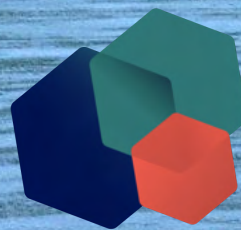


# The Displacement and Dispossession of Banaba: Justice for Rabi

POLICY BRIEF



**ICAAD**  
Human Rights Innovation

## **ACKNOWLEDGEMENTS**

This report is the product of a rich relationship between ICAAD and the Acting Rabi Council of Leaders, the Banaban Women’s Organization, and the Rabi Island Community Hub. We are deeply grateful to both our partners on Rabi as well as the Banaban elders who shared their stories as a part of ICAAD’s Activism program. Further, the depth of this project would not have been possible without the pro bono support of Clifford Chance LLP and the team of dedicated lawyers who conducted the research and connected with our partners on Rabi via video calls throughout the project.

*Importantly, this research does not constitute legal advice or definitive conclusions related to the relevant jurisdictions.*

The photographs used in the report are from Vaitoa Teaiwa Mallon who is a student studying at the University of Auckland. He is a Banaban from Wellington and hails from the village of Tabiang and Tabwewa, Banaba/Rabi.

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## SUMMARY

In 1945, the British colonial authorities and the British Phosphate Commission (BPC) relocated the entire population of Banaba Island (also known as Ocean Island and part of present-day Kiribati) to Rabi Island (present-day Fiji) to continue mining phosphate on Banaba.<sup>1</sup> The BPC exhausted the phosphate deposit on the island in the 1980s, and the mining has devastated the island ecologically.<sup>2</sup> Since 1945, some Banabans have returned to Banaba<sup>3</sup> or moved overseas, but most remain in Fiji on Rabi Island.

This policy brief is focused on the conditions on Rabi Island and the discrimination faced by Banabans as a result of extractive industry, colonial map-making, and ongoing governance challenges. As a partially self-governing entity, Rabi falls between the cracks of two jurisdictions, Fiji and Kiribati. This brief is based on the work of ICAAD, international law firm Clifford Chance and the Banaba Local Government and Civil Society (BLoGSC) Working Group, and is also informed by a series of community dialogue sessions undertaken by ICAAD on Rabi from November 2021 to June 2022. That work resulted firstly in the identification of a number of pertinent and pressing questions arising from issues relating to the Banaban community on Rabi (and on Ocean Island). Those questions were then answered and recommendations made for further work and practical next steps. ICAAD and the BLoGSC Working Group then outline key demands, in light of the exhibition at Silo 6<sup>4</sup> in Auckland, New Zealand in February and March 2023.

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<sup>1</sup> Jane McAdam, "Under Two Jurisdictions": Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations", *Law and History Review*, Volume 34, Issue 2, May 2016.

<sup>2</sup> "Destruction by Phosphate Mining", accessible at: <https://www.banaban.com/destruction-caused-phospahte-mining>.

<sup>3</sup> The Guardian, "The island with no water: how foreign mining destroyed Banaba", 8 June 2021, accessible at: <https://www.theguardian.com/world/2021/jun/09/the-island-with-no-water-how-foreign-mining-destroyed-banaba>.

<sup>4</sup> "Art Exhibit Brings Banaban Human Rights Struggles to Global Stage", ICAAD, 27 February 2023, accessible at <https://icaad.ngo/2023/02/27/art-exhibit-brings-banaban-human-rights-struggles-to-global-stage/>.

## METHODOLOGY

This research was conducted by Clifford Chance, ICAAD, and the Banaba Local Government and Civil Society (BLoGSC) Working Group, set up in Rabi. ICAAD supported the BLoGSC Working Group to lead a series of community dialogue sessions on Rabi to explore critical legal questions around human rights and displacement as well as lessons for climate mobility in the region more broadly under their Right to Life with Dignity Climate Justice program<sup>5</sup> in early 2022. ICAAD and Clifford Chance then set out to answer the questions raised. The research team held two video calls with two renowned Banaban scholar, Professor Katerina Teaiwa and longtime Climate Change activist, Pelenise Alofa. Clifford Chance shared the research via a legal memo with the broader research team which was presented in summary to Banaban elders on Rabi and the Banaban Women's Organisation in June 2022. This policy brief is based on all of the material and discussions described above.



<sup>5</sup> "Protecting the Right to Life with Dignity of Climate Displaced Persons", accessible at: <https://icaad.ngo/righttolifewithdignity/>.

