

WHEN DISASTER STRIKES  
A HUMAN RIGHTS ANALYSIS OF THE 2005 GULF  
COAST HURRICANES

IN RESPONSE TO THE UNITED STATES' PERIODIC REPORT UNDER THE  
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS  
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## I. EXECUTIVE SUMMARY

In August and September of 2005, two powerful hurricanes slammed into the Gulf Coast of the United States, flattening coastal towns in Texas, Louisiana, Mississippi and Alabama. The storms claimed over a thousand lives and uprooted millions of people from their homes.<sup>1</sup> In images broadcasted on the nightly news, two groups of individuals stood out – one for its visibility and the other for its absence. Heartrending images of African American Gulf Coast residents pleading for assistance from rooftops above toxic waters reminded the United States of its legacy of discrimination and the persistence of poverty. The fate of immigrant communities living on the Gulf Coast remained conspicuously unaddressed by mainstream media.

The suffering of hundreds of thousands of poor people of color was not only the result of nature's fury but of the failure of the United States government to adequately and effectively plan for and respond to one the most anticipated disasters in U.S. history. Unfortunately, the U.S. government has not learned from its mistakes. The needs and the rights of low-income African Americans and immigrants continue to be largely ignored during the reconstruction and resettlement efforts currently underway.

This analysis responds to the United States government's periodic report under the International Covenant on Civil and Political Rights. Notably, the government's official report omits any mention of the government's planning and response to Hurricane Katrina despite the storm's significant impact on the human rights of Gulf Coast residents. Based on a review of government reports, documentation published by nongovernmental organizations, and newspaper reports this submission highlights how the government's failure to incorporate human rights protections in natural disasters preparedness, response and recovery has affected the human rights of low-income African American and immigrant communities.

This analysis concludes that:

- Preexisting human rights conditions rendered low-income African American and immigrant communities particularly vulnerable to the destructive forces of Hurricane Katrina;
- The failure of the U.S. government to take into account the preexisting vulnerabilities of African American and immigrant communities in its natural disaster planning jeopardized the welfare of these populations;
- The U.S. government did not ensure low-income African American and immigrant populations adequate and accessible emergency assistance in a nondiscriminatory manner;

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<sup>1</sup> Committee on House Government Reform: Subcommittee on Select Katrina Response Investigation, Oct 19, 2005. (Testimony by Michael Chertoff, Security Secretary) (hereinafter "Chertoff testimony". See also Spencer Hsu, *2 Million Displaced By Storms*, WASH. POST, Jan. 13, 2006.

- The U.S. government has not adopted the necessary measures to ensure the right of return of African Americans and immigrants displaced by the storm. The government has failed to ensure community participation in reconstruction efforts, the residents' right to property, the residents' right to shelter and a safe and healthy environmental conditions in disaster-affected regions; and
- The U.S. government has a duty to safeguard the human rights of individuals participating in the cleanup and reconstruction effort.

Based on these conclusions, we respectfully request that the Human Rights Committee adopt the following draft concluding observations:

- The Committee is concerned that the U.S. Government's failure to take into account the pre-existing vulnerabilities of African American and immigrant communities in developing evacuation plans jeopardized the personal integrity of members of these communities and contributed to loss of life. The Committee recommends that the State party takes positive measures required by Articles 2.1, 6 and 26 to ensure that victims receive equal treatment in the evacuation context by, for example, providing publicly-accessible transportation and requiring multi-lingual emergency warnings.
- The Committee is concerned that emergency humanitarian assistance was not available and accessible to African-American and immigrant communities in a non-discriminatory manner. The Committee recommends that the State party takes positive measures, required by Articles 2.1 and 26 to ensure that members of racial minorities and immigrant communities can obtain life-saving assistance by developing and implementing human rights standards for aid policies and programs as well as mechanisms for monitoring human rights compliance with said standards.
- The Committee is concerned that post-Katrina reconstruction does not promote the right of displaced minority communities to return. The Committee recommends that the State party improves community participation in reconstruction planning and implementation, guarantees the right to property and shelter, and ensures safe and healthy environmental conditions in disaster-affected regions.
- The Committee is concerned about reports of abuses of worker's rights committed by federal contractors including allegations regarding the failure of employers to pay workers as well as egregious violations of health and safety standards. The Committee recommends that the State party strengthen employer accountability for labor violations by allocating adequate resources to monitor and enforce labor laws in the region.

## II. INTRODUCTION<sup>2</sup>

In August and September of 2005, two powerful hurricanes slammed into the Gulf Coast of the United States, flattening coastal towns in Texas, Louisiana, Mississippi and Alabama. Over a thousand lives were lost, and millions of people were uprooted from their homes.<sup>3</sup> In images broadcasted on the nightly news, two groups of individuals stood out – one for its visibility and the other for its absence. Heartrending images of African American Gulf Coast residents pleading for assistance from rooftops above toxic waters reminded the United States of its legacy of discrimination and the persistence of poverty. The fate of immigrant communities living on the Gulf Coast remained conspicuously unaddressed by mainstream media.

The suffering of hundreds of thousands of poor people of color was not only the result of nature's fury but of the failure of the government of the United States of America ("the U.S. Government" or "the State") to address the preexisting vulnerabilities of these communities in disaster planning and response. Unfortunately, the State has not learned from its mistakes. The needs and the rights of low-income African Americans and immigrants continue to be ignored during the reconstruction and resettlement efforts currently underway.

Natural disasters have devastating and far-reaching effects on the impacted communities, but these negative consequences can be significantly reduced with adequate government planning.<sup>4</sup> Under international law, it is the duty of the State to ensure that the human toll of natural disasters is minimized not only through effective humanitarian response, but also by addressing the human rights challenges that victims may face.

As evidenced by the 2004 Tsunami, groups vulnerable before a catastrophe strikes – the economically disadvantaged, racial or ethnic minorities, women and children, the elderly, undocumented and documented immigrants and refugees, and persons with disabilities – are those exposed to the greatest risk of human rights violations after the disaster. The failure of national authorities and humanitarian organizations to take the preexisting vulnerabilities of these at-risk populations into account in disaster response exposes these populations to the risk of numerous human rights violations.

This submission highlights the importance of incorporating human rights protections in natural disasters preparedness, response and recovery through an assessment of the impact of Hurricanes Katrina and Rita ("the Gulf Coast Hurricanes") on the human rights of low-income African American and immigrant communities. We will argue that the U.S. Government failed to comply with the ("ICCPR") on Civil and Political Rights by protecting the right to life of Gulf

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<sup>2</sup> This document was written by the International Human Rights Law Clinic at the University of California, Berkeley School of Law (Boalt Hall) by Clinical Interns Azmina Jasani, Emily Proskine, and Teresa Wang, under the direction of Clinical Lecturer Roxanna Altholz and edited by Clinical Professor Laurel Fletcher.

<sup>3</sup> Committee on House Government Reform: Subcommittee on Select Katrina Response Investigation, Oct 19, 2005. (Testimony by Michael Chertoff, Security Secretary) (hereinafter "Chertoff testimony". See also Spencer Hsu, *2 Million Displaced By Storms*, WASH. POST, Jan. 13, 2006.

<sup>4</sup> Marjorie Cohn, *The Two Americas*. TRUTHOUT PERSPECTIVE. Sept. 3, 2005, at [http://www.truthout.org/docs\\_2005/printer\\_090305Y.shtml](http://www.truthout.org/docs_2005/printer_090305Y.shtml). Cuba is an example of best practice. When a Category 5 storm hit Cuba in September 2004, 1.5 million people were evacuated to higher ground. 20,000 houses were destroyed but not one person died. The key to Cuba's success was early warning and a civil defense strategy: people knew where to go. *Id.*

Coast residents in a non-discriminatory manner through effective and appropriate planning and response to the 2005 Gulf Coast Hurricanes.

There are four specific objectives of this document. First, it provides the Human Rights Committee (“the Committee”) with general factual information related to the Gulf Coast Hurricanes’ impact on the affected region. Second, it identifies and explores the preexisting human rights conditions that rendered low-income African American and immigrant communities particularly vulnerable to the destructive forces of the Gulf Coast Hurricanes. Third, it sets forth the human rights legal framework that applies in natural disaster contexts. Finally, it evaluates the U.S. Government’s practices and policies regarding evacuation, humanitarian assistance, return and reconstruction in light of its international human rights obligations.<sup>5</sup>

### III. BACKGROUND

#### a. The Gulf Coast Hurricanes

Hurricane Katrina was called the most anticipated disaster in modern U.S. history:<sup>6</sup> Government officials, including the Federal Emergency Management Agency (“FEMA”), the lead governmental agency for disaster preparedness,<sup>7</sup> as well as scientists and journalists had warned of a major hurricane hitting the Louisiana city of New Orleans for years.<sup>8</sup> Nonetheless, when Hurricane Katrina<sup>9</sup> struck, the Gulf Coast region was woefully ill-prepared.<sup>10</sup> As predicted, Hurricane Katrina caused “human suffering incredible by modern standards.”<sup>11</sup>

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<sup>5</sup> This report examines the State’s responsibility in protecting the victims of natural disasters in light of the International Covenant on Civil and Political Rights (“ICCPR”), including the principle international human rights’ treaties and relevant international instruments like the United Nations Guiding Principles on Internally Displaced Persons, the International Covenant for Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UN Charter.

<sup>6</sup> Hobart King, *Rebuilding New Orleans*, Jan. 12, 2006, available at [www.geology.com](http://www.geology.com).

<sup>7</sup> See FEMA Website, at <http://www.fema.gov>. FEMA was formerly an independent agency that became part of the new Department of Homeland Security in March 2003. FEMA is tasked with responding to, planning for, recovering from and mitigating against disasters. FEMA traces its beginnings to the Congressional Act of 1803, the first piece of disaster legislation that provided assistance to a New Hampshire town following an extensive fire. “About FEMA: FEMA History,” FEMA Website, at <http://www.fema.gov/about/history.shtm>.

<sup>8</sup> Jia-Rui Chong and Hector Becerra, *Katrina’s Aftermath*, L.A. TIMES, Sept. 8, 2005, at A1. “U.S. Geological Survey seismologist Lucy Jones remembers attending an emergency training session in August 2001 with the Federal Emergency Management Agency that discussed the three most likely catastrophes to strike the United States. First on the list was a terrorist attack in New York. Second was a super-strength hurricane hitting New Orleans. Third was a major earthquake on the San Andreas fault. *Chertoff: Katrina Scenario did not Exist*, CNN.COM, Sept. 5, 2005.

<sup>9</sup> Valerie Bauerlein, *Battle Rages over Cause of Deadly Storms*, WALL ST. J., Feb. 19, 2006.

<sup>10</sup> See *An Unnatural Disaster: The Aftermath of Hurricane Katrina*, A Center for Progressive Reform Publication, Sept. 2005, available at [http://www.progressivereform.org/Unnatural\\_Disaster\\_512.pdf](http://www.progressivereform.org/Unnatural_Disaster_512.pdf).

<sup>11</sup> Giles Whittell, *Warnings were Loud and Clear - but Still City Drowned*. TIMES ONLINE, Sept. 8, 2005, available at <http://www.informationclearinghouse.info/article10193.htm>.

In the early morning of August 29, 2005, Hurricane Katrina made landfall just east of New Orleans, Louisiana.<sup>12</sup> The subsequent storm surge overtopped the inadequately constructed and maintained levees along the Mississippi River and Lake Pontchartrain and caused extensive flooding across the region.<sup>13</sup> More than a third of the region's 1.7 million residents were affected by flooding or moderate to catastrophic storm damage.<sup>14</sup> The storm displaced over two million people and killed more than 1,300 Gulf Coast residents.<sup>15</sup> Eight months later, approximately 1,400 people remain missing.<sup>16</sup> Hurricane Katrina is one of the costliest natural disasters in U.S. history, and damages are estimated between \$75 and \$200 billion.<sup>17</sup>

In New Orleans, when critical levees protecting the city from flooding broke thousands were stranded without power, food, or drinking water for more than four days.<sup>18</sup> Although New Orleans captured the majority of the media attention, the situation elsewhere in the Gulf region was similarly dire. A report issued by the U.S. House of Representatives found that in neighboring Mississippi, Hurricane Katrina "completely flattened entire neighborhoods in communities such as Waveland, Bay St. Louis, and Pass Christian."<sup>19</sup> Even well inland from the Gulf of Mexico, the damage was extensive: sixty percent of Mississippi, an area of 28,000 square miles, was transformed into "a catastrophic disaster area."<sup>20</sup> Yet despite this devastation, in many areas of Mississippi, there was no visible government assistance for days.<sup>21</sup>

Less than one month later, Hurricane Rita's 9-foot storm surge hit coastal towns in Louisiana and Texas, taking the lives of over one hundred people and causing \$4.7 billion in

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<sup>12</sup> Willie Drye, *Hurricane Katrina Smashes Gulf Coast*, NATIONAL GEOGRAPHIC NEWS, Aug. 29, 2005. Hurricane Katrina grew from a tropical depression near the Bahamas on August 23, and touched down as a Category I storm in Florida on August 25, killing 11 people in its wake. *Id.*

<sup>13</sup> *Is Bush to Blame For New Orleans Flooding?* FACTCHECK.ORG, Sept. 2, 2005, available at <http://www.factcheck.org/article344.html>. In 2005 the Army Engineers Corps requested \$22.5 million for the Lake Pontchartrain levee project, but Congress allocated only \$3.9 million; Congress increased the amount to \$5.5 million. The Corps' fact sheet notes that "Seven contracts are being delayed due to lack [of] funds." For fiscal year 2006 the administration's proposed appropriation fell further to \$3.0 million and the overall budget of the New Orleans District of the Corps was cut by \$71.2 million. *Id.*

<sup>14</sup> John Logan, *The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods*, Brown University, 2005 (hereinafter "Brown University Study"). The majority of people living in damaged areas were in the city of New Orleans (over 350,000), with additional concentrations in suburban Jefferson Parish (175,000) and St. Bernard Parish (53,000) and along the Mississippi Coast (54,000). *Id.*

<sup>15</sup> See *2 Million Displaced By Storms*, *supra* note 3; Bruce Alpert, *White House Accused of Gag Order*, TIMES-PICAYUNE (New Orleans, LA), Jan. 25, 2006; *Death Toll from Katrina likely Higher than 1,300*, MSNBC, Feb. 10, 2006.

