

**PROTECTION OF RIGHT TO ADEQUATE HOUSING IN
POST-DISASTER SITUATIONS IN INDIA: AN
ASSESSMENT IN THE LIGHT OF INTERNATIONAL LAW
AND PRACTICE**

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Abstract

Disasters render millions homeless and hence right to housing (or shelter) emerges extremely important in post disaster scenario. In fact, IDMC data reflects that the number of people displaced by natural disasters has multiplied in the recent years exceeding the number displaced by armed conflict. Yet the victims of disasters rendered homeless or forced to migrate have received lesser attention and protection under the international law compared to their conflict counterparts. The fulcrum for the right to adequate housing under international law is enshrined in the ICESCR. The criteria for right to adequate housing mentioned in CESCR General Comments have found their way in the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, Sphere Project and several UN Declarations. While the Supreme Court of India articulated the 'right to shelter', the judiciary has failed to pay any attention in safeguarding this right in the context of natural disasters. The role of the

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NDMA or NHRC has not been encouraging either. There are no disaster specific norms available, including the Disaster Management Act, 2005, ensuring right to adequate housing. As a result, the victims continue to live in vicious circle of misery, both in temporary shelters and permanent housing, as the right has ramification on their other rights. This paper demonstrates the poor state of affairs from Orissa Super Cyclone to Uttarakhand floods – the trend which has remained unchanged. Considering the void in our domestic legal regime, this paper attempts to lay down broad outlines of a right-based housing policy for disaster victims drawing inferences from the international law and practice.

I. INTRODUCTION

Adequate housing is universally viewed as one of the most basic human needs. While it is among the most recognized of all economic, social and cultural rights, it is also vital so far enjoyment of other such rights is concerned.¹ The Special Rapporteur on Adequate Housing proposed a working definition of right to housing as a ‘right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity’.²

The right to adequate housing can be severely compromised by disasters through damage and destruction, loss of records and the displacement. Hence, the right acquires greater importance in post-disaster situations. The plight of the victims of such disasters worsens when they are exposed to all forms of insecurity in the absence of any shelter. Added to

¹Ina Zoon, *The right to adequate housing*, ROMA RIGHTS JOURNAL (2000), <http://www.errc.org/article/the-right-to-adequate-housing/874>.

²Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living 8, E/CN.4/2001/51 (2001).

this, anomalies on the part of various agencies engaged in post-disaster relief and rehabilitation process further aggravate the situation.

According to the data provided by the Norwegian Refugee Council's ("NRC"), International Displacement Monitoring Centre ("IDMC"), an estimated 32.4 million people were displaced by disasters³ compared to 6.5 million people due to armed conflict⁴ in 2012. Despite its sheer numbers, it is unfortunate that the homeless victims of disasters have failed to grab enough attention when compared to their counterparts in armed conflicts. Unlike International Humanitarian Law ("IHL"), there is no specific set of laws which may be termed as 'international disaster management law'. Therefore, the protection of the disaster victims including their right to adequate housing has been derived through an amalgamation of provisions enshrined under various sources of international law.

Human rights are considered to be 'universal, indivisible and interdependent and interrelated'.⁵ By implication, disregard of the right to adequate housing paves the way for further human rights violations in post-disaster situations. While wide range of international instruments – from treaties to UN resolutions to guidelines, which have recognized the right to adequate housing, the applicability of this right in the aftermath of natural disaster does not distinctively feature in the mainstream International Human Rights discourse.

It may be noticed that right to adequate housing is fundamentally different from other relief items such as food aid or medicine, as it is a significant, long-term and non-consumable asset. In all regions worldwide, the average cost in owning a house is significantly higher compared to the annual income of a particular household. In Latin

³IDMC, NRC, *Global Estimates 2012: People Displaced by Disasters*, INTERNAL DISPLACEMENT MONITORING CENTRE (May, 2013), <https://www.internal-displacement.org/publications/global-estimates-2012-people-displaced-by-disasters>.

⁴IDMC, NRC, *Global Overview 2012: People Internally Displaced by Conflict and Violence*, RELIEF WEB (Apr. 29, 2013), <https://reliefweb.int/report/world/global-overview-2012-people-internally-displaced-conflict-and-violence>.

⁵UN Gen. Assembly, *Vienna Declaration and Programme of Action*, ¶ 5, A/CONF.157/23 (1993).

America, while it is 5.4 times higher, it 12.5 times in case of Africa. Part of the issue lies in the fact that unlike other areas of relief, housing's status as property typically involves more obvious questions of ownership and legal entitlement.⁶ Nevertheless, in post-disaster programming it attracts less far attention than it actually deserve. Housing reconstruction is mostly considered as a developmental activity rather than a humanitarian concern, and hence, tends to ignore the wholesome content of the right.⁷

In Section II, the author explains the concept with reference to the international law. In Section III, the author highlights some crucial issues relating to right to adequate housing that arose in the aftermath of certain mega disasters in the country, i.e. the Orissa Super Cyclone in 1999, the Gujarat Earthquake in 2001, the Indian Ocean Tsunami in 2004, the Uttarakhand Floods in 2013. Analogies from various countries are drawn to substantiate the arguments. While Section IV discusses the role of the courts and human rights institutions in safeguarding the right, Section V explores the disaster management law and policy regime. Eventually in the concluding Section V, the author proposes the broad outlines of in protecting the right to adequate housing of the natural disaster-affected victims.

II. RECOGNITION OF THE RIGHT IN INTERNATIONAL LAW IN THE CONTEXT OF NATURAL DISASTERS

Ronan McDermott points out that that the relationship between natural disasters and international regulation has been considered historically weak, especially when compared to the IHL applicable to armed conflict situations. It is encouraging to note that there is a growing interest in formulating international disaster management law primarily due to some mega disaster that the human race has encountered in the recent past

⁶Sultan Barakat, *Housing Reconstruction after Conflict and Disaster*, 43 NETWORK PAPER 1 (2013) [hereinafter Barakat].

⁷*Id.*

across the globe. Yet as it stands today, the normative standard for the protection of the disaster victims applicable to all phases of disaster management essentially derives its essence from the interpretation of International Human Rights Law (“**IHRL**”) as it applicable to the peace time situations as opposed to the IHL applicable during conflict situation. Henceforth, the provisions of the IHRL may be extended to disaster situation as there is a vacuum with regard to legal safeguard. Besides such binding treaties, there exists several soft law or non-binding instruments which afford protection to the disaster victims.⁸ These instruments have their origin in IHRL as well as IHL, International Refugee Law (IRL),⁹ and International Environmental Law (“**IEL**”).¹⁰

A. *International Human Rights Treaties*

The foundation of right to adequate housing at the international level was first laid down in Article 25(1) of the Universal Declaration of Human Rights (“**UDHR**”) as a part of the “right to a standard living”. Subsequently, the same was transformed into a binding treaty obligation of the States under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”). Needless to say, the aforementioned provision reinforces ICESCR’s principle enshrined under Article 2(1) which calls upon the State parties to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with

⁸Gregory C. Shaffer and Mark A. Pollack have repudiated the positivist legal scholars’ effort of typically distinguishing hard and soft international law using a simple, binary binding/non-binding divide. Instead, they have preferred the wide spectrum of classifying international law through (1) obligation, (2) precision of rules, and (3) delegation to a third-party decision-maker. However, because of its inherent complexities in the second option and the fact that the importance of this article lies somewhere else, the author has adopted the binary division of international law for the purpose of this article. See, Gregory C. Shaffer and Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 BOSTON COLLEGE L. REV. 1159 (2011).

