

**MEMORANDUM IN SUPPORT OF A UNITED STATES POLICY GENEROUSLY  
GRANTING HUMANITARIAN PAROLE FOR HAITIAN VICTIMS OF THE  
EARTHQUAKE OF JANUARY 12, 2010**

**TO: Roxana Bacon, Chief Counsel, U.S. Citizenship and Immigration Services**

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**DATE: February 25, 2010**

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## INTRODUCTION

The earthquake that hit Port-au-Prince, Haiti on January 12, 2010 left more than 230,000 dead<sup>1</sup> and an estimated 600,000 homeless in a city of roughly two million.<sup>2</sup> Another 200,000 have already left the city seeking shelter with family in the countryside. Roughly 250,000 are injured, almost half of whom are likely to be children, according to a pediatric emergency study.<sup>3</sup> Hospitals in Miami-Dade, Broward and Palm Beach counties in Florida have already provided care for more than 500 earthquake victims, and the federal government has activated the National Disaster Medical System to cover the victims' medical costs.<sup>4</sup> The United States of America has led the world in its response to the Haitian tragedy. In the hours following the earthquake, the government immediately organized a massive humanitarian response to provide direct aid on the ground in Port-au-Prince. It has committed significant U.S. resources to the country; granted TPS status to Haitians awaiting deportation in the United States; and established a fund for Haitian relief chaired by two former Presidents.

In light of the magnitude of this tragedy, we urge the U.S. Citizenship and Immigration Services to exercise its lawful discretion to generously grant humanitarian parole for Haitian victims of the earthquake under 8 U.S.C. § 1182(d)(5). Such action is within the legal discretion of the Attorney General of the United States. It is consistent with U.S. obligations under international human rights law. The United States has exercised such authority in the past to assist victims of other tragedies; doing so now would be consistent with traditional American ideals of generosity.

### **I. Humanitarian Parole Is Permitted Under U.S. Law.**

Under the Immigration and Nationality Act (INA) of 1952<sup>5</sup>, the Attorney General can “in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States,” on the condition that such parole will not be regarded as an admission.<sup>6</sup> Under 8 U.S.C. § 1182(d)(5), this authority may be used to parole into the United States a refugee only if “the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require” parole instead of refugee status under § 1157 of the title.

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<sup>1</sup> Haiti Quake Death Toll Rises to 230,000, BBC, Feb. 11, 2010, available at <http://news.bbc.co.uk/2/hi/americas/8507531.stm>.

<sup>2</sup> Vivian Sequera and Mike Melia, Shocking Toll; Official: 150,000 Buried, Final Figure Still a Mystery; Meanwhile, Food Aid Continues to Fall Short, *Newsday*, Jan. 25, 2010, at A07.

<sup>3</sup> University of Southern California; Almost Half of Injured Haitians Are Likely to be Children, Pediatric Emergency Study Indicates, *Drug Week*, Feb. 12, 2010, at 3324.

<sup>4</sup> Greg Allen, Fla. Doctors Commit to Helping Haiti Quake Victims, NPR, Feb. 5, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=123385139>.

<sup>5</sup> Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101, et seq.).

<sup>6</sup> *Id.* at § 212(d)(5); 8 U.S.C. § 1182(d)(5) (2006).

The parole authority bestowed upon the Attorney General under the INA has since been redelegated to the Secretary of Homeland Security under the Homeland Security Act of 2002.<sup>7</sup> Under 8 C.F.R. § 212.5(a), the Secretary’s authority to make parole determinations under INA § 212(d)(5)(A) may be further exercised by other officials within the Department of Homeland Security, including “the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing.”<sup>8</sup>

Under 8 C.F.R. § 212.5, parole is justified in a number of specific instances for “urgent humanitarian reasons” that serve a “significant public benefit.” These include cases where the individual has a serious medical condition;<sup>9</sup> is pregnant;<sup>10</sup> is a juvenile;<sup>11</sup> will be a witness to a judicial or administrative proceeding in the United States;<sup>12</sup> or any other purpose satisfying the public interest, as determined by a designated public official.<sup>13</sup> Moreover, the authority has been exercised to serve the goal of family reunification for Cuban migrants.<sup>14</sup>

