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Does the right of return exist in International Law and Practice?

Please contact Neophytos Loizides at n.loizides@kent.ac.uk for full citation

As social scientists debating the right of return we are often confronted with conflicting legal, political and normative interpretations. This depends on the definition of the ‘right of return’ itself which involves in our view not only the right of mobility/movement (i.e. someone’s right to move to their pre-conflict village or city) but also three other necessary components: a) the right of restitution for property including financial support for the loss of income and for the reconstruction of destroyed properties; b) the transferability of those rights to one’s family and c) individual and communal rights which might include non-discrimination, electoral rights and participation in local decision-making processes as well as representation in policing and security mechanisms (and in cases of vulnerable groups positive discrimination such as preferential employment).

Each of these elements is necessary for the restoration of a multicultural community but unfortunately there is no comprehensive legal framework that includes all three not to mention credible enforcement mechanisms. There is also key differentiation between international and EU/Council of Europe decisions. Within the EU legal system, Greek Cypriots often cite the right of movement and acquisition of property to justify the right of return for Greek Cypriots under future Turkish Cypriot administration. While the right of mobility for European citizens de facto resolves many of the displacement disputes among EU members (e.g. post-WWII Germans fleeing Poland), it has two major weaknesses; it lacks all other aforementioned elements that constitute the right of return and second it downgrades IDPs and refugees to the level of migrants/citizens of third states. EU’s mobility

rights have been at times restricted giving opponents of the right of return arguments to oppose the much more solid normative and legal claims by IDPs and refugees.

As to our fundamental question, does the right of return exist in international law? Our own interpretation is that international law is in the process of integrating the right of return but as of today this right has not yet been secured in relevant international legal provisions, practices, and norms. Our interpretation does not aim to challenge the legitimacy of the right of return or to disempower refugees and IDPs but rather to provide the necessary warnings against the use of 'weak' legal or political arguments; the additional danger with some of those is raising expectations that international law cannot satisfy at the moment. At the same time, the struggle of IDPs and refugees to secure their rights does not end by simply stating the boundaries of the current international legal system. On the contrary, one of the key purposes of the book is to initiate a discussion in relevant international fora aiming for the full incorporation of the right of return in international law.

What is the present state of affairs? The UN's own Pinheiro principles on housing and property reinstatement comes close to be integrating the right of return in international legal practices. The Principles include detailed provisions on the rights of dispossessed owners emphasizing in particular their right to have their properties restituted, if they so wish and without stipulating any time limitations. Pinheiro however proposes non-binding principles (soft law) which are up to the discretion of individual member states to accept or reject. The Principles also fail to include the need for electoral decision-making mechanisms (a key finding of this book from Bosnia) and the role of community rights and organizations; they require though adequate consultation and participation of displaced persons in decision-making (principle 14) during the process of return.¹

¹ <http://2001-2009.state.gov/documents/organization/99774.pdf>

Human rights advocates emphasize the centrality of justice mechanisms and argue for the application of widely acknowledged standards on refugees as documented in resolutions of international organizations such as the UN (Leckie, 2003: 12).² Leckie cites two relevant types of UN resolutions: a) binding ones voted by the Security Council and b) non-binding from the General Assembly. Security Council resolutions emphasize the right of return in the former Yugoslavia (Kosovo), Georgia, (Abkhazia), Croatia, Iraq (Kuwait) and Cyprus while General Assembly resolutions focus on Palestine/Israel. Specifically, on Cyprus SC RES. 361, Aug. 30, 1974 calls on parties to “permit persons who wish to do so to return to their homes” (Leckie, 2003: 12). Critics might argue that in Cyprus the conditions 40 days after the Turkish invasion are different from now after fifty or so years. ECHR decisions have pointed to this direction already with decisions restricting property restitution to second generation IDPs (Skoutakis, 2010).

Countering this point, Barkan argues that no matter how long the injustice occurred, its legitimization or failure to defend them in the case of IDPs only encourages other wrongdoings (Barkan, 2000: xxxiii). Another concern is that the right of return cannot be established without family reunification and community rebuilding. As this book, demonstrates IDPs and refugees will not return unless there is significant community involvement and mobilization for return. Likewise, the right of return could be interpreted as covering descendants and non-IDP partners. In many occasions, IDPs might not have been displaced directly at the time of the conflict (some might have left earlier for financial reasons but found the right of return to an ancestral land restricted as a result of a conflict)/

A key challenge for human rights activists is that the right of return is not universally defined or even welcomed in legal or political terms. AN often unchallenged view is that protracted refugee situations tend to produce radicalized populations that would cause

renewed conflict if IDPs and refugees are allowed to return back (Adelman, 1998; Sude et al. 2015; Lischer 2015). Following the signing of the Dayton Accords, Chaim Kaufmann argued that refugee return provisions are undesirable and unenforceable suggesting instead compensations for lost property (Kaufmann, 1996:168). Others have emphasized the security dimension of the issue and even coined the term “refugee warriors” (Zolberg et. al. 1986) introducing a language that explicitly use security concerns to limit IDP and refugee rights. Adelman and Barkan are probably the strongest proponents of the ‘irreversibility thesis; they specifically argue that “the ideology and commitment to return, conveys the notion of repatriation as a distant, impractical solution in the face of real desperation’ (Adelman and Barkan 2011: xvii). Amongst those the general assumption is that forced displacements are irreversible once new demographic facts are established on the ground (e.g., Kaufmann 1996; Adelman & Barkan 2011).

