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GOVERNANCE FOR COMMUNITIES
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INDEPENDENCE**

JANE MCADAM

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UNSW Law
UNSW Sydney NSW 2052 Australia

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Self-determination and Self-Governance for Communities Relocated across International Borders: The Quest for Banaban Independence

*Jane McAdam**

Scientia Professor of Law and Director of the Andrew & Renata Kaldor Centre for International Refugee Law, Faculty of Law, University of New South Wales, Australia

Abstract

In 1945, the small Banaban community of Ocean Island (Banaba) in present-day Kiribati was relocated to Rabi Island in Fiji. They were ostensibly moved due to irreversible damage done to the island during Japanese occupation in the Second World War. However, this was largely a convenient excuse to facilitate the wholesale phosphate mining of Ocean Island by the British Phosphate Commission, a consortium of the British, Australian and New Zealand governments. The Banaban relocation provides a rare example of a whole community seeking to re-establish itself in another State. This article charts the Banabans' bids for independence during the 1960-70s, revealing novel responses to complex questions of self-determination and governance, including legal status, nationality, political representation, and rights to land and resources. While their experience cannot be universalised, it is relevant to contemporary deliberations about the possible future relocation of Pacific communities impacted by climate change.

Keywords

Banaba; international law; legal history; minority rights; decolonisation; sovereignty; independence; relocation; resettlement

We have never regarded ourselves as being anything but Banabans. We are not Gilbertese. We are not Ellice Islanders, nor are we any other race. We are what we are.¹

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¹ Statement by Tekoti Rotan, Leader of the Banaban Delegation to a Meeting with the Gilbert and Ellice Islands Colony Delegation, to discuss the Banaban’s [sic] Claim to Seek Independence of Ocean Island from Britain, held on Nauru on 22 January 1975, para. 18, A1838, 319/1/3, part 7 (Canberra).

If they wish to take their place as a small independent nation, it is not for us to stand in their way. It is for us to help them to stand on their own feet, if necessary alone.²

[T]he trouble about elevating self-determination to a sacred principle is simply that it must stop somewhere, and this would seem to me to be self-determination taken ad absurdum.³

1. Introduction

In 1945, the small Banaban community of Ocean Island (Banaba) in present-day Kiribati was relocated to Rabi Island in Fiji. The Banabans were ostensibly moved on account of irreversible damage done to Ocean Island during its occupation by the Japanese in the Second World War. However, this was largely a convenient excuse to facilitate the wholesale phosphate mining of the island by the British Phosphate Commission, a consortium of the British, Australian and New Zealand governments. Mining had flourished ever since the discovery of high-grade phosphate there in 1900, and the Banabans had long been regarded as an “awkward obstacle” to the full exploitation of the island’s resources.⁴

Even though the British colonial authorities acknowledged that it would be “repugnant” to “evict a native tribe” simply “to afford wider opportunity of gain to a rich commercial corporation”,⁵ “the interests of the Empire seem to demand that the process of development on Ocean Island should be allowed to continue until the whole island [was] worked out.”⁶ After two decades of stop-start negotiations between the Banabans and the colonial authorities, in March 1942 the freehold title of Rabi Island in Fiji was purchased by the authorities on the Banabans’ behalf, who became the beneficial owners.⁷ Officials noted that it would “probably be many years before the Banabans w[ould] 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”.⁸ However, in December 1945, 703 Banabans, accompanied by 300 Gilbertese friends and relatives,⁹ were relocated there *en masse*.¹⁰

This article examines the Banabans’ international legal identity as a relocated community.¹¹ It charts their bids for independence and claims to self-determination, including

² HC Deb. 23 January 1975, vol. 884, col. 2102 (John Lee).

³ HL Deb. 15 March 1979, vol. 399, col. 771 (Lord McNair).

⁴ HC Deb. 18 December 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.

⁵ Letter from C.H. Rodwell, High Commissioner, to the Secretary of State for the Colonies (25 March 1919) para. 2, AU Microfilm 78-346, 2273/1918, University of Auckland Library.

⁶ *Ibid.*, para. 5.

⁷ Foreign and Commonwealth Office (FCO), Comments on Draft Petition of the Banabans to the United Nations (1 November 1974) p. 3 in GEIC Secret SG 6/4 vol. II (Kiribati).

⁸ File note by Johnson (19 August 1942) para. 2, F37/269/1 (Fiji).

⁹ See H.E. Maude, ‘Memorandum on the Future of the Banaban Population of Ocean Island, with Special Relation to Their Lands and Funds’ (2 September 1946) para. 37, Series F, 1.F.9.29 (Adelaide).

¹⁰ 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: T.K. Teaiwa, ‘Rabi and Kioa: Peripheral Minority Communities in Fiji’, in B.V. Lal and T.R. Vakatora (eds.), *Fiji in Transition: Research Papers of the Fiji Constitution Review Commission*, vol. 1 (University of the South Pacific, Suva, 1997) p. 134.

¹¹ This is a companion piece to J. McAdam, “‘Under Two Jurisdictions’: Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations”, 34 *Law and History Review* (2016) pp. 281–333 which examines the unique governance and citizenship arrangements that were constructed for the Banaban community in both Kiribati and Fiji in order to protect their rights in their old and new countries of residence.

their resort to the UN’s decolonisation mechanism. Yet, although the Banabans desired independence for Ocean Island, they rarely argued for a completely autonomous State.¹² In 1948, they sought independence from the colonies of Fiji and the Gilbert and Ellice Islands (later Kiribati and Tuvalu), requesting instead that they be directly administered by the British colonial power.¹³ In the 1960s and 1970s, most notably in the lead-up to Kiribati’s independence in 1979, they sought to become a State in free association with Fiji (although other proposals were also mooted). The Banabans’ “attitude of independence”¹⁴ was described as being less about complete sovereign independence and more about a desire to retain their own socio-political identity.¹⁵ In turn, the Gilbertese authorities’ strong rejection of the Banaban claims was described as stemming from concern “not [about] sovereignty but separatism”,¹⁶ and a fear that any erosion of their territorial integrity was dangerous because it might spur on other groups within the islands.¹⁷

The Banaban relocation provides a fraught example of a whole community re-establishing itself on foreign territory set aside for its exclusive occupation.¹⁸ This has relevance to contemporary deliberations about the possible future relocation of whole communities from low-lying Pacific islands impacted by climate change, and what this might mean for their international legal status.¹⁹ Notwithstanding a consensus among Pacific island communities that relocation is the option of last resort because of its impact on land, identity, sovereignty and culture,²⁰ there is reluctant recognition that cross-border movement may be a

For other aspects of the Banaban relocation, *see e.g.* J. McAdam, ‘Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change’ 49 *Journal of Pacific History* (2014) pp. 301–327; T.K. Teaiwa, *supra* note 10; K.M. Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Indiana University Press, Bloomington and Indianapolis, 2015); G.M. Tabucanon, ‘The Banaban Resettlement: Implications for Pacific Environmental Migration’ 35 *Pacific Studies* (2012) pp. 343–370; J. Edwards, ‘Phosphate and Forced Relocation: An Assessment of the Resettlement of the Banabans to Northern Fiji in 1945’, 41 *The Journal of Imperial and Commonwealth History* (2013) pp. 783–803.

¹² Mostly their claims related to Ocean Island, but in the lead-up to Fiji’s independence in 1970, they also called for autonomy over Rabi (implied in the 1948 claim as well). This was sometimes implied in their arguments to the UN Committee of 24 in 1968.

¹³ Letter from the Rambi Island Council to the Administrative Officer, Rambi Island (30 June 1948), WPHC 6 48/5/2 vol. II requests “our Independence, under England”, and suggests that Rabi Island Council, with the Governor of Suva, administer Ocean Island instead of the Gilbert and Ellice Islands Colony. Speech at Rambi Island by His Excellency, Sir Brian Freeston, KCMG, OBE (3 August 1948) para. 4, WPHC 9, 48/5/10 vol. II explains why Rabi cannot be independent from Fiji.

¹⁴ J.L. Joy and A.R.G. Prosser, *Report of a Mission to Rambi Island Fiji: August 1967* (Ministry of Overseas Development, November 1967) p. 35, FCO 32/415 (Kew).

¹⁵ *Ibid.*, p. 36. *See also* McAdam (2016), *supra* note 11.

¹⁶ Department of Foreign Affairs, Inward Cablegram from Suva to Canberra, ‘South Pacific Forum: Gilberts Membership and Banabans’ (22 August 1977) para. 3, A1838, 319/1/3, part 19 (Canberra).

¹⁷ ‘Gilbert Islands: Attitudes to Banabans and Ocean Island: Paper for Mr Posnett’ (February 1977) para. 3, FCO 32/1394 (Kew).

¹⁸ While Rabi had been alienated for plantation use long before the Banabans acquired it, there have been renewed tensions in recent years with the original indigenous inhabitants on Taveuni: K.M. Teaiwa, *supra* note 11, pp. 173–175. There are two other historical examples of cross-border relocations in the Pacific, namely the partial relocation of the Vaitupians from present-day Tuvalu to Fiji, beginning in 1947, and the relocation of Gilbertese (most of whom had been part of an ‘internal’ resettlement scheme to the Phoenix Islands which began in 1937) to Gizo and Wagina in the Solomon Islands between 1955 and 1964. There were at least three others mooted but not carried out, and there are many other examples of internal relocation. For details and references, *see* McAdam (2014), *supra* note 11.

¹⁹ For related analysis, *see* other McAdam (2014, 2016), *supra* note 11; J. McAdam, ‘Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to “Danger Zones”’ 3 *London Review of International Law* (2015) pp. 93–130.

²⁰ Nansen Initiative on Disaster-Induced Cross-Border Displacement, *Human Mobility, Natural Disasters and Climate Change in the Pacific* (Outcome Report from the Pacific Regional Consultation, Rarotonga, 21–24 May 2013), p.18. As such, any relocation should: “i) define the legal status of the relocated community within the

necessary adaptation strategy to avoid the long-term impacts of natural disasters and environmental degradation (predicted to intensify with global warming).²¹

In 2013, the President of Fiji stated that “Fiji will not turn its back on our neighbours in their hour of need”, noting that “[w]e accepted the Banaban people when they were forced to leave Ocean island because of the pressure of phosphate mining there.”²² In 2014, the Prime Minister of Fiji provided further reassurance that if “the sea level continues to rise because the international community won’t tackle global warming, some or all of the people of Kiribati may have to come and live in Fiji”:

“You will be able to migrate with dignity. The spirit of the people of Kiribati will not be extinguished. It will live on somewhere else because a nation isn’t only a physical place.

A nation – and the sense of belonging that comes with it – exists in the hearts and minds of its citizens wherever they may be.

Fiji will not turn its back on our neighbours in their hour of need. We accepted the Banaban people when they were forced to leave Ocean Island because of the pressure of phosphate mining there. These people now live in Fiji but have their own seat in the parliament of Kiribati and if necessary, we will do it again.”²³

While politics is undoubtedly at play in such statements, especially in advancing Fiji’s leadership by contrast to the lack of assistance being offered by other States in the region (especially Australia and New Zealand), they nonetheless illustrate the salience of relocation as a potential policy response to the impacts of climate change.²⁴ The government of Kiribati

new state, ii) help communities adapt to local customs and laws, iii) include consultation with potential host communities, and iv) contain measures to facilitate the diaspora community maintaining cultural ties, such as allowing dual citizenship.” Relocation has been described as an “extreme” option that can exacerbate vulnerability: T. Birk, ‘Relocation of Reef and Atoll Island Communities as an Adaptation to Climate Change: Learning from Experience in Solomon Islands’ in K. Hastrup and K.F. Olwig (eds.), *Climate Change and Human Mobility: Global Challenges to the Social Sciences* (Cambridge University Press, Cambridge, 2012) p. 84.