The Executive’s discretion regarding parole status has been interpreted by courts to be very broad and entitled to a strong presumption of legitimacy.<sup>15</sup> However, the statutes and regulations governing the factors relevant to the parole determination do not authorize the consideration of race or national origin by those officials making the determination.<sup>16</sup>

There is a strong tradition of Executive reliance upon this discretionary power to extend parole to victims of tragedy and repression at various points throughout the nation’s history. In 1956, the Eisenhower administration invoked the parole power to temporarily admit 15,000 Hungarians fleeing communist persecution.<sup>17</sup> The power was instrumental in the United States’ response to the Cuban refugee crisis of the 1960s and permitted the President to respond appropriately to refugee influxes from Vietnam, Haiti and Cuba in the 1970s.

The Refugee Act of 1980 altered the parole authority by establishing the requirement that parole status be given to refugees only if there are “compelling reasons in the public interest” and

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<sup>7</sup> See Homeland Security Act of 2002, §§ 441(2), 442(a)(3), 451(b), 116 Stat. 2192, 2193, 2196, 6 U.S.C. §§ 251(2), 252(a)(3), 271(b) (2006). See also *Clark v. Martinez*, 543 U.S. 371, 375 n.1 (2005).

<sup>8</sup> 8 C.F.R. § 212.5(a).

<sup>9</sup> 8 C.F.R. § 212.5(b)(1).

<sup>10</sup> 8 C.F.R. § 212.5(b)(2).

<sup>11</sup> 8 C.F.R. § 212.5(b)(3).

<sup>12</sup> 8 C.F.R. § 212.5(b)(4).

<sup>13</sup> 8 C.F.R. § 212.5(b)(5).

<sup>14</sup> See *infra*, note 16—19, and accompanying text.

<sup>15</sup> See, e.g., *Bertrand v. Sava*, 684 F.2d 204, 212-13 (2d Cir.1982); *Pierre v. U.S. I.N.S.*, 793 F.Supp. 440, 442 (E.D.N.Y.,1992).

<sup>16</sup> See *Jean v. Nelson*, 472 U.S. 848, 857 (1985).

<sup>17</sup> Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 502 (2009).

requiring that the determination be made “with respect to that particular alien.”<sup>18</sup> Nonetheless, the government relied on the parole authority to respond effectively to the arrival of more than 150,000 Cubans during the Mariel boatlifts and a large influx of individuals fleeing Haiti in 1980. While the new restrictions established by the Refugee Act of 1980 were to take effect sixty days following the Act’s enactment on March 17, 1980, they were sufficiently flexible as to allow the President to extend parole status to those migrants who arrived before October 10 of that year.<sup>19</sup> For 30 years prior to 1981, the United States had a policy of general parole for undocumented aliens arriving in the United States seeking admission.<sup>20</sup> It was not until that year that the policy was changed to require detention without parole of any aliens arriving in the United States who could not present a prima facie case for admission.<sup>21</sup>

Since that time, the United States Citizenship and Immigration Services (USCIS) has interpreted the parole authority as being sufficiently flexible to grant the USCIS authority to establish the new Cuban Family Reunification Parole Program (CFRP).<sup>22</sup> Under the U.S.-Cuba Migration Accords, the United States seeks to provide 20,000 travel documents annually to Cubans seeking to emigrate.<sup>23</sup> However, statutory restrictions on the number of family-based immigrant visas and constraints placed on the Cuban Lottery Program by the Cuban government have severely hampered such efforts.<sup>24</sup> As a result, USCIS has relied upon the executive parole authority to establish the CFRP as a means of achieving its annual goal of 20,000 legal migrants from Cubans to the United States.<sup>25</sup>

The USCIS thus has the legal authority to establish a parole program for Haitian victims of the January 12 earthquake. The U.S. government has granted parole status to victims of tragedies and persecution since the 1950s and continues to use such power to grant temporary status to migrants from other countries in the region, such as Cuba. Parole status is discretionary and may be justified in cases of severe medical conditions and family reunification, both of which are critical issues for many Haitians in the wake of the January 12 earthquake.