## BACKGROUND

Banaba, or Ocean Island, is a high limestone phosphate atoll between the western-most edge of Kiribati and Nauru in the northern Pacific Ocean. The island is located approximately 400km from Kiribati and 300km from Nauru.<sup>6</sup> In the late 19th century, the British colonial states in Australia and New Zealand were growing. The search for phosphate for agriculture intensified with the need to support growing settler populations.<sup>7</sup> In 1900, British prospectors found that Banaba had the highest-grade phosphate which could be used for superphosphate fertilizer. Britain quickly moved to annex Banaba and incorporate the island into its existing colonial protectorate of the Gilbert and Ellice Islands.<sup>8</sup>

Britain granted the BPC, which was equally owned by New Zealand, Australia, and Britain, exclusive rights to occupy the land to collect and export phosphate. The Banabans initially agreed to the quarrying of specific sites, but the BPC ignored requests to limit the scale of mining and rehabilitate the land.<sup>9</sup> In 1915, the Gilbert and Ellice Islands colonial protectorate became a fully-fledged British colony. In 1916, Banaba was formally included in the colony's boundaries.<sup>10</sup>



*Regional map created by David Garcia.*

<sup>6</sup> Katerina Teaiwa, *Consuming Ocean Island: stories of people and phosphate from Banaba* (2015) Bloomington: Indiana University Press

<sup>7</sup> *Ibid.*

<sup>8</sup> Present-day Kiribati and Tuvalu.

<sup>9</sup> BBC, "Kiribati profile – Timeline", accessible at: <https://www.bbc.co.uk/news/world-asia-pacific-16433905>.

<sup>10</sup> *Ibid.*

Soon after, the British colonial authorities started planning for the removal of Banabans from Banaba to a new home, which would be purchased using the proceeds of phosphate mining. In 1942, the colonial authorities purchased Rabi Island in Fiji.<sup>11,12</sup>

World War II then intervened and many Banabans fled, or were deported from, Banaba by Japanese imperial forces.<sup>13</sup> In 1945, at the end of the war, the British colonial authorities and the BPC declared Banaba uninhabitable and forced the Banabans to relocate to Rabi.<sup>14</sup> The Banaban community arrived to find an entirely undeveloped island that lacked basic services or housing.<sup>15</sup>

## DECOLONIZATION

Fiji gained independence in 1970. In 1975, the Gilbert and Ellice Islands colony was divided into two separate territories. In 1979, the Gilbert Islands territory became an independent nation under the name of Kiribati. In the mid-1970s, there was a parallel bid for Banaba's own independence. This movement resulted in special provisions in the Kiribati Constitution to safeguard the rights of Banabans.

By 1979, all mining on Banaba had stopped, and **22 million tons of land had been removed. Ninety percent of Banaba's surface had been stripped away. The mining activities cut down the landscape from 80 meters above sea level to only 20-30 meters above sea level.**

In 1965, the Banabans brought legal action against the United Kingdom (UK) government and the BPC which ended in 1979 making it one of the longest civil court cases in the UK. The UK settled on an ex-gratia payment which absolved them of legal obligations, and the amount was significantly lower than the Banabans sought through court. In 1979 the Gilbert Islands were granted independence from the British government while Banaba, despite resistance, was given to Kiribati.

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<sup>11</sup> Jane McAdam, "Under Two Jurisdictions": Immigration, Citizenship, and Self-Governance in Cross-Border Community Relocations", *Law and History Review*, Volume 34, Issue 2, May 2016.

<sup>12</sup>

<sup>13</sup> *Ibid.*

<sup>14</sup> *Tito v Waddell* (No.2) [1977] Ch 106, paragraph 186.

<sup>15</sup> Julia B. Edwards, "Phosphate mining and the relocation of the Banabans to northern Fiji in 1945: Lessons for climate change-forced displacement", *Journal de la Societe des Oceanistes*, 2014, pages 138-139, accessible at: <https://journals.openedition.org/jso/7100>.

## PRESENT-DAY BANABA

A small population of Banabans remains in Banaba today. As of 2021, the population was approximately 300.<sup>16</sup> The damage to Banabans' ancestral land is extensive, and ongoing neglect by the Kiribati and Fiji governments has led to persistent human rights issues.