<sup>16</sup> *Still Missing After Katrina: A News Hour with Jim Lehrer Transcript*, PBS, March 21, 2006, available at [http://www.pbs.org/newshour/bb/economy/jan-june06/missing\\_3-21.html](http://www.pbs.org/newshour/bb/economy/jan-june06/missing_3-21.html).

<sup>17</sup> Spencer S. Hsu, *Katrina Report Spreads Blame*, WASH. POST, Feb. 12, 2006, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/02/11/AR2006021101409\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/02/11/AR2006021101409_pf.html).

<sup>18</sup> See *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina*, U.S. House of Representatives, available at <http://a257.g.kamaitech.net/7/257/2422/15/feb2006/230/www.gopaccess.gov/katrinareport/mainreport.pdf>.

(Hereinafter, "Congressional Report"). See also, Tom Planchet, *Updates as They Come In on Katrina*, WLTV.COM, Sept. 6, 2005; *CJ Experience: Hurricane Katrina*, Citizen Journalist's Report at MSNBC.COM, Sept. 28, 2005.

<sup>19</sup> Congressional Report, *supra* note 18, at 8 (note: due to length, the entire report is not included as an exhibit).

<sup>20</sup> *Id.*

<sup>21</sup> Elizabeth Mehren, *'Like We're Invisible'; Katrina cut off an already isolated rural Mississippi, so residents helped one another*, LOS ANGELES TIMES, Sept. 19, 2005, at A1.

damage. The evacuation and relief response, despite the lessons of Hurricane Katrina, remained inadequate.<sup>22</sup> Many poor in the path of Rita could not evacuate and were forced to wait the storm out.<sup>23</sup>

### **b. Preexisting Vulnerabilities of Gulf Coast Low-Income African American and Immigrant Communities**

In the public imagination, natural disasters do not discriminate, but are instead “equal opportunity” catastrophes that do not single out victims by race, class, or gender. However, natural disasters do not occur in historical, political, social, or economic vacuums. Instead, the consequences of such catastrophes replicate and exacerbate the effects of extant inequalities, and often bring into view the implications of historic discrimination, legal status, language barriers, poverty and geographic vulnerabilities. While many vulnerable communities exist in the hurricane-affected region, this section details the preexisting vulnerabilities of low-income African American and immigrant communities which were not adequately addressed by the U.S. Government’s planning and response to the Gulf Coast Hurricanes.

In the United States poverty and race are inextricably linked. African Americans and Latinos are twice as likely as white Americans to be poor; this reality significantly impacted how communities were affected by Hurricane Katrina.<sup>24</sup> In a speech to the nation, President George W. Bush acknowledged this fact: “As all of us saw on television, there is also some deep, persistent poverty in this region as well. And that poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America.”<sup>25</sup>

While most of Gulf Coast citizens fled the region before Hurricanes Katrina and Rita hit, those residents lacking the means to relocate were left behind. The residents who lacked access to personal vehicles for evacuation<sup>26</sup> were overwhelmingly poor and people of color.<sup>27</sup> One study found that thirty-three percent of Latino families living on the Gulf Coast could not evacuate if a disaster were to strike due to lack of transportation; the same reason was cited by twenty-seven percent of African American, and twenty-three percent of white residents.<sup>28</sup> According to the 2004 U.S. Census, over 3.6 million African Americans lived in Alabama, Louisiana and Mississippi prior to Hurricane Katrina. Roughly 270,000 foreign-born persons resided in those three states and, 200,000 of these individuals were Latino.<sup>29</sup> Analysis of these Census figures

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<sup>22</sup> Blaine Harden & Sylvia Moreno, *Thousands Fleeing Rita Jam Roads From Coast*, WASH. POST, Sept. 23, 2005.

<sup>23</sup> Larry Hales, *Hurricane Rita Exposes Capitalists’ Lack of Planning*, WWW.WORKERS.ORG, Sept. 29, 2005, available at <http://www.workers.org/2005/us/hurricane-1006/>.

<sup>24</sup> *Poverty in the United States: 2002*, U.S. CENSUS BUREAU, available at <http://www.census.gov/prod/2003pubs/p60-222.pdf>. In 2002, 8.0 percent of non-Hispanic whites lived in poverty, compared to 24.1 percent African-Americans and 21.8 percent Hispanics.

<sup>25</sup> Congressional Report, *supra* note 18 at 19.

<sup>26</sup> *Essential Facts about the Victims of Hurricane Katrina*, CENTER ON BUDGET AND POLICY PRIORITIES, Sept. 19, 2005.

<sup>27</sup> Brown University Study, *supra* note 14.

<sup>28</sup> *Stalling the Dream: People of Color Less Likely to Own Cars, Less Able to Escape Hurricanes and Poverty*, United for a Fair Economy, Jan. 10, 2006, at [www.faireconomy.org](http://www.faireconomy.org) (hereinafter, “Stalling the Dream”).

<sup>29</sup> Ruth Ellen Wasem, *Hurricane Katrina-Related Immigration Issues and Legislation*, Congressional Research Service Report for Congress, Sept. 19, 2005, available at [http://openers.cdt.org/rpts/RL33091\\_20050919.pdf](http://openers.cdt.org/rpts/RL33091_20050919.pdf).



with the aforementioned survey suggests that nearly 100,000 Latinos and more than one million African Americans may have remained in the Gulf Coast during Hurricane Katrina for the sole reason that they lacked transportation to evacuate the region.

The geography of the Gulf Coast makes the region vulnerable to natural disaster because it is low-lying and situated in a flood plain.<sup>30</sup> New Orleans is particularly vulnerable to natural disaster as the city developed in a ‘shallow bowl’ with an average elevation of 6 feet below sea-level.<sup>31</sup> The erosion of marshlands, which would have acted as natural storm barriers, has increased the region’s geographic vulnerability.<sup>32</sup> Manmade storm barriers did not replace the protection that such natural barriers would have provided, because levees and barriers around Lake Pontchartrain and up the Mississippi River were inadequately constructed.<sup>33</sup> Additionally, the Gulf of Mexico’s warm waters are breeding grounds for hurricanes<sup>34</sup> and the after-effect of such storms, namely storm surges and flooding, carry the greatest potential for loss of life.<sup>35</sup>

Low-income African American communities bore the brunt of the immediate devastation brought on by Hurricane Katrina because, for the most part, these communities were located in the lower-lying, more flood prone areas.<sup>36</sup> A report on New Orleans by the Brookings Institution observed, “With greater means and power, the white population occupied the better-drained sections of the city, while blacks typically inhabited the swampy ‘rear’ districts.”<sup>37</sup> Thus, New Orleans was extremely segregated by both race and income at the time of the storm,<sup>38</sup> and, as the Brookings Institution concluded, “Blacks and whites were living in quite literally different worlds before the storm hit.”<sup>39</sup> Many low-income African Americans lived in concentrated hubs of poverty in the Gulf Coast’s most vulnerable geographic areas. In New Orleans, blacks and other minority groups made up fifty-eight percent of those whose neighborhoods were flooded, though they encompassed just forty-five percent of the metropolitan population.<sup>40</sup>

While this situation was particularly stark in New Orleans, the whole Gulf Coast region suffered from the storm’s exacerbation of these geographic and economic vulnerabilities. The Gulf Coast is one of the poorest regions in the United States. According to the 2004 U.S.

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Jeffrey Passel, a demographer who specializes in unauthorized migration, estimates that 20,000 to 35,000 unauthorized migrants were victims of Katrina. *Id.*

<sup>30</sup> *Mississippi Delta*, Union of Concerned Scientists, Aug. 5, 2005, available at <http://www.ucsusa.org/gulf/gcplacesmis.html>.

<sup>31</sup> Adam Blenford, *New Orleans: Nature’s Revenge?* BBC NEWS, Aug. 31, 2005, available at <http://news.bbc.co.uk/1/hi/world/americas/4201060.stm>.

<sup>32</sup> *Washing Away: In Harm’s Way*, TIMES-PICAYUNE (New Orleans, LA). June 23, 2002, available at <http://www.nola.com/hurricane/?/washingaway/>.

<sup>33</sup> Nicole T. Carter, *New Orleans Levees and Floodwalls: Hurricane Damage Protection*, Congressional Research Service Report for Congress, Sept. 2005, available at <http://www.fas.org/sgp/crs/misc/RS22238.pdf>.

<sup>34</sup> NOAA Scientists Survey Gulf of Mexico’s Warm Water Reservoirs, ‘Fuel Injectors’ For Hurricane Intensification, NOAA, Aug. 3, 1999, available at <http://www.publicaffairs.noaa.gov/releases99/aug99/noaa99r516.html>.

<sup>35</sup> *Id.*

<sup>36</sup> *New Orleans After the Storm: Lessons Learned from the Past, a Plan for the Future*, The Brookings Institution Metropolitan Policy Program, Oct. 2005, available at [http://www.brookings.edu/metro/pubs/20051012\\_NewOrleans.pdf](http://www.brookings.edu/metro/pubs/20051012_NewOrleans.pdf) (hereinafter, “*New Orleans After the Storm*”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Census, twenty-one percent of Mississippi residents live below the poverty line, making it the poorest state in the country.<sup>41</sup> With nineteen percent of its families in abject poverty, Louisiana ranks second.<sup>42</sup> A sluggish economy further depressed these dismal poverty statistics in the Gulf Coast, for example, in New Orleans, forty-four percent of African American males age sixteen or older were not participating in the labor force.<sup>43</sup>

Compounding the effects of these geographic and socioeconomic vulnerabilities, the African American experience in the Gulf Coast region has also been shaped by historic discrimination: “The Deep South is stuck with [a] unique legacy – the legacy of slavery, Jim Crow, and white resistance to equal justice for all.”<sup>44</sup> This discrimination has led to a general distrust of the U.S. Government on the part of segregated communities, as African American communities remain underrepresented in the relevant decision-making bodies, including government regulatory agencies.<sup>45</sup>

The vulnerabilities of the region’s Asian and Latino immigrant communities were also magnified the Gulf Coast Hurricanes, as these populations were subject to both de facto and de jure discrimination by the U.S. Government.<sup>46</sup> Many of these immigrants had come to the Gulf Coast region for employment opportunities, generally in low-wage service jobs. A large number of Latino immigrants were employed by the booming casino industry on Mississippi’s Gulf Coast, while Vietnamese worked in shrimp farming. These immigrant communities tended to be poor as they held low-wage jobs, and many sent remittances to their families abroad.<sup>47</sup>

State immigration policies that denied “unqualified aliens,” many of whom were legally in the U.S., access to public resources, coupled with a general fear of deportation, impeded immigrant integration into the larger society.<sup>48</sup> The shortage of trained bilingual staff limited immigrants’ access to mainstream service providers in the wake of the Gulf Coast Hurricanes.<sup>49</sup> Before the Gulf Coast Hurricanes hit, these barriers and discriminatory practices against immigrants were already pervasive in the region. Just five years ago, Mississippi’s school

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<sup>41</sup> U.S. Census Bureau, *2004 U.S. Census*, available at [http://factfinder.census.gov/servlet/GRTTable?\\_bm=y&-geo\\_id=01000US&-box\\_head\\_nbr=R1701&-ds\\_name=ACS\\_2004\\_EST\\_G00\\_&-format=US-30](http://factfinder.census.gov/servlet/GRTTable?_bm=y&-geo_id=01000US&-box_head_nbr=R1701&-ds_name=ACS_2004_EST_G00_&-format=US-30).

<sup>42</sup> *Id.* Alabama is ninth at 16.1 percent. *Id.*

<sup>43</sup> *New Orleans after the Storm*, *supra* note 36.

<sup>44</sup> Bullard, Robert D., *Dumping in Dixie: Race, class, and environmental quality*. 1990, Boulder, CO: Westview.

<sup>45</sup> Of 27 U.S. Congressional Representatives in Mississippi, Alabama and Louisiana, only 3 are African American. No Asian American or Latino Americans are represented. *See* Contacting the Congress, available at <http://www.visi.com/juan/congress/cgi-bin/newseek.cgi?site=ctc&state=al>; <http://www.visi.com/juan/congress/cgi-bin/newseek.cgi?site=ctc&state=ms>; <http://www.visi.com/juan/congress/cgi-bin/newseek.cgi?site=ctc&state=la>.

<sup>46</sup> Louisiana was home to more than 60,000 Asian Americans, more than half of whom are Vietnamese. *Katrina and the Asian American Community*, National Council of Asian Pacific Americans, available at [http://www.advancingequality.org/files/ncapa\\_katrina.pdf](http://www.advancingequality.org/files/ncapa_katrina.pdf). Southern Mississippi was home to more than 7,000 Asian Americans. In addition to Vietnamese, populations of Lao, Filipino, Chinese, Korean and Bangladeshi lived in the Gulf coast and were affected by the Hurricanes. *Id.* Additionally, approximately 200,000 documented Latino immigrants lived in Louisiana and Mississippi. Diego Cevallos, *Latin American Storm Victims Adrift*, IPS NEWS, Sept. 21, 2005, available at <http://www.ipsnews.net/news.asp?idnews=30370>. Of these, nearly 120-150,000 were Hondurans living in Louisiana. Other Latino populations included Mexicans and El Salvadorans. *Id.*

<sup>47</sup> Katharine Donato & Shirin Hakimzadeh, *The Changing Face of the Gulf Coast*, MIGRATION POLICY INSTITUTE, Jan. 1, 2006.

<sup>48</sup> *See* Cevallos, *supra* note 46; Donato, *supra* note 47.

<sup>49</sup> *Briefing Highlights Katrina’s Toll on Asian American Communities*, CIVILRIGHTS.ORG, Oct. 19, 2005.

system was still refusing to register children of undocumented persons,<sup>50</sup> in violation of a U.S. Supreme Court ruling.<sup>51</sup> Additionally, reports of casinos employing undocumented migrants on construction jobs, and subsequently calling Immigrations and Customs Enforcement (“ICE”) to have the workers deported, rather than to pay them, were frequent.<sup>52</sup>

These preexisting vulnerabilities of the Gulf Coast region – its geography, poverty, history of discrimination, immigration consequences, and language barriers – should have informed the United State’s planning for, and response to the 2005 hurricane season. Unfortunately, the manner in which the State turned a blind eye to such historic, social, political and economic factors only exacerbated the plight of already vulnerable low-income African American and immigrant communities.