## **II. International Human Rights Norms and Practices Support Exercise of the Humanitarian Parole Power.**

### **A. The United States has a responsibility to render humanitarian assistance to Haitian earthquake victims.**

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<sup>18</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, at § 203(f) (codified at 8 U.S.C. § 1182(d)(5)(B)).

<sup>19</sup> Cox & Martinez, *supra* note 17, at 507—08.

<sup>20</sup> See *Jean v. Nelson*, 472 U.S. 848, 849 (1985).

<sup>21</sup> *Id.*

<sup>22</sup> See Press Release, U.S. Citizenship and Immigration Services, Questions and Answers: Cuban Family Reunification Parole Program (Nov. 21, 2007) (“The Immigration and Nationality Act provides that USCIS may exercise its discretionary parole authority ‘for urgent humanitarian reasons or significant public benefit.’ See INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); see also 8 CFR § 212.5(c) & (d)”).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

International human rights norms suggest that states have an obligation to render humanitarian assistance after a natural disaster. The International Commission on State Sovereignty nodded to this responsibility in its 2001 report, saying that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but . . . when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”<sup>26</sup>

The Commission’s report focused specifically on humanitarian military intervention, but international law also supports a broader commitment to render assistance. The Inter-American Convention to Facilitate Disaster Assistance is premised on the idea that states within the Americas will provide each other with humanitarian assistance after a disaster.<sup>27</sup> Moreover, states arguably have an international obligation to assist with the provision of an adequate standard of living for all people in the world. Article 25 of the Universal Declaration of Human Rights, for instance, guarantees the right to an adequate standard of living for each person who loses his livelihood “in circumstances beyond his control.”<sup>28</sup>

Though the United States has not explicitly endorsed the obligation to provide humanitarian assistance, it has received implicit support. President Obama, in his Nobel Peace Prize acceptance speech, recognized the moral imperative for states to intervene through military or other means where a state is unwilling or unable to protect its own people from harm.<sup>29</sup> Many within the administration, such as foreign policy advisor Samantha Power, have advocated for the concept.<sup>30</sup> Moreover, the provision in U.S. law of Temporary Protected Status to individuals who cannot return home due to, *inter alia*, the havoc wreaked by natural disaster, indicates that the United States embraces the concept of international responsibility for responding to natural disasters, regardless of the territory upon which these disasters occur.

Particularly for critically injured Haitians, this responsibility requires use of the humanitarian parole power. While the United States and the international community have undertaken a remarkable effort to provide humanitarian assistance, including medical care, for the most seriously injured victims, this is not enough. Doctors Without Borders and other groups on the ground report that medical facilities are inadequate to treat complex cases, and without evacuation to U.S. hospitals, many face certain death.<sup>31</sup> In these cases, fulfilling the imperative

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<sup>26</sup> The Responsibility to Protect: Report of the International Commission on State Sovereignty, p. VIII (2001).

<sup>27</sup> Inter-American Convention to Facilitate Disaster Assistance, Adopted at Santiago de Chile, June 1991; Entry into force, October, 1996.

<sup>28</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810, Art. 25 (1948) [hereinafter UDHR].

<sup>29</sup> Press Release, the White House, “Remarks by the President at the Acceptance of the Nobel Peace Prize,” Dec. 10, 2009.

<sup>30</sup> Steven Fake and Kevin Funk, “R2P: Disciplining the Mice, Freeing the Lions,” *Foreign Policy in Focus*, Mar. 23, 2009.

<sup>31</sup> Jennifer Kay, “Doctor: Quake victims dying without U.S. airlifts,” *Associated Press*, Jan. 30, 2010.

to provide effective humanitarian assistance requires paroling victims into the United States to receive medical treatment.

For family members awaiting unification, humanitarian parole provides the easiest and most effective means of fulfilling these principles. In the short term, parole will allow Haitians who seek admission to the United States for family reunification purposes to escape a dire situation. In the long term, it will reduce the number of the destitute in Haiti requiring assistance, ensure an orderly and safe outflow of inevitable migrants, and allow more Haitians to work in the United States and send cash remittances to their families in Haiti.