²¹ See J. McAdam, B. Burson, W. Kälin and S. Weerasinghe, *International Law and Sea-Level Rise: Forced Migration and Human Rights* (Fridtjof Nansen Institute and Andrew & Renata Kaldor Centre for International Refugee Law, 2016, FNI Report 1/2016) and the sources cited therein, online at <www.kaldorcentre.unsw.edu.au/sites/default/files/FNI-R0116.pdf>, visited on 27 July 2016.

²² Prime Minister J.V. Bainimarama, Closing Speech at the 9th Pacific Islands Conference on Conservation and Protected Areas (6 December 2013), online at <www.fiji.gov.fj/Media-Center/Speeches/closing-the-9th-Pacific-Islands-Conference-on-Cons.aspx>, visited on 27 July 2016.

²³ His Excellency Ratu Epeli Nailatikau, President of the Republic of Fiji, Address at State Dinner hosted by the President and First Lady of Kiribati (Tarawa, 10 February 2014) <www.fiji.gov.fj/Media-Center/Speeches/HIS-EXCELLENCY--ADDRESS-AT-STATE-DINNER-HOSTED-BY-.aspx>, visited on 27 July 2016.

²⁴ See e.g. *Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future: Report: Sanremo, Italy, 12–14 March 2014* (UNHCR, Brookings, Georgetown University, 2014) <reliefweb.int/sites/reliefweb.int/files/resources/54082cc69.pdf>, visited on 27 July 2016; E. Ferris, *Planned Relocations, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future: Background Document: Sanremo Consultation, 12–14 March 2014* (UNHCR, Brookings, Georgetown University, March 2014) <www.unhcr.org/53c4d6f99.pdf>, visited on 27 July 2016 (both documents relate to internal relocations only); McAdam (2014), *supra* note 11; McAdam (2015), *supra* note 19; 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), <unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>, visited on 27 July 2016. *Note also* the work of the Nansen Initiative on Disaster-Induced Cross-Border Displacement <www.nanseninitiative.org/>, visited on 27 July 2016, in particular the Agenda for the Protection of Cross-Border Displaced Persons in the context of Disasters and Climate Change (October 2015) <www.nanseninitiative.org/global-consultations/>, visited on 27 July 2016.

has already bought 6,000 acres of freehold land in Fiji, which is primarily for food security and investment, but the issue of future relocation has been raised.²⁵

There are certainly reasons why planned relocation needs to be part of a protection toolkit to respond to human mobility in the context of climate change and disasters. Most relocations will occur *within* States, moving people out of harm’s way before disasters strike or areas of land become uninhabitable because of erosion, water shortages, or, ultimately, sea-level rise.²⁶ In this way, relocations have the potential to avoid future displacement. However, unless they are very carefully planned, with the full participation of affected communities, there is a risk that they may create further vulnerability and long-standing distress. These issues will be compounded where *cross-border* relocations are contemplated, and complex matters of self-determination and governance, legal status (nationality), political representation, and rights to land and resources come into sharp focus.

The rich, historical detail of the Banaban case study, explored in this article, reveals novel responses to sovereignty, citizenship and minority protection and helps to anchor thinking about the issues raised above. Yet, it also raises questions about consent, authority and participation, which go to the heart of who decides, and what gets decided. It shows that while elaborate legal safeguards can help to ameliorate concerns about loss of identity, land and control, they are unlikely to overcome them.²⁷

The article’s scope is necessarily bounded by methodological, theoretical and substantive choices. It seeks to bring to light an untold historical contest in international law, at the same time as it involves a microanalysis of a particular instance of colonial dispossession and a macroanalysis of its implications for potential future community relocations in the context of climate change.²⁸ It is intended, first and foremost, as a contribution to the literature on mobility in the context of climate change and disasters, specifically on planned relocation as a form of adaptation to climate change.²⁹ However, it also contributes to scholarship on the historiography of law in the Pacific,³⁰ and colonial and transnational history.³¹

The article does not focus on whether the future relocation of whole communities across international borders is necessary, desirable or politically feasible, an aspect with which I have engaged more closely in related work.³² Nor does the article examine whether statehood

²⁵ ‘Kiribati to Buy Fiji Land Amid Rising Sea Levels’, *ABC*, 6 February 2013, <www.abc.net.au/news/2013-02-06/an-kiribati-buys-fiji-land-for-food-security/4503472>, visited on 27 July 2016; ‘Migration Not a Priority Yet’, *Islands Business*, 22 July 2013, <www.islandsbusiness.com/news/fiji/2028/migration-not-a-priority-yet-kiribati/>, visited on 27 July 2016; Prime Minister Bainimarama, *supra* note 22.

²⁶ On which, *see* McAdam, Burson, Kälin and Weerasinghe, *supra* note 21.

²⁷ This is discussed in more detail in McAdam (2014), *supra* note 11.

²⁸ For an interesting analysis of approach, *see* A. Riles, ‘The View from the International Place: Perspective and Scale in the Architecture of Colonial International Law’ in E. Darian-Smith and P. Fitzpatrick (eds.), *Laws of the Postcolonial* (University of Michigan Press, Ann Arbor, 1999) p. 127.

²⁹ *See supra* note 24.

³⁰ *See e.g.* L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press, Cambridge, Massachusetts, 2010); S. Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, Massachusetts, 2007); S. Engle Merry and D. Brenneis (eds.), *Law and Empire in the Pacific: Fiji and Hawai’i* (School of American Research Press, USA, 2003).

³¹ *See* the discussion of such histories and historiography in A. Iriye, *Global and Transnational History: The Past, Present and Future* (Palgrave Macmillan 2013); D. Armitage and A. Bashford (eds.), *Pacific Histories: Ocean, Land, People* (Palgrave Macmillan 2014), especially their ‘Introduction: The Pacific and Its Histories’, p. 1 and A. Iriye’s chapter ‘A Pacific Century?’, p. 97; T. Banivanua Mar and P. Edmonds (eds.), *Making Settler Colonial Space: Perspectives on Race, Place and Identity* (Palgrave Macmillan 2010); J. Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939* (Oxford University Press, Oxford, 2009).

³² *See instead* J. McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2012); J. McAdam and E. Ferris, ‘Planned Relocations in the Context of Climate Change: Unpacking

may continue if a population relocates to another territory.³³ It does, however, consider how communities that are relocated *en masse* may seek to assert their rights as separate legal and political entities under international and domestic law, and examines a variety of possible models for facilitating this.

2. Methodology

This article draws on thousands of pages 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; 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; and the records of the United Nations Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (known as the Committee of 24). These documents span the period 1900 to 1986 and include 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, and Banaban representatives. The article also draws on parliamentary debates in the UK and Australia between 1908 and 1994.

3. Background: The Terms of Relocation

The Banabans were relocated to Rabi in December 1945 and the vast majority of the population (now around 5,000) has resided there ever since.³⁴ Within Fiji, the Banaban community enjoys a degree of internal self-determination through a local council with relatively broad powers,³⁵ but it does not have any special legal status under international

the Legal and Conceptual Issues’ 4 *Cambridge Journal of International and Comparative Law* (2015) pp. 137–166.

³³ See e.g. the International Law Association Committee on International Law and Sea-Level Rise, which is currently examining these questions <www.ila-hq.org/en/committees/index.cfm/cid/1043>, visited on 27 July 2016; McAdam, *supra* note 32, pp. 119–60; R. Rayfuse, ‘International Law and Disappearing States: Maritime Zones and the Criteria for Statehood’ 41 *Environmental Policy and Law* (2011) pp. 281–287; D. Wong, ‘Sovereignty Sunk? The Position of “Sinking States” at International Law’ 14 *Melbourne Journal of International Law* (2013) pp. 346–391; S. Park, ‘Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States’ (Legal and Protection Policy Research Series, UNHCR, May 2011) <www.unhcr.org/4df9cb0c9.html>, visited on 27 July 2016; J. Grote Stoutenburg, ‘When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States’, p. 57 and M.A. Burkett, ‘The Nation Ex-Situ’, p. 89, in M.B. Gerrard and G.E. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and A Changing Climate* (Cambridge University Press, New York, 2013).

³⁴ A small residual community has generally lived on Ocean Island since that time. For instance, in 1977 there were fewer than 50 Banaban inhabitants: R.N. Posnett, *Ocean Island and the Banabans: A Report to the Minister of State for Foreign and Commonwealth Affairs* (1977) p. 2.

³⁵ The Rabi Council has a higher status than other island councils in Fiji, being able to levy taxes and make its own regulations: see Banaban Settlement Act, Cap 123 of 1978 (as amended by Banaban Settlement (Amendment) Act No 8/1996) s. 5; Banaban Lands Act, Cap 124 of 1985, s. 6.

law.³⁶ Within Kiribati, the Banabans have a unique constitutional status, with special rights of entry, residence and parliamentary representation – even if they are not I-Kiribati citizens.³⁷

When the Banabans voted to make Rabi their permanent home in May 1947,³⁸ they signed a document entitled the “Statement of Intentions of Government”. This was “cast in the form of a statement of proposed Government policy vis-à-vis the Banabans”,³⁹ countersigned by the colonial administrations of Fiji and the Gilbert and Ellice Islands, and eventually became the basis for the Banabans’ entrenched rights in the Kiribati Constitution.

The Statement of Intentions provided *inter alia* that:

- the Banabans’ decision to remain on Rabi would not affect their rights to lands on Ocean Island;
- they retained an inalienable right to return to Ocean Island;
- the title to worked-out phosphate lands there, which had or might come into the possession of the Crown, should revert to the Banabans;
- ownership of Rabi was to be vested in the Rabi Island Council, except for a Crown reserve of 50 acres; and
- the stock, tools, houses and other assets of the copra estate on Rabi were to vest in the Rabi Council.

Additionally, the Banaban Settlement Ordinance, the Banaban Funds Ordinance and the Banaban Lands Ordinance entrenched certain rights for the community on Rabi in Fiji.⁴⁰

Just a year after the Statement of Intentions was agreed, the Banabans petitioned the UK authorities for independence from the governments of Fiji and the Gilbert and Ellice Islands Colony. They argued that the Rabi Island Council, under the Governor of Fiji, should administer both Ocean Island and Rabi:

“Rambi Island in Fiji is truly our new homeland, and we beg that it may no longer be subject to the Government of Fiji, nor also subject to the Government of the Gilbert and Ellice Islands Colony, but that its administration may be handed over to the Rambi Island Council, with the Governor at Suva.

Banaba, (Ocean Island) our old homeland, is now subject to the Government of the Gilbert and Ellice Islands Colony. We beg that the administration of Ocean Island may be handed over to the Rambi Island Council, with the Governor in Suva.

We beg that all Government taxes normally be collected at Ocean Island and those to be levied at Rambi will not be held by the respective Governments of the Gilbert and Ellice Islands Colony and Fiji but will come under the control of the Rambi Island Council, with the Governor at Suva.”⁴¹

The Governor of Fiji responded by citing paragraph 15 of the 1947 Statement of Intentions, which provided that the Banabans would be subject to the laws of Fiji in the same manner as

³⁶ For an in-depth treatment of these issues, see McAdam (2016), *supra* note 11. In land law terms, the Banabans ‘own’ Rabi, but in international and constitutional law terms, the island remains part of Fiji’s territory: see ‘Ocean Island: Opinion’ (14 December 1973) p. 2 in GEIC Secret SG 6/4 vol. I (Kiribati).

³⁷ See further McAdam (2016), *supra* note 11.

³⁸ Resident Commissioner Henry E. Maude to Acting High Commissioner for the Western Pacific (11 July 1947) para. 12 in WPHC 9, 48/5/10.

³⁹ *Ibid.*, para. 3.

⁴⁰ See McAdam (2014), *supra* note 1111.

