

**THE CRIMES OF HURRICANE KATRINA  
AND THE NEED FOR INTERNATIONAL CRIMINAL  
COURT JURISDICTION OVER THE  
UNITED STATES OF AMERICA**

National Conference of Black Lawyers (NCBL) Memorandum  
to the International Tribunal on Hurricanes Katrina and Rita

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## About the National Conference of Black Lawyers

The National Conference of Black Lawyers (NCBL) is a very small, but committed association of lawyers and legal activists. Our mission is to serve as the legal arm of the movement for Black Liberation, to protect human rights, to achieve self-determination of Africa and African Communities in the Diaspora and to work in coalition to assist in ending oppression of all peoples. NCBL is a bar association but its program concerns matters of critical concern to the broader Black community.

Since its founding in 1968, cases in which the organization has been involved have included the cases of Angela Davis, Assata Shakur, the Attica Brothers, and the cases of numerous other political prisoners, including Mumia Abu Jamal. NCBL has long been active in the defense of affirmative action and the mass demand for reparations. Internationally, NCBL has fought apartheid in Southern Africa, demanded self-determination for Palestine, Ireland and America's First Nations, challenged imperialist aggression in Latin America and the Caribbean, and the organization is currently engaged in an ongoing campaign to protect the land and natural resources of Africa from foreign exploitation.

All of NCBL's work falls into one or more of three categories: criminal justice, international affairs, and social/political/economic justice. The organization is structured accordingly. The Katrina disaster is of the highest concern to NCBL because the problems that flow from it fall into all three of NCBL's programmatic priorities.

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## INTRODUCTION

The establishment of the International Criminal Court (ICC) in 1998 gave hope to literally millions of desperate, oppressed people around the world who otherwise believed that state-sponsored tyrants, soldiers and thugs who were responsible for mass murder, torture and other atrocities would never be held accountable for their crimes. The ICC, which is governed by the provisions of a treaty known as the “Rome Statute” is unprecedented in that in countries that submit to the court’s jurisdiction, nobody – even heads of state – can be immune from criminal prosecution and punishment for genocide, war crimes and crimes against humanity. The creation of the ICC, which was inspired in significant part by incidents where governments used their domestic court apparatus to absolve those guilty of heinous crimes was widely celebrated as a significant step forward for humanity. Even in the United States where there was concern about potential abuse of the court, former President Bill Clinton signed on to the Rome Statute with reservations.

Technically, there was the potential for ratification until Clinton’s successor, George W. Bush, directed that Clinton’s signature be removed from the Rome Statute. While the subsequent U.S. attacks on Iraq, and the tortures that have been carried out in Guantanamo Bay, Abu Ghraib and elsewhere, have likely made the withdrawal from the Rome Statute a pretty good idea from the Bush Administration’s perspective, the National Conference of Black Lawyers (NCBL) regards it as a tragic, monumental step

backwards in the ongoing movement for the universal protection of human rights. The need for the International Criminal Court has become crystal clear in the wake of the Katrina disaster. NCBL had the opportunity to both tour the ruins of New Orleans and also to speak with survivors. The survivors' accounts of horrific conditions in temporary shelters and allegations of criminal conduct by police, National Guard troops and other officials strongly suggest the need for culpable actors to be held accountable. As will become evident, the International Criminal Court is best suited for this purpose.

Article 13 of the Rome Statute specifies three methods by which the ICC may exercise its jurisdiction over a situation or case:

(A.) A state (country) that has signed on to the Rome Statute and is a party to the treaty may refer a situation to the ICC Prosecutor.

(B) The United Nations Security Council may refer a situation to the ICC Prosecutor.

(C) The ICC Prosecutor may initiate an investigation.

