2021/11

TESEV
BRIEFS

Legal Aspect of The Concept of Climate Refugee: Evaluation of Existent Protection Tools and Suggested Solutions

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It is reported that in 2019, approximately 25 million people in 140 countries were forcefully displaced due to environmental disasters. This is not only the highest figure that has been recorded since 2012 in terms of migration movements resulting from similar reasons, but is also three times higher than cases of displacement due to social upheavals and widespread indiscriminate violence.[1] Majority of these movements occurring due to environmental impacts are observed in East Asia and the Pacific region. Nevertheless, although the total figures may not be very high, it is observed in Europe and Central Asia that the number of people displaced due to environmental disasters (101,000) is much higher than those displaced due to civil strife, or widespread violence (2800)[2]. Although environmental impacts are mostly known to result in internal displacement, it is seen that cross-border migration movements have recently begun to occur for the same reason. However, the significance of cross-border migration movements due to environmental reasons undoubtedly lies in the anticipation that such situations will probably be encountered more often in the future. As a matter of fact, adverse environmental impacts triggered mainly

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by global warming cause a certain increase in the number of both sudden disasters and disasters that progress slowly but can have very severe results. For example, it is predicted that countries such as Tuvalu and Kiribati will become completely submerged in the coming years due to the rising sea level. As a matter of fact, in such countries, agricultural and settlement areas have already been damaged, and part of the migration movements have occurred due to this very reason.

Contradictions in Terms

Even though it can be accepted at the first glance that such kind of migrations can be considered within the scope of "forced migration" in sociological terms due to the compelling effect of environmental reasons on migration, tools offered by international law for forced migration fall short of protecting "climate refugees" in practice. In fact, the term "climate refugee" itself has been criticized on the grounds that it does not comply with international refugee law and/or creates a misleading perception that international law provides special protection for people migrating due to environmental reasons. Although different terms such as "environmental migrants" and "environmentally displaced people" are used in this context, it can be argued that the expression "climate refugees" offers a clearer sociological characterization outside of the legal framework. That is, the expression "climate refugee" clearly reveals that the nature of this type of migration is "compulsory" on the one hand, and that on the other hand, this very same type of migration occurs due to climate (or environmental disasters/causes). However, it is not possible to find a match for this semantic clarity within the legal context.

(In)Efficiency of Protection Tools in International Law

In order to justify the deduction that protection tools offered by international law for forced migration are insufficient in the protection of climate refugees, concrete characteristics of the migratory movement should be evaluated first. There is no "umbrella" term for forced migration in international law. Whether a specific type of migration is of a forced nature, or not, is determined by whether the individual act of migration falls within the framework determined by the means of protection. Hence a migration movement that can be defined as forced migration in sociological terms may not be treated in the same manner within the context of international

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law. Moreover, special regulations regarding the protection and status of people migrating due to climate change/environmental impacts in international law are included neither in international conventions on the environment, nor in any other related conventions. Therefore, when exploring the framework of protection currently available to climate refugees, it is necessary to evaluate the general protection tools available in international law regarding forced migration.

In international law, the first of the protection tools in this direction is the 1951 Convention Relating to the Status of Refugees (1951 Convention). This Convention defines the refugee as a person who is outside his/her country of nationality, or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group, or political opinion; and is unable, or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution.[3] Thus, for the refugee status to be recognized, first there must be a probability of persecution, and secondly, there must be a clear link between that probability and the reasons listed in the Convention. When it comes to the interpretation of the flexible concept of persecution, approaches generally followed in practice are those based on the danger of the violation of fundamental rights and freedoms, focusing on situations that cause serious harm to the individual. Yet, it is difficult to demonstrate that damages that may occur due to climate change have a direct effect on these rights.[4] Even if it may be accepted for a moment that it is possible to concretely demonstrate this effect by way of a case, the connection between the very effect and the causes of persecution should also be propounded. In this case, establishing the mentioned connection will be very difficult, or almost impossible.[5] Of course, that the damages caused by climate change may possibly be a factor in the recognition of refugee status by indirectly affecting the risk of persecution is not excluded entirely.[6] For example, in a situation wereby farmers who are aggrieved by the loss of agricultural lands in a country are provided certain aids within the scope of a national plan, the exclusion of a group of farmers from these provisions by their

