

BRING IT ON HOME: A GULF COAST MARSHALL PLAN BASED ON INTERNATIONAL HUMANITARIAN STANDARDS

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INTRODUCTION

Two years after Hurricanes Katrina and Rita,¹ many parts of New Orleans and the Gulf Coast are still devastated, and the needs of millions of residents remain unmet. One independent study summarized the need for more robust federal action saying:

The federal disaster aid programs now in place were never designed to handle the scale of catastrophic damage left behind by hurricanes Katrina and Rita. . . . [I]t is evident from the continuing slow pace of the recovery more than two years after the storms that other avenues need to be explored.

. . . .

. . . Neither state nor local governments are prepared to handle the challenges posed by recovery from a mega-disaster. *They need federal help. . . .*

Delayed aid, in turn, delays recovery.²

One reason for this is that the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act or Act),³ the primary U.S. law

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1. Hurricane Katrina will be used to refer to the storms and their aftermath for purpose of brevity. It is important to make clear that much of the damage was caused not by the hurricanes directly but from the failure of levees and destruction of protective wetlands. *See infra* Part I.B.

2. JENNIFER PIKE, PUB. AFFAIRS RESEARCH COUNCIL OF LA. & THE NELSON A. ROCKEFELLER INST. OF GOV'T, GULFGOV REPORTS: SPENDING FEDERAL DISASTER AID: COMPARING THE PROCESS AND PRIORITIES IN LOUISIANA AND MISSISSIPPI IN THE WAKE OF HURRICANES KATRINA AND RITA at v, 21 (2007) (emphasis added), *available at* <http://www.rockinst.org/WorkArea/showcontent.aspx?id=12268> [hereinafter GULF REPORT].

3. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5127–5207 (2000).

governing federal disaster relief, is insufficient for responding to a disaster so catastrophic that it overwhelms the capacities of state and local governments. Such a catastrophe, involving massive, interrelated problems, calls for a new legal and policy framework to enable the centralized national intervention needed to restore the stricken areas.

Of course, federal law on disaster response is hardly the sole reason for governmental failure to meet the needs of storm victims. Lack of political will, inadequate resources, bureaucratic dysfunction, and sheer incompetence have characterized the government's recovery efforts. A significant complication is that many of the problems—including the integrity of the flood-protection system, the quality of the education and health care systems, and the strength of the economy—existed before the storms, although surely Katrina worsened many of them to the breaking point. As to flood protection, Katrina catastrophically exceeded the breaking point.

That said, new congressional action to create a “Marshall Plan”⁴ for the Gulf Coast is needed to replace the Stafford Act. Such legislation will sweep away not just the legal impediments to recovery but will also help remove the political, resource, administrative, and competency obstacles to recovery. The Katrina disaster is too big for state and local management with intermittent and discretionary federal collaboration, which is all the Stafford Act provides. The Act's structure provides for federal involvement that is entirely discretionary and almost completely insulated from legal accountability by broad statutory immunity. The Act is a virtual prescription for the ineffective federal-state response to the disasters to date.

This Article proposes that international humanitarian standards be used as a framework for the following sixteen-point Gulf Coast Marshall Plan (Plan) that would address unmet needs in the stricken area:

- (1) The federal government will assume primary responsibility for an integrated recovery effort;
- (2) all persons displaced or injured by the disaster will have recovery rights;
- (3) displaced persons willing to return will have a right to return, and their displacement will end as soon as possible;

4. Former Secretary of State George C. Marshall initially proposed the Marshall Plan in a 1947 commencement speech at Harvard University. U.S. Agency for Int'l Dev., USAID: Marshall Plan Home Page, <http://www.usaid.gov/multimedia/video/marshall/> (last visited Oct. 1, 2007). The Marshall Plan called for economic and technical assistance to rebuild Europe after World War II. *Id.* “As a keystone of U.S. foreign policy, the Marshall Plan set a precedent for helping countries combat poverty, disease, and malnutrition.” *Id.*

- (4) materially sufficient living conditions will be established to allow persons to return and remain;
- (5) the government will assist persons in repairing and rebuilding recoverable homes and will ensure access to decent and affordable housing;
- (6) comprehensive, reliable flood-protection measures will be taken, including strengthened levees and restored coastal wetlands;
- (7) ineffective bureaucracies will be replaced by a streamlined, efficient, effective, and easily understood administrative process for relief and recovery;
- (8) the military will be deployed for debris removal and rebuilding;
- (9) personal property and possessions will be protected, and disaster victims will be reasonably compensated for losses;
- (10) Gulf Coast residents will have access to health care;
- (11) the government will reopen schools and take other measures to ensure education for all children in stricken communities;
- (12) the government will take steps to increase economic opportunities in stricken areas, such as partnerships, incentives, and assistance for businesses that reopen or locate in the region;
- (13) the right of evacuees to participate in politics and civic life will be ensured;
- (14) storm victims—returnees and evacuees—will be included in federal recovery planning;
- (15) anti-discrimination measures will be enforced to ensure that the disaster and recovery do not have a discriminatory effect; and
- (16) the special needs of at-risk groups will be met.

This Plan is based on international standards for disaster relief; specifically, the United Nations Guiding Principles on Internal Displacement (Principles),⁵ which provide a more effective basis for Gulf Coast recovery policy than current U.S. law. Anticipating up front that U.N. policy will be greeted by some audiences with skepticism, here is a concise summary of why it makes sense: The U.S. government follows the Principles in effective disaster response and recovery in *other* countries, but U.S. response and recovery to the Gulf Coast disaster in *this* country does not follow the Principles and has been woefully inadequate.

5. The Representative of the Secretary-General, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Human Rights, Mass Exoduses and Displaced Persons*, add., U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998), available at <http://www.unhcr.ch/html/menu2/7/b/principles.htm> [hereinafter *U.N. Principles*].

This Article has five Parts:

- (I) A review of present conditions in stricken areas, which demonstrates how badly recovery efforts are failing;
- (II) an examination of the Stafford Act, which explains why the Act is inadequate to address a disaster as catastrophic as Katrina;
- (III) a description of the Principles applicable to Gulf Coast recovery and an assessment of the legal status of the Principles;
- (IV) a point-by-point analysis of the proposed Gulf Coast Recovery Plan, which examines how the Principles support each point and how the Act is insufficient to meet each goal;
- (V) an analysis of U.S. international disaster-relief policy and practice, which shows that the U.S. government follows the Principles in responding to disasters elsewhere in the world.

This Article focuses on the situation in New Orleans and southern Louisiana for two reasons. First, the damage there was greater than in other stricken areas,⁶ and the unique devastation of the highly populated New Orleans area makes it the epicenter of the continuing humanitarian crisis resulting from the storms.⁷ Second, much of the damage in Louisiana resulted from failed flood protection that was the government's responsibility.⁸ Accordingly, the moral and political argument for large-scale federal government intervention is strengthened by governmental complicity in the tragic devastation in Louisiana that exceeds the losses, terrible though they are, in other places.

I. THE PROBLEM ON THE GROUND: STALLED POST-KATRINA RECOVERY

The major problems with the recovery can be divided into three broad categories. First, people are not returning, or not remaining, because the failure to rebuild civic infrastructure—the economy, health care, and education—makes the stricken areas hard places to live. Second, uncertain flood protection leaves basic physical security in doubt. Third, government incompetence and administrative inefficiency have been, and continue to be, an insurmountable obstacle to virtually everything needed for recovery—return, rebuilding, renewed services and infrastructure, and flood protection.

6. *Written Testimony of Walter Leger, Member of the Board of the Louisiana Recovery Authority Before the S. Subcomm. on Response and Recovery of the S. Comm. of Homeland Security and Governmental Affairs*, 110th Cong. 2 (2007), available at <http://www.lra.louisiana.gov/assets/senate/WalterLegerTestimony012997.pdf> [hereinafter *Leger Testimony*].

7. *See infra* Part I.B.

8. *See infra* Part I.B.

A. *The Problem of Returning and Rebuilding: Failure to Assist Rebuilding, Restore Services, and Repair the Civic Infrastructure Keeps People from Returning and Remaining*

A February 2007 Greater New Orleans Community Data Center (GNOCDC) study concluded that “[r]ecent indicators suggest that New Orleans’ recovery is only inching along” and that “decision-makers at all levels need to reduce red tape to put momentum back into recovery efforts.”⁹ According to the study, less than half of the pre-Katrina New Orleans population has returned.¹⁰ In the greater New Orleans metropolitan area alone, almost 300,000 people displaced by Katrina and its flooding have not returned.¹¹

The New Orleans area has lost over 118,000 jobs and over 25% of its workforce, with the majority coming from service industries such as transportation, utilities, education, and health.¹² Health care and education sectors, critical to the region’s recovery, have lost over 25% of their employees.¹³

There is statistical evidence that many of those displaced want to return to the region.¹⁴ However, one reason people have not returned is that they

9. *Tracking Recovery of New Orleans and the Metro Area*, THE KATRINA INDEX (Greater New Orleans Cmty. Data Ctr., New Orleans, La.), Feb. 15, 2007, at 1, 1 [hereinafter FEB. KATRINA INDEX]; see also GULF REPORT, *supra* note 2, at v, 21. (observing slow pace of recovery and delayed aid). The GNOCDC, in collaboration with The Brookings Institute, issues quarterly reports on Katrina recovery. The most recent of those reports available when this Article was finalized for publication was the August 2007 report. Earlier reports are cited for information not updated in more recent reports or for information otherwise relevant to more current circumstances.

10. FEB. KATRINA INDEX, *supra* note 9, at 10 fig.5, 25 tbl.10. St. Bernard Parish, a hard-hit municipality neighboring New Orleans, also reported that fewer than half of its pre-storm residents have returned. *Id.*

11. *Id.* A more recent estimate, based on postal deliveries rather than a formal census, concluded that two-thirds of the City’s population and 83% of the region’s population may be back. Amy Liu & Allison Plyer, *A Review of Key Indicators of Recovery Two Years After Katrina*, THE NEW ORLEANS INDEX (The Brookings Inst. Metro. Policy Program & Greater New Orleans Cmty. Data Ctr., New Orleans, La.), Aug. 2007, at 1, 1–2, available at http://www.brookings.edu/metro/pubs/200512_katrinaindex.htm.

12. CHRIS KROMM & SUE STURGIS, INST. FOR S. STUDIES, BLUEPRINT FOR GULF RENEWAL: THE KATRINA CRISIS AND A COMMUNITY AGENDA FOR ACTION 5 (2007) [hereinafter SOUTHERN STUDIES REPORT]; *Tracking Recovery of New Orleans and the Metro Area*, THE KATRINA INDEX (Greater New Orleans Cmty. Data Ctr., New Orleans, La.), June 14, 2007, at 1, 39 tbl.22, 42–44 tbl.23b [hereinafter JUNE KATRINA INDEX]; Liu & Plyer, *supra* note 11, at 9.

13. JUNE KATRINA INDEX, *supra* note 12, at 39 tbl.22, 42–44 tbl.23b; Liu & Plyer, *supra* note 11, at 9.

14. JUNE KATRINA INDEX, *supra* note 12, at 25 tbl.9. Seventy-four percent of New Orleans residents applying for housing assistance under the Road Home Program state they want to use their assistance to keep their home. *Id.* The number of those intending to stay is higher (88%) in heavily populated Jefferson Parish and lower in other parishes neighboring the City. *Id.*

literally have no homes to return to. An estimated 200,000 homes were destroyed in Louisiana.¹⁵ Assistance to return and rebuild has been slow in coming. As of August 2007, of the over 180,000 homeowners who have applied for assistance under the Road Home Program, only 25% had their applications processed and approved.¹⁶ Many of those who did receive aid suffered from what has been described as “[p]altry calculation,” and state recovery officials have described the award challenge process as a “black hole.”¹⁷ Rental rates in the New Orleans area have persistently remained 40–50% higher than pre-Katrina rates; since renters receive limited housing assistance, this leaves them with few options.¹⁸ Loan delinquencies and foreclosures have increased significantly since the storm.¹⁹

As of August 2007, about two years after the storms, an estimated 80,000 people were still living in cramped trailers provided by the Federal

15. SOUTHERN STUDIES REPORT, *supra* note 12, at 5.

16. Liu & Plyer, *supra* note 11, at 11, app. B at 26 tbl.25 (indicating that only a quarter of Road Home applicants have been awarded aid).

17. David Hammer, *Disputes over Awards Add to Road Home Headaches; New Steps to Resolve Challenges Urged*, TIMES-PICAYUNE (New Orleans), Mar. 13, 2007, § (National), at 2 [hereinafter Hammer, *Disputes*] (describing criticism of Road Home relief and process); *see also* David Hammer, *Road Home Shortfall \$1 Billion Higher: State Says It Could Reach \$6.6 Billion*, TIMES-PICAYUNE (New Orleans), Sept. 22, 2007, § (National), at 1 [hereinafter Hammer, *Road Home Shortfall*] (reporting that recipients are expected to receive smaller than promised aid payments). The Road Home Program is federally funded and administered by the State of Louisiana. The Road Home: About Us, <http://www.road2la.org/about-us/default.htm> (last visited Sept. 16, 2007). Under the program, eligible homeowners may receive up to \$150,000 in assistance. *Id.* The State contracted out administration of the program, including distribution of financial assistance. *Id.* Claims processing has increased somewhat, but still leaves the vast majority of applications unaddressed. *See* Liu & Plyer, *supra* note 11, at app. B at 26 tbl.25 (noting that only 40,000 closings have been held for approximately 180,000 Road Home applications). Moreover, warnings from state officials that the program was significantly underfunded have proven to be correct. *See Leger Testimony*, *supra* note 6, at 9 (documenting that Congress provided the State of Louisiana \$12 billion while the actual need was closer to \$18 billion); Michelle Krupa, *LRA Feeds Road Home Kitty*, TIMES-PICAYUNE (New Orleans), June 26, 2007, § (National), at 1. As a result, the program stopped accepting claims, and the State has reallocated recovery spending in order to make up for part of the federal budgeting shortfall. *Id.*

18. *See* FEB. KATRINA INDEX, *supra* note 9, at 20 tbl.3 (noting that the fair market rent in New Orleans for a one-bedroom apartment was \$531 in 2004 and \$836 in 2007); JUNE KATRINA INDEX, *supra* note 12, at 21 tbl.3 (indicating that post-Katrina rental rates had increased). Renters face other obstacles, the most significant being sheer availability, as it has been estimated that less than half of flood-damaged rental units are “on track” to be rebuilt. SOUTHERN STUDIES REPORT, *supra* note 12, at 5. Road Home funding assistance is not available to renters. *See* Peter Whoriskey, *We Called It Hurricane FEMA*, WASHINGTON POST, Mar. 12, 2007, at A1 (describing how renters were excluded from federal assistance); The Road Home: About Us, *supra* note 17 (indicating that aid is available only for builders and property owners). Instead, the federal government is providing assistance to the owners of rental property in the hope that this will make more rentals available. *Id.* Some rental assistance is available through FEMA. Fed. Emergency Mgmt. Agency, FEMA: Disaster Assistance Available from FEMA, <http://www.fema.gov/assistance/process/assistance.shtm> (last visited Sept. 28, 2007).

19. FEB. KATRINA INDEX, *supra* note 9, at 53–55 tbls.23a, 23b & 23c.

Emergency Management Agency (FEMA).²⁰ These trailers were intended for temporary residence, and a member of the Louisiana Recovery Authority testified that putting families in trailers for long periods was “unacceptable.”²¹

Another obstacle to those who want to return and stay is that the public institutions and infrastructure necessary to sustain the population remain severely diminished.²² In Orleans Parish, 45% of the public schools and 64% of the child care centers remain closed.²³ Public school enrollment in New Orleans and St. Bernard Parish for the spring of 2007 is down 60% from pre-Katrina levels.²⁴

Six months after Katrina, city, state, and hospital officials reported that “the local health care system had been severely compromised.”²⁵ There has not been much improvement. According to New Orleans’ health director, the mortality rate in New Orleans has increased 42% since the hurricanes;²⁶ other studies report an increase in post-hurricane death rates as high as 50%.²⁷ As of June 2007, only 52% of the hospitals in Orleans Parish were open, while 36% of the state-licensed hospitals in the greater municipal area were closed.²⁸ Charity Hospital, the New Orleans area’s largest public hospital and the only one with a Level I trauma center, was still closed with

20. SOUTHERN STUDIES REPORT, *supra* note 12, at 2.

21. *Leger Testimony*, *supra* note 6, at 11. As bad as they are, the trailers may be better than the fate that awaits many if FEMA takes trailers away from those who have not found housing as it has planned. See Whoriskey, *supra* note 18 (noting unaffordable rental units as the alternative to FEMA trailers). Many of those people have nowhere else to go. See *id.* (emphasizing that residents have few resources with which to search for more permanent housing).

22. Liu & Plyer, *supra* note 11, at 1 (noting that there has been little progress in restoring public infrastructure and services).

23. *Id.* at app. B at 29, 35. In St. Bernard Parish only 20% of the schools and 12% of the child care centers have reopened. *Id.* at 13, app. B at 29, 35; JUNE KATRINA INDEX, *supra* note 12, at 13 fig.7.

24. JUNE KATRINA INDEX, *supra* note 12, at 28 tbl.14. For the New Orleans metropolitan area as a whole, public school enrollment is down 30% from pre-storm levels. Liu & Plyer, *supra* note 11, at 3. Problems are not exclusive to the public school system; over 40% of the private schools in Orleans Parish remained closed as of August 2007. *Id.* at 14–15, app. B at 29 tbl.29.

25. U.S. GOV’T ACCOUNTABILITY OFFICE, HURRICANE KATRINA: STATUS OF THE HEALTH CARE SYSTEM IN NEW ORLEANS AND DIFFICULT DECISIONS RELATED TO EFFORTS TO REBUILD IT APPROXIMATELY 6 MONTHS AFTER HURRICANE KATRINA 9 (2006) [hereinafter GAO REPORT: STATUS OF THE HEALTH CARE SYSTEM IN NEW ORLEANS].

26. Bill Walsh, *Medical Crisis in La. Felt in D.C.*, TIMES-PICAYUNE (New Orleans), Mar. 14, 2007, § (National), at 1.

27. The American Medical Association reported a 50% increase in mortality and attributed this to damaged health care facilities and the loss of health care workers. Ed Stoddard, *Post-Katrina New Orleans Death Rate Shoots Up*, REUTERS, June 22, 2007, <http://www.reuters.com/article/healthNews/idUSN2139658520070622?feedType=RSS>.

28. JUNE KATRINA INDEX, *supra* note 12, at 7, 14 fig.9. In August 2007, ten of the twenty-three major hospitals and rehabilitation facilities in the City remained closed. Liu & Plyer, *supra* note 11, at 15.

no plan to reopen.²⁹ Charity remains closed over the opposition of some prominent doctors in the state who contend the hospital could be partially reopened to relieve significantly the region's health care-access problems.³⁰ In St. Bernard Parish, neither of the two hospitals that served the community before the storm has reopened.³¹

The federal government recognized that "rebuilding the health care system will be vital to attract people back to New Orleans and ensure its recovery."³² However, despite the centrality of health care and education for the region's recovery, these critical services are still unavailable to many: "Demand for essential services continues to overwhelm supply as hospitals report saturated emergency rooms, and the public school system had to put returning students on a waiting list due to lack of facilities and teachers."³³

Other essential services are not nearly recovered. Public transportation service is well below pre-Katrina levels.³⁴ Increased crime in the City since the storms has been attributed in part to the failure to restore the City's law-enforcement buildings.³⁵ The restaurant industry, although publicly promoted as "back," continues to suffer, with only 46% of pre-Katrina retail food establishments open as of late 2006.³⁶

While the destruction from the storms and flooding crossed all demographic lines, statistics indicate that the impact in damaged areas was disproportionately borne by African Americans, renters, the poor, and the unemployed.³⁷ Failure to rebuild damaged areas and return residents to

29. U.S. GOV'T ACCOUNTABILITY OFFICE, HURRICANE KATRINA: STATUS OF HOSPITAL INPATIENT AND EMERGENCY DEPARTMENTS IN THE GREATER NEW ORLEANS AREA 5, 8 tbls.1 & 9 (2006) [hereinafter GAO REPORT: STATUS OF HOSPITAL INPATIENT AND EMERGENCY DEPARTMENTS]. Charity served many uninsured and Medicaid patients and was described by the federal government as a "primary health care safety net for many local residents." *Id.* at 9. Charity was a teaching and training hospital, and its closing deprived the City of a major resource for training doctors, nurses, and other health care professionals. *Id.* It was considered one of the nation's leading trauma centers. CNN: *Closing Arguments Under Way in Zacarias Moussaoui Trial* (CNN television broadcast Apr. 24, 2006), available at <http://cnnstudentnews.cnn.com/TRANSCRIPTS/0604/24/lt.02.html> [hereinafter CNN: *Closing Arguments*].