Because all known Katrina-related crimes occurred in the United States, which is not a party to the Rome Statute, the ICC lacks authority to extend its jurisdiction to these matters even if other countries or the ICC Prosecutor himself has an interest in commencing an investigation. Of the three options listed above, the only one that might theoretically be employed for Katrina-related crimes is referral to the ICC Prosecutor by the UN Security Council. In cases where the Security Council makes a referral there is no requirement that the crimes occur on the territory of a state that is a party to the Rome Statute. Although it is theoretically possible for the Security Council to refer Katrina crimes, as a practical matter, such is unlikely because the U.S., as a permanent member of

that body would almost certainly veto any decision by the other members to suggest criminal prosecution.

It is the view of NCBL that the Katrina crimes are dramatic evidence of why the U.S. should not be exempt from ICC jurisdiction. It is our hope that a determination by this Tribunal of the suitability of the Katrina crimes for investigation and prosecution by the ICC can be one of several significant steps toward the construction of a consensus in favor of ICC jurisdiction that will ultimately outweigh the Bush Administration's recalcitrant stance. This Tribunal's conclusions will be particularly useful as candidates for the Presidency of the United States are presented with the question of whether they, if elected, will play a leadership role in making the U.S. a party to the Rome Statute.

To facilitate the Tribunal's review, we submit this memorandum that addresses the issues that would likely be of concern to the ICC Prosecutor if he were able to receive a referral regarding the Katrina crimes and consider whether they warrant a formal investigation by the ICC. When evaluating whether an investigation would be proper, the ICC Prosecutor reaches conclusions about whether there is a "reasonable basis" [Art. 53, Rome Statute] for employing the investigative resources of the court to obtain government documents, conduct interviews, and in other ways substantiate any suspicions that there has been criminal conduct that warrants ICC prosecution. This memorandum (which is intended to demonstrate only that the ICC Prosecutor would have a reasonable basis for commencing an investigation) does not purport to conclusively establish the criminal culpability of government actors. Thus, there is considerable reference to hearsay statements and other evidence that would not be regarded as

competent in many courts of law. However, such evidence is highly probative and useful for threshold determinations of whether there should be an investigation.

The National Conference of Black Lawyers therefore respectfully requests that this International Tribunal on Hurricanes Katrina and Rita, assume for the sake of this discussion that the ICC has jurisdiction over the United States, and then provide an opinion concerning:

**Whether accounts of observations and experiences of Katrina survivors are sufficient to provide a reasonable basis for the International Criminal Court's Prosecutor to commence an investigation of whether genocide and crimes against humanity were committed during the aftermath of the hurricane and flood that occurred in New Orleans during August, 2005.**

The summaries of accounts of survivors' observations and experiences provided to NCBL and that appear below imply the commission of genocide and three crimes against humanity: murder, extermination, and torture. (Other crimes against humanity are also implied, but none are as apparent as those specified.) The names of survivors whose accounts are summarized below are not important for purposes of this document, and they have been withheld to protect their privacy.

## THE SURVIVORS' ACCOUNTS

### Survivor Account A

#### **Potential Charges: Murder Extermination**

This survivor was a Sheriff's Department deputy who, after fourteen years of service, resigned in protest because of the department's conduct during the disaster. This survivor's most alarming report was of allegations made by her husband. This survivor reported that her husband claims that he observed a young woman become animated and

irate because of the conditions encountered by the survivors. The survivor stated that her husband alleges that the young woman began to direct her frustration at nearby National Guardsmen, and that the Guardsmen then grabbed her, pulled her into a helicopter and ascended to flying height, where they threw her overboard to her death.

She stated that her husband also alleges that while in the Super Dome, he observed National Guardsmen capture a man who was accused of having just raped a child. She stated that her husband alleges that the Guardsmen called over a superior officer who listened to the accusations made about the man in custody. She stated that her husband alleges that the superior officer then used a pistol to shoot the accused man in the head. She said her husband further alleges that the subordinate Guardsmen then threw the body over the railing of the Super Dome ramp.

