The Commandant also banned the hiring of employees of Japanese descent over fears of espionage. *Id.*

<sup>173</sup> PEATTIE, *supra* note 119, at 247. This included the Americans building an airstrip on Howland Island, officially as a waypoint for Amelia Earhart on her flight around the world; when her craft disappeared on July 2nd, 1937, there was rampant American speculation of Japanese foul play. *Id.*

<sup>174</sup> MAX HASTINGS, *INFERNO: THE WORLD AT WAR, 1939-1945* 269-72 (2011). The international dateline somewhat obscures that the attacks on Hong Kong, Singapore, Malaya, Thailand, the Dutch East Indies, the Philippines, Guam, Wake, and Pearl Harbor were essentially launched simultaneously. *See id.* As it was December 8th in every territory but one when the coordinated assault began, I use that date.

<sup>175</sup> PEATTIE, *supra* note 119, at 250-51.

<sup>176</sup> *See e.g.*, IMMERWAHR, *supra* note 15, at 168-69 (stating the defenses in Hawai‘i were “substantial” and that, in the Philippines, there were 31,000 American troops, 120,000 Filipino reservists, and the largest concentration of American warplanes outside the mainland).

<sup>177</sup> RAUZON, *supra* note 155, at 171.

<sup>178</sup> PEATTIE, *supra* note 119, at 251.

<sup>179</sup> IMMERWAHR, *supra* note 15, at 168.

<sup>180</sup> HASTINGS, *supra* note 174, at 267-69.

<sup>181</sup> *Id.* at 261-62, 269-70. Japan relied almost exclusively on oil imports to sustain

By the time the Japanese ambassador stopped en route to Washington D.C. at the Pan American Hotel on Wake on the night of November 7, 1941, the Japanese plans for war had been conditionally approved.<sup>182</sup>

G. *Ibebin Pata* (Waves of War)<sup>183</sup>

In coordination with the Japanese attack on Pearl Harbor, the battle of Wake Island commenced on December 8, 1941, with forces dispatched from the Japanese base at Kwajalein, 700 miles to the south.<sup>184</sup> Four-hundred American Marines and over 1,000 civilians withstood Japanese attacks until Wake fell on December 23rd.<sup>185</sup> While Wake remained in Japanese control until the end of the war, the American island hopping strategy left the Japanese garrison at “Otori Jima” to wither on the vine after the allied capture of Tarawa, Makin, Majuro, Kwajalein, and Eniwetok in 1943 to 1944.<sup>186</sup> The success of Operation Hailstone’s conventional air

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its economy and war effort; as America was the world’s largest oil exporter at the time the embargo resulted in Japan losing over 80 percent of its oil supply. Yuichi Arima, *The Way to Pearl Harbor: US vs Japan*, Inventory of Conflict and Environment Case Studies (2003), <http://mandalaproyects.com/ice/ice-cases/japan-oil.htm>. The Japanese campaign to seize oil fields in the Dutch East Indies was launched simultaneously with the attacks on Wake, Guam, and Pearl Harbor. See *supra* note 174, *infra* note 184, and accompanying text.

<sup>182</sup> RAUZON, *supra* note 155, at 172.

<sup>183</sup> In Marshallese *ibeb* can be used to describe a series of large ocean waves as well as the actions of being overrun, being overcome, overflowing, onrush, or onslaught. It also came to be applied to the waves of ships and planes that descended on the Marshalls during WWII. See ABO ET AL., *supra* note 1, at 69.

<sup>184</sup> PEATTIE, *supra* note 119, at 257.

<sup>185</sup> RAUZON, *supra* note 155, at 172-73. Known as the “Alamo of the Pacific” the U.S. Marines turned back the initial Japanese invasion, exacting a high price from Japan: eleven ships, twenty-nine planes, and more than 5,700 men. *Id.* The Americans lost only twelve planes and ninety-six men in the first two weeks defending Wake, but American reinforcements never came, and the garrison eventually surrendered to save civilian lives in the face of a hopeless situation. *Id.* Japan took 1,462 American POWs, of which 231 perished. *Id.* The actions of the American defenders of Wake led President Roosevelt to declare,

There were only some 400 United States Marines who, in the heroic and historic defense of Wake Island, inflicted such great losses on the enemy. . . . When the survivors of that great fight are liberated and restored to their homes, they will learn that one hundred and thirty million of their fellow citizens have been inspired to render their own full share of service and sacrifice.

*Id.* at 174. One is left to wonder whether the amnesia in American’s collective memory over the sacrifices made at Wake is due to efforts to conceal the Marshallese claim to *Āneen Kio*. See e.g. Franklin Zaromb, et al., *Collective memories of three wars in United States history in younger and older adults*, 42 MEMORY COGNITION 383, 383-99 (2014) (ninety percent of young adults surveyed about WWII recalled Pearl Harbor, less than twenty-three percent recall Wake).

<sup>186</sup> RAUZON, *supra* note 155, at 177 (recounting that a reported 54,000 rats were

assault on Chuuk Lagoon forced the Japanese fleet to abandon Chuuk, and unwittingly bought Micronesia a two year reprieve from the American nuclear program.<sup>187</sup> On August 5, 1945, the *Enola Gay* took off from North Field on the island of Tinian in the former Japanese mandate and unleashed the horrors of the nuclear age upon the world.<sup>188</sup> The Empire of Japan surrendered six days after a second nuclear strike was launched from Tinian.<sup>189</sup>

#### H. *Trust Territory of the Pacific Islands*

Following Japan's unconditional surrender, the American military controlled the conquered Japanese mandate in the Pacific until 1947, when the Trust Territory of the Pacific Islands ("TTPI") was created under the auspices of the newly formed United Nations ("UN").<sup>190</sup> The UN Trust Territory System, the successor to the League of Nations' mandate, was established in 1945 by Chapter XII of the UN Charter. The Trusteeship Council, one of the six principal organs of the UN,<sup>191</sup> was established by General Assembly resolution the following year.<sup>192</sup> On April 2, 1947, the UN Security Council issued a resolution creating the TTPI, defining its boundaries as, "[c]onsisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations."<sup>193</sup> America designated the TTPI a "Strategic Area" pursuant to Article 82 of the UN Charter, meaning that the Security Council<sup>194</sup>—and not the General Assembly—would determine the terms of the Trusteeship

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eaten, the flightless Wake Island rail was extirpated, and 1,300 Japanese troops garrisoned on Wake starved to death). Faced with starvation after an American bombing raid in 1943, Rear Admiral Sakaibara ordered ninety-eight civilian workers executed on May 10, 1943; in 1947 Sakaibara and eleven officers were tried and convicted of war crimes before an American tribunal at Kwajalein. *Id.*

<sup>187</sup> MILITARY POLICY COMMITTEE, MINUTES OF MEETINGS (May 3, 1943) ("The point of [the] use of the first bomb was discussed and the general view appeared to be that its best point of use would be on a Japanese fleet concentration in the Harbor of Truk") (available at <http://blog.nuclearsecrecy.com/wp-content/uploads/2013/09/R03-T06-F23-Military-Policy-Committee-Minutes-of-Meetings.pdf>).

<sup>188</sup> HASTINGS, *supra* note 174, at 845-48.

<sup>189</sup> *Id.*

<sup>190</sup> Kevin Morris, *Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance*, 41 U. HAW. L. REV. 384, 388 (2019).

<sup>191</sup> U.N. Charter Chap. XIII.

<sup>192</sup> G.A. Res. 64 (I), Establishment of the Trusteeship Council (Dec. 14, 1946).

<sup>193</sup> S.C. Res. 21, art. 1 (Apr. 2, 1947).

<sup>194</sup> On which the United States has a permanent seat and veto. U.N. Charter art. 23, 27(3).

Agreement and when it terminated.<sup>195</sup> That agreement stipulated that while the Trusteeship Council had the authority to consider reports submitted by the Americans, accept petitions, provide for periodic visits, and take “other actions in conformity” with the agreement, the United States retained the discretion to “determine the extent of . . . applicability to any areas which may from time to time be specified by it as closed for security reasons.”<sup>196</sup> Japan officially relinquished any claims in Micronesia in the 1951 Treaty of San Francisco that normalized relations between Japan and America.<sup>197</sup> The treaty granted the United States “the right to exercise all and any powers of administration, legislation and jurisdiction” over the remainder of Japan’s Pacific island territory.<sup>198</sup> Furthermore, it required Japan to concur in any American proposal to place those islands under the UN Trusteeship System, with America as the sole administering authority.<sup>199</sup>

### 1. *Baam ko Ilōnin Aelōn Kein Ad* (Bombs Above our Islands)

The Marshall Islands bore the brunt of the American military presence in the “strategic area,”<sup>200</sup> with the Americans establishing an army garrison and ballistic missile range on Kwajalein, a navy air base on Wake, and the “Pacific Proving Grounds” on Bikini and Eniwetok where the United States conducted sixty-seven atmospheric nuclear tests (and previously undisclosed biological and chemical weapons tests).<sup>201</sup> It seems perverse that under the guise of a trust that was established with the objective of “encourag[ing] respect for human rights and for fundamental

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<sup>195</sup> U.N. Charter art. 83; *compare id.* at 85.

<sup>196</sup> S.C. Res. 21, art. 13 (Apr. 2, 1947).

<sup>197</sup> Treaty of Peace with Japan, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3169. “Japan renounces all right, title and claim in connection with the League of Nations Mandate System and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.” *Id.* at art. 2.

<sup>198</sup> *Id.* at art. 3.

<sup>199</sup> *Id.*

<sup>200</sup> Department of Energy, 3. *Military Items Relating to the TTPI*, SD/T/637 (declassified document discussing talking points “should the Soviet or PRC delegations criticize our use of the Trust Territory for military purposes.”). (available at <https://www.osti.gov/opennet/servlets/purl/16367805.pdf>).

<sup>201</sup> Susanne Rust, *How the U.S. Betrayed the Marshall Islands, Kindling the next Nuclear Disaster*, L.A. TIMES, Nov. 10, 2019. While U.S. courts have consistently found Marshallese claims to be barred by statutes of limitations, *see e.g.* *People of Bikini v. United States*, 77 Fed. Cl. 744, 781 (Fed. Cir. 2007), the discovery rule may apply to the chemical and biological weapons tests that first came to light in 2019. *See generally* 2 Toxic Torts Guide § 9.01[4] (2021).

freedoms,”<sup>202</sup> the United States conducted a nuclear testing program that necessitated forced removal and relocation of inhabitants, severe physical destruction of atolls and widespread radioactive contamination.<sup>203</sup> Yet, this overlooks the fact that America had begun nuclear testing a year before the UN provided the American occupation of Micronesia a veneer of legality; indeed,

Congress and the Department of the Interior advocated for complete annexation of the islands. Had it not been for the UN's assurances that the U.S. would be the sole administering authority of the TTPI, it seems unlikely that the U.S. would have budged from its imperialist position in an age of decolonization.<sup>204</sup>

In 1946, *Ri-Pikinni* were asked to give up their atoll for the “good of all mankind and to end all wars.”<sup>205</sup> *Irooj* Juda responded that “*men otemjej rej ilo pein Anij*”—all things are in the hands of God.<sup>206</sup> *Ri-*

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<sup>202</sup> U.N. Charter art. 76 b.

<sup>203</sup> People of Bikini, 77 Fed. Cl. At 749. The tests’ effects can hardly be disputed; even American courts, in ultimately denying compensation, have acknowledged they included “annihilation of some islands and vaporization of portions of others; permanent resettlement with substantial relocation hardships to some inhabitants; exposure to high levels of radiation by some inhabitants; and widespread contamination from radioactivity that renders some islands unusable by man for indefinite future periods.” *Id.*

<sup>204</sup> Morris, *supra* note 190, at 388.

<sup>205</sup> STRANGERS IN THEIR OWN LAND, *supra* note 79, at 271.

<sup>206</sup> MARTHA SMITH-NORRIS, DOMINATION AND RESISTANCE 44 (2016); Bikini, the Atom Island (MGM 1946) (American propaganda film containing *Irooj* Juda’s original quote, available at <https://youtu.be/zri2knpOSqo>). Much has been made of this quote over the years, including the recent interpretation that Commodore Wyatt was “[c]apitalizing on Christianity, the one real connection between the Bikini Islanders and Americans” and that *Ri-Pikinni* had “no likely reason to doubt America’s good faith intentions.” Morris, *supra* note 190, at 389. This discounts *Ri-Majeļ* agency, faith, language, culture, and memory of the prior 60 years of colonial rule. As the RMI Minister of Health, and former trust liaison for the people of Bikini, Jack Niedenthal recently said in an interview:

Juda, the leader of the Bikinians, he just keeps standing up and saying the same answer every time. . . and if you know what I know about Marshallese culture, if someone said to me, if I asked them if I could do something, and they said, “everything’s in the hands of God,” that’s about as much as a no as you’re ever gonna get. I mean it’s in the hands of God. You better be careful. But if you watch. . . twenty-six takes of the same shot. . . [In the end,] the commodore stands up, dusts off his pants, he says, “Well, everything being in the hands of God, it cannot be other than good” and off he walks.

The Final Years of Majuro (Wendover Productions 2020) (available at <https://youtu.be/3J06af5xHD0?t=1165>). The American military had a camera crew with them to document the occasion and attempted to stage the scene where *Irooj* Juda and *Ri-*

*Ānewetak* fared little better than their neighbors to the east;<sup>207</sup> and the Americans did not even bother to relocate *Ri-Majeļ* living on any atolls downwind of the “Proving Grounds,” instead, opting for selective temporary evacuations.<sup>208</sup> This disregard for Marshallese life paved the way for Castle Bravo—the worst nuclear disaster in American history.<sup>209</sup> Castle Bravo was like one thousand Hiroshimas, designed to “produce as much local fallout as possible.”<sup>210</sup> While it is apparent that American calculations were grossly wrong about how large the blast would become,<sup>211</sup> it is less clear whether accidents were made in estimating how far fallout would be thrown.<sup>212</sup> At 6:45 AM on March 1, 1954, *Ri-Majeļ* on Rongelap and Utrik awoke to:

[A] burst of brilliant light, were rocked by a long and heavy

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*Pikinni* gladly gave their consent. *See id.* Instead, twenty-six times in a row Juda defiantly rose and said to the man whose country claimed to be harnessing the power of the sun, “everything is in the hands of God.” An exasperated Commodore eventually threw up his hands and brushed aside *Irooj* Juda and *ankilaan* (the will of) *Ri-Pikinni*.

<sup>207</sup> STRANGERS IN THEIR OWN LAND, *supra* note 79, at 272-73, 328-29. *Ri-Pikinni* were initially moved to Rongerik, an atoll so poor in resources they nearly starved. *Id.* They were temporarily transferred to a tent city on Kwajalein, before being sent to the island of Kili which they described as a “Prison” because of its isolation and lack of a safe harbor. *Id.* *Ri-Ānewetak* were forced to resettle on Ujelang where they depended on government rations to avoid starvation. *Id.* at 329-30.

<sup>208</sup> *Id.* at 273.

<sup>209</sup> HOLLY M. BARKER, BRAVO FOR THE MARSHALLESE: REGAINING CONTROL IN A POST-NUCLEAR, POST-COLONIAL WORLD 23 (2004).

<sup>210</sup> *Id.*

<sup>211</sup> Ariana Rowberry, *Castle Bravo: The Largest U.S. Nuclear Explosion*, Brookings Institute, (Feb. 27, 2014), <https://www.brookings.edu/blog/up-front/2014/02/27/castle-bravo-the-largest-u-s-nuclear-explosion/>.

<sup>212</sup> BARKER, *supra* note 209, at 155.

Given the extensive meteorological data from previous tests and knowledge about the unpredictable nature of the trade winds in the Marshall Islands, it was not an “accident” that wind blew radioactive fallout over inhabited islands. While there is no documentary proof that the U.S. government purposefully exposed people to radioactive fallout, the U.S. government conducted human radiation experiments with vulnerable U.S. populations without their consent or knowledge and failed to take any precautions to minimize injuries. Furthermore, the U.S. government evacuated residents from atolls downwind from the smaller tests as a precaution, but failed to evacuate people for what was planned to be the biggest and dirtiest test of all time. At a minimum, the U.S. government grossly failed in its duty to protect the residents of the Trusteeship from harm. After all, if the events on March 1, 1954, were an accident, why didn’t the U.S. government conduct an investigation?

*Id.*

vibration, an intense rush of wind and the sound of the explosion. Hours later the fallout began falling like gray snow, clinging to bodies and covering the ground two inches deep. The next day the water in the cisterns had turned brackish yellow and the people began showing their first symptoms—vomiting, their entire bodies aching, eye irritations, fatigue weakness, some had burnt skin and bleeding, hair and fingernails loosened and fell out.<sup>213</sup>

It would be two days before any help arrived and *Ri-Ron̄lap* were evacuated to Kwajalein for emergency “medical treatment.”<sup>214</sup>

## 2. *Pukpukote Anemkwōj in Kāālōt* (Seeking Self-Determination)

Despite the UN charter’s claim that the purpose of the Trusteeship System was to promote “development towards self-government and independence,” it was nearly twenty years before the Americans allowed a body with legislative powers to convene in the TTPI with the formation of the Congress of Micronesia in 1964.<sup>215</sup> The U.S. Navy had governed the Territory under martial law until 1951, when an American bureaucrat was appointed “High Commissioner” and vested with all executive, legislative and administrative authority.<sup>216</sup>

However, this delay in self-determination was not because of the political backwardness of the TTPI’s citizens. The first decade under civilian administration saw each district establish their own local assembly,<sup>217</sup> and by 1965 Micronesians had submitted at least fifty-six petitions to the Trusteeship Council<sup>218</sup> (including repeated requests to end

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<sup>213</sup> STRANGERS IN THEIR OWN LAND, *supra* note 79, at 273.

<sup>214</sup> BARKER, *supra* note 209, at 155. (Disputing the adequacy of this “care” by pointing to numerous examples such as “the U.S. government documented and photographed the radiation burns received by the people of Rongelap but did not offer them pain medication even when the burns reached and exposed the bones in people’s feet.”).

