



ASIA PACIFIC JUDICIAL COLLOQUIUM ON CLIMATE CHANGE: USING CONSTITUTIONS TO ADVANCE
ENVIRONMENTAL RIGHTS AND ACHIEVE CLIMATE JUSTICE
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Climate-induced displacement, justice and the courts: Asia and Pacific

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- Images from Bangladesh

Outline

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- The scale of the problem
- Definitions
 - Refugee under 1951 Convention
 - Climate change refugee
 - Non-human subjects as climate change refugees
- Inadequacy of international law framework
- Inadequacy of national constitutions
- Challenges of displaced persons for courts
 - New Zealand cases
- Need for adoption of new principles at national level

Some arguments

- The links between human rights and climate change are being more widely recognised within legal processes
- Asian and Pacific legal systems are generally ill-equipped to deal with effects of climate change on human rights
- Climate change refugees are not recognised like other types of refugees
- We need new legal principles and mechanisms to address climate change and migration
- Constitutional provisions on human rights are one avenue for dealing with climate displacement

The scale of the problem

One estimate:

- 2050 up to 200 million people will be permanently displaced by the effects of climate change.
- Use such an estimate with caution
 - complexity of climate models
 - the varied reasons why individuals and communities migrate
 - But in any case the number is likely to be large
- **It is not a distant problem, it is happening now.**

Definition of refugee under 1951 Refugee Convention

- “... any 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 [her] 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.”

Climate change refugee

- Problematic under the 1951 Convention: not subject to 'persecution'
- Some countries do not wish to use the term climate refugee
 - Example : Kiribati in Pacific region President of Kiribati, Anote Tong, advocated for 'migration with dignity'
- **Are 'displaced person' or 'climate change migrant' better terms?**

Non-human subjects as climate change refugees: more than a philosophical question?

- Some constitutions recognize non-human entities as juridical persons
- Some courts have recognized that nature has rights, including the right to life/right to exist
- International declarations have recognized the inherent rights of nature

Question: can we argue that if animals are forced to migrate because of climate change, they are entitled to the same considerations as people?

Transborder displaced persons

Transborder displaced persons

- When people are forced to migrate across national borders (example Kiribati) as a result of environmental pressures

Internally displaced persons

- When people are forced to move within their own countries (example Bangladesh; or Carteret Islands)
- This is the most common form of displacement, and one that may raise direct constitutional issues

Displacement and relevant constitutional provisions in the Asia Pacific:

- Robust formulations of environmental rights in The Philippines, South Korea, Indonesia, Nepal, The Maldives, Mongolia, Timor Leste, and Fiji.
- The robust approach is characterized by a direct recognition of a right, sometimes with a corresponding duty on the part of citizens to protect the environment.

Table 5.1. Environmental rights in national constitutions

<i>Jurisdiction</i>	<i>Constitutional provision</i>
Constitution of the Republic of The Philippines	Article 16: The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.
Constitution of the Republic of Korea 1987 (South Korea)	Article 35: (1) All citizens have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment. (2) The substance of the environmental right is determined by law.
Constitution of the Republic of Indonesia 1945 and 2002	Article 28H(1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care. Article 28F Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.
Constitution of the Republic of Fiji	Environmental rights Article 40 (1) Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures. (2) To the extent that it is necessary, a law or an administrative action taken under a law may limit, or may authorise the limitation of, the rights set out in this section.

Use of Constitutional Provisions on the 'Right to Life' in the Courts

- In various jurisdictions, where a specific environmental right is not embedded in their constitutions, other constitutional provisions which do not relate specifically to the environment but to the area of human rights, such as the right to life, have been used as a basis for legal actions to achieve environmental outcomes.
- Such provisions could be used in cases where climate-induced migration breaches constitutional guarantees

What human rights can be categorized as climate change rights?

Many of these coincide with broader environmental rights

Many of them are found in national constitutions in the Asia Pacific :

1. Right to life
2. Right to dignity
3. Right to adequate food
4. Right to water
5. Right to highest standards of health
6. Right to adequate housing
7. Right to self-determination
8. Right to cultural identity
9. Other rights: property, freedom of residence, freedom of movement

See also ASEAN Human Rights Declaration 2012, Article 28, especially Article 28 (f)



Maldives Cabinet
Ministers meeting
under water before
2009 Copenhagen
Climate Change
Conference of the
Parties

President Nasheed
chairing the
meeting of the
Maldives Cabinet



The government of the Maldives has held a cabinet meeting underwater to highlight the threat of global warming before Copenhagen Climate Change COP 2009.

President Mohamed Nasheed and his cabinet signed a document calling for global cuts in carbon emissions.

Ministers spent half an hour on the sea bed, communicating with white boards and hand signals. The president said the UN climate change conference in Copenhagen this December cannot be allowed to fail.

At a later press conference while still in the water, President Nasheed was asked what would happen if the summit fails. "We are going to die," he replied.

The Maldives stand an average of 2.1 metres (7ft) above sea level, and the government says they face being wiped out if oceans rise.