This survivor alleges the following conditions existed at the jail for Sheriff's Department personnel who remained on duty during the disaster: lack of water, food or power for a period of at least five days; feces-covered floors; the roof as the only safe place to sleep; and the absence of assistance until the Department of Corrections arrived to take her by boat to a bridge where she remained for about 24 hours along with a large crowd of other survivors. She alleges that National Guardsmen were on either end of the bridge with their guns aimed at the survivors. She claims that although she and other deputies had radios that were being used to report everything that occurred, she concluded that the sheriff chose to do nothing and to leave his own staff in jeopardy.

This survivor further reported allegations made by her two adult sons. Specifically that they walked across the Mississippi River bridge, and that as they neared the other side, they ran into a line of Jefferson Parish police who had their rifles aimed at the

survivors. She said her sons allege that one of the officers yelled: “Get your black asses back on the other side.”

### **Survivor Account B**

#### **Potential Charges: Murder Extermination**

This account was provided by a 49-year-old administrator who stated that her inability to leave the region was due to the fact that a tree fell during the hurricane and crushed her new car. She and others took refuge in a three level housing project. As they watched from the top level, they saw police and boats passing by. She claims that all gave their assurances that rescuers were on the way. However, she eventually concluded that these were lies. She and her companions remained in the same location for a day and a half. Finally, she decided to leave to seek assistance.

She began to wade through chest deep water, watching giant rats swimming nearby. Her first stop was the Super Dome. She was told that she should go to the convention center. She decided that rather than go there, she would cross the bridge and use her credit card to check into a hotel. As she started that trip, she was told that the Jefferson Parish Sheriff was positioned on the far end of the bridge prepared to shoot anyone who tried to cross. She decided to go to the convention center, but rather than enter it, she decided to sleep outside on the sidewalk.

On her second day there, she came across people who had found food in the convention center freezers. These were the same freezers where they had begun to store

dead bodies. The air conditioning in the convention center went out, and not long afterwards, the lights went out as well.

In the middle of the third night, while sleeping outside of the convention center, she claims she was awakened by a woman shouting: “Don’t Do It!” She alleges that she then observed a young man jump at a passing National Guard jeep with a pair of upraised scissors. She alleges that a National Guardsman in the jeep raised his rifle and shot the young man in the head. She alleges that the jeep never slowed, and it continued its journey without any of the soldiers so much as looking back.

The survivor claims that she later learned that the young man had become suicidal, and the woman urging him to “stop” was his sister. She claims the dead body lay on the sidewalk for more than seven hours before someone finally covered it with a blanket. She stated that as far as she knows the body was never removed for at least the balance of her stay at the convention center.

### **Survivor Account C**

#### **Potential Charge: Extermination**

This survivor is a young man whose family includes his wife and three sons who were ages 6, 11, and 13 at the time of the disaster. The family was lodged in the convention center on the first night that it was available. He stated that the facility was clean when they arrived, and the other survivors in the facility were overwhelmingly persons of African descent. He said everyone was repeatedly told that there would be buses and assistance, but neither ever arrived. He said that by the second day, the convention center began to smell like feces and urine, and that there were increasing numbers of low income persons being brought in. He alleges that he attempted to speak

with a policeman about buses, but the officer would not respond. The survivor alleges that the officer had his hand on his gun as the family approached. As they neared, the survivor alleges the officer pulled his pistol and aimed it at the family. The survivor alleges that the policeman said: “Get the fuck back in there!”

As persons in the center began to commit crimes, the survivor alleges that the police stood by and did nothing. He said that each day survivors were directed to line up for buses that never came. He alleges that on three occasions each night, a SWAT team entered the convention center with guns drawn and aimed at the survivors. He alleges that the SWAT team went directly to white survivors, and escorted them out of the convention center, presumably for evacuation. He states that it was his impression that the police knew exactly who they were coming to get.

