ENVIRONMENTAL MIGRATION IN THE PACIFIC: RESETTLEMENT AND LEGAL FRAMEWORKS FOR PROTECTION

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Abstract

Environmental migration is not a new phenomenon in the Pacific. Pacific Islanders have moved across great distances in the past and environmental threats have been among the triggers. However, long-term climatic processes suggest that environmental migration will increase over the coming years. The Pacific region, with its low-elevation island nations, is particularly vulnerable to environmental challenges, and is predicted to be among the areas where the adverse effects of environmental change will be felt most keenly. This thesis examines the role of law and legal policy towards migration and protection of environmental migrants in the Pacific. Its aim is twofold: to identify admission opportunities for Pacific environmental migrants in Pacific Rim countries, and to explore avenues for protecting the culture and identity of resettled migrants in their host communities. The study is a multidisciplinary thesis by publication, comprising seven articles that have been published or accepted for publication. The first two explore migration opportunities, while the other five are case studies corresponding to what the thesis claims to be attempted (Nauru), failed (Bikini) and successful (Banaba) cases of resettlement in the Pacific. The thesis adopts a range of methodologies, including doctrinal analysis, archival work and qualitative interviews. The thesis concludes that, absent an international regime, the most pragmatic approach for dealing with environmentally-displaced peoples in the Pacific is through a liberal implementation of domestic migration policies. Additionally, the promotion of minority rights and the protection of the collective identity of environmental migrants in their host societies are critical components of successful long-term resettlement

Statement of Candidate

I certify that the work in this thesis entitled "Environmental Migration in the Pacific: Resettlement and Minority Protection" has not previously been submitted for a degree, nor has it been submitted as part of requirements for a degree, to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research, and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

Gil Marvel P.Tabucanon

Acknowledgement

It has been a long journey. The process of writing the seven articles has taken me to different places and archives in Australia and two other Pacific countries, namely, Fiji and the Marshall Islands. I have read countless documents, books and journals as well as met people, including academics, fellow researchers, and not least, both first and later generation settlers involved in the case studies. My interactions with them, and hearing about their perspectives have transformed me in many ways. I can only say with humility that my research experience has been as enriching as it has been life changing in the way I now regard community resettlements in the Pacific.

I want to express my gratitude to Macquarie University for the grant of an International Macquarie Research Excellence Scholarship (iMQRES), and other research and travel grants that allowed me to conduct the research presented in this thesis.

I am equally grateful to my primary supervisor, Professor Brian Opeskin of Macquarie University, and adjunct supervisor, Professor John Connell of Sydney University, for their meticulous guidance and patience during the entire time I grappled with the rigours of writing and research. The depth of my gratitude to you, Sirs, is without bounds.

I am also thankful to Judy Davis for her excellent cartographic work that I used in the case studies.

Special mention of fondness and gratitude goes to my wife Ruby and children August, Caroline and Justinian, to my parents and siblings, as well as my relatives in Berowra and friends in Sydney, for their companionship, love, and understanding without which I could not have finished this work.

Not least, I dedicate this work to the Nauruans, Banabans and Bikinians, as well as to all the environmental migrants of the world. May the world heed the lessons from your experiences, and become better and wiser custodians of our planet.

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Candidate's Contribution to Each Paper

The articles included in this thesis were written by this Candidate, including the development of their concept, data collection and analysis. The Nauru article, however, needs qualification: while I did all the foundational research, archival work in the Queensland State Archives in Brisbane and have written the first draft, it was my co-author Professor Brian Opeskin who suggested the case study, reworked the draft and bibliography, and attended to the authors' correction for publication.

LIST OF ABBREVIATIONS

AALCO	Asian-African Legal Consultative Organization
ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
AU	African Union
C107	International Labour Organization Convention No. 107
C169	International Labour Organization Convention No. 169
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBSA	Canada Border Services Agency
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CIREFCA	International Conference on Central American Refugees
COFA	Compact of Free Association
CRS	Congressional Research Service
CRC	Convention on the Rights of the Child
CTH	Commonwealth
DED	Deferred Enforced Departure
DIAC	Department of Immigration and Citizenship (Australia)
EDP	Environmentally-Displaced Person
EIPM	Environmentally-Induced Population Movement
FCNM	Framework Convention for the Protection of National Minorities
GEF	Global Environment Facility Trust Fund
HFA	Hyogo Framework for Action
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICRC	International Committee of the Red Cross
IDDRI	Institute for Sustainable Development and International Relations
IDPs	Internally Displaced Persons
IIED	International Institute for Environment and Development
IPCC	Intergovernmental Panel on Climate Change
ILO	International Labour Organization
IMMACT	Immigration Act of 1990 (United States)
IOM	International Organization for Migration
LDCTF	Least Developed Countries Trust Fund
MRT	Migration Review Tribunal (Australia)
OAS	Organisation of American States
OAU	Organisation of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs (UN)
PAC	Pacific Access Category (New Zealand)
PIC	Pacific Island Countries
PNG	Papua New Guinea
QLD	Queensland
RDAF	Regional Development Australia Fund
RRT	Refugee Review Tribunal (Australia)
RSE	Recognised Seasonal Employer (New Zealand)
SCCF	Special Climate Change Trust Fund

SWP	Seasonal Worker Program (Australia)
TPS	Temporary Protection Status
TPV	Temporary Protection Visa
TSR	Temporary Suspension of Removal
UCLA	University of California, Los Angeles
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNEP	United Nations Environment Programme
UNESCO	United Nations Education, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNISDR	United Nations Office for Disaster Risk Reduction
UNTS	United Nations Treaty Series
US	United States
USCIS	U.S. Citizenship and Immigration Service
WB	World Bank
WBCSD	World Business Council for Sustainable Development

PART I

THE BACKGROUND

Chapter 1

1. Introduction

Resettlement is not a new phenomenon in the Pacific. Environmental threats, whether natural or human-induced, have been identified among the triggers of the movement. In 1946 Bikini Islanders were relocated by the United States government to another atoll in the Marshalls due to nuclear tests,[1] while in 1951 the condominium government of New Hebrides (now Vanuatu) relocated Ambrym Islanders to safer islands due to volcanic eruption.[2] In recent years, environmental events and processes triggered by global warming indicate that resettlements from vulnerable communities will become increasingly likely. The isolation, small size and relative lack of development of many Pacific islands make the Pacific peoples and communities highly vulnerable to the impacts of environmental change.[3] According to the Intergovernmental Panel on Climate Change, the "greatest single impact" of environmental and climatic changes will be on "human migration and displacement."[4] Yet, climate change is not be the only trigger for environmental migration or community relocation in the Pacific. The effects from mining in mineral rich nations of the Pacific such as Papua New Guinea, as well as the need to acquire land for development projects often lead to relocation of communities, albeit on a smaller and more localised scale than that expected from climate change. While most environmental migrations are expected to be internal and temporary, permanent international relocation may be necessitated.

Environmental migration may be voluntary and proactive, done in anticipation of extreme environmental changes, or it may be reactive and forced, done as an act of survival to escape from imminent environmental threats. The categories are not exclusive but part of a continuum, with most movements falling within the grey area of being neither purely voluntary nor purely forced. Environmental migration may be short-term and temporary, with

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1 Jonathan Weisgall, 'The Nuclear Nomads of Bikini' (1980) 39 *Foreign Policy* 77.

2 Robert Tonkinson, 'The Exploitation of Ambiguity: A New Hebrides Case ' in Michael Lieber (ed), *Exiles and Migrants in Oceania* (University Press of Hawaii, 1977) 269.

3 Robert Nicholls and Richard Tol, 'Impacts and Responses to Sea-level Rise: A Global Analysis of the SRES Scenarios over the Twenty-First Century' (2006) 364 *Philosophical Transactions of the Royal Society* 1073.

4 Intergovernmental Panel on Climate Change, 'First Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC, 1990).

migrants returning to their homes once the threat has subsided, or it may be long-term, when return is not possible or when the migrants themselves decide to make their resettlement permanent. It can also be internal or international.

Walter Kälin identifies five kinds of conditions potentially triggering environmental migration: (1) ‘‘sudden-onset disasters,” such as flooding and storms; (2)‘‘slow-onset environmental degradation,” such as those caused by “rising sea levels, increased salinization of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification’’; (3) the ‘‘so-called ‘sinking’ small island states’’; and (4) those parts of the country designated by governments as ‘‘high-risk zones too dangerous for human habitation on account of environmental dangers’’; and (5) environmentally-triggered conflicts which in turn cause displacements.[5] While the decision whether to move or stay is influenced by many factors —social, economic or purely personal—that are not related to the environment, nonetheless, the seriousness of the threat of current environmental and climatic changes is such that it would be irresponsible to ignore its potential to induce forced migrations, or at least strain to the utmost existing channels of migration.

Understood conventionally, migration entails voluntariness on the part of migrants in deciding when and where to move, while an element of involuntariness is an attribute of displacements. Migration happens when the decision to leave is “taken freely by the individual concerned, for reason of personal convenience and without intervention of an external compelling factor.”[6] Displacement, on the other hand, involves an involuntary physical eviction where decision-making processes of those who relocate are coerced or restricted.[7] While migration subsumes cases of undocumented or irregular migrants, that is, migrants who cross international borders in violation of immigration laws of the host state, “refugees, exiles, or others compelled to leave their homes” for reasons ranging from widespread conflict situations, construction or development projects, or the presence of environmental threats, are generally considered displaced persons.[8] The distinction between migration and displacement is, however, not straightforward. This is particularly true in cases

[5] Walter Kälin, 'Conceptualizing Climate-Induced Displacement' in Jane McAdam (ed), Climate Change and Displacement: Multidisciplinary Perspectives (Hart Publishing, 2010) 85.

[6] United Nations Commission on Human Rights, 'Report of the Intergovernmental Working Group of Experts on IDPs' (UNCHR, 1997) 15.

[7] Theodore Downing, 'Avoiding New Poverty: Mining-Induced Displacement and Resettlement' (IIED and WBCSD, 2002) 5.

[8] Guy Goodwin-Gill, 'UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield’ USCR World Refugee Survey 2000' (USCR, 2000) 164.

of environmentally induced movements where "many important migratory flows are not easy to categorize as one or the other."[9] Many instances of environmentally induced migration are "[c]onceptually sandwiched between [that of] voluntary migrants and refugees," as movements are influenced by varied levels of deficiencies (or anticipated deficiencies) in one's socio-economic or physical environment.[10] Some individuals recognise the slow but progressive deterioration of the home environment and leave voluntarily; while those who remained may have "failed to recognize the change" or "lacked the means" to leave and are ultimately compelled to leave when environmental conditions become a grave threat.[11]

For lack of a better term encapsulating the full remit of situations where people have to leave their homes due to environmental changes, this study will use the term environmental migration as suggested by the International Organization for Migration (IOM). The IOM defines environmental migrants as those who for "compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad."[12] This definition has been chosen for its equal application to situations involving voluntary or forced movements as well as relocations which are temporary or permanent, and internal or international. Implicitly, the term includes migrations involving individuals and entire communities. A longer discussion on environmental migration is provided under the theoretical frameworks section of this chapter.

Resettlement entails the planned transfer of populations from one location to another. It is a "planned social change that necessarily entails population movement, population selection and most probably population control."[13] Resettlement is distinguished from ordinary migration in two senses: while migration generally covers cases involving an individual or a family, resettlement denotes collective movement, that is, a planned movement of sizeable groups of individuals or entire communities. Secondly, while migration is associated with voluntary movements, resettlement often involves forced transfers. While this study uses the blanket term of environmental migration, in the context of Pacific environmental migrations

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9 Diane Bates, 'Environmental Refugees? Classifying Human Migrations Caused by Environmental Change' (2002) 23(5) *Population and Environment* 467.

10 Ibid.

11 Ibid.

12 International Organization for Migration, 'Migration and Environment' (IOM, 2007).

13 Robert Chambers, *Settlement Schemes in Tropical Africa: A Study of Organizations and Development* (Routledge and Kegan Paul, 1969) 5.

which potentially involve the relocation of entire communities as an adaptation strategy to the effects of environmental change, resettlement is the more apt term to refer to these planned population movements if they are coerced.

Extreme environmental changes are expected to trigger migration from countries in the Pacific region. "It seems likely," for instance, according to Jon Barnett and Michael Webber, that "beyond a 2ºC rise in global average temperature, decision makers will need to plan for both spontaneous and planned community relocations."[14] While low-lying atolls—including the island nations of Kiribati, Tuvalu and the Marshall Islands, are often mentioned among the countries likely to experience community relocation— this does not mean the larger countries of the Pacific are not vulnerable. The capital cities of Fiji, Solomon Islands, Papua New Guinea, Tonga and Vanuatu, not to mention other areas of heavy population and infrastructure concentration, are located along coastlines exposed to long-term climatic processes. But while larger islands have higher grounds for populations to move to, this option is not available to low-lying atoll nations. Given the possibility of even a "moderate amount of climate change over the next century," atoll countries may ultimately become unsustainable as human habitations.[15]

It is possible the bulk of mass migrations may not necessarily conform to alarmist estimates and projections.[16] Movements may be deferred given the "full gamut of adaptation responses, and their barriers and limits, has not been adequately assessed," and given people's natural reluctance to "move from islands that sustain their material cultures, lifestyles and identities."[17] Nonetheless, should severe drought (leading to depletion of fresh water reserves) or large scale inundation from king tides or sea level rise occur, international resettlement from atoll nations will likely be an only option. Should this happen, the international community must ensure not only the settlers' physical survival but the retention and protection of their social and cultural heritage, not least their collective identity as unique communities and peoples.

The thesis is a multidisciplinary study of current migration opportunities as well as past cases of actual or attempted resettlement of communities in the Pacific. Presented as a thesis by

[14] Jon Barnett and Michael Webber, 'Migration as Adaptation: Opportunities and Limits' in Jane McAdam (ed), *Climate Change and Displacement Multidisciplinary Perspectives* (Hart Publishing, 2010) 52.

[15] Jon Barnett and W Neil Adger, 'Climate Dangers and Atoll Countries' (Tyndall Centre for Climate Change Research, 2001).

[16] Etienne Piguet, 'From "Primitive Migration" to "Climate Refugees": The Curious Fate of the Natural Environment in Migration Studies' (2012) 103(1) Annals of the Association of American Geographers 154

[17] Barnett and Webber, above n 14 at 53.

publication, it explores the role of law and policy towards both short-term and long-term protection of Pacific environmental migrants. Its aim is two-fold: to identify admission opportunities in law and policy for Pacific environmental migrants in Pacific Rim countries, and to explore collective identity and cultural protection of environmental migrants in resettlement. The former relates to initial scenarios, the latter to sustainability of long-term resettlements.

2. Research Questions

The study asks: if resettlements are required today, how may they be done using current legal tools and frameworks (not only future or hypothetical legal scenarios); and, assuming resettlements become long-term, how may the migrants' collective culture and identity be protected. The questions are asked bearing in mind that, unlike the case of refugees, international law does not in the formal sense treat cross-border environmental migrants as a discrete "category of people in need of special protection."[18] At the international level there is currently no "coordinated legal and administrative system" to relocate environmental migrants in a "planned and orderly manner;[19]

To answer these questions, three sub-questions are addressed:

Absent an international legal framework for cross-border environmental migrants, do current frameworks in domestic legislation of likely destination countries provide an adequate foundation for the admission of environmental migrants in the Pacific?

2. Do states have moral obligations to protect non-citizen environmental migrants by admitting them in their jurisdictions? If so, what are the strengths and limitations of these obligations?

3. How do international and domestic legal frameworks assist or hinder resettled communities in retaining their cultural heritage and identities within their host communities?

The first question asks if admission options are available for Pacific environmental migrants under the existing domestic legislation of likely destination countries in the Pacific Rim. The

[18] Jane McAdam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' in Alice Edwards and Carla Ferstman (eds), Human Security and Non-Citizens (Cambridge University Press, 2010)

[19] Ilona Millar, 'There's No Place like Home: Human Displacement and Climate Change' (2007) 14 *Australian International Law Journal* .

purpose of this inquiry is to ascertain whether flexibility exists in these countries' domestic laws for environmental migrants from Pacific countries. It particularly asks if admissions through the exercise of ministerial discretions based on humanitarian and compassionate grounds, as well as preferential admission schemes, sufficiently address potential Pacific migrations brought about by environmental change. It will identify both opportunities and challenges in legislation. The United States, Canada, Australia and New Zealand were chosen not only for their geographical proximity, high development status and relatively open migration policies but also for their long history of economic, cultural, political and colonial ties with many Pacific Island nations.

The second question takes further the problem raised in the first question. It asks whether states have a moral obligation to admit environmentally vulnerable non-citizens coming into their territories. The juristic and philosophical writings of Pufendorf, Vattel and Kant are analysed within the context of cross-border environmental migration. While arguments supporting a moral obligation for states to open their borders to environmentally distressed populations exist, contrary views based on the primacy of state interest are likewise canvassed.

The third question asks how the identity and cultural heritage of resettled communities may be protected within their host communities. Using Nauru, Banaba and Bikini as case studies of attempted or actual community relocations in the Pacific, the question explores why some resettlements fail and others succeed, and reflects on the role of identity and cultural diversity protection as aspects of a successful resettlement. The case studies were chosen for the insights which may be derived from the experiences should future relocations be necessitated in the Pacific. It builds on the works of John Campbell, who defines a successful relocation as one in which the "important characteristics of the original community, including its social structures, legal and political systems, cultural characteristics and worldviews are retained: the community stays together at the destination in a social form that is similar to the community of origin."[20]

3. Significance of the Study

[20] John Campbell, 'Climate-induced Community Relocation in the Pacific: The Meaning and Importance of Land' in Jane McAdam (ed), *Climate Change and Displacement. Multidisciplinary Perspectives* (Hart Publishing, 2010) 59.

Environmental degradations and disasters, whether due to human intervention or natural causes, are "at their foremost, human disasters."[21] This is particularly true if they occur in heavily populated areas, in which case vulnerability is aggravated. Compared to half a century ago, the Pacific region today has become heavily populated. The Secretariat of the Pacific Community (SPC) reports that the total population of its 22 member countries and territories increased from four million in 1970, to eight million in 2000, to around 10 million in 2011.[22] The population is projected to reach 15 million by 2035, although there is "considerable variety across the region, with some countries and territories even shrinking in population."[23] For instance, Niue (-2.3%) and Tokelau (-0.2%) have experienced continuous population decline due to emigration to New Zealand. Niue's population density in 2010 was estimated at 6 people per square kilometre. The most densely populated countries on the other hand as of 2010 were Nauru (485 people per square kilometre), Tuvalu (431), Guam (355), American Samoa (335), and the Marshall Islands (304).[24] Some atolls in Kiribati are also densely populated due to rapid urbanisation. Overall, the Pacific region is experiencing a yearly population growth of 188,000 people, a figure "equivalent to the population of Samoa."[25] For its sheer number alone, the high population concentration in the region has implications for the vulnerability of the island communities vis-à-vis climate and other environmental changes. Among the projected effects of climate change is an increased incidence of migration, including international relocation of entire communities.

Nonetheless, looking at the Pacific region through the lens of vulnerability is only part of the picture. The Pacific is also a mine of experience relative to past and present cases of environmentally induced migrations and relocations. It may thus be regarded as an "area that is able to *offer* information and valuable knowledge germane to the climate change concerns of the international community worldwide."[26] Of the 86 cases of community resettlements in the Pacific identified by Campbell, Goldsmith and Koshy, 50 were caused by environmental factors, out of which 37 were from "environmental variability" such as natural hazards and

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[21] Michel Prieur, 'Draft Convention on the International Status of Environmentally-Displaced Persons" (2011) 43(1) *The Urban Lawyer* .

[22] Secretariat of the Pacific Community, *Pacific Islands Population Tops 10 Million* <http://www.spc.int/sdd/index.php/en/component/content/article/1/74-pacific-islands-population-tops-10-million>.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Elizabeth Ferris, Michael Cernea and Daniel Petz, *On the Front Line of Climate Change and Displacement, Learning from and with Pacific Island Countries* (The Brookings Institution –London School of Economics, 2011) 5.

disasters while the remaining 13 were from "environmental degradation due to human actions" such as mining and nuclear testing.[27]

This thesis identifies past cases of environmentally-induced community resettlements in the Pacific, which can provide lessons on cultural and identity protection of communities in their host societies. Due to space and resource limitations, three cases were chosen: Nauru, Bikini and Banaba. Nauru represents a case of an attempted international resettlement of an entire island community; Bikini represents a case of failed resettlement, while Banaba is a case of a successful resettlement, albeit with qualifications. Each is an excellent case study of actual or potential community relocations. Two cases, namely, Banaba and Nauru, involve the possibilities of crossing "international" borders (judged from the perspective of today's geopolitical boundaries) although in fact they involved relocation within something akin to a colonial system. The Banabans, who were from the Gilbert and Ellice Islands colony, were resettled in Fiji which was at that time, like the Gilberts and Ellice Islands, also a British colony. In the case of Nauru, during the Nauruan negotiations with Australia in the early 1960s, Nauru was a trust territory within the United Nations Trusteeship system, under Australia's administrative control. For Bikini, while resettlement was within the same island group, the relocation was in response of the need for nuclear test sites by the United States, which had administrative authority over the Marshall Islands under the United Nations Trusteeship system.

The colonial set-up has advantages and disadvantages which are by and large no longer applicable to Pacific nations today. For instance, while as late as fifty years ago most Pacific nations were colonial territories, today only a few remain in an analogous situation, among them, American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn, Tokelau, which are non-self-governing territories on the watch list of the United Nations Special Committee on Decolonization ("the Committee of 24").[28] During colonial times, structural power imbalance allowed colonisers to dictate terms for relocation of colonised peoples according to the colonisers' goals. The environmental deterioration of Nauru, Banaba and Bikini attests to this. It is not the role of this thesis to ascribe responsibility for the situation. Suffice it to say, "[c]olonial administrations could make decisions about the land and community locations

[27] John Campbell, Michael Goldsmith and Kanyathu Koshy, 'Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)' (Asia-Pacific Network for Global Change Research, 2005).

[28] The United Nations and Decolonization, www.un.org/en/decolonization/specialcommittee.shtml (accessed 29 July 2013.

much easier than is currently possible where land is enshrined in laws established in independent nations."[29] As a consequence, colonial administrations could "easily move people across what are now international boundaries, as long as the territories were colonised by the same metropolitan power."[30]

Although the colonial set-up is largely inapplicable at present, still the scenarios presented by Nauru, Banaba and Bikini resonate a message for states and governments who are considering community relocation as a means of last resort should all measures of in situ adaptation fail. All three have the advantage of being cases of en masse relocations due to human induced deterioration of the home environment. Primary records are available in various archives relative to the study of each case. And it is possible to speak to the persons, who actually experienced resettlement or at least their descendants.

Overall, the significance and distinct contribution of this study is its focus not only on the admission options for Pacific peoples who may need to relocate to other states because of environmental changes, but, through an examination of cases of actual or attempted community relocations in the Pacific, it illustrates how the promotion of minority rights and the protection of the collective identity and culture of environmental migrants in their host societies are critical components of successful long-term resettlement. The protection of human cultures, like the protection of biodiversity, has value not only for particular societies concerned but for humankind. Cultural diversity is a "cherished asset for the advancement and welfare of humanity at large."[31] It is argued in this thesis that not even environmentally-induced displacements should be allowed to eradicate such diversity and heritage.

4. Methodology

This thesis is a multidisciplinary study that examines the role of law and legal policy towards migration and protection of environmental migrants in the Pacific. It is presented as a thesis by publication, consisting of manuscripts that have been published, accepted for publication, or submitted for publication in academic journals. A range of methodologies, including doctrinal analysis, archival work and qualitative interviews have been adopted, reflecting the different questions asked in each article.

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[29] Campbell, Goldsmith and Koshy, above n 27 at 27.
[30] Ibid.
[31] The United Nations Commission on Human Rights, Commission on Human Rights Resolution 2003/26 'Promotion of the Enjoyment of the Cultural Rights of Everyone and Respect for Different Cultural Identities', (UNCHR, 2003).

For the article on admission opportunities (Chapter 2), doctrinal analysis is the primary methodology. Domestic legislation and cases, as well as migration and protection policies in four Pacific Rim countries, namely the United States, Canada, Australia and New Zealand have been analysed to ascertain if flexibility exists to admit environmental migrants from the Pacific. The study explores the question whether ministerial discretion in migration and preferential admission schemes sufficiently address potential Pacific island relocations brought about by global warming and climate change. Both opportunities and challenges in legislation are identified.

The next article (Chapter 3) examines whether states have a moral obligation to admit and protect non-citizen environmental migrants in their territories. Conceptual/philosophical analysis is the primary methodology utilised to arrive at a deeper understanding of the philosophical basis for admitting environmental migrants. Three writers (Pufendorf, Vattel and Kant) were chosen based on the resonance of their writings vis-à-vis current environmental migration and protection concerns.

For the case studies on Nauru (Chapter 4), Bikini (Chapter 5) and Banaba (Chapters 6, 7 and 8), research work was done primarily through archival work and evaluation of historical material. The Bikini and Banaba articles in addition utilise doctrinal analysis in arguing for indigenous and minority rights protections. Additionally, the article on continuity and change in identity among later-generation Banabans utilises qualitative interviews.

The historical data and materials utilised in the research with respect to the attempted Nauru resettlement were derived from the following sources: (1) reports of the United Nations Trusteeship Council, the primary agency of the United Nations charged with the responsibility for the administration and supervision of the Trust Territories including Nauru; (2) the reports made between 1950 and 1965 by the six Visiting Missions to the United Nations Trusteeship Council. The Visiting Missions were tasked by the Trusteeship Council to collect first-hand information relative to the environmental situation at Nauru; (3) legal materials from the case that Nauru filed against Australia in the International Court of Justice in 1989; (4) accounts from Australian and foreign newspapers; and (5) archival materials on the proposed Nauruan resettlement gathered from the Queensland State Archives. The archival research was helpful in clarifying the contrasting viewpoints of Nauru and Australia as regards the overall terms of relocation, as well as on the details regarding the inspection of Fraser and Curtis Islands in Queensland by a delegation of Nauruans in 1962.

The data and materials used for the Bikini article were derived from the following sources: (1) documents on the Bikini resettlement held in the Nuclear Claims Tribunal in Majuro, the Marshall Islands. This researcher visited the Nuclear Claims Tribunal on 22-25 January 2013 for archival research; (2) legal materials from the cases the Bikinians filed against the United States in the U.S. Court of Federal Claims; (3) accounts from British and foreign newspapers; and (3) secondary research materials on the Bikinian resettlement. Of particular note are the reports of Leonard Mason on the relocations of the Bikinians to the various parts of the Marshall Islands. Mason was a key figure in the transfer of the Bikinians from Rongerik at a critical time when the islanders were facing starvation.

Historical materials for the Banaba articles were derived from the following sources: (1) documents on the Banaba resettlement held in the Pacific Collection Section, Barr Smith Library, University of Adelaide and the National Archives of Fiji in Suva, Fiji; (2) legal materials from the case the Banabans filed against the United Kingdom Attorney General (1971) and the British Phosphate Commissioners (1973) in the Chancery Division of the British High Court of Justice; (3) accounts from British and foreign newspapers; and (4) secondary research materials on the Banaban resettlement. The Pacific Collection of the University of Adelaide was a particularly rich source of primary materials on the Banaban resettlement, including minutes of Banaban meetings, letters, and documents collected by Henry Maude. Maude, a former Lands Commissioner for Banaba and later Resident Commissioner of the Gilbert and Ellice Islands colony, was a key figure in the purchase of Rabi Island in Fiji where the Banabans resettled. In light of the fact that the majority of Banaban materials needed for the research were available at both the Pacific Collection Section of the Barr Smith Library in the University of Adelaide and at the National Archives of Fiji in Suva, it was not necessary to undertake archival work at the Western Pacific Archive at the University of Auckland.

Qualitative field research was conducted in Fiji in February - March 2012. Nineteen members of the Banaban community were interviewed: 14 on Rabi Island and 5 in Suva. Of these, 18 were second and third generation Banabans, while one interviewee, a woman who lived in Suva, was one of the last survivors of the original 1,003 settlers who arrived on Rabi Island in 1945. She was teenager when the relocation occurred and, although of an advanced age, had retained vivid recollection of the time the Banabans first arrived on Rabi. The 18 later-generation interviewees were a convenience sample selected on the basis of their availability

and willingness to be interviewed. Some were referred by Banaban officials based in Suva and Rabi. Their age ranged from 15 to 49 years. Of the 18, two were public officials and one was head of an NGO working on Rabi, while one worked as an academic in one of the Universities in Suva. Ethics approval was obtained from the Macquarie University Human Research Ethics Committee prior to the trip to Fiji, and permission to visit and conduct interviews on Rabi was sought (and given) prior to my departure for Fiji.[32] Emails were exchanged with the Banaban Executive Director based on Rabi, and two of the interviewees including the island's magistrate were recommended by the Executive Director. For the questions, open-ended questions were prepared prior to departure. The questions however were flexible and more in the nature of a guide. The actual questions posed thus varied from person to person, depending on the interviewees' responses and willingness to proceed further. A copy of the interview questions is attached as Annex A.

5. Literature Review

While there is a large body of literature on environmental migration, particularly related to climate change, the focus here is on literature that deals with issues at the intersection of environmental migration, policy and law. Of particular relevance are migration and minority rights protection of environmental migrants in the Pacific. An extensive survey of literature was conducted to contextualise this study and identify previous works which similarly delineate protection issues among environmental migrants. The materials consulted include books,[33] journal articles, United Nations reports and publications, government reports and theses.

A ground breaking comparative study of resettled communities in the Pacific is Michael Lieber's "Exiles and Migrants in Oceania."[34] The twelve chapters in this edited collection reflect on the various aspects of resettlement in Oceania through a detailed presentation by leading Pacific scholars of ten case studies, including separate chapters on the Bikinian and Banaban relocations. A good source of historical and anthropological data, some of which

[32] Ethics Application Reference Number: 5201100813, Final Approval (24 November 2011).

[33] Alice Edwards and Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010); Étienne Piguet, Antoine Pecoud and Paul de Guchteneire, *Migration and Climate Change* (Cambridge University Press and UNESCO Publishing, 2011); Bruce Burson, *Climate Change and Migration South Pacific Perspectives* (Victoria University of Wellington, Institute of Policy Studies, 2010); Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007); Jane McAdam, *Forced Migration, Human Rights and Security* (Hart Publishing, 2008); Graeme Hugo, *Migration and Climate Change* (Edward Elgar Publishing, 2013).

[34] Michael Lieber, *Exiles and Migrants in Oceania* (The University Press of Hawaii, 1977).

were used in this thesis, the book is particularly useful in the way Lieber conceptualises key concepts used in this thesis. For instance, he uses "resettlement" as that "process by which a number of culturally homogenous people from one locale come to live together in a different locale."[35] The term is used in this thesis in this sense. Lieber further distinguishes two types of resettlements based on how communities came to be resettled. The first is "relocation" which is a "planned movement of a group of people, whose destination is determined by some outside agency"; the other, "migration", refers to "movements undertaken by individuals without the intervention of an outside agency."[36] While the categories are not mutually exclusive, and the use of the terms are at times interchanged, one can reasonably hypothesise that most forced community movements belong to the former, while the element of voluntariness is commonly present in the latter. For instance, the Banaban and Bikinian movements are community relocations in the sense that the locus of the decision to move was determined by a "forceful" third party, leaving the community little or no choice but to comply. The attempted Nauruan movement to Australia's Curtis Island in the1960s may be considered a potential relocation, even though the decision whether to relocate or stay was attended with a greater element of voluntariness than either the Banaban or Bikinian cases. Nauru's worsening environmental situation and the felt need to find a "new Nauru" were both at the core in the resettlement negotiations. Overall, "Exiles and Migrants in Oceania" is an excellent historical and anthropological study of Pacific resettlements but it does not focus on policy and legal frameworks for the protection of culture and collective identity in resettlement which is the concern of this thesis. Lieber's use of "resettlement" is adopted in this thesis with a caveat that the term involves a degree of planning and preparation, thus distinguishing it from displacement which refers to unplanned population movements.

The understanding of resettlement as planned community transfers with corresponding support systems in the new location finds resonance in development-induced displacement and resettlement (DIDR) literature. Robert Chambers, who has examined development-induced resettlements in Africa, sees resettlement as "characterized by two main features: [a] movement of population; and an element of planning and control."[37] Despite careful planning Chambers notes the inherent difficulties involved in resettlement schemes, particularly the

[35] Ibid. at 342.
[36] Ibid.
[37] Robert Chambers, *Settlement Schemes in Tropical Africa: A Study of Organizations and Development* (Routledge & Kegan Paul, 1969).

human consequences of having to move entire villages and communities.[38] This finding is echoed in both the Banaban and Bikinian resettlement experiences. Due to the negative impact of resettlement on people, Chambers argues for restraint in making decisions involving projects which require the resettlement of communities. Mengistu Woube defines a resettlement scheme as a "planned project or programme involving the transfer of people…from one region to another" decided upon by governments and sponsored by "private agencies or national or international organisations such as the World Bank."[39] To Woube, resettlement involves two processes: physical relocation and long-term adaptation. During both processes, the settlers face both "physical and mental stress."[40] From his studies, he noted that "[m]ost of the resettlement projects were designed with only short-sighted political gains in mind." Because the projects were done as "isolated entities" rather than as "integrated development programmes," this had led to land use and ethnic conflicts, land degradation and food shortages.[41] The situation as described by Woube is reminiscent of the consequences of the short sighted preparation and lack of careful planning that attended the Bikini resettlement discussed later in this thesis.

Thayer Scudder's "The Future of Large Dams" details the "social, environmental, institutional and political costs" of involuntary resettlements by presenting case studies of relocated communities in Asia, Africa and Canada. The book also explains the Stress and the Settlement Process model that he earlier developed with Colson.[42] Michael Cernea's "Risks and Reconstruction, Experiences of Resettlers and Refugees" (co-edited with McDowell), on the other hand, presents case studies of development-displaced communities as well as refugees fleeing from conflicts or natural calamities.[43] Cernea elucidates his Impoverishment Risks and Reconstruction model in the first chapter. Both Scudder and Cernea's books are rich sources of insights from years of studying involuntary community resettlements. While the case studies are mainly of resettlements from dam and development construction, nonetheless they remain instructive in their treatment of the psychological stresses and risks the settlers experience in the resettlement process. The case studies presented in both books

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38 Ibid. at 173-177.

39 Mengistu Woube, *Effects of Resettlement Schemes on the Biophysical and Human Environments: The Case of Gambela Region, Ethiopia* (Universal Publishers, 2005) 19.

40 Ibid.

41 Ibid. at 10.

42 Thayer Scudder, *The Future of Large Dams: Dealing with Social, Environmental, Institutional and Political Costs* (Earthscan, 2005).

43 Michael Cernea and Christopher McDowell, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (The World Bank, 2000).

also have a non-Pacific focus, unlike the cases in this thesis. Yet, the difficulties and frustrations the Banabans and Bikinians, especially during the early years of resettlement, find resonance in the models described by Scudder and Cernea. The Nauruans' pre-resettlement concerns and anxieties may in part be explained using Scudder's model. Both Scudder and Cernea provided useful sociological frameworks that help in the critical analysis of the materials used in this thesis. Their models are examined in more detail below under theoretical frameworks.