⁹This set of international law is significant for its reference to emergency situations.

¹⁰Ronan McDermott, *Compliance with Normative Frameworks in Disaster Management: A Comparative Study of Indonesia and Ireland*, HUMAN SECURITY: HUMANITARIAN PERSPECTIVES AND RESPONSES CONFERENCE, ISTANBUL (2013), http://humanitarianstudiesconference.org/wchs2013/fileadmin/user_upload/fe_users/ronanrua/wchs_paper315.pdf.

a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. Other core human rights treaties have since then referred to some aspects of this right. E.g., Article 5(e)(iii) of the UN Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”) prohibits racial discrimination in the enjoyment of the right to housing. Article 14(2)(g) and (h) and Article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women (“**CEDAW**”) provides for the rights of rural women to adequate housing. Article 27(1), (2) and (3) of the Convention on the Rights of the Child (“**CRC**”) establishes the positive obligation of States parties to provide material assistance, including housing to children in need.

While the concept of ‘adequacy’ of the right is neither elaborated in the UDHR nor the ICESCR, the Committee of Economic, Social and Cultural Rights (“**CESCR**”) in its General Comment 4 has enumerated certain aspects which must be taken into account for this purpose in any particular context. It means more than mere shelter and includes the following:¹¹

- a) Security of tenure;
- b) Availability of services, materials, facilities and infrastructure;
- c) Affordability;
- d) Habitability;
- e) Accessibility;
- f) Location; and
- g) Cultural adequacy.

The State shall take sufficient measure ensuring that every individual realizes this right ‘in the shortest possible time in accordance with the

¹¹CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), ¶ 8, E/1992/23 (1991).

maximum of available resources'.¹² Besides, the CESCR emphasized that the principle of non-discrimination, enjoyment of other human rights,¹³ special attention towards disadvantaged groups including 'victims of natural disasters' and 'people living in disaster-prone areas',¹⁴ participation of all in the decision-making process,¹⁵ protection against forced eviction¹⁶ should not be compromised by the State while guaranteeing right to adequate housing to its people and provide appropriate legal remedies including payment of compensation are in place in case of illegal actions of any nature.¹⁷

The phenomenon of forced eviction deserves special mention in this context. It is considered to be gross human rights violation and may be only justified in extreme conditions with adequate protection.¹⁸ The CESCR, in its General Comment 7 has defined 'forced eviction' as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection' provided that such action is carried out 'in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights'.¹⁹ Additionally, the CESCR notes that forced eviction may also result in violations of civil and political rights, e.g. the right to life, security of the person, privacy, family, peaceful enjoyment of possessions. Such an approach is evident from Article 17(1) of the ICCPR which recognizes, *inter alia* right to be protected against 'arbitrary or unlawful interference' with one's home.²⁰

In case eviction becomes imminent, the CESCR considers that the affected persons should enjoy certain procedural protections which

¹²*Id.* at 14.

¹³*Id.* at 9.

¹⁴*Id.* at 11.

¹⁵*Id.* at 12.

¹⁶*Id.* at 13.

¹⁷*Id.* at 17.

¹⁸UN Comm'n on Hum. Rts., Forced evictions, E/CN.4/RES/1993/77 (1993).

¹⁹CESCR, General Comment No. 7: The Right to Adequate Housing, Art.11(1) of the Covenant: Forced Evictions, E/1998/22 (1997).

²⁰*Id.* at 8.

include: (a) an opportunity for genuine consultation; (b) adequate and reasonable notice prior to the eviction; (c) presence of government officials along with them during an eviction; (d) provision for legal remedies. Under no circumstances, eviction should render people homeless or vulnerable to other human rights violations.²¹ In the light of the above observations of the CESCR, it may be concluded that in post-disaster scenario, if the victims have to be relocated, they should be provided with all necessary information about resettlement or facilitated to return to their original place of residence at the earliest, in case of temporary or permanent displacement respectively.

B. International Soft Law

a) Habitat Declarations

Besides international treaties, the States have committed themselves towards the protection of adequate housing in various international declarations. E.g., the Vancouver Declaration 1976,²² adopted by the UN Conference on Human Settlements (also known as Habitat I) advocated for a settlement policy which would eliminate social and racial segregation, ensure participation of all people and integration of the women folk, and give highest priority to the rehabilitation of the people rendered homeless due to natural disasters.

The objective of the Habitat Agenda – Istanbul Declaration on Human Settlements²³ – the outcome of Habitat – II in 1996, was to arrest the deterioration of the conditions of the human settlements by addressing various crisis situations including ‘environmental degradation’ and ‘increased vulnerability to disasters’ and integration of all sections of the population in implementing the Habitat Agenda. Inspired by the local programs as envisaged under Agenda 21 of the Earth Summit, local authorities were given prominence in action and also emphasized on cooperation among the government, private sector, NGOs, etc.

²¹*Id.* at 16.

²²Vancouver Declaration 1976, UN G.A. Res. 114, A/RES/31/109, (1976).

²³Report of the UN Conference on Human Settlements (Habitat II), Istanbul, UN Pub., Sales No. E.97.IV.6, chap. I, res.1, annex I (1996).

b) Rio Declarations

The UN Conference on Environment and Development (also known as Earth Summit) held at Rio de Janeiro in 1992 is an important milestone in the realm of IEL having ramification on the housing in disaster-prone areas.²⁴ The outcome of the summit – Agenda 21 has dealt with sustainable human settlement in 21st century with special reference to promoting planning and management in disaster-prone areas. Acknowledging the fact that disasters had disastrous impact on human lives and settlement, three areas of action were identified, namely, developing a culture of safety, pre-disaster planning and post-disaster reconstruction.²⁵ The first initiative involved undertaking impact studies of disasters, implementing awareness campaigns.²⁶ Pre-disaster planning was aimed to include tools to encourage disaster-sensitive settlements; training programs for builders, contractors as well as rural population on disaster-resilient methods; training programs for emergency site managers, NGOs, community groups which cover all aspects of disaster mitigation; developing action plans for the reconstruction of settlements.²⁷ Post-disaster reconstruction includes activities like adopting effective guidelines with particular focus on development-focused strategies; initiating contingency planning with participation of the affected communities for post-disaster reconstruction and rehabilitation.²⁸ The program desired for international cooperation in implementing the above proposals through financing, technology transfer, human resource development and capacity building.²⁹

²⁴UN Gen. Ass'mly, Report of the UN Conference on Environment and Development, Rio de Janeiro, A/CONF.151/26 (1992).

²⁵United Nations Sustainable Development, *United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21*, SUSTAINABLE DEVELOPMENT 7.55 – 7.59, <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

²⁶*Id.* at 7.60.

²⁷*Id.* at 7.61.

²⁸*Id.* at 7.62.