30. CNN: *Closing Arguments*, *supra* note 29.

31. Liu & Plyer, *supra* note 11, at 15, app. B at 34 tbl.34.

32. GAO REPORT: STATUS OF THE HEALTH CARE SYSTEM IN NEW ORLEANS, *supra* note 25, at 7.

33. FEB. KATRINA INDEX, *supra* note 9, at 5.

34. See Liu & Plyer, *supra* note 11, at 15, app. B at 33 tbl.33 (reporting 19% of buses running on 50% of routes).

35. See *id.* at 16, app. B at 36 tbl.37 (noting that police are operating out of trailers).

36. FEB. KATRINA INDEX, *supra* note 9, at 57 tbl.26; see also Leger *Testimony*, *supra* note 6, at 2 (reporting that more than 81,000 businesses have been impacted, including over 18,000 that have been catastrophically damaged); SOUTHERN STUDIES REPORT, *supra* note 12, at 5 (reporting that 25% of stores, malls, and restaurants are closed).

37. JOHN R. LOGAN, THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED

them would alter the racial and economic composition of the metropolitan area.³⁸

One statistically immeasurable but sadly tangible obstacle to return and recovery is the sheer physical devastation of much of the area. Despite improved efforts, abandoned cars, beached boats, ruined homes, and uncleared debris piles remain strewn throughout much of southern Louisiana.³⁹

B. The Problem of Security: Uncertainty as to Whether Flood-Protection Failures That Caused Much of the Disaster Have Been Fixed

The two main flood protections for metropolitan New Orleans are the series of levees surrounding the area and coastal wetlands that serve as a buffer against wind and water surges.⁴⁰ Both the levees and wetlands are largely federal responsibilities, with the Army Corps of Engineers (Corps) primarily responsible for the levees and significantly involved in efforts to preserve the wetlands.⁴¹ The President and Congress have the authority to direct federal policy and regulate private industry to strengthen both levee and wetlands protections.⁴²

Federal neglect of these essential flood protections is by far the main cause of the vast majority of human suffering and damage that followed Katrina in the New Orleans metropolitan area.⁴³ However, it is still unclear

NEIGHBORHOODS 1, 7 (2006), available at <http://www.s4.brown.edu/Katrina/report.pdf>.

38. *Id.* at 1, 16; see also Liu & Plyer, *supra* note 11, at 1 (noting fewer African American students returning).

39. J.R. Welsh, *Residents Determined to Get Hancock County's Messes Cleaned Up*, SUN HERALD (Biloxi), Mar. 28, 2007, at A1.

40. See Joel K. Bourne, Jr., *Gone with the Water*, NAT'L GEOGRAPHIC, Oct. 2004, at 92, 96 (describing the disappearance of protective coastal wetlands and the raising of levees in 1927 as a preventative measure).

41. U.S. Army Corps of Eng'rs, *Missions of the U.S. Army Corps of Engineers*, <http://www.usace.army.mil/missions/index.html> (last visited Sept. 30, 2007). Other federal agencies, such as the U.S. Department of the Interior and the U.S. Geological Survey National Wetlands Research Center, are also involved. U.S. Dep't of the Interior, U.S. Department of the Interior - Emergency Management, <http://www.doi.gov/emergency/katrina.html> (last visited Oct. 1, 2007); Press Release, U.S. Geological Survey Nat'l Wetlands Research Ctr., USGS Providing Humanitarian and Scientific Aid in Hurricane Katrina Aftermath (Aug. 31, 2005), available at http://www.nwrc.usgs.gov/releases/pr05_005.htm.

42. See, e.g., Press Release, White House Office of Mgmt. & Budget, *President Bush Requests Funds for New Orleans Levees* (Apr. 25, 2006), available at http://www.whitehouse.gov/omb/pubpress/2006/fact_sheet_new_orleans_levees.pdf (noting that President Bush asked Congress for an additional \$2.2 billion to improve and increase the level of hurricane and storm protection provided by the levees in the New Orleans area).

43. It is estimated that levee breaches accounted for 80-85% of the hurricane flooding in New Orleans. 1 R.B. SEED ET AL., *INVESTIGATION OF THE PERFORMANCE OF THE NEW ORLEANS FLOOD PROTECTION SYSTEMS IN HURRICANE KATRINA ON AUGUST 29, 2005*, at 15-5 (2006) [hereinafter *LEEVE*

whether the federal government will commit the resources necessary to build levees and restore wetlands as necessary to provide the best feasible protection to residents of southern Louisiana.

After initial denials, the Corps eventually admitted that it was to blame for the catastrophic levee breaches that caused over 80% of the flooding in the New Orleans area.⁴⁴ Leading civil-engineering experts described the New Orleans levees as the “single most costly catastrophic failure of an engineered system in history,”⁴⁵ a “system [that] is not an integrated, well-thought-out system,” and a system that “failed miserably” and “catastrophically.”⁴⁶

The levees did not stop the flooding because the Corps’ engineering lapses led to faulty levee construction.⁴⁷ “[T]he levee system protecting New Orleans was defective,”⁴⁸ and levee failures were preventable and foreseeable.⁴⁹ However, the levees were not strengthened, in part because of the Corps’ poor judgments and in part because of inadequate congressional oversight.⁵⁰

One of the fundamental problems with the levees is that the government did not want to pay for good ones. Costs were reduced even

REPORT]. The levees surrounding St. Bernard Parish, a municipality which was entirely flooded and where 100% of the property suffered significant flood damage, were incomplete and also failed. *See id.* at 15-2 (noting the “devastating” damage to St. Bernard Parish and flooding in excess of twelve feet above sea level); *Leger Testimony*, *supra* note 6, at 2 (reporting that St. Bernard, among other parishes, experienced 100% flooding).

44. Cain Burdeau, *Army Corps Takes Blame in Levees’ Failure*, BOSTON GLOBE, June 2, 2006, at A2; *see also* LEVEE REPORT, *supra* note 43, at 15-5 (stating that approximately 80–85% of flooding in New Orleans was attributable to the levee breaches).

45. LEVEE REPORT, *supra* note 43, at 15-1. The estimate by the Independent Levee Investigation Team that the levee breach was the most catastrophic such failure in history was based on the over one thousand people killed in the flooding, the hundreds of thousands displaced, and property damage estimates as high as \$200 billion. *Id.*

46. Letter from the Am. Soc’y of Civil Eng’rs to Lt. Gen. Carl A. Strock, Chief, U.S. Army Corps of Eng’rs (Feb. 20, 2006) (on file with author).

47. *See* LEVEE REPORT, *supra* note 43, at 15-7 to 15-11 (identifying the multiple mistakes made by the Corps that led to faulty levee construction and recommending changes to the Corps’ levee planning, construction, and maintenance processes).

48. Robert Sanders, *UC Berkeley-Led Levee Investigation Team Releases Final Report at Public Meeting in New Orleans*, UC BERKELEY NEWS, May 24, 2006, http://www.berkeley.edu/news/media/releases/2006/05/24_leveereport.shtml.

49. *See* LEVEE REPORT, *supra* note 43, at 15-9 (stating that catastrophic flooding and other consequences resulting from Hurricane Katrina had been predicted for decades, but these risks “were not adequately recognized, defensive measures were not identified and prioritized, and effective action was not mobilized to deal effectively with these hazards”).

50. *See id.* at 15-5 to 15-9 (stating that a number of engineering errors and poor judgments by the Corps contributed to the catastrophe in New Orleans, which were all part of the larger organizational or institutional problems associated with government).

though this undermined the reliability of the levee system.⁵¹ The levee flaws were largely the result of federal and state mandates to build more levees cheaply; the levees failed because politicians would not spend enough money on them.⁵²

The engineering experts recommended building an improved, integrated flood-protection system.⁵³ The experts stressed that there was no substitute for committing the needed resources, noting that “in the end the nation will only get what it is willing to invest and pay for.”⁵⁴

Despite this warning, it is still not clear that the federal government will do what is needed to fix the levees so that they adequately protect the residents of the New Orleans area. Engineering experts concluded that the levee failures during Katrina “call into question the integrity and reliability of other sections of the flood-protection system that did not fail during this event.”⁵⁵ However, a year after Katrina, much levee-improvement work was not completed, and the head of the Corps conceded that it was not clear whether the repairs that had been made had strengthened the levee system sufficiently to withstand a major storm.⁵⁶ More recently, in early 2007, leading U.S. and international flood-protection engineering experts who inspected the supposedly improved levees warned that the levees suffered from multiple weaknesses and could be broken by a storm weaker than Katrina.⁵⁷

The second component of flood protection is the network of coastal wetlands. The story of the wetlands is the same as that of the levees—long neglect, failure to commit resources, a predicted disaster, and failure to correct the problem even after the disaster.

Louisiana’s miles of coastal wetlands serve as a buffer that protects inland areas by diminishing the force of wind and water.⁵⁸ However, the

51. *See id.* at 15-7 (“There was a persistent pattern of attempts to reduce costs of constructed works, at the price of corollary reduction in safety and reliability.”).

52. *See Sanders, supra* note 48 (noting that the flood defense system cannot be made “better, faster and cheaper . . . without lowering the quality”).

53. LEVEE REPORT, *supra* note 43, at 15-13.

54. *Id.*

55. Sanders, *supra* note 48.

56. Michelle Roberts, *Army Corps Worries About Big Easy Levees: New Orleans Levees May Not Hold in Another Big Storm This Year, Corps of Engineers Chief Says*, ABC NEWS, <http://abcnews.go.com/print?id=2360530> (last visited Sept. 2, 2007).

57. Joel Bourne, *A City’s Faulty Armor: Experts Question Repairs to New Orleans Levees*, NAT’L GEOGRAPHIC, May 16, 2007, <http://magma.nationalgeographic.com/ngm/levees>. One reason the levees are not yet secure may be a problem afflicting Gulf Coast recovery generally—the failure to spend federal funds allocated for relief. Only 20% of the money allocated to the Corps for levee repair had been spent as of July 2007. SOUTHERN STUDIES REPORT, *supra* note 12, at 5.

58. *See Bourne, supra* note 40, at 89, 92–96 (stating that the risks of hurricane and storm damage are rising as the “natural defenses” and “protective fringe” of wetlands are “quietly melting

wetlands have suffered devastating losses. According to the U.S. government, from 1932 to 2000, over 1900 square miles of wetlands were lost.⁵⁹ Governmental and private investigations revealed that the wetlands were deteriorating because of federal flood policies, the actions of the oil and gas industry, and most significantly, the building of thousands of industrial canals through the wetlands.⁶⁰

Nearly ten years before Katrina, the U.S. government warned that diminishing wetlands would strip away storm barriers.⁶¹ Less than a year before Katrina, observers predicted with awful accuracy that degraded wetlands could lead to hurricanes that would kill thousands, displace hundreds of thousands, and leave people stranded on rooftops.⁶² The government recommended “aggressive action to reverse the trend” and “[f]ederal regulatory oversight by the Corps” to stop wetlands loss resulting from government policy and industry.⁶³

However, as was the case with levees, elected officials not only failed to act, but they actually made things worse. Funds allocated for wetlands protection were cut by 90%, and agencies abandoned projects.⁶⁴ Congress cut wetlands protection funds and promoted business projects that reversed wetlands restoration.⁶⁵

Katrina battered the Louisiana coast and accelerated the deterioration

away”); 2 SEC’Y OF THE INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS, at ch. 8 (1994), available at <http://www.doi.gov/oepec/wetlands2/v2ch8.html> [hereinafter WETLANDS REPORT] (stating that Louisiana’s rich network of wetlands “[r]educes storm and erosion damage by curtailing tidal surge and wind velocities”); NAT’L WETLANDS RESEARCH CTR., U.S. GEOLOGICAL SURVEY, 100+ YEARS OF LAND CHANGE FOR SOUTHEAST COASTAL LOUISIANA (2003), available at <http://www.coast2050.gov/images/landloss8X11.pdf> [hereinafter USGS REPORT] (depicting actual and predicted loss of protective wetlands in southeast coastal Louisiana).

59. USGS REPORT, *supra* note 58.

60. Bob Marshall & Mark Schleifstein, *Losing Ground*, TIMES-PICAYUNE (New Orleans), Mar. 5, 2007, § (National), at 1; *see also* WETLANDS REPORT, *supra* note 58, at ch. 8 (stating that approximately 8200 miles of canals have been dredged in coastal Louisiana for activities such as ship navigation and oil and gas pipelines); Bourne, *supra* note 40, at 96 (finding that engineers in Louisiana have cut more than 8000 miles of canals through the marshes resulting in increasing saltwater concentration and erosion in the wetlands); USGS REPORT, *supra* note 58 (“Louisiana accounted for an estimated 90 percent of the coastal marsh loss in the lower 48 states during the 1990s.”).

61. *See* WETLANDS REPORT, *supra* note 58, at ch. 8 (stating that the wetlands of Louisiana, which reduce storm erosion and damage, could be cut in half in the next 100 years if they continue to disappear at current rates).

62. Bourne, *supra* note 40, at 92.

63. WETLANDS REPORT, *supra* note 58, at ch. 8.

64. *See* Marshall & Schleifstein, *supra* note 60 (reporting that in 2002, federal agencies cut the budget of and challenged the science behind the Louisiana Coastal Area Ecosystem Restoration Plan, which led to the plan’s dissolution).

65. *See id.* (reporting that since 1994, Louisiana’s elected officials’ support of deregulation and incentives for oil and gas and incentives for oil and gas drilling has increased the cost of coastal restoration projects).

of the wetlands. Before the 2005 hurricanes, the government forecast that 700 square miles of wetlands would be lost by 2050 without intervention;⁶⁶ the hurricanes alone destroyed almost a third of that.⁶⁷ As a result of past wetlands losses and the disastrous effect of Hurricane Katrina on the wetlands, some observers have concluded that urgent action is needed and that modest restoration efforts will not make a serious impact.⁶⁸ While recent legislation provides for up to \$1 billion in wetlands restoration assistance, experts conclude that this is a fraction of what adequate protections will cost.⁶⁹

Finally, the industrial channels cut through the wetlands are another cause of flooding for which the federal government is responsible. Perhaps the worst of the channels is the Mississippi River Gulf Outlet, which runs from the Gulf of Mexico to New Orleans through the heavily flooded St. Bernard Parish and the lower Ninth Ward in the City. It is estimated that the outlet has destroyed 100 square miles of wetlands since 1965.⁷⁰ Moreover, engineering experts have concluded that levee weaknesses near the outlet continue to place St. Bernard and the lower Ninth Ward at great risk of flooding.⁷¹

C. The Problem of Government: Official Incompetence, Inefficiency, and Inadequate Deployment of Resources

The stark statistics showing that hundreds of thousands of residents have not returned and that the civic services needed for them to return are sorely lacking are proof that government recovery efforts are failing at all levels. As a member of the Louisiana Recovery Authority put it, “The simple truth is that recovery is not happening quickly enough. Things need to change.”⁷²

It might be suggested that the overall federal funding for post-storm

66. USGS REPORT, *supra* note 58.

67. See John A. Baras, U.S. GEOLOGICAL SURVEY, LAND AREA CHANGES IN COASTAL LOUISIANA AFTER THE 2005 HURRICANES: A SERIES OF THREE MAPS (2006), available at http://pubs.usgs.gov/of/2006/1274/marsh/method_508.pdf (showing 217 square miles of wetlands lost in the 2005 storms).

68. Bob Marshall, *Last Chance: The Fight to Save a Disappearing Coast*, TIMES-PICAYUNE (New Orleans), Mar. 4, 2007, § (National), at 1.

69. *Id.*; see also SOUTHERN STUDIES REPORT, *supra* note 12, at 6 (estimating wetlands restoration cost at \$14 billion).

70. SOUTHERN STUDIES REPORT, *supra* note 12, at 6.

71. Bourne, *supra* note 57.

72. *Leger Testimony*, *supra* note 6, at 3. See generally GULF REPORT, *supra* note 2 (describing the need for a changed approach in view of the continued need for aid).

relief, estimated by the Bush Administration at \$116 billion,⁷³ indicates that the federal government is doing its part. This is wrong for several reasons. First, the funding allocated is spread over five states and is not proportional to the damages suffered by those states.⁷⁴ Second, only 30% of the \$116 billion is dedicated to the long-term rebuilding needed for the region to recover; the rest went to immediate short-term emergency relief efforts.⁷⁵

Worse still, of that 30% allocated to long-term recovery, only half has actually been spent.⁷⁶ As one independent study concluded: “[F]ew estimated dollars have reached state and local communities. . . . [A] large portion of federal resources committed for rebuilding have not yet reached local communities.”⁷⁷

Governmental inefficiencies have caused great difficulty, delay, and expense in the recovery.⁷⁸ There are problems at two levels of government. First, state and local governments do not have the resources to do what is needed.⁷⁹ The cost burden of the catastrophes has made it difficult to impossible for state and local governments to meet recovery requirements and provide basic services simultaneously.⁸⁰ State government is unable to successfully assist local governments, and governments in the most hard-hit areas are overwhelmed.⁸¹ Local governments have been devastated by revenue losses and tax-base reductions and have cut work forces and

73. SOUTHERN STUDIES REPORT, *supra* note 12, at 5, 7; Liu & Plyer, *supra* note 11, at 17.

74. GULF REPORT, *supra* note 2, at 5.

75. SOUTHERN STUDIES REPORT, *supra* note 12, at 5; Liu & Plyer, *supra* note 11, at 17.

76. SOUTHERN STUDIES REPORT, *supra* note 12, at 7.

77. Liu & Plyer, *supra* note 11, at 17.

78. *See Leger Testimony, supra* note 6, at 4 (contending that most federal programs were never designed to address “truly catastrophic disasters”).

79. *Id.* at 5; *see also* GULF REPORT, *supra* note 2, at 21–22 (restating that local governments lack capacity to recover from Katrina without state and federal help).

80. *Leger Testimony, supra* note 6, at 5.

81. *Id.* at 4. Among the most serious burdens were “cost-share” rules that required state and local governments to pay 10% of the costs of federally funded rebuilding, replacement, and individual-assistance programs. *Id.* at 5. For example, the FEMA cost share *alone* for Louisiana in 2006 was \$1 billion, of which the State has paid some \$400 million (out of the State’s \$7 billion in tax revenues). *Id.* The FEMA share does *not* include costs for increased demands for social services, additional support for economic development and recovery, costs for bringing buildings up to safety code, and payment for facility repair. *Id.* Ever since the storms, state and local officials urged Congress and the President to waive cost-sharing rules for post-Katrina programs. *Id.* On May 25, 2007, legislation was finally enacted that rescinded these requirements. U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub. L. No. 110-28, § 4501, 121 Stat. 112, 156 (2007). Prior to that, relief from the cost-sharing requirement was met with what has been described as “prolonged resistance from the White House.” GULF REPORT, *supra* note 2, at 19. By the time cost sharing was finally waived, already strapped state and local governments had absorbed cost-sharing burdens for twenty months following the storms. *See Leger Testimony, supra* note 6, at 5 (noting that as of January 2007, “the State of Louisiana [has] already paid its fair share of costs for this disaster”).

services dramatically.⁸² According to the Louisiana Recovery Authority, “in our hardest hit communities . . . the capacity and financial capability no longer exists to rapidly deal with the contracts, planning, and other responsibilities that the recovery requires.”⁸³

The second level of dysfunction is in the federal government, which has failed to adequately respond in several ways. First, the federal government is simply not spending the money needed.⁸⁴ Take, for example, the Road Home Program, the federally funded, state-implemented program, which provides housing assistance of up to \$150,000 for home repair or replacement.⁸⁵ Although the State of Louisiana estimated that \$18 billion were needed for the Road Home Program, Congress authorized only \$12 billion, and as a result of this shortfall thousands of applicants are not receiving the aid they seek.⁸⁶ Nor is it clear that the federal government is willing to spend the money necessary to provide adequate flood protection in the form of reliable levees and restored coastal wetlands.⁸⁷

A second and related federal problem is misallocation of the funding that has been authorized, as federal funding has not taken into account that Louisiana has suffered by far the greatest damage of the stricken states and has by far the greatest number of residents in need.⁸⁸ Louisiana has

82. See *Leger Testimony*, *supra* note 6, at 14 (reporting that the City of New Orleans had to reduce its Contracts Department from thirty-five people before the storms to two people today).

83. *Id.*

84. See *id.* at 8–9 (“FEMA has been unwilling or unable to approve nearly \$1.2 billion of funding that is desperately needed for the program out of the mitigation pool available to the State.”).

85. *The Road Home: About Us*, *supra* note 17.