John Campbell's "Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)", co-written with Goldsmith and Koshy, has a Pacific focus, unlike Scudder and Cernea.[44] The report's main case study discusses the environmentally-induced relocations of the original Biausevu community of Fiji, which had experienced a history of river flooding associated with tropical cyclones. The lessons from the Biausevu experience such as the vital role of leadership, community cooperation and availability of basic resources (such as water) in the relocation resonate with the lessons from the Nauruan, Banaban and Bikinian experiences. The report likewise identifies at least 86 community relocations in the Pacific and categorises the reasons for the relocation, showing that at least 50 were from environmental causes, whether natural or human-induced. Campbell discussed the value of the land left behind by resettled communities, a subject he dealt with in further detail in his chapter on "Climate-induced Community Relocation in the Pacific: The Meaning and Importance of Land."[45] The value Pacific peoples attach to land transcends material and economic considerations. Land, as Campbell demonstrates, is inextricably linked with Pacific peoples' culture and identity. This thesis brings Campbell's insight to the level of legal frameworks and policy in protecting communities against forced relocations. If relocations are inevitable, the value that settlers attach to land needs to be taken into account in resettlement.

Neil Adger's insight into the cultural dimensions of environmental migration expands the theme on land attachment. His article entitled "Cultural Dimensions of Climate Change Impacts and Adaptation" (co-written with Barnett, Brown, Marshall and O'Brien) is significant to the overall purpose of this study.[46] The article defines culture as the "symbols that express meaning, including beliefs, rituals, art and stories that create collective outlooks

[44] Campbell, Goldsmith and Koshy, above n 27 at 28.
[45] Campbell, above n 20 at 57.
[46] W Neil Adger et al, 'Cultural Dimensions of Climate Change Impacts and Adaptation' (2013) 3 *Nature Climate Change* 112.

and behaviours," from which "strategies to respond to problems are devised and implemented;" the article further posits that culture is "often closely tied to places (physical spaces that are given meaning by people)."[47] It argues that as "culture and community are frequently rooted in place" changes in the environment will "affect cultures in diverse ways"; that the "risks are manifest globally", and "few cultures will escape the influences of climate change in these coming decades whether in the cities in the developed world or in resource dependent subsistence economies."[48] This study adopts the above perspective and definition of culture. In other articles, Jon Barnett and Michael Webber argue for the respect of social and cultural rights of peoples living on islands.[49] They note the reluctance of islanders to move out from their islands which "sustain their material cultures, lifestyles and identities," and the dangerous possibility that "powerful actors" might use the "excuse of reducing community exposure to climate change in order to conduct forced migrations for political or economic gain."[50] Considering the frustrating socio-cultural impacts on affected communities, not to mention the risks of severe economic repercussions foreseen by Cernea, the "relocation of communities should be a strategy of last resort."[51]

Richard and Charlotte Bedford in "International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu" argue for the examination of the immigration policies of Australia and New Zealand (and other countries in the Pacific region) to determine whether they can "accommodate increasing numbers of I-Kiribati and Tuvaluans in their annual streams of migrants for work, family reunion and under special programmes."[52] In their view, there is no need to wait before islands "become uninhabitable because of progressive environmental damage."[53] That "[a]mendments to existing immigration policies" favouring coordinated and managed migrations from atoll countries will have a greater chance of success and be "more acceptable" to societies in both the source and destination countries than "delaying action until the mass resettlement of people is the only option."[54] Bedford's proposal is the rationale behind Chapter two of this thesis, which

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47 Ibid.
48 Ibid.
49 Jon Barnett and Michael Webber, 'Accommodating Migration to Promote Adaptation to Climate Change ' (The Commission on Climate Change and Development, 2009).
50 Barnett and Webber, above n 14 at 53.
51 Ibid.
52 Richard Bedford and Charlotte Bedford, 'International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu' in Bruce Burson (ed), *Climate Change and Migration South Pacific Perspectives* (Victoria University of Wellington, Institute of Policy Studies, 2010) 89.
53 Ibid. at 125.
54 Ibid.

asks if windows of opportunity exist under the domestic laws of the United States, Canada, Australia and New Zealand for Pacific environmental migrants.

Roger Zetter's work, entitled "Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks", defines protection of environmentally displaced peoples in two ways: (1) as a "material commodity" such as when shelters are provided; and (2) as a set of processes or responses such as those actions which reduce threats.[55] Protection may be remedial, that is, given after the event, or proactive in such a way that it enhances the "dignity of treatment and advocacy for environmentally displaced people."[56] Additionally, Zetter argues for a "*progressive* form of rights protection norms" which may begin from temporary protections which may "then [be] scaled up to more permanent rights protection measures."[57] The concept of protection is used in much the same way in this thesis, which argues for long-term and legally proactive cultural and identity protections for environmentally relocated communities.

The legal protection of international environmental migrants is the focus of Walter Kälin and Nina Schrepfer's study entitled "Protecting People Crossing Borders in the Context of Climate Change."[58] They note that the international protection regime for environmental migrants is "marred by several gaps": (1) there is the "lack of agreed terminology" (which has legal and policy implications for their protection); (2) there are problems in the implementation of the Guiding Principles on Internal Displacement; (3) there is a "substantial lack of rules and guarantees regarding admission, stay and status of persons displaced across internationally recognized borders by effects of climate change or other sudden-onset natural disasters"; (4) there is a "gap in international law" as regards the "fate of persons leaving submerged small island states" and the "law on stateless persons does not provide sufficient protection for such persons, in particular because they are unlikely to become stateless persons in the legal sense; and (5) there is the "lack of institutional arrangements to effectively address the protection and assistance needs of persons migrating or being displaced in the context of climate change."[59]

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[55] Roger Zetter, *Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks* (Refugee Studies Centre, University of Oxford, 2011).
[56] Ibid. at 5.
[57] Ibid. at 4-5.
[58] Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (Swiss Ministry of Foreign Affairs, 2011).
[59] Ibid. at 65.

Absent an internationally binding framework protecting environmental migrants, some turn to domestic legislation for protection frameworks, even though domestic frameworks and governance practices are generally "ill-equipped to deal with environmental migration."[60] Some argue for the establishment of a new protection scheme or legal instrument independent of and separate from the 1951 Refugee Convention and its 1967 Protocol to confront climate change refugees;[61] a "Protocol" on "Recognition, Protection, and Resettlement of Climate Refugees to the United Nations Framework Convention on Climate Change,"[62] or a United Nations General Assembly resolution protecting climate migrants' fundamental rights.[63] The proposed instruments are envisaged to prevent and remedy the climate change refugee problem by establishing treaty-based human rights guarantees and protections and establishing world-wide network of institutions, a coordinating agency and a global fund. They likewise envisage an institutional readiness and availability of humanitarian aid should the need arise.

While there have been publications focussing on the intersection between law and environmental migration, relatively little attention has been given to existing rights of Pacific environmental migrants under domestic laws, and even less to the protection of the migrants' collective culture and identity in the host states. Of particular note is Jane McAdam's "Climate Change, Forced Migration, and International Law."[64] A chapter on "State Practice on Protection from Disasters and Related Harms" extensively examines "legislative and ad hoc schemes" by States for people fleeing from "disasters and environmental harm." [65] The chapter examines domestic legislation for international environmental migrants discussed in Chapter two of this thesis, including discretionary grounds for individual non-citizen claimants to stay for compassionate or humanitarian reasons, as well as a discussion on the Pacific Access Category—New Zealand's preferential migration scheme for Pacific peoples. Overall, however, McAdam's chapter has a global focus and examines "temporary protection

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[60] Benoit Mayer, 'Environmental Migration in the Asia-Pacific Region: Could We Hang Out Sometime?' (2013) 3 *Asian Journal of International Law* 101.

[61] Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349; David Hodgkinson et al, 'The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change' (2010) 36 *Monash University Law Review* 69; Mostafa Mahmud Naser, 'Climate Change, Environmental Degradation and Migration: A Complex Nexus' (2012) 36 *Environmental Law and Policy Review* 713.

[62] Frank Bierman and Ingrid Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' (2010) 10(1) *Global Environmental Politics* 60.

[63] Benoit Mayer, 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 357.

[64] Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012).

[65] Ibid. at 100.

responses, asylum type mechanisms, and ad hoc humanitarian schemes (group and individual) of existing domestic and regional frameworks in responding to climate-change movement" from a world-wide perspective.[66] Chapter two of this thesis on the other hand has a Pacific focus, and particularly looks into various migration options for Pacific peoples within domestic legislation of Pacific Rim countries, which are, arguably, the likely destination states for most Pacific environmental migrants.

Other works on environmental migration such as Gregory White's "Climate Change and Migration: Security and Borders in a Warming World"[67] focus on climate-induced migrations as a security issue i.e., how these movements are perceived as external security threats by potential destination states. Gemenne, Brucker and Ionesco's "The State of Environmental Migration" on the other hand focuses on case studies of environmental migrations triggered by both sudden-onset disasters and slow-onset events from a non-Pacific perspective.[68]

Other studies on environmental migration with a Pacific focus include the works of Bruce Burson;[69] Elizabeth Ferris, Michael Cernea and Daniel Petz;[70] the Asian Development Bank;[71] Evan Litwin,[72] and Dominic Collins.[73] While they explore various aspects of environmental/climate change displacements, among them the phenomenon of emigration from island states, they do not specifically focus on cultural and identity protection of relocated populations in the host states. Collins' discussion on the Banaban and Bikinian experience as case studies focuses on developing a planning or analytical tool to assess wider cases of resettlements, and not the cultural and identity protections of relocated populations. Pearl Binder,[74] Martin Silverman[75] and more recently John Campbell[76] have written about various aspects of the Banaban resettlement. Campbell particularly focused on the meaning

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66 Ibid.

67 Gregory White, *Climate Change and Migration: Security and Borders in a Warming World* (Oxford University Press, 2011).

68 Francois Gemenne, Pauline Brucker and Dina Ionesco, 'The State of Environmental Migration' (The Institute for Sustainable Development and International Relations –IDDRI, 2012).

69 Burson, above n 33.

70 Ferris, Cernea and Petz, above n 26.

71 Asian Development Bank, 'Addressing Climate Change and Migration in Asia and the Pacific' (Asian Development Bank, 2012).

72 Evan Litwin, 'The Climate Diaspora: Indo-Pacific Emigration from Small Island Developing States' (McCormack Graduate School of Policy and Global Studies, University of Massachusetts, 2011).

73 Dominic Noel Collins, *Forced Migration and Resettlement in the Pacific: Development of a Model Addressing the Resettlement of Forced Migrants in the Pacific Islands Region from Analysis of the Banaban and Bikinian Cases* (University of Canterbury, 2009).

74 Pearl Binder, *Treasure Islands: The Trials of the Banabans* (Angus and Robertson, 1978).

75 Martin Silverman, 'Making Sense: A Study of a Banaban Meeting' in Michael Lieber (ed), *Exiles and Migrants in Oceania* (The University Press of Hawaii, 1977) 121.

76 Campbell, above n 20 at 71.

and significance of land for resettled Pacific populations in the context of possible climate-induced displacement. None however deal extensively with legal frameworks and minority rights protection, which is the focus of the case studies presented in this thesis. Robert Kiste,[77] Leonard Mason,[78] Jonathan Weisgall[79] and more recently, Jack Niedenthal[80] have written about the Bikinian resettlement. Their focus however is on historical and anthropological aspects of the resettlement. Again, none focus on the legal frameworks and minority rights protection which is one of the core concerns of this thesis.

More generally, existing literature on the Banaban, Nauruan and Bikinian resettlement focus on the social,[81] historical,[82] anthropological[83] and political aspects[84] of resettlement. There is a gap in the literature namely, the role of policies and legal frameworks relative to the resettlement, and their implications for current concerns in environmental migration. This thesis addresses that gap and demonstrates the significance of policies and legal frameworks relative to the protection of identity, culture and minority rights of the settlers. The sustained argument for cultural and identity retention in resettlement among environmental migrants, presented by way of specific case studies , is the distinct contribution of this work and is what sets the thesis apart from other published work on the subject of environmental migration.

6. Conceptual Frameworks

This section explains and contextualises the legal and ideological frameworks that underpin the topics examined in the subsequent chapters. It begins with a discussion of "environmental

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77 Robert Kiste, *The Bikinians: A Study in Forced Migration* (Cummings Publishing Company, 1974).

78 Leonard Mason, 'The Bikinians: A Transplanted Population' (1950) 9 *Human Organization* 6.

79 Weisgall, above n 1.

80 Jack Niedenthal, *For the Good of Mankind: A History of the People of Bikini and their Islands* (Bravo Publishing, 2001).

81 Honor Maude and Henry Evans Maude, *The Book of Banaba* (Institute of Pacific Studies, The University of the South Pacific 1994); Honor Maude and Henry Evans Maude, 'The Social Organization of Banaba or Ocean Island, Central Pacific' (1932) *Journal of Polynesian Society* 262; Leonard Mason, 'Tenures from Subsistence to Star Wars, in Land Tenure in the Atolls: Cook Islands, Kiribati, Marshall Islands, Tokelau, Tuvalu' in RG Crocombe (ed), (Institute of Pacific Studies, The University of the South Pacific, 1987) .

82 Briggs Giff Johnson, *Nuclear Past Unclear Future* (Micromonitor News and Printing Company, 2009); Nancy Viviani, 'Nauru Phosphate Negotiations' (1968) 3(151) *The Journal of Pacific History* ; Maslyn Williams and Barrie MacDonald, *Phosphateers: A History of the British Phosphate Commissioners and the Christmas Island Phosphate Commission* (Melbourne University Press, 1985).

83 Wolfgang Kempf, 'Songs Cannot Die: Ritual Composing and the Politics of Emplacement Among the Banabans Resettled on Rabi Island in Fiji' (2003) 112 *The Journal of the Polynesian Society* 33; Stuart Kirsch, 'Lost Worlds: Environmental Disaster, Culture Loss and the Law' (2001) 42 *Current Anthropology* 2; Elfriede Hermann, 'Emotions, Agency and the Displaced self of the Banabans in Fiji' in Toon Van Meijl and Jelle Miedema (eds), *Shifting Images of Identity in the Pacific* (KITLV Press, 2004) .

84 Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (Oxford University Press, 1992); Helen Hughes, 'From Riches to Rags: What are Nauru's Options and How can Australia Help?' (Centre for Independent Studies, 2004).

migration" as well as related concepts and typologies. The three frameworks used in this study, namely the moral, legal and sociological frameworks are separately discussed below:

"Environmental migration" and related concepts

While there is currently no generally accepted definition of "environmental migrants," the IOM definition is helpful in capturing the broad typology of the concept. The definition's strength is its ability to capture many facets of environmental migration. For instance, the dichotomies of "voluntary" and "involuntary," "sudden" and gradual" as well as "internal" and "international" are subsumed in the definition, which is one reason why it is widely, though not universally, accepted. Another strength of the definition is that it subsumes a range of environmentally-induced movements beyond "climate-change displacement" or "climate change migration."

As a definition, however, the IOM definition is problematic. Its boundaries are too porous and blur with other categories of persons displaced for reasons other than environmental threats. For instance, it may be questioned whether persons fleeing from drought-stricken areas in search of better livelihood prospects are environmental migrants or labour migrants. The lack of clarity of the definition hinders the establishment of policies addressing the concerns of environmental migrants as a discrete category of persons whose situation otherwise deserves legal protection. One reason for the IOM definition's weakness is that it assumes a mono-causal link between the environment and migration. In fact, studies show the environment is only one of the myriad socio-cultural and economic factors that influence the decision to move. People who move out of their farms due to desertification may also be regarded as voluntary labour migrants looking for improved livelihoods. In this case the environment is only one of the factors that triggered migration. Nonetheless, the IOM definition is used here as a conceptual tool that covers migrations triggered in various degrees by environmental factors.

To counteract the simple causality suggested by the IOM definition, the terms "environmentally-induced population movements" (EIPM) and "environmentally-displaced persons" (EDP) have been proposed.[85] EIPMs are voluntary migratory movements stemming from both "natural resource deterioration and disruption compounded by social, political and

[85] United Nations High Commissioner for Refugees, International Organization for Migration and The Refugee Policy Group, 'Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migrations' (International Symposium organised by the UNHCR, IOM and RPG, 1996).

economic turmoil."[86] EDPs on the other hand are "persons who are displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one."[87] EIPMs and EDPs both recognise the multi-causal triggers of migration, including social, political and economic factors. They differ in that the decision to move in the former is voluntary while the latter is more or less forced. Another difference is that one refers to the movement, while the other focusses on the people who move. The categories are similar to Koko Warner's dichotomy between "environmentally motivated migrants" who move before grave environmental deterioration endangers their lives and "environmentally forced migrants" whose home environment has become uninhabitable.[88] The former use migration as an adaptation measure of the first resort while the latter regard migration as a survival mechanism of last resort. Some maintain that the notion of EIPM remains vague and lacks public appeal. The terms EDP and "environmental displacees," however, continue to be used, and are often distinguished from "development displacees" who are persons "relocated or resettled due to a planned land use change."[89]

Another term often discussed in media and academic circles is "environmental refugee." First used by Lester Brown of the World Watch Institute in the 1970s, environmental refugee has been used increasingly in recent years, although neither international law nor the United Nations has adopted the term. Perhaps the most quoted definition of environmental refugee comes from U.N. Environment Programme (UNEP) researcher El-Hinnawi, who observed the displacements triggered by the Bhopal and Chernobyl disasters. He defined environmental refugees as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected their quality of life."[90] Descriptive and needing little explanation, the concept quickly caught the imagination of many writers and academics. The term has been criticised as problematic for

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86 Ibid.

87 Ibid. at 4.

88 Koko Warner et al, 'Human Security, Climate Change and Environmentally Induced Migration' (United Nations University, Institute for Environment and Human Security, 2008)

89 Olivia Dun, Francois Gemenne and Robert Stojanov, *Environmentally Displaced Persons: Working Definitions for the EACH-FOR Project* < http://www.each-for.eu/documents/Environmentally_Displaced_Persons_-_Working_Definitions.pdf>.

90 Camillo Boano, Roger Zetter and Tim Morris, *Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration* (Oxford: Refugee Studies Centre, 2008).

various reasons. The United Nations High Commissioner for Refugees (UNHCR) in particular expressed its "serious reservations with respect to the terminology and notion of environmental refugees or climate refugees."[91] The terms have no basis in international refugee law aside from the fact that they tend to "undermine the international legal regime for the protection of refugees whose rights and obligations are quite clearly defined and understood".[92] Under the 1951 Refugee Convention the established legal framework caters exclusively to persecuted persons. The push to expand refugee protections towards environmentally threatened populations runs the risk of undermining the refugee framework under the Refugee Convention by diluting the already meagre resources available for the existing categories of refugees.

Kälin's typology, mentioned above, expands beyond the two oft-cited categories that trigger environmental migration: sudden-onset disasters, and slow-onset environmental degradation. His other three categories include environmental scenarios that can necessitate migration, albeit some may still happen in the future. For instance, migration could ensue from any of the following categories: relocation due to the "sinking" small island state phenomenon, relocation from areas identified by governments as "high risk zones too dangerous for human habitation," and migration from conflict situations triggered by decrease of resources due to environmental changes.[93] For Kälin, the so-called "sinking" low island states present a "special case of slow-onset disasters" for as a result of "rising sea levels and their low-lying topology, such areas may become uninhabitable. In extreme cases, the remaining territory of affected states may no longer be able to accommodate their population …[w]hen this happens, the population would become permanently displaced to other countries." Kälin's typology is significant for the purpose of this study in that it recognises the unique case and special consequences that will occur when the entire population of island states have to be relocated. Should this happen, unprecedented legal, political as well as socio-cultural challenges will need to be addressed. The case studies of past experiences of long-term

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[91] United Nations High Commissioner for Refugees, Climate Change, Natural Disasters and Human Displacement: a UNHCR Perspective, 8. http://www.unhcr.org/4901e81a4.html.

[92] Ibid. at 9. Art. 1 of the 1951 Refugee Convention as amended by the 1967 Protocol defines refugee as "[any] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[93] Kälin, above n 5 at 85-86.

community relocations presented in this thesis is an attempt to learn what may happen should en masse island resettlement be necessitated in the future.

Oli Brown describes sudden onset disasters as environmental "events", while slow-onset changes are "processes."[94] Sudden events such as earthquakes and tsunamis may or may not trigger displacements, but when they do, the displacement is temporary and does not usually cross international borders. Due to volcanic eruption, entire island residents of Niua Fo'ou in northern Tonga, Tristan da Cunha (a UK territory in the south Atlantic), and Vestmanneyjar (Westman Island) in south Iceland were evacuated in 1946, 1961 and 1973, respectively.[95] In all cases, most of the residents came back when volcanic activity ceased. Environmental processes, by contrast, such as desertification, resource depletion or sea level rise, might require permanent relocation of entire populations, sometimes crossing international borders. These processes may be triggered by natural causes or by human intervention. Gilbert Islanders from Phoenix Islands were resettled in the 1950s in the Solomon Islands due to famine; while the entire population of Banaba (also from the Gilberts) was relocated to Rabi Island, Fiji, in 1945 due to decades of phosphate mining, making most parts of Banaba Island an uninhabitable desert of coral pinnacles.

Sudden onset disasters require immediate humanitarian responses. In some cases, aid in terms of food, medicine and shelter is enough and migration is not necessary. In other cases, the extent of destruction requires migration: within days of Haiti's 2010 earthquake, for instance, Canada announced it would "speed up" Haitian family reunification visas for primary relatives, while Quebec instituted its own 'humanitarian sponsorship' program to allow humanitarian entry of both primary and secondary relatives.[96] By contrast, migration induced by prolonged slow-onset environmental processes, including a possible inundation of low lying islands due to rising sea levels, requires the resettlement of entire communities. This scenario necessitates thorough planning, preparation for availability of resources, particularly land, and trust funds as well as multi-sectoral if not international collaboration. Equally important, long-term and permanent migrations require not only the observance of individual

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[94] Oli Brown, '*Migration and Climate Change*' (International Organization for Migration Research Series No. 31 2008).

[95] James Lewis, *Development in Disaster-prone Places: Studies of Vulnerability* (Intermediate Technology Publications: London, 1999; Jelle Zeilinga de Boer and Donald Theodore Sanders, *Volcanoes in Human History: The Far-Reaching Effects of Major Eruptions* (Princeton University Press, 2004).

[96] Royce Bernstein Murray and Sarah Petrin Williamson, ' Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti' (Center for Global Development Working Paper 255, 2011) Quebec's Immigration Minister reported in January 2011 that of the 8,000 applied for sponsorship, 3,000 was selected, but the figure might reach 5,000.

human rights and protections for admission, but also collective minority rights for the protection of the migrants' cultural, ethnic and linguistic heritage in resettlement.

Moral Frameworks

Do states have moral obligations to admit and protect environmental migrants into their territory? Intuitively, most of us acknowledge a moral obligation to relieve human suffering or distress when doing so would not equally endanger our life and limb.[97] This stems from our common humanity and manifests in situations such as a stranger's instinctive, almost reflexive, response to save a child drowning in a pool. While the demand to respond is more compelling with those closest to us—such as family, neighbors and friends in the community— nonetheless the intuitive urge to aid a distressed stranger is well documented.

Writing on the universal obligation to help famine victims of Bangladesh in the early 1970s, Peter Singer posits that such an obligation extends to individuals beyond state borders.[98] His argument is premised on the fact that suffering from lack of food and medicine is bad, and that it is within the power of other states to prevent or relieve the suffering in such a situation. Singer believes that the more privileged nations can do something to reduce the number of starving people without giving up the basic necessities themselves.[99] As extreme or prolonged environmental changes not only displace people but may place them in situations of near starvation (such as the Bikini experience), Singer's arguments apply to them.

Emmanuel Kant (1724–1804) maintained that states not only have a categorically imperative moral obligation to provide humanitarian assistance and hospitality towards distressed populations beyond borders, but that such obligation requires both states and their citizens to do far more than current practices suggest. Samuel von Pufendorf (1632–1694) and Emerich de Vattel (1714–1767) on the other hand argue that states have no obligation to admit vulnerable non-citizen populations into their territories. While Pufendorf is categorical that no such moral obligation exists for states (their primary concern being self-protection), for Vattel the decision to aid affected populations is optional. Vattel is for the primacy of each states' freedom to choose who, or who not, to admit within their territories. This thesis argues that both Pufendorf and Vattel's views are problematic, from the viewpoint of justice and

[97] Brian Opeskin, 'The Moral Foundations of Foreign Aid' (1996) 24 *World Development* 21.
[98] Peter Singer, 'Famine, Affluence and Morality' (1972) 1(3) *Philosophy and Public Affairs* 229.
[99] Ibid.

fairness. It is not one's choice to be born on low lying atoll for example, thus fairness dictates that those living on higher landmasses provide safe haven and hospitality to those fleeing low grounds. Further, Puferndorf and Vattels' views are ultimately unsustainable from a human rights perspective for their likelihood in ignoring the basic human needs and rights of individuals fleeing from environmental threats. It is in this light that the thesis turns to the arguments raised by Kant as the viable option available for long-term environmental migrants. For Kant, the duty to admit distressed persons, which likely includes environmentally threatened populations, is obligatory. Kant posited that states "cannot legitimately send a person back to a country where she or he will die or be killed as a result of being sent back."[100] The state's duty to admit and provide hospitality to distressed non-citizen visitors and sojourners is founded on a human being's "right to associate" with fellow human beings "by virtue of their common possession of the surface of the earth," as "[o]riginally no one had more right than another to a particular part of the earth."[101]

The duty to provide hospitality has deeper and wider implications than seems at first. Kant seems to have anticipated the international law principle of *non-refoulement* (non-return) that applies to refugees, and in some ways expanded the scope of the principle as it is currently used. For instance, international law prohibits asylum states from returning victims of persecution to their home states pursuant to the 1951 Refugee Convention, nor may individuals be returned to places where they may face torture under the 1984 Convention against Torture or other Cruel, Inhuman or Degrading Treatment (CAT). While Kant's principle prohibits the return of anyone in distress who is seeking asylum, the *non-refoulement* right under CAT is restricted to situations involving torture and analogous conduct. [102] Kant's right of hospitality protects any forced migrants, including environmental migrants, from being returned to their home. Kant's duty to help others in distress is a

[100] Pauline Kleingeld, 'Kant's Cosmopolitan Law: World Citizenship for a Global Order' (1998) 2 *Kantian Review* 21.

[101] Ibid.

[102] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). Article 33 (1) states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Also see Convention against Torture or other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 1465 UNTS 113. Article 3(1) of the Convention against Torture (CAT) provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

categorical imperative, an absolute moral law.[103] Hospitality cannot be refused in times of distress or life threatening situations, such as environmental disasters or threats.[104] The "meritorious duty to others," arises for a person who is "going well" while "he sees that others have to contend with great hardships."[105] It may be argued that Kant's hospitality principle goes beyond physical survival, e.g. food and housing. Forced migrants, whose need for hospitality may be temporary or long-term, have needs beyond physical survival. For instance, if sea levels rise, making low lying islands uninhabitable, the need for resettlement may be permanent. The longer the resettlement, the stronger the need to protect group identity and rights, and for the migrants to retain their cultural and ethnic identity as a people.[106] Pufendorf, Vattel and Kants' views represent the divergent philosophical (and moral) viewpoints relative to the issue whether destination states have moral or legal obligations towards environmental migrants from other countries. These views contribute to a deeper understanding of the reason why gaps exist in law for the protection of cross border environmental migrants and why many states remain reticent in acknowledging, much less providing for, their protection.

Legal Frameworks

The effects stemming from environmental threats facing the world today are no respecter of state boundaries. This includes the movement of populations as a result of environmental factors. While most environmental migration is expected to occur within countries,[107] cross border migration is likely, especially where substantial portions of a state are materially affected by environmental changes.[108] Increasingly, affected states and populations will have to resort to international law, particularly human rights and minority rights, for their defence and protection.

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[103] Emmanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1997).

[104] Immanuel Kant, *Perpetual Peace* (The Bobbs-Merrill Co., 1957), 20 "Hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another."

[105] Immanuel Kant, *Foundations of the Metaphysics of Morals* (Lewis Beck trans, Bobbs-Merrill Library of Liberal Arts, 1959).

[106] Kleingeld, above n 100. According to Kleingeld, Kant's universalist arguments have greatly influenced modern day institutions, among them the League of Nations and United Nations.

[107] Roberta Cohen and Megan Bradley, 'Disasters and Displacement: Gaps in Protection' (2010) 1 *Journal of International Humanitarian Legal Studies* .

[108] Bogumil Terminski, 'Development-Induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges' (Geneva, 2013) 9.

States, as members of the United Nations, pledge to achieve "international cooperation in solving international problems of an economic, social, cultural, or *humanitarian* character."[109] To achieve this, they covenant to promote human rights and dignity "for all" regardless of "race, sex, language, or religion." The use of "humanitarian" in this context is generic, referring to the promotion of human welfare generally, and not particularly to war or conflict situations.

a. Human Rights Law

The present human rights system is based upon the foundational principles of universal rights for all human beings enunciated in the *Universal Declaration of Human Rights* (UDHR) adopted by the United Nations General Assembly on 10 December 1948.[110] Considered the moral cornerstone of human rights norms around the world, the Declaration articulates inalienable rights and affirms that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[111] The principles were further elaborated in later human rights treaties, among them the *International Covenant on Civil and Political Rights* 1966 (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR). Under international human rights law, *everyone* has the right to life.[112] The right to life is one of the foundational principles of international law. Likewise, every person has a right to adequate food, clothing, housing and the continuous improvement of living conditions,[113] and everyone has the right not to be deprived of his or her means of subsistence.[114]

This thesis takes a human rights approach to environmental migration. The approach implies that "[e]very single person who is forced from their home, against their will, must have a remedy available to them which respects their rights, protects their rights and, if necessary,

[109] *Charter of the United Nations* art 1(3).
[110] *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (10 December 1948).
[111] Ibid. at preamble.
[112] Ibid. at art 3.
[113] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[114] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

fulfills their rights as recognised under international human rights law."[115] Further, the thesis takes a societal and collective approach to the protection of the human rights of displaced peoples to their collective identity and culture in resettlement. Recent environmental processes, among them climate change, have the potential to deprive entire communities – even island nations - not just their means of subsistence, but the very matrix from which their cultural identities are grounded. It is thus important to consider the protection not only of individual rights but the collective rights of peoples to retain cultural diversity in resettlement.

The obligations elaborated in various human rights treaties are traditionally regarded as duties owed by states to persons within their jurisdiction. Under this line of reasoning, state obligations do not generally extend to persons beyond state boundaries. The territorial scope of treaties under Article 29 of the *Vienna Convention on the Law of Treaties* is invoked to support the argument: "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[116] A closer reading of the law, however, reveals that no such intra-state limitation exists. The intention, suggested by the term "entire," is to "prevent states parties from claiming that the treaty is not binding for a certain part of the territory – or to make sure that such intention is explicit beforehand."[117] Granting that Article 29 limits the scope within state territories, it may be argued, at least for the twin international covenants on civil and political rights, and economic, social and cultural rights, that a different – and universal – intention appears. Both treaties, as their Preambles expressly state, were envisaged to "promote universal respect for, and observance of, human rights and freedoms" pursuant to the United Nations Charter, and the Universal Declaration of Human Rights.[118] The *International Covenant on Economic, Social and Cultural Rights* is explicit about the obligation to provide international cooperation and assistance: Article 2(1) obliges states parties to "take steps, individually and

[115] Scott Leckie, 'Climate Change and Displacement: Human Rights Implications' (2008) 31 *Forced Migration Review* .

[116] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980).

[117] Rolf Kunnemann, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights' (Foodfirst International Action Network, 2005).

[118] *International Covenant on Economic, Social and Cultural Rights* above n 113; *International Covenant on Civil and Political Rights* above n 114: *Preamble*, common provisions: "The States Parties to the present Covenant, [c]onsidering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of *all* members of the human family is the foundation of freedom, justice and peace in the world,… [c]onsidering the obligation of States under the Charter of the United Nations to promote *universal* respect for, and observance of, human rights and freedoms,… [a]gree upon the following articles" (emphasis ours).

*through international assistance and co-operation…*to the maximum of [their] available resources…including particularly the adoption of legislative measures;" Article 11(2) mandates states parties to recognise the "fundamental right of *everyone* to be free from hunger" and obligates states parties to take measures "*individually and through international co-operation*" to provide everyone their human right to adequate food.

Admittedly, the enforcement of the positive right to adequate food is limited in practice, a subject matter beyond the scope of this thesis. Thus, while the right to life, like the right to food, is compellable as a negative right under international customary law, e.g. the right *not* to be killed or not to be intentionally starved (as when another nations' food supply is cut off), it may not be compellable when expressed as a positive right, e.g. to compel delivery of bags of rice or to undergo medical treatment under ordinary situations.

Although technically not "law", the General Comment No. 12 of the Committee on Economic, Social and Cultural Rights provides an important interpretation on the joint responsibilities of states to provide disaster relief and humanitarian aid in emergency situations, which would include extreme environmental events: "[s]tates have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons."[119] While internationally displaced environmental migrants are technically not subsumed in the above comment, they are not excluded either, and hence may be encompassed among those requiring "disaster relief and humanitarian assistance."

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) mandates "developed country [p]arties" to "assist the developing country [p]arties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects."[120] While migration as a form of adaptation may not have been considered during the framing of the Convention in 1992, today, migration is increasingly considered together with in situ measures as a probable adaptation response. The UNFCCC's definition of adaptation, not being limited to in situ situations, may be understood to subsume

[119] Committee on Economic Social and Cultural Rights, General Comment No. 12, States and International Organizations, U.N. Doc. No. E/C. 12/1995/5.

[120] *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

resettlements at both national and international levels.[121] The International Law Commission (ILC), a body of legal experts established by the United Nations to promote development and codification of international law, similarly articulated measures for international coordination, including humanitarian assistance, to populations in disaster situations. Its 2007 Draft Articles on the Protection of Persons in the Event of Disasters affirms the need for international cooperation and respect of human rights in disaster situations. States thus have the "duty to cooperate" whenever appropriate "among themselves, and with the United Nations and other competent intergovernmental organizations."[122] Populations "affected by disasters are entitled to respect for their human rights,"[123] and any "[r]esponse to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable."[124] It is noteworthy that principles of humanity and non-discrimination need to be taken into account in the protection of persons in disaster situations. Even though the Draft Articles are merely recommendatory and non-binding, they nonetheless represent an important step in the development of a framework of protections under international law for persons forced to move from their homes because of environmental causes.

Under existing human rights instruments, freedom of movement including the right to leave one's country and the right to seek asylum in another country is recognized.[125] The right to *seek* asylum, however, is not the same as the right to unilaterally demand asylum or admission, since the latter is still the prerogative of the receiving state. While the right to asylum is usually limited to cases of persecution defined under the Refugee Convention, some regional instruments have expanded the definition to potentially include persons affected by disaster situations. The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa of the Organization of African Unity (now African Union, or AU), expanded the 1951 Refugee Convention's definition and included as refugees those

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[121] Mayer, above n 60.

[122] *Draft Articles on the Protection of Persons in the Event of Disasters*, art 5 as provisionally adopted by the ILC Drafting Committee 24 July 2009, A/CN.4/L.758.

[123] Ibid. at art 8 (Human Rights).

[124] Ibid. at art 6 (Humanitarian Principles in Disaster Response).