⁴¹ Letter from Rotan Tito to the Administrative Officer, Rambi Island (30 June 1948), WPHC 6 48/5/2 vol. II. See also *Tito v. Waddell* [1977] Ch 106, pp. 192–193.

other residents.⁴² As such, the request for independence could not be granted. The Governor explained to the Banabans that they had only been in the Colony of Fiji for a short time and would eventually learn to understand its laws, which were “very like” those of the Gilbert and Ellice Islands Colony.⁴³

Banaban calls for independence ebbed until the process of decolonisation began in the Pacific in the 1960s, when a concerted campaign was mounted (with considerable support from some lawyers and politicians in the UK). A number of factors were at play: the Banabans felt aggrieved that the Gilbert and Ellice Islands Colony was receiving the majority of the Ocean Island phosphate royalties, which they felt were rightfully theirs; the neighbouring phosphate island of Nauru became independent in 1968, retaining rights to mining income;⁴⁴ the Ellice Islands indicated their desire to separate from the Gilbert Islands, becoming the independent State of Tuvalu in 1978;⁴⁵ and – most crucially – with independence for the Gilbert Islands also on the horizon, the Banabans were determined to regain their homeland and control over its lucrative resources.

The Banabans’ claim was based on four key points:

1. they were a different people from the Gilbertese;
2. Banaba had been forcibly co-opted into the Gilbert Islands without consultation;⁴⁶
3. Banaba was not governed by the Gilbertese until the 20th century; and
4. since the Ellice Islanders had been permitted to become the independent State of Tuvalu, they should also be allowed to become independent.⁴⁷

Over the course of the next 12 years, deliberations about the Banaban situation consumed thousands of hours of meetings, conferences and parliamentary debate in the UK and the Gilbert and Ellice Islands Colony. While some regarded (and still regard⁴⁸) their appeals as being purely about money,⁴⁹ the “driving force” behind the bid was “the treatment of the

⁴² Speech at Rambi Island by His Excellency, Sir Brian Freeston, KCMG, OBE (3 August 1948) para. 4, WPHC 9, 48/5/10 vol. II.

⁴³ *Ibid.*, para. 5.

⁴⁴ UN Department of Political Affairs, Trusteeship and Decolonization, *Decolonization* (No 15, July 1979, Issue on Kiribati (Gilbert Islands)) p. 16, <www.un.org/en/decolonization/pdf/decolonization/decon_num_15-1.pdf> and <www.un.org/en/decolonization/pdf/decolonization/decon_num_15-2.pdf>, visited on 27 July 2016.

⁴⁵ The Ellice Islands separated from the Gilbert Islands in 1975–76, and gained independence in 1978 as Tuvalu. The Gilbert Islands became Kiribati in 1979, a process of decolonisation that was partly delayed by the Banaban bids for independence. See FCO, *Report of the Gilbert Islands Constitutional Conference* (Cmnd 7446, Misc No. 1, 1978–79).

⁴⁶ Although as some MPs noted, that was hardly unusual for the times: HC Deb. 24 May 1979, vol. 967, col. 1300 (Anthony Kershaw); HC Deb. 24 May 1979, vol. 967, col. 1308 (John Roper). See also FCO Comments on Draft Petition, *supra* note 7; Petition of the Banaban People to the United Nations Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1974) para. 34, GEIC Secret SG 6/4 vol. II (Kiribati).

⁴⁷ HC Deb. 24 May 1979, vol. 967, col. 1247 (The Lord Privy Seal, Sir Ian Gilmour).

⁴⁸ Even today, many I-Kiribati maintain that the bid for Banaban independence was wholly related to money. They argue that the Banabans were never a distinct race, nor Ocean Island a separate country: interviews with Atanraoi Baiteke, former Secretary-General, South Pacific Commission, 1989–93 (Tarawa, 10 September 2013); Teburoro Tito, former President of Kiribati, 1994–2003 (Tarawa, 10 September 2013).

⁴⁹ See e.g. letter from Naboua T. Ratieta, Chief Minister of the Gilbert and Ellice Islands, to *The Times*, ‘Future of Gilbert and Ellice Islands’ (6 February 1975). The Rabi Council did acknowledge that one of its “main motives” was “to provide for the financial security of the Banaban people”: ‘Concluding Statement made by the Reverend Tebuke Rotan, Member of the Banaban Delegation, at Lancaster House on Tuesday, 29 October, 1968’ in FCO, *The Ocean Island Phosphates Discussions* (October 1968) p. 17; Rabi Island Council, ‘Submission presented to Her Majesty’s Government at Negotiations in London, United Kingdom’ (June 1968), tabled by the Banaban Delegation at the first meeting, in FCO, *supra* note 49, p. 5.

Banabans in the past and their wish to preserve their identity which they had clung to tenaciously over the years.”⁵⁰

Debates raged in the UK Parliament⁵¹ and elsewhere about the historical and ethnic origins of the Banabans, and whether they were sufficiently distinct as a ‘people’ to justify their secession from the Gilbert Islands Colony. Whereas the Banabans stressed their uniqueness and physical separation from the rest of the Gilbert Islands,⁵² the Gilbertese emphasised their common Micronesian heritage, shared language, shared gods and extensive intermarriage.⁵³ They posited that any differences between the groups were merely those “between the people of one village and another village in the same country, the differences between one family and another family in the same village”, but “not the differences between one people and another.”⁵⁴ In short, their arguments for retaining sovereignty over Ocean Island were based on history, geography and brotherhood.⁵⁵

According to Banaban scholar, Katerina Teaiwa, the distinctive ethnic identity promoted by the Banabans throughout the 1960s and 70s was largely manufactured, but was “a matter of political necessity to challenge exploitative colonial policies”.⁵⁶ As such, “groups previously differentiated by kainga or district became the homogenized ‘Banabans’; ‘Gilbertese’, meanwhile, became not distant kin, but ‘others’.”⁵⁷

From an international law perspective, the Banabans’ motivations were clear: only by embracing the language of international law itself and positioning themselves as a distinct ‘people’ could they defend their claim to self-determination and, ultimately, statehood.⁵⁸ As Pahuja has explained, “asserting one’s existence as a nation state was the sole means of capturing legal personality in a global setting”,⁵⁹ and “self-determination could only be achieved at the cost of self-definition”.⁶⁰ The positivist international law approach enabled

⁵⁰ Record of a Meeting between the Parliamentary Under-Secretary of State and a Delegation representing the Banabans [sic] Leader at the FCO (17 September 1974) para. 4, GEIC Secret SG 6/4 vol. I (Kiribati). *See also* UNGA, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Summary Record of the 605th Meeting, UN Doc. A/AC.109/SR.605 (5 June 1968) p. 9, acknowledging that “the Rabi Island Council would certainly not hide the fact that it was motivated in part by the need to provide for the financial security of the Banaban people.”

⁵¹ As a British colony, the Gilbert Islands could only become independent if the UK Parliament passed enabling legislation.

⁵² HC Deb. 18 December 1975, vol. 902, col. 1864 (John Lee).

⁵³ HC Deb. 24 May 1979, vol. 967, col. 1247 (The Lord Privy Seal, Sir Ian Gilmour); HC Deb. 23 January 1975, vol. 884, col. 2106 (Minister of State for Foreign and Cth Affairs, David Ennals). *See* Statement by the Gilbert and Ellice Islands Colony delegation, para. 5, Annexure C to Notes on Meeting in Nauru between the Gilbert and Ellice Islands Colony Parliamentary Delegation and Representatives of the Rabi Council of Leaders (22–24 January 1975) in GEIC Secret SG 6/4 vol. III. *See also* statement by Reuben K. Uatiao (Chief Elected Member of the Gilbert and Ellice Islands) to UN Special Committee, UN Doc. A/AC.109/SR.607 (7 June 1968) p. 6.

⁵⁴ HC Deb. 23 January 1975, vol. 884, col. 2106 (Minister of State for Foreign and Cth Affairs, David Ennals).

⁵⁵ HL Deb. 15 March 1979, vol. 399, cols. 783–784 (Lord Hylton). On the role of anthropology in ‘legitimizing’ claims, *see* S.Engle Merry, ‘Anthropology and International Law’ 35 *Annual Review of Anthropology* (2006) p. 107.

⁵⁶ K.M. Teaiwa, *supra* note 11, p. 167 (fn omitted). She describes the deliberate, political construction of new ‘Banaban’ songs and dances in the 1960s: pp. 119–120, 142, 167, 177. *See* parallels in S.Engle Merry, ‘Law and Identity in an American Colony’ in Engle Merry and Brenneis (eds.), *supra* note 30, pp. 143–146.

⁵⁷ K.M. Teaiwa, *ibid.*, p. 167 (fn omitted).

⁵⁸ ‘In effect, the requirements of statehood repeat the founding violence of colonialism by inscribing it in a new legal narrative that relegitimizes its imperialist outcomes’: D. Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’ 5 *Social and Legal Studies* (1996) pp. 341.

⁵⁹ S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, New York, 2011) p. 57.

⁶⁰ *Ibid.*, 58, paraphrasing G. Rist, *The History of Development: From Western Origins to Global Faith* (trans. P. Camiller) (Zed Books, London, 1997) p. 79.

imperial States to “overcome the historical fact that non-European states had previously been regarded as sovereign” by dismissing forms of tribal organisation and imposing wholly foreign conceptual constructs on them.⁶¹ It is unsurprising, then, that from time to time the Banabans undoubtedly over-emphasised points of difference in an attempt to frame their claims in accordance with “a system of law which was fundamentally European”.⁶² As a report reviewing the Banaban constitutional safeguards in 1985 explained, concepts such as sovereignty “push[ed] parties into antagonist positions and obscure[d] the possibilities that exist[ed] for the accommodation of their differences.”⁶³

A particular hurdle was that the international legal principle of *uti possidetis* transformed administrative frontiers established by the colonial powers (however arbitrary) into international borders at the time of independence.⁶⁴ As a principle designed to promote the stability of newly independent States, it meant that minorities within an established territory could not challenge the boundaries, even if they cut across ethnic lines and/or pre-colonial organisational structures. With the UK government invoking the principle and relevant UN resolutions on this point,⁶⁵ this was the quandary in which the Banabans found themselves vis-à-vis the emerging State of Kiribati.

The next sections, presented chronologically, examine the Banabans’ claims. Key moments include the Banabans’ request to the British government in the late 1960s that they be granted independence; petitions to the UN Committee of 24 in 1968 and 1974; the Bairiki resolutions of 1977; the Gilbert Islands constitutional conference in London in late 1978; and the period immediately prior to Kiribati’s independence in 1979.⁶⁶

4. The Banabans’ Request for Independence: 1960s

The question of Banaban independence was first raised in the UK Parliament in June 1967. The Banabans made clear that once the phosphates on Ocean Island were exhausted, they wanted to achieve “political separation” from the Gilbert and Ellice Islands Colony.⁶⁷ Some British parliamentarians assumed that the Banabans envisaged “an independent State within the Commonwealth of two small islands 1,000 miles apart”, described by one MP as “the concept of national sovereignty gone mad.”⁶⁸ But this was seen as “entirely out of the question”, since “[t]he Fijians would not consider any severance of the island from Fiji”, and

⁶¹ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, New York, 2005) 59, 83. For instance, Maude had observed in 1946 that the Banabans showed a “remarkable degree of local political self-government”: Rabi Island Council Submission, *supra* note 49, referring to H.E Maude, *The Future of the Banaban Population of Ocean Island: with special relation to Their Lands and Funds* (Memorandum to the Secretary, WPHC, 2 September 1946), section 25, Series F, Folder 9 (Adelaide). See also Pahuja, *supra* note 59, pp. 26–32.

⁶² Anghie, *supra* note 61, p. 33. See also S. Engle Merry, ‘Sex Trafficking and Global Governance in the Context of Pacific Mobility’ 15 *Law Text Culture* (2011) p. 193.

⁶³ Republic of Kiribati, *Report of the Independent Commission of Inquiry relating to the Banabans* (September 1985) para. 35. See also Engle Merry, *supra* note 62, p. 193, who notes “the role played by law in allocating control over land and power, and in constructing ideologies of difference that render the system coherent and legitimate.”