As a direct result of mining, Banaba no longer has a source of fresh water. In 2021, the Kiribati government built two desalination plants, but both have broken down leaving the nearly 300 people living there forced to drink contaminated water leading to outbreaks of diseases and fears of starvation.<sup>17</sup> In January 2023, the head of the Banaban Council of Elders reported that there had been no food or water imports in three months, once again calling on the Fiji and Kiribati governments to address the ongoing food and water crisis.<sup>18</sup>

Mining has also impacted food security. Phosphate mining has removed most of Banaba's fertile soil and destroyed hundreds of drought-resistant coconut and pandanus trees.<sup>19</sup> Banaba's remoteness is also a challenge for shipping provisions to account for the loss of agricultural capacity.<sup>20</sup>

Banaba also has significant deposits of badly decaying asbestos. The majority of the residential properties are built with asbestos roofing material. Several buildings on Banaba are badly damaged or former phosphate mining buildings.<sup>21</sup> Costing the asbestos removal as a part of broader remediation work is challenging because of the logistical difficulties on Banaba. There is no regular shipping route, no airfield, no local support structure, no readily available accommodation or food, and no suitable local disposal.<sup>22</sup> Rehabilitating Banaba would require rebuilding or cleaning of the underground network of caves, measures to improve food security, and removing asbestos.

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<sup>16</sup> The Guardian, "The island with no water: how foreign mining destroyed Banaba", 8 June 2021, accessible at: <https://www.theguardian.com/world/2021/jun/09/the-island-with-no-water-how-foreign-mining-destroyed-banaba>.

<sup>17</sup> The Guardian, "The island with no water: how foreign mining destroyed Banaba", 8 June 2021, accessible at: <https://www.theguardian.com/world/2021/jun/09/the-island-with-no-water-how-foreign-mining-destroyed-banaba>.

<sup>18</sup> Radio New Zealand, "Elder says water crisis on Banaba is a human rights issue", 19 January 2023, accessible at: [https://www.rnz.co.nz/international/pacific-news/482696/elder-says-water-crisis-on-banaba-is-a-human-rights-issue?fbclid=IwAROFBFRv2lFdYRRu6rA1Td3s3m7kd7detzbdveCzIWreI9JxQvB9oabo\\_po&mibextid=Zxz2cZ](https://www.rnz.co.nz/international/pacific-news/482696/elder-says-water-crisis-on-banaba-is-a-human-rights-issue?fbclid=IwAROFBFRv2lFdYRRu6rA1Td3s3m7kd7detzbdveCzIWreI9JxQvB9oabo_po&mibextid=Zxz2cZ).

<sup>19</sup> National Geographic, "Life in a harsh paradise: surviving drought on Banaba island", 12 August 2016, accessible at: <https://blog.nationalgeographic.org/2016/08/12/life-in-a-harsh-paradise-surviving-drought-on-banaba-island/>.

<sup>20</sup> *Ibid.*

<sup>21</sup> A survey carried out as part of the Pacific Hazardous Waste Project for the Secretariat of the Pacific Regional Environment Programme in May 2015 analysed 26 sample sites and found asbestos at all of them. See A four year, EUR 7.85 million project funded by the European Union to improve regional hazardous waste management. See SREP PROE, "Survey of the Regional Distribution and Status of Asbestos", 2015, accessible at: [https://www.sprep.org/attachments/pacwaste/SPREP\\_Asbestos\\_Report- RMI - Final.pdf](https://www.sprep.org/attachments/pacwaste/SPREP_Asbestos_Report- RMI - Final.pdf).

<sup>22</sup> *Ibid.*



## THE BANABAN COMMUNITY ON RABI

By 1995, the Banaban population on Rabi had grown to over 5,000 from 1,000 since 1945.<sup>23</sup> As a result of the Banabans' legal action against the UK Government and the BPC, they were awarded a fund of 10 million Australian dollars ex-gratia payment which was regulated by the Banaban Settlement Act. As a result of this fund, the Fijian government excluded the Banaban community from the mainstream development process.

This fund was clearly insufficient to support development on Rabi which remains "one of Fiji's most disadvantaged and politically marginalized communities."<sup>24</sup> Beyond the lack of development assistance, the underdevelopment on Rabi is worsened by its geographic isolation, limited information-technology infrastructure, insufficient shipping and mail services, and lack of a political voice.<sup>25</sup>

At present, governance in Rabi is led by Acting Executive Director and Interim Administrator appointed by the Office of the Prime Minister. The prior formal Council dissolved in 2013. Funding for services comes directly through the Office of the Prime Minister and administered by the interim Administrator and Acting Executive Director.