[125] *Universal Declaration of Human Rights* above n 110 at arts 13 and 14. Article13: "(1) Everyone has the right to freedom of movement and residence within the borders of each state; (2) Everyone has the right to leave any country, including his own, and to return to his country." Article 14: "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution; (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

leaving their country due to "events seriously disturbing public order."[126] On its face the definition includes persons displaced by environmental threats, noting the regional practice in Africa of allowing those affected by natural disasters such as famine and drought to cross international borders.[127] While some governments are careful not to characterize the practice as an outright obligation arising from the AU treaty, nonetheless, it may be argued that the definition can contribute to the development of the protection rights for environmentally displaced persons on "humanitarian grounds under customary international law."[128]

The 1984 Cartagena Declaration on Refugees, a regional refugee instrument for Latin America, similarly broadens the definition of refugee to include those who have "fled their country" due to "massive violation of human rights," or to "circumstances which have seriously disturbed public order."[129] Albeit non-binding, the Cartagena Declaration is nonetheless highly influential. Brazil, Colombia, Costa Rica, Ecuador and Paraguay, among others, have incorporated the right to asylum into their constitutions.[130] Notwithstanding the interpretation by the International Conference on Central American Refugees (CIREFCA) of the Cartagena Declaration deeming those affected by disasters are not covered within the remit of "circumstances which have seriously disturbed public order," there are those who maintain that displacements from human-induced disasters, including those triggered by climate change, may be considered to fall within the ambit of "massive violation of human rights."[131]

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[126] *Convention Governing the Specific Aspects of Refugee Problems in Africa* adopted 10 September 1969, 1001 U.N.T.S. 45 (entered into force 20 June 1974). Art 1(2): "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

[127] Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14(2) *African Journal of International and Comparative Law* 204.

[128] Ibid.

[129] *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* adopted 22 November 1984. Section III(3): "To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

[130] Roberta Cohen and Megan Bradley, 'Disasters and Displacement: Gaps in Protection' (2010) 1 *Journal of International Humanitarian Legal Studies*.

[131] Ibid.

In Asia, a refugee declaration exists, namely, the 1966 Bangkok Principles on the Status and Treatment of Refugees, adopted by the Asian-African Legal Consultative Organization (AALCO), a regional governmental organisation formed in 1958. The Bangkok Principles similarly expand the definition of refugee to include internationally displaced persons by reason of "events seriously disturbing public order."[132] The Bangkok Principles, however, unlike the African Convention, are non-binding. Moreover, membership of the AALCO is limited and does not include a number of Asian countries, among them Cambodia, Laos, the Philippines, and Vietnam thereby making the ambit of the Bangkok Principles less inclusive, compared to other regional instruments which cover most if not all of Southeast Asian countries.

Another lesser known but significant regional instrument relative to environmental migration is the Arab Convention on Regulating Status of Refugees in the Arab Countries adopted by the League of Arab States in 1994. It is a significant instrument in that it explicitly recognises persons displaced due to environmental factors as "refugees." The Convention, while adopting the definition of refugee under the 1951 Refugee Convention, broadens the term's ambit to subsume "[a]ny person who unwillingly takes refuge in a country other than his country of origin… because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof."[133] While the Convention has been adopted by a regional organization in the Arab region, the same has not been ratified, and to date has never been used.[134]

While international human rights standards are less categorical in the protection of environmental migrants crossing international borders, these protections are better articulated and developed in the case of populations that are internally displaced by environmental threats. Internal movement may not be an option for some Pacific countries, particularly the small atoll states, yet this may be the preferred long-term adaptation among environmentally threatened residents of larger Pacific states such as Fiji and Papua New Guinea. The 1998

[132] *Bangkok Principles on the Status and Treatment of Refugees*, published 31 December 1966, adopted 24 June 2001 at the 40th session of the Asian-African Legal Consultative Organization in New Delhi. Article 1(2): "The term "refugee" shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

[133] *Arab Convention on Regulating Status of Refugees in the Arab Countries*, adopted 1994 by the League of Arab States, available at: http://www.refworld.org/docid/4dd5123f2.html.

[134] Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge, 2012) 93.

Guiding Principles on Internal Displacement, in its definition of internally displaced persons (IDPs), categorically includes those affected by disaster situations. IDPs are "persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border."[135] Although the Guiding Principles is a non-binding instrument, which means a recalcitrant state could not be held liable for violating its guidelines, in practice the instrument has achieved a high level of international support and acceptance. The governments of Burundi, Angola and Colombia have "accepted the authoritative character of the Guiding Principles."[136] At the international level the "Inter-American Commission on Human Rights, UN Treaty Bodies, Special Rapporteurs of the UN Human Rights Commission, the General Assembly and even the UN Security Council have referred to the Guiding Principles either as a valid restatement of present international law or as a useful tool for properly addressing situations of internal displacement."[137]

One of the strengths of the Guiding Principles is it applies equally to a broad spectrum of disaster situations: whether natural or human-induced, or whether one of short duration such as cyclones, volcanic eruptions and earthquakes, or one of prolonged duration such as droughts or other types of sustained environmental deterioration. The state directly affected by the disaster has the "primary duty and responsibility to provide protection and humanitarian assistance,"[138] although it may also invoke international aid and assistance, for instance, under the 2005 Hyogo Framework for Action (HFA). The HFA, established by the United Nations General Assembly through the United Nations Office for Disaster Risk Reduction (UNISDR), is the first universally accepted framework spanning 2005-2015 for disaster risk reduction. It brings together governments and international agencies into a world-wide system of coordination to reduce the negative impacts of disasters. The HFA, thus, complements and strengthens the aims of the Guiding Principles, among which are to provide the IDPs "[a]t the minimum" and "regardless of the circumstances," safe access to (a) "[e]ssential food and potable water, (b) [b]asic shelter and housing, (c) [a]ppropriate clothing,

[135] *Guiding Principles on Internal Displacement*, 11 February 1998, U.N. Doc. E/CN.4/1998/53/Add.2.
[136] Walter Kälin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework' (Ralph Bunche Institute for International Studies, CUNY Graduate Center, 2001).
[137] Ibid.
[138] *Guiding Principles on Internal Displacement*, above n 135 at Principle 3(1).

and (d) [e]ssential medical services and sanitation."[139] The Guiding Principles were further strengthened by the introduction in 2007 of the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, otherwise known as the Pinheiro Principles,[140] after UN Special Rapporteur on Housing and Property Restitution, Paulo Sérgio Pinheiro. The Pinheiro Principles set a new international standard outlining the rights of refugees and displaced persons (including those displaced from disasters) to housing, and, when appropriate, the right to return to their countries and to restitution of their properties.

Lastly, the Guiding Principles mandates that displacement must, as much as possible, be avoided; that "all feasible alternatives" must be explored in order to avoid displacement. If for any compelling reason displacement cannot be avoided altogether, Principle 7(3) establishes certain guarantees which need to be complied with, such as the legal authority of the agency tasked to implement the displacement, and the prior "free and informed consent" of those who would be displaced.[141] The authorities concerned shall also endeavour to "include those affected, particularly women, in the planning and management of their relocation."[142] Voluntary movement of the IDPs is at all times guaranteed, as are their rights to seek safety in another part of the country, leave the country, seek asylum in another country, and their right to be protected against forcible return to or resettlement in any place where their lives, safety, liberty or health would be at risk.[143] The right against forced displacements allows environmentally affected populations the space and agency to decide when and where to move. Except in imminent and life threatening situations, the right protects environmental migrants from dubious evacuations initiated by their governments otherwise motivated by economic or political reasons but using climate and environmental threats as a pretext.

b. Minority Rights Law

[139] Ibid. at Principle 18(2).
[140] *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, United Nations Sub-Commission on the Promotion and Protection of Human Rights, published 28 June 2005, E/CN.4/Sub.2/2005/17.
[141] *Guiding Principles of Internal Displacement*, above n 135 at Principle 7(3)(c).
[142] Ibid. at Principle 7(3)(d).
[143] Ibid. at Principles 14 and 15.

The protection of human cultures, like the protection of biodiversity, has value not only for the individuals concerned but for humankind. One of the effects of environmental migration, particularly of community relocations, is the prospect that settlers become minorities in their host community or state. This happens as soon as the settlers arrive in their host community. In the case of Nauru, the issue was considered long before actual resettlement took place. Migrating communities upon arrival are immediately confronted with a decision about whether to assimilate, and in the process lose or diminish their identity, or strive to retain their cultural heritage in resettlement. The situation is, of course, not an either/or choice, but one of degree. Migration, regardless of type, necessarily involves changes to identity and culture once settlers interact with the host population. However, voluntary assimilation or cultural hybridisation among minority members is one thing. Coerced assimilation through legal and social pressures resulting in loss of linguistic, religious or cultural identity is another.

Christian Joppke, identified two predominant minority rights approaches towards migrants in contemporary liberal states, namely that of antidiscrimination and multiculturalism.[144] The thrust of antidiscrimination is "universalistic," that is, to "render minority groups invisible" by policies that looks at individual members of society in a "color-blind" way regardless of "race, color, religion, sex, or national origin."[145] The predecessors of contemporary anti-discrimination laws are the U.S. civil rights laws in the 1960s to "end racial segregation of American blacks."[146] Multiculturalism, on the other hand, is "particularistic" by seeking to perpetuate distinctiveness through the protection of identity and ethnicity of minority groups.[147] The two approaches are not exclusive but rather complementary. There is overlap and many grey areas in between. For instance, antidiscrimination policies in the U.S. have been transformed, by way of affirmative action, from a "notionally group destroying" into a "factually group-making measure", ultimately promoting diversity and multiculturalism.[148] Antidiscrimination laws thus broadened from their mainly colour-blind and equal opportunity thrust to one that promoted the protection of identity, heritage and diversity.

Legal frameworks have a big role to play in protection of identity, cultural heritage and cultural diversity. As the 2001 Durban Declaration in the World Conference against Racism, Racial

[144] Christian Joppke, 'Minority Rights for Immigrants? Multiculturalism and Antidiscrimination' (2010) 43 *Israel Law Review* 49.
[145] Ibid. at 54-55.
[146] Ibid.
[147] Ibid. at 51.
[148] Ibid. at 55.

Discrimination, Xenophobia and Related Intolerance affirms "cultural diversity is a cherished asset for the advancement and welfare of humanity at large," and hence should be "valued, enjoyed, genuinely accepted and embraced as a permanent feature which enriches our societies."[149] Under Article 27 of ICCPR, in States where linguistic minorities exist, minority members "shall not be denied the right, in community with the other members of their group … to use their own language."[150] This means minority members have the right to use their own language without interference of the host State. The United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM), adopted by the General Assembly in 1992, articulates further the rights of members of linguistic minorities. Albeit non-binding, the UNDM expresses the need for states to "take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue."[151] States are likewise mandated to "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards."[152] Criticised as providing only a "certain modest obligations on states,"[153] the Declaration nonetheless expands the negative formulation of minority rights in the ICCPR and replaces it with a stronger –positive- formulation. For instance, while Article 27 of the ICCPR articulates the right of minority members to use their own language without interference of the host State, Articles 1 and 2 of the UNDM are more positively framed. Article 1 says "[s]tates shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories," and for that purpose "shall adopt appropriate legislative and other measures to achieve those ends."[154] The mandate goes beyond non-interference, but requires the taking of legal and policy measures to ensure that persons belonging to minorities retain their ethnic, cultural, religious and linguistic identity.

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[149] *Durban Declaration*, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/CONF.189/12 (8 September 2001).

[150] *International Covenant on Civil and Political Rights* above n 114.

[151] *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 48th sess, 85th plen mtg, UN DOC A/RES/48/138 (18 December 1992).

[152] Ibid. at art 4(2).

[153] G Extra and K Yağmur, 'Language Rights Perspectives' in G Extra and K Yağmur (eds), *Urban Multilingualism in Europe: Immigrant Minority Languages at Home and School* (Multilingual Matters Ltd, 2004) 73.

[154] *United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* above n 151.

For minorities displaced by disasters, natural or human induced, and who have remained within state borders, the Guiding Principles on Internal Displacement offers both rights against discrimination and positive minority rights protection, particularly on the prohibition of forced displacements of any kind. The Guiding Principles mandate that the principles be applied "without discrimination of any kind such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria."[155] Special protections are given to vulnerable sectors of the population. Children, the elderly, female heads of households and persons with disabilities are guaranteed special "protection and assistance required by their condition and to treatment which takes into account their special needs."[156] Cultural and ethnic minorities are protected against forced displacements of any kind: "States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."[157] This right expressly includes those undertaken within disaster situations: "The prohibition of arbitrary displacement includes displacement…[i]n cases of disasters, unless the safety and health of those affected requires their evacuation."[158] In any event, the displacement shall not last "longer than required by the circumstances."[159]

Minority protection is also ensured in matters of religion, language and education. IDPs, whether living within or outside of camps, are guaranteed rights against discrimination in the enjoyment of their "rights to freedom of thought, conscience, religion or belief, opinion and expression,"[160] as well as the "right to communicate in a language they understand."[161] The right to education is guaranteed to IDPs, whether members of minorities or otherwise, and

[155] *Guiding Principles of Internal Displacement*, above n 135 at Principle 4(1).
[156] Ibid. at Principle 4(2): Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs. Principle 19 (1) All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.(2) Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
[157] Ibid. at Principle 9.
[158] Ibid. at Principle 6(2)(d).
[159] Ibid. at Principle 6(2)(e).
[160] Ibid. at Principle 22(1)(a).
[161] Ibid. at Principle 22(1)(e).

education is "free and compulsory at the primary level."[162] Education should, however, respect minority members' "cultural identity, language and religion."[163] The Guiding Principles would have particular relevance in the Pacific considering the cultural and linguistic diversity existing in the region.

The Office of the High Commissioner for Human Rights has identified four areas for the protection of minority rights. These are in (a) survival and existence, (b) promotion and protection of the identity of minorities, (c) equality and non-discrimination, and (d) effective and meaningful participation.[164] These are subsumed under particular provisions of the ICCPR and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). Article 2(1) of ICERD requires state parties to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."[165] These include the elimination of plans and programs specifically placing minority communities in disadvantageous situations, including the forcible resettlement of communities such as the Banabans and Bikinians.

c. Indigenous Rights Law

Under the United Nations Declaration on the Rights of Indigenous Peoples 2007, indigenous peoples have the "right to the full enjoyment as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[166] Art 10 of the Declaration mandates that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories" and that "[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just compensation and, where possible, the option of return."[167] Indigenous peoples likewise have a "right not to be subjected to forced assimilation or destruction of their culture,"[168] and states are mandated to "provide effective mechanisms for prevention of, and redress for: … (b) [a]ny action which has the aim or effect of dispossessing them of their lands, territories or

[162] Ibid. at Principle 23(2).
[163] Ibid.
[164] Office of the High Commissioner for Human Rights, 'Minority Rights: International Standards and Guidance for Implementation' (United Nations, 2010).
[165] *International Convention for the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 19 (entered into force 4 January 1969).
[166] *United Nations Declaration on the Rights of Indigenous Peoples*, GA/Res/61/295, UN GAOR, 61st sess, 107th pln mtg, Supp No 49, UN Doc A/RES 61/295 (13 September 2007).
[167] Ibid.
[168] Ibid. at art. 8(1).

resources; [and] (c) [a]ny form of forced population transfer which has the aim or effect of violating or undermining any of their rights."[169] The Declaration was adopted by United Nations General Assembly in 2007 with 144 states in favour, 11 abstentions and 4 against, namely the United States, Canada, Australia and New Zealand.[170] Although non-binding, the Declaration represents a "dynamic development of international legal norms" in that it "reflects the commitment of the UN member states to move in [a] certain direction," which is the setting of a standard in the observance of the human rights of indigenous peoples.[171] The Declaration thus carries persuasive authority as a set of guiding principles should indigenous peoples require resettlement due to environmental change.

A binding international instrument protecting the rights of indigenous peoples is the 1989 International Labour Organization Convention No. 169 (C169) otherwise known as the Indigenous and Tribal Peoples Convention. C169 replaced the 1957 ILO Convention No. 107 (C107) which was widely criticised for being paternalistic and assimilationist. C107 for instance, typifies indigenous peoples as "populations which are not yet integrated into the national community."[172] Seeking to restore indigenous peoples' dignity and co-equal status with other segments of society, C169 represents the idea that integrationist and assimilationist approaches are no longer acceptable policies to pursue in these times. C169 recognises indigenous peoples' rights of ownership and possession over the lands which they traditionally occupy (Art 14.1).[173] Notably, it prohibits the removal of indigenous peoples from their home land: "the peoples concerned shall not be removed from the lands which they occupy."[174] If their relocation is "necessary," it must be a case of an "exceptional measure" and shall take place only with the indigenous peoples' "free and informed consent" (Art 16.2). Further, they shall be "provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development" (Art 16.4). One weakness of C169 is that it has only been ratified by a limited number of states – 22 in all- with only one state in the

[169] Ibid. at art. 8(2).
[170] United Nations Permanent Forum on Indigenous Issues, <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>
[171] Declaration on the Rights of Indigenous Persons Frequently Asked Questions, <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.
[172] *Indigenous and Tribal Populations Convention* (ILO Convention No. 107), opened for signature 26 June 1957 (entered into force 2 June 1959).
[173] *Indigenous and Tribal Peoples Convention* (ILO Convention No. 169), opened for signature 27 June 1989, 76th ILC session (entered into force 5 September 1991).
[174] Ibid. at art. 16 (1). "[Indigenous and tribal] peoples concerned shall not be removed from the lands which they occupy.

Pacific, Fiji, ratifying in 1998. Its adoption was nonetheless considered a milestone in indigenous rights protection. It is not only a binding treaty, but it is generally considered to have ushered in the eventual adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples on 13 September 2007.

In the context of climate change and environmental deterioration, indigenous peoples who are often marginalised and have little political voice stand at an even greater disadvantage compared with the dominant members of the population. There is the danger for instance that "powerful actors will use the excuse of reducing community exposure to climate change in order to conduct forced migrations, for political or economic gain."[175] The relocation of the Bikinians attests to the ease with which communities that have occupied their lands since time immemorial may be relocated. This is where the various protections afforded by indigenous rights laws play an important role. Ultimately what is at stake is not only the physical survival of indigenous peoples but the survival of their distinct cultures, customs, ways of life and world views.

d. Domestic Legislation

Cross border environmental migration is not always forced. People may choose to move voluntarily or proactively without having to wait for extreme environmental deterioration to occur on their islands.[176] These movements may be long-term using regular migration channels, or short-term, through the utilization of temporary labour migration schemes. Examples of the latter are New Zealand's Recognised Seasonal Employer (RSE) scheme and Australia's Seasonal Worker Program (SWP) which both allow Pacific Islanders preferential seasonal employment in New Zealand and Australia's agricultural sectors. Temporary labour migration has implications relative to strengthening the adaptation capacity of those who chose to stay behind, in a way obviating the need for urgent or large scale relocations. The remittances sent to family members left behind help in building better infrastructure (e.g., tropical cyclone proof houses), and in furthering the education of the workers' children. While the RSE and SWP establish a type of circular migration where workers are obliged to return home after the harvesting season, it could potentially open up opportunities for permanent migration. A worker's experience and professional network in New Zealand and Australia, could, for example, make them better candidates for permanent migration under

[175] Barnett and Webber, above n 14 at 53.
[176] Warner et al, above n 88.

skilled migration visa categories. The RSE and SWP may also serve as a model for similar schemes in other Pacific Rim countries.

Domestic legal frameworks likewise provide opportunities for international Pacific migration leading to permanent residence. An example is the Pacific Access Category (PAC) of New Zealand which grants nationals from select Pacific countries permanent residency status in New Zealand. Every year, permanent residence visas under the PAC are given to up to "250 citizens of Tonga, 75 citizens of Tuvalu, and 75 citizens of Kiribati."[177] Chapter 2 of this thesis contains a more detailed discussion of the PAC. On a smaller, somewhat more practical level, Kiribati has reached an agreement with Australia to establish the Kiribati-Australia Nurses Initiative (KANI).[178] Under the initiative, Australia will provide scholarships to I-Kiribati students to study a Bachelor of Nursing degree in Australia. Commencing with a 16-week research and English language training in Kiribati, the students proceed to an Australian university for a 16-week Nursing Diploma Preparation Program, then an 18-month Diploma in Nursing prior to the regular Bachelor of Nursing program.[179] From its inception in 2006, the program has provided scholarships to 82 students.[180] While the number of beneficiaries in relation to the overall needs of the Pacific region may be modest, KANI nonetheless is an excellent model of the way in which developed countries in the Pacific region may assist developing countries in addressing educational and employment challenges of the region. The program likewise offers permanent migration prospects for nationals from an environmentally vulnerable country like Kiribati. The iKiribati nurses who choose to remain and work in Australia may qualify as permanent residents under Australia's regular skilled migration schemes.

Discretionary admissions based on humanitarian and compassionate grounds as well as other preferential admission schemes offered by Pacific Rim countries also may provide long-term migration and protection opportunities for the environmentally displaced. They are discussed in Chapter 2. However, many of these opportunities are at best ad hoc and limited.

Sociological Frameworks

[177] Immigration New Zealand, Operations Manual, S1.40 Pacific Access Category.
[178] Department of Foreign Affairs and Trade (Australia), Kiribati Australia Nursing Initiative, http://aid.dfat.gov.au/countries/pacific/kiribati/Pages/initiative-nursing.aspx.
[179] Ibid.
[180] Ibid.

By its nature, forced relocation is deeply destabilizing and traumatic, regardless of its cause. It differs from voluntary migrations in one key aspect: there is psychological and often physical readiness in the latter. Voluntary migrants have the choice to leave or stay. Often they have predetermined their destination, which is usually a place where human capital i.e., friends or family members already exist. Moreover, voluntary migrations are often undertaken by persons who are in their lives' prime, willing to take risks and accept changes. Forced migrants on the other hand do not have a choice whether to move or stay. In many cases, the decision is determined by extrinsic factors, such as orders from governmental authorities or environmental force majeure. The entire community moves out, including the very young, the sick and the elderly. Thus, while voluntary migrations presuppose a high level of readiness and preparedness this is not so with forced relocations.

Two conceptual frameworks deal with forced resettlements: Thayer Scudder's model on stress and the settlement process, and Michael Cernea's impoverishment risks and reconstruction model. Writing on the effects of relocation of communities displaced by dam constructions, Scudder developed the stress and settlement process model.[181] The model predicts that relocated communities pass through four stages in resettlement: (a) recruitment, (b) relocation, (c) community formation, and (4) incorporation/handing over stages. Each stage has corresponding psychological, physiological and socio-cultural challenges for the settlers.

1. Recruitment – is the planning and pre-resettlement phase. The level of psychological stress experienced by the people facing the possibility of resettlement increases as the date of resettlement nears. There is a high level of anxiety for the future where people are uncertain about what will come next and how things will turn out for them in resettlement.[182] In order to reduce stress, Scudder argues for the involvement of those affected in each step in the planning and decision making process.
2. Relocation – is the phase when the actual resettlement has begun. This is the most difficult stage of all, where all of the community's coping and adjustment skills are summoned. Psychologically, settlers experience grief for their lost community.[183] On the economic front, their standard of living is expected to drop. This is also the stage when the community feels a threat to their collective cultural identity as settlers have to cope with adjusting to a new

[181] Scudder, above n 42.
[182] Ibid. at 25.
[183] Ibid.

environment, a different routine and deal with the largely strange host population. Scudder predicts that the settlers in this phase will be averse to try out new ideas or behavioural patterns. In order to reduce stress, they prefer to cling to their pre-resettlement behaviours and routines. It is difficult for policy makers to promote innovation at this stage.

3. Community formation – this is the stage when most settlers have adjusted to the initial phase of relocation. Activities geared towards community formation and livelihood development are done. Settlers buy things, improve their homes, start businesses, and generally involve themselves in community projects. This is when the settlers start to become self-reliant, regain their economic dignity and become less dependent from hand-outs and external help.

4. Incorporation and handing over – this stage involves later generation settlers. As the settlers and their descendants cope with relocation, they become fully involved in their new home. For Scudder, success in resettlement comes not only through economic development but through genuine community formation as new institutions are formed. Emphasis is placed less on personal home building and more on the establishment of farmers unions, water associations, cooperatives, burial societies and municipal councils. This stage marks the end of resettlement, and Scudder recommends the handing over of communal assets unto the settlers' institutions.

The model's strength is its ability to explain the multidimensional aspects of the stresses experienced by settlers as it points to how a successful resettlement maybe attained.[184] A downside is that the model assumes the settlers are a homogenous group, rather than communities with different cultures and backgrounds hence with a variety of adaptation and behavioural responses. Dolores Koenig has questioned the usefulness of the model's stages, which appears to proceed linearly from first to fourth. She claims that the reasons for the transition from one stage to the next are not clearly explained, and that the third and fourth stages may not always occur in that order.[185] Nonetheless Scudder's model is widely used, particularly in anticipating the multidimensional stresses experienced by settlers and for identifying prerequisites of successful resettlements. It is particularly helpful in understanding the stresses and frustrations experienced by the Banabans and Bikinians particularly in the early phases of their resettlements.

[184] Brigitte Sorensen, *Relocated Lives: Displacement and Resettlement within Mahaweli Project, Sri Lanka* (Amsterdam VU University Press, 1996)

[185] Dolores Koenig, *Toward Local Development and Mitigating Impoverishment in Development-Induced Displacement and Resettlement* (Oxford University Refugee Studies Centre, 2002).

Cernea's impoverishment risks and reconstruction model, on the other hand, builds on the earlier insights of the Scudder model and argues that forcibly relocated peoples face the risk of encountering social, cultural and economic impoverishments in resettlement. The challenge of policy makers is in the avoidance, or at least minimisation, of the risks. Cernea enumerates eight risks, namely, landlessness, joblessness, homelessness, marginalisation, food insecurity, increased morbidity, loss of access to common property resources and community disarticulation. For Cernea, the task is to adopt "targeted strategies" that prevent if not overcome these pattern of impoverishments.[186] The strategies adopted and directions taken should be from: "landlessness to land-based resettlement," "joblessness to reemployment," "homelessness to house construction," "marginalization to social inclusion," "increased morbidity to improved health care," "food insecurity to adequate nutrition," "loss of access to restoration of community assets and services", and "social disarticulation to networks and community rebuilding."[187]

The strength of Cernea's model is its systematic study of the risks of impoverished conditions usually encountered by settlers. One criticism of the model is its non-human focus, that is, that it extensively discusses the risks rather than the experiences and behaviours of the settlers themselves who are the main actors in resettlement.[188] Nonetheless, Cernea's model is an important framework for governments, institutions and policy makers involved in resettlement. If the strategies are successful, the benefits redound to the people. Moreover, as Cernea himself states, the model performs four interlinked functions: (a) a predictive function, which warns of potential risks in resettlement; (b) a diagnostic function, which helps assess and explain the impacts of resettlement; (c) a problem-resolution function in "guiding and measuring resettlers' reestablishment"; and (d) a research function, in "formulating hypothesis and conducting theory-led field investigations."[189] Cernea's impoverishment risks and reconstruction model provides a useful framework on the analysis of the outcomes of both the Banaban and Bikinian resettlements.

7. Thesis outline

[186] Cernea, above n 43 at 20.
[187] Ibid.
[188] Scudder, above n 42.
[189] Cernea, above n 43 at 21

This study is a multidisciplinary thesis by publication, comprising nine chapters: seven are articles that have been published, accepted for publication or submitted for publication, and these are framed by a separate introduction and conclusion. The core of the thesis is divided into two parts: The first, consisting of Chapters 2 and 3, focuses on admission opportunities and challenges for Pacific environmental migrants. Chapter 2 surveys and analyses the domestic laws of four likely destination countries on the Pacific Rim, namely the United States, Canada, Australia and New Zealand, for possible migration opportunities for Pacific environmental migrants. Chapter 3 asks whether states have moral obligations to admit non-citizen environmental migrants into their territory and to protect them once admitted.

The second part, which comprises Chapters 4 to 8, identifies the role of law and policy in the retention of the resettled communities' collective identity, cohesion and the expression of the community's tangible and intangible cultural heritage in resettlement. Three case studies of actual or attempted resettlements in the Pacific are studied, namely that of Nauru (one article), Bikini (one article) and Banaba (three articles). Below is a list of the articles included in the thesis corresponding to Chapters 2-8:

1. Gil Marvel Tabucanon, 'Migration for Environmentally Displaced Pacific Peoples: Legal Options in the Pacific Rim' (2012) 30(1) *UCLA Pacific Basin Law Journal* 55-92.

2. Gil Marvel Tabucanon, 'Pacific Environmental Migration in a Warming World: Is there an Obligation Beyond State Borders? (2013) 14 *Vermont Journal of Environmental Law* 549-573.

3. Gil Marvel Tabucanon and Brian Opeskin, 'The Resettlement of the Nauruans in Australia: An Early Case of Failed Environmental Migration' (2011) 46(3) *Journal of Pacific History* 337-356.

4. Gil Marvel Tabucanon, 'Protection for Resettled Island Populations: The Bikini Resettlement and its Implications for Pacific Environmental Migration' (accepted for publication in the *Journal of International Humanitarian Legal Studies*, 2014, forthcoming)

5. Gil Marvel Tabucanon, 'The Banaban Resettlement: Implications for Pacific Environmental Migration' (2012) 35(3) *Pacific Studies* 343-370.

6. Gil Marvel Tabucanon, 'Social and Cultural Protection for Environmentally-Displaced Populations: Banaban Minority Rights in Fiji' (accepted for publication in *The International Journal on Minority and Group Rights*, Vol. 21, No. 1, 2014, 25-47).

7. Gil Marvel Tabucanon, 'Continuity and Change: Identity Among Later-Generation Banabans' (accepted for publication in *Shima: The International Journal of Research into Island Cultures*, 2014, forthcoming).

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CHAPTER 2

Migration for Environmentally Displaced Pacific Peoples: Legal Options in the Pacific Rim

Publication Status

Published in the *UCLA Pacific Basin Law Journal*, Vol. 30 No. 1 Fall 2012, 55-92.

Link to Previous Chapter

This introductory article seeks to identify admission opportunities for environmental migrants within the domestic laws of potential destination countries in the Pacific Rim, namely the United States, Canada, Australia and New Zealand.

Contribution to Thesis

This article explores an aspect of protection for Pacific environmental migrants. It examines the various admission and migration options available for environmentally-displaced Pacific peoples under the laws of the United States, Canada, Australia, and New Zealand. It ascertains whether flexibility exists in these countries' domestic laws for environmental migrants from neighbouring Pacific countries. It asks if humanitarian/ ministerial discretion admissions and preferential admission schemes sufficiently address Pacific island relocations brought about by global warming and climate change, and identifies both opportunities and challenges in existing legislation. The article argues that in the absence of an international legal protection regime for cross border environmental migrants, states should expand immigration opportunities for persons fleeing from environmental threats.

Pages 55-94 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Tabucanon, G. M. (2012). Migration for environmentally displaced Pacific peoples: legal options in the Pacific Rim. *UCLA Pacific Basin Law Journal*, *30*(1), 55-92.

CHAPTER 3

Pacific Environmental Migration in a Warming World: Is there an Obligation Beyond State Borders

Publication Status

Published in the *Vermont Journal of Environmental Law*, Vol. 14 No. 4, Summer 2013, 549-573.

Link to Previous Chapter

This article addresses issues that were merely implicit in the first article, by considering the foundations of a state's moral and ethical obligations towards environmentally displaced persons from other countries. The article seeks to identify foundational principles among key jurists and legal philosophers with respect to the extra-territorial duties of states towards populations affected by natural disasters and environmental changes.

Contribution to Thesis

This article explores another aspect of protection for Pacific environmental migrants. It looks beyond current domestic legislation of states and asks whether states have moral obligations to protect non-citizen environmental migrants by admitting them into their jurisdictions. Using the juristic writings of Pufendorf, Vattel and Kant as a lens of inquiry, three diverse viewpoints are pursued. The article concludes that states not only have a moral obligation to provide humanitarian assistance and hospitality towards environmentally threatened non-citizens, but that this obligation requires both states and their citizens to do far more than current practices suggest.

Pages 97-123 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Tabucanon, G. M. P. (2013). Pacific environmental migration in a warming world: is there an obligation beyond state borders? *Vermont Journal of Environmental Law*, *14*, 549-573.

CHAPTER 4

The Resettlement of the Nauruans in Australia: An Early Case of Failed Environmental Migration

Publication Status

Published in *The Journal of Pacific History*, Vol. 46, No. 3, 2011, 337-356.
co-authored with Brian Opeskin.

Link to Previous Chapter

This article is the first in a series of case studies that examine migration and resettlement in the Pacific. This article goes outside the realm of philosophy and theory, and examines an actual case of attempted community resettlement triggered by environmental factors, namely, the long-term exploitation of phosphate deposits on the island of Nauru. It examines not only the history of the case, but also the reasons why the negotiations for resettlement to Australia failed.

Contribution to Thesis

This chapter explores an important aspect of environmental migration, namely the desire of potential migrants to preserve their cultural and national identity in resettlement. The attempted Nauru resettlement in Australia demonstrates that resettlement is not only about having a home, but finding a home in which individuals can conduct meaningful lives. While geophysical requirements are important, the intangible needs of the community need also to be addressed by law and policy, namely the retention of the community's collective identity and the preservation of the group's cohesion, values and culture in resettlement.

Pages 127-148 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Tabucanon, G. & Opeskin, B. (2011) 'The resettlement of the Nauruans in Australia: an early case of failed environmental migration', *Journal of Pacific History* 46(3), pp. 337-356.

DOI: 10.1080/00223344.2011.632992

CHAPTER 5

Protection for Resettled Island Populations: The Bikini Resettlement and its Implications for Pacific Environmental Migration

Publication Status

Accepted for publication in the *Journal of International Humanitarian Legal Studies*, 2014, forthcoming.

Link to Previous Chapter

This article is the second in the series of case studies that examine migration and resettlement in the Pacific. While Nauru was a case of attempted resettlement, the Bikinians were actually resettled on another island in response to the demand by the United States for a Pacific location to conduct nuclear testing immediately after the Second World War. The Bikinian case, however, can be considered to be an example of a "failed" community resettlement.

Contribution to Thesis

This article explores an important aspect of environmental migration, in so far as it examines the reasons why some resettlements fail. Using policy and legal framework, this paper focusses on three aspects of the Bikinian relocation: (a) how lack of preparation resulted in the choice of inadequate resettlement sites, (b) how compensation and trust funds, while on the one hand generous, resulted in many Bikinians becoming dependent on foreign financial assistance, and (c) how the failure to understand the Bikinians' deep attachment to and connection with their lands of origin produced deep frustrations through the generations. The article concludes that resettlement is not only about re-locating to a new place, but how to make relocation sustainable in a productive and self-sufficient manner. The Bikinians failure to become the productive, self-reliant community they once were on Bikini attests to the resettlement's non-success. The Bikinian experience continues to provide important lessons for environmental migration in the Pacific today.