86. *Leger Testimony*, *supra* note 6, at 9. Warnings from state and local officials that federal Road Home funding was inadequate by billions of dollars were sadly borne out. In June 2007, Road Home officials reported a shortfall of approximately \$5 billion. JUNE KATRINA INDEX, *supra* note 12, at 6. The program stopped taking new aid applications on July 31, 2007, in part because of this inadequate federal support. *Id.* The State of Louisiana is contributing \$1 billion to the Road Home Program to make up for the insufficient federal funding. See Krupa, *supra* note 17 (stating that most of the state funding came from reallocating money previously budgeted for Charity Hospital and government building repairs). In September 2007, it was revealed that the shortfall may be as high as \$6.6 billion. Hammer, *Road Home Shortfall*, *supra* note 17. Road Home aid recipients are receiving smaller than promised payments, *id.*, and those who claimed casualty losses previously will actually have their aid payments taxed. David Hammer, *IRS Has Bad News on Road Home: Grants Taxable for Some Recipients*, TIMES-PICAYUNE (New Orleans), Sept. 17, 2007, § (National), at 1.

87. See Sanders, *supra* note 48 (reporting that the White House and Congress have historically mandated that work on the New Orleans flood defense system be performed in a timely and cost-effective manner); Marshall, *supra* note 68 (“Coastal restoration efforts have been under way for two decades, but not a single project capable of reversing the trend [of wetland loss] currently awaits approval.”); LEVEE REPORT, *supra* note 43, at 15-7 (examining multiple instances where cost-reduction measures reduced the safety and reliability of the flood-protection system).

88. See *Leger Testimony*, *supra* note 6, at 12 (comparing Louisiana’s \$74.5 million housing grant with Mississippi’s \$280 million grant, despite the fact that Mississippi “experienced roughly one quarter of the number of damaged homes as Louisiana”).

repeatedly received funding far lower than its proportionate share of the total storm damage, and in several instances Louisiana's federal aid and support were cut off well before other states that sustained far less damage.⁸⁹

A third federal problem is the bureaucratic labyrinth that obstructs aid instead of delivering it. Congress was told by the Louisiana Recovery Authority that administrative requirements force governments "to continually try to fit a square peg into a round hole in an effort to help people and their communities, often with great difficulty, delay, and limited effect."⁹⁰ These administrative burdens directly result in the absence of government services needed by returning residents. As the Louisiana Recovery Authority explained to Congress: "[M]any of the actions we must take in order to deliver the assistance we need to deliver—such as housing assistance . . . and infrastructure repair funding—remain burdened by conflicting and complex Federal program requirements, rules, and regulations that hinder our recovery."⁹¹

FEMA has narrowly interpreted regulations allowing federal assistance to states for paying employees for recovery-related work; assistance is limited to overtime, per diem pay, and travel.⁹² This has imposed even greater costs on state and local governments already struggling to meet increased obligations as their tax base and revenue have been devastated by the storm.⁹³ Funding needed to secure homes was blocked due to FEMA's failure to respond to questionnaires—a delay described by a state recovery official as "unacceptable."⁹⁴ Similarly, statutorily required insurance and FEMA deductions from assistance are causing major delays, and processing the deductions takes significant resources away from housing assistance.⁹⁵ Some communities, already physically battered by the storms and financially flooded with storm costs, are now faced with the possibility that

89. See *id.* at 12–13 (describing disproportionately low federal support for Louisiana in housing assistance, education funding, and recovery planning).

90. *Id.* at 4.

91. *Id.* FEMA administrative requirements threaten the financial viability of some recovery programs. *Id.* at 9. Further, programs designed to reserve flood-prone areas as open space are being thwarted by federal regulations that prevent notice to affected residents. *Id.* at 11. The Road Home Program is another example of a bureaucratic snafu. The administration of the Program was awarded to a private, out-of-state contractor, and after a year of operation, only 25% of the approximately 180,000 applications had been processed. Liu & Plyer, *supra* note 11, at app. B at 26 tbl.25.

92. See *Leger Testimony*, *supra* note 6, at 15 (noting that absent explicit regulatory language, FEMA did not have to limit spending where "nearly all other Federal programs allow administrative costs to be interpreted much more broadly").

93. *Id.* at 5–6, 14–15.

94. *Id.* at 8–9.

95. *Id.* at 17–18.

disaster loans will not be forgiven.⁹⁶

The combination of inadequate federal aid and federal bureaucratic obstruction has crippled state and local recovery efforts. FEMA reimbursement policies generally required local governments to pay out of pocket before receiving federal aid, and localities with little revenue and a tax base destroyed by the hurricanes literally did not have the money to get recovery efforts started, much less to obtain FEMA funding.⁹⁷ Because of FEMA procedures, much aid is tied up in multiple layers of the bureaucratic process, and two years after the storm, FEMA is still not finished determining projects and assessing damages.⁹⁸ Already overwhelmed state and local officials not only have to cope with the slow pace of aid but also are forced to devote limited time and resources to navigating the federal administrative process.⁹⁹ In some cases the federal government was outright incompetent—incorrect federal estimates regarding eligibility and cost for recovery projects have left localities funding projects for which they thought they would have federal support.¹⁰⁰

Some of the harshest criticism of the ineptitude and administrative obstructionism in the federal Katrina response has come from federal judges, and one described the government's treatment of Katrina victims as "Kafkaesque."¹⁰¹ While much of this can be attributed to lack of political priorities and sheer human bungling, Louisiana recovery officials also blame the inadequacy of federal disaster law:

One common thread weaving through most of the problems we are having with recovery relates to one simple fact: that the Stafford Act and its implementing regulations, as well as many other Federal programs, were never designed to address the needs of States and communities that are impacted by *truly catastrophic disasters*.¹⁰²

The following Part examines why the Stafford Act is not up to the task of catastrophic disaster relief.

96. *Id.* at 14.

97. GULF REPORT, *supra* note 2, at v.

98. *Id.* at 4, 16.

99. *Id.* at 16.

100. *Id.* at 19.

101. Ass'n of Cmty. Orgs. for Reform Now v. FEMA, 463 F. Supp. 2d 26, 35 (D.D.C. 2006), *stay granted in part*, No. 06-5403, 2006 WL 3847841 (D.D.C. Dec. 22, 2006).

102. *Leger Testimony*, *supra* note 6, at 3–4.

II. THE PROBLEM IN THE LAW: WHY THE STAFFORD ACT IS AN
INSUFFICIENT LEGAL FRAMEWORK FOR POST-KATRINA RECOVERY

A. *The Act Does Not Sufficiently Require, Empower, or Hold Accountable
Federal Authority for Large-Scale Disaster Response*

Two caveats are in order for the following critique of the Stafford Act as a poor statutory vehicle for delivering relief in a Katrina-scope disaster. First, the Stafford Act is probably sufficient to address smaller crises that can be handled primarily by state and local governments with some federal assistance. Indeed, the entire content of the Act creates exactly such a disaster-relief system. Second, while much of the problem is that all federal action under the Act is discretionary, there is much to be said for allowing governments flexibility at all levels in disaster response. Emergencies come in all shapes and sizes and from all directions. Accordingly, this Article does not advocate a statutory straightjacket that rigidly limits federal responses. Nor should a solution require ineffective responses or create entitlements that could lead to operational, legal, or financial burdens to needed recovery efforts. The Act should remain in effect, but should be replaced for purposes of Katrina response by the more robust Gulf Coast Marshall Plan described in Part IV.

The Act is plainly inadequate as a legal framework for responding to catastrophes so severe that they prompt federally led intervention. While a disaster like Katrina requires the federal government to take over emergency response and do almost everything, the Act legally allows the federal government to do virtually nothing.

Considered broadly, the Stafford Act creates a disaster response system in which primary responsibility falls on state and local governments, which can request federal support.¹⁰³ The findings and definitions of the Act make clear that the states and localities are expected to carry the load.¹⁰⁴ The Act is intended “to assist the efforts of the affected States,” to “provide . . . assistance by the Federal Government to State and local governments in carrying out *their* responsibilities to alleviate the suffering and damage which result from such disasters,” and to “encourag[e] individuals, States, and local governments *to protect themselves* by obtaining insurance coverage.”¹⁰⁵ The federal government is to “encourag[e] the development

103. See generally Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 (2000).

104. *Id.* §§ 5121–22.

105. *Id.* § 5121(a)–(b) (emphasis added).

of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations *by the States and by local governments*.¹⁰⁶ Federal assistance, while available, is discretionary and provided as “needed to supplement State and local efforts and capabilities.”¹⁰⁷

Under the Act, the federal government’s involvement in responding to a disaster is triggered in two ways, both of which require a presidential declaration.¹⁰⁸ First, the Act authorizes the President to take certain emergency actions in situations in which the United States has exclusive or preeminent responsibility or authority under the Constitution or federal law.¹⁰⁹ This is the only circumstance under which the Act indicates that the federal government has primary responsibility and authority to respond to a disaster without first receiving a request from an affected state, and even here federal action is discretionary rather than mandatory.¹¹⁰

Second, the Act authorizes federal action if the President declares that a major disaster or emergency exists.¹¹¹ The procedure and requirements for presidential declaration of an emergency or disaster are the same.¹¹² All requests for a presidential declaration shall be made by the governor of the affected state.¹¹³ A state request for a declaration requires: (1) a finding that federal assistance is necessary because the situation is of such severity and magnitude that state and local governments cannot effectively respond; and (2) that the governor furnish information describing the state and local efforts and resources that have been or will be used to alleviate the emergency and define the type and extent of federal aid required.¹¹⁴ The Act requires the governor of an affected state to “take appropriate action under State law and direct execution of the State’s emergency plan” as part of a request for a declaration and as a prerequisite to federal assistance under the Act.¹¹⁵

Three points bear noting about the Act’s requirements for triggering federal involvement in disaster response. First, the clear expectation set forth in the statute is that states and localities are the primary disaster responders and will perform most of the work. Second, the fact that federal

106. *Id.* § 5121(b)(2) (emphasis added).

107. *Id.* § 5122(1); *see also id.* § 5122(2) (stating that federal aid is intended “to supplement the efforts and available resources of States, local governments, and disaster relief organizations”).

108. *Id.* § 5191.

109. *Id.* § 5191(b).

110. *Id.* This provision has not been invoked in response to Hurricane Katrina.

111. *Id.* §§ 5170, 5191(a).

112. *Id.* § 5191(a).

113. *Id.* §§ 5170, 5191(a).

114. *Id.*

115. *Id.* § 5191(a).

involvement requires a presidential declaration means that, legally, *all* federal assistance is discretionary. Third, federal assistance requires states to gather and provide information and take actions as prerequisites to assistance that are impracticable in a catastrophic disaster such as Katrina.

Federal involvement is triggered once the President declares a disaster or emergency.¹¹⁶ The Act provides for administrative procedures to facilitate federal responses to state requests for assistance.¹¹⁷ The Act also authorizes FEMA to take various actions related to disaster response and mitigation; however, as is the case with the rest of the Act, the FEMA provisions are largely procedural and do not create a legally binding obligation to do anything substantive.¹¹⁸

In addition, to the extent the Act addresses federal authority to provide specific types of disaster relief and assistance, it does nothing more than make federal relief and assistance discretionary. Perhaps the best illustration of the flimsiness of the federal statutory disaster response is that the provision of the Act entitled “Essential assistance” makes such so-called essential assistance discretionary.¹¹⁹ Included in the “[e]ssential assistance” that the Stafford Act permits, *but does not require*, the federal government “may” provide the following: “[f]ederal resources, generally,” such as “[u]tilizing, lending, or donating to State and local governments [f]ederal equipment, supplies, facilities, [and] personnel”;¹²⁰ “medicine, food, and other consumable supplies”;¹²¹ and “work or services essential to saving lives and protecting and preserving property or public health and safety.”¹²² This includes such services as “debris removal,” “emergency medical care,” provision of medicine, “temporary facilities for schools and other essential community services,” and “reduction of immediate threats to life, property, and public health and safety.”¹²³

Although this assistance is described as “essential to meeting immediate threats to life and property resulting from a major disaster,”¹²⁴ the Act does not require the federal government to provide it.¹²⁵ There is no

116. *Id.* § 5192.

117. *See id.* §§ 5143–44 (requiring appointment of officers and formation of support teams); *id.* § 5153(a) (establishing housing assistance priorities); *id.* § 5156 (requiring standards for reviewing disaster and emergency programs); *id.* § 5189(a) (requiring appeals procedures).

118. *See id.* §§ 5196–5197g (prescribing only procedures and actions that the federal government “may” take).

119. *Id.* § 5170b.

120. *Id.* § 5170b(a)(1).

121. *Id.* § 5170b(a)(2).

122. *Id.* § 5170b(a)(3).

123. *Id.*

124. *Id.* § 5170b(a).

125. The “essential assistance” provision authorizes use of the military, but only upon request

question that the combined governmental response to Katrina to date has failed to provide the very assistance described in the Act as “essential” to hurricane victims.¹²⁶

Another key area of need where federal involvement is limited and discretionary is housing assistance to individuals.¹²⁷ Housing assistance is discretionary in the first place, and, once granted, it is limited in time and dollars.¹²⁸ Medical, dental, property, and transportation expenses of disaster victims are also expenses for which the federal government may, or may not, provide assistance.¹²⁹ If the federal government chooses to help in these areas, the Act forbids it from providing more than 75% of the aid needed, leaving the rest of the expense to states under a cost-sharing provision.¹³⁰

Other areas of discretionary, rather than required, federal assistance are debris removal,¹³¹ unemployment compensation,¹³² crisis counseling,¹³³ repair of federal, state, local government, and non-profit facilities,¹³⁴ and community-disaster loans.¹³⁵ The Act has a provision on “hazard mitigation,” which allows for the federal government to contribute up to 75% of costs for reduction of future risks.¹³⁶ Again, the federal government’s involvement is discretionary and its financial contribution limited.¹³⁷

In many instances, even the discretionary assistance available is subject to problematic conditions and limits under the Act. Examples that have hampered relief efforts for Katrina survivors have included exclusions that deny aid to persons without flood insurance,¹³⁸ that disqualify stricken

from the governor of the affected state and for a period of no more than ten days. *Id.* § 5170b(c)(1).

126. *See supra* Part I.

127. Disaster Mitigation Act of 2000, 42 U.S.C. § 5174(b) (Supp. IV 2004) (amending 42 U.S.C. § 5174 (2000)).

128. *Id.* § 5174(b)–(d), (h).

129. *Id.* § 5174(e).

130. *Id.* § 5174(g)(2). *See also Leger Testimony, supra* note 6, at 5–6 (discussing cost-sharing rules as an impediment to recovery).

131. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5173 (2000).

132. *Id.* § 5177.

133. *Id.* § 5183.

134. *Id.* § 5171 (federal facilities); *id.* § 5172 (state or local government and non-profit facilities). The Act’s provisions for repair of state or local government and non-profit facilities include several qualification requirements and aid limits, *id.* § 5172(a)(2)–(a)(3), and further mandate aid reductions for facilities without flood insurance. *Id.* § 5172(d).

135. *Id.* § 5184.

136. *Id.* § 5170c.

137. *Id.*

138. *Id.* § 5154a; *see also Leger Testimony, supra* note 6, at 9–10 (citing flood insurance eligibility requirements as a source of delay and wasted government resources). The Act prohibits the

communities from disaster loans if they are behind in payments,¹³⁹ and that deprive displaced persons of temporary housing at times set by statute.¹⁴⁰

The lack of federal responsibility is deepened by the Act's sweeping immunity provision, which holds the federal government harmless from liability for performance or non-performance of discretionary functions under the Act.¹⁴¹ While courts have held that immunity does not extend beyond the Act and that persons can sue for violations of the Constitution,¹⁴² this leaves a fairly narrow avenue for what is likely to turn out to be limited procedural relief. The fact remains that under the Act, the federal government does not have to do anything. The failure of government to adequately respond to the needs of those suffering from the Gulf Coast disaster is, for the most part, perfectly legal.

Concededly, the Act does permit the President to override the Act's discretionary, decentralized framework by directing disaster and emergency recovery that is led, coordinated, and supported by the federal government.¹⁴³ The President, however, has not invoked these provisions for post-Katrina relief.¹⁴⁴

The Act is related to the failed Gulf Coast response in several respects. First, although the disaster has overwhelmed state and local governments, the Act does not provide a comprehensive, centralized, and integrated federal recovery program with massive resources.¹⁴⁵ Such effort can only be provided by the federal government, but the Act does not require anything remotely approaching this. Second, the Act's delegation of responsibility away from the federal government, the cumbersome

President from waiving the flood-insurance requirement. Disaster Mitigation Act of 2000, 42 U.S.C. § 5174(c)(3)(C) (Supp. IV 2004) (amending 42 U.S.C. § 5174 (2000)).

139. § 5184(c)(2); *see also Leger Testimony*, *supra* note 6, at 14 (describing the burden of loan repayment obligations on communities suffering from hurricane-related revenue loss).

140. *See* § 5174(c)(1)(B)(ii) (limiting period of assistance to eighteen months). Although the eighteen-month period has been extended, many in temporary housing may still have no place to go if their temporary housing is eventually taken away because of greatly increased rents in the stricken area. Whoriskey, *supra* note 18. While it is true that the Act allows for waiver of administrative conditions, *id.* § 5141, and that some bureaucratic requirements have been modified, the fact remains that not nearly enough recovery work is being done due to administrative tangles. *See generally Leger Testimony*, *supra* note 6, at 11–12 (criticizing interim housing grant distribution in developing “Katrina Cottages” as an alternative to FEMA’s trailers and mobile homes). *See infra* Part II.B for judicial criticism of federal disaster recovery administration.

141. § 5148.

142. *See infra* Part II.B.

143. §§ 5170a, 5191(b), 5192.

144. *See* E.L. Gaston, *Taking the Gloves off of Homeland Security: Rethinking the Federalism Framework for Responding to Domestic Emergencies*, 1 HARV. L. & POL’Y REV. 519, 525–26 (2007) (describing political pressures and federalism concerns leading to the Bush Administration’s failure to invoke direct federal control).

145. *Leger Testimony*, *supra* note 6, at 4.

integration of federal, state, and local government recovery efforts, and the numerous limits and exclusions have led to enormous bureaucratic obstruction that delays and, in many instances, stops essential assistance.¹⁴⁶ Relief, such that it is, comes from a bewildering welter of federal, state, local, private, volunteer, and non-profit sources.¹⁴⁷ Those who need help often do not know where to find it, and, once found, it takes too long to get.¹⁴⁸

Third, the Act creates no rights to assistance and little legal recourse for those denied relief because the Act's double whammy of federal discretion and immunity leaves no meaningful process for governmental accountability.¹⁴⁹ Fourth, relief under the Act is not need driven; that is, the Act does not require the government to assess human needs and do as much as practicable to meet them.¹⁵⁰ Instead, the Act delineates and limits federal involvement without regard to the actual needs of disaster victims. In this regard, the Act differs dramatically from the Principles, which establish a series of rights for persons displaced by disasters with the expectation that governments will take action as necessary to fulfill those rights.¹⁵¹

Perhaps the most trenchant recognition of the post-Katrina failure of the Act and the federal government has come from federal judges in lawsuits against FEMA.¹⁵² Those judges have excoriated the performance of the government, criticized the administrative burdens placed on storm victims, and yet ruled, in at least one case with express regret, that the law leaves little remedy.¹⁵³

146. *Id.* at 3–4.

147. *See* § 5170a(2) (noting the President's capability of coordinating relief assistance among federal agencies, private organizations, and state and local governments).

148. *See Leger Testimony, supra* note 6, at 8–9 (describing delays applicants faced under the Hazard Mitigation Grant Program).

149. §§ 5170a, 5191(b).

150. *See Leger Testimony, supra* note 6, at 13 (discussing inequities in the distribution of disaster resources).

151. *U.N. Principles, supra* note 5, at annex Principle 1 ¶ 1, annex Principle 3 ¶ 1.

152. *See infra* Part II.B.1.

153. *See McWaters v. FEMA*, 436 F. Supp. 2d 802, 820 (E.D. La. 2006) (criticizing FEMA for its actions regarding notification procedures for disaster assistance).

