

# The Right to Housing Recovery After Natural Disasters

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## INTRODUCTION: A GATHERING STORM

Every year the world witnesses the forces of nature running amok: an earthquake, flood, or hurricane of unusual force devastates a community, capturing the attention of the world. While no one in its path can expect to escape the wrath of such disasters, and wealth is no talisman, disasters especially afflict the poor. About half of those who have been killed by natural disasters from 1994–2003 were inhabitants of low-development countries, with less than 10% coming from high-development countries.<sup>1</sup> Even in developed countries, disasters have a knack of finding the poor and vulnerable.<sup>2</sup>

These victims of natural disasters encounter a host of human rights violations, including “unequal access to assistance; discrimination in aid provision; enforced relocation; sexual and gender-based violence; loss of documentation; recruitment of children into fighting forces; unsafe or involuntary return or resettlement; and issues of property restitution.”<sup>3</sup> Moreover, natural disasters tend to further exacerbate the intractable vulnerability of those who find themselves at the intersection of multiple avenues of historical injustice—women and religion, for example, or minorities and housing.<sup>4</sup> Women, who constitute a high percentage of disaster victims, are disproportionately vulnerable to human rights violations of a gen-

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1. See *IDA at Work: Managing Natural Hazards, Reducing Risks to Development* (World Bank/Int'l Dev. Ass'n, Wash. D.C.), Apr. 2007, at 2, <http://siteresources.worldbank.org/IDA/Resources/IDA-Risk-Management.pdf>.

2. See generally Alan Berube & Bruce Katz, Brookings Inst., *Katrina's Window: Confronting Concentrated Poverty Across America* (Brookings Inst./Metropolitan Pol'y Program, Wash., D.C.), Oct. 2005, [http://www.brookings.edu/metro/pubs/20051012\\_Concentratedpoverty.pdf](http://www.brookings.edu/metro/pubs/20051012_Concentratedpoverty.pdf) (noting Hurricane Katrina's disproportionate effect on the poor).

3. U.N. INTER-AGENCY STANDING COMM., PROTECTING PERSONS AFFECTED BY NATURAL DISASTERS: IASC OPERATIONAL GUIDELINES ON HUMAN RIGHTS AND NATURAL DISASTERS 3 (2006) [hereinafter IASC GUIDELINES].

4. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (examining the intersection of race and sex in violence against women).

eral sort as well as to gender-specific violations.<sup>5</sup> Indigenous peoples, with historically close associations to their homes and lands, often with tenuous tenure rights, face similar layered challenges.<sup>6</sup>

In spite of the prevalence of human rights violations following natural disasters, the conceptual framework to guide responses to such violations is not well-developed, especially when compared to, say, the human rights framework for post-conflict recovery. Given that the scale of devastation from natural disasters is increasing, addressing this omission is especially urgent. The Centre for Research on the Epidemiology of Disasters (“CRED”), for example, which maintains a comprehensive database on disasters,<sup>7</sup> reports that natural disasters affected more than 255 million people annually between 1994 and 2003.<sup>8</sup> While improvements in data collection and reporting techniques over the past thirty years make CRED reluctant to claim that the incidence of disasters has increased,<sup>9</sup> CRED has clearly concluded that the number of people affected has increased<sup>10</sup> and that the economic cost of disasters has risen dramatically—a fourteen-fold cost increase since the 1950s.<sup>11</sup> In its most recent report, CRED found that “[t]here is increasingly conclusive evidence which confirms that global climate change

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5. See Lorena Aguilar, *Climate Change and Disaster Mitigation* (IUCN/World Conservative Union, Gland, Switzerland), (n.d.), at 1, [http://www.genderandenvironment.org/admin/admin\\_biblioteca/documentos/Climate.pdf](http://www.genderandenvironment.org/admin/admin_biblioteca/documentos/Climate.pdf) (last visited Apr. 23, 2009); see also U.N. Hum. Rts. Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 82, U.N. Doc. A/HRC/7/16 (Feb. 13, 2008) (Special Rapporteur’s report noting disproportionate impact of disasters on women and children).

6. See, e.g., Phuket Disaster Seminar: People’s Leadership in Disaster Recovery: Rights, Resilience and Empowerment 3 (n.d.), <http://www.naomiklein.org/files/resources/pdfs/phuket-notes.pdf> (last visited Apr. 23, 2009) (notes taken during the Phuket Disaster Seminar in Phuket, Thailand, Oct. 30–Nov. 3, 2006) (describing efforts of indigenous Moken “sea gypsies” in Ban Tung Wah, Thailand to reclaim rights to traditional village following the Indian Ocean Tsunami).

7. CRED defines a disaster as “a situation or event, which overwhelms local capacity, necessitating a request to national or international level for external assistance; an unforeseen and often sudden event that causes great damage, destruction and human suffering.” P. HOYOIS ET AL., CENTRE FOR RES. ON THE EPIDEMIOLOGY OF DISASTERS, ANNUAL DISASTER STATISTICAL REVIEW: NUMBERS AND TRENDS 2006 15 (2007) [hereinafter CRED 2006]. For a disaster to be entered into its database, CRED requires at least one of the following: ten or more people are reported killed; one hundred or more people are affected; there is a declaration of a state of emergency; or there is a call for international assistance. See D. GUHA-SAPIR ET AL., CENTRE FOR RES. ON THE EPIDEMIOLOGY OF DISASTERS, THIRTY YEARS OF NATURAL DISASTERS 1974–2003: THE NUMBERS 16 (2004) [hereinafter CRED THIRTY YEARS].

8. See CRED THIRTY YEARS, *supra* note 7, at 13.

9. See *id.* at 20.

10. See *id.* at 26.

11. See *id.* at 13. The most recent CRED annual report records that 427 natural disasters in 2006 killed over 23,000 people, affected another 143 million, and caused \$34.5 billion in economic damage. CRED 2006, *supra* note 7, at 13. In a review of U.S. disasters, Mary Comerio noted the stunning increase in the scale of property loss in recent disasters. For example, hurricanes in the U.S. are frequent—about two of every three years—but have only caused property damage exceeding \$1 billion since 1969. See MARY COMERIO, DISASTER HITS HOME: NEW POLICY FOR URBAN HOUSING RECOVERY 12 (1998). In the five year period ending in 1994, five major disasters caused \$75 billion in property damage, half in residential structures, involving 800,000 units. See *id.* at 15 (noting that this is equivalent to the total number of housing units in metropolitan Seattle).

will have an impact on the occurrence and magnitude of extreme events.”<sup>12</sup> According to CRED, the world is facing disasters on an unprecedented scale.<sup>13</sup>

Our understanding is improving regarding the extent to which human action is present in the precipitation or mitigation of natural disasters. To the individual who loses her home, the distinction may be of little immediate interest, but it is a significant factor in evaluating liability and in shaping a theory of natural disasters that, in turn, will influence the development of a human rights framework. From the set of human rights in jeopardy following a natural disaster, this paper concentrates on the right to housing, an established but evolving right under international law. The recovery of housing is essential to a community’s recovery. In addition to the centrality of a home in the lives of families, housing represents 60–70% of the total building stock of a community.<sup>14</sup> Moreover, the longer the displacement, the greater the risk of human rights violations.<sup>15</sup>

Although post-disaster work is not a strictly linear process, it tends to move in overlapping periods: it begins with emergency response; moves to restoration or repair; then to replacement of capital stock; and, finally, to a commemorative, betterment, and development reconstruction period.<sup>16</sup> Individuals experience these stages at different times, depending on post-disaster conditions, as some disaster victims require greater infrastructure development prior to being able to return to their community. This paper explores the period of restoration and replacement, with a specific focus on permanent housing.

Generally, those with access to resources before the disaster continue to have access after it has subsided, and they are usually the ones to build in the best locations following a return to the community area.<sup>17</sup> By contrast, the poor face significant challenges to recovery after natural disasters, challenges that are often exacerbated by existing vulnerabilities to human rights violations and economic exploitation. For example, a study of the Indonesian province of Aceh undertaken two years after the Indian Ocean Tsunami found that the poorest and most marginalized groups – squatters, women-

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12. CRED 2006, *supra* note 7, at 14.

13. See CRED THIRTY YEARS, *supra* note 7, at 13.

14. See COMERIO, *supra* note 11, at 39.

15. See IASC GUIDELINES, *supra* note 3, at 8.

16. See Robert B. Olshansky, How do Communities Recover from Disaster? A Review of Current Knowledge and an Agenda for Future Research 2 (presented at 46th Annual Conf. of the Ass’n of Collegiate Schools of Planning, Oct. 27, 2005), available at <http://kernn.org/pdf/ACSP%20Disaster%20Recovery%20Oct05%20Olshansky.pdf> (last visited Apr. 23, 2009). The disaster response community sees housing as a continuous flow of settlement, shelter, and housing. See U.N. Off. for Coordination of Humanitarian Aff. [OCHA], *Exploring Key Changes and Developments in Post-Disaster Settlement, Shelter and Housing, 1982–2006*, at 2, U.N. Doc. OCHA/ESB/2006/6 (Mar. 13, 2006), available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1004550> (scoping study to inform the revision of Shelter After Disaster: Guidelines for Assistance) [hereinafter OCHA, *Scoping Study*].

17. See Olshansky, *supra* note 16, at 1.

headed households, and orphans – were still facing a crisis.<sup>18</sup> The report specifically cited land-rights as a serious concern still in need of resolving.<sup>19</sup> Difficulty accessing government disaster grants by the poor, denial of government-administered loans, and redlining by insurers are likely to contribute to an alteration of New Orleans's racial make-up following Hurricane Katrina.<sup>20</sup>

Leaders in the non-governmental organization (“NGO”) community have noted the need to strengthen the attention to human rights in post-disaster reconstruction.<sup>21</sup> While one would hope that a human rights framework guides international aid organizations, these organizations are not, in fact, directly subject to the international human rights treaties. Indeed, there has actually been growing concern within the NGO community regarding international aid organizations and their unintentional complicity in human rights violations following natural disasters.<sup>22</sup> It has been charged, for example, that people with fewer resources receive less attention from aid organizations, and receive aid later than people who have more resources.<sup>23</sup> A fact-finding mission to Tamil Nadu, India, and Sri Lanka following the Indian Ocean Tsunami found that rehabilitation efforts were based on convenience and agency competency, rather than what was actually needed by the victims.<sup>24</sup> In the last few years, however, key initiatives have emerged to imbue the disaster response community with a rights-based ethos.

One of these initiatives is the United Nations Inter-Agency Standing Committee's Operational Guidelines on Human Rights and Natural Disasters (“IASC Guidelines”).<sup>25</sup> Operating within a human rights perspective, the Guidelines take a comprehensive view of the needs of people affected by natural disasters, and emphasize that people who become displaced still

18. See Oxfam Int'l, *The Tsunami Two Years On: Land Rights in Aceh*, OXFAM BRIEFING NOTE (Oxfam Int'l Secretariat, Oxford, U.K.), Nov. 30, 2006, at 7–8, [http://www.oxfam.org.uk/resources/policy/conflict\\_disasters/downloads/bn\\_tsunami\\_twoyears.pdf](http://www.oxfam.org.uk/resources/policy/conflict_disasters/downloads/bn_tsunami_twoyears.pdf).

19. See *id.* at 2.

20. See Robert D. Bullard, *Katrina and the Second Disaster: A Twenty-Point Plan to Destroy Black New Orleans*, <http://www.ejrc.cau.edu/Bullard20PointPlan.html> (last visited Apr. 23, 2009). For the first time in approximately two decades, the majority of New Orleans's City Council is white. See Adam Nossiter, *Whites Take a Majority on New Orleans's Council*, N.Y. TIMES, Nov. 20, 2007, at A14.

21. See Scott Leckie, *The Great Land Theft*, <http://www.cohre.org/store/attachments/TheGreatLandTheft-Article.pdf> (last visited Apr. 24, 2009).

22. See, e.g., Terje Skavdal, Regional Disaster Response Adviser, OCHA, Address at the Dec. 2–4, 2003 International Conference on Total Disaster Risk Management: NGO Networking and Cooperation Towards Total Disaster Risk Management in Asia 191–92 (n.d.), [http://www.adrc.or.jp/publications/TDRM2003Dec/45\\_MR.%20TERJE%20SKAVDAL.pdf](http://www.adrc.or.jp/publications/TDRM2003Dec/45_MR.%20TERJE%20SKAVDAL.pdf) (last visited Apr. 24, 2009) (citing the need for NGO cooperation and accountability).

23. See Olshansky, *supra* note 16, at 14.

24. See *Post-Tsunami Relief and Rehabilitation: A Violation of Human Rights*, NEW DELHI MISSION REP. (Habitat Int'l Coalition, Santiago, Chile), 2005, <http://www.hic-net.org/documents.asp?PID=277>.