⁶⁴ *Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment)* [1986] ICJ Reports 554, paras. 20–21, 23.

⁶⁵ HC Deb. 24 May 1979, vol. 967, col. 1257 (Edward Rowlands), referring to UN res. 1514 (XV).

⁶⁶ At times, the Banaban position seemed to shift: for instance, at a meeting with the FCO in September 1970, “it appeared that the Banabans were no longer seeking independence for Ocean Island, as they had decided to take up Fiji citizenship”: *Tito v. Waddell*, *supra* note 41, p. 207.

⁶⁷ HC Deb. 7 June 1967, vol. 747, col. 1256–1257 (Minister of State for Cth Affairs, Judith Hart). They noted that Rabi Island was part of Fiji and thus under its administration.

⁶⁸ HC Deb. 4 February 1969, vol. 777, col. 343 (Edwin Brooks).

there “would certainly be repercussions from Fiji politicians” were the UK government to propose this.⁶⁹

At important intergovernmental discussions in London in 1968 about the future of Ocean Island’s phosphate, the Rabi Island Council sought the British government’s agreement “to the immediate granting of independence to Ocean Island.”⁷⁰ Citing UN General Assembly resolutions 1514 (XV) and 1541 (XV) on the granting of independence to colonial countries and people, they argued that they had “the right to self-determination”, with the right to “freely determine their political status and freely pursue their economic, social and cultural development.”⁷¹ Reverend Tebuke Rotan, one of the Banaban leaders, added that: “until we feel that justice has been achieved, we will continue to press our case in the United Nations, or any other available forum of world opinion, including a test of our legal rights if we can find a Court that has jurisdiction.”⁷²

The Banabans pinpointed 1900 as the moment when they “lost their independence”.⁷³ This was the year when Ocean Island was annexed by the British and placed under the jurisdiction of the Resident Commissioner of the Gilbert and Ellice Islands Protectorate (which became a colony in 1916).⁷⁴ Tebuke Rotan explained that by ‘independence’ they meant that up until that time, “no foreign country, including any part of the Gilbert and Ellice Islands, exercised any power or influence on our island. It was Britain, and Britain alone, that took our independence from us, and exploited our phosphate for the benefit of people other than ourselves.”⁷⁵

It seems that ‘independence’ was more about (re)asserting control over resources and their financial benefits than political governance per se. While independence would help to “preserve the separate identity of the Banaban people”,⁷⁶ it was invoked as a means of “looking after our own affairs” financially. In this regard, Tebuke Rotan explained that it would be

“a most extraordinary thing if we are denied independence on the grounds that we could not survive economically when at the same time we are being denied access to the means necessary to ensure our economic survival. In the short run our best prospects for national survival will be attained by gaining independence on Ocean Island. Later on, our ability to sustain self-government on Ocean Island will rely upon our only other asset, which is the economic potential of Rabi Island. But Ocean Island is our homeland and we want political independence there now because it is a separate geographical entity – it is only because of the phosphate that it was annexed to the Gilbert and Ellice Islands Colony.”⁷⁷

The representatives of the Gilbert and Ellice Islands Colony were adamant that the excision of Ocean Island from their territory was wholly unacceptable. Noting its “direct constitutional

⁶⁹ *Ibid.*, cols. 355–356 (Under-Secretary of State for Foreign and Cth Affairs, William Whitlock).

⁷⁰ Rabi Island Council Submission, *supra* note 49.

⁷¹ *Ibid.*, 3, citing UN res. 1514 (XV), para. 3.

⁷² Concluding Statement by Tebuke Rotan, *supra* note 49, p. 17.

⁷³ Rabi Island Council Submission, *supra* note 49, p. 3. This was notwithstanding the fact that contact with missionaries in the 19th century resulted in the demise of the Banaban language (since the Bible and religious instruction was in Gilbertese). Interestingly, in interviews conducted by the author on Rabi in 2012, many Banabans linked the demise of their language with the commencement of phosphate mining, even though when asked directly, they knew that it occurred much earlier.

⁷⁴ ‘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, *supra* note 49, p. 21.

⁷⁵ Concluding Statement by Tebuke Rotan, *supra* note 49, p. 16.

⁷⁶ *Ibid.*

⁷⁷ Rabi Island Council Submission, *supra* note 49, p. 5. They also drew attention to UNGA res 1514 (XV) para. 3: “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”

link” with that colony, and its “responsibility for the good order and efficient conduct of the administration”,⁷⁸ the UK government refused the Banabans’ request. Invoking the “cardinal principle to which Britain has adhered closely in the past in dealing with her dependent territories, and to which we continue to adhere – that the wishes of the people of the territory must be the main guide to action”, the Minister of State, Lord Shepherd, explained that “we must be guided by the wishes of the people as a whole within the existing boundaries of the territories.”⁷⁹

5. 1968 Petition to the UN Committee of 24

Having been unsuccessful in their bilateral discussions with the British, the Banabans petitioned the UN Special Committee on Decolonization, also known as the Committee of 24.⁸⁰ The Committee was already considering the situation of the Gilbert and Ellice Islands Colony as a non-self-governing territory, and in a series of resolutions between 1964 and 1973 affirmed the right of its people to self-determination and independence.⁸¹ In this connection, the Committee also considered the position of the Banabans, granting hearings to their representatives in 1968, 1974 and 1975.

The Banabans argued that they had been “deprived of their independence by a stroke of the pen” when the British had annexed Ocean Island.⁸² By contrast to Nauru, which had attained independence with UN support and enjoyed “the full economic benefit from their phosphate”, the Banabans argued that they were “in danger of losing their national identity.”⁸³ As a “people in exile”, they “wanted to return to Ocean Island as soon as possible”⁸⁴ which should be constituted as “a separate State with a republican and democratic form of government”.⁸⁵

Alternatives to fully fledged statehood were also considered, including “a treaty giving the United Kingdom Government responsibility for the foreign affairs of the island and providing, if possible, for the association of the island with the Commonwealth”; “a closer association with Nauru”; or even an association “with the Marshall Islands by signing a treaty with the United States Government, since that archipelago was nearer to Ocean Island than were the Gilbert and Ellice Islands.”⁸⁶ When asked about the possibility of obtaining independence for Rabi, the Banabans explained that they “could not envisage such a possibility, for Rabi Island was part of Fiji; their accession to independence must therefore be linked with their re-establishment on Ocean Island.”⁸⁷

The Gilbertese authorities wholly rejected the Banabans’ claims. They argued that the Banabans’ claim to independence was incompatible with operative paragraph 6 of UNGA

⁷⁸ Concluding Statement by Lord Shepherd, *supra* note 74, pp. 21–22, 23.

⁷⁹ *Ibid.*, p. 22.

⁸⁰ UN Special Committee, UN Doc. A/AC.109/PET.967 (9 May 1968); *see also* Petition of the Banaban People, *supra* note 46, para. 39.

⁸¹ UN Department of Political Affairs, Trusteeship and Decolonization, *supra* note 44, p. 35.

⁸² UN Special Committee, Summary Record of the 605th Meeting, UN Doc. A/AC.109/SR.605 (5 June 1968) p. 6.

⁸³ UN Doc. A/AC.109/PET.967, *supra* note 80, p. 3. The Banabans’ own advisers explained that their situation was very different, and that the Nauruan comparison was likely to be unhelpful: ‘Recommendations for Future Action by Rabi Island Council’ (1969), on letterhead of Philip Schrapnel and Co Pty Ltd, in A.D. Patel Papers: Personal Papers, 1936–70, PMB 1152, Reel 2, Folder 17 (Pacific Manuscripts Bureau).

⁸⁴ UN Special Committee, Summary Record of the 606th Meeting, UN Doc. A/AC.109/SR.606 (6 June 1968) p. 23.

⁸⁵ *Ibid.*, p. 21.

⁸⁶ *Ibid.*, p. 26.

⁸⁷ *Ibid.*

resolution 1514 (XV), which recommended that territorial unity and integrity be preserved.⁸⁸ They likened the Banaban case to that of the Katangans, which the UN had opposed.⁸⁹

“We are ourselves on the certain path to independence, and do not wish to be thwarted in that purpose by being deprived, through fragmentation or dismemberment of our territory, of the economic resources of any one part at the request of absentee owners (already individually richer than we are) whose sole purpose is to secure for themselves undue wealth to the detriment of the rest of the territory.”⁹⁰

The UK government warned that comparing the Banabans to Nauru was “somewhat misleading”, since Nauru had a long history as a separate trust territory prior to independence, and its people “had remained in Nauru after their return in 1945 and had not decided to resettle elsewhere.”⁹¹ By contrast, Ocean Island had been administered as part of the Gilbert and Ellice Islands group for 68 years, and to separate it would be “a retrograde step and one which would undermine the economy of the Territory by depriving it of the revenues from phosphate mining on Ocean Island.”⁹² Reiterating a favourite argument, the UK warned of the need to avoid “Balkanization”: if Ocean Island were to secede, this could trigger “a chain reaction, with small islands demanding to secede from the territories of which they formed a part”, a process that “would be contrary to the principle of territorial integrity so frequently enunciated in the Committee”.⁹³

Although many UN Committee members were sympathetic to the Banaban claims,⁹⁴ in the end they recommended only that the UK establish a committee to consider the demands and grievances of the Banabans, without necessarily endorsing their claim for separation.⁹⁵ They also recalled the right of peoples to permanent sovereignty over their wealth and natural resources, and urged the UK government to give the Banabans a direct role in the control and management of the phosphate industry on Ocean Island.⁹⁶

6. Models for Independence (1973)

The Banabans were not content with this outcome. In 1973, a referendum in the Ellice Islands on its proposed separation from the Gilbert Islands inspired hope among the Banabans for a similar constitutional change for Ocean Island.⁹⁷ They procured a legal opinion from a

⁸⁸ Statement of Reuben K. Uatiao (Chief Elected Member of the Gilbert and Ellice Islands) to UN Special Committee, Summary Record of the 607th Meeting, UN Doc. A/AC.109/SR.607 (7 June 1968) p. 6.

⁸⁹ *Ibid.*

⁹⁰ UN Doc. A/AC.109/PET.986, pp. 1–2.

⁹¹ UN Special Committee, Summary Record of the 608th Meeting, UN Doc. A/AC.109/SR.608 (10 June 1968) p. 4 (Mr Shaw, UK).

⁹² *Ibid.*, p. 5.

⁹³ *Ibid.*, p. 9; *see also* Memo from AL Free to Miss Emery (14 January 1970) para. 21, FCO 32/625 (Kew).

⁹⁴ UN Special Committee, Summary Record of the 605th Meeting, UN Doc. A/AC.109/SR.605 (5 June 1968) pp. 14–18 (*e.g.* Sierra Leone, India, USSR, Mali, Iran).

⁹⁵ *See* UNGAOR, 23rd sess., Annexes, addendum to item 23, UN Doc. A/7200/Rev.1, (5 December 1968) ch. XVIII, para. 13.

⁹⁶ UN Department of Political Affairs, Trusteeship and Decolonization, *supra* note 44, p. 36. Further discussions in October 1968 resulted in an £80,000 offer by the British government for Rabi’s development: Petition of the Banaban People, *supra* note 46. Dissatisfied with this outcome, the Banabans commenced legal proceedings in the High Court in London (on 10 November 1971) claiming that the Crown had breached a fiduciary relationship with the Banabans through transactions relating to land on Ocean Island (an action that was unsuccessful), and that it had additionally failed to replant 250 acres of worked-out land in breach of an agreement (partially successful): *Tito v. Waddell*, *supra* note 41.

⁹⁷ Posnett, *supra* note 34, p. 6.