²⁹*Id.* at 7.63-7.66.

In pursuance of General Assembly Resolution 64/236, and to order to mark the 20th anniversary of the Earth Summit of 1992, Rio+20 was organized at the same place in 2012.³⁰ The outcome document of Rio+20 – Future We Want, disaster risk reduction gets specific mention. The importance of inter-linkages among disaster risk reduction, recovery and long-term development planning was noted ‘in order to reduce risk, increase resilience and provide a smoother transition between relief, recovery and development’. Eventually, it called for a coordinated action from all relevant stakeholders concerned from national to international level.³¹

c) UN Guiding Principles On Internally Displaced Persons

Furthermore, the UN Guiding Principles on Internally Displaced Persons (IDPs)³² recall that every human being shall have the right to be protected against being arbitrarily displaced from his home or place of habitual residence.³³ They also emphasize that all the IDPs have the right to an adequate standard of living and that the competent authorities shall ensure IDPs with safe access to basic shelter and housing at a minimum, regardless of the circumstances and without discrimination.³⁴ The State shall take appropriate measures to take care of the property and possessions left behind by the IDPs against destruction and arbitrary and illegal appropriation, occupation or use.³⁵ The IDPs have a right to protection against forcible return or resettle where their life, liberty, safety and health would be under threat.³⁶ While facilitating voluntary return of the IDPs to their original home in safety and with dignity remains the primary duty and responsibility of the authorities, they shall

³⁰Rio+20 – Future We Want, G.A. Res. A/RES/66/280 (2012).

³¹*Id.* at 189.

³²UN Comm’n on Hum. Rts., *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, (1998).

³³*Id.*, Principle 6.

³⁴*Id.*, Principle 18.

³⁵*Id.*, Principle 21.

³⁶*Id.*, Principle 15(d).

also enable the reintegration of returned or resettled IDPs.³⁷ Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons considers return or resettlement as a complex issue involving various challenges, namely, a human rights challenge (ensuring their right to security, property and housing), a humanitarian challenge (as they need temporary shelter until destroyed houses are rebuilt), a development challenge (in achieving durable solutions in providing access to livelihoods, education and health care identified by the Millennium Development Goals and helping to establish or re-establish local governance structures) and a reconstruction challenge (as durable solutions not possible without political, economic and social stabilization).³⁸

d) *Pinheiro Principles*

Another key initiative specific to housing rights is the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, commonly known as the ‘Pinheiro Principles’, endorsed by the UN in 2005. It recommends restitution of property from which they were arbitrarily displaced. States should establish appropriate administrative and judicial institutions and mechanisms to assess and enforce housing, land and property restitution claims. While the Principles were drafted primarily in the backdrop of post-conflict situations; the Official Handbook for their implementation makes explicit references to natural disasters because of wide range of common concerns.³⁹

The concept of restitution provides offers the displaced with an aspiration to recover and repossess the dwelling, land or property which was their original home before the disaster happened. This is not only a theoretical discourse but the principles are designed to provide the States, UN and international community with practical guidance to address the complex

³⁷*Id.*, Principle 28.

³⁸Brookings-Bern Project on Internal Displacement, *IASC Framework on Durable Solutions for IDPs* (2010).

³⁹Food and Agriculture Agency et. al., *Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the ‘Pinheiro Principles’* (2007).

legal and technical issues surrounding housing rights. In fact, restitution rights have been recognised, and laws and procedures developed and enforced in post-conflict contexts such as Bosnia-Herzegovina, Kosovo and Tajikistan; in post-authoritarian countries like South Africa or Iraq; and in post-communist countries including East Germany, Latvia and Albania.⁴⁰

The Principles proclaim that State shall consider right to restitution as the ‘preferred remedy for displacement and a key element in restorative justice’ ensuring ‘right to voluntary return in safety and dignity’.⁴¹ The principles emphasises that everyone has a right to adequate housing and protection against arbitrary displacement.⁴² The State can interfere with the right to housing only in extreme circumstances in the ‘interest of society’ in its restrictive sense.⁴³ Hence, restitution shall be applied by the State in a non-discriminatory fashion reflecting the ‘best interests of the child’, through a just and timely manner.⁴⁴ States should ensure that restitution claims process is available to every displaced person with an option of special assistance including free legal aid for all, especially, the illiterate, children and disabled persons. The claim forms are required to be simplified and the process should be done in a language comprehensible for the victims.⁴⁵ The process should be facilitated through adequate and effective participation of the victims in the decision making process.⁴⁶ States should ensure the appropriate registration records are in place. In cases of disasters, when there is mass displacement and there is little documentary evidence, the determining authorities ought to adopt conclusive presumption that persons fleeing their homes during a given period marked by disaster, have done so

⁴⁰*Id.* at 4.

⁴¹UN Sub- Comm’n on Promotion and Protection of Hum. Rts., *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, Principle 2 & 10, E/CN.4/Sub.2/2005/17, (2005).

⁴²*Id.*, Principle 8 & 5.

⁴³*Id.*, Principle 7.

⁴⁴*Id.*, Principle 12.

⁴⁵*Id.*, Principle 13.

⁴⁶*Id.*, Principle 14.

because of the disaster and are therefore entitled to right to restitution.⁴⁷ The principles also recognize the rights of the secondary occupants.⁴⁸ In exceptional cases where restitution is impossible, persons concerned shall be compensated as a form of restorative justice.⁴⁹ State should ensure that the decisions of the authorities determining the rights of the displaced people are implemented and respected by all concerned.⁵⁰

e) Humanitarian Standards

Few standards have evolved as an amalgamation of IHRL, IHL and IRL. E.g. the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters which promotes and facilitates a rights-based approach to humanitarian assistance activities, including building of temporary shelter and permanent housing for the affected communities.⁵¹

The Guidelines emphasize that the actors involved in the humanitarian services must ensure that the victims of disasters shall be allowed to live in security, peace and dignity in temporary camps and collective shelters as well as permanent relocation sites. They stress on adopting a community-based approach to strengthen the absorption capacities and resilience of host communities, e.g. through provision of additional water and sanitation facilities, enhancement of school and health services to the community, provision of building materials for host families to enlarge dwellings, etc. The shelters should preferably be culturally acceptable providing privacy for women and children; and also user-friendly for persons with disabilities or older persons. They must have adequate water and sanitation facilities, separate toilets and bathing facilities for men and women and for single-parent households. Moreover, the Guidelines make

⁴⁷*Id.*, Principle 15.

⁴⁸*Id.*, Principle 16 & 17.

⁴⁹*Id.*, Principle 21.

⁵⁰*Id.*, Principle 20.