#### IV. LEGAL FRAMEWORK

##### a. The ICCPR and the UN Guiding Principles on Internal Displacement

This Committee has requested that the United States provide information about measures adopted by the State before and after Hurricane Katrina to ensure equal treatment of victims, without discrimination.<sup>53</sup> The Gulf Coast Hurricanes displaced roughly two million residents from the Gulf Coast region.<sup>54</sup> To understand the rights afforded to IDPs by the ICCPR, this Committee should refer to the human rights standards articulated by the United Nations Guiding Principles on Internal Displacement (“Guiding Principles”).<sup>55</sup> The Guiding Principles interpret

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<sup>50</sup> See “All Children Have the Right To Attend Public Schools in Mississippi” flyer distributed in 2002, by Mississippi Immigrants Rights Alliance (MIRA) used to inform immigrant communities about the Mississippi Senate Bill 2225 (2002) Section I, that brought Mississippi into compliance with U.S. law.

<sup>51</sup> *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that schools must provide equal public education for all children, regardless of immigration status; schools are prohibited from asking for documentation of a student’s immigration status; schools cannot use the social security number as prerequisite for enrollment; and schools are prohibited from sharing any information about a student’s immigration status with any individual or institution).

<sup>52</sup> Adam Lynch, *Immigrants Left Behind*, JACKSON FREE PRESS, Vol. 41, no. 2, Sept. 29-Oct. 5, 2005.

<sup>53</sup> U.N. Hum. Rts. Comm., List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America. UN Doc. CCPR/C/USA/Q/3, March 30, 2006. Question 16 reads: “Please report on measures implemented during and after disaster caused by Hurricane Katrina in order to ensure equal treatment of victims without discrimination based on race, social origin and age, in particular in the context of evacuations. Please comment on the information that measures taken have exacerbated problems in respect of the Afro-American population, with regard to homelessness, loss of property, inadequate access to healthcare, loss of education opportunities, legal remedies and voting rights. *Id.*”

<sup>54</sup> *2 Million Displaced By Storms*, *supra* note 3. Although FEMA originally estimated that roughly 450,000 to 600,000 families were displaced by the storm, further investigation prompted FEMA to increase this amount to 685,635 households. Prior estimates failed to account for families receiving aid under a traditional disaster aid program. FEMA approximates that each household includes 3 people. *Id.*

<sup>55</sup> The UN Guiding Principles on IDPs have been met with international approval. The Principles, developed in 1998 by the UN Representative on IDPs, Francis Deng, unite existing human rights norms pertinent to situations of internal displacement, while interpreting these norms in light of the specific needs of the internally displaced. The Principles, though not binding, have been recognized by the U.N. Commission on Human Rights (55 countries), and numerous states have adopted these principles into their internal practices. See Walter Kälin, *The Guiding Principles on Internal Displacement- Introduction*, 10 INT’L J. REFUGEE L. 557 (1998). See also Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459 (2004), and Patrick Schmidt, *The Process and prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment*, 35 GEO. J. INT’L L. 483,

the specific needs of displaced persons in light of the basic rights guaranteed within the ICCPR<sup>56</sup> and other instruments including the International Convention on Economic, Social and Cultural Rights (“ICESCR”).<sup>57</sup> The Committee previously has recognized the Guiding Principles as relevant authority in interpreting the rights established in the ICCPR<sup>58</sup> We now request that the Committee again apply the same interpretative approach to the ICCPR to protect the rights of persons displaced by natural disasters.

In the immediate aftermath of a natural disaster, authorities and relief agencies usually focus on addressing the urgent needs of the affected communities: search and rescue, food, clothing, potable water, shelter, and medical attention. Human rights are too often overlooked in the chaos following disaster and survivors are left vulnerable to a host of human rights violations such as lack of accessible humanitarian assistance, discrimination in the distribution of aid, sexual and gender-based violence, forced recruitment of children, loss of documentation, safe and voluntary return or resettlement, and issues of property restitution.<sup>59</sup>

The frequency and magnitude of natural disasters manifest the absolute necessity of applying a human rights framework to ensure the protection of persons left vulnerable from acts of nature. A human rights framework helps to ensure the effectiveness of relief, recovery and reconstruction efforts *after* disaster strikes, as well as to shape disaster preparedness plans. By internalizing and implementing a human rights framework as it applies to natural disaster, states can protect their residents in the aftermath of natural disasters.

The United Nations has sought to identify and encourage states to address the multiple human rights challenges victims displaced by human-made or natural disasters may face by developing the Guiding Principles.<sup>60</sup> The activities of the United Nations Representative of the

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503 (2004). The UN Guiding Principles on IDPs define IDPs as persons (i) forced or obliged to flee or to leave their homes or places of habitual residence who (ii) have not crossed an internationally recognized State border. Guiding Principles on IDPs, *supra* note 60, par. 2.

<sup>56</sup> The United States signed (Oct. 5 1977) and ratified the ICCPR (June 8, 1992).

<sup>57</sup> The U.S. has signed (Oct. 5, 1977) but not ratified the ICESCR, and as a signing party, has the duty to not act in contravention of its terms.

<sup>58</sup> The Committee, in its General Comment No. 29 on States of Emergency, makes reference to the Guiding Principles as part of the developments in international law regarding human rights standards that are applicable in emergency situations. U.N. Hum. Rt. Comm., List of Issues: Central African Republic, UN Doc. No. CCPR/C/79/C/CAF Sept. 3, 2003. Furthermore, the Committee again recognized the Guiding Principles in their “List of Issues to the Central African Republic,” when the Committee inquired whether the current treatment of the displaced persons in the Central African Party is “in keeping with the ‘Guiding Principles on Internal Displacement.’” *Id.*

<sup>59</sup> “Often such [human rights] violations are not consciously planned and implemented but result from inappropriate policies or simple neglect. They could easily be avoided if the relevant human rights guarantees were taken into account from the beginning by national as well as international actors.” UN Representative to the Secretary General on the Human Rights of Internally Displaced Persons, Draft Operational Guidelines on Human Rights Protections in Situations of Natural Disasters, with Particular Reference to the Persons Who Are Internally Displaced (Feb. 7, 2006) (Hereinafter, “*Draft Guidelines on Human Rights and Natural Disasters*”).

<sup>60</sup> Though the classification of internally displaced persons (“IDPs”) has, up to this point, been used to primarily refer to persons forced to leave their homes and villages because of armed conflict, the Guiding Principles explicitly recognize the applicability of the IDP classification to victims of natural disasters. In the introduction to the UN Guiding Principles, IDPs are those persons obliged to flee, “in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or *natural or human-made*

Secretary-General on Internally Displaced Persons (“UN Representative on IDPs”) also assist states to address the human rights of the internally displaced. The UN Representative on IDPs visited the regions affected by the 2004 South Asian Tsunami to document the plight of displaced persons in light of the Guiding Principles.<sup>61</sup> Additionally, the UN Representative on IDPs currently is drafting Operational Guidelines on Human Rights and Natural Disasters.<sup>62</sup> These Operational Guidelines address the human rights concerns that specifically confront persons affected by natural disasters and seek to guide governmental and nongovernmental actors in integrating human rights standards into disaster response, recovery, and reconstruction efforts.<sup>63</sup>

The Committee can address the human rights consequences of natural disasters as a means of ensuring the respect and protection of the fundamental rights of vulnerable communities. Charged with monitoring the implementation of the ICCPR<sup>64</sup>, the Committee should urge State parties, herein the United States, to incorporate human rights norms in their disaster preparation and response plans, in order to safeguard the rights of all persons affected by disaster without discrimination.

#### **b. State Obligations of Nondiscriminatory Protection of Survivors of Natural Disasters**

The State’s duty to act in a nondiscriminatory manner and address situations where discrimination persists is of paramount concern in each stage of the lifecycle of a natural disaster: evacuation, humanitarian assistance, return, and reconstruction stages.<sup>65</sup> The Guiding Principles provide that national authorities have the primary duty and responsibility to protect and assist victims of natural disasters within their jurisdiction without discrimination,<sup>66</sup> mirroring the prohibition against discrimination enshrined in the ICCPR.<sup>67</sup> This principle of nondiscrimination is of particular importance following a natural disaster, when opportunities for exploitation and discrimination arise, and preexisting discrimination is often worsened.<sup>68</sup>

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*disasters’* (emphasis added). United Nations Guiding Principles on Internal Displacement, U.N. Doc. E/CN.t/1998/53/Add.2 (1998) (hereinafter, “Guiding Principles on IDPs”).

<sup>61</sup> Walter Kälin, *Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons*, Feb. 27 - March 5, 2005.

<sup>62</sup> *Draft Guidelines on Human Rights and Natural Disasters*, *supra* note 59.

<sup>63</sup> *Id.* at 10.

<sup>64</sup> *Human Rights Committee*, Office of the United Nations High Commissioner for Human Rights Website, available at <http://www.ohchr.org/english/bodies/hrc/index.htm>.

<sup>65</sup> Guiding Principles on IDPs, *supra* note 60, are divided into sections entitled, “Protection From Displacement,” “Protection During Displacement,” “Humanitarian Assistance,” and “Return, Resettlement, and Reintegration.”

<sup>66</sup> Guiding Principles on IDPs, *supra* note 60, Principle 3(1): National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction, and Principle 4(1), These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.

<sup>67</sup> ICCPR, Articles 2.1, 26.

<sup>68</sup> Walter Kälin, “Natural Disasters and IDPs’ Rights,” Special Issue: Tsunami, Learning from the Humanitarian Response, FORCED MIGRATION REVIEW, July 2005, available at <http://www.fmreview.org/FMRpdfs/Tsunami/03.pdf>.

The Committee, in its General Comment No. 18, concludes that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”<sup>69</sup> Thus, article 2, paragraph 1, of the ICCPR obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the ICCPR without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>70</sup> Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>71</sup> A number of human rights instruments that the U.S. has either signed or ratified, also affirm the fundamental importance of the principle of nondiscrimination.<sup>72</sup>

### **c. State Obligation to Protect Human Rights of Survivors of Natural Disasters**

In accordance with international human rights law, states have the obligation to respect, protect and fulfill human rights. With respect to its jurisdiction to monitor and protect human rights, the Committee has noted that its jurisdiction extends to commenting on alleged violations of the ICCPR by States Parties for the acts or omissions of state agents or organs.<sup>73</sup> Any state agent, regardless of rank, can generate international state responsibility by violating the guarantees enshrined by the ICCPR. Moreover, the Committee observes that the positive obligations on States Parties to ensure the rights protected by the ICCPR will only be fully discharged if individuals are protected by the State not just against violations by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of rights in so far as they are amenable to application between private persons or entities.<sup>74</sup> Throughout this document, we will highlight the ways in which the U.S. Government has failed to protect and provide life-sustaining assistance to its residents in times of natural disaster.

In the context of Hurricanes Katrina and Rita, international state responsibility is generated by the acts and/or omissions of U.S. Government agents at every level of government, including federal, state and local authorities. In addition, in accordance with the views presented by the Committee, the U.S. Government may be responsible for the acts and/or omission of the Red Cross. Although the Red Cross is an “independent entity”<sup>75</sup> that is organized as a “nonprofit, tax-exempt, charitable institution” pursuant to a charter granted to it by the United States

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<sup>69</sup>U.N. Hum. Rts. Comm., General Comment No. 18: Non-Discrimination: 10/11/89, Thirty-seventh session, 1989.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup> See International Covenant for Economic, Social, and Cultural Rights (“ICESCR”), Articles 1 and 24; The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), Article 2; The Convention on the Rights of the Child (“CRC”); and The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“Convention on the Rights of Migrant Workers”), Article 7.

<sup>73</sup> Article 2.1. U.N. Hum. Rts. Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant. UN Doc. No. CCPR/C/21/Rev.1/Add.13. May 26, 2004.

<sup>74</sup> General Comment No. 31, *supra* note 73 at para. 8.

<sup>75</sup> The Federal Charter of the American Red Cross. <http://www.redcross.org/museum/charters.html>.

Congress, it has the legal status of “a federal instrumentality.”<sup>76</sup> Under its charter, the Red Cross is required “to carry out responsibilities delegated to it by the federal government.”<sup>77</sup> Among these is the responsibility to “maintain a system of domestic and international disaster relief, including mandated responsibilities under the National Response Plan coordinated by the Federal Emergency Management Agency (FEMA).”<sup>78</sup>

Having outlined the factual context of the Gulf Coast Hurricanes, the Gulf region’s preexisting vulnerabilities, and the human rights laws pertinent in natural disaster contexts, this document will proceed to illustrate the human rights concerns that have arisen and continue to arise in the different phases of the natural disaster lifecycle. This analysis examines the concerns that arise in four areas in particular: evacuation, humanitarian assistance, return, and reconstruction.

## **V. GOVERNMENT RESPONSE: EVACUATION EFFORTS**

Government complacency, poor planning and dereliction of duty prior to and during the evacuation of Hurricane Katrina contributed to over a thousand deaths and jeopardized the welfare of Gulf Coast residents who did not evacuate the region before the hurricane hit.

Human rights law maintains that humanitarian assistance must be provided without discrimination of any kind on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, age, disability or other status.<sup>79</sup> Therefore, when an imminent natural disaster endangers the life or physical integrity and health of affected individuals and communities, the governing state must take all appropriate measures necessary to protect those in danger.<sup>80</sup> If such measures would be insufficient, endangered persons should be ordered to leave the danger zone or, to the extent that they cannot do so on their own, be evacuated in a manner that fully respects the right to life, dignity, liberty and security of those affected.<sup>81</sup>

### **a. Lack of Transportation and Shelter**

The U.S. Government’s evacuation plans did not take into account the difficulties faced by low-income African American and immigrant communities and effectively abandoned these communities to fend for themselves in the face of a Category 4 hurricane. The U.S. Government’s evacuation efforts failed in three respects: it failed to (1) issue a mandatory evacuation in a timely manner; (2) organize effective transportation from the most vulnerable areas; and (3) provide adequate and appropriate shelters to enable those left behind to safely weather the storm.

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> ICESCR, Article 12. See Section III(c): Legal Framework Section: State Obligations of Nondiscriminating Protection of Survivors of Natural Disasters at 14.

<sup>80</sup> General Comment 31, *supra* note 73.