25. See IASC GUIDELINES, *supra* note 3.

maintain their rights.<sup>26</sup> The rights the Guidelines address range from the protection of the life and security of the person to housing, religion, and electoral rights. Another key initiative specific to housing rights is the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons,<sup>27</sup> commonly known as the Pinheiro Principles. Endorsed by the Sub-Commission on the Promotion and Protection of Human Rights in 2005, the Pinheiro Principles introduced a new framework of restitution not present in the IASC Guidelines.<sup>28</sup>

Considering housing recovery from a rights perspective

describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance where needed.<sup>29</sup>

Just as health has been described as a matter of rights, rather than as a hand-out, and the people who receive health services recognized not as "objects of charity or targets of social engineering" but as "agents who have a role to play in the definition of programs, policies and decisions that directly bear on their own well-being,"<sup>30</sup> the same can be said for housing restoration. Considering housing recovery from a rights perspective shifts the moral framework for action from charity to justice: "what was once understood as 'charity' becomes 'justice' from the corresponding duty-holder."<sup>31</sup>

Why tamper with a system that brings forth such an outpouring of goodwill and compassion; that unites men and women in a common understanding of the human condition? Why risk undermining that caring with the rhetoric of rights? The answer lies in the escalating need, in the growing scale of disasters, in the limited effectiveness of the current approach to restore housing for the most vulnerable. It also lies in the belief that charity and justice are not mutually exclusive, dichotomous concepts, but pow-

26. See *id.* at 5.

27. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n Hum. Rts., Sub-Comm'n on Promotion & Prot. of Hum. Rts., *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) [hereinafter *Pinheiro Principles*].

28. See CENTRE HOUSING RTS. & EVICTIONS [COHRE], THE PINHEIRO PRINCIPLES: UNITED NATIONS PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS 4 (2005), available at <http://www.cohre.org/store/attachments/Pinheiro%20Principles.pdf>.

29. The Secretary-General, *Report of the Secretary-General on the Work of the Organization—1998*, delivered to the General Assembly, ¶ 174, U.N. Doc. A/53/1 (Aug. 27, 1998), available at <http://www.un.org/Docs/SG/Report98/ch5.htm>.

30. Alicia E. Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda*, 27 HUM. RTS. Q. 1200, 1236 (2005).

31. See Emilie Filmer-Wilson, *The Human Rights-Based Approach to Development: The Right to Water*, 23 NETH. Q. HUM. RTS. 213, 213 (2005).

erful and complementary human motivations. Charity is needed even as justice is sought.

## I. THE RIGHT TO HOUSING

A right to housing does not spring whole from a disaster; it is grounded in the well-established right to housing under international law. While the right to housing is among the most recognized of the economic, social, and cultural rights (hereinafter referred to as “economic rights”),<sup>32</sup> this is decidedly not the same as saying that the right to housing has been realized. For the first time in history, half of the world’s population lives in cities, and the number is growing.<sup>33</sup> One billion of these people, however, live in slums.<sup>34</sup> Across the globe, 100 million people are homeless and 1.6 billion subsist in shelter below the minimum standard sought by the United Nations.<sup>35</sup>

### A. *International Covenant on Economic, Social, and Cultural Rights*

The fulcrum for the right to housing under international law is the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>36</sup> Article 11 of the ICESCR asserts “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”<sup>37</sup> In obliging States Parties to “take appropriate steps to ensure the realization of this right,”<sup>38</sup> Article 11 reinforces the ICESCR’s core Article 2(1) algorithm for implementation of all economic rights, which calls on States Parties to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full

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32. For a history of the challenges economic rights have had to overcome, see PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (2d ed. 2003); David Beetham, *What Future for Economic and Social Rights*, in *POLITICS AND HUMAN RIGHTS* 41 (David Beetham ed., 1995); Yamin, *supra* note 30, at 1219; Michael J. Dennis & David P. Steward, *Justiciability of Economic, Social, and Cultural Rights*, 98 AM. J. INT’L L. 462, 465 (2004); Wouter Vandenhoe, *Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights*, 21 NETH. Q. HUM. RTS. 423 (2003).

33. See UN-HABITAT, *STATE OF THE WORLD’S CITIES 2006–2007*, at 1, U.N. Doc. SOWC/06/07/B/Urb1 (2006), [http://www.unhabitat.org/documents/media\\_centre/sowcr2006/SOWCR%201.pdf](http://www.unhabitat.org/documents/media_centre/sowcr2006/SOWCR%201.pdf).

34. See *id.*

35. See Press Briefing by Special Rapporteur on Right to Adequate Housing (May 11, 2005), <http://www.un.org/News/briefings/docs/2005/kotharibrf050511.doc.htm>.

36. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

37. *Id.* art. 11.

38. *Id.*

realization of the rights recognized in the present Covenant by all appropriate means . . . .”<sup>39</sup>

In 1985, the United Nations Economic and Social Council established the Committee on Economic, Social and Cultural Rights (“CESCR”) to help it fulfill its responsibilities under the Covenant. That Committee has released a series of General Comments over time interpreting and expanding upon provisions of the Covenant.<sup>40</sup> Housing was the first substantive right to which the CESCR devoted a General Comment. In General Comment 4: The right to adequate housing,<sup>41</sup> CESCR reads into the sparse language of the Covenant’s Article 11 specific aspects of the right, including: legal security of tenure, availability of essential services, affordability, habitability, accessibility, a location with access to employment, health care, schools, and similar services, and cultural adequacy.<sup>42</sup> Helpfully, the CESCR cites “victims of natural disasters” and “people living in disaster-prone areas” as among those disadvantaged groups that should be ensured “some degree of priority consideration in the housing sphere.”<sup>43</sup> General Comment 4’s expansive right reflects the CESCR’s rejection of housing as merely a shelter commodity and originates from its alternative rights-based conception of a right “to live somewhere in security, peace and dignity.”<sup>44</sup>

General Comment No. 7: The right to adequate housing,<sup>45</sup> which pertains to forced evictions, is also worth mentioning. Here, the CESCR prescribes procedural protection to which any forced eviction should be subject, which includes genuine consultation with those affected, notice, information, legal remedies, and legal aid.<sup>46</sup> The State Party is responsible for taking “all appropriate measures, to the maximum of its available resources,” to ensure alternative housing or resettlement is available.<sup>47</sup> While natural disasters do not immediately conjure up images of state or third-party induced evictions, the notion of constructive forced eviction does have

39. *Id.* art. 2(1).

40. A related right of relevance to recovery of housing following a disaster is the freedom to choose a residence, protected in Article 12 of the International Covenant on Civil and Political Rights. See International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The Human Rights Committee has read this to include protection against all forms of forced internal displacement. See U.N. Hum. Rts. Comm., *General Comment 27: Article 12 (Freedom of Movement)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

41. See U.N. Comm. on Econ., Soc. & Cultural Rts., *General Comment 4: The right to adequate housing*, ¶ 8, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter *General Comment 4*].

42. General Comment 4 requires that “[t]he way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.” *Id.* ¶ 8(g).

43. *Id.* ¶ 8(e).

44. *Id.* ¶ 7.

45. See U.N. Comm. on Econ., Soc. & Cultural Rts., *General Comment 7: The Right to Adequate Housing (art. 11.1 of the Covenant): Forced Evictions*, U.N. Doc. E/C.12/1997/4 (May 20, 1997).

46. See *id.* ¶ 15.

47. See *id.* ¶ 16.

application where government action prevents individuals or groups from reclaiming their homes.<sup>48</sup>

International human rights law acknowledges that circumstances may militate against allowing those displaced to return to their homes. The IASC Guidelines, for example, provide for the protection of persons affected by natural disasters from the dangers of potential secondary hazards and other disaster risks.<sup>49</sup> However, a field manual intended to aid in the implementation of the IASC Guidelines clarifies that return should only be prohibited if homes are in areas where there are “real dangers;” that such restrictions should only last as long as the dangers exist; and should only be implemented if less intrusive measures are not available.<sup>50</sup> Prohibition must be necessary only “in the individual case” for “safety, health, disaster prevention, or the implementation of reconstruction and development schemes,” and return should be facilitated as soon as possible.<sup>51</sup> Procedures are set forth in the IASC Guidelines to govern any necessary evictions.<sup>52</sup>

### B. *Other International Conventions and Declarations*

While the ICESCR is international law’s core statement on the right to housing, it is not the sole pronouncement. As early as 1951, the International Convention Relating to the Status of Refugees accorded lawful refugees treatment “as favorable as possible” in regards to housing.<sup>53</sup> In doing so, this document integrated various civil and political rights of refugees with housing and other economic rights. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), predating the ICESCR by a year, identifies the right to housing as one of the rights to be enjoyed without discrimination.<sup>54</sup> These latter treaties are of particular importance in enforcing the right to housing against States that have not ratified the ICESCR but have ratified these other important conventions. For example, when assessing recovery from domestic natural disasters, such as Hurricane Katrina, the United States’

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48. See COHRE, *The Right to Return, Resettlement and Restitution after the Tsunami Disaster: Applicable International Legal Standards*, Feb. 2005, <http://www.cohre.org/store/attachments/COHRE%20Tsunami%20Right%20to%20Return.doc>.

49. See IASC GUIDELINES, *supra* note 3, at A.2.1.

50. See HUMAN RIGHTS AND NATURAL DISASTERS: OPERATIONAL GUIDELINES AND FIELD MANUAL ON HUMAN RIGHTS PROTECTION IN SITUATIONS OF NATURAL DISASTER 22 (2008) (Brookings-Bern Project on Internal Displacement ed., Pilot Version).

51. See IASC GUIDELINES, *supra* note 3, at A.2.1.

52. See *id.* at C.2.10, C.2.11.

53. See Convention Relating to the Status of Refugees, art. 21, *adopted* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

54. See International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(iii), *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).



ratification of ICERD provides a human rights regime that can be applied.<sup>55</sup>

Treaties that focus on specific populations have also emphasized a right to housing. The International Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), in a provision concerned with women in rural areas, identifies housing as being among the adequate living conditions that are to be ensured.<sup>56</sup> The International Convention on the Rights of the Child (“CRC”) also recognizes the right “to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development,”<sup>57</sup> and obliges States Parties to provide material assistance when needed with regard to nutrition, clothing and housing.<sup>58</sup> Finally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides migrant workers with equality of treatment to that of nationals in relation to access to housing.<sup>59</sup>

A full appreciation of the reach of the right to housing continues to unfold in international law. While its importance to the individual and the family has long been clear, a further collective dimension is now revealing itself.<sup>60</sup> For example, the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, acknowledges the right of indigenous people to improve their housing and to determine housing priorities and strategies.<sup>61</sup> This acknowledgment of a collective right to housing stems from a larger recognition that natural disasters often implicate the rights of communities, not just of individuals and families.

Overall, these binding treaties have drawn inspiration from a body of international declarations that lifts up housing as an essential right.<sup>62</sup> In 1948, the Universal Declaration of Human Rights laid the foundation for the institutionalization of the right to housing by enumerating housing

55. The United States has not ratified the ICESCR, nor does the U.S. Constitution explicitly grant a right to housing. The U.S. Supreme Court has not found an implicit right to housing in the U.S. Constitution. See Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35, 37 (2007).

56. See International Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

57. See International Convention on the Rights of the Child, art. 27(1), *adopted* Nov. 20, 1977 U.N.T.S. 3 (entered into force Sept. 2, 1990).

58. See *id.* art. 27(3).

59. See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43(1)(d), *adopted* Dec. 18, 1990 U.N. Doc. A/45/49 (entered into force July 1, 2003).

60. See UN-HABITAT & Off. High Comm’r Hum. Rts., *Indigenous Peoples’ Right to Adequate Housing*, U.N. Doc. HS/734/05E (2005), available at <http://www.ohchr.org/Documents/Publications/IndigenousPeoplesHousing.pdf>.