He said he concluded that there would be no buses, and his family attempted to leave on foot with the intention of walking out of the disaster area. He said he attempted to walk to a WalMart and approach a police officer to request information. He alleges that the officer said: “There’s nothing we need to talk about.” He alleges that the officer pulled his gun, aimed it and told the family to return to the convention center.

The family joined a crowd of people attempting to cross the Mississippi River Bridge. The survivor claims they got as far as the access ramp when they heard a gunshot, and the crowd began a mass stampeding retreat. He stated that people in the crowd reported that a survivor at the front of the crowd had been gunned down by police. He said, the family had no alternative to returning to the convention center.

On their third day in the convention center, rations and water began to arrive. That evening they were airlifted out of the convention center and taken to Baton Rouge.

Before they left, the survivor claims his family saw countless dead bodies in and about the convention center wrapped in white sheets.

### **Survivor Account D**

#### **Potential Charge: Extermination**

This survivor is a 37-year-old laborer. He reports that on the day before the hurricane, he was following his routine of leaving his first job to go to his second one. He claims he was exhausted on this day and he pulled over to take a nap behind the wheel. He stated that when he awoke, police were searching his car, and they began to interrogate him while he was still in a groggy state. He claims he was then arrested for reckless driving and public drunkenness. He alleges that when the hurricane hit, the sheriff's department put the prisoners on lockdown and fled. He states that he was lodged on the second floor and the flood waters did not rise to that level.

He claims that one group of prisoners managed to break out by punching holes in the walls. He alleges that these prisoners climbed to the roof where they directed shouted pleas for assistance at armed guards stationed on an adjacent roof. He alleges that some of the prisoners attempted to jump off of the roof and that guards shot them with rubber bullets. He alleges that the other prisoners were warned that they too would be shot if they attempted to escape. He alleges he was among a second group to escape from their cells and that they explored the jail's interior. He claims that on the first level the water had risen to neck level. He alleges that even though he saw no bodies, there were between 50 and 75 prisoners on the first level, and he can't imagine how at least some of the people could not have drowned in water that deep. He claims that after the first group of

prisoners made it to the rooftop, the jailers finally had a locksmith come in and open the cells.

He said it is his belief that the plan was to keep the prisoners out of sight and out of mind, but the escape exposed the prisoners to the media, and the sheriff then had no alternative to a full evacuation of the facility. He alleges that the prisoners were taken to a bridge and held at gunpoint. He said he was part of a group that was taken to Hunt Prison, a maximum security facility. He claims he was given two sandwiches, and placed in a prison yard with thousands of hardened criminals.

He claims he had no criminal history, and he was traumatized to be in the midst of chaos. He said all prison rivalries were free to play themselves out. He alleges that guards stood by as prisoners beat and shanked each other at will. He claims he was not the only person who did not belong there. He alleges that there were a number of curfew violators and others facing lesser charges. He alleges that he spent three months in this and another maximum security prison before he was released, almost covertly, without any paperwork. He alleges that throughout his entire ordeal, he was never taken before a judge for any reason at any time.

### **Survivor Account E**

#### **Potential Charge: Torture**

This survivor is a 51-year-old maintenance worker who has been a New Orleans resident since 1974. He stated that after the hurricane, Parish police picked him and others up on Roberts Street and told them they would be taken to Napoleon and St. Charles where buses would be waiting. They were dropped off a block from the convention center. He said it was pitch black inside of the convention center and there

were no buses. He claims they could hear screams for help from someone who said she was being raped. He said that occasionally, the police would come through with flashlights. He alleges that the National Guard circulated with their guns aimed at survivors. He alleges that Guardsmen were also patrolling the exterior of the convention center in hummers and tanks. He alleges that he asked a police officer when the buses were expected to arrive. He alleges that the officer's response was: "What kind of drugs are you on?"

