



Environmental Displacement: Possible Strategic Litigation

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What is climate change displacement?

Individuals who are:

- **forced from their countries of habitual residence**
- as a **reaction** primarily to **climatic push factors** which pose
- an **existential threat** to their right to life

Examples



Problem:

- No **international legal protection** when displaced across borders
- Do not qualify for **refugee** status
- Not protected by **internal (national) legal frameworks**

Progress:

- **Scholarly publications** on the subject
- **United Nations** and other studies
- **General acceptance** that the problem exists

Litigation

- *Inuit petition to the Inter-American Commission on Human Rights (2005)*
- *Kivalina v ExxonMobil Corporation and others (2008)*
- *Teitiota v Ministry of Business, Innovation and Employment (2014)*

Inuit petition to the Inter-American Commission on Human Rights (2005)



Figure 1. The circumpolar in distribution of Inuit, inhabiting Arctic regions of Canada, Alaska (US), Greenland (Denmark), and Chukotka (Russia).

Inuit petition to the Inter-American Commission on Human Rights (2005)

- **Facts**

- Inuit Circumpolar Conference requests assistance of IACHR in obtaining relief from **human rights** violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States
- alleges that the United States' refusal to limit their GHG emissions constitutes a **threat to various Inuit human rights**

Inuit petition to the Inter-American Commission on Human Rights (2005)

- **Decision**

- **Failed to demonstrate a violation of the rights** protected in the American Declaration
- invited the petitioners to testify at an **information hearing to investigate the relationship between global warming and human rights**
- Nevertheless brought **substantial international attention to the plight of the Inuit**, enhancing their influence and visibility in international climate negotiations.

Kivalina v ExxonMobil Corporation (2008)



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Kivalina v ExxonMobil Corporation and others (2008)

- **Facts**

- Village becoming uninhabitable due to dissipation of ice protection and subsequent destruction of Kivalina's land
- Plaintiffs alleged that as a result, the Village will have to be relocated at a cost estimated to range from \$95 to \$400 million
- Filed suit against 24 oil, energy and utility companies to US Federal Court based on theories of **public nuisance, private nuisance, and conspiracy to commit a tortious wrong.**

Kivalina v ExxonMobil Corporation and others (2008)

- **Outcome**

- Appealed a number of times, case finally dismissed in 2013

- **Reasoning**

- Defendants failed to cite any specific breach of federal law or the Constitution (**wrongfulness**)

- Could not be established that defendants were causing a specific injury to a specific area (**causation**)

- Regulating greenhouse emissions was a political rather than a legal issue and one that needed to be resolved by Congress and the Administration rather than by courts (**separation of powers**)

Teitiota v Ministry of Business, Innovation and Employment (2014)



Teitiota v Ministry of Business, Innovation and Employment (2014)

- **Facts**

- Mr Teitiota, a Kiribatian, apprehended for unlawfully residing in New Zealand
- Mr T then applied for refugee/NZ protected person status which was subsequently declined by the Refugee and Protection Officer
- Appealed to the Immigration and Protection Tribunal and the High Court to determine whether he is able to bring himself within the **Refugee Convention** or New Zealand's protected person jurisdiction

Teitiota v Ministry of Business, Innovation and Employment (2014)

- Outcome
 - Concept of **sociological refugee** status **rejected**
- Reasoning
 - Did not establish that he meets the **definitional criteria** set out in the 1951 *Refugee Convention*
 - Could not show that he is being ‘persecuted’ for one of the five definitional grounds
 - Indiscriminate nature of the events and processes gave rise to **no nexus** to a Convention ground
 - Mr T “**would not suffer a sustained and systemic violation of his basic human rights such as the right to life** under Article 6 of the ICCPR or the right to adequate food, clothing and housing under Article 11 of ICESCR”.

Article 1A(2) of the *Refugee Convention*

- a person who, owing to 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 **unable** or, owing to such fear, is **unwilling** to return to it.

Teitiota v Ministry of Business, Innovation and Employment (2014)

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Conclusion

Litigation has proved to be a challenging route for seeking protection against climate change:

Conduct:

- Hard to show that the resulting harm was a **reasonably foreseeable** consequence of a particular defendant's activities (scientific risks of carbon emissions have only become common knowledge fairly recently)

Wrongfulness:

- Carbon **emissions limits have only recently been imposed** through international instruments and in certain national jurisdictions, therefore hard to establish in many instances

- **Causation:**

- Arguably most challenging element to establish seeing as our climate is affected by several factors interacting in complex ways.
- Hard to precisely determine **which natural events are caused by climate change**
- Hard to determine which events are caused by that portion of climate change which is resultant of **our GHG emissions**
- Harder still to determine **which climatic events are caused by a specific polluter or group of polluters**

Conclusion

- Establishing **legal liability** for historical emissions, in particular, which have contributed to anthropogenic climate change remains a challenge.
- **Existing international law instruments** such as the 1951 *Refugee Convention* appear not necessarily to be a viable protection option
- *Inuit* and *Teitiota* judgements support the findings of my masters thesis that an **alternative protection framework is needed.**

Conclusion

- It has been suggested that anyone seeking to sue for damage arising from climate change **"would face formidable legal, logistical, evidentiary and financial obstacles"**
- **Strategic litigation**, however, can serve a **political function**
- **Raises awareness** of the impacts of climate change on the on-going viability of settlement in particular areas and the attendant human rights consequences
- It **could precipitate the required legal and/or policy change**