"Under Two Jurisdictions": Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations

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> The governments of Kiribati and Fiji "should make every effort to minimise the difficulties of and inconveniences to this community which finds itself under two jurisdictions."[1]
>
> Our younger generation have been taught that they also have another home. There are still two homes. That's their roots. That's where they belong.[2]

1. Introduction

This article addresses an unexplored aspect of Pacific colonial history that has surprising, but important, implications for contemporary policy making: the legal consequences of cross-border community relocation. In 1945, the small Banaban community from Ocean Island in the Gilbert and Ellice Islands Colony (present-day Kiribati) was relocated to Rabi

1. Republic of Kiribati, *Report of the Independent Commission of Inquiry Relating to the Banabans* (September 1985), para. 94.
2. Interview with male member of the Banaban community, Suva (October 18, 2012).

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Island in Fiji. The community was granted considerable local autonomy within Fiji, and also retained special rights of entry, residence, and parliamentary representation in Kiribati, even if they were not citizens of that country.

The story is important for its own sake, but also for the lessons it provides about cross-border relocation generally.[3] It speaks to a rapidly growing body of research on mobility in the context of climate change and disasters, specifically on planned relocation as a form of adaptation to climate change.[4] It also forms part of the literature on the historiography of law in the Pacific,[5] and contributes to scholarship on Pacific colonial and transnational history.[6]

3. For a similar approach in a different context, see Sally Engle Merry, "From Law and Colonialism to Law and Globalization," *Law and Social Inquiry* 28 (2003): 569.

4. See, for example, "Planned Relocations, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future: Report: Sanremo, Italy, 12–14 March 2014" (United Nations High Commissioner for Refugees [UNHCR], Brookings, Georgetown University, 2014) http://reliefweb.int/sites/reliefweb.int/files/resources/54082cc69.pdf (March 25, 2015); Elizabeth Ferris, "Planned Relocations, Disasters and Climate Change: Consolidating Good Practices, Preparing for the Future: Background Document: Sanremo Consultation, 12–14 March 2014" (UNHCR, Brookings, Georgetown University, March 2014) http://www.unhcr.org/53c4d6f99.pdf (March 25, 2015); "Planned Relocations, Disasters, and Environmental Change (including Climate Change)" (UNHCR, Brookings, Georgetown University, Bellagio Consultation, May 18–22, 2015) http://www.brookings.edu/about/projects/idp/planned-relocations (July 28, 2015) (all these documents relate to internal relocations only); Jane McAdam, "Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change," *Journal of Pacific History* 49 (2014): 301; Jane McAdam, "Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to 'Danger Zones,'" *London Review of International Law* 3 (2015): 93; and Cancún Adaptation Framework: "Decision 1/CP.16 – The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention" (2010), para. 14(f) http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf (March 25, 2015). Note also the work of the Nansen Initiative on Disaster-Induced Cross-Border Displacement http://www.nanseninitiative.org (November 2, 2015).

5. See, for example, Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge MA: Harvard University Press, 2010); Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge MA: Harvard University Press, 2007); and Sally Engle Merry and Donald Brenneis, eds., *Law and Empire in the Pacific: Fiji and Hawai'i* (Santa Fe: School of American Research Press, 2003).

6. See the discussion of such histories and historiography in Akira Iriye, *Global and Transnational History: The Past, Present and Future* (Basingstoke: Palgrave Macmillan, 2013); David Armitage and Alison Bashford, eds., *Pacific Histories: Ocean, Land, People* (Basingstoke: Palgrave Macmillan, 2014), especially their "Introduction: The Pacific and Its Histories" and Iriye's chapter "A Pacific Century?"; Tracey Banivanua Mar and Penelope Edmonds, eds., *Making Settler Colonial Space: Perspectives on Race, Place and Identity* (Basingstoke: Palgrave Macmillan, 2010); and James Belich,

The significance of the Banaban case study is that it reveals innovative responses to complex questions relating to legal status, in particular nationality and citizenship; access to and rights over land; and self-determination and governance. It enables a rethinking of the concepts of sovereignty, citizenship, and minority protection. It shows that although elaborate legal safeguards can help to ameliorate concerns about loss of identity, land, and control, they are unlikely to overcome them.[7] This is why relocation remains such a fraught option to this day.

There is a reluctant recognition in low-lying Pacific island states that at some point in time, international movement may be a necessary adaptation strategy to avoid the long-term impacts of natural disasters and climate change. Although the media has often portrayed this as requiring the mass relocation of whole populations, it is more likely that people will move gradually, and through regular migration channels where possible.[8] This is for several reasons: the absence of "spare" land for group relocation, differing perspectives on when movement is necessary or desirable, and the immense legal and practical challenges of re-establishing a whole community in another country.

Whether people migrate (at an individual or household level) or are relocated (with the intervention of the state), some common legal issues arise. Among these are nationality and citizenship,[9] and the extent to which the community can exercise a degree of self-determination and self-governance in the new location. The latter is particularly pertinent if a community is relocated from one place to another, but may also be relevant if large numbers of migrants co-locate in the new country (or join an ethnic community already established there).

Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939 (Oxford: Oxford University Press, 2009).

7. This is discussed in more detail in McAdam, "Historical Cross-Border Relocations."

8. It is commonly assumed that sea-level rise will be the trigger. However, the scientific evidence suggests that insufficient fresh water supplies, along with an increase in the intensity and severity of extreme weather events, will render land uninhabitable well before it is inundated by the sea.

9. This article adopts the common practice of using the terms "nationality" and "citizenship" interchangeably, even though they are not strictly synonymous. As Rosas explains, "nationality is a concept primarily of international law for inter-state purposes (eg diplomatic protection), while citizenship is a conglomerate of special political and other rights granted primarily under domestic law and for domestic purposes": Allan Rosas, "Nationality and Citizenship in a Changing European and World Order," in *Law under Exogenous Influences,* ed. Markku Suksi (Turku: Turku Law School, 1994), 34, cited in Laurie Fransman, *Fransman's British Nationality Law,* 3rd ed. (London: Bloomsbury Professional, 2011) 4.

To the extent that the long-term habitability of low-lying island states has been critically examined in international discussions on migration, the focus has often been on the need to secure alternative land elsewhere: for food and water security initially, and for migration in due course.[10] There has been a tendency to overlook important legal issues that migration scholars have noted from the start: that although land is obviously important, it offers no solution unless affected communities also have the right to enter and reside in the other country, enjoy their full range of human rights (including the right to work), and not be subject to expulsion.[11]

This has been reiterated in recent intergovernmental consultations with affected Pacific communities. They regard relocation as an option of last resort precisely because of concerns that it would permanently rupture conceptions of home, land, and identity, and impact negatively on nationhood, sovereignty, control over land and sea resources, culture, and livelihoods.[12] For this reason, they have stressed that any relocation should: 1) define the legal status of the relocated community within the new state, 2) help communities adapt to local customs and laws, 3) include consultation with potential host communities, and 4) contain measures to facilitate the diaspora community maintaining cultural ties, such as allowing dual citizenship.[13]

Mindful of these concerns, this article takes a historical approach to these matters by examining the unique governance and citizenship arrangements that were constructed in both Fiji and Kiribati for the Banaban community. Although the use of special statuses[14] and the "rule of

10. See, for example, "Kiribati to Buy Fiji Land Amid Rising Sea Levels," *ABC News*, February 6, 2013 http://www.abc.net.au/news/2013-02-06/an-kiribati-buys-fiji-land-for-food-security/4503472 (March 25, 2015); and "Migration Not a Priority Yet," *Islands Business*, July 22, 2013 http://www.islandsbusiness.com/news/fiji/2028/migration-not-a-priority-yet-kiribati/ (March 25, 2015).

11. See, for example, Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford: Oxford University Press, 2012), 148–49; Walter Kälin and Nina Schrepfer, "Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches," *UNHCR Legal and Protection Policy Research Series* 2012, UN Doc PPLA/2012/01: 61 http://www.unhcr.org/4f33f1729.pdf (October 30, 2015); and Nansen Initiative on Disaster-Induced Cross-Border Displacement, "Human Mobility, Natural Disasters and Climate Change in the Pacific" (Report from the Nansen Initiative Pacific Regional Consultation, Rarotonga, Cook Islands, May 21–24, 2013), 21 http://www.pacificdisaster.net/pdnadmin/data/original/PRC_2013_Human_mobility.pdf (October 30, 2015).

12. Nansen Initiative, "Human Mobility," 6, 10, 11, 17.

13. Ibid., 21.

14. See, for example, Annelise Riles, "Law as Object," and John D Kelly, "Gordon Was No Amateur: Imperial Legal Strategies in the Colonization of Fiji," in Merry and Brenneis, *Law and Empire*; John D Kelly and Martha Kaplan, *Represented Communities: Fiji and World Decolonization* (Chicago: University of Chicago Press, 2001); Fransman,

difference"[15] were characteristic of British imperialism, the Banaban safeguards in the Kiribati Constitution were unprecedented in their protection of non-residents' and (potentially) non-citizens' rights to entry, land, and parliamentary representation. Similarly, the local autonomy granted to the Banabans within Fiji, especially during a period of fierce debate about Fijian paramountcy, was very significant.[16]

It should be emphasized that the Banaban case provides an unusually "pure" example of cross-border community relocation because it involved the movement of almost the *entire* Banaban population, to an *uninhabited* island in *another country* (which meant they did not have to integrate with a pre-existing community).[17] By contrast, any future relocations are likely to involve *partial* movements to *inhabited* areas, and in most cases *within* countries, rather than across international borders. This is why the focus of most research and international discussions is on internal relocation; cross-border relocation is regarded as exceptional and highly complex. The particular legal safeguards that were created for the Banabans in Fiji and Kiribati, especially in relation to self-governance, were arguably possible because relocation was undertaken en masse to a relatively isolated location.

The article is structured in two main parts, centered on Fiji and Kiribati respectively. Part I provides a brief overview of the Banabans' relocation to Rabi in Fiji. It then examines the governance structures that were established on Rabi to give the Banabans a degree of internal autonomy within Fiji, and the Banabans' legal status in Fiji, including questions of

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Fransman's British Nationality Law, especially ch. 5–6; and A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), 278–83. The "legal definition of status was a central mechanism in the creation of the colonial and postcolonial social order": Sally Engle Merry, "Sex Trafficking and Global Governance in the Context of Pacific Mobility," *Law Text Culture* 15 (2011): 187, 193.

15. See Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993); and Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton: Princeton University Press, 2010), 11–12.

16. I thank the anonymous reviewer for this insight. See further, Kelly and Kaplan, *Represented Communities*, 84.

17. Although Rabi had been alienated for plantation use well before the Banabans acquired the island, there have been renewed tensions in recent years with the original indigenous inhabitants of Rabi, who now reside in Lovonivonu on Taveuni: Katerina M Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Bloomington: Indiana University Press, 2015), 173–75. See also text to note 118. For an interesting theoretical parallel, see Adrian Howkins, "Appropriating Space: Antarctic Imperialism and the Mentality of Settler Colonialism," in Mar and Edmonds, *Making Settler Colonial Space*.

citizenship. Part II shifts the focus to Kiribati, to examine the unique constitutional safeguards that were created to entrench the Banabans' rights of entry to stay and parliamentary representation in Kiribati, including a right to dual citizenship. The final section of the article reflects upon the meaning of formal, "legal" identities vis-à-vis personal understandings of belonging and attachment, and what this may mean for relocated communities.

2. Methodology and Approach

This article is the first scholarly attempt to paint a comprehensive picture of the legal frameworks devised to protect the rights of the relocated Banaban community in both their old and new countries of residence. Although there is literature on the cultural, social, and economic dimensions of cross-border relocations,[18] little attention has been paid to these legal questions.[19]

18. See, for example, Martin G. Silverman, *Disconcerting Issue: Meaning and Struggle in a Resettled Pacific Community* (Chicago: University of Chicago Press, 1971); Teresia K. Teaiwa, "Rabi and Kioa: Peripheral Minority Communities in Fiji," in *Fiji in Transition: Research Papers of the Fiji Constitution Review Commission*, ed. Brij V. Lal and Tomasi R. Vakatora (Suva: University of the South Pacific, 1997); Teaiwa, *Consuming Ocean Island*; Julia Edwards, "Phosphate and Forced Relocation: An Assessment of the Resettlement of the Banabans to Northern Fiji in 1945," *Journal of Imperial and Commonwealth History* 41 (2013): 783; Richard D. Bedford, "Resettlement: Solution to Economic and Social Problems in the Gilbert and Ellice Islands Colony" (MA diss., University of Auckland, 1967); John Campbell, Michael Goldsmith, and Kanyathu Koshy, *Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)* (Asia-Pacific Network for Global Change Research, 2005); John Campbell, "Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land," in *Climate Change and Displacement: Multidisciplinary Perspectives,* ed. Jane McAdam (Oxford: Hart Publishing, 2010); John Connell, "Population Resettlement in the Pacific: Lessons from a Hazardous History?," *Australian Geographer* 43 (2012): 127; Thomas Birk, "Relocation of Reef and Atoll Island Communities as an Adaptation to Climate Change: Learning from Experience in Solomon Islands," in *Climate Change and Human Mobility: Global Challenges to the Social Sciences,* ed. Kirsten Hastrup and Karen Fog Olwig (Cambridge: Cambridge University Press, 2012); Wolfgang Kempf, "Translocal Entwinements: Toward a History of Rabi as a Plantation Island in Colonial Fiji" (Research paper, Institut für Ethnologie, Universität Göttingen, 2011) http://webdoc.sub.gwdg.de/pub/mon/2011/kempf.pdf (March 25, 2015); Wolfgang Kempf and Elfriede Hermann, "Reconfigurations of Place and Ethnicity: Positionings, Performances and Politics of Relocated Banabans in Fiji," *Oceania* 75 (2005): 368; and Elfriede Hermann, "Emotions and the Relevance of Past: Historicity and Ethnicity among the Banabans of Fiji," *History and Anthropology* 16 (2005): 275.

19. The exceptions are Brian Opeskin and Gil Marvel Tabucanon, "The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration," *Journal of*

The analysis draws largely on the examination of official records housed in the national archives of Kiribati, Fiji, Australia, and the United Kingdom; the Papers of Henry Evans and Honor Courtney Maude, 1904–99 at the Barr Smith Library, University of Adelaide; and the colonial records of the Western Pacific High Commission (the British colonial authority responsible for Fiji and the Gilbert and Ellice Islands Colony, inter alia) held in New Zealand. These documents span the period 1900–86.[20] The archival records contain correspondence between the local Pacific colonial administrations (primarily the Gilbert and Ellice Islands Colony and Fiji), the Colonial Office in London, and the governments of Australia and New Zealand. They also include correspondence from Banaban representatives. The article also draws on parliamentary debates in the United Kingdom and Australia between 1908 and 1994.

In addition, the article reflects findings from 38 interviews conducted by the author in Fiji and Kiribati in 2012 and 2013. Interviewees in Fiji were members of the Banaban community living on Rabi or in Suva, including present and past political and community leaders. The youngest interviewee was 18; the oldest were Banabans in their 90s who had been part of the original relocation in 1945. In Kiribati, interviewees were past or present government officials. The article also draws on the sparse secondary literature relevant to the study, in particular the 1985 review of the Banaban provisions in the Constitution of Kiribati, which provides the only detailed analysis on that subject.

3. The Banaban Relocation to Fiji

A Background

The Banabans were the original inhabitants of Ocean Island (or Banaba), a tiny South Pacific island in present-day Kiribati. Ocean Island is located

Pacific History 46 (2011): 337; Gil Marvel Tabucanon, "The Banaban Resettlement: Implications for Pacific Environmental Migration," *Pacific Studies* 35 (2012): 343; and McAdam, "Historical Cross-Border Relocations." This article does not examine attendant legal questions relating to rights over phosphate on Ocean Island, most famously examined in the High Court of England and Wales in *Tito v Waddell (No. 2)* [1977] Ch 106.

20. All Western Pacific High Commission (WPHC) materials cited in this article come from Great Britain, High Commission for Western Pacific Islands, Western Pacific Archives, 1877–1978, MSS & Archives 2003/1, Special Collections, University of Auckland Library; all Foreign and Commonwealth Office (FCO) items come from The National Archives at Kew in the United Kingdom (hereafter Kew); all folders beginning with F come from the National Archives of Fiji (hereafter Fiji); and all folders beginning with GEIC Secret (referring to Gilbert and Ellice Islands Colony) come from the Kiribati National Archives (hereafter Kiribati).

approximately 400 kilometers from the nearest island in Kiribati, and 300 kilometers from Nauru. This isolated high, coral island was discovered by the British ship *Ocean* in 1804 (from which it derives its English name). In 1892, the British proclaimed the Gilbert and Ellice Islands as a protectorate,[21] but did not include Ocean Island. However, when the British discovered high-grade phosphate on Ocean Island in 1900, they incorporated the island into the boundaries of the protectorate, and granted the Pacific Islands Company[22] the exclusive right to occupy the land to collect and export phosphate.[23] When the protectorate became the Gilbert and Ellice Islands Colony in 1915, Ocean Island was annexed. A subsequent Order in Council of January 27, 1916 formally included Ocean Island within the colony's boundaries.[24] Lucrative mining operations commenced on the island in 1900, and by 1909, the mining company was agitating for the Banabans' removal.[25] Without an indigenous population (albeit only 476 people as of January 1, 1909),[26] phosphate resources could be exploited to the full.