The survivor alleges that the officer grabbed him by the shoulder and began to beat him on the lower body with a night stick. He alleges that the officer then sprayed him with mace. He alleges that five or six other police officers pulled out their sticks and joined in the beating. He claims that he fell to the ground, and then managed to get to his knees and begin praying. He alleges that the police backed away and left him on the ground praying. He alleges that the then chief of police was in the vicinity and observed the entire beating without intervening.

The survivor claims he rose and began walking across the Gretna bridge. He alleges that a line of Gretna police stood in his path with their guns drawn. He claims that he began to wave a white towel to discourage them from shooting him. He alleges that the police began to laugh and make jokes that it took five or six officers to subdue him across the way, and they were curious to know how many of them it would take. The survivor claims that he retreated and waited until the buses arrived. He said that when he got access to water, he used it repeatedly for several days to attempt to wash the mace from his eyes. He claims his eyes burned for the entire period despite his flushing efforts.

### **Survivor Account F**

#### **Potential Charge: Extermination**

This survivor is a 49-year-old disabled nurse who stated that after evacuation to the New Orleans convention center she observed: large numbers of people dying, feces throughout the building and other unsanitary conditions. She further stated that no food was made available to those in the convention center, and four days passed before rations were dropped into the facility. She alleges that as a matter of routine, at or about 5 or 6 p.m. each evening, the National Guard arrived and escorted white and Asian survivors to buses. The survivor alleges that able-bodied whites and Asians were evacuated before people of African descent who were elderly and disabled. The survivor alleges that she asked a Guardsman whether there were plans to evacuate the disabled, and his response was that there were no plans to do so. The survivor alleges that she said to the Guardsman that it appeared that the National Guard was evacuating only white people. The survivor alleges that the Guardsman's response was: "You see that, huh."

### **Survivor Account G**

#### **Potential Charge: Extermination**

This survivor is a nurse and life-long New Orleans resident. She stated that she and other survivors were dropped off at the convention center where there was neither food nor water. She alleges that periodically, the National Guard would come by and tell them to line up for buses that never came. She alleges that each time they passed, the Guardsmen would cock their rifles. She stated that on one occasion survivors did see buses approaching, but the buses never stopped. She said that eventually a group decided that they would attempt to walk out of the disaster area by crossing the Greater New

Orleans Bridge. She alleges that they were just beginning to cross the bridge when a group up ahead began to scream because someone in that group had been shot by either the National Guard or the police. She said that everyone turned back. She said she didn't want to return to the convention center because there had been rumors that the survivors would be flooded out of the facility. She alleges that she stood outside of the convention center and watched as about 50 white survivors were lined up and marched as a group around the building. She said she knew neither the purpose of this nor the destination of the white group. Eventually she was able to pile into someone's car and she made her way to Lafayette. She said she and her husband were separated from each other during the disaster. She said she was traumatized by the entire experience and she now takes medicines for both anxiety and sleeping disorders.

## I. CRIMES AGAINST HUMANITY

The summaries of survivors' accounts imply commission of extermination, murder or torture. These and the other crimes specified by the Rome Statute rise to the level of "crimes against humanity" if they are: "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." [Article 7].

Article 7 defines "extermination" as: "...the intentional infliction of conditions of life inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."

Article 7 defines "torture" as:.. "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control

of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

“Murder” is also specified by Article 7 as a crime against humanity, but no definition is provided. It is reasonable to assume that the ICC accepts most conventional definitions of homicide.

These few accounts describe official acts that were directed against very large numbers of people. A reasonable conclusion can be reached that the acts were widespread and systematic. Our analyses acknowledge that survivors’ allegations are unproven, but for the sake of discussion they are presumed to be true.

### **The Charge of Murder**

Survivors A and B describe cold-blooded premeditated murders. In one instance a National Guardsman allegedly placed a pistol to a man’s head at point-blank range and effected a gangland style execution. In another instance, a helpless woman was allegedly taken to flying altitude in a military helicopter and then thrown overboard to her death. Finally, a civilian pedestrian was allegedly shot to death by a Guardsman in a passing jeep. The question here is not whether crimes were committed, but rather, whether they rise to the level of being crimes against humanity (i.e. were these murders “part of a widespread or systematic attack directed against [a] civilian population...?”)