In the light of all these considerations, it can be concluded that it is unlikely for people who are forced to migrate on the grounds of environmental reasons to be protected under the refugee status in international law, and that climate change, or environmental reasons can only have an indirect effect on the recognition of the refugee status.

state of origin on the basis of severe discriminations due to their ethnic origin, or religious, or political views, and the prevention of aids from other sources for the same reason in an environment where it may not be possible to redress the damage by other means, recognition of the status may remain possible in the event that living conditions are reduced to a level that are not fit with human dignity. On the other hand, in the interpretation of relevance criteria sought under the 1951 Convention, a connection is aimed to be established between the protection deficiency of the state of origin and the five reasons listed in the Convention on the condition that the persecutor has directly created a fear of persecution on the grounds of these five reasons, or the persecutor is a non-state actor acting independently of the same five reasons.[7] Therefore, determination of the actor of persecution is also important in terms of the recognition of the status. In cases of migration due to environmental impacts, an interesting situation arises as to the actor of persecution. Industrialized countries, which are sought by people seeking protection in order to become a refugee due to environmental impacts, are often precisely the ones who contribute to the environmental impacts that cause climate change and migration triggered by global warming.[8] In the light of all these considerations, it can be concluded that it is unlikely for people who are forced to migrate on the grounds of environmental reasons to be protected under the refugee status in international law, and that climate change, or environmental reasons can only have an indirect effect on the recognition of the refugee status.

Another tool that protects people subjected to forced migration, and is indeed closely linked to refugee protection in international law, is non-refoulement. This prohibition is a binding rule that both takes its source from certain international conventions, and is accepted as a rule of customary international law. According to this prohibition, a person cannot be sent to a place where his/her life, or freedom is in danger because of his/her race, religion, nationality, political views, or membership to a particular social group. Thereunder, it is also prohibited to send a person to a

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place where his/her right to life is under the risk of being violated, or where s/he in danger of torture and/or inhumane, or cruel treatment. The relationship between migration movements due to climate change, or environmental impacts, and the prohibition of refoulement requires the following question to be answered: "'Can climate change, or environmental reasons, be considered as reasons that may violate the right to life of the person, or cause the person to be subjected to inhuman treatment, and prevent his/her refoulment?" In order to reveal how this question is answered on the level of positive law, first the jurisprudence of the European Court of Human Rights (ECtHR) should be evaluated. Yet, the ECtHR has not established a direct and clear jurisprudence in this respect. However, in very rare and exceptional cases, it is seen that the Court decreed that the humanitarian conditions in the country to which the person will be sent can reach a level that is likely to create inhumane treatment, included in the prohibition of torture and ill-treatment regulated by Article 3 of the European Convention on Human Rights (ECHR) for reasons other than environmental impacts, i.e. on the axis of economic and social rights.[9] The Court applied a very strict standard in this direction until 2016, rendering the cases of refoulement due to climate change/environmental impacts almost impossible to be evaluated within this framework even through interpretation.[10] Nonetheless, although these two decisions of the European Court of Human Rights in 2016 and 2019[11] were not related to environmental impacts and still set forth a high standard, they have become likely to be interpreted in a way that makes the cases of severe economic and social deprivation deriving from climate change/environmental impacts to possibly fall within the scope of inhumane treatment, which is prohibited in Article 3 of the European Convention on Human Rights.[12] Yet, the most exciting development in connection with the European Court of Human Rights is the pending case of *Cláudia Duarte Agostinho and Others v. Portugal and Others*.[13] This suit has been brought by six Portuguese children and youth against 32 European countries, including Turkey. The appellants assert that the respondent states have contributed to the global greenhouse gas emissions and caused the existing and expected damages due to global warming, therefore, the right

to life regulated in Article 2 of the ECHR and the right to the protection of private and family life regulated in Article 8 of the ECHR. They also claim that these states have violated the prohibition of discrimination regulated by Article 14 of the ECHR on the ground that their own generation will be particularly harmed by this situation. On the other hand, in its notification to the parties regarding the case, the Court also requested the views of the parties regarding Article 3 of the ECHR, which regulates the prohibition of torture and inhumane/ill-treatment, thereby signalling that it included *proprio motu*[14] Article 3 among the rights, the violation of which would be examined. Although this suit is not directly related to a migration movement caused by climate change, the Court's examination in the axis of Article 3 has the potential to put forward a clear stance on whether or not situations stemming from climate change may fall within the scope of inhumane treatment. The Court's decision in this direction will undoubtedly be decisive in answering the question of whether the prohibition of refoulement will have an impact on climate refugees, or not.