London barrister, John Macdonald, which set out five possible models for independence: (a) complete independence as a sovereign State; (b) a trusteeship arrangement; (c) a protected State arrangement; (d) associated State status; or (e) withdrawal from the international community altogether (effectively becoming a non-entity).⁹⁸

6.1 *Complete Independence – Statehood*

The legal opinion suggested that if the Banabans were to reinhabit Ocean Island, they could theoretically satisfy the four criteria of statehood under international law. However, it was noted that this did not seem like a viable option in reality. First, it was unlikely that other States would recognise Ocean Island as a State, which in practical terms at least would preclude it from functioning as one. In particular, Ocean Island would not have sufficient resources to maintain foreign relations, although another State might be willing to represent it. Secondly, there was a general unwillingness to recognise microstates, and it was doubtful whether the UN would admit it. While this would not be conclusive of statehood, it would pose significant practical obstacles. Thirdly, as part of a UK colony, the UK “would have to agree to, or at any rate acquiesce in, independence unless the Banabans were to put themselves into a position akin to revolt”.⁹⁹

The UK was determined to avoid undue fragmentation, a key concern being the prospective economic viability of such a tiny country.¹⁰⁰ One MP thought it “ridiculous to grant sovereignty to an island that is barren, without any resources and with perhaps no, or at least only 100 or so, permanent inhabitants.”¹⁰¹ It was “absurd to imagine that Ocean Island could be a constitutional entity in itself”, given that the majority of Banabans resided in Fiji.¹⁰² Others pointed out that small size alone was an insufficient justification for denying sovereignty, noting existing examples within the Pacific and elsewhere.¹⁰³ They argued that if Britain accepted the principle of self-determination, then “we accept the right of people to decide what form their independence shall take.”¹⁰⁴

6.2 *Trusteeship*

A second option suggested that the UK could place Ocean Island under the trusteeship system of the UN, pursuant to article 77 of the UN Charter. However, this seemed counter-intuitive in light of the above, since one objective of that system was to promote the eventual independence or self-governance of the territory. As such, this proposal was unlikely to secure support from the UN.¹⁰⁵

⁹⁸ J. Macdonald, ‘Ocean Island: Opinion’ (14 December 1973) p. 2, GEIC Secret SG 6/4 vol. I (Kiribati).

⁹⁹ *Ibid.* Interestingly, Nauru had gained independence in 1966 with only 2,921 Nauruan inhabitants (and a total population of 6,000), although its economic resources were said to be much greater than those of Ocean Island.

¹⁰⁰ HC Deb. 27 May 1977, vol. 932, col. 1765 (Dr David Owen).

¹⁰¹ HC Deb. 24 May 1979, vol. 967, col. 1301 (Anthony Kershaw).

¹⁰² HC Deb. 13 June 1978, vol. 951, cols. 887–888 (Anthony Kershaw). *See also* HC Deb. 11 June 1979, vol. 968, col. 125 (Edward Rowlands): “By my definition, ‘territory’—an independent State or an association between States 1,400 miles apart—means a significant number of the citizens of that State living and working in the territory defined as a free and independent State. That is not ever likely and cannot be, alas, in the case of Ocean Island and the Banabans.”

¹⁰³ “[I]f Tuvalu is very small, Nauru is smaller still, but not notably larger or smaller than Ocean Island was before it was devastated by the phosphate exploiters. Indeed, Nauru and Ocean Island go very much hand in hand. They were both exploited by the same organisation—the British Phosphate Commission. They are both small and compact islands. Whereas Nauru has been granted independence by the Australians, the future of Ocean Island remains in doubt”: HC Deb. 13 June 1978, vol. 951, col. 886 (John Lee). He also cited Liechtenstein, San Marino and Monaco.

¹⁰⁴ HC Deb. 23 January 1975, vol. 884, col. 2102 (John Lee).

¹⁰⁵ Macdonald, *supra* note 98, p. 4.

6.3 *Protected State*

A third possibility was for Ocean Island to become a “protected State”, placing itself under the protection of another State (Fiji) via a treaty.¹⁰⁶ The UK, which would also need to be a party to the agreement, would then have to renounce sovereignty over Ocean Island. Fiji’s competence would extend only to defence and external affairs unless otherwise expressly stated. This would grant the Banabans “semi-independence, and a substantial control over their internal affairs, including possibly finance.”¹⁰⁷ Swaziland was cited as a precedent. However, in the decolonisation context, there was a strong trend away from protected status to independence, and this option was regarded as a “last century solution”.¹⁰⁸

6.4 *Associated Status*

The more contemporary approach was associated status, described as a new type of international relationship created for the West Indies *vis-à-vis* the UK in the 1960s.¹⁰⁹ It shared many of the same features as protected status – e.g. the delegation of such matters as defence, external affairs and citizenship – but it was less ‘imperial’ in its overtones. By contrast to protected status, however, it was suggested that associated status was more appropriate where a territory was already in “an advanced state of self-government, with corresponding institutions”, which Ocean Island was not.¹¹⁰ Nevertheless, the opinion proposed that a modified form of associated status could be possible. The opinion pointed to other precedents for handing over a territory to another independent government in the Commonwealth, such as the transfer of Christmas Island from the UK (Singapore) to Australia in 1958.¹¹¹

6.5 *A Non-Entity*

Finally, the opinion suggested that the Banabans could “drop out of the world community” and allow Ocean Island “to become an area of land not forming a State or part of one”, but noted the unlikelihood that the UK (or indeed the international community) would accept this.¹¹²

The opinion concluded that the only feasible model was for Ocean Island to become independent (with a small resident population and administration) in free association with another State, and for Rabi to remain as a parallel diaspora community in Fiji.

7. **Free Association with Fiji (1974)**

¹⁰⁶ Protected States have their own Head of State and legislature, but the protecting State typically manages external affairs and defence (although possibly on the advice of the protected State).

¹⁰⁷ Macdonald, *supra* note 98.

¹⁰⁸ Confidential letter from J.H. Smith to C.B. Dowds, Pacific Dependent Territories Department, FCO, London (8 March 1974) para. 3, GEIC Secret SG 6/4 vol. I (Kiribati).

¹⁰⁹ See West Indies Act 1967 and related Orders in Council. Contemporary examples in the Pacific region include New Zealand’s arrangements with the Cook Islands and Niue.

¹¹⁰ Macdonald, *supra* note 98, p. 7.

¹¹¹ Cited by Fiji’s Secretary for Foreign Affairs, Joji Kotobalavu, who noted there were “precedents for dividing a colonial territory”: Department of Foreign Affairs, Inward Cablegram from Suva to Canberra, ‘South Pacific Forum: Banabans’ (19 August 1977) para. 2, A1838, 319/1/3, part 19 (Canberra).

¹¹² Macdonald, *supra* note 98, p. 3.

In January 1974, the Banabans presented a petition to the UK government again requesting the independence of Ocean Island and the convening of a constitutional conference.¹¹³ In May, they lodged a further petition with the UN Committee of 24. Heeding the advice in the 1973 legal opinion, the Banabans now favoured becoming an independent State in association with Fiji.¹¹⁴ Recognising “the difficulties of granting independence to small communities”,¹¹⁵ they believed this approach would “protect the people left on Ocean Island and would enable the remaining Banabans to develop Rabi in order to supply those on Ocean Island”.¹¹⁶ Fiji was generally supportive of the idea, subject to the agreement of the UK and the Gilbert Island authorities.¹¹⁷ There were discussions between the Fiji government and the Rabi Council about how such an arrangement might be structured.¹¹⁸

However, it was difficult to separate the question of legal status from the issue of control over phosphate resources and revenue. In response to the Banabans’ UN petition, the Chief Minister of the Gilbert and Ellice Islands Colony objected “most strongly to one of our islands seeking to break away simply and solely in order to enjoy all the wealth which rightly belongs to the nation as a whole.”¹¹⁹ He argued that it was inappropriate for Fiji to intervene in the affairs of Ocean Island, just as “it is not for us to intervene in the affairs of Rabi”,¹²⁰ and noted that he had received “a personal assurance from the Prime Minister of Fiji ... that Fiji has no intention of interfering with another country’s territorial integrity.”¹²¹ In the wake of the UN Committee’s discussions on the subject, the Gilbertese House of Assembly passed a motion that “in the firm belief that Ocean Island is an integral part of the Gilbert Islands, [it] utterly rejects any claim by, or on behalf of, the landowners of Ocean Island for any change in the present status of that island which would make it separate and independent from the remainder of the Gilbert Islands”.¹²²

Clearly, this was a delicate political and diplomatic issue. Fiji’s Prime Minister, Ratu Mara, assured the Chief Minister that he “had no intention of interfering with another country’s sovereignty”,¹²³ but felt that association was possible without doing so. His government unreservedly accepted that Ocean Island was part of the Gilbert and Ellice Islands Colony, but also recognised the right of all peoples to self-determination.¹²⁴ He noted that the Banabans had maintained their “separate identity and culture” on Rabi against “all

¹¹³ It was drafted by Sir Elwyn Jones QC and Mr John Macdonald. See letter from Joan Lestor to Tebuke Rotan (28 February 1975), GEIC Secret SG 6/4 vol. III (Kiribati). No substantive reply was received: Posnett, *supra* note 34, p. 6.

¹¹⁴ The Future of Ocean Island in association with Fiji: Note for Meeting with Senator Willesee (23 July 1974) para. 15, GEIC Secret SG 6/4 vol. I (Kiribati).

¹¹⁵ Record of a Meeting between the Parliamentary Under-Secretary of State and a Delegation representing the Banabans [sic] Leader at the FCO (17 September 1974) para. 2, GEIC Secret SG 6/4 vol. I (Kiribati). The Banaban population was only 2,500, although as was noted in the 1973 legal opinion, Nauru had become independent with a similarly small population.

¹¹⁶ Record of a Meeting between the Parliamentary Under-Secretary of State and the Reverend Tebuke Rotan, FCO (21 February 1975) para. 9, GEIC Secret SG 6/4 vol. III (Kiribati).

¹¹⁷ Petition of the Banaban People, *supra* note 46, para. 31.

¹¹⁸ *Ibid.*, para. 32.

¹¹⁹ Statement by the Hon Naboua T. Ratieta, Chief Minister of the Gilbert and Ellice Islands in relation to the Petition by the Rabi Council of Leaders, para. 8, GEIC Secret SG 6/4 vol. II (Kiribati).

¹²⁰ *Ibid.*, para. 11.

¹²¹ *Ibid.*, para. 12.

¹²² Telegram from Tarawa to FCO (26 November 1974), GEIC Secret SG 6/4 vol. II (Kiribati).

¹²³ Record of a Meeting between the Chief Minister and Ratu Sir Kamisese Mara, Prime Minister of Fiji, Suva (14 October 1974), GEIC Secret SG 6/4, vol. II (Kiribati). See also GEIC Secret SG 6/4, vol. III (Kiribati).

¹²⁴ Telegram from London to the Governor of Tarawa (15 November 1974) p. 2, GEIC Secret SG 6/4, vol. II (Kiribati).

the odds” and their belief that it could “only be preserved and strengthened in the future” if they regained their “homeland” of Ocean Island.¹²⁵

Ratu Mara explained that the Fiji government’s involvement stemmed from its obligation to help the Banabans as citizens of Fiji.¹²⁶ But a confidential memorandum by the British Foreign and Commonwealth Office suggested that Ratu Mara’s commitment to the Banabans was not necessarily reflective of the views of his government and stemmed “in part from his own deep feeling for the rights of land-owners as understood among Pacific Islanders”.¹²⁷ It also speculated that his motivations might be self-serving, since Fiji could benefit significantly from Ocean Island’s phosphate revenue¹²⁸ and a newly-generated 200 mile exclusive economic zone.¹²⁹

Some British MPs were concerned about the vast geographical distance between Fiji and Ocean Island (1,400 miles) compared to the Gilbert Islands and Ocean Island (200 miles). In response, a number of examples were cited as evidence that distance was not an obstacle to association – for instance, there was a distance of 2,000 miles between the Cook Islands and New Zealand, and much greater distances between Britain and its associated States in the Caribbean).¹³⁰

For its part, the UN Committee concluded that “the parties directly involved should resolve their differences by negotiations, bearing in mind the wishes and interests of the peoples of the Territory and with a view to obtaining a settlement satisfactory to all concerned.”¹³¹ One concrete outcome was a mutual agreement by the Banabans and the Gilbert and Ellice Islands Colony authorities to discuss the Banaban petition in a neutral place.¹³²

8. Further Discussions (1975)

From 1975, a number of meetings were convened between the Gilbertese and Banaban representatives in an attempt to resolve the impasse.¹³³ For instance, in March that year, the Gilbertese authorities agreed that the Banabans’ rights in the 1947 Statement of Intentions (guaranteeing their rights to land on Ocean Island and their inalienable right to return there)

¹²⁵ Petition of the Banaban People, *supra* note 46, para. 39.