<sup>215</sup> U.N. Charter art. 76; HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at 131. Even then any legislation was subject to unilateral veto by the Trusteeship “High Commissioner” and could only be put into force by American bureaucrats. *Id.*

<sup>216</sup> HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at 23-24; U.S. State Dep’t, *16th Annual Report to the United Nations on the Administration of the Trust Territory of the Pacific Islands, 1963-1966*, in TRUST TERRITORY OF THE PACIFIC ISLANDS: 16TH-19TH 19 (1967).

<sup>217</sup> The Americans titled these as “advisory bodies.” HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at 131.

<sup>218</sup> From author’s independent research at United Nations Digital Library, <https://digitallibrary.un.org/search?ln=en&cc=Trusteeship+Council> (search using “pacific islands” AND petition).

nuclear testing).<sup>219</sup> As Hanlon has recounted, “the cause of representative government moved guardedly forward under the [American] naval and later civilian administrations,” yet Micronesian leaders “took themselves more seriously than the Trust Territory administrators intended.”<sup>220</sup> This trend began with the first annual civilian administrators’ conference in Guam in 1949 where two “local representatives” from each district were permitted to attend.<sup>221</sup> It evolved into the delegates to the 1956 conference voting to call themselves the “Inter-District Advisory Committee to the High Commissioner”, and finally culminated with the members changing the committee’s name to the “Council of Micronesia” in 1961 as they sought more than an advisory role.<sup>222</sup>

Among the first issues and longest fights taken up by the representatives from the Marshall Islands district was the relocation of those who were displaced by nuclear testing and a push to clean up their atolls. In 1968, President Lyndon B. Johnson announced that it was safe to return to Bikini; yet, by 1977, the U.S. Department of Energy (“DOE”) admitted that the radiation level of Bikini was dangerously high and that it would remain uninhabitable for decades.<sup>223</sup> Some on Ujelang attempted to return to Eniwetok after the completion of the (now leaking)<sup>224</sup> Runit Dome, a concrete dome built to encase radioactive topsoil; however, they were told that they had to restrict their movements to the southernmost part of the atoll and risk uptake of plutonium and cesium through the food chain.<sup>225</sup> *Ri-Roñlap* were returned to their atoll after three years of allowing it to “cool off,” but were again evacuated after the appearance of thyroid cancer, leukemia, and birth defects in the population.<sup>226</sup>

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<sup>219</sup> See, e.g., Petition from the Marshallese People, U.N. Doc. T/PET.10/28 (May 6, 1954), <https://digitallibrary.un.org/record/3824667?ln=en>.

<sup>220</sup> HANLON, POLITICAL BIOGRAPHY OF TOSIWO NAKAYAMA, *supra* note 8, at 93-94.

<sup>221</sup> *Id.* The term “permitted” is used advisedly as there were “severe restrictions on travel in and out of the American Trust Territory.” *Id.* at 57 (Discussing the fifteen-year wait for future FSM President Nakayama to reunite with his father who had been deported to Japan).

<sup>222</sup> *Id.* at 94.

<sup>223</sup> STRANGERS IN THEIR OWN LAND, *supra* note 79, at 329-30.

<sup>224</sup> Rust, *supra* note 201.

<sup>225</sup> Ken O. Buesseler, et al., *Lingering Radioactivity at the Bikini and Enewetak Atolls*, 621 SCI. TOTAL ENV. 1185, 1185-98 (2018).

<sup>226</sup> BARKER, *supra* note 209, at 45-47. Brookhaven National Laboratory scientists responsible for conducting radiation surveys indicated the atoll had “cooled off” and allowed both the exposed and unexposed *Ri-Roñlap* to return despite their data indicating levels of radioactivity twenty to forty times higher than any inhabited region in the world. See Morris, *supra* note 175, at 391.

Part of this struggle for self-determination and decolonization focused on Wake. In 1974, the Congress of Micronesia passed a joint resolution declaring, “Enen-Kio is and has always been the property of the people of the Marshall Islands and their traditional leaders.”<sup>227</sup> The resolution emphasizes that *Āneen Kio* is the northernmost island in the *Ratak* Chain, was discovered by Marshallese, bears a Marshallese name, occupies an important place in the tradition and history of the Marshallese people, that it has always been claimed by the *Irooj* of the Marshall Islands, and that *Irooj* have assigned fishing rights therein.<sup>228</sup> By that time, Wake’s importance as a stop on the transpacific air route had diminished with commercial jet airliners, despite the construction of a new airport terminal in 1962.<sup>229</sup> Yet, the atoll still held great “strategic” significance to the Americans, with use expanding to the housing of radar, building of a coast guard station, and hosting the infamous Truman-McArthur summit in October of 1950.<sup>230</sup> Following the fall of Saigon in 1975, some 15,000

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Greater knowledge of [radiation] effects on human beings is badly needed... Even though the radioactive contamination of Rongelap Island is considered perfectly safe for human habitation, the levels of activity are higher than those found in other inhabited locations in the world. The habitation of these people on the island will afford most valuable ecological radiation data on human beings[.]

*Id.*; see also JULIAN AGUON, *THE PROPERTIES OF PERPETUAL LIGHT* 88 (2021).

Though the public record is now replete with evidence substantiating this claim [about the decades of nonconsensual medical experiments that followed nuclear testing], it is the deeply dehumanizing way in which American scientists and doctors spoke of the Marshallese that always gutted me, and guts me still. For instance, one Dr. Merrill Eisenbud had this to say at a 1956 meeting of the Atomic Energy Commission: ‘It will be very interesting to go back and get good environmental data, how many per square mile; what isotopes are involved and a sample of food changes in many humans through their urines, so as to get a measure of the human uptake when people live in a contaminated environment. Now, data of this type has never been available. While it is true that these people do not live, I would say, the way Westerners do, civilized people, it is nevertheless also true that these people are more like us than the mice.

*Id.* n. 34.

<sup>227</sup> H.D. 1, 5<sup>th</sup> Cong. Micr., 2d sess. (TTPI 1974); U.N. Doc. T/COM.10/L.122 (Mar. 29, 1974) (available at <https://digitallibrary.un.org/record/3838322?ln=en>).

<sup>228</sup> *Id.*

<sup>229</sup> Dirk H.R. Spennemann, *To Hell and Back: Wake During and After World War II*, DIGITAL MICRONESIA-AN ELECTRONIC LIBRARY & ARCHIVE (Dirk H.R. Spennemann ed., 2000), [http://marshall.csu.edu.au/Marshalls/html/Wake\\_WWII/Wake\\_WWII-Text.html](http://marshall.csu.edu.au/Marshalls/html/Wake_WWII/Wake_WWII-Text.html) [hereinafter *To Hell and Back*].

<sup>230</sup> *Id.*

Vietnamese refugees stayed at Wake Island for a duration of up to four months while awaiting transportation and relocation to America.<sup>231</sup>

The Republic of the Marshall Islands gained political independence from the TTPI in 1979, although the Trusteeship Agreement did not terminate with respect to the Marshall Islands for another seven years.<sup>232</sup> During that time, the Marshall Islands began negotiations with the United States on its future status, with the forefront issue being compensation for nuclear testing, including medical care, cleanup, and relocation.<sup>233</sup> As part of these negotiations, a delegation from Bikini toured the Island of Hawai‘i, Moloka‘i, Palmyra, and Wake, as well as other islands located in the Marshall Islands for possible resettlement.<sup>234</sup> The group agreed that they were only interested in resettlement on *Āneen Kio* due to the atolls proximity to Bikini and opportunities for employment due to the American military presence.<sup>235</sup> Representatives from the Marshall Islands presented the desires of *Ri-Pikinni* to relocate to Wake, along with their claim to sovereignty over *Āneen Kio* before the U.S. Senate and the UN Trusteeship Council.<sup>236</sup> In response to the latter, the Soviet Union indicated that they

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<sup>231</sup> *Id.*

<sup>232</sup> HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at 220-21. The legality of an American President unilaterally “determining” the Trusteeship agreement is no longer in effect by executive order is very questionable. *See* 51 FR 40399. As has been noted by Micronesian lawyer and scholar, Dr. Gonzaga Puas,

[s]ome questions about the legalities of the US’s conduct surrounding the disintegration of the TTPI remain unanswered. In particular, the question of whether the US violated the terms of the trusteeship agreement. . . . There is a strong case for arguing that the US’s conduct contradicted the terms of the agreement. For example, Section 1 of Article 83 indicated that any ‘alteration or amendment to the TTPI agreement shall be exercised by the Security Council’. . . . the principles within UN Resolution 1514 (XV) could have been applied to terminate the TTPI agreement rather than a simple agreement between the US and Micronesia. The TTPI agreement specifically granted the UN Security Council the final power to terminate the agreement.

THE FEDERATED STATES OF MICRONESIA’S ENGAGEMENT WITH THE OUTSIDE WORLD 139-40 (2021).

<sup>233</sup> HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at 220-21.

<sup>234</sup> *Oversight on Territories and Insular Affairs: Hearing Before the S. Comm. on Energy and Nat. Resources*, 96th Cong. 358-381 (1979) [hereinafter *Hearing on Insular Affairs*]. The other islands in the Marshalls considered included Mili, Knox, Jaluit, Ailinglaplap, Erikub, and Likiep. *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*; U.N. TCOR, 47th Sess., 1503d, U.N. Doc. T/PV.1503 (May 29, 1980), <https://digitallibrary.un.org/record/1655056?ln=en> [hereinafter *Trus. Counc. Meeting 1503*].

had “always regarded Wake Island as part of the Marshall Islands.”<sup>237</sup> After recounting how the United States had relinquished their disputed claims over islands in Kiribati,<sup>238</sup> Tuvalu, and the Cook Islands, Tony DeBrum—then serving as the Marshall Islands special representative to the Trusteeship Council—stated,

[w]e are confident that the United States will decide to treat the Marshall Islands no less favorably than our . . . neighbors in the Pacific . . . . Any other course would be unthinkable, especially in the light of the special circumstances that mark our past relationship with the United States.<sup>239</sup>

The U.S. Department of Defense stated that “any such resettlement is out of the question.”<sup>240</sup> When the DOE began exploring a classified plan to store nuclear waste on Wake, the American status negotiator, Peter R. Rosenblatt, requested that any plans for Wake be classified and kept from the Marshallese. Rosenblatt conveyed in a statement to the Senate that there existed “a latent and longstanding but rather unviable Marshallese claim to Wake, and Wake is in the region of the Marshalls, . . . there would be some extreme sensitivity at this critical time in the negotiations to a public statement about Wake.”<sup>241</sup> A State Department official further claimed, somewhat disingenuously, that the status negotiations did not,

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<sup>237</sup> Trus. Counc. Meeting 1503, *supra* note 236, at 3-5.

<sup>238</sup> Including Kanton Island, which served as a key allied airbase during WWII and housed U.S. Air Force and the U.S. Space and Missile Systems Organization missile tracking operations after the war. *See Kanton Atoll*, ENCYC. BRITANNICA (March 28, 2020), <https://www.britannica.com/place/Kanton-Atoll>.

<sup>239</sup> Trus. Counc. Meeting 1503, *supra* note 236, at 6-7. DeBrum elaborated that,

[w]hen the United States obliterated and destroyed private lands on Bikini Atoll in the course of the nuclear weapon testing, the United States [did not] compensate[] the people for their loss of land . . . with land claimed by the United States, but . . . lands of the Marshall Islands on Kili. Simple justice would oblige the United States to make some amends. . . for this appropriation of Marshall Islands public lands by renouncing its questionable . . . claim to Wake in favor of the Marshall Islands on the same basis as it has [relinquished questionable claims] elsewhere in the Pacific. We solicit the encouragement of this council, but we remain confident that the United States will reach this just and logical position on its own initiative.

*Id.*

<sup>240</sup> *Department of the Interior and Related Agencies Appropriations for 1981: Hearings Before a Subcommittee of the Committee on Appropriations*, 96th Cong. 589 (1980); Jonathan M. Weisgall, *The Nuclear Nomads of Bikini*, 39 FOR. POL'Y 74, 92 (1980), <https://www.jstor.org/stable/1148413> (“The Pentagon, however, has flatly refused to permit them to settle there.”).

<sup>241</sup> *Pacific Spent Nuclear Fuel Storage: Hearing Before the S. Comm. on Energy*

[c]over Wake Island per se but the people of the trust territory in the Pacific and the Marshalls group, which is of international concern since it is a UN trust territory. They have a claim to Wake Island. I have been told by the negotiator they would be deeply concerned and it would be seriously disruptive to his negotiations if we were to have a public mention of Wake Island at the present time.<sup>242</sup>

The Director of the Office of Territorial Affairs added that,

[t]he people of the Marshalls have an interest in Wake because of some historic tie between the Marshalls and Wake Island. We were not aware—I was not aware—until this hearing that there was the objection that Ambassador Rosenblatt has expressed to revealing the interest in Wake to the Marshallese.<sup>243</sup>

Despite the State Department's claim that the status negotiations did not involve Wake "per se," the Marshallese claim to *Āneen Kio* was raised again in U.S. Senate Committee hearings on the negotiated Compact of Free Association.<sup>244</sup> When asked whether it would favor relinquishing Wake to promote friendly relations with the Marshall Islands, similar to the American relinquishment of Kanton to Kiribati, the State Department responded flatly that,

[i]n response to Marshallese claims, we have publicly and formally reaffirmed our sovereignty over Wake. Following a Marshallese assertion at the 1980 meeting of the United Nations Trusteeship Council, the U.S. delegation promptly rebutted the Marshallese claim. Similarly, in 1980, when the Marshall Islands asserted jurisdiction over waters off Wake in a commercial fisheries agreement, the Department sent letters to the Marshall Islands Government and to each of the other parties to the agreement "pointing out that Wake is under U.S. sovereignty and that the Marshall Islands has no authority to regulate fishing in the waters surrounding the atoll." We do not regard U.S. sovereignty over Wake as negotiable.<sup>245</sup>

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and Nat. Resources, 96th Cong. 26-27. (1979).

<sup>242</sup> *Id.* at 48 (statement of Thomas R. Pickering, Ass't Sec., Bur. Oceans and Int'l Envir. Sci. Affairs).

<sup>243</sup> *Id.* at 49-50 (statement of Ruth Van Cleve).

<sup>244</sup> *To Approve the Compact of Free Ass'n: Hearing Before the S. Comm. on Energy and Nat. Resources*, 98th Cong. (1984).

<sup>245</sup> *Id.* at 879.

When pressed on why the United States would not recognize Marshallese claims to Wake if it was prepared to relinquish Kanton, the response was, “[w]e have determined that we have a continuing long-term requirement for Wake Island. This determination differentiates Wake from Canton [sic] Island.”<sup>246</sup>

### I. *Compact of Free Association*

In 1986, the RMI and U.S. concluded a Compact of Free Association, which provided the basis for the government-to-government relationship between the two independent countries.<sup>247</sup> The Compact left in place extensions of certain American programs from the TTPI era,<sup>248</sup> allowed Compact citizens to live and work in America indefinitely,<sup>249</sup> and provided a one-time payment for nuclear claims.<sup>250</sup> In exchange, the Compact gave the United States exclusive military control over all RMI territory,<sup>251</sup> the right to land for military bases (subject to negotiation),<sup>252</sup> the dismissal of all lawsuits in U.S. courts related to nuclear testing, and the stripping of jurisdiction from all U.S. Federal courts to hear any nuclear claims.<sup>253</sup> The Compact of Free Association defined the United States’ acceptance of “responsibility for compensation owing to citizens of the Marshall Islands” affected by nuclear testing,<sup>254</sup> established a claims trust

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<sup>246</sup> *Id.* at 947.

<sup>247</sup> HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at 220-21.

<sup>248</sup> For example, access to FEMA, the FAA, and U.S. Postal Service. Compact of Free Association, Marsh. Is.-U.S., art. II, Sec. 221, Jan. 14, 1986, 99 Stat. 1800 [hereinafter COFA I].

<sup>249</sup> *Id.* at sec. 141.

<sup>250</sup> *Id.* at sec. 177. A separate agreement, referred to as the “Section 177 Agreement” was reached between the U.S. and RMI to implement Section 177 of COFA I dealing with compensation for nuclear testing. 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, KAV 4575 (Jun. 25, 1983) [hereinafter Sec. 177 Agreement] (available at <https://heinonline.org/HOL/P?h=hein.forrel/coagree0001&i=238>).

<sup>251</sup> COFA I, *supra* note 248, at sec. 311.

<sup>252</sup> *Id.*

<sup>253</sup> *Juda v. United States*, 13 Cl. Ct. 667, 689-690 (Cl. Ct. 1987) (holding that the United States’ consent to be sued had been withdrawn with respect to the pending takings claims and dismissing them). While the United States “accepted responsibility” for nuclear testing and initially funded the NCT, the Section 177 Agreement did not confer upon the Claims Tribunal any “jurisdiction over the United States, its agents, employees, contractors, citizens or nationals with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program.” *Supra* note 250, art. IV, sec. 1.

<sup>254</sup> COFA I, *supra* note 248, at Sec. 177(a).

fund of \$150 million to be utilized for payments to persons known to be affected by the nuclear testing program (specifically, the people of Bikini, Eniwetok, Rongelap and Utrik),<sup>255</sup> and established the Nuclear Claims Tribunal ("NCT") to adjudicate all claims.<sup>256</sup> The establishment of the settlement fund was agreed upon as a full and final settlement for nuclear compensation claims.<sup>257</sup> While the Compact provides that a "Changed Circumstances" petition could be submitted to Congress if "such injuries render the provisions of this Agreement manifestly inadequate,"<sup>258</sup> it did not "commit the Congress of the United States to authorize and appropriate funds."<sup>259</sup> Of the awards approved by the NCT, \$945,253,338 remain unpaid because the settlement fund has been depleted.<sup>260</sup> In 2002, former U.S. Attorney General Richard Thornburgh was commissioned to undertake an independent examination of the NCT's process and issued a report to the U.S. Congress concluding that:

[T]he NCT fulfilled the task for which it was created in a reasonable, fair and orderly manner, and with adequate independence. . . . It is our judgment that the \$150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of U.S. nuclear tests that took place in their homeland.<sup>261</sup>

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<sup>255</sup> *Id.* at sec. 177(c). In 2000 the Center for Disease Control "recommend[ed] that Ailuk, Jemo, Likiep, Wotho, and Wotje receive compensation for exposure to fallout from the Bravo test of 1954." Julianne M. Walsh, *Marshall Islands in Review: Issues and Events, 1 July 1998 to 30 June 1999*, 12 CONTEMP. PAC 204, 209 (2000).

