

**The IDPs of South Asia:
*Strategising for
Protection and Rehabilitation***

The super cyclone which lashed the coastal state of Orissa in India in October 1999 has begun to reveal the precarious condition of the 15 million internally displaced persons (IDPs). With nature striking her deathly blow, conservative estimates put the death toll at over 10,000, with financial losses running into millions of dollars. Even with advanced weather forecasting mechanisms, the vengeance of nature could not be mitigated. However, the strategies in disaster management in the aftermath of the cyclone was pitiable, with most of the displaced and dispossessed angry at the lethargy of the government officials.

It is in the background of numerous such calamitous situations that this paper seeks to address legal issues of human displacement in South Asia. Like refugees, the displaced are victims of civil wars, internal strife, communal violence, forced relocation and gross violations of human rights; they lack food, shelter, clothing, safety, basic health care and education. Vulnerable and unable to find places of safety, IDPs often suffer persistent violations of fundamental human rights, and their needs go unmet.¹ While there are clear parallels between refugees and the displaced, both groups lack the protection of their governments. The root causes of both are similar, and hence 'solutions' for one are often interlinked with the other. Yet, the fact that one group crosses the border and another does not or cannot, makes a significant difference to their situation under international law and the United Nations' response to their plight. For refugees, there is the international protective mechanism under the UNHCR mandate and a specific body of law to address their needs. The needs of the internally displaced remain to be addressed largely with the general provisions of human rights law and humanitarian law, and through *ad hoc* operational measures and mechanism. A legal framework specific to the protection of the internally displaced persons is conspicuous by its absence. No legal instrument covers the particular needs of the IDPs and no institution has been mandated to address those needs. The

UNHCR and the Office for the Co-ordination of Humanitarian Assistance (OCHA) have underlined the importance of establishing a legal framework that could be used by humanitarian organizations in their discussions with relevant authorities.

Human rights and humanitarian norms comprise of conventional as well as customary law. Although human rights apply primarily in times of peace and humanitarian norms in times of international or internal conflict, the overlap in their material applicability is growing. There is a significant convergence and parallelism between norms originating in human rights instruments and those originating in humanitarian instruments. While both types of instruments contain provisions not only regulating relations between the governments and the governed, but also governing relations between States by laying down their mutual rights and duties, such latter provisions are much more central to humanitarian instruments.²

It must be acknowledged that there are potential gaps in the protections provided by both international human rights and international humanitarian law with respect to IDPs since the most provisions of the ICCPR are subject to derogation in declared public emergencies. International humanitarian law is a system of legal rules specially conceived for the implementation in the event of armed clashes, but it does not supersede the other systems of international rules protecting the individuals in situations of armed conflict. International human rights law and international humanitarian law are applied concurrently. For a number of reasons the provisions of humanitarian law are tailored more specifically to deal with the special problems that arise during armed conflict than are those of human rights law. The applicability of international human rights instruments is often suspended during armed confrontations. The inalienable human rights remain applicable but the protection they offer would seem to be inferior to that afforded by international humanitarian law. International human rights law contains no rules on the methods and means of combat, meaning at most problems relating to the conduct of hostilities are outside its purview.³ Humanitarian law contains obligations which are binding on all the belligerents, whereas in principle only States can be held responsible for human rights violations.⁴

It is certainly possible to conceive of improvements in the international legal regime applicable with respect to the problem of forced displacement, particularly in situations that do not qualify as armed conflicts.⁵ Among the issues that could usefully be addressed in normative terms or the prohibition of forced displacement, ensuring a humanitarian access to those in need of protection and assistance, whether they are in conflict or in non-conflict areas, and measures to ensure the safety of the workers and staff of humanitarian organisations.