The story of the Banaban relocation has been told in detail elsewhere.[27] For present purposes, it suffices to note the following. The British government was initially far more circumspect about the prospect of relocation than the mining company (or, indeed, colonial officials in the region). It stressed that the Banabans had a right to remain in their traditional homeland, and that any move would have to "operate entirely by way of inducement and not by compulsion."[28] However, imperial interests ultimately won out: Ocean Island's extensive phosphate resources, which could produce high-quality fertilizers to stimulate agriculture and thus produce food

21. Present-day Kiribati and Tuvalu, since 1979 and 1978 respectively.

22. Later the Pacific Phosphate Company, and then the British Phosphate Commission, which was a consortium of the British, Australian and New Zealand governments.

23. Letter from Chairman of the Pacific Phosphate Company to the Secretary of State, Colonial Office, London (December 31, 1907) para. 3, AU Microfilm 627, 491/1909: Land on Ocean Island, University of Auckland Library. A copy of the agreement is reproduced in Barrie Macdonald, *Cinderellas of the Empire: Towards a History of Kiribati and Tuvalu* (Suva: University of the South Pacific, 2001), 95–96. For a detailed account of the history and the constitutional position of Ocean Island, see *Tito v Waddell (No. 2)* [1977] Ch 106.

24. Orders in Council of November 10, 1915 and January 27, 1916.

25. Confidential letter from Arthur Mahaffy, Assistant to the High Commissioner, Ocean Island to the High Commissioner for the Western Pacific, Suva (April 14, 1909) para. 13, AU Microfilm 627, 491/1909: Land on Ocean Island, University of Auckland Library.

26. Ibid., para. 9.

27. McAdam, "Historical Cross-Border Relocations"; Teaiwa, "Rabi and Kioa"; Teaiwa, *Consuming Ocean Island*; and Tabucanon, "The Banaban Resettlement".

28. Letter from J. Lambert to the Chairman of the Pacific Phosphate Company (June 5, 1918) AU Microfilm 78–346, 2273/1918: Question of Banaban Removal, University of Auckland Library.

for the Empire, took priority.[29] An article published in the *Sydney Morning Herald* in 1912 encapsulated the prevailing sentiment: "it is inconceivable that less than 500 Ocean Island-born natives can be allowed to prevent the mining and export of a produc[t] of such immense value to all the rest of mankind."[30]

In 1913, a trust fund, known as the Banaban Fund, was established "for the general benefit of Ocean Island natives, always having in view the purchase of another island in the Gilbert Group and the ultimate transfer of the natives to that island."[31] In 1931, the Banaban Provident Fund was also established (from a portion of the royalty on exported phosphate) "for the purpose of the eventual purchase of a new island home for the Banabans."[32]

In a letter to the Colonial Secretary in London in 1919, Britain's resident High Commissioner for the Western Pacific, Cecil Hunter Rodwell, opined:

> Is it better for them that they should be encouraged to remain where they are, utilising only the surface of their land, regarded—rightly or wrongly—as obstacles in the way of developing the wealth below it, surrounded by an advancing tide of scientific enterprise, and subjected probably to influences not conducive either to their social or to their moral welfare; or that some other place should be found for them, no less desirable save perhaps, on sentinmental [sic] ground than their present habitation, where their presence will be welcome and where they may profess unmolested and, subject to proper administrative control, on their own lines?[33]

In March 1942, the British authorities purchased the freehold title of Rabi Island in Fiji on behalf of the Banabans, who became the beneficial

29. Ibid., para. 5.

30. "Ocean Islanders: To Go, or Not to Go? Bad Outlook for Natives," *Sydney Morning Herald,* April 13, 1912, cited in Teaiwa, *Consuming Ocean Island*, 17. Albert Ellis, the man who discovered Ocean Island's rich phosphate supplies, explained: "There can be no civilization without population, no population without food, and no food without phosphate": Albert Ellis, *Phosphates: Why, How and Where?* (speech to the Auckland Rotary Club in New Zealand, 1942), cited in Teaiwa, *Consuming Ocean Island*, xv.

31. Confidential letter from John Quayle Dickson, Resident Commissioner to the High Commissioner for the Western Pacific (December 10, 1909) para. 3, AU Microfilm 627, 491/1909: Land on Ocean Island, University of Auckland Library.

32. Memorandum from H. Vaskess, Secretary, Western Pacific High Commission to His Excellency, "Proposed Settlement of Banabans in Rambi Island," (September 4, 1944) para. 3 in WPHC 6: CF48/5 vol. II.

33. Letter from Cecil Hunter Rodwell, High Commissioner, to the Secretary of State for the Colonies (March 25, 1919) para. 3, AU Microfilm 78–346, 2273/1918: Question of Banaban Removal, University of Auckland Library.

owners.[34] Rabi had been owned by Lever Bros, an Australian company which ran a coconut plantation there. Officials noted that it would "probably be many years before the Banabans will be ready to migrate to Rabi Island," and that "by that time different counsels might prevail and the migration might never take place at all."[35] However, in December 1945, 703 Banabans (185 men, 200 women, and 318 children), accompanied by 300 Gilbertese friends and relatives,[36] were relocated to Rabi.[37]

The Banabans characterize their relocation as "forced,"[38] likening their "exile" to the biblical exodus from Israel.[39] They did, however, raise the possibility of relocation themselves on two occasions: in 1920 and again

34. FCO, Comments on Draft Petition of the Banabans to the United Nations (November 1, 1974) 3 in GEIC Secret SG 6/4 vol. II (May 1974): Constitution—Constitutional Position and Future of Ocean Island (Kiribati); see also HC Deb January 23, 1975, vol. 884, col. 2103 (Minister of State for Foreign and Commonwealth Affairs, Mr. David Ennals). Although in land law terms, the Banabans "owned" Rabi and Ocean Island, in international and constitutional law terms, those islands belonged to the Crown; respectively, Fiji (independent from 1970) and the Gilbert and Ellice Islands Colony (for which the government of the United Kingdom was responsible internationally): "Ocean Island: Opinion" (December 14, 1973) 2 in GEIC Secret SG 6/4 vol. I (June 1973 to April 1974) (Kiribati). In the 1968 Phosphate Talks, Lord Shepherd noted the Banabans' "original possession of the Island containing the phosphate": "Concluding Statement by the Rt Hon The Lord Shepherd, the Minister of State, Foreign and Commonwealth Office, at Lancaster House on Wednesday, 30 October, 1968," in FCO, *The Ocean Island Phosphates Discussions* (October 1968), 25. On the colonial division of land in Fiji, see Banner, *Possessing the Pacific,* 260–86.

35. File note by Johnson, para. 2 (August 19, 1942) in F 37/269/1: Settlement of Natives of Ocean Islanders [sic] on Rabi Island—Fiji (Fiji).

36. See Henry Evans Maude, "Memorandum on the Future of the Banaban Population of Ocean Island, with Special Relation to Their Lands and Funds" (September 2, 1946) para. 37, in Papers of Henry Evans and Honor Courtney Maude, 1904–99, MSS 0003, Series F, 1. F.9.29, Barr Smith Library, University of Adelaide.

37. These seem to be the accepted figures. However, elsewhere it was recorded that there were 944 people in total (308 men, 275 women, 361 children): Telegram from Acting Resident Commissioner of the Gilbert and Ellice Islands Colony to the High Commissioner (December 8, 1945) para. 2, confirmed in letter from H. Vaskess, Secretary of the Western Pacific High Commission to the Colonial Secretary, Fiji (December 10, 1945) para. 1 in WPHC 6, CF 48/5/2 vol. I: Banabans: Settlement of, in Fiji, 1945–46. There was a small second movement in 1947, when Banaban leaders from Rabi, having returned there to determine whether or not the community would remain in Fiji or go back to Banaba, picked up some Banabans who were still living in the Gilbert Islands: Teaiwa, "Rabi and Kioa," 134.

38. See McAdam, "Historical Cross-Border Relocations."

39. Teaiwa, *Consuming Ocean Island*, 184, noting that most of the Banaban leaders had been Methodist ministers and had drawn upon the biblical story as a parallel.

in 1940.[40] They felt that they had a responsibility to secure land for the future "against the time when the phosphate deposits in that island [Ocean Island] will have been worked out and the island will, in consequence, have become largely uninhabitable,"[41] However, they stipulated a condition—accepted by the colonial authorities at the time—that "no sudden or wholesale removal would be resorted to at any period."[42] Furthermore, any new location "was not to be regarded as a replacement for Ocean Island but rather as a second home."[43]

Ostensibly, the relocation in December 1945 was prompted by irretrievable damage done to Ocean Island when it was occupied by the Japanese during the Second World War (who deported most of the Banabans to other parts of the colony).[44] Rather than return the Banabans to an apparently uninhabitable island,[45] the British authorities encouraged a wholesale move to Rabi.[46] Having long regarded the Banabans as an "awkward obstacle" to the full exploitation of Ocean Island's phosphate resources,[47] it seems very likely that the postwar circumstances provided the colonial authorities with a convenient excuse to relocate them. They were told that their transportation, the cost of establishing their temporary camp on

40. Letter from E.C. Eliot, Resident Commissioner to the High Commissioner (April 2, 1920), AU Microfilm 79–217, 692/1920: Removal of Banabans, University of Auckland Library; Confidential letter from J.C. Barley, Resident Commissioner to His Excellency, the High Commissioner for the Western Pacific (July 15, 1940) in WPHC 6: CF48/5 vol. I: Proposed Purchase of Wakaya as Future Home for, 1940–53. This fact is generally omitted from their own historical accounts: see McAdam, "Historical Cross-Border Relocations," 308–10, 318, 325. Teaiwa, *Consuming Ocean Island*, 19 agrees that the archives reveal they were "at times … agents of their own displacement."

41. Letter from H. Vaskess (Secretary to the High Commission) to the Colonial Secretary (Office of the High Commission for the Western Pacific) (June 29, 1942) para. 2 in F 37/269/1 (Fiji).

42. Ibid., para. 3.

43. FCO, Comments on Draft Petition, 3.

44. Letter from H. Vaskess, Secretary of the Western Pacific High Commission to G.K. Roth (December 5, 1945) para. 8 in WPHC 6: CF 48/5/2 vol. I.

45. Notes of a meeting (October 1945) between the British colonial authority and representatives of the British Phosphate Commission, referred to in HC Deb December 18, 1975, vol. 902, col. 1856 (Sir Bernard Braine). The Banabans were told that "all building and houses are badly damaged and destroyed by the Japanese. They built gun emplacements and pulled down houses for the purpose. They cut down cocoanuts to clear the field of fire": Minutes of Meeting, Nuku, Rabi (March 19, 1946) 2 in WPHC 6: CF 48/5/2 vol. II; "all the villages and food gardens had been destroyed": Letter from Vaskess to Roth: (December 5, 1945) para. 8.

46. For details, see McAdam, "Historical Cross-Border Relocations."

47. HC Deb December 18, 1975, vol. 902, col. 1857 (Sir Bernard Braine), referring (at col. 1856) to notes of a meeting (October 1945) between the British colonial authority and representatives of the British Phosphate Commission.

Rabi, and one month's rations would be paid for by the Gilbert and Ellice Islands Colony. If *they* chose to return after a two year trial period, then the colonial government would also cover the costs of transport back to Ocean Island.[48] Standard immigration, quarantine, and customs requirements were waived.[49]

According to Banaban accounts, they were misled into thinking that they were moving to an established town with roads, cars, and two storey houses, where life would be easier than on Ocean Island.[50] On December 14, 1945, when the ship *Triona* arrived at Rabi, the women got "all dressed up: gold earrings, gold bangles, bracelets," in anticipation of their disembarkation at a bustling town.[51] On arrival, however, they found no town and very few inhabitants, apart from some Solomon Islanders who had stayed behind to work on the old coconut plantations. "When we got here there was no proper housing, they were temporary shelters, not what we were promised," explained Naomi Christopher, who was 15 years old at the time.[52] "It was nothing compared to what we were told," said Tebwebwe Teai, who was then a child.[53] The Banabans had to live in canvas tents beside the beach, with only two months' rations and little knowledge of how to cultivate the island and become

48. Maude, "Memorandum," para. 36.

49. The Banabans were permitted to complete immigration forms after their arrival. There was no need for quarantine because the Banabans had already been medically examined prior to departure, and were examined by the medical officer on arrival (who reported that their health "was on the whole very good". Normal customs procedures were dispensed with "on the understanding that no goods other than personal effects [we]re landed and that the vessel then call[ed] at either Suva or Levuka to complete the necessary Customs formalities." See Letter from the Secretary for Fijian Affairs to the District Office, Rabi, "Immigration Forms for Banabans," (December 10, 1945) in F 37/269/1 (Fiji); Memorandum by Lindsay Verrier (Medical Officer Cakau) to the Director of Medical Services, "Immigrant Banabans: Health and Sanitation," (January 2, 1946) para. 4 in F 37/269/1 (Fiji); see also Letter from the Secretary for Fijian Affairs to Roko Tui Cakaudrove, "Settlement of Banabans on Rabi Island," (December 10, 1945) para. 2 in F 37/269/1 (Fiji).

50. The elders were allegedly shown photographs of such a place: it was not Rabi, but Levuka, the former capital of Fiji. See McAdam, "Historical Cross-Border Relocations," 311.

51. Interview with female member of the original relocating group, Suva (October 18, 2012), who was 20 years old when she relocated to Rabi. The Banaban version of events is captured in dance and song: see Teaiwa, *Consuming Ocean Island*, 178; and Hermann, "Emotions and the Relevance of Past," 282–85.

52. Interview with Naomi Christopher, Rabi (October 23, 2012).

53. Interview with Tebwebwe Teai, Rabi (October 24, 2012). She was the daughter of Rotan Tito, the first Chairman of the Rabi Council.

self-sufficient.[54] Colonial documents from the period described Rabi as "a refugee camp,"[55] and in later years, the United Kingdom authorities admitted that the early conditions on Rabi were unsatisfactory with "inadequate housing and poor medical and educational facilities."[56]

B A Part of Fiji or Apart from Fiji?

In 1944, when relocation was mooted but no concrete scheme was yet in place, the High Commissioner for the Western Pacific noted that "[i]f the Banabans come to live in Fiji it must be as 'Fijians' and not as a foreign settlement."[57] This revealed an expectation that the Banabans would integrate and not maintain a separatist enclave: "There has never been any idea on our part of any 'extraterritoriality' in connexion with this proposed Banaban settlement in Fiji—once we have transported them to the island and settled them in, our concern with them will cease; and they will immediately on arrival pass under Fiji jurisdiction. I do not know whether the Banabans think otherwise, but I propose that this point be made perfectly clear to them when the matter is reopened with them."[58]

However, a different attitude prevailed a year later when the relocation was being planned. Major Donald Kennedy, who was to brief and accompany the group (at their request) and become the first Banaban adviser, recommended that contact between the Banabans and the existing Fiji population should be "carefully watched." He surmised that the Banabans would "probably wish to maintain a certain degree of aloofness or segregation of their own community until the Elders have had time to adjust themselves to a new environment and, if this should prove to be the case, they should be assured of Government co-operation in preventing indiscriminate contacts."[59]

The Colonial Secretary wrote to Fiji's Attorney-General intimating that the officers handling the Banaban relocation "had a vague sort of idea that

54. Interview with Tebora Tewai, a member of the original relocating group, Rabi (October 21, 2012); and interview with Naomi Christopher, Rabi (October 23, 2012).

55. Telegram from Colonial Secretary to McAlpine, Savu Savu (November 18, 1945) para. 1 in WPHC 6: CF 48/5/2 vol. I.

56. FCO, Comments on Draft Petition, 3. See also the descriptions in Pearl Binder, *Treasure Islands: The Trials of the Ocean Islanders* (London: Blond and Briggs, 1977) 103–5.

57. Minute by the High Commissioner (August 31, 1944) in WPHC 6: CF48/5 vol. II.

58. Memorandum from H. Vaskess, Secretary of the Western Pacific High Commission to His Excellency, "Proposed Settlement of Banabans in Rambi Island," (September 4 1944) para. 10 in WPHC 6: CF48/5 vol. II.

59. Donald Kennedy, "Outline of Scheme for the Preliminary Settlement of the Banaban People at Rabi, Fiji," (October 8, 1945) para. 35 in WPHC 6: CF 48/5/2 vol. I.

the Banabans, by purchasing the freehold, had 'annexed' part of Fiji and would live there as a separate community."[60] He noted that although it was "clearly desirable" to establish a Banaban local authority, Kennedy's recommendations could not be facilitated without an ordinance of some kind.[61] He also queried whether it was currently lawful for Rabi to operate as a "sort of closed area" on which only Banabans or certified persons could land.[62]

A month prior to the Banabans' arrival, Fiji's District Commissioner Northern noted that on a recent visit to Rabi and Taveuni (a neighboring island), he had been asked many questions about the Banabans' pending relocation. One of the points on which he wanted more information was the "[r]elations between Fijian and others."[63] Although he thought it appropriate to let the Banabans travel to other islands in Fiji, he proposed that such movement should be controlled by a system of travel permits.[64] Other officials thought it a mistake to impose such controls, especially because legally, the Banabans were "as free as any other resident of Fiji to roam from island to island at will."[65] Harold Cooper, the chief of the Government Information Office for the Fiji Islands, argued that the Banabans needed to view Rabi "as a home and not a prison." He thought it important for their longer-term integration that they be enabled to mingle with others living in Fiji: "They cannot remain forever a separate community, wrapped in a sort of geographical cellophane, and if they are to become happy and useful inhabitants of this Colony they must get to know, and to understand, the people who are to be their neighbours."[66]

In 1946, Harry Maude, at that time the Acting Resident Commissioner of the Gilbert and Ellice Islands Colony, argued that a recent visit to Rabi had given him the distinct impression "that the fact that [the Banabans] were being compulsorily cloistered from the outside world, like the lepers

60. File note from the Colonial Secretary to the Attorney-General of Fiji (November 2, 1945) para. 1 in F 37/269/1 (Fiji).