<sup>256</sup> Sec. 177 Agreement, *supra* note 250, at art. IV.

<sup>257</sup> Sec. 177 Agreement, *supra* note 250, art. X, sec. 1 ("This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.").

<sup>258</sup> Sec. 177 Agreement, *supra* note 250, Article IX.

<sup>259</sup> *Id.*; see also *People of Bikini v. United States*, 554 F.3d 996, 998 (Fed. Cir. 2009) ("The Government of the Marshall Islands submitted a Changed Circumstances petition to Congress requesting additional funding in 2000. To date, Congress has not acted on that petition.").

<sup>260</sup> *People of Bikini*, 77 Fed. Cl. at 763-64.

<sup>261</sup> *Id.*

The Compact also made official what DeBrum had called unthinkable—the United States passed entirely on deciding anything with regards to *Ri-Pikinni* and *Āneen Kio*.<sup>262</sup> For the Marshall Islands' new national government and its representatives, there was a “sensitive balancing act” between honoring the sacrifices of those particularly harmed by the American presence and “acting in the best interest of the nation.”<sup>263</sup> This dissonance was also illustrated in the negotiations over the American appropriation of Kwajalein, with newly elected President, *Irooj*, and Kwajalein landowner Amata Kabua stuck squarely in the middle of the dispute.<sup>264</sup> It was Amata Kabua that had petitioned the UN Trusteeship Council in 1959, asking that Bikini, Kwajalein, and Majuro be “restored in their original condition and turned over to the rightful owners together with payment for past use.”<sup>265</sup> Amata's adoptive father, Lejolan,<sup>266</sup> was the lead plaintiff in *Kabua v. United States*, where Kwajalein landowners unsuccessfully brought an action against the United States for the uncompensated taking of their islands.<sup>267</sup> The original compromise over

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<sup>262</sup> The Compact defined

For the purpose of this Compact only and without prejudice to the views of the Government of the United States or the Government of the Marshall Islands . . . as to the nature and extent of the jurisdiction under international law of any of them that ‘Trust Territory of the Pacific Islands’ means the area established in the Trusteeship Agreement consisting of the administrative districts of . . . the Marshall Islands . . . as described in [the Trust Territory Code].

COFA I, *supra* note 248, art. VI, sec. 461. The Marshall Islands Administrative District was purposefully drawn to exclude Wake:

consisting of those islands of the Trust Territory and the territorial waters thereof, which lie within the area beginning at a point 11° north latitude, 155° east longitude; thence southeast to a point 5° north latitude, 166° east longitude; thence south along the 166th meridian east longitude to 0° latitude; thence northeast to a point 4° north latitude, 170° east longitude; thence east to a point 4° north latitude, 174° east longitude; thence north to a point 16° north latitude, 174° east longitude; thence northwest to a point 19° north latitude, 158° east longitude; thence south to the place of beginning.

3 Trust Territory Code § 1(6) (1979). *See also infra* Figure 7, note 496.

<sup>263</sup> DVORAK, *supra* note 1, at 214.

<sup>264</sup> *Id.*

<sup>265</sup> Petition from Representatives Bolkain [sic] and Kabua Concerning the Pacific Islands, U.N. Doc. T/PET.10/30/Add.1 5 (Nov. 3, 1959), <https://digitallibrary.un.org/record/3824661?ln=en>.

<sup>266</sup> DVORAK, *supra* note 1, at 201.

<sup>267</sup> 212 Ct. Cl. 160, 167 (Ct. Cl. 1976) (“Our inability to resolve the long impasse on quantum is no doubt regrettable, since it is doubtful whether plaintiffs can recover anywhere else against the taker in possession.”).

Kwajalein, which provided \$9 million annually in rent to maintain the American military base through 1999,<sup>268</sup> left a “bitter aftertaste” with the Kwajalein landowners.<sup>269</sup> While this provided some measure of justice for landowners who had fought a decades long battle for compensation for their land, it was far from a decisive victory.<sup>270</sup>

When the American Congress proposed including Wake within the territory of Guam in 1990, President Amata Kabua reaffirmed the *Ri-Majeļ* claim to *Āneen Kio*, declaring that it was a “site of great importance to the traditional chiefly rituals” of the Marshall Islands and that the RMI claimed the territory as an independent sovereign nation.<sup>271</sup> When compensation for use of Kwajalein was re-negotiated in 2003, landowners were offered “much less than what they asked for,” with some claiming that the number from the United States was “never really negotiable.”<sup>272</sup> The Americans were accused of having “masterminded a sort of coup d’état based on the tactic of ‘divide and conquer,’ pitting two opposing parties in the Marshalls against each other in the expectation that the landowners would finally relent.”<sup>273</sup> In 2005, former RMI President Imata Kabua, who became *Iroojlaplap* of Kwajalein after the death of his cousin Amata, wrote a pointed open letter to the American ambassador condemning American actions and drawing a line in the sand, “[w]e do not subscribe to your world policy that ‘[m]ight makes right.’ . . . We have been your friends for the longest time in spite of the outrageous things your government has done to us. But there comes a time when even friends must draw the line.”<sup>274</sup>

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<sup>268</sup> The Compact provided no retroactive compensation for use of Kwajalein from 1944 to 1964. DVORAK, *supra* note 1, at 209.

<sup>269</sup> *Id.* at 215-16.

<sup>270</sup> Tom Kijiner Jr., one of the landowners’ representatives, is quoted as saying, “these landowners deserve much more compensation than they have received to date, getting proper compensation is hard, hard work.” DVORAK, *supra* note 1, at 203.

<sup>271</sup> EUROPA REGIONAL SURVEYS OF THE WORLD, THE FAR EAST AND AUSTRALASIA 2008 1064 (Lynn Daniel ed., 39th ed. 2008); *see also* Spennemann, *To Hell and Back*, *supra* note 229 (“A Special Commission on Eneen-Kio (Wake Island) was established to draft report on the Republic of the Marshall Islands’ claims to Eneen-Kio (Wake Island).”).

<sup>272</sup> DVORAK, *supra* note 1, at 221-22.

<sup>273</sup> *Id.*

<sup>274</sup> Giff Johnson, *Iroij Imata: U.S. Money Move Illegal*, Mars. Is. J. 6 (Oct. 14, 2005), reprinted as *A clear message on the Kwajalein issue*, Saipan Trib. (Oct. 12 2005), <https://www.saipantribune.com/index.php/a4d22c0b-1dfb-11e4-aedf-250bc8c9958e/>.

Nowhere in our Constitution is there a provision I am aware of that states that the United States of America does not have to abide by our laws. . . . Our Constitution prohibits the taking of land without the consent of the owners of the land and fair compensation. . . Your condescending public statements ignoring that reality go beyond acceptable standards of

### III. *BA BWE EWŌR AN JIMWE BWE EN WŌR AN* (THE CLAIM)

Whether Wake Island was inadvertently placed into the TTPI depends upon the interpretation of the clause, “the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations.”<sup>275</sup> This, in turn, depends upon the construction of the clause used to define that mandate and affirmed in the treaty between Japan and America—“all the former German islands situated in the Pacific Ocean and lying north of the Equator.”<sup>276</sup> By virtue of Germany’s treaties with Spain, Britain, and—most importantly—the *Irooj* of the *Rālik* and *Ratak* chains, there is no question that by 1886, under international law, *Āneen Kio*

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international relations and, to us, reflect *systematic taunting on the part of a powerful partner bullying a less powerful one*. . . . Is it your position and that of your government that you will simply deny the existence of our Constitution and take land which [does not] belong[. . . to you? . . . . [This] is a remarkable display of *colonial audacity*. . . . [R]iding *roughshod* over our own Marshallese Constitutional processes to *force that injustice upon our people is outrageous!* Your government has done similar things to us to in the past [with *Ri-Pikinni* & Castle Bravo]. Stonewalling those issues like what you are doing with the Kwajalein issue will not solve them. These issues aggravate an already grave and sensitive wound in our shaky relationship. You take Marshallese land without compensation and use it to pay your debts to other Marshallese people whose lands and livelihood you have destroyed. While you abused us during the Trusteeship period, *what you do now is even more acrimonious and unjust*. You are threatening a sovereign nation. Your threat is not so veiled this time. . . we are not afraid to stand up to you and your might. We have legally confronted you before and we shall do it again to protect our homelands and assert our inalienable rights. . . What are you going to tell our elders, our children and grandchildren? That it is the “will of God” that you take Kwajalein and that “everything is in God’s hands?” Make no mistake about our physical and spiritual ties to our lands. Our forefathers fought and died to provide us with this peaceful home, sovereign and free. Our right to live here peacefully and to pass to it on to our heirs, whole and intact, is a fundamental right you and your government cannot take away. . . [I]t appears hypocritical on the one hand that the United States is losing thousands of American lives and continues to put at risk American and Marshallese lives to defend the cause of freedom and to inaugurate a new constitution and establish democracy in Iraq, while on the other hand, your government is undermining the very foundation of our Marshallese constitutional democracy. . . . If there is something that we do not understand about your views regarding our relationship and your intentions for the future, please enlighten us. But *threatening us as if we are just grass for the American elephants to tramp on does not augur well for a mutually beneficial tomorrow*.

*Id.* (emphasis added).

<sup>275</sup> S.C. Res. 21, art. 1 (Apr. 2, 1947).

<sup>276</sup> 2 League of Nations Off. J. 85, art. I (1921).

was a “German” island situated in the Pacific Ocean and lying north of the equator. Unless America took effective actions to obtain Wake by December 17th, 1920, Wake was included within the Japanese mandate, and via incorporating reference, in the TTPI.

#### A. *International Law on Acquisition of Territory*

Acquisition of territory by nation states has shaped nearly every aspect of the world we now live in. Territory is defined as, “the spatial sphere within which a state’s sovereignty is normally manifested.”<sup>277</sup> Often, the term sovereignty is used as a synonym of territorial sovereignty.<sup>278</sup> Historically, there have been four main ways in which a nation acquires title to territory:

- Title by discovering and occupying *terra nullius*.
- Title based on longstanding, effective, and peaceful possession (prescription).
- Title by military conquest.<sup>279</sup>
- Title by treaty of cession.<sup>280</sup>

While in practice, it is sometimes difficult to distinguish between occupation of *terra nullius* and acquisitive prescription, the first distinction is determined by the nature of the territory itself. *Terra nullius* involves territory that belongs to no sovereign; with prescription, there will be a sovereign title and an adverse possession by another international subject.<sup>281</sup>

##### 1. Terra Nullius

Historically, territory was acquired by nations based on the Roman law concept of *terra nullius*—nobody’s land.<sup>282</sup> The international law that emerged in Europe after 1684 expanded the concept of *terra nullius* to include territory that was “discovered” by a European power and that was unclaimed by any other sovereign state recognized by European powers.<sup>283</sup>

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<sup>277</sup> ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW 66 (2005).

<sup>278</sup> *Id.*

<sup>279</sup> Most scholars date the prohibition of territorial acquisition by conquest to the Kellogg-Briand pact. LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 358-64 (7th ed. 2019). As both Japan and America were parties to that act, *see supra* note 158 and accompanying text, discussion of military conquest as it relates to Japan’s invasion in 1941 and subsequent unconditional surrender in 1945 is omitted as a potential basis for acquisition.

<sup>280</sup> DAMROSCH & MURPHY, *supra* note 279, at 358-64.

<sup>281</sup> Milano, *supra* note 277, at 88.

<sup>282</sup> DAMROSCH & MURPHY, *supra* note 279, at 385.

<sup>283</sup> William B Heflin, *Diayou/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 1 ASIAN-PAC. L. & POL’Y J. 18, 10 (2000).

The international law of the sixteenth century arguably granted absolute title to islands that were *terra nullius* to the discoverer.<sup>284</sup> However, the more modern rule is that discovery, without any further display of authority or occupation of an island, does not demonstrate ownership where another state exercised actual authority over the same islands.<sup>285</sup> Modern scholars have concluded that the actions of erecting landmarks and hoisting flags on a few points of discovered territory are no more than “symbolic annexation,” which merely grants “inchoate title” that may lapse if not perfected by some other action, such occupation or cession.<sup>286</sup> The concept of *terra nullius* is based on the assumption that it excludes “from its field of application territories subject to State sovereignty.”<sup>287</sup>

## 2. Prescription

Acquisitive prescription transfers title over territory if the possession of parts of the territory of another state was peaceful and uninterrupted, the possession was public, and the possession has endured a certain period.<sup>288</sup> Acquiescence from the formal sovereign and other interested parties will be of paramount importance in prescriptive acquisition.<sup>289</sup> Acquisitive prescription is defined as:

[A] mode of establishing title to territory which is not *terra nullius* and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated. It is the legitimization of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign . . . . However, the required “passage of time” to establish valid title over the territory in question will “depend, as so much else, upon all the circumstances of the case, including the nature of the territory and the absence or presence of any competing claims.”<sup>290</sup>

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 11.

<sup>286</sup> Alfred-Maurice De Zayas, *Territory, Discovery*, 4 ENCYC. PUB. INT’L L. 839-40 (Rudolf Bernhardt ed., 2000).

<sup>287</sup> Santiago Torres Bernárdez, *Territory, Acquisition*, 4 ENCYC. PUB. INT’L L. 831, 835 (Rudolf Bernhardt ed., 2000).

<sup>288</sup> Jan Wouters & Sten Verhoeven, *Prescription*, MAX PLANCK ENCYCS. OF INT’L L. para. 5 (online ed. 2008).

<sup>289</sup> MILANO, *supra* note 277, at 88. Although Milano cautions that “the distinction between *terra nullius* and inhabited land is not easily tenable if we consider colonial territories.” *Id.*

<sup>290</sup> Han-yi Shaw, *Revisiting the Diaoyutai/Senkaku Islands Dispute: Examining Legal Claims and New Historical Evidence Under International Law and the Traditional*

A state cannot acquire title if it is administering the territory in a capacity other than that of a sovereign over the territory; thus states having administered a territory as mandate or trust will never obtain title by prescription.<sup>291</sup> Possession by private nationals will not transfer title; occupiers must be exercising functions of state authority.<sup>292</sup> It has been established that possession in the face of constant opposition cannot transfer title by prescription,<sup>293</sup> yet the form of opposition that is required is less clear.<sup>294</sup> A modern principle of international law is that, “the significance of an absence of protest will to a large extent depend upon all the circumstances of the situation; failure to protest by a state being directly and substantially affected by the act in question will be of greater significance than failure by a state not so effected.”<sup>295</sup> While it is firmly established that the possession must endure for a certain period of time, international law does not provide for a fixed term.<sup>296</sup> Since no rule has been established setting a fixed length of time, it has been held that enough time must have lapsed in order to give rise to the general recognition that the title has passed.<sup>297</sup>

The burden of proof of effectiveness is higher in cases of prescription, compared to occupation of *terra nullius*, “both in terms of the intensity of state activities and in terms of length of time.”<sup>298</sup> According to Milano, the 1885 treaty between Germany and Spain regarding claims in Micronesia is “confirmation of how effective occupation had become . . .

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*East Asian World Order*, 26 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 95, 101-02, n. 14 (2008) [hereinafter Shaw, *Diaoyutai/Senkaku Islands Dispute*]; see also MALCOLM N. SHAW, INTERNATIONAL LAW 290-91 (3d ed. 1991).

<sup>291</sup> Shaw, *Diaoyutai/Senkaku Islands Dispute*, *supra* note 290, at 168.

<sup>292</sup> *Id.*; Kasikili/Sedudu Island (Bots. v Namib.), Judgment, 1999 I.C.J. 1045, 1105 (“[I]t has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of those authorities.”) (I.C.J. 1999); compare CONSTITUTION OF THE REPUBLIC OF THE MARSH. IS. art. III (establishing the Council of *Irooj* as the upper house of the RMI parliament).

<sup>293</sup> Wouters & Verhoeven, *supra* note 288, at para. 5; The Chamizal Case (Mexico v U.S.), 11 R.I.A.A. 316, 328-29 (I.B.C. 1911).

<sup>294</sup> Wouters & Verhoeven, *supra* note 288, at para. 5.

<sup>295</sup> Shaw, *Diaoyutai/Senkaku Islands Dispute*, *supra* note 290, at 155 (quoting L. OPPENHEIM, INTERNATIONAL LAW 1195 (H. Lauterpacht ed., 8th ed. 1955)).

<sup>296</sup> Wouters & Verhoeven, *supra* note 288, para. 5. Wouters & Verhoeven surveyed prior practice and found that states have claimed title by prescription after the passage of fifty, sixty, and forty-three years; while some authors deem only thirty years sufficient (this seems to be the shortest time proposed). *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> MILANO, *supra* note 277, at 88.

the primary criterion for dispute settlement.”<sup>299</sup> The modern view is that when acquiring territory, “effectiveness has become a variable criterion according to geographical, economic and strategic conditions.”<sup>300</sup>

While acquisitive prescription has been an accepted principle by the majority of experts, it has rarely been applied and invoked by states to settle disputes regarding territorial title or delimitation in recent times.<sup>301</sup> Thus, scholars have concluded that prescription “cannot constitute a rule of customary international law, although it might be a general principle of law in the sense [of Article 38 of the] ICJ Statute.”<sup>302</sup>

The leading relevant cases in international law dealing with the acquisition of territory are *Palmas*, *Clipperton*, and *Eastern Greenland*. In the *Island of Palmas Case*, described as the “seminal case dealing with island disputes,” America and the Netherlands disputed ownership of a lightly inhabited island twenty miles southwest of the Philippines.<sup>303</sup> America claimed that Spain’s sixteenth century “discovery” of the island when it was *terra nullius* had given Spain “original title, and that title had passed to America when it defeated Spain in the Spanish-American war.”<sup>304</sup> The Netherlands countered that the developments in the law over the ensuing 400 years should not be ignored, that it had continuous contact with the region, and that it had entered into treaties with “native princes” establishing Dutch sovereignty over the island.<sup>305</sup> The arbitrator agreed with the Netherlands finding that that the law at the time of the alleged breach, and not the law prior to it, controls island disputes.<sup>306</sup> He continued by

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<sup>299</sup> *Id.* at 84.