61. See Declaration on the Rights of Indigenous Peoples, arts. 21, 23, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

62. See Declaration on Social Progress and Development, art. 10(f), G.A. Res. 2542 (XXIV), U.N. Doc. A/7630 (Dec. 11, 1969); Declaration on the Right to Development, art. 8(1), G.A. Res. 41/128, U.N. Doc. A/41/53 (Dec. 4, 1986).

among the elements of the right to an adequate standard of living.<sup>63</sup> The International Labour Organization (“ILO”) laid the cornerstone for this foundation even earlier when it declared in 1944 the provision of adequate housing among its aims.<sup>64</sup> The ILO has continued to advance this goal in later conventions and recommendations.<sup>65</sup>

### C. Regional Systems

The right to housing is also firmly established in each of the three regional human rights systems. The Inter-American System initially wed the right to housing to the right to health in the 1948 American Declaration of the Rights and Duties of Man, stating: “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”<sup>66</sup> The Organization’s Charter, as amended, substantially strengthened this marriage of rights by obliging member-states to devote “their utmost efforts” to accomplishing certain basic goals, including “[a]dequate housing for all sectors of the population.”<sup>67</sup> The Council of Europe also embraces housing rights, most clearly in the European Social Charter, which obliges Parties to ensure the “effective exercise of the right to housing” and to take measures designed to (1) promote access to housing of an adequate standard; (2) prevent and reduce homelessness with a view to its gradual elimination; and (3) make the price of housing accessible to those without adequate resources.<sup>68</sup>

Finally, while the African Charter on Human and Peoples’ Rights does not explicitly include housing as a right,<sup>69</sup> the African Commission has read a right to shelter or housing into the Charter.<sup>70</sup> The right to housing was established through a combined reading of Article 14, the right to property, Article 16, the right to the best attainable state of physical and mental

63. See Universal Declaration of Human Rights, art. 25(1), *adopted* Dec. 10 1948, U.N. Doc. A/ 811.

64. See Int’l Labour Org. [ILO], *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, *adopted* May 10, 1944.

65. See, e.g., ILO, *Recommendation No. 115 Concerning Workers’ Housing*, *adopted* June 7, 1961 (promoting construction of housing); ILO, *Convention No. 117 Concerning Basic Aims and Standards of Social Policy*, art. 5(2), *adopted* June 22, 1962, (entered into force Apr. 23, 1964) (taking account of housing in ascertaining minimum standards of living).

66. American Declaration of the Rights and Duties of Man, art. XI, O.A.S. Res. XXX, *adopted* by Ninth Int’l Conf. of Am. States (1948), *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, at 17, OEA/Ser L V/II.82 Doc. 6 Rev. 1 (1992).

67. Charter of the Organization of American States, art. 34(k), *adopted* Apr. 30, 1948, 119 UNTS 48 (entered into force Dec. 13, 1951).

68. See European Social Charter, art. 31, *adopted* May 3, 1996, ETS No. 163 (entered into force July 1, 1999) (European Council); see also Padraic Kenna, *Housing Rights—The New Benchmarks for Housing Policy in Europe?*, 37 URB. LAW 87 (2005).

69. See African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, 21 ILM 58 (1982) (entered into force Oct. 21, 1986); but see *id.* art. 14 (guaranteeing the right to property).

70. See The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, Afr. Comm’n Hum. & Peoples’ Rts, Comm. No. 155/96, ¶ 60 (2002).

health, and Article 18(1), the protection of the family.<sup>71</sup> By the time of the drafting of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the focus on housing was such that the right to adequate housing was explicitly included in the Protocol. With an eye on women's land rights and access to housing, Article 16 and Article 19 were designed to address the intersection of these two historical vulnerabilities.<sup>72</sup>

#### D. *Developing Norms*

While each of the international conventions and declarations cited recognize housing as a right, in none of these instruments is housing the dominant consideration. Housing first began to achieve a larger degree of awareness in international law with the United Nations Conference on Human Settlements, known as Habitat, in Vancouver in 1976. Habitat, later to be known as Habitat I, produced the Vancouver Declaration on Human Settlements, which asserted the primacy of settlements in determining quality of life.<sup>73</sup> It placed "[t]he highest priority" on "the rehabilitation of expelled and homeless people who have been displaced by natural or man-made catastrophes."<sup>74</sup> Habitat I led to the creation in 1978 of the Commission on Human Settlements ("Commission") and its secretariat, the United Nations Centre for Human Settlements ("Centre").<sup>75</sup>

At a second conference, Habitat II, held in Istanbul in 1996, 171 governments voted to adopt the Istanbul Declaration on Human Settlements<sup>76</sup> and the Habitat Agenda,<sup>77</sup> which called for renewed efforts to provide adequate shelter for all. In 2002, the United Nations effectively consolidated the Commission and Centre into the United Nations Human Settlements Programme, UN-HABITAT, which today serves as the focal point for the U.N.'s human settlement activities and strategies.<sup>78</sup>

In 2000, this elevated awareness of the right to housing gained further momentum with the appointment of a special rapporteur on adequate housing.<sup>79</sup> In his first report, issued in 2001, the Special Rapporteur broadly interpreted the right to adequate housing as a component of the right to an adequate standard of living; set out its legal status; and identified priorities

71. *See id.*

72. *See* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 11, 2003, CAB/LEG/66.6 (entered into force Nov. 25, 2005).

73. *See* U.N. Conference on Human Settlements, *Vancouver Declaration on Human Settlements*, Preamble, U.N. Doc. A/Conf.70/15 (1976).

74. *Id.* § II(15).

75. G.A. Res. 32/162, U.N. Doc. A/RES/32/162 (Dec. 19, 1977).

76. *See* U.N. Conference on Human Settlements, *Istanbul Declaration on Human Settlements*, U.N. Doc. A/Conf.165/14 (1996).

77. *See* U.N. Conference on Human Settlements, *Habitat Agenda*, U.N. Doc. A/Conf.165/14 (1996).

78. G.A. Res. 56/206, U.N. Doc. A/56/206 (Feb. 26, 2002); *see* U.N. Habitat: For a Better Urban Future, Our Mission, <http://www.unhabitat.org/categories.asp?catid=10> (last visited May 10, 2009).

79. *See* U.N. Comm'n on Hum. Rts. Res. 2000/9, U.N. Doc. E/CN.4/RES/2000/9 (Apr. 17, 2000).

to advance it.<sup>80</sup> Over time, the Special Rapporteur has raised additional concerns, with the most recent report identifying housing in the aftermath of natural disasters as an area in need of continued focus.<sup>81</sup>

Perhaps the most ambitious attempt to improve humanitarian professionals' accountability to those affected by disasters (including calamity and conflict) has been The Sphere Project, an initiative established in 1997. The Sphere Project, which involves over 4,000 people from 400 organizations in 80 countries, was galvanized by the widespread perception of a failed international response to the Rwanda genocide.<sup>82</sup> Its Humanitarian Charter and Minimum Standards in Disaster Response<sup>83</sup> combine a human rights framework with standards set by a consensus of key participants in the field.<sup>84</sup> The standards covering shelter and settlement, however, have been singled out as being the least developed of the standards promulgated by Sphere, due to the lack of established, sophisticated policies on which to base a consensus.<sup>85</sup> Moreover, the Special Rapporteur on adequate housing has found these standards to lack a strong human rights perspective.<sup>86</sup>

The Special Rapporteur was supportive, however, of the IASC Guidelines,<sup>87</sup> which were crafted to provide guidance to the humanitarian community—intergovernmental and non-governmental actors—responding to natural disasters.<sup>88</sup> The IASC Guidelines' criteria for adequacy of housing—accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education<sup>89</sup>—mirror the criteria in CESCRC General Comment 4.<sup>90</sup> They emphasize the speedy transition from shelter to permanent housing, and they encourage consultation and participation with affected groups and persons to ensure sustainable long-term planning.<sup>91</sup>

As mentioned above, somewhat contemporaneous with the drafting of the IASC Guidelines was the development of the Pinheiro Principles.<sup>92</sup>

80. See U.N. Comm'n on Hum. Rts., *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, U.N. Doc. E/CN.4/2001/51 (Jan. 25, 2001).

81. See U.N. Hum. Rts. Council, *supra* note 5, ¶¶ 81–84.

82. See Sphere Project, *The Sphere Project*, <http://www.sphereproject.org> (last visited Jan. 19, 2009).

83. See SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (2004), available at <http://www.sphereproject.org/content/view/27/84/lang,english/>.

84. See MARCI VAN DYKE & RONALD WALDMAN, CENTER FOR GLOBAL HEALTH & ECON. DEV., *THE SPHERE PROJECT EVALUATION REPORT 8* (2004), available at [http://www.sphereproject.org/about/ext\\_eval/sphere\\_eval\\_fin.pdf](http://www.sphereproject.org/about/ext_eval/sphere_eval_fin.pdf).

85. See OCHA *Scoping Study*, *supra* note 16, at 24.

86. See U.N. Hum. Rts. Council, *supra* note 5, ¶ 84 (encouraging the use of the IASC GUIDELINES “by all actors who currently rely exclusively on the Sphere guidelines which the Special Rapporteur finds lacking in a strong human rights, including women’s rights, perspective”).

87. See *id.*

88. See *id.*

89. See IASC GUIDELINES, *supra* note 3, § C.3.2.

90. See *General Comment 4*, *supra* note 41.

91. See IASC GUIDELINES, *supra* note 3, §§ C.3.1, C.3.3.

92. See *Pinheiro Principles*, *supra* note 27.

Named after the Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons who drafted them, Paulo Sergio Pinheiro, the Pinheiro Principles were endorsed in 2005 by the Sub-Commission on the Promotion and Protection of Human Rights. These principles spotlight the centrality of the right to restitution of housing for displaced persons and are grounded in the principle of restorative justice and restitution as a legal remedy.<sup>93</sup>

While the right to housing is well recognized in international law, hundreds of millions of the world's poor have yet to experience its promise. As with many economic rights, "the full realization" of this right is daunting. Natural disasters present a need for housing recovery beyond that of a single individual, but not typically at the full scale of a nation's general housing shortfall. Disasters can serve, then, as a bellwether of a state's commitment to the housing right. If a State fails to respond to the targeted housing needs of the discrete population displaced by a disaster, coupling its resources with the funding from outside sources typically forthcoming after such events, it is probably unlikely to garner the political will to progressively achieve the housing rights of its general population.

## II. THE DISASTER EXPERIENCE

Advancing the right to housing in normal contexts has never been easy; protecting that right in the face of massive displacement and the pressing need for urgent response following a natural disaster has its own set of further challenges. Yet, natural disasters also attract human and financial resources—and the *tabula rasa* left by the disaster arouses an inclination to rebuild better than existed before. To the individual who has lost her home, however, the prevailing emergency mindset and focused attention on new potential can have a "help strikes again" feel, as human rights are often ignored in the rush to rebuild. The rights of the individual are often dwarfed by the scale of the event and of the community-building machine. This is due in part to the way the world has tended to look at disasters and comprehend vulnerability to disaster.

### A. *Theories of Disaster*

Favored explanations of human vulnerability to natural disasters largely shape arguments for protecting the right to housing under international law in the wake of disasters: the degree to which human intervention is seen as a causative factor, the predictability of disasters, and the vulnerability of populations living in disaster-prone locations all affect the legal approach to

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93. See U.N. FOOD & AGRIC. AGENCY ET AL., HANDBOOK ON HOUS. & PROP. RESTITUTION FOR REFUGEES & DISPLACED PERSONS: IMPLEMENTING THE 'PINHEIRO PRINCIPLES' 10 (2007), available at <ftp://ftp.fao.org/docrep/fao/010/a1131e/a1131e01.pdf> (last visited May 10, 2009) [hereinafter IMPLEMENTING PINHEIRO].

recovery.<sup>94</sup> In contrast, the dominant historical perspective was to depict these disasters as “acts of God” or force majeure,<sup>95</sup> beyond the ken or control of humankind.<sup>96</sup> While the theory of force majeure is surprisingly resilient today, the understanding of the humanitarian and scientific communities regarding the nature of disasters has changed substantially over time.<sup>97</sup> With the acknowledgement that most natural disasters are not unusual to their locations<sup>98</sup> and are therefore not so unexpected,<sup>99</sup> especially given the development of better science, disaster theory has advanced accordingly over the past twenty-five years. This notion that disasters might be ordinary features of affected communities, however, raises questions in regards to mitigation and vulnerability.

While the classic approach to vulnerability perceived populations in disaster-prone areas as at the mercy of nature and dependent on the West for assistance,<sup>100</sup> more recent examinations of land management, access to urban water systems, and community involvement in disaster management, however, have challenged this thinking, revealing political orientations as the driving forces behind narratives formerly accepted as objective scientific discourse.<sup>101</sup> Amartya Sen’s seminal analysis of the vulnerability of a population to famine, for example, revealed the importance of access to economic, political, and social power in mitigating vulnerability. Sen’s analysis has application to the question of vulnerability to natural disasters, as well.<sup>102</sup>

94. See generally NATURAL DISASTERS AND DEVELOPMENT IN A GLOBALIZING WORLD (Mark Pelling ed., 2003) [hereinafter NATURAL DISASTERS].

95. A force majeure can include such non-weather events as governmental action necessitated by war. See James E. Mercante, *Hurricanes and Act of God: When the Best Defense is a Good Offense*, 18 U.S.F. MAR. L.J. 1, 4 n.7 (2005–2006).

96. See Jacqueline Homan, *The Social Construction of Natural Disaster: Egypt and the UK*, in NATURAL DISASTERS, *supra* note 94, at 141–42 (arguing that greater appreciation of cultural differences in metaphysical explanations of natural disasters could improve mitigation efforts).

97. A number of religious leaders interpreted Hurricane Katrina as God’s retribution on a sinful city. See, e.g., Tom Zeller, Jr., *To Some, Katrina Was Mission Accomplished*, N.Y. TIMES, Sept. 12, 2005, available at <http://www.nytimes.com> (search “Zeller Katrina,” then follow “To Some, Katrina Was Mission Accomplished” hyperlink) (last visited Mar. 24, 2009).