### **B. Other countries have successfully implemented expedited entry policies for Haitian earthquake victims.**

Both Canada and France have announced programs allowing some form of expedited entry for either critically injured quake victims or Haitian family members of lawful residents. On January 14, France announced it would suspend deportations to Haiti and grant temporary entry to Haitians in need of medical assistance.<sup>32</sup> On January 16, Canada amended its immigration policies to give priority to family reunification applications for Haitian family members.<sup>33</sup> To date, the process in both countries has been orderly and there have been no reports of increased illegal migration or overtaxed medical facilities. In Canada, public opinion has favored the immigration measures, and a number of NGOs and community groups are calling for even greater immigration measures to aid Haitian earthquake victims.<sup>34</sup> The United States should follow the lead of these countries.

### **C. Humanitarian parole would protect the right to family of Haitians and their U.S. citizen/lawful permanent resident family members.**

International human rights instruments place high importance on the right to family. The Universal Declaration of Human Rights, which contains a set of universally accepted human rights principles, and the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, recognize that the family is the “natural and fundamental group unit of society.”<sup>35</sup> As such, the family is entitled to protection by the state.<sup>36</sup> Article 8 of the

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<sup>32</sup> “France suspends expulsions of illegal immigrants to Haiti in wake of quake,” Associated Press, Jan. 14, 2010.

<sup>33</sup> Citizenship and Immigration Canada, “Frequently Asked Questions: Special Immigration Measures in Response to the Earthquake in Haiti”, <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-01-16.asp> (last visited Feb. 11, 2010).

<sup>34</sup> See, e.g., Kriya Govinder and Antoine Dion Ortega, “Canada in Haiti, Haiti in Canada,” *The Dominion*, Jan. 25, 2010.

<sup>35</sup> UDHR, *supra* note 28, at Art. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810, Art. 12 (1948); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Art. 24 (Mar. 23, 1976) [hereinafter ICCPR].

<sup>36</sup> *Id.*

Convention on the Rights of the Child (CRC) requires that States Parties respect the child's right to preserve family relations, as recognized by law, without unlawful interference.<sup>37</sup>

The Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families have established a specific right to family reunification. Article 9 of the CRC establishes a child's right to non-separation from her parents against her will, and requires States' Parties to ensure this right.<sup>38</sup> Article 10 further requires that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States' Parties in a positive, humane and expeditious manner."<sup>39</sup> Article 44, Paragraph 2 of the International Convention on the Rights of Protection of all Migrant Workers and their families requires that states facilitate the reunification of migrant workers with their spouses or persons who have a relationship with the migrant worker that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.<sup>40</sup> At the regional level, Articles V and VI of the American Declaration of the Rights and Duties of Man establish the right to family and the right of an individual to protection of the law against attacks on family life.<sup>41</sup>

While the right to family reunification is subject to limitations based on a state's right to control its borders, international law places strong weight on a state's humanitarian obligations to preserve family life. Both the European Court of Human Rights and the Human Rights Committee of the ICCPR have ruled that, where an immigrant seeks to enter a country to reunite with her family, states must weigh the state's interest in controlling migration against the migrant's right to family life.<sup>42</sup> In *Plyer v. Doe*, the U.S. Supreme Court implicitly recognized this general principle. It prohibited Texas from denying public education to undocumented children, on the grounds that the state interest in immigration enforcement could not outweigh the best interests of undocumented immigrant children.<sup>43</sup>

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<sup>37</sup> Convention on the Rights of the Child, 1577 U.N.T.S. 3, Art. 8, ¶ 1 (Nov. 20, 1989) [hereinafter CRC].

<sup>38</sup> *Id.*, at Art. 9, ¶1; International Organisation on Migration, "International Law and Family Reunification," <http://www.iom.int/jahia/Jahia/about-migration/developing-migration-policy/migration-family/international-law-family-reunification/> (last visited Feb. 7, 2010).

<sup>39</sup> CRC, at Art. 10.

<sup>40</sup> International Organisation on Migration, *supra* note 38.

<sup>41</sup> American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Art. V, VI (1948).