61. Ibid., para. 1.

62. Ibid., para. 3. Today, visitors to Rabi must seek permission from the Rabi Council.

63. Extract from District Commissioner Northern's diary (November 13, 1945) para. 48 in F 37/269/1 (Fiji).

64. Confidential memorandum from District Commissioner Northern to the Colonial Secretary: "Banabans and Gilbertese on Rabi Island," (June 15, 1946) para. 3 in F 128/1: Banabans and Gilbertese on Rambi Island—Control of Movements (Fiji).

65. Note from Harold Cooper to the Acting Colonial Secretary (undated but close to June 1946) para. 2, citing the Attorney-General of Fiji in F 128/1 (Fiji). This view was supported by others: Note on behalf of the Colonial Secretary to the Commissioner of Police (July 8, 1946) para. 1 in F 128/1 (Fiji); Note from Henry Evans Maude to the Colonial Secretary (July 15, 1946) para. 1 in F 128/1 (Fiji).

66. Note from Harold Cooper to the Acting Colonial Secretary, para. 3.

on Makogai, was one of the principal factors behind their growing dislike of the place."[67] He thought that in their own interests, they should be treated "in precisely the same manner as any other race in Fiji," and for this reason, should have no special privileges either (such as having their repatriation to Rabi paid out of Banaban trust funds if a Banaban were stranded outside Rabi).[68] Such privileges would enable a Banaban "to evade the responsibilities of a citizen."[69]

Some media commentary within Fiji at the time cast doubt on the desirability of the Banaban settlement altogether. An article in the *Fiji Times and Herald* thought it "quite possible" that the resettlement scheme would fail. Detecting the Banabans' apparent desire for isolation on Rabi, the author noted that although such wishes would be respected, they seemed to trump the wishes of the Fijians themselves: "If the Fijian people as a whole could be consulted they might say that they do not want the Banabans here at all."[70] At the heart of this was the concern that Banabans—along with other migrants—were destabilizing employment opportunities and economic conditions for local Fijians. Allegedly, some Banabans had already made their way to Suva as early as 1946, following a longstanding general pattern of movement from outer islands to the urban center in search of work.

Although the Banabans generally welcomed local Fijians to Rabi, they resented those who came with the sole intent of stealing foodstuffs and bush materials.[71] The Secretary for Fijian Affairs warned the local chief of the area that he would be grateful if he would tell his people to cease this practice, noting that he would "appreciate that the Fijians themselves would naturally object to strangers trespassing on their land for the purpose of taking things away without permission."[72] Immediately prior to the Banabans' arrival in December 1945, he had written to the chief to say that consideration needed to be given to whether the reefs adjoining Rabi should be "made available to the Banabans for their own exclusive use," and that in the interim, Fijians should not use them.[73] The right of

67. Note from Henry Evans Maude to the Colonial Secretary, para. 1.

68. Ibid., para. 3, referring to Note on behalf of the Colonial Secretary to the Commissioner of Police, para. 3.

69. Note from Henry Evans Maude to the Colonial Secretary, para. 3.

70. "Banabans in Fiji," *Fiji Times and Herald*, August 24, 1946 in WPHC 6: CF 48/5/2 vol. II.

71. Letter from F.G.L. Holland (Administrative Officer, Rambi) to the Secretary to the Western Pacific High Commission (September 19, 1946) in F 128/1 (Fiji).

72. Letter from J.W. Sykes (for the Secretary for Fijian Affairs) to Roko Tui Cakaudrove (October 3, 1946) in F 128/1 (Fiji).

73. Letter from the Secretary for Fijian Affairs to Roko Tui Cakaudrove, "Settlement of Banabans on Rabi Island" (December 10, 1945) para. 5 in F 37/269/1 (Fiji).

indigenous Fijians to fish in the waters off Rabi remains a source of tension to this day.[74]

The next section explores the governance arrangements established on Rabi that enabled the Banabans to establish a degree of autonomy within Fiji. The article then turns to the issue of citizenship and formal "belonging" within Fiji.

C Governance Structures on Rabi

The Banaban relocation to Fiji was initially for a trial period of 2 years. The Secretary of the Western Pacific High Commission thought it "very doubtful" that the Banabans would agree to remain on Rabi permanently, noting that their willingness to do so would "depend upon their treatment there and whether they get to like the place sufficiently during their enforced sojourn in the island."[75] This was a key factor in the decision to grant the Banabans a degree of autonomy in managing their own affairs.

> For this reason it is important that the proposed legislation should give them as nearly as possible the same Government organization and powers of self-Government as they enjoyed and were used to in Ocean Island. It must be borne in mind that they are intensely suspicious of anything the Government may do to get them away from Ocean Island; and if they think that their new constitution is going to take any powers or privileges away from them which they have enjoyed in Ocean Island, it is going to influence them in their decision whether they remain permanently in Rambi or not.[76]

In the months preceding the relocation, Major Kennedy was asked to outline a scheme for resettlement. He proposed that the new settlement "be arranged to function in the same manner as a Banaban village on Ocean Island," with a native government, under an administrative officer's guidance, appointing camp officers to exercise customary controls.[77] Kennedy recommended that the native government

74. Teaiwa, *Consuming Ocean Island*, 173; this was reinforced in my interviews on Rabi. The Banabans are only permitted to fish for subsistence, not commercially. According to Teaiwa, permitting the Banabans to fish at all is often portrayed as a sign of Fiji's generosity and is used as political leverage during elections.

75. Letter from Vaskess to Roth (December 5, 1945) para. 9.

76. Ibid., para. 10. In 2012, the Executive Director of the Rabi Council attributed the Banabans' decision to remain on Rabi to the fact that "their interests on this island were protected, so they were more reassured that they were able to stay here freely": Interview with Marlie Rota, Executive Director, Rabi Council of Leaders, Rabi (October 24, 2012).

77. Kennedy, "Outline of Scheme," para. 22.

> should be permitted, from the outset to exercise all the legal functions and powers it possessed under the laws of the Gilbert and Ellice Islands Colony. To permit of this being done, it will be necessary to grant a special authority and dispensation within the territory of Fiji pending the enactment, at a later date, of suitable legislation to provide for the special needs of the Banaban community.[78]

Harry Maude, the Acting Resident Commissioner of the Gilbert and Ellice Islands Colony, discussed this matter with the Secretary for Fijian Affairs and Fiji's Acting Solicitor-General. The Secretary gave his in-principle agreement that the Banabans "should be permitted to retain as much of their system of Local Government as was practicable under the circumstances and undertook to consider favourably any legislation drafted with this end in view."[79] The Acting Solicitor-General offered the assistance of the government's Legal Department to draft the necessary legislation should he be instructed to do so by the Fiji government. The Secretary of the Western Pacific High Commission requested that Fiji's Legal Department be asked to draft a bill, which, based on the views of the Acting Solicitor-General, might be in the form of either

1. A short Bill empowering the Governor-in-Council to enact Regulations to provide for the Local Government of Rambi Island; or, in more general form, to enable Regulations to be enacted to provide for the Local Government of any such homogenous communities; or
2. A longer Bill adapting suitable sections of the Gilbert and Ellice Islands Colony Native Governments Ordinance 1941 for application in Rambi Island. This Ordinance supersedes the Native Laws Ordinance 1917, and, while it has not yet been applied to Ocean Island owing to the war, it is considered to form the more appropriate model for basing any Fiji enactment.[80]

In December 1945, the first of three ordinances governing Banaban affairs on Rabi was drafted. The Banaban Settlement Ordinance established the local governance framework for the island.[81] This included the Rabi Island Council (which, among other things, regulated the system of land

78. Ibid., para 23.

79. Letter from H. Vaskess, Secretary of the Western Pacific High Commission to the Colonial Secretary, Fiji, (November 2, 1945) para. 2 in WPHC 6: CF 48/5/2 vol. I.

80. Ibid., para. 3. For draft bill, see document 33a in F 37/269/1 (Fiji).

81. No. 28/1945 (December 27, 1945); Banaban Settlement (Amendment) Ordinance No. 15/1951; Banaban Settlement Ordinance No. 38/1970 (October 8, 1970) (repealed the 1945 Ordinance: s 8); Banaban Settlement (Amendment) Act No. 12/1973 (June 28, 1973) (amended the 1970 Ordinance); Banaban Settlement Act, Cap 123 of 1978 (a consolidated version of the Banaban Settlement Ordinance 1970 and the Amendment Act 1973); Banaban Settlement (Amendment) Act No. 8/1996 (August 28, 1996). The current statute is the Banaban Settlement Act Cap 123 of 1978, as amended by the 1996 statute.

tenure and inheritance), the Rabi Island Court, and the Rabi Island Fund. Section 3 authorized the Governor in Council to "make regulations to provide for the peace order and good government of the Banaban community," but the Rabi Island Council could submit recommendations to him. Section 5 empowered the Rabi Island Council to make island regulations on the following subjects (subject to the prior approval of the Governor): island cleanliness and public health; maintenance of peace, order and public safety; social and economic betterment of the population; performance of communal works/activities; controlling livestock; prevention/removal of public nuisances; care of children and aged persons; conservation of food supplies; fishing and fishing rights; hospitals, prisons and schools; and "the promotion of the general welfare of the native inhabitants." Importantly, section 5(4) prescribed that island regulations published "in such manner as is customary in the Banaban community" would "thereupon be of full force and effect," notwithstanding any other laws that might be in force.

At a meeting on January 26, 1946, the heads of 153 family groups on Rabi met to devise a structure for the Rabi Island Council. They accepted a proposal put forward by Major Kennedy to instate ten Council members and a Chairman. Seven plus the Chairman would be elected annually at the general meeting of elders, and three would be nominated by the Chairman in consultation with the District Commissioner.[82] There was some discussion about precisely what a "family group" consisted of, but Kennedy suggested that for political purposes on Rabi, "those people who eat over one fire form an economic family group." [83] As a colonial construct, the Council effectively

82. Major Donald Kennedy, "Progress Report on Banaban Settlement: 23rd October, 1945 to 20th January, 1946," para. 10 in WPHC 6: CF 48/5/2 vol. II; and Maude, "Memorandum," para. 40. The Banaban Settlement Ordinance No. 28 of 1945 did not specify the specified number of councillors: "Subject to the provisions of any regulations made under s 3 of this Ordinance, the composition, procedure and sessions of the Rabi Island Council shall be in accordance with such directions as may be issued from time to time by the administrative officer in charge of Rabi Island" (s 2). Amending regulations issued in 1956 specified that the Council would consist of eight members and an island scribe, with the Chairman to be elected as one of the eight: Banaban (Rabi Island Council) Regulations Cap 104 of 1967 (incorporating amendments from October 31, 1956), regs 2 (1), 3(1). These regulations continued to apply after the passage of the 1970 Banaban Settlement Ordinance. The current Regulations (Banaban Council Regulations Cap 123 of 1978) have kept the composition to eight members, specifying that "each of the four communities on Rabi Island, namely the Uma, Buakonikai, Tabwewa and Tabiang communities, shall elect two members to the Council": reg 3(3). For further discussion of the Banaban Settlement Ordinance (later Act), see Gil Marvel P. Tabucanon, "Social and Cultural Protection for Environmentally Displaced Populations: Banaban Minority Rights in Fiji," *International Journal on Minority and Group Rights* 21 (2014): 25.

83. Kennedy, "Progress Report," Appendix 5: Minutes of General Meeting of Banaban Elders, Nuku, January 26, 1946, 1.

assumed the authority previously wielded by the Banaban elders, who became "an unelected but customary advisory board for the Council."[84] Rotan Tito, who had been the chief leader of Banaban affairs for the past 15 years on Ocean Island (and who was later to lead the Banabans' movement for independence), was unanimously elected as the first Chairman. The first task of the Council was to formulate the island regulations to be made pursuant to section 5 of the ordinance.[85]

Although the Rabi Council is subject to the ultimate control of the Fiji government,[86] in practice it "has maintained a large degree of autonomy and has acquired freedom from supervision in [its] affairs."[87] It has a higher status than other island councils in Fiji, being able to levy taxes and make its own regulations.[88] A councillor described it as

> a governing body which looks after the affairs of the Banabans in terms of, okay, economic developments, and at the same time, it tries to find ways of uplifting or upgrading the living standards of our people, and at the same time, we tend to, sort of, promote the idea to the younger generation that we, as Banabans, we come from an island of itself, right now it's under the Kiribati government, that is Ocean Island. We try to maintain the idea that the youngsters, when they grow up, they should maintain their identity as Banabans, and also to know the history; where do they come from and what type of island that they come from.[89]

In practical terms, there has been much financial mismanagement and corruption within the Council over the years. In the early 1990s, it was placed

84. Teaiwa, "Rabi and Kioa," 138.

85. Kennedy, "Progress Report," para. 12–13. I thank the anonymous reviewer who pointed out the significance of this in the context of Fiji's politics at the time. In 1946, vehement arguments for Fijian paramountcy were reaching their height with the Deed of Cession debate in Parliament, and there was a broad reluctance to recognize Indo-Fijian institutions, making the degree of autonomy granted to Rabi particularly noteworthy (see further Kelly and Kaplan, *Represented Communities*, 84).

86. One interviewee described the Council as being under the umbrella of the Fiji government: "They look after our affairs here. They see that the island that we bought is maintained and . . . safeguard our interests long term". Interview with Tiboua Auriaria, Rabi (October 21, 2012).

87. J.L. Joy and A.R.G. Prosser, *Report of a Mission to Rambi Island Fiji: August 1967* (London: Ministry of Overseas Development, November 1967), 34, in FCO 32/415 Fiji: Economic Affairs (Internal): Rabi Island: Development Aid For (Kew).

88. Teaiwa, "Rabi and Kioa," 132; Banaban Settlement Act, Cap 123 of 1978 (as amended by Banaban Settlement (Amendment) Act No. 8/1996) s 5; and Banaban Lands Act, Cap 124 of 1985, s 6. The 1996 constitutional review doubted whether the Rabi Council's purported application of its regulations to non-Banabans (namely Fijians) was lawful: Sir Paul Reeves, Tomasi Rayalu Vakatora and Brij Vilash Lal, *The Fiji Islands: Towards a United Future: Report of the Fiji Constitution Review Commission* (Suva: Parliament of Fiji, 1996) para. 17.76, 17.78.

89. Interview with Rabi councillor, Suva (October 16, 2012).

under administration by a panel appointed by the Prime Minister of Fiji.[90] In mid-2013, an interim administrator was again appointed by the Prime Minister's office because the Council had failed to meet targets set by the government in relation to works to be carried out on Rabi.[91] According to one interviewee, "we always say that a Council is going to create an atmosphere or environment that will bring in honey, milk and honey, you know, but we haven't seen any honey or anything and now all we are seeing is just poverty."[92]

D Permanent Settlement

On May 13, 1947, a referendum was held on Rabi for the Banabans to determine whether or not they would make Rabi their permanent home.[93] By 270 to 48 votes, they decided to remain,[94] based on the conditions set out in the 1947 Statement of Intentions of Government. This was a document signed by the Banabans and the colonial administrations of Fiji and the Gilbert and Ellice Islands, "cast in the form of a statement of proposed Government policy vis-à-vis the Banabans."[95] It was based on a draft Memorandum of Agreement prepared by Maude, who doubted that it would have any legal validity.[96] The Statement of Intentions subsequently became the basis for the Banabans' entrenched rights in the Constitution of Kiribati.

In essence, the Statement of Intentions provided that the Banabans' decision to remain on Rabi would not affect their rights to lands on Ocean Island; that they retain an inalienable right to return to Ocean Island; that the title to worked-out phosphate lands there, which had or might

90. See Teaiwa, "Rabi and Kioa," 139ff; Cyril Aidney, Luke Ratuvuki and Taomati Teai, *Report of the Committee of Inquiry into the Rabi Council Affairs* (Suva: Parliament of Fiji, 1994) cited in Teaiwa, *Consuming Ocean Island*, 171.

91. "Rabi Island Council Dissolved," *Islands Business*, June 27, 2013 http://www.islandsbusiness.com/news/fiji/1605/rabi-island-council-dissolved/ (March 25, 2015). Teaiwa, *Consuming Ocean Island*, 220 fn 29 says it was "due to corruption and a lack of activity in their administration of island services."

92. Interview with Aren Baoa, Suva (October 18, 2012).

93. There was an earlier vote in November 1946, in which there was unanimous agreement to remain, but this is omitted from a lot of histories, and the 1947 vote is regarded as the definitive one. See Telegram from Major F.G.L. Holland to the Secretary of the Western Pacific High Commission (November 20, 1946) in WPHC 6: CF 48/5/2 vol. II; Letter from Major Holland (Administrative Officer, Rambi) to the Secretary of the Western Pacific High Commission (December 2, 1946) para. 4 in WPHC 6: CF 48/5/2 vol. II.