Media accounts and other anecdotes provide reason to believe that the types of murders described by Survivors A and B were not uncommon. The accounts provided by other survivors in this document describe what was (or events similar to) the infamous shooting incident on Danziger bridge.<sup>1</sup> Also, there was no apparent shortage of

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<sup>1</sup> “What Happened on New Orleans Danziger Bridge?” by John Burnett, NPR Online, Sept. 13, 2006.

Guardsmen who aimed their rifles at civilians as a matter of routine. However, the plain meaning of the language in Article 7 suggests that there need not be widespread or systematic shootings. Rather, the shootings must be part of a “widespread or systematic *attack* directed against any civilian population.” (Emphasis added). When considered in that light, the assorted acts of torture, denial of food and medicine, the prevalent practice by government actors of training firearms on civilians all tend to suggest that there was a widespread full-scale attack on the African population in New Orleans. There is therefore ample reason for a prosecutor to initiate an investigation with an eye toward criminal prosecution.

### **The Charge of Extermination**

The Rome Statute’s definition of extermination refers specifically to “deprivation of access to food and medicine.” As to this point alone, three of the survivors provide highly probative information. Survivor A recounts allegations about jail inmates and staff who were left without food for five days. Survivors F and G describe the absence of food at the convention center. But extermination refers as well to other acts that are “...calculated to bring about the destruction of part of a population.” In this respect the act of containing a population within a confined, unsanitary, dangerous facility may rise to the level of extermination, particularly when (as in this case) many people actually died. The descriptions of large numbers of corpses in the convention center – some covered by sheets – and others stored in the facility’s freezers, are remarkable evidence of the impact of this practice.

The efforts by state actors to contain and confine the population are evident from the use of guns by National Guard troops and police to force survivors back into the

convention center, and to prevent them from crossing the bridge. In the case of prisoners in the jail, there are allegations that many were left to drown in a flooded facility, and some who escaped were shot with rubber bullets.

When all of these allegations are considered together and in context, it is clear that there are ample grounds to investigate whether extermination occurred.

### **The Charge of Torture**

As is the case for all crimes against humanity, acts of torture must be “part of a widespread or systematic attack directed against any civilian population...” If the beating described by Survivor E occurred, it is reasonable to assume that there were many other beatings. However, even if this was the only incident where this particular form of torture was employed, there are certainly countless accounts of other official acts that were part of a systematic attack against the U.S.-born Africans of New Orleans. Torture is not limited to beatings. As defined by the statute, it includes acts that result in “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused...”

When all of the acts described by these survivors are considered together - the use of rifles for violence and threatened violence, deprivation of food and medicine, executions, and in at least one case, a beating, then there is a very high likelihood of widespread mental, if not physical injuries that might be regarded as torture, and that should be investigated.

## **II. GENOCIDE**

Article 6 of the Rome Statute defines “genocide” as specified acts “...committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as

such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.”

Unlike other serious crimes specified by the Rome Statute, genocide carries a special requirement that there be “intent to destroy, in whole or in part, a national, ethnical, racial or religious group...” The survivors’ accounts set forth in the preceding section contain allegations that imply:

**A) There were race-specific decisions and acts in connection with evacuation operations.**

*These survivors’ accounts (all of which were separately provided) describe the orderly surgical removal of white survivors from the convention center and the Super Dome.*

**B) A specific racial group was forced to remain in emergency shelter conditions that by any reasonable standard would cause death, and at least serious mental and physical harm.**

*Not only were Africans directed to these shelters, but they were forced, sometimes at gunpoint to remain.*

**C) The conditions in the shelters did in fact cause numerous deaths and widespread illness.**

*The survivors describe countless corpses covered by white sheets and convention center freezers that were used to store dead bodies.*