*B. Post-hurricane Judicial and Legislative Treatment of the Stafford Act
and the Government's Recovery Efforts*

1. Court Cases

There are at least two significant ongoing cases in which federal judges have criticized the performance of FEMA while acknowledging legal restrictions on holding the government accountable. In *Association of Community Organizations For Reform Now (ACORN) v. FEMA*, a citizens' advocacy group sued FEMA on behalf of thousands of evacuees whose claims for long-term housing benefits were denied.¹⁵⁴ *ACORN* maintained that FEMA's denial and appeals procedures were so flawed that they violated the constitutional rights of evacuees to due process.¹⁵⁵

The *ACORN* court's most significant ruling to date came in November 2006, when it issued an injunction requiring FEMA to restore the benefits of all evacuees until it corrects flaws in the denial process.¹⁵⁶ Specifically, the court ruled that because denial letters were so vague, and the reasons given in letters and other communications were so unclear and often contradictory, evacuees lacked sufficient notice of reasons for denial to appeal.¹⁵⁷

The court held that the FEMA notice provisions were unconstitutionally vague and uninformative and that a more detailed statement of reasons for denial, including factual and statutory reasons, "must be provided in order to: (1) diminish the risk of erroneous deprivation; (2) restore the [claim appeals] process to the valuable safeguard it was intended to be; and (3) free these evacuees from the 'Kafkaesque' application process they have had to endure."¹⁵⁸

The *ACORN* decision is significant in several respects. First, the court held that Stafford Act immunity is limited to claims under the Act and does not protect FEMA from liability for violating the Constitution.¹⁵⁹ Second, the court was scathing in its factual findings and criticism of the flaws in FEMA's administrative processes. The court found that the denial letters, which included cryptic references to coded reasons for claim denial, were "confusing and chaotic," "vague and nonindividualized," "ambiguous and

154. *Ass'n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 28 (D.D.C. 2006), stay granted in part, No. 06-5403, 2006 WL 3847841 (D.D.C. Dec. 22, 2006).

155. *Id.*

156. *Id.* at 36.

157. *Id.* at 35.

158. *Id.*

159. *Id.* at 31.

unintelligible,” “contradictory and confusing,” “Kafkaesque,” and ultimately did “not adequately communicate FEMA’s reasoning” for denying benefits.¹⁶⁰ The court also noted that thousands of letters were flatly erroneous, as they wrongly informed evacuees that their claims were denied when they were actually granted.¹⁶¹ FEMA often provided contradictory explanations for denial.¹⁶² Third, the opinion recognized that evacuees have legal rights. Specifically, the court held that eligible evacuees have a constitutionally protected right to housing assistance and a constitutionally protected right to effective procedures for seeking such assistance.¹⁶³ Finally, while not a legal matter, the court acknowledged the human suffering caused by FEMA’s failed processes, stating that “each additional day [evacuees] go without assistance, they are harmed further.”¹⁶⁴ The court reprimanded FEMA, stating that “[i]t is unfortunate, if not incredible, that FEMA and its counsel could not devise a sufficient notice system to spare these beleaguered evacuees the added burden of federal litigation to vindicate their constitutional rights.”¹⁶⁵

A second case, *McWaters v. FEMA*, was a class action for evacuees who unsuccessfully applied for FEMA housing assistance after their homes were destroyed.¹⁶⁶ The plaintiffs challenged FEMA action on a broad range of issues, including evictions from temporary hotels, slow response to requests for assistance, discrimination on the basis of economic disadvantage, and inadequate implementation of administrative rules.¹⁶⁷

The *McWaters* court, like the court in the *ACORN* case, recognized that evacuees eligible for assistance have a constitutional property right to such housing assistance.¹⁶⁸ Like the court in the *ACORN* case, the *McWaters* court rejected FEMA’s immunity defense, holding that the Stafford Act and other statutory-immunity provisions do not bar constitutional claims.¹⁶⁹ Although the court held that the evacuees did have certain constitutional rights related to procedures for assistance, it dismissed virtually all of the evacuees substantive claims on the grounds that FEMA’s actions, though

160. *Id.* at 29, 35.

161. *Id.* at 35.

162. *Id.* at 29, 35.

163. *Id.* at 34.

164. *Id.* at 36.

165. *Id.* at 29.

166. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 805 (E.D. La. 2006).

167. *Id.* at 805–06, 823–24.

168. *Id.* at 818.

169. *Id.* at 812, 814. FEMA claimed absolute immunity, and the court, despite preserving the plaintiffs’ constitutional challenges, did find that many of the claims were barred by the Act’s immunity provision. *See id.* at 813 (stating that FEMA is immune only from review of those acts that are discretionary in nature).

flawed, still did not violate those rights.¹⁷⁰ The one substantive ruling in favor of the evacuees was the court's reaffirming of a prior holding that FEMA's notice provisions required clarification.¹⁷¹

The most striking aspect of the case, when considering whether the Stafford Act provides adequate remedies to disaster victims, is that the *McWaters* court made many extraordinarily critical factual findings regarding the FEMA response, but concluded, with express regret, that FEMA's many failures were not illegal.¹⁷² This case demonstrates judicial recognition that the current state of the law is inadequate to provide assistance and legal recourse to storm victims, as well as to ensure needed governmental accountability.

The case contains some rather dramatic language that makes those points. Judge Duval's observations are so powerful that they merit quotation at length. The court observed that "FEMA did and *is* taking action, albeit at a rather excruciatingly slow pace"¹⁷³ and concluded that FEMA's conduct could be considered "cagey behavior with regards to [its] ever-changing requirements."¹⁷⁴ "FEMA's indecision and internal bureaucratic bumbling has strained even the most patient of citizens."¹⁷⁵ FEMA's responsibilities "*must* mean attention to those individual American taxpayers who are most directly affected by the disaster."¹⁷⁶ FEMA "must not forget that the foundations of . . . our own government[,] and FEMA itself, are individual people—human beings who must also be cared for, equally, equitably, and fairly."¹⁷⁷ FEMA, the court stated, was "hiding behind bureaucratic double-talk, obscure regulations, outdated computer programs, and politically loaded platitudes such as 'people need to take care of themselves'"¹⁷⁸ when its "goal *should* have been to foster an environment of openness and honesty with *all* Americans affected by the disaster."¹⁷⁹

The court was clearly outraged over FEMA's failure to carry out its humanitarian mission. In compelling language that contrasts the absence of legal requirements with the presence of great humanitarian need, the court stated:

170. *Id.* at 819.

171. *Id.* at 823.

172. *Id.* at 819.

173. *Id.*

174. *Id.* at 820.

175. *Id.*

176. *Id.*

177. *Id.* at 820–21.

178. *Id.* at 821.

179. *Id.*

[W]hile FEMA may not be *legally* required to notify applicants or recipients of assistance about what FEMA provides, much less provide any data regarding its availability or the requirements for obtaining such assistance, one can only wonder *why* FEMA would choose to *not* do so, as has so often been the case herein. It defies reason that a federal agency whose exclusive provision—and indeed, sole reason for existence—is to assist fellow Americans in a time of natural disaster in meeting their utmost needs would *fail* to notify people of the available services *and* the requirements for engaging those services, in some clear, consistent, and accessible way.¹⁸⁰

Judge Duval continued by questioning FEMA's priorities in pursuing fraud claims rather than providing assistance: "It . . . defies reason that such an agency would be seemingly more concerned with fraud on the individual level than with actually helping those persons whose lives have been literally turned upside down through no fault of their own."¹⁸¹ Although the judge ruled that he had no legal authority to make FEMA provide more accessible information on assistance, he still urged for "[s]haring information in simple, clear, and precise terms and delineating the terms and conditions of available assistance in an up-front and forthright manner."¹⁸² Judge Duval actually charged FEMA with hurting the nation by its indifference to providing helpful information: "[This] Court has seen scant evidence that any such desire for openness and clarity guided *any* of FEMA's communications, and this obfuscation has acted much to the detriment of plaintiffs, and indeed, the entire country."¹⁸³ The judge concluded by reluctantly conceding that he was constrained by law to rule in FEMA's favor, but he openly suggested new congressional legislation to change the law: "FEMA is not *legally* required to notify applicants or recipients of assistance . . . or how to obtain such assistance. Regrettably this Court must leave any dissatisfaction with the law in this regard for those in the legislative branch to remedy."¹⁸⁴ In short, it seems Judge Duval would change the law to require more of FEMA if he could.¹⁸⁵

180. *Id.* at 820.

181. *Id.* (footnote omitted). Judge Duval further suggested that attention to fraud be directed to contract bidding rather than individual claims. *Id.* at 820 n.33.

182. *Id.* at 821.

183. *Id.*

184. *Id.*

185. For less sympathetic judicial treatment of a storm victim that nonetheless demonstrates the bureaucratic obstacles faced by those seeking relief, see *Richardson v. Paulison*, No. 06-1745, 2007 WL 647289, at *1-4 (E.D. La. Feb. 28, 2007). In this case, a storm victim seeking \$17,300 of debris-removal assistance was denied aid, even though he submitted an application, because the application

The judicial treatment of the Stafford Act and criticisms about government performance under the Act confirm that the Act is insufficient to the task of enabling post-Katrina recovery.

2. Legislation

The Stafford Act was amended in October 2006 with the Post-Katrina Emergency Management Reform Act of 2006 (Post-Katrina Act).¹⁸⁶ The Post-Katrina Act somewhat expands federal emergency authority, particularly by allowing the President to order immediate response to disasters absent a request from states.¹⁸⁷ The Post-Katrina Act does change the Stafford Act and other federal laws in several areas related to Gulf Coast relief.¹⁸⁸

However, the Post-Katrina Act keeps the basic tenets of the Stafford Act in place that have obstructed more comprehensive federal accountability for recovery. The amendment leaves virtually all federal assistance discretionary,¹⁸⁹ premises federal efforts on state requests, and retains the Stafford Act restrictions on eligibility and amounts of aid. The Stafford Act immunity provision remains in place. Much of the Post-Katrina Act constitutes changes in FEMA's organizational structure and personnel, which do not have a direct relation to Gulf Coast needs (with the notable exception of the addition of new recovery offices in Gulf Coast states).¹⁹⁰

was not sworn and was less than complete. *Id.* at *1-*3.

186. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1394.

187. *See* Post-Katrina Emergency Management Reform Act of 2006, 42 U.S.C.A. § 5170a(5) (Supp. 2007) (amending 42 U.S.C. § 5170a (2000)) (permitting the President to "provide accelerated federal assistance" under certain circumstances).

188. For example, utility costs are included in temporary housing assistance, *id.* § 5174(c)(1)(A)(i); discrimination in relief and assistance on the basis of disability and English language proficiency are now prohibited, *id.* § 5151(a); preferences to give disaster recovery work to businesses in disaster-affected areas have been added, *id.* § 5150; accommodation processes for disabled persons are required, 6 U.S.C.A. § 773 (Supp. 2007) (amending 6 U.S.C. § 773 (2000)); family unification procedures have been added, *id.* § 774; pilot programs regarding rental housing are authorized, *id.* § 776; and provisions to counter fraud, waste, and abuse in governmental action and contracting have been added. *Id.* § 791.

189. *See, e.g.*, § 5174(c)(1)(A)(i) (noting that assistance "may" include utilities payments).

190. § 638(a), 120 Stat. at 1422.

III. THE U.N. GUIDING PRINCIPLES AS APPLICABLE TO GULF COAST RECOVERY EFFORTS

International standards for the treatment of internally displaced persons (IDPs) were set forth in the United Nations Guiding Principles on Internal Displacement (Principles).¹⁹¹ The Principles consist of four introductory paragraphs that outline the scope and purpose of the Principles followed by thirty substantive principles.¹⁹² The Principles were accompanied by interpretive annotations authored by Dr. Walter Kalin (Annotations), the Representative of the United Nations Secretary General for Internally Displaced Persons.¹⁹³ The Annotations explain the purpose of and identify the sources in existing international law for each of the Principles. What follows is discussion of those Principles that are applicable to post-Katrina recovery.

As was the case with the Stafford Act, discussion of the Principles begins with a premise and caveats. The argument here is that the Principles are an effective framework for a more comprehensive, integrated, and better-resourced federal intervention needed to address the needs of Gulf Coast residents. Unlike the Stafford Act, the Principles establish goals for meeting the humanitarian needs of those displaced by disaster.¹⁹⁴

That said, there are limitations to the Principles. While the Stafford Act's scheme is too discretionary and decentralized to be a meaningful framework for recovery from a mass catastrophe like the Gulf Coast disaster, the Principles are probably too obligatory and general to be adopted into U.S. law or policy. For example, although much of the international community recognizes rights to health care and education, the U.S. does not. It is hard to imagine the U.S. government creating such broad, open-ended rights under U.S. law, even as to Gulf Coast disaster victims. However, the Principles could and should be used to shape a political and public campaign for a Gulf Coast recovery plan. The relief programs detailed in the plan could be based on specific substantive areas identified in the Principles without necessarily stating that the programs create or reflect any rights outside of the plan.

191. *U.N. Principles*, *supra* note 5, at annex Introduction ¶ 1.

192. *Id.*

193. 32 WALTER KALIN, *Guiding Principles on Internal Displacement: Annotations*, in *STUDIES IN TRANSNATIONAL LEGAL POLICY* 1 (2000).

194. *See id.* at 2 (“The Guiding Principles approach displacement from the perspective of the needs of [IDPs].”).

A. Discussion of Specific Principles

1. Introductory Paragraph 2: Description of IDPs¹⁹⁵

The Principles define IDPs as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence . . . in order to avoid the effects of . . . natural or human-made disasters, and who have not crossed an internationally recognized State border.”¹⁹⁶ The Annotations to Introductory Paragraph 2 state that this is “a descriptive identification” but “is not a legal definition of internally displaced persons.”¹⁹⁷

The Annotations note that the description includes those displaced by “violations of human rights or natural or human-made disasters,” adding that “[v]ictims of disasters are included, as they, too, might in some cases become victims of discrimination and other human rights violations as a consequence of their displacement.”¹⁹⁸ The Annotations also state that the use of the phrase “in order to avoid the effects of” in the description of IDPs means that persons can become IDPs “either after suffering the effects of coercive factors or in anticipation of such effects.”¹⁹⁹

The description of IDPs helps promote the protection of Gulf Coast IDPs in domestic policy or legislation in three key respects. First, and most obviously, the description of IDPs expressly includes victims of “natural or human-made disasters.”²⁰⁰ This means Gulf Coast IDPs meet the description regardless of whether the hurricanes and their aftermath are considered a natural or man-made disaster. The description forecloses any argument that victims of the Gulf Coast disaster are not IDPs.

Second, the description of IDPs includes victims of “violations of human rights.”²⁰¹ This means that those persons displaced by a hurricane-related human rights violations are IDPs. For example, persons who could show that racial discrimination in some way factors into their displacement are IDPs.²⁰²

Third, the description includes displacement “as a result of *or in order*

195. While the Principles themselves do not have titles, the author has added them to summarize for the reader the subject of each Principle.

196. *U.N. Principles*, *supra* note 5, at annex Introduction ¶ 2.

197. KALIN, *supra* note 193, at 2.

198. *Id.*

199. *Id.* at 3.

200. *U.N. Principles*, *supra* note 5, at annex Introduction ¶ 2.

201. *Id.*

202. KALIN, *supra* note 193, at 2.

to avoid the effects of . . . disasters.”²⁰³ This means that persons are IDPs not just if they are displaced after a disaster strikes, but also if they leave in anticipation of its effects. Arguably, this would mean that those who return to their homes, but subsequently leave because of continued hurricane-related problems, are IDPs. For example, those who returned but subsequently left out of concern that levee and wetland protections are dangerously weak, or that health care is inadequate, would be IDPs.

In short, the description means that those who left their homes in the Gulf Coast Region are IDPs, those who return but leave due to hurricane-related problems are IDPs, and all those who remain or return are potential IDPs. These concepts could be incorporated into a Gulf Coast Marshall Plan to identify the broad category of hurricane-stricken persons subject to protection and relief.

2. Introductory Paragraphs 3 and 4: Legal Status, Scope, and Purpose of the Principles

Introductory Paragraph 3 states that the “Principles reflect and are consistent with international human rights law and international humanitarian law” and serve as a model of conduct for: “(b) States when faced with the phenomenon of internal displacement; (c) [a]ll other authorities, groups and persons in their relations with internally displaced persons; and (d) [i]ntergovernmental and non-governmental organizations when addressing internal displacement.”²⁰⁴ Introductory Paragraph 4 adds that the “Principles should be disseminated and applied as widely as possible.”²⁰⁵

The Annotations make clear that the Principles are not intended to constitute binding law in themselves.²⁰⁶ However, the Annotations go on to discuss the purpose of the Principles, which is to guide all authorities and organizations that deal with IDPs by summarizing international law applicable to IDPs:

The Guiding Principles restate in more detail those legal provisions that respond to the specific needs of internally displaced persons and spell them out in order to facilitate their application in situations of internal displacement. They also clarify those areas where the [United Nations Commission on

203. *U.N. Principles*, *supra* note 5, at annex Introduction ¶ 2 (emphasis added).

204. *Id.* at annex Introduction ¶ 3.

205. *Id.* at annex Introduction ¶ 4.

206. KALIN, *supra* note 193, at 3.

Human Rights] came to the conclusion that present international law contains certain gray areas and even gaps.

....

... [T]he main purpose of these Principles [is] to provide guidance to all those dealing with situations of internal displacement. This guidance is mainly provided by synthesizing the many applicable norms into clear principles and by highlighting those more concrete aspects of human rights and humanitarian law guarantees that are of special significance for the internally displaced.²⁰⁷

Introductory Paragraphs 3 and 4, taken with their interpretive Annotations, preclude argument that the Principles *themselves* can be said to comprise international law. However, the Principles have some normative impact to the extent they are based on well-established international law, and this may provide some argument for using the Principles as a platform for policy. The authors of the Principles unquestionably intended them to be a basis for policy making and legislation on IDPs. This is demonstrated by the list of those for whom the Principles are to serve as guidelines—states, non-governmental organizations, and “[a]ll other authorities, groups and persons”—and the recommendation that the Principles be widely disseminated and followed.²⁰⁸

In summary, the Principles are not binding, but the goals of the Principles are intended to serve as guidelines for nations and other entities when they take action to deal with IDPs. One reason the Principles should be followed is that they are based on international law. As to Gulf Coast IDPs, this would mean that federal, state, and local governments should use the Principles in enacting legislation and policy. The Principles also serve as a framework for non-governmental entities dealing with Gulf Coast IDPs.

3. Principles 1 and 29: Non-discrimination on Grounds of IDP Status

These Principles establish that displaced persons cannot be discriminated against because of their status as displaced persons.²⁰⁹ Principle 1 prohibits discrimination against IDPs generally, stating that

207. *Id.* at 3–4.

208. *U.N. Principles*, *supra* note 5, at annex Introduction ¶¶ 3–4.

209. *Id.* at annex Principle 1 ¶ 1, annex Principle 29 ¶ 1. Principle 4 prohibits discrimination on the basis of many criteria protected under U.S. civil rights law. *See infra* Part III.A.6.

“[i]nternally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”²¹⁰

Principle 29 more specifically prohibits discrimination against IDPs even after they “return[] to their homes or places of habitual residence or . . . resettle[] in another part of the country.”²¹¹ Principle 29 also recognizes that IDPs “have the right to participate fully and equally in public affairs at all levels and have equal access to public services.”²¹²

U.S. law does not recognize IDPs as a special class of persons entitled to anti-discrimination protection. Gulf Coast IDPs can make claims under U.S. civil rights laws that prohibit discrimination on other criteria, such as race, gender, age, and disability.²¹³ However, it is difficult to imagine the U.S. enacting new legislation that would add IDPs as a class of persons protected against discrimination.

However, several concepts embodied in the anti-discrimination provision would be useful features of a Gulf Coast Marshall Plan. The Principles recognize that displaced persons have rights even after they return home or resettle.²¹⁴ This serves as a basis for ensuring that relief efforts go beyond mere physical settling of IDPs to meeting continuing needs such as civic infrastructure and flood protection. Also, the Principles recognize that IDPs have a right to participate in public life wherever they are.²¹⁵

4. Principle 2: Broad Scope and Minimum Standards

Principle 2 reaffirms that the Principles are intended to be observed by all entities with responsibility for IDPs and that the Principles are to be followed “without any adverse distinction.”²¹⁶ The second paragraph of Principle 2 clarifies that the Principles constitute a minimum standard and that more favorable applications of law are not precluded.²¹⁷

The non-distinction language serves as a possible basis for eliminating the disproportional impact the disaster and recovery efforts have had on

210. *U.N. Principles*, *supra* note 5, at annex Principle 1 ¶ 1.

211. *Id.* at annex Principle 29 ¶ 1.

212. *Id.*

213. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000) (prohibiting employment discrimination based on an “individual’s race, color, religion, sex, or national origin”).

214. *U.N. Principles*, *supra* note 5, at annex Principle 29 ¶ 1.

215. *Id.*

216. *Id.* at annex Principle 2 ¶ 1.