98. See generally Maureen Fordham, *Gender, Disaster and Development: The Necessity for Integration*, in NATURAL DISASTERS, *supra* note 94, at 57–63 (tracing the development of a vulnerability approach to disaster theory).

99. See Joel Eagle, *Divine Intervention: Re-Examining the “Act of God” Defense in a Post-Katrina World*, 82 CHI.-KENT L. REV. 459, 476–77 (2007); see also Casey P. Kaplan, *The Act of God Defense: Why Hurricane Katrina & Noah’s Flood Don’t Qualify*, 26 REV. LITIG. 155 (2007) (considering act of God defense under U.S. federal environmental statutes).

100. See Mark Pelling, *Paradigms of Risk*, in NATURAL DISASTERS, *supra* note 94, at 11 (“This dominant perspective paints the inhabitants of such regions as being incapable of removing themselves from danger and privileges Western expertise as the magic that can provide security in a place of misery.”).

101. See generally *id.* at 9–11; see also Homan, *supra* note 96, at 142 (noting natural hazard losses from the mistrust and structural weakness that result from withholding expertise-driven knowledge).

102. See NATURAL DISASTERS, *supra* note 94, at 9; see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 170–75 (1999) (noting that famines are easy to prevent and their causation depends on the alienation of the rulers from those ruled); Annelies Heijmans, *Vulnerability: A Matter of Perception* 2 (Benfield

Additionally, examinations of the human and physical aspects of globalization are also affecting natural disaster theory. Globalization, in its exacerbation of environmental degradation and access to the world market,<sup>103</sup> is now seen as a factor in creating vulnerabilities.<sup>104</sup> Global causal factors of both vulnerability and disaster occurrence in turn raise questions about global risk allocation and global responsibility.<sup>105</sup> The majority of climate change losses, for example, will occur in developing countries but are ostensibly caused by greenhouse gas emissions in developed countries.<sup>106</sup>

These developments in disaster theory have led to a reassessment of the capacity of affected populations and to calls for greater community participation in disaster mitigation and recovery.<sup>107</sup> Community planners have long recognized that active citizen participation is integral to successful resettlement.<sup>108</sup> The participation of those affected in decision-making has become synonymous with a rights-based approach and is in fact required under both the Pinheiro Principles<sup>109</sup> and the IASC Guidelines.<sup>110</sup> Community participation, however, is a concept that means different things to different people.<sup>111</sup> Community may refer to a neighborhood, a group of men or women, or local NGOs.<sup>112</sup> Participation may mean consultation, self-help construction, or communal meetings.<sup>113</sup> Shifting to a truly com-

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Greig Hazard Research Ctr., Working Paper No. 4, Nov. 2001), available at <http://www.abuhrc.org/rp/publications/Pages/wpdsm.aspx> (follow "Read more" hyperlink under Working Paper 4) (last visited Mar. 24, 2009) (distinguishing nature, cost, and societal structure as causes of disasters).

103. See NATURAL DISASTERS, *supra* note 94, at 7.

104. See *id.* at 6.

105. See James K. Boyce, *Let Them Eat Risk? Wealth, Rights, and Disaster Vulnerability* (Pol. Econ. Res. Inst., Working Paper Series No. 4, 2000), available at [http://www.peri.umass.edu/fileadmin/pdf/working\\_papers/working\\_papers\\_1-50/WP4.pdf](http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_1-50/WP4.pdf) (last visited Mar. 24, 2009) (contrasting a wealth-based approach with a rights-based approach); see also Ian Christophos, *Actors in Risk*, in NATURAL DISASTERS, *supra* note 94, at 95 (assessing the shifting roles of the State, NGOs, and the private sector in disaster preparedness and response); see generally Julian E. Salt, *The Insurance Industry: Can it Cope with Catastrophe?*, in NATURAL DISASTERS, *supra* note 94, at 124–38 (describing the reinsurance industry and international efforts to understand and mitigate climate change impact).

106. See Salt, *supra* note 105, at 137.

107. See, e.g., Katrina Allen, *Vulnerability Reduction and the Community-Based Approach: A Philippines Study*, in NATURAL DISASTERS, *supra* note 94, at 170; see also Homan, *supra* note 96, at 142 (arguing that increased attention to cultural perceptions of nature and to the development of a more symbiotic relationship between people and the hazards with which they live could lessen vulnerability).

108. See, e.g., Olshansky, *supra* note 16, at 4–5; cf. CARLOS MARTÍN BERISTAIN ET AL., HUMANITARIAN AID WORK: A CRITICAL APPROACH 31 (U. Penn. 1999); but see Peter Uvin, *On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise*, 17 FLETCHER J. DEV. STUD. 1, 4 (2002) (suggesting that the application of this principle to development discourse is a self-serving or disingenuous strategy).

109. See Pinheiro Principles, *supra* note 27, § 14.

110. See IASC GUIDELINES, *supra* note 3, § C.3.3.

111. See Colin H. Davidson et al., *Truths and Myths About Community Participation in Post-Disaster Housing Projects*, 31 HABITAT INT'L, 2006, at 100, 101–02.

112. See *id.* at 102.

113. See *id.*

munity-oriented participation model has proven to be a difficult transformation.<sup>114</sup>

### B. *Evaluating the Recovery*

There is no universal indicator for the fulfillment of the human right to housing. In the broad panoply of goals in the Millennium Declaration, the one housing-related target is “by 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers,” with the corresponding indicator being the “proportion of households with access to secure tenure.”<sup>115</sup> An expert group organized under the auspices of UN-HABITAT and the Office of the High Commissioner for Human Rights has proposed a set of housing rights indicators that include such factors as: sufficient living area; percentage living in permanent structures in compliance with building codes and bye-laws; proportion of households with access to potable water; homeless persons per 100,000 population, over a five-year period; and a number of other items.<sup>116</sup> While housing indicators such as these—proposed for the assessment of general advances in housing rights—can shape our thinking, they are too generalized to apply directly in the context of disaster recovery, largely because they were not designed for that purpose. Unfortunately, the post-disaster housing response sector remains in its infancy, lacking globally endorsed policies and globally agreed-upon definitions.<sup>117</sup> It has yet to produce its own indicators.

The IASC Guidelines and the Pinheiro Principles both identify important measures intended to lead to the recovery of housing and to protect rights while housing is being restored. A human rights approach to housing recovery must be concerned, however, with both the outcomes and the process.<sup>118</sup> It is one thing for rights to be protected in the process of responding to a disaster, but that does not guarantee that individuals, families, and peoples will actually have homes at the end of that process. A thorough assessment of the protection of the right to housing following a disaster would consider both the extent of the disaster and the ongoing status of implementation or enforcement—the number of displaced persons

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114. Note the observation that there has been “an over-romanticism of beneficiary participation, with little understanding of how to achieve it” in OCHA, *Scoping Study*, *supra* note 16, at 19. See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., *Human Rights and Extreme Poverty*, ¶ 55, U.N. Doc. E/CN.4/2006/43/Add.1 (March 27, 2006) (*prepared by Arjun Sengupta*) (citing complaints received during mission to U.S. that state and municipal committees established to recommend reconstruction of New Orleans were not representative).

115. See The Millennium Project, Goals, Targets and Indicators, <http://www.unmillenniumproject.org/goals/gti.htm#goal7> (last visited May 10, 2009); see also U.N. Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. GAOR, 8th plen. mtg., U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

116. See Expert Group Meeting on Housing Rights Monitoring, Geneva, Switzerland, Nov. 26–28, 2003, *Summary Report*, at 9, available at [http://www.unhabitat.org/downloads/docs/3681\\_88724\\_EGM\\_HousingRightsMonitoring-FINAL-REPORT.pdf](http://www.unhabitat.org/downloads/docs/3681_88724_EGM_HousingRightsMonitoring-FINAL-REPORT.pdf).

117. See OCHA, *Scoping Study*, *supra* note 16, at 16.

118. See Filmer-Wilson, *supra* note 31, at 216.



whose housing has been restored—at important subsequent stages. Ideally, the assessment would also take cognizance of the status of housing rights in the affected community prior to the disaster: its availability, affordability, habitability, and the other aspects addressed by the CESCR's General Comment 4.<sup>119</sup> While the assertion of a human right should not be limited to its historic position in a community, that position will inform an understanding of the infrastructure available and the remedial work necessary to support the right during the rebuilding efforts.

Mary Comerio has identified six factors important in evaluating a disaster from a housing perspective.<sup>120</sup> The first factor that should be evaluated is the amount of housing damage relative to the overall damage caused by the disaster. This evaluation serves as an important indicator of whether the commercial sector remains adequately robust to fuel economic recovery. Subsequent factors include the damage to rental units versus owner-occupied units; the degree of habitability; the value of the losses and the cost to rebuild; the measure of damage concentration (which helps to target recovery efforts and funding); and, finally, the assessment of local conditions. Assessing, for example, social and economic data, ratio of housing costs to average income, etc. helps to predict the kind and magnitude of assistance likely to be needed.

The second evaluative factor, damage to rental units, deserves particular discussion, as the importance of distinguishing rental housing from owner-occupied units has received too little attention in disaster recovery literature and law. Renters have been called both the easiest and the hardest households to return to permanent housing. They are the easiest if unaffected rental units are available in the area—since they are not dependent on a particular property—and they are the hardest when there is no available rental housing.<sup>121</sup> Renters and rental property owners use very different algorithms in determining whether a particular property should be rebuilt, with owners typically focusing on whether they are able to raise rents to finance the cost of redevelopment or uninsured losses.<sup>122</sup> An additional worrisome reality is that rental properties often have a more difficult time in accessing recovery programs due to program conditions or to the complicated ownership structure of the housing.<sup>123</sup>

Given that it is typically the poorest individuals and families who occupy rental housing,<sup>124</sup> the redevelopment of rental units is of great importance

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119. See *General Comment 4*, *supra* note 41.

120. See COMERIO, *supra* note 11, at 38–45.

121. See Fed. Emergency Mgmt. Agency, *National Disaster Housing Strategy* (Dep't of Homeland Sec., Working Draft, 2008), [http://www.fema.gov/pdf/media/2008/ndhs\\_071708\\_public.pdf](http://www.fema.gov/pdf/media/2008/ndhs_071708_public.pdf).

122. See COMERIO, *supra* note 11, at 40–42, 240.

123. See Jie Ying Wu, *A Comparative Study of Housing Reconstruction After Two Major Earthquakes: The 1994 Northridge Earthquake in the United States and the 1999 Chi-Chi Earthquake in Taiwan* 71 (Aug. 2003) (unpublished Ph.D. dissertation, Texas A&M Univ.), <http://txspace.tamu.edu/bitstream/handle/1969.1/74/etd-tamu-2003B-2003061914-Wu-1.pdf?sequence=1>.

124. See OCHA, *Scoping Study*, *supra* note 16, at 32.

from a rights perspective.<sup>125</sup> Distressingly, governments and NGOs tend to see rental housing as within the private sector and thereby leave some of the lowest-income individuals and families at particular risk.<sup>126</sup> Renters—often the poorest members of a community—suffer disproportionately as a result.

While a number of indicators could be teased from this analysis of efforts in the housing and disaster fields, three of these indicators seem particularly helpful to understanding the housing recovery experience: the speed to recovery; the community profile; and procedural indicia, such as levels of community participation and access to due process. First, speed to recovery—the raw number or percentage of destroyed homes replaced or returned to habitability over time—is an important threshold measure in protecting housing rights. Indeed, “speedy” transition from temporary or intermediate shelter to temporary or permanent housing is one of the three housing statements in the IASC Guidelines.<sup>127</sup> While any human right should be afforded as soon as possible, the restoration of damaged housing stock has an inherent need for speed: as with any unoccupied property, vacant homes and dwellings stand as wasting assets and are of less and less value as time slips away. The availability of housing stock is also essential for community and livelihood development. Further, the longer individuals and families remain in temporary shelter, the more susceptible they are to attendant human rights violations.<sup>128</sup>

Second, comparison of the community profile before and after the disaster is an important indicator of levels of achievement in providing access to housing for all segments of the population.<sup>129</sup> Thus, the measure of success should also incorporate and reflect the actual return of individuals to their homes, and the return of the most vulnerable, in particular.

125. The World Bank has noted the importance of assistance to renters as one of its “lessons for the future” to promote equitable redevelopment. See WORLD BANK GROUP, OPERATIONS EVALUATION DEPARTMENT, LESSONS FROM NATURAL DISASTERS AND EMERGENCY RECONSTRUCTION 4 (Jan. 10, 2005), [http://www.worldbank.org/oed/disasters/lessons\\_from\\_disasters.pdf](http://www.worldbank.org/oed/disasters/lessons_from_disasters.pdf).