An investigator’s inquiry would likely focus heavily on the degree to which harmful acts were intended, and whether they were the subject of an official plan. While there is no known “smoking gun” that provides a contemporaneous record of the hatching of a conspiracy, there is certainly a considerable amount of smoke. First, it is difficult, if

not impossible to imagine circumstances that might have reasonably justified the failure to timely provide survivors with rations and medical care that would have prevented many of the deaths that occurred in the convention center. To provide but one example of a deliberate act that caused these conditions, the Bush administration continually resisted vigorous efforts by the Cuban government to deploy to New Orleans a large brigade of physicians who carried medicine, and who were specially trained to treat the injuries and illnesses suffered by Katrina survivors. Other foreign government offers were also rejected. Private corporations, charitable organizations and individual well-meaning citizens bearing material aid were barred from entering the disaster zone for highly questionable reasons.<sup>2</sup>

It is significant that while there was no food or water for survivors (thereby exposing this group to “conditions of life calculated to bring about its physical destruction in whole or in part”) there were apparently no problems connected with providing the numerous National Guard troops on the scene with necessary food and water. It is also unlikely that the Guard troops at the convention center and the Super Dome were acting independently as a renegade faction. The Guard was apparently assigned to patrol these shelters under the direction of supervising officers, and there was no intervention to stop the affirmative harmful acts of the Guard troops. Further evidence of the Guards’ hostile intent was the display and use of rifles to coerce and intimidate civilian survivors in much the same way that they might guard convicted felons.

Finally, it is important to keep in mind that an assessment of whether a charge of genocide is appropriate should not be based only on the accounts set forth above. The

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<sup>2</sup> “Katrina Aid From Cuba? No Thanks Says U.S.” by Mary Murray, MSNBC Online September 14, 2005.; “Airboaters Stalled by FEMA,” by Nancy Imperiale, Orlando Sentinel, September 2, 2005.

crimes described above are heinous, but there are numerous other accounts of numerous other types of atrocities not reported in this document that are part of the Katrina context and which have much to do with whether genocide occurred. For example, in a case out of Yugoslavia [*Prosecutor v. Krstic*, 43 I.L.M. 1301 (2004)], there was a question of whether the forcible transfer of children to another group would alone constitute genocide. In interpreting the Statute of the International Criminal Tribunal for the Former Yugoslavia (which contains a genocide provision identical to that of the Rome Statute), the ICTY Trial Chamber ruled that standing alone, forcible transfer is not genocide. But the Trial Chamber found that in that case, the forcible transfer was an integral part “of one single scheme to commit genocide, involving killings, forcible transfer, and destruction of homes.” *Id.* At 1358.

Thus, it is NCBL’s contention that even if an initial assessment of a single crime suggests that it alone does not constitute genocide, that crime must be considered in not only the context of all crimes that occurred during the Katrina disaster, but also within the context of all crimes that have historically been committed against Africans since they were first enslaved and forcibly brought to U.S. shores in chains.<sup>3</sup>

### III. CRIMINAL RESPONSIBILITY

NCBL asserts that, with respect to events described by survivors interviewed by the organization, there is a reasonable basis for the investigation of: as-yet unnamed individual New Orleans police officers; all then-administrators of the New Orleans Police

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<sup>3</sup> See the following books: *In the Matter of Color*, by A. Leon Higginbotham; *Shades of Freedom*, by A. Leon Higginbotham; *The Destruction of Black Civilization*, by Chancellor Williams; *COINTELPRO*, by Nelson Blackstock; *Agents of Repression*, by Ward Churchill; *Criminalizing A Race*, by Charshee McIntyre; *Dark Alliance*, by Gary Webb.