<sup>300</sup> *Id.* at 85.

<sup>301</sup> *Id.* at 84.

<sup>302</sup> Wouters & Verhoeven, *supra* note 288, at para. 9.

<sup>303</sup> Heflin, *supra* note 283, at 18; *Island of Palmas Case*, (U.S. v. Neth.), 2 R.I.A.A. 829, 832 (Perm Ct. Arb. 1928).

<sup>304</sup> *Island of Palmas Case*, 2 R.I.A.A. at 837; Heflin, *supra* note 303, at 18.

<sup>305</sup> Phillip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT’L L. 735, 735 n. 50 (1928).

<sup>306</sup> *Island of Palmas Case*, 2 R.I.A.A. at 845-46 (“The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law... It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty.”); *see also* Julian Aguon, *The Commerce of Recognition (Buy One Ethos, Get One Free): Toward Curing the Harm of the United States’ International Wrongful Acts In The Hawaiian Islands*, ‘Ohia 22 (2012) (“Although this case has been cited over time as enshrining a more or less fundamental principle of international law, a more restrictive reading of the ruling is

concluding that “though the U.S. had inchoate title to the Island of Palmas, based on its ascension to possession of the Philippines through earlier Spanish discovery, the Netherlands had actual title to the island because it had peacefully and continuously displayed authority over the island.”<sup>307</sup> The arbitrator found that “contracts” between a state and “chiefs of peoples not recognized as the members of the community of nations” were not recognized as treaties under international law in 1928; yet, he refused to exclude the contracts from being taken into consideration.<sup>308</sup>

While *Palmas* stood for the proposition that discovery of an inhabited island without peaceful and continuous display of authority is insufficient to perfect title, the Arbitrator in the *Clipperton Island Case* faced two competing claims based on discovery and occupation of an uninhabited atoll.<sup>309</sup> The arbitrator concluded that pure symbolic effectiveness can be sufficient when considering uninhabited and remote islands.<sup>310</sup> However, as Pierlings notes, “the arbitrator’s comments on effectiveness, territorial claims based on historical grounds and abandonment are hardly capable of general application. On these questions, the decisions . . . in [*Eastern Greenland* and *Palmas*] deserve far greater attention.”<sup>311</sup>

In 1933, the Permanent Court of International Justice (“PCIJ”) seemed to repudiate modern application of the doctrine of *terra nullius*, at least as it applied to Norway’s claim that Eastern Greenland was subject to appropriation because it was outside the limits of Danish colonies.<sup>312</sup> Milano summarized the court’s opinion as standing for the proposition that “the administrative and legislative acts enacted by Denmark on Greenland, despite having as direct addressees only the Western inhabited part of the island, referred to Greenland in its unitary geographical meaning and therefore should be considered as an intention to exercise sovereignty on

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possible. There, the United States claimed the disputed territory as successor to Spain under an 1898 treaty of cession. Accordingly, the outcome in that case squarely turned on the nature of the Spanish rights at that time.”).

<sup>307</sup> Heflin, *supra* note 283, at 11; see *Island of Palmas Case*, 2 R.I.A.A. at 845-846.

<sup>308</sup> *Island of Palmas Case*, 2 R.I.A.A. at 858-59.

<sup>309</sup> *Clipperton Island Case*, (Fr. v. Mex.) 2 R.I.A.A. 1105 (1931), reprinted in 26 AM. J. INT’L L. 390 (1932).

<sup>310</sup> See *Clipperton Island Award*, A.J.I.L. at 390.

<sup>311</sup> Tobias Pierlings, *Clipperton Island Arbitration*, MAX PLANCK ENCYCS. OF INT’L L. para. 6 (online ed. 2006).

<sup>312</sup> Gudmundur Alfredsson, *Eastern Greenland Case*, in MAX PLANCK ENCYCS. OF INT’L L. para. 1 (online ed. 2007); *Legal Status of Eastern Greenland* (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Seri. A/B) No. 53 (Apr. 5).

the whole territory.”<sup>313</sup> The court also outlined a framework for analyzing the claim of sovereignty under prescription:

A claim to sovereignty based not upon some particular act or title *such as a treaty of cession* but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.<sup>314</sup>

Seeming to harmonize their decision with the principles outlined in the *Clipperton* case, the court acknowledged that, “in the case of claims to sovereignty over areas in thinly populated or unsettled countries,” tribunals have been satisfied “with very little in the way of the actual exercise of sovereign rights, *provided that the other State could not make out a superior claim*.”<sup>315</sup>

### 3. Title by Treaty of Cession

Cession is the transfer of sovereignty through agreement between two or more states.<sup>316</sup> Article 31 of the Vienna Convention on the Law of Treaties states that, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>317</sup> In the *Isle of Palmas Case*, it was said in dicta that a treaty of protection,

is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of the autonomy of the natives . . . And thus[,] suzerainty over

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<sup>313</sup> See *Eastern Greenland*, 1933 P.C.I.J. at 46-56; MILANO, *supra* note 277, at 86. Thus, *Eastern Greenland* supports the existence in international law of the principle of geographical contiguity to support claims lacking a thorough effective basis. In analyzing this case Milano writes,

Where a group of islands was occupied, or a certain coast was occupied, those islands belonging to the archipelago and those lying adjacent to the coast were considered part of the geographic unity of the territory even if not necessarily actually occupied. Again, this principle has found application in cases where a territory was uncharted or remote. It has stressed the functional nature of modern state sovereignty that was no more seen as settlement and exploitation but as a display of state activities.

*Id.*

<sup>314</sup> *Eastern Greenland*, 1933 P.C.I.J. at 27-28 (emphasis added).

<sup>315</sup> *Id.* at 46 (emphasis added).

<sup>316</sup> MILANO, *supra* note 277, at 89.

<sup>317</sup> Vienna Convention on the Law of Treaties art. 31 [VCLT], May 23, 1969, 1155 U.N.T.S. 331.

the native States becomes the basis of territorial sovereignty as towards other members of the community of nations.<sup>318</sup>

In 2002, well into the era of decolonization, the International Court of Justice (“ICJ”) construed an 1884 treaty of “protection” with Indigenous leaders as a treaty of cession.<sup>319</sup> However, as Milano states, “[o]ne should not underestimate the fact that, by denying the doctrine of *terra nullius* in *Western Sahara*, *Mabo* and *Cameroon/Nigeria*, at least the property rights of the [I]ndigenous populations are recognized.”<sup>320</sup> In comparison to prescription and occupation, effectiveness does not play a pivotal role in the acquisition of territory through cession.<sup>321</sup>

### B. Critical Date

There are two key questions concerning the status of *Āneen Kio*: 1) was Wake *terra nullius* or German territory at the time the United States appropriated it and, 2) had America obtained title to Wake before the Japanese mandate was established? To answer these questions, it is necessary to establish the “critical date” on which these actions occurred because, “territorial claims imply a succession of events occurring over a considerable span of time[;] a tribunal is therefore obliged to determine the moment in time when the parties’ claims must be legally assessed.”<sup>322</sup> The classic definition of “critical date” is the moment in time “after which any actions of the parties can no longer affect the issue.”<sup>323</sup> The purpose of establishing the critical date is to “prevent disputants from unilaterally taking steps to improve their position by changing the extant situation.”<sup>324</sup> Acts performed after the critical date cannot be invoked as an independent source of title, which is of “particular relevance with regard to acquiescence.”<sup>325</sup> However, as Brownlie notes in his seminal text, “Of course, evidence of acts and statements occurring after the critical date may

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<sup>318</sup> 2 R.I.A.A. at 858-859.

<sup>319</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, 404-05 (Oct. 10).

<sup>320</sup> MILANO, *supra* note 277, at 78.

<sup>321</sup> *Id.*

<sup>322</sup> Marcelo G. Kohen & Mamadou Hébié, *Territory, Acquisition*, in MAX PLANCK ENCYC. OF INT’L L. para. 50 (online ed. 2011).

<sup>323</sup> Shaw, *Diaoyutai/Senkaku Islands Dispute*, *supra* note 290, at 156; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II*, 1955-56 BRIT. Y.B. INT’L L. 20, 20.

<sup>324</sup> Shaw, *Diaoyutai/Senkaku Islands Dispute*, *supra* note 290, at 156.

<sup>325</sup> Kohen & Hébié, *supra* note 322, at para. 51.

be admissible if not self-serving, as in the case of admissions against interest.”<sup>326</sup>

While there are a number of accepted methods for determining the critical date,<sup>327</sup> Sir Gerald Fitzmaurice's definition of the critical date as the moment when the claim was made seems most applicable.<sup>328</sup> Thus, the first critical date should be set on January 17, 1899—the date on which America officially claims to have annexed Wake.<sup>329</sup>

Fixing the critical date for the establishment of Japan's mandate is less clear; it could plausibly be set anywhere between 1914 and 1920.<sup>330</sup> An argument could be made that since this dispute involves America, the critical date should be set at the signing of the Japanese-American treaty on February 11, 1922; however, this is problematic because the terms of the treaty affirmed the mandate as established years prior.<sup>331</sup> Regardless of the

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<sup>326</sup> Aguon, *supra* note 306 at 22, quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 126 (7th ed. 2008).

<sup>327</sup> *Id.* (“There are several types of critical date, and it is difficult and probably misleading to formulate general definitions”); Shaw, *Diaoyutai/Senkaku Islands Dispute*, *supra* note 290, at 156.

<sup>328</sup> Fitzmaurice, *supra* note 323, at 30-31.

*Occupation: the issue is ‘res nullius’ or not.* The position here is that one of the parties maintains that a certain piece of territory, island, &c., is ownerless—*res nullius*—and therefore that sovereignty over it can be acquired and asserted by taking the proper steps prescribed by international law for that purpose . . . The other party maintains that the territory or island is not *res nullius*, but is already under its sovereignty. In this type of case[,] it is clear that the critical date must be that of the claim or event that raises the issue of *res nullius*. If one State claims sovereignty on the ground that, at the moment of the claim, the territory is *res nullius* (or if that is in fact the basis of the claim), and this is resisted by another State on the ground that the territory has already been reduced into its own sovereignty, *i.e.* was not on that date *res nullius*, then the legal positions falls to be adjudged as at the moment of the claim, for the issue is: was it at that moment a *res nullius* . . . or did it then already belong to a given State, so that it was not open to appropriation by another?

*Id.*

<sup>329</sup> See *supra* note 98 and accompanying text.

<sup>330</sup> This period spans Japan's entry into the war (August 23, 1914), the Imperial Navy's landing at Eniwetok (September 29, 1914), capturing the German administrative capital in the Marshalls at Jaluit (October 3, 1914), signing the secret agreement with Britain (February 20, 1917), the award by the Supreme Council of Allied Powers of the former German islands north of the equator to Japan (May 7, 1919), the signing of the Treaty of Versailles (June 28, 1919), and the approval of the Japanese mandate by the council of the League of Nations (December 17, 1920). See PEATTIE, *supra* note 119, at 35-61.

<sup>331</sup> See *supra* note 148 and accompanying text.

exact moment when the critical date is fixed, it does not change the admission by the U.S. State Department that, between 1899 and 1932, Wake was “unoccupied and unused by either American citizens or interests, or by the Government.”<sup>332</sup> Nor does it change the fact that between 1913 and June 19, 1922,<sup>333</sup> not a single American ship or sailor exercising any function of state authority so much as laid eyes upon Wake. It seems that, “in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned.”<sup>334</sup>

### C. Analyzing the American Claim on the First Critical Date

On January 17, 1899, was *Āneen Kio terra nullius* or German territory? The fact that Germany had perfected title by cession is supported by three treaties: the treaty signed in October of 1885 with the *Irooj* of the *Rālik* chain and acceded to by 11 *Irooj* of the *Ratak* chain,<sup>335</sup> the treaty signed with Spain on December 17, 1885 selling all its rights to islands east of the 164th meridian to Germany,<sup>336</sup> and the 1886 agreement with Britain affirming German possession of islands above the 6th parallel north and west of the line at 173° 30' east.<sup>337</sup> The inclusion of Wake in the German colonial atlas also seems to provide circumstantial evidence that Germany regarded Wake as part of the annexed *Rālik* and *Ratak* chains.<sup>338</sup> Furthermore, records from the German political archives show that when news broke about America's plans to annex Wake in 1898, Germany viewed this as an infringement on its sovereignty.<sup>339</sup> There may be some question whether Germany's claim to Wake was sufficiently effective, but effectiveness does not play a pivotal role in the acquisition of territory through cession.<sup>340</sup> Moreover, geographical contiguity can support claims lacking a thorough effective basis because, “those islands belonging to the archipelago [should be] considered part of the geographic unity of the territory even if not necessarily actually occupied.”<sup>341</sup> The *Eastern*

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<sup>332</sup> SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 939-40.

<sup>333</sup> When the *USS Beaver* put in at Wake to begin a survey for a military base. RAUZON, *supra* note 155, at 164.

<sup>334</sup> See *Minquiers and Ecrehos Case*, (Fr. v U.K.), Judgment, 1953 I.C.J. Rep. 47, 59 (Nov. 17).

<sup>335</sup> See *supra* note 67 and accompanying text.

<sup>336</sup> See *supra* note 66 and accompanying text.

<sup>337</sup> See *supra* note 71 and accompanying text.

<sup>338</sup> See *supra* note 81 and accompanying text.

<sup>339</sup> See *supra* note 93 and accompanying text.

<sup>340</sup> See *supra* note 320 and accompanying text.

<sup>341</sup> See *supra* note 313 and accompanying text.

*Greenland Case* seems analogous to this situation, and just as the administrative and legislative acts enacted by Denmark on Greenland were considered as an intention to exercise sovereignty on the whole territory, administrative and legislative acts enacted by Germany on the Marshall Islands<sup>342</sup> should be considered an intention to exercise sovereignty on the whole territory, including those uninhabited portions.<sup>343</sup> Though often overlooked, the “treaty of friendship between the Marshallese chiefs and the German Empire” is key to establishing the sovereignty of Germany over *Āneen Kio*.<sup>344</sup> While some might quibble with the words used to characterize the treaty, an international tribunal would likely have no problem concluding this second treaty of “friendship” between the *Iroojis* and Germany was actually a treaty of cession.<sup>345</sup> Thus, the conclusion seems inescapable, that on January 17, 1899, *Āneen Kio* was under the sovereignty of the German empire.

Having established that on the critical date *Āneen Kio* was under the sovereignty of Germany, the actions of Commander Taussig on January 17, 1889, cannot be the basis for American sovereignty over Wake. *Terra nullius* involves territory that belongs to no sovereign and excludes from its field of application territories subject to state sovereignty, such as *Āneen Kio*.<sup>346</sup> Taussig’s actions in raising the American flag over Wake cannot be characterized as anything more than symbolic annexation, which under the best of circumstances can only grant inchoate title that will lapse if not perfected by occupation or cession.<sup>347</sup> And while the *Clipperton Case* established that the bar for effective occupation is lower for an uninhabited island, it still remains true that without any further display of authority or occupation of an island, symbolic annexation does not demonstrate ownership where another state exercised actual authority over the same

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<sup>342</sup> See Dirk H.R. Spennemann, *A Hand list of Imperial German Legislation regarding the Marshall Islands (1886-1914)*, 3 *Heritage Futures* 1 (2007) (providing a full hand list of the German legislative enactments, references to the German language documents, and translation of their titles into English) (available at [http://home.mysoul.com.au/heritagefutures/HF\\_biz/SGCH/SGCH003.pdf](http://home.mysoul.com.au/heritagefutures/HF_biz/SGCH/SGCH003.pdf)).

<sup>343</sup> See *Eastern Greenland*, 1933 P.C.I.J. at 46-56; discussion *supra* at note 313. Application of *Eastern Greenland* to the dispute over Wake does raise the issue of intertemporal law, however as the P.C.I.J. relied upon legislative enactments of Denmark dating to the 1700s to support its conclusions, *id.* at 29-30, it seems likely that German legislative enactments between 1886 and 1914 could be relied upon in a similar manner.

<sup>344</sup> See *supra* note 67 and accompanying text.

<sup>345</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, 404 (Oct. 10) (“[T]he international legal status of a [treaty] entered into under the law obtaining at the time cannot be deduced from its title alone.”); see also *supra* note 67.

<sup>346</sup> See *supra* note 287 and accompanying text.

<sup>347</sup> See De Zayas, *supra* note 286, at 840.

island.<sup>348</sup> It is the principles enunciated in *Eastern Greenland* where a *terra nullius* claim gave way to title perfected by cession, and not *Clipperton*, that should control with regards to the actions taken at *Āneen Kio* on January 17, 1899.<sup>349</sup> Indeed, in what was plainly an admission against interest,<sup>350</sup> the U.S. State Department conditioned the validity of the American claim on the absence of a basis for a claim by another country, stating that “the claim of the United States to sovereignty over Wake Island *would appear to be valid in the absence of any evidence of a claim, or basis for a claim, by another country.*”<sup>351</sup> The American claim to sovereignty over Wake based upon discovery and occupation is, by its own admission, invalid.

While never articulated by America as an alternative basis, cession also provides no basis for American sovereignty<sup>352</sup> because Wake was not included in the Treaty of Paris,<sup>353</sup> and no agreement was ever made between Germany and America with regards to Wake.<sup>354</sup> The explanation why no agreement was reached between Germany and America is likely due to the fact that the Americans never took any action to occupy or build anything at Wake that forced the issue.<sup>355</sup> That Germany was prepared to trade use, but not necessarily ownership, of Wake, Bokak, or Eniwetok to America for other territorial concessions,<sup>356</sup> cannot be equated to America acquiring title by cession.<sup>357</sup> It also must be stressed that while Germany had signed a

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<sup>348</sup> See Heflin, *supra* note 283, at 11.