⁵¹Brookings-Bern Project on Internal Displacement, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (2011).

it abundantly clear that such shelters are only transitional and the victims are required to be shifted to the permanent housing as soon as possible.⁵²

Another important standard for humanitarian assistance is the Sphere Project launched in 1997 by a group of humanitarian NGOs and the Red Cross and Red Crescent movement. It consists of a Humanitarian Charter and Minimum Standards in Disaster Response. Sphere endorses the same criteria regarding right to adequate housing as enshrined in the General Comment 4 of the CESCR. The Minimum Standards regarding Shelter and Settlement are a practical expression of the principles and rights embodied in the Humanitarian Charter. The Standards underline that better shelter and settlement disaster response can be achieved through better preparedness. Such preparedness is possible through capacities, relationships and knowledge developed by the governments, humanitarian agencies, local civil society organisations and communities to anticipate and respond effectively to the impact of likely, imminent or current hazards. Preparedness is informed by an analysis of risks and the use of early warning systems. The Standards comprise of strategic planning, settlement planning, covered living space, construction and environmental impact. Each component of the standards spells out guidance notes, e.g. regarding strategic planning of the settlement sites, they recommend to undertake and regularly review a comprehensive risk and vulnerability assessment. In case of transitional shelters, the notes recommend that for non-displaced populations, such shelters can be erected *in situ* as a basic starter home, to be upgraded, expanded or replaced over time as resources permit. In case of, displaced populations, they can be disassembled and reused when the affected populations are able to return to their original homes or resettled elsewhere. The notes pay specific attention to the protection of housing and property rights of the vulnerable, especially, women, those widowed or orphaned by the disaster, persons with disabilities, tenants, social occupancy rights-holders and informal settlers. The settlements should include essential facilities, such as, water, sanitary facilities, communal cooking facilities, healthcare, solid waste disposal, schools, social facilities, places of

⁵²*Id.* at 41.

worship, meeting points, space for livestock accommodation, access to roads, etc. The notes also lay down quantifiable standards to be conformed, e.g. fire safety provision shall have a 30-metre firebreak between every 300 metres of built-up area, and a minimum of 2 metres between individual buildings to prevent collapsing structures from touching adjacent ones. Similarly, with regard to covered living space, it has been prescribed that immediately after the disaster, particularly in extreme climatic conditions, a covered area of less than 3.5m² per person may be appropriate to save life and to provide adequate short-term shelter.⁵³

C. Special Procedure: Report of the Special Rapporteur on Adequate Housing

In the recent past, the Special Rapporteur on Adequate Housing has also focussed on matters in the post-disaster context. Although the report circumscribed post-conflict situations; it broadly dealt with the commonalities, notwithstanding certain fundamental differences between the two situations. It urged the States to incorporate right to adequate housing as an integral part of any humanitarian, reconstruction and development responses. States, with the support of the NGOs should provide temporary shelter in reasonable adequate living conditions for the displaced population.⁵⁴

Appreciably, it recognized that housing has an ‘inherent social value’ of vital importance for social stability, alleviation of poverty and development, and therefore, response to the impact of disasters on the right to adequate housing should not confine to the physical damage assessment shelter and infrastructure and should seek to address issues, e.g., disruption of social and economic relationships and networks; destruction of home-centred livelihoods; specific rights of the vulnerable

⁵³*The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response*, The Sphere Handbook (2004).

⁵⁴Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/16/42 (2010).

groups; compromised access to facilities, amenities and livelihood opportunities. It vociferously argued in favour of involving the local communities in decision-making regarding location, design and infrastructure of housing while rebuilding lives in the aftermath of disasters. A rapid assessment and analysis of the pre-disaster land holding should be conducted in the immediate aftermath of a disaster was considered essential towards sustainable rehabilitation and reconstruction.⁵⁵

In his report on women and adequate housing, the Special Rapporteur made specific mention for exploration regarding the impact of natural disasters on the right of women to adequate housing.⁵⁶ The report, published soon after the 2004 Tsunami, raised several issues concerning inadequate protection of the women's housing rights in post-disaster scenario in general and Tsunami in specific. The report expressed dismay over the fact that poor housing and living conditions in the centralized camps posed severe health risks to women and forced them to sleep in the places of worship in the neighbourhood. Assistance is too often distributed on a "head-of-family" basis and women, particularly single parents, fail to be recognized in the process. Women are excluded from camp governance or response planning. Additionally, loss of homes and livelihood after the tsunami exposed women not only to increased trafficking but also to incidents of violations of bodily integrity.⁵⁷

⁵⁵*Id.* at 62.

⁵⁶Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living – Women and adequate housing, E/CN.4/2005/43 (2005).

⁵⁷*Id.* at 5.

III. PROTECTION OF THE RIGHT IN THE AFTERMATH OF MEGA DISASTERS: A REALITY CHECK IN INDIA

Experiences across the globe reveal that in many disaster situations, there is very little or no need assessment of the affected communities, the houses are physically built without any reference to the right to adequate housing concept. As a result, the houses are either abandoned or remain unoccupied.⁵⁸ India is not alien to such problems. This section reflects and analyzes some of the common issues that have arisen in our country in the aftermath of some mega disasters that have haunted us in the recent past.

A. *Anomaly & Discrimination in Receiving House Damage Compensation*

In the aftermath of the Super Cyclone, there were reports of wide range malpractice. There was virtually no applicable rule for scrutiny of the beneficiary. It so happened that there were 4 to 5 claimants of the grant in one family. But surprisingly, people having houses on Government land since last 20 years or more were not eligible for getting house damage grant.⁵⁹ Housing loans, meant to help government employees and people serving in public sector units were given to fictitious PSUs and persons.⁶⁰ Except Gajapati district, from all other 13 affected districts of Orissa, a total of 15,43,672 petitions regarding non-payment and/or underpayment for the damaged houses were received by the end of June 2000, out of which 15,29,809 cases were enquired into and of this 1,18,125 cases were found eligible for house building assistance.⁶¹

⁵⁸Barakat, *supra* note 6.

⁵⁹Subhradipta Sarkar, *Compounding Disaster: Conformability Of Post-Natural Disaster Relief And Rehabilitation Process With Human Rights Standards* (2007).

⁶⁰Soumyajit Pattnaik, *Orissa cyclone relief sinks without a trace*, THE HINDUSTAN TIMES (Sept. 29, 2006), <http://el.doccentre.info/website/DOCPOST/sep-06-rdc/sep-06-rdc-formated/DB10-TS1-D-ht-y01-orissa-cyclone-relief-sinks-without-a-trace.pdf>.

⁶¹GO Ms. No. 172, *infra* note 83.

The Government of Gujarat provided financial assistance to the earthquake victims in the form of a compensation package to build their own houses. However, it did not trickle down to poorer sections of the society. The more influential members of the communities took advantage of these packages and built their own houses. On many occasions the economically vulnerable communities were left out of the enumeration process conducted by the government. Consequently, without any financial assistance they continue to live in deplorable condition in temporary shelters.⁶²

To bring about some uniformity in providing financial assistance to the affected populations, in 2015, the Government of India (GoI) has issued new norms of assistance from the State and National Disaster Response Fund established under the Disaster Management Act, 2005.⁶³ Accordingly, for fully or severely damaged houses the compensation be received is Rs. 95,100 and Rs. 1,01,900 with respect to each house in the plains and hilly areas respectively. In case of partial damage, it is Rs. 5,200 and Rs. 3,200 for pucca and kutcha house respectively, where the damage is at least 15%. It further note that the damaged houses should be an authorized one certified by a competent authority of the State Government. The norms are valid for period of 5 years, i.e. from 2015 to 2020.⁶⁴ Yet it is difficult to comprehend the manner in which the norms may be complied with in letter and spirit.