International law in no way leaves belligerents free to launch attacks causing disproportionate losses to the civilian population or have indiscriminate effects. All these practices are prohibited by rules which have not yet been formally codified in respect of internal armed conflict. Since such practices are at the root of most of the population displacements occurring today, there can be no doubt that the relevant rules should be promoted as a matter of urgency, especially by the UNHCR.⁶

The absence of a single body of principles and norms specifically for the protection of the internally displaced, equivalent to international refugee law, has also been mentioned as a deficiency in the present legal situation. Refugees have been granted a particular status because they are foreigners who do not enjoy the protection of any Government. The IDPs, as nationals within their own country, require above all respect for an enforcement by the authorities of their rights as full citizens, including the right to liberty of movement and freedom of residence, whether in the place from which they were displaced or elsewhere. A specific legal status different from their fellow citizens would perhaps not be to their advantage. On the other hand, codification of legal protection against displacement as well as of remedies and protections for persons who have suffered displacement, including the right if they so wished to return to their homes, could be of value.

The further development of international legal norms against forcible displacement and for the protection of the displaced, building on the protection already provided by international human rights and humanitarian law, would be most welcome. It must be recognized that the most serious problems with respect to the protection of persons who are either displaced or threatened with displacement in their own country result not from an absence or deficiency of legal norms but from the failure of the parties concerned to respect and to

enforce those norms, and, even more fundamentally, from the failure of warring parties, and of the international community as a whole, to achieve a peaceful resolution of the murderous conflicts that are the major cause of forced displacement. Any effective legal system must include both norms of conduct and some mechanism to ensure their observance or enforcement. The existing international mechanisms for ensuring observance of human rights principles and of humanitarian law are clearly not fully adequate to the task.

Humanitarian assistance and protection for the IDPs requires the cooperation of the States directly concerned. A non-international armed conflict is an internal affair of the State concerned, so that State can invoke the principle of non-interference to oppose third-party interventions intended to promote implementation of the relevant international rules. Article 1 common to the Geneva Conventions nevertheless provides that States have the duty to ensure respect for humanitarian law and the International Court of Justice considers that this duty obtains with respect to non-international armed conflicts as well.⁷

As for refugees,⁸ international presence and humanitarian access are indispensable. Wherever the consent and cooperation of the relevant authorities have been forthcoming, the absence of any single legal instrument specifically addressing the problems of the displaced and the theoretical gaps in the legal protections available have not prevented humanitarian access and action. Where the consent of the parties is not given, legal provisions by themselves cannot secure effective access. While international legal norms have strong persuasive power and moral authority, and national laws and signed agreements are valuable practical protection tools, humanitarian access and protection depend in practice on the ability and political will of the international community to persuade States to accept and to discharge their responsibility for the welfare and safety of all the displaced, or people who have never left home.⁹

When masses of people are suddenly forced to leave their homes and communities for reasons beyond their control, a humanitarian crisis sets in irrespective of the cause or location of the displacement. Although some general categories, such as displacement resulting from civil war or other form of armed conflict may be available, the one self-evident fact is that no two internal displacement situations are ever the same. Thus,

just as there is no typical situation of internal displacement, nor is there a typical international approach to address the needs of the displaced.

The crisis of the IDPs is that they fall within the domestic jurisdiction of states and are therefore not covered by the protection accorded to refugees. In the case of refugees, the need for international protection in the sense of a temporary substitute for national protection is inherent in the definition, owing to the fact that refugees find themselves under the jurisdiction of a foreign State. In the case of IDPs, however, it is not clear what international legal norms and type of protection is required to be exercised by the international community. It should be emphasised that the fundamental rights and human needs of IDPs are as threatened, if not more, as those of refugees. On the whole, the need of the IDPs for international protection and assistance appears to be greater. Since the most recurrent cause of coerced population displacement is armed conflict or generalised violence, it can be argued that a 'first level' of protection would be the provision of shelter from attack against one's life or physical integrity.

However, the normative aspect calls for the compilation and evaluation of existing legal norms, the determination of whether there are gaps in the law and the development of principles for bridging those gaps. The issues of institutional responsibility must also be resolved in order to have an effective international response to the IDPs in need of assistance and protection. With the legal and institutional issues resolved, the task of those charged with immediate responsibility would then be to develop strategies of international response to the crisis of internal displacement. In cooperation with appropriate organs, these strategies would help address the underlying problems of national and regional security, stability and development, thereby mitigating the sufferings of IDPs in South Asia.