126. See OCHA, *Scoping Study*, *supra* note 16, at 32, 56; see also COMERIO, *supra* note 11, at 78–81 (noting in an analysis of earthquake recovery in the U.S. that renters are not likely to be aided by many of the financing schemes for housing recovery); but see *People’s Leadership in Disaster Recovery: Rights, Resilience and Empowerment*, *supra* note 6 (describing program in Ban Nam Khem to help renters without claims come together as a community and rebuild).

127. See IASC GUIDELINES, *supra* note 3, § C.3.1.

128. Speed is a relative term, however. It has been noted that the restoration period following a disaster tends to last ten times as long as the emergency period, and the replacement reconstruction period about ten times as long as the restoration period. One review of Hurricane Katrina based on this formula predicts a restoration period of eight to eleven years, and the Tsunami recovery could be comparable. See R.W. Kates et al., *Reconstruction of New Orleans after Hurricane Katrina: A Research Perspective*, 103 PROC. NAT’L ACAD. SCI. U.S. 14653, 14655 (2006), available at <http://www.pnas.org/cgi/reprint/103/40/14653>.

129. One analysis shows that post-hurricane regions, for example, experienced dramatic growth during the six-to-ten year recovery period, resulting in substantially more population and housing units than prior to the disasters, but the growth was socially uneven. See James R. Elliott, *What’s Next? Vulnerability and Post-Disaster Recovery* 3 (Nov. 2007) [http://www.populationenvironmentresearch.org/papers/Elliott\\_post-disaster.pdf](http://www.populationenvironmentresearch.org/papers/Elliott_post-disaster.pdf).

Finally, the participation of the community and the availability of mechanisms for due process and complaints redressal provide qualitative indicators of current levels of respect for the rights of the individual. Notably, both the Pinheiro Principles and the IASC Guidelines emphasize the importance of community participation in recovery efforts. The Pinheiro Principles, for example, include a number of safeguards designed to ensure access to housing, within which participation in decision-making by those affected is explicitly noted.<sup>130</sup> Similarly, the housing guidelines in the IASC Guidelines for housing also highlight participation by affected groups in planning and implementing housing programs.<sup>131</sup> Thus, the common denominator between these two key documents is active participation by affected communities in recovery initiatives.

A reasonable composite indicator of housing rights in disaster recovery, then, might include: the percentage of houses rebuilt at the second anniversary and annually thereafter; the profile of the returned population at those same dates in comparison with the pre-disaster community profile; and the procedural safeguards of community participation in recovery efforts and the availability of due process mechanisms. Recognizing that preceding conditions influence recovery from a disaster, the actual targets for these indicators would ideally be calibrated to reflect not only the extent of the disaster, but also the pre-disaster status of housing, as well.

### C. *Applying the Indicators*

Despite existing evaluations of response to specific disasters,<sup>132</sup> the housing recovery field largely lacks longitudinal studies on the effectiveness of its methods.<sup>133</sup> Two roughly contemporaneous recent disasters—the Indian Ocean Tsunami in December 2004 and Hurricane Katrina in August 2005—have passed their three-year anniversaries and provide useful examples of current approaches. Reviewing the recovery from these two disasters also allows a glimpse into the differences and similarities of approaches in developed and developing nations.

While Hurricane Katrina affected a large part of the Gulf Coast region of the United States, its most devastating consequences were evidenced in the flooding visited upon the city of New Orleans, causing about 1800 deaths and property loss estimated at \$75 billion.<sup>134</sup> The Indian Ocean Tsunami, by contrast, spread its misery across 14 nations, resulting in the loss of over

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130. See *Pinheiro Principles*, *supra* note 27, §§ 12–14.

131. See IASC GUIDELINES, *supra* note 3, § C.3.3.

132. See OCHA, *Scoping Study*, *supra* note 16, at 38.

133. See *id.* at 22, 42.

134. See Reuters AlertNet, Hurricane Katrina (Aug. 14, 2008), [http://www.alertnet.org/db/crisis/profiles/US\\_HUR.htm](http://www.alertnet.org/db/crisis/profiles/US_HUR.htm). Economic loss estimates vary widely. Later reports, for example, have placed losses at \$150 billion. See, e.g., Rick Jervis, *2 Years After Katrina, Pace of Rebuilding Depends on Who Pays*, USA TODAY, Aug. 28, 2007, available at [http://www.usatoday.com/news/nation/2007-08-28-rebuild\\_N.htm?loc=interstitialskip](http://www.usatoday.com/news/nation/2007-08-28-rebuild_N.htm?loc=interstitialskip).

200,000 lives, primarily in Indonesia, Sri Lanka, India, and Thailand, and rebuilding costs were estimated to be in excess of \$10 billion.<sup>135</sup> Each of these disasters displaced about two million people for some period of time.<sup>136</sup>

### *Speedy Recovery*

The Indian Ocean Tsunami destroyed or seriously damaged 580,000 houses.<sup>137</sup> Housing recovery has occurred at a respectable, but varied, pace. While 213,000 homes had been built or were under construction in the Indonesian province of Aceh, one of the areas most devastated by the Tsunami,<sup>138</sup> in Tamil Nadu, another particularly affected area, a U.N. two-year progress report noted that only 14,639 new houses had been handed over, of a total of 54,653 that had to be built<sup>139</sup>—just over 25% recovery at two years.

The definitive reporting effort on the Tsunami recovery is the Joint Evaluation by the Tsunami Evaluation Coalition (“TEC”), established in July 2006. The TEC was formed shortly after the Tsunami by a group of over forty key aid agencies—including the United Nations, donor governments, and NGOs—which, recognizing the historic proportion of the disaster, pledged early on to set new standards of accountability and transparency and to evaluate the relief and recovery effort.<sup>140</sup> The TEC report cited numerous problems; key among them was a growing frustration within the affected population as the relief phase shifted into the recovery phase.<sup>141</sup> A primary cause for the dissatisfaction was a perception that NGOs were not keeping promises.<sup>142</sup> For example, the report noted that, while some 25 agencies and donors, including some major organizations, had committed to providing 50,000 housing units, building for only 500, collectively, had begun by the time of the report.<sup>143</sup>

135. See Reuters AlertNet, Indian Ocean Tsunami (Aug. 28, 2008), [http://www.alertnet.org/db/crisisprofiles/SA\\_TID.htm?v=at\\_a\\_glance](http://www.alertnet.org/db/crisisprofiles/SA_TID.htm?v=at_a_glance).

136. See, e.g., Reuters AlertNet, *supra* note 134 (number of people displaced by Hurricane Katrina); Reuters AlertNet, *supra* note 135 (number of people displaced by Indian Ocean Tsunami).

137. See AMERICAN RED CROSS, TSUNAMI RECOVERY PROGRAM: TWO-YEAR REPORT 7 (2006), available at <http://www.redcross.org/images/pdfs/TRP2YrReport.pdf> (citing the U.N. Office for the Special Envoy for Tsunami Recovery).

138. See *id.* at 7.

139. See U.N. TEAM FOR TSUNAMI RECOVERY SUPPORT, PROGRESS REPORT 14 (May 2007), [http://www.un.org.in/untr/reports/Progress\\_report\\_may\\_11.pdf](http://www.un.org.in/untr/reports/Progress_report_may_11.pdf).

140. See JOHN TELFORD & JOHN COSGRAVE, TSUNAMI EVALUATION COALITION, JOINT EVALUATION OF THE INTERNATIONAL RESPONSE TO THE INDIAN OCEAN TSUNAMI: SYNTHESIS REPORT 18 (July 2006), <http://www.tsunami-evaluation.org/The+TEC+Synthesis+Report/Full+Report.htm> [hereinafter TEC EVALUATION].

141. See *id.* at 68.

142. See *id.* at 71.

143. See *id.* at 69. A separate survey in Aceh province in August 2005 found that the greatest need for communication was in regard to housing, with an amazing 100% of respondents citing this. See IMOGENE WALL, WHERE'S MY HOUSE? IMPROVING COMMUNICATION WITH BENEFICIARIES: AN ANALYSIS OF INFORMATION FLOW TO TSUNAMI AFFECTED POPULATIONS IN ACEH PROVINCE 4 (2005), <http://>

Hurricane Katrina also has passed the three-year mark. When it struck the Gulf Coast of the United States in August 2005, it resulted in far fewer deaths than the Indian Ocean Tsunami, but caused comparable displacement and greater economic loss. One hundred fifty thousand houses and 43,000 rental units were damaged in New Orleans.<sup>144</sup> Recovery efforts for U.S. disasters are principally addressed by the Stafford Act, which established the Federal Emergency Management Agency (“FEMA”) as the single point for federal disaster coordination.<sup>145</sup> Among its extensive disaster relief provisions, the Stafford Act allows for up to eighteen months of housing assistance.<sup>146</sup> FEMA also maintains authority to provide grants that can be used for housing repairs. The adequacy of these grants and FEMA’s performance in general, however, have been the subject of domestic litigation.<sup>147</sup>

One year after Katrina, an impressive 50% of the pre-disaster households had returned.<sup>148</sup> By year three, the city population was back to 72% of pre-storm levels.<sup>149</sup> Complicating this return, however, was the fact that 70% of the affordable rental housing units in New Orleans had been damaged and rendered unavailable by Hurricane Katrina.<sup>150</sup> Over 40,000 affordable rental units, out of a total of 86,000, experienced severe or major damage.<sup>151</sup> For those units that were available, costs soared. The fair market rent calculated by the U.S. Department of Housing and Urban Development (“HUD”) for a two-bedroom apartment rose from \$676 per month prior to Katrina to \$978 two years later,<sup>152</sup> a rise of 45%. The severe damage to rental units and spike in rental costs was significantly problematic, given the higher percentage of renters in New Orleans. Indeed, apartment rebuilding is of particular concern in New Orleans, given that it accounts for over half of all households.<sup>153</sup>

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www.tsunami-evaluation.org/NR/rdonlyres/D8C87941-8316-453F-9B8D-4019128384A8/0/undp\_Wheres\_my\_house\_20050905.pdf.

144. See William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 958, 986 (2007); see also Jeffrey Thomas, *Abating Katrina's Second Wave: A Strategy for Using Code Enforcement to Target Unoccupied Nuisance and Blighted Property in Post-Disaster New Orleans*, 53 LOY. L. REV. 839, 843 (2007) (citing 188,000 residential and rental properties destroyed or damaged).

145. See John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA's Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443, 448–49 (2008).

146. See *id.* at 451.

147. See *id.* at 463, 478.

148. AMY LIU & ALLISON PLYER, BROOKINGS INST. METRO. POL'Y PROGRAM & GREATER N. ORLEANS CMTY. DATA CTR., *THE NEW ORLEANS INDEX: THREE YEARS AFTER KATRINA 8* (anniversary ed., 2008), available at <http://www.brookings.edu/reports/2007/08neworleansindex.aspx>.

149. See *id.*

150. See William P. Quigley, *Obstacle to Opportunity: Housing that Working and Poor People Can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393, 400 (2007).

151. See *id.*

152. See *id.* at 402.

153. Pre-Katrina New Orleans had a 47% homeownership rate compared to 67% nationally. See NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, *HOUSING IN NEW ORLEANS: ONE YEAR*

Moreover, HUD's decision not to renovate a substantial portion of the public housing units previously available for rent further hindered return for individuals and families who had been renting prior to the Hurricane.<sup>154</sup> The primary government agency responsible for housing policy in the United States, HUD, uncharacteristically operated the public housing in the City of New Orleans prior to the Hurricane, under an administrative receivership.<sup>155</sup> Its decision to demolish 4500 rental units has been extensively criticized by New Orleans tenants.<sup>156</sup>

### *Community Profile*

From a rights perspective, equally important to the actual restoration of housing is the profile of those returning. For example, of the approximately 200,000 people who had not returned to New Orleans by the one-year mark following the Hurricane, 70% of them were African-American and 38% lived below the poverty line.<sup>157</sup> Even at the two-year date, those who were able to rebuild with private funds or insurance proceeds were more likely to have returned than those who were dependent on government assistance programs to rebuild.<sup>158</sup> The Lakeview district, for example, largely white and middle-class, has seen significant recovery, while the historically African-American Lower Ninth Ward district has experienced minimal levels of resident return.<sup>159</sup> Federal decisions on the level of fortification of the levee system profoundly affect the ability of areas like the Lower Ninth Ward to rebuild.<sup>160</sup>

Assessing the profile of the returning population is also particularly important given that the population immediately returning after a disaster can greatly influence or shift political power and consequent decision-making.<sup>161</sup> The U.S. Department of Housing and Urban Development projected that the African-American population in New Orleans would decrease from a pre-Katrina level of two-thirds to a post-Katrina level of

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AFTER KATRINA 9 (2006), [http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/Housing\\_in\\_NOLA\\_KI\\_OppAg\\_NAACP.pdf](http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/Housing_in_NOLA_KI_OppAg_NAACP.pdf).