¹²⁶ Record of a Meeting between the Chief Minister and Ratu Sir Kamisese Mara, Prime Minister of Fiji, Suva (14 October 1974), GEIC Secret SG 6/4 vol. II (Kiribati).

¹²⁷ Confidential, ‘Fiji – Attitudes to Banabans and Ocean Island’ (FCO, February 1977) para. 1, FCO 32/1394 (Kew).

¹²⁸ *Ibid.*, para. 3.

¹²⁹ Letter from R.J. Percival, Americas and South Pacific Branch, Department of Foreign Affairs to Dr R.S. Merrillees, Australian High Commission, London (9 September 1977), A1838, 319/1/3, part 19 (Canberra).

¹³⁰ HL Deb. 15 March 1979, vol. 399, col. 767 (Principal Deputy Chairman of Committees, Lord Greenwood of Rossendale). *See also* HL Deb. 15 March 1979, vol. 399, col. 784 (Lord Hylton): “I should like to throw into the pot the case of Hawaii, a component State of the United States, which is more than 2,000 miles from California. Then there is the case of the French Overseas Departments which are part of metropolitan France and at very much greater distances than 2,000 miles.”

¹³¹ UN Special Committee, Report of Sub-Committee II, UN Doc. A/AC.109/L.1039 (25 July 1975) para. 7(12).

¹³² Notes on the Meeting held in Nauru between the Gilbert and Ellice Islands Colony Parliamentary Delegation and Representatives of the Rabi Council of Leaders (22–24 January 1975), GEIC Secret SG 6/4 vol. II (Kiribati); Cabinet Information Note No 7/75: Meeting of the Colony and Banaban Delegations at Nauru, 22 January 1975 (3 March 1975) in Council of Ministers Memorandum Notes (Kiribati).

¹³³ For example, meetings between the Banabans and Gilbertese were held in January 1975 (in Nauru), October 1975, December 1975, April 1977, November 1977: HL Deb. 15 March 1979, vol. 399, cols 786–87 (Lord Goronwy-Roberts); GEIC Secret SG 6/4 vol. II (Kiribati).

should be entrenched in the independence constitution.¹³⁴ The Chief Minister also offered the Banabans other special guarantees if they renounced their claims to independence.¹³⁵ Known as the “Fifteen Points”, these included:

- “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 in the new Parliament; and
- a suggestion that these rights could be embodied in “a formal agreement for registration with the United Nations” and that the UK and Fiji governments could be asked “to stand as guarantors of the agreement”.¹³⁶

The Banabans rejected the offer and maintained their claim for independence.

At a meeting convened by the Fiji Prime Minister in October 1975, a joint resolution was passed recommending that a further meeting be held to discuss Ocean Island’s constitutional future with all concerned, including the UK, Australian and New Zealand governments (the mining partners).¹³⁷ The meeting never eventuated, however. The British government doubted that such a conference would be “appropriate or helpful” at that time, since the Gilbertese House of Assembly was “firmly opposed to the separation of Ocean Island”.¹³⁸ The British position was undoubtedly welcome news for the Australian and New Zealand governments, since neither wanted to be involved in the constitutional and political questions relating to the future of Ocean Island.¹³⁹ Australia sought to avoid “unwanted attention” to its own involvement in that area,¹⁴⁰ and was concerned that if it were required to provide any “restitution” for its alleged exploitation of the Banabans, similar claims might be made by Nauru.¹⁴¹

Following a further Banaban petition to the British government on 28 January 1977,¹⁴² a compromise was reached between the Gilbert Islands government and the Rabi Council of Leaders in November. Known as the “Bairiki Resolutions”, these 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 UK government must honour the outcome “when deciding on the

¹³⁴ Telegram from Tarawa to UK Mission in New York and the FCO (23 March 1975) para. 1, GEIC Secret SG 6/4 vol. III (Kiribati). The idea was mooted in a telegram sent the previous day by the UK Foreign Mission in Suva to the UK Mission in New York and Tarawa (22 March 1975) para. 2, GEIC Secret SG 6/4 vol. III (Kiribati).

¹³⁵ See ‘The “Fifteen Points”’ in 1985 review, *supra* note 63, pp. 50–51.

¹³⁶ See ‘The “Fifteen Points”’, para. (xiv) in *Ibid.*, p. 51.

¹³⁷ HL Deb. 15 March 1979, vol. 399, cols 766–767 (Principal Deputy Chairman of Committees, Lord Greenwood of Rossendale).

¹³⁸ HC Deb. 18 June 1975, vol. 893, cols 461–462W (Edward Rowlands).

¹³⁹ Confidential, Australia and New Zealand: Attitudes to Banabans and Ocean Island (February 1977) para. 2, FCO 32/1394 (Kew). See, respectively, ‘The Future of Ocean Island in association with Fiji: Note for Meeting with Senator Willesee’ (23 July 1974) paras. 18–19, GEIC Secret SG 6/4 vol. I (Kiribati); Letter from T.L. Richardson of the UK Mission to the UN to T.A.H. Solesby at the FCO (1 October 1974) para. 3, GEIC Secret SG 6/4 vol. I (Kiribati).

¹⁴⁰ Confidential, Foreign Affairs Ministerial Submission, ‘Banabans/Gilbert Islands’ (14 February 1979) para. 4, A1838, 319/1/3, part 22 (Canberra).

¹⁴¹ Confidential, Australia and New Zealand: Attitudes to Banabans and Ocean Island (February 1977) para. 2, FCO 32/1394 (Kew).

¹⁴² HC Deb. 7 April 1977, vol. 929, cols 605–606W (Evan Luard); HL Deb. 24 January 1977, vol. 379, col. 232 (Lord Goronwy-Roberts).

question of independence at the forthcoming constitutional conference”.¹⁴³ If separation were approved, then the Banabans would be allowed to commute freely between Rabi, Banaba and any other of the Gilbert Islands (subject to the provisions of the Closed District Ordinance); retain their right of land ownership in the Gilbert Islands; be permitted to acquire dual citizenship upon application (subject to the concurrence of the Fiji government); elect a Banaban representative for the Gilbert Islands House of Assembly; and any Banaban choosing to resettle on Banaba would be provided by the Gilbert Islands government.¹⁴⁴ The phosphate royalty paid to the Gilbert Islands would drop from 85 to 25 per cent, but Gilbertese labourers could still work on Banaba and the Gilbert Islands government could fish up to 20 miles within Banaban waters. If separation were not approved, then the status quo would be maintained with respect to the phosphate royalties.¹⁴⁵

Why, after so many years of disagreement, did each side agree to this? The answer is that each thought it had sufficient support for the vote to go in its favour.¹⁴⁶ In the end, the referendum did not proceed because elections in the Gilbert Islands and on Rabi led to different leadership in both places,¹⁴⁷ and the Banabans withdrew from the agreement before a vote could be held,¹⁴⁸ once again reverting to their demand for independence.¹⁴⁹

9. Gilbert Islands Constitutional Conference (1978)

In late 1978, a Constitutional Conference for the Gilbert Islands was convened in London. Its purpose was to consider the provisions of the independence constitution, based on proposals arising out of extensive discussions in the Gilbert Islands between 1976 and 1978.¹⁵⁰ The conference also considered the future status of Ocean Island and the Banabans. The Banabans again stressed that only the complete separation of Ocean Island could safeguard their rights, and argued that “it was unfair and impracticable to expect them to live under two jurisdictions—that is, a ‘monarchical’ Fiji and a ‘republican’ Gilbert Islands.”¹⁵¹

As expected, this was unacceptable to the Gilbert Islands delegation. By way of compromise, it offered to safeguard the Banabans’ rights through entrenched provisions in the new constitution. As a further sign of good faith, it also expressed its willingness to discuss a novel proposal by the Rabi Council: a treaty between Fiji and Kiribati that would

¹⁴³ Joint Resolutions (to be known as the ‘Bairiki Resolutions’) approved by the Gilbert Islands Government and the Rabi Council of Leaders at a Meeting held in Tarawa, Gilbert Islands, from 1st to 9th November 1977, res 1–2, cited in HC Deb. 24 November 1977, vol. 939, col. 880W (Evan 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 its [sic] Gilbertese name ‘Banaba’” (at 881W).

¹⁴⁴ *Ibid.*, res. 10–11.

¹⁴⁵ A 15-point offer was first made by the Gilbert and Ellice Islands Colony to the Banabans on 5 June 1975, on the proviso that “you relinquish your claim to independence”: Letter from Naboua T. Ratieta, Chief Minister of the Gilbert and Ellice Islands, to Rev Tebuke Rotan (6 June 1975), GEIC Secret SG 6/4 vol. IV (Kiribati).

¹⁴⁶ Letter from Maris King, High Commissioner, to the Secretary of the Department of Foreign Affairs, Canberra, ‘Gilbert Islands: Ocean Island Question’ (7 November 1977) paras. 4–5, A1838, 319/1/3, part 19 (Canberra). The British doubted that separation was likely: Department of Foreign Affairs (Australia), Meeting with Mr R.N. Posnett, FCO Adviser on Dependent Territories and Special Envoy on Banaban Affairs (10 November 1977) 1 in A1838, 319/1/13, part 19 (Canberra); Confidential communication from London to Wellington, cc’ed to Canberra (18 November 1977) para. 2 in A1838, 319/1/13, part 19 (Canberra).

¹⁴⁷ HC Deb. 24 May 1979, vol. 967, col. 1321 (Sir Bernard Braine).

¹⁴⁸ 1985 review, *supra* note 63, para. 30.

¹⁴⁹ For an overview of the Banaban claims in full, see UN Department of Political Affairs, Trusteeship and Decolonization, *supra* note 44, pp. 11–18.

¹⁵⁰ *Report of the Gilbert Islands Constitutional Conference*, *supra* note 45, para. 4. A constitutional convention had been held in the Gilbert Islands in April/May 1977.