<sup>81</sup> See Guiding Principles on IDPs, *supra* note 60, Principles 1, 7, and 8. See also, *Draft Guidelines on Human Rights and Natural Disasters*, *supra* note 59.

The governor of Louisiana and the mayor of New Orleans did not order mandatory evacuation until less than twenty-four hours before the storm hit.<sup>82</sup> The lack of warnings had dire consequences: more than one hundred thousand people were left behind when Katrina made land. The U.S. Government left critical decisions regarding transportation for evacuation to the last minute.<sup>83</sup> Deciding “at the spur of the moment,” however, proved to be a badly flawed approach to accomplishing mass evacuation out of the city.

Most evacuees who remained in their homes during Hurricane Katrina cited a lack of access to transportation as their primary reason for staying.<sup>84</sup> According to Professor Robert D. Bullard, a scholar on environmental issues concerning communities of color, the U.S. Government failed to take into consideration people without resources when carrying out evacuation efforts and these vulnerabilities “shaped an unfair situation in terms of response.”<sup>85</sup> Government evacuation plans identified personal vehicles as the primary means of evacuation,<sup>86</sup> although it was widely known that the region’s poorest people did not own cars.<sup>87</sup> Furthermore, because the storm was at the end of the month, and many low-income residents of the Gulf Coast live from paycheck to paycheck, economic resources for self-evacuating were particularly scarce.

U.S. Government evacuation efforts failed to address the needs of these residents who lacked transportation to evacuate. Most of the vehicles designated to transport such individuals went unused because the U.S. Government could not find willing drivers.<sup>88</sup>

Designated sites for those without transportation out of the region to gather and be collected were not located in areas of great need. In areas like East and Central New Orleans where concentrated poverty was the most prevalent, pickup locations were few and far between. With full knowledge of the shortage of privately owned vehicles in poor areas of the Gulf Coast, the region’s evacuation plans focused on traffic management for those with cars.<sup>89</sup> Although due to the lack of planning it was too late to save most of the region’s elderly who could not evacuate themselves, some U-haul trucks were used to evacuate the elderly.<sup>90</sup> There was also no special plan in place to evacuate the disabled.<sup>91</sup> Desperate conditions compelled hospitals to evacuate some of their patients on boats who, then, waited for hours with other evacuees before being rescued.<sup>92</sup>

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<sup>82</sup> *New Orleans Braces for ‘the Big One’*, CNN.COM, Sept. 29, 2005.

<sup>83</sup> *NBC’s Meet the Press: Transcript for September 11*, MSNBC, Sept. 11, 2005, available at <http://www.msnbc.msn.com/id/9240461>.

<sup>84</sup> *Survey of Hurricane Katrina Evacuees*, The Washington Post/Kaiser Family Foundation/Harvard University, Sept. 2005, available at <http://www.kff.org/newsmedia/upload/7401.pdf>.

<sup>85</sup> Jonathan Curiel, *Disaster Aid Raises Race Issue*. The San Francisco Chronicle, Sept. 3, 2005 at A10.

<sup>86</sup> The Southeast Louisiana Hurricane Evacuation and Sheltering Plan, 2000, p. 13, at <http://www.letxa.com/katrina/EOPSupplement1a.pdf>.

<sup>87</sup> *Stalling the Dream*, *supra* note 28.

<sup>88</sup> *NBC’s Meet the Press: Transcript for September 11*, MSNBC, *supra* note 83.

<sup>89</sup> *Stalling the Dream*, *supra* note 28.

<sup>90</sup> Paul H.B. Shin et al., *The Saved and The Stranded. 25,000 rescued but attacks on victims go on*. Daily News, Sept. 4, 2005 at 5.

<sup>91</sup> Courtney Giarrusso, *The Disabled Deserve a Better Way Out*, The Times Picayune, March 1, 2006 at 7.

<sup>92</sup> Robert Davis, *Hospitals Learn From Katrina; System Isn’t Prepared For Catastrophe*, USA Today, Jan. 24, 2006 at 1D.



In New Orleans, many of these residents who could not self-evacuate were shuttled to shelters in the city, such as the Superdome, in apparent contradiction of the city's standing mandatory evacuation order.<sup>93</sup> The New Orleans Convention Center, although never officially designated as a place of refuge, swarmed with residents who arrived there awaiting buses to evacuate them out of the city; those buses never came.<sup>94</sup> Nearly 25,000 people were eventually evacuated to the Superdome and nearly 20,000 gathered at the Convention Center.<sup>95</sup> Others were not even "lucky" enough to be evacuated to shelters. Approximately 2,500 evacuees were stranded on the 'Interstate Highway 10' in the scorching heat went without food and water for four days.<sup>96</sup> An estimated 50,000, of who were overwhelmingly African American, remained elsewhere in New Orleans, on rooftops and in upper floors of office buildings.<sup>97</sup>

The State had no plan in place to provide assistance or to carry out evacuation measures for the approximately 25,000 people who were evacuated to the Superdome and the approximately 20,000 evacuees in the Convention Center. In fact, the State has claimed that it did not even know about the evacuees in the Convention Center until three days after Hurricane Katrina hit.<sup>98</sup> Even so, evacuation measures from these shelters did not begin until three days after the hurricane hit and it took another four days to complete the evacuation process.<sup>99</sup> The lines of communication between the state and federal government had completely faltered.<sup>100</sup> Governor Blanco of Louisiana requested buses to rescue the thousands of people from the fetid Superdome and Convention Center.<sup>101</sup> However, by the third night only a fraction of the 500 vehicles promised by federal authorities had arrived.<sup>102</sup> During this evacuation phase government and nongovernmental shelters were grossly undersupplied.<sup>103</sup> In fact, very few were pre-positioned with supplies.<sup>104</sup> As a result, some people went without food or clean drinking water for three or four days.<sup>105</sup> Despite the lack of resources, churches serving ethnic minorities opened

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<sup>93</sup> Elana DeLozier and Nina Kamp, *Hurricane Katrina Timeline*, The Brookings Institution, available at <http://www.brookings.edu/fp/projects/homeland/katrinatimeline.pdf> (hereinafter "Hurricane Katrina Timeline").

<sup>94</sup> Wil Haygood & Ann Scott Tyson, *It Was as if All of Us Were Already Pronounced Dead*, WASH. POST, Sept. 15, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091402655.html>.

<sup>95</sup> *Convoys Bring Relief to New Orleans*, CNN.COM, Sept. 2, 2005, available at <http://www.cnn.com/2005/US/09/02/katrina.impact/>.

<sup>96</sup> Paul H.B. Shin, *The Saved and The Stranded. 25,000 rescued but attacks on victims go on*. Daily News, Sept. 4, 2005 at 5.

<sup>97</sup> *Id.*

<sup>98</sup> Joseph B. Treaster, *First Steps to Alleviate Squalor and Suffering at Convention Center*, N.Y. TIMES, Sept. 3, 2005, at A16.

<sup>99</sup> *Hurricane Katrina Timeline*, *supra* note 93.

<sup>100</sup> Jeff Duncan, *Lawmakers focusing visit on hurricane readiness; Evacuation plans among concerns*, The Times Picayune, Mar. 21, 2006 at 5.

<sup>101</sup> *Hurricane Katrina Timeline*, *supra* note 93.

<sup>102</sup> *Hurricane Katrina Timeline*, *supra* note 93.

<sup>103</sup> "Opening Statement of Senator Susan M. Collins, Chairman, Committee on Homeland Security and Governmental Affairs." Jan. 24, 2006, available at [http://72.14.207.104/search?q=cache:csZTVbUIy2kJ:hsgac.senate.gov/\\_files/012406SMCOpen.pdf+Katrina+shelters+undersupplied&hl=en&gl=us&ct=clnk&cd=1](http://72.14.207.104/search?q=cache:csZTVbUIy2kJ:hsgac.senate.gov/_files/012406SMCOpen.pdf+Katrina+shelters+undersupplied&hl=en&gl=us&ct=clnk&cd=1).

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., Wil Haygood & Ann Scott Tyson, *It Was as if All of Us Were Already Pronounced Dead*, *supra* note 94.

their doors to hurricane evacuees, who were failed by the U.S. Government in its response efforts.<sup>106</sup>

In sum, the U.S. Government's evacuation plans benefited those in the best position to evacuate and not the most vulnerable communities. Such discrimination demonstrates the State's failure to take into account preexisting vulnerabilities. Consequently, the evacuation exacerbated the disaster and created a catastrophe of human suffering.

### **b. Lack of Response to Immigrant Populations**

The U.S. Government failed to alert immigrant populations of the impending storm in their native languages or to ensure their access to essential provisions. The State did not issue warnings about the approaching hurricanes in any language other than English.<sup>107</sup> In fact, even now, nearly six months after the storm, scant information is available on how immigrant communities were warned of the storm.<sup>108</sup> The limited press reports indicate that private individuals on a volunteer, ad-hoc basis provided the main source of information for the Spanish-speaking population. For example, a small Spanish-language AM-radio station provided the New Orleans area with information,<sup>109</sup> while in Mississippi the owner of a grocery store that caters to the Latino population went from church to church where Spanish speaking parishioners gathered, to warn of the impending storm and distribute information about evacuation the Sunday before the storm hit.<sup>110</sup> In the absence of information from the government, this Mississippi volunteer relied on a one page Spanish-language article that had been printed that day in the local paper.<sup>111</sup> In the face of one of the most powerful hurricanes in U.S. history, the only early warning system immigrant communities could rely on was word of mouth.

After the hurricanes struck, the inability to communicate effectively was a particular vulnerability for immigrant communities as it impeded their access to critical information. Language barriers resulted in instances of residents not understanding the health concerns related to drinking contaminated water.<sup>112</sup> Without language-accessible information, Asian American evacuees and many Latino evacuees sought out humanitarian assistance at local religious centers.<sup>113</sup> State agencies failed to reach out to these centers, which became known places of

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<sup>106</sup> Myron P. Medcalf, *Black Churches Come Through; A coalition of churches and black community leaders is doing effective work in helping Gulf Coast evacuees in the Twin Cities*, Star Tribune, Oct. 19, 2005 at 3B; Bruce Hamilton, *Home Has a New Meaning*, The Times Picayune, Oct 22, 2005 at 1.

<sup>107</sup> Three months after the hurricanes, the Emergency Alert System conducted an internal review and reformed their warning system so that warnings would be issued in the primary language that is used by the station or cable system broadcasting the announcement. See Review of the Emergency Alert System, before the Federal Communications Commission, E.B. Doc. No. 04-296, Nov. 3, 2005, available at <http://www.fcc.gov/eb/Orders/2005/FCC-05-191A1.html>.

<sup>108</sup> *Rita and the Asian American Community*, National Council of Asian Pacific Americans, available at <http://www.advancingequality.org/files/RitaAACCommunity.pdf>.

<sup>109</sup> *After Katrina: How Radio Saved the City of New Orleans*, UMass Amherst, available at <http://www.umass.edu/umhome/events/articles/24777.php>.

<sup>110</sup> Nikki Davis Maute, *Volunteer Informs Hispanics of Storm*, HATTIESBURG AMERICAN, Aug. 29, 2005.

<sup>111</sup> Nikki Davis Maute, *Spreading word to Hispanics a Concern*, HATTIESBURG AMERICAN, Aug. 28, 2005.

<sup>112</sup> *Id.*

<sup>113</sup> Kari Lyderson, *Some Immigrants Suffer Doubly After Hurricane Katrina*, NEW STANDARD, Sept. 28, 2005, available at <http://newstandardnews.net/content/index.cfm/items/2410>.

refuge for migrant communities.<sup>114</sup> For example, a leader of a Buddhist Temple in Biloxi that served as a distribution center for food and supplies and provided temporary shelter to many Asian-American families observed that U.S. Government officials never visited the Temple to inquire about disaster survivors.<sup>115</sup> This situation was mirrored across the Gulf Coast states.<sup>116</sup>

## VI. GOVERNMENT RESPONSE: HUMANITARIAN ASSISTANCE

In accordance with the ICCPR and the Guiding Principles, national authorities have the primary duty to provide protection and assistance to internally displaced persons.<sup>117</sup> National authorities should guarantee that essential goods and services, such as food, potable water, basic shelter, housing, appropriate clothing, and essential medical services, including psychological and social services and sanitation are available and accessible to internally displaced persons without discrimination.<sup>118</sup> Furthermore, national authorities should respect and guarantee the right of displaced persons to request and to receive protection and assistance from authorities without being subject to persecution or punishment.<sup>119</sup>

Unfortunately, the U.S. Government has failed to provide low-income African American and immigrant populations with adequate and accessible assistance in a nondiscriminatory fashion.

### a. Availability and Access to Assistance

During the first critical days of the Gulf Coast disaster, necessary relief and health workers and essential provisions were desperately in short supply. Victims unable to evacuate themselves sought refuge in the Superdome.<sup>120</sup> Officials expected evacuees to bring enough food and water with them to last for three days.<sup>121</sup> The evacuees in the New Orleans Superdome and the Convention Center, most of whom were African American,<sup>122</sup> did not have access to medical staff, and these shelters lacked sick bays.<sup>123</sup> Much of the medical staff who had been working in the “special needs” areas were evacuated before residents, who were left in destroyed areas after the storm.<sup>124</sup>

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<sup>114</sup> “Katrina and the Asian American Community” Congressional Briefing: Testimony of Reverend Thich Hang Dat, Sept. 29, 2005, available at <http://www.advancingequality.org/files/hang.pdf>.

<sup>115</sup> *Id.*

<sup>116</sup> *Laotian-American Victims of Hurricane Katrina Seek Refuge in Wat Lao Thammarattanaram of Louisiana*, VOANEWS.COM, Sept. 9, 2005.

<sup>117</sup> Guiding Principles on IDPs, General Comment No. 31 *supra* note 73.

<sup>118</sup> Guiding Principles on IDPs, ICCPR, Arts. 2.1 and 26.

<sup>119</sup> Guiding Principles on IDPs, ICCPR, Art. 6.

<sup>120</sup> Steve Connor, *Mayor Evacuates New Orleans as Katrina Blows In*, *The Independent*, Aug. 29, 2005 at 6.