B. Temporary Shelter

Often the temporary shelters are built with just to provide shelter to affected communities with minimalist concern for their basic rights. The temporary shelters built in the tsunami-affected areas had limited sanitary conditions, particularly for women and young girls. Without any provision for kitchen inside the shelters, kerosene stoves were being used

⁶²Rohit Jigyasu, *Post-Earthquake Rehabilitation in Gujarat 9 Months After: A Field Assessment*, RADIX – THE GUJARAT EARTHQUAKE (2001), <http://www.radixonline.org/gujarat4.htm>.

⁶³Disaster Management Act, 2005, §46 & §48(1)(a).

⁶⁴GoI, No. 32-7/2014-NDM-I, Ministry of Home Affairs (Disaster Management Division) (Apr. 8, 2015).

inside sleeping quarters and that posed a serious fire and health hazard. There was a terrible lack of hygiene with utensils being washed outside each shelter, leaving dirty puddles that have breeding grounds for mosquitoes and flies. The shelters turned into tinderboxes in the blistering summer heat and leaked during the rains.⁶⁵

Recently R. Stephen Diyali, CEO of an NGO responsible for building temporary shelters in Uttarkashi district of the State of Uttarakhand after 2013 floods, in an interview with the author revealed that the shelters built by his NGO has no provision for toilets, though there is a small kitchen attached to the living area. There is no common toilet or bathroom facility either. He opined that it was not the primary concern of the desperate victims after the disaster and that there was no fund with his NGO for the same. Two years on, victim families continue to languish in those tin shelters.⁶⁶ All these examples are in clear violation of the humanitarian and human rights standards discussed in the previous section.

In 2001, following the earthquake a peculiar situation arose in Gujarat. Many people were allotted temporary shelter only after they had started to build permanent houses. Consequently, some families went on to have multiple houses – a temporary one, a semi-permanent one and a permanent one. While some used combined structures in order to retain them all, delays in process of building permanent housing encouraged families to convert their semi-permanent shelters into permanent housing by building stone walls. There was ample doubt of those hybrid structures to withstand future earthquakes.⁶⁷

With pre-fabricated housing becoming increasingly popular in the western countries, perhaps, it's time for us to make a shift in the housing strategy. Although there is a concern regarding their durability, at times, pre-fabricated houses have shown long term endurance as in Croatia

⁶⁵*Fire guts India tsunami shelters*, BBC NEWS (Nov. 1, 2015), http://news.bbc.co.uk/2/hi/south_asia/4396086.stm.

⁶⁶Interview with R. Stephen Diyali, CEO, Mission for Ananth Development & Welfare Society, Uttarkashi, Uttarakhand (Jul. 28, 2015).

⁶⁷Barakat, *supra* note 6, at 15.

where many such houses have survived over a decade. Political situation in those areas have compelled the agencies to retain such houses but over a period of time, such structures have gained the ‘permanent’ status.⁶⁸

When hundreds are rendered homeless and the demand of housing is very high and rapid, there have been instances of providing durable transition homes which may be upgraded to permanent houses subsequently, as it happened in the Nyiragongo eruption in Goma in 2002 destroying 15,000 houses in two days. To come up with a rapid housing solution, more durable transitional shelters were built with a provision of upgrading them to permanent ones. In that case, plastic sheeting was provided for temporary roofing. However, the framework for the roof was constructed in such a way so that they could bear the weight of the tiles meant for permanent structures subsequently. While the first set of transitional housing was set up within six weeks of the disaster, during the lifetime of the program, 69 per cent of families had upgraded their homes.⁶⁹

C. Community Participation In Permanent Housing

Habitat Declarations to Rio Declarations to Humanitarian Standards – every instrument has underlined the need of community approach in housing reconstruction in disaster context. In the Orissa cyclone reconstruction, the affected community was sparingly involved. The government had little faith in using low-cost technology in traditional housing. On the contrary, various expert guidelines have generally endorsed in favour of using indigenous technologies for better results.⁷⁰ The Gujarat earthquake reconstruction and rehabilitation policy promised a community-driven approach to reconstruction. Nonetheless in reality, it was mere consultation rather than actual decision-making. The ambiguity over community participation is evident in the construction debates.⁷¹ There was gradual improvement in the process in the context of Tsunami.

⁶⁸GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT (GTZ), GUIDELINES FOR BUILDING MEASURES AFTER DISASTERS AND CONFLICTS 64 (Eshborn, 2003).

⁶⁹Barakat, *supra* note 6, at 16.

⁷⁰*National Disaster Management Guidelines: Management of Earthquakes*, NDMA, GOVERNMENT OF INDIA (2007).

⁷¹GO Ms. No. 172, *infra* note 83, at 11.

An effort was made in involving the beneficiaries in actual building of their homes. Yet the mission remained far from being accomplished. As it was reported that only 2.22 per cent of the people employed in the post-Tsunami construction work were from the affected villages, even though they desperately needed the work.⁷²

It is encouraging to note that after the Uttarakhand floods, to ensure community participation, the Government with funds from the World Bank proposed to the affected people whose houses got completely destroyed, to choose between prefabricated houses and ‘owner-driven’ constructed houses. To build their houses, the State of Uttarakhand issued a Government Order (GO) for providing Rs 5 lakh per unit in four installments after completion of certain phases of the work.⁷³ The names of all 2,497 beneficiaries along with the names of their respective villages, financial details, date of payment of the last installments and even their mobile numbers are uploaded on the website.⁷⁴ This practice augurs for transparent governance.

While the initiative is praiseworthy, it has not been devoid of pitfalls. First of all, it took a long time for the initiative to take off and the people were forced to stay in tents for months even in harsh winter.⁷⁵ In a recent interaction with the author, Gopal Thapliyal, Project Manager of an NGO working in Uttarkashi district of the State expressed his displeasure regarding the project. Besides pointing out the delay in the construction process, he does not find the process as participatory as the beneficiaries have been left to fend on their own and there is no proper supervision of the project. According to him, it should have been guided by professional contractors or engineers appointed by the government to approve the

⁷²Nagaraj Srinivasan & Venkatesh, *The State and Civil Society in Disaster Response: An Analysis of the Tamil Nadu Experience*, J. SOC. WORK DISABIL. REHABIL (2005).

⁷³G.O. No. 1024/F/XVIII-(2)/2013-16(5)/2013, Disaster Relief and Rehabilitation Department, Govt. of Uttarakhand (2013).

⁷⁴*Housing: About ODCH, UK DISASTER RECOVERY*, <http://ukdisasterrecovery.in/index.php/projects/udrp1/hpb>.

⁷⁵Kavita Upadhyay, *Housing in limbo in deluge-hit Uttarakhand*, THE HINDU (Jan. 2, 2014), <http://www.thehindu.com/news/national/other-states/housing-in-limbo-in-delugehit-uttarakhand/article5527280.ece>.

plans and modifications desired by individual families according to their need. There could have a provision of payment of their professional services and surprise checks to ensure that the construction is taking place according to the respective bye-laws of the local authorities.⁷⁶

At times, if situation demands, community members may be inducted in informal manner which enhance confidence in the reconstruction program. E.g. in Mexico City following an earthquake in 1985, 'Renovation Councils' with elected representatives were formed for each reconstruction or rehabilitation site. Those councils did not have a legal status; yet, they provided an effective forum for community members to represent their needs to the authorities.⁷⁷ This is very much possible through meeting in the panchayats and municipal bodies in case of our country.