Protection for Resettled Island Populations: The Bikini Resettlement and its Implications for Pacific Environmental Migration

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Abstract

In the mid-1940s, Bikini Islanders were resettled on another atoll to make way for the use by the United States of Bikini atoll as a nuclear weapons testing site. Although the relocation was with the Bikinians' ostensible consent, it was in truth a forced migration - the Bikinians were not in a position to resist the planned tests. The Bikinians' initial relocation on Rongerik atoll was only the beginning of a series of relocations the effects of which would have long-term, mostly frustrating, implications for Bikini Islanders individually and collectively. The Bikinian experience is a significant case study on environmental migration in that it was an example of a resettlement that produced losses (material, cultural and spiritual) and deep frustrations, the effects of which last up to today. Using a legal policy framework, this paper focuses on three aspects of the relocation: (a) how hasty relocation resulted in the choice of inadequate resettlement sites; (b) how compensation and trust funds, while seemingly generous, resulted in many Bikinians becoming dependent on hand-outs, and (c) how the failure to understand the Bikinians' deep attachment and connection to their lands of origin produced deep frustrations through the generations. The paper concludes that resettlement is not only about re-locating to a new place, but about making relocation sustainable. Both international law and national legislation have a role to play in protecting indigenous peoples' collective rights over their land, culture and resources. If relocation be unavoidable, policy and legal frameworks should contribute to the minimisation, if not avoidance, of impoverished conditions. Bikini is an important case study on environmental migration because it involved a diminution, if not loss, of various aspects of a once thriving culture. Conventional wisdom assumes resettlement is less complicated if done within national borders rather than internationally. This is not necessarily so, as the Bikinian experience attests. The Bikinians' inability to become the productive, self-reliant community they once were on Bikini attests to the resettlement's failure, and continues to provide important lessons for environmental migration in the Pacific today.

Tabucanon, G. M. P. (2014). Protection for resettled island populations: the Bikini resettlement and its implications for environmental and climate change migration. Journal of International Humanitarian Legal Studies, 5(1-2), 7-41. https://doi.org/10.1163/18781527-00501006

I

Introduction

Resettlements due to deterioration of the home environment are not new in the Pacific. In 1946, due to volcanic eruption, the Government of Tonga resettled Niuafo'ou Islanders from their outlier island in northern Tonga to the southern island of Eua;[1] while from 1955-58, due to "lengthy intervals of drought," the government of the Gilbert and Ellice Islands Colony facilitated the resettlement Phoenix Islanders from the Gilberts (now Kiribati) to the Solomon Islands.[2] Recent events and processes, among them the increasingly frequent effects of global warming, indicate that resettlements from vulnerable communities will become increasingly likely. The isolation, small size and relative lack of resilience of many Pacific islands make the Pacific one of the regions highly vulnerable to the impacts of environmental change, including more frequent storms, coastal flooding and the possibility of rising sea-levels.[3] While most displacements are internal and temporary, in some cases permanent international relocation may be necessitated.

Environmental disasters are "at their foremost, human disasters."[4] Should *en-masse* relocations due to environmental factors occur in the Pacific, "existing norms of international law should be fully utilized" and "normative gaps addressed."[5] When national adaptive capacity is limited or diminished, "regional frameworks and international cooperation should support action at [the] national level."[6]This is particularly so because island communities (many of which are indigenous) have both a "unique place in the societies where they live" and a "profound relationship" with their "land, territories and resources."[7] Their cultural, spiritual and social connection, as well as sense of collective identity are "clearly distinct

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[1] Garth Rogers, Politics and Social Dynamics in Niuafo'ou, An Outlier in the Kingdom of Tonga (1968) (University of Auckland).

[2] Kenneth Knudson, *Sydney Island, Titiana, and Kamaleai: Southern Gilbertese in the Phoenix and Solomon Islands, in* EXILES AND MIGRANTS IN OCEANIA (Michael Lieber ed. 1977).

[3] Robert Nicholls & Richard Tol, *Impacts and responses to sea-level rise: a global analysis of the SRES scenarios over the twenty-first century*, 364 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY 1073(2006).

[4] Michel Prieur, *Draft Convention on the International Status of Environmentally-Displaced Persons*, 43 THE URBAN LAWYER 247(2011).

[5] Art. VII The Nansen Principles on Climate Change and Displacement, Ministry of Foreign Affairs(2011), *available at* http://www.regjeringen.no/upload/UD/Vedlegg/Hum/nansen_prinsipper.pdf.

[6] *Id.* at Art. IV.

[7] William Jonas, *Setting the Scene, in* INDIGENOUS PEOPLES, RACISM AND THE UNITED NATIONS 43, (Martin Nakata ed. 2001).

from those of the other segments of society."[8] Resettlements, particularly the forced type, whether induced by fellow humans or by nature, are disruptive and difficult for both the displaced and their host communities. They tear apart existing community systems and social structures. Impoverished social, cultural and economic conditions are often experienced.[9] Yet, the negative impact need not be unduly harsh or prolonged, particularly where adequate planning, understanding of social processes and support are observed.

This paper focuses on the resettlement of Bikinians among various atolls and islands in the Marshall Islands, which began in 1946. It examines the long-term impacts of resettlement on Bikinian society and identity, and asks why in spite of the measures implemented to compensate the Bikinians, resettlement continues to be a frustrating experience. The Bikinian experience merits detailed consideration, for the lessons it can offer towards the planning of prospective island resettlements which may be necessitated in light of the impacts of environmental changes. Bikini is an important case study on environmental migration in that it involved a diminution if not loss of various aspects of a once thriving culture. Conventional wisdom assumes resettlement is less complicated if done within national borders rather than internationally. This is not necessarily so, as the Bikinian experience attests.

This paper adds to the existing knowledge of environmental migration by presenting a case study on the impacts of planning and policy among the Bikinians in the various resettlement locations. It examines the effects of hasty planning and inadequate policy making on the culture, identity and well-being of a resettled population. The paper argues that recognition and protection of the relocated communities' culture and identity are indispensable aspects of a sustainable relocation. Using a policy and legal framework, the paper focuses on three aspects of the relocation: (a) how hasty preparation or lack of preparation resulted in the choice of grossly inadequate resettlement sites; (b) how compensation and trust funds, while on one hand generous, made many Bikinians dependent on hand-outs, and (c) how the failure to understand the Bikinians' deep attachment and connection with their lands of origin produced deep frustrations through the generations.

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[8] *Id.*

[9] MICHAEL CERNEA & CHRISTOPHER MCDOWELL, RISKS AND RECONSTRUCTION: EXPERIENCES OF RESETTLERS AND REFUGEES (The World Bank. 2000).

The paper is structured as follows: Part I presents an overview of the Pacific situation in relation to environmental migration. Part II explains the context and history of the Bikinian resettlement. Part III discusses the long-term effects of hasty preparation, compensation schemes and the failure to consider the resettled peoples' deep attachment and connection to their home islands. Part IV reflects on the implications of the Bikinian resettlements for the future of Pacific environmental migration. It focuses on the necessity of legal protection, under both international law and domestic legislation, for indigenous populations who find themselves displaced from their lands and resources. It asks how expected resettlement risks and impoverished conditions may be minimised if not avoided; and, in general, reflects on what is a successful relocation. The Bikini experience continues to provide important lessons for environmental migration in the Pacific today.

The materials used in this study were derived from four principal sources: (i) documents on the Bikini resettlement held in the Nuclear Claims Tribunal in Majuro, the Marshall Islands, which were accessed by the author during a field trip on 22-25 January 2013, (ii) materials collected in the course of the legal actions that the Bikinians brought against the United States in the U.S. Court of Federal Claims, (iii) accounts from British and foreign newspapers; and (iv) secondary research materials on the Bikinian resettlement. The reports of Leonard Mason, on the relocation of the Bikini Marshallese, was particularly helpful in shedding light on the situation of the Bikinians in their various sites of resettlement. Leonard Mason was a key figure in the transfer of the Bikinians from Rongerik at a critical time when the islanders were facing starvation.

II

Historical Context

Bikini Atoll (henceforth, Bikini) is one of the 29 atolls and 5 isolated islands that comprise the Republic of the Marshall Islands (see Figure 1). Located in the northernmost part of country, some 3,540 kilometres southwest of Hawaii, Bikini has 26 islands the largest of which is Bikini Island. Bikini's combined land area is 6 square kilometres enclosing a

lagoon of 634 square kilometres.[10] Bikini's location contributed to its historical isolation, in turn creating strong bonds with fellow islanders, family and land. Its isolation, away from air and shipping routes, also contributed to the decision by the United States to use the atoll as a site for testing the effects of nuclear weapons on ocean vessels.[11]

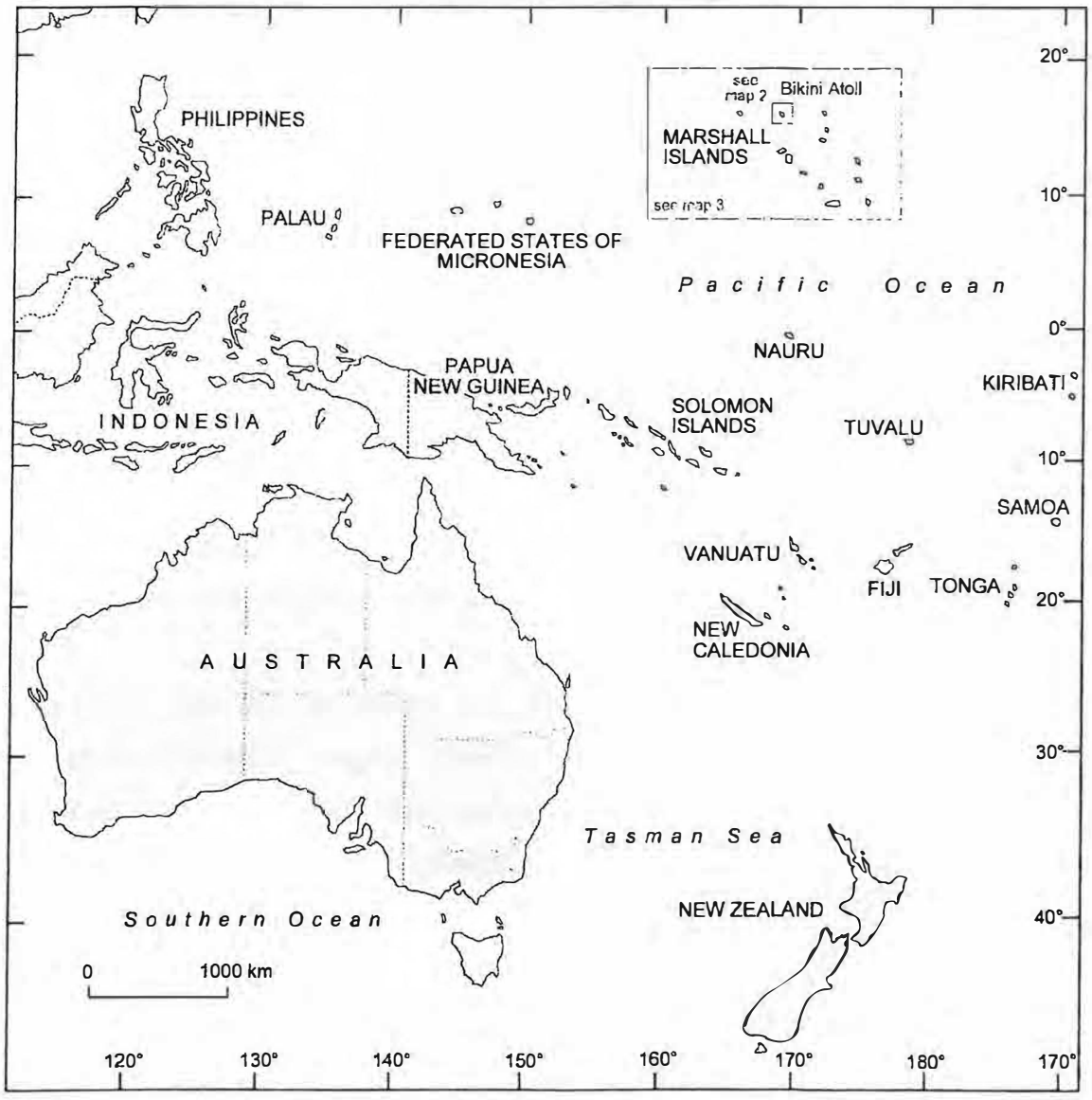

FIGURE 1. The Marshall Islands. Cartography: Judy Davis.

The Marshall Islands were already populated by Micronesians for millennia before their discovery by Europeans. Spanish navigator Alonso de Salazar became the first Westerner to discover the islands in 1526, but it was the arrival of British mariners John Charles Marshall

[10] The People of Bikini v. United States of America, Amended Complaint (No. 06-288C, Judge Block), In the United States Court of Federal Claims, 17 July 2006.

[11] NEAL HINES, PROVING GROUND: AN ACCOUNT OF THE RADIOBIOLOGICAL STUDIES IN THE PACIFIC, 1946-1961 (University of Washington Press. 1963).

and Thomas Gilbert in 1788 that got the islands their name. In 1885 the Marshalls became part of the protectorate of German New Guinea and, following Germany's defeat in World War I, it became a mandate of Japan in 1920. During World War II the United States obtained control of the Marshall Islands, and from 1947–1986 administered the islands under a United Nations sponsored trusteeship with "full powers of administration, legislation and jurisdiction."[12] Despite foreign domination of the Marshalls, Bikini remained "relatively distant and isolated" and was among the last atolls to be affected by foreign influence.[13] Although Christianity had spread to other parts of the Marshalls well before the 20th century, it was not until 1908 that the first missionaries arrived on Bikini.[14]

Bikini's isolation produced an "extremely well-integrated society."[15] The community was headed by a chief (the *iroij*), while the eleven extended families were each represented by a matrilineal headman (the *alab*).[16] Bikinians also recognised the authority of the paramount chief (the *iroij-lab-lab*). In exchange for money from the sale of coconuts, food and mats, the *iroij-lab-lab* who lived in the southern atoll of Ailinglablab and whose hegemony extended through the Marshalls' western (Ratak) atolls, would provide protection, "assistance in case of emergencies" and "representation in dealings with the Europeans."[17]

World War II saw nuclear weapons used for the first time and proved their potential in maintaining military superiority. As interest in the weapons' capability mounted, more tests were needed—outside United States territory but effectively within United States control, and away from "heavily populated areas and at least 500 miles from all sea and air routes."[18] Bikini fulfilled all the requirements for further nuclear weapons testings. This also meant the inhabitants of Bikini and other nearby atolls would have to be relocated. From 1946 to 1958 the United States deployed 67 nuclear devices (including 2 hydrogen bombs) on the Marshall Islands, with an overall "explosive yield" equivalent to "1.6 Hiroshima bombs

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[12] Trusteeship Agreement for the Former Japanese Mandated Islands (Trusteeship Agreement), Apr. 2, 1947, 61 Stat. 3301, 8 U.N.T.S. 189; see also 61 Stat. 397.

[13] ROBERT KISTE, THE BIKINIANS: A STUDY IN FORCED MIGRATION 13-16 (Cummings Publishing Company. 1974).

[14] *Id.* at 18.

[15] Leonard Mason, *The Bikinians: A Transplanted Population*, 9 HUMAN ORGANIZATION, 6 (1950).

[16] *Id.* at 6.

[17] *Id.*

[18] Kiste, *supra* note 13 at 27.

per day for those twelve years."[19] Of these, 43 were detonated on Enewetak Atoll, one was detonated 137 kilometres away from Enewetak, and 23 atomic devices (including one hydrogen bomb) were detonated on Bikini.[20] On 1 November 1952, the world's first hydrogen bomb was detonated on Enewetak Atoll at 10.4 megatons, which "vaporized the Enewetak island of Elugelab, leaving a crater more than a mile in diameter."[21] On 1 March 1954, "Bravo", another hydrogen bomb, was detonated on Bikini (see Figure 2). At 15 megatons, Bravo was the largest nuclear detonation in history, and approximately "1,000 times stronger than the bomb dropped on Hiroshima."[22]

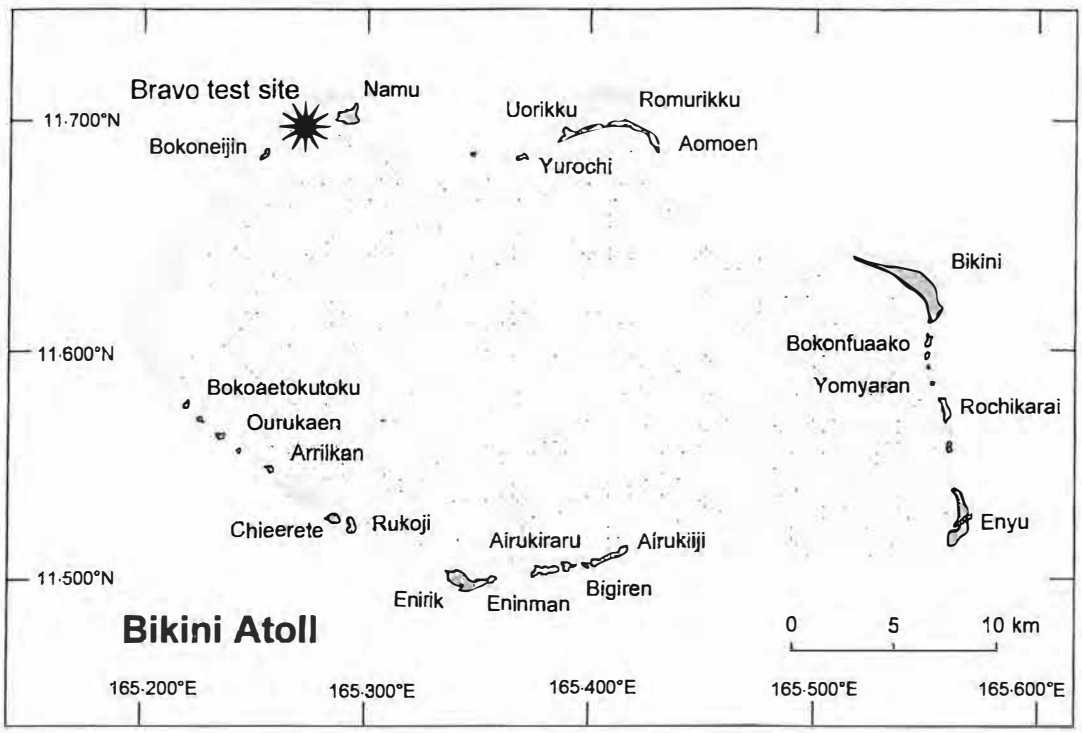


FIGURE 2. Bravo test site on Bikini Atoll

Three islands on Bikini were vaporised from the Bravo explosion, memorialised by the three stars on the upper right corner of the Bikinian flag (see Figure 3). Bravo's fallout reached Rongelap and Ailinginae atolls, 100 miles from Bikini, three to four hours after detonation, and later Utrik atoll, 320 miles from Bikini, necessitating the relocation of all of

[19] ADAM WATKINS, et al., KEEPING THE PROMISE, AN EVALUATION OF CONTINUING U.S. OBLIGATIONS ARISING OUT OF THE U.S. NUCLEAR TESTING PROGRAM IN THE MARSHALL ISLANDS (Harvard Law Student Advocates for Human Rights, Harvard Law School. 2006).

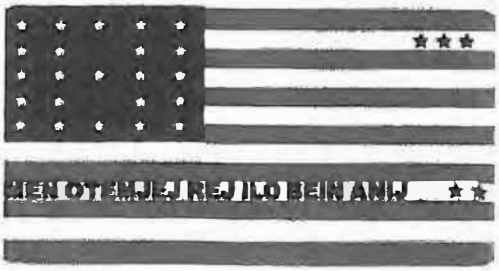
[20] In the Matter of: The People of Bikini, et al., Memorandum of Decision and Order, Nuclear Claims Tribunal, 5 March 2001.

[21] Watkins, *supra* note 16 at 3.

[22] *Id.* "A detonation of one megaton has an explosive force equivalent to one million tons of TNT."

these atolls' inhabitants when radioactive fallout reached the islands.[23] The "fireball and shock" were heard on Mejit Island, 400 miles east of Bikini, where startled residents "thought it was the end of the world."[24]

FIGURE 3. Flag of the People of Bikini Atoll



The 23 stars represent what remains of Bikini's 26 atolls. The two stars at the lower right represent the islands of Kili and Ejit, where the Bikinians currently reside, and which are "symbolically far away from Bikini's stars on the flag as the islands are in real life (both in distance and quality of life)."[25] *Men Otemjej Rej Ilo Bein Anij* is Marshallese for "Everything is in the Hands of God."[26]

III

Resettlement Features

If the Bikinian experience is to assist in evaluating the current prospects for environmental migration in the Pacific, it is important to consider its key features and evaluate its strengths and weaknesses. A simple but useful framework is Cernea's conceptualization of resettlement as a process that almost always involves the risk of landlessness, homelessness, joblessness, marginalization, food insecurity, loss of access to

[23] *Id* at 3-4.
[24] *Id.* at 3, from an interview with Dr. Masao Korean, Doctor at Majuro Hospital, Majuro, Marshall Islands, 18 January 2006.
[25] JACK NIEDENTHAL, FOR THE GOOD OF MANKIND, A HISTORY OF THE PEOPLE OF BIKINI AND THEIR ISLANDS (Bravo Publishing. 2001).
[26] *Id.* at 175.

common property resources, increased morbidity, and social disarticulation.[27] Although the framework was primarily used to reveal impoverished conditions of resettled communities due to dam constructions and development projects,[28] the insights generated are applicable to other cases of resettlement, including other types of environmental resettlement.[29]

Due to limitations of space, only three risks will be discussed here, namely, landlessness, food insecurity and social disarticulation, which are the most relevant to the Bikinian experience. Expropriation of land "removes the main foundation" upon which people's "productive systems, commercial activities, and livelihoods are constructed."[30] Landlessness is the "principal form of decapitalization and pauperization of [a] displaced people, as they lose both natural and man-made capital." For the Bikinians, Bikini was the only place they knew. Bikini was also the home and burial ground of their ancestors, the setting of their myths and magic. Its lagoon was the main source of their food and the place they went to escape from the cares of land. The taking away of Bikini thus not only removed the source of the community's productive systems, but the very spot to which they anchored their identity. As discussed later in this paper, the failure to reconstruct in resettlement a productive environment similar to the one they had in Bikini was one of the chief sources of frustration for the Bikinians. Unless the "land basis of people's productive systems" is reconstructed elsewhere the phenomenon of landlessness - which is the feeling of being uprooted from one's habitat - is experienced and the community becomes impoverished.[31] Food insecurity, another resettlement risk, happens when a relocated people experience temporary or prolonged undernourishment, due to scarcity of food. This became a major risk when many of the Bikinians nearly died of starvation in Rongerik, their first resettlement site. Food insecurity also leads to another resettlement risks mentioned by Cernea which is an increased susceptibility to illness and even death.

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[27] Michael Cernea, Impoverishment Risks, Risk Management, and Reconstruction: A Model of Population Displacement and Resettlement, UN Symposium on Hydropower and Sustainable Development. Beijing (2004).

[28] Maria Clara Mejia, *Economic Recovery After Involuntary Resettlement: the Case of Brickmakers Displaced by the Yacyreta Hydroelectric Project, in* RISKS AND RECONSTRUCTION: EXPERIENCES OF RESETTLERS AND REFUGEES (Michael Cernea & Christopher McDowell eds., 2000).

[29] ELIZABETH FERRIS, et al., ON THE FRONT LINE OF CLIMATE CHANGE AND DISPLACEMENT: LEARNING FROM AND WITH PACIFIC ISLAND COUNTRIES (The Brookings Institution – London School of Economics Project on Internal Displacement. 2011).

[30] Cernea, supra note 9 at 23.

[31] *Id.*

Social disarticulation is another consequence of resettlement. The confusion resulting from competition for resources and power, not to mention difficulties in adjusting to a new location may have the effect of fragmenting social organizations, even in close-knit societies like that of the Bikinians. Resettlement tears apart existing communities and social structures, interpersonal ties, and the enveloping social fabric; kinship groups often get scattered, and life-sustaining informal networks of mutual help, local voluntary associations, and self-organized service arrangements are diminished.[32] To overcome social disarticulation, the recreation of the old social and cultural fabric assumes significance. This is especially true of long-term relocations, where the need to maintain community integrity and sustainability becomes even more pronounced. Before relocation the Bikinians were an isolated community with its society, way of life and culture intact. Due to many factors, among which was the insufficiency of land in Kili, the Bikinians' traditional social arrangement based on land could not be implemented. Instead, an artificial way of apportioning land was devised (not based on traditional "lineage membership"), which resulted in long-term structural "fragmentation of households" and increased tension among the Bikinians.[33]

Preparation in Resettlement

The significance of preparation for resettlement cannot be overestimated. This is especially true if resettlement is less than voluntary, and if it involves an entire community. The Asian Development Bank regards a carefully planned and managed resettlement as a way to minimise, if not avoid, the expected impoverished conditions of the settlers.[34] There are three areas where planners and policy makers need preparation, and understanding: (a) socio-cultural effects of dispossession, (b) economic dislocations, and (c) plan for growth at the relocation site.[35] In the case of Bikini, the preparation was wanting at all three levels. There was little effort to understand the socio-cultural and economic aspects of dispossession, including the predictable -but preventable- impoverished conditions that ensue right after

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[32] Michael Cernea, *The Risks and Reconstruction Model for Resettling Displaced Populations*, 25 WORLD DEVELOPMENT 1569(1997).

[33] ROBERT KISTE, KILI ISLAND: A STUDY OF RELOCATION OF THE EX-BIKINI MARSHALLESE (Department of Anthropology, University of Oregon. 1974).

[34] ASIAN DEVELOPMENT BANK, GUIDELINES ON INVOLUNTARY RESETTLEMENT IN ADB PROJECTS (ADB Manila. 2001).

[35] Michael Cernea, *Why Economic Analysis if Essential to Resettlement: A Sociologist's View*, 34 ECONOMIC AND POLITICAL WEEKLY 2149 (1999).

relocation due to difficulties in coping with a new environment. Nor was there careful planning for productivity and self-reliance at the relocation site. As events would unfold, the chief interest of the policy makers who removed the Bikinians was for the relocation to be done with dispatch, in order to make way for the nuclear tests.

On 10 February 1946, Commodore Ben Wyatt, the American military governor for Marshall Islands, went to Bikini and informed the Bikinians that the United States intended to conduct nuclear tests on their atoll, thus they would have to leave their homes.[36] He said scientists were still "trying to learn how to use it for the good of mankind and to end all world wars."[37] To this the Bikinians, through their *iroij* Chief Juda Kessibuki, are reported to have responded: "If the United States government and the scientists of the world want to use our island and atoll for furthering development, which with God's blessing will result in kindness and benefit to all mankind, my people will be pleased to go elsewhere."[38]

Rongerik

Advance parties of Bikinians and the United States Navy Construction Battalion went to Rongerik to prepare dwellings. On 7 March 1946 the Bikinian community left Bikini aboard the vessel LST 1108: "[s]ome sang songs of farewell. Most were silent, some wept."[39] The following day, all 167 Bikininans were relocated on Rongerik atoll 125 miles to the east. The relocation occurred less than a month after the Bikinians were informed their home atoll would be used for nuclear testing purposes. Nine of eleven family heads (*alab*) chose Rongerik over the other inhabited atolls offered as relocation site: Rongerik was an atoll like Bikini, and being uninhabited it offered Bikinians freedom from outside interference, which figured prominently in the decision.[40] The United States, however, as the party primarily responsible for the resettlement failed to inform the Bikinians that Rongerik was an "infertile sandbar" and therefore extremely resource-poor in terms of its capacity to provide food for the entire community.[41] The urgency of pre-resettlement preparation likewise caused the Bikinians to downplay the fact that, according to their folklore, Rongerik was where an evil spirit lived so that consequently the fish in its lagoon were considered poisonous.

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[36] Jonathan Weisgall, *The Nuclear Nomads of Bikini*, 39 FOREIGN POLICY 77(1980).
[37] *Id.*
[38] *Id.*
[39] Kiste, *supra* note 13 at 33.
[40] *Id.* at 28.
[41] Zohl de Ishtar, *Poisoned, Contaminated Lands: Marshall Islanders are Paying a High Price for United States Nuclear Arsenal*, 2 SEATTLE JOURNAL OF SOCIAL JUSTICE 288(2004).

A new village was constructed on Rongerik using materials from Bikini: dwellings, a church, a community house and cisterns were readied by U.S. Navy personnel and an advance party of Bikinians prior to relocation. The military personnel brought in supplies of food "sufficient to feed the Bikinians [for] several weeks until they could adjust to their new environment."[42] Unlike the "dispersed settlement pattern" on Bikini, the village plan on Rongerik "resembled a community in the United States – dwellings were arranged in a compact L-shaped cluster on the main land."[43] Households that formerly lived adjacent to each other were given dwellings at opposite sides of the new village. Although households on Bikini were situated on delineated plots of land, this was not so on Rongerik— that the land on Rongerik was never divided is perhaps a reflection of the Bikinians' belief that their resettlement was to be temporary.[44]

It did not take long for the Bikinians to realise that Rongerik's potential to provide food for the community was limited due to poor soils. There were no papayas, bananas or taro and the fruits of breadfruit trees were small. Although arrowroot was plentiful it was soon depleted. The Bikinians also belatedly realised many fish in the lagoon were poisonous: "[w]e soon discovered that the fish in the lagoon were toxic...so we got sick every time that we would eat fish."[45] A report addressed to the governor of the Marshall Islands noted the unsustainable resettlement and recommended relocation from Rongerik: "agriculture of the main island is in a very low state" and the "food supply has fallen so low that natives are cutting palms to eat the heart, a progressively destructive and eliminative action."[46] Leonard Mason's visit in January 1948 confirmed the community's near-starvation such that within weeks the Bikinians were temporarily relocated in Kwajelein Atoll prior to being resettled on Kili Island.

Kili

[42] Mason, *supra* note 15 at 10.
[43] Kiste, *supra* note 13 at77.
[44] *Id.*
[45] Rubon Juda, *in* FOR THE GOOD OF MANKIND, A HISTORY OF THE PEOPLE OF BIKINI AND THEIR ISLANDS (Jack Niedenthal ed. 2001).
[46] Howard G. MacMillian, Report to the Governor of the Marshalls, Economic Development on the Research Council, South Pacific Commission, 19 August 1948, quoted in Mason, supra note 15.

Kili is a low coral island 2.4 kilometres long and 1.2 kilometres wide. At 0.93 square kilometres, its area is less than one-sixth to that of Bikini Island.[47] Unlike Bikini Island which has a lagoon, Kili is an isolated island without a lagoon, a matter initially downplayed by the Bikinians, but which later surfaced as a long-term concern. Three features figured prominently in the Bikinians choice of Kili in November 1948: (a) Kili has good soils and agricultural potential (it has a coconut plantation); (b) it was largely uninhabited, and; (c) politically, Kili was not under the rule of an iroij-*lab-lab* or paramount chief.[48] To Weisgall, the choice of Kili was due to the Bikinians' frustration over the inability of their *iroij-lab-lab* to aid them in their need:

> The Bikinians chose Kili partly out of frustration and anger at their plight. In the Marshalls almost all land is owned by paramount chiefs or *iroijes* who historically functioned much like feudal lords, receiving a form of tithe from the subjects who worked their land and providing them protection in times of danger. The deprivation and psychological stress the Bikinians experienced on Rongerik led them to question their traditional belief in the power of the *iroij*....One of the attractions of Kili was that it was not controlled by an *iroij*.[49]

Thus, the decision to go to Kili may be regarded as a denunciation of the traditional institution of *iroij-lab-lab* and an actualisation of their desire to free themselves from the control of non-Bikinian *iroij-lab-lab*. In fact, later events on Kili were to prove otherwise, as the Bikinians became even more dependent on another outsider, the United States government. The Bikinian experience on Kili Island, although an improvement on Rongerik, was nonetheless dismal. The resettlement proved not only disruptive but destructive of their culture, identity and lifestyle as the environmentally inhospitable new home made the Bikinians' traditional fishing and livelihood skills useless.[50] Kili's inadequate land area led to an artificial method of land division that was no longer based on traditional lineage membership. This in turn fragmented households and created tension within the community. Many Bikinians described their stay on Kili as akin to living in a prison.[51] Without a

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[47] Bikini Island, the largest island on Bikini atoll has an area of 6 square kilometres. According to Tobin, Kili was purchased in 1874 by Adolph Capelle and Co from Lebon Kabua and other chiefs of the Relik chain for $300. It was later transferred to various German corporations (including Jaluit Gesellschaft), which operated the island as a coconut plantation for copra production. The Japanese Imperial government took over Kili when it seized the Marshalls in 1914, through a lessee Nanyo Boeki Kaisha resumed the copra production until 1940. The United States government took over Kili after World War II.

[48] Niedenthal, *supra* note 25.

[49] Weisgall, *supra* note 36 at 81

[50] Kiste, *supra* note 13.

[51] Lore Kessibuki, *in* FOR THE GOOD OF MANKIND, A HISTORY OF THE PEOPLS OF BIKINI AND THEIR ISLANDS (Jack Niedenthal ed. 2001).

protective lagoon, the island is often battered by rough waves making fishing and canoeing for leisure difficult, and in certain months of the year boats are unable to land.

Return to Bikini

The Bikinians have always expressed the desire to return to Bikini which was uninhabited from 1946 to1972. In 1958 President Eisenhower declared a moratorium on all United States atmospheric tests. By 1969 the United States Atomic Energy Commission declared Bikini safe for resettlement, stating that: "[t]here is virtually no radiation left, and we can find no discernible effect on plant or animal life."[52] In the same year, plans were developed for the clean-up of Bikini Island.[53] Bikini and neighbouring Eneu Island were bulldozed, the topsoil "turned over to reduce radiation" and 50,000 new trees were planted.[54] In October 1972, three extended families returned to live on Bikini.[55] However, tests conducted in 1977 revealed high levels of radiation in coconuts, unsafe strontium 90 levels in Bikini's well waters, and the returned Bikinians had "absorbed doses of cancer-causing radioactive elements [of] strontium, plutonium and caesium."[56] In August 1978, the 139 residents of Bikini Island were again relocated, this time to Ejit Island near Majuro (see Figure 4).[57] The United States government, through the Department of Interior, reversed its initial position and concluded that residual radiation on Bikini still posed danger through the island-grown food that people eat, thus decided to render the island "off limits for at least 50 years."[58]

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[52] Weisgall, *supra* note 36 at 86.
[53] Dominic Noel Collins, Forced Migration and Resettlement in the Pacific (2009) University of Canterbury).
[54] Weisgall, *supra* note 36 at 86.
[55] Niedenthal, *supra* note 46.
[56] Weisgall, *supra* note 36 at 89.
[57] *Id.*
[58] *Id.*

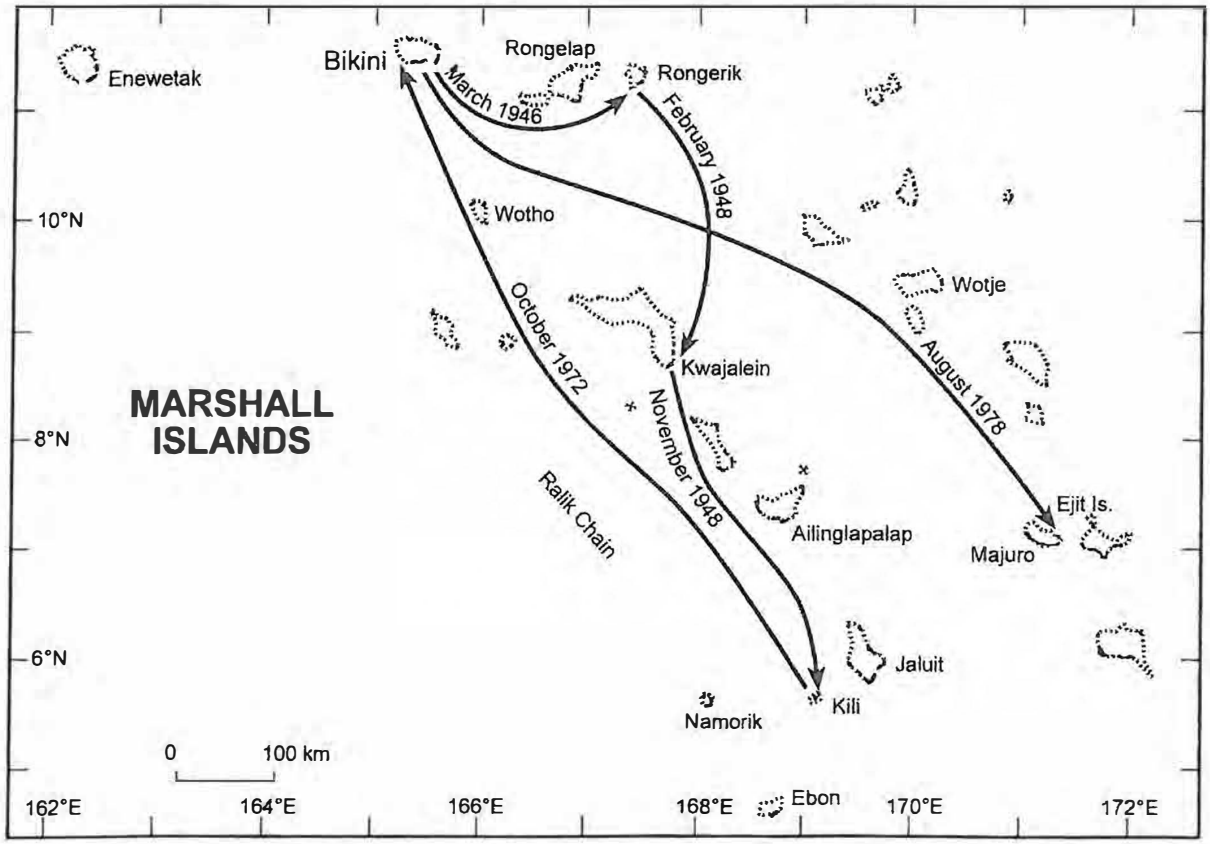

FIGURE 4. Relocation of the Bikinians[59]

Today, the Bikinians live on Kili and Ejit islands, as well as in Majuro, while some have moved to the United States to further their education.