Development funds for the Rabi Council of Leaders are grouped alongside the other partially self-governing islands of Rotuma and Kioa. Based on the 2022-2023 Budget of the Office of the Prime Minister, development assistance to the Rotuma Island Council and Kioa Island Councils

<sup>23</sup> United Nations International Human Rights Instruments, "Core Document Forming part of the Report of States Parties", 14 March 2007, accessible at: <https://www.refworld.org/docid/464031c72.html>, pp. 12-13.

<sup>24</sup> S Kumar, "Poverty and Deprivation Amongst Ethnic Minorities in Fiji", *Fijian Studies: Journal of Contemporary Fiji*, January 2006, accessible at: <https://search.informit.org/doi/10.3316/informit.201516565771453>.

<sup>25</sup> United Nations International Human Rights Instruments, "Core Document Forming part of the Report of States Parties", 14 March 2007, accessible at: <https://www.refworld.org/docid/464031c72.html>, pp. 12-13.



averaged around \$140-150 per capita while assistance to the Rabi Island Council fell far behind at an estimated \$30 per capita.<sup>26</sup>

Another consequence of mining and displacement has been the loss of culture and heritage. Kinship, genealogies, protocols, customs, and land rights are the backbone of Banaban identity. The challenges Rabi faces falling between jurisdictions extend to cultural rights. For example, the Council has limited powers to make claims for the ownership and repatriation of artifacts. The relevant jurisdictions also neglect the role of preserving culture in preserving the Banaban identity. In Fiji, the lack of development assistance to Rabi means there is no longer a Banaban history and culture teacher at the Rabi School.



<sup>26</sup> In the 2022-2023 budget, \$240,000 was allocated to the Rotuma Island Council (est. 2017 population 1,594), \$70,000 was allocated to the Kioa Island Council (est. 2022 population 500), and \$155,000 was allocated to the Rabi Island Council (est. 2022 population 5,000). See Fiji Government 2022-2023 Budget Estimates, pp. 17, accessible at: [https://www.economy.gov.fj/images/Budget/budgetdocuments/estimates/2022-2023\\_Budget\\_Estimates\\_-\\_As\\_Approved\\_by\\_Parliament.pdf](https://www.economy.gov.fj/images/Budget/budgetdocuments/estimates/2022-2023_Budget_Estimates_-_As_Approved_by_Parliament.pdf).

## PHOSPHATE LEGACIES AND REPARATIONS

The Nauru Island Agreement of 1919 which established the BPC actually consisted of New Zealand, Australia, and the UK with commissioners from each country setting out to mine Banaba and Nauru. In the 1980s, the Banabans sued the UK Government and the BPC in the case, *Tito v Waddell (No. 2)*. The case disposed of many issues that would arise from “forcible displacement.” The Banabans faced numerous legal obstacles including a lack of obvious cause for action and a major time bar. The case did not succeed in securing substantial compensation for the Banabans. Furthermore, in 1981, the Banabans settled all claims against the UK, Australia, and New Zealand.

While there are theoretically several grounds for further claims against the countries responsible for the mining and displacement, international law permits only states, rather than individuals, to bring claims unless expressly provided for by a relevant treaty. In this case, that would require Fiji and/ or Kiribati to bring action against the UK, Australia, and New Zealand on behalf of the Banabans.

The deportation of the Banaban community could also constitute a crime against humanity, but there are major jurisdictional challenges to such a claim and the time that has passed since the relevant events will create numerous other legal and factual obstacles. There is precedent for reparations in other contexts involving extractive industries. In 1989, Nauru brought claims against Australia in the International Court of Justice (ICJ) for reparations for phosphate mining and failure to rehabilitate areas of the island that had been mined.<sup>27</sup> As a result, Australia agreed to pay AUD 120 million to Nauru over a 20 year period.<sup>28</sup>

The jurisdiction problem for displaced peoples persists because Kiribati would have to bring a claim and they won't because they have already received royalty payments by the UK government - valued at 1.17 billion USD compared to a smaller amount of financial compensation to the Banaban community.<sup>29</sup>

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<sup>27</sup> Nauru alleged that Australia had breached the trusteeship obligations it had accepted under Article 76 of the Charter of the United Nations and the Trusteeship Agreement for Nauru. See International Court of Justice, "Nauru v Australia, Overview of the Case", accessible at: <https://www.icj-cij.org/en/case/80>.

<sup>28</sup> New Scientist, "Nauru settles", 14 August 1993, accessible at: <https://www.newscientist.com/Article/mg13918862-500-nauru-settles/>.