<sup>349</sup> See *supra* note 298 and accompanying text.

<sup>350</sup> See *supra* note 326 and accompanying text.

<sup>351</sup> SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 939-40 (emphasis added).

<sup>352</sup> Conquest of Spain in the Spanish-American War is not a valid basis either because, like in *Palmas*, conquering Spain would have at best granted inchoate title to the U.S. as the successor to Spanish claims; yet Spain had sold all their claims east of the 164th meridian in 1885. See *supra* notes 66, 304 and accompanying text. Furthermore, Spain had agreed to sell to Germany all its remaining claims in the Pacific not ceded to America in the Treaty of Paris. See *supra* note 79 and accompanying text. While it was argued that *Palmas* was included in the Treaty of Paris as part of the Philippines, no such analogy can be made with regard to Wake. See *supra* note 80 and accompanying text. It is beyond dispute that by 1899 any Spanish title, imperfect or otherwise, had been extinguished.

<sup>353</sup> See Treaty of Paris, *supra* note 80, at 1.

<sup>354</sup> See *supra* note 94 and accompanying text.

<sup>355</sup> See SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 939-40; Spennemann, *Annexation of Wake*, *supra* note 13, at 240-41.

<sup>356</sup> See *supra* note 95 and accompanying text.

<sup>357</sup> See, e.g., *Nuclear Tests Case (Austl. v Fr.)*, Judgment, 1974 I.C.J. 253, para. 44 (Dec. 20) (holding that the binding force of a State's unilateral act depends on the declaring State's intention to be bound).

treaty with the *Iroojs* of the *Rālik* and *Ratak* chains, after more than 120 years, the Americans have yet to settle this issue with the Marshallese.

D. *Analyzing the American Claim on the Second Critical Date*

Whether America had perfected title to Wake before the Japanese mandate was established is perhaps the most pertinent question in this dispute. Having shown that Germany established sovereign title to *Āneen Kio* by cession, the American claim should be properly analyzed under prescription. This is an important distinction because the burden of proof of effectiveness is higher in cases of prescription, “both in terms of the intensity of state activities and in terms of length of time.”<sup>358</sup> Moreover, acquiescence from “the formal sovereign and *other interested parties* will be of paramount importance in prescriptive acquisition.”<sup>359</sup>

As articulated in *Eastern Greenland*, a tribunal will be satisfied with very little in the way of the actual exercise of sovereign rights, if the other state cannot make out a superior claim.<sup>360</sup> However, in *Eastern Greenland*, it was articulated that a claim based upon *terra nullius* is inferior to a claim based upon a treaty of cession.<sup>361</sup> To defeat a superior claim based upon a treaty of cession, a state must show both, “the intention and will to act as sovereign, and some actual exercise or display of such authority.”<sup>362</sup> It seems that America did display some intention to act as sovereign over Wake; however, the question remains whether there was actual exercise or display of such authority. Between 1899 and 1920, America passed no laws with regard to Wake<sup>363</sup> and did not place it under the jurisdiction of any

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<sup>358</sup> See MILANO, *supra* note 277 at 88.

<sup>359</sup> See *id.* (emphasis added).

<sup>360</sup> See Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 27-28 (Apr. 5).

<sup>361</sup> See *id.* at 27-28, 46. Application of *Eastern Greenland* to the Wake dispute again raises the issue of intertemporal law, as the critical date in that case was stipulated to be set in 1931. *Id.* at 44. However, because the P.C.I.J. relied in part on the 1814 Treaty of Kiel and the effectiveness of Danish actions between 1814 to 1915 for its conclusion that the claim of Denmark was superior, *id.* at 51-52, this principle likely applies to the present dispute. Furthermore, the setting of the critical date in *Eastern Greenland* likely violated the traditional construction of the rule of intertemporal law as the critical date was set two days before the case was filed with the P.C.I.J., rather than when the alleged breach of Norway first occurred. *Id.* at 44.

<sup>362</sup> See *id.* at 27-28.

<sup>363</sup> On Aug. 8, 1918, President Woodrow Wilson issued Exec. Order No. 2932 which stated that, “No Permit Agents have been designated in Tutuila, Manua, Guam, or Wake Island, as it is believed that travel from these points will not necessitate such appointments. For the time being persons desiring to leave any of these insular possessions may do so without securing permission hereunder.” PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1918, SUPPLEMENT 2, THE WORLD WAR 817 (Joseph V. Fuller et al. eds., 1933), <https://history.state.gov/historicaldocuments/frus1918Supp02>

government agency or department until 1934.<sup>364</sup> During the period of 1899 to 1920, only four American ships passed by Wake, and the last visit was in 1912.<sup>365</sup> In 1902, the *USAT Buford* stopped off at Wake and was met by a launch of eight Japanese citizens who claimed to be fishing.<sup>366</sup> The captain of the *Buford* suspected they were actually harvesting pearls, and there were calls for deportation, but no action was ever taken.<sup>367</sup> In 1904, the *USS Adams* spotted Japanese citizens residing on Wake collecting bird feathers and finning sharks, but again, no action was taken.<sup>368</sup> In 1906, General Pershing, while en route to observe the Russo-Japanese War, stopped to raise the American flag and deploy a “cache of emergency supplies for future shipwrecked mariners.”<sup>369</sup> Finally, in 1912, the *USS Supply* stopped while en route from Guam to Washington State<sup>370</sup> and attempted to plant some coconut palms on Wake.<sup>371</sup> The decade-long interruption in American activities at Wake directly corresponds with the Japanese Navy gaining de facto control of the entirety of the *Rālik* and *Ratak* chains in 1914.<sup>372</sup>

In contemporary international law, effectiveness is a variable criterion according to geographical, economic, and strategic conditions;<sup>373</sup> when these conditions are compared to other American possessions in the

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/d924 (last visited Mar. 14, 2022). It seems paradoxical that executive declaration of inaction could be the basis for sovereignty and given that this action took place after Japan had taken complete control of the Marshall Islands and secured agreements with Britain, Italy, and Russia affirming their territorial gains, see HEZEL, *supra* note 79, at 153-54, it seems to fall within the category of a measure “taken with a view to improving the legal position of the Party concerned.” See *Minquiers and Ecrehos Case* (Fr. v. U.K.), Judgment, 1953 I.C.J. 47, 59 (Nov. 17). Moreover, it is unclear who would have been in a position to protest this executive order; the Germans had already lost de facto control of all their territory in the Pacific, the Marshallese were facing an occupying force, and Japan was America’s wartime ally. See HEZEL, *supra* note 79, at 147, 149, 153-54; PEATTIE, *supra* note 119, at 47-48.

<sup>364</sup> See RAUZON, *supra* note 155, at 165.

<sup>365</sup> See *supra* note 105 and accompanying text.

<sup>366</sup> See Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 13.

<sup>367</sup> See *supra* notes 102-105 and accompanying text.

<sup>368</sup> See Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 12-15.

<sup>369</sup> RAUZON, *supra* note 155, at 164.

<sup>370</sup> In 1912, the only run east from Guam made by the *Supply* was to the dry dock at Bremerton, Washington for repairs. See Naval History and Heritage Command, *Supply II (Supply Ship)*, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS (Mar. 14, 2018, 8:56 PM), <https://www.history.navy.mil/research/histories/ship-histories/danfs/s/supply-ii.html>.

<sup>371</sup> Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 2. These palms had all died by the time an American ship returned in 1922. *Id.*

<sup>372</sup> See PEATTIE, *supra* note 119, at 35-61.

<sup>373</sup> See MILANO, *supra* note 277, at 88.

Pacific, it seems that American activities were not effective. Regarding economic conditions, through 1920, Wake was the least developed territory<sup>374</sup> over which America refused to relinquish its claim.<sup>375</sup> Geographical conditions strongly undercut the American claim as well, as there is much more evidence to support Wake being a part of the Marshall Islands<sup>376</sup> than there is to group Wake with the Leeward Hawaiian Islands.<sup>377</sup> With regard to strategic conditions and taking the dubious habit of America grouping Wake with the Northwestern Hawaiian Islands at face value, the differential between the effectiveness of state activities at Midway and Wake is very instructive.<sup>378</sup> Midway Atoll was independently claimed by America in 1867, prior to the illegal annexation of Hawai‘i.<sup>379</sup> Midway was administered by the U.S. Navy, and in 1870, the U.S. Congress appropriated funds to start a project of blasting and dredging a shipping

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<sup>374</sup> For example, American companies mined guano on Jarvis and Baker Island for twenty-one years, and on Howland for thirty years. *See* SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 678-728.

<sup>375</sup> The vast majority of islands were claimed by America under the Guano Islands Act of 1856, 48 U.S.C. § 1411-1419, which required islands to be unoccupied and not within the jurisdiction of another government. As such, I have excluded from consideration the dubious claims made under the Guano Islands Act that were eventually relinquished. These dubious claims include those to inhabited islands and atolls—such as in Tuvalu (Atafu, Nukulaelae, Nukufetau, Niulakita, and Funafuti [present day capital]), Tokelau (Nukunonu and Fakaofu) Kiribati (Butaritari and Makin), and Cook Islands (Manihiki, Tongareva, Pukapuka, and Rakahanga)—as well as claims to islands already under the jurisdiction of the British (Kanton, Kirimati, and Washington). *See generally* SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91.

<sup>376</sup> *See* PRICE & MARAGOS, *supra* note 14, at 773-89.

<sup>377</sup> More recently this practice was modified to acknowledge that Wake is not technically a geographic part of the northern Hawaiian Islands, but still uses Hawai‘i as a frame of reference to emphasize Wake’s geographic isolation and obfuscate proximity to the Marshall Islands. *See* SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 8585, at 899 (“Wake is an isolated island, far to the southwest of the Leeward Hawaiian Islands, and not geographically a part of any group.”).

<sup>378</sup> This American grouping of Wake and Midway is shown for example by the Secretary of the Department of Agriculture recommending in a 1923 letter to the Secretary of the Navy that the Tanager expedition to the Northwest Hawaiian Islands obtain information from “neighboring outlying islands . . . especially Midway, Wake, and Johnston.” Storrs L. Olson, *History and Ornithological Journals of the Tanager Expedition of 1923 to the Northwestern Hawaiian Islands, Johnston and Wake Islands*, 433 ATOLL RES. BULLETIN 1, 3 (1996) (available at <https://repository.si.edu/handle/10088/5880>). Despite Olson’s contention that Midway was considered “outlying” because it was not part of the Hawaiian Islands Bird Reservation, such an argument ignores the explicit connection to Hawai‘i of Midway (part of Hawaiian chain) and Johnston (claimed by the Kingdom of Hawai‘i) that Wake lacks. *See* Chang, *supra* note 89, at 95-96, nn.64-65 (discussing the Hawaiian connection to Midway and Johnston).

<sup>379</sup> *See* Chang, *supra* note 89, at 95-96.

channel.<sup>380</sup> In 1903, the Pacific Cable Company began residing permanently on the atoll.<sup>381</sup> Due to complaints about Japanese squatters and poachers, twenty-one marines were stationed on Midway from 1904 to 1908 to protect the atoll.<sup>382</sup> By contrast, when the Japanese-American treaty was signed in 1922, America had never built anything on Wake, had appropriated no funds, had tasked no entity with administering it, and did nothing about the Japanese squatters who were doing the exact same things on Wake that on Midway had warranted calling in the marines.<sup>383</sup> Furthermore, Japan and America were engaged in a lengthy dispute over the status of Yap after the war;<sup>384</sup> it seems unreasonable that, in settling this issue, Japan should have been required to broach the subject of an island the Americans had not visited in the past decade.

Viewed in this light, the sum of the first thirteen years of America's actual exercise or display of authority at Wake amounted to visits from four ships (two of which did nothing to enforce American claims of sovereignty against Japanese squatters), one flag raising, some emergency supplies,<sup>385</sup> and some dead palm trees. Furthermore, the seemingly anomalous gap in American activities at Wake from 1912 to 1922 coincides with the Japanese Navy seizing control of the entirety of the *Rālik* and *Ratak* chains in 1914. According to at least one source, it was also during this time that Japanese citizens returned to Wake to commercially harvest birds and other resources.<sup>386</sup> This casts serious doubt on both the effectiveness of American possession and the requisite passage of time.

While there is no set time period under international law for prescription, "enough time must have been lapsed in order to give rise to the general recognition that the title has passed."<sup>387</sup> In the case of Wake, only thirteen years of American activities elapsed before ten years of absence. While very few English sources comment on this absence,<sup>388</sup> the likely inference is that whatever American possession there was of Wake

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<sup>380</sup> SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 85, at 920-33.

<sup>381</sup> *Id.*

<sup>382</sup> Robert D. Heinl, *Marines at Midway*, in MARINE CORPS MONOGRAPHS 4, n.12 (1948); Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 23-24.

<sup>383</sup> See SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 939-40; Spennemann, *Annexation of Wake*, *supra* note 13, at 242; Spennemann, *Exploitation of Seabird Populations*, *supra* note 100, at 23-24.

<sup>384</sup> See *supra* Section II.E.4 for a discussion of the Yap controversy.

<sup>385</sup> That were subsequently consumed by the aforementioned Japanese squatters. RAUZON, *supra* note 155, at 164.

<sup>386</sup> RAUZON, *supra* note 155, at 165.

<sup>387</sup> See WOUTERS & VERHOEVEN, *supra* note 288, at 5.

<sup>388</sup> It is possible that further research in Japanese and German language archives would yield more insight on this point.

was interrupted when Japan established de facto control of the Marshall Islands in 1914. Thus, a likely interpretation of the facts is that any American occupation lasted for a maximum of only fifteen years from 1899 to 1914. Even if this time period was expanded to include the years when no American actions were taken, it remains a dubious proposition that enough time had passed between the claim and the League of Nations approving the mandate—at most twenty-two years—which is far shorter than any period of time established by treaty or claimed before an international tribunal.<sup>389</sup> Even among scholars, it seems the shortest time suggested as being adequate is thirty years.<sup>390</sup>

While it is true that when the United States purported to annex Wake Germany did not take immediate actions to oppose the Americans; Germany's initial failure to launch a formal protest must be viewed in light of both countries' involvement in the Second Samoan Civil War.<sup>391</sup> When Taussig claimed to annex Wake on Jan. 17, 1899, Germany and America were already engaged in a proxy war over the territory of Samoa; it seems unnecessary to require a formal protest over a claim to land in the Marshall Islands when the two countries were essentially already at war over claims to land in Samoa.<sup>392</sup> Germany's apparent willingness to include Wake as a sweetener for the eventual settlement of the war in Samoa can hardly be considered acquiescence to the American claim.<sup>393</sup> Furthermore, it seems hard to argue that Germany was "directly and substantially affected" by American actions as, by America's own admission, since 1899, Wake was "unoccupied and unused by either American citizens or interests, or by the Government."<sup>394</sup> There was nothing to protest about at Wake except a symbolic act; on the other hand, Germany was being directly affected by the shelling of its consulate and the landing of American troops in Samoa.<sup>395</sup> When America wanted to use Wake for a cable station, Germany was willing to negotiate; but as American interest in Wake dissipated, leaving the atoll unoccupied and unused, it was left as an open question while the larger dispute was settled. Wake may have been a pawn that Germany was willing to sacrifice. However, the Americans never asked for that sacrifice.

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<sup>389</sup> See WOUTERS & VERHOEVEN, *supra* note 288, at 5.

<sup>390</sup> See WOUTERS & VERHOEVEN, *supra* note 288, at 5.

<sup>391</sup> See *supra* notes 83-98 and accompanying text; OPPENHEIM, *supra* note 295 ("[T]he significance of an absence of protest will to a large extent depend upon all the circumstances of the situation; failure to protest by a state being directly and substantially affected by the act in question will be of greater significance than failure by a state not so effected.").

<sup>392</sup> See *supra* notes 83-98 and accompanying text.

<sup>393</sup> See *supra* notes 89-98 and accompanying text.

<sup>394</sup> See SOVEREIGNTY OF ISLANDS CLAIMED, *supra* note 91, at 939-40.

<sup>395</sup> See *supra* notes 83-88.

The actions of Japan become relevant to this analysis starting in 1914 when it gained de facto control of the Marshall Islands and, arguably, became the successor in interest to Germany's claims there.<sup>396</sup> The fact that Japan made no official protest regarding the American claim to Wake between 1914 and the establishment of the League of Nations mandate must again be viewed in light of the fact that America took no actions regarding Wake during that time.<sup>397</sup> Indeed, during this time, it was Japanese citizens who were inhabiting Wake,<sup>398</sup> and it hardly seems necessary to require a state to protest a claim made by another state on paper when its citizens are occupying the territory in practice.

The combination of the short time period, coupled with the lack of effective control on behalf of America, leads to the conclusion that by the time the Japanese mandate had been established, America had not acquired title to Wake by prescription.

#### E. *Possible Prescription after the Mandate's Establishment*

When the terms used by the Supreme Allied Council<sup>399</sup> and League of Nations<sup>400</sup> to award and affirm the Japanese mandate are interpreted in accordance with the VCLT,<sup>401</sup> it seems that Wake was included. However, there remains the question of whether America acquired title from Japan through prescription.

It should be emphasized that the property rights of the *Irooj*s that were signatories to the treaty with Germany and their descendants cannot be ignored. The *Irooj*s specifically, and Marshall Islanders generally,<sup>402</sup> were interested parties as it related to any potential acquiescence to American prescription, as the property rights of Indigenous populations are recognized under contemporary international law.<sup>403</sup> The significance of the

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<sup>396</sup> See *supra* note 330.

<sup>397</sup> The statement of the Japanese government in 1902 that they had no claim on the sovereignty of Wake, see HIRAOKA, *supra* note 104, at 16, is inapposite as their claim to the Marshall Islands could be dated at the earliest to 1914. See PEATTIE, *supra* note 119, at 35-61.

<sup>398</sup> See RAUZON, *supra* note 155, at 165 and accompanying text.

<sup>399</sup> FULLER, *supra* note 132, at 508 ("German Islands North of the Equator. The mandate shall be held by Japan.").