The United Nations Human Rights Committee's Decision on Teitiota v. New Zealand: A Hope for Legal Protection?

It is possible to see that the United Nations Human Rights Committee's (UNHRC) very recent decision on Teitiota v. New Zealand constitutes a relatively clearer answer to the question of the relationship between the prohibition of refoulement and climate refugees.[15] The application subject to the verdict was submitted by Mr Teitota, a citizen of Kiribati. Having applied earlier for the recognition of a refugee status in New Zealand, Teitiota was rejected. In his complaint to the UNHRC, as the appellant, he claimed that New Zealand's sending him back to Kiribati was a violation of his right to life, which is regulated by Article 6 of the United Nations International Covenant on Civil and Political Rights (ICCPR). The underlying reason for this claim is that the rising sea level in Kiribati due to global warming resulted in severe deprivations in the living standards of him and his family. Although the Committee did not find a violation on the basis of concrete claims, it made a comment for the first time that sending a person back to a place where

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these effects occur due to the negative impacts of climate change may result in a violation of the right to life with regard to the ICCPR. Although the Committee imposes a very high level of threshold and a heavy standard of proof for such a violation of the right to life to occur, with this decision, a direct connection was for the first time established between climate change and the prohibition of refoulement. Besides, the importance of the Teitiota decision undoubtedly lies in the fact that the recognition that people forced to migrate due to climate change can be subject to the prohibition of refoulement is the first step in the creating conditions that may make it mandatory to seek protection remedies for these people, especially within national laws.

Possible Protection Solutions and the Situation in Turkish Law

The fact that the international community has not taken a direct and effective step towards the protection of climate refugees so far and that states generally approach refugee protection with a restrictive attitude supports the argument that a progress in this direction is unlikely to happen in the near future.[16] Nevertheless, the Teitiota decision of the UNHRC and the prospective steps to be taken by European Court of Human Rights may pave the way for the formulation of a direct protection tool[17] in national laws in connection with the prohibition of refoulement, or the inclusion of climate refugees in the scope of existing complementary (subsidiary) protection practices.[18] As a matter of fact, in this regard, it is seen that some countries have already included certain tools of human protection and temporary protection in their national laws, although their use is at their discretion.[19]

As for the Turkish law, there is currently no tool that can directly enable such protection. However, in Turkish law, which accepts the prohibition of refoulement without exception, and adopts the principle that human rights conventions such as the ICCPR and ECHR should be taken as a basis in domestic law—in line with the positive developments that may occur in the interpretation of the aforementioned conventions through the UNHRC and the European Court of Human Rights—there is no legal obstacle to the inclusion of those who are in need of protection due

to climate change, especially in the scope of secondary protection[20] on the condition that they remain subject to the obvious legislative changes that can be made in the relevant legislation.[21] With respect to temporary protection, in order for climate refugees to be included in this scope, it is required that they come to Turkey as part of a mass influx and the Presidency take the decision to extend temporary protection to them. However, if an interpretation is adopted in the direction that the prohibition of refoulement may also cover the damages that may occur due to climate change, it may be possible for these people to be included in the scope of humanitarian residence permit at least in order for them to regularly stay in the country without the need for any legislative change. It must be noted that this residence permit is effective in cases where legal decisions of deportation cannot be implemented, or be issued. However, it should be underlined that humanitarian residence permit is not a type of international protection, or temporary protection status.

NOTES

1. Figures mentioned correspond to the number of internally displaced people, see IDMC, Global Report on Internal Displacement, https://www.internal-displacement.org/global-report/grid2020/

2. Ibid.

3. 1951 Convention, Article 1A(2).