"We're now actually trying to send our message, let the world know what is happening, and what will happen to the Maldives if climate change is not checked," President Nasheed said.

"If the Maldives cannot be saved today we do not feel that there is much of a chance for the rest of the world," he added.



Pacific Island Region: 14 independent countries and several dependencies (US and France)



Pacific Islands

- The territorial integrity of several island states in the South Pacific is threatened by climate change.
- In some cases their very existence might be in jeopardy, which makes the rising sea and the more frequent and intense cyclones not only an environmental but even more a security concern.
- Any adaptation and mitigation measures will only have a limited impact due to small landmass and low elevation of most of those island states.


Pacific Islands: climate change displacement

In the Pacific, displaced people are at risk of being deprived of both land and traditional livelihoods and they will face special challenges in meeting basic needs.

Displacement is likely to increase the risk of conflicts over land and resources, political instability, and, in particular instances, discrimination and perhaps violence, where old and new communities fail to integrate adequately.

Carteret Islanders: World's first climate refugees

- Carteret community being displaced by the rising sea
- Around 2,500 people; a culturally unique Halia speaking community.
- 86 kilometers northeast of Bougainville and belongs to Papua New Guinea.
- Several low lying islands with a maximum elevation of only 1.5 meters, which makes them highly vulnerable to floods.
- Constantly rising sea level. Further stress on the shoreline has been caused by an increased number of tidal waves and storm surges
- Gardens and crops destroyed, damaging houses, and finally making the islands uninhabitable by polluting the fresh water supplies with salt water The islands are virtually uninhabitable.

A satellite image of Bougainville Island, Papua New Guinea. The island is elongated and mountainous, with a prominent white plume of smoke or ash rising from the western end, near Mount Bagana. The surrounding ocean is dark blue, and the eastern coast shows a series of smaller islands and reefs. A blue location pin is placed on the eastern coast of the main island.


Plume at Mount Bagana, Bougainville Island  Bougainville Island

Image NASA
Image © 2008 DigitalGlobe

 Google

4°39'05.45" S 149°29'04.37" E

Eye alt 3197.99 km

Carteret islands, Papua New Guinea



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AN UNCERTAIN FUTURE

The homes of many Pacific islanders are threatened by increased storm surges, rising sea levels and sinking atolls, creating a growing number of environmental refugees. Here, researcher Taloi Havini highlights the plight of one such group, the Carteret Islanders.

Throughout much of the Pacific, the tribal possession of land underpins the traditions and beliefs that define the Custom or *Kastom* of each culture. But when ownership of land is threatened or people lose their land, what then becomes of these cultures?

Several Pacific communities in tropical and sub-tropical regions are set to lose their low-lying islands. Increased coastal erosion – caused by changes in climate, weather patterns and unpredictable seasons – are greatly affecting the daily lives of these communities who live by their traditional *Kastoms*.

This situation now faces the people of the Tulun or Carteret Islands, located 120 kilometres north-east of Bougainville. The Carteret Islanders urgently need to relocate their population of over two thousand to the Bougainville 'mainland' and are reportedly the world's first environmental refugees. Their circular atoll, with a total land area of 0.6 square kilometres, has a maximum land height of just 1.2 metres above sea level.

Over the last ten years, people have witnessed the loss of sixty per cent of their land, and the islands are expected to disappear completely by 2015. Further to the east, the islands of Kiribati and Tuvalu are similarly endangered.



Most important loss felt by inhabitants is losing of their cultural heritage

Carteret Island Atoll



Image © 2008 DigitalGlobe
Image NASA

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4°46'30.32" S 155°26'05.80" E

