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International Law Meeting Summary

The Mandate of the Special Rapporteur on the Human Rights of Internally Displaced Persons

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INTRODUCTION

The recorded number of people displaced within their country due to conflict or violence rose to 27.5 million in 2010, the highest in a decade. It is likely that this figure increased during 2011 given the armed conflict in Libya and the heightened insecurity in Syria, Sudan, Cote d'Ivoire and Yemen. On the 20th anniversary of the establishment of the mandate of the UN Special Rapporteur on Internally Displaced Persons ('IDPs'), the current post-holder reflected the evolution of the mandate, the progress and achievements at the international and regional levels to strengthen the protection of IDPs, and discussed the measures being taking in order to extend the mandate's assistance and protection of IDPs to current situations of internal displacement across the world.

The participants included representatives of NGOs, embassies, academics and practising lawyers.

The meeting was not held under the Chatham House Rule.

SUMMARY

Establishment of the Mandate

With the end of the Cold War, the UN embarked upon a period of reflection to reassess its humanitarian mandate with a view to strengthening its commitments in pursuit of the purposes and principles of the UN Charter. This period of review in the early 1990s coincided with the displacement of many millions of individuals by armed conflict. At the request of the UN Economic and Social Council,¹ the UN Secretary General produced a report that reviewed the capacity of the UN to deliver and coordinate assistance to those displaced.² Through this review, it emerged that many of those needing assistance were also in need of protection and that very many were displaced *within* their state of origin. The findings of the report prompted the UN Commission for Human Rights to request the Secretary General to designate a Special Representative who would be responsible for internally displaced persons.³

The international system and international law were familiar with the plight, assistance and protection of refugees (in other words, those who had fled their country of origin and who required assistance and/or protection in *another* state) but the provision of assistance and protection to those displaced *within* the borders of their own state proved a novel challenge. In the absence of any mechanism or mandate to protect and assist IDPs, there was some debate as to how the UN might most appropriately respond. In light of the resistance by the existing UN agencies and member states to create another agency, the system of protection that eventually evolved was a 'cluster' system, comprising the existing major agencies including the UN High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human Rights (OHCHR), the Office for the Coordination of Humanitarian Affairs (OCHA, the World Health Organisation (WHO, and other agencies) working in collaboration with the newly created post of Special Representative to the Secretary-General on IDPs.

Evolution of the Mandate

1992-2004: Francis M. Deng, Special Representative to the Secretary General on IDPs

The first mandate holder, Francis Deng, was appointed by the Secretary General in July 1992. When seeking to discern the relevant normative framework affecting the rights and protections of IDPs, Deng initially attempted to identify what he perceived to be the gaps in the protection of IDPs within the existing normative landscape. However, this approach was soon replaced by an alternative account based on the understanding that IDPs were 'rights holders' under international human rights law (in times of peace and conflict) and furthermore, were entitled to specific protections as civilians under international humanitarian law in times of armed conflict. Accordingly, it was recognised that rather than seeking to identify the gaps in protection, a more suitable approach would be to identify the synergies and synthesis between those existing regimes and their respective rules and to consider the implications of their application to the assistance and protection of IDPs. The outcome of this process was the 1998 Guiding Principles on Internal Displacement,⁴ constituted through a process of dialogue within the UN system and in consultation with other international actors. The Guiding Principles were presented to the Commission on Human Rights pursuant to its request for the elaboration of a framework for the assistance and

¹ ECOSOC, 'Refugees, displaced persons and returnees', Resolution 1990/78, 27 July 1990.

² ECOSOC, 'Note by the Secretary-General pursuant to Economic and Social Council Resolution 1990/78: addendum; report on refugees, displaced persons and returnees, prepared by Mr Jacques Cuénod, Consultant', E/1991/109/Add.1, 27 June 1991.

³ UN Commission on Human Rights, 'Internally Displaced Persons', E/CN.4/RES/1992/73, 5 March 1992, at operative paragraph 2.