217. KALIN, *supra* note 193, at 9.

African Americans, the poor, and other vulnerable groups. Further, the language is a corrective to the fact that less support per capita has been given to Louisiana, the state hardest hit by the disaster, than other storm-stricken areas.²¹⁸ The second paragraph establishes minimum standards that do not prevent more-remedial legal or policy efforts.²¹⁹ This helps support efforts to use the Principles as a base framework for legislation or policy designed to promote Gulf Coast recovery or protection.

5. Principles 3 and 25: National Government Responsibility

These are critical provisions as they require what has been lacking from the recovery to date—centralized federal leadership and responsibility. Principle 3 states: “National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”²²⁰ Principle 3 next explains that “[i]nternally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities.”²²¹

Principle 25 reiterates that “[t]he primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.”²²² There are two related conceptions of duty and right here. The first is that the national government has *primary* responsibility for protection and recovery. The second is that individuals have the right to protection and assistance from national authorities. This is exactly the opposite of the Stafford Act scheme, under which national government responsibility is entirely discretionary, primary duties fall to lesser-resourced state and local governments, and individuals have no unqualified substantive rights to any protection or assistance.²²³

It is worth noting that the Principles require national governments to provide not just assistance but also protection.²²⁴ As to Gulf Coast IDPs, a duty to protect would require the federal government to protect the region against future disasters by restoring wetlands protection, building levees sufficient to withstand powerful storms, and filling channels that heighten flood risks.

218. See *Leger Testimony*, *supra* note 6, at 11–12 (describing the distribution of resources after Hurricane Katrina as “anything but fair for the people of Louisiana,” who experienced nearly 80% of the total housing damage, but received far less funding than lesser-damaged Mississippi).

219. KALIN, *supra* note 193, at 9.

220. *U.N. Principles*, *supra* note 5, at annex Principle 3 ¶ 1.

221. *Id.* at annex Principle 3 ¶ 2.

222. *Id.* at annex Principle 25 ¶ 1.

223. See *supra* Part II.A.

224. *U.N. Principles*, *supra* note 5, at annex Principle 3 ¶¶ 1–2.

Principle 3 includes an anti-retaliation provision which states that IDPs have the right to request protection and assistance and cannot be punished for doing so.²²⁵ This protection should be built into a Gulf Coast Marshall Plan to protect those who seek help and those who raise reports or complaints about shortcomings in recovery efforts.

6. Principle 4: Anti-discrimination and Special Needs

Principle 4 is a broad anti-discrimination clause, which states: “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.”²²⁶ Principle 4 also recognizes that certain people—such as children, the elderly, and expectant mothers—are uniquely at risk in disasters and, therefore, requires that recovery efforts “take[] into account their special needs.”²²⁷

U.S. civil rights laws prohibit discrimination against many, but not all, of the groups listed in Principle 4.²²⁸ In addition, the Stafford Act prohibits discrimination against certain groups due to recent amendments that strengthen protection of the disabled and add protection of persons with English language deficiency.²²⁹ A Gulf Coast Marshall Plan should incorporate these anti-discrimination provisions, with consideration given to other classifications, such as sexual orientation, that are well recognized throughout the U.S. It seems doubtful that the federal government would adopt discrimination prohibitions in several areas identified in Principle 4—specifically political opinion, social origin, legal or social status, property, and birth. Given how subjective these classifications are, it is best that they be left out.

Careful implementation of anti-discrimination principles could help correct one of the most glaring failures of hurricane relief and recovery to date—the disparate impact that the disaster and recovery has had on African Americans. The Principles and U.S. law provide a legal basis for judicial and legislative investigation of the role of race in all aspects of disaster prevention, relief, and recovery, as well as for remedies for past discrimination and prevention of future discrimination.

225. *Id.* at annex Principle 3 ¶ 2.

226. *Id.* at annex Principle 4 ¶ 1.

227. *Id.* at annex Principle 4 ¶ 2.

228. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000) (prohibiting employment discrimination based on an “individual’s race, color, religion, sex, or national origin”).

229. Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 689(a), 120 Stat. 1394, 1449.

The recognition of vulnerable groups' special needs is another important concept from the Principles that should be part of a Gulf Coast Marshall Plan. While U.S. law prohibits disability discrimination and age discrimination in employment,²³⁰ it does not otherwise protect special-needs groups as listed in Principle 4. Federal remedial policy should determine whether certain groups have been rendered particularly vulnerable by the disaster and take special steps to protect them.

Children in particular have been disadvantaged by the closing of many public schools and child care facilities in the Gulf Coast region as well as the loss of teachers.²³¹ These problems have been particularly burdensome for families with limited needs and resources, such as poor or single-parent families. Disabled and uninsured persons are also uniquely at risk, as they have been especially hard hit by the medical crisis and limited access to health care.²³²

7. Principle 6: Prevention and Limited Duration of Displacement

Principle 6 recognizes a right to be protected against arbitrary displacement and further establishes that “[d]isplacement shall last no longer than required by the circumstances.”²³³ There are two related concepts in this Principle applicable to Gulf Coast recovery. The first is an individual right of protection against displacement, and the second is a governmental obligation to end displacement as soon as possible.

While the protection against arbitrary displacement applies often in armed conflict, the Annotations specifically describe what constitutes an arbitrary displacement in a non-military disaster: “Forced displacement in situations of disaster is arbitrary if it is undertaken for reasons other than the safety and health of the affected persons.”²³⁴ The Annotations next add that displacement in a non-military disaster for any other reasons is “hardly imaginable.”²³⁵ It seems compelling to maintain that continued displacement of Gulf Coast evacuees who are willing to return is arbitrary when it results from governmental inefficiency and bungling. Certainly, the federal judges who criticized this problem in the *ACORN* and *McWaters* cases came close to saying—as the Annotations do—that this was “hardly imaginable.”²³⁶ It can also be credibly put that displacement due to

230. See 29 U.S.C. § 623(a) (2000) (age); 42 U.S.C. § 12112(a) (2000) (disability).

231. See *supra* notes 23–24 and accompanying text.

232. See *supra* notes 25–31 and accompanying text.

233. *U.N. Principles*, *supra* note 5, at annex Principle 6 ¶¶ 1–3.

234. KALIN, *supra* note 193, at 18.

235. *Id.*

236. *Id.*; see also *supra* Part II.B.1.

insufficient assistance or governmental failure to rebuild civic infrastructure or flood protection is arbitrary.

The right against arbitrary displacement also serves as a basis for requiring flood protection sufficient to protect the region. If such protection is affordable and technologically feasible, it must be arbitrary for the government not to provide it.

As with several of the Principles, the general concepts set forth here are not binding under U.S. law and are not likely to be enacted as legally enforceable rights. Nonetheless, there are several ways in which Principle 6 supports the need for legislative and policy efforts. First, read together with other provisions addressing prevention of displacement, this Principle supports the concept that the federal government is primarily obligated to prevent and limit Gulf Coast displacement. Clearly, the steps needed to accomplish this are beyond the capacity of state and local governments.

Second, the common-sense principles that displacement after disaster should be as short as possible and that such displacement is arbitrary unless it is necessary to protect the safety and health of IDPs support compelling legislative and political arguments. Clearly, the primary reason for continued involuntary displacement of Gulf Coast evacuees this long after the storms is not government protection of the safety and health of evacuees, but rather it is inadequate, ineffective, and incompetent governmental recovery efforts—a reason which would have to be considered “hardly imaginable” by the authors of the Principles. Whether displacement due to official neglect and incompetence is illegal or not, it provides a strong political and moral case for greater and more-comprehensive federal government intervention.

Third, Principle 6 provides another basis for correcting the imbalanced impact of recovery efforts on displaced African Americans because it prohibits alteration of the racial composition of the population due to displacement response efforts.²³⁷ While surely no government remedial effort can or should be racially differentiated, racial imbalance in the impact of the disaster can be the basis for campaigning for governmental relief that is non-discriminatory.

8. Principle 7: Limited Adverse Effects, Satisfactory Humanitarian Conditions, and Right to Remedies

Principle 7 addresses three problems that have plagued the Gulf Coast recovery—the failure to protect storm victims against adverse

237. *U.N. Principles*, *supra* note 5, at annex Principle 6 ¶ 2.

consequences,²³⁸ the poor conditions under which many of them have lived,²³⁹ and the administrative obstacles that have gotten in the way of relief.²⁴⁰ The relevant portions of Principle 7 state:

[1] Where no alternatives [to displacement] exist, all measures shall be taken to minimize displacement and its adverse effects.

(2) The authorities . . . shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

. . . .

[3](b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;

. . . .

(d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;

. . . .

(f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.²⁴¹

Application of paragraphs 1 and 3 of this Principle would require correction of the governmental and administrative failures that have prevented Gulf Coast IDPs from returning to their homes or obtaining affordable housing. The Principle requires that displacement and its

238. *See Leger Testimony, supra* note 6, at 2 (discussing many of the adverse consequences that flowed from the hurricane, including significant destruction of housing, damage to the local economy, and an overall cost of over \$100 billion).

239. *See id.* at 12 (stating that hundreds of thousands of Louisiana citizens were living in trailers while the federal government postponed appropriations of supplemental funding for the state).

240. *See id.* at 8-9 (stating that more than \$1 billion in aid available to Louisiana was not approved because of agency unwillingness or inability).

241. *U.N. Principles, supra* note 5, at annex Principle 7 ¶¶ 1-3.

adverse effects be minimal, full information be given on procedures for relocation, and that IDPs be given an effective remedy.²⁴² The FEMA procedures for temporary housing and the Road Home Program have not met those standards. Instead they have been ineffective bureaucratic obstacles to return.²⁴³ An effective remedy that minimizes the effects of displacement would require a new federal program that would provide assistance needed for return and recovery through a streamlined, easily understood process. Such a program would include rent and mortgage relief, affordable insurance, fair property-value assessment, and subsidies for repair and construction.

Paragraph 2 of the Principle addresses humanitarian needs that were abandoned in the immediate aftermath of the hurricane and that remain neglected for many Gulf Coast IDPs and returnees.²⁴⁴ Application of the provision would require correction of the lack of access to health care and of the sanitary problems posed by uncollected debris and unrepaired homes.

Paragraph 3(d) addresses the problem of exclusion of IDPs from the process of recovery planning.²⁴⁵ Many of the problems with the recovery effort have resulted from ineffective measures imposed by government or outside contractors without the participation of the victims of the disaster. Including Gulf Coast residents in the planning will help ensure that their needs and problems are better addressed. Indeed, successful government efforts must include community and neighborhood organizations, non-profits, and volunteers who have done much of the recovery work that has taken place to date.

9. Principles 8 and 11: Personal Dignity and Basic Rights

Principle 8 states that “[d]isplacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.”²⁴⁶ Principle 11 adds that IDPs shall be protected against “cruel, inhuman or degrading treatment . . . and other outrages upon personal dignity.”²⁴⁷

242. *Id.* at annex Principle 7 ¶ 1, 3.

243. *See supra* Introduction, Parts I.C, II.B.1.

244. *U.N. Principles, supra* note 5, at annex Principle 7 ¶ 2.

245. *Id.* at annex Principle 7 ¶ 3.

246. *Id.* at annex Principle 8.

247. *Id.* at annex Principle 11 ¶ 2. The ban against “cruel, inhuman or degrading treatment” is taken from Common Article 3 of the Geneva Convention, which is generally considered as setting the minimum standard for treatment of persons in situations of armed conflict. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art.3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (stating that all “[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely”).

The immediate displacement of Gulf Coast IDPs violated these Principles in many respects. As to current treatment of Gulf Coast IDPs, application of the Principles would require more housing assistance. Officials of the Louisiana Recovery Authority have maintained that requiring people to reside in cramped trailers for long periods, and thereafter leaving them without housing or residential aid, is unacceptable treatment of human beings.²⁴⁸

The health care crisis also arguably violates rights to life, dignity, security, and freedom from cruel, inhuman, and degrading treatment. Many in need of medical attention are unable to get it or must endure long waits for it. More specific provisions address housing and health care, but the conception of the right to personal dignity and to be free from treatment that does not meet minimum humanitarian standards provides a strong basis for political arguments that more effective policies in these areas are needed.

10. Principle 18: Standard of Living, Shelter, and Housing

Principle 18 identifies a “right to an adequate standard of living,” adding that “[a]t the minimum, . . . competent authorities shall provide internally displaced persons with and ensure safe access to: (a) [e]ssential food and potable water; (b) [b]asic shelter and housing; (c) [a]ppropriate clothing; and (d) [e]ssential medical services and sanitation.”²⁴⁹ This is yet another provision that describes as rights things that would not be considered or recognized as legal rights under U.S. law, but would likely be viewed as political and moral imperatives at least as applied to disaster victims.

11. Principle 19: Medical Care

The Principle requiring medical care is not phrased in language of legal right. On its face, this Principle would likely be accepted by most Americans and could be adopted verbatim into a Gulf Coast Marshall Plan:

- (1) All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.

248. See *supra* note 21 and accompanying text.

249. *U.N. Principles*, *supra* note 5, at annex Principle 18 ¶¶ 1–2.

(2) Special attention should be paid to the health needs of women . . . such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.

(3) Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.²⁵⁰

Many communities and people in the Gulf Coast lack sufficient health care facilities.²⁵¹ The lack of access to health care is a problem not just because of the great suffering it leads to; it is also a great hindrance to the recovery of the region. The government itself acknowledges that access to health care is essential for people to return and for the region to recover.²⁵² Application of this Principle would recognize this and require the government to open sufficient health care facilities to care for the medical needs of the community.

12. Principle 21: Protection of Property

Under Principle 21, “[p]roperty and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.”²⁵³ This Principle applies in two respects.

First, governmental failure to support Gulf Coast IDPs by promptly repairing and cleaning flood-damaged property has led in many instances to the loss of property and possessions. The longer homes have been left unattended, the worse the damage has become, and in many cases the delay has resulted in homes deteriorating beyond remedy.

Second, it could be said that the homes of Gulf Coast IDPs who have not returned have been arbitrarily appropriated. Gulf Coast IDPs are being driven from their homes by the collective impact of governmental neglect, skyrocketing insurance rates,²⁵⁴ poor civic infrastructure, and unregulated home ownership costs. Some are being forced to sell homes at well below their worth,²⁵⁵ such that their homes are arguably being arbitrarily

250. *Id.* at annex Principle 19 ¶¶ 1–3.

251. *See supra* text accompanying notes 25–31.

252. FEB. KATRINA INDEX, *supra* note 9, at 5; GAO REPORT: STATUS OF THE HEALTH CARE SYSTEM IN NEW ORLEANS, *supra* note 25, at 7.

253. *U.N. Principles*, *supra* note 5, at annex Principle 21 ¶ 3.

254. Liu & Plyer, *supra* note 11, at 18.

255. *See* FEB. KATRINA INDEX, *supra* note 9, at 19 tbl.1 (reporting that homes in St. Bernard

appropriated by predatory purchasers.

Application of the concepts in this Principle would lead to measures such as stepped-up government financial or manpower assistance for residents attempting to repair and keep property. Financial assistance, such as mortgage and loan forgiveness, that allows strapped property owners time to restore their lives in order to keep property would also be supported by this Principle. There should be reasonable government oversight to insure that the lending, development, real estate, and insurance industries do not take unfair advantage of post-storm circumstances to the detriment of homeowners and renters.

13. Principle 22: Employment and Civic Participation

Principle 22 states that IDPs “shall not be discriminated against” in, *inter alia*, “(b) [t]he right to seek freely opportunities for employment and to participate in economic activities; (c) [t]he right to associate freely and participate equally in community affairs; [and] (d) [t]he right to vote and to participate in governmental and public affairs.”²⁵⁶

While there is not a right to employment under U.S. law, Gulf Coast recovery requires that those who return have work. People will not return, and returnees may leave, if there are not enough jobs. Moreover, lack of jobs leads to other problems, such as persons without health insurance, high social service costs, and crime. For these reasons, a recovery plan should include incentives to encourage businesses to return and support those that have.

14. Principle 23: Right to Education

Principle 23 states that “[e]very human being has the right to education” and that “[e]ducation and training facilities shall be made available to internally displaced persons, in particular adolescents and women . . . as soon as conditions permit.”²⁵⁷ The Annotations stress “the importance of an education with the fewest possible interruptions,” that “[t]he aim of the greatest possible continuity in education is firmly rooted in both human rights and humanitarian law,” and that the purpose of the law is to “try to minimize interruptions in schooling.”²⁵⁸

While some might contest whether there is a “right” to education, there would be widespread agreement that all school-age children should have

Parish have been selling at less than half of their pre-Katrina value).

256. *U.N. Principles*, *supra* note 5, at annex Principle 22 ¶ 1.

257. *Id.* at annex Principle 23 ¶¶ 1, 4.

258. KALIN, *supra* note 193, at 60.

access to education and agreement with the concept behind the Principle that education should not be interrupted.

Application of this Principle to recovery policy would call for wholesale restoration of the Gulf Coast education system and infrastructure, beginning with reopening the many closed public schools in the region. Many teachers have left, and schools that are open have lost facilities and equipment. As a result the schools are understaffed, under-resourced, and crowded.²⁵⁹ Many students have been out of school for long periods.²⁶⁰ Like the loss of employment opportunities, the inaccessibility of education is not only problematic in itself, but contributes to other issues such as crime and an unskilled workforce.

Here it is important to consider that the condition of the public schools, as well as proposals to improve them, was a matter of attention and controversy before the hurricanes, most notably in New Orleans. Pre-hurricane reform efforts will be implicated in disaster-related education plans.

15. Principle 24: Impartiality in Humanitarian Assistance—No Favoritism

Paragraph 1 of Principle 24 restates that compliance with humanitarian and anti-discrimination principles is expected.²⁶¹ As to impartiality, Principle 24 adds something new, stating that “[h]umanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.”²⁶² The Annotations stress that it is critical that essential services reach “the persons who are suffering” and that those services not be diverted for other purposes.²⁶³

The concepts in the Principle would be useful components of an improved Gulf Coast recovery plan in several respects. First, the provisions speak to the commonsense notion that assistance must actually reach those in need and thus echo a concern expressed by recovery officials and judges about failed government relief programs.²⁶⁴ Accordingly, this Principle can be invoked to call for effective government humanitarian assistance.

Second, the Principle prohibits diversion of humanitarian assistance for political or military reasons.²⁶⁵ The Principle thus provides a basis for policies that would correct the problem of diversion of needed aid to less

259. FEB. KATRINA INDEX, *supra* note 9, at 29; JUNE KATRINA INDEX, *supra* note 12, at 7, 13.

260. See FEB. KATRINA INDEX, *supra* note 9, at 29 tbl.14 (showing that as of February 2007, only 44% of schools in Orleans Parish and 24% of schools in St. Bernard Parish had reopened).

261. *U.N. Principles*, *supra* note 5, at annex Principle 24 ¶ 1.

262. *Id.* at annex Principle 24 ¶ 2.

263. KALIN, *supra* note 193, at 62–63.

264. See *supra* Parts I.A–C, II.B.1.

265. *U.N. Principles*, *supra* note 5, at annex Principle 24 ¶ 2.

damaged areas as the result of politicized decisions or corruption.²⁶⁶

Third, the proscription against diversion for military purposes, while likely intended to address displacement during armed conflict, could be relied on to argue for deployment of the military for recovery, rebuilding, and debris removal. The fact that the U.S. military has carried out such disaster relief missions in other nations strengthens the political argument for such service in the Gulf Coast.²⁶⁷

16. Principle 28: Right to Return

Principle 28 recognizes a comprehensive government responsibility to provide IDPs with a “right to return”:

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.²⁶⁸

Principle 28 also reaffirms that IDPs should fully participate in the planning and management of return and reintegration.²⁶⁹

Principle 28 synthesizes the Principles by creating a comprehensive “right to return” that creates three general duties for states: (1) to return IDPs who wish to come back to their homes; (2) to establish conditions that will allow IDPs who do return to live safely and with sufficient means; and (3) to reintegrate returning IDPs. This is not just a right to return, but a right to return to a life of material sufficiency and safety.

This Principle reaffirms that the “right to return” is the “primary duty” of national authorities.²⁷⁰ It incorporates the more specific obligations set forth in other Principles, including, but not limited to, health care, education, employment opportunity, and protection against future displacement. These conditions allow a safe return with dignity and are

266. See *Leger Testimony*, *supra* note 6, at 12–13 (reporting, for example, that “a sole political appointee at FEMA determined that Louisiana should only receive \$74.5 million of the [interim housing] funding approved by Congress,” while much-less-damaged Mississippi received \$280 million).

267. See *American Hospital Ship Leaves Tsunami-Ravaged Area*, CHARLESTON DAILY MAIL (Charleston, W. Va.), Mar. 16, 2005, at 3A [hereinafter *American Hospital Ship*] (describing the U.S. military’s role in post-tsunami medical relief to eastern Indonesia).