<sup>29</sup> Kiribati Government, "2021 Recurrent Budget", accessible at: [http://www.mfed.gov.ki/sites/default/files/FINAL%20RB2021\\_AS%20APPROVED%20BY%20THE%20MM\\_03.12.2020.pdf](http://www.mfed.gov.ki/sites/default/files/FINAL%20RB2021_AS%20APPROVED%20BY%20THE%20MM_03.12.2020.pdf).

## CITIZENSHIP

As the law currently stands, Banabans can be citizens of both Fiji and Kiribati. This has not always been the case which has resulted in confusion about Banabans' rights to dual citizenship. In Fiji, there is no specific pathway to citizenship for Banabans (for example, no specific pathway based on Banaban ancestry). The pathways to citizenship are birth, registration, and naturalization as detailed in the Fiji Constitution and the 2009 Citizenship Act. Kiribati legislation provides for Banabans' right to citizenship based on ancestry. However, it is less clear whether and how this is realized in practice.

The historical ban on dual nationality has led many Banabans to surrender their citizenship of other countries in order to maintain one citizenship of choice. Even though the law in both Fiji and Kiribati currently allows dual citizenship, many Banabans fear their ability to apply for and hold citizenship in both countries could be threatened. In the short term, there is a need to inform members of the Banaban community about their rights to dual citizenship. In the long term, the Banaban community would benefit from guarantees from the governments of Fiji and Kiribati that neither will interfere with Banabans' rights to hold dual citizenship.

Further support is needed to assist "undocumented" Banabans living in Rabi including clarifying procedures and reducing the financial burden on those Banabans who had previously surrendered their Fijian citizenship and are in the process of reapplying for Fijian citizenship now that dual citizenship is permitted. Further support is needed to help Banabans understand and navigate the different application processes for Fijian and Kiribatian citizenship (for example by sharing educational materials or connecting the Banaban community with Fijian immigration lawyers), and this support should extend to members of the Banaban diaspora living elsewhere.



## KEY DEMANDS

The following demands were developed by ICAAD and the BLoGSC Working Group informed by this research and ongoing community dialogue.

- 1) **The Kiribati government must take immediate action to ensure access to basic food supplies and clean water on Banaba.** This should also include long-term solutions like developing and improving of infrastructures (e.g. a wharf and airport), re-establishing a consistent shipping schedule and repairing the desalination plants. Importantly, the Kiribati government must implement the SOPAC report for Banaba's rehabilitation beginning with the urgent removal of asbestos.
- 2) **The Fiji Office of the Prime Minister should embark on an urgent fact-finding mission to Rabi to evaluate development outcomes.** This trip should also include a scoping assessment to plan an election to reinstate the Rabi Council of Leaders. A comprehensive list of suggested amendments to the Banaban Settlement Act 1970 can be found in Appendix A.
- 3) **Both the Kiribati and Fiji governments should extend guarantees of dual citizenship for Banabans.** This has not always been the case, and this guarantee is crucial for the enjoyment of a number of human rights.
- 4) **Both the Kiribati and Fiji governments should extend support to Banabans applying for citizenship.** This should include reducing application fee and simplifying processes.
- 5) **The Fiji government should establish a Ministry for Minor Ethnic Groups** with a specific budget for development assistance on Rabi, Kioa, and Rotuma.
- 6) **The UK, Australia, and New Zealand governments must pay into Loss and Damage funds** which compensate vulnerable countries, given the economic and non-economic impacts of extractive industry and pollution borne by the mining period.



## **APPENDIX A: SUGGESTED AMENDMENTS TO THE BANABAN SETTLEMENT ACT 1970**

The following appendix elaborates on suggestions to the Banaban Settlement Act 1970, developed by the BLoGSC Working Group.