⁴ UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission resolution 1997/39 – Addendum: Guiding Principles on Internal Displacement', E/CN.4/1998/53/Add.2, (11 February 1998).

protection of IDPs⁵ and were accepted as the internationally recognised standards for the assistance and protection of IDPs by the General Assembly in 2004.⁶

As expected, there was some resistance to the notion of international regulation of internal protection, challenged on the basis of sovereignty and the principle of non-intervention. A number of UN resolutions, in particular those passed by the General Assembly, had reaffirmed the territorial integrity of states placing the question of the protection of those internally displaced within the sovereign authority of the state concerned.⁷ Indeed, in these early years there was considerable hostility towards the mandate. Given that the vast majority of IDPs had been displaced as a consequence of internal conflict, states had an interest in retaining control over the population particularly since those displaced were, in many cases, a product of internal state collapse where the relationship between the IDPs and the government was a clear issue. For instance, in his first mission to Colombia Deng realised that IDPs are often politically disenfranchised;⁸ they may not identify themselves with the government of the day and it is not uncommon for them to belong to minority, indigenous, or other such groups defined by their identity that is at odds with those in authority. Clearly, in such circumstances where the state authorities are reluctant to provide access to IDPs, it can be difficult for the mandate holder to reach such populations.

On the relationship between state sovereignty and the protection of populations, Deng worked hard to emphasise the concept of 'sovereignty as responsibility' such that sovereignty cannot be used as an excuse for the failure to discharge international obligations as understood under international law. He also initiated the process of dialogue with states, a process that has been crucial when obtaining confidence in the mandate and the cooperation of states.

2004-2010: Walter Kälin, Representative to the Secretary General on IDPs

Having worked closely with Deng throughout his tenureship and having chaired the Working Group responsible for drafting the Guiding Principles, Kälin put his experience and expertise to tremendous effect. He consolidated the framework of the Guiding Principles by producing annotations and comments in order to clarify the ambit of the applicable law. However, perhaps his most significant contribution to the mandate was the development of *national* legal policy frameworks. Here he had considerable success. Colombia, Angola, Uganda, Georgia, and Iraq have all developed domestic law and policy on IDPs. This legacy continues – Kenya is in the process of developing law and policy in this field and, as recently as this month, the Chiapas state in Mexico adopted internal legislation on IDPs.

Another theme of Kälin's tenureship was the operationalization of the mandate. He improved significantly the coordination between the UN specialised agencies so that not only does the mandate have 'a voice' but it also has an impact on the ground. One particularly notable achievement was the agreement concluded with the government of Sri Lanka to dismantle the IDP camps in the country.

The post is a particularly visible one with a strong political and diplomatic element. The post holder is required to have a regular dialogue with states and expected to actively engage with, and ensure there is effective co-ordination between, the key UN agencies. The post-holder sits on the Inter-Agency Standing Committee, the central forum of the cluster system responsible for the protection and assistance of IDPs which is chaired by the High Commissioner for Human Rights.

Kälin's involvement in the IDP situation arising out of the protracted dispute between Armenia and Azerbaijan over the Nagorno-Karabakh (and also in relation to Georgia and South Ossetia and

⁵ See UN Commission on Human Rights, Resolution 50/195 (22 December 1995), 1996/52 (19 April 1996) and 1997/39 (11 April 1997).

⁶ General Assembly Resolution 58/177, A/RES/58/177, 12 March 2004, operative paragraph 8.

⁷ For instance, see GA Res 46/182 (19 December 1991), Annex, para.1 and 2.

⁸ UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95 – Addendum: Profiles in displacement – Colombia', E/CN.4/1995/50/Add.1, (3 October 1994).