94. Resident Commissioner Henry Evans Maude to Acting High Commissioner for the Western Pacific (July 11, 1947) para. 12 in WPHC 9, 48/5/10: Banaban Lands and Funds: Report by Mr Henry Evans Maude, MBE, on future of, 1946–53.

95. Ibid., para. 3.

96. Ibid.

come into the possession of the Crown, should revert to the Banabans; that ownership of Rabi was to be vested in the Rabi Island Council, except for a Crown reserve of 50 acres;[97] and that the stock, tools, houses, and other assets of the copra estate on Rabi were also to vest in the Council. The Council would legislate for the division of lands on Rabi, and for the system of land tenure and inheritance.[98] At this time, the question of citizenship did not arise, because Fiji, like the Gilbert and Ellice Islands Colony, was a Crown colony and its inhabitants were citizens of the United Kingdom and Colonies.[99]

The Banabans were formally brought under the jurisdiction of the Governor of Fiji on January 1, 1950.[100] In addition to the Banaban Settlement Ordinance, two further legislative instruments were drafted to govern the affairs of the Banaban community on Rabi. First, the Banaban Funds Ordinance established the Banaban Trust Funds Board, to administer the proceeds received from phosphate mining on Ocean Island.[101]

Second, the Banaban Lands Ordinance vested the freehold title of Rabi in the Rabi Island Council in trust for the Banaban community.[102] The 50 acre Crown reserve that had not been part of the original sale was transferred as freehold in 1948.[103] Although in land law terms the Banabans "owned" Rabi and Ocean Island, in international and constitutional law terms, those islands remained within the territory of Fiji and the Gilbert and Ellice Islands Colony respectively (for which the United Kingdom government was responsible internationally).[104]

97. See Minute by the High Commissioner (August 31, 1944) in WPHC 6: CF48/5 vol II: "why on earth are we fussing about 50 acres? The pp. read like documents about the Sudeten Germans!".

98. Based on summary in *Tito v Waddell (No. 2)* [1977] Ch 106, 190–91; Appendix V to the 1985 review.

99. HC Deb June 11, 1979, vol. 968, col. 154 (Sir Bernard Braine); HL Deb February 19, 1979, vol. 398, col. 1610 (Baroness Elles).

100. Maude, "Memorandum," para. 44.

101. Banaban Funds Ordinance No. 25/1948 (September 29, 1948); Banaban Funds (Amendment) Ordinance No. 35/1958; Banaban Funds (Amendment) Ordinance No. 9/1961 (April 26, 1961); and Banaban Funds (Repeal) Ordinance No. 36/1970 (October 8, 1970).

102. Banaban Lands Ordinance 1953 No. 30/1953 (November 26, 1953); Banaban Lands Ordinance 1965 No. 31/1965 (July 8, 1965) (repealed the 1953 Ordinance: s 20); Banaban Lands (Amendment) Ordinance No. 37/1970 (October 8, 1970); and Banaban Lands Act Cap 124 of 1985 (which appears to consolidate the 1965 and 1970 Ordinances) and is the statute currently in force.

103. Confidential Report by A.L. Free (Pacific and Indian Ocean Department) on "The Banabans at the Independence of Fiji" (March 25, 1970), Annex XII, para. 1 in FCO 32/610: Development Aid for Rabi Island in Fiji (1970) (Kew).

104. Ocean Island: Opinion (December 14, 1973) 2 in GEIC Secret SG 6/4 vol. I (Kiribati).

Land title had been deliberately omitted from the earlier Banaban Settlement Ordinance because the Secretary for the Western Pacific High Commission wanted to retain it "as a bargaining lever in connexion with the necessary renunciation by the Banabans of their interests in Ocean Island."[105] He thought it "most unwise to vest the Rambi Island lands in the Banabans before they agree[d] to exchange their rights to the lands in Ocean Island for those in Rambi."[106] Fiji's Attorney-General explained that the Secretary was not in a position to offer Rabi to the Banabans in exchange for them relinquishing their rights to Ocean because Rabi was held by the Western Pacific High Commission on trust for the Banaban community, and "it would be an abuse of the High Commissioner's powers as trustee to make the carrying out of the trust dependent upon such a condition."[107]

On Fiji's independence in 1970, the Banaban Funds Ordinance was repealed and the remaining two ordinances became the Banaban Settlement Act and Banaban Lands Act respectively. Until 2013, they were entrenched in successive Fiji Constitutions, which meant they could not be repealed or amended without a special parliamentary majority.[108] The 1970 Constitution required at least a three-quarter majority in Parliament.[109] The 1990 Constitution required a simple majority in the lower house, plus at least 18 of the 24 members of the Great Council of Chiefs (Bose Levu Vakaturaga) in the Senate.[110] The 1997 Constitution required that any bill to amend the Banaban statutes be read three times in each house

105. Letter from Vaskess to Roth (December 5, 1945) para. 13. In a subsequent letter, he suggested that it could be expressed as the High Commissioner holding the title "as part of the assets of the Banaban Provident Fund": Letter from H. Vaskess, Secretary of the Western Pacific High Commission to the Attorney-General of Fiji (December 11, 1945) para. 5 in WPHC 6: CF 48/5/2 vol. I.

106. Letter from Vaskess to the Attorney-General of Fiji (December 11, 1945) para. 2.

107. Note to the Colonial Secretary from J.H. Vaughan, Attorney-General (December 12, 1945) para. 2 in WPHC 6: CF 48/5/2 vol. I.

108. See Tabucanon, "The Banaban Resettlement," 359–60. There have been four Constitutions in Fiji: 1970, 1990, 1997, and 2013.

109. 1970 Constitution, s 68(1). Any provision that affected "Fijian land, customs or customary rights" required the support of at least six of the eight members of the Senate appointed by the Governor-General on the advice of the Great Council of Chiefs: s 68(2).

110. 1990 Constitution, s 78(1). This was in response to Fijian concerns that their interests might be adversely affected by the safeguards: *Report of the Constitution Review Committee* (Suva: Parliament of Fiji, July/August 1987) para. 6.11–6.21. The 1996 Fiji Constitution Review Commission observed that Fiji's separate race-based systems of law "assumed that the communities in question would remain isolated and homogenous." It argued that as more non-Banabans took up residence on Rabi, "the application of laws on a personal, rather than a territorial, basis will become increasingly problematic": *Report of the Fiji Constitution Review Commission*, para. 17.81.

of Parliament, and that it receive the support of at least 9 of the 14 members of the Senate appointed by the President on the advice of the Great Council of Chiefs before it could be approved.[111]

The 2013 Constitution removed the legal safeguards for the Banabans, ostensibly as part of a new national policy to enhance unity in ethnically diverse Fiji.[112] The Banaban statutes could now be amended or repealed just like any other Act.[113] The Prime Minister of Fiji claimed that the new Constitution provided "greater protection and security for … Banaban land than ever before."[114] However, it is difficult to reconcile this view with section 28(5) of the 2013 Constitution, which provides that the "ownership of all Banaban land shall remain with the customary owners of that land and Banaban land shall not be permanently alienated, whether by sale, grant, transfer or exchange, except to the State in accordance with Section 27."[115] The term "customary owners" is not defined, and although it may have been an error incurred by hasty drafting,[116] it is clear that the provision offers no protection against the Fiji government compulsorily acquiring Banaban land for a "public purpose."[117] It essentially makes the Banabans tenants-at-will of the state. The President of Kiribati referred his concerns about the provision to his Attorney-General for further investigation, noting that: "I think the wording of the new Constitution really opens the possibility that they may lose that land. … It remains native land and may revert back."[118]

111. 1997 Constitution, s 185(1).

112. Citizens' Constitutional Forum, *An Analysis: 2013 Fiji Government Draft Constitution* (March 26, 2013) 20 http://www.c-r.org/sites/c-r.org/files/Fiji_govtDraftconstitution2013_CCF_analysis.pdf (March 25, 2015). The constitutional process itself was vexed, with the government rejecting the draft prepared by the Constitution Commission it had appointed, and instead formulating its own, an act widely regarded as antidemocratic. For a detailed analysis, see Vijay Naidu, *Fiji: The Challenges and Opportunities of Diversity* (London: Minority Rights Group International, 2013). For an overview of Fiji's ethnic groups, see 8–9.

113. Citizens' Constitutional Forum, 5.

114. Fijian Government, "Blueprint for a Better Fiji: The 2013 Constitution is Unveiled" (Press Release, August 22, 2013) http://www.fiji.gov.fj/Media-Center/Press-Releases/BLUEPRINT-FOR-A-BETTER-FIJI---THE-2013-CONSTITUTIO.aspx (March 25, 2015).

115. Section 27 deals with compulsory acquisition by the state.

116. Citizens' Constitutional Forum, 20. Someone involved in the Constitution-making process suggested to me that this particular concern could be a result of careless cutting and pasting.

117. 2013 Constitution, s 28(6). The president of Kiribati has expressed concerns about the apparent dilution of Banaban rights on Rabi under the new Fiji Constitution.

118. Interviews with President Anote Tong, Tarawa (September 11, 2013); Tessie Eria Lambourne, Secretary, Kiribati Ministry of Foreign Affairs and Immigration, Tarawa (September 10, 2013).

E The Legal Status of Banabans in Fiji: Citizenship Entitlements

On relocation from Ocean Island to Rabi, the Banabans retained their pre-existing legal status as citizens of the United Kingdom and Colonies by birth, as both islands formed parts of British colonies. They also acquired "belonger" status in Fiji, which exempted them from immigration control.[119]

In preparation for Fiji's independence from the United Kingdom in 1970, there were extensive deliberations about what legal status the Banabans should have once Fiji was no longer a British colony. Officials at the Foreign and Commonwealth Office (FCO) detailed a number of possible options, citing precedents from other Commonwealth countries.[120] A key question was whether the Banabans should retain citizenship of the United Kingdom and Colonies.

The British government was eager to divest itself of responsibility for the Banabans, concerned that they would become a national embarrassment.[121] It was determined to avoid the possibility of an "enclave" of United Kingdom citizens living on their "own private estate in an independent Commonwealth country, pressing us for development and budgetary assistance, to be administrated under their own control, to enable them to

119. See, respectively, the Deportation, Immigration British Subjects Ordinance 1962; Fiji Immigration Ordinance 1962. The British noted that they should try to ensure that anyone who did not become a citizen of Fiji (i.e., a Banaban not born on Rabi) could retain the right to residence as a "belonger": Confidential Report by A.L. Free (Pacific and Indian Ocean Department) on "The Banabans at the Independence of Fiji" (March 25, 1970), Annex XI, para. 3 in FCO 32/610 (Kew). The Fiji government accepted that belongers should be able to obtain Fiji citizenship at independence, and that this should be written into the Constitution: Extract from Committee on Constitutional Affairs (re Fiji Constitutional Conference of May 1970), para (c) in FCO 32/625: Status and Rights of Banabans at Independence of Fiji (Kew). "Belonger" status was a colonial concept that functioned similarly to nationality. It was a legal status automatically acquired by the indigenous population and children born in the territory to others settled there, and conferred entitlements as the right to reside, vote, hold public office, and own land: HL Deb 24 July 2001, vol. 626, col. 1871 (Baroness Amos). Belonger status still exists in a number of British Overseas Territories, such as the British Virgin Islands and Anguilla. The rights that flow from it vary in each country.

120. See, for example, Memorandum from A.L. Free to Miss Emery (January 14, 1970) Annex entitled "Comments on Fiji Citizenship as it Might Affect the Banaban Community" in FCO 32/625 (Kew); and Lord Hope's report on Fiji, para. 13–16 on citizenship based on the Mauritius Constitution, cited in Extract from Introductory Discussion to Fiji Constitutional Conference of May 1970, para. 49 in FCO 32/625 (Kew). For background discussions on the nationality of the Banabans in the context of Fiji's independence, see, generally, FCO 32/625 (Kew).

121. See, generally, FCO 32/625 (Kew).

sustain their present standard of living."[122] The British were also determined not to replicate their experience in other decolonization contexts, noting that "we risk a little East Africa in Rabi."[123] Nevertheless, they recognized that they could not renege on their undertaking in the 1947 Statement of Intentions that the Banabans could return to and reside on Ocean Island at any time. Although they might seek to argue that the situation had changed radically on Fiji's independence, FCO officials noted that "this would scarcely find favour with our critics in the United Nations and elsewhere."[124]

Over the longer term, the British government wanted to avoid potential problems for a future Gilbertese State (namely, Kiribati). If the Banabans retained their citizenship of the United Kingdom and Colonies on Fiji's independence, they would acquire Gilbertese (I-Kiribati) citizenship when the Gilbert Islands became independent.[125] The British government considered that a newly independent Gilbertese state would not welcome responsibility for a large diaspora community (noting that in addition to the Banabans on Rabi, there were already more than 1,000 Gilbertese emigrants in the British Solomon Islands Protectorate[126]) and "might require cash compensation to take account of this responsibility."[127] The British, therefore, wanted "to leave a tidy situation."[128]

However, the FCO acknowledged that unless and until the Gilbert and Ellice Islands Colony became independent, it would be wrong to assume "that if the Banabans take up Fiji citizenship they will cease permanently to be our problem."[129] This was because "under the U.K. reacquisition legislation [they] will always have the right to reacquire U.K. citizenship whenever they should wish to do so."[130] This would not give them a

122. Memorandum from Free to Emery (January 14, 1970) para. 7.

123. Confidential memorandum from E.J. Emery to Mr. Morgan re: "Banaban Citizenship and Fiji Independence" (April 13, 1970) para. 2 in FCO 32/625 (Kew). This referred to a substantial number of Indians in East Africa with United Kingdom citizenship.

124. Memorandum from Free to Emery (January 14, 1970) para. 19.

125. Confidential letter from A.L. Free to Miss Emery, ref HPF 18/5 (February 13, 1970) para. 12 in FCO 32/625 (Kew); Brief for Mr. J.C. Morgan visit to Fiji, March 1970, "The Probable Effect upon the Banabans of Fiji Citizenship Law at Independence" (March 16, 1970) para. 2 in FCO 32/625 (Kew).

126. Memorandum from Free to Emery (January 14, 1970) para. 18–19.

127. Confidential letter from Free to Emery (February 13, 1970) para. 9.

128. "Inter-relationship of Political and Financial Factors" (personal and confidential) 1 in 319/1/13, Part 19: Gilbert and Ellice Island Colony Resettlement of Population: Banabans Rabi (Department of Foreign Affairs) (National Archives of Australia).

129. Confidential, Memorandum by A.L. Free, "Banaban Citizenship" (May 18, 1970), para. 5 in FCO 32/626 Status and Rights of Banabans at Independence of Fiji (Kew).

130. Ibid.

right of entry to the United Kingdom, but they would retain a right to entry and residence in the Gilbert and Ellice Islands Colony if they were born there, or if they were the minor children of, or married to, someone born there.[131] It was also noted that if the Fiji government were to alter the rights attaching to "belonger" status, it could possibly expel Banabans who did not become Fiji nationals.[132]

Considering that the best way to safeguard the Banabans' future was for them to integrate into Fiji's economic and social life,[133] British officials sought to convince the Banabans that their future lay in Fiji.[134] Confidential memoranda prepared by the British government revealed strategies "to encourage the Banabans to identify themselves with Fiji, adopt Fiji citizenship and abandon separatist tendencies"; "to encourage the Fijians to treat the Banabans as citizens of Fiji, to help them integrate into the Fiji community and to develop Rabi as their home"; and to ensure that the Fiji Constitution would "provide protection of Banaban custom, particularly land tenure."[135] They also reiterated that the Banabans had declined to return to Ocean Island en masse, and that therefore, they had "really no alternative but to accept that their future lies in Fiji."[136]

The government of the United Kingdom anticipated that there would be Banaban resistance given their longstanding desire for independence,[137] and the fact that they already enjoyed "virtual autonomy locally under the various Fiji ordinances."[138] Officials were, therefore, very surprised when the Banabans readily accepted that they would become citizens of Fiji, and, moreover, requested that they automatically become so on independence.[139] This represented a "material change" in their attitude.[140]

131. Ibid., para. 6.

132. Ibid., para. 7. This concern has been raised in the contemporary context: merely having a right to reside does not protect against expulsion.

133. Memorandum from Free to Emery (January 14, 1970) para. 9.

134. Fiji Constitutional Conference (London, April 1970), "The Effect upon the Banabans of the Fiji Proposed Citizenship Law at Independence"—Draft form in FCO 32/625 (Kew).

135. Fiji Constitutional Conference (London, April 1970), "Banabans and Fiji Independence," UK Brief No. FCO(70)7 (April 13, 1970) para. 1 in FCO 32/625 (Kew).

136. Memorandum from Free to Emery (January 14, 1970) para. 13.

137. In 1948, and again in the lead-up to Fiji's independence in 1970 and Kiribati's independence in 1979, the Banabans made bids for their own independence: see *Tito v Waddell (No. 2)* [1977] Ch 106, 192–93. These proposals are examined in depth in a forthcoming article by the author.

138. Memorandum from Free to Emery (January 14, 1970) para. 12.

139. Memorandum by Free (May 18, 1970) para. 2 in FCO 32/626 (Kew).

140. Letter from J.E. Morgan to E.J. Emery, "Position of Banabans after the Independence of Fiji" (March 21, 1970) para. 4 in FCO 32/625 (Kew).