Department; as-yet unnamed individual National Guard troops and all other superior officers in the chain of command leading up to and including George W. Bush, as commander in chief of the U.S. military and other members of his administration as yet unnamed, along with other state and local officials as yet unnamed. Criminal responsibility of the police and National Guard personnel who were in direct contact with survivors and who engaged in criminal conduct may arise under Article 25 of the Rome Statute. Under that provision, criminally responsible persons are those who commit the crime "...as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible."

To take Survivor Account E as but one example, when the survivor asked a police officer when buses would arrive, it is alleged that he was mocked, and that the officer commenced beating him all over his lower body with his nightstick, sprayed mace in the survivor's eyes, and was then joined by five or six other officers who joined in the beating.

If the allegations are true, pursuant to Article 25 of the Rome Statute, the officers are criminally liable, because they committed the above-mentioned crimes against a civilian "...as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible." Further, the officers would have the requisite *mens rea* specified by Article 30, as they committed elements of the crimes with "intent and knowledge." Under the article, a person has intent where (a) in relation to conduct, that person means to engage in the conduct; and (b) in relation to a consequence, that person means to cause the consequence or is aware that it will occur in the ordinary course of events. If the allegations are true, it is unreasonable to believe that the officers

failed to comprehend the consequences of their behavior, or that their conduct occurred unintentionally, in response to some type of perceived threat. Here, both knowledge and intent are evident, as the behavior occurred in response to a simple question posed by a survivor about buses.

Liability extends as well to anyone who “[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted.”

Article 30 requires that material elements of crimes be committed with “intent and knowledge.” It provides:

“...For purposes of this article, a person has intent where:

- (a) in relation to conduct, that person means to engage in the conduct;
- (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

“...For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”

Under the Rome Statute, the subordinate officers are not the only culpable parties.

Article 28 of the Rome Statute provides: “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i.) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii.) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

Liability may continue to the top of the chain of command. Article 27 provides: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

NCBL respectfully submits that the degree to which supervisory officers (including the President of the United States) were aware of (or should have been aware of) many of the crimes alleged by survivors is apparent because of the extraordinary scale of the disaster and the fact that the mass media brought news of the survivors’ plight into every corner of the Earth. This is very much unlike an incident where rogue military personnel commit a small scale atrocity in a small village. The tragedy was so thoroughly covered by the media that if supervisory officers were unaware of what transpired, more than in practically any other criminal law case, the supervisors should have known of the acts that were being unlawfully carried out by U.S. military personnel and police.

More to the point however are the survivors’ references to specific statements and unambiguous actions of government actors that should cause any reasonable person to suspect that the acts complained of occurred because of a pre-determined plan that was possibly developed by supervisors.

## CONCLUSION

The allegations made by survivors and summarized in this document are serious. Taken together, they describe conditions in emergency shelters and the jail that were unsanitary and unsafe to the point of being life-threatening. They describe organized, violent efforts by state actors (police and National Guard troops) to contain large numbers of people within these life-threatening facilities. There are descriptions of deliberate, pre-meditated executions of civilian survivors carried out dispassionately by state actors. There are accounts of torture, both physical and mental. There are recurring, consistent accounts of evacuation operations that were race-specific and racially discriminatory. Finally, the survivors' accounts imply if not explicitly describe events that were condoned, if not planned by the supervisory personnel for state actors directly involved in the commission of crimes.

For all of these reasons and others, the National Conference of Black Lawyers contends that, were the United States subject to the jurisdiction of the International Criminal Court, there would be ample grounds (from these few survivors' accounts alone) for the court's prosecutor to commence an investigation of whether the following crimes have been committed: genocide and the crimes against humanity of murder, extermination and torture.

It is respectfully requested that the honorable judges of the International Tribunal on Katrina and Rita make a finding to that effect, and that all people of good will present that finding to all candidates for the Presidency of the United States, along with the question whether each candidate, if successful, will take a leadership role in making the

United States a party to the Rome Statute and fully subject to the jurisdiction of the International Criminal Court.

Respectfully Submitted,

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