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Notes & References:

¹ Boutros Boutros-Ghali, *Analytical Report of the Secretary-General on Internally Displaced Persons*, E/CN.4/1992/23, (United Nations, 1992), para.6.

² Theodor Meron, 'The Protection of the Human Person under Human Rights Law and Humanitarian Law', *Bulletin of Human Rights*, 91/1, (Centre for Human Rights, Geneva), United Nations, New York, 1992. Meron further propounds the continuum of norms protecting the rights of human person in all situations, from international armed conflict at one end of the spectrum, through internationalized internal armed conflict, internal armed conflict, violent internal strife, internal disturbances and tensions, to situations of internal repressions at the other. The human person is interested in the substance, not in the label of a protective system of norms. Drawing on the analyses of Meron, it should also be emphasised that the internally displaced or people at risk of displacement often require not only humanitarian assistance but also protection, including both protection against further displacement and protection of their human rights while they are displaced and following their return home. It is imperative to realise that when the UNHCR is called upon to extend humanitarian assistance and protection to IDPs, it invokes internationally recognized norms of human rights law and humanitarian law, as well as mandatory norms or elements of customary international law. The office also relies on the enforcement by the authorities of the relevant national laws. An additional legal basis for protection is often provided by specific formal undertakings made by the authorities concerned, for example as elements of peace settlements, repatriation agreements, Memorandum of Understanding or adhoc agreements with UNHCR or with other UN bodies or international organizations. see EC/SCP/87, 17 August 1994.

³ Denise Plattner, 'The Protection of Displaced persons in non-international armed conflicts', *International Review of the Red Cross*, No.291, November-December 1992, p.567-580, at 569.

⁴ see Theodor Meron, 'Human Rights and Humanitarian Norms as Customary Law', (Clarendon Press, Oxford, 1989). However, the author states that the protection of humanitarian law are limited to armed conflicts involving organized armed groups 'under responsible command' but not in other situations of internal disturbances and tension {Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1}. Where applicable the prohibition of forced movements of civilians in Protocol II also provides for an exception if 'imperative military reasons so demands' {Protocol II, Article 17}. However, all this exception in theory reduced protection against forced displacement, it would undoubtedly be impossible to obtain any practical protection whatsoever without such concessions to the reality of armed conflict.

⁵ Humanitarian law contains provisions that would merit extension to cover other situations. The rules afford protection from the effects of hostilities are those that govern the means and methods of combat. The rules in Protocol II relating to military operations (Part IV) bans attacks on civilian populations {Protocol II, Article 13 (2)}, prohibits the starvation of civilian population {Protocol II, Article 14, first sentence} and attacks on objects indispensable to its survival {Protocol II, Article 14, second sentence} and Article 17 prohibits the displacement of the civilian population unless the security of the civilians involved or imperative military reasons so demand.

⁶ Denise Plattner, *op.cit.*, p.571. In addition, refugee law, beginning with the 1951 Convention relating to the Status of Refugees, has developed specific standards for the treatment of persons who have been displaced, in this case across international frontiers. Some of the principles of refugee law could be adapted by way of analogy, invoking the corresponding principles of human rights law, to promote the protection of the internally displaced. The principle of non-refoulement, for example, is more explicit and focused than the human right to liberty of movement and freedom of residence as formulated in Article 12 of the International Covenant on Civil and Political Rights.

⁷ Judgment of the International Court of Justice in the case of military and para-military activities in and against Nicaragua, ICJ, *Reports of Judgments, Advisory Opinions and Orders*, (The Hague, 1986), p.104, para. 220.

⁸ See, James Hathaway, 'Fear of persecution and the law of human rights', *Bulletin of Human Rights*, 91/1, (Centre for Human Rights, Geneva), United Nations, New York, 1992, p. 100-104.

⁹ EC/SCP/87, 17 August 1994.