Fiji refused to confer automatic citizenship on all Banabans, because it would have meant treating them differently from other minority groups in the country; however, it agreed to grant citizenship automatically to Banabans who had been born in Fiji[141]—approximately three quarters of the 2,000 Banabans in Fiji at independence.[142] The British were reluctant to agitate for further special arrangements, because "Fiji's attitude to its nationality legislation will be governed by its big Indian problem, not by its 'little' Banaban problem."[143]

Therefore, section 19 of Fiji's independence Constitution provided that anyone born in Fiji prior to October 10, 1970 who was a citizen of the United Kingdom and Colonies would automatically become a citizen of Fiji on that date, whereas section 21 provided that those born after independence would be Fiji citizens by birth (and citizens of the United Kingdom and Colonies by descent[144]). They could remain dual nationals up to the age of 21, but would have to renounce their citizenship of the United Kingdom and Colonies before they turned 22 if they wanted to retain their Fiji citizenship.[145] Such a provision was common in the decolonization context.[146] It was not until 2009 that Fiji permitted dual citizenship.[147]

On Fiji's independence in 1970, Banabans born on Ocean Island but living on Rabi retained citizenship of the United Kingdom and Colonies and "belonger" status in Fiji.[148] They could apply for Fiji citizenship within two years of independence, but to do so they had to have resided in Fiji

141. Brief for meeting between Lord Shepherd and Banaban representatives (May 19, 1970) in FCO 32/626 (Kew).

142. Fiji Constitutional Conference (London, April 1970), "Banaban Citizenship and Fiji Independence," UK Brief No. FCO(70)7, Annex, para. 1 in FCO 32/625 (Kew).

143. Brief for Mr. J.C. Morgan visit to Fiji, March 1970, "The Probable Effect upon the Banabans of Fiji Citizenship Law at Independence," (March 16, 1970) para. 9 in FCO 32/625 (Kew). See further, Kelly and Kaplan, *Represented Communities*.

144. Confidential telegram from FCO (Owen) to Tarawa on "Banabans: Citizenship" (October 30, 1978) para. 1 in FCO 107/16: Mr. Luard's visit to Kiribati and Fiji and further action (1979) (Kew). It was customary for a person in a newly independent country not to lose United Kingdom and Colonies citizenship if that person, that person's father or that person's paternal grandfather was born in the United Kingdom or a remaining colony. See also draft brief, Lord Shepherd's visit to Fiji, January, 1970, "The Probable Effect upon the Banabans of Fiji Citizenship Law," para. 4 in FCO 32/625 (Kew).

145. Fiji Citizenship Act 1971, s 16; 1970 Constitution, s 25(e).

146. Brief for Mr. J.C. Morgan visit to Fiji, March 1970, "The Probable Effect upon the Banabans of Fiji Citizenship Law at Independence," (March 16, 1970) para. 5 in FCO 32/625 (Kew).

147. Citizenship of Fiji Decree 2009, s 14.

148. On citizenship of the United Kingdom and Colonies, see Fransman, *Fransman's British Nationality Law*, 74–75. This status replaced "British subject status" from January 1, 1949 when the British Nationality Act 1948 entered into force.

for at least seven years and have renounced any other citizenship if they were older than 21.[149] The FCO was justifiably concerned that this latter requirement would dissuade Banabans from acquiring Fiji citizenship, as experience elsewhere suggested that "immigrant races do not voluntary [sic] surrender their UK citizenship to acquire local citizenship."[150] In particular, the FCO feared that the Banabans' emotional attachment to Ocean Island, still part of the Gilbert and Ellice Islands Colony, might galvanize them to retain their United Kingdom links.[151]

Eight years after Fiji's independence, only one such Banaban had renounced his United Kingdom citizenship.[152] Of the Banabans living on Rabi, it was estimated that 854 were citizens of the United Kingdom and Colonies only, whereas 1,440 were citizens of the United Kingdom and Colonies and Fiji (permitted up to the age of 21). It was noted that these figures would increase/decrease respectively by 46 per year if people did not renounce their United Kingdom and Colonies citizenship before turning 22.[153] Other Banabans older than 22 had ceased to be Fiji citizens (14% of the population), or, by virtue of their birth outside Fiji, had never acquired Fiji citizenship (23%).[154] Only a handful of Banabans were citizens of Fiji only: second generation Banabans born on Rabi (and the man who renounced his United Kingdom and Colonies citizenship).[155]

Therefore, for one generation after independence, a large proportion of Banabans remained citizens of the United Kingdom alone (by birth or descent).[156] This gave them continued enjoyment of "the conventional avenue of appeal to British MPs and government departments" via the British

149. Fiji Citizenship Act 1971, ss 5, 16.

150. Confidential letter from Free to Emery (February 13, 1970) para. 15.

151. Ibid.

152. Confidential telegram from FCO to Tarawa, para. 3; Memorandum by H.M. Paterson, Nationality and Treaty Department, on "Gilbert Islands: Banaban Community," (November 9, 1978) para. 2 in FCO 107/16 (Kew). Only 263 people on Rabi in 1976 were born on Ocean Island itself: HC Deb May 24, 1979, vol. 967, col. 1325 (Mr Blaker).

153. Memorandum by Paterson (November 9, 1978) para. 3. The 1976 census recorded that 61% of the approximately 2,400 Banabans living in Fiji had been born there and were, therefore, Fiji citizens by birth: HC Deb May 24, 1979, vol. 967, col. 1322 (Mr. T. H.H. Skeet).

154. Confidential telegram from FCO to Tarawa, para. 3 in FCO 107/16 (Kew); and Memorandum by Paterson (November 9, 1978) para. 2. Only 263 people on Rabi in 1976 were born on Ocean Island itself: HC Deb May 24, 1979, vol. 967, col. 1325 (Mr. Blaker).

155. HC Deb March 23, 1979, vol. 964, col. 319W (Mr. Luard); Confidential, Gilbert Islands Constitutional Conference (London, November 1978), "Citizenship" (UK Brief No. 4xiii) para. 8 in FCO 32/1460 Constitutional Conference: Briefs (1978) (Kew).

156. Fiji Constitutional Conference (London, April 1970), "Banaban Citizenship and Fiji Independence," UK Brief No. FCO (70)7, Annex (April 15, 1970) para. 1 in FCO 32/625 (Kew).

High Commissioner,[157] a mechanism they utilized extensively as they again sought autonomy in the lead-up to the Gilbert and Ellice Islands Colony's independence in the late 1970s.

4. The Banabans' Rights and Legal Status in Kiribati

> The safeguards are very satisfactory and unusually extensive.[158]

A Introduction

It will be recalled that the 1947 Statement of Intentions guaranteed the Banabans' rights to land on Ocean Island and their inalienable right to return there. Therefore, when the process of decolonization began in the Gilbert and Ellice Islands in the mid-1970s, the ongoing legal status of the Banabans also came into sharp focus.[159] The Banabans' own bids for independence intensified, and although unsuccessful, they were highly relevant to the special provisions inserted into the Constitution of Kiribati to safeguard their rights of access, land, and political representation in that country.

As early as March 23, 1975, the Gilbert Islands had agreed that the Banabans' rights in the 1947 Statement of Intentions should be enshrined in the independence Constitution.[160] In discussions in June 1975, the chief minister of the Gilbert Islands offered the Banabans a number of constitutional guarantees if they renounced their claims to independence.[161] Known as the "Fifteen Points" these included:

- An enshrined right of return to Ocean Island
- "Belonger" status in the Gilbert Islands (pre-independence), and then the right to citizenship (post-independence), "irrespective of the fact that they may also be citizens of Fiji"
- A dedicated parliamentary seat, and

157. Memorandum from Free to Emery (January 14, 1970) para. 23.

158. HC Deb May 24, 1979, vol. 967, col. 1250 (The Lord Privy Seal, Sir Ian Gilmour).

159. The Ellice Islands separated from the Gilbert Islands in 1975–76, and gained independence in 1978 as Tuvalu. The Gilbert Islands became the independent state of Kiribati in 1979, a process delayed in part by the Banabans' own bids for independence. See FCO, *Report of the Gilbert Islands Constitutional Conference* (Cmnd 7446, Misc. No. 1, 1978–79).

160. Telegram from Tarawa to United Kingdom Mission in New York and the FCO (March 23, 1975) para. 1 in GEIC Secret SG 6/4 vol. III (December 21, 1974) (Kiribati). The idea was mooted in a telegram sent the previous day from the United Kingdom Foreign Mission in Suva to the United Kingdom Mission in New York and Tarawa (March 22, 1975) para. 2 in GEIC Secret SG 6/4 vol. III (Kiribati).

161. See "The 'Fifteen Points'" in Republic of Kiribati, *Report of the Independent Commission*, 50–51.

- A suggestion that these rights could be embodied in "a formal agreement for registration with the United Nations" and that the United Kingdom and Fiji governments could be asked "to stand as guarantors of the agreement."[162]

It was no secret that both sides had a vested interest in maintaining control over Banaba on account of the vast income generated by its phosphate resources.[163] For the Banabans, this was intimately bound up with questions of identity and home.[164] For the Gilbertese, the issue was primarily about territorial integrity. As the Chief Minister of the Gilbert Islands recorded in a secret document presented to his Council of Ministers:

> There can be no question of conceding the Banaban claim to independence since the House of Assembly has resolved that Ocean Island is an integral part of the Gilbert Islands and there can therefore be no change in our position without reference back to the House. Similarly we must protect our phosphate income by every means possible. I nevertheless believe that there could be considerable advantage in our making an offer to the Banabans in sufficiently generous terms to ensure that if it was rejected it became clear that it was they who were being totally unreasonable and not this Government.[165]

162. Ibid., 51.

163. It was also suggested that they had "some idea of benefitting from fisheries rights": Department of Foreign Affairs (Australia), Meeting with Mr. R.N. Posnett, FCO Adviser on Dependent Territories and Special Envoy on Banaban Affairs (November 10, 1977), 1 in 319/1/13, Part 19 (National Archives of Australia). Others claimed that it was "little more than emotional public relations, designed to assist their efforts to obtain money" from the proceedings launched against the British Phosphate Commissioners and the United Kingdom Attorney-General in the High Court of England and Wales in *Tito v Waddell* [1975] 3 All ER 997 and *Tito v Waddell (No. 2)* [1977] Ch 106: "IDC Meeting on Banaban Litigation" (December 19, 1974) para. 10 in 74/7300 (Department of the Prime Minister and Cabinet) (National Archives of Australia).

164. One older interviewee in Kiribati, who was at one time the Commissioner for Banaba, told me: "I think the main reason why they wanted to separate themselves is because of the money." Interview with Atanraoi Baiteke, Tarawa (September 10, 2013). Similarly, former President Tito argued: "It was all just economics, the economics of the island. I think Fiji at the time, Ratu Mara had an interest to expand his waters into the Kiribati waters. . . . We knew that he was quiet behind the scene, but hoping that Banaba would become independent and would be part of Fiji." Interview with Teburoro Tito, former President of Kiribati (1994–2003), Tarawa (September 10, 2013). When I asked 82-year-old Naomi Christopher, Rabi (October 23, 2012), who was part of the original relocation, whether she supported proposals to re-mine Ocean Island, to my surprise, she said yes. It became apparent that the key issue was not mining per se, but rather who would have control over whether mining took place, and who would benefit from the profit: the Banabans or the government of Kiribati.

165. Secret, Council of Ministers, "Negotiations with the Banabans" (presented by the Chief Minister), Memorandum No. 75/75 (May 19, 1975) para. 2 (Kiribati). This document

Nevertheless, the Banabans rejected the "Fifteen Points," and maintained their claim to full independence.

Two-and-a-half years later, in November 1977, the Gilbert Islands government and the Rabi Council of Leaders did reach a compromise. They jointly approved the "Bairiki Resolutions," which provided that "a referendum to decide on the separation of Banaba from the Gilbert Islands should be held on all islands of the Gilbert Islands and, with the prior approval of the Government of Fiji, on Rabi also," and that the government of the United Kingdom must honor the outcome "when deciding on the question of independence at the forthcoming constitutional conference."[166] If the result was that Banaba should remain part of the Gilbert Islands, then it was agreed that the Banabans would be "allowed to commute freely between Rabi in Fiji and Banaba and any other Gilbert Islands," and that "subject to the concurrence of the Fiji Government," the Banabans would be "conferred dual citizenship by the Gilbert Islands Government upon application."[167] The Banabans believed that they had support from the outer islands for separation from the Gilberts, although the British doubted that separation was likely[168] (and expressed doubt that the agreement to hold a referendum would "stick," as leader Tebuke Rotan was not involved).[169]

In the end, the referendum did not proceed, because elections in the Gilbert Islands and on Rabi led to different leadership in both places,[170] and the Banabans withdrew from the agreement before a vote could be held.[171] They reverted to their earlier demand for Banaban independence.

The process for securing Gilbertese independence continued nonetheless. A constitutional conference for the Gilbert Islands was convened in

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outlines what the Gilbert Islands authority was prepared to give in exchange for the Banabans abandoning a claim to independence.

166. Joint Resolutions (hereafter "Bairiki Resolutions") approved by the Gilbert Islands government and the Rabi Council of Leaders at a meeting held in Tarawa, Gilbert Islands, from November 1 to 9, 1977, res. 1–2, cited in HC Deb November 24, 1977, vol. 939, col. 880W (Mr. Luard). Res. 8 provided that: "The Gilbert Islands Government and the Rabi Council of Leaders jointly resolved that henceforth Ocean Island be referred to only by is Gilbertese name 'Banaba'" (at col. 881W).

167. Bairiki Resolutions, para. 11(iii) and (vi), in Papers of Henry Evans and Honor Courtney Maude, 1904–99, MSS 0003, Series F, 1.F.10.1.32, Barr Smith Library, University of Adelaide.

168. Meeting with Mr. R.N. Posnett (November 10, 1977) 1; Confidential communication from London to Wellington, cc'ed to Canberra (November 18, 1977) para. 2 in 319/1/13, Part 19 (National Archives of Australia).

169. Meeting with Mr. R.N. Posnett (November 10, 1977) 1.

170. HC Deb May 24, 1979, vol. 967, col. 1321 (Sir Bernard Braine).

171. Republic of Kiribati, *Report of the Independent Commission*, para. 30.

London from November 21 to December 7, 1978.[172] Although the Banabans were permitted to send representatives to the meeting, they were apparently unhappy that they were not full delegates,[173] and they walked out when the British made clear that they would not support Banaban secession. British officials said that there were inadequate grounds to justify any departure from the "long-established and widely accepted policy" followed by successive British governments that "the principle of territorial integrity" and "the wishes of the people as a whole within the existing boundaries [of the Gilbert Islands Colony] should be the main guide."[174] Notwithstanding the Banabans' claim that the very annexation of Ocean Island was illegitimate, the island had come to be considered part of the territory of the Gilbert Islands, a situation that "has existed for at least 60 years and . . . the situation with which we have to deal."[175]

Nevertheless, British officials stressed the importance of protecting the Banabans' "special interests and concerns," which should be "safeguarded to the fullest extent possible within the sovereignty of the Gilbert Islands State."[176] They welcomed an offer by the Gilbert Islands delegation to provide a "specially privileged constitutional status for Banaba and the Banabans, within a sovereign independent Gilbert Islands State."[177] This would give effect to the safeguards set out in the 1947 Statement of Intentions by protecting the Banabans' rights to land, entry, and residence on Ocean Island.[178]

As a sign of good faith, the Gilbertese delegation expressed its willingness to discuss a novel proposal by the Rabi Council: a treaty between Fiji and Kiribati that would enable the Banabans to make representations to

172. *Report of the Gilbert Islands Constitutional Conference*. A constitutional convention had been held in the Gilbert Islands in April/May 1977.

173. Department of Foreign Affairs (Australia), inward cablegram from London (November 22, 1978) para. 2 in 319/1/13, Part 22: UK South Pacific Territories: Gilbert and Ellice Island Colony Resettlement of Population: Banabans Rabi (Department of Foreign Affairs) (National Archives of Australia).

174. FCO, *Report of the Gilbert Islands Constitutional Conference*, 5. The Gilbert Islands delegation was adamant that separation was totally unacceptable. See also Confidential, Cabinet (Defence and Overseas Policy Committee), Gilbert Islands Independence: Memorandum by the Lord Privy Seal (May 10, 1979) Annex I: 'Future Status of Banaba, Citizenship and Financial Arrangements', para. 1 in FCO 107/73 Gilbert Islands Legislation and Bill (1979) (Kew).

175. FCO, *Report of the Gilbert Islands Constitutional Conference*, 5.

176. Ibid.

177. Ibid., 4.

178. Ibid., 6.

either government if they felt their constitutional rights were being infringed.[179] However, when the Banabans withdrew from the London constitutional conference, this idea was not developed any further.

B The Constitutional Safeguards

The remaining delegations at the constitutional conference did, however, draft constitutional safeguards for the Banabans, which to my knowledge are unique in their protection of non-resident and non-citizen rights.[180] The Banabans did not formally accept the provisions, stating that they were "thrust down our throats."[181] They later acknowledged that many of them replicated parts of the pre-independence Constitution.[182]

The safeguards are contained in Chapter IX of the Constitution, entitled "Banaba and the Banabans," and Chapter III, which governs citizenship. Although Chapter III does not refer expressly to the Banabans, it entitles them, as persons of I-Kiribati descent,[183] to acquire citizenship by registration[184] and to hold dual nationality.[185] The Constitution also establishes a right of appeal to the Judicial Committee of the Privy Council from any decision of the High Court involving the interpretation of the Constitution that might negatively impact the rights or interests of any Banaban or the Rabi Council.[186]

179. Confidential, Gilbert Islands Constitutional Conference (London, November 1978), "Citizenship" (UK Brief No. 4xiii) para 69 in FCO 32/1460 Constitutional Conference: Briefs (1978) (Kew).