<sup>121</sup> *Id.*

<sup>122</sup> See Section II(b): Background Information: Preexisting Vulnerabilities of Gulf Coast Low-Income African American and Immigrant Communities. See also, Bill Quigley, *Six Months After Katrina: Who Was Left Behind- Then and Now*, Common Dreams News Center, Feb. 21 2006, available at <http://www.commondreams.org/views06/0221-36.htm>; DeWayne Wickham, *Blacks Suffering Over Race or Class? Some of Both*, U.S.A. Today, Sept. 13, 2005, at 13A.

<sup>123</sup> *Superdome Evacuation Completed*, ASSOCIATED PRESS, Sept 3, 2005, available at <http://www.msnbc.msn.com/id/9175611/>.

<sup>124</sup> *Id.*

The U.S. Government also failed to provide adequate access to humanitarian assistance after the storm to low-income residents. The American Red Cross did not set up shelters in flood-prone areas, including New Orleans and the Mississippi coastal flood plains, because of liability concerns.<sup>125</sup> In rural Mississippi, neither the federal government nor the Red Cross arrived to provide needed shelter, food, ice, or water in Hurricane Katrina's wake.<sup>126</sup> In some cases, it took twelve days for the Red Cross to reach people without cars and homes in certain areas of Mississippi.<sup>127</sup> Government officials and the Red Cross knew, or should have been aware that more than 1.6 million people, half of Mississippi's population live in storm-affected rural areas.<sup>128</sup> Stranded without access to shelters, the only assistance came from charitable community groups and heroic individuals, who attempted to rescue their neighbors from the floodwaters.<sup>129</sup>

Furthermore, community advocacy organizations reported that the Red Cross failed to set up operations in low-income African American jurisdictions, while establishing assistance centers in higher-income white communities.<sup>130</sup> Low-income hurricane victims in search of aid often traveled large distances (though they often lacked access to cars) to remote shelter locations. In one incident, an African American couple that traveled to shelter outside of their town to access assistance was sent to the back of the line because they were not from the area.<sup>131</sup>

The lack of critical assistance was not due to the lack of resources. The conditions in the Gulf Coast drew offers of assistance in various forms. However, FEMA, the U.S. Government's disaster agency, rejected offers of trains to evacuate Gulf Coast residents<sup>132</sup> as well as water supplies provided by retail stores.<sup>133</sup> Needed help by hundreds of firefighters was also delayed so that proper bureaucratic processes could be observed, though some volunteers complained that this critical delay translated into the loss of lives.<sup>134</sup>

The housing and cash assistance programs enacted by FEMA were complex and confusing to applicants. In testimony before Congress, a FEMA official admitted these programs were inaccessible and failed to deliver aid in a timely fashion.<sup>135</sup> Deadlines were not

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<sup>125</sup> Stephanie Strom & Campbell Robertson, *As Its Coffers Swell, Red Cross is Criticized on Gulf Coast Response*, N.Y. TIMES, Sept. 20, 2005, at A5.

<sup>126</sup> Elizabeth Mehren, *'Like We're Invisible'; Katrina cut off an already isolated rural Mississippi, so residents helped one another*, *supra* note 21.

<sup>127</sup> Reene Montagne & Howard Berkes, *Red Cross response to Katrina criticized*. NAT'L PUB. RADIO, Oct. 6, 2005.

<sup>128</sup> *Id.*

<sup>129</sup> Declaration of Victoria Cintra, Operations Coordinator, MIRA, taken by UC Berkeley's International Human Rights Law Clinic, signed on March 2, 2006, at ¶ 15 (on file with the UC Berkeley International Human Rights Law Clinic).

<sup>130</sup> Committee on House Government Reform; Subcommittee on Select Katrina Response Investigation, Dec. 6, 2005 (Testimony by Barbara Arnwine, Executive Director, Lawyers Committee for Civil Rights), (hereinafter "Congressional Subcommittee Testimony").

<sup>131</sup> *Id.*

<sup>132</sup> *Bush's FEMA Turns Natural Disaster Into Bureaucratic Disaster*. U.S. FED NEWS, Sept. 7, 2005.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Committee on House Government Reform; Subcommittee on Select Katrina Response Investigation, Dec. 8, 2005 (Testimony of Scott Wells, FEMA Federal Coordinating Officer).

well-communicated and consistently changed, leaving displaced persons confused as to the amount of aid available to them. Furthermore, FEMA officials have advocated that aid amounts should be raised because they are insufficient for low-income disaster victims.<sup>136</sup> For example, FEMA ended hotel payments for twelve thousand families across the country on February 13, 2005, despite the fact that many of these displaced persons have no other housing options.<sup>137</sup> Though FEMA claims that most victims will still receive apartment rental assistance or trailers, by the agency's own accounts, ninety thousand people who requested trailers are still waiting.<sup>138</sup>

Medical care is not accessible to displaced victims of Hurricane Katrina. One study found that that the displaced victims and their children, living in housing provided by FEMA, are suffering from serious medical problems.<sup>139</sup> According to the study, thirty four percent of displaced children have behavioral problems or health conditions like anxiety and asthma, while only twenty five percent of the children experienced these conditions pre-hurricanes.<sup>140</sup> Forty four percent of the adults lack medical insurance and almost half of them are suffering from chronic diseases like high blood pressure, cancer, and diabetes.<sup>141</sup> More than half the mothers and female caregivers who took a mental health exam showed signs of clinical depression or anxiety.<sup>142</sup> Louisiana was said to have the lowest rate of access to primary health care in the country pre-2005 Gulf Coast Hurricane<sup>143</sup> but, "Neither Congress nor the state of Louisiana have eased eligibility requirements for Medicaid after the storm, and because each state sets its own guidelines, some families who received insurance and food stamps in other states were no longer eligible when they returned home."<sup>144</sup> The authors of the study described the need of medical care as urgent and recommended that Medicaid provide universal disaster relief and mental health services.<sup>145</sup>

## **b. Immigrant Access to Emergency Aid**

National laws exclude certain classes of immigrants from most of the major federal assistance programs.<sup>146</sup> These individuals are not eligible for *any* of the federal government's long-term shelter or food assistance programs,<sup>147</sup> though they may be eligible for certain short-term, non-cash, emergency services. What emergency assistance is available to immigrants is

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<sup>136</sup> *Id.*

<sup>137</sup> Shailla Dewan, *Hotel Aid Ends; Katrina Evacuees Seek Housing Again*, N.Y. TIMES, Feb. 14, 2005, *available at* <http://www.nytimes.com/2006/02/14/national/nationalspecial/14hotels.html>.

<sup>138</sup> Doug Smith, *The Nation*, L.A. TIMES, Mar. 22, 2006 at 14.

<sup>139</sup> Shailla Dewan, *Storm Evacuees Found To Suffer Health Setbacks*, N.Y. TIMES, Apr. 18, 2006, at A1.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Certain groups of migrants are categorized as "unqualified aliens." As defined by the 8 U.S.C. § 1641., the term "qualified alien" includes "anyone who has been granted legal permanent residence ("green card"), refugee or asylee status, withholding of deportation, conditional entry, parole into the U.S. for at least one year; or a Cuban-Haitian Entrant; or a battered spouse or child(ren) with a pending or approved spousal petition or petition for relief.

<sup>147</sup> Kate Meiss et al., *Power Point Presentation "Benefits for Hurricane Katrina Survivors. Training for Legal Services and Pro Bono Attorneys in Louisiana,"* Sept. 20, 2005, *available at* [http://www.lsnr.net/disaster/katrina\\_fema\\_final\\_09-21-05.pdf](http://www.lsnr.net/disaster/katrina_fema_final_09-21-05.pdf).

often nullified by *de facto* discriminatory practices. As a result, many immigrant survivors have been denied access to basic shelter, food, and medical care.

### 1. Failure to Assure Equal Access to Assistance

Promises of short-term assistance for all immigrants, regardless of documentation status, were illusory, as FEMA effectively discouraged these persons from accessing short-term disaster assistance by failing to assure them that aid seekers would not be prosecuted for immigration violations.<sup>148</sup> In previous natural disaster situations, the U.S. Government had provided such assurances<sup>149</sup> which made FEMA's refusal to do so after the Gulf Coast Hurricanes particularly conspicuous. In fact, FEMA told immigrants they would *not* have immunity from deportation when providing information required to receiving federal aid.<sup>150</sup> Numerous media accounts chronicled how immigrants, Latino immigrants in particular, did not seek federal aid because they feared deportation.<sup>151</sup>

These fears of deportation were not unfounded. Just days after Hurricane Katrina hit, two unauthorized immigrants were taken into custody by state police in West Virginia, after a military cargo plane carrying approximately three hundred evacuees arrived.<sup>152</sup> In a second incident, three undocumented migrants who had been evacuated to El Paso, Texas, were met at the airport by immigration agents and placed in deportation proceedings.<sup>153</sup>

On September 28, 2005, police and the U.S. Marshals raided a Red Cross shelter in Long Beach, Mississippi, and demanded identification from approximately sixty people who looked Latino.<sup>154</sup> Witnesses, including the shelter's staff, confirmed that the officers blocked the parking lot and exits and pulled people out of the shower and bathroom.<sup>155</sup> These individuals were then informed they had to leave the shelter within two days or else they would be deported.<sup>156</sup> A week later, in D'Iberville, Mississippi, all of the Latino residents of two Red Cross shelters were rounded up and ordered to leave within 48 hours, under an assumption that they were newly-arrived migrant workers and not hurricane survivors.<sup>157</sup> In Hattiesburg and

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<sup>148</sup> Suzanne Gamboa, *Feds Stop Short in Assurances for Illegal Immigrants*, ASSOCIATED PRESS, Sept. 8, 2005; E. Eduardo Castillo, *Illegal Immigrants Afraid to Get Storm Aid*, ASSOCIATED PRESS, Sept. 9, 2005.

<sup>149</sup> *All Who Need Help Should Seek Help Regardless of Immigration Status*, FEMA Press Release, Oct. 13, 2001, at <http://www.fema.gov/news/newsrelease.fema?id=5632>.

<sup>150</sup> Darryl Fears, *For Illegal Immigrants, Some Aid Is Too Risky; Fears Abound as Government Won't Promise Immunity From Deportation*, WASH. POST, Sept. 20, 2005.

<sup>151</sup> Suzanne Gamboa, *Feds Stop Short in Assurances for Illegal Immigrants*, and Eduardo Castillo, *Illegal Immigrants Afraid to Get Storm Aid*, *supra* note 148.

<sup>152</sup> Darryl Fears, *For Illegal Immigrants, Some Aid is Too Risky*, *supra* note 150. Immigration and Customs Enforcement officials said the two men were friends and were taken into custody after state police received a complaint that one had been accused of a sexual assault. *Id.*

<sup>153</sup> Suzanne Gamboa, *Handful of Katrina Victims in Deportation*, ASSOCIATED PRESS, Sept. 19, 2005.

<sup>154</sup> Chad Tehrune and Evan Pérez, *Roundup of Immigrants in Shelter Reveals Rising Tensions*, WALL ST. JOURNAL, Oct. 3, 2005, at B1; *see also* Tracy Dash and Joshua Norman, *Is This Law Enforcement or Profiling?*, SUN HERALD (Biloxi, MS), Oct. 7, 2005, at <http://www.sunherald.com/mld/sunherald/12838799.htm>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Hurricane Katrina Response and Immigrants, Select Bipartisan Committee to Investigate the Preparation and Response to Hurricane Katrina, Dec. 6, 2005, Written Testimony for the Record by Bill Chandler,

Laurel, Mississippi, Red Cross volunteers asked anyone who appeared to be foreign-born to produce a social security card and/or a birth certificate before receiving emergency services.<sup>158</sup> Many people had lost such documents in the storms and flooding. Hundreds of disaster victims were turned away.<sup>159</sup> These events, together with the absence assurance from the U.S. Government that aid was accessible without fear of deportation, led many Latino immigrants to weather the storm and its aftermath without federal aid, and as a result, often lacked essential subsistence and other provisions.<sup>160</sup>

The U.S. Government's assistance regulations fail to provide longer-term assistance to immigrants who are legally in the country. Once short-term emergency shelters are dismantled,<sup>161</sup> the U.S. Government does not provide certain classes of immigrants with any further assistance. While "qualified aliens" are provided with a range of federal disaster assistance programs<sup>162</sup> which reflect the depth of the U.S. Government's resources, both unauthorized and certain categories of lawfully present immigrants are denied access to adequate housing, food, or health care.<sup>163</sup> For instance, many of the 120,000 to 150,000 Hondurans living along the Gulf Coast when the hurricanes struck were lawfully present within the United States. These individuals were protected by the U.S. Government's Temporary Protected Status (TPS) program, which grants nationals of a foreign state relief from removal if the U.S. Government finds that such nationals are unable to safely return to their home country because of ongoing armed conflict, the temporary effects of an environmental disaster, or other extraordinary and temporary conditions.<sup>164</sup> After Hurricane Mitch ravaged Central America in 1998, the United

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President/Director Mississippi Immigrants Rights Alliance (MIRA) and Guadalupe Gamboa, Program Officer and Immigration Attorney, Oxfam America.

<sup>158</sup> Declaration of Victoria Cintra at ¶ 20, *supra* note 129. The Red Cross is an "independent entity" that is organized as a "nonprofit, tax-exempt, charitable institution pursuant to a charter granted to it by the United States Congress. "It has the legal status of 'a federal instrumentality' due to its charter requirements to carry out responsibilities delegated to it by the federal government." Among these is the responsibility to "maintain a system of domestic and international disaster relief, including mandated responsibilities under the National Response Plan coordinated by the Federal Emergency Management Agency (FEMA)."

<http://www.redcross.org/museum/history/charter.asp>. See Section III(d): Legal Framework: State Obligation to Protect Human Rights of Survivors of Natural Disasters, at p.15.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> The Red Cross is structured to provide emergency shelter and feeding services for two through thirty days of a disaster. Congressional Report citing Interview by Select Committee staff with Joseph C. Becker, Sr. Vice Pres., Preparedness and Response, American Red Cross in Wash., D.C. (Oct. 14, 2005).

<sup>162</sup> See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121, *et seq.* Under the Stafford Act, qualified households are eligible for housing and food assistance, plus up to \$25,000.00 in financial assistance (adjusted annually for inflation).