Abkhazia) demonstrates the importance of exercising strong political acumen in the face of political tensions between states.⁹

2010 - : Chaloka Beyani, Special Rapporteur on the Human Rights of Internally Displaced Persons

The speaker assumed the post of Special Rapporteur on the back of his involvement in the work of both his predecessors as well as his extensive involvement in the development of regional standards and regimes for the protection of, and assistance to IDPs in Africa, most notably in the Great Lakes region and with the African Union. Both these processes paved the way for the acceptance of the mandate by a number of key states in the region with significant IDP problems. These regional initiatives drew heavily on the Guiding Principles as internationally recognised standards, thus consolidating and strengthening the normative framework for the assistance and protection of IDPs.

The Great Lakes Protocol and the African Union Convention

Between 2004 and 2006, the International Conference on the Great Lakes Region (ICGLR) sought to establish a comprehensive post-conflict framework applicable to the troubled region. This framework is founded on four thematic strands comprising: i) peace and security; ii) democracy and good governance; iii) economic development; and iv) humanitarian and social concerns. Notably, member states of the ICGLR wished to elaborate a Protocol that dealt specifically with IDPs that crucially would apply the 1998 Guiding Principles.¹⁰

The Guiding Principles were annexed to the *Protocol on the Protection and Assistance to Internally Displaced Persons* that was adopted in 2006. The entry into force of the Protocol in 2008 had the effect of crystalizing as 'hard law' the *soft law* Guiding Principles for the purposes of the states parties to the Protocol, with the principles themselves having originally been distilled from hard law – international human rights law, humanitarian law and refugee law.

Alongside this initiative in the Great Lakes region there was a growing interest amongst the Economic Community of West African States (ECOWAS) and the African Union (AU) to elaborate principles relating to IDPs. The AU, in an effort to stem the fragmentation of regional efforts to protect IDPs, invited the speaker to assist the process of drafting a continent-wide Convention. In contrast to the Great Lakes Protocol, to which the Guiding Principles were annexed, the AU Convention sought to incorporate the Guiding Principles directly into the Convention itself – a strategy that risked doing irreparable damage to the authority of the Guiding Principles themselves should the AU process break down. This risk did not materialise and the Heads of State of the AU approved the African Union Convention for the Protection and Assistance of Internally Displaced Person in Africa ('Kampala Convention') in 2009.¹¹

On assuming office, the Special Rapporteur's first objective was to establish some thematic priorities and after a process of consultation the themes outlined below emerged.

Consolidation of the Normative Framework

By 2010 important normative developments specifically addressing internal displacement were evident: The Guiding Principles on Internal Displacement, the *Great Lakes Protocol*, the *Kampala*

⁹ Similarly, Beyani has been invited by South Korea to consider whether those individual who belonged to separated families in North Korea could be considered as IDPs.

¹⁰ International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/29D2872A54561F66C12572FB002BC89A/\\$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/29D2872A54561F66C12572FB002BC89A/$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf).

¹¹ As of 07/02/12, 34 Member States of the AU have signed the Convention, and only 9 have ratified it. The Convention will enter into force once 15 Member States have ratified the Convention (see <http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced....pdf>).

Convention and the *Council of Europe Resolution on Property and Internally Displaced Persons*. In addition, the problem of displacement was increasingly entering international discussions involving climate change.

Notwithstanding this progressive trend, a handful of states began to challenge the authority of the Guiding Principles as internationally applicable standards on the grounds that they were not a product of negotiation by states. The speaker's response was unequivocal: when establishing the post of Special Rapporteur, the member states of the Human Rights Council (including those that were challenging the Guiding Principles) explicitly mandated the post-holder to use the Guiding Principles reiterating that, in spite of its new nomenclature, the substance of the mandate remained unchanged.¹² Accordingly, states could not now challenge the authority of the Guiding Principles.

This episode exposed the continued importance of reaffirming and reinforcing the normative framework while concurrently encouraging the adoption of national policies and legislative frameworks for the protection of IDPs.