268. *U.N. Principles*, *supra* note 5, at annex Principle 28 ¶ 1.

269. *Id.* at annex Principle 28 ¶ 2.

270. *Id.* at annex Principle 28 ¶ 1.

clearly necessary for returning IDPs to reintegrate successfully upon return.

This Principle, like Principle 22, calls for full participation of IDPs in the planning and management of their return, resettlement, and reintegration.²⁷¹ One reason recovery efforts have failed is that IDPs have been excluded from them.

Principle 28 serves as the foundation for a campaign for a comprehensive, integrated federal intervention to return Gulf Coast IDPs to their homes. This intervention would provide the safety infrastructure, civic services, and socio-economic opportunities necessary for them to remain home upon return. The government is obligated to establish conditions that allow return, provide means of return, and reintegrate returning IDPs. To fulfill this obligation, the government must engage in ongoing efforts to rehabilitate entire communities from which IDPs have been displaced so that all IDPs from those communities who so choose can return. A tour through the lower Ninth Ward, the Seventh Ward, Lakeview, or St. Bernard Parish shows that these obligations have been scarcely addressed, much less met.

17. Principle 29: Restoration of Property

Principle 29 establishes that the government has the duty and responsibility to assist IDPs with recovery, “to the extent possible,” of “their property and possessions which they left behind or were dispossessed of upon their displacement.”²⁷² “When recovery of such property and possessions is not possible,” the government is to assist IDPs “in obtaining appropriate compensation or another form of just reparation” or should provide such recovery itself.²⁷³

This Principle is based on the real-world consideration that IDPs regularly lose much of their property while displaced. The Annotations suggest two international adjudicative models for determining the restitution or compensation rights for IDPs, both of which were established by the Dayton Peace Accords, which were mediated by the U.S. government.²⁷⁴

Principle 29 obligates the government to restore IDPs for property losses, either by direct recovery of property or compensation for unrecovered property.²⁷⁵ The restoration obligation applies to lost

271. *Id.* at annex Principle 28 ¶ 2.

272. *Id.* at annex Principle 29 ¶ 2.

273. *Id.*

274. KALIN, *supra* note 193, at 73.

275. *U.N. Principles*, *supra* note 5, at annex Principle 29 ¶ 2.

possessions, as well as to homes and real estate.²⁷⁶

Clearly, the property losses of Gulf Coast storm victims are not being restored. Hundreds of thousands of Gulf Coast IDPs have not recovered their homes, and millions have sustained property losses totaling billions of dollars. The procedures established by the government for recovery of home and property have processed few claims, awarded incomplete or no relief, and have been marked by long delays and incompetent performance.

There are several remedies that could flow from application of this Principle. One remedy is to provide more streamlined, faster, and effective administrative procedures that compensate for losses and return Gulf Coast IDPs to their homes. Another is mobilization of military or law enforcement personnel to help Gulf Coast IDPs reclaim or repair homes and property. A third possibility is the creation of restitution tribunals similar to the international commissions and courts suggested by the Annotations²⁷⁷ or the recent September 11 settlement process. Just as these remedies were used by the federal government for September 11 claims and approved for resolution of IDP claims in the former Yugoslavia,²⁷⁸ it seems reasonable to consider their use for major-disaster property recovery.

Anticipating one objection, provisions for property recovery need not require “make-whole” relief that would restore all Gulf Coast residents to their pre-Katrina status. As even some of the strongest critics of the government’s recovery efforts have observed, it is not reasonable to expect the government to act as an insurer for all disaster losses.²⁷⁹ Indeed, complete property recovery is not required by Principle 29, which instead calls for recovery “to the extent possible” and requires “appropriate” and “just” compensation rather than complete compensation.²⁸⁰ Within limits of reason, capacity, and verification, Gulf Coast recovery policy should provide for as much restoration of property damage as possible.

B. Legal Status of the Principles: A Non-binding Framework for Policy

There is no question that the Principles, on their face, are not legally binding. However, they have been adopted in part for disaster relief policy by fifteen nations.²⁸¹ Thus, it is worth briefly considering the question of

276. KALIN, *supra* note 193, at 72.

277. *See id.* (discussing adjudicative models for determining restitution compensation rights for IDPs).

278. *Id.*

279. *McWaters v. FEMA*, 436 F. Supp. 2d 802, 820 (E.D. La. 2006).

280. *U.N. Principles*, *supra* note 5, at annex Principle 29 ¶ 2.

281. *See* Jessica Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, HUM. RTS. BRIEF, Fall 2006, at 7, 8 (referring to Angola, Burundi, Liberia, Uganda in Africa; India and

whether the Principles would be recognized as customary international law and, if so, whether the Principles are recognized clearly and uniformly enough to be considered part of U.S. law.

1. The Principles Probably Do Not Yet Constitute International Law

The answer to the first question is that the Principles probably do not yet constitute international law. The Principles' drafters state they are not binding,²⁸² and while their adoption by twelve nations represents a developing trend towards the establishment of legal obligations to IDPs, it is very unlikely that the Principles have been sufficiently recognized as legally binding for them to have ripened into customary international law.

The first step in analyzing whether the Principles are legally binding is to look to the source and drafters of the Principles. The Principles were prepared for and issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR).²⁸³ The OHCHR is an agency of the United Nations that does not have authority to make binding international law,²⁸⁴ so the promulgation of the Principles by the OHCHR does not in itself give them legal force.

What is most fatal to any argument that the Principles are binding is that the drafters of the Principles state that they are not. In the interpretive Annotations that accompanied the Principles, the drafters wrote: "These Guiding Principles are not a draft declaration on the rights of internally displaced persons, nor do they constitute, as such, a binding instrument."²⁸⁵ Similarly, the interpretive Annotations note that the Principles' description of IDPs is "not a legal definition" and that the Principles do not confer special legal status on IDPs.²⁸⁶

Still, there are two possible arguments that the Principles, or at least some of them, are binding as a matter of international law. First, stated in the Principles themselves, as well as the interpretive Annotations, is the notion that the Principles reflect and are consistent with already-existing

Sri Lanka in Asia; Azerbaijan, Bosnia and Herzegovina, Georgia, Russia, Serbia, and Turkey in Europe; and Colombia and Peru in Americas).

282. KALIN, *supra* note 193, at 3.

283. Office of the United Nations High Comm'r for Human Rights, Representative of the Secretary-General on Internally Displaced Persons, <http://www.ohchr.org/english/issues/idp/standards.htm> (last visited Nov. 12, 2007).

284. KALIN, *supra* note 193, at 3; *see also U.N. Principles, supra* note 5, at Introductory Note to the Guiding Principles ¶ 11 ("The Guiding Principles are therefore intended to be a persuasive statement that should provide not only practical guidance, but also an instrument for public policy education and consciousness-raising.").

285. KALIN, *supra* note 193, at 3.

286. *Id.* at 2.

“international human rights law and international humanitarian law.”²⁸⁷ To that end, the interpretive Annotations cite existing human rights and humanitarian law instruments from which the Principles are derived.

While it is beyond the scope of this Article to evaluate which of the thirty Principles actually reflect existing international law, several points are relevant. First, the drafters themselves concede that several of the Principles do not currently exist in international law. Second, many of the Principles are only loosely based on international law provisions that are broader or pertain to different subjects. Consequently, as to those Principles, the argument that they are binding is fairly attenuated. Third, even as to those Principles which clearly and directly reflect well-recognized international law provisions, those provisions are parts of international instruments that the United States has either not entered or has entered on a non-binding status.²⁸⁸ For these reasons, the fact that the Principles restate existing international law would be unlikely to result in their enforcement in U.S. courts.

There is a second argument that the Principles, though not binding in themselves, are nonetheless part of the body of international law. The issue here is whether the Principles have evolved into customary international law (CIL). In order for the Principles to constitute CIL, there would have to be evidence that state practice demonstrates they have been generally accepted as legally binding.²⁸⁹

There is some support for this. At least fifteen nations have enacted IDP legislation or policy; of those, twelve have done so since the Principles were issued and rely considerably on them.²⁹⁰ However, because the authors of the Principles offered them as a non-binding model for domestic law or policy, the fact that the Principles have been used by some nations as a basis for domestic law does not necessarily mean that those nations considered themselves legally compelled to implement the Principles.

287. *Id.* at 3; *U.N. Principles*, *supra* note 5, at annex Introduction ¶ 3.

288. The notable exception is that many Principles are based on provisions of the Geneva Conventions, which are binding on the United States. Certainly, this exception applies to those portions the United States has formally accepted. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art.3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting torture and cruel, inhuman, and degrading treatment during armed conflict). However, as those provisions apply directly to armed conflict, they most likely would not be considered applicable to the Gulf Coast disaster.

289. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, at xxxi–xxxii (2005).

290. *See* Wyndham, *supra* note 281, at 8 (listing the countries that have enacted IDP legislation).

One of the most respected authorities in the development and recognition of CIL, the International Committee of the Red Cross (ICRC), has taken the view that the following provisions of the Principles are CIL:

- (1) Principles 6(3): “Displacement shall last no longer than required by circumstances.”²⁹¹
- (2) Principle 18(2): IDPs have the right of safe access to food, potable water, shelter, housing, medical services, and sanitation.²⁹²
- (3) Principle 21(3): The property rights of IDPs include that the government shall protect such property “against destruction and arbitrary . . . appropriation, occupation or use.”²⁹³
- (4) Principle 25(1): National governments have primary responsibility for IDP treatment.²⁹⁴
- (5) Principle 25(2): International assistance to IDPs is legal.²⁹⁵
- (6) Principle 28(1): IDPs have the right to resettle elsewhere in their country of residence.²⁹⁶
- (7) Principle 28(1): National governments have a duty to facilitate voluntary return and “reintegration” of IDPs.²⁹⁷

It should be noted here that the ICRC, while respected, is certainly not the final word as to what constitutes CIL, and many observers would take issue with at least some of its conclusions. Nonetheless, the recognition of these provisions as CIL does provide them with some additional normative force.

Determining CIL is a necessarily imprecise art, but, as to IDPs, it can probably be said that while there is a developing trend toward using the Principles to develop domestic IDP policy, that trend has not been followed by enough countries, or with specific recognition of legal obligation, to have ripened into an internationally accepted requirement of law. Arguments can be made that several of the Principles, most particularly those recognized by the ICRC, are either incorporated into CIL or reflect provisions of existing law in other instruments. However, those arguments lack the clarity and uniform acceptance necessary for U.S. courts to apply the Principles as binding U.S. law.

291. HENCKAERTS & DOSWALD-BECK, *supra* note 289, at 469 (quoting *U.N. Principles*, *supra* note 5, at annex Principle 6 ¶ 3).

292. *Id.* at 465 (citing *U.N. Principles*, *supra* note 5, at annex Principle 18 ¶ 2).

293. *Id.* at 472 (quoting *U.N. Principles*, *supra* note 5, at annex Principle 21 ¶ 3).

294. *Id.* at 467 (citing *U.N. Principles*, *supra* note 5, at annex Principle 25 ¶ 1).

295. *Id.* at 468 (citing *U.N. Principles*, *supra* note 5, at annex Principle 25 ¶ 2).

296. *Id.* at 470 (citing *U.N. Principles*, *supra* note 5, at annex Principle 28 ¶ 1).

297. *Id.* (citing *U.N. Principles*, *supra* note 5, at annex Principle 28 ¶ 1).

2. The Principles Would Not Be Incorporated into U.S. Law by U.S. Courts Under Existing Case Law

The guiding case on the incorporation of international law into U.S. law is *Sosa v. Alvarez-Machain*.²⁹⁸ *Sosa* prohibits federal courts from recognizing private claims under federal common law for violations of international laws with less definite content and acceptance among nations than other clearly established traditional rules, such as those against piracy, slavery, and torture.²⁹⁹ The Court repeatedly emphasized the importance of limiting the adoption of international standards by calling for “caution” and “restraint” in applying international norms, requiring a “high bar to . . . causes of action for violating international law” and urging against the creation of new and debatable violations of international law.³⁰⁰ Under *Sosa*, courts should only recognize “a handful of heinous actions . . . [that] violate[] definable, universal and obligatory norms”³⁰¹ and only apply a “narrow class of international norms.”³⁰²

The developing concept of IDP legal rights has not risen to the level of universal recognition and clarity that *Sosa* requires for U.S. courts to incorporate international standards into U.S. law. This is because the Principles were promulgated by a body without authority to make law, and the authors stated that the Principles are not binding. In addition, recognition of the Principles by the ICRC and their limited adoption by some states does not establish universal acceptance or clearly define the law on IDP rights.

3. Implications of the Legal Status of the Principles

The Principles’ non-binding status confirms that they are best used as a framework for legislative or policy changes that better address the needs of Gulf Coast IDPs. This is exactly the Principles’ purpose according to their drafters.³⁰³ This also reflects the position of the U.S. government, which advocates the use of the Principles as a “framework for response” that plays a “practical role” in dealing with IDP crises.³⁰⁴

298. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

299. *Id.* at 724–25.

300. *Id.* at 725, 727–28.

301. *Id.* at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

302. *Id.* at 729.

303. See *U.N. Principles*, *supra* note 5, at Introductory Note to the Guiding Principles ¶ 11 (“The Guiding Principles are therefore intended to be a persuasive statement that should provide not only practical guidance, but also an instrument for public policy education and consciousness-raising.”).

304. U.S. AGENCY FOR INT’L DEV., ASSISTANCE TO INTERNALLY DISPLACED PERSONS POLICY 6 (2004), available at <http://www.usaid.gov/policy/ads/200/200mbc.pdf> [hereinafter USAID,

IV. A SOLUTION BASED ON INTERNATIONAL HUMANITARIAN STANDARDS:
HOW THE PRINCIPLES SUPPORT A GULF COAST MARSHALL PLAN

A better framework for responding to the Gulf Coast crisis is provided in the Principles. In fact, the U.S. government has encouraged other nations to follow the Principles in formulating their disaster recovery policies,³⁰⁵ and many nations have done so.³⁰⁶ The following is an outline of how the Principles would support a comprehensive, integrated federal program—a “Gulf Coast Marshall Plan”—addressing unresolved Gulf Coast recovery problems.

A. The Federal Government Will Assume Primary Responsibility for an Integrated Recovery Effort

There can be little doubt that the decentralized and fragmented recovery effort is failing. Federal intervention is called for to provide the resources and centralized leadership needed to jump start the stalled restoration of the Gulf. Many of the issues involved, particularly flood protection, levee building, and wetlands restoration, fall squarely within federal jurisdiction. The Principles reflect the reality that national governments must take the lead in catastrophic disaster relief. Principle 3 states that “[n]ational authorities have the primary duty and responsibility” for protecting and providing humanitarian assistance to persons displaced by disaster.³⁰⁷

The Stafford Act does not recognize the necessity of national leadership in disaster relief. Under the Act, the federal government has primary responsibility only in disasters relating to areas of exclusive federal responsibility under the Constitution and U.S. law, and, even then, the federal government need not lead recovery efforts.³⁰⁸ The federal government’s assistance is discretionary, and the overall scheme of the Act clearly calls on state and local governments to assume primary responsibility.³⁰⁹ The Act’s broad immunity provision practically

INTERNALLY DISPLACED PERSONS POLICY]; *see also infra* Part V.

305. *See id.* (stating that USAID encourages its partners and host governments to reference the Principles); *infra* Part V.

306. *See* Wyndham, *supra* note 281, at 8 (listing the countries that have enacted IDP legislation based on the Principles).

307. *U.N. Principles*, *supra* note 5, at annex Principle 3 ¶ 1.

308. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5191(b) (2000).

309. *See, e.g., id.* § 5121(b) (declaring the policy of providing only “assistance” to states); *id.* § 5122(1) (permitting the federal government to “supplement State and local efforts”). For a discussion on the federal government’s discretion in disaster response under the Act, *see supra* Part II.A.

eliminates federal accountability for failure.³¹⁰ The Act's requirement that state governments apply for recognition and assistance sets up an impractical, multi-tiered bureaucracy where actual responsibility is hard to find.³¹¹

One component of federal leadership should be to replace the present bureaucratic machinery and administrative requirements with a single agency or task force that has legal authority to implement a recovery plan. While the participation of local residents is critical to ensure that problems on the ground are carefully considered, the network of responders needs clear leadership.

B. All Persons Displaced or Injured by the Disaster Should Have Recovery Rights

The discussion in Part I demonstrates that hundreds of thousands of storm victims are being left behind by the so-called recovery process. One reason for this is that under the Stafford Act, disaster victims literally have no legal rights.³¹² There is no definition of a class of individuals entitled to relief or remedies under the Act.³¹³ To the contrary, several provisions allow for reduction or elimination of benefits to persons even if they have been injured by a disaster.³¹⁴

Following the Principles would correct this insofar as they recognize that displaced persons have recovery rights.³¹⁵ The description of persons entitled to relief under the Principles includes those "forced or obliged to flee or to leave their homes or places of habitual residence . . . as a result of or in order to avoid the effects of . . . natural or human-made disasters."³¹⁶ Principle 3 establishes that displaced persons have the right to request and receive protection and humanitarian assistance from government authorities.³¹⁷ Similarly, Principle 7 gives displaced persons the "right to an

310. See § 5148 ("The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter."); *supra* text accompanying notes 141–42.

311. See § 5170 (requiring state governors to make certain findings and apply to the President for a declaration that a disaster requiring federal aid exists).

312. See *id.* § 5165c(b)(2) (stating that there is no legal right of action for any party challenging disaster relief policies).

313. See *id.* § 5122 (excluding persons entitled to relief from the definitions under the Stafford Act).

314. See, e.g., *id.* § 5154a(a) (restricting the application of federal assistance funds).

315. *U.N. Principles, supra* note 5, at annex Introduction ¶ 1.

316. *Id.* at annex Introduction ¶ 2.

317. *Id.* at annex Principle 3 ¶¶ 1–2.

effective remedy,” including judicial review.³¹⁸

Incorporation of these concepts would make providing relief to those who need it the goal of policy instead of defining the federal role so narrowly as to preclude any legal responsibility for recovery, which is the effective purpose of the Stafford Act. Principle-based legislation—recognizing that all storm victims have at least some right to aid—would prevent exclusion of certain storm victims from relief based on surface-level distinctions, such as the precise source of injury or lack of insurance, which are unrelated to the critical question of whether they are in need of humanitarian aid.

C. Displaced Persons Willing to Return Have a Right of Return and Their Displacement Will End as Soon as Possible

Hundreds of thousands of Gulf Coast residents have not returned home.³¹⁹ Again, the law is partly to blame: Under the Stafford Act, no one has a right to return home, and there is no time limit to displacement under the Act. On the contrary, the Act actually requires the government to displace disaster victims from temporary housing after eighteen months.³²⁰

The Principles are again corrective because they focus on the needs and rights of the displaced. Under Principle 28, the government must establish conditions and provide the means for persons to return voluntarily to their homes or residences.³²¹ Furthermore, Principle 6 states that “[d]isplacement shall last no longer than required by the circumstances,”³²² and Principle 7 requires that “all measures shall be taken to minimize displacement and its adverse effects.”³²³

D. Living Conditions Will Be Established That Are Materially Sufficient to Allow Persons to Return and Remain

The Principles do not merely require return, but oblige the government to make this possible by establishing conditions that allow safe return and

318. *Id.* at annex Principle 7 ¶ 3.

319. FEB. KATRINA INDEX, *supra* note 9, at 10, 12.

320. Disaster Mitigation Act of 2000, 42 U.S.C. § 5174(c)(1)(B)(ii) (Supp. IV 2004) (amending 42 U.S.C. § 5174 (2000)).

321. *U.N. Principles*, *supra* note 5, at annex Principle 28 ¶ 1. *See generally Leger Testimony*, *supra* note 6, at 12–13 (describing how “unfair distribution of disaster resources or treatment among the states along the Gulf Coast” hinders the recovery of housing, educational, health, and transportation services).

322. *U.N. Principles*, *supra* note 5, at annex Principle 6 ¶ 3.

323. *Id.* at annex Principle 7 ¶ 1.

reintegration of returnees and recognize their need to have an adequate standard of living upon their return.³²⁴ This general obligation to restore stricken places to livability is critical. It is insufficient to create a right of return to a place that no one can live in; disaster recovery requires government to rebuild and restore community services and infrastructures so that people can return and live safely. The continuing absence of services, infrastructure, health care, education, sanitation, and flood protection paints a picture of a place where IDPs can neither return nor reside.