<sup>400</sup> 2 League of Nations Off. J. 87, art. I (1921), *supra* note 141, ("The islands over which a Mandate is conferred upon His Majesty the Emperor of Japan . . . comprise all the former German islands situated in the Pacific Ocean and lying north of the Equator.").

<sup>401</sup> VCLT, *supra* note 317, at 12 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

<sup>402</sup> See e.g., DVORAK, *supra* note 1, at 144 ("[A]ll Marshall Islanders have claims to land, with multiple affiliations crisscrossing between atolls and islands.").

<sup>403</sup> See MILANO, *supra* note 320, at 78.

*Ri-Majeļ* delay in protesting the American occupation of *Āneen Kio* depends to a large extent upon all the circumstances of the situation.<sup>404</sup> By 1935, when the Americans started building facilities at Wake, the Marshall Islands had been a mandated territory for fifteen years, which under international law had put sovereignty of the islands in “abeyance.”<sup>405</sup> Marshall Islanders had no reason to suspect that their rights to any land in the *Rālik* or *Ratak* chains could be appropriated under this arrangement. Taiwanese international law scholar Han-Yi Shaw has put forward similar arguments in a controversy involving uninhabited islands in the East China Sea,

[G]iven that the disputed islands were placed under a system of trusteeship administered by a temporary Administering Authority, rather than being effectively controlled in the name of a sovereign State, it follows that [the delayed]<sup>406</sup> protest cannot be construed as explicitly or tacitly recognizing any claim of sovereignty of another state.<sup>407</sup>

Another circumstance that should not be ignored is that as American action increased at Wake, the progressive Japanese civil government—the Nan'yō Chō—started to give way to the oppressive military rule of the Japanese Navy.<sup>408</sup> In 1937, the Japanese Navy officially took over the South

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<sup>404</sup> Cf. *supra* note 295 and accompanying text.

<sup>405</sup> RUTH GORDON, MANDATES para. 51 (Max Planck Encyclopedias of Int'l L. online ed. 2013) (“Sovereignty over mandated territories was in abeyance, and when the inhabitants obtained recognition as an independent State, sovereignty was revived and vested in the new State.”); see also *International Status of South-West Africa*, Advisory Opinion, 1950 I.C.J. 128, 132 (July 11) (holding that a class “C” mandate was a special regime where the doctrine of sovereignty did not apply).

<sup>406</sup> The “lack of protest” Shaw refers to in the original could be more accurately termed “lack of an *immediate* protest.” See Shaw, *supra* note 290, at 152-53 (discussing that while the R.O.C. did not object to U.S. administration of the disputed islands immediately after WWII, it filed diplomatic protests in 1953 when the U.S. announced it was returning them to Japan) (emphasis added).

<sup>407</sup> Shaw, *supra* note 290, at 155.

<sup>408</sup> See e.g., DVORAK, *supra* note 1, at 151. Writing of the *Ri-Kuwajleen* experience:

Many Marshallese in Kwajalein old enough to remember the Japanese colonial period do so with a fair degree of nostalgia and as a time of productivity, cooperation, and generally positive change. Those same elders, though, make a clear distinction between the civilian administration of the atoll up until the late 1930's and the ensuing time of military rule that followed. They also distinguish between “Japanese civilians” and “Japanese soldiers,” the latter group being characterized as unreasonably hostile and harsh or “[*bwebwe*].”

*Id.* Although Dvorak seems to translate *bwebwe* as “crazy,” it can also connote demented, insane, mad, or stupid.

Seas Mandate, and in 1939, Micronesians began being conscripted as laborers for heavy construction projects.<sup>409</sup> The increasingly repressive nature of Japanese rule when American actions at *Āneen Kio* began in earnest is significant when viewed in light of relevant history of *Ri-Majeļ* resistance, such as *Iroojlaplap* Labareo's attempt to protest infringement on his *mō* lands in 1909.<sup>410</sup> A logical inference is that if the *Irooj* were unable to effectively protest use of their *mō* lands under the relatively laissez-faire German colonial administration,<sup>411</sup> it would have been nearly impossible under the Japanese military.

Micronesians fared little better under the administration of the U.S. Navy,<sup>412</sup> and it was not until 1950 that *Ri-Majeļ* gained some form of self-determination with the creation of a "political advisory body."<sup>413</sup> Despite this nominal grant of self-determination, the Marshall Islands and the rest of the TTPI found themselves to varying degrees under the control of the U.S. President, U.S. Congress, Department of the Interior, Trust Territory High Commissioner, UN Trusteeship Council, and UN Security Council.<sup>414</sup> Against these immense odds, *Ri-Majeļ* were faced with stopping the clear and present danger of nuclear testing, followed by a decades-long struggle over compensation for nuclear victims, American appropriation of two-thirds of Kwajalein atoll, and the fight for independence.<sup>415</sup> Yet, in the face of all these challenges that directly and substantially affected them, *Ri-Majeļ* and the rest of Micronesia indeed protested the American occupation

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<sup>409</sup> PEATTIE, *supra* note 119, at 250-51.

<sup>410</sup> *See supra* note 77.

<sup>411</sup> *See* HEZEL, STRANGERS IN THEIR OWN LAND, *supra* note 79, at 124 ("The role of the German government there was a minor one from the start: it provided a few basic services and left the rest to the business firms and the church, institutions that had been the major forces of change in the Marshalls for years. The German administration never bothered to mount a public works program for building docks and roads. . . . Consequently, when the government was taken out of the hands of the Jaluit Company and incorporated into the island territory of Micronesia in April 1906, island life was untouched.")

<sup>412</sup> *See, e.g.* DVORAK, *supra* note 1, at 189, n.42, "[E]lderly Marshallese who experienced both Japanese and American periods tend to see each nation's imperialism as interchangeable or arbitrary sides of the same coin." *See also supra* Sections II.H.1-2 for discussion of American nuclear colonialism.

<sup>413</sup> U.S. DEP'T OF STATE, *Seventh Annual Report on the Administration of the Territory of the Pacific Islands*, in TRUST TERRITORY OF THE PACIFIC ISLANDS, 7TH-10TH 15-16 (1955) (available at <https://babel.hathitrust.org/cgi/pt?id=umn.31951d00818531u&view=1up&seq=1>). While this body was referred to as the "Marshall Islands Congress" it had no legislative powers in the territory and could only forward resolutions to an American bureaucrat for ratification. *Id.*

<sup>414</sup> *See id.*

<sup>415</sup> *See supra* Sections II.H.2, II.I.

of *Āneen Kio* in 1974.<sup>416</sup> The RMI formalized this protest in 2016 when pursuant to UNCLOS, it deposited with the UN a list of geographical coordinates that included *Āneen Kio* in the Marshall Islands' territorial sea.<sup>417</sup> Taking into account all the circumstances of the situation, the delayed *Ri-Majel* protest cannot be construed as recognizing American claims of sovereignty over *Āneen Kio*.

Moreover, the passage of time is a hurdle that the American claim cannot seem to clear. It is unclear whether there exists under international law any principle analogous to that of domestic law adverse possession which allows “tacking to occur between owners of the land being adversely possessed” where the “time of several holders of land is combined for one measure,”<sup>418</sup> but regardless, possession must be open and continuous.<sup>419</sup> Even assuming arguendo that tacking is allowed under international law, it should not be applied here because American inaction regarding Wake between 1912 and 1922 cannot reasonably be described as “open,” “continuous,” or even “possession.” The earliest possible beginning date for America's prescription against Japan could plausibly be fixed at is June 19, 1922, when the *USS Beaver* began surveying Wake for a military base.<sup>420</sup> However, that leaves only nineteen years until America's possession of Wake was unequivocally interrupted by Japan on December 8, 1941.

#### F. *Implications of Placing Wake in the TTPI*

Having established that America could not have gained title by occupation of *terra nullius* in 1898, and further showing that Wake fell within the definition used to create the Japanese mandate, this implies that Wake was placed into the TTPI by the Security Council's incorporating reference.<sup>421</sup> That the authority existed to place Wake into a trust territory should be unquestioned as America had authority to place essentially all territory occupied by Japan in the Pacific into a trust territory by virtue of

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<sup>416</sup> See *supra* note 227 and accompanying text.

<sup>417</sup> U.N. Secretary-General, Letter dated May 3, 2016, from the Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, M.Z.N.120.2016.LOS (May 3, 2016), [https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn\\_s/mzn120ef.pdf](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn120ef.pdf); Giff Johnson, *US: Time to Wake up*, MARS. IS. J. (May 6, 2016) **Error! Hyperlink reference not valid.**<https://marshallislandsjournal.com/us-time-wake/>. See *infra* Figure 8 taken from the RMI deposit showing a map of the RMI territorial sea.

<sup>418</sup> *Tacking (Tack)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).

<sup>419</sup> Wouters & Verhoeven, *supra* note 288, at para. 5.

<sup>420</sup> See RAUZON, *supra* note 155, at 164 and accompanying text.

<sup>421</sup> See *supra* note 20 and accompanying text.

the Treaty of San Francisco.<sup>422</sup> The Security Council had the authority to dispose of Wake, and because of an oversight, it failed to exclude it from the boundaries of the TTPI. There are several implications of this determination.

### 1. The TTPI Still Exists

The Security Council has never taken steps to completely dissolve the TTPI; instead, in 1994, the Security Council merely stated that “the applicability of the Trusteeship Agreement has terminated with respect to Palau.”<sup>423</sup> The grant of independence to the Marshall Islands in the Compact of Free Association<sup>424</sup> was worded to specifically exclude *Aneen Kio*.<sup>425</sup> If Wake was put into the trust, the TTPI still exists because the trust has never terminated with respect to Wake.

### 2. America has Never Perfected Title to Wake Island

America’s continuous possession of Wake was cut off in 1941.<sup>426</sup> After WWII, America was likely free to dispose of all captured Japanese territory as it saw fit, as confirmed by the terms of the Treaty of San Francisco.<sup>427</sup> However, because America opted to create and administer the TTPI based on the boundaries of the Japanese mandate, it put sovereignty in “abeyance”; a trustee cannot acquire title while administering a trust.<sup>428</sup> If Wake was placed in the Trust, America cannot have perfected title by

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<sup>422</sup> See *supra* notes 197-199 and accompanying text. America was granted the authority to place the Ryukyus, Bonins, Marcus Island, Palau, Carolines, and Marshalls into a trust territory, with the support of Japan. *Id.* Additionally, New Guinea and Nauru, territories in the Pacific invaded by Japan, were placed into trust. ANDRIY Y. MELNYK, UNITED NATIONS TRUSTEESHIP SYSTEM para. 10 (Max Planck Encyclopedias of Int’l L. online ed. 2013).

<sup>423</sup> S.C. Res. 956, para. 2 (Nov. 10, 1994).

<sup>424</sup> The U.N. Security Council did not recognize this development until 1990, when their resolution merely affirmed the terms of the Compact:

The Security Council... Determines, in the light of the entry into force of the new status agreements for the Federated States of Micronesia, the Marshall Islands and the Northern Mariana Islands, that the objectives of the Trusteeship Agreement have been fully attained, and that the applicability of the Trusteeship Agreement has terminated, with respect to those entities.

S.C. Res. 683 (Dec. 22, 1990).

<sup>425</sup> See *COFA I*, *supra* note 262.

<sup>426</sup> See *supra* note 185 and accompanying text.

<sup>427</sup> See *supra* notes 197-199 and accompanying text.

<sup>428</sup> See Shaw, *Diaoyutai/Senkaku Islands Dispute*, *supra* note 290, at 168; GORDON, *supra* note 405, at para. 51.

prescription, despite its continuous possession of Wake since 1947, because it is the trustee of the TTPI.

### 3. American Actions Regarding *Āneen Kio* are Contrary to International Law

In 2019, the I.C.J. issued an advisory opinion regarding the unilateral detachment of colonial territory by a colonial power, stating:

The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.<sup>429</sup>

The court applied this principle to British actions in detaching the Chagos Archipelago from the rest of Mauritius, which it found to be “a wrongful act entailing the international responsibility” of Britain.<sup>430</sup> The court concluded that the “United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.”<sup>431</sup>

If British actions were a violation of international law when all the territories in question were colonies held under British sovereignty, it seems likely that the actions of America in detaching *Āneen Kio* from the Marshall Islands when the territory was being held in trust<sup>432</sup> is also contrary to international law. The detachment of *Āneen Kio* was plainly undertaken without the “freely expressed and genuine will”<sup>433</sup> of the people of the TTPI generally,<sup>434</sup> and the Marshall Islands specifically,<sup>435</sup> and is thus contrary to Customary International Law.

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<sup>429</sup> Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, 134 (Feb. 25, 2019).

<sup>430</sup> *Id.* at 136-37.

<sup>431</sup> *Id.* at 139-40.

<sup>432</sup> With the specific purpose of promoting political advancement and self-government, U.N. Charter Art. 76, and where the United States had pledged in Article VI of the Trusteeship Agreement to “protect the inhabitants against the loss of their lands and resources.” S.C. Res. 21 (Apr. 2, 1947).

<sup>433</sup> *Chagos Archipelago Advisory Opinion*, 2019 I.C.J. at 134.

<sup>434</sup> See *supra* notes 227-228 and accompanying text.

<sup>435</sup> See *supra* notes 236-239 and accompanying text.

IV. *JKIN EO EMMAN IM EKKAR* (THE VENUE)

Having considered that the Republic of the Marshall Islands has a viable claim under international law, the question now arises where the proper venue to resolve this dispute will be. As has been illustrated by past experience, resorting to the courts of the United States seems futile.<sup>436</sup> Unfortunately, neither the final text of the Japanese mandate nor the Trusteeship Agreement included a provision regarding the settlement of territorial disputes before an international tribunal.<sup>437</sup> There is, however, one archaic organ of the United Nations that would be able to hold a hearing on this dispute where America would be obliged to participate the, now dormant, UN Trusteeship Council.

On Nov. 1, 1994, the Trusteeship Council suspended operations and amended its rules of procedure to drop the obligation to meet annually.<sup>438</sup> In place of an annual meeting the Council agreed to meet as occasion required—either by its own decision, the decision of its President, at the request of the Security Council, or at the request of a majority of the General Assembly.<sup>439</sup> As currently constituted, the Trusteeship Council is made up of the five permanent members of the Security Council—China, France, the Russian Federation, the United Kingdom and the United States.<sup>440</sup> According to Article 87(b) of the UN Charter, the Trusteeship Council may “accept petitions and examine them in consultation with the administering authority.” In the past, petitions were submitted by groups and individuals, both in written form and in oral statements made in meetings of the

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<sup>436</sup> See *People of Bikini v. United States*, 77 Fed. Cl. 744, 763-64 (2007); *Kabua v. United States*, 546 F.2d 381, 384 (Ct. Cl. 1976).

<sup>437</sup> See S.C. Res. 21 (Apr. 2, 1947); 2 League of Nations Off. J. 87, Art. I (1921). Thus, the United States has not submitted to the compulsory jurisdiction of any international tribunal on the issue and is unlikely to provide consent. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.)*, Overview of the Case, **Error! Hyperlink reference not valid.**<https://icj-cij.org/en/case/160> (observing that the Marshall Islands “distinguished between those three States (India, Pakistan and the United Kingdom) which had recognized the compulsory jurisdiction of the Court” and the six others (including the United States) “in respect of which the Marshall Islands proposed to found the jurisdiction of the Court on consent yet to be given.”).

<sup>438</sup> Trusteeship Council Res. 2200 (LXI), at 2 (May 25, 1994).

<sup>439</sup> *Id.*

<sup>440</sup> See U.N. Docs., TCOR, *Introduction to Trusteeship Council* (2020), <https://research.un.org/en/docs/tc>.

Trusteeship Council.<sup>441</sup> Trusteeship Council rules provide for hearings on petitions.<sup>442</sup>

The fact that the TTPI was declared a “strategic” area does somewhat complicate matters. Article 83, sections (1) and (3) of the UN Charter provide that, “the functions of the United Nations with respect to strategic areas under the Trusteeship System shall be exercised by the Security Council, with the assistance of the Trusteeship Council in respect of political, economic, social and educational matters in such areas.”<sup>443</sup> In practice, however, since 1947 when the Trusteeship Council and Security Council made an arrangement with regards to strategic territories, the Trusteeship Council has been the only organ that concerned itself with conditions in the TTPI.<sup>444</sup>

Thus, because the TTPI has not been absolutely dissolved and Wake remains within the Trust, the RMI can make a motion in the UN General Assembly to reconvene the Trusteeship Council to oversee the TTPI. If a majority in the General Assembly were to approve this request, the Trusteeship Council would be obliged to reconvene. At such a time, the RMI, or any other party, would be permitted to submit a petition to the Trusteeship Council as it is authorized to accept petitions on behalf of the Security Council by Trusteeship Council rule and the text of the TTPI Trusteeship Agreement.<sup>445</sup>

While it is true that the Trusteeship Council heard hundreds of petitions regarding the TTPI, it rarely resulted in concrete action on the international stage. For instance, in 1954, the Trusteeship Council issued a resolution in response to a petition from the Marshallese people asking for the immediate cessation of nuclear testing, which recommended that “if the Administering Authority considers it necessary in the interests of world peace and security to conduct further nuclear experiments in the Territory, it take such precautions as will ensure that no inhabitants of the territory are again endangered, including those precautionary measures requested by the petitioners.”<sup>446</sup>

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<sup>441</sup> See U.N. Docs., TCOR, *Documents of the Trusteeship Council* (2020), <https://research.un.org/en/docs/tc/documents>.

<sup>442</sup> R. 78, Rules of Procedure of the Trusteeship Council, U.N. Docs. T/1/Rev.7 (1995) (“The Trusteeship Council may hear oral presentations in support or elaboration of a previously submitted written petition.”)

<sup>443</sup> Repertory of Practice of United Nations Organs, Supp. No. 1 (1954-1955), Vol. II, Art. 83, Para. 1, [https://legal.un.org/repertory/art83/english/rep\\_supp1\\_vol2\\_art83.pdf](https://legal.un.org/repertory/art83/english/rep_supp1_vol2_art83.pdf).

<sup>444</sup> *Id.*

<sup>445</sup> R. 75, Rules of Procedure of the Trusteeship Council, U.N. Docs., at 16 T/1/Rev.7 (1995).