Climate Change and Displacement

The 2010 Cancún Agreements specifically recognised climate change-induced displacement as requiring further understanding and cooperation between states. Building on this development, in his first report to the Human Rights Council, the Special Rapporteur focussed on climate change and displacement outlining a number of issues that require further attention.¹³

- The need to depoliticise the issue of displacement arising from climate change by uncoupling the considerations of human rights and displacement from climate change politics. At the same time however, those principles underlying climate change including the precautionary principle, the preservation of the earth for future generations and intergenerational equity all relate to the underlying concepts of human dignity and the preservation of the individual underpinning human rights discourse more broadly.
- The relationship between rural to urban migration and climate change and in particular slow climatic changes leading to desertification and the implications of this from the perspective of the protection and assistance of IDPs.
- The danger of rising sea levels to small island states and the implications of this for populations inhabiting such states. In this regard, a number of discussions have taken place at the international level regarding climate change, internal displacement, trans-boundary displacement and the question of relocation in instances where the territory of affected island states including the Maldives, Tuvalu and Nauru is predicted to be overcome by rising sea levels. To this effect the Special Rapporteur has been in discussions with UNHCR to begin to consolidate a framework within which to respond to this problem. Discussions to date have drawn heavily on refugee law and the notion of temporary protection but longer term solutions remain to be addressed.
- Although trans-boundary displacement does not fall directly within the mandate of the Special Rapporteur, it is undoubtedly the case that in the absence of an *internal* system of assistance and protection, people will move across boundaries.

Women and Displacement

Despite it being the case that the majority of IDPs are women, there has never been a thematic report on the situation of displaced women, a subject which raises important questions of special protection both in the context of flight and in situations of displacement. Displacement often means that women are forced to confront and adjust to significant changes in livelihoods, calling for additional support, protection and assistance. Furthermore, there is a need to encourage and facilitate the participation of women in the negotiation of durable solutions, whether in peace

¹² UN Human Rights Council, Resolution 14/6, A/HRC/RES/14/6, 23 June 2010, adopted without a vote.

¹³ UN Human Rights Council, Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, A/HRC/16/43, 20 December 2010, at p.13 *et seq.*

processes following conflict or the solutions in response to the situation from which the displacement occurred.

During his tenure the Special Rapporteur aims to explore the gender dimensions of internal displacement and in doing so strengthen links with the institutional bodies established under CEDAW¹⁴ and the CRC¹⁵ in addition to other UN and treaty bodies.

IDPs Living Outside of Camps

The approach to the protection and assistance of IDPs is very much modelled on the approach adopted in the context of refugees which is developed on the assumption that displacement will only be temporary and the envisaged solution is one of return. Thus *temporary* camps and settlements are the typical means through which assistance to and protection of IDPs is structured and managed. However, the statistics show that the vast majority of IDPs are found outside of camps and therefore do not receive regular assistance or protection. This became particularly clear to the Special Rapporteur on his second mission to Kenya in 2011, where a large proportion of IDPs can be found in urban areas or staying with host families. What is necessary is a change of mind-set when considering IDPs who are nationals of the state in which they are displaced; rather than being shackled to camps, they should be able to live as 'normal' life as possible in their country.

Current IDP situations and the activity of the Special Rapporteur

The Special Rapporteur's ability to make visits to countries where there exists an IDP situation depends entirely on the goodwill and cooperation of the state in question. Accordingly, the ability to effectively exercise the mandate in practice is contingent on the diplomatic and negotiation skills of the post-holder. Much of the work can involve engaging with ambassadors in UN fora, writing formal requests to carry out a country visit and engaging in rounds of discussions with state representatives to build a relationship of trust.

One major anxiety among states (which may partially account for permission to enter being denied) is the concern that a country visit by the Special Rapporteur is likely to result in the matter being placed on the agenda of the UN Human Rights Council in a subsequent session. However, the Special Rapporteur does have a choice of means through which to engage with states on the assistance and protection of IDPs some of which do not require the submission of reports to the Human Rights Council as for example working visits and dialogues with governments that do not entail meetings with IDPs themselves. Where the Special Rapporteur engages in a *mission*, a report to the Human Rights Council is obligatory.