Again, the Stafford Act is not up to the task of doing what is needed. While the Act lists various specific forms of assistance as “essential,” such as debris removal and health care, these are all discretionary.³²⁵ The federal government is not obligated under the Act to restore disaster-stricken communities so that people can return to and live in them. In fact, even those things the Act describes as “essential assistance”—including emergency medical care, shelter, clearing roads and bridges, demolition of unsafe buildings, dissemination of health and safety information, and warning and reduction of immediate life-threatening risks—are discretionary and need not be done.³²⁶

E. The Government Will Assist Persons Whose Homes Are Recoverable to Repair and Rebuild and Must Ensure Access to Decent and Affordable Housing

Many Gulf Coast residents cannot obtain affordable housing and cannot afford to repair and rebuild.³²⁷ Application of the Principles would address this because the right to return to livable conditions includes the right to assistance necessary to repair and rebuild. Principle 21 requires the protection of property against destruction and therefore obliges government assistance necessary for persons to save their homes.³²⁸ Similarly, Principle 29 creates a duty to assist returned persons with recovery of property they are dispossessed of and requires just reparation and compensation of persons who cannot recover such property.³²⁹

324. *Id.* at annex Principle 18 ¶ 1, annex Principle 28 ¶ 1.

325. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170b(a)(1)–(3), (c)(1) (2000); *see also supra* Part II.A.

326. § 5170b(a)(1)–(3), (c)(1); *see also supra* Part II.A.

327. *See Whoriskey, supra* note 18 (suggesting that Katrina victims living in FEMA trailer parks cannot afford the rent in New Orleans).

328. *U.N. Principles, supra* note 5, at annex Principle 21 ¶¶ 1–2.

329. *Id.* at annex Principle 29 ¶ 2.

The right to “[b]asic shelter and housing” in Principle 18³³⁰ should include rent and mortgage subsidies that preclude predatory real estate practices. Principles 11 and 8 prohibit cruel, degrading, and inhuman treatment and require that the dignity of persons be respected.³³¹ Though customarily these concepts apply to treatment of IDPs in armed conflict, they are arguably violated by the treatment of Gulf Coast evacuees. Hundreds of thousands of IDPs do not have affordable housing, have been neglected entirely, or have been herded to and from makeshift housing from which they may soon be ejected.³³²

Under the Stafford Act, all housing assistance is discretionary, and even the assistance that may be provided is limited.³³³ Temporary housing is discretionary and can be taken away after eighteen months.³³⁴ Again, as applied, the Act has often been more a part of the problem than the solution.

F. Comprehensive, Reliable Flood-Protection Measures Will Be Taken, Including Strengthening Levees and Restoring Coastal Wetlands

Principle 6 establishes a right against displacement,³³⁵ and, similarly, Principle 28, which requires a right to return in safety,³³⁶ encompasses the responsibility to provide the best possible protection against the known risks of flooding and future displacement. When read collectively, the Principles would prohibit subjecting Gulf Coast residents to the risk of future displacement by neglect of flood protection that would lead to another—possibly even worse—disaster.

Meeting the duty to prevent displacement would require rebuilding an integrated system of strengthened levees, closing canals that surge floods into populated areas and degrade wetlands, and restoring those protective coastal wetlands. Indeed, the U.S. government is so concerned with floods in other countries that it has described them as the worst natural humanitarian disaster,³³⁷ and, as a result, U.S. international disaster policy

330. *Id.* at annex Principle 18 ¶ 2.

331. *Id.* at annex Principle 8 ¶ 1 (dignity); *id.* at annex Principle 11 ¶ 2 (cruel and degrading).

332. *See supra* notes 16–21, 94–95, 173–179 and accompanying text.

333. Disaster Mitigation Act of 2000, 42 U.S.C. § 5174(b)–(d), (h) (Supp. IV 2004) (amending 42 U.S.C. § 5174 (2000)).

334. *Id.* § 5174(c)(1)(B)(ii). The President can extend the eighteen month period, *id.*, and has done so by six months. *Whoriskey, supra* note 18.

335. *U.N. Principles, supra* note 5, at annex Principle 6 ¶ 1.

336. *Id.* at annex Principle 28 ¶ 1.

337. *See* U.S. AGENCY FOR INT’L DEV. ET AL., DISASTER REDUCTION: A PRACTITIONER’S GUIDE 73, 76 (2002), available at http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/resources/pdf/disaster_reduction_2002.pdf [hereinafter DISASTER REDUCTION GUIDE] (“Floods are the most economically devastating and deadly natural hazards.”).

places great emphasis on flood prevention and protection.³³⁸ It should do the same for its own citizens.

But the Stafford Act does not. The Act does not require preventive measures to protect against further displacement. Instead, it provides limited, discretionary assistance to states that develop mitigation plans³³⁹ and offers program development grants of up to \$250,000 to support states in developing preparedness programs.³⁴⁰ The Act's only provisions offering protection to individuals from future risk provide the government with discretion to warn the public of further risks and hazards³⁴¹ and to "reduc[e] . . . immediate threats to life, property, and public health and safety."³⁴² It is not a defense that flood protection, levees, wetlands, and canal work fall outside the Act. These are clearly federal responsibilities that were neglected with tragic consequences and that continue to be neglected.³⁴³

G. Ineffective Bureaucracies Will Be Replaced by a Streamlined, Efficient, Effective, and Easily Understood Administrative Process for Relief and Recovery

The government response itself has been so poor that it can fairly be said that the government is now part of the Katrina disaster.³⁴⁴ Improving the government's recovery administration and procedures is essential to the restoration of the Gulf.³⁴⁵ State recovery officials, judges, and independent researchers have forcefully condemned the Stafford Act and the federal response under it.³⁴⁶ There are no provisions in the Act that provide

338. See U.S. Agency for Int'l Dev., USAID Environment: Biodiversity - Wetland and Freshwater, http://www.usaid.gov/our_work/environment/biodiversity/freshwater.html (last visited Aug. 24, 2007) [hereinafter USAID Environment] (describing USAID efforts to protect wetlands due to the role they play in flood prevention); Press Release, U.S. Agency for Int'l Dev., USAID Fact Sheet: Tsunami Reconstruction, Two Years Later (Dec. 22, 2006), available at <http://www.usaid.gov/press/factsheets/2006/fs061222.html> [hereinafter USAID Fact Sheet] (describing USAID reconstruction efforts in nations affected by the 2004 tsunami).

339. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5165 (2000).

340. *Id.* § 5131(c).

341. *Id.* § 5170b(a)(3)(F).

342. *Id.* § 5170b(a)(3)(I).

343. See *supra* Part I.B.

344. See *supra* Parts I.C, II.B.

345. See *Leger Testimony*, *supra* note 6, at 5–6 (suggesting that the federal government should waive Louisiana's portion of its cost-share responsibility); FEB. KATRINA INDEX, *supra* note 9, at 1 (describing the need to "reduce red tape" at all levels); *supra* notes 90–100 and accompanying text.

346. See *Ass'n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26, 29 (D.D.C. 2006) (criticizing FEMA for failing to create a sufficient notice system to protect evacuees' constitutional rights), *stay granted in part*, No. 06-5403, 2006 WL 3847841 (D.D.C. Dec. 22, 2006);

accessible administrative processes that effectively deliver relief; rather, the Act and its implementation create exactly the opposite effect. The Act is a labyrinth of multilayered disaster recovery tools that allows all levels of government to avoid responsibility. It leaves people in need confused as to where to go, what to do, and how to get help. Statutory immunity leaves victims with little legal recourse and allows the government to evade accountability.³⁴⁷

The Principles again offer correctives. Principle 7 calls on governments to guarantee displaced persons full information on procedures regarding displacement, compensation, and relocation.³⁴⁸ This Principle also establishes the right to an effective remedy, including judicial relief,³⁴⁹ which allows citizens to hold the government legally accountable for meeting their needs. Principle 24 prohibits diversion of assistance,³⁵⁰ with the Annotations emphasizing that it is critical that essential services reach persons who need them.³⁵¹

Principle 24 specifically addresses a significant problem in federal disaster relief—diversion of resources away from places where the need is greatest in order to reward politically favored states or companies.³⁵² Furthermore, Principle 24 proscribes diversion “for political or military reasons.”³⁵³ Gulf Coast recovery policy sorely needs enforceable provisions that prevent this.

Some might question whether this proposed Gulf Coast Marshall Plan will solve administrative obstacles when it suggests new governmental entities such as a federal task force to lead recovery efforts and arbitral bodies for awarding compensation. These concerns are misplaced for three reasons. First, the new institutions would replace some old ones, at least for purposes of Gulf Coast recovery. Second, the new institutions would lead, direct, and organize efforts that are presently scattered and rife with barriers to relief, in part by eliminating unnecessary institutional or regulatory obstacles. Third, the legal structures that make responsibilities unclear and accountability practically impossible would be eliminated, so the new

McWaters v. FEMA, 436 F. Supp. 2d 802, 820 (E.D. La. 2006) (chastising FEMA for failing to serve the needs it was created to meet); *Leger Testimony*, *supra* note 6, 8–9 (describing recovery efforts as “unacceptable”); FEB. KATRINA INDEX, *supra* note 9, at 5 (noting the failure of the federal Road Home Program).

347. § 5148.

348. *U.N. Principles*, *supra* note 5, at annex Principle 7 ¶ 3.

349. *Id.*

350. *Id.* at annex Principle 24 ¶ 2.

351. KALIN, *supra* note 193, at 62.

352. See *Leger Testimony*, *supra* note 6, at 11–13 (documenting the inequitable distribution of emergency relief funds among the Gulf Coast States).

353. *U.N. Principles*, *supra* note 5, at annex Principle 24 ¶ 2.

recovery administration would know what to do and face liability if it failed.

H. Military Units Will Be Deployed for Debris Removal and Rebuilding

Lack of affordable manpower is a great obstacle to rebuilding homes, and many Gulf Coast communities remain physically scarred with uncollected debris, abandoned cars, and even boats miles inland.³⁵⁴ The work of gutting and rebuilding hundreds of thousands of damaged homes remains undone and, to the extent it is being done, it is largely by residents and volunteers.³⁵⁵ The authority to deploy the military for disaster recovery is implicit in the duty of national government to take primary responsibility for recovery, the duty to take steps necessary to restore property to persons, and the duty to create livable conditions when such tasks are too extensive to be achieved by state and local government or private resources.

This is another area where U.S. international disaster relief is a model for needed action in the Gulf. The United States deployed 15,000 troops over three months in 2004–2005 to provide humanitarian relief in the wake of the devastating tsunami in South Asia.³⁵⁶ A similar commitment in the Gulf would help enormously in the manpower-intensive, physical recovery work that is the first step in restoring stricken communities.

However, the Stafford Act does not permit U.S. troops to serve in Louisiana as they did in Indonesia, Sri Lanka, and Thailand. The Act gives the President the discretion to deploy military forces for no more than ten days upon the request of a state governor—but only in the immediate aftermath of a disaster—to perform emergency work “essential for the preservation of life and property.”³⁵⁷

I. Personal Property and Possessions Will Be Protected and Disaster Victims Should Be Reasonably Compensated for Losses

Judging by the statistics on the unprocessed Road Home applications and various class action lawsuits against FEMA for denying claims, it is

354. J.R. Welsh, *Residents Determined to Get Hancock County's Messes Cleaned Up*, SUN HERALD (Biloxi), Mar. 28, 2007, at A1.

355. See FEB. KATRINA INDEX, *supra* note 9, at 5 (noting that the Corps only tore down eighty homes in January 2007, compared with an average of 387 home demolitions that have taken place each month following the storm); JUNE KATRINA INDEX, *supra* note 12, at 6 (reporting 243 free home demolitions in April, most of which were probably performed by home owners).

356. *American Hospital Ship*, *supra* note 267.

357. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170b(c)(1) (2000).

clear that hundreds of thousands of Gulf Coast residents have been completely unassisted by government. And many more have been inadequately assisted in the protection and recovery of their property and amelioration of the great financial losses they have sustained due to its destruction.³⁵⁸

The Stafford Act might have something to do with this. There are no provisions in the Act requiring government assistance in protecting and recovering private property. Protecting property is included in a provision describing “essential assistance,” but the government has the discretion not to provide such assistance.³⁵⁹ Nor are there any provisions providing for compensation for property losses outside of the limited provisions regarding housing.³⁶⁰

The Principles provide an alternative to this statutory indifference. Principle 21 calls upon governments to protect property left behind against destruction or illegal appropriation, occupation, and use.³⁶¹ Principle 29 requires government assistance in recovery of property and possessions when this is possible and appropriate compensation when it is not.³⁶² The Annotations suggest arbitral or judicial models to compensate disaster victims,³⁶³ another recommendation for institutional reform that could replace dysfunctional bureaucracies with remedial ones.

J. Gulf Coast Residents Will Have Access to Health Care

Many people in the Gulf region have inadequate access to medical care.³⁶⁴ Due to limited health care facilities in Louisiana, trauma and psychiatric patients have endured forced transportation across the state, and emergency room patients have had long waits.³⁶⁵ Restoration of medical care access sufficient to meet community needs is indispensable to the region’s recovery.³⁶⁶

These problems would be eliminated under application of the Principles. Principle 18 identifies access to medical services as a

358. See Liu & Plyer, *supra* note 11, at 11 app. B at 26 tbl.2 (noting that only 25% of Road Home applications have been processed); LEVEE REPORT, *supra* note 43, at 15-1 (reporting damage estimates of \$100–\$200 billion in the greater New Orleans area); *supra* Section II.B.1.

359. § 5170b(c)(1).

360. Disaster Mitigation Act of 2000, 42 U.S.C. § 5174 (Supp. IV 2004) (amending 42 U.S.C. § 5174 (2000)).

361. *U.N. Principles*, *supra* note 5, at annex Principle 21 ¶¶ 1–3.

362. *Id.* at annex Principle 29 ¶¶ 1–2.

363. KALIN, *supra* note 193, at 72.

364. See *supra* notes 25–33 and accompanying text.

365. FEB. KATRINA INDEX, *supra* note 9, at 5.

366. GAO REPORT: STATUS OF THE HEALTH CARE SYSTEM IN NEW ORLEANS, *supra* note 25, at 7.

fundamental right that must be provided by government,³⁶⁷ and Principle 7 requires satisfactory health conditions.³⁶⁸ Principle 19 states that displaced persons shall receive the medical care and attention they require to “the fullest extent practicable and with the least possible delay”; this includes psychological and social services and calls for special attention to the needs of women and the prevention of contagious and infectious disease.³⁶⁹

Again, the Stafford Act falls flat. While “emergency medical care” and “reduction of immediate threats to life . . . and public health” are considered “[e]ssential assistance” under the Act, whether the federal government should actually reduce such threats or provide access to such care is discretionary.³⁷⁰ Moreover, these discretionary provisions do not address non-emergency care or less-than-immediate health threats.

K. The Government Will Reopen Schools and Take Other Measures to Ensure Education for All Children in Disaster-Affected Communities

Many children in the Gulf region have been unable to go to school for long periods because schools are closed and teachers are gone.³⁷¹ This denies children educational opportunities, which in turn deprives them of employment skills. It also creates a large population of unoccupied, frustrated young people and has possibly contributed to other problems such as crime. The Stafford Act includes schools as “[e]ssential services,” but the government has discretion on whether to provide them.³⁷² There is no obligation under the Act to take any real action to provide access to education.

By contrast, Principle 23 affirms that all persons have the right to education and specifically requires that “[e]ducation and training facilities shall be made available . . . as soon as conditions permit.”³⁷³ Not only do the Principles recognize that education must be provided, but they also explain *why*. The Annotations emphasize the importance of educational continuity and the need to minimize schooling interruptions.³⁷⁴

367. *U.N. Principles*, *supra* note 5, at annex Principle 18 ¶ 2.

368. *Id.* at annex Principle 7 ¶ 2.

369. *Id.* at annex Principle 19 ¶¶ 1–3.

370. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170b(a)(3)(B), (I) (2000). Crisis counseling is also discretionary. *Id.* § 5183.

371. FEB. KATRINA INDEX, *supra* note 9, at 5; JUNE KATRINA INDEX, *supra* note 12, at 7, 13.

372. § 5170b(a)(3)(D).

373. *U.N. Principles*, *supra* note 5, at annex Principle 23 ¶¶ 1, 4.

374. KALIN, *supra* note 193, at 60.

L. The Government Will Take Steps to Increase Employment Opportunities in Stricken Areas, Including Partnerships, Incentives, and Assistance for Businesses to Reopen or Relocate in the Region

Many businesses in hard-hit communities were damaged and remain closed.³⁷⁵ The duty to support businesses in the region is implicit in the responsibility to provide material sufficiency and livable conditions for residents. Without a business base, residents will not have places to work or to obtain necessities, goods, and services that are a part of normal life.

Principle 22 expressly recognizes the right to seek employment opportunities and “to participate in economic activities.”³⁷⁶ The only provision of the Stafford Act addressing employment provides for up to twenty-six weeks of unemployment compensation for otherwise uncovered persons unemployed because of disaster and allows for discretionary reemployment assistance.³⁷⁷

M. The Right of Evacuees to Participate in Politics and Civic Life Should Be Ensured

Principle 22 guarantees displaced persons “[t]he right to vote,” “[t]he right to . . . participate in governmental and public affairs,” the right to association, and “[t]he right . . . to participate equally in community affairs.”³⁷⁸ The Stafford Act does not require or address voting or civic participation.

The right to vote in elections was honored in the technical sense for many evacuees, but the logistical obstacles were so great that many could not vote as a practical matter.³⁷⁹ The rights to associate and to participate in community and public affairs have been compromised, particularly for those who are not living in their communities. This is crucial because community organizations are making many decisions related to recovery at local meetings that displaced residents cannot attend.³⁸⁰

375. See FEB. KATRINA INDEX, *supra* note 9, at 57 (demonstrating that only 46% of retail food establishments were open in the New Orleans Metro area as of August 2006); *Leger Testimony*, *supra* note 6, at 2 (“More than 81,000 businesses were affected . . . in the most impacted parishes, including over 18,000 businesses . . . that suffered direct flooding or catastrophic damages.”).

376. *U.N. Principles*, *supra* note 5, at annex Principle 22 ¶ 1.

377. § 5177(a).

378. *U.N. Principles*, *supra* note 5, at annex Principle 22 ¶ 1.

379. Jeff Duncan, *Lawmaker Says Election Violates Voter Rights*, TIMES-PICAYUNE (New Orleans), Mar. 9, 2006, § (Metro), at 1.

380. See Ryan O’Donnell & Rob Richie, Editorial, *Louisiana’s Electoral Disaster*, WASH. POST, Dec. 22, 2005, at A29 (stating that evacuees are excluded from voting due to “bureaucratic squabbling” and lack of infrastructure for the distribution of mail-in ballots).

N. Storm Victims—Returnees and Evacuees—Should Be Given the Right to Participate in Federal Recovery Planning

Principle 28 requires “[s]pecial efforts . . . to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”³⁸¹ This is also implicit in Principle 22’s protection of the more general right to participate in civic life.³⁸² The Stafford Act does not require or address participation of displaced persons in remedial planning and management.

This participation has been hard for persons who remain far from their homes. Perhaps most significantly, much of the recovery effort that has succeeded has been done by community and neighborhood organizations, non-profits, and volunteers, while much that has failed has been marked by a “top down” approach by government and contractors who have not consulted displaced persons or adequately taken their needs into account.³⁸³ In the event the author’s suggestion for federal leadership of recovery is followed, it will be critical that federal efforts involve local residents and groups in the planning and implementation of relief.

O. Anti-discrimination Measures Will Be Enforced to Ensure That the Disaster and Response Do Not Have a Discriminatory Impact

This is the issue on which the Stafford Act is closest to the Principles. Both the Principles and the Act prohibit discrimination in relief and assistance on the basis of race, color, religion, nationality, sex, age, economic status, and disability.³⁸⁴ The Principles also prohibit displacement that results in alteration of “ethnic, religious or racial composition of the affected population.”³⁸⁵ A Gulf Coast Marshall Plan should prohibit discrimination on the bases identified in both the Act and the Principles.

381. *U.N. Principles*, *supra* note 5, at annex Principle 28 ¶ 2.

382. *Id.* at annex Principle 22 ¶ 1.

383. See Bruce Alpert, *FEMA Was Warned, Official Says*, *TIMES-PICAYUNE* (New Orleans), Oct. 21, 2005, § (National), at 1 (documenting internal criticism of the leadership within FEMA following Hurricane Katrina).

384. *U.N. Principles*, *supra* note 5, at annex Principle 4 ¶ 1; Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5151 (2000). Principle 4 additionally prohibits discrimination on the basis of “political or other opinion, . . . ethnic or social origin, . . . disability, property, [or] birth” status. *U.N. Principles*, *supra* note 5, at annex Principle 4 ¶ 1. Principle 18 generally prohibits discrimination regarding access to food, water, shelter, housing, clothing, medical services, and sanitation. *Id.* at annex Principle 18 ¶ 2. Principle 24 generally prohibits discrimination in humanitarian assistance. *Id.* at annex Principle 24 ¶ 1.