<sup>446</sup> Trusteeship Council Res. 1082 (XIV), at para. 7 (July 15, 1954).

Thus, expectations about the type of remedies available to a petitioner before the Trusteeship Council should be tempered. However, the Trusteeship Council could conceivably be compelled to comply with the requirements of the UN Charter by resuming annual meetings, accepting petitions, and sending visiting delegations<sup>447</sup> while also requesting that America resume submitting an annual report on the trust territory.<sup>448</sup>

#### V. *WĀWEEN KAJIMWE JORRĀN KO* (The Remedy)

Calling attention to their situation at the hands of powerful others is equivalent to a demand for justice and for others to take responsibility to look after the less powerful more seriously, as chiefs provide for their people [or] mothers protect their children . . . It is obvious to Marshallese that they have been wronged. By pointing it out to the world they are insisting on justice.<sup>449</sup>

The “special relationship” between the Marshall Islands and United States has always been one-sided.<sup>450</sup> While the most obvious and prominent example of this imbalance is nuclear testing, further examination also reveals that much of this imbalance is inextricably tied to land. The initial claims that *Ri-Ānewetak* and *Ri-Pikinni* brought against the American government for harms suffered from nuclear testing were rooted in Fifth Amendment claims for taking property without just compensation.<sup>451</sup> The Nuclear Claims Tribunal awarded \$244 million for loss of the use of Enewetak and \$278 million for loss of the use of Bikini based upon Fifth Amendment “just compensation” principles,<sup>452</sup> and the Kwajalein landowners have been fighting for more than sixty years to receive just compensation for taking of their land.<sup>453</sup> The disputed sovereignty over *Āneen Kio* is not an anomaly, but another in a long line of atolls that *Ri-*

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<sup>447</sup> Although, because the TTPI is a strategic trust, America may be able to suspend U.N. visiting delegations pursuant to the Trusteeship Agreement as it did at Bikini and Enewetak. Repertory of Practice of United Nations Organs (1945–1954), Vol. IV, Art. 83, para. 12, [https://legal.un.org/repertory/art83/english/rep\\_orig\\_vol4\\_art83.pdf](https://legal.un.org/repertory/art83/english/rep_orig_vol4_art83.pdf).

<sup>448</sup> See U.N. Charter Art. 83, para. 2-3; Art. 88.

<sup>449</sup> DVORAK, *supra* note 1, at 186 (quoting Julianne M. Walsh, *Imagining the Marshalls: Chiefs, Tradition, and the State on the Fringes of U.S. Empire*, 407-408 (Aug. 2003) (Ph.D. thesis, University of Hawai‘i at Mānoa).

<sup>450</sup> See DVORAK, *supra* note 1, at 154.

<sup>451</sup> Prior to *COFAI* stripping U.S. courts of jurisdiction over nuclear testing claims, the Court of Claims held that the Fifth Amendment applied to *Ri-Majeļ* claims. *Juda v. United States*, 6 Cl. Ct. 441, 458 (1984).

<sup>452</sup> *People of Bikini v. United States*, 77 Fed. Cl. 744, 763 (2007).

<sup>453</sup> See *Kabua v. United States*, 546 F.2d 381, 383 (Ct. Cl. 1976).

*Majeļ* are striving through peaceful means to return to their control.<sup>454</sup> What this peaceful struggle towards justice has shown is that the Americans will not be compelled by judicial force into honoring their debts—either “moral” or legal.<sup>455</sup> However, the landowners of Kwajalein Atoll have shown that the law can be used as one tool in a broader tool kit to creatively settle land disputes. The *jodiks* launched by traditional landowners displaced by American activities on Kwajalein serve as a powerful example of a potential path forward. The Marshallese know that they have been wronged, and in pointing it out to the world, they can insist upon justice.<sup>456</sup> The experience of the Kwajalein landowners has shown that by continuing to call attention to the problem, the Marshallese can make ignoring the problem more costly than addressing it.

In *manit in Majeļ* (Marshallese culture), losing one’s land is to lose one’s identity, power, and “face.”<sup>457</sup> The *Ri-Majeļ* historian, Lokrap, has explained that,

After the land is lost, the *Irooj* rank is lost . . . Rank depends upon the possession of rights in land . . . if the United States took away all of [an *Irooj*’s land], he would still have *Irooj* blood, but he would not be respected as *Irooj* . . . Blood does not count; the land is the criterion.<sup>458</sup>

Dvorak concludes that,

In the premodern past, *Irooj* and their followers were often killed if not at least dispossessed of their land when defeated by others. . . Nowadays, . . . losing land to the United States . . . would be the epitome of disgrace. Throughout the ages in the Marshall Islands . . . such a loss would have represented a total erasure of a lineage’s past, a rupture in history; by the same token, it would have been a forfeiture

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<sup>454</sup> The practice of using foreign legal mediation to resolve land disputes in the Marshalls can be traced at least as far back as 1904, when *Iroojlaplap* Leban Kabua retained an agent of Burns, Philp & Company to defend his interests against a successor of *Irooj* Loek. See DVORAK, *supra* note 1, at 205.

<sup>455</sup> See e.g., *People of Bikini v. United States*, 554 F.3d 996, 1000 (Fed. Cir. 2009) (refusing to enforce the judgements of the Nuclear Claims Tribunal).

<sup>456</sup> See *supra* text accompanying note 449.

<sup>457</sup> DVORAK, *supra* note 1, at 206. The Marshallese idiom “*bwilok māj*”, which literally translates as fracture/break face, TAKAJI ABO ET. AL., *supra* note 1, at 49, is strikingly similar to the Japanese concept of *mentsu wo ushinau* (to lose face). See e.g., Rochelle Kopp, *Saving Face: A little discretion can go a long way in Japan*, JAPAN INTERCULTURAL CONSULTING (Mar. 23, 2010), <https://japanintercultural.com/free-resources/articles/saving-face-a-little-discretion-can-go-a-long-way-in-japan/>.

<sup>458</sup> DVORAK, *supra* note 1, at 206.

of future generations' birthright.<sup>459</sup>

This cultural perspective is essential to understand that *Ri-Majeļ* are not becoming, as some have so erroneously suggested, "professional victims."<sup>460</sup> Instead, if one understands this "bitter context of loss and demoralization," the fallacy that *Ri-Majeļ* landowners who seek just compensation are "covetous and proud," that they are only "making trouble," or that they are simply "trying to glean as much money as possible,"<sup>461</sup> can be dismissed. Rather, this struggle over land that some view as tiny, sinking specks of sand, is an existential threat to "the fundamental basis of Marshallese culture and society."<sup>462</sup>

The *jodiks* of the Kwajalein landowners incorporated many of the principles of freedom that Americans so often champion. Dvorak rightly cautions that the *jodiks* advocated by *Rālik Irooj*s and spearheaded by *kōrā in Kuwajleen* (the women of Kwajalein) were by no means a pan-Marshallese movement, but they did represent "landowners' ability to subvert colonial paradigms and flip the tables of power upside-down."<sup>463</sup> This subversion was not a one-time event. In 1969, the first "sail in" was launched to reinhabit the "Mid-Atoll Corridor" that had been forcefully evacuated for missile testing.<sup>464</sup> When the initial terms of the lease agreement for Kwajalein islet ("Kwaj")<sup>465</sup> were not being kept, the Mid-Atoll Corridor was reoccupied in 1977.<sup>466</sup> In 1982, landowners landed at the military base on Kwaj to protest the terms of an agreement reached between the American and Marshallese governments.<sup>467</sup> Kwaj was occupied again

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<sup>459</sup> DVORAK, *supra* note 1, at 207.

<sup>460</sup> Francis X. Hezel, *Becoming a Professional Victim*, MICR. COUNS. (2000), <https://micronesianseminar.org/micronesians-counselo/becoming-a-professional-victim/>.

<sup>461</sup> DVORAK, *supra* note 1, at 207.

<sup>462</sup> See MASON, *supra* note 17, at 4.

<sup>463</sup> DVORAK, *supra* note 1, at 230. For a greater discussion of how the majority of *jodik* participants were women and the Marshallese principle of *lejman jūri* (when a woman speaks, the men must give way). See *id.* at 216-18. In some cases, those chiefs were also *kōrā in Kuwajleen*, such as *Lerooj Likwor Litokwa*.

<sup>464</sup> DVORAK, *supra* note 1, at 209. Those who were displaced were given a meager forty-dollar stipend. *Id.*

<sup>465</sup> Kwajalein refers to both the entire atoll as well as the largest islet within the atoll. For clarity I use the American abbreviation, "Kwaj," to refer specifically to the American base on Kwajalein Islet, within the larger Kwajalein atoll.

<sup>466</sup> DVORAK, *supra* note 1, at 209-10.

<sup>467</sup> DVORAK, *supra* note 1, at 212. Several *Ri-Kuwajleen* men were arrested during this protest, which lasted for more than three months. The army responded to the protests by shutting off all water to the protester's camps, barring *Ri-Majeļ* employees from working on base, banning *Ri-Majeļ* access to telephones and banking, erecting razor wire and search lights, and ordering a press blackout. *Id.* *Ri-Kuwajleen* organizer and RMI

in 1985 to protest neglected promises to rebuild Ebeye<sup>468</sup> and unfair distribution of compensation.<sup>469</sup> As Dvorak summarizes:

By vowing to go home, the landowners pursued their own true liberation of the atoll by invading their homelands in a brazen reversal of Japanese and American military tactics. Drawing on American paradigms of democratic freedom of speech and civil disobedience, they made their voices heard . . . the landowners simultaneously reasserted themselves as the heroes and survivors—not the victims—of military and nuclear colonialism . . . The context of the Kwajalein landowners’ “homecoming” mission to be heard, to be treated fairly, and to gain adequate compensation for the military use of their land was indeed a heroic history on par with the struggles of the people of Bikini, Eniwetok, Rongelap, and other nuclear-affected atolls. Practicing civil disobedience, hiring their own lawyers and public relations firms, broadcasting their messages through the media, and utilizing the very tools of democracy and freedom of speech that American “liberation” supposedly bestowed upon them, the Ri-Kuwajleen have been patiently waging their own battle since shortly after World War II. Yet beyond this struggle for the justice bestowed by proper compensation, the thought of returning to the land represented a wish to restore wholeness to the atoll.<sup>470</sup>

#### A. *The Relevance of Jodik to Āneen Kio*

The mission of the Kwajalein landowners to be heard, to be treated fairly, to gain adequate compensation, and to restore wholeness to their atoll through the American tools of democracy and freedom of speech may serve as one potential *waan joñak* (example) for a *Ri-Majeļ* resolution to the

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Senator Ataji Balos was forced to fly to Honolulu to be able to speak with the media and report on the situation to humanitarian groups. *Id.* at 212-13.

<sup>468</sup> Ebeye is the population center of Kwajalein Atoll, where an estimated 13,000 *Ri-Majeļ* occupy a mere eighty-nine acres. Many of the inhabitants of Ebeye have been displaced from their home atolls and islets from American nuclear and missile testing. For further discussion of Ebeye, see DVORAK, *supra* note 1, at ch. 7; HANLON, DISCOURSES OVER DEVELOPMENT, *supra* note 4, at ch. 7.

<sup>469</sup> DVORAK, *supra* note 1, at 214. Ataji Balos recalled, “that time, the U.S. military deployed over a hundred military men from Honolulu with machine guns and riot gear... the colonel on Kwaj couldn’t arrest us, because it was our land. He put up yellow tape and told the marines to shoot to wound but not to kill if anyone exited.” *Id.* RMI President and *Rālik Irooj* Amata Kabua eventually negotiated an end to the standoff, but not before the protesters were removed from the base by force. *Id.*

<sup>470</sup> DVORAK, *supra* note 1, at 230.

dispute over *Āneen Kio*. This is one of many avenues available to the Marshall Islands and some might criticize this proposal as being too gradualist, yet, this proposal attempts to hew a middle path that seeks justice without forever severing the ties between the RMI and United States.<sup>471</sup> Given the “outrageous things” that the United States has done to the people of the Marshall Islands, more drastic measures<sup>472</sup> would be comprehensible as “there comes a time when even friends must draw the line.”<sup>473</sup>

The *jodiks* combined peaceful protest with lawsuits in American courts and petitions to the UN Trusteeship Council. While none of these actions individually resulted in a settlement with the American government, the cumulative efforts of the Kwajalein landowners led to a gradual improvement in their positions. As one former political consultant to the RMI has said:

With America you try to be nice[,] and you get sidestepped and pushed aside. In America, people speak up! It[']s like “the wheel that squeals gets a little oil.” And that’s why the Kwajalein money got proposed as part of the first Compact . . . because of the demonstrations and what have you. . . It[']s very American to go after what is right . . . the Kwajalein landowners actually represent the core of [American] values! Do what is right, stand up for what you believe is right.<sup>474</sup>

The first step in bringing the world’s attention to the issue of *Āneen Kio* would be for the RMI to ask the UN General Assembly to vote to reconvene the Trusteeship Council. The notion that the RMI could be successful in winning such a vote should not be discounted given its history of coalition building and the fact that, by the U.S. State Department’s own

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<sup>471</sup> Given that there are an estimated 20,000 *Ri-Majeļ* living in Arkansas alone under the terms of *COFA II*, U.S. GOV’T. ACCOUNTABILITY OFF., GAO-20-491, COMPACTS OF FREE ASSOCIATION: POPULATIONS IN U.S. AREAS HAVE GROWN, WITH VARYING REPORTED EFFECTS 107 (2020), there are gravely serious implications for proposing any action that would irrevocably damage this relationship. Pursuing an option that terminated or suspended COFA and related agreements could have potentially severe human rights implications and lead to the dislocation of tens of thousands of *Ri-Majeļ*. Such actions should not be suggested lightly.

<sup>472</sup> While beyond the scope of this paper, such drastic options could potentially include declaring the Compact of Free Association void in whole or in part due to fraud in the inducement, *see* discussion *supra* note 201 of previously undisclosed biological and chemical weapons tests and potential application of the discovery rule, or alternatively declaring the United States to be in material breach of the Trusteeship Agreement with regards to Wake, and engaging other countries in negotiations on behalf of the *Irooj* landowners for a lease of their land at *Āneen Kio*. *See generally, supra* note 317, at § 3.

<sup>473</sup> *See supra* note 274.

<sup>474</sup> DVORAK, *supra* note 1, at 211.

assessment, a minority of states consistently vote with the United States on important issues before the General Assembly.<sup>475</sup> If the General Assembly votes to reconvene the Trusteeship Council, it would—at the very least—serve to draw attention to the issue of Wake, and cause some American annoyance. However, given the general American recalcitrance when it comes to being bound by international law, it seems unlikely that any organ of the UN could be used to compel the U.S. Government to do anything.<sup>476</sup> Despite how unlikely it may be for the RMI to obtain an unqualified victory that would vindicate its claim to *Āneen Kio*, award just compensation, or bind the United States, a resolution is still possible. Specifically, the RMI could employ the type of “creative diplomacy” that helped to broker a deal over Kwajalein: no individual petition to the Trusteeship Council or *Ri-Majeļ* plaintiff<sup>477</sup> secured an enforceable judgement against the United States. Yet, the *jodiks*—including those petitions and lawsuits—injecting enough uncertainty into the American calculus and applied sufficient political pressure (both domestic and international) to bring the United States to the negotiating table. While the Kwajalein landowners never won a judgment for just compensation in a court of law, their actions eventually resulted in an agreement that was materially better than what they would have obtained otherwise.

The Trusteeship Council, of which the United States is a member, will not be issuing a resolution declaring *Āneen Kio*, “is and has always been the property of the people of the Marshall Islands and their traditional leaders” in the foreseeable future. Yet, if Wake is part of the TTPI, it cannot be removed without the consent of the entire Security Council. This opens the door for the RMI to inject uncertainty into the situation and gain political support for a negotiated settlement. One potential course of action would be for the RMI to ask that the council resume requiring the Americans to make a yearly report on the strategic trust territory. Furthermore, it could request that the Trusteeship Council resume its duties under the UN Charter, which

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<sup>475</sup> U.S. State Dep’t, *Voting Practices in the United Nations for 2019*, at 48-53 (Mar. 31, 2019), <https://www.state.gov/wp-content/uploads/2020/05/Report-Voting-Practices-in-the-United-Nations-2019.pdf>. According to the most recent data only twenty-eight countries voted with the United States on “important issues” more than fifty percent of the time; of those twenty-eight, ten are Pacific Island countries—including all five Micronesian states (Palau, RMI, F.S.M., Kiribati, and Nauru). *See id.*

<sup>476</sup> *See e.g.*, Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT’L L. 783, 784 (2004) (“The attitude of the United States towards international adjudication seems to have reached another low point.”)

<sup>477</sup> *See Nitol v. United States*, 7 Cl. Ct. 405, 407 (Cl. Ct. 1985) (involving twelve complaints filed on behalf of 3,318 plaintiffs from sixteen atolls and islands affected by nuclear fallout); *Juda v. United States*, 6 Cl. Ct. 441, 446 (Cl. Ct. 1984) (including as plaintiffs the 1,004 members of the Bikini community); *Peter v. United States*, 6 Cl. Ct. 768, 769 (Cl. Ct. 1984) (involving seventeen individual plaintiffs on their own behalf and on behalf of a class composed of all persons recognized as the Enewetak people).

would require the Americans to participate in annual meetings, address petitions from any interested party, and grapple with requests to send visiting delegations to Wake.<sup>478</sup>

The terms of the agreements surrounding the Kwajalein land dispute could also serve as templates to a future settlement over *Āneen Kio*. That agreement began with the government-to-government agreement for compensation that was codified in the Compact of Free Association. The 2003 Compact terms reached by U.S. and RMI negotiators provided for a fifty-year lease at \$15 million annually (to be adjusted for inflation), \$3.1 million set aside annually for “special impact” funding to address overcrowded Ebeye islet, and \$200,000 annually in development grants.<sup>479</sup> If, as has happened in the past, the American government is brought to the table by the peaceful efforts of *Ri-Majeļ* for justice, methods similar to those developed by the Kwajalein Negotiation Committee could be used to calculate a figure for just compensation for the use of *Āneen Kio*.<sup>480</sup> An essential part of any government-to-government agreement would be the affirmation of the Republic of the Marshall Islands’ sovereignty over *Āneen Kio*. Thanks to America’s right of strategic denial, such a concession would come at almost no strategic cost.<sup>481</sup> Just as special impact funding for

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<sup>478</sup> While the United States retains the right to suspend U.N. visiting delegations to the strategic trust territory, as it did at Bikini and Enewetak, *see supra* note 447, at para. 12, this would still result in the expenditure of American resources and political capital.