A parallel but worse experience occurred among nearby Rongelap islanders who were relocated (initially) to Ejit Island two days after the Bravo Hydrogen bomb – the most powerful among all the 67 nuclear devices- was detonated on Bikini in 1954. Three years later, the Rongelapese returned to their atoll when they were assured it was safe to go back.[60] An unusually high incidence of cancer and childhood deaths from leukaemia caused the Ronglapese to again leave Rongelap atoll in 1985.[61] They currently reside in Ebeye near the United States military base in Kwajalein, in Mejatto and in Majuro.[62]

Compensation

[59] Kiste, *supra* note 13. This map builds on Kiste's map.
[60] Kiste, *supra* note 13 at 194.
[61] Stuart Kirsch, *Environmental Disaster, Culture Loss, and the Law*, 42 CURRENT ANTHROPOLOGY (2001).
[62] *Id.* at 170.

A comparable case occurred among the Banabans who were resettled on Rabi Island, Fiji, in 1945 when their home island of Banaba in the Gilberts (now Kiribati) became progressively uninhabitable due to decades of phosphate mining.[63] While both the Banaban and Bikinian communities were compensated, the amount of received by the Bikinians was far greater than the AUD 10 million "*ex gratia* payment" placed in a trust fund for the Banabans by the British, Australian and New Zealand governments.[64] Although late in coming (more than 30 years after the first relocation), trust funds were created by the U.S. government for Bikinians on Kili and Ejit Islands, as well as those living on Majuro, the capital of the Marshall Islands. In 1978 the U.S. government established the first trust fund worth $6 million called "The Hawaiian Trust Fund for the People of Bikini."[65] In 1982, a second trust fund was established worth $20 million, called "The Resettlement Trust Fund for the People of Bikini."[66] The second fund was supplemented with an additional $90 million for the rehabilitation of the main islands on Bikini Atoll, Bikini and Eneu Islands.[67] The Trust is exempt from all Federal and local taxes.[68]

The 1978 and 1982 funds presaged the formal acknowledgement by the United States of its responsibility for the environmental destruction of Bikini, and the displacement of the Bikinians. Under Section 177(a) of the *Compact of Free Association* (COFA) which the United States entered into with the Republic of the Marshall Islands in 1983 and which came into force on 21 October 1986,[69] the United States accepted "responsibility for compensation owing to citizens of the Marshall Islands" or for "loss or damage to property and person of the citizens of the Marshall Islands" as a result of the "nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958."[70] The United States and Marshall Islands governments agreed under Section 177(b) to set forth in a "separate agreement" the "provisions for the just and adequate settlement" of uncompensated claims, or for claims arising in the future.[71] The

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[63] Gil Marvel Tabucanon, *The Banaban Resettlement: Implications for Pacific Environmental Migration*, 35(3) PACIFIC STUDIES (2012).

[64] MICHAEL HOWARD, THE IMPACT OF THE INTERNATIONAL MINING INDUSTRY ON NATIVE PEOPLES (Transnational Corporations Research Project, University of Sydney. 1988).

[65] U.S. Public Law 94-34.

[66] U.S. Public Law 97-257.

[67] U.S. Public Law 99-239, Sec 103(1).

[68] U.S. Public Law 97-257

[69] Compact of Free Association Act, U.S. Public Law 99-239, 99 Stat. 1770 (1986). The Compact of Free Association was opened for signature on 25 June 1983, and signed into law by the U.S. Congress on 13 November 1986. The Compact was renewed for another 20 years from 2003.

[70] Compact of Free Association Act, Sec. 177 (a), U.S. Public Law 99-239, 99 Stat. 1770 (1986).

[71] Compact of Free Association Act, Sec. 177 (b), U.S. Public Law 99-239, 99 Stat. 1770 (1986).

separate agreement established a Claims Tribunal with jurisdiction to "render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program."[72] In 1987 the United States agreed to contribute $150 million to a separate investment fund pursuant to Section 177 of the COFA, half of which went to the Bikinians. The entire fund was to be managed by a professional fund manager under the administration of the government of the Marshall Islands.

Compensation is "[m]oney or payment in kind to which the people affected are entitled in order to replace the lost asset, resource or income."[73] Compensation is not however limited to a mode of material exchange. Under World Bank Guidelines, compensation may also come through the grant of local autonomy to the community, skills training opportunities to its members and infrastructure development that "fit the needs of the community."[74] The Guidelines states these are "sometimes more effective than cash" since "[c]ash, unfortunately, does not always bring benefits."

Compensation by itself however is insufficient to rehabilitate a displaced community.[75] This is particularly true when "compensation [and] not rehabilitation or sustainable development becomes the [main] goal rather than a means to help ensure a sustainable outcome."[76] In the case of the Bikinians, their first compensation in the form of substitute islands –Rongerik and Kili- did not prevent them from being worse off. As monetary compensation trickled in – mostly through trust funds- beginning 1978, the economic conditions of the Bikinians improved. The funds were used for various projects for the Bikinians on Kili and Ejit Islands. According to Niedenthal:

> These funds have made it possible for the people of Bikini to build over 170 homes, two schools, churches, government buildings, power plants, and recreation facilities including a gymnasium for their people residing on Ejit and

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[72] Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, Art .IV, Sec 1 (a) *Establishment and Operation of the Claims Tribunal*. Under Art XIII, Section 1 Effective *Date*, The Agreement comes into effect "simultaneously with the Compact in accordance with Section 177 of the Compact."

[73] ASIAN DEVELOPMENT BANK, HANDBOOK ON RESETTLEMENT: A GUIDE TO GOOD PRACTICE (ADB. 1998).

[74] WORLD BANK, GENERAL GUIDELINES, http://www.worldbank.org/afr/ik/guidelines/generalguides.pdf (last visited 27 December 2013).

[75] Rehabilitation (from *habilitare*, make fit again) is used here in the sense of the restoration -to as close as possible- of the resettled community's social systems and cohesion.

[76] THEODORE DOWNING, AVOIDING NEW POVERTY: MINING-INDUCED DISPLACEMENT AND RESETTLEMENT, (International Institute for Environment and Development (IIED), No. 58. 2001).

> on Kili islands. This trust has also given the Bikinian people the ability to create a scholarship program that sends annually over 400 children to school to the United States and other countries, construct infrastructure on Bikini for the dive program and future resettlement activities, hire American professionals such as attorneys, scientists, engineers, teachers and trustees, and to fund a medical plan. The total value of the fund (30 June 2001) is approximately $118 million.[77]

However, contrary to intentions, the funds converted the Bikinians into a consumer-oriented society. When money came, cars and television sets were bought, and even food was for sale. People forgot how to sail, fish and build canoes. "Fishing at Kili has become rare, but the Robert Reimers department store shelves are full of canned mackerel from California."[78] Yet, despite money and goods for individual distribution, because there is no other source of employment on Kili, the Bikinians found their "$2,000 annual stipend to be woefully inadequate:"[79]

> When the trust funds came into being, yes, there was more money. But when you compare that with how we lived on Bikini able to eat breakfast, lunch and dinner without spending a penny, living off the land and fishing in the lagoon....[w]hen we have to go out and survive with that money, it isn't enough.[80]

Land

The connection of indigenous people to their land and culture is not only strong but forms the core of their being. Royal, in his study of comparative worldviews, found that while Westerners view God as external to humans, and Easterners see heaven as something found within, many indigenous cultures regard human beings as having a seamless connection with the world, including land, rivers and seas.[81] This bond between indigenous peoples and their lands therefore has to be respected and acknowledged. The dislocation of indigenous peoples from their lands would have negative impacts on their health and well-being.[82]

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[77] Niedenthal, *supra* note 46 at 157-158.
[78] Jeffrey Davis, *Bombing Bikini Again*, NEW YORK TIMES MAGAZINE 1994.
[79] *Id.* at 6.
[80] *Id.* quoting Tomaki.
[81] TE AHUKARAMU CHARLES ROYAL, INDIGENOUS WORLDVIEWS – A COMPARATIVE STUDY (Wellington: Te Wananga-o-Raukawa. 2003).
[82] Chris Cunningham & Fiona Stanley, *Indigenous by Definition, Experience, or Worldview*, 327 BRITISH MEDICAL JOURNAL 403(2003).

For the Bikinians, as with the rest of the Marshallese Islanders, land is not only where one lives or eats. It is a predominant object central to the life of society. In a 1954 petition that the Marshallese people submitted to the United Nations Trusteeship Council raising their concerns about the nuclear weapons tests, the central role of land to Marshallese society was expressed in the following terms:

> The Marshallese people are not only fearful of the danger to their persons from these deadly weapons in case of another miscalculation, but they are also very concerned for the increasing number of people who are being removed from their land....Land means a great deal to the Marshallese. It means more than just a place where you plant your food crops and build your houses; or a place where you can bury your dead. It is also the very life of the people. Take away their land and their spirits go also.[83]

The identity of the Bikinians thus was largely derived from their deep connection to Bikini which they inherited from their ancestors.[84] Bikini was associated with the Bikinians' origins, in both a physical and spiritual sense. Much like other Marshallese Islanders, the sense of connection to the land is "rooted in the indigenous religion of the Marshall Islands" and appears to have survived the introduction of Christianity.[85] For instance, the Marshallese beliefs in the nature god *Jebro* (god of breadfruit), and *irooj rilik* (god of fish) appears to have survived in chants to the sharks before fishing.[86] Among the effects of resettlement is the sense of being uprooted from one's physical and spiritual matrix. For indigenous peoples abruptly severed from their homeland by displacement, living in strange environments causes "serious disorientation and anomie" particularly if familiar systems could not be "successfully reproduced in the new context."[87] The Bikinian resettlement proved not only disruptive but destructive of their culture, identity and lifestyle. "In those early days on Kili," according to a Bikinian, "we spent a lot of time contemplating and dreaming about our homeland...[w]e feel that Kili is a prison because we can't sail to another island, or even take a long refreshing

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[83] Petition from the Marshallese People Concerning the Pacific Islands: Complaint Regarding Explosion of Lethal Weapons within our Home Islands, United Nations trusteeship Council, T/PET.10.28, 20 April 1954.

[84] Kiste, *supra* note 13 at 37.

[85] BARBARA JOHNSON & HOLLY BARKER, HARDSHIPS AND CONSEQUENTIAL DAMAGES FROM RADIOACTIVE CONTAMINATION, DENIED USE, EXILE, AND HUMAN SUBJECT EXPERIMENTATION EXPERIENCED BY THE PEOPLE OF RONGELAP, RONGERIK AND AILINGINAE ATOLLS, (Office of the Public Advocate, Nuclear Claims Tribunal 2001).

[86] *Id.* at 89.

[87] Ranjit Nayak, *Risks Associated with Landlessness: An Exploration Toward Socially Friendly Displacement and Resettlement, in* RISKS AND RECONSTRUCTION EXPERIENCES OF RESETTLERS AND REFUGEES 91, (Michael Cernea & Christopher McDowell eds., 2000).

walk when life closes in on us."[88] All in all, the deprivation and frustration the Bikinians experienced in resettlement led them to discard many of their traditional cultural and social systems.[89] Yet, all is not lost. Notable are current efforts to revive Bikinian pride and culture. The Waan Aelõñ in Majel (Canoes of the Marshall Islands) is non-governmental organisation based in Majuro that trains Marshallese –and Bikinian- youth the skills of traditional canoe and boat building. On Kili, Bikinian women produce quality ladies' bags using coconut fronds. The bags are popular among not only among the Marshallese but to foreigners who find them chic.

IV

Reflections on Pacific Environmental Migration

The resettlement of the Bikinians offers insights into the complexity of migrations that are precipitated by environmental pressures. While the Bikinian experience is unique, and was contingent on peculiar historical and factual circumstances, it is also a good springboard for reflection as it raises important issues that need to be addressed in circumstances affecting the future of Pacific environmental resettlement. These reflections are discussed below under four subsections:

Protection of Collective Rights

Firstly, there is the need for legal protection of indigenous peoples' collective rights over land, culture and resources. The Indigenous and Tribal Peoples Convention, C169, defines indigenous peoples "on account of their descent from the populations which inhabited the country, or geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[90] One defining –and perhaps universal- characteristic of indigenous peoples is their strong sense of connection to their homeland. They have consistently communicated to the outside world this need to be understood in terms of their relationship to their homelands. This is also one of the reasons why displacement of indigenous peoples is a particularly

[88] Kessibuki, *supra* note 49 at 75-76.
[89] Weisgall, *supra* note 34 at 85.
[90] International Labour Organization Convention 169 (ILO 169), published 27 June 1989, entered into force 5 September 1991.

painful experience— for to them, their lands are crucial to their continued existence, identity and culture.[91] The lingering frustrations stemming from the Bikinian experience demonstrates that relocation should never have been done at all, or, where they have to be done, for instance in cases of unavoidable environmental threats, adequate precaution must be observed in such a manner that recognises, respects and protects indigenous worldviews and culture.

When the Bikinians were resettled in 1946 there were no protections from hasty and whimsical relocation of indigenous peoples. The rights enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples* adopted by the United Nations General Assembly during its 61st session on September 13, 2007, the Guiding Principles on Internal Displacement adopted in 1998 by the then United Nations Commission on Human Rights (now UN Human Rights Council) and the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), ratified by 175 countries (including the United States in 1994 but not by the Marshall Islands) still lay in the future.[92]

The Guiding Principles, an international law framework for the protection of the rights of internally displaced persons, prohibits arbitrary displacement of any kind: "Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence"[93] Principle 7(3) establishes the principle of prior "free and informed consent" of those who would be displaced. If for any compelling reason displacement has to be undertaken, the authorities shall endeavour to "include those affected, particularly women, in the planning and management of their relocation."[94] The principles requiring prior voluntary consent and, during resettlement, the involvement of the settlers in the planning and management of their relocation are important protections brought in by the

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[91] James Anaya & Robert Williams Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARVARD HUMAN RIGHTS JOURNAL 33(2001).

[92] *International Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature and ratification by General Assembly resolution 2106 (XX), 21 December 1965 (entered into force 4 January 1969). Art 1.1 defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[93] Guiding Principles on Internal Displacement, principle 6(1), 11 February 1998, U.N. Doc. E/CN.4/1998/53/Add.2. If displacement must be done for any compelling reason, Principle 7(1) states: "Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects."

[94] Ibid. at principle 7(3)(d).

Guiding Principles but which were not yet in existence during the resettlement of the Bikinians. Although the Guiding Principles is a non-binding instrument, which means a recalcitrant state could not be held liable for violating its guidelines, yet in practice the instrument has achieved a high level of international support and acceptance.[95]

Article 2(1) of ICERD on the other hand requires state parties to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms." This includes the elimination of plans and programs specifically placing indigenous communities in inferior or disadvantageous situations, such as what happened to the Bikinians. Special measures for affirmative action may be established by states in favour of disadvantaged ethnic groups, and such would not constitute racial discrimination within the context of the Convention. Article 1(4) states: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination."[96] While article 1(4) does not specifically mandate states to establish affirmative action, nonetheless it may serve as a guide for policy and legal frameworks on how states may protect indigenous groups within their jurisdiction. In Latin America some countries have written into their new Constitutions special recognition and legal protection for indigenous and cultural minorities. Article 32 of the 2009 Bolivian Constitution states: "The Afro-Bolivian people enjoys...the economic, social, political and cultural Rights recognized in the Constitution to the indigenous and original Peasant nations and peoples."[97] Similarly, Article 58 of the 2008 Ecuadorean Constitution states: "To strengthen their identity, culture, traditions and rights, the collective rights of the afro-Ecuadorian people are recognized as established in the Constitution, the law and the pacts, covenants, declarations and other international human rights instruments."[98] Both Constitutions command states to safeguard and protect the rights of indigenous or ethnic minorities as a matter of law. The United Nations Committee on the Elimination of Racial Discrimination calls upon states-parties to "recognize and protect the rights of indigenous peoples to own, develop, control

[95] Ibid.
[96] *Id.* at Art. 1(4).
[97] Constitution of the Plurinational State of Bolivia, Art. 32, 2009.
[98] Constitution of the Republic of Ecuador, Art 58, 2008.

and use their communal lands, territories and resources."[99] Although the recommendation is non-binding, it may be argued that it goes to the essence of what the Convention is about, which is for the "protection as may be necessary" of "certain racial or ethnic groups" who may require such legal protection. In the context of global warming these groups may be indigenous peoples and islanders whose human rights to life and livelihoods are threatened by extreme environmental changes.

Under the *United Nations Declaration on the Rights of Indigenous Peoples*, indigenous peoples have the "right to the full enjoyment as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[100] Art 10 of the Declaration mandates that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories" and that "[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just compensation and, where possible, the option of return."[101] Indigenous peoples likewise have a "right not to be subjected to forced assimilation or destruction of their culture,"[102] and states are mandated to "provide effective mechanisms for prevention of, and redress for:... (b) [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources; [and] (c) [a]ny form of forced population transfer which has the aim or effect of violating or undermining any of their rights."[103] The Declaration was adopted by United Nations General Assembly in 2007 with 144 states in favour, 11 abstentions and 4 against, namely the United States, Canada, Australia and New Zealand.[104] Although non-binding, the Declaration represents a "dynamic development of international legal norms" in that it "reflects the commitment of the UN member states to move in [a] certain direction," which is the setting of a standard in the observance of the human rights of indigenous peoples.[105] The

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[99] UN Committee on the Elimination of Racial Discrimination, CERD General Recommendation No. 23 on Indigenous Peoples, 1997.

[100] United Nations Declaration on the Rights of Indigenous Peoples, Art. 1, GA/RES/61/295, 13 September 2007.

[101] United Nations Declaration on the Rights of Indigenous Peoples, U.N. General Assembly, Resolution adopted by the General Assembly on 2 October 2007, A/RES/61/295.

[102] United Nations Declaration on the Rights of Indigenous Peoples, Art. 8(1)

[103] United Nations Declaration on the Rights of Indigenous Peoples, Art. 8(2)

[104] United Nations Permanent Forum on Indigenous Issues website, http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx (last visited 6 May 2013).

[105] Declaration on the Rights of Indigenous Persons, Frequently Asked Questions at http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf (last visited 10 March 2013).

Declaration thus carries persuasive authority as a set of guiding principles should indigenous peoples require resettlement due to environmental change.

A binding international instrument protecting the rights of indigenous peoples is the 1989 International Labour Organization (ILO) Convention No. 169 (which replaced the earlier Convention No. 107), recognising indigenous peoples' rights of ownership and possession over the lands which they traditionally occupy (Art 14.1).[106] ILO Convention No. 169, otherwise known as the Indigenous and Tribal Peoples Convention, has been ratified by 22 states, but not including the United States or the Marshall Islands. While ILO Convention No. 169 has been ratified by only a limited number of states (with only one state in the Pacific –Fiji- ratifying in 1998), its adoption was nonetheless considered a milestone in indigenous rights protection. It is not only a binding treaty, but it is generally considered to have ushered in the eventual adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples. The Convention prohibits the removal of indigenous peoples from their home land: "the peoples concerned shall not be removed from the lands which they occupy."[107] If their relocation is "necessary," it must be a case of an "exceptional measure" and shall take place only with the indigenous peoples' "free and informed consent" (Art 16.2). Further, they shall be "provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development" (Art 16.4). While ILO 169 neither binds the U.S. nor the Marshall Islands, which are non-party states, the principles nonetheless point to a commitment by a growing, albeit slow, number of countries to be bound by emerging legal norms recognising and respecting indigenous rights within their jurisdiction.[108] In 2001 the Awas Tingni, an indigenous community in living in eastern Nicaragua won a case in the Inter-American Court of Human Rights against the government of Nicaragua. The Awas Tingni pressed for protection of their traditional lands and resources when the Nicaraguan government granted a logging concession to private parties in traditional lands without prior consultation and consent. The Court determined that Art.14(2) of ILO Convention No. 169 mandates governments to " guarantee effective protection of [the] rights of ownership and protection [of indigenous peoples]" even though Nicaragua was

[106] Indigenous and Tribal Peoples Convention (ILO Convention No. 169) adopted on 27 Jun 1989, Geneva, 76th ILC session, entered into force 5 Sep 1991.

[107] *Id.* at Art. 16 (1). "[Indigenous and tribal] peoples concerned shall not be removed from the lands which they occupy

[108] Spain and Nepal ratified in 2007, Chile in 2008 while the Central African Republic and Nicaragua ratified in 2010.

not a party to the Convention in 2001 although it eventually ratified in August 2010. Further, Judge Garcia Ramirez in writing the concurring opinion referred to parts of the draft U.N. Declaration on the Rights of Indigenous Peoples to support his conclusion.[109]

Responsibility

The second issue is who bears responsibility for the destruction of the environment, and of the people and culture sustained by such an environment. The Bikinians had a strong moral and legal claim against the United States, and the latter in fact admitted legal responsibility for the consequent environmental destruction, loss or damage to property and person of the citizens of the Marshall Islands.[110] The establishment of the Nuclear Claims Tribunal was thus not only for compensation purposes but in recognition of the "contributions and sacrifices" of the Marshall Islanders towards the successful completion (albeit environmentally destructive) of the nuclear testing program of the United States[111] Extrapolating this insight gleaned from the Bikini experience, it is doubtful if the effects of other long-standing environmentally destructive activities done by the world's biggest carbon gas emitters deserve a similar recognition and moratorium from the countries responsible. A corollary question is whether the affected island countries most vulnerable to the long-term impacts of environmental changes have recourse under international law, and if so under what forum.

There is an increasing interest in the relevance of litigation in the redress of damages resulting from the impacts of anthropogenic climate and environmental change. When it comes to increased frequency of storms due to global warming, the difficulty in proving a specific anthropogenic causes, unlike the case of Bikini, is however recognised. Nonetheless, Tuvalu investigated the possibility of suing the worst national emitters of greenhouse gases in an attempt to convert moral responsibility into legal liability. The plan however came to nothing. There is also a growing interest in finding possible causes of action for climate change damage in existing international law tribunals, among them the International Tribunal

[109] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court on Human Rights, Ser. C No. 79, 31 August 2001; see also James Anaya, International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State, Arizona Journal of International and Comparative Law, Vol. 21, No. 1, p44, (2004).

[110] Compact of Free Association Act, Sec. 177 (a), U.S. Public Law 99-239, 99 Stat. 1770 (1986).

[111] Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, Preamble,

for the Law of the Sea (ITLOS) established under the United Nations Convention on the Law of the Sea (UNCLOS). The jurisdiction of the Tribunal comprises "all disputes concerning the interpretation or application of the Convention."[112] UNCLOS entered into force in 1994 has currently 165 State parties with Timor-Leste, the 165th state-party, acceding on 8 January 2013. Under UNCLOS, parties are required to "prevent, reduce and control pollution of the marine environment from any source."[113] The prohibition includes the "release of toxic, harmful or noxious substances, especially those that are persistent,[114] [whether] "from land-based sources [or] through the atmosphere."[115] Under UNCLOS, states must adopt all measures necessary "to ensure that activities under their jurisdiction are conducted in a manner that does not cause pollution damage to other States and their environment."[116] Art 235 states that "[s]tates are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."[117] An interesting prospect for the consideration of ITLOS is the possibility that climate change has an anthropogenic trigger. Assuming causality is determined, should states with large populations such as China and India, or the developed states with higher per capita pollution emissions compared with, say, the small Pacific states such as Nauru and Tuvalu, be made liable? How will liability and responsibility be translated towards the small nations disproportionately affected by climate change? An important characteristic of a judgment by an UNCLOS tribunal is that it is final and enforceable.

Avoidance of Impoverished Conditions

The third issue is the minimisation or avoidance of risks and impoverished conditions should relocation be unavoidable. Relocation is almost always frustrating to those involved because it "unravels" spatially and culturally based patterns of social organisation as it

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[112] The International Tribunal for the Law of the Sea website, http://www.itlos.org/index.php?id=11&L=0 (last visited 28 December 2013). The Tribunal's jurisdiction is subject to "the provisions of article 297 and to the declarations made in accordance with article 298 of the Convention." Nonetheless, "Article 297 and declarations made under article 298 of the Convention do not prevent parties from agreeing to submit to the Tribunal a dispute otherwise excluded from the Tribunal's jurisdiction under these provisions (Convention, article 299). The Tribunal also has jurisdiction over all disputes and all applications submitted to it pursuant to the provisions of any other agreement conferring jurisdiction on the Tribunal." (Ibid.)

[113] United Nations Convention on the Law of the Sea, art. 194(1).

[114] *Id.* at 194(3).

[115] *Id.* at 194(3).

[116] William Burns, *Potential Causes of Action for Climate Change Damages in International For a: The Law of the Sea Convention*, 2 McGill International Journal of. Sustainable Development Law and Policy 1 (2006)

[117] United Nations Convention on the Law of the Sea, art. 235.

uproots all members of the community including the sick, elderly and the very young, allowing for little psychological or physical preparation.[118] Long-term relocations, such as what happened to the Bikinians, are even more complex and problematic as relocated communities find themselves in a state of discontent, with many wanting to return to their home islands. A "sense of loss" is especially pronounced in relocation due to environmental triggers, where relocated populations suddenly find themselves uprooted from their traditional lands and social systems.[119]

The very institutions that brought about the relocation have the responsibility to ensure the expected risks and impoverished conditions resulting from the relocation are minimised if not avoided. This requires not just rigorous planning but careful monitoring of the various phases of resettlement. One danger identified by Nayak is the "social dependence" that could develop for such institutions which "increasingly in the modernizing process are becoming remote and inaccessible to the people affected by risks."[120] This happened to the Bikinians, who instead of recovering their traditional self-reliance as a community became heavily dependent on generous United States hand-outs which provides them with free housing, electricity, water and periodic rations of food.

The Bikinians' relocation to Rongerik, and Kili removed the traditional foundations upon which their social and livelihood systems were constructed. Compared with the Banaban resettlement on Rabi Island in Fiji due to extensive mining on Banaba Island, the Bikinians never fully recovered from the trauma experienced in the initial years of relocation. For instance while Bikinians would often refer to Kili as a prison, the Banabans successfully transplanted Banaba on Rabi. Rabian villages were not only named after the Banaban villages,[121] the Banabans replicated on Rabi Island the social and administrative features long known to them in Banaba. For instance through the *Banaban Settlement Act* (1945, amended in 1970), the Rabi Council of Leaders was established providing the Banabans with a system of self-government that is "as near as possible [to] what the Banabans were used to in Ocean Island"[122]

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[118] Cernea & McDowell *supra* note 9.
[119] Kirsch *supra* note 59.
[120] Nayak, *supra* note 76 at 80.
[121] Rabi villages were named after the original Banaban villages of Tabwewa, Uma, Tabiang and Buakonikai, and residents generally chose to live in the village named after where their ancestors came from are from.
[122] Western Pacific High Commission, Confidential Memorandum No. C.F. 48/5/2, Maude Papers, Part I: Series J, Special Collections, Barr Smith Library, University of Adelaide (1946).

While the Bikinians have far more financial resources than the Banabans due to monetary compensation given by the U.S. government, the Banabans have successfully demonstrated not just the sense of continuity between old and new but kept the community intact in tangible and intangible ways. Unlike the Bikinians who have become heavily dependent on outside financial aid, the Banabans converted Rabi into a self-reliant, albeit poor, community able to preserve their collective pride and identity.

Successful Relocation

The last is a reflection on what is successful relocation. The Bikinian experience is a significant case study on environmental migration in that it involved the relocation of an entire community within the same nation state. Conventional wisdom assumes resettlement is less problematic if resettlement is internal rather than when migrants cross international borders. This is not necessarily so, as the Bikinian experience demonstrates. Resettled communities, whether internal or international, can become strangers in their places of resettlement, at least in the adjustment years. A complex dynamic is created among the resettled community and their host place in ways that challenge if not permanently alter deeply held cultural values.

The periods of near-starvation the Bikinians experienced on Rongerik is not so much the proof of the resettlement's failure, but rather how the collective trauma generated from the experience contributed to a society highly dependent on outside aid. For Campbell, a "successful" relocation is one in which the "important characteristics of the original community, including its social structures, legal and political systems, cultural characteristics and worldviews are retained: the community stays together at the destination in a social form that is similar to the community of origin."[123] One of the important characteristics which the Bikinians seemed to have lost in resettlement is self-reliance on their capacity as a community to survive without financial aid. However with grassroots organisations like the Waan Aelõñ in Majel, aspects of Bikinian culture may be still be revived particularly among the young.

[123] John Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land, in* CLIMATE CHANGE AND DISPLACEMENT. MULTIDISCIPLINARY PERSPECTIVES (Jane McAdam ed. 2010).

While "success" in resettlement is a problematic concept because peoples and societies have different cultural criteria and conceptions of what constitutes success, there are commonalities. Voutira and Bond for instance refer to a situation where the settlers' livelihood condition is at least minimally restored.[124] For Scudder, resettlement success is demonstrated by a genuine community formation which is the "handing over" of a sustainable resettlement process to the later generation of settlers.[125] As new institutions are formed, the people's ability to reclaim the level of self-sufficiency they had prior to resettlement is an important ingredient of success. It is an essential component in formation of collective dignity and self-esteem. For example, emphasis is placed less on personal home building and more on the establishment of farmers unions, water associations, cooperatives and other institutions indicative of a community rooted in their new home.

In the context of long-term climate and environmental change, such as desertification or the possible rise in sea levels, relocation is permanent. It is thus important to regard relocation in terms of rootedness, and the recovery of a community's capacity for long-term sustainability with their social and community fabric intact in their new home. Both Banabans and the Bikinians were resettled more than 60 years ago. Yet, the Banabans may be considered to have taken roots on Rabi, but the same cannot be said for the Bikinians on Kili and Ejit Islands. Ultimately, a successful resettlement is the "end" of resettlement, that is, when the settlers find a home and meaning in their new location. Resettlement for the Bikinians is an open wound, which prevents closure of the process of resettlement no matter how long ago that was.

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[124] Eftihia Voutira & Barbara Harrell-Bond, *Successful Refugee Settlement: Are Past Experiences Relevant, in* RISKS AND RECONSTRUCTION: EXPERIENCES OF RESETTLERS AND REFUGEES (Michael Cernea & Christopher McDowell eds., 2000).

[125] THAYER SCUDDER, THE FUTURE OF LARGE DAMS: DEALING WITH SOCIAL, ENVIRONMENTAL, INSTITUTIONAL AND POLITICAL COSTS (Earthscan. 2005).

CHAPTER 6

The Banaban Resettlement
Implications for Pacific Environmental Migration

Publication Status

Published in *Pacific Studies*,
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Link to Previous Chapter

This article is the third in a series of case studies that examine migration and resettlement in the Pacific. While Bikini was a case of "failed" resettlement, the resettlement of Banabans in Fiji, in response to the long-term mining of phosphate on Banaba, is presented as an example of a "successful" resettlement, albeit in a qualified sense.

Contribution to Thesis

This article explores an important aspect of environmental migration by investigating what is considered to be a case of "successful" resettlement, despite the Banabans' economic difficulties. This article examines the context and long term impacts of policies and legal frameworks relevant to the Banaban resettlement. The Banaban experience is a significant case study on environmental migration in that it involved the relocation of an entire island population as opposed to gradual, individual or family migration; and the resettlement crossed international boundaries, in contrast to internal or intra-state relocations. The article concludes that long-term preparation by way of establishing trust funds and advance land purchase, and the adoption of policies favourable to preservation of the community's culture, were the principal reasons for the resettlement's relative success. The manner in which the Banabans retained their group identity, adopted their indigenous system of self-government, and maintained their social structures and world views are evidence of the resettlement's success.

Pages 183-212 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Tabucanon, G. M. (2012). The Banaban resettlement: implications for Pacific environmental migration. *Pacific studies*, *35*(3), 1-28.

CHAPTER 7

Social and Cultural Protection for Environmentally-Displaced Populations: Banaban Minority Rights in Fiji

Publication Status
Accepted for publication in *The International Journal on Minority and Group Rights*, Vol. 21, No. 1, 2014, forthcoming.

Link to Previous Chapter

The previous article discussed the general reasons why the Banaban resettlement succeeded. This article looks deeper into the Banaban case and identified the establishment of Minority Rights protections for the Banabans under the laws of Fiji as among the reasons for the resettlement's success.

Contribution to Thesis

This article explores an important aspect of environmental migration, by examining the minority rights protections of the Banabans under Fijian laws. The article aims to (1) identify Banaban minority rights within current Fijian laws, focusing on three areas of law, namely, self-government, indigenous dispute resolution mechanisms and linguistic rights; (2) evaluate Banaban minority rights under current norms of international law and propose avenues for a more effective minority protection; and (3) reflect on the need to recognize and protect minority rights of environmental migrants within their host state. The article argues that while Fiji, as host state, extended elements of minority rights protection to the Banabans, recent political developments in Fiji, including the abrogation of the old constitution and adoption of a new constitution, send out disturbing signals threatening to veer away from minority rights protection and multiculturalism. While minority rights for migrant populations are important components in a successful resettlement, they are also subject to shifts in political priorities of the host state. The Banaban experience is an example of the importance of establishing guarantees, whether through the constitution or through international law, in safeguarding the minority rights of migrants.