180. This is how they were described at the time: HL Deb February 19, 1979, vol. 398, col. 1611 (Baroness Elles). As she explained at col. 1610: "To the best of my knowledge and belief, they must be among the most generous terms ever provided for a minority, whether on the attainment of independence or in any treaty provisions that I have ever come across concerning minority groups."

181. Republic of Kiribati, *Report of the Independent Commission,* para. 47.

182. Ibid.; see also HL Deb February 19, 1979, vol. 398, col. 1598 (Minister of State, FCO, Lord Goronwy-Roberts).

183. Constitution of Kiribati, s 29(1)(a): "a person one of whose ancestors was born in Kiribati before 1900."

184. Constitution of Kiribati, s 23. In Kiribati Cabinet papers, it is expressly stated that this provision would cover a child born on Rabi, with Fiji citizenship, with parents born in Banaba expressly referenced: Secret, "Proposed Citizenship (Amendment) Act and Proposed Citizenship (Amendment) Regulations," Cabinet Memorandum No. 100/81 (September 8, 1981) (Kiribati).

185. Constitution of Kiribati, s 24. A naturalized citizen who is not of I-Kiribati descent must renounce their other nationality. The 2013 Constitution of Fiji, s 5(4) permits dual nationality. See also Citizenship of Fiji Decree 2009, s 14.

186. Constitution of Kiribati, s 123(1).

At the time of drafting, a number of United Kingdom parliamentarians doubted that the Banaban safeguards would remain secure after independence.[187] Many Gilbertese found this insulting. As "Pacific islanders practising the Pacific way," explained Lord Goronwy-Roberts in the House of Lords, they "not only intend but insist on treating the Banaban Islanders as their brothers, which they truly are."[188] Any agreement would be "held as binding on all generations to come."[189] It was noted that in "the whole history of the islands there has not been an example of an edict being repealed without the full consent of all the Members [of Parliament]."[190] The constitutional safeguards do remain in place today, notwithstanding claims that many I-Kiribati dislike them.[191]

The following section explains the constitutional safeguards. It incorporates analysis from an independent Commission of Inquiry that reviewed the provisions in 1985, which remains the only in-depth treatment of them.[192]

(i) Chapter IX: land rights, entry, and residence

Chapter IX of the Kiribati Constitution secures the Banabans' land rights and interests on Ocean Island and preserves their right to enter and reside there.[193] Accordingly, provisions relating to restrictions on the movement,

187. See, for example HC Deb May 24, 1979, vol. 967, col. 1276 (Sir Bernard Braine); HC Deb June 11, 1979, vol. 968, col. 84 (Mr. Frank Hooley): "This constitution, however, solemnly says that if the specially elected Banaban representative says 'No, I do not like this,' that is the end of it. Politically speaking, this is absolute nonsense. This Parliament would never tolerate such a situation and I cannot imagine any Parliament in the world tolerating an arrangement under which one individual—even an elected representative—can effectively prevent a constitutional change which two-thirds of the members of that country's Parliament have decided is necessary and essential."

188. HL Deb March 15, 1979, vol. 399, cols. 787–88 (Lord Goronwy-Roberts).

189. HC Deb May 24, 1979, vol. 967, col. 1310 (Mr. Roper).

190. Ibid.

191. See section IV D above.

192. In July 1981, Sir Bernard Braine in the House of Commons asked what arrangements were being made to implement that review, and was told only that it was "for the Government of Kiribati to make the necessary arrangements for an independent commission of inquiry to conduct such a review." The review was conducted some years later and reported on in 1985. See HC Deb July 10, 1981, vol. 8, col. 235W; Republic of Kiribati, *Report of the Independent Commission*.

193. Constitution of Kiribati, s 119. A Banaban seeking to enter Kiribati is given a letter from the Rabi Council of Leaders stating that that person is of Banaban descent: Interview with Marlie Rota, Executive Director, Rabi Council of Leaders, Rabi (October 24, 2012). It should be clarified that section 19 of the Constitution provides that anyone of "I-Kiribati descent shall have an inalienable right to enter and reside in Kiribati and on Independence Day shall as hereinafter provided, become or have and continue to have thereafter the right to become a citizen of Kiribati." Chapter IX guarantees should therefore not be

residence, exclusion, or expulsion of non-citizens do not apply to Banabans vis-à-vis Ocean Island.[194]

Section 19 of the Constitution provides that anyone of "I-Kiribati descent shall have an inalienable right to enter and reside in Kiribati and on Independence Day shall as hereinafter provided, become or have and continue to have thereafter the right to become a citizen of Kiribati." Because Banabans are defined as being of "I-Kiribati descent" (see subsequent description), Chapter IX guarantees do not restrict Banaban movement to Ocean Island alone.[195]

Conversely, however, legislative restrictions may be placed on the movement of non-Banabans to Ocean Island, even citizens of Kiribati.[196] Although the Kiribati government sought to have this provision repealed, the 1985 Commission of Inquiry believed it was an essential safeguard for the Banabans, in part because the Banabans claimed that "Banaba can support only a limited population and the entry of non-Banabans would hinder their own resettlement."[197]

As far as practicalities are concerned, any Banaban wishing to enter Kiribati is issued a letter from the Rabi Council stating that: "This person is of Banaban descent, was born in Fiji and is visiting for that purpose."[198] As a Kiribati government official explained, "they are allowed under our Constitution, to travel on a one-way ticket and live as long as they wish in Kiribati."[199] According to a former President of Kiribati, Teburoro Tito, "I arranged for the one-way ticket. Before they were required to have a two-way ticket. I arranged that the visa and things would be relaxed

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read as restricting Banaban movement to Banaba alone: Republic of Kiribati, *Report of the Independent Commission*, para. 62, read in conjunction with Chapter III of the Constitution.

194. Kiribati Constitution, s 119(4).

195. See also Republic of Kiribati, *Report of the Independent Commission*, para. 62, read in conjunction with Chapter III of the Constitution.

196. Kiribati Constitution, s 120. In this way, it is a derogation from section 14. See Republic of Kiribati, *Report of the Independent Commission*, para. 70. At the time of the 1985 Commission of Inquiry, the practice was simply that the Rabi Council representative on Banaba had a veto over who was permitted to enter Banaba, and the Commission was concerned that this power could be used in an "arbitrary or capricious" manner. It therefore recommended that if the movement of non-Banabans were to be limited, this should be set out in legislation (as envisaged by section 120) with a clear definition of the nature of the restrictions, the authorities who can exercise the power to restrict, and the safeguards for those adversely impacted by them: Republic of Kiribati, *Report of the Independent Commission*, para. 70. The Commission's view was that the Closed District Ordinance (Cap 9), first enacted in 1936 and applied to Banaba in 1975, was void: para. 71.

197. Republic of Kiribati, *Report of the Independent Commission*, para. 72.

198. Interview with Marlie Rota, Executive Director, Rabi Council of Leaders, Rabi (October 24, 2012).

199. Interview with Kiribati government official, Suva (October 17, 2012).

between the two sides, Fiji and Kiribati."[200] Individuals must fund their own travel; there is "no provision for repatriation at official expense."[201]

(ii) Chapter IX: internal governance on Banaba

Section 121 establishes the Banaba Island Council to give the residents of Banaba some autonomy in administering their affairs, and to deal with the central Kiribati government on their behalf.[202] At the time of the 1985 review, the Council had not yet been established, which "adversely affected development planning for Banaba as well as consultations between the Banabans and the government."[203] The Banabans wanted more extensive powers than an ordinary island council, and believed it should be composed of the same members as the Rabi Council. Under the Local Government Act, however, a Kiribati island council's members had to be elected by the island's residents, and this would not be the case if Banabans from Rabi were to form the Banaba Island Council.[204] Notwithstanding the Commission of Inquiry's sympathy toward a single representative body, given that the Rabi Council already had the de facto authority to speak for the Banabans of both Rabi and Banaba, it concluded that a separate council on Banaba was important for two reasons: to represent the interests of any non-Banaban who might reside there, and to preserve a right of direct representation in the event that the Banabans on Ocean Island might develop interests distinct from the Banabans on Rabi. For these reasons, the Commission suggested that a majority of the Banaba Island Council should be composed of nominees of the Rabi Council, with the remainder elected by the residents of Banaba.[205]

(iii) Chapter IX: parliamentary representation in Kiribati

The Kiribati Constitution provides for two elected parliamentary representatives to safeguard the Banabans' interests. They do not have to be citizens of Kiribati.[206] One is the "elected member" of the electoral district

200. Interview with Teburoro Tito, former President of Kiribati (1994–2003), Tarawa (September 10, 2013).

201. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, May 8, 1979 (Andrew Peacock).

202. Republic of Kiribati, *Report of the Independent Commission*, para. 74.

203. Ibid.

204. Ibid., para 77.

205. Ibid.

206. Constitution of Kiribati, ss 117, 118; see also ss 55, 56(3). Interestingly, this entrenched a provision in the pre-independence Constitution of 1977, when the Rabi Council was given the right to appoint a Banaban representative to the Gilbertese House

"comprising or including Banaba,"[207] who may be either "a citizen of Kiribati or a Banaban."[208] That person is elected by citizens of Kiribati or Banabans over the age of 18 who reside within the electorate.[209]

The other is the "nominated representative of the Banaban community," selected by the Rabi Council (and presumably a resident of Rabi, although this is not expressly stipulated).[210] This person must be "Banaban," defined in section 125(1) of the Constitution as "the former indigenous inhabitants of Banaba and such other persons one of whose ancestors was born in Kiribati before 1900 as may now or hereafter be accepted as members of the Banaban community in accordance with custom."[211] In practice, if there is any doubt as to a person's Banaban status, the Rabi Council makes a ruling on it. The High Court of Kiribati has jurisdiction over any disputes as to whether the nominated member has been validly declared,[212] even though the selection is undertaken by the Rabi Council within Fiji.

The two Banaban members have the right to veto proposed amendments to the Banaban constitutional safeguards.[213] If the nominated member is not present at the time of voting on the second reading of the bill, then the bill's consideration must be deferred. If the nominated member votes against the bill at that later time, then the bill must not be passed. In that sense, the nominated member (from Rabi) has special privileges not enjoyed by the elected member (from Ocean Island).

During the 1985 review, the Rabi Council suggested that the elected Banaban member's veto should be removed, because the Rabi Council's nominated member was "the rightful spokesman for the Banabans; and

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of Assembly, in addition to the Banaban representative elected by the Banabans living on Ocean Island: HC Deb July 31, 1978, vol. 955, col. 86W (Mr. Luard). During the 1985 constitutional review, it was noted that the Banabans had not taken up this opportunity, but might do so in the future: Republic of Kiribati, *Report of the Independent Commission*, para. 51.

207. Kiribati Constitution, s 118.

208. Ibid.

209. Ibid., ss 64, 118(3).

210. Ibid., s 117.

211. Ibid., s 125. The reference to "custom" was apparently to indicate that Gilbertese who accompanied the Banabans to Rabi were part of the "Banaban" community: post by Ken Sigrah, "Banaban Identity," *Banaban Voice*, March 22, 2009 http://banabanvoice.ning.com/forum/topics/banaban-identity (March 25, 2015). This was also reflected in the definition of "Banaban community" in section 2 of the Banaban Settlement Act in force at the time of Fiji's independence. See further the discussion in section D above. *Reviews of the Constitutional Safeguards*.

212. Kiribati Constitution, s 117(5).

213. Ibid., s 124.

that there was danger that the nominated and the elected members might speak with different voices."[214] However, the Commission of Inquiry was not persuaded. It did, however, recommend that Banaba be designated as an electorate on its own, rather than combined with any other part of Kiribati, given its special needs and interests, a position that the Kiribati government accepted during the hearings.[215] Evidence to the Commission of Inquiry showed that although there had been a separate elected member for Banaba since 1978, it had never been a Banaban because the Banabans had refused to participate in elections.[216]

The Constitution requires all members of Parliament to take an oath of allegiance to Kiribati,[217] except the nominated member from Rabi. This creates an inherent tension for any elected Banaban member with Fiji citizenship.[218] From a constitutional perspective, there is no concern: section 56(3) notes that no one shall be disqualified by this section "by reason only that he possesses the nationality of a state other than Kiribati" (an obvious carve-out for the Banabans).[219] However, as the 1985 Commission of Inquiry noted, under Fiji law, a Banaban member who was a citizen of Fiji could potentially lose that citizenship if such an oath were taken.[220] Although the Commission was told that the Fiji authorities tended "to turn a blind eye to rights and procedures concerning the Banabans,"[221] it did not consider this a satisfactory solution. Instead, it suggested that if the government of Fiji were not willing to relax its laws, then perhaps the Kiribati government could exempt any Banaban with Fiji nationality from the oath of allegiance.[222]

(iv) Chapter III: citizenship

Chapter III of the Constitution concerns matters of citizenship. That chapter provides that a person of "I-Kiribati descent" has "an inalienable right

214. See section IV D above.

215. Ibid., para 59.

216. Ibid., para 58.

217. Section 56(1)(a) states that no one may be elected as a member of Parliament if, "by virtue of his own act, [s/he is] under any acknowledgement of allegiance, obedience or adherence to a foreign power or state."

218. Interview with former nominated member, David Christopher, Rabi (October 23, 2012).

219. See also Kiribati Constitution, ss 55(a), 57(d).

220. Republic of Kiribati, *Report of the Independent Commission*, para. 53; Kiribati Constitution, s 70.

221. Republic of Kiribati, *Report of the Independent Commission*, para. 53.

222. Ibid., para. 54.

to enter and reside in Kiribati,"[223] the right "to become a citizen of Kiribati" (if not automatically so by virtue of other provisions),[224] and the right not to be deprived of that citizenship.[225] Dual nationality is permitted for persons of I-Kiribati descent.[226]

Although the Banabans are not expressly mentioned in Chapter III, these provisions apply to them. A person of "I-Kiribati descent" is "a person one of whose ancestors was born in Kiribati before 1900."[227] Section 125 of the Constitution defines "Banabans" as "the former indigenous inhabitants of Banaba and such other persons one of whose ancestors was born in Kiribati before 1900 as may now or hereafter be accepted as members of the Banaban community in accordance with custom."[228] From a political perspective, it is significant that the very provision that safeguards Banaban rights in Kiribati depends upon Ocean Island being described as part of Kiribati, which was the central dispute by the Banabans in their claims for independence.

This definition is different from the definition of "Banaban community" in Fiji's Banaban Settlement Act, which does not refer to Kiribati at all. At the time of Fiji's independence (and still when the Constitution of Kiribati was drafted), it provided that "unless the context otherwise require[d]," the 'Banaban community' comprised "the former indigenous inhabitants of Ocean Island and such other persons as may now or hereafter be accepted as members of the Banaban community in accordance with Banaban custom; and includes any member

223. Kiribati Constitution, s 19. Subsequent sections explain the process depending on where a person was born, and rights by virtue of marriage.

224. Kiribati Constitution, ss 19, 23. Most Banabans did not automatically become citizens of Kiribati on independence (see ss 20, 21).

225. Kiribati Constitution, s 28.

226. See also the Kiribati Citizenship Act, Cap 8A of 1998, which provides that rules prohibiting dual citizenship pertain only to citizens who are not of I-Kiribati descent, or if a person obtains a second nationality through marriage: section 8(1). Section 2 of the Act provides that "I-Kiribati descent" means "descent from a person who was born in Kiribati before 1900." This is intended to ensure that the Banabans can hold dual citizenship.

227. Kiribati Constitution, s 29(1); see Republic of Kiribati, *Report of the Independent Commission*, para. 43.

228. The relevant "custom" by which identity was established was Banaban custom: Republic of Kiribati, *Report of the Independent Commission*, para. 92. The Banaban Lands Act contains yet a different definition. For the purposes of that Act (ownership, registration and dealings with land on Rabi), a "member of the Banaban community" means "a descendant of the original indigenous inhabitants of Ocean Island, of the whole or of the half blood, illegitimate or legitimate, or a person who is accepted as a member of the Banaban community in accordance with Banaban custom": Banaban Lands Act, Cap 124 of 1985, s 2.

of a race indigenous to Micronesia and Polynesia who is ordinarily resident on Rabi Island."[229]

In 1996, this definition was changed to "the former indigenous inhabitants of Banaba and their descendants,"[230] which had the effect of limiting who could vote on Rabi, curtailing, for example, the rights of non-Banaban spouses.[231] According to John Teaiwa, the trigger was rampant corruption by a non-Banaban Council Chairman, Rongorongo, who was "Banaban" by adoption rather than blood.[232] Katerina Teaiwa writes that this led to the Banaban Council of Elders recommending that a tighter definition be adopted for the purposes of local elections.[233]

During the 1985 review, the Rabi Council proposed that the definition in Kiribati's Constitution be harmonized with the Fiji statute "to avoid confusion as well as a situation where a person is a Banaban for the purposes of one legislation and not for another, or is a Banaban in one country but not another."[234] The Commission of Inquiry rejected this proposal because it regarded the two instruments as having different purposes: whereas the Act broadly regulates the Banabans on Rabi, Chapter IX of the Constitution specifies fundamental constitutional rights for people with special ties to Kiribati, and as such, a definition removing the express link to Kiribati would be inappropriate.[235]

229. Banaban Settlement Ordinance No. 38/1970 (October 8, 1970) s 2; Banaban Settlement Act, Cap 123 of 1978 (a consolidated version of the Banaban Settlement Ordinance 1970 and the Amendment Act 1973) s 2.