385. *U.N. Principles*, *supra* note 5, at annex Principle 6 ¶ 2.

One of the most difficult questions presented by the crisis is how best to respond to the disparate impact the disaster, displacement, rescue, and recovery have had on African Americans and the economically disadvantaged. It is likely that following the Principles would have a corrective effect. Giving sufficient material support, financial assistance, services, and civic infrastructure would remove barriers that prevent displaced persons from returning and remaining. Such support would also encourage those remaining to help restore the region's communities to their pre-storm demographics. Explicit race- or status-conscious disaster relief would violate the Act, anti-discrimination law, constitutional civil rights, and equal protection guarantees. Moreover, in view of the fact that the disaster has caused enormous suffering and loss to millions of people across racial and socio-economic lines, there are serious questions about the morality and political viability of remedies that are potentially exclusive as to race and class.

P. The Special Needs of At-Risk Groups Will Be Met

The Post-Katrina Act addresses accommodation needs for disabled persons and adds those with English language deficiencies to groups protected by the Stafford Act's anti-discrimination clause.³⁸⁶ Otherwise, the Stafford Act and its amendment make no special provision for persons acutely vulnerable in disaster situations.

The Principles make much greater provision for the special needs of persons who are particularly at risk in disasters. Principle 4 states that certain displaced persons, such as children, new and expectant mothers, disabled persons, and the elderly, shall be entitled to protection and assistance that takes their special needs into account.³⁸⁷ Anti-discrimination provisions, need-based remedial measures, and financial assistance should significantly address the problems of these persons.

There are two additional groups who are acutely vulnerable. The first is persons with psychological problems. The disaster appears to have increased the number of persons afflicted, while decreasing the medical capacity available to treat them.³⁸⁸ The second is economically disadvantaged persons.³⁸⁹ Those without health or property insurance and

386. Post-Katrina Emergency Management Reform Act of 2006, 42 U.S.C.A. § 5151(a) (Supp. 2007).

387. *U.N. Principles*, *supra* note 5, at annex Principle 4 ¶ 2.

388. See GAO REPORT: STATUS OF HOSPITAL INPATIENT AND EMERGENCY DEPARTMENTS, *supra* note 29, at 14 (documenting the shortage of hospital beds for psychiatric patients in New Orleans hospitals).

389. LOGAN, *supra* note 37, at 1, 7.

those who do not have the means to recover on their own are now threatened with financial, physical, and personal collapse. A Gulf Coast Marshall Plan should address the unique needs of these at-risk groups.

Q. Reasons for a Gulf Coast Marshall Plan

There are four compelling moral and political arguments for the comprehensive Gulf Coast Marshall Plan modeled on the Principles. The first and most obvious is that what is being done is not nearly enough to relieve the human suffering caused by the disaster or restore the persons and communities that have been affected. The second is that a comprehensive federal solution is justified because the federal government is responsible for much of the disaster due to its neglect of storm and flood protection. The third is that the Principles are a common-sense, practical approach most likely to work because they address all of the continuing problems faced by the Gulf Coast and its residents in an integrated, preventive, and long-term way. The final argument is that the U.S. should provide its own citizens with the disaster relief it provides to other nations. Otherwise our government is exporting humanitarianism and compassion.

The following analysis of official U.S. policy and examples of practices on international IDP relief shows that U.S. international disaster relief is nothing like the Stafford Act but instead reflects the Principles and would promote the sixteen-point program outlined above.

V. A GULF COAST MARSHALL PLAN BASED ON THE PRINCIPLES IS THE RIGHT SOLUTION BECAUSE THE UNITED STATES SUPPORTS AND FOLLOWS THE PRINCIPLES FOR DISASTER RECOVERY AND PREVENTION IN OTHER COUNTRIES

The U.S. government advocates following the Principles when catastrophic disasters lead to mass displacement and injury in other nations. Moreover, the U.S. government is actually following the Principles in international disaster relief by doing many of the very things that the government is neglecting to do in its failed response to Hurricane Katrina. In short, we ought to be doing at home what we are doing abroad. In the following section, it will be shown that the U.S. *says* that the Principles are the model for disaster relief abroad and that the U.S. *does* what the Principles say.

A. U.S. Policy on International Disaster Relief

U.S. international IDP policy is set forth in the United States Agency for International Development Assistance to Internally Displaced Persons Policy (USAID Policy), promulgated in 2004.³⁹⁰

The USAID Policy promotes a comprehensive, multifaceted, and integrated long-term approach to disaster response and thus is much more like the Principles and the Plan outlined in this Article than the Stafford Act. In fact, USAID endorses the Principles as a “[f]ramework for [r]esponse” with a “practical role” for nations dealing with IDPs.³⁹¹ USAID encourages “wider international recognition” of the Principles.³⁹²

The USAID Policy should be applied by our own country for Gulf Coast recovery. Indeed, the following USAID description of the problems faced by IDPs is almost an exact portrait of what is happening today in hurricane-stricken areas in the Gulf:

[After return], many IDPs remain vulnerable. They return to destroyed homes and towns, disputes over land tenure, absent or distrustful local officials, and other obstacles to reintegration. Some IDPs never return home and must resettle permanently

. . . Prolonged displacement typically disrupts or reverses progress made in schooling, healthcare, food production, sanitation systems, infrastructure improvements, local governance, and other sectors fundamental to economic and social development. Failure to address the long-term development needs of previously uprooted populations risks new cycles of national instability and population displacement.³⁹³

The USAID Policy further states: “IDPs often go back to homes and properties destroyed, . . . damaged infrastructure, devastated local economies, weak civil administrations, simmering social and political tensions, and lingering security risks.”³⁹⁴

The USAID Policy for IDP recovery mirrors the Principles. Like the Principles, the USAID Policy promotes the central responsibility of national government, stating that “[g]overning authorities in affected countries hold

390. See USAID, INTERNALLY DISPLACED PERSONS POLICY, *supra* note 304, at 4 (“USAID is the acknowledged lead U.S. government agency for addressing internal population displacement.”).

391. *Id.* at 6 & n.6.

392. *Id.* at 1.

393. *Id.* at 3.

394. *Id.* at 7.

primary responsibility for IDPs.”³⁹⁵ The USAID Policy, like the Principles, but unlike the Stafford Act, further recognizes that governments have duties to IDPs to “encourage the governments of affected countries to fulfill their *responsibilities* to protect and assist their own citizens, including IDPs.”³⁹⁶ Return, resettlement, and reintegration are expressly identified by USAID as governmental responsibilities, as are protection, well-being, and security.³⁹⁷ These duties are also recognized in the Principles.³⁹⁸

USAID recognizes that relief to victims of large catastrophes requires an integrated strategy, sustained over time, that addresses the many facets of recovery. The USAID Policy calls for a “comprehensive response” and a “comprehensive strategy.”³⁹⁹ USAID goes beyond immediate emergency efforts to include long-term, durable solutions and eventual self-reliance for IDPs.⁴⁰⁰ This long-term commitment requires “sustained support for IDPs and their host communities over many years.”⁴⁰¹

The USAID Policy addresses the need to provide the following specific assistance:

- “lifesaving humanitarian access to needy populations”;⁴⁰²
- “protection of IDPs during all phases of displacement”;⁴⁰³
- “housing, food, water, sanitation systems, [and] healthcare”;⁴⁰⁴
- “access to education, training, tools, microcredit, . . . trauma counseling, family tracing, . . . [and] protection from exploitation”;⁴⁰⁵
- “transportation home, . . . help to reclaim their land and rebuild houses and businesses, . . . support to establish accountable local governance and stronger civil society”;⁴⁰⁶
- “assistance to construct or repair water systems, health systems, schools, and transportation routes”;⁴⁰⁷ and
- “vocational training and business or agricultural loans.”⁴⁰⁸

395. *Id.* at 4; *see also supra* notes 220–21, 268 and accompanying text.

396. USAID, INTERNALLY DISPLACED PERSONS POLICY, *supra* note 304, at 6 (emphasis added).

397. *Id.* at 1, 4.

398. *See supra* notes 246, 321–23 and accompanying text; *supra* Part. II.B.16.

399. USAID, INTERNALLY DISPLACED PERSONS POLICY, *supra* note 304, at 1, 4.

400. *See id.* at 1, 8 (emphasizing USAID’s short- and long-term commitments to people displaced by disaster).

401. *Id.* at 7.

402. *Id.* at 1.

403. *Id.*

404. *Id.* at 7.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

This assistance is called for under the Principles, but it is not being adequately provided to Gulf Coast storm victims.

The USAID Policy repeatedly emphasizes the need for government accountability in disaster recovery, calling for “[a]ccountability measures that ensure commitments are fulfilled” and that ensure IDP “needs are being addressed comprehensively.”⁴⁰⁹ Furthermore, the USAID Policy encourages “accountability and evaluation of programs” and policy implementation guidelines to ensure that a broad, integrated approach to IDP assistance is used.⁴¹⁰ It is hard to imagine that the Stafford Act scheme—which provides for discretionary, short-term federal assistance, obstructs accountability, and provides crimped aid to an eligible few—would be approved by USAID if another country proposed to use it.

The USAID policies for disaster relief are fleshed out further in its Field Operations Guide.⁴¹¹ None of the following steps, expected in U.S. response to international disasters, is being met by the U.S. government in the post-Katrina Gulf Coast. In responding to disasters in other countries, the U.S. government instructs its officials to identify the foreseeability of future disasters and determine whether they can be mitigated at reasonable cost.⁴¹² U.S. international disaster relief includes assessment of plans to repair and restore protective infrastructure such as levees.⁴¹³ Plans for the removal and disposal of garbage and waste must also be evaluated for effectiveness.⁴¹⁴

USAID places great emphasis on ensuring access to health care in disaster-stricken communities.⁴¹⁵ The USAID Field Operations Guide states: “In emergency situations, the population must be able to access appropriate treatment.”⁴¹⁶ It further explains: “What is required . . . is a community-based health service that identifies and treats those in need of health care and provides that care at the appropriate level.”⁴¹⁷

USAID also is prepared to do yet another thing that has not been done in Gulf Coast recovery—work with the military.⁴¹⁸ The military is trained

409. *Id.* at 5–6.

410. *Id.* at 1.

411. U.S. AGENCY FOR INT’L DEV., FIELD OPERATIONS GUIDE FOR DISASTER ASSESSMENT AND RESPONSE (2005), available at http://pdf.dec.org/pdf_docs/pnade100.pdf.

412. *Id.* at II-39.

413. *Id.* at II-58 to II-59.

414. *Id.* at II-37.

415. *See id.* at II-30 to II-35 (highlighting USAID’s protocol for accessing and providing health care among disaster-stricken populations).

416. *Id.* at III-87.

417. *Id.*

418. *See id.* at F-2 to F-14 (discussing the procedure for cooperation between the Office of U.S.

and willing to provide post-disaster humanitarian assistance and indeed has done so—in other countries.⁴¹⁹ In fact, in response to the 2004 tsunami, the U.S. deployed over 15,000 troops for disaster relief during a period of three months.⁴²⁰ Compare this to what has happened under the Stafford Act in the Gulf Coast since Katrina—where no troops have been deployed for non-rescue humanitarian recovery and rebuilding aid, and the Act limits any such deployment to ten days.⁴²¹

B. U.S. Practices as to International Disaster Relief and Other Assistance Similar to Gulf Coast Needs

This Part examines some examples of aid the United States has given internationally in situations similar to the Gulf Coast. This is not to criticize such humanitarian work, but rather to praise it by suggesting that what is being done by USAID to benefit other nations abroad should be done by the government to benefit U.S. citizens in the Gulf Coast.

1. Tsunami Recovery in South Asia

Gulf Coast citizens could not be blamed if they looked with envy at the role played by USAID following the 2004 South Asian tsunami. It is almost the exact opposite role played by the federal government in the Gulf Coast. A USAID website describes its rebuilding role following the tsunami:

[S]tanding side-by-side with the survivors, we are rebuilding communities and lives. Our cash-for-work programs give families incomes. Loans, businesses advice and training in job skills help develop new businesses and sources of income. Longer-term projects to reconstruct water systems, roads and other critical systems are underway.⁴²²

USAID carries out international flood control projects that are

Foreign Disaster Assistance and U.S. military in disaster-stricken communities).

419. See Press Release, U.S. Dep't of Def., U.S. Military Support to Tsunami Relief Efforts (Dec. 28, 2004), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=8090> (describing U.S. military aid to victims of the 2004 South Asian tsunami).

420. *American Hospital Ship*, *supra* note 267.

421. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170b(c)(1) (2000).

422. U.S. Agency for Int'l Dev., USAID: Earthquake and Tsunami Reconstruction, http://www.usaid.gov/locations/asia_near_east/tsunami/ (last visited Oct. 9, 2007) [hereinafter USAID: Earthquake and Tsunami Reconstruction].

desperately needed—but absent from—the Gulf Coast. The USAID’s post-tsunami recovery projects include creating an enhanced early-warning system of flood protection and working to strengthen community and political infrastructure.⁴²³ In Sri Lanka, USAID is rehabilitating fishing harbors, breakwaters, and docks, and is assisting in dredging inlets and removing debris.⁴²⁴ It is providing loans and assisting in the reconstruction of buildings, playgrounds, hospitals, and other infrastructure.⁴²⁵ USAID is even providing reemployment assistance and community grants to entrepreneurs and is assisting the local government with anti-corruption training.⁴²⁶ In Indonesia, USAID has improved access to clean water for 20% of the population by rebuilding water facilities and improving sewage, drainage, and irrigation systems.⁴²⁷ It has installed community health clinics and is training caregivers, including midwives and psychosocial workers.⁴²⁸ Over 18,000 business grants and loans have been distributed in Indonesia, and USAID is working with the government to reschedule debt so that public resources will be free for reconstruction.⁴²⁹ In Thailand, USAID just celebrated the opening of an energy-efficient, environmentally sound learning center.⁴³⁰

2. U.S. Humanitarian Aid to Iraq

USAID is doing many things in Iraq that the federal government is leaving undone in Louisiana. Hospitals and health clinics are being rehabilitated.⁴³¹ USAID has established community action projects to support 5071 projects that serve the humanitarian needs of hundreds of thousands of Iraqis.⁴³²

Regarding employment and economic help, USAID and its partners have provided income-generating work for 40,000 Iraqis, including employment on much needed public works projects.⁴³³ Thousands in Iraq

423. USAID Fact Sheet, *supra* note 338.

424. USAID: Earthquake and Tsunami Reconstruction, *supra* note 422.

425. USAID Fact Sheet, *supra* note 338.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Tsunami Reconstruction*, TSUNAMI UPDATE (U.S. Agency for Int’l Dev., Wash., D.C.), Dec. 26, 2006, at 6, available at http://www.usaid.gov/in/Pdfs/tuDec26_6.pdf.

431. U.S. Agency for Int’l Dev., USAID: Assistance for Iraq – Humanitarian Assistance, <http://www.usaid.gov/iraq/accomplishments/ofda.html> (last visited Sept. 12, 2007).

432. U.S. Agency for Int’l Dev., Iraq Community Action Program, <http://www.usaid.gov/iraq/contracts/pdf/A16-IraqCommunityActionProgram.pdf> (last visited Sept. 13, 2007).

433. U.S. Agency for Int’l Dev., USAID – FY 2005 Policy, <http://www.usaid.gov/policy/par05/>

have benefited from vocational training and education, which has targeted essential services.⁴³⁴ Grants have been provided to hundreds of Iraqi businesses and enterprises, and thousands of Iraqis have received U.S. subsidized skills training.⁴³⁵

The U.S. government is rebuilding the Iraqi education system at all levels.⁴³⁶ USAID has rehabilitated almost 3000 schools, trained thousands of teachers, provided special programs for 14,000 out-of-school children, supplied millions of new textbooks, and started a model school system.⁴³⁷

U.S. humanitarian support to Iraq extends to a subject many observers believe is central to the survival of Southern Louisiana—wetlands protection.⁴³⁸ The U.S. government has taken on the task of restoring 8000 square miles of Iraqi wetlands that had been deliberately drained by the government under Saddam Hussein.⁴³⁹ USAID stated that the purposes of the Marshlands Restoration Program for Iraq were to “restore the marshland ecosystem through improved management and strategic re-flooding in addition to providing social and economic assistance [to residents] including health, education, and rural development.”⁴⁴⁰

3. U.S. Flood Protection and Environmental Restoration for Other Countries

USAID states that “[f]loods are the most economically devastating and deadly natural hazards” and stresses the importance of comprehensive flood-protection planning, which it describes as “an end-to-end process.”⁴⁴¹ According to USAID, systemic protection should be provided for residents of flood-prone delta river basins (like the Mississippi), and such efforts should “emphasize reducing the vulnerability of the population to flood hazard, and increasing their resiliency to disasters.”⁴⁴²

USAID carries out this policy by planning for and building flood protection throughout the world. It acknowledges that “wetlands . . .

ps_so1_sg2a.html (last visited Sept. 13, 2007).

434. U.S. Agency for Int’l Dev., USAID: Assistance for Iraq – Skill Training, <http://www.usaid.gov/iraq/accomplishments/busskills.html> (last visited Sept. 13, 2007).

435. *Id.*

436. U.S. Agency for Int’l Dev., USAID: Assistance for Iraq – Education, <http://www.usaid.gov/iraq/accomplishments/education.html> (last visited Sept. 13, 2007).

437. *Id.*

438. *See supra* Part I.B.

439. U.S. Agency for Int’l Dev., USAID: Assistance for Iraq – Marshlands, <http://www.usaid.gov/iraq/accomplishments/marsh.html> (last visited Sept. 13, 2007).

440. *Id.*

441. DISASTER REDUCTION GUIDE, *supra* note 337, at 73, 76.

442. *Id.* at 78.

provide important ecological services [including] . . . flood control.”⁴⁴³ The Agency “supports activities that conserve these important habitats and the benefits they provide.”⁴⁴⁴ There are U.S. sponsored wetlands conservation projects in twenty-five countries.⁴⁴⁵ Residents of the Gulf Coast would likely agree with USAID’s observation in the title of a news release about U.S. relief work in Bangladesh: “Wetlands Conservation Pays Off.”⁴⁴⁶

CONCLUSION

It is beyond dispute that what is being done in the Gulf Coast is not enough to restore the lives of the people who live there and to protect them as much as possible from another catastrophe. There are many reasons for the failed recovery effort to date, but high among them is that federal disaster law does not require the federal government to do what is necessary.

Instead, the recovery effort has been a second catastrophe for the stricken region. The insufficient relief cascades slowly through a decentralized, multilayered bureaucracy that itself has become an obstacle to recovery. Relief takes months and perhaps years before it reaches those who need it. There is no effective central recovery plan or authority to coordinate relief efforts. The Stafford Act’s purpose is to limit federal responsibility rather than meet the needs of victims.

A Marshall Plan is needed for the Gulf Coast region. The international Principles provide a suitable framework for such a Plan, as they address the multiple problems faced by communities recovering from disasters. The Principles also allow for a fully integrated, coordinated response that recognizes the interdependency of the problems and solutions. While the Principles’ recognition of victims’ “rights” is not likely to become U.S. law, the underlying humanitarian purpose of the Principles is morally incontestable—the national government’s disaster policy must aim to meet the needs of its citizens. Meeting these needs should be the cornerstone of Gulf Coast recovery policy. Sadly, it is not now.

In the end, there is no substitute for the three most precious resources in humanitarian relief efforts: (1) money to pay for recovery, rebuilding, and relief; (2) manpower on the ground; and (3) a streamlined, efficient administrative process to distribute the money and manpower where they

443. USAID Environment, *supra* note 338.

444. *Id.*

445. *Id.*

446. Press Release, U.S. Agency for Int’l Dev., *Before & After: Wetlands Conservation Pays Off* (Oct. 22, 2007), available at http://www.usaid.gov/stories/bangladesh/ba_bg_wetlands.pdf.

are most needed. All three are lacking in Gulf Coast recovery. It will take more money than presently allotted to rebuild the homes, schools, hospitals, levees, and wetlands that must be restored to preserve the Gulf Coast. It will also take manpower. The United States sent 15,000 troops to South Asia for three months after the tsunami. If those troops were sent to the Gulf, they could clean a lot of neighborhoods, fix a lot of houses, and restore the morale and the lives of hundreds of thousands of people who have seen nothing but desolation for over two years. The sclerotic, convoluted administrative process is part of the disaster and not part of the recovery.

Our national policy is to follow humanitarian disaster recovery principles abroad, but not at home. There is no reason to stop our generosity in other countries or to withhold it from our own citizens in need. We should bring home the international humanitarian principles we practice abroad. When we do, we will bring many of our citizens home too.