<sup>42</sup> See, e.g. *Tuquabo-Tekle v. The Netherlands*, App. No. 60665/00, slip op. at 13 (Eur. Ct. H.R. Dec. 1, 2005), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Application Number" for 60665/00) (balancing the state's interest in maintaining a restrictionist immigration policy against the family's interest in living together and finding violation of Article 8 of the European Convention on Human Rights); *Canepa v. Canada*, U.N. H.R. Comm'n, U.N. Doc. CCPR/C/59/D/558/1993, ¶11.4 (1997) (interpreting the right to family reunification in the deportation context pursuant to Article 17 of the International Covenant on Civil and Political Rights' prohibition on arbitrary or unlawful interference in family life). See also Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 Hofstra L. Rev. 1271, 1279, 1281 (2008).

<sup>43</sup> *Id.*, at 1285, *Plyer v. Doe*, 457 U.S. 202 (1982).

In the context of the current humanitarian crisis in Haiti, international law strongly supports extending humanitarian parole to families of U.S. citizens and lawful permanent residents. Due to the massive death toll, many Haitians may find that their closest remaining family ties are to relatives in the United States. Expedited entry into the United States is key in preserving those family ties. The DHS has already recognized the particular vulnerability of children by granting humanitarian parole for orphaned children who are in the process of adoption. Extending parole to all Haitians with approved visa petitions would protect the best interests of U.S. citizen children whose closest relatives may be awaiting entry and Haitian children whose closest relatives may now be in the United States.

**D. Denial of humanitarian parole to Haitians when it has been granted to other similarly situated groups violates nondiscrimination obligations.**

The ICCPR and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) require that states adopt and apply immigration regulations without regard to race or national origin. Article 24 of the ICCPR guarantees “equal protection by the law” and “equal and effective protection against discrimination” based on race and national origin.<sup>44</sup> Article 2 of CERD obligates all parties thereto to “rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”<sup>45</sup> The CERD Committee’s General Comment No. 30 notes that discrimination against non-citizens (such as restrictions on entry) should not discriminate “in purpose or effect” based on race or national origin.<sup>46</sup>

Since 2007, the Cuban Family Reunification Parole Program (CFRP), established by U.S. Citizenship and Immigration Services (USCIS), has provided for expedited entry by Cuban immigrants seeking lawful permanent resident status. Invoking the INA § 212(d)(5)(A) humanitarian parole provision, the CFRP allows Cuban beneficiaries of approved family-preference-based immigrant visa petitions a preferential opportunity to come to the United States before their visa numbers become current.

For other immigrants, particularly Haitians, no such opportunity exists. INA §203(e) provides that immigration visa numbers be issued in the order for which that were applied, subject to per-country caps. This means that, even after receiving visa approval, most immigrants will wait years for a current visa number that will allow for entry into the United States<sup>47</sup> Moreover, since

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<sup>44</sup> ICCPR Art. 24.

<sup>45</sup> Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, Art. 2(Jan. 4, 1969) [hereinafter CERD].

<sup>46</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on Discrimination against Non-Citizens*, ¶ 4 U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005).

<sup>47</sup> For Haitians, as of February 2010, the minimum wait for non-immediate family members with approved petitions was six years. For some visa preference categories, the between approval and receiving an entry visa is nearly 11 years. USCIS Visa Bulletin, No. 17, Vol. IX, Washington, D.C. (February 2010).

2002, entering Haitians without a valid visa have been deemed a national security risk and are subject to mandatory detention upon arrival at a U.S. port of entry.

For extended family, the current state of affairs prolongs the family reunification process on discriminatory grounds, in violation of U.S. obligations under Article 2 of CERD. Failure to extend humanitarian parole would also violate CERD's general prohibition on disparate treatment. As a similarly situated group now suffering a dire humanitarian crisis, this nondiscrimination principle requires that the United States extend to Haitians the same family reunification opportunities available to Cubans.

Particularly given its history of discriminatory immigration policy towards Haitians,<sup>48</sup> failure to exercise humanitarian parole power when it has been previously used in less dire situations would constitute a further violation of CERD. The Haitian disaster is a humanitarian crisis at least comparable to those that triggered mass humanitarian parole for Indochinese and Cuban migrants.<sup>49</sup> Denial of this same benefit to Haitians based solely on their national origin would constitute impermissible disparate treatment as defined by CERD.