4. Jane McAdam, Climate Change, Forced Migration, and International Law, Oxford University Press, 2012, s. 48 vd.

5. Ibid.

6. Regarding how climate refugees can be included in the scope of the Convention by way of an inclusive interpretation (particularly on the grounds of membership in a particular social group) see, Jessica B. Cooper, "Environmental Refugees: Meeting the Requirements of the Refugee Definition," New York University Environmental Law Journal, Vol. 6, No. 2, 1998, pp. 480-530.

7. This last approach is often applied in respect to the recognition of refugee status in cases of domestic violence.

8. Jane McAdam, Climate Change, Forced Migration, and International Law, Oxford University Press, 2012, pp. 45-47.

9. See, D. v. UK, App. No. 146/1996/767/964, 02.05.1997.

10. See, N v. UK, App. No. 26565/07, 27.05.2008.

11. See ,Paposhvili v. Belgium, App. No. 41738/10, 13.12.2016; Savran v. Denmark, App. No. 57467/15, 01.10.2019.

12. See Louise Olsson, "Environmental Migrants in International Law," BA Thesis (Örebro Universitet), 2015, pp. 45-47.

13. Cláudia Duarte Agostinho and Others v. Portugal and Others, App. No. 39371/20.

14. Proprio motu means "by one's own volition." In accordance with the principle that "the judge knows/applies the law by his own volition" (jura novit curia) European Court of Human Rights is not subject to the claims of the parties in the designation of the provisions of the ECHR the violations of which will be examined.

15. Ioane Teitiota v. New Zealand, CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 07.01.2020.

16. For a similar approach, see Seda Yurtcanlı Durmaz, "İklim Değişikliği, Afetler ve İnsan Hakları: Çevresel Zorunlu Göç" (Climate Change, Disasters and Human Rights: Environmental Forced Migration), Phd dissertation, Marmara University Institute of Social Sciences, Faculty of Law, Department of Public Law, Istanbul 2019, p. 102.

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17. For a similar approach, see Giovanni Sciaccaluga, International Law and the Protection of "Climate Refugees," Palgrave 2020, pp. 159-174.

18. Complementary or subsidiary protection is a type of protection shaped by national laws to provide protection to people who cannot be expelled due to the prohibition of refoulement, but who also cannot be recognized as refugees since they cannot prove the link between the reasons for persecution and the persecution itself. However, this type of protection is mainly provided for those fleeing indiscriminate violence such as civil unrest, war, or for those whose right to life is under risk of violation via torture or inhumane treatment.

19. For example, in Finland it is stated that climate refugees can also be included in the scope of temporary protection. As for Sweden, a specific status for "people otherwise in need of protection" has been regulated. It has been accepted that climate refugees can be included in this status. And yet, both countries have limited the scope of these statuses by making some changes in their laws and practices after 2016. In the United States, on the other hand, it is possible for people who qualify as climate refugees to be included in the scope of the status of "temporary protection status." However, this status is granted at discretion.

20. In Turkish law, there are three international protection status for forced migration (refugee status, conditional refugee status and subsidiary protection status) and there is the temporary protection status that can be effective in cases of mass influx. Subsidiary protection is defined as follows (in Article 63 of the Law on Foreigners and International Protection): "*A foreigner or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would a) be sentenced to death or face the execution of the death penalty; b) face torture or inhumane or degrading treatment or punishment; c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict; and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of (former) habitual residence.*"

21. Regarding that these people cannot be included in the scope of subsidiary protection in the current stuation, see, Nuray Ekşi, "İklim Mültecileri" (Climate Refugees), Göç Araştırmaları Dergisi (The Journal of Migration Studies), Vol. 2, No. 2, 2016, p. 49.

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How to Cite:

Öztürk, Neva Övünç. 2021. “Legal Aspect of The Concept of Climate Refugee: Evaluation of Existent Protection Tools and Suggested Solutions” TESEV Briefs 2021/10.

https://www.tesev.org.tr/tr/research/legal-aspect-of-the-concept-of-climate-refugee-evaluation-of-existent-protection-tools-and-suggested-solutions/

This brief was translated from its Turkish original by Emine Ayhan and Özlem Ünsal.

TESEV would like to thank the Friedrich Ebert Stiftung for their support for this publication.

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