<sup>163</sup> Under Title IV of the Personal Responsibility to Work Opportunity Act of 1996, 8 U.S.C. §§ 1601-1646, a "qualified alien" includes "anyone who has been granted legal permanent residence ("green card"), refugee or asylee status, withholding of deportation, conditional entry, parole into the U.S. for at least one year; or a Cuban-Haitian Entrant; or a battered spouse or child(ren) with a pending or approved spousal petition or petition for relief." *Id.* § 1641; see also FEMA FAQs. This definition excludes undocumented migrants and many categories of persons lawfully residing within the United States, including individuals here on temporary work, student, or tourist visas and nationals of a foreign state granted Temporary Protected Status (TPS). FEMA's Policy on Verification of Citizenship, Qualified Alien Status and Eligibility for Disaster Assistance, issued by the Office of Legislative Affairs. Finally, this definition apparently excludes all persons with pending asylum applications.

<sup>164</sup> 8 U.S.C. § 1254.

States designated Honduras for the TPS program.<sup>165</sup> Ironically, Hondurans along the Gulf Coast who received relief after a hurricane hit their own county are ineligible for hurricane relief for the storm they survived here.

## 2. Failure to Bridge Language and Cultural barriers

After the hurricanes struck, the U.S. Government's failure to account for language barriers impeded immigrant communities' access to critical, life-saving information. Language barriers resulted in instances of residents not understanding the health concerns related to drinking contaminated water.<sup>166</sup>

In the absence of assurances and language-accessible information from the government, as discussed above in Section IV,<sup>167</sup> Asian American evacuees and many Latino evacuees sought out humanitarian assistance at local religious centers.<sup>168</sup> Concerns were raised by the U.S. Congress and Latino, Asians and Native Americans advocacy groups that Red Cross shelters failed to provide enough translators and lacked cultural sensitivity.<sup>169</sup> Evacuees who spoke little or no English, including Latino and Asian immigrants along the Gulf Coast, as well as French-speaking members of the Houma United Nation tribe (an indigenous people) in Louisiana, struggled to make themselves understood because there were so few translators at shelters.<sup>170</sup> Red Cross leaders admitted that they failed to meet the needs of immigrant communities due to a lack experience and training in dealing with diverse populations.<sup>171</sup>

Additionally, U.S. Government failed to make basic health and survival information accessible to persons with limited proficiency in English (LEP).<sup>172</sup> Reportedly, one LEP family returned home after Hurricane Katrina and, finding their home without electricity, lit a match that ignited leaking natural gas and blew up the house, killing everyone inside.<sup>173</sup> Such a tragedy might have been avoided if the U.S. Government had ensured that health and safety warnings were issued in Spanish.<sup>174</sup> In Mississippi, local announcements instructing listeners where to get ice, water, food, and shelter were only broadcast in English, *de facto* denying LEP residents access to the barest necessities.<sup>175</sup> Mississippi's LEP residents were also unable to access essential health warnings, putting them at greater risk for a "litany of health problems – from carbon-monoxide poisoning from generators to skin rashes and gastrointestinal problems from unclean drinking water."<sup>176</sup>

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<sup>165</sup> See 64 Fed. Reg. 524 (Jan. 5, 1999).

<sup>166</sup> *Id.*

<sup>167</sup> Section IV(b), Government response: Evacuation Efforts, Lack of Response to Immigrant Populations.

<sup>168</sup> Kari Lyderson, *Some Immigrants Suffer Doubly After Hurricane Katrina*, *supra* note 113.

<sup>169</sup> Jacqueline Salmon, *Red Cross Bolstering Minority Outreach*, WASH. POST, Dec 5, 2005, at A01.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Petition for Immediate Interim Relief, Before the Federal Communications Commission, EB Docket NO. 04-296, at 1 (hereinafter "FCC Petition").

<sup>173</sup> *Id.* at 1, fn. 2.

<sup>174</sup> Petition at 3, *supra* note 171.

<sup>175</sup> Petition at 7, *supra* note 171.

<sup>176</sup> Beth Musgrave, *Vietnamese and Latino Communities Could be More at Risk*, SUN HERALD (Biloxi, MS), Sept. 12, 2005, at A11.



## VII. HUMAN RIGHTS AND RECONSTRUCTION

This section highlights areas of concern regarding the extent to which the U.S. Government is fulfilling or failing to fulfill its international obligations to protect the right of hurricane-displaced individuals to return to their homes. Violations of the right to return have already begun to emerge in these early stages of return and reconstruction, and the U.S. Government must act quickly and equitably to prevent returnees' rights from being further jeopardized.

The ICCPR guarantees the right to reside where one chooses as a matter of basic dignity and liberty.<sup>177</sup> The occurrence of a natural disaster may temporarily prevent individuals from exercising this right, but the State has the responsibility to take steps so that individuals can, following a disaster, again choose their residence as soon as possible. Specifically, the Guiding Principles recognize the State's obligation to facilitate the return of internally displaced persons as soon as return is feasible.<sup>178</sup>

There are four (4) dimensions to the right to return that require U.S. Government action. The State must (1) ensure community participation in rebuilding and resettling efforts;<sup>179</sup> (2) protect residents' right to property in an equitable manner, including following proper measures to restore property or compensate owners for demolished property; (3) protect residents' right to shelter, including temporary shelter where necessary;<sup>180</sup> and, finally, (4) reestablish safe and healthy environmental conditions in disaster-affected regions. Underlying these four responsibilities is the U.S. Government's duty to act in accordance with the principle of nondiscrimination. In the Gulf Coast region, low-income communities are largely composed of African American and immigrant populations,<sup>181</sup> and efforts to properly inform, assist, and

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<sup>177</sup> ICCPR, Art. 12.

<sup>178</sup> Guiding Principles on IDPs, *supra* note 58. Principles 28, 29: *Principle 28(1)*: Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons. *Principle 28(2)* Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration. *Principle 29(1)* Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services; *Principle 29(2)* Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

<sup>179</sup> *Id.*, Guiding Principle 28(2).

<sup>180</sup> Guiding Principles on IDPs, ICCPR, Art.12. In accordance with IDP's rights to property, Principle 29 and Principle 21(1) No one shall be arbitrarily deprived of property and possessions. (2) The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts: (a) Pillage; (b) Direct or indiscriminate attacks or other acts of violence; (c) Being used to shield military operations or objectives; (d) Being made the object of reprisal; and (e) Being destroyed or appropriated as a form of collective punishment. (3) Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use. *Id.*

<sup>181</sup> See Section II(b): Background Information: Preexisting Vulnerabilities of Gulf Coast Low-Income African American and Immigrant Communities.

otherwise ensure their rights of return must take into account the specific needs of these populations.

**a. The Right to Community Participation in Rebuilding and Resettling Efforts**

Consistent with the ICCPR's guarantee of the right to residence, U.N. Guiding Principle 28(2) articulates that special efforts should be made to ensure the full participation of IDPs in the planning and management of their return or resettlement and reintegration. Protecting the right to community participation is in keeping with not only the right to residence, but also the rights to dignity and property guaranteed in the ICCPR.<sup>182</sup>

The primary way in which the U.S. Government has breached its duty to encourage community participation is through omission. The State has failed to provide a meaningful voice for displaced persons in reconstruction planning and implementation processes, particularly regarding rebuilding of residential areas. As an initial matter, displaced persons who hope to return have no meaningful access to basic information about when and if their homes will be habitable again. This failure to inform preempts any opportunity for displaced persons to exercise their right to participate in resettlement decisions, because it excludes them from the decision-making process altogether.

The U.S. Government's efforts to engage displaced residents have been meager, and they have failed to take into account the post-hurricane diaspora. The handful of town hall forums in cities outside Louisiana where displaced persons have taken up residence, such as Atlanta, Georgia and Houston, Texas, were ineffective, as they were inaccessible to persons who lacked transportation and thus were poorly attended.<sup>183</sup>

Although the federal, state and local government have announced recommendations for rebuilding and pledged funds for reconstruction, uncertainty continues to characterize recovery from the storm. In New Orleans, approximately 300,000 people were driven out due to Hurricane Katrina and many victims have been unable to return, as their homes remain uninhabitable.<sup>184</sup> FEMA recommends that residents whose houses were damaged more than fifty percent need to rebuild their homes on piers that are three feet high.<sup>185</sup> Homeowners complain that the government is not providing sufficient assistance to promote rebuilding.<sup>186</sup>

Accordingly, the U.S. Government must first develop a coherent plan that informs displaced persons of their rights and how they will be permitted to rebuild or be compensated for their home loss. Nine months after Hurricane Katrina no such plan has been enacted.<sup>187</sup> In the

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<sup>182</sup> ICCPR, Arts. 1, 10.

<sup>183</sup> See Brenda Goodman, *Forum for Evacuees in Atlanta Draws Small, Unhappy Crowd*, Jan. 22, 2006, N.Y. TIMES, at 1.23. See also Will Sentell and Kevin Blanchard, *Louisiana Speaks\*\*Housing, Levees Top Meetings List*, THE ADVOCATE (Baton Rouge, LA), Jan. 22, 2006, at 1A.

<sup>184</sup> Jon Healey, *A Gulf Ghost Town*, L.A. TIMES, Feb. 26, 2006.

<sup>185</sup> Editorial, *Rebuilding a Safer Community*, TIMES-PICAYUNE, Apr. 16, 2006, at 6.

<sup>186</sup> Spencer S. Hsu & Peter Whoriskey, *Wait Ends On The Rules Of Katrina Rebuilding*, WASH. POST, Apr. 13, 2006, at A01. See Kim Quillen, *Grant Program Worth a look*, TIMES-PICAYUNE, Apr. 16, 2006, at 01Money

<sup>187</sup> The latest plan, unveiled on February 20, 2006 by Louisiana Governor Blanco, proposes federal buyouts of devastated property. See Adam Nossiter, *Louisiana Unveils a Plan With Cash to Rebuild Homes*, N.Y. TIMES, Feb.

city of New Orleans in particular, the Mayor's proposed plan has not yet become concrete, leaving an information vacuum for residents who are unsure if they can return or rebuild their homes.<sup>188</sup>

The Guiding Principles not only point out the need to make special efforts to engage community participation, Principle 29 also provides that displaced persons should not be discriminated against on the basis of their displaced status, but should be allowed to participate fully and equally in public affairs.

Voting, a right enshrined by the ICCPR,<sup>189</sup> is a critical part of community participation that is currently in jeopardy, as efforts to reach Louisiana voters displaced in other states may be inadequate. Although progress is being made by establishing early voting options through absentee ballots and satellite voting within the state of Louisiana,<sup>190</sup> the process is severely flawed. Due to the lack of satellite voting outside the state of Louisiana, natives of New Orleans need to fill out absentee ballots, a process that is proving to be inefficient and burdensome on the voters.<sup>191</sup>

In a letter to the Voting Chief of the Department of Justice, the President and CEO of the National Association of the Advancement of Colored People (NAACP), expressed grave concerns about the voting plans for displaced residents of the Gulf Coast.<sup>192</sup> In the absence of satellite voting stations outside of Louisiana, displaced voters, numbering in the hundreds of thousands, and including fifty percent of the African-American population of New Orleans, were given less than sixty days to apply for an absentee ballot, have the application processed, receive the ballot and vote.<sup>193</sup> One organization monitoring elections in New Orleans commented, "New Orleans had nearly a half-million people, about 70 percent of them black, before Hurricane Katrina. Those who have returned number fewer than 200,000, and most are white."<sup>194</sup>

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21, 2006, p. A5.14. Louisiana Congressman Baker's bill that proposed the federal government ultimately offer buyouts to homeowners and pay off mortgages was rejected by President Bush's administration, *see* Adam Nossiter, *Rejection of Building Plan Causes Dismay in Louisiana*, N.Y. TIMES, Jan. 25, 2006, at A.1.16

<sup>188</sup> Linton Weeks, *The Big Easy? Now It's Limbo Land*, WASH. POST, Feb. 9, 2006, at A01. The mayor's proposed plan requires that neighborhoods demonstrate that over 50% of neighborhood residents intend to return before rebuilding efforts begin in earnest; this is troubling because the very uncertainty perpetuated by the state has prevented displaced residents from deciding on returning. *See* Frank Donze and Gordon Russell, *4 MONTHS TO DECIDE; Nagin panel says hardest hit areas must prove viability; City's footprint may shrink; full buyouts proposed for those forced to move; New housing to be developed in vast swaths of New Orleans' higher ground*, TIMES-PICAYUNE (New Orleans, LA), Jan. 11, 2006, at 1.

<sup>189</sup> ICCPR, Art. 25.

<sup>190</sup> Adam Nossiter, *Evacuees Return for New Orleans Vote*, N.Y. TIMES, Apr. 10, 2006.

<sup>191</sup> Opinion-Editorial, *How Many Voters Gave Up?* TIMES-PICAYUNE, Apr. 16 2006, at 6.

<sup>192</sup> Bruce Gordon & Julian Bond, *Re: Request for Pre-Clearance of Procedures For New Orleans Election*, NAACP.org, Mar. 13, 2006, available at [http://www.naacp.org/inc/docs/index/bruce\\_louisiana\\_election-2.pdf](http://www.naacp.org/inc/docs/index/bruce_louisiana_election-2.pdf).

<sup>193</sup> *Id.*

<sup>194</sup> *Katrina Victims Make the Trek to Vote*, CBS 6, Apr. 13, 2006, available at <http://www.wtvr.com/Global/story.asp?S=4750586>.

## b. The Right to Property

The U.S. Government's policies regarding property demolition and restoration fail to respect and protect hurricane victims' rights to residence and property as guaranteed under the ICCPR. In fulfilling these duties, the U.S. Government must abide by the norm of nondiscrimination.