- 1) Section 2: Elder should be better defined as being Banaban over the age of 60. The definition for Banaban Customary Law could also be added here.
- 2) Section 3: With regard to the Council of Leaders, instead of only meeting at least 6 times a year, the Council should meet at least monthly. Council members should also be term-limited to four full terms.
- 3) Section 3A: Candidates for the Council or Board should be disqualified if they were ever convicted of any sort of fraud or financial crimes.
- 4) Sections 4 and 6: Where there is a conflict between the Council and the Banaban Trust Fund Board entering into contracts or suing and being sued, the Board's power should trump that of the Council.
- 5) Section 5: The powers of the Tribunal and Rabi Island Court should be independent from the Council. The Council should not have the power to regular the Court because that makes the Court subordinate, rather than separate and equal. Currently, the Judicial and Legal Services Commission is empowered to restrict the powers of the magistrate court (Section 7(3) of the Magistrate Court Act), so it is not necessary to have the Council also regular the Rabi Island Court.
- 6) Section 8: The Rabi Island Court should be promoted to a second-class magistrate, meaning the sentencing power would increase from criminal cases up to a maximum imprisonment of six months and/ or a fine of \$100 to a maximum imprisonment of one year and/ or a fine of \$200.
- 7) Banaban Council Regulations 1951, Section 10 [reg 2]: There are a number of recommended amendments to the process of elections for the council.
  - a) Sub section 5: Residential status for voting should be clarified to residing in one of the four Rabi villages at the time of voting, and the legal age should be changed from 21 years to 18 years of age to align with the legal voting age in national elections.
  - b) Sub section 6: Instead of just being nominated by two qualified electors to run for Council, a candidate must instead collect a petition of at least fifty electors within their specific village before being eligible to run.
  - c) Sub section 7: Instead of paying a deposit of \$50 to run for Council, candidates should be required to pay a non-refundable fee of \$100 to the Rabi Island Fund.

- d) Sub section 9: The requirement that Council Members consult with their communities after each sitting should be clarified to require that Members attend an open meeting in their village, with advance notice provided through collaboration with the village chairperson.
  - e) Sub section 10: In the process of dismissing a Council Member, the immediate recourse of suspension pending dismissal should be clarified, adding that the village committee shall oversee and activate the suspension.
  - f) Additional eligibility requirements should be added for potential candidates for Council elections including that they have resided on Rabi for at least one year, the year prior to running. Candidates should also be required to attend a training offered by the Rabi Island Court on customary and local land laws. If elected, Council members will also need to continue residing on Rabi during their term in office.
- 8) Banaban Council Regulations 1951, Section 10 [reg 6]: Instead of mandating that the Executive Director themselves be responsible for the carrying out of all Council administrative work, the job of an Administrative Officer should be added to the statute, to work directly under the Executive Director and assist with all the administrative work.
  - 9) Banaban Council Regulations 1951, Section 10 [reg 7]: Members of the public should be generally admitted to Council meetings. Closed meetings should be the exception to the rule.
  - 10) Banaban Council Regulations 1951, Section 10 [reg 10]: A section should be added relating to decisions on land allocation to require two council members from the village where land is located to meet with the village chairman in an open meeting to discuss intention. If a formal dispute arises, then the matter must go before the Land Court Judge.
  - 11) General suggestions for improving the Banaban Settlement Act to better serve the Banaban community.
    - a) Public service departments should be enshrined into local government. The current departments in place are the Department of Water Supply, the Department of Social Welfare, the Department of Lands Office, the Department of Youth, and the Department of Local Rabi Police. Many of these existing departments could be improved by defining their purpose and duties in the BAS.
    - b) A number of public service departments should be added, falling under the direction and management of the Executive Director. These may include departments of transportation, infrastructure, tourism, ports and roads, business licensing, regulation and taxation, waste management, conservation, health, and

education and traditional knowledge. These departments could also increase local government revenue by levying taxes and establishing fines and fees.

- c) There must be a legal avenue where Council decisions can be disputed in the Rabi Island Court, a requirement that new laws are endorsed by the people before being passed, and a designated government role for disseminating news from the Council to the community.
- d) The powers and duties of the village land committees should be defined. This should also include village election rules and areas that fall under the committee's purview such as the upkeep of villages, infrastructure maintenance, roads, water, electricity, and new allocation of land.
- e) The National Government and Rabi Island Court should establish an arrangement to have any summons issued by the Rabi Island Court served and enforced by local Fiji law enforcement.
- f) The Rabi Island Court should also have jurisdiction over civil matters including local adoptions, health matters, wills and probate, and transportation matters.

## APPENDIX B: INTERNATIONAL HUMAN RIGHTS MECHANISMS

International human rights mechanisms as detailed below provide pathways for advocacy around human rights concerns. While there is no direct enforcement, each treaty has opportunities for non-government stakeholders to participate and voice concerns that will be raised during the state party (Fiji or Kiribati's) international review. ICAAD has experience in producing these reports and is happy to collaborate should they be seen as an effective advocacy pathway. Further, a comprehensive analysis of breaches of international human rights treaty obligations could draw on evidence of discrimination against the Banaban community.