The Special Rapporteur noted that his decision to visit the Maldives as his first mission was well-received by Asian and African states and, as a consequence, countries such as Kenya, Somalia and Sudan expressed a willingness to engage further with the mandate. He emphasised the value of 'quiet diplomacy' and warned against the dangers of high profile criticisms that can risk causing substantial damage to confidence in the mandate and thus its efficacy.

¹⁴ The Convention on the Elimination of All Forms of Discrimination against Women.

¹⁵ The Convention on the Rights of the Child.

The following section is based on the discussion which followed the Special Rapporteur's presentation.

Azerbaijan, Armenia and the Nagorno Karabakh

The situations in Azerbaijan, Armenia and the Nagorno Karabakh have occupied the mandate for a number of years. In the last years of his mandate, Walter Kälin visited the region on an annual basis. Notwithstanding the adoption of resolutions by both the Security Council and the General Assembly, the disagreements between the parties remain unresolved, creating a situation of 'protracted displacement'.¹⁶ The underlying problem concerns the failure to resolve the *territorial* disputes between Armenia and Azerbaijan; as a result, the question of *internal* displacement cannot be effectively addressed until these boundary disputes are resolved. A similar problem exists in South Ossetia and Abkhazia.

Pending a political solution between Armenia and Azerbaijan, the Special Rapporteur will continue to focus on the plight of IDPs and work to: i) ensure improvements in living conditions and livelihoods; ii) support the political process and; iii) encourage the establishment of a durable solution for IDPs within the framework of the political solution.

Haiti

The Special Rapporteur intends to visit Haiti during his mandate. Many of those who were displaced following the earthquake nearly two years ago continue to face daily obstacles and hardship. In addition to those in the camps, many also live in the ruins of their destroyed homes or have sought temporary shelter with relatives. In this regard, a significant problem is the unwillingness of the government to exercise the theory of eminent domain of land ownership, perhaps fearing a loss of support by the powerful and influential landowners. This is compounded by the problem that many of those who continue to live in the ruins of buildings fear that if they allow the government to clear the rubble all evidence as to ownership would be destroyed and they would risk being dispossessed of their properties. This suggests that Haiti did not have a system of property registration.

The Special Rapporteur identified three further challenges that have exacerbated the plight of IDPs in Haiti. First, the ill preparedness of Haiti to respond to, and ameliorate the consequences of natural disaster. The magnitude of the earthquake that hit Japan was significantly higher than in Haiti's case; yet the level of destruction caused by the earthquake in Japan was considerably less than that experienced in Haiti. Second, following the earthquake, there was an exodus of skilled workers from the Haitian civil service to international organisations and NGOs draining the capacity of the Haitian government to effectively implement reconstruction. Third, there was poor coordination between the numerous international actors engaged in providing assistance to Haiti and the Haitian people. The proliferation of solutions and their implementation without coordination is not conducive to securing a durable and comprehensive solution. The Special Rapporteur considered that prior to any mission to Haiti, a meeting might be convened involving the various international actors with the objective of developing a common position so as to provide consistency when engaging with the Haitian government, people and local civil society.

For the moment, the priority is to improve the basic living conditions of IDPs which, two years after the earthquake, appears to be worse than during the immediate period following the earthquake. In this regard, the Special Rapporteur has raised before the inter-agency committee the issue of sequencing responses to natural disasters and has called for a coordinated approach to be adopted at the international level. The need for such an approach is exemplified by the case of Haiti where international assistance in the form of emergency shelter and food did not continued past the initial phase. Two years after the disaster Haiti continues to face an emergency situation; the priority is to stabilise that situation and to provide basic protection. Protection also extends to

¹⁶ UN SC Resolutions 882, 853, 874 and 884 (1993) and General Assembly Resolution 48/114 (A.RES/48/114).

the protection of those trying to leave Haiti including those who may attempt to reach the US or Cuba by sea.