Community participation also helps in proper identification of the beneficiaries. This is crucial but it can prove expensive; as it happened in case of one NGO active in the Knin area of Croatia, which spent 22 per cent of its housing construction budget on identifying the target group.⁷⁸ Good local knowledge about the community assists in identifying the most vulnerable, and ensuring that the program actually reaches the target groups.

One of the finest examples of community participation was witnessed in the post-1993 earthquake in Maharashtra which damaged around 230,000 houses. The government of Maharashtra created the Maharashtra Emergency Earthquake Rehabilitation Program (MEERP) with assistance from the World Bank. For relocated communities, the MEERP ensured that the beneficiaries were engaged in every stages of the construction process from selection of the beneficiaries to the design of houses. To ensure fairness, final decisions were taken in plenary meetings of the

⁷⁶Interview of Gopal Thapliyal, Project Manager, Shri Bhuvneshwari Mahila Ashram, Uttarkashi, Uttarakhand (Jul. 29, 2015).

⁷⁷Barakat, *supra* note 6, at 6.

⁷⁸Barakat, *supra* note 6, at 11.

whole village. Once the construction was completed, houses were allotted to beneficiaries in an open consultation with the entire village.⁷⁹

For in situ reconstruction or repair, it was an owner driven process where the owners took charge of the construction with materials and financial and technical assistance provided by the government. The coupons for construction materials were transferred to the bank accounts, opened for this purpose, directly. Each village formed a beneficiary committee, even consisting of women self-help groups, to work with the project management unit. In the process the beneficiaries became well-aware of their entitlements and MEERP transformed into a people's project.⁸⁰

D. Forced Relocation/Eviction

In the aftermath of a disaster, decisions whether to relocate and rebuild in a new area, or to rebuild on the same site become extremely sensitive. Settlements do not come into existence arbitrarily; various social, cultural and economic reasons dominate communities' preference of one place over the other. Hence, forcing them could prove destructive for the lives of the members in the settlement. Findings from UN shelter projects in 1970s and 1980s reveal that survivors generally prefer residing as close as possible to their original homes and means of livelihood, and strongly oppose to forced evacuation.⁸¹

Two years after the Latur earthquake in 1991, a report revealed that 97 per cent of people from 52 villages were happy with in situ homes, whereas only 48 per cent were happy with their relocated homes, which cost 3 to 10 times more. The Gujarat Earthquake Reconstruction and Rehabilitation Policy was an improvement in this regard as it offered the people with a choice to stay back or relocate to a new place. However, findings of study released ten months after the 2001 earthquake had a

⁷⁹Barakat, *supra* note 6, at 34.

⁸⁰Barakat, *supra* note 6, at 34.

⁸¹Barakat, *supra* note 6, at 27.

different story to tell. It revealed that people had abandoned their ‘new’ homes and relocated back to their old settlements.⁸²

Despite the documentation of such negative impact of forcible relocation, disaster victims in India continue to suffer against the norms enshrined in the UN Guiding Principles on IDPs. To illustrate further, GO Ms. No. 172⁸³ was purportedly issued by the Government of Tamil Nadu inducing people to relocate outside the coast in lieu of a new house provided by the government. According to the GO, in case of partly damaged houses built before 1991⁸⁴ within 200 metre of the High Tide Line, the owners would get a new house worth Rs 1.5 lakh, constructed by the government; provided the owners are willing to move beyond 200 metre. However, the owners unwilling to move out would undertake all the repair work without any government assistance. In case of fully damaged houses there was no option but of moving out, as new construction in the same place was strictly prohibited according to this GO. This appeared to be a conscious policy of the government forcing the helpless people to relocate. Willing owners were asked to relinquish their old property to the government in favour of a new abode. The old property so relinquished by the owners would be used for ‘public purposes’. Nothing is mentioned about the nature of these public purposes. In such circumstances, there would be no legal hindrance for the State Government to go ahead even with tourism projects at the expense of those poor people.⁸⁵

Under the pretext of enforcing the Coastal Regulation Zone Notification, 1991,⁸⁶ while the Government apparently issued the distance limitation out of concern for the safety of the coastal communities, it did not do so

⁸²GO Ms. No. 172, *infra* note 83, at 11.

⁸³GO Ms. No. 172, Revenue (NC.III) Department, Government of Tamil Nadu (Mar. 30, 2005), <http://www.tn.gov.in/gosdb/gorders/rev/rev-e-172-2005.htm> [hereinafter GO Ms. No. 172].

⁸⁴The year has reference to the enforcement of Coastal Regulation Zone (CRZ) Notification.

⁸⁵Subhradipta Sarkar & Archana Sarma, *Disaster Management, 2005 – A Disaster in Waiting?*, 41(35) THE ECO. & POL. WEEKLY, 3763 (2006).

⁸⁶The Notification issued under the provisions of the Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986.

in case of luxury resorts and hotels for exceeding the stipulated distance. Evicting fisher folk from the coast not only leads to their displacement, it has an enormous ramification on their livelihood as fishing activity demands the community to stay nearby the shore. Therefore, such forced evictions constitute gross violations of human rights such as the right to housing and thereby the right to an adequate standard of living.⁸⁷

Some attempts of forced eviction were reported by NGO coordination, namely, the Tsunami Relief and Rehabilitation Coordination (TRRC) of Tamil Nadu and Pondicherry. In one village, Anna Nagar Kuppam, in Tamil Nadu, the TRRC alleged that the authorities had deterred coastal communities from replacing huts washed away by the waves, shut off electricity and water utilities to remaining houses, and removed their children from local schools. However, the forced location was stayed by the Madras High Court in an interim injunction after the TRRC had filed a writ petition in that matter.⁸⁸ All these instances demonstrate that we have to travel a long way to ensure right to restitution, as set out in Pinheiro Principles, for those displaced people.

IV. ROLE OF THE JUDICIAL & HUMAN RIGHTS INSTITUTIONS

A. *Judgments Of Indian Courts*

It is very regrettable that the natural disaster management, on a whole, has received a step-motherly behaviour from our judiciary.⁸⁹ Though not in the context of disaster, it is significant to mention that in Chameli

⁸⁷*From Relief to Recovery*, SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE (Jul. 28, 2005), <http://www.hrdc.net/sahrdc/hrfeatures/HRF123.htm>.

⁸⁸ GO Ms. No. 172, *supra* note 83, at 16.

⁸⁹Subhradipta Sarkar & Archana Sarma, *Disaster Management: A Black Hole in Indian Judicial System*, 26(6) LEGAL NEWS AND VIEWS, 20 (2012).

Singh v. State of Uttar Pradesh,⁹⁰ the Supreme Court of India has expounded its own concept of a shelter. The Court observed:

“Right to shelter . . . includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. . . . Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right.”