Social and Cultural Protection for Environmentally Displaced Populations: Banaban Minority Rights in Fiji

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The effects of global warming are now being felt in various parts of the world. For vulnerable countries, few aspects of social and cultural life are likely to remain unaffected. The Pacific is widely regarded as being among the most vulnerable regions, as low lying islands are exposed to greater risk of flooding from rising sea-levels and more frequent storms.[1] According to the Intergovernmental Panel on Climate Change, the "greatest single impact" of environmental change will be on "human migration and displacement".[2] Recent events and processes suggest that environmental migration is expected to increase significantly over the coming years.[3] Although the impact will vary among islands, it is expected that "beach erosion and coastal land loss, inundation, flooding and salinization of coastal aquifers and soils will be widespread".[4] The possibility of a sea-level rise poses "the greatest threat to small island states relative to other countries"[5] Given the possibility of even a "moderate amount of climate change over the next century," atoll countries may ultimately become unsustainable as human habitations.[6]

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1 R. Nicholls and R. Tol, 'Impacts and Responses to Sea-level Rise: A Global Analysis of the SRES Scenarios over the Twenty-first Century', 364 *Philosophical Transactions of the Royal Society* (2006) p. 1073.

2 Intergovernmental Panel on Climate Change, *First Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC) 1990)

3 International Organization for Migration, *Migration, Climate Change and the Environment*, IOM Policy Brief (2009). The IOM defines environmental migrants as those persons who for "compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad". While is there is currently no generally accepted definition of "environmental migrants," the IOM definition is helpful in capturing the broad typology of the concept. The definition's strength is its ability to capture many facets of environmental migration. For instance, the dichotomies of "voluntary" and "involuntary," "sudden" and gradual" as well as "internal" and "international" are subsumed in the definition, which is one reason why it is widely, though not universally, accepted. Another strength is that the definition subsumes a range of other environmentally-induced movements such as those from volcanic eruptions or environmental disasters whether natural or human induced, and is not causally limited to climate change.

4 Intergovernmental Panel on Climate Change, Climate Change 2001, Working Group II: Impacts, Adaptation and Vulnerability <http://ipcc.ch/ipccreports/tar/wg2/index.php?idp=621>

5 *Ibid.*

6 J. Barnett and W. N. Adger, 'Climate Dangers and Atoll Countries' (Tyndall Centre for Climate Change Research, 2001).

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While migration is not the only response to environmental changes, as affected populations may choose to adapt *in situ* or simply do nothing, it is a likely response for those whose homes and means of livelihood are in vulnerable locations. Relocations of whatever type or duration are by their nature disruptive, and usually traumatic.[7] The farther and more permanent these relocations become, the more complex and greater the challenges both for resettled populations and their host societies.[8] While most displacements are internal and temporary, for low lying atoll states in the Pacific permanent international relocation may be the only option.

This paper focusses on the social and cultural rights of environmental migrants. It examines the resettlement of Banabans in Fiji as a case study on minority rights of an environmentally-displaced population. While the Banaban displacement was not due to climate change but to long-term impacts of phosphate extraction on Banaba Island, the Banaban experience provides important lessons on the role of minority rights in the protection of culture and identity of environmentally-displaced communities.

The aim of this paper is threefold: 1) to identify Banaban minority rights within current Fijian laws, focussing on the three areas of self-government, indigenous dispute resolution mechanisms, and linguistic rights; 2) to evaluate Banaban minority rights under current international law standards and propose avenues for more effective protection; and 3) to reflect on the need to recognise and protect minority rights of environmental migrants within their host state. The paper argues that while Fiji, as host state, extended elements of minority rights protection to the Banabans, crucial aspects were also denied them, thus exacerbating their already disadvantaged socio-economic status. Recent political developments, including the military coup that led to the abrogation of the Fiji Constitution and its Bill of Rights in 2009, as well as the adoption in September 2013 of the new Fijian Constitution, send disturbing signals that threaten to veer away from minority rights protection and multiculturalism.

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7 M. Cernea and C. McDowell, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (The World Bank 2000).

8 E. Ferris, M. Cernea and D. Petz, *On the Front Line of Climate Change and Displacement: Learning from and with Pacific Island Countries* (The Brookings Institution-London School of Economics Project on Internal Displacement, 2011).

Existing literature on the Banaban resettlement focusses on the social,[9] historical,[10] anthropological,[11] and development aspects[12] of resettlement. There is a gap in the literature, namely, the role of minority rights protections relative to the resettlement. This paper seeks to address that gap and demonstrates the significance of minority rights for the social and cultural protection of environmentally displaced populations.

I. Historical Context

Banaba, known as Ocean Island in colonial times, was the established home of the Banabans. A dot in the Pacific Ocean with an area of 6.5 square kilometres, it is only a few kilometres south of the equator at 0.53° S latitude [see Figure 1]. Banaba's nearest neighbours are Nauru, some 285 kilometres to the west, and the main islands of Kiribati, the country to which Banaba Island is currently politically attached, some 400 kilometres to the east. Banaba comprises the tip of an oceanic mountain surrounded by a reef where, for thousands of years, migrating birds rested and deposited guano to form one of the world's largest deposits of high grade phosphate. The island's interior features a plateau rising to 80 metres, where most of the phosphate was situated[13]

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9 H. Maude and H. Maude, *The Book of Banaba* (Institute of Pacific Studies, University of the South Pacific, Suva 1994); H. Maude and H. Maude, 'The Social Organization of Banaba or Ocean Island, Central Pacific', *Journal of Polynesian* Society (1932) p. 41.

10 P. Binder, *Treasure Islands: The Trials of the Banabans* (Angus & Robertson, 1978).

11 W. Kempf, 'Songs Cannot Die: Ritual Composing and the Politics of Emplacement among the Banabans Resettled on Rabi Island in Fiji'. *Journal of the Polynesian Society* (2003) p. 112; M. Silverman, 'Making Sense: A Study of a Banaban Meeting', in M. Lieber (ed.), *Exiles and Migrants in Oceania* (University of Hawaii Press, Honolulu, 1977).

12 S. Kumar, T. Terubea, V. Nomae and A. Manepora'a, 'Poverty and Deprivation Amongst Ethnic Minorities in Fiji: The Case of Ni Solomoni and Rabi Islanders', 4 *Fijian Studies A Journal of Contemporary Fiji* (2006) p. 126.

13 F. Reed, 'Notes on Ocean Island (Banaba),' 10 *Geological Magazine* (1903) p. 298.

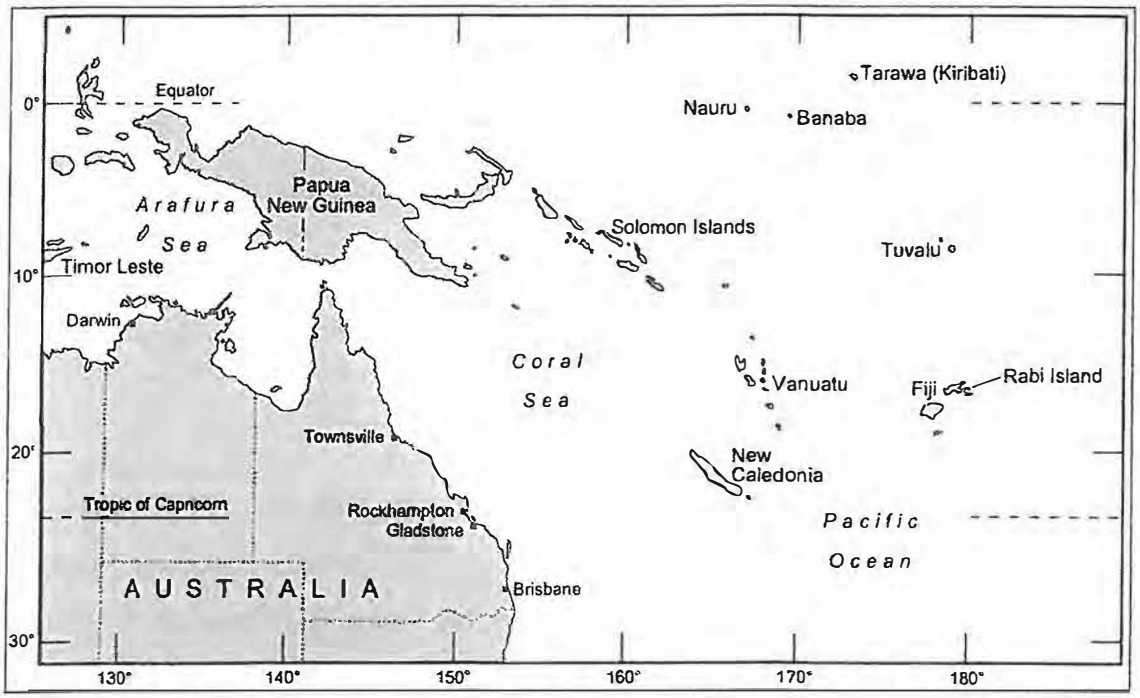

FIGURE 1: Banaba and its South Pacific neighbours. Cartography: Judy Davis

When Albert Ellis, who would later become the British Phosphate Commissioner for New Zealand, discovered Banaba's phosphate deposits on 3 May 1900, the island was isolated and had not yet been annexed by any Western power. In the same year, Banaba was declared part of the British Gilbert and Ellice Islands Protectorate, and in 1916 became the Gilbert and Ellice Islands Colony. Within 20 years of Ellis' discovery, British corporations began to extract the island's phosphates. In 1920, the governments of the United Kingdom, Australia and New Zealand constituted the British Phosphate Commission (BPC) for phosphate mining in Nauru and Banaba, with the proceeds to be divided in the following ratio: Australia 42 per cent; United Kingdom 42 per cent, and New Zealand 16 per cent.[14] From 1920, BPC acquired Pacific Island Phosphate Co., and mined Banaba's phosphates for over 50 years. Mining stopped for three years from 1942–45 when Japanese forces occupied Banaba and dispersed the Banaban population to various Micronesian islands to the north.

In 1942 Rabi Island—then part of the British colony of Fiji—was purchased with money from the Banaban phosphate funds, which were sequestered for the purchase of the

14 N. Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, Canberra, 1970).

Banabans' "future home."[15] It was envisaged that Banaba's phosphate reserves would eventually be depleted and that the island would then be uninhabitable. After the Second World War, the Banabans who had been dispersed in Nauru, Kosrae and other islands were gathered in Tarawa (Kiribati) and told that their villages were devastated and uninhabitable. The Banabans agreed to a two-year resettlement on Rabi Island, Fiji, some 2,100 kilometres southeast of Banaba. On 14 December 1945, about one thousand Banabans, with some Gilbertese friends and relatives, arrived on Rabi on board the BPC-owned ship, *Triuna.*[16]

The settlement of the Banabans on Rabi Island began in 1945 as a two-year experiment, but was later extended permanently. In the initial years, lack of preparation and adequate facilities, coupled with the settlers having to adjust to a strange environment, contributed to unnecessary confusion and suffering, and resulted in the death of at least forty new settlers.[17] Yet, Rabi had the physical amenities of soil and water, which Banaba lacked. The Fiji government, moreover, in both the colonial and post-independence era enacted legislation protecting Banaban land tenure and self-government on Rabi. In 1947, within two years of their arrival on Rabi, the Banabans voted by referendum to make Rabi their permanent home.

II. Features of Banaban Minority Rights Protection

A. Banaban local government

Unlike other resettled communities in the Pacific, the Banabans, with the help of enabling legislation in the host community, replicated their former governmental system in their new home. Through the *Banaban Settlement Act* 1945[18] the Banabans were granted local autonomy and self-government on Rabi through the Rabi Council of Leaders, while the *Banaban Lands Act* 1964 gave the Council legal custody and trust of the entire island of Rabi for the Banabans. To prevent abuse, Sec. 5.1 of the amended *Banaban Settlement Act* 1970 has subjected the Council's decisions to the review and supervision of the Prime Minister.

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15 H. Maude, Memorandum, The Future of the Banaban Population of Ocean Island: With Special Relation to their Land and Funds. H.E. Maude Special Collection Section, Barr Smith Library, University of Adelaide, 1946.

16 M. Silverman, *Disconcerting Issue: Meaning and Struggle in a Resettled Pacific Community* (The University of Chicago Press, Chicago 1971).

17 Binder, *supra* note 9.

18 Although the *Banaban Settlement Act* 1945 was enacted by the British colonial government, the law was substantially adopted in 1970 when Fiji became an independent state.

The Banabans decided to form a council which should be "as near as possible [to] what the Banabans were used to in Ocean Island."[19] On 26 January 1946, a meeting was held, attended by the District Officer for Rabi, Major Donald Kennedy, and 153 Banaban elders representing 153 families. The Rabi Council of Leaders ("Council") was formed consisting of both "[l]egislative and executive functions" with some members "constitut[ing] a Court for hearing criminal and civil actions under the local regulations made by the Council". The Council is composed exclusively of Banabans, and is elected by Banabans. The elders constituting the Council are elected according to family groups, or *utu*, which according to Banaban custom are "those people who eat over one fire."[20] The Council became Rabi Island's administering body, promulgating ordinances according to indigenous laws and customs on internal affairs only, since the Banabans were at the same time subject to the then colonial regulations of Fiji. From the vantage of minority rights, the Council's establishment under Fijian law allowed the Banabans to "participate effectively in cultural, religious, social, economic and public life,"[21] albeit in a local sense. Nationally, however, the Banabans had neither participation nor representation in Fijian affairs, and thus had no influence on national decisions that may potentially affect them.

The Council was not only the political but also the economic and spiritual backbone of the Banaban community, a fact not always to the Banabans' advantage. The over-centralisation of authority, for instance, encouraged paternalistic dependency, and even abuse. In the early 1990s, and even before that, some Council members allegedly misused council funds for alcohol and overseas travel, resulting in unpaid wages and gross mismanagement.[22] The crisis of leadership culminated in a coup in December 1991 when a group of Banabans "marched in protest and overthrew the recently elected island Council."[23] The Fiji national government was forced to intervene and install an interim administration, the first act of which was to close the liquor store.[24] According to the 1993 Committee of Inquiry appointed by the Fijian Prime Minister, the coup was the "culmination of two years

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19 Western Pacific High Commission, W.P.H.C. Confidential Memo No. C.F. 48/5/2, Maude Papers, Part I: Series J, Special Collections, Barr Smith Library, University of Adelaide, 1946.

20 Banaban Elders General Meeting, Minutes of Banaban Meeting held in Nuku, Rabi, 26 January 1946, Maude Papers, Part I: Series J, Special Collections, Barr Smith Library, University of Adelaide, 1946.

21 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Art.2.2, U.N. General Assembly Resolution No. 47/135, 18 December 1992.

22 G. Hindmarsh, *One Minority People: A Report on the Banabans* (UNESCO, Apia 2002).

23 T. Teaiwa, 'Rabi and Kioa, Peripheral Minority Communities in Fiji', in B. Lal and T. R.Vakatora (eds.), *Fiji in Transition* (School of Social and Economic Development, University of the South Pacific, Suva, 1997) p. 139.

24 Hindmarsh, *supra* note 21.

of dissatisfaction and complaint of financial hardship, social distress and frustration by the people of Rabi in its Council."[25]

Today, the Banaban Council holds office at Banaba House in Suva, while the Chief Executive, who acts as the overall manager and implementer of the Council's policies and decisions, operates from the Administrative building in Nuku, Rabi. The Council continues to be the Banaban community's face to the outside world. For example, in recent years the Council entered into a joint venture with a Chinese fishing company and developed trade links with Kiribati for the export of kava, a plant root used to make a beverage with sedative and anaesthetic properties. In 2005 the Council received the Ambulance donation for the Rabi Health Centre from the government of Japan.[26]

B. Institution of Customary Elders

Another institution the Banabans replicated on Rabi was the establishment of the "Council of Elders" consisting of older members of the community renowned for their good judgment and integrity. As repositories of the Banabans' collective wisdom, the elders serve as the community's moral voice and conscience. The group is unelected and serves as an advisory board to the Council, particularly as regards customary law and policy.[27] As customary advisers, the Elders participate in the administration of Rabi: they work alongside the Council, as well as liaise with the Rabi Island Tribunal in the interpretation of legal issues based on customary law. The Elders can "make policies relative to the functioning of the community not in terms of law, but [in matters of] customary law."[28] Conflicts in matters of customary law are resolved by the Elders, while the Rabi Island Tribunal deals with civil disputes, although in practice the distinction is blurred. In one case a Banaban (and part Gilbertese) resident of Rabi stole pots and damaged property. Under "traditional laws, he would have been beaten,"[29] while subordinate legislation implementing the *Banaban Settlement Act* mandated imprisonment for "any period not exceeding two months or a fine not exceeding fifty dollars".[30] Ultimately he was deported to Kiribati[31] on humanitarian

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25 Aidney Report, quoted in Teaiwa, *supra* note 22.

26 Embassy of Japan, 'Japan Provides Ambulance to Rabi Health Centre', Embassy of Japan Press Release, 2005.

27 Teaiwa, *supra* note 22 at 138.

28 Interview, Ten M, Rabi Island Court, 2 March 2012.

29 *Ibid.*

30 Banaban Settlement Act, Sec 5.9 (Miscellaneous Offences): "Any person who commits theft of or in respect of any property not exceeding in the opinion of the Court the value of twenty dollars shall be liable

grounds, as there was "no jail in Rabi" or else he would have been "sent to prison in Labasa (in Vanua Levu)."[32]

The collaboration between Banaban elders and Rabi Island Tribunal over interpretations of customary law has its roots in the traditional *kabowi* system on Banaba Island, albeit heavily influenced by Western legal concepts. The *kabowi* or native court was an "assembly of village *kaubure* or headmen, presided over by a Native Magistrate."[33] The *kaubure* met every month in the *maneaba* (community hall) for "administrative and judicial" business,[34] and subject to the Resident Commissioner's approval, made "regulations for the cleanliness and good order" of Banaban villages. As moral guardians of the community, the *kaubure's* services were purely voluntary, and they received no salary. They were, however, assisted by salaried village policemen in overseeing the "maintenance of ... regulations" and in looking after the "general welfare of their parishioners."[35] On Rabi, the administrative and legislative powers of the Resident Commissioner are now taken over by the elected Rabi Council of Leaders while the traditional role of the assembled *kaubure* continue with their advisory functions as the unelected elders giving customary advice to the Council. The *kaubure's* judicial functions are now vested in the Rabi Island Tribunal.

In the mid-1990s, there were moves to amend the *Banaban Settlement Act*. Some members of the Banaban community recommended that the "Rabi Council of Leaders" be replaced by the "Council of Elders," considering the traditional status of the latter and that it had "always functioned alongside the Council of Leaders."[36] The Aidney Committee of Inquiry instead recommended that the "special status of Elders" be recognised in the law, defining "Elders" as "male members of the Banaban community who are aged 60 and above."[37] The attempt to define "Elders" by legislation was criticised for excluding women and those below 60, some of whom were already recognised as Elders by the Banabans on Rabi. The Bill was defeated in the Fijian Senate on 14 December 1995.[38]

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on conviction to imprisonment for any period not exceeding two months or to a fine not exceeding fifty dollars or to both such imprisonment and fine."

31 Interview, Ten M, Rabi Island Court, 2 March 2012

32 *Ibid.*

33 A. Grimble, *Pattern of Islands* (John Murray Publishers Ltd., London, 1970), p. 85.

34 *Ibid.*

35 *Ibid.* at 86

36 Teaiwa, *supra* note 22.

37 *Ibid.*

38 *Ibid.*

C. Rabi Island Tribunal

A local court called the Rabi Island Tribunal was established under the *Banaban Settlement Act*. The Tribunal's powers, duties and functions, including rules of court procedure and determination of fees, are legislated for by the Council, subject to the approval of the Office of the Prime Minister.[39] To ensure a degree of judicial independence, "no person holding the office of Tribunal shall be a member of the Council."[40] The term of office is three years with possibility of reappointment.[41] Jurisdiction extends to members of the Banaban community, and Fijians "during such time as they are on the Island of Rabi"[42] on any offence under the Settlement Act.[43] The Court can also make orders for the doing or not doing of an act "prescribed to be done or not to be done" under the Act even though the regulations prescribe no punishment.[44] Where sentences are authorised by law, the Court can impose a penalty of imprisonment for a term not exceeding two months, or a fine not exceeding one hundred dollars, or a combination thereof.[45]

Under the *Banaban Settlement Act* the Tribunal has a role in the maintenance of health, sanitation, peace and order on Rabi. It has also a role in education and food production. For instance, "infectious diseases" must be reported to the "nearest medical officer" by the parents, member of the household or next of kin.[46] Failure to report makes one liable for fine, and in default, imprisonment.[47] Placing "refuse, filth or excreta" potentially contaminating a "well, spring or any source of water" is prohibited, and so is bathing, washing clothes or cleaning food "within one hundred feet of a well, spring, stream or source of fresh water."[48]

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39 Banaban Settlement Act, Sec 5.2

40 Banaban Settlement Act, Sec. 5.2.9 (Banaban Council Regulations), as amended by Regulations, 27 May 1977.

41 Banaban Settlement Act, Sec 8.1

42 Banaban Settlement Act, Sec 5.4 (Rabi Island Court Regulations), as amended by Regulations, 27 May 1977.

43 *Ibid.* at Sec 5.2.a

44 *Ibid.* at Sec 5.2 (1)(b)

45 *Ibid.* at Sec 5.2 (2)(a)(b)

46 Banaban Settlement Act Subsidiary Legislation, Sec 5.3 (Rabi Island Infectious Diseases Regulations). Under Regulation 2, Class A, "cholera, plague, smallpox, typhus, yellow fever and epidemic of any infectious diseases" are for "immediate notification", while Class B mandates "weekly notification" for "chickenpox, dysentery, measles", etc.

47 *Ibid.*, at Sec 5.12. Penalty for non-reporting is "fine not exceeding twenty dollars and in default...imprisonment for any period not exceeding two months."

48 *Ibid.* at Sec 7.13 ("*safeguard of water supplies*"), Sec 7.16 ("*bathing, etc. near sources of water*"). Breach of Sections 7.13, 7.16 and 7.15 prohibiting defecation outside of latrines "within five hundred yards of any habitation or within fifty yards of any well, spring, stream or source of water" is penalised with a fine not exceeding twenty dollars or imprisonment for a period not exceeding two months.

Likewise prohibited are "drunken and disorderly conduct" and behaving in "riotous or disorderly manner" in public places.[49]

The Court is also an active participant in promoting education,[50] in having landowners grow their own food,[51] and encouraging the use of indigenous instruments such as the tom-tom or lali (boat shaped drum made from tree trunks) to summon churchgoers or school children.[52] This is an expansion of a Court's traditional role beyond conflict resolution. The education of Banaban children, for example, is compulsory on Rabi. A parent who neglects to "keep his child in regular attendance at school" from age five to fourteen is fined up to twenty dollars.[53] Yet, in spite the legal impetus to education, a majority of the household heads on Rabi have only primary school education.[54] While 27 per cent obtained two years of lower secondary education, only 13 per cent have higher secondary education.[55] Part of the reason is that the island has only one secondary school, the Rabi High School, located in Tabiang, in the southern part of the island. Beyond high school, Banabans have to go outside Rabi. Scholarships for tertiary study have been limited and hard to get due to competitive academic requirements for entrance to university, limited scholarship places available, and the high cost of living: even if a Rabi student receives a scholarship, the usual living allowance of $F500 per semester is inadequate, "thereby requiring parents/guardians on the Island to make up the balance."[56]

D. Language Rights

The Banabans on Rabi continue to speak a variety of Kiribati (or Gilbertese, its colonial name), which is the language they brought with them from Banaba. The Banaban variety differs slightly from mainstream Kiribati for having "retained a handful of distinctive words" and "with borrowings" from Fijian and English.[57] Many Banabans are fluent in Fijian and

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49 *Ibid.* at Sec. 5.13 ("*Drunken and disorderly conduct*").

50 *Ibid.* at Sec. 5.7 ("*Neglect to send children to school*").

51 *Ibid.* at Sec. 7.2.1 ("*Landowner to grow food*").

52 *Ibid.* at Sec.5.14 ("*Miscellaneous Offences: Beating Drums and other Noise*"): The prohibition against beating drums, lali or tomtom shall not apply in the following cases: "a) for the purpose of indicating the time of day, b) to summon a church congregation or school children, and c) for any other purpose approved by the Council."

53 *Ibid.* at Sec. 5.7 ("*Neglect to send children to school*").

54 Kumar et al., supra note 11 at 138: "...27% had education below the fifth class and 33% had education between classes 6 and 8."

55 *Ibid.*

56 *Ibid.*

57 F. Mangubhai and F. Mugler, 'The Language Situation in Fiji', 4 *Current Issues in Language Planning* (2003), p. 383.

English in part due to education, migration to other parts of Fiji, and frequent contacts with Fijians. On Rabi, Kiribati is used in ordinary communication and in local administration. It is also taught "from kindergarten to high school" using "materials obtained from Kiribati."[58] Fijian is used in dealing with provincial level officials, among them the government officials of Cakaudrove province to which Rabi Island is politically attached, despite the island's autonomous status. Fijian is likewise used with the predominantly Fijian Methodist Church, while English is the *lingua franca* in dealing with the national government and other institutions.[59]

The *Banaban Settlement Act* not only recognises Gilbertese as the language of the Banabans, but its use is mandated by law in judicial and business functions. Section 5.7 of the Banaban (Rabi Island Court) Regulations, which is subordinate legislation under the *Banaban Settlement Act*, mandates that the "language of the Court shall be in Gilbertese."[60] Similarly, Section 5.8 of the Banaban (Copra) Regulations, another piece of subordinate legislation under the *Banaban Settlement Act*, requires not only that a statement of the minimum price of copra be posted in a conspicuous place but that the statement be "in the Gilbertese language."[61]

Language is a key factor in determining identity. For minorities, conscious of their small size and inferior political status, language projects an important boundary-marking function.[62] To avoid complete assimilation by the dominant culture, minority groups are more likely to be "conscious of the need for clear linguistic boundaries in relation to a surrounding dominant language and culture."[63] The use of a minority language allows for socio-linguistic space within the host community, and its strength is often employed as a demarcating feature of identity.[64] Conversely, the blurring of linguistic boundaries is often regarded as a threat to

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58 *Ibid.* at 404.

59 Teaiwa, *supra* note 22 at 133.

60 Banaban Settlement Act Subsidiary Legislation, Sec 5.7, Banaban (Rabi Island Court) Regulations.

61 Banaban Settlement Act Subsidiary Legislation, sec 5.8.3, Banaban (Copra) Regulations. Sec 5.8.2: "The minimum price of copra to be paid on any sale to the manager of a village store shall be fixed from time to time by the manager of such store subject to the approval of the Banaban Adviser." Sec 5.8.3: "A statement in the Gilbertese language of the minimum price of copra for the time being in force at a village store shall be posted up and kept posted up in a conspicuous place in the store."

62 A. T. Keller, 'Language and Identity', in Florian Coulmas (ed.), *The Handbook of Sociolinguistics* (Blackwell, Oxford 1997) p. 315.

63 S. May, 'Language Rights: Moving the Debate Forward', 9 *Journal of Sociolinguistics* 3 (2005) p. 331.

64 B. Kleif, 'Insiders, Outsiders and Renegades: Towards a Classification of Ethnolinguistic Labels', in Howard Giles and Bernard Saint-Jacques (eds.), *Language and Ethnic Relations* (Pergamon Press, Oxford) 1979 p. 159.

a minority group's existence.[65] Yet, resisting cultural imposition by way of minority linguistic preservation is only small function of language. Language is the vehicle of thought in accordance with the "knowledge and the world vision of a given culture," and of a "people who have inherited this [language] from their ancestors" to be passed on to latter generations.[66]

E. Current concerns

The rights of the Banaban community in Fiji are not as secure as they appear. Three developments threaten to veer away from minority rights protection of the Banabans in recent years. These are interconnected legal, political and social issues whose resolution will determine the future of the Banaban community. Prior to the 1990 Constitutional amendments, the Banabans were classified as "Indigenous Fijians" together with Rotumans (the indigenous inhabitants of the island of Rotuma in the northern part of the Fiji Islands) and autochthonous Fijians. Following reclassification, they were classified as "others", together with the small minority groups of Fiji. The reclassification excluded the Banabans from anti-poverty programs favouring Rotumans and indigenous Fijians. These programs aim to encourage "greater employment of ethnic Fijians in both the public service and the private sector," and "[s]oft loans to indigenous Fijian business enterprises and infrastructural developments targeted at majority indigenous parts of the country have also characterised both post-1987 and post-2000 government policy."[67]

Fiji's political upheavals, namely, the coups that occurred between 1987 and 2006, resulting in the abrogation of the Constitution in 2009 and the abolition of the Great Council of Chiefs in 2012, has likewise brought insecurity to the Banabans. Minority and ethnic groups in Fiji, the Banabans included, have felt vulnerable and "subject to the mercy or whim of ethnic Fijians".[68] When the Banabans were resettled on Rabi in 1945, an indigenous Fijian community was "displaced to nearby Taveuni Island to make way for the Banabans."[69] The series of coups had emboldened the original inhabitants of Rabi Island, now living in another

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65 *Ibid.*

66 R. Menchu, 'Letter Sent on the Occasion of the Proclamation of the Universal Declaration of Linguistic Rights', *World Conference of Linguistic Rights*, Barcelona, June 6, 1996.

67 J. Fraenkel, *Minority Rights in Fiji and the Solomon Islands*, paper prepared by J. Fraenkel for the Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights Working Group on Minorities, Ninth session, 12-16 May 2003

68 Hindmarsh, supra note 21 at 28.

69 Immigration and Protection Tribunal, BG (Fiji) Appellant, NZIPT 800091-2012.

island in Fiji to claim back Rabi for themselves.[70] The claims continue to cause tensions over ownership of Rabi Island. While indigenous Fijians have generally maintained good relationship with Banabans, some factions with ultra-nationalist leanings based on the concept of "taukei" meaning the "owner [or] original dweller of the land," have been more threatening.[71]

With these developments, the Banabans have modified their "public profile as an ethnic group" in relation to the dominant group, and played the "politics of caution".[72] Following the 1987 coup, the Rabi-based Banabans adopted the strategy of "consolidat[ing] their close relationships to the political and neo-traditional elite of the autochthonous Fijians."[73] Keeping a low profile in Fiji at this time deflected attention away from the Rabi community, and later-generation Banabans have generally avoided political discussions and activities. Yet, the strategy can backfire since it invites an impression of Banaban indifference to political positioning, particularly with the adoption of Fiji's new Constitution in 2013. It remains to be seen whether the strategy of caution will be beneficial to Banaban group rights formation in the long run. Taking their cue from older Banabans, the younger-generation simultaneously articulate their identity as residents and owners of Rabi, yet "never to the point of offending the Fijians" as the indigenous owners of Fijian land.[74]

III. Social and Cultural Rights for Environmental Migrants

The protection of human cultures, like the protection of biodiversity, has value not only for the individuals concerned but for humankind. As the 2001 Durban Declaration against Racism affirms, "cultural diversity is a cherished asset for the advancement and welfare of humanity at large," and hence should be "valued, enjoyed, genuinely accepted and embraced as a permanent feature which enriches our societies."[75] The protection of cultures within migrant communities is not a new concern of migration studies. However, the issue has

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70 J. Campbell, *International relocation from Pacific Island Countries, Adaptation or Failure*? Paper presented to the Conference on Environment, Forced Migration & Social Vulnerability, 9-11 October 2008 Bonn, Germany.

71 Immigration and Protection Tribunal, *supra* note 68.

72 W.Kempf and E. Hermann, 'Reconfigurations of Place and Ethnicity: Positionings, Performances and Politics of Relocated Banabans in Fiji', 75 *Oceania* (2005) p.383.

73 Teaiwa, *supra* note 22 at 142.

74 Kempf and Hermannn, *supra* note 71 at 374.

75 Durban Declaration, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001

special poignancy if the migration is forced, for the lack of physical and psychological preparation generate a feeling of being uprooted from one's home. In case of long term effects of environmental changes rising sea level due to climate change, migrants are denied the possibility of return, and thus the possibility of renewing their cultural practices by interacting with those who stay behind. Should islands become uninhabitable due to long term effects of environmental changes such as severe drought (leading to depletion of fresh water reserves), large scale inundation from king tides or sea level rise, permanent international relocation may be required. The issue of cultural preservation of communities in their host communities thus becomes critical. Feasible strategies for "social-economic and ethnic integration, as well as for long-term sustainable reconstruction" would have to be pursued.[76]

A. Displacement Impacts

According to Cernea, forced displacement "tears apart existing communities and social structures, interpersonal ties, and the enveloping social fabric".[77] Family groups "often get scattered and life sustaining informal networks of mutual help, local voluntary associations and self-organized service arrangements are dismantled."[78] Resettlement unravels spatially and culturally based patterns of social organisation as it uproots all members of the community, including the sick, elderly and the very young, allowing for little psychological or physical preparation.[79] Resettled communities often find themselves in a "state of discontent" with many wanting to return to their home islands.[80] Indeed, during a meeting of the Banabans on Rabi, within a few weeks of their arrival, some Banabans adamantly wanted to go back home.[81] A "sense of loss" is especially pronounced in relocation due to environmental triggers, where relocated populations suddenly find themselves uprooted from their traditional lands and systems.[82]

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76 Ferris et al., *supra* note 5.

77 M. Cernea, 'The Risks and Reconstruction Model for Resettling Displaced Populations', 25 *World Development* (1997) p. 1569.

78 *Ibid.*

79 Cernea and McDowell supra note 4.

80 J. Campbell, M. Godsmith and K.Koshy, *Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)* (Final Report for APN project 2005-14-NSY-Campbell, Submitted to Asia-Pacific Network for Global Change Research, 2005).

81 Minutes Banaban Meeting (1946). Minutes of General Meeting of Banaban Elders held at Nuku, Rabi, 26 January 1946, Maude Papers, Part I: Series J, Special Collections, Barr Smith Library, University of Adelaide.

82 S. Kirsch, 'Lost Worlds: Environmental Disaster, Culture Loss and the Law', 42 *Current Anthropology* (2001) p. 167.

In time, the Banabans successfully replicated a similar type of social system and self-government to what they were used to in Ocean Island. The community not only retained its worldview and identity as Banabans –if with a bit of Fijian flavour – but a sense of continuity was established throughout the later generations. Much of Banaban identity retention may be attributed to legal frameworks established during both the colonial and post-independence era upholding Banaban self-government, and cultural and linguistic rights on Rabi. That this has happened points to the critical role of law in fostering the preservation of cultural, identity and linguistic rights for minorities within the host territory.

It may be also argued that Banaban identity and cohesion were aided in no small measure by the place of resettlement, Rabi Island, which is isolated and geographically separate from Fiji's two main islands. To the Banabans, Rabi became their geographical and psychological enclave, and for many later-generation Banabans, Rabi is the only home they know. To them, Rabi is Banaba. More specifically, Rabi is a "reconfigured" or new Banaba attached and dedicated in memory of the original homeland.[83] Rabian villages were named after Banaban villages—Tabwewa, Uma, Tabiang and Buakonikai—and residents chose to live in villages named after the original villages from which their ancestors came. Delai Rabi, the island's highest peak, was renamed Maungani Banaba (Mount Banaba).[84] On Rabi maps and pictures of Banaba are displayed in many houses and buildings. During commemorations and festivities lively and rhythmic indigenous Banaban songs and dances are regularly performed. Kempf and Hermann have called the naming of Rabi villages after Banaban places the "politics of spatial articulation."