### **III. The United States Has a History of Using Large-Scale Parole Programs to Respond to Humanitarian Crises and Should Do So in the Haitian Context.**

The United States has utilized various immigration tools to respond to humanitarian crises abroad. The United States has created, in addition to grants of humanitarian parole, special parole programs for immigrants fleeing political turmoil in their home countries. Notable and extensive programs include the 1994 Cuban Migration Accords<sup>50</sup> and the Orderly Departure Program (ODP) for Indochinese.<sup>51</sup>

These programs have provided safe haven in the United States through extensive grants of humanitarian parole, presumed asylum eligibility, temporary protected status (TPS), and grants of permanent residency. While the United States has made some efforts to respond to the current

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<sup>48</sup> See US Human Rights Network, U.S. Violations of its Obligations Under the Convention vis-à-vis its Treatment of Haitian Migrants, available at

[http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/2bHaitian\\_Asylum\\_Seekers.pdf](http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/2bHaitian_Asylum_Seekers.pdf).

<sup>49</sup> See Part IVIVIII for an in-depth discussion of prior uses of the humanitarian parole power.

<sup>50</sup> U.S. Dept. of State, Cuban Migration to the United States (Jan. 26, 2009), available at

<http://www.state.gov/p/wha/rls/fs/2009/115415.htm>.

<sup>51</sup> These programs provided for special admission into the United States. The United States has also offered "adjustment programs" that allow certain groups to obtain permanent residency. See e.g. Cuban Adjustment Act of 1966 (PL 89-732); Nicaraguan Adjustment and Central American Relief Act of 1997 (PL 105-100); Indochinese Parole Adjustment Act of 2000. Certain Haitians who have been continuously present in the United States since 1995 are also eligible for immigration benefits under the Haitian Immigration Fairness Act (HIFA). See Department of Justice, Press Release, INS Publishes Final Regulations for HRIFA (Mar. 21, 2000), available at [http://www.uscis.gov/files/pressrelease/FinalRegsHRIFA\\_032100v2.pdf](http://www.uscis.gov/files/pressrelease/FinalRegsHRIFA_032100v2.pdf).

A new parole program for North Koreans was recently introduced by Rep. James A. Leach (R-Iowa). North Korean Human Rights Act of 2004 (H.R. 4011). It would establish a special asylum policy; grant qualified North Koreans humanitarian parole; allow them to adjust their status to that of lawful permanent residents; and provide temporary protected status to North Koreans in the United States

situation in Haiti, such as by providing TPS to Haitians already in the United States, the number admitted for medical and family reunification purposes via humanitarian parole has been woefully small.<sup>52</sup> The extent of the humanitarian crisis compels the U.S. government to use its immigration powers to provide more extensive protections to those attempting to leave the island for medical and family reunification purposes. Prior special parole programs demonstrate the strong need for such a program in the context of the Haitian earthquake.

### **A. Cuban parole programs.**

Hundreds of thousands of Cubans have been admitted into the United States since the Cuban Revolution in 1959. The first wave of nearly 200,000 fled Cuba by sea between 1959 and 1964, followed by around 277,000 between 1966 and 1973.<sup>53</sup> In 1980, more than 120,000 undocumented immigrants left the port of Mariel, Cuba, for the United States as part of the "Mariel boatlift."<sup>54</sup> Although some were put into exclusion proceedings, most were granted humanitarian parole.<sup>55</sup> As Cuban migration to the United States continued throughout the 1990s, the U.S. government negotiated the 1994 Migration Accords with Cuba. In that accord, the United States agreed to admit 20,000 persons yearly through direct application in Havana.<sup>56</sup>

Admission and parole under the current program, called The Cuban Family Reunification Parole Program, is not limited to those who qualify for admission as refugees or permanent residents but offered broadly for humanitarian reasons, such as family reunification.<sup>57</sup> Furthermore, under the Cuban Adjustment Act of 1966, as amended, Cuban parolees arriving outside of the program may also adjust their status to that of lawful permanent resident after one year of residence in the United States.<sup>58</sup>

The rationale behind these special programs is at its core humanitarian. In the 1980s, the U.S. government was responding to what it saw as a potential humanitarian disaster as Cubans fled

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<sup>52</sup> See Shaila Dewan, U.S. Suspends Haitian Airlift in Cost Dispute, N.Y. Times (Jan. 30, 2010), available at <http://www.nytimes.com/2010/01/30/us/30airlift.html> (noting United States has admitted only 34 Haitians under Humanitarian Parole following the earthquake).