230. Banaban Settlement (Amendment) Act No. 8/1996 (August 28, 1996) s 2.

231. There was much debate in the 1990s about the change: Interview with Koririnnang Manibwe, Magistrate, Rabi (October 22, 2012).

232. Cited in Teaiwa, *Consuming Ocean Island*, 171.

233. Ibid. Teresia Teaiwa states that the elders had sought to expand the definition beyond "blood" to include Melanesians on Rabi. This recommendation was adopted by the Aidney Report in 1994, but a bill to broaden the definition in this way was defeated in 1995: Teaiwa, "Rabi and Kioa," 141, referring to the Aidney report. She notes (at 136) that the Banaban elders (mis)cited the definition in their submission to the 1997 Fiji Constitution Review Commission as "any member of a race indigenous to Micronesia and *Melanesia*." They stated that "the Banabans … have since the war closely identified themselves with the Fijian people and causes and have fulfilled their traditional obligations with and through Lalagavesi and Tui Cakau." According to an anonymous reviewer of this article, Banabans are comfortable with multiple definitions of "community" for different purposes (e.g., "blood" for local elections, but broader for other purposes). On this point, see also Kelly and Kaplan, *Represented Communities*, 87.

234. Republic of Kiribati, *Report of the Independent Commission*, para. 93.

235. Ibid., para 94.

C Dual Citizenship

Although the Kiribati Constitution permits dual citizenship for Banabans, this "generous treatment" was for a long time "somewhat illusory in practice" because Fiji did not permit dual citizenship until 2009.[236] Banabans who wanted to take up citizenship of Kiribati had to renounce their Fiji citizenship first. Because approximately 90% of all Banabans resided on Rabi at the time of Kiribati's independence[237]—and most wanted to retain the citizenship of their country of residence, namely, Fiji—they were "effectively prevented from claiming their citizenship rights under the Constitution of Kiribati."[238]

Sir Bernard Braine, a Conservative member of Parliament in the United Kingdom and staunch Banaban supporter, wanted assurances that "a Banaban, who is a Fijian subject, will be able not merely to live on Rabi, which is agreed, but will be able to work on Rabi and, having lived and worked on Ocean Island, will be free to go back to live and to work on Rabi." He argued that without a bilateral agreement between Fiji and Kiribati "to have some arrangement for dual citizenship,"[239] complete freedom of movement would be impossible.[240]

The predominant view in the United Kingdom's Parliament was that this was a matter beyond its control, because it was "a restriction imposed by a sovereign Government, the Fijian Government."[241] Although officials in the United Kingdom agreed to raise the issue with the Fiji Prime Minister, the United Kingdom could not interfere.[242] The concerns of most members of Parliament were assuaged by Fiji's tolerant approach in practice. "Whatever Fiji law may say, the Fiji Government allow Banabans to move freely to and from Banaba. They treat all Banabans as if they were Fiji citizens, and draw no distinction between those who were or were not citizens. I see no reason to expect the Fiji Government to change their practice in that respect. It is for the Fiji Government to decide, but I can see no reason to expect a change."[243]

236. See Fiji Citizenship Act 1971, s 16; Citizenship of Fiji Decree 2009, s 14; and 2013 Constitution, s 5(4). See also discussion in Republic of Kiribati, *Report of the Independent Commission*, para. 44.

237. HC Deb May 24, 1979, vol. 967, col. 1325 (Mr. Blaker).

238. Republic of Kiribati, *Report of the Independent Commission*, para. 44.

239. HC Deb June 11, 1979, vol. 968, col. 155 (Sir Bernard Braine).

240. Ibid., col. 156 (Sir Bernard Braine): "the 1947 agreement guarantees cannot in morality or justice, or in law, be transferred to the new Kiribati Republic, and the House of Commons will be asked to sanction something that is totally dishonourable."

241. Ibid. (Mr. Roper).

242. HL Deb February 19, 1979, vol. 398, col. 1637 (Lord Goronwy-Roberts).

243. HC Deb June 11, 1979, vol. 968, col. 163 (Mr. Blaker).

However, Lord Hylton recognized that Banabans who were Fiji citizens would "be faced with a very difficult choice of citizenship if they wish[ed] to return to Ocean Island."[244] Lord Somers expressed it this way: "If they want to come back to Banaba—and many of them do—they will of course have to face the problem of either retaining their Fijian citizenship, and so remaining for political purposes foreigners in their own country, or they will have to reject their Fijian citizenship and take on that of the Gilbert Islands, which is the last thing on earth that they want to do."[245] In a confidential Cabinet memorandum, it was noted that by virtue of their Gilbertese descent, they would have the right to enter and reside in Kiribati irrespective of their formal nationality.[246]

In anticipation of possible accusations that the British government was "unjustifiably infringing the human rights of the Banabans," the FCO argued that it "would clearly be helpful if the Fiji government were prepared to make special provisions for Banabans living on Rabi to acquire or regain Fiji citizenship" at that time.[247] It was suggested that the Fiji government could either draft new legislation to restore citizenship to Banabans who had lost it, and grant it to those who had never acquired it (e.g., Banabans born on Ocean Island), or it could amend the Fiji Citizenship Act to enable the Banabans to hold dual citizenship and to pass it on to their descendants.[248]

When the Commission of Inquiry reviewed the Kiribati Constitution in 1985, it found that no Banaban had either sought to register as a citizen of Kiribati or to renounce Kiribati citizenship. Neither the Kiribati government nor the Banabans raised the issue as one of concern.[249] The Commission of Inquiry noted, however, that although non-Kiribati-citizen Banabans still had the right to enter and reside in Kiribati, they were at risk of losing their Fiji citizenship if they remained in Kiribati for five years or sought to exercise certain political entitlements there.[250] Even though the Fiji government seemed to exercise considerable tolerance toward Banabans returning to Banaba,[251] the Commission was concerned about

244. HL Deb February 19, 1979, vol. 398, col. 1623 (Lord Hylton).

245. Ibid., col. 1624 (Lord Somers).

246. Confidential, Cabinet (Defence and Overseas Policy Committee), Gilbert Islands Independence: Memorandum by the Lord Privy Seal (May 10, 1979) Annex I: "Future Status of Banaba, Citizenship and Financial Arrangements," para. 2 in FCO 107/73 (Kew).

247. Confidential telegram from FCO (Owen) to Suva, "My IPT: Banaban Citizenship" (October 30, 1978) para. 2 and 3, respectively in FCO 107/16 (Kew).

248. Ibid., para. 3.

249. Republic of Kiribati, *Report of the Independent Commission*, para. 46.

250. Ibid., para. 44.

251. HL Deb February 19, 1979, vol. 398, col. 1637 (Lord Goronwy-Roberts); Republic of Kiribati, *Report of the Independent Commission*, para. 53; Confidential telegram from FCO to Suva (October 30, 1978) para. 4.

the precariousness of the situation. It recommended that the Kiribati government request that Fiji permit dual citizenship for Banabans to enable them "to fully exercise their rights in Kiribati as Kiribati citizens, without risk of jeopardizing rights as Fijians."[252]

It was not until April 2009 that Fiji law finally permitted dual citizenship.[253] A primary motivation was to open up opportunities for investment,[254] rather than to respond to Banaban concerns. This relatively recent legislative change might partially explain the confusion among many Banabans on Rabi today as to their legal status in Kiribati. Some believe that they are citizens of Fiji *and* Kiribati, others are adamant that they cannot be citizens of both, and some assume that they are citizens of Kiribati because they have the right under its Constitution to enter and reside there.[255]

Finally, it is important to note that in 2005, Fiji offered a three month grace period to permit 500–600 Banabans on Rabi *without* Fiji nationality to acquire it, waiving the usual fee.[256] These were people who had arrived in subsequent migrations to Rabi (between 1975–77, and 1981–83 after the 1979 closure of the phosphate mines), whose presence had been tolerated by the Fiji authorities but not yet formalized.[257]

252. Secret, "Recommendations of the Independent Commission of Inquiry on Banaba," Cabinet Memorandum No. 67/86 (July 21, 1986) para. 4(i) (Kiribati).

253. Citizenship of Fiji Decree 2009, s 14; "Dual Citizenship … at a Cost," *Indian Weekender*, January 17, 2013 http://www.indianweekender.co.nz/Pages/ArticleDetails/14/729/Fiji/Dual-citizenship-at-a-cost (March 25, 2015).

254. Ministry of Information (Fiji), "State Benefits Dual Citizenship" (Press Release, September 26, 2010) http://www.fiji.gov.fj/Media-Center/Press-Releases/State-benefits-dual-citizenship.aspx (March 25, 2015).

255. Interviews with Rabi Councillor, Suva (October 16, 2012); female member of the original relocating group, Suva (October 18, 2012); female member of the Banaban community, Suva (October 18, 2012); male member of Banaban community, Suva (October 18, 2012). Teaiwa also observed this confusion: Teresia K Teaiwa, "Peripheral Visions? Rabi Island in Fiji's General Election," in *Fiji before the Storm: Elections and the Politics of Development*, ed. Brij V Lal (Canberra: ANU Epress, 2012), 94.

256. Different reports refer to different figures. "Fiji's Banabans Offered Citizenship," *Radio New Zealand International*, January 19, 2005 http://pidp.eastwestcenter.org/pireport/2005/January/01-20-09.htm (January 15, 2015); "Fijians Celebrate 69 Years of Banaban Arrival," (Press Release, December 15, 2014) http://www.fiji.gov.fj/Media-Center/Press-Releases/FIJIANS-CELEBRATE-69-YEARS-OF-BANABAN-ARRIVAL.aspx (January 15, 2015).

257. "Fiji Citizenship granted to Tuvaluans in Kioa," *Tuvalu News,* December 16, 2005 http://www.tuvaluislands.com/news/archived/2005/2005-12-16.htm (January 15, 2015). The fee waiver was said to amount to FJ$1,000,000 in total. Teaiwa records that the fee was FJ $800 per person: Teaiwa, "Peripheral Visions?" 104.

D Reviews of the Constitutional Safeguards

> The difficult situation in which the Banabans and the Kiribati government find themselves is not of their own making. The situation has been created by the former colonial authority; they are both equally the victims of it. . . . The inequities of the colonial legacy become the responsibilities of the newly independent people.[258]

(i) 1985 Commission of Inquiry

Reference has already been made to the independent review of the Banaban constitutional safeguards, which took place in 1985. The Constitution itself provided that such a review would be held three years after independence (i.e., in 1982), and there were some discussions to that end between the Rabi Council and the Kiribati government in 1981 and 1982. However, the Kiribati government did not have sufficient funds to instigate a review at that time. When the government did move to establish a Commission of Inquiry in 1985, it inadvertently failed to consult the Rabi Council, which therefore had no say in the membership, venue, or other arrangements of the review. Nevertheless, the Rabi Council expressed confidence in the impartiality of the Commission's members: the Honorable Sir Darnley Alexander GCON, CFR, CBE from Nigeria (Chair), Professor Yash Ghai from Kenya, and Angoea Tadabe from Papua New Guinea.[259]

At the time of the 1985 review, the majority of Banabans (approximately 4,000) resided on Rabi and were Fiji citizens, either by naturalization or birth.[260] The Commission noted their unique circumstances and the challenges of being subject to two different jurisdictions. This required flexibility among all concerned and the willingness "to explore, and if necessary adopt, unconventional procedures and solutions."[261] In general, the Commission believed that the Banabans' ownership of Rabi and their special internal governance arrangements there had enabled them "to preserve a sense of community and traditions', and the Rabi Council, through its legal powers in Rabi and its concern for Banaba, had "helped the community to cope with problems of divided jurisdiction while maintaining unity within itself."[262]

258. Republic of Kiribati, *Report of the Independent Commission*, para. 34.

259. Ibid., para. 80.

260. Ibid., para. 37. By contrast, there were only 46 people living on Banaba at that time: see 1985 census in Republic of Kiribati Island Report Series, "Banaba," (rev 2012) 5 http://www.climate.gov.ki/wp-content/uploads/2013/01/19_BANABA-revised-2012.pdf (March 25, 2015).

261. Republic of Kiribati, *Report of the Independent Commission*, para. 96.

262. Ibid., para. 37.

With respect to the special Banaban provisions in the Kiribati Constitution, the Commission found that few had in fact been implemented. This was mainly because the Banabans had refused to accept the legitimacy of the Constitution and, therefore, had not cooperated to make it work.[263] Nevertheless, over the years, the Rabi Council and the Kiribati government had consulted with each other, albeit sometimes outside the constitutional framework,[264] and the Commission detected a new determination to enable the constitutional provisions to operate effectively.[265]

The Commission's overarching conclusion was that the Kiribati Constitution provided sufficient safeguards to meet the Banabans' needs. Any problems thus far had stemmed from the provisions not being fully utilized, rather than from deficiencies in the provisions themselves.[266] It made a number of recommendations, of which the most pertinent for present purposes were that:

- The government of Kiribati should enter into discussions with Fiji about possible changes to the law of Fiji to permit dual nationality for the Banabans, and acceptable procedures and documents to identify Banabans travelling in Kiribati (Chapter III)
- If Fiji were unwilling to relax its citizenship laws, the Kiribati government should consider ways of exempting the nominated or elected member of Parliament from the oath of allegiance, which would jeopardize his or her Fiji citizenship (section 117)
- Banaba should be a stand-alone electorate (section 118)
- A majority of the Banaba Island Council should be councillors or nominees of the Rabi Council, with the rest elected by the residents of Banaba, and the council's powers should be those set out in the Local Government Act (section 121)
- The Banaban elected member should retain the power of veto (section 124)
- Section 125(a) be amended to clarify that the relevant "custom" is Banaban custom
- The definition of "Banaban" in section 125(a) otherwise remain unchanged.[267]

No constitutional amendments were made following the 1985 review, and the Banaban safeguards remain as originally drafted.

263. Ibid., para. 39.
264. Ibid., para. 40.
265. Ibid., para. 41.
266. Ibid., para. 95.
267. Ibid., 37–40 ("Summary of Recommendations").

(ii) 1996 constitutional review and the future of the constitutional safeguards

In November 1994, a Select Committee of the Kiribati Parliament conducted a general review of the Kiribati Constitution.[268] Its findings were published in March 1996 and tabled in the May–June 1996 session of Parliament. Despite my best efforts to obtain a copy of the report, no one in the national archives, government, or parliamentary library of Kiribati was able to locate it for me. Former President Tito tracked down his personal copy of the minutes of the constitutional conference (in Gilbertese) and translated a number of select passages for me, but none revealed any pertinent discussion of the Banaban provisions,[269] other than the member for Banaba stating that "the laws that are here before us reflect our greatest need and we really need them to be in place and we trust that this will be maintained and further developed by the government."[270]

Given the Banaban right of veto, the process to amend or repeal the Chapter IX provisions is the most stringent of the whole Constitution. Former President Tito recalled that the Banabans argued strongly that the safeguards should be maintained.

> They were saying that they've been moved out of their homeland, they're in a position in Fiji where they're not even counted as equal to the Fijians, they are substandard in Fiji, and they needed the sympathy and understanding of the Kiribati people. They asked that these provisions should be kept as they were. . . . I remember in Cabinet we had the view that we should start amending those provisions. Then we knew that it would still require a Banaban to say yes, and we could not guarantee that.[271]

According to Tito, the Cabinet's initial rationale for amending the safeguards was that they "wanted everybody to feel equal, feel uniform. We wanted to do away with the argument that the Banabans were a different

268. Michael N. Takabwebwe (former Attorney-General of Kiribati), "Kiribati," 154 referring to the Select Committee of Parliament's Report on the Review of the Constitution http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/Pacific%20law/Takabwebwe.pdf (January 10, 2015). The Select Committee travelled through the islands of Kiribati, and also visited Rabi in Fiji.

269. This does not necessarily mean that the minutes contain no references to the provisions, only that they were not among the passages he identified in his perusal of the documents.

270. Translation from Gilbertese of "Minutes of the Convention relating to the Review of the Constitution, 11–19 March 1996," 398–99, by former President Teburoro Tito.

271. Interview with Teburoro Tito, former President of Kiribati (1994–2003), Tarawa (September 10, 2013).

race, different language. They were not. . . . They're just part of our people, they're just part of us. We are part of them and they are part of us."[272]

The Magistrate on Rabi similarly recalled the discord among the Kiribati members of Parliament about Banaba's "higher" status in the Constitution. "Now all the islands in Kiribati, they all in any chapter, but Chapter IX is only for the Banabans. They asked 'why?', and then the President, he called the Attorney-General, and then all the people voted for amending the Constitution, or the Chapter IX. But the Attorney-General and the President, they stood up and responded to them. Those who agree to amend this Chapter IX: that is the Banabans only."[273]

In the end, it was agreed that there would be no change to the Banaban safeguards.[274] Nevertheless, Tito believes that they remain unpopular among the Kiribati population because they afford "special treatment." He anticipates that they will eventually be changed "[o]nce the Banabans feel they're comfortable with us." "I'm sure changes that would happen would ensure that they have free access to the island, in and out."[275]

In interviews with I-Kiribati officials, one gets the sense that there is considerable frustration at the government's inability to progress initiatives on Ocean Island (such as rehabilitation of the land[276]) because of the veto entrenched by the constitutional safeguards. According to the Kiribati opposition leader, "we want to amend [the Banaba provisions] so that we will be able to do a lot more for Banaba, for Rabi and Ocean Island. Of course it's difficult as it is now. They can just veto anything if they don't agree on it."[277]

272. Ibid.

273. Interview with Koririnnang Manibwe, Magistrate, Rabi (October 22, 2012).

274. The amending legislation contained no changes to the Banaban provisions: Constitution (Amendment) Act 1995 (Kiribati) http://www.wipo.int/wipolex/en/text.jsp?file_id=196418 (March 25, 2015). Teaiwa, *Consuming Ocean Island*, 174 refers to additional constitutional discussions in 2000, when her father John Teaiwa, then Chairman of the Council, explained that "the council had expressed its desire to have both chapters [IX and III] strengthened in order to reflect the friendly relations they were trying to foster between the Banabans and the Kiribati government. In his thinking the Banabans had a unique opportunity to create economic and cultural exchanges with Kiribati, given their dual citizenship."