There are few instances where the constitutional courts have delivered judgments in protecting right to shelter in post-disaster situations. In *Kranti v. Union of India*,⁹¹ the Supreme Court was forced to intervene in various problems faced by the by the inhabitants of the Andaman and Nicobar Islands in the aftermath of the Tsunami and issue directions including exploring the feasibility of constructing houses/huts in the traditional manner and design, and using climate-friendly material, such as timber.

In *Ambikapathi @ Vinayagam v. Union Territory of Pondicherry*,⁹² writ petitions were filed before the Supreme Court against the Government for acquiring land from private individuals by invoking extraordinary powers under Section 17 of the Land Acquisition Act, 1894, for the purpose of providing house sites to Tsunami affected victims. The petitions argued that they were unfairly deprived of the opportunity to put forth their objections against the acquisition of their lands despite the fact that there was a procedural delay of around 14 months. Moreover, the land fell under ‘No Development Zone’, i.e. within 200 meters from High Tide Line (HTL), as per the CRZ Notification, and hence, no construction might be allowed and that no prior environmental clearance certificate was obtained. Moreover, there were alternative lands available for the purpose. The Court dismissed the petitions and held whether there was

⁹⁰Chameli Singh v. State of Uttar Pradesh, (1996) AIR 1051 (SC).

⁹¹Kranti v. Union of India, (2007) 6 SCC 744.

⁹²Ambikapathi @ Vinayagam v. Union Territory of Pondicherry, (2008) 2 M.L.J. 513 (“**Ambikapathi @ Vinayagam**”).

urgency or which land is suitable – the administrative discretion lies solely with the Government and it is not amenable to judicial review. However, it shall not be formed arbitrarily or capriciously or with a *malafide* or oblique motive. With reference to the CRZ norms, some of the proposed lands were outside the CRZ and others fell under CRZ - II as per Pondicherry Coastal Zone Management Plan where construction of houses was a permissible activity. However, clearance should be obtained from the Town and Country Planning Department before starting any construction activity in such land. Nevertheless, the Court directed the Government to pay appropriate compensation for acquiring the land to the petitioners without much delay.

The case of *Bipin Chandra Diwan v. State of Gujarat*,⁹³ was regarding relief and rehabilitation in general, and hence, deserves mentioning here. As there was no statutory law at that time, the Court invoked Article 21 of the Constitution of India which guarantees to every citizen protection of his life and personal liberty, and is repository of all important human rights. Moreover, reference was made to the doctrine of ‘*Parens Patriae*’ which refers to the obligation of the State to protect and take into custody the rights and privileges of its citizens for discharging its obligations. If necessary, the National Human Rights Commission (NHRC) may also act in accordance with the provisions of Section 12(b)⁹⁴ of the Protection of Human Rights Act, 1993, in redressing the complaints of violation of human rights. Right to adequate housing will naturally be encompassed under Article 21.

B. References to Foreign Court Judgments

Any discussion on the protection of the right to adequate housing will remain incomplete without reference to the notable judgment from the Constitutional Court of South Africa in the case of the *Government of the*

⁹³*Bipin Chandra Diwan v. State of Gujarat*, (2002) AIR 99 (Guj).

⁹⁴Protection of Human Rights Act, 1993, Sec. 12. Functions of the Commission. – The Commission shall perform all or any of the following functions, namely:- . . . (b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court; . . .

Republic of South Africa and others v. Grootboom.⁹⁵ The respondents were evicted from private property and living in temporary shelter which became unsustainable for living because of the winter rains. They prayed for the enforcement of their right to basic shelter till they obtained permanent housing. The Court held that, although there was a comprehensive housing legislation and policy in place aimed at the progressive realization of the socio-economic right to adequate housing, they failed to take into account the situation of people in desperate need. The Court applied a test of reasonableness to the housing policy and concluded that it did not meet this test, as a reasonable part of the national housing budget was not devoted to such people. While the Court found that the State had no obligation to provide housing immediately upon demand, there is a negative obligation to ensure that the right is not impaired for those in desperate need. Additionally, the Court asked the State to devise and implement an appropriate program ensuring progressive realization of the right and devote reasonable resources towards the implementation of the same.

Failure of the State in protecting victims' right to adequate housing is not peculiar to India. It has been noted in the US that the failures of Federal Emergency Management Agency (FEMA) in managing various disasters in 1980s and 1990s were repeated in the wake of Hurricane Katrina.⁹⁶ In *McWaters v. FEMA*,⁹⁷ the first lawsuit against FEMA related to Hurricane Katrina, it was inter alia alleged that FEMA failed to provide adequate information and temporary housing assistance to the victims as mandated by the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 – the principal disaster management legislation. Pursuant to the non-liability provision in the Act,⁹⁸ the federal government is not liable for any claim based on the exercise or performance of a discretionary function or duty in carrying out the provisions of the Act. Hence, FEMA argued that the alleged acts and/or

⁹⁵The Government of the Republic of South Africa and others v. Grootboom, (2000) ZACC 19.

⁹⁶John K. Pierre and Gail S. Stephenson, *After Katrina: A Critical Look at FEMA's Failure to Provide Housing for the Victims of Natural Disasters*, 68 LA. L. REV. (2008).

⁹⁷*McWaters v. FEMA*, (2006) 408 F. Supp. 2d 221.

⁹⁸42 U.S.C. § 5148 (2006).

omissions were all discretionary in nature and consequently immune from judicial review. The court held that non-liability provision does not expressly shield FEMA from constitutional violations or violations of mandatory duties. It further held that the victims of natural disasters have a property interest in temporary housing assistance created by the Stafford Act and that is protectable under the Due Process Clause. Therefore, such administrative action cannot preclude judicial review under the garb of sovereign immunity.

C. Role of the NHRC

The role of the National Human Rights Commission has not been consistent in the mega disasters. After the cyclone wreaked havoc in the coastal districts of Orissa in 1999, the NHRC considered it imperative to take *suo motu* cognizance of the situation. The Special Rapporteur, Chaman Lal, visited the affected areas for damage assessment, interacted with the officials at various levels and submitted a detailed report to the NHRC. Based on this report, the NHRC made specific directions/recommendations to the State Government in respect of housing⁹⁹ including construction of cyclone shelters, an action plan for each district to undertake the rehabilitation work and establishment of appropriate machinery for monitoring long-term rehabilitation measures.

In case of Gujarat earthquake, many of the directions were similar to that of Orissa. In particular, the Commission urged the State Government to hasten the work for the rehabilitation of the affected population and to ensure that temporary shelters were provided to all quake-affected people before the onset of the monsoon. In his report, the Special Rapporteur indicated various inadequacies in the rehabilitation process.¹⁰⁰ E.g. A number of houses constructed by outside agencies was lying un-occupied because the beneficiaries were not willing to accept relocation. It resulted in a colossal waste of scarce funds.

⁹⁹National Human Rights Commission, Annual Report 1999 – 2000, 6.5.

¹⁰⁰National Human Rights Commission, Annual Report 2004 – 2005, 152 – 54.

The victims, who had been tenants, were facing lot of difficulties since they had lost their documents, either due to passage of time or in the quake. They had no proof to establish their tenancy rights. There were 1,000 such families who were awaiting decision of the Government for allotment of land.