> With these reconfigurations, the Banabans were practicing a politics of spatial articulation with respect to both islands [Banaba and Rabi]: they linked the two islands together and expressed this linkage by place names. The articulation allowed them to create in Fiji a space that embodied their continuing relationship to their island of origin in the Central Pacific, while still underwriting their autonomous identity as Banabans in the diaspora.[85]

B. Protection of collective Identity

Today, preservation of cultural identity remains a critical issue in long-term environmentally induced resettlements, particularly among island States and communities, as is evident in the very different experience of the Nauruans who sought a new island home in

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83 Kempf and Hermann, *supra* note 71 at 371.
84 *Ibid.*
85 *Ibid.*

the 1960s as a result of decades of phosphate mining of their island. The preservation of national identity assumed a critical role in the failed resettlement negotiations between Nauru and Australia in the 1960s. The Nauruans made it clear at the outset that they opposed assimilation into the territory of another state because they wanted to preserve their unique identity.[86] According to the chief negotiator (and later the first President of an independent Nauru), Hammer De Roburt, the idea that Nauruans should simply leave their island and be dispersed as citizens in any one of three metropolitan counties (Australia, New Zealand or the United Kingdom) "constituted a policy of disintegration of Nauruan society' which had to be rejected."[87]

Compared to descendants of Solomon Islander indentured labourers[88] who reside in 40 different settlements in Fiji (15 in greater Suva), the Banabans are better established spatially, if not politically, at least for the time being. The former's lack of legal ownership over their settlements has resulted in their inability to sustain livelihood and is among the reasons for the community's high incidence of poverty.[89] Land tenure insecurity also caused the community's frequent displacements.[90] Unlike the Banabans, who enjoy legislated protections over their stay on Rabi, no legal framework was enacted for the Solomon Islanders' self-government or secure land tenure.[91] The settlements provided for the Solomon Islanders by the Anglican Church in the 1930s have become virtual "ghettos [of] social alienation, poverty, unemployment, industrial exploitation and crime."[92]

As earlier intimated, the Banabans have their share of insecurities. Fiji's political instabilities and growing privileges for indigenous Fijians threaten the long-term rights and protections of the Banaban people. The 2009 abrogation of Fiji's Constitution, an aftermath of the 2006 coup, wiped out special constitutional provisions protecting the *Banaban Settlement Act* and the *Banaban Lands Act* against whimsical and politically motivated abrogation. In September 2013, the new Constitution of Fiji was adopted. According to interim Prime Minister Frank Bainimarama, it "enshrines principles that are at the heart of all

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86 G.M.Tabucanon and B. Opeskin, 'The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration', 46 *The Journal of Pacific History* (2011) p. 337.

87 International Court of Justice, Memorial of Nauru, Appendix 1, 255.

88 The Solomon Islanders arrived as indentured plantation labourers in in Fiji in mid-1800s.

89 Kumar et al., *supra* note 11.

90 Winston Halapua, *Living on the Fringe, Melanesians in Fiji* (Institute of Pacific Studies, The University of the South Pacific, Suva, 2001).

91 *Ibid.*

92 Roderick Ewins, "Review of Winston Halapua's 'Living on the Fringe: Malanesians in Fiji'", 74 *Pacific Affairs*, 3 (2002), pp. 501-2.

the great liberal democracies...an independent judiciary, a secular state and a wide range of civil, political and social-economic rights." Under Chapter 2 (Bill of Rights), Section 26(1), "[e]very person...has the right to equal protection, treatment and benefit under the law," while Section 26(3) guarantees freedom from discrimination, including the right not to be unfairly discriminated, whether "directly or indirectly," because of "race, culture, ethnic or social origin, colour [or] place of origin." From these provisions the Banabans may invoke freedom from direct or indirect discrimination on the grounds of their having a different ethnicity, culture or place of origin compared to the indigenous Fijians. The Banabans have after all, lived in Fiji for over 67 years, and they have already acquired Fijian citizenships. Nonetheless, a deeper reading of the 2013 Constitution reveals it has created rather than clarified uncertainties. Under Sec 28(5), the "ownership of all Banaban land shall remain with the customary owners of that land." The wording is ambiguous since it is well known that a group of indigenous Fijians now based on nearby Taveuni Island are also claiming rights over Rabi Island. While it may be too early to speculate relative to the legal definition of "customary owners," still the ambiguous construction of the phrase in fact raises rather than puts to rest questions of ownership rights over Rabi. Thus, as it stands Sec 28(5) may be considered a potential concern to the long-term protection of Banaban rights on Rabi Island.

As the Banaban experience attests, ethnic minority peoples, much like indigenous peoples, maintain deep connection with their land, history and tradition. This is the source of their identity, and strength as a people. That Fiji-born Banabans preserved this identity, albeit fluidly, is proof of their tenacity and determination to remain a distinct people. An understanding of distinct cultural identities of minorities provides a context for respect and appreciation of these people's right to exist collectively, as well as contribute their share to their host country's goals. Cultural diversity does not run counter to national cohesion but actually reinforces it.[92]

States are increasingly recognising the contribution of ethnic and migrant communities in their territories. Some Latin American countries have written into their new Constitutions both recognition and legal protection that ethnic and cultural minorities deserve. Article 32 of the 2009 Bolivian Constitution states: "The Afro-Bolivian people enjoys...the economic, social, political and cultural Rights recognized in the Constitution to the indigenous and

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92 United Nations Development Programme (UNDP), *Human Development Report 2004 – Cultural Liberty in Today's Diverse World* 3-4

original Peasant nations and peoples."[93] Similarly, Article 58 of the 2008 Ecuadorean Constitution states: "To strengthen their identity, culture, traditions and rights, the collective rights of the afro-Ecuadorian people are recognized as established in the Constitution, the law and the pacts, covenants, declarations and other international human rights instruments."[94] Both Constitutions recognise distinctiveness of cultural identities and command states to safeguard and protect these as a matter of law.

C. Areas for Minority Rights Protection

The Office of the High Commissioner for Human Rights has identified four areas for the protection of minority rights. These are (a) survival and existence, (b) promotion and protection of the identity of minorities, (c) equality and non-discrimination, and (d) effective and meaningful participation.[95] These are subsumed under particular provisions of the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 27 of the ICCPR mandates that states in which "ethnic, religious or linguistic minorities exist" shall not deny to "persons belonging to such minorities ... in community with the other members of their group" the right "to enjoy their own culture, to profess and practise their own religion, or to use their own language,"[96] while Article 1(4) of CERD provides that "[s]pecial measures ... for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"[97] As the Human Rights Committee has remarked, "special measures" means that the principle of equality sometimes requires states to "take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."[98] The Committee added that "certain

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93 Constitution of the Plurinational State of Bolivia, Art. 32, 2009.

94 Constitution of the Republic of Ecuador, Art 58, 2008.

95 Office of the High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, United Nations, New York and Geneva, 2010.

96 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

97 *International Convention for the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969)

98 Human Rights Committee, General Comment No. 18 (Non-Discrimination), Par. 10, Office of the United Nations High Commissioner for Human Rights, 1989.

preferential treatment in specific matters" so long as "such action is needed to correct discrimination [is] in fact...a case of legitimate differentiation under the Covenant."[100]

The Banaban minority rights protection on self-government, local legislation and the use of their native language on Rabi may thus be considered special measures, a case of legitimate differentiation, to which the Banabans are entitled under international law, the more so because Fiji is a party to CERD.[101] While Fiji is not party to the ICCPR, the minority rights granted to the Banabans provided some legal security in conformity with the standards set under international law.

The United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM), adopted by the General Assembly in 1992, is the first UN instrument to formulate positive rights for members of linguistic minorities. Albeit non-binding, the UNDM nonetheless urges states to "take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue."[102] States are likewise mandated to "take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards."[103] Criticised as providing only "certain modest obligations on states,"[104] the Declaration nonetheless expands the negative formulation of minority rights in the ICCPR and replaces it with a stronger, positive, formulation. Under Article 27 of ICCPR, in States where linguistic minorities exist, minority members "shall not be denied the right, in community with the other members of their group ... to use their own language."[105] This means minority members have the right to use their own language without interference of the State. By contrast Articles 1 and 2 of the UNDM are positively framed: Article 1: "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories," and

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100 *Ibid.*

101 S. Narayan, 'Racial Discrimination in Fiji', 12 *Journal of South Pacific Law* 1 (2008).

102 UN Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art 4 (3), GA resolution 47/135, adopted in New York 18 December 1992.

103 *Ibid.* at Art 4 (2).

104 G. Extra and K. Yağmur, 'Language Rights Perspectives', in G. Extra and K. Yağmur (eds.), *Urban Multilingualism in Europe: Immigrant Minority Languages at Home and School* (Multilingual Matters Ltd., 2004) p. 73.

105 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

for that purpose "States shall adopt appropriate legislative and other measures to achieve those ends."[106] More importantly, persons belonging to linguistic minorities "have the right to ... use their own language."[107]

It may also be argued that the Banabans are an indigenous people of Banaba relocated due environmental factors, and as such are entitled to protection under various international law instruments protecting indigenous peoples. Under the United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples have the "right not to be subjected to forced assimilation or destruction of their culture." States are mandated to "provide effective mechanisms for prevention of, and redress for: ... (b) [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources; [and] (c) [a]ny form of forced population transfer which has the aim or effect of violating or undermining any of their rights. Although non-binding, the Declaration represents a "dynamic development of international legal norms" in that it "reflects the commitment of the UN member states to move in [a] certain direction," which is the setting of a standard in the observance of the human rights of indigenous peoples. The Declaration thus carries persuasive authority as a set of guiding principles for the protection of indigenous peoples who may have to face the prospect of relocation due to, among them, environmental degradation.

Banabans, as citizens of multicultural Fiji, deserve to have their distinct identity recognized, their voices heard, and their right to exist as a minority people respected under fundamental laws of the land. As the Fijian nation continues to articulate its concept of nationhood in the Pacific, the Banabans will continue to depend on the current legislative framework under Fijian law for the protection of their distinct culture, language and identity.

IV. Protection Lessons from the Banaban Experience

Resettlement of communities is a possibility among many Pacific Island nations today. While the Banaban case is unique in that colonial policies at the time facilitated an "international" resettlement of an entire community in circumstances where the Banabans acquired an entire island for themselves, nonetheless the experience provides important lessons for international environmental migrants, particularly in minority rights protection.

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106 UN Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art 1 (1) (2), GA resolution 47/135, adopted in New York 18 December 1992.

107 *Ibid.* at Art 2 (1).

These lessons will become even more important as the effects of global warming and climate change are increasingly felt in the South Pacific:

A. Tensions in the host community

One characteristic of international resettlement is that the migrant community becomes a minority group in their host country. The presence of the resettled community is often a source of disagreement between the settlers and the host community, some of whom may have been displaced to accommodate the newcomers. For instance, the resettlement of the Gilbertese between 1955 and 1971 due to, among other things, recurrent droughts from the Phoenix Islands in the Gilberts (now Kiribati) to the Western Province of the Solomon Islands has been "a source of tension" between the settlers and members of the local community.[108] Western Province leaders said that while "they were not hostile to the Gilbertese as such" they "resented the fact that their province took all the burden of Gilbertese resettlement."[109] A similar tension exists between the descendants of the indigenous Fijians who were moved from Rabi Island long before the Banabans resettled on Rabi. That the tension did not escalate to the level of violence is attributable in part to the minority rights protections adopted by the Fiji for the Banabans. According to the Office of the United Nations High Commissioner for Human Rights, "[l]ack of respect for, lack of protection and lack of fulfilment of the rights of minorities" may be a factor in displacement and "in the worst cases even lead to the extinction of such communities."[110] That the Banabans continue to live peacefully and cohesively on Rabi Island may be attributed in part to the favourable policies and protections bestowed by the Fijian government.

B. Protection of Cultural Identity

When migrants are forced to relocate due to environmental threats, it is not only necessary for the host state to ensure their physical survival, individually and as a group, , but it is equally important for them to recognise and protect the migrants' collective cultural and social identity. Identity is constructed within the context of a society, thus respect for the society is a prerequisite for maintaining the identity of its members. While cultural diversity is seen from an objective vantage, identity is how the members see and feel themselves

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108 J. Campbell et al, *supra* note 79.

109 R. Premdas, J. Steeves and P. Larmour, 'The Western Breakaway Movement in the Solomon Islands,' 7 *Pacific Studies* 2 (1984) p. 34.

110 Office of the United Nations High Commissioner for Human Rights, 'Minority Rights: International Standards and Guidance for Implementation," United Nations HR/PUB/10/3 2010

subjectively. Collective identity is vital for any society, more so for displaced societies, as the people's sense of belonging and purpose is anchored in it. Identity is an "acknowledgment of one's participation or membership in social relations."[111] Identity is formed through continuity over time and differentiation from others.[112] The group is conceived as historically rooted through common experiences and meanings. The shared values, beliefs, habits and practices allow the members to imagine themselves as a community separate and distinct from others.

In the case of the Banabans, Fiji as the host state not only recognised but in fact adopted special measures of affirmative action for the protection of Banaban ethnic and linguistic identity pursuant to the *International Convention on the Elimination of All Forms of Racial Discrimination*, by way of minority rights protection. While the *Banaban Settlements Act* and *Banaban Lands Act* were enacted in colonial times, the government of Fiji respected their provisions after Fiji achieved independence in 1970. Admittedly, both laws have weaknesses, foremost being that the over-centralisation of authority in the Rabi Council has bred dependency and paternalism and how the prohibition to sell or mortgage land under the *Banaban Lands Act* has hindered the growth of commerce on Rabi Island. Yet, this does not take away the fact that the laws promoted a kind of self-determination and identity promotion among the Banabans. Potential destination countries of future environmentally-displaced migrants may thus learn from the protections established though these laws.

While resettled migrants occupy a unique, if marginal, place in their host societies, they must also engage with their host society in an interaction that affects and at times enriches both societies. This is so because as migrants "attempt to address the problems of ethnic boundary and meaning,"[113] boundaries are rarely fixed and are in fact porous. The taking-in of new meanings is discernible among the younger, Rabi-born Banabans who are now Fijian citizens and speak fluent Fijian. The multiculturalism of present day Banabans does not diminish the fact that they are "first and foremost" Banabans.

The Banaban resettlement experience continues to resonate among scholars from diverse fields of study not only as a valuable case study of an entire community resettled

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111 K.Yardley. and T. Honess, T., *Self-Identity: Psychosocial Perspectives* (John Wiley & Sons, New York, 1987) p.121.

112 R. Baumeister, *Identity: Cultural Change and the Struggle for Self* (Oxford University Press, 1986) p. 18.

113 J. Nagel (1994), 'Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture', 41 *Social Problems* (1994) p. 152.

internationally due to environmental pressures, but also because the resettlement occurred more than 60 years ago thereby affords the possibility of a longitudinal study of resettlement and its aftermath. That the Banabans have retained their collective identity despite long Fijian interaction and influence attests to the resilience of Banaban culture, although it must be acknowledged that inhabiting an entire island has helped in such preservation. Yet, such cultural and identity preservation may also be explained in part by the attitude of the host state of Fiji in weaving into its laws minority rights protections for the resettled community. The grant of minority rights protections thus serves as a lesson for potential destination states on whose shores environmental migrants of the future may settle.

CHAPTER 8

Continuity and Change: Identity Among Later-Generation Banabans

Publication Status

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Link to Previous Chapter

This is another article on the Banaban resettlement that looks into the long-term and intergenerational effects of resettlement, particularly how later generation Banabans chose to retain core Banaban identity notwithstanding evidence of acculturation into Fijian society.

Contribution to Thesis

This article explores an important aspect of environmental migration that looks into the inter-generational impacts of resettlement. In the context of current environmental changes threatening to permanently displace low-lying island communities, the Banaban case demonstrates that not only is retention of collective identity possible among later-generations, but that ethnically distinct peoples need cultural rights protection if they are to survive collectively in their host society. Cultural membership and recognition are basic rights, and migrants cannot be assumed to have renounced cultural claims once they leave their country of origin to enter a host society. The protection of cultural diversity promoting a balance of cultural identity retention and acculturation as a by-product of a healthy interaction with the host society constitutes a component of successful long-term resettlement. The Banaban case demonstrates how core collective identity and culture are retained through the generations.

Pages 241-266 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

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PART III

CONCLUSION

Chapter 9

1. Introduction

This thesis is a multidisciplinary study that examines the role of law and policy towards migration and collective protection of environmental migrants in the Pacific. It asks if resettlements are required today, how they may be done using current legal tools and frameworks –ad hoc and limited they may be - and, assuming resettlements become long-term, how may the migrants' collective culture and identity be protected. To answer the questions, domestic legislation of likely destination countries were explored upon, and past cases of actual or potential resettlements in the Pacific were studied. While resettlements are not a new phenomenon in the Pacific, recent environmental events and processes suggest that environmental migration will increase over the coming years.

While particular circumstances surrounding the resettlements vary, all three case studies presented in this thesis reflect three predominant themes: attachment to the home island, the role of resettlement preparation, and the importance of cultural and identity protection as aspects of successful relocation. The themes recur throughout the case studies. The islanders' deep attachment to their home islands is a bond that connects them to their lands of origin. It defines their identity in resettlement. This bond in part explains why Pacific Islanders are averse to resettlements, more so involving the entire community, and why resettlement has been a difficult and frustrating experience for most islanders. The feeling for home and place is very strong, such that today, more than 60 years after the Banabans and Bikinians left their home islands, the attachment remains albeit in a modified way, and notwithstanding many later generation settlers have not even been to the home islands of their parents and grandparents. It is likely that a similar feeling of connection exists among other Pacific Islanders in relation to their islands. While colonial interests triggered the resettlements in

the case studies presented in this thesis, today a different trigger looms in the horizon, as many islands in the Pacific face the possibility of environmentally-induced resettlements in light of the increasingly felt impacts of climate change.

2. Findings on the Research Questions

At the beginning of this thesis the following overarching questions were asked: If resettlements are required today, how may they be done using current legal tools and frameworks (not only future or hypothetical legal scenarios); and, assuming resettlements become long-term, how may the migrants' collective culture and identity be protected. In order to address these questions, three sub-questions were asked. The sub-questions will be answered, drawing upon the conceptual frameworks identified in the thesis.

Research Question No. 1

Absent an international framework for cross-border environmental migrants, do current frameworks in domestic legislation of likely destination countries provide an adequate foundation for the admission of environmental migrants in the Pacific?

To answer this question, four schemes were examined under the domestic laws of United States, Canada, Australia and New Zealand: free movement from a former colony to a metropolitan state, temporary protection schemes in environmental emergencies, ministerial discretion as migration opportunity for the environmentally displaced, and preferential migration schemes for Pacific peoples. While some Pacific countries, by virtue of past colonial ties enjoy free movement to metropolitan countries on the Pacific Rim, other countries do not have the same opportunities. Ironically, those that do not have access are the countries often cited as places potentially requiring resettlement due to environmental threats. The citizens of Kiribati and Tuvalu, for instance, do not have free movement access to the United States, Canada, Australia or New Zealand. The temporary protection schemes of the United States and Canada, by way of a safe haven grant and suspension of deportation,

provide temporary humanitarian protection to nationals from countries affected by natural disasters. However, the schemes are restricted to non-citizens who are already in the United States or Canada at the time of the disaster. Further, they are granted with the expectation that non-citizens will return home after the environmental threat has subsided. The protection thus excludes non-citizens outside the United States and Canada seeking safe haven from environmental threats. Likewise, considering the temporary nature of the schemes, they are ill-equipped to deal with environmental deterioration of a long-term or permanent nature.

All four metropolitan Pacific Rim countries have ministerial discretion built into their migration legislation. The discretion is based on humanitarian or compassionate grounds, although in the case of New Zealand a visa of any type may be granted at the absolute discretion of the Minister of Immigration. While ministerial discretion theoretically provides windows of opportunity for environmental migrants crossing international borders, the opportunity has obvious downsides. Specific rights and remedies can never be assured due to the non-compellable and non-reviewable nature of discretionary decisions. Secondly, the wide latitude implicit in ministerial discretion is subject to changing political tides, making the process vulnerable to charges of whimsy and favouritism.

Some Pacific Rim countries have preferential migration schemes for Pacific peoples. Among these are New Zealand's Pacific Access Category (PAC) allowing 75 citizens from each of Kiribati and Tuvalu to migrate to New Zealand each year. Other schemes are temporary in nature, such as New Zealand's Recognised Seasonal Employer (RSE) Scheme and Australia's Seasonal Worker Program (SWP), allowing nationals from Pacific countries to work in the former countries' agricultural sectors on a temporary basis. The PAC's concessionary benefits, and to a lesser extent the benefits derived from the RSE and SWP, provide opportunities (however limited) for environmentally threatened populations from atoll nations such as Kiribati and Tuvalu. However, the challenge posed by a possible sea level rise would require permanent relocation of a much larger number of people. The limit of 75 citizens a year from each atoll country will *not* be enough to address large scale emigration. Nonetheless, schemes such as the PAC provide proactive and voluntary avenues for migration. Those who moved earlier can provide social and cultural support for later migrants through chain migration.

While there are patches of migration opportunities found in humanitarian and ministerial discretion laws and preferential admission schemes in the four named destination countries,

these opportunities are *ad hoc* and temporary. Thus they do not provide reliable safe havens in the long-term. They are also in the main individual based, and not envisaged to address *en masse* migration should the same be necessitated. To protect Pacific environmental migrants at both an individual and group level, there is thus the need to further enhance admission and migration opportunities for environmental migrants in the Pacific, including migration and protection opportunities for wholesale community relocations.

Legal reform by way of amending domestic laws and policies is perhaps the most pragmatic approach in dealing with environmental migration today. Unlike the currently non-existent international legal framework for cross border environmental migrants, domestic laws on environmental migration already exist, albeit sporadically and premised on the host state's discretion. If ministerial discretion provisions are placed within a rights-based legal structure, the duty to protect environmental migrants would become obligatory and binding, better reflecting the urgency of environmental migrants' positions and corresponding to the humanitarian objectives of many states. Nonetheless, and for no other reason but based on compassion and our common humanity alone, the environmentally displaced - individuals or communities- should not be returned back to their country if doing so would cause them harm. As Kälin notes, "[e]ven when return would be lawful and reasonable, people should not, on the basis of compassionate and humanitarian grounds, be expected to go back if the country of origin does not provide any assistance or protection, or if what is provided falls far below international standards of what would be considered adequate."[1] This is so because while the types of harm to which the usual non-refoulement principle attaches do not cover environmental migrants, yet the gravity of some environmental threats such as widespread un-inhabitability due the effects of climate-change would expose the migrants to equally life-threatening situations and violations of fundamental human rights, should they be returned to their places of origin. For the environmentally displaced caught up in extreme environmental events, human needs are real and urgent, and the need for protection from other states is definite.

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1 Walter Kälin, 'Climate Changed Induced Displacement, A Challenge for International Law, Distinguished Lecture Series 3' (Calcutta Research Group, 2011).

Research Question No. 2

Do states have moral obligations to admit and protect environmental non-citizen environmental migrants in their jurisdictions? If so, what are the strengths and limitations of these obligations?

This question takes further the problem raised in the first question by examining the foundations of a state's moral obligations towards environmentally displaced persons from other countries. To answer the question three diverse viewpoints were pursued: that states have no moral obligation to allow non-citizen environmental migrants into their territory; that the admission of environmental migrants is optional or a matter of charity; and, lastly that an obligation exists based on the categorical moral imperative of beneficence towards distressed persons.

The first adopts Pufendorf's view that states have no moral obligation to admit vulnerable populations into their territories—the states' primary concern being self-protection. An example is a securitised view of environmental migration that sees environmental migrants as threats to the world's states. According to this view, the interaction of the settlers and the host population results in a volatile situation. Cultural and ethnic differences will trigger conflict as settlers compete with the local population for jobs and limited resources. The fear of hostility on the part of the host population was a factor that prevented the Nauruan resettlement in Australia. The Nauru Local Government Council commented on the great deal of hostility shown towards the Nauruans by Queenslanders because the latter were unhappy at the prospect of being dispossessed of their properties for the resettlement.[2] The experience of the wives of a Nauruan delegation being subjected to racist remarks[3] only aggravated the Nauruans' fear of being "regarded as [but] another tribe of Aboriginals" once resettlement has commenced.[4] The Nauruans ended up deciding against resettlement. Yet as the case studies of actual resettlement have demonstrated, conflict with the host community is not a necessary consequence of environmental migration, at least not generalised conflict.

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2 Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (Oxford University Press, 1992).

3 Helen Hughes, 'From Riches to Rags: What are Nauru's Options and How can Australia Help?' (Centre for Independent Studies, 2004).

4 Maslyn Williams and Barrie MacDonald, *Phosphateers: A History of the British Phosphate Commissioners and the Christmas Island Phosphate Commission* (Melbourne University Press, 1985).

Except for claims of some indigenous Fijians in relation to land rights on Rabi Island, no widespread competition for jobs or resources occurred among the Banabans relative to their Fijian hosts. On the contrary, the somewhat porous cultural boundary existing between the Fijians and Banabans resulted in a generally healthy culture mix, interaction and exchange.

The decision of a state to adopt Pufendorf's securitised view of environmental migration raises ethical questions based on fairness and justice. For instance, is it fair for those born on a continental landmass to monopolise a secure territory while vulnerable atoll islanders requiring relocation because of environmental threats are shut out at the borders? While securitising the issue of environmental migration may be politically expedient by catering to populist anxieties about not letting strangers in, a policy that turns a nation's back against vulnerable populations is ultimately unethical, not to mention questionable under existing universal human rights standards. They cannot be sustained in the long run since they ultimately result in conflict through hard line competition for territory, which is ironically what the securitised view of the problem hopes to avoid.

The second view—which finds support in the writings of Vattel—maintains that the decision to admit non-citizen environmental migrants is optional or a matter of charity. Though couched in a somewhat benign language, the second view shares a commonality with the first: It maintains the primacy of the states' freedom to choose who or who not to admit within their territories rules out primary considerations of morality and justice. One difference is while Pufendorf takes a realist perspective that gives precedence to the interests of the state in survival by controlling its borders, Vattel recognises the authority of the state to regulate its borders but implies that it may still have regard to the interests of non-citizens in making judgments about who to admit.

Despite the state-centred and protectionist arguments raised by Pufendorf and Vattel, there remain strong arguments in support of the third view that states have moral obligations to admit environmentally distressed populations within their jurisdictions. Kant is the strongest proponent of this view, which is also shared by other philosophers. Kant's categorical imperative of giving assistance to the victims of calamities comes closest to the principles enunciated in the Universal Declaration of Human Rights that everyone not only has the right to life,[5] but also the right not to be deprived of his or her means of subsistence.[6] Other

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5 *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (10 December 1948).

philosophers, among them Michael Walzer, have argued that communities have "an obligation to provide aid to others who are in dire need" even though "we have no established bonds with them."[7] Joseph Carens uses Rawlsian principles to support a case favouring open borders." These philosophical viewpoints arguing for state obligations towards environmentally affected populations trace their roots to cosmopolitan ideals from the ancient Greeks and Romans. These principles are founded on our common humanity, and from "our deep commitment to [and] respect [for] all human beings as free and equal moral persons."[8] This thesis takes the stance that only frameworks and policies that observe fundamental moral principles stand the chance of being sustainable in meeting existing and future challenges posed by environmental migration.

Research Question No. 3

How do international and domestic legal frameworks assist (or hinder) resettled communities in retaining their cultural heritage and identities within their host communities?

Among the projected impacts of environmental change is the displacement of entire Pacific communities. While most relocation will likely happen within the same state, such as the resettlement of Carteret Islanders to other locations within Papua New Guinea, in other cases international relocation may be necessitated. Long-term cross border relocations typically result in the settlers' becoming minorities in the host state. When resettlement becomes long-term, existential questions about the collective destiny of the relocated community surface: will the community continue to maintain its culture and identity in resettlement, or will it ultimately be assimilated into the host society. The issue was foremost in the minds of the Nauruans when they came face to face with the imminent possibility of resettlement in Australia in the 1960s.

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6 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

7 Michael Walzer, *Spheres of Justice* (Basic Books, 1983).

8 Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *The Review of Politics* 251.

According to the UNESCO Universal Declaration on Cultural Diversity, cultural diversity is the "common heritage of humanity."[9] The diversity may be observed in the "uniqueness and plurality of the identities of the groups and societies making up humankind."[10] As a "source of exchange, innovation and creativity," cultural diversity is as "necessary for humankind as biodiversity is for nature."[11] Diversity should thus be "affirmed for the benefit of present and future generations."[12] The protection of cultural diversity assumes poignancy in the case of environmental migration, more so for resettled communities, whose relocation is less than voluntary and whose experience in resettlement may be as difficult as it is traumatic. The experience of the Banabans and Bikinians, especially in the early phases of resettlement, attests to this. Michael Lieber's insights assume a special significance for resettled communities in particular: that living together in communities is "not merely a sociological fact; it is a cultural fact as well."[13] That "living together *means* something to people" and the "meaning of living together depends on people's living together in a particular way, not just any way at all."[14]

When the Banabans and Bikinians were relocated, the protections of international human rights law still lay in the future. Nonetheless, in the case of the Banabans, Fiji as the host state not only recognised but adopted special measures of affirmative action for Banaban self-administration and the promotion of Banaban ethnic and linguistic identity on Rabi Island. While the *Banaban Settlements Act* and *Banaban Lands Act* were enacted in colonial times, the government of Fiji respected their provisions after Fiji achieved independence in 1970. Yet, the Banabans have had their share of insecurities: Fiji's political instabilities and the growing privileges for indigenous Fijians threaten the long-term rights and protections of the Banaban people. It remains to be seen for instance whether the ethnic and minority rights will continue to find a place within future Fijian legislation. While the special Banaban legislation may not be the only factor that helped to retain Banaban identity and culture in resettlement, the protections they offer played a significant part. On the other hand, one may question whether the failure of the Bikinians to retain their traditional self-reliance may be due to a culture of dependence that has arisen from the long term receipt of financial support in the

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9 *Universal Declaration on Cultural Diversity of UNESCO*, General Conference of the United Nations Educational, Scientific and Cultural Organisation, 31st sess (2 November 2001) .

10 Ibid at art 1.

11 Ibid.

12 Ibid.

13 Michael Lieber, 'Conclusion: the Resettled Community and its Context ' in Michael Lieber (ed), *Exiles and Migrants in Oceania* (1977) 356.

14 Ibid.

guise of compensation. Lieber takes the more nuanced view that the Bikinians "sought to establish a relationship of dependency on the Trust Territory administration from the outset of their settlement on Kili."[15] It is of course possible that both the policy of the host state and the settlers' attitude reinforced each other. In any case, there are at present hopeful signs of change. Grassroots organisations such as the Waan Aelõñ in Majel (Canoes of the Marshall Islands) are teaching young Bikinians about the revival of traditional self-reliance through livelihood projects and the recovery of "lost" aspects of Bikinian culture.[16]

For Pacific islands and nations facing the possibility of environmentally-induced relocations, various international legal frameworks assist resettled communities in retaining their cultural heritage and identities within the host communities. The International Convention for the Elimination of All Forms of Racial Discrimination (ICERD) proscribes racial discrimination and protects settlers from racially discriminatory conduct. Article 5 obliges state parties to "prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law."[17] Although many non-metropolitan Pacific states are not parties to the ICERD as only Fiji, Nauru, Palau, Papua New Guinea, the Solomon Islands and Tonga have either signed or acceded to it, the four likely destination countries namely the United States, Canada, Australia and New Zealand all ratified the Convention, albeit with some declarations. The Convention's individual complaints mechanism effectively helps affected persons enforce the treaty's provisions against state parties that have accepted the complaints mechanism. While some state-parties, among them the United States, do not recognise the competence of the Committee to "receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention," nonetheless the Convention is an important document in the eradication of "racial hatred and discrimination in any form" which will have far reaching benefits for cross-border environmental migrants.

A significant framework for the protection of minority rights is Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which requires that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities

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15 Ibid at 352.

16 Bikini Atoll Local Government Council, *Waan Aelõñ in Majel (WAM) Wins 2011 Global Vision Award* <http://bikiniatoll.wordpress.com/2011/10/20/waan-aelon-in-majel-wam-wins-2011-global-vision-award/>

17 *International Convention for the Elimination of All Forms of Racial Discrimination* opened for signature 21 December 1965, 660 UNTS 19 (entered into force 4 January 1969).

shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[18] The ICCPR is a binding instrument and is monitored by the United Nations Human Rights Committee. It has been signed and ratified by a majority of the world's states, including the United States, Canada, Australia and New Zealand. Many Pacific countries are however non-parties to the Covenant: while Nauru and Palau both signed but did not ratify the ICCPR, Fiji, Kiribati, the Marshall Islands, the Federated States of Micronesia, the Solomon Islands, Tonga and Tuvalu neither signed nor ratified the Covenant. It is thus ironic that the very countries which may need the long-term protections dispensed under the ICCPR in the event of resettlement are currently the very ones outside its express ambit.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the United Nations General Assembly in 1992, develops further the rights of minority members elaborated in Article 27 of the ICCPR. Article 1(1) of the Declaration mandates that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity."[19] Although non-binding, the declaration nonetheless serves as a guide for the enactment by nations of frameworks and policies towards minority members within their jurisdiction. A salient feature of the Declaration is its espousal of the protection of collective identity of minorities, whether national, ethnic, cultural, religious or linguistic.

Today, preservation of cultural identity remains a critical issue in long-term environmentally induced resettlements, particularly among island States and communities. The issue was central in the Nauru, Bikini and Banaba cases. The Trusteeship Council in its report to the General Assembly summed up Nauru's predicament as follows: "'[T]here was a very strong and earnest desire on the part of the Nauruan people to remain the people of a distinct small nation.... No matter how small they were and how unimportant they may be to others, they wanted to be free to perpetuate their homogeneity and to preserve themselves as a distinct people and nation. They wanted to shape their own destiny."[20] The identity of the Bikinians was largely derived from their deep connection to Bikini which they inherited from their

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18 *International Covenant on Civil and Political Rights* above n 6.

19 *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 48th sess, 85th plen mtg, UN DOC A/RES/48/138 (18 December 1992).

20 Weeramantry, above n 2 at 287.

ancestors.[21] Bikini was associated with the Bikinians' origins, in both a physical, cultural and even spiritual sense. Much like other Marshallese Islanders, the sense of connection to the land is "rooted in the indigenous religion of the Marshall Islands" and appears to have survived the introduction of Christianity.[22] In a 1954 petition that the Marshallese people submitted to the United Nations Trusteeship Council they not only raised their concerns regarding nuclear weapons tests, but effects of their relocation to their identity and spirit:

> The Marshallese people are not only fearful of the danger to their persons from these deadly weapons in case of another miscalculation, but they are also very concerned for the increasing number of people who are being removed from their land....Land means a great deal to the Marshallese. It means more than just a place where you plant your food crops and build your houses; or a place where you can bury your dead. It is also the very life of the people. Take away their land and their spirits go also.[23]

The Bikinian resettlement proved not only disruptive but destructive of their culture, identity and lifestyle. The experience led them to discard many of their traditional cultural and social systems.[24] While resettlement was similarly painful and traumatic for the Banabans, eventually they were able to create in Fiji a "space that embodied their continuing relationship to their island of origin in the Central Pacific, while still underwriting their autonomous identity as Banabans in the diaspora."[25] Consciousness of Banaban identity continues through the later generation Banabans. Though Fiji born and have acquired Fijian ways and citizenship, the latter-generation nonetheless retained their core Banaban identity and became bonded with both Banaba and Rabi: "We love Banaba, [but] we [also] love Rabi because we are Fijian citizens....Rabi is our own, Banaba is our own."[26] For the young Banabans in Fiji, it is attachment to Banaba, and now also Rabi, that holds Banaban identity together. Retention of collective identity in resettlement may be attributed to Banaban cultural resilience, and the Banabans' having acquired an entire island to themselves. One outstanding factor however is, unlike other resettled communities in the Pacific, the Banabans, with the help of enabling legislation in the host community, replicated their former

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21 Robert Kiste, *The Bikinians: A Study in Forced Migration* (Cummings Publishing Company, 1974)

22 Barbara Johnson and Holly Barker, *Hardships and Consequential Damages from Radioactve Contamination, Denied Use, Exile and Human Subject Experimentation Experienced by the People of Ronglap, Rongerik and Ailinginae Atolls* (Office of the Public Advocate, Nuclear Claims Tribunal, 2001)

23 Petition from the Marshallese People Concerning the Pacific Islands: Complaint Regarding Explosion of Lethal Weapons within our Home Islands, United Nations trusteeship Council, T/PET.10.28, 20 April 1954.