¹⁵¹ HL Deb. 19 February 1979, vol. 398, col. 1600 (Minister of State, FCO, Lord Goronwy-Roberts).

enable the Banabans to make representations to either government if they felt their constitutional rights were being infringed.¹⁵²

After a week of “exhaustive discussion”,¹⁵³ the British government (with whom the ultimate decision rested), found that there were inadequate grounds to justify any departure from the “long-established and widely accepted policy” that “the principle of territorial integrity” and “the wishes of the people as a whole within the existing boundaries should be the main guide.”¹⁵⁴ 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. This was a situation that “has existed for at least 60 years and ... the situation with which we have to deal”.¹⁵⁵ The separation of the Ellice Islands was distinguished on the basis that it was accepted “not only by the people of Tuvalu, but by the elected representatives of the people of the territory *as a whole*.”¹⁵⁶

On hearing this, the Banaban representatives walked out of the talks.¹⁵⁷ They were not involved in the subsequent drafting of “unprecedented”¹⁵⁸ constitutional safeguards to protect their “special interests and concerns” to “the fullest extent possible within the sovereignty of the Gilbert Islands State”,¹⁵⁹ which were welcomed by the UN Special Committee.¹⁶⁰ These included securing their rights and interests over land on Ocean Island; the right to enter and reside in Kiribati; the right to special parliamentary representation in Kiribati; the right to an Banaba Island Council (with “the fullest autonomy consonant with the intention of the unitary character of the Gilbertese State of Kiribati”¹⁶¹); the right to veto proposed amendments to the Banaban constitutional provisions; and the right to acquire citizenship of Kiribati.¹⁶²

¹⁵² Confidential, Gilbert Islands Constitutional Conference (London, November 1978), ‘Citizenship’ (UK Brief No 4xiii) para. 69, FCO 32/1460 (Kew). However, when the Banabans withdrew from the London constitutional conference, this idea was not developed further. The British later recorded that the Fiji government was unwilling to act as guarantor for the Banaban safeguards, but the Gilbert Islands Chief Minister indicated his willingness to accept another Commonwealth country in this role: Confidential telex from London to Wellington (16 February 1979) para. 3, A1838, 319/1/3, part 22 (Canberra); Confidential, Cabinet (Defence and Overseas Policy Committee), Gilbert Islands Independence: Memorandum by the Lord Privy Seal (10 May 1979), Annex I: ‘Future Status of Banaba, Citizenship and Financial Arrangements’, para. 1, FCO 107/73 (Kew), referring to the decision conveyed by the GEIC Constitutional Conference Chair, Lord Goronwy-Roberts. The UK Parliament subsequently entertained the idea of a ‘supervision’ treaty between Kiribati and another Commonwealth country to oversee the implementation of the constitutional safeguards: HL Deb. 15 March 1979, vol. 399, col. 790 (Lord Goronwy-Roberts).

¹⁵³ HC Deb. 24 May 1979, vol. 967, col. 1248 (The Lord Privy Seal, Sir Ian Gilmour).

¹⁵⁴ *Report of the Gilbert Islands Constitutional Conference*, *supra* note 45, p. 5. The Gilbert Islands delegation was adamant that separation was totally unacceptable.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ In internal correspondence, it was recorded that the Fiji High Commissioner stated that the real reason for the walkout was the Banabans’ dissatisfaction with their conference status (as ‘representatives’ rather than full delegates): Department of Foreign Affairs, Inward Cablegram from London to Canberra, ‘Gilbert Islands Constitutional Conference (21 November 1978) para. 2, A1838, 319/1/3, part 22 (Canberra).

¹⁵⁸ HL Deb. 19 February 1979, vol. 398, col. 1602 (Minister of State, FCO, Lord Goronwy-Roberts).

¹⁵⁹ *Report of the Gilbert Islands Constitutional Conference*, *supra* note 45, p. 5.

¹⁶⁰ Recommendation adopted on 15 June 1979 by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Annex II, UN Department of Political Affairs, Trusteeship and Decolonization, *supra* note 44, p. 41.

¹⁶¹ HL Deb. 15 March 1979, vol. 399, col. 792 (Lord Goronwy-Roberts).

¹⁶² Kiribati Constitution, ch. IX, ss. 23, 24. See *Report of the Gilbert Islands Constitutional Conference*, *supra* note 45, pp. 17–20. The Banabans did not formally accept the provisions, but later acknowledged that many replicated parts of the pre-independence constitution (based in part on the 1947 Statement of Intentions): 1985 review, *supra* note 63, para. 47.

10. Final Options (1979)

Despite the outcome of the constitutional conference, there remained a final hurdle before the Gilbert Islands Colony could become independent: the UK Parliament needed to pass enabling legislation. The plight of the Banabans again took centre stage, and MPs made impassioned speeches on both sides of the debate.¹⁶³

The Banaban push for independence was perceived as having two elements: “constitutional and financial.”¹⁶⁴ Internal cables of the Australian Department of Foreign Affairs recorded that the “British are convinced that the claim for sovereignty is simply a tactical manoeuvre [sic] to bring about a favourable financial settlement of the present claim before the British courts for an increased share of the phosphate revenues from Ocean Island.”¹⁶⁵ Other confidential memos show that the British hoped “to leave a tidy situation” for the Gilbert Islands on independence,¹⁶⁶ including making them as economically self-sufficient as possible. Granting them a majority share of remaining phosphate revenue would help to alleviate the UK’s foreign aid bill.

Some MPs lamented the fact that the two issues had become linked because it hampered progress on each element.¹⁶⁷ Indeed, Lord Goronwy-Roberts, the Minister of State suggested that it was difficult to accept the Banabans’ arguments about “homeland” as “being the basis of an argument if from time to time a certain price is placed upon it.”¹⁶⁸ While he recognised the “very deep feelings among the Banaban community in favour of separation from the Gilbert Islands”, he also emphasised the “equally strong feelings among the Gilbertese against the fragmentation of their territory”. Rhetorically, he asked: “do we substitute for the satisfaction of a profoundly concerned minority the dissatisfaction of an equally profoundly concerned majority?”¹⁶⁹

There was heated discussion about how best to weigh these two positions. Baroness Elles, recently returned from a meeting of the UN Commission on Human Rights in Geneva, felt compelled to bring debates about the protection of minorities in that forum to the attention of the House of Lords. She noted the UK’s obligation to “pay particular attention to the views of the international community” pursuant to its obligations under article 27 of the ICCPR, quoting from a report of the Human Rights Commission that explained that the promotion of minorities’ rights should be “based upon strict respect for the sovereignty,

¹⁶³ The Hansard debates are particularly extensive because the bill was introduced in February 1979 by the Labour government and completed all its stages in the House of Lords, but it lapsed on Parliament’s dissolution in April. The new Conservative government stood by the previous government’s decision to grant independence to the Gilbert Islands Colony, but the bill was again debated in both houses: HC Deb. 24 May 1979, vol. 967, col. 1243 (The Lord Privy Seal, Sir Ian Gilmour).

¹⁶⁴ HC Deb. 27 May 1977, vol. 932, col. 1757 (Secretary of State for Foreign and Cth Affairs, Dr David Owen).

¹⁶⁵ Department of Foreign Affairs, ‘Committee of 24: Ocean Island: Claim by Banabans’, Inward Cablegram from New York to Canberra (15 October 1974) para. 1 in A1209, 1974/7300 (Canberra). The Banaban case in the High Court in London, *supra* note 41, was the longest-running case ever heard in that jurisdiction.

¹⁶⁶ Confidential, ‘The Inter-relationship of Political and Financial Factors’ 1, A1838, 319/1/3, part 19 (Canberra).

¹⁶⁷ HL Deb. 19 February 1979, vol. 398, col. 1616 (Lord McNair). When the 1977 Bairiki resolutions were passed, the two issues remained separate. However, the Banabans subsequently resiled from this position and said that the resolutions should be regarded as a package: HL Deb. 19 February 1979, vol. 398, col. 1599 (Minister of State, FCO, Lord Goronwy-Roberts).

¹⁶⁸ *Ibid.*, col. 1599.

¹⁶⁹ HL Deb. 13 March 1979, vol. 399, col. 500 (Lord Goronwy-Roberts); *see also* HL Deb. 15 March 1979, vol. 399, col. 780 (Baroness Elles); HC Deb. 24 May 1979, vol. 967, col. 1256 (Edward Rowlands); HL Deb. 19 June 1979, vol. 400, cols. 828–829 (Lord Trefgarne). According to John Roper, “[t]o the Gilbertese, a separate Banaba represents a form of reverse discrimination, where the unfounded desire of a small minority is imposed against the wishes of a majority of more than 50,000”: HC Deb. 24 May 1979, vol. 967, col. 1309.

territorial integrity and political independence of the countries in which minorities lived and upon non-interference in the internal affairs of those countries.”¹⁷⁰

In this context, some other options were put forward, although none gained sufficient traction.

10.1 *A Lease Option*

One MP proposed granting the Rabi Council a 999-year lease over Ocean Island, similar to Hong Kong’s relationship with China. “Local autonomy would thus be guaranteed to the Banabans for the full term of the lease, subject only to reservations on defence, which could be covenanted for in the lease itself.”¹⁷¹ In response, it was explained that this would not interest the Banabans unless it involved separation. The Banabans already owned the land on Ocean Island so it was difficult to see how a lease would advantage them, and the draft constitution already contained strong guarantees about land and its ownership.¹⁷²

10.2 *Suspend the Determination of Ocean Island’s Status*

Lord Hylton suggested that the Gilbert Islands Colony be granted independence, but that Ocean Island be left out of the equation, so that the Banabans could later determine with which other State they might like to be associated.

“Nobody is arguing that they should be totally free and independent, with a seat in the United Nations, either where they live in Rabi or where they have lived on Ocean Island. Various possibilities of association have been put forward. It might well be that it will end up being an association with Kiribati. The island of Nauru, which is no great distance away, has also been suggested as a possible candidate for association. There have been considerable suggestions of association with the Fiji group. Those are three possibilities.”¹⁷³

He cautioned that “if we cannot get this question right, how do we hope to settle satisfactorily, properly and correctly the future of the Falkland Islands, with their population of 1,805, the question of Gibraltar, with its population of just under 30,000, or the question of Belize, with its population of 140,000?”¹⁷⁴ However, this approach was not considered feasible.

10.3 *Free Association with Kiribati*

At talks chaired in Suva in May 1979 by the Prime Minister of Fiji, Ratu Mara, the Banabans expressed a willingness to discard the idea of free association with Fiji and instead enter into a similar arrangement with the Gilbert Islands.¹⁷⁵ Despite having requested the meeting, the Gilbertese authorities “said that they had no mandate to consider such ideas, although they were prepared to consider some kind of autonomy within a unitary State after independence.”¹⁷⁶

Seeking to overcome this stalemate, the Prime Minister of Fiji suggested a compromise which the Banabans ultimately accepted. It was that Ocean Island (represented by the Rabi

¹⁷⁰ HL Deb. 15 March 1979, vol. 399, col. 782 (Baroness Elles), referring to the UN Commission on Human Rights, 34th sess., ECOSOC Official Records 1978, Supp. No. 4, UN Doc. E/1978/34 (1978) 71 para. 5.

¹⁷¹ HC Deb. 24 May 1979, vol. 967, cols. 1321–1322 (Trevor Skeet).

¹⁷² HC Deb. 11 June 1979, vol. 968, col. 142 (Peter Blaker).

¹⁷³ HL Deb. 14 June 1979, vol. 400, col. 795 (Lord Hylton).

¹⁷⁴ *Ibid.*, cols. 794–795.

¹⁷⁵ “They had previously asked for association with Fiji because they occupied Rabi Island and because of the support they had received from the Fiji Government”: HL Deb. 19 June 1979, vol. 400, col. 817 (Lord Brockway).

¹⁷⁶ HC Deb. 11 June 1979, vol. 968, col. 74 (Sir Bernard Braine); *see also* HC Deb. 24 May 1979, vol. 967, col. 1277 (Sir Bernard Braine).

Council of Leaders) would a “self-governing, but not wholly independent” entity in free association with Kiribati,¹⁷⁷ based on the following principles:

“Banaba shall be self-governing but not independent; the Gilbert Islands will retain authority and responsibility for security, defence and citizenship matters and the Gilbert Islands constitution will have entrenched clauses on the citizenship rights of the Banabans; Banaba will have authority and responsibility for external affairs, including marine resources; both parties will agree on a mutual sharing of phosphate royalties from Ocean Island and on consultation on such matters as access to, or exploitation of, marine resources in their respective economic zones; this compact of free association could run for a specified period and then be renewed. Alternatively, it could provide for unilateral termination by either party or termination by mutual agreement of both parties.”¹⁷⁸

The rationale behind this was allegedly as follows. The Fiji government regarded the outcome of the London constitutional conference as unjust because conferral of sovereignty over Ocean Island on Kiribati was “an act of unilateral imposition by Britain”, and the Banabans “could not possibly accept the proposed [constitutional] safeguards as they had no part in drafting them.”¹⁷⁹ It was suggested that by separating the Banabans and the Gilbertese “ab initio” and then joining them “in an association as equals”, a future Kiribati government could not strip the Banabans of their rights. “The Suva proposals would underwrite Banaban identity. They would safeguard Banaban freedom, but they would also preserve for the Gilbertese ultimate sovereignty over the area as a whole. It is an honourable compromise and one that is, to borrow those words again, practical, right and just.”¹⁸⁰

It was further suggested that a compact of free association between the Gilbert Islands government and the Rabi Council of Leaders on behalf of Ocean Island “could be underwritten and guaranteed by a six-nation treaty embracing the Gilbert Islands Government, the Rabi Council of Leaders, Fiji, the United Kingdom, New Zealand and Australia.” While this would not mean full independence for the Banabans – “their legal status would be short of that of a full sovereign State”¹⁸¹ – they would have a full internal economy.