<sup>53</sup> Marvin H. Morse, Lucy M. Moran, Troubling the Waters: Human Cargos, 3 J. Mar. L. & Com. 1, at 28-29 (2002).

<sup>54</sup> *Rosales-Garcia v. Holland*, 238 F.3d 704, 707 (6th Cir. 2001).

<sup>55</sup> *Id.* at 707. See INA § 212(d)(5)(A), 8 U.S.C. § 212(d)(5)(A) (1994).

<sup>56</sup> U.S. Dept. of State, Cuban Migration to the United States (Jan. 26, 2009), available at <http://www.state.gov/p/wha/rls/fs/2009/115415.htm>.

<sup>57</sup> See U.S. Dept. of State, The Cuban Family Reunification Parole Program (Jan. 26, 2009) [hereinafter USDOS, Cuban Family], available at <http://www.state.gov/p/wha/rls/fs/2009/115413.htm>. Established in 2007, the Cuban Family Reunification Parole Program gives Cuban beneficiaries of approved family preference-based immigrant visa petitions for whom no visa is currently available an opportunity to come to the United States rather than stay in Cuba to apply for lawful permanent resident status. *Id.* The program authority is under the Humanitarian Parole provision of the INA, § 212(d)(5)(A).

<sup>58</sup> United States Citizen & Immigration Services, Report to Congress Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act (1997) [hereinafter USCIS, Report to Congress], available at <http://www.uscis.gov/files/article/parole9697.pdf>.

the country in boats often too small and overcrowded to safely cross the Gulf Stream.<sup>59</sup> Similarly, in the 1990s the government stated its rationale for the special accord was to prevent dangerous attempts to escape from Cuba by raft.<sup>60</sup> In its 2007 expansion of the program, USCIS stated the goal was “to expedite family reunification through safe, legal, and orderly channels of migration to the United States and to discourage dangerous and irregular maritime migration.”<sup>61</sup>

## **B. Indochinese parole programs.**

Cubans are not alone in having received special immigration privileges in response to humanitarian need. Following the end of the Vietnam War in 1975, millions of people fled Vietnam and the neighboring countries of Cambodia and Laos.<sup>62</sup> They were resettled in third countries, and by 1989, around 900,000 had been settled in the United States.<sup>63</sup> Many Vietnamese “boat people” were rescued at sea and brought to the United States, which recognized that “[e]xtreme human suffering and hardship have accompanied organized clandestine departures.”<sup>64</sup> Deterrence of sea arrivals was a prominent aspect of U.S. policy, and it offered Indochinese fleeing the region a number of immigration options that could be obtained in Bangkok, including immigration status for people who could benefit from family reunification, for people with close associations with U.S. government policies, and for reeducation camp detainees.<sup>65</sup> Those who did not qualify as refugees were granted humanitarian parole.<sup>66</sup>

The Lautenberg Amendment in 1989 established a program for adjustment to lawful permanent resident status of persons from the former Soviet Union, Vietnam, Laos, or Cambodia who had been paroled under the program but were not granted refugee status.<sup>67</sup> Like the Cubans, these parolees may apply to adjust to lawful permanent resident status after one year of U.S. residence. From fiscal years 1989 through 1997, more than 83,000 persons from the former Soviet Union or Southeast Asia were paroled under the program.<sup>68</sup>

## **C. The United States should respond to the compelling humanitarian crisis in Haiti by offering Haitians parole in the United States.**

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<sup>59</sup> VADM Benedict L. Stabile, USCG (Ret.) & Dr. Robert L. Scheina, U.S. Coast Guard Operations During the 1980 Cuban Exodus (last modified Feb. 4, 2009), available at [http://www.uscg.mil/history/articles/USCG\\_Mariel\\_History\\_1980.asp](http://www.uscg.mil/history/articles/USCG_Mariel_History_1980.asp).

<sup>60</sup> USCIS, Report to Congress, *supra* note 58.

<sup>61</sup> USDOS, Cuban Family, *supra* note 57.