24 Jonathan Weisgall, 'The Nuclear Nomads of Bikini' (1980) 39 *Foreign Policy* 77.

25 Wolfgang Kempf and Elfriede Hermann, 'Reconfigurations of Place and Ethnicity: Positionings, Performances and Politics of Relocated Banabans in Fiji' (2005) 75 *Oceania* 369.

26 Interview, R.K., 2012.

governmental system in their new home. The Banaban Settlement Act 1945 granted them local autonomy and self-government on Rabi through the Rabi Council of Leaders, while the Banaban Lands Act 1964 gave the Council legal custody and trust of the entire island of Rabi for the Banabans.

While the success of future resettlements may be hinged on the willingness of the host state to grant cultural and even political space for minority rights to thrive and grow in line with international law standards for minority protection, the Banaban "success" was from a somewhat different cause. Banaban minority protection was from an enlightened domestic legislative policy, and not the result of binding international obligations which were mostly non-existent at the time the protections were dispensed. Nonetheless, the unilateral protections offered in the host states, including the infrastructure and policy protections offered by Australia should the Nauruans proceed with relocation underscore the significance of legislative protections of the settlers in resettlement. The case studies demonstrate the significance of having frameworks or policies protecting culture and identity in resettlement. Given the severity of the impacts stemming from environmental changes in the near future, which may require community resettlement, governments and policy makers must ensure international frameworks are observed and, when feasible, domestic frameworks are established to minority rights protection of environmental migrants.

3. Key Research Findings and Research Implications

This section considers the implications of the findings under the three research questions. The articles presented in this thesis have provided critical contributions to the various aspects of inquiry raised in this thesis. This section presents four key observations and offers reflections on what may be needed to advance migration and cultural protection opportunities for Pacific environmental migrants.

3.1 Nature of the environmental trigger that created the need for resettlement

While the environmental deteriorations in all the case studies were the outcome of human agency, particularly colonial interests that sought to use the islands for various purposes, some parallels may be suggested in relation to resettlement arising from current environmental concerns. In the case of Nauru and Banaba, environmental deterioration was a long and slow process spanning decades of phosphate mining, while in the case of Bikini, resettlement was motivated by an event (nuclear testing) that gave little time for preparation by the settlers. The slow-onset deterioration in the case of Nauru and Banaba presented alternatives and thinking space, including the opportunity to decide whether to move or stay. It also allowed the opportunity to scout for alternative island homes with the amenities to sustain a relocated community. While slow onset environmental degradations, may offer opportunities for negotiation with authorities towards beneficial terms of resettlement, the protracted situation could also lead to delayed action, or complete inaction because of the lack of any sense of urgency. Sudden onset environmental events on the other hand usually propel government agencies and NGOs into quick action and immediate solutions, often without due reflection or appropriate consultation with those affected. The urgency with which Bikini was to be used as nuclear testing site (unilaterally set by a world military power) gave the Bikinians neither choice nor opportunity to negotiate their resettlement terms, at least in the initial stages of the resettlement. The situation faced by the Bikinians is similar to urgent last-minute resettlements from tsunamis, earthquakes or volcanic eruptions which create emergency situations that place the settlers at the mercy and control of governmental and institutional agencies in charge of resettlement. While the result may not be to the settlers' disadvantage, the possibility of a slipshod relocation subjecting the settlers to frustrating situations is a significant risk, as the Bikinian experience suggests.

While slow-onset environmental deteriorations may require long-term resettlements and displacement, and sudden onset disasters are often characterised as temporary with the displaced persons and communities going back to their homes soon after the disaster subsides, the distinction is not always straightforward. For instance, the after effects of massive devastations such as those from chemical or nuclear contamination often lead to long-term if not permanent displacement. Compared to a planned resettlement with the relocation site carefully chosen in advance, (as in the case of the Banabans), displacements from sudden-onset causes present a humanitarian situation where people are evicted usually without adequate guarantee of physical or social support in their places of relocation. As the Bikini case study attests, even sudden onset causes may have far reaching consequences in

that the displaced community may be relocated long term. According to Anthony Oliver-Smith, regardless of the cause, to be resettled is "one of the most acute expressions of powerlessness because it constitutes a loss of control over one's physical space."[27] Cernea thus calls the compartmentalisation of resettlement according to trigger as an "unjustified dichotomy."[28] In his studies comparing various types of resettlement in Africa, Keith Sutton observed the commonalities in the way societies respond to resettlement, though the inducement for resettlement may be different. He states the "comparability can stem from the traumatic effects produced by resettlement" and how the "stress of forced removal is so great that societies respond similarly."[29] Whether resettlement was triggered by slow or sudden onset events is beside the point as comparative studies, including this study, have shown similarities in their impacts. Thus, while academic or conceptual distinctions exist between resettlements from slow onset causes such as mining and sudden onset events such as disasters, in practice the levels of protection given to resettled populations should be the same. The Banaban and Bikinian experiences confirm a commonality in the difficulties encountered by the settlers in the various phases of the resettlement, although the Banaban resettlement took years, while that of the Bikinians took only weeks. In both cases, the shock at having to relocate to a new place was traumatic particularly in the initial years. In both cases, greater preparation was needed to prepare those involved in resettlement physically and psychologically.

3.2 Role of preparation

Resettlement is a complex process that requires detailed preparation, as well as physical and psychological readiness on the part of both the settlers and the host communities. It also involves costs before, during and after the initial period of resettlement has passed. Prior to resettlement, arrangements have to be made for the availability of the resettlement site. This may be done through purchase, long-term lease or by way of some other legal arrangement. As resettlement nears, provisions for transportation, and for setting up infrastructure in the

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[27] Anthony Oliver-Smith, 'Displacement, Resistance and the Critique of Development: From the Grass-Roots to the Global' (RSC Working Paper No. 9, University of Oxford, 2002)

[28] Michael Cernea, 'Internal Refugee Flows and Development-Induced Population Displacement' (1990) 3(4) *Journal of Refugee Studies* 320.

[29] Keith Sutton, 'Population Resettlement: Traumatic Upheavals and the Algerian Experience' (1977) 15(2) *Journal of Modern African Studies* 279.

relocation site—including roads, housing, utilities and ultimately the construction of schools and health centres—need to be realised.

In the case of the Banabans, the purchase of Rabi Island was planned years before actual resettlement, and was made possible because of a trust fund dedicated to the purchase of a new home for the Banabans. While the establishment of the Banaban fund was made possible by the Banaba Island's phosphate royalties, other institutional or bilateral arrangements may be made in relation to the current challenges brought about by climate change.

Funding for climate change adaptation may require multilateral cooperation. Although not specifically directed to financing environmental migration, the Global Environment Facility (GEF) Trust Fund, which includes the Least Developed Countries Trust Fund (LDCTF) and Special Climate Change Trust Fund (SCCF) provides grants for adaptation projects related to, among others, the impacts of climate change, as well as those from "land degradation" and "persistent organic pollutants."[30] The LDCTF was particularly established to "address the special needs of the Least Developed Countries...under the Climate Convention," and provides funds for the preparation and implementation of national adaptation programs of least developed countries including some Pacific nations vulnerable to the effects of climate change.[31] Arguably, migration may be included among the adaptation projects in response to environmental impacts; otherwise, the funds can be used as a blueprint for the establishment of another trust fund specifically financing climate or environmentally-induced resettlements.

Considering that natural disasters exacerbated by climate change can happen any time, early preparation is imperative. Ilan Kelman suggests an early planning but delayed departure scheme.[32] If anything, the delayed departure scheme permits "psychological and logistical" readiness and saves "decades of productive island life."[33] Contingency measures such as the identification or advance purchase of relocation sites would have to be undertaken, with departure occurring much later, as circumstances dictate. In 2008 President Nasheed of Maldives announced his country's plan to purchase land in metropolitan states for possible later relocation. Called the "Safer Islands Plan," the scheme foresees the eventual relocation

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30 Global Environment Facility, *What is the GEF?* <http://www.thegef.org/gef/whatisgef>.

31 Global Environment Facility, *Least Developed Countries Fund (LDCF)* <http://www.thegef.org/gef/LDCF>.

32 Ilan Kelman, 'Island Security and Disaster Diplomacy in the Context of Climate Change' (2006) 63 *Les Cahiers de la Securite* 61.

33 ibid32.

of the Maldives population to other states such as India or Iceland.[34] In April 2012 the Kiribati Government "approved the purchase of 2,282 hectares of free-hold land located in the Savusavu area of Fiji's second largest island, Vanua Levu."[35] Although the decision to buy was ostensibly for investment purposes, the area is "certainly one of a number of options for future residence" for the I-Kiribati people "who have long had to grapple with environmental uncertainty in their low lying coral islands."[36] While it is more difficult to purchase resettlement sites today compared to colonial times where administrators could facilitate the purchase of relocation sites within the colonies, yet other immigration options are available today to environmental migrants in Pacific Rim countries, albeit most are ad hoc and temporary.

A well-managed resettlement which has carefully considered the deficiencies and benefits of the chosen resettlement site avoids, or at least mitigates, the expected risks of impoverishment which accompany most cases of resettlements.[37] One indicator of good planning is to include in the preparation the possibility of having access to income or livelihood in the resettlement site. This was one area that the Nauruans considered carefully in their deliberations as to which island they would choose as a resettlement site. Beyond livelihood or income restoration, the preparation must also ensure full participation of the displaced people in public affairs. This includes the right to "associate freely" (with one another and the larger society around them) as well as the right to "participate equally in the community affairs."[38] In this way, the dignity and voice of the settlers in the management of their affairs in the resettlement site will be ensured.

3.3 Legal and institutional frameworks

The effects of environmental change and hazards present a global humanitarian challenge that requires an integrated response from all sectors of society. Among these effects are

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34 Koko Warner et al, 'In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement' (United Nations University et al., 2009)

35 John Campbell and Richard Bedford, in Etienne Piguet and Frank Laczko (eds), *People on the Move in a Changing Climate: The Regional Impact of Environmental Change on Migration* (Springer, 2013)

36 Ibid.

37 Asian Development Bank, *Guidelines on Involuntary Resettlement* (ADB Manila, 2001).

38 *Guiding Principles on Internal Displacement*, Principle 22(c), 11 February 1998, U.N. Doc. E/CN.4/1998/53/Add.2.

population displacements, including possible resettlements of entire Pacific island communities in other countries. The protection afforded by legal and institutional frameworks, while forming only a part of the overall solution, nonetheless plays an important part. Despite documented cases of populations already displaced from their homes due to environmental deterioration (a trend that is expected to worsen), the protection in international law given towards environmental migrants is more clearly articulated in cases of internal displacements, and is less clear, or absent, in the case of environmental migrants crossing international borders. The protections towards internally displaced persons (IDPs) in the Guiding Principles, while technically non-binding, enjoy general acceptance as authoritative among many states. The protection of environmental migrants crossing international borders is more problematic, in the sense that at present no unified international framework exists for their protection. Unlike "refugees" as that term is defined in the 1951 Refugee Convention, cross-border environmental migrants are not provided a particular legal status in international law, nor are their rights to seek asylum in another country (with the corresponding prohibition of *non-refoulement*, or the right not to be returned to their country of origin) recognised. This current gap in international law is one of the challenges that needs to be addressed.

Recently there has been an emerging trend towards the recognition and establishment of legal protections towards environmental migrants crossing international borders. Nonetheless these proposals for legal protection have not gone beyond consultation. In December 2010 during the 16th session of the Conference of the Parties (COP 16) to the United Nations Framework Convention on Climate Change (UNFCCC) held in Cancun, Mexico, the international community, for the first time, "recognise[d] explicitly the humanitarian consequences of climate change-related population movements as an adaptation challenge."[39] Decision 14(f) of the Cancun Adaptation Framework "invites all parties" to undertake "measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels."[40] Although the Cancun Adaptation Framework did not go into detail about how to respond to the challenges of climate or environmentally induced

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39 Walter Kälin, 'From the Nansen Principles to the Nansen Initiative' (2012) 41 *Forced Migration Review* 48.

40 Cancun Adaptation Framework, Decision 14(f)/CP.16, United Nations FCCC/CP/2010/7/Add.1, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010.

migration, it nonetheless acknowledges that any meaningful move to address to this challenge requires multi-level efforts in state, regional and international arenas.

In June 2011 the government of Norway hosted the Nansen Conference on Climate Change and Displacement in the 21st Century which developed ten principles for recommendation to the December 2011 United Nations Climate Change Conference in Durban and the June 2012 United Nations Conference on Sustainable Development in Rio (Earth Summit 2012).[41] While the Nansen recommendations were not formally adopted in the conferences, the principles brought to international attention various normative gaps in environmentally-induced displacements. Principle IX, articulated the need for a "more coherent and consistent approach at the international level" in order to "meet the protection needs of people displaced externally owing to sudden-onset disasters." Principle X states that resettlement or planned relocation must be implemented "on the basis of non-discrimination, consent, empowerment, participation and partnerships with those directly affected." Moreover, resettlement requires "due sensitivity to age, gender and diversity aspects." It is also imperative to hear and take into account the "voices of the displaced or those threatened with displacement, loss of home or livelihood... without neglecting those who may choose to remain."

In order to bring the momentum generated from the introduction of the Nansen Principles to a new level, the governments of Norway and Switzerland launched the Nansen Initiative in October 2012 in Geneva and New York. The Initiative is a "state-led, bottom-up consultative process" aimed to "build consensus on the development of a protection agenda addressing the needs of people displaced across international borders by natural disasters, including the effects of climate change."[42] Regional consultation meetings in areas identified as vulnerable to cross border displacements were conducted. The Pacific Regional Consultation was held in Rarotonga, the Cook Islands, in May 2013, attended by representatives from various Pacific countries, international organisations and academia. Participants at the Rarotonga Consultation expressed concern that cross-border relocation may have adverse impact on their nationhood and culture. They stressed that having to leave their countries is their "least

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41 Ministry of Foreign Affairs of Norway, *The Nansen Principles on Climate Change and Displacement*, http://www.regjeringen.no/en/dep/ud/whats-new/news/transcript-of-the-prime-ministers-speech/nansen_principles.html?id=651568

42 The Nansen Initiative, *The Nansen Initiative: Disaster-Induced, Cross-Border Displacement*, http://www.nanseninitiative.org/.

preferred option," but that should environmental displacement become inevitable, they must be able to retain their "social and cultural identity."[43]

In the absence of international legal frameworks coordinating the movements of cross border environmental migrants, perhaps the most pragmatic approach at the present time is still through domestic legislation and policies. But as earlier observed, existing domestic protections for environmental migrants are at most ad hoc and temporary. Migration opportunities based on humanitarian and compassionate ground are subject to the host state's discretion, and hence do not offer any long-term rights-based solutions. Environmental change is a global challenge that cannot be solved through piecemeal and ad hoc approaches. There is a need for coordinated legal and institutional efforts in all the levels of society to address the long-term prospects of environmental migration.

At a regional level the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) aims to respect and protect the culture and identity of national minorities within its member states. Although criticised as offering hardly anything new to those already written in other international treaties (with some member countries such as France and Turkey not ratifying), the Treaty is nonetheless regarded as the "most comprehensive international standard in the field of minority rights so far" and is the "first legally binding multilateral instrument devoted to the protection of minorities."[44] Article 4.1 of the Convention reiterates existing human rights standards of non-discrimination and equality, while Article 4.1 "makes it clear that a State's obligations may also require affirmative action on the part of the government and not merely abstention from discrimination."[45] The Framework Convention may serve as model for the Pacific region on collective and minority rights protection not only for present but likewise for future minorities resettled on foreign lands from the varying impacts of environmental changes.

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43 The Nansen Initiative, *Conclusions: Nansen Initiative Pacific Regional Consultation*, http://www.nanseninitiative.org/sites/default/files/Conclusion%20Document%20Nansen%20Initiative%20Pacific%20Consultation_0.pdf

44 Office of the High Commissioner for Human Rights, *Pamphlet No. 8 of the UN Guide for Minorities: The Council of Europe's Framework Convention for the Protection of National Minorities* <http://www.ohchr.org/Documents/Publications/GuideMinorities8en.pdf>

45 Ibid.

One of the regional instruments that breaks new ground in the protection of disaster displaced IDPs is the Kampala convention, which entered into force on 6 December 2012.[46] Officially called the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, the Kampala Convention is the first binding treaty defining state obligations relative to the rights of displaced persons which subsumes environmentally displaced persons. It is noteworthy that the Convention's protection coverage not only includes IDPs but anyone who is arbitrarily displaced, thus including those crossing international borders: "All persons have a right to be protected against arbitrary displacement," declares Article 4(4),[47] where arbitrary displacement includes "[f]orced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected."[48] The separate articulation of the right to protection from arbitrary displacement, and not having the concept of arbitrary displacement placed within the sole context of internal displacement, seems to imply that protection "includes both internal displacement and displacement across international borders."[49] The Kampala Convention, unlike the Guiding Principles, thus "goes beyond the scope that its title implies."[50] The Convention likewise protects the cultural and spiritual heritage of displaced minority and indigenous groups. Article 4(5) provides that "States Parties shall endeavour to protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests."[51] While the Kampala Convention only binds African member states, its principles and protections may offer lessons for similarly situated regional associations, including the Pacific Islands Forum, an inter-governmental organization of independent nations in the Pacific region.

In the Pacific, both the Otin Taai Declaration of the World Council of Churches and the Niue Declaration on Climate Change of the Pacific Islands Forum leaders recognise the urgency and seriousness of the impacts generated by climate change on Pacific islands, peoples and culture. Otin Taai declares "as forcefully as we can the urgency of the threat of human-

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46 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention"), adopted 23 October 2009 (entered into force 6 December 2012).

47 Ibid.

48 Ibid. at art. 4(4)(f).

49 Maria Stavropoulou, 'The Kampala Convention and Protection from Arbitrary Displacement' (2010), 36 *Forced Migration Review* 62.

50 Ibid.

51 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, above n. 46 at art 4(5).

induced climate change to the lives, livelihoods, societies, cultures and eco-systems of the Pacific Islands."[52] The Niue Declaration on the other hand being "deeply concerned by the serious current impacts of and growing threat posed by climate change to the economic, social, cultural and environmental well-being and security of Pacific Island countries," recognises the "importance of retaining the Pacific's social and cultural identity, and the desire of Pacific peoples to continue to live in their own countries, where possible."[53] As the case studies have demonstrated, law has a significant role in the protection of social and cultural identity, particularly in resettlement.

Resettlement was made possible in the case studies largely because it was easier to relocate entire communities to other islands in the Pacific so long as the host communities were within the same colonial system. The Banabans relocated from one British colony to another, without the barriers of migration and border control, unlike the situation that would prevail today if the same resettlement were contemplated. During colonial times, administrators could "make decisions about land and community locations with fewer constraints than is currently possible."[54] Movements between colonies were "orchestrated by the colonial services and did not require passports or contemporary protocols of residency, citizenship, visas and the like."[55] The same colonial context facilitated the resettlement of the Vaitupuans in 1947 from Vaitupu (now part of Tuvalu) to Kioa Island, in Fiji in 1947, and the Phoenix Islanders from the Gilberts (now part of Kiribati) to the Western province of the Solomon Islands. Today, should international relocation be required, destination states may have to amend existing domestic legislation or regulations to allow admission of environmental migrants into their territories, and this may require the re-setting of quantitative migration quotas or qualitative criteria for admission. Bilateral and multilateral agreements may be needed to spread out costs and burdens. Although triggered by political and not environmental factors, one may learn from how Southeast Asian nations responded to the influx of 270,000 Indochinese refugees arriving by boat from 1975 to 1979. At the insistence of the United Nations High Commissioner for Refugees (UNHCR), a consultative meeting on displaced persons in Southeast Asia was convened in December 1978. In that meeting

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52 The Otin Taai Declaration, World Council of Churches and WCC Member Churches in the Pacific (2004).

53 The Niue Declaration on Climate Change, The Pacific Islands Forum, Smaller Island States (SIS) Leaders' Summit (2008).

54 John Campbell, 'Climate-induced Community Relocation in the Pacific: The Meaning and Importance of Land' in Jane McAdam (ed), *Climate Change and Displacement. Multidisciplinary Perspectives* (Hart Publishing, 2010) 59

55 Ibid at 77.

Thailand called for a wider sharing of the resettlement burden and limit of period of stay in ASEAN countries.[56] A follow up consultative Meeting on Refugees and Displaced Persons in Southeast Asia was held in July 1979 which resulted in the formalization of the burden sharing principle among ASEAN and western countries.[57] The burden sharing principle is particularly important considering the substantial economic and social strain that may be created in the host countries should large relocations materialise. Without burden sharing, one wonders on hindsight how much of a strain would really be imposed on, say, Australia to accept the entire population of Nauru of more or less 10,000.

Should long-term environmental change necessitate the resettlement of Pacific island populations, for instance due to rising sea levels, the resettlement will likely be international and permanent. Since not only individuals but entire communities, and perhaps nation states will be affected, there is the need for frameworks that go beyond temporary protections of individuals. This entails durable and long-term schemes involving not just mere survival but respect and protection of the resettled communities' language, lifestyles, world views and cultural heritage.

3.4 Successful Resettlement

While the concept of "success" in resettlement is problematic because peoples and societies have different cultural expectations and conceptions what constitutes success, yet there are commonalities. Eftihia Voutira and Barbara Harrell-Bond refer to a situation where the settlers' livelihood condition is at least minimally restored.[58] For Thayer Scudder, resettlement success is demonstrated by a genuine community formation which is the "handing over" of a sustainable resettlement process to the later generation of settlers.[59] As new institutions are formed, the people's ability to reclaim the level of self-sufficiency they had prior to resettlement is an important ingredient of success. It is an essential component in

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56 United Nations High Commissioner for Refugees, 'Draft Summary Report: Consultative Meeting with Interested Governments on Refugees and Displaced Persons in Southeast Asia' (UNHCR, 1978)

57 Gil Marvel Tabucanon, 'An Alternative Home? ASEAN and Pacific Environmental Migration' (2013) 5(1) *Cosmopolitan Civil Socieities: An Interdisciplinaty Journal* 24

58 Eftihia Voutira and Barbara Harrell-Bond, 'Successful Refugee Settlement: Are Past Experiences Relevant,' in Michael Cernea and Christopher McDowell (eds), *Risks and Reconstruction: Experiences of Resettlers and Refugees* (The World Bank, 2000)

59 Thayer Scudder, *The Future of Large Dams: Dealing with Social, Environmental, Institutional and Political Costs* (Earthscan, 2005)

the formation of collective dignity and self-esteem. For example, emphasis is placed less on personal home building and more on the establishment of farmers unions, water associations, cooperatives and other institutions indicative of a community rooted in their new home.

In the context of long-term climate and environmental change, such as desertification or rising sea levels, where relocation is likely permanent, resettlement success is more than a matter of handing over the resettlement process to later generation settlers. Success also goes beyond overcoming the risks of landlessness, joblessness and other insecurities discussed by Michael Cernea. For resettlement to succeed in a meaningful way, the relocation must be seen in terms of being rooted in the new home. This entails the recovery of the resettled community's capacity for long-term sustainability with their social and community fabric intact in resettlement. As consistently argued in this thesis, a successful long-term resettlement is one where the "important characteristics of the original community, including its social structures, legal and political systems, cultural characteristics and worldviews are retained: the community stays together at the destination in a social form that is similar to the community of origin."[60] Yet, this does not mean fossilisation and literal re-creation of every cultural attribute brought from home. Resettlement by its nature involves change, including cultural and identity changes because lived cultures are necessarily dynamic. What is important is the change must not be coerced; in the same way the free expression of legitimate aspects of one's culture in resettlement must not be suppressed. If anything, change will come in time amidst healthy cultural encounters and exchanges with the members of other cultural groups within the host state.

While both Banabans and the Bikinians resettled more than 60 years ago, only the Banabans may be considered to have taken root on Rabi, having become relatively self-reliant, and having come to regard Rabi as home. The same cannot be said for the Bikinians, the sustainability of whose settlement on Kili and Ejit Islands still depends on external aid. Ultimately, a successful resettlement is the "end" of resettlement, that is, when the settlers find a home and meaning in their new location. Resettlement for the Bikinians is an open wound, which prevents closure of the process of resettlement no matter how long ago that was.

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60 Campbell, above n 54 at 59.

From the case studies, the Banaban resettlement's success may be seen in the manner in which the Banabans have retained the significant characteristics of their original society, among these their social, cultural and even political structures, albeit with modifications. They have also retained their collective identity and up to this day even the later generation settlers are proud to call themselves Banabans. This identity and cultural preservation may be attributed to the resilience of Banaban culture itself, brought about by the community's unique history and struggles, although it must also be acknowledged that inhabiting an entire island to themselves has helped. Yet, such cultural and identity preservation may also be explained by the way in which the host state, Fiji, has woven minority rights protections for the resettled community into its laws. While the case studies explored various Banaban minority rights in Fiji, among them the rights to limited self-government as well as positive rights to use their own language, a variety of I-Kiribati, in court, business transactions and in school, further research clearly needs to be done. We would need to know for instance to what extent Banaban rights need to be refined or amended to reflect the changing social and economic needs of the later-generation Banabans. The prohibition on the sale or mortgage of lots on Rabi to non-Banabans, for example, while beneficial towards Banaban cohesion, also led to "in-breeding" by discouraging investments and small business by outsiders from being established on Rabi. The concept of minority rights protection is not static, as already noted, and levels of protection can change over time. For instance, an existing set of minority rights may be subjected to the vagaries of political change as the Banaban case in Fiji suggests.

Conclusion

As previously noted, the protection of human cultures, like the protection of biodiversity, has value not only for particular societies affected but for humankind. The distinct contribution of this study is its focus not only on the admission options of environmentally affected Pacific peoples, but, through the case studies, how it demonstrates that the protection of the collective identity and culture of environmental migrants and the promotion of minority rights in their host societies are critical components of successful long-term resettlement. This study, however, is but a small contribution on the nexus between law and policy on one hand and environmental migration on the other. Nonetheless, the breadth and depth of the

field is such that it would be impossible to exhaust the scope of the topic in one work. At the very least, this study may provide a platform for future research. There is thus the need for further research on the matter, particularly because the circumstances surrounding the resettlements during colonial times are markedly different from the circumstances today. For instance, should resettlement of island states be done today, will migrants continue to be citizens of their abandoned home states, or acquire new citizenship in resettlement? Will they settle in one contiguous geographical area or be dispersed among the various metropolitan cities? What legal guarantees will the settlers rely on to retain and preserve their distinct language, religion and culture in resettlement, and lastly what legal and institutional arrangements must be done to ensure resettlement that not only respects the culture of the migrants, but likewise the culture and rights of the host population who may be similarly displaced to make way for new settlers. The Nauruans, Bikinians and Banabans answered some of these questions during their time; other settlers would have different answers.

As the case studies have demonstrated, resettlement has been a painful and frustrating experience for the most part. If it needs to be done at all, it must only be done as a survival mechanism of ultimate resort. Other adaptation options have to be explored including in situ adaptation measures and exploring the possibility of proactive voluntary migration to safer locations before grave environmental deterioration compels en masse relocations. Resettlement preparation, which includes consultation and involvement of the settlers in all aspects of decision-making must be observed. Likewise, individual and collective rights protection for those affected in the resettlement must be observed. While law and policy may not be the only factors leading to a successful resettlement outcome, they contribute a significant part to it. The study thus asks, if long-term resettlements are necessitated today, how can current legal frameworks protect the individual and collective rights of those affected.

In severe environmental changes such rising sea levels inundating low island states, relocation may be the only viable option for existing populations. The relocation will likely be permanent and cross international borders. Should relocation of entire island communities and nations be necessitated, the need to pursue a policy that respects collective identity and culture – rather than a policy of assimilation - is emerging as a focus. The protection of human cultures, like the protection of biodiversity, has value not only for the individuals concerned but for humankind. As the 2001 Durban Declaration against Racism affirms, "cultural diversity is a cherished asset for the advancement and welfare of humanity at large,"

and hence should be "valued, enjoyed, genuinely accepted and embraced as a permanent feature which enriches our societies."[61] Migration has long been an accepted response of populations to both sudden and gradual changes in their environment. While states are increasingly recognising the contribution of ethnic and migrant communities in their territories, and their need for cultural and identity protection, more work still needs to be done in devising legislation promoting minority rights. Also further down the road it remains to be seen whether the modern system of territorially bounded states will provide a humane framework for meeting the challenges of global environmental changes which will have marked impacts on the islands of the Pacific.

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[61] Durban Declaration, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001, A/CONF.189/12.

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Annex 1 (page 295) removed from Open Access version as they may contain sensitive/confidential content.

Annex 2

Interview questions for Banabans:

Gil Marvel P. Tabucanon

Interviewees:

Banabans

Interview questions:

1. What is your name?
2. When and where were you born?
3. Is your mother Banaban? Where was she born?
4. Is your father Banaban? Where was he born?
5. What languages do you, your mother, father, siblings speak?
6. Do you consider yourself foremost as: Fijian, iKiribati, Banaban, Rabi islander? Please explain.
7. How does Fijian law or government policy treat you as Banaban? In what way could the law or policy serve the Banabans better?
8. How does Kiribati law or government policy treat you as Banaban? In what way could the law or policy serve the Banabans better?
9. Have you heard of the Banaban Trust Funds? If so, has it been helpful to you, your family and community?
10. Do you think more could be done with the Banaban Trust Funds?
11. Have you heard of the Kiribati Revenue Equalization Reserve Fund (RERF)? If yes, what is your opinion of the fund?
12. Do you know the circumstances in which your family settled in Rabi?
13. Do you think the Banabans should continue staying in Rabi or go back to Banaba? Do you have personal plans to return—temporarily or permanently?
14. Do you approve of the resettlement? Do you think some other arrangements would have been better for the Banabans? If so, what?
15. What is your citizenship/ nationality?
16. Why do you think it took years before the Banabans were granted Fijian citizenship?
17. Was there a difference in the treatment of Banabans before and after acquiring Fijian citizenship?
18. What do you think of the situation of Banabans of today compared with the Banabans as you knew them say, 10 years ago, 20 years ago?

19. Do you think the Banabans need special attention or protection from the Fijian or Kiribati government?
20. What do you think of the Banabans being represented in the Kiribati and Fiji legislature? How has this benefitted Banaban society?
21. Do you think the resettlement of the Banabans in Fiji is successful? Why? Why not?
22. In what other way may Fiji or Kiribati help the Banabans?

Annex 3

Addenda/Errata

1. Chapter 2

Page

58 "Refugee-like peoples" are persons in caught in generalised conflict or refugee-like situations but do not technically fit within the strict legal definition of "refugee." (page 56, para. 1 of article)

59 Among the reasons why the article examines domestic laws:

a) A protection regime in international law towards environmental migrants crossing international borders is absent;
b) Domestic legislation is currently the most pragmatic approach in dealing with environmental migration because of its flexibility in providing a link between the sending and host states.

59-60 The Swedish and Finnish legislation similarly protects victims of natural and human-induced disasters. The laws may have been written in light of the April 1986 Chernobyl nuclear accident, the fallout of which reached Scandinavia.

60 "Environmental migrants" in this context mean those persons who for "compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad."[1]

60 While no express visa category exists in the laws of the United States, Canada, Australia and New Zealand on the basis of environmental factors, some environmental migrants may avail themselves of discretionary schemes and other windows of opportunity for migrants based on compassionate and other grounds.

68 The Temporary Protection Status is not an automatic grant, but is based on the discretion of the United States.

68 "Effected" should be "affected" (page 66, para.1 of article)

[1] International Organization for Migration, 'Migration and Environment' (IOM, 2007)

71 The use of "ministerial discretion" in the article is generic, and refers to any discretionary visa grant.

72 "Komannskog" should be "Kolmannskog" (page 70, footnote 66 of article).

72-73 The former Temporary Protection Visa (TPV) regime of Australia has a different meaning and application to the Temporary Protection Status (TPS) visa of the United States.

74, 77 While additional protection categories are available onshore in Australian law for persons in refugee-like situations, (such as those in relation to arbitrary deprivation of life, death penalty, torture or cruel, inhuman or degrading treatment or punishment), they are not discussed in this article for lack of space, and their remote connection to the topic of environmental migration.

76 RRT is the (Australian) Refugee Review Tribunal and not Refugee Review Board.

79 "[G]rant of migration rights" means a grant of admission privileges to New Zealand through ministerial discretion.

87 Campbell's source is the Secretariat of the Pacific Community:
SPC (2009) *Pacific Island Populations* 2009. Noumea: Secretariat of the Pacific Community.

88 The PAC and RSE may be utilised as relocation test cases in order "to assess the feasibility of incorporating environmental migrants into already existing economic migration regimes." For instance, labour shortages in the destination states' agricultural sector may be remedied by hiring seasonal workers from environmentally affected regions of the Pacific. The application of the PAC may also be expanded to specifically target environmentally affected populations in the Pacific region.

89 While New Zealand's motivation for including Tuvalu and Kiribati may also be due to other factors such as the desire to link migration with development, yet humanitarian considerations cannot be discounted, for the reasons already discussed in the article.

90 Australia may, in the exercise of its sovereign prerogatives, create a new visa class any time, as it has done in the past.

93 The possibility of *en masse* humanitarian displacements may be pre-empted by way of gradual, phased and proactive schemes in migration. See Conclusion of Chapter 2.

2. Chapter 3

120 All the countries discussed are Pacific Rim states with the exception of Ireland.

121 "Corollary The corollary" should only be "Corollary."

3. Chapter 4

The IPCC predicts 150 million environmentally displaced persons due to climate change by 2050 – equivalent to 1.5% of 2050's predicted global population of 10 billion;[2] while the Stern Review, commissioned by the UK Treasury projects there could be 200 million displaced by 2050.[3] While the figures are estimates, they are based on current developments relative to climate and environmental changes.

According to Bogumil Terminski "the earthquake-generated tsunami in South Asia (December 2004), Hurricane Katrina in the US (August 2005), and the tsunami on the coast of Japan and its associated nuclear power plant accident in Fukushima (March 2011) brought home to global public opinion and international institutions that fact that natural disaster may become a cause of forced migrations, both internal and international, on a massive scale, in many parts of the globe."[4]

4. Chapter 6

Page 347 (par. 2 of article) "adverse" should be "averse"

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[2] United Nations High Commissioner for Refugees, 'Refugees. No.127: A Critical Time for the Environment' (UNHCR, 2002)

[3] Nicholas Stern, *Stern Review on the Economics of Climate Change* <www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm >

[4] Bogumil Terminski, 'Development-Induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges' (Geneva, 2013).