154. See Julia Cass & Peter Whoriskey, *New Orleans to Raze Public Housing*, WASH. POST, Dec. 8, 2006, at A3.

155. See Quigley, *supra* note 144, at 987.

156. See *id.* at 987-88.

157. See *Two Years After the Storm: Housing Needs in the Gulf Coast: Testimony of Amy Liu before the U.S. Sen. Comm. on Banking, Housing and Urban Affairs* 17, 110th Cong. (Sept. 25, 2007), available at [http://www.brookings.edu/testimony/2007/0925katrina\\_liu.aspx](http://www.brookings.edu/testimony/2007/0925katrina_liu.aspx). The African-American proportion is roughly equal to the breakdown of New Orleans's population prior to Katrina, when African-Americans represented 67%. See Quigley, *supra* note 144, at 3.

158. See Jervis, *supra* note 134.

159. See Justine M. Cannon, *Accountability in Reconstruction: The Need for Federal Involvement in Post-Disaster Reconstruction to Protect Housing Interests of Poor and Minority Residents*, 47 SANTA CLARA L. REV. 93, 105 (2007).

160. See *id.* at 106.

161. See Nossiter, *supra* note 20 (reporting on the first white majority on New Orleans's City Council in two decades, two years following Katrina).

35–40%.<sup>162</sup> This is potentially problematic, given that New Orleans was not a city of parity prior to the Hurricane,<sup>163</sup> when it had the second-highest concentration of African-American poverty in the United States.<sup>164</sup> The poverty rate was over 23% in the New Orleans parish, the seventh highest among large American counties.<sup>165</sup> In addition, New Orleans had a lower rate of home ownership than the national average—55% in the affected area.<sup>166</sup> Consequently, when 38 of New Orleans's 47 extreme-poverty census tracts were flooded,<sup>167</sup> more individuals were left dependent on the decisions of others, especially owners of rental units, when it came to rebuilding.

The profile of the returning population is more difficult to evaluate across the wide expanse of the Tsunami affected region. Discrete studies have documented, though, that inadequate attention was given to women, the elderly, and children.<sup>168</sup> These studies also conclude that the rich received more assistance than the poor in government compensation programs and in aid to property owners versus renters.<sup>169</sup> In Sri Lanka, for example, there were reports that government policies prohibiting new construction within 100 meters of the mean sea level were granting exceptions for property developers and hotel development, thereby dramatically changing the demographics of the coastline.<sup>170</sup> Similarly, human rights reports assessing Tsunami related recovery have raised concerns about “environmentally protected zones” in Thailand and a “safe island” program in the Maldives that threaten to further displace communities that inhabited these areas prior to the Tsunami.<sup>171</sup>

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162. See Cannon, *supra* note 159, at 108.

163. As an historical note, the U.S. Supreme Court's perhaps most notorious decision, *Plessy v. Ferguson*, 163 U.S. 537 (1896), upholding racial segregation under a “separate but equal” doctrine, arose out of a Louisiana case. The U.S. Supreme Court finally overturned this decision in 1954 in *Brown v. Board of Education*, 347 U.S. 483 (1954).

164. See BERUBE & KATZ, *supra* note 2, at 1.

165. See *id.* at 2.

166. See CONG. RES. SERV., HURRICANE KATRINA: SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREAS 23 (2005). These figures are more dramatic when analyzed by poor and non-poor households, where home ownership figures were 27% and 62% respectively. See *id.* at 24.

167. See BERUBE & KATZ, *supra* note 2, at 24. Areas with little or no flooding were 46% African-American and 25% poor. See Kates, *supra* note 128 at 5; see also Sherrie Armstrong Tomlinson, *No New Orleanians Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153 (2006).

168. See TEC EVALUATION, *supra* note 140, at 75 (noting that “in general the needs of vulnerable groups (women, the elderly and children) tended to be overlooked or were not met at the pace or scale expected”).

169. See *id.*

170. See Leckie, *supra* note 21, at 1-2.

171. See ACTIONAID INT'L, TSUNAMI RESPONSE: HUMAN RIGHTS ASSESSMENT 18 (Jan. 2006), [http://www.reliefweb.int/rw/RWFiles2006.nsf/FilesByRWD/DocUNIDFileName/SODA-6LM2SS-tsunami\\_HR01.pdf/\\$File/tsunami\\_HR01.pdf](http://www.reliefweb.int/rw/RWFiles2006.nsf/FilesByRWD/DocUNIDFileName/SODA-6LM2SS-tsunami_HR01.pdf/$File/tsunami_HR01.pdf).

*Community Participation and Access to Due Process*

Apart from measuring the speed of recovery and comparing the pre- and post-community profile, an assessment of housing recovery must evaluate whether the state's actions following the disaster actually respected rights in the process. While emergency measures may be required and public safety may preclude rebuilding in certain areas, safeguards against violations of human rights are still required. Whether affected residents can participate in decision-making and whether residents have access to due process are two proxies for determining whether rights were respected during the recovery process.

A fact-finding mission in 2005 found that relief and rehabilitation processes in Tamil Nadu and Sri Lanka following the Indian Ocean Tsunami evidenced a "glaring disregard" for human rights.<sup>172</sup> Women were seen as bearing the brunt of the disaster, yet policies developed after the disaster were cited as having actually *increased* discrimination against women. Overall, the needs of vulnerable groups were not taken into account, the right to participate in recovery efforts was not respected, and accountability for governments and NGOs was lacking. Reports urged agencies to follow a rights-based approach, upholding the principles of non-discrimination, equality, and gender-sensitivity, and cited a "clear and urgent" need to develop further guidelines and to agree on a timeline for the provision of permanent housing.<sup>173</sup>

In New Orleans, the local government housing rebuilding strategies, based on expropriation, condemnation, and eminent domain, raise serious concerns regarding the right to housing and require diligent due process attention. Recent amendments to Louisiana's State Constitution impose new restrictions on government's expropriation of private property and expand "just compensation" requirements for such "takings."<sup>174</sup> These amendments appear to limit the existing statutory authority of the New Orleans Redevelopment Authority ("NORA"), a lead agency in the government's redevelopment efforts. Previously, expropriation of property could occur if an administrative hearing officer determined it to be blighted; now a taking must remove a threat to public health or safety.<sup>175</sup> The constitutional amendments further frustrate government's intentions to transfer ex-

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172. See HABITAT INT'L COALITION, *supra* note 24, at vi.

173. See *id.* at 69.

174. See David A. Marcello, *Housing Redevelopment Strategies in the Wake of Katrina and Anti-Kelo Constitutional Amendments: Mapping a Path Through the Landscape of Disaster*, 53 LOY. L. REV. 763, 771 (2007). The constitutional amendments were not inspired by Hurricane Katrina, but rather are consistent with similar actions of other states to counter a recent landmark U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), upholding broad use of eminent domain by the government to expropriate private property.

175. See Marcello, *supra* note 174, at 773-74.



propriated property to new owners by restricting disposition of such properties.<sup>176</sup>

An alternative redevelopment strategy is to seize properties with delinquent real estate taxes. The City of New Orleans anticipated transferring 2,500 such properties to developers following Hurricane Katrina.<sup>177</sup> In the context of a natural disaster, however, the use of this governmental power, which avoids constitutional just compensation requirements, must be accompanied by extraordinary due process. Although owners do have a right to redeem seized property for some period of time,<sup>178</sup> the extenuating circumstances of a disaster make this safeguard, standing alone, unsatisfying. As a practical matter, the possibility of redemption and the complications of gaining clear title to the property have made this a far less frequent event than the city envisioned.<sup>179</sup>

Both disasters covered here—the Indian Ocean Tsunami and Hurricane Katrina—were massive, and subsequent recovery challenges were daunting. Yet, both elicited an outpouring of support and financial resources that set a high expectation for recovery.<sup>180</sup> Judging simply from a third anniversary snapshot, the housing recovery results have been credible for both disasters, with over two-thirds of the New Orleans’s households returned, and apparently between one-half and two-thirds of households have been returned across the Tsunami affected area. Perhaps the greatest challenge in the recovery of housing, however, arises not from acts of commission—land grabs and forced resettlements—but from acts of omission. The respective after-maths of both Hurricane Katrina and the Indian Ocean Tsunami reflect a failure to focus adequately on the particular needs of the most vulnerable, especially those who did not own their housing prior to the disaster and who are especially dependent on the rebuilding decisions of others. Given the complexity of vulnerability in the disaster context, there is clearly a need for a more visible rights perspective. The next, and final, section will evaluate the legal framework necessary to achieve that.

### III. A LEGAL FRAMEWORK FOR HOUSING RECOVERY

The current human rights framework does not contemplate victims of natural disasters in any comprehensive way. Especially in regards to housing rights, victims of natural disasters are a conceptual appendage to a sys-

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176. *See id.* at 776; Thomas, *supra* note 144, at 855.

177. *See* Marcello, *supra* note 174, at 794. This effort was a renewal of pre-Katrina attempts to redevelop abandoned property.

178. *See id.* at 792.

179. *See id.* at 795.

180. The international response to the Indian Ocean Tsunami was substantial, with about \$13.5 billion in aid. *See* TEC EVALUATION, *supra* note 140, at 16, 80. The international aid included \$5.5 billion from the general public in developed countries. *See id.* at 81. The TEC report calculated total funding at \$7100 for every affected person. *See id.* at 21.

tem designed for victims of conflicts. As the notion of vulnerability to a disaster has shifted, our legal framework of duty has not kept pace. Where once vulnerability centered on exposure to unknowable forces of nature, it now must recognize the linkages between disaster vulnerability and access to economic, political, and social power.<sup>181</sup> Disaster victims float in the interstices between duty and bad luck, between justice and charity. Respect for human rights requires that we identify a legal framework that can address the implications of discrimination, poverty, and vulnerability.

#### A. *The Stepchild of Conflict Law*

The international law that applies in the event of a natural disaster—to label it “natural disaster law” would credit it with more intentional jurisprudence than is warranted—is substantially dependent on the law that has developed to address post-conflict situations. Protections afforded to refugees from conflicts have been extended to persons internally displaced by conflicts, and from there to those displaced by natural disasters. Consequently, persons displaced by natural disasters can find themselves relying for protection on provisions that arose out of very different types of events and which may inelegantly apply to disaster scenarios.

To the extent that housing after disasters is visible in international law, it is in the Pinheiro Principles, whose beneficiaries—“refugees and displaced persons”—include victims of a natural disaster. The Guiding Principles on Internal Displacement define “internally displaced persons” to include persons who leave their homes for reasons that specifically include natural disasters,<sup>182</sup> and this definition has also been incorporated into the Explanatory Notes on the Pinheiro Principles.<sup>183</sup> Unfortunately, the Principles themselves do not specifically reference “natural disasters.” In fact, the inclusion of natural disaster victims within the scope of principles covering internally displaced persons has been a subject of dispute.<sup>184</sup>

The Handbook on Implementing the Principles, developed by the U.N. High Commissioner for Refugees, UN-HABITAT, the U.N. High Commissioner for Human Rights, and others, however, emphasizes the expansive inclusion of all displaced persons within the scope of the Principles.<sup>185</sup> It specifically cites natural disasters, noting that “[i]n some settings, the displaced are arbitrarily and/or unlawfully prevented from returning to and

181. See *supra* notes 100–101 and accompanying discussion.

182. See U.N. Comm’n on Hum. Rts., *Guiding Principles on Internal Displacement*, ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

183. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Promotion & Prot. of Hum. Rts., *Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons*, ¶ 2, U.N. Doc. E/CN.4/Sub.2/2005/17/Add (July 11, 2005) [hereinafter *Explanatory Notes*] (prepared by Paulo Sérgio Pinheiro).

184. See ROBERTA COHEN, KEY POLICY DEBATES IN THE INTERNAL DISPLACEMENT FIELD 4 (Dec. 4, 2006), [http://www.brookings.edu/fp/projects/idp/2006\\_RCstmt\\_TESEVsymposium.pdf](http://www.brookings.edu/fp/projects/idp/2006_RCstmt_TESEVsymposium.pdf).

185. See IMPLEMENTING PINHEIRO, *supra* note 93, at 10.

recovering their homes, and/or otherwise involuntarily relocated to resettlement sites despite their wishes to return home.”<sup>186</sup> In this regard, there is some evidence in the final Pinheiro report of an attempt to widen the post-conflict lens. For example, the definition of restitution in the 2003 preliminary report as “the return of arbitrarily or illegally confiscated housing”<sup>187</sup> was changed in the final point to include housing “of which they were arbitrarily or unlawfully deprived.”<sup>188</sup> While this detail is both appropriate and important, the emphasis of attention has been on post-conflict victims. Emphasis has not been placed on the unique needs of post-disaster victims, which are much more likely to be centered on rebuilding challenges—challenges such as government strategies to spur redevelopment that may give short shrift to the needs and rights of the poor or vulnerable.