Regarding updating the building bye-laws, while some progress was made, a lot remained undone. There was no qualification required to become a builder. The structural engineers hardly verify whether the structures were properly put up. They did not have the time to check the quality and adequacy of the materials used.

Although the NHRC made a commendable beginning during the Orissa Super Cyclone but the task remained undone due to lack of sustained commitment. The NHRC should have appointed a Special Rapporteur on Adequate Housing whose mandate should also include housing rights of the disaster victims. Alternatively, there could be a Special Rapporteur on Rights of the Victims of Disasters who would report periodically to the Commission about the violation of human rights including housing rights of such victims.

V. DISASTER MANAGEMENT LAW AND POLICY REGIME

A. Disaster Management Act

The Disaster Management Act, 2005, provides for setting up a chain of disaster management authorities right from the central government to the district and local levels to draw, implement and execute a disaster management action plan. Unfortunately, rights perspective does not feature in the Act except Section 12 which obligates the National Disaster Management Authority (NDMA) to recommend guidelines for the minimum standards of relief to be provided to the affected communities. Interestingly, it includes relief camps in relation to shelter. Yet it there is no mention of the permanent housing. The Review of the Act does not add anything noteworthy in this matter.

B. National Policy On Disaster Management

The National Policy on Disaster Management requires the District Disaster Management Authorities (DDMAs) to set up the temporary relief camps and ensure basic facilities therein. The intermediate shelters with suitable sanitary facilities will be undertaken to ensure a reasonable quality of life to the affected people. It emphasizes that design of such shelters need to be eco-friendly and in consonance with local culture. The onus is on the State Disaster Management Authorities (SDMAs) to plan during periods of normalcy, the layout of intermediate shelters which is cost-effective and as per local needs with multi-use potential.¹⁰¹

For reconstruction, owner driven approach should be preferred. It is desirable that permanent housing must be completed within two to three years with dedicated project teams constituted by the State Governments. The entire process must be inclusive in nature incorporating various stakeholders. During periods of normalcy, the SDMAs should prepare the layout of intermediate shelters/permanent houses which are cost-effective and as per local needs with multi-use potential.¹⁰²

C. National Disaster Management Guidelines

The NDMA has published an array of guidelines for different types of disasters. For consideration of the component of the housing, the author has referred to the Guidelines relating to the management of floods and earthquake.

a) National Guidelines on the Management of Floods

The National Guidelines on the Management of Floods acknowledged that absence of flood shelters as a major gap in flood management of the country.¹⁰³ As a measure of flood proofing, they suggest various techniques including providing raised platforms for flood shelter for

¹⁰¹*National Policy on Disaster Management*, NDMA, GOVERNMENT OF INDIA (2009).

¹⁰²*Id.* at 31.

¹⁰³*National Disaster Management Guidelines: Management of Floods*, NDMA, GOVERNMENT OF INDIA (2008).

human and cattle, raising the public utility installation especially the platforms for drinking water hand pumps and bore wells above flood level, promoting construction of double-storey buildings wherein the first floor can be used for taking shelter during floods. It would be the responsibility of the state governments/SDMAs to provide adequate number of raised platforms/flood shelters at suitable locations in the flood plains with basic amenities such as drinking water, sanitation, medical treatment, cooking, tents, lantern etc. for the people to take shelter during floods.¹⁰⁴ As a part of preparedness, the Guidelines emphasize on the construction of suitable shelters for the flood-affected people during the relief period. Such shelters should be designed, with minimum health and hygiene standards, in accordance with the appropriate climatic conditions. The responsibility for evolving such structure rests on the Ministry of Water Resources, in consultation with various expert bodies, e.g. Central Water Commission, Brahmaputra Board, Central Building Research Institute, etc., and the state governments. Nonetheless, the State Governments/SDMAs through the district and local authorities must ensure that schools, anganwadis or other similar facilities are maintained properly so that they are available in good condition during floods as and when required.¹⁰⁵

b) National Guidelines on The Management of Earthquakes

The NDMA Guidelines on the Management of Earthquakes is primarily concerned with safe buildings. They call for adoption of earthquake-resistant structure for all new buildings including residential housing. The state governments/SDMAs were urged to organise capacity building programs among professionals and masons for the aforementioned purpose. It also prescribed a deadline of completing the project within one and half year ending in December 2008. In reality, it remained an ambitious project with no practical implication whatsoever. Additionally, it recommended BIS Codes to be simplified and easily available in the interest of the public. It also suggested mandatory licensing and certification of the professionals involved in building structures – both

¹⁰⁴*Id.* at 32.

¹⁰⁵*Id.* at 54.

private and public. Architects and engineers licenses would only be renewed only after certification of their proficiency in seismic safety standards and codes. Artisans should also be certified by the state governments by following a five year licencing cycle.¹⁰⁶

VI. CONCLUSION

Right to adequate housing is pivotal in enjoying other associated rights and bringing the affected community back to normalcy. Progress has been made in India from the Super Cyclone days, yet certain problems continue to recuperate after every disaster. Local resources, needs, perception and constraints associated with the right pose humongous governance challenge to the State. If the State is committed to the cause of ensuring the right to the victims of disaster, it is imperative to prepare a policy for the same taking the following points into consideration:

1. India has ratified ICESCR. Hence, it is important that Government of India to ensure that the concept of adequate housing advocated by the CESCR is carried out in letter and spirit.
2. The State is under an obligation to provide access to right to shelter for the people rendered homeless after disasters. The Bipin Chandra Diwan judgment requires more publicity which emphatically pronounces the duty of state in a disaster situation. Our judiciary may also take note of the McWaters case from the US in this regard.
3. Every district authority must identify places for temporary as well as permanent shelters beforehand to avoid unnecessary litigation as the Ambikapathi case. It will help in accelerating the rebuilding of the lives of the disaster victims.
4. Forced eviction must be prohibited at all cost. Apart from abiding by the UN Guiding Principles on IDPs, the judgment of the South

¹⁰⁶Ambikapathi @ Vinayagam, *supra* note 92, at 17, 18.

African court in the Grootboom case may be referral point.

5. Property restitution, according to the Pinheiro Principles, should be considered for people who had been displaced arbitrarily.
6. The NDMA Guidelines serve no purpose other than academic interest. They are more peripheral in nature rather than practical guidelines as the Sphere standards. The NDMA must invest energy and resources to formulate similar guidelines which can be used in the field.
7. Every district authority must identify agencies and professionals equipped in building disaster-resilient houses, in advance.
8. Without community participation in its true sense, right to adequate housing will always remain a distant dream. We have gradually progressed and it is evident from the owner-driven housing project in Uttarakhand; nevertheless there is still scope for improvement. Additionally, experiences learnt through MEERP need replication.
9. The NHRC require mainstreaming the human rights violations faced by the disaster-victims by giving more visibility to the issue. As a first step towards that matter could be by appointing a thematic Special Rapporteur as suggested above and take appropriate actions on the periodic reports prepared by such Rapporteur.
10. Incorporation of the best practices from other countries and efforts to put them into action with local adjustments will further strengthen our housing reconstruction strategies.

These suggestions are destined to go a long way in safeguarding the right of the victims of disaster to enjoy environmentally, socially and financially sustainable housing.