

A role for strategic litigation

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Strategic litigation to protect individuals at risk can usefully support higher-level protection initiatives.

Strategic litigation seeks to achieve significant changes in the law, practice or public awareness using methods such as the bringing of test cases to court, submitting *amicus curiae* briefs in ongoing cases, consistently advancing arguable points across a range of similar cases over time and so forth.

Discussion of protection gaps relating to cross-border displacement in the context of disasters and the adverse effects of climate change often takes place at the relatively abstract level of provisions of international legal instruments. Less attention has been paid to the practicalities of securing protection for individuals at risk of disaster-related harm both in terms of how the law can be interpreted against specific factual scenarios and in terms of the roles that academics, NGOs, lawyers and courts can play in addressing individual protection needs and clarifying the scope of host state obligations.

In addition to the (sometimes surmountable) challenges presented by the law itself, a further 'protection gap' may operate if lawyers are not identifying cases where individuals may risk being exposed to

disaster-related harm on return to their home countries.¹ Lawyers may be constrained from asking relevant questions because they are conditioned by mental or actual checklists relating to the requirements for securing refugee status or complementary forms of protection, and it can be difficult to think outside of that box. Or claimants may not point to a fear of disaster-related harm because they feel they need to present their protection narrative in terms easily reconcilable with established refugee categories.

A strategic litigation initiative around these matters should, firstly, provide the opportunity to test the actual scope of host-state protection obligations. Two cases in New Zealand have made useful contributions to our jurisprudential understanding of how the law applies in this emerging area, despite the fact that in both cases the claimants were considered **not** to be in need of international protection.²

Secondly, it provides the opportunity to raise public awareness. Media coverage of the above-mentioned cases was substantial, with articles appearing in a number of international as well as local newspapers.

Thirdly, strategic litigation can add some political pressure on states to focus on the phenomenon. A strategic litigation initiative that brings actual cases of human suffering linked to disasters and the adverse effects of climate change through media and judicial channels can focus attention on finding appropriate responses where existing instruments currently are inadequate.

Finally, it signals to individuals that their risk of exposure to serious disaster-related harm can support a claim for international protection, thereby promoting claimant self-identification and ongoing development of the law.

The strength of strategic litigation lies in its ability to incrementally develop the law against real-life scenarios. Close judicial scrutiny of the kinds of harm that individuals fear being exposed to in concrete disaster contexts, assessment of the sufficiency of protection that is available in the home country, and application of relevant law have the potential to deepen our understanding of the circumstances in which people displaced across borders in the context of disasters and the adverse effects of climate change are in need of international protection and when such people are actually entitled to it.

Some of the elements of a strategic litigation initiative would include:

Arguments: It would entail the identification of legal arguments that go beyond the perceived limitations of existing instruments. Lawyers who make it their daily task to find effective legal arguments in novel scenarios are very well placed to advance thinking in this area.

Training: Drawing on arguments about the scope of host-state protection obligations, training and other awareness-raising activities aimed at practitioners can promote a more active engagement by lawyers with the possibility that clients from disaster-affected areas may have an arguable case if the facts are suitable. Lawyers will be better

placed to advise such individuals of the strengths and weaknesses of their case.

Strategy: Where an arguable case is identified, lawyers should be encouraged to collaborate with leading counsel, organisations with an interest in strategic litigation, country experts including those from disaster response backgrounds, and – depending on the nature of the argument – climate scientists. The possibility of litigating a case that results in a restrictive precedent is ever present in a situation where the perception, however ill-placed, is that it will open ‘floodgates’ but such risks can be mitigated by taking expert advice.

Funding: One concrete recommendation to support strategic litigation would be the creation of a Strategic Litigation Fund (such as the Strategic Legal Fund for Vulnerable Young Migrants in the United Kingdom³). A similar initiative focusing on protection in the context of disasters and the adverse effects of climate change could promote active identification of protection needs and development of strategic approaches to securing protection in practice. The European Commission, along with other international as well as domestic actors may be well placed to contribute to such a fund.

The international protection framework will not be remade by a strategic litigation initiative. However, where individuals face a substantial risk of being exposed to serious harm, strategic litigation has the potential to extend the currently prevailing restrictive interpretation of host state obligations in some cases.

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1. A qualitative pilot study conducted between 2013-2014 involving in-depth semi-structured interviews with leading asylum and immigration lawyers in the United Kingdom and Sweden suggested that practitioners in these jurisdictions may not be attuned to disaster risks in claimant countries of origin, and claimants themselves may not reference such risks in their asylum narratives. See http://works.bepress.com/matthew_scott/6/

2. *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 and *AC (Tuvalu)* [2014] NZIPT 800517-520

3. www.strategiclegalfund.org.uk