### B. Restitution

To facilitate rebuilding after a natural disaster in a way that respects the right to housing, a new legal framework is necessary. One way to respond to the losses from natural disasters is through an expanded view of restitution. While this is the approach the Pinheiro Principles take, it is a somewhat forced fit in the natural disaster context. A restitution framework is more common in post-conflict situations, where existing homes may be wrongfully occupied, than in natural disaster recovery, where reconstruction is often required.<sup>189</sup>

Historically, restitution serves as the remedy in contracts and torts for unjust enrichment.<sup>190</sup> The Explanatory Notes to the Pinheiro Principles define restitution as “an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position.”<sup>191</sup> This definition artfully avoids any explicit reference to a violation. In that sense, it accurately captures the classic concept of restitution.

While, in somewhat free-floating language, the Pinheiro Principles assert the right to restitution as “a distinct right,”<sup>192</sup> this may be too expansive a reading. While a 2002 working paper on the Pinheiro Principles does speak to restitution as “a free-standing, autonomous right,” it is specifically in

186. *Id.* at 18.

187. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Hum. Rts., *Housing and property restitution in the context of the return of refugees and internally displaced persons: Preliminary report of the Special Rapporteur*, ¶ 9, U.N. Doc. E/CN.4/Sub.2/2003/11 (June 16, 2003).

188. See *Pinheiro Principles*, *supra* note 27, § 2.1. The text sheds no light on what would constitute an arbitrary deprivation.

189. See *id.* Introduction ¶ 6 (noting that the Pinheiro Principles are “rooted in . . . the ‘best practices’ which have emerged in previous post-conflict situations wherein restitution has been seen as a key component of restorative justice”).

190. See Dennis Klimchuk, *Restitution and Realism*, 20 CAN. J.L. & JURISPRUDENCE 225, 226 (2007).

191. *Explanatory Notes*, *supra* note 183, ¶ 4.

192. See *Pinheiro Principles*, *supra* note 27, § 2.2.

regards to restitution as a remedy for grave human rights violations.<sup>193</sup> It might be best, therefore, to read the Pinheiro Principles as continuing to ground restitution either in unjust enrichment or in a right to reparation. Under this alternative basis for restitution, the right to a remedy, restitution is available where there is a gross violation of international human rights law.<sup>194</sup> The Explanatory Notes refer admiringly to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>195</sup> as providing the best articulation of the right to a remedy for human rights violations.<sup>196</sup> The Basic Principles state that restitution “should, whenever possible, restore the victim to the original situation before the gross violations . . . occurred.”<sup>197</sup> They specifically include the return of property.<sup>198</sup> Restitution is, in fact, the preferred remedy for displacement.<sup>199</sup>

This approach to restitution as a remedy, however, requires a “gross” violation of international human rights law. In a conflict scenario, the state may bear direct responsibility for the loss of housing. This is a high standard to reach in the event of a natural disaster, where the initial loss is almost always, by definition, an act of God or an act of nature, even when the emerging understanding of states’ roles in creating vulnerabilities is acknowledged.<sup>200</sup>

While it is tempting to want to stretch further the elasticity that the legal concept of restitution has demonstrated over the years and make it independently available to victims of natural disaster, it is more compelling to ensure that its application is grounded in solid legal theory. Rooting claims to restitution in unjust enrichment or as a remedy for gross violations provides a sound legal basis, but relegates it to being a less useful tool for victims of natural disasters. Only the most tendentious legal reasoning or unusual circumstances will lead to valid claims about unjust enrichment at the expense of disaster victims, as the typical disaster victim is not ren-

193. See U.N. Econ & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Hum. Rts., *Working Paper: The Return of Refugees’ or Displaced Persons’ Property*, ¶ 32, U.N. Doc. E/CN.4/Sub.2/2002/17 (June 12, 2002) (prepared by Paulo Sérgio Pinheiro) [hereinafter *Working Paper*].

194. See Giulia Paglione, *Individual Property Restitution: From Deng to Pinheiro—And the Challenges Ahead*, 20 INT’L J. REFUGEE L. 391, 409 (2008).

195. G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter *Basic Principles*].

196. See *Explanatory Notes*, *supra* note 183, ¶ 5.

197. *Basic Principles*, *supra* note 195, ¶ 19.

198. See *id.*

199. See *Pinheiro Principles*, *supra* note 27, ¶ 2.2.

200. Mitigating against State liability, the Guiding Principles on Internal Displacement include within their prohibition displacement in “cases of disaster, unless the safety and health of those affected requires their evacuation.” See *Guiding Principles on Internal Displacement*, *supra* note 182, § 6(2)(d). Specific procedural safeguards apply when a displacement occurs apart from the emergency stage of a disaster. See *id.* § 7(3).

dered homeless due to an accompanying or precipitating gross violation of human rights.

Nonetheless, property restitution following displacement is a developing area.<sup>201</sup> There is, indeed, an emerging new basis for restitution, in the right of refugees to return, to be repatriated, to their countries of origin.<sup>202</sup> This concept has been localized to provide a right to return to their *homes*. Especially beginning at the end of the 20th century, for example, the Security Council asserted for refugees and internally displaced persons in certain post-conflict situations the right “to return to [their] home[s].”<sup>203</sup> Similarly, the Guiding Principles on Internal Displacement place the primary duty on competent authorities “to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily . . . to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.”<sup>204</sup>

Earlier drafts of the Pinheiro Principles similarly found a right to housing restitution in the right to return,<sup>205</sup> and the final principles provide that the pursuit of “durable solutions” other than return do not prejudice the right to restitution.<sup>206</sup> However, the right to restitution as a component of the right to return has not been applied *to restoring* housing for victims of natural disaster.<sup>207</sup> Extending this rationale from conflict situations to natural disaster scenarios is problematic. While it may be useful where the State is arbitrarily preventing disaster victims from returning to habitable homes, or in post-conflict situations when State intervention is necessary to restore ownership of an otherwise occupied home, this ratio-

201. See Paglione, *supra* note 194, at 397.

202. See Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441, 458 (2005). The underlying right to return is found in, or derived from, for example, the Universal Declaration of Human Rights, *supra* note 63, art. 13(2) (“Everyone has the right to leave any country, including his own, and to return to his country.”); and the International Covenant on Civil and Political Rights, *supra* note 40, art. 12(1) (“right to liberty of movement and freedom to choose his residence”).

203. See *Working Paper*, *supra* note 193, ¶¶ 23–24.

204. *Guiding Principles on Internal Displacement*, *supra* note 182, § 28(1). See Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459 (2004) (discussing the drafting process); Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325 (2007) (exploring the application of a domestic right of return for victims of Hurricane Katrina).

205. See *Working Paper*, *supra* note 193, ¶ 29.

206. See *Pinheiro Principles*, *supra* note 27, § 10.3. The Principles have been criticized for evidencing a bias for the restoration of the status quo ante as the preferred outcome, in spite of evidence that return may not be optimal from the perspective of some of the displaced. See Paglione, *supra* note 194, at 407–08; see also U.N. High Comm’r for Refugees, *Handbook on Voluntary Repatriation: International Protection*, ch. 2.3 (1996), available at <http://www.unhcr.org/publ/PUBL/3bfe68d32.pdf> (characterizing voluntariness in return as the cornerstone of international protection of refugees in order to avoid violating the principle of *non-refoulement*).

207. See MALCOLM LANGFORD, *THE RIGHT TO RETURN, RESETTLEMENT AND RESTITUTION AFTER THE TSUNAMI DISASTER*, 2 DISASTER BRIEF (2005), <http://www.disasterwatch.net/focus/cohre.htm>.

nale, when standing alone, lacks the strength to compel the physical restoration of inhabitable shelters commonly needed after a disaster.

Before addressing an alternative legal framework for post-disaster recovery, it should be noted that the preceding conclusion is not meant to diminish the significance of the growing emphasis on restitution in the support of displaced persons; it is merely to say that restorative justice, and its retributive justice and transitional justice siblings, are prominent post-conflict concerns<sup>208</sup> and more at home within the context of massive human rights atrocities.<sup>209</sup> Where egregious conditions are present in natural disaster contexts, as when property developers benefit from government prohibitions against residents returning to their coastal homes, claims should be robustly prosecuted. Moreover, even if a right to restitution under international human rights law is elusive for disaster victims, the restitution goal of restoring conditions to the status quo ante should still pertain.

### C. *Emerging Alternatives to Restitution*

If restitution is best reserved for instances of unjust enrichment or as a remedy for gross violations—situations not typical in natural disasters—and if the right to return does not today require housing reconstruction, what alternative theory might a victim of a natural disaster assert to advance the right to housing lost in the disaster?

#### *A Right to Disaster Mitigation*

It is an axiom of international human rights law that the primary duty to enforce human rights rests with the State.<sup>210</sup> True to this, the Internal Displacement Principles place primary responsibility for internally displaced persons with the State.<sup>211</sup> A legal argument against the State might be available under international law to victims of a disaster if the State can be shown to have breached a specific obligation that was a proximate cause of the housing loss. Significantly, pre-planning matters in disasters could be viewed as such obligations. The speed of housing recovery is improved when a pre-impact recovery preparedness plan is in place.<sup>212</sup> Thus, there may come a time when failure by a State to plan for speedy and effective disaster recovery constitutes a breach of duty. There may some day be a right to disaster mitigation—a State duty to mitigate the likelihood of

208. See, e.g., Roman David & Susanne Choi Yuk-ping, *Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic*, 27 HUM. RTS. Q. 392 (2005).

209. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

210. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm'n on Hum. Rts., *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Addendum, Framework for National Responsibility* ¶ 2, U.N. Doc. E/CN.4/2006/71/Add.1 (Dec. 23, 2005).

211. See *Guiding Principles on Internal Displacement*, *supra* note 182, §§ 3(1), 25(1).

212. See Jie Ying Wu, *supra* note 123, at 66–67.

disasters and their effect—and an institutional framework that could lead to the realization of the right.<sup>213</sup>

Such a right could be grounded in the right to a safe environment<sup>214</sup> and in an increasing understanding of the linkage between human activity and natural disasters. The responsibility for effective pre-disaster planning and preparation is becoming more pronounced due to human activity. Encroachment on the wetlands of the Mississippi River Delta, for example, may have increased the magnitude of Hurricane Katrina.<sup>215</sup> Massive logging and the destruction of wetlands exacerbate erosion and precipitate flooding.<sup>216</sup> Not every natural disaster, of course, is caused by human activity, but the palette of man-made disasters is bleeding onto natural disasters, convoluting further the nature of duty and justice surrounding disaster recovery.

Insurance systems are an effective means of providing for disaster recovery and can shape future expectations.<sup>217</sup> This is the common approach in developed states. Disasters are known future events. We do not know exactly where they will occur, or when, but we can predict with some degree of certainty their frequency and severity. Predictable events are insurable events. In his consideration of approaches to reducing vulnerability to disaster, James Boyce explores methods for allocating scarce resources,<sup>218</sup> differentiating a wealth-based allocation approach from a rights-based approach. The former, an economics-driven method, is based on willingness and ability to pay. The rights-based approach, by contrast, assigns equal weight to impact across the population, regardless of wealth or social status. Boyce would create incentives for mitigation under the rights-based approach by finding liability for infringement of a right to a safe environment. An international system would help spread this risk.

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213. See George Kent, *The Human Right to Disaster Mitigation and Relief*, 3 ENVTL HAZARDS 137–38 (2001) (calling for such a right).

214. For an assessment of the current state of the right to environment in international law, see Lynda Collins, *Are We There Yet? The Right to Environment in International and European Law*, 3 MCGILL INT'L J. SUST. DEV. L. & POL'Y 119 (2007). See also Steve Turner, *The Human Right to a Good Environment—The Sword in the Stone*, 4 NON-STATE ACTORS & INT'L L. 277 (2004).

215. See Mark Fischetti, *Protecting Against the Next Katrina*, SCI. AM. (Oct. 24, 2005), <http://www.sciam.com/article.cfm?id=protecting-against-the-ne>.

216. See Kofi A. Annan, *An Increasing Vulnerability to Natural Disasters*, INT'L HERALD TRIBUNE, Sept. 10, 1999, at 8 (stating “[t]oday’s disasters owe as much to human activities as to the forces of nature. Indeed the term ‘natural’ is . . . increasingly misleading.”).

217. See Cannon, *supra* note 159, at 101–02 (noting shift in U.S. federal support for disaster recovery from “blameless victim” narrative to entitlement program). The development of compensation funds for disaster victims, rather than relying entirely on private charity, and rather than straining to find culpable parties under tort theories, is an example of a changing approach to disaster recovery. See Lawrence M. Friedman & Joseph Thompson, *Total Disaster and Total Justice: Responses to Man-Made Tragedy*, 53 DEPAUL L. REV. 251 (2003–2004) (tracing the development of public attitudes toward compensation for disasters in the U.S.).