In compliance with the principle of nondiscrimination, the U.S. Government must take into account returnees' cultural and historical ties to land, or as may be the case for Gulf Coast shrimping communities, ties to the sea.<sup>195</sup> In coastal regions devastated by Hurricanes Rita and Katrina, such as Port Arthur, Texas and Bayou La Batre, Alabama, many Vietnamese immigrants make their living through shrimping and fishing.<sup>196</sup> The U.S. Government's refusal to help these hurricane victims recover their shrimping boats is not just a denial of their economic livelihood, but also a violation of their right to return to their homes because it gives displaced shrimpers little incentive to return. Where it is impossible to recover shrimpers' boats, or where other factors such as increased fuel prices and the destruction of the seafood industry's infrastructure may prevent shrimpers from returning to their pre-disaster occupation, the U.S. Government must continue its efforts to provide them with training in alternative industries.<sup>197</sup>

The U.S. Government must also take into account the cultural and historical ties to the region of many of the low-income African American communities. For example, many African American residents of New Orleans trace their ties to the city to before the U.S. Civil War.<sup>198</sup> Another factor to consider is the high percentage of the pre-hurricane Gulf Coast population that was born and raised in the region.<sup>199</sup> Demographers have noted that these high rates of native-born residents suggest that displaced residents are more likely to be connected to the region and more eager to return, but may be prevented by persisting uncertainties about housing and employment in their home cities.<sup>200</sup>

In observance of these ties, the U.S. Government's affirmative duty to protect of IDPs' property against destruction and further damage<sup>201</sup> is shown in sharp relief. Low-income African American residents who, because of cultural and historical ties, strongly wish to return, have not been able to do so, because of the government's failure to communicate a coherent rebuilding and demolition strategy. The U.S. Government has thus far lagged in protecting returning residents' rights to property in taking adequate measures to ensure proper inspection of houses

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<sup>195</sup> Guiding Principles on IDPs, *supra* note 60, Principle 9(2): States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

<sup>196</sup> See Timothy Boone, *Seafood Industry Pleads Its case*, THE ADVOCATE (Baton Rouge, LA), Jan. 5, 2006, at 1D; see also Edward Hegstrom, *Port Arthur: Vietnamese Worry About the Future of Shrimping*, HOUSTON CHRONICLE, Oct. 8, 2005, at B1; and Matt Apuzzo, *Stricken Shrimpers Face Desperate Times in Gulf*, THE ADVOCATE (Baton Rouge, LA), Sept. 15, 2005, at 1D.

<sup>197</sup> *Port Arthur: Vietnamese Worry About the Future of Shrimping*, *supra* note 196.

<sup>198</sup> James Dao, *In New Orleans, Smaller May Mean Whiter*, N.Y. TIMES, Jan. 22, 2006, at 1.1

<sup>199</sup> Audrey Singer and Katharine M. Donato, *In Katrina's Wake, Who Will Return?* Brookings Institute Web Exclusive, Sept. 27, 2005, available at [http://www.brookings.edu/views/op-ed/20050927\\_singer.htm](http://www.brookings.edu/views/op-ed/20050927_singer.htm).

<sup>200</sup> *Id.*

<sup>201</sup> Guiding Principles on IDPs, *supra* note 60, Principle 21(3).

before issuing demolition orders, properly notifying owners of demolition, and, where demolition or elevation is mandated, providing compensation to owners.

To date, adequate inspections of flood-damaged houses have not taken place. Many inspections have either been “rapid exterior inspections” or satellite-produced.<sup>202</sup> The failure to properly inspect houses before slating them for either demolition or expensive flood-proofing violates residents’ right to property by depriving them of their homes without procedural safeguards. And where demolition or elevation is proper, the U.S. Government has failed to provide low-income residents with the means to pay for flood-proofing or receive reparations for their homes.

Furthermore, compounding the effects of inadequate inspection, insufficient notice about demolition has also deprived residents of their right to property. The New Orleans city government only agreed to adequately notify owners of the demolition of their homes after settling a lawsuit.<sup>203</sup> Until that point, displaced persons could not ascertain whether or not their homes were slated for demolition, much less seek judicial recourse to contest the act. While the bulldozing of the Lower 9th Ward of New Orleans is ongoing, many victims are expressing concerns over the ambiguity of the rebuilding plan set forth by the Government.<sup>204</sup> Furthermore, an ad hoc appeals process has emerged to permit residents with damaged homes to appeal city orders to demolish or flood-proof damaged homes. However, this crude review process is available only to those residents who can physically access New Orleans city hall, not those who are displaced outside the city or who lack transportation.<sup>205</sup>

Residents have sought these ad hoc review measures because the U.S. Government has insufficiently protected the right of homeowners to reparation where their property cannot be restored to them. Guiding Principle 29(2) provides that “competent authorities will provide or assist in obtaining appropriate compensation or another form of just reparation.”<sup>206</sup> Although the State of Louisiana recently released a plan outlining reparations for homeowners that deemphasizes buyouts and attempts to encourage homeowners to return and rebuild, the plan has not yet been put into effect.<sup>207</sup> As the U.S. Government implements the reparation plan, care must be taken to guarantee low-income and limited English proficient individuals receive adequate information about the scope of the compensation provided.

### **c. The Right to Shelter**

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<sup>202</sup> Eric Lipton, *FEMA Calls 60,000 Houses in Storm Area Beyond Repair*, N.Y. TIMES, Nov. 5, 2005, at A14.

<sup>203</sup> *Demolition Process and Notification*, City of New Orleans Website, <https://secure.cityofno.com/portal.aspx?portal=37&load=~/Services/SafetyAndPermits/Permits/DemolitionExhibit.ascx>, stating, “Pursuant to a Consent Decree between the City of New Orleans and plaintiffs in, *Kirk, et al v. The City of New Orleans*, notification will be published in Times-Picayune newspaper for three (3) consecutive days, beginning Monday, February 6, 2006, and will also be posted online at [www.cityofno.com](http://www.cityofno.com). The City will also send notification by U.S. Mail to the last known address of the homeowner, if the address of the homeowner can be determined.”

<sup>204</sup> Gwen Filosa, *Razing Draws Sharp Divide; Some Want to Move On, Others Not Ready*, TIMES-PICAYUNE, Mar. 26, 2006, at 1.

<sup>205</sup> Adam Nossiter, *Sparing Houses in New Orleans Spoils Planning*, N.Y. TIMES, Feb. 5, 2006, at 1.1.

<sup>206</sup> Guiding Principle on IDPs, *supra* note 60, Principle 29(2).

<sup>207</sup> *See Louisiana Unveils a Plan With Cash to Rebuild Homes*, *supra* note 187.

Currently, the State is jeopardizing residents' right to return<sup>208</sup> by failing to provide adequate temporary housing near residents' original homes, which would enable returnees to reestablish their communities and oversee the rebuilding process. The U.S. Government must overcome logistical hurdles, such as delivery, installation, electrical and sewage services, in delivering promised trailers, which enable residents to return and reestablish their communities.<sup>209</sup> The importance of delivering the promised trailers is reinforced by the termination of housing and hotel voucher programs which has left residents, particularly low-income residents without other resources to resettle, without shelter.<sup>210</sup>

Furthermore, the U.S. Government must establish temporary housing areas in accordance with principles of nondiscrimination. Some neighborhoods have resisted the installation trailers by citing concerns about property value decline and crime rates, though community groups note that these concerns demonstrate a thinly veiled effort to exclude persons of different economic classes or race from their neighborhoods.<sup>211</sup> Because of these "not in my neighborhood" protests against trailer installation, only a small fraction, 1,632 of 30,000 of the requested trailers have been installed in New Orleans.<sup>212</sup>

#### **d. The Right of Return and to a Safe and Healthy Environment**

The State must protect returnees' rights to return, life, health by monitoring and establishing safe, livable conditions for former residents. The U.S. Government's responsibilities in this regard include clearing the affected areas of harmful debris and monitoring residents' potential exposure to toxins in the soil, air, and water. The U.S. Government also has the duty to candidly inform residents who hope to return about toxicity levels in the region. State officials have reiterated, "there are generally no unacceptable long-term health risks directly attributable to environmental contamination resulting from the two hurricanes."<sup>213</sup> Contrary to these government reports, regional environmental groups dispute the government's findings and point to high arsenic and toxin levels in water and soil that are up to 10 times Louisiana standards; these groups also point to the government's failure to conduct sufficient testing and make those results public.<sup>214</sup>

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<sup>208</sup> Guiding Principles on IDPs, *supra* note 60, Principle 29(2).

<sup>209</sup> Spencer Hsu, *Post-Katrina Promises Unfulfilled; On the Gulf Coast, Federal Recovery Effort Makes Halting Progress*, WASH. POST, Jan. 28, 2006, at A01. *See also* Eric Lipton, *Trailer Dispute May Mean Thousands Will Go Unused*, N.Y. TIMES, Feb 14, 2006, at A.18; Jennifer Steinhauer and Eric Lipton, *Storm Victims Face Big Delay To Get Trailers*, N.Y. TIMES, Feb 9, 2006, at A.1

<sup>210</sup> James Varney, *People in Hotels Urged to Move; Not Everyone Will Get Trailer, FEMA Says*, TIMES-PICAYUNE (New Orleans), Feb. 2, 2006, p.1. *See also*, Michelle Goldberg, *Homeless Again in New Orleans*, Salon.com, Feb. 7, 2006, available at [www.salon.com/news/feature/2006/02/07/hotels](http://www.salon.com/news/feature/2006/02/07/hotels).

<sup>211</sup> Rob Nelson & James Varney, *'Not in My Back Yard' Cry Holding Up FEMA Trailers: Emotional Tone of Opposition Hints at Role of Stereotypes of Race, Class*, TIMES-PICAYUNE (New Orleans), Dec. 26, 2005, at 1. *See also*, Ellen Tandy, *Trailers Anger Neighbors*, THE ADVOCATE (Baton Rouge), Jan. 31, 2006, available at [www.theadvocate.com/news/2255091.html](http://www.theadvocate.com/news/2255091.html).

<sup>212</sup> *Id.*

<sup>213</sup> Letter from Mike McDaniel, Secretary, Louisiana Department of Environmental Quality to Natural Resources Defense Council, (Feb. 2, 2006), stating that though environmental sampling was not complete, it indicated that no immediate health risk existed. The first major report on environmental considerations was issued on October 13, 2005. A second report was issued in January 2006.

<sup>214</sup> Matthew Brown, *Debate Renewed as Soil is Retested- EPA Downplays Risk but Activist Cries Foul*, TIMES-PICAYUNE (New Orleans, LA), Feb. 10, 2006, at 1. *See also*, *New Testing Shows Widespread Toxic Contamination*

Many reports display grave environmental concerns. “Several chemical plants, petroleum refining facilities, and contaminated sites, including Superfund sites, were covered by floodwaters.”<sup>215</sup> Others describe post-Katrina environmental hazards in effected areas as a toxic gumbo.<sup>216</sup> In a report by the Natural Resource Defense Council, the Government has been charged with neglecting major safety threats both indoors and outdoors.<sup>217</sup> The report found mold levels in the Gulf Coast extremely high and showed notable differences in the amount of toxins present in affected areas and the level of toxins present in unaffected areas.<sup>218</sup> “Other news accounts showed that petroleum chemicals, sewage and other dangerous chemicals and waste were ubiquitous.”<sup>219</sup>

The Deep South Center for Environmental Justice, in partnership with United Steel Workers of America, launched a project to remove contaminated soil from ten homes in New Orleans.<sup>220</sup> Nine out of the ten houses have at least one chemical at higher concentration than the states residential guidelines prescribe.<sup>221</sup> Moreover, toxic metals such as arsenic were found in forty percent higher concentration than what is deemed safe, while petroleum such as diesel was present in twice its normal limit.<sup>222</sup> The EPA has not begun the clean up process, but recommends that returnees wear protective gear when working on their homes.<sup>223</sup> However, according to a local advocate the government is not providing any protective gear.<sup>224</sup>

By failing to take into consideration the serious environmental concerns encountered by Gulf Coast residents in the wake of the Gulf Coast Hurricanes, the U.S. Government is jeopardizing with their right to life protected by the ICCPR’s Article 6. The U.S. Government must continue to carefully monitor all indicia of environmental safety and inform the public about any changes to its current analyses. Furthermore, the U.S Government must observe the right to nondiscrimination by ensuring that cleanup proceeds equitably – taking into account neighborhoods with older houses, older plumbing systems and dangerous building materials such as asbestos may require more intensive efforts that must account for particular safety hazards.

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in New Orleans Soil, National Resources Defense Council Press Release, Dec. 1, 2005, at <http://www.nrdc.org/media/pressreleases/051201.asp>.

<sup>215</sup> Danny Reible, *Toxic and Contaminant Concerns Generated by Hurricane Katrina*, 36 Nat’l Acad. of Engineering, 1 (Spring 2006), available at <http://www.nae.edu/NAE/bridgecom.nsf/weblinks/MKEZ-6MYQQP?OpenDocument>.

<sup>216</sup> *Post-Katrina environmental catastrophe: A Diary Of Toxic Injustice*, SEEN.ORG, Oct. 4, 2005, available at <http://www.seen.org/pages/Katrina/pollution.shtml>.

<sup>217</sup> Brendan Coyne, *Unacceptable Mold Levels Found in New Orleans Air*, THE NEWS STANDARD, Nov. 22, 2005, available at [http://newstandardnews.net/content/?action=show\\_item&itemid=2622&x=x](http://newstandardnews.net/content/?action=show_item&itemid=2622&x=x).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Ann M. Simmons, *New Orleans Activist Starting From the Ground Up*, Mar. 24, 2006, at A19.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Chris Stuff and Amy Gluckman, *Voices From The Gulf Coast*, Special Issues of Dollars and Sense, Mar. 29, 2006, at [http://minorjive.typepad.com/hungryblues/2006/04/voices\\_from\\_the.html](http://minorjive.typepad.com/hungryblues/2006/04/voices_from_the.html).

<sup>224</sup> *Id.*

## VIII. WORKERS' RIGHTS IN THE RECONSTRUCTION PHASE

### a. Human Rights of Reconstruction Workers

Natural disasters such as hurricanes endanger the human rights of a number of populations, not only those immediately impacted by the disaster. In the context of the Gulf Coast Hurricanes, the U.S. Government's duty to safeguard the human rights of individuals within its borders extends to the cleanup and reconstruction workers.<sup>225</sup> Our analysis will specifically focus on the large population of migrant workers who have participated in reconstruction efforts. Nongovernmental organizations have chronicled the plethora of human rights violations against these workers, including the U.S. Government's failure to monitor employers who fail to pay wages, abide by adequate health and safety precautions, or remedy discrimination issues.