Human Rights Treaty	Rights Protected	Signatory
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1969	CERD defines and prohibits racial discrimination. State Parties have declared that racial discrimination should be outlawed and have pledged themselves to abide by the terms of the Convention.	Fiji
International Covenant on Civil and Political Rights (ICCPR) 1966	ICCPR defines a range of human rights including those relating to: freedom from torture and other cruel, inhuman or degrading treatment or punishment, fair trial rights, freedom of thought, religion and expression, privacy, home and family life, and equality and non- discrimination.	Fiji
International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966	ICESCR ensures the enjoyment of economic, social and cultural rights, including the rights to: education, fair and just conditions of work, an adequate standard of living, the highest attainable standard of health, and social security.	Fiji
United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984	CAT aims to tackle and prevent the use of torture and other forms of cruel, inhuman or degrading treatment or punishment. This means they have made a commitment to ensuring their laws, policies and practices are in line with its provisions.	Fiji, Kiribati
Convention on the Rights of the Child (UNCRC) 1989	CRC defines the rights of young people under the age of 18. It includes the right to education, the right to play, the right to health and the right to respect for privacy and family life.	Fiji, Kiribati
Convention on the Rights of Persons with Disabilities (UNCRPD)	CRPD is about the rights of disabled people. That can be a person who has an impairment, illness, injury or health condition and who may	Fiji, Kiribati



2008	face barriers to being included in society.	
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Fiji has ratified a number of human rights treaties relevant to general claims about the socio-economic deprivation faced by the Banabans including ICERD, ICCPR, and ICESCR. Kiribati has ratified CAT, CRC, and CRPD which are relevant to concerns about disability rights, children's rights, women's rights, and freedom from torture.

NGOs can submit shadow reports, joint reports, or violations of these treaties can be used in other advocacy efforts. As an example of what a report to one of these treaty bodies may look like, we can look at socio-economic deprivation including poor quality of housing and limited access to education and employment. There are a number of potential breaches of international human rights treaty obligations, but this example will allow us to explore what evidence might be drawn upon and which treaties might apply.

In terms of evidence, there are a number of sources that could support claims around socio-economic deprivation related to access to housing, education, and employment. Some examples of evidence may include:

- Banabans live in Housing Authority and Public Rental Board flats
- Banabans are only allowed to have one family in each house, unlike iTaukei families who are permitted to have multiple families in one house<sup>30</sup>
- There are no scholarships exclusively for Banaban children
- Banabans are unfairly prejudiced by only being able to access the very competitive merit-based Public Service Commission scholarships and multi-ethnic scholarships which do not have quotas for Banaban children.<sup>31</sup>

## UNIVERSAL PERIODIC REVIEW

The Universal Periodic Review is one of the primary international human rights mechanisms that stakeholders and NGOs can engage with. The UPR is universal in the sense that all 193 UN Member States undergo this review, so there is no specific ratification process, unlike other treaties.

As stated in the name, it is also a periodic peer-review that States go through every four and a half years. The Human Rights Council undertakes review three times a year. Stakeholder reviews are a really important part of the process and offer a way for non-government stakeholders to have their say on the State's human rights record and State recommendations being made.

<sup>30</sup> Minority Rights Group International and Citizens' Constitutional Forum, "Fiji: The Challenges and Opportunities of Diversity", 2013, accessible at: <https://paperzz.com/doc/8825241/fiji--the-challenges-and-opportunities-of-diversity>.

<sup>31</sup> Minority Rights Group International and Citizens' Constitutional Forum, "Fiji: The Challenges and Opportunities of Diversity", 2013, accessible at: <https://paperzz.com/doc/8825241/fiji--the-challenges-and-opportunities-of-diversity>, p. 26.

As with all treaty bodies, joint submissions by multiple NGOs are more likely to be referenced in the summary and recommendations. The reports themselves are typically 5-10 pages, depending on if it's an individual or joint submission. They also include first-hand information assessing the implementation of past recommendations with corresponding recommendations going forward.

Fiji will be in the 48th session, and Kiribati will be in the 49th session of the Universal Periodic Review with stakeholder report submission deadlines of 27 June 2024 and 26 September 2023, respectively.<sup>32</sup>

## ICERD

In the context of socio-economic deprivation, the relevant provision in ICERD is article 2 which requires the State Party to prohibit racial discrimination by any persons, groups, or organizations. As an example, this could include instances where the Fijian government has either adopted policies which discriminate against Banabans or failed to adopt policies which would address the discrimination they are already facing.