275. Interview with Teburoro Tito, former President of Kiribati (1994–2003), Tarawa (September 10, 2013).

276. See, for example, Bauro Vanualailai (Chairman, Rabi Council of Leaders) and Peter Crowley, "Banaban Rehabilitation Project," *Banaban Voice*, April 30, 2010 http://banaban-voice.ning.com/forum/topics/banaban-rehabilitation-project (March 25, 2015).

277. Interview with Opposition Leader Tetaua Taitai, Tarawa (September 11, 2013).

There are apparently also tensions with the small population on Banaba,[278] who are wary of the model of "external" governance from Rabi.[279] One government official suggested that the Rabi Council's attitude toward the Banaban "caretakers" on Ocean Island was along the following lines. "Why are you on Banaba to make decisions when there's only maybe 100 of you, and the rest of us are here. So we have more people and we've got the authority. You just look after the island. That's all you do."[280]

Similarly, as a Kiribati government official in Fiji explained, there were "lots of problems now" because the Banabans on Rabi often have different views from those on Ocean Island. The Rabi Council had prevented certain activities being undertaken on Ocean Island, despite the fact that the Banaban MP from Ocean Island had requested them. Banabans on Rabi "have overarching, sort of more control."[281]

5. Identity and Belonging

> The ideology of Banabans is within us.[282]
>
> We sometimes sit and talk about Banaba, even now. We want to keep the memory alive, it is still our home.[283]
>
> Because of the fact that we are now on our new settlement place of Rabi Island in the Fiji Group, we had no other practical choice in the circumstances but to become citizens of Fiji.[284]

278. Of the 295 residents at the last census (2010), 165 were Banabans, 125 were from other outer islands of Kiribati, and five were from other Pacific islands: Republic of Kiribati Island Report Series, "Banaba," 5.

279. Interview with government official, Tarawa (September 10, 2013). On political tensions, see also Katerina Teaiwa, "Banaban Island: Paying the Price for Other Peoples' Development," *Indigenous Affairs* 1 (2000): 38, 43.

280. Interview with government official, Tarawa (September 10, 2013). Few Banabans are inclined to move to Ocean Island, because services and infrastructure are so limited. There is no phone or internet, no air strip, and no scheduled boat service. The water supply is very precarious and at times the island runs short of food and other supplies: Republic of Kiribati Island Report Series, "Banaba," 3, 6.

281. Interviews with Kiribati government official, Suva (October 17, 2012); Tessie Eria Lambourne, Tarawa (September 10, 2013).

282. Interview with Aren Baoa, Suva (October 18, 2012).

283. Interview with Naomi Christopher, Rabi (October 23, 2012).

284. "Statement by Tekoti Rotan, Leader of the Banaban Delegation to a meeting with the GEIC Delegation, to discuss the Banaban's [sic] Claim to Seek Independence of Ocean Island from Britain" (Nauru, January 2, 1975) para. 28 in 319/1/13, Part 7: Gilbert and Ellice Islands Colony: Resettlement of Population: Banabans Rabi (Department of Foreign Affairs) (National Archives of Australia).

As other scholars have found in the Pacific context, the legal status of social groups, and immigrant groups in particular, can have long-term effects on their present situation.[285] This is the case for the Banaban community, where the deep, intergenerational consequences of planned relocation are still apparent.

Most Banabans I interviewed felt that being a Fiji citizen was important, a finding that resonated with a small survey conducted by Teresia Teaiwa in 1999, in which 32 out of 33 respondents shared this view.[286] However, formal citizenship does not necessarily equate with personal understandings of identity and belonging. A recurring theme in my interviews with Banabans on Rabi was: "I am Banaban. Because I am in Fiji I am Fijian, but I am Banaban."[287] Another interviewee explained: "Yes, a Fijian citizen, but we can't do anything about it. It's the government's idea. We can't do anything."[288]

In his 2012 submission to the Fiji Constitutional Commission, a former nominated Banaban member, David Christopher (later also a member of Parliament in the Fiji government), explained that he could not identify as "Fijian," despite being a citizen of Fiji. "[T]he word Fijian is associated with race, with the race of the indigenous community of Fiji. Banaba is an island in the central Pacific Ocean. The indigenous community on Banaba are called the Banabans. I am a descendant of the indigenous community on Banaba and I call myself a Banaban. I find it difficult and most uncomfortable to call myself a Fijian as I was not a Fijian and will never be a Fijian."[289]

The strong sense of Banaban identity is pervasive,[290] and there is a determination for it to remain so. One member of the Rabi Council explained that "if we do not keep on telling the younger generation that we are Banabans, they come from an island, the limestone island in the Kiribati

285. Merry, "Sex Trafficking," 188, 193, referring also to Merry and Brenneis, *Law and Empire,* "Introduction."

286. Teaiwa, "Peripheral Visions?" 109.

287. Interview with Naomi Christopher, Rabi (October 23, 2012); and interview with Tebwebwe Teai, Rabi (October 24, 2012).

288. Interview with Teem Takoto, Rabi (October 22, 2012).

289. Interview with David Christopher, Rabi (October 23, 2012). On the politics of race in Fiji, see Kelly and Kaplan, *Represented Communities.*

290. Interviews with Banaban member of the Catholic Church, Suva (October 16, 2012); youth, Rabi (October 22, 2012); David Christopher, Rabi (October 23, 2012); Lucian Tuari, Itaia Tuari, and Terikano Takesau, Rabi (October 23, 2012); Marlie Rota, Executive Director, Rabi Council of Leaders, Rabi (October 24, 2012); Tute Touakin, Kioa (October 26, 2012). "Inside our hearts we are Banabans": interview with Terikano Takesau, Rabi (October 23, 2012). John Teaiwa identified as "a Rabi Islander than an Ocean Island Banaban": interview with John Teaiwa, Suva (October 17, 2012).

group, they will just grow up as Fiji citizens."[291] He has even proposed the construction of a new Banaban language to preserve the group's cohesion and distinctiveness.[292] In part, this stems from a longstanding insistence that the Banabans are a unique ethnic group. But it also feeds into, and from, the sense that the Banabans are still outsiders in Fiji,[293] notwithstanding generally good relations with the Fiji government.[294] Teresia Teaiwa describes what she terms mutual "peripheralities": "Fiji" exists on the periphery for the Banabans, whereas the Banabans and Rabi exist on the periphery in Fiji national consciousness.[295] This is despite the fact that there is a large amount of intermarriage between the Banabans and other Pacific islanders (including from Fiji), a fact that also predated relocation, which, however, is still perceived by many as a "threat" to Banaban culture and identity.[296]

Some argue that relocation has actually "reinforced the separate identity of the Banaban people."[297] Pacific scholar, John Connell, suggests that this

291. Interview with Rabi councillor, Suva (October 16, 2012).

292. Ibid: "My intention—I have talked with the Chairman of the Council—we will try to construct a language whereby we can say that—we can claim that that is our new Banaban language. Interestingly, we will be using the Kiribati language and we will be using the Fijian language, and to construct a language combining the two, maybe. … I said, 'If I'm using somebody's language, of course I am part of that group.' So, the intention of maintaining my original identity, I think the best thing was to formulate or just construct a language." This would not be the first attempt to forge a unique identity. Katerina Teaiwa describes the deliberate, political construction of new "Banaban" songs and dances in the 1960s during the strong push for Banaban independence: Teaiwa, *Consuming Ocean Island*, 119–20, 142, 167, 177.

293. Interviews with Tiboua Auriaria, Rabi (October 21, 2012); Rabi councillor, Suva (October 16, 2012): "We have been shifted from where our ancestors grew up, and for all these years until now, we are still trying to settle now, even though we have a place to stay."

294. "The Fijian Government has been very good to us, all this time. They looked after us. We're acquainted too. We speak their language, we embrace their culture and we get along together with them. … But that is different with the Kiribati people. Very different": Interview with male member of the Banaban community, Suva (October 18, 2012). "The Settlement Act is looked after by the Prime Minister himself, so we have very close relationship with the Fijian Government": interview with David Christopher, Rabi (October 23, 2012).

295. Teaiwa, "Peripheral Visions?" 93.

296. Interviews with Naomi Christopher, Rabi (October 23, 2012); Bingati Sigrah, Vice Chairman, Rabi Council of Leaders, Rabi (October 24, 2012); Rabi councillor, Suva (October 16, 2012); Tute Touakin, Kioa (October 26, 2012); Lucian Tuari, Itaia Tuari, and Terikano Takesau, Rabi (October 23, 2012). Acknowledgment of historical practice: John Teaiwa, Suva (October 17, 2012); Marlie Rota, Executive Director, Rabi Council of Leaders, Rabi (October 24, 2012); member of the Banaban community, Suva (October 18, 2012); and Tiboua Auriaria, Rabi (October 21, 2012).

297. Letter from Sir Bernard Braine to the Rt Hon James Callaghan MP, Secretary of State for Foreign and Commonwealth Affairs, London (February 10, 1975), 2 in GEIC Secret SG 6/4 vol. III (Kiribati).

is commonplace in the Pacific, where relocations (predominantly internal) have "enhanced rather than diminished the retention of island identities in the face of difference."[298] Arguably, the experience of dislocation—the physical severance of the link to place and home—intensifies the desire to preserve (and forge) a collective identity.[299] In the Banaban case, the existence of "an opposing ethnic group," in this case Fijians, may also have stimulated the desire to maintain a distinct identity.[300] However, the fact that the Banabans were relocated en masse, and that those living on Ocean Island today are "caretakers" sent from Rabi rather than a remaining indigenous community, distinguishes them from diasporic communities whose identities are articulated "against a still-present 'home' culture."[301]

The complexity of identity (and governance) in the Banaban context is revealed by the invariable response Teresia Teaiwa received when she asked her survey participants about their perceptions of government: "which government?".[302] For Banabans on Rabi, it may mean the Rabi Council, the Fiji government, the Kiribati government, or even the British government. As Katerina Teaiwa explains, "Banabans, like many Pacific Islanders, have plural, situational identifications,"[303] which means that trying to isolate a single "identity" is artificial.

There is anecdotal evidence that a sizeable number of Banabans are now returning to Kiribati to access social benefits, such as government

298. Connell, "Population Resettlement," 139. Kempf argues that by recreating their four original villages, the Banabans "transferred spatial structures from their island of origin to their new Fijian island of Rabi; further, that their intention, in so doing, was to underline a claim to ownership of both islands": Kempf, "Translocal Entwinements," 27. On Banaban identity, see also Kempf and Hermann, "Reconfigurations of Place."

299. As Connell, "Population Resettlement," 139 puts it, "[t]his longing for home distinguishes so much involuntary and collective resettlement from individual and household migration." As has been noted elsewhere, there is generally a greater loss of social networks where families are dispersed, rather than relocated in groups and social units: Michael M. Cernea, "Risks, Safeguards, and Reconstruction: A Model for Population Displacement and Resettlement," in *Risks and Reconstruction: Experiences of Resettlers and Refugees,* eds. Michael M. Cernea and Christopher McDowell (Washington, DC: The World Bank, 2000), 30.

300. Michael D. Lieber, "Conclusion: The Resettled Community and Its Context," in *Exiles and Migrants in Oceania* (Honolulu: The University Press of Hawaii, 1977), 360, referring to Alan Howard and Irwin Howard, "Rotumans in Fiji: The Genesis of an Ethnic Group," in *Exiles and Migrants in Oceania,* ed. Michael D. Lieber (Honolulu: The University Press of Hawaii, 1977). On the political construction of Banaban identity through dance, see Katerina M. Teaiwa, "Choreographing Difference: The (Body) Politics of Banaban Dance," *The Contemporary Pacific* 24 (2012): 65, 78–89.

301. Teaiwa, *Consuming Ocean Island*, 185.

302. See Teaiwa, "Peripheral Visions?" 94.

303. Teaiwa, *Consuming Ocean Island*, 184; see also Merry, "Sex Trafficking," 189.

scholarships for education and old-age pensions.[304] Indications are that this has more to do with economic and social incentives rather than a sense of belonging.[305] This may reflect what anthropologist Martin Silverman described as the Banabans' "have your cake and eat it too" approach—"an attempt to get the best (or at least something) of all worlds."[306] Accurate statistics on return migration are not available because the Kiribati Immigration Ministry has not maintained systematic records.[307] The last Kiribati census (2010) showed that there were 295 residents of Ocean Island (of whom 165 were Banabans), representing only 0.3% of Kiribati's total population, with negative growth (-0.4%).[308] Because this number has remained fairly consistent since 1990,[309] it suggests that most Banabans who are moving to Kiribati are not returning to Banaba. The Kiribati government says that in terms of access to Kiribati: "We are trying to encourage them. We don't want to create barriers."[310]

From a governance perspective, the Kiribati government continues to monitor the Banabans' situation in Fiji.[311] As former President Teburoro Tito told me, he always made a point of meeting with Fiji's President or Prime Minister whenever he visited Fiji in order to discuss the Banabans: "It would always be on my agenda, the Rabi people, ways and means of assisting them in their unique position."[312]

304. Interviews with Tessie Eria Lambourne, Tarawa (September 10, 2013); Banaban member of the Catholic Church, Suva (October 16, 2013). Some Banabans say that they are discriminated against in Fiji's scholarship process, with indigenous Fijians taking priority: interview with Terikano Takesau, Rabi (October 23, 2013); and interview with youth, Rabi (October 22, 2012).

305. I-Kiribati citizens over 70 years of age cannot access the pension unless they are resident in Kiribati: "Threats to Relinquish Citizenship a 'Stunt'," *ABC Radio Australia*, March 21, 2012 http://www.radioaustralia.net.au/international/radio/onairhighlights/threats-to-relinquish-citizenship-a-stunt (March 25, 2015).

306. Silverman, *Disconcerting Issue*, 15.

307. Interview with Tessie Eria Lambourne, Tarawa (September 10, 2013).

308. Republic of Kiribati Island Report Series, "Banaba," 1. By contrast, in the 1931 and 1947 censuses, it had the highest population of any island in the country (2,607 and 2,060 respectively): 5.

309. Ibid., 4.

310. Interview with Opposition Leader Tetaua Taitai, Tarawa (September 11, 2013).

311. Interviews with President Anote Tong, Tarawa (September 11, 2013); Kiribati government official, Suva (October 17, 2012); Tessie Eria Lambourne, Tarawa (September 10, 2013).

312. Interview with Teburoro Tito, former President of Kiribati (1994–2003), Tarawa (September 10, 2013).

6. Conclusion

> I think if you mention the moving of people, a group of people, set in ways, like us, if you are thinking of moving them to another place, the good thing is they'll be able to live maybe better … but at the same time, I think they should be really careful because once they are relocated to a certain place, they may not be able to enjoy the privileges that they want—they had—because where they are staying now, because that is a different place, a different government is going to govern them, and there will also be a chance of integration.[313]

The Banaban story is simultaneously unique and emblematic. It reflects a broader historical narrative about colonization, exploitation, and dispossession.[314] At the same time, any "metanarrative of colonialism" must be resisted.[315] As with any relocation, the Banaban case must be understood on its own terms, with its own complexities and anomalies, within a particular historical context. It is precisely the rich historical detail presented in this article that provides the key to understanding the ramifications of this particular planned relocation, from which lessons can be extracted for the contemporary context.

The necessity, desirability, and political feasibility of future relocation by Pacific island communities remains contested, not least because of these past experiences.[316] Furthermore, the legal "solutions" created for the Banaban context cannot simply be extrapolated to contemporary examples. They were contingent on the resolution of larger questions relating to Banaban self-determination and identity, which were the subject of lengthy and hotly contested negotiations between the Banabans and the governments of Britain, the Gilbert Islands, and Fiji. Nevertheless, the Banaban case study merits closer analysis if relocation across international borders is ever to be considered as a possible adaptive response to the impacts of climate change. It provides an example of how states have created special statuses for relocated groups in the past, which may help to inform thinking about matters such as dual nationality, land rights, and the maintenance of distinct, self-governing communities, if groups are relocated across borders in the future.

313. Interview with Rabi councillor, Suva (October 16, 2012).

314. See McAdam, "Relocation and Resettlement."

315. Merry and Brenneis, *Law and Empire*, 6.

316. See Nansen Initiative on Disaster-Induced Cross-Border Displacement, "Human Mobility"; McAdam, "Historical Cross-Border Relocations," 305. It has been described by Birk, "Relocation of Reef," 84 as an "extreme" option that can exacerbate vulnerability.