This book challenges the irreversibility thesis in three different ways. First, our database of peace processes and durable returns demonstrates how in comprehensive peace settlements, IDPs and refugees are supported through various mechanisms. The rates of return among IDPs and refugees in 25 comprehensive settlements we examined using the Peace Accords matrix of the Kroc Institute suggest a range of outcomes from almost full return (e.g. El Salvador) to ten percent return (Angola); the remaining cases lie within this range. Secondly, our own survey data do not support claims that IDPs and refugees tend to be more radicalized (Psaltis et al. forthcoming); in our Cyprus survey, IDPs were even more likely to support a future settlement than non-IDPs while in Bosnia returnees were more open to reconciliation (Hall et.al 2018). Finally, our Cyprus data suggest replacing the *irreversibility* with the *Goldilocks zone thesis*. We argue that return under Turkish Cypriot administration is expected to happen in significant numbers for Greek Cypriots to make reunification meaningful but is not expected to exceed more than a quarter of the affected

IDP population. Greek Cypriot IDP return will not create ‘practical difficulties’ for Turkish Cypriots as those are implied for instance in the High-Level agreement, however, to be absolutely confident and to convince the leaderships of both sides we propose a non-binding census of all IDPs and their preferences ahead of any further discussion on the issue.

This latter point suggests that pragmatism needs to be combined with legal principles (or their absence) to address comparable situations. The pragmatic approach to problems facing post-conflict societies looks on how people reconstruct their lives and prioritizes restorative justice and community rebuilding. It looks at a wider range of factors including the need for victim-offender mediations (Zehr & Mika, 1998), mutually agreed compromises, the passage of time, local power dynamics, and the rights of non-indigenous groups/settlers or their descendants (Carens, 2000: 217). International mediators have often been exposed to the challenges of IDP and refugee return across divided and post-conflict societies therefore comparative expertise and precedents matter. As noted above, it is unlikely to see freely negotiated peace settlements not respecting the right of return in the future (with the exclusion of cases from WWII and before); even in the absence of the legal framework a norm is emerging particularly among the largely IDP and refugee nations (e.g. the Palestinians, Cypriots, the Rohingyas).

Yet in the absence of legal frameworks, not only intentions but also precedents are important. Drawing on another experience from Rwanda, a member of De Soto’s team in Cyprus during the Annan Plan talks, Lisa Jones pointed out that fundamental rights of the affected population should be carefully balanced with security concerns and comments positively on post-genocide, community-based arrangements to share land among returnees and new owners, thus avoiding the prospect of renewed-violence (Jones, 2003: 223 & 217). Jones’s argumentation reflects the fusion of alternative orientations in the literature and practice of conflict resolution: as noted earlier *Human rights/Legalism* is based on the

applicability of universal norms and high standards of retributive justice while *pragmatism*, which relies on adaptation to local conditions and political expediency (Leckie, 2003:25; Snyder and Vinjamuri, 2003; Vinjamuri and Snyder, 2004).

While the book endorses this understanding of pragmatism it makes two qualifications: first, short term political expediency should not limit or endanger the search towards universal human rights standards (if there is to be a marriage between the two the dominant partner should be the former) and secondly not all pragmatic approaches have equal effects. For example, the book critiques both the UN and ECHR approaches on IDPs providing a new framework combining novel institutional formulas, social capital and survey technologies.

With regards to surveys, the book revisits the idea of a census of all IDPs and current users aiming to identify the zone of possible agreement through amicable compromises. So far, conventional wisdom assumed a trilemma on the Cyprus problem. If Greek Cypriot had the right to choose first on the fate of their properties, Turkish Cypriot users will be disappointed. If Turkish Cypriot users get the first say, Greek Cypriots will find such an arrangement unacceptable. If the situation stays as it is both communities lose because of lack of clarity as to rights while efforts by the UN to identify criteria for restitution or compensation have been extremely time-consuming and caused uproar on both communities. The census idea resolves this trilemma particularly if sufficient number of IDPs are already certain as to how to allocate their properties (as also shown our surveys). If a proportion of Greek Cypriots is certain as to non-return then their decisions (assuming sufficient compensations) secures Turkish Cypriot majority private ownership and population. If a portion of Greek Cypriots aspires to immediate return even under Turkish Cypriot administration, then their return becomes easier once the former have been secured a key concession related to their understanding of bizonality. This arrangement does not leave

undecided respondents out of the picture though; better arrangements for them become easier by minimizing the overall cases for property commissions and by removing the bizonality constraints once a certain percentage of IDPs opt for compensations. Besides the census, online apps could be developed for respondents to change their mind (until they are asked to sign) thus potentially minimizing undecided respondents and offering all affected individuals equal chances and the opportunity to re-adjust their views during public deliberations for the settlement.

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