Libya

The situation in Libya is increasingly disturbing, particularly the reports that many of those who had fled towns and cities during the uprising against Colonel Gaddafi's regime are now being actively prevented from returning to their homes by the militia who control those areas, ostensibly on the basis that such areas had previously been 'pro-Gaddafi' and thus some form of justice needs to be extracted before residents are allowed to return.

One of the main problems in Libya is the lack of effective control exercised by the National Transitional Council (NTC) over the whole of Libya - indeed the lack even of any *attempt* to constitute a national government with a national presence. Combined with the failure to disarm the militia groups there is a real risk of the country fragmenting. As these various groups begin to exercise effective control over different regions it comes as no surprise that IDPs are being prevented from returning since one way to lay political and economic claim over an area is to control the return of the local population.

Some of this can be attributable to the nature of the uprising and the limited commitment to post conflict planning and reconstruction by the proponents of the responsibility to protect doctrine who exercised that doctrine by effecting military intervention. During the conflict the opposition forces lacked any form of command structure, one of the fundamental requirements of international humanitarian law; and having been born out of a situation in which the law was disregarded, it is no surprise that the militia continue to operate in a lawless manner.

There have also been reports that the Red Crescent has not been permitted access to areas where humanitarian assistance is needed, for both political and religious reasons. This is not dissimilar from the strategy adopted by Al-Shabaab in Somalia and if the Libyan situation is not addressed urgently the risk of fragmentation will become increasingly acute.

Efforts by international and regional organisations and states are being made to assess and implement means by which to assist the stabilisation of the situation in Libya in a coordinated manner and the Special Rapporteur intends to support and contribute to these processes emphasising the need to protect and assist IDPs.

Colombia

Although Colombia enacted the Victim's Law and has undertaken a project of land restitution, the challenges facing the Colombian government are great. The situation in the country is still one of violent conflict. There is inadequate funding for the programmes and initiatives in question and there are powerful interests in land owned by private corporations, paramilitary forces and the foreign forces, all which impede the objectives of these restitution programmes and initiatives to address the situation of IDPs. In particular, FARC appears to be unwilling to relinquish control of areas over which they exercise effective control as they wish to maintain control over the resources in those areas.

Colombia requires international solidarity in terms of finances and engagement by UN actors to provide assistance and protection to IDPs. The enactment of domestic laws has led to a number of judgments before the highest courts that are favourable and which have contributed to tangible improvements to the protection of and assistance to those internally displaced. However, until the underlying issues regarding access and control over resources are resolved, the development and implementation of a durable solution will remain elusive.

Japan and the US

Both Japan and the United States experienced situations of mass displacement following environmental disasters, in the former case, the earthquake, subsequent tsunami and the radiation

emitted following the damage to the Fukushima nuclear plant, and in the latter case, the displacement caused by Hurricane Katrina that hit the South Coast of the US seven years ago.

The situation in Japan unfolded shortly after the speaker had assumed the post but a proposed visit to the country was stalled at the recommendation of the UN on grounds of health and safety posed by the radiation leak from the Fukushima plant. Important lessons have been learned from the Japanese experience on the importance of immediate evacuation from the vicinity of danger and on the establishment of shelters for those displaced. In this context, the Special Rapporteur is of the view that the Japanese government responded to the situation measurably well, and the actions it has taken reflect best practices. However, he emphasised the importance of providing special protection and assistance to those who require it.

It is interesting to note the different attitudes towards the mandate and also international assistance and protection to IDPs within the industrialised countries, such as Japan and the USA. There is an overriding perception that IDPs are an issue that belongs to the global South, where there is limited capacity, and thus require international assistance, whereas there is a resistance to acknowledge and accept international assistance by developed countries. The Special Rapporteur noted objection of the US government in the strongest terms to the statement by the previous mandate holder, Walter Kälin, in which he stated that the victims of hurricane Katrina were IDPs and required assistance and protection.

Summary by Hemi Mistry