Within the United Nations system, the rights of migrant workers to life, health, and remuneration, regardless of immigration status, have been consistently recognized. The UN affirmed these rights in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("Migrant Convention").<sup>226</sup> The Migrant Convention enumerates migrant workers' rights within employment relationships. Of particular relevance to our present analysis of the Gulf Coast hurricane reconstruction effort are Articles 7 (freedom from discriminatory treatment), 16 (right to protection from the state against violence, physical injury, threats and intimidation) and 25 (right to treatment not less favorable than nationals).<sup>227</sup> These Articles interpret the right to equality before the law and freedom from discrimination, protected by Article 26 of the ICCPR. General Comment No. 28 of the Committee discusses this connection in the context of inequality between men and women in the workforce: "a large proportion of women are employed in areas which are not protected by labour laws and ... prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value."<sup>228</sup> The Committee recommended that States parties should "review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields."<sup>229</sup> The ICCPR's non-discrimination principle allows the Committee to apply this discussion of gender equality in the workforce to aliens as well, because the Covenant gives aliens all the protection regarding rights guaranteed therein.<sup>230</sup>

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<sup>225</sup> Pursuant to Article 2(1) of the ICCPR, each state party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction." ICCPR, art. 2, para. 1. In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. U.N. Hum. Rts. Comm., General Comment No. 15: The Position of Aliens under the Covenant. 4/4/86, twenty-seventh session, 1986.

<sup>226</sup> See United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, U.N. Doc. CMW/C/SR.25, Dec. 22, 2005.

<sup>227</sup> *Id.*

<sup>228</sup> U.N. Hum. Rts. Comm., General Comment No. 28: Equality of Rights Between Men and Women. UN Doc. CCPR/C/21/Rev.1/Add.10. March 29, 2000.

<sup>229</sup> *Id.*

<sup>230</sup> General Comment 15 *supra* note 225.



The State has responsibilities to migrant workers when it is itself an employer, but also in cases where private, third parties are employers.<sup>231</sup> Thus, whether the State is the primary employer or not, it must protect worker rights by creating legislation that defines the labor relationship, monitoring the compliance with that legislation, and providing recourse for workers when their rights are violated.<sup>232</sup>

## **b. Right to Remuneration**

Immediately following the Gulf Coast Hurricanes, President Bush suspended legislation requiring payment of prevailing wages for federally-funded reconstruction contracts as well as requiring employers to maintain payroll records.<sup>233</sup> The effect of suspending this legislation not only gave contractors license to pay lower wages to workers, it also permitted contractors leeway to keep their payroll records private, which leaves room for worker exploitation.<sup>234</sup> Although the legislation has since been reinstated, several large subcontracts were signed during this suspension period.<sup>235</sup>

By waiving this legislation, without implementing accompanying measures to keep employers accountable for proper remuneration, the U.S. Government has neglected the reconstruction workers' rights to remuneration. Advocacy organizations and media outlets in the Gulf Coast have documented numerous cases of workers who have not been paid for their work.<sup>236</sup> Furthermore, not only do contractors fail to pay workers, they also place them in unhealthy living conditions and fail to provide them with food after promising them room and board in addition to work.<sup>237</sup> The lack of oversight and accountability create conditions that endanger fundamental rights and expose workers to the danger of forced labor.<sup>238</sup> Though the U.S. Government's Department of Labor has obtained back pay for unpaid workers in cases involving one Gulfport, Mississippi subcontractor, the Government must increase these efforts to remedy remuneration violations.<sup>239</sup>

Two domestic lawsuits have been filed against large reconstruction firms on behalf of migrant workers who are particularly vulnerable to exploitation because of their reluctance to

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<sup>231</sup> Article 25(1)(a)-(b) provides that migrant workers shall enjoy treatment not less favorable than that which nationals of the state of employment in respect of pay and other conditions and terms of work. Furthermore subsection 2 of this Article also states that the Principle of Equality of Treatment referred to in subsection 1 cannot be derogated in private contracts.

<sup>232</sup> *Id.* at pars. 146-152

<sup>233</sup> Memorandum from Alfred Robinson, Deputy Administrator of U.S. Department of Labor Employment Standards Administration (Sept. 22, 2005).

<sup>234</sup> Davis-Bacon Act was suspended by the U.S. Department of Labor, Employment Standards Administration, *see* Thomas Edsall, *Bush Suspends Pay Act in Areas Hit by Storm*, WASH. POST, Sept. 9, 2005, at D03.

<sup>235</sup> *See* Edsall, *supra* note 234.

<sup>236</sup> Justin Pritchard, *Immigrants Often Unpaid for Katrina Work*, ASSOCIATED PRESS, Nov. 6, 2005. Joshua Norman, *All Work and No Pay Is Plight of Some- Latino Workers Face Fight to Receive Their Due*, SUN HERALD (Biloxi, MS), Nov. 19, 2005, at A1. *See also* Darryl Fears, *Firms in Gulf Coast Allege Nonpayment: 150 Immigrants' Cases Sent to Labor Dept.*, WASH. POST, Nov. 4, 2005, at A04. *See also*, Kristen Gelineau, *Civil Rights Leaders Say Hispanic Immigrants Going Unpaid for Katrina Work*, ASSOCIATED PRESS, Nov.19, 2005.

<sup>237</sup> Robin Pogrebin, *Lured to U.S. by the Work but Struggling for Fair Pay*, N.Y. TIMES, October 17, 2005, at A15.

<sup>238</sup> ICCPR, Art. 8(3)(a).

<sup>239</sup> *U.S. Labor Department Recovers Over \$141,000 in Back Wages for 106 Workers Involved in Hurricane Clean-up Work*, News Release, U.S. Department of Labor, Jan. 25, 2006.

report wage abuses.<sup>240</sup> The companies involved in the lawsuits allegedly refused to pay overtime and used a subcontracting system to avoid paying wages to hundreds of workers, the majority of whom were Latino. The plaintiffs cleaned mold, mud, and toxic contamination from flooded government buildings including courthouses, schools, and hospitals, and were either under compensated or not compensated at all for their labor.<sup>241</sup>

The U.S. Government's failure to uphold migrant workers' right to remuneration amounts to *de facto* discrimination. The U.S. Government's duty to provide procedural safeguards to prevent wage violations failed to take into account Latino workers' hesitancy to approaching government authorities,<sup>242</sup> as the only government labor agencies where workers can file wage complaints are located in the same buildings as immigration enforcement offices.<sup>243</sup> The U.S. Government's prerogative to enforce immigration laws should not conflict with workers' right to seek legal recourse for wage violations. Thus, the U.S. Government must take adequate measures to distinguish between agencies enforcing workers' rights from those enforcing immigration laws and to inform all workers of their right to remuneration without fear of immigration consequences. To that end, the Government must prevent labor violations by monitoring and holding accountable employers who attempt withhold wages by calling immigration enforcement to round up workers who have completed their work but have not yet been paid.<sup>244</sup>

### **c. Rights to Health and Life**

The U.S. Government breached the duty to safeguard the health and life of all individuals, including migrant workers following the Gulf Coast Hurricanes, by failing to implement adequate and accessible health and safety monitoring and enforcement measures in the months following the Hurricanes. The U.S. agency responsible for monitoring workplace health and safety, the Occupational Health and Safety Administration ("OSHA"), suspended its routine inspection and enforcement of Gulf Coast workplaces for several months, and only resumed monitoring in all but the worst affected areas, on January 25, 2006.<sup>245</sup> In the exempted areas, OSHA now provides "technical assistance to employers and workers by providing advice and information."<sup>246</sup> Though the suspension of its inspections was supposed to make OSHA more effective at targeting egregious violations, it breached the rights of migrant workers by failing to implement health and safety monitoring, as well as training, at the time when it was most necessary. Furthermore, upon resuming inspections, OSHA inspectors focused on federal

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<sup>240</sup> *Center Seeks Justice for Katrina's Migrant Workers*, Press Release by Southern Poverty Law Center, Feb. 2, 2006, available at [www.splcenter.org/legal/news/article.jsp?aid=160&site\\_area=1&printable=1](http://www.splcenter.org/legal/news/article.jsp?aid=160&site_area=1&printable=1).

<sup>241</sup> *Id.*

<sup>242</sup> See Section II(b): Background Information: Preexisting Vulnerabilities of Gulf Coast Low-Income African American and Immigrant Communities. See also, *All Work and No Pay is Plight of Some*, *supra* note 198, noting that the Department of Labor is just down the hall from ICE.

<sup>243</sup> *All Work and No Pay is Plight of Some*, *supra* note 198.

<sup>244</sup> *Id.*, see also Joshua Norman, *Labor Management – Latinos Here to Work*, SUN HERALD (Biloxi, MS), Dec. 4, 2005, at A1.

<sup>245</sup> *OSHA Resuming Regular Enforcement Along Most of Gulf Coast*, OSHA National News Release, January 20, 2006, available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=11805](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11805).

<sup>246</sup> *Id.*

employees and contractors, with limited attention to the large day-labor workforce.<sup>247</sup> Accordingly, the health of cleanup workers has been critically jeopardized by this lack of adequate inspection; workers are clearing out sites with asbestos and hazardous waste without adequate safety gear or training.<sup>248</sup>

Furthermore, given migrant workers' particular reluctance to approach government agencies,<sup>249</sup> the U.S. Government should have made special efforts to reach out to these workers, many of whom were engaged in the most hazardous cleanup activity. Instead, government officials discouraged this population from accessing proper health and safety training by blurring the lines between OSHA and immigration enforcement agencies. In an incident in North Carolina, in October 2005, shortly after the Gulf Coast Hurricanes, Latin American migrant workers were detained by immigration officials posing as OSHA officials at a mock health and safety training set up specifically to ensnare undocumented persons.<sup>250</sup> The U.S. Government has stated that it will not disavow these methods in the future; despite the chilling effect they have on workers' willingness to attend training sessions.<sup>251</sup> Such intentionally deceptive measures will only further endanger workers' health and safety, as they become increasingly suspicious of government attempts to address and improve their working conditions.

#### **d. Discrimination Against Migrant Workers**

As a population particularly vulnerable to exploitation, migrant workers must be protected from discrimination.<sup>252</sup> The State has perpetuated discrimination against migrant workers through failing to monitor and effectively address workers' rights violations. By failing to enact and communicate a consistent policy on immigration enforcement that separates human rights protections from legal enforcement of domestic immigration laws, the U.S. Government places in jeopardy the effective protection of workers' rights. By permitting employers to use, with impunity, immigration enforcement as a mechanism to avoid paying workers, the U.S. Government also jeopardizes the workers' rights to remuneration and nondiscrimination. By implementing inadequate health and safety training and monitoring measures, the U.S. Government violates workers' rights to life and health.

Cleanup efforts, though underway, will continue in the months to come. Much of the large-scale, government-funded rebuilding contracts have not yet begun. In total, \$4.7 billion

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<sup>247</sup> Barab J. *OSHA.FEMA Failing to Protect Day Laborers in the Gulf*, available at <http://spewingforth.blogspot.com>.

<sup>248</sup> Robin Pogrebin, *Lured to U.S. by the Work but Struggling for Fair Pay*, *supra* note 199. Bill Chandler of Mississippi Immigrants Rights Advocates reports lack of safety gear, such as goggles and gloves, as well as inadequate vaccinations for tetanus and other diseases likely to arise on cleanup sites. *Id.* See also *EPA Warns of Cleanup Dangers*, *TIMES-PICAYUNE* (New Orleans, LA), Sept. 14, 2005, listing safety precautions for cleanup workers.

<sup>249</sup> See Section II(b): Background Information: Preexisting Vulnerabilities of Gulf Coast Low-Income African American and Immigrant Communities.

<sup>250</sup> Letter from Monica Guizar, Employment Policy Attorney, National Immigration Law Center, to Jonathan Snare, Deputy Assistant Secretary of OSHA, U.S. Department of Labor (Oct. 4, 2005).

<sup>251</sup> Steven Greenhouse, *U.S. Officials Defend Ploys To Catch Immigrants*, *N.Y. TIMES*, February 11, 2006, at A8.

<sup>252</sup> ICCPR, Art. 26, International Covenant on Migrant Workers, Arts. 7, 16, 25.

dollars has already been allocated by the federal government toward rebuilding efforts.<sup>253</sup> In addition to acknowledging existing violations of migrant workers' rights, the U.S. Government must act to prevent further discrimination from occurring in the rebuilding that is yet to come.

## IX. CONCLUSION

By ignoring the needs and rights of the region's most vulnerable communities, the U.S. Government magnified the destructive effects of the Gulf Coast Hurricanes. The human toll of future disasters can be significantly reduced if States address the human rights challenges faced by survivors and recovery workers participating in reconstruction efforts. The Committee is in a unique position to promote the protection of human rights in natural disaster preparedness, response and recovery. Based on the factual and legal analysis presented in this written submission, we respectfully request that the Human Rights Committee adopt the following draft concluding observations:

- The Committee is concerned that the U.S. Government's failure to take into account the pre-existing vulnerabilities of African American and immigrant communities in developing evacuation plans jeopardized the personal integrity of members of these communities and contributed to loss of life. The Committee recommends that the State party takes positive measures required by Articles 2.1, 6 and 26 to ensure that victims receive equal treatment in the evacuation context by, for example, providing publicly-accessible transportation and requiring multi-lingual emergency warnings.
- The Committee is concerned that emergency humanitarian assistance was not available and accessible to African-American and immigrant communities in a non-discriminatory manner. The Committee recommends that the State party takes positive measures, required by Articles 2.1 and 26 to ensure that members of racial minorities and immigrant communities can obtain life-saving assistance by developing and implementing human rights standards for aid policies and programs as well as mechanisms for monitoring human rights compliance with said standards.
- The Committee is concerned that post-Katrina reconstruction does not promote the right of displaced minority communities to return. The Committee recommends that the State party improves community participation in reconstruction planning and implementation, guarantees the right to property and shelter, and ensures safe and healthy environmental conditions in disaster-affected regions.
- The Committee is concerned about reports of abuses of worker's rights committed by federal contractors including allegations regarding the failure of employers to pay workers as well as egregious violations of health and safety standards. The Committee recommends that the

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<sup>253</sup> Spreadsheet: Hurricane Katrina Contracts, The Federal Procurement Data System, *at* <http://www.fpds.gov/>. The Federal Data Procurement System's latest information on hurricane-related contract awards, as of March 2, 2006, notes that the total amount of funds allotted to post-Katrina contracts stands at \$1.6 billion (most FEMA and Defense Department contracts are not included). The largest portions of this amount are attributed to Homeland Security, the Environmental Protection Agency, and the Department of Transportation.

State party strengthen employer accountability for labor violations by allocating adequate resources to monitor and enforce labor laws in the region.