The Committee has already highlighted some of Fiji's shortcomings in past sessions. In 2003, the Committee pointed out that Fiji's affirmative action programs largely favor Indigenous Fijians and Rotumans while Indo-Fijians and Banabans have experienced increasing poverty.<sup>33</sup> The Committee has also highlighted the need for equal representation of ethnic groups, including Banabans, in state institutions and public administration.<sup>34</sup>

In 2012, the Committee recommended that the Fiji government address the lack of disaggregated information relating to the economic, social, and cultural rights of people belonging to less numerous minority groups.<sup>35</sup>

Fiji's latest state part report was due 10 February 2016, so it is difficult to ascertain when the next review will take place. However, the CERD committee accepts civil society reports at any time. A stakeholder report may respond to the lack of disaggregated data to "act as the eyes and ears of the Committee."<sup>36</sup> More information about stakeholder reports to the CERD Committee can be found on the [OHCHR website](#).

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<sup>32</sup> See UN Human Rights Council, 4th UPR cycle: contributions and participation of "other stakeholders" in the UPR, accessible at: <https://www.ohchr.org/en/hr-bodies/upr/ngos-nhris>.

<sup>33</sup> United Nations, CERD Concluding Observations, CERD/C/62/CO/3, paragraph 16.

<sup>34</sup> United Nations, CERD Concluding Observations, CERD/C/FJI/CO/17, 2008, p. 4. ; United Nations, CERD Concluding Observations, CERD/C/FJI/CO/18-20, 2012, p. 3.

<sup>35</sup> United Nations, CERD Concluding Observations, CERD/C/FJI/CO/18-20, 2012, p. 2-3.

<sup>36</sup> Joint Committee of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission, *A User's Guide to the International Convention on the Elimination of Racial Discrimination*, 2003, accessible at: <https://www.ihrec.ie/documents/a-users-guide-to-the-international-convention-on-the-elimination-of-racial-discrimination/>, p. 23-25.

## ICESCR

For the protection of socio-economic rights, the ICESCR is the best fit. The ICESCR requires states to fulfill minimum core obligations to ensure minimum essential levels of economic, social, and cultural rights are upheld. While this is a general requirement, the Committee has also noted the cross-cutting obligation of states to not discriminate based on race as detailed in ICERD.

When it comes to housing and employment as two categories of socio-economic deprivation, the Committee details specific attributes of Article 11, right to adequate housing and Article 6, the right to work. Adequate housing includes the legal security of tenure, availability of facilities essential for health, security, comfort and nutrition, and affordability and habitability.<sup>37</sup> The right to work includes availability, accessibility, acceptability, and quality.<sup>38</sup>

All of these attributes may be used to collect information about the housing and employment rights of Banabans in Fiji. It may be possible to establish a violation of the right to adequate housing or work on the basis that what is provided to Banabans falls below the minimum obligation and/ or is inadequate as a result of Fijian policies based on ethnic origin.

Fiji's latest state part report was due 16 November 2020, so it is difficult to ascertain when the next review will take place. The CESCR committee prefers reports from coalitions of stakeholders six to ten weeks prior to sessions which would be scheduled after a state party report is submitted. More information about stakeholder reports to the CESCR Committee can be found on the [OHCHR website](#).

## ICCPR

The ICCPR may be an avenue for redress for other human rights violations; however, it would be difficult to make a claim for socio-economic deprivation under this treaty. There was potential for considering Article 7 as the protection of socio-economic rights, as it reads:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>39</sup>

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<sup>37</sup> United Nations, "CESCR General Comment No. 4: The Right to Adequate Housing (Article 11 (1) of the Covenant)", accessible at: <https://www.refworld.org/docid/47a7079a1.html>.

<sup>38</sup> United Nations, "CESCR, General Comment No. 18: The Right to Work (Article 6 of the Covenant)", accessible at: <https://www.refworld.org/docid/4415453b4.html>. E/C.12/GC/18.

<sup>39</sup> Article 7, "ICCPR", accessible at: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

Subsequent decisions have narrowed the scope of this definition to require a high level of deliberate harm to qualify as a violation under the ICCPR.<sup>40</sup> Similar to other treaties, Fiji is behind schedule in submitting their state party report. A stakeholder report for Fiji's next review or information submitted generally to the committee could address other human rights violations as defined in the provisions of the ICCPR, it is not the best fit for socio-economic deprivation.

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<sup>40</sup> Immigration and Protection Tribunal New Zealand [2012] NZIPT 800091, accessible at: [https://www.refworld.org/cases,NZ\\_IPT,4f425a932.html](https://www.refworld.org/cases,NZ_IPT,4f425a932.html), paragraphs 160-161.

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