In the House of Commons, Sir Bernard Braine thus proposed an amendment to the Kiribati Independence Bill to “make provision for a compact of free association between the Gilbert Islands (other than Banaba) and Banaba which grants self-government for the Banabans on Banaba under the overall sovereignty of the Government of Kiribati.”¹⁸² Pursuant to this, the constitution should provide that:

“(a) the Kiribati Government’s authority over and responsibility for Banaba shall be confined to matters relating to external security, defence and citizenship, the special citizenship rights of the Banabans being entrenched in the Kiribati Constitution; and
(b) the Government of Banaba shall have sole authority and responsibility for conducting their foreign affairs and sole jurisdiction over Banaban marine resources; and
(c) the compact of free association between the Gilbert Islands and Banaba may be terminated unilaterally by either party after a period of three years.”¹⁸³

¹⁷⁷ HC Deb. 24 May 1979, vol. 967, col. 1277 (Sir Bernard Braine). *See also* HL Deb. 14 June 1979, vol. 400, col. 791 (Lord Brockway).

¹⁷⁸ HC Deb. 11 June 1979, vol. 968, col. 75 (Sir Bernard Braine).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, col. 78. By contrast to existing free association agreements in the Pacific, the Suva proposal proposed that Australia, New Zealand and Britain would jointly provide financial support to the Banabans and the Gilbertese after independence: col. 76.

¹⁸¹ *Ibid.*, col. 88 (Frank Hooley).

¹⁸² Amendment No 5, to clause 2, page 1, line 14, HC Deb. 11 June 1979, vol. 968, col. 58 (Chairman).

¹⁸³ HC Deb. 11 June 1979, vol. 968, col. 58 (Chairman).

In effect, this would have permitted a considerable degree of autonomy for the Banabans as a minority group within the State of Kiribati (especially their control over marine resources).

However, the amendment was rejected. The majority of MPs believed that the consent of the Gilbertese was necessary before any such relationship could be agreed to,¹⁸⁴ and that the arrangement was inconsistent with what had been agreed at the constitutional conference the previous year. It would be left to the newly independent government of Kiribati to decide how to proceed.¹⁸⁵

Ultimately, then, the UK Parliament found that there was no justification for the separation of Banaba from the Gilbert Islands, invoking the international law principle of *uti possidetis* and relevant resolutions of the UN on this point.¹⁸⁶ “Separation will be contrary to our normal British policy and the generally accepted United Nations’ principle of respecting existing colonial boundaries and the wishes of the people of the territory as a whole”, explained Lord Trefgarne.¹⁸⁷ There was also concern about the precedent it might set.¹⁸⁸ The Minister of State explained that “the best hope for the future lies in the two communities working together within a devolved system”¹⁸⁹ by “fashioning a position of strong autonomy for Ocean Island within the independent Gilbertese State.”¹⁹⁰

Some MPs regarded this conclusion as wholly political, noting that there were “many examples” of the UK permitting part of a territory to secede against the wishes of the majority of the population.¹⁹¹ Mr Hooley described the argument of territorial integrity as “spurious” and “a lot of nonsense”, noting “dozens of other cases in which we have in various ways, with or without the permission or even the knowledge of the people concerned, hived off or brought together particular groups of islands. There is no divine right to keep a group of islands together because at the beginning of the twentieth century it happened to suit the Colonial Office to lump them under one governor and put them under one administration”,¹⁹² especially when it stemmed “out of sheer greed”.¹⁹³

Ocean Island remains part of Kiribati to this day. While agitation for independence has waned,¹⁹⁴ there are on-going tensions between the Banabans on Rabi and the government of Kiribati about the management and possible rehabilitation of the island.¹⁹⁵ Safeguards in the

¹⁸⁴ “[I]t seems incredible to me that, following the Suva talks, no attempt was made to get the parties together, even unofficially, to discuss the brave initiative made by the Prime Minister of Fiji”: HC Deb. 11 June 1979, vol. 968, col. 141 (Sir Bernard Braine).

¹⁸⁵ HL Deb. 14 June 1979, vol. 400, col. 798 (Lord Trefgarne).

¹⁸⁶ HC Deb. 24 May 1979, vol. 967, col. 1257 (Edward Rowlands), referring to UN res. 1514 (XV).

¹⁸⁷ HL Deb. 19 June 1979, vol. 400, col. 829 (Lord Trefgarne).

¹⁸⁸ HC Deb. 24 May 1979, vol. 967, cols. 1333–1334 (Peter Blaker): “There are the separatist movements in the Solomon Islands, the New Hebrides and Papua New Guinea. Hon. Members who have argued the Banaban case cannot imagine that we could carve off Banaba just before independence without repercussions in those three territories.” See also HC Deb. 24 May 1979, vol. 967, col. 1315 (Paul Dean).

¹⁸⁹ HL Deb. 28 June 1977, vol. 384, col. 1002 (Minister of State, FCO, Lord Goronwy-Roberts).

¹⁹⁰ *Ibid.*, col. 1000.

¹⁹¹ HC Deb. 24 May 1979, vol. 967, col. 1275 (Sir Bernard Braine).

¹⁹² *Ibid.*, col. 1295 (Frank Hooley).

¹⁹³ HC Deb. 11 June 1979, vol. 968, col. 81 (Frank Hooley); cf HC Deb. 11 June 1979, vol. 968, col. 140 (Peter Blaker).

¹⁹⁴ Most recently, during the 2000 coup in Fiji, Banaban elders once again expressed their desire for Ocean Island to become independent, fearful of political instability and their own status within Fiji. The Rabi Council chairman of the time, John Teaiwa, did not believe that the Banabans’ status within Fiji was at risk, but conveyed their views to the government of Kiribati: K.M. Teaiwa, *supra* note 11, p. 174.

¹⁹⁵ See e.g. B. Vanualailai (Chairman, Rabi Council of Leaders) and P. Crowley, ‘Banaban Rehabilitation Project’ (*Banaban Voice*, 30 April 2010), <banabanvoice.ning.com/forum/topics/banaban-rehabilitation-project>, visited on 27 July 2016.

Kiribati Constitution prevent the government from taking any action without the approval of the Banaban MP from Rabi, who has the power to veto proposals relating to Ocean Island (and has done so).¹⁹⁶ This has caused frustration among law and policymakers in Kiribati.¹⁹⁷

11. Conclusion: Lessons for Future Relocations

This article has sought to put empirical flesh on the otherwise abstract bones of scholarly contemplations about how relocated communities might seek to reconstitute themselves – both legally and politically. While there is inherent value in recording and analysing the history recounted here, it is also important for understanding how concerns about identity, self-determination and control over territory and resources might play out in future if populations are relocated.¹⁹⁸ It shows why cross-border relocation remains such a fraught option to this day.

Through detailed historical analysis, this article has explored the legal status which a relocated community might have within another country; the political or legal advantages that might come with community relocation, compared to individual migration; how territory left behind might be governed by people who are predominantly resident in (and nationals of) another State; and how pluralistic societies may (or may not) tolerate the special treatment of distinct communities. It has also revealed how intrinsic conceptions of identity, ethnicity and belonging are to the legal structures ultimately adopted, and how narrative construction can shape perceptions of what solutions are appropriate.

In the 2013 speech in which he offered to assist his Pacific island neighbours, the Prime Minister of Fiji recognised some of the challenges raised by international relocation:

“The Banaban homeland was not a sovereign state. The citizens of Kiribati most certainly are. So Fiji is facing a range of unprecedented and perplexing decisions as we contemplate giving them refuge against the rising sea. We clearly cannot have another sovereign nation within our borders. So what do we do? Are these people prepared to become Fijians? Can they be dual nationals of Kiribati and Fiji? How will the whole thing work? These are just some of the aspects we are having to consider as the climate change crisis escalates.”¹⁹⁹

The absence of bilateral, regional or international policy frameworks to facilitate cross-border movement in the context of climate change and disasters means that it is unclear how many individuals will have the opportunity to migrate voluntarily in anticipation of longer-term changes to their environment. This, in turn, may affect whether and how any cross-border *community* relocation might occur. It seems improbable that any country today would provide a dedicated portion of land capable of housing the whole population of a low-lying island State; thus, any future relocations would likely involve smaller settlements in several areas.

Notwithstanding these obvious contextual differences, there are some significant similarities between the Banaban relocation and potential future relocations. The degree of control that a relocated population can exert over the old and new territory needs to be determined, as does its legal status (individually and collectively) in both places. With respect

¹⁹⁶ Kiribati Constitution, ch. IX; *see further* McAdam (2016), *supra* note 1115.

¹⁹⁷ “[W]e 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”: interview with Opposition Leader Tetaua Taitai, Tarawa (11 September 2013). On political tensions, *see* K. Teaiwa, ‘Banaban Island: Paying the Price for Other Peoples’ Development’ 1 *Indigenous Affairs* (2000) p. 43.

¹⁹⁸ R.J. Nicholls and A. Cazenave, ‘Sea-Level Rise and Its Impact on Coastal Zones’ 328 *Science* (2010) p. 1519; L.A. Nurse *et al.*, ‘Small Islands’ in Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, New York, 2014) p. 1616.

¹⁹⁹ Prime Minister Bainimarama, *supra* note 22.

to self-governance, host States have historically only been willing to offer a local council-like structure, such as the Rabi Council of Leaders.²⁰⁰ Governance models for any future relocated group might draw inspiration from the constitutional safeguards granted to the Banabans in Kiribati, including special forms of parliamentary representation within the host State. They would need to be developed on a case-by-case basis, cognisant of the status of any existing minorities within the host State, and ensuring that any special benefits did not create discriminatory practices or ethnic tensions.

Finally, the Banaban experience highlights the importance of informative, participatory and transparent decision-making processes in any proposed relocation. The meaningful involvement of affected communities is essential to enhancing ownership of the process and helping to reduce new vulnerabilities and future discontent.²⁰¹ Despite the innovative legal safeguards and governance arrangements created for the Banabans, a narrative of injustice continues to characterise their self-story 70 years later.²⁰² For this reason, while formal legal and institutional protections are a crucial element of cross-border relocations, they are insufficient on their own to foster a harmonious outcome over the long term.

²⁰⁰ See e.g. the Australian government’s offer to Nauru in the 1960s: J. McAdam, ‘The High Price of Resettlement’ 48 *Australian Geographer* (2017) (online version published); G.M. Tabucanon and B. Opeskin, ‘The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration’ 46 *Journal of Pacific History* (2011) pp. 337–356.

²⁰¹ ‘Planned Relocations, Disasters, and Environmental Change (including Climate Change)’ (UNHCR, Brookings, Georgetown University, Bellagio Consultation, 18–22 May 2015) <www.brookings.edu/about/projects/idp/planned-relocations>, visited on 27 July 2016 ; McAdam and Ferris, *supra* note 32; J. Connell, ‘Population Resettlement in the Pacific: Lessons from a Hazardous History?’ 43 *Australian Geographer* (2012) p. 140.

²⁰² See McAdam (2014), *supra* note 11.