Eye alt 36.37 km

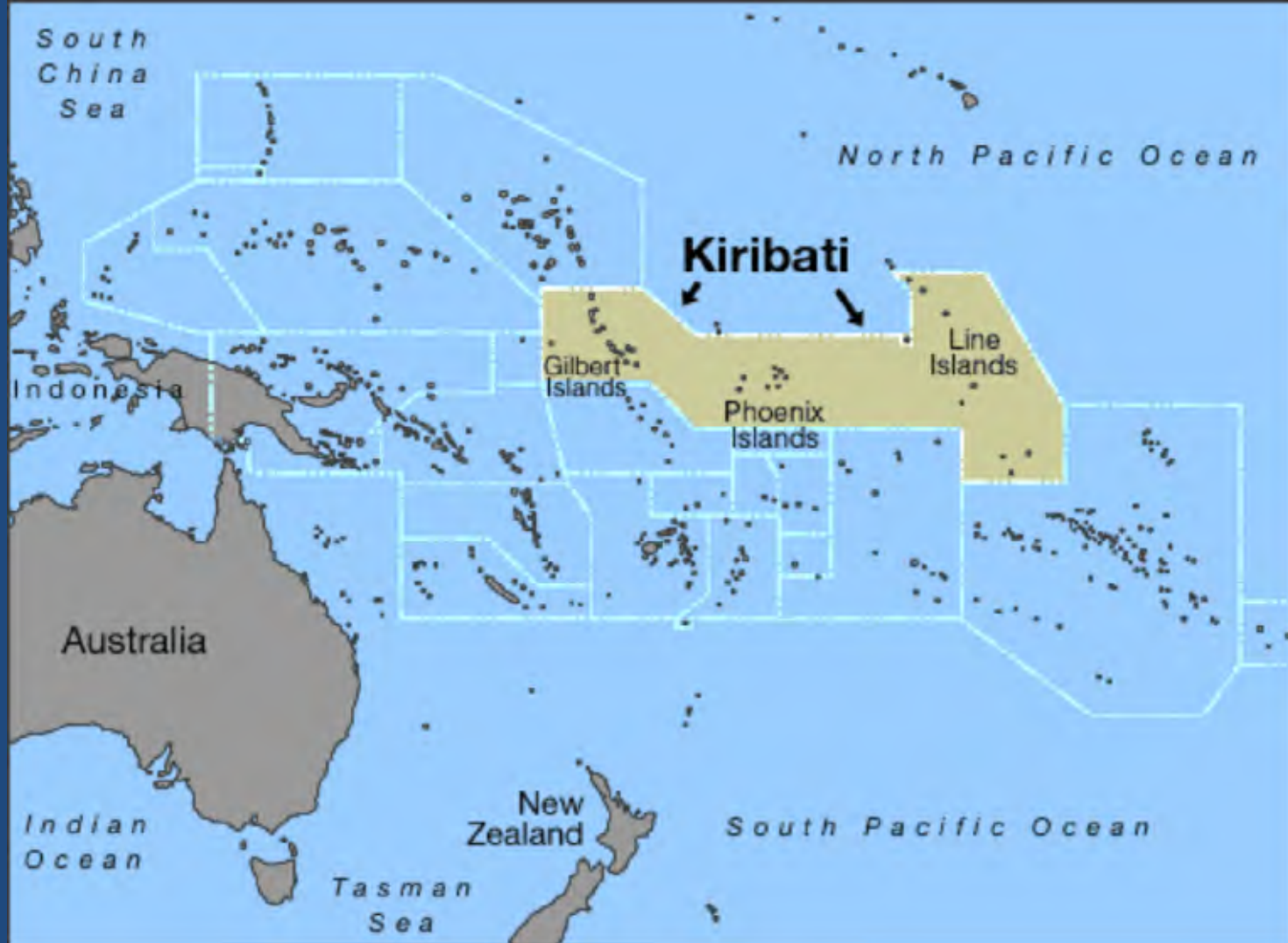
The inadequacy of traditional human rights law in the face of climate-induced displacement

New Zealand court cases involving questions of illustrate some of the complex questions faced by communities and decision-makers.

Ioane Teitiota v Chief Executive of Ministry of Business, Innovation and Employment

The applicant was a national of the Pacific atoll State of Kiribati, who had come to New Zealand with his wife on a temporary permit in 2007 and remained there after their permits expired in 2010.

Kiribati: population <200,000



Teitiota claim for refugee status

Mr Teitiota applied for refugee and/or protected person status, but his application was declined.

Mr Teitiota then appealed this decision to the Immigration and Protection Tribunal. The primary basis for his application was the effect of climate change:

“The appellant claims an entitlement to be recognized as a refugee on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change. The issue for determination is whether the appellant is able to bring himself within the Refugee Convention or New Zealand’s protected person jurisdiction on this basis. The Immigration Act refers to the definition of ‘refugee’ under the 1951 United Nations Convention Relating to the Status of Refugees.”

Appeal rejected

With regard to the status of Mr Teitiota as a 'refugee', Tribunal stated: 'underlying environmental events and processes favour no civil or political status' under s 129 of the New Zealand Immigration Act 2009 was interpreted in light of the Refugee Convention. Furthermore, the Tribunal denied that the applicant was 'in danger of being subjected to cruel treatment' under s 131 of the Act.

After rejection of the application in the first instance, Mr Teitiota applied for leave to appeal to the New Zealand High Court. The essence of the application was again whether the word 'refugee' under the New Zealand Immigration Act included those who are refugees because of climate change and its effects.

The Court rejected the appeal

The attempt to expand dramatically the scope of the Refugee Convention was 'impermissible'

The High Court said: **The appellant raised an argument that the international community itself was tantamount to the 'persecutor' for the purposes of the Refugee Convention. It completely reverses the traditional refugee paradigm.**

Traditionally a refugee is fleeing from his own government or a non-state actor from whom the government is unwilling or unable to protect him.

New Zealand Appeal Court also stated:

“No-one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community.

The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.”

Accordingly, the findings of the New Zealand Immigration and Protection Tribunal were confirmed and leave to appeal was again dismissed

The applicant was deported

Conclusions

- Legal responses to climate change and human rights in the Asia-Pacific remains largely fragmented
- There are indications that regional responses are becoming more coherent
- National courts and judges can play a larger role in addressing climate change rights, in the absence of robust governmental responses, and, in some instances on the basis of current constitutional provisions on human rights