<sup>479</sup> DVORAK, *supra* note 1, at 221. Due to requirements imposed by the RMI Constitution, a land use agreement (LUA) between the Kwajalein landowners and RMI Government was required to be reached before the funds could be distributed. *Id.* at 221-22. The RMI Constitution affirms traditional land ownership, and purposefully curtails the power of eminent domain. *Id.* at 215. In practice, the government of the RMI owns no land. *Id.* at 222-23; *see also* CONSTITUTION OF THE REPUBLIC OF THE MARSH. IS. art. II. § 2, art. X. § 1-2. These constitutional requirements are one of many reasons why the claims of the “Kingdom of EnenKio” were fraudulent. *See* MINISTRY OF FOREIGN AFFAIRS AND TRADE OF THE REPUBLIC OF THE MARSHALL ISLANDS, CIRCULAR NOTE 01-98 (1998) (condemning the fictitious “Kingdom of EnenKio” for making fraudulent assertions that violate the RMI Constitution and purporting to assert control over “areas within the geographical and political boundaries of the Republic of the Marshall Islands.”); Adam Clanton, *The Men Who Would Be King: Forgotten Challenges To U.S. Sovereignty*, 6 UCLA PAC. BASIN L.J. 1, 26 n.133 (2008) (discussing the complaint filed against American Robert F. Moore by the S.E.C. for purporting to offer one billion dollars of “Enenkio Gold War bonds” over the internet).

<sup>480</sup> DVORAK, *supra* note 1, at 219-20. Organized around the beginning of the new millennium, the K.N.C. was formed by Kwajalein landowners and chaired by *Irooj* and future RMI president Christopher Loeak. The K.N.C. adopted the approach that all natural resources were being leased to the American military—including both the land and lagoon. *Id.*

<sup>481</sup> In addressing the U.S. House of Representatives on the Compact of Free Association it was said that:

[t]his [Compact] is very much in the interest of the United States.

displaced *Ri-Kuwajleen* was provided in the Compact, special impact funding for those inhabitants of the northern atolls displaced by nuclear testing<sup>482</sup> would be an important term;<sup>483</sup> as the request to resettle at *Āneen Kio* was denied. Finally, any agreement would be unacceptable if it did not allow for some amount of *Ri-Majeļ* access to *Āneen Kio*; the most likely arrangement would be similar to those at Kwajalein, allowing for *Ri-Majeļ* to live and work on the American base.

Affirming *Āneen Kio* as a part of the Marshall Islands would benefit American interests, as well as Marshallese. For example, under the guise of obfuscating Wake's connection with the rest of the Marshall Islands, Wake is administered by the 11th Air Forces Pacific Air Force Support Center

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Strategically, this agreement gives us the right of strategic denial, so that we are in a position for the rest of time to prevent any foreign power from establishing a military presence in Micronesia without our consent. That is an extraordinary concession made by the Micronesians and a very real achievement for the United States.

DVORAK, *supra* note 1, at 226. As this article was being written, the Biden Administration had significantly delayed engaging in any talks with the RMI (or other Freely Associated States) on renewing *COFA II*. David Brunnstrom & Michael Martina, *With Blinken in Pacific, Marshall Islands says talks on U.S. military access 'stalled'*, REUTERS (Feb. 9, 2022), <https://www.reuters.com/world/asia-pacific/with-blinken-pacific-marshall-islands-says-talks-us-military-access-stalled-2022-02-10/>. This perhaps belies American intentions to assert their purported right to strategic denial in the absence of any ongoing financial compensation. See e.g., Puas, *supra* note 232, at 197-98 (quoting former American Ambassador Martha Campbell “[there is a] dangerous belief that the U.S. will extend more aid when the current Compact of Free Association grant package ends in 2023 ... there is no intention on the part of anyone anywhere in the government of the U.S. to extend Compact funding past 2023.”) For further discussion that the Compacts “should be more correctly seen as a lease between a landlord and tenant” see *id.* at 20-21, 145-46. See also *id.* at 142-43 (arguing that the concept of a permanent denial clause contravenes the FSM's sovereignty as upheld in its Constitution, and the FSM's interpretation is that the U.S.'s rights derive from the Compact and end when the Compact ends); cf Constitution of the Republic of the Marsh. Is. art. I §1-2 (declaring the Constitution to be the supreme law of the RMI, and any law inconsistent with the constitution to be void).

<sup>482</sup> This could conceivably be expanded to include not only residents and descendants of Rongelap, Utrik, Enewetak, and Bikini; but also, to those of Ailuk, Jemo, Likiep, Wotho, and Wotje; whom the C.D.C. has recommended receive compensation for exposure related to the Castle Bravo test. See Walsh, *supra* note 257, at 209. This may also be necessary in practice as an inducement to secure the LUA between the RMI Government and those that claim traditional ownership of *Āneen Kio* (i.e., the *Irooj*s of the northern *Ratak* chain, including Ailuk and Wotje).

<sup>483</sup> This need only be priced into the American agreement, sidestepping the likely American opposition to including nuclear reparations language into any agreement, given the relevant history. See discussion *supra* Section II.I; *supra* note 481. Conceivably this could be accomplished through a LUA between the traditional owners and RMI Government.

from Joint Base Elmendorf-Richardson near Anchorage, Alaska.<sup>484</sup> The distance between Wake and Elmendorf-Richardson is over 3,500 miles; the distance to Bucholz Army Airfield at Kwaj is less than 750 miles.<sup>485</sup> This bifurcation of Wake and Kwaj makes even less sense when viewed in light of the U.S. Missile Defense Agency pouring hundreds of millions of dollars into integrating Wake into the Ronald Reagan Ballistic Missile Defense Test Site, whose mission control center is on Kwaj.<sup>486</sup> Moreover, the contractor at Kwaj<sup>487</sup> fills approximately 1,000 positions by hiring Marshallese workers from the pool of 10,000 people who live on Ebeye.<sup>488</sup> In contrast, Chugach Native Corporation, which holds the federal contract for Wake, resorts to hiring workers that must be flown in from Thailand.<sup>489</sup>

While Americans and Marshallese have been at an impasse over *Āneen Kio* for nearly fifty years, with the American “pivot towards the Pacific”<sup>490</sup>—and the accompanied increase in antagonism with fellow permanent Security Council members—the geopolitical landscape may be ripe to settle the dispute over Wake. Regardless of whether the American government continues to advocate its “might makes right” position and ground its claim to Wake on the doctrine of *terra nullius*, the *Ri-Majeļ* claim to *Āneen Kio* will persist. In 1990, the Constitution of the Republic of the Marshall Islands was amended to emphasize that it applies to “every place within the traditional boundaries of the archipelago of the Marshall

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<sup>484</sup> Emily Farnsworth, *75 years after the U.S. recaptured it during WWII, a U.S. base in the Pacific is dealing with a new menace: birds*, BUSINESS INSIDER (Feb. 25, 2020), <https://www.businessinsider.com/air-force-base-wake-island-pacific-dealing-with-bird-strikes-2020-2>.

<sup>485</sup> Calculated using National Hurricane Center and Central Pacific Hurricane Center Latitude/Longitude Distance Calculator, available at **Error! Hyperlink reference not valid.** <https://www.nhc.noaa.gov/gccalc.shtml>, latitude and longitude available at [geohack.toolforge.org](http://geohack.toolforge.org).

<sup>486</sup> Kirstin Downey, *The U.S. Military Is Pouring Hundreds Of Millions Of Dollars Into Tiny Wake Island*, HONOLULU CIVIL BEAT (Oct. 15, 2019), <https://www.civilbeat.org/2019/10/the-u-s-military-is-pouring-hundreds-of-millions-of-dollars-into-tiny-wake-island/>.

<sup>487</sup> The contract has recently changed from Kwajaelin Range Services to RGNext. Allen Cone, *Raytheon, General Dynamics secure \$502M deal to operate missile test site*, UPI (Feb. 26, 2019), <https://www.upi.com/Defense-News/2019/02/26/Raytheon-General-Dynamics-secure-502M-deal-to-operate-missile-test-site/9451551189389/>.

<sup>488</sup> DVORAK, *supra* note 1, at 180.

<sup>489</sup> RAUZON, *supra* note 155, at 159-60. There would be no immigration concerns with regards to hiring RMI citizens if *Āneen Kio* was confirmed as part of the Marshall Islands.

<sup>490</sup> Which seems to include a major American buildup at Wake. *See e.g.*, Dave Makichuk, *U.S. preps for Pacific conflict with Wake Island expansion*, ASIA TIMES (July 6, 2020), <https://asiatimes.com/2020/07/us-preps-for-pacific-conflict-with-airfield-expansion-on-wake-island/>.

Islands.”<sup>491</sup> As Lijon Eknilang, *Ri-Roñlap* activist and Castle Bravo survivor, so powerfully stated:

We own land because we are born. The island has belonged from generation to generation. That land is not really ours—it belongs to the next generations too. That means you cannot give it away.<sup>492</sup>

## VI. CONCLUSION

*An piliñliñ koba kōmṃan lōmeto, im bokkwidik kōmṃan āne ko.*

—*Jabōnkōnnaan.*

*Drops combined make the sea, and the finest sand makes the islands.*

—*Marshallese Proverb*

Just as no single petition to the Trusteeship Council ended the horrors of nuclear testing, and no individual plaintiff or protestor brought compensation for the use of Kwajalein, it is unlikely that any single action can or will compel America to relinquish its claim to Wake.<sup>493</sup> However, while no single action taken by *Ri-Majeļ* in the pursuit of justice may yield a resolution, the cumulative efforts may accrete to become a powerful force for change. The United States cannot continue the systematic taunting and bullying of a less powerful partner, riding roughshod to force injustice upon the Marshallese people.<sup>494</sup>

The idea proposed in this article, of asking the UN General Assembly to reconvene the Trusteeship Council after a quarter century of inactivity, and then petitioning the Trusteeship Council to resume supervising the administration of the Trust Territory of the Pacific Islands with regards to *Āneen Kio*, is no certainty. Countless times, the petitions of *Ri-Majeļ* have fallen on deaf ears. However, at this juncture it seems like there is nothing to lose in trying; to address the problems that future generations will face will demand the type of creativity that *Ri-Majeļ* have so powerfully demonstrated in the past. The legal argument is that because those more powerful countries did not pay attention to detail, they have left the door open, if ever so slightly. Whether it can be done in practice, or if it would lead to any meaningful change, is unknown today. Yet, while that uncertainty may be uncomfortable for American strategic interests, such uncertainty is all too familiar to the Marshallese; perhaps Americans can find solace in the knowledge that, “*men otemjej rej ilo pein Anij*”—all things

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<sup>491</sup> Article X § 2(3). This was likely in response to an American proposal to include Wake within the boundaries of the territory of Guam. See *supra* note 271, at 1064 and accompanying text.

<sup>492</sup> DVORAK, *supra* note 1, at 193.

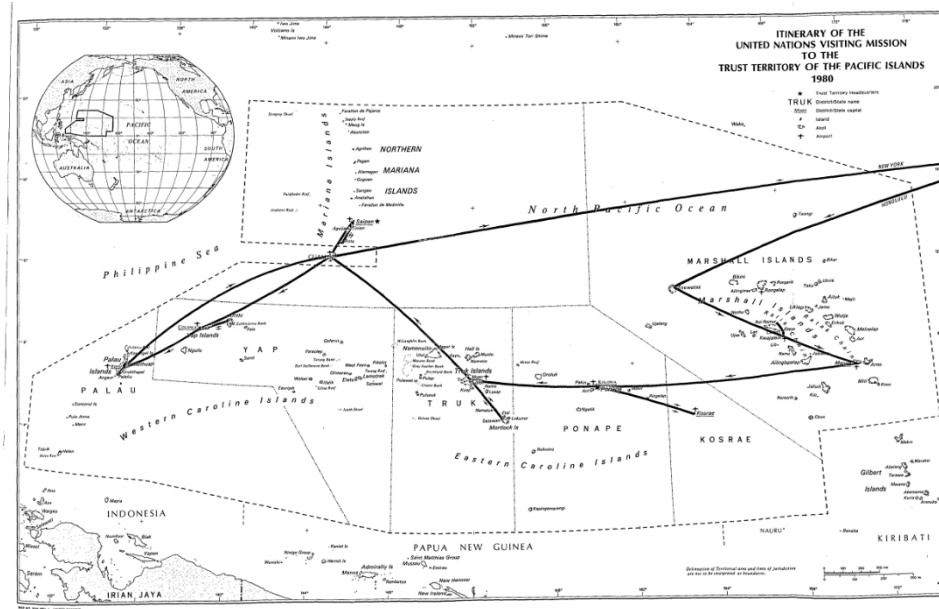
<sup>493</sup> Or for that matter honor the judgments of the NCT.

<sup>494</sup> See *supra* note 274 and accompanying text.

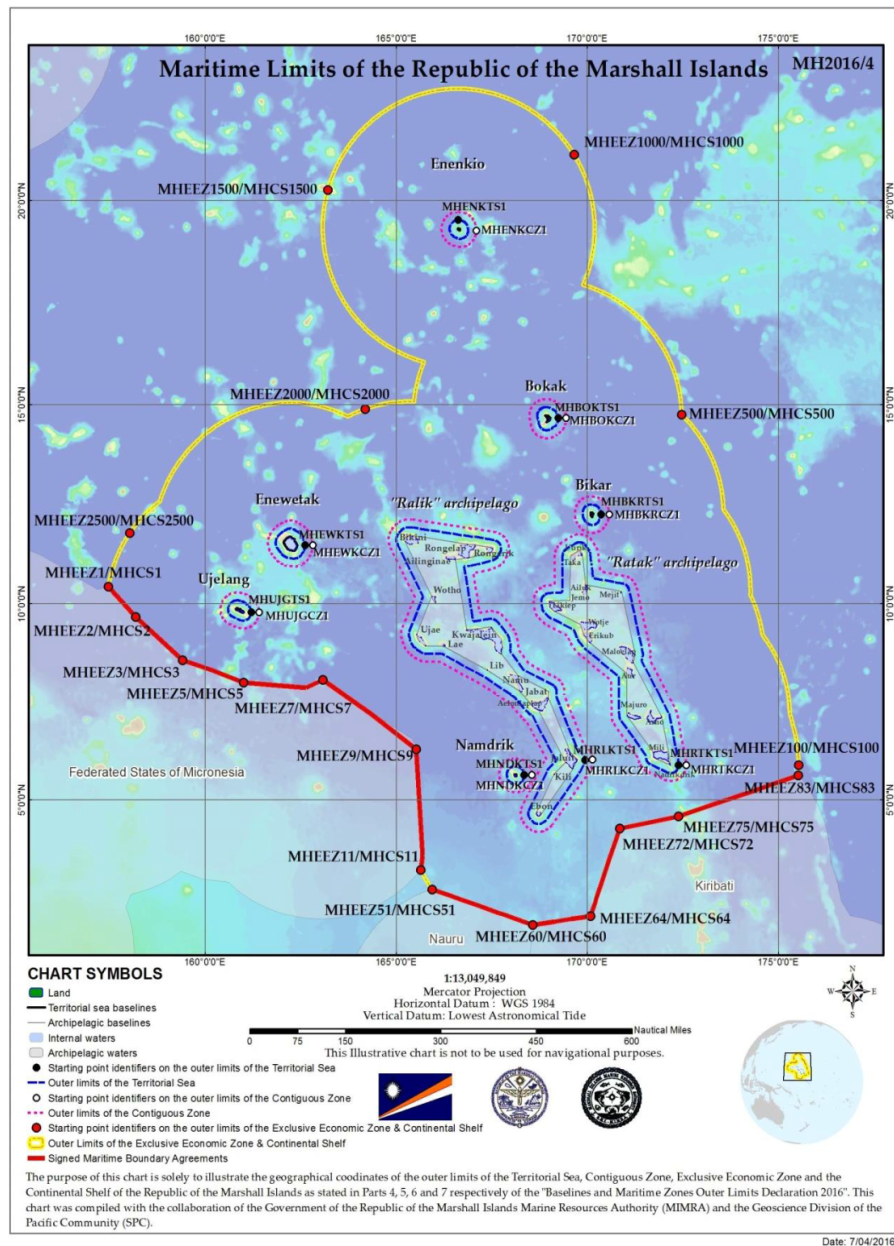
are in the hands of God.<sup>495</sup>

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<sup>495</sup> See *supra* note 206 and accompanying text.

Figure 7: UN Map Showing 1980 District Boundaries<sup>496</sup>

<sup>496</sup> Itinerary of the U.N. Visiting Mission to the Trust Territory of the Pacific Islands (map), REP. OF THE U.N. VISITING MISSION TO THE TRUST TERRITORY OF THE PACIFIC ISLANDS, U.N. Doc. T/1816, 121 (1980). Note that running east from the Marianas the boundary jogs south to exclude Wake. *Id.*

Figure 8: Maritime Limits of the RMI<sup>497</sup>

<sup>497</sup> *Chart Illustrating the Outer Limits of the Territorial Sea of the Republic of the Marsh. Is. (map)*, M.Z.N.120.2016.LOS of 3 May 2016, MH2016/4 (2016), Deposited with the UN pursuant to UNCLOS. [https://www.un.org/depts/los/LEGISLATIONANDTREATIES/legislationandtreaties/statefiles/mhl\\_deposit\\_mzn120LEGISLATIONANDTREATIES/STATEFILE S/MHL\\_Deposit\\_MZN120.htm](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/legislationandtreaties/statefiles/mhl_deposit_mzn120LEGISLATIONANDTREATIES/STATEFILE S/MHL_Deposit_MZN120.htm).