218. See Boyce, *supra* note 105.

Providing an insurance program is not by itself a panacea, however.<sup>219</sup> In fact, it can make matters worse if not thoughtfully implemented. It was the availability of federal flood insurance, for example, that led to greater development in danger zones in Louisiana in the years before Hurricane Katrina.<sup>220</sup> A further challenge to a risk or insurance approach is that vulnerability is not an objective term—communities and individuals assess risk differently.<sup>221</sup> People likely to be affected by disaster may weigh differently the risk of dependency on external support for their livelihood as compared with the risk of a disaster.<sup>222</sup> Risk assessment is even further complicated by the common failure to effectively engage those affected by disasters in relevant decision-making.<sup>223</sup> Consequently, others apply their own assessments of the risk.<sup>224</sup>

A risk framework requires that we examine who bears the risk of the event and, in particular, the assumption of risk implications. The defense of risk assumption is seldom levied against those initially displaced, but it is often lurking around the logistics of rebuilding. For example, the wisdom of rebuilding New Orleans, a city located below sea level, following Hurricane Katrina, has been challenged more than once—notably, by those who seem to have no reservations about rebuilding on earthquake-prone fault lines in California. Asking whether the poor have assumed the risk of a natural disaster by living in a disaster-prone area, however, is only inoffensive if they have realizable alternatives.<sup>225</sup>

We are still some distance from being able to assert a right to disaster mitigation, but increased recognition of the right to a safe environment and of the linkages between vulnerability to disasters and human activities may someday close that gap. While its future is twinned with that of environmental rights generally, environmental proponents could strengthen their case by bringing natural disasters—and impelling human activity—more fully to the front and center.

### *International Community Responsibility*

In addition to a State responsibility to protect against natural disasters, the international community, too, has a substantial role pertaining to natural disasters. Environmental concerns, including preparation for natural di-

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219. See Salt, *supra* note 105 (evaluating the impact of increased weather-related events on the insurance industry).

220. See Marcia Johnson, *Addressing Housing Needs in the Post Katrina Gulf Coast*, 31 T. MARSHALL L. REV. 327, 335 (2005–2006).

221. See Heijmans, *supra* note 102, at 7–8.

222. See *id.* at 9.

223. For a discussion of the relationship between the civil and political right to participate and the economic right to housing, see Ralph Wolf, *Participation in the Right of Access to Adequate Housing*, 14 TULSA J. COMP. & INT'L L. 269 (2006–2007).

224. See Heijmans, *supra* note 102, at 10.

225. Cf. PAUL FARMER, *PATHOLOGIES OF POWER* 155 (2005) (noting a tendency in development approaches to blame the poor for their poverty).



sasters, cry out for international planning and cooperation. The lack of a coordinating mechanism for the international community's housing recovery work, in particular, has been identified as a serious shortfall,<sup>226</sup> especially given the magnitude of the sustained investment that such a framework requires.<sup>227</sup>

The responsibility of states to provide international assistance is nonetheless gathering momentum. One of the key lessons the International Strategy for Disaster Reduction has drawn from the Indian Ocean Tsunami is that, as natural hazards increasingly span borders, their management requires global cooperation.<sup>228</sup> This echoes one of the findings from a world conference on disaster reduction convened in 2005 in Kobe, Japan, which identified a need to enhance international and regional cooperation and assistance in disaster risk reduction.<sup>229</sup>

Under emerging political doctrine, when a state is unwilling or unable to protect its citizens, an international responsibility to protect arises that trumps the principle of non-intervention in a sovereign state.<sup>230</sup> Recently, there have been arguments that the responsibility to protect extends to international intervention in post-disaster situations.<sup>231</sup> This is a helpful line of reasoning for our purposes, as the responsibility to protect specifically includes a responsibility to rebuild.<sup>232</sup>

The past two decades have seen continued international will to advance economic rights, despite the difficulty of doing so and the dramatic changes in international economic development. In 1987, international jurists crafted the Limburg Principles to inspire further progress, recognizing that market and non-market economies and centralized and decentralized political structures all had work to do.<sup>233</sup> Ten years later a group of experts developed the Maastricht Guidelines to build upon those earlier Principles.<sup>234</sup> The Guidelines specifically noted that the realization of economic

226. See OCHA, *Scoping Study*, *supra* note 16, at 59.

227. See *id.* at 61.

228. See U.N. INT'L STRATEGY FOR DISASTER REDUCTION, LESSONS FOR A SAFER FUTURE: DRAWING ON THE EXPERIENCE OF THE INDIAN OCEAN TSUNAMI DISASTER 11 (2007), <http://www.unisdr.org/ppew/tsunami/pdf/lesson-for-a-safer-future.pdf>.

229. See World Conference on Disaster Reduction, Kobe, Japan, Jan. 18–22, 2005, *Report of the World Conference on Disaster Reduction* 10, U.N. Doc. A/CONF.206/6 (Mar. 16, 2005).

230. See INT'L COMM'N INTERVENTION & ST. SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001), <http://www.iciss.ca/pdf/Commission-Report.pdf>.

231. See Tyra Ruth Saechao, *Natural Disasters and the Responsibility to Protect: From Chaos to Clarity*, 32 BROOK. J. INT'L L. 665 (2006–2007); see also *To Protect Sovereignty, or to Protect Lives?*, ECONOMIST, May 17, 2008, at 73 (reporting on attempts to apply the responsibility to protect doctrine to a natural disaster in Myanmar).

232. See INT'L COMM'N INTERVENTION & ST. SOVEREIGNTY, *supra* note 230, at 39.

233. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Annex, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987).

234. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13 (Oct. 2, 1997).

rights depends significantly on state action.<sup>235</sup> These analyses of the implications of global economic movements on human rights can, for example, shape how we think about an appropriate international response to phenomena like global warming.<sup>236</sup> The responsibility to protect doctrine, however, is still in an early developmental stage. Whether it matures and affords protection for victims of disasters will depend in large part on the will of the international community to recognize new limitations to state sovereignty.

#### D. Non-Discrimination

Despite these new theories, the responses that do occur do not adequately prevent the disparate impact that the poor experience in trying to recover from a disaster.<sup>237</sup> While new theories are gaining ground, we should use the tools we have. International law is replete with prohibitions against discrimination.<sup>238</sup> ICERD is of particular interest because it does not require a showing of intent in its prohibition of discrimination and discriminatory effect.<sup>239</sup> Currently, State action in disaster planning and recovery fails to prevent such a disparate impact when it comes to housing restoration for those affected by disasters. A disproportionate burden is felt by the poor and other marginalized sectors of the community, a burden that often leads to sustained human rights violations, especially when prior vulnerabilities, such as gender, race, or income levels, and natural disasters intersect.<sup>240</sup>

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235. See *id.* ¶ 2.

236. Intergovernmental organizations are already involved in disaster assistance. The International Monetary Fund, for example, provided over \$10 million in emergency assistance related to natural disasters from 2004 to 2005. See Int'l Monetary Fund, IMF Emergency Assistance: Supporting Recovery from Natural Disasters and Armed Conflicts (Feb. 2009), <http://www.imf.org/external/np/exr/facts/conflict.htm>. For the same period, the World Bank, through its International Development Association, committed \$13 billion to disaster recovery and prevention activities. See *IDA at Work*, *supra* note 1. For a critical self-assessment of the World Bank's involvement in disaster recovery, see Roy Gilbert, *Doing More for Those Made Homeless by Natural Disasters* (World Bank Disaster Risk Management Working Paper Series No. 1, 2001), <http://siteresources.worldbank.org/INTDISMGMT/Resources/housing.pdf>).

237. See generally *supra* Section II; see also Daniel A. Farber, *Disaster Law and Inequality*, 23 *LAW & INEQUAL.* 297 (2007); Boyce, *supra* note 105, at 6 (dubbing Guatemala's 1976 earthquake a "class-quake" for its disproportionate impact on the poor).

238. See, e.g., Universal Declaration of Human Rights, *supra* note 63, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . ."); ICESCR, *supra* note 36, art. 2(2); see also Farber, *supra* note 237, at 309–311 (noting the potential for remedy for discriminatory disaster relief in the Stafford Act, the primary U.S. legislation governing disaster recovery).

239. See Int'l Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 56, art. 1(1) (using "purpose or effect" in its definition of racial discrimination).

240. CERD has demonstrated its concern for such intersectionality in human rights violations. See, e.g., CERD, *General Recommendation No. 29: Article 1, paragraph 1 of the Convention (Descent)*, ¶¶ 11–13, U.N. Doc. A/57/18 (Jan. 11, 2002) (addressing multiple discrimination against women members of descent-based communities).

There are systemic changes that could alleviate the discriminatory impact that the poor experience. For example, financial programs for recovery, which are especially important for the poor,<sup>241</sup> oftentimes fail to assist all sectors of society evenly. How housing is financed and insured influences the capacity to recover from any subsequent disaster.<sup>242</sup> Mary Comerio's thoughtful pre-Katrina analysis of U.S. disaster policies concludes that they "often create more problems than they solve in catastrophic urban disasters."<sup>243</sup> While her recommendations for policy change are not human rights focused, she acknowledges that a "hard-hearted market-driven model[ ]" is unacceptable.<sup>244</sup> She contends that public assistance should be redirected away from homeowners with limited damage, which constitute the largest U.S. assistance programs, and toward restoration of public infrastructure. Recognizing that rental housing is an important community resource, she also argues for creating special relief for rental property owners.<sup>245</sup>

Today, ICERD appears to be routinely violated in the context of housing recovery following natural disasters. Indeed, the examination of the property rights of displaced persons, which led eventually to the Pinheiro Principles, originated with a 1997 proposal by CERD.<sup>246</sup> Perhaps it is time, now more than a decade later, to do more than acknowledge the significant contributions the Pinheiro Principles are making to the field generally. We now need to launch a new examination that focuses specifically on the housing rights of natural disaster victims.

#### CONCLUSION

The right to housing is well established in international law, most famously in the International Covenant on Economic, Social and Cultural Rights, and also finds a place in a number of other international and regional human rights instruments. Oddly, however, there is no ready human rights framework that protects the rights of the thousands of individuals and families who dramatically lose their homes every year to natural disasters.

In disaster housing recovery, today, victims of natural disasters are largely invisible in the housing rights framework. The Pinheiro Principles show a way forward, building on the legal principle of restitution, though

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241. See Johnson, *supra* note 220, at 345 nn.61–64.

242. See COMERIO, *supra* note 11, at 18.

243. *Id.* at 12–13 (attributing this failure to the fact that these policies are based on the thirty or so "garden-variety" disasters that occur annually in the U.S.).

244. See *id.* at 26.

245. See *id.* at 254–55.

246. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Comprehensive Examination of Thematic Issues Relating to the Elimination of Racial Discrimination*, 4 U.N. Doc. E/CN.4/Sub.2/1997/31 (May 27, 1997).

restitution—as a remedy for unjust enrichment or for a gross violation of international human rights law—is more readily applicable to the victims of conflict, the original motivation for development of the Principles. The recent extension of restitution to refugees as a component of the right to return may hold the most promise for natural disaster victims, though it currently lacks the muscle to compel housing recovery.

An alternative framework, which finds a right to disaster mitigation that includes specific housing rights, is also in its infancy. Its eventual acceptance is linked to environmental rights generally and to an understanding of the causative or aggravating effect of human action on natural disasters specifically. Raising questions about the international obligations of states, this approach will require a global perspective. While the responsibility to protect doctrine is already preparing the way for that conversation, victims of natural disasters need to be drawn more fully into the story.

The need to advance the conversation is upon us. The storms are indeed gathering. The number of people disasters affect and the economic cost of disasters have been dramatically rising. The incidence of those categories of disasters that are particularly destructive to housing, such as floods, is expected to increase further. Human rights are seriously jeopardized during displacements, especially for those already living at the margins of communities. With housing representing two-thirds of the total building stock of a community, the recovery of housing is essential to the community's recovery. Developing a crisp human rights framework for the recovery of housing lost to disasters is an urgent priority.

Evidence over the past three years shows a respectable pace of housing recovery following the Indian Ocean Tsunami and Hurricane Katrina. The generosity of people and states around the globe, the commitment of a dedicated natural disaster recovery community, and the persistent human spirit of those affected by these disasters account for the successes. However, the post-disaster story is very different for those living in poverty or who are otherwise marginalized than it is for those with access to resources. A more robust human rights framework could change this story.

There is evidence today that the discriminatory effect that ICERD prohibits is present in the recovery of housing for those affected by disasters. CERD's identification of discrimination in post-conflict situations led it to call for a comprehensive review of that subject in 1997, leading to the eventual development of the Pinheiro Principles. A parallel review, focused on the unique conditions that natural disasters occasion, is warranted today. It has the potential to accelerate the advance of a housing rights framework that would facilitate housing recovery and, in the end, promote justice.