<sup>62</sup> House Immigration Subcommittee Holds Hearing On Vietnamese Boat People, 66 NO. 25 Interpreter Releases 714, 714 (1989).

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

<sup>64</sup> *Id.* at 715 (quoting the Comprehensive Plan of Action adopted by the International Conference on Indochinese Refugees in Geneva).

<sup>65</sup> *Id.* at 716.

<sup>66</sup> *Id.*

<sup>67</sup> USCIS, Report to Congress, *supra* note 58.

<sup>68</sup> USCIS, Report to Congress, *supra* note 58.

Haiti is currently the site of a humanitarian crisis of almost unimaginable proportions. On February 3, the Haitian Prime Minister Jean-Max Bellerive stated that the earthquake death toll had exceeded 200,000 people, with another 300,000 injured, along with 250,000 destroyed houses and 30,000 disrupted businesses.<sup>69</sup> According to USAID, approximately 3 million people have been affected.<sup>70</sup>

Yet, unlike the Cubans and Indochinese, Haitians seeking to flee their country by sea in times of crisis have been systematically denied access to the United States. Interdiction programs, starting during the Reagan Administration in 1981, have ensured that Haitian asylum seekers would not reach the United States.<sup>71</sup> When the largest single monthly exodus occurred in May 1992 following the overthrow of President Aristide, President George H.W. Bush ordered the Coast Guard to return all interdicted Haitians directly to Haiti, without any determination of refugee status.<sup>72</sup> All Haitians were forcibly returned, even those were headed not to the United States, but to the Bahamas, Cuba or other destinations.<sup>73</sup> Although President Clinton ended this direct return policy in 1994,<sup>74</sup> the U.S. continues to interdict Haitian migrants. Current U.S. policy, referred to as the “shout test,” is to return all Haitian boat migrants without an asylum screening unless they physically or verbally resist.<sup>75</sup>

Although safety concerns inspired the United States to *relax* immigration policy toward Cubans, the United States used the same concerns to justify the strict return of Haitians interdicted at sea. The U.S. government claimed its interdiction policies were inspired by the desire to save the lives of those who would otherwise be encouraged to take to the sea in unsafe vessels.<sup>76</sup> Yet maintaining closed borders today is even more dangerous than permitting risky arrival by boat. Port-au-Prince has been devastated, with Haiti’s main hospitals damaged or destroyed and the UN hospital so overcrowded that patients are forced to lie outside.<sup>77</sup> Hundreds of thousands are in need of medical care, but hospitals lack adequate medical supplies to treat victims suffering from gangrene, tetanus, and malaria.<sup>78</sup>

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<sup>69</sup> USAID, Haiti Earthquake: Fact Sheet #23 (FY 2010, Feb. 4, 2010), available at <http://www.usaid.gov/helphaiti/documents/02.04.10-USAID-DCHA Haiti Earthquake Fact Sheet 23.pdf>.

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

<sup>71</sup> Cheryl Little, *Intergroup Coalitions and Immigration Politics: The Haitian Experience In Florida*, 53 U. Miami L. Rev. 717, 721 (1998).

<sup>72</sup> Exec. Order 12807, May 24, 1992, 57 F.R. 23133. The Coast Guard cutters intercepted over 130 vessels and 13,053 Haitians.

<sup>73</sup> Little, *supra* note 71, at 726.

<sup>74</sup> Exec. Order 12932, Oct. 14, 1994, 59 F.R. 52403.

<sup>75</sup> See Mark Hetfield, Preventing Migration Aftershock for Haiti, Huffington Post (Feb. 2, 2010), available at [http://www.huffingtonpost.com/mark-hetfield/preventing-migration-aft-e\\_b\\_446591.html](http://www.huffingtonpost.com/mark-hetfield/preventing-migration-aft-e_b_446591.html) (describing the “shout test” as “the U.S. policy to return all Haitian boat migrants without any asylum screening whatsoever, except those who physically or verbally resist the Coast Guard’s efforts to return them”).

<sup>76</sup> Little, *supra* note 71, at 726.

<sup>77</sup> Alfred De Montesquiou, Haitians die at hospital for lack of supplies, Associated Press (Jan. 20, 2010), available at [http://news.yahoo.com/s/ap/20100120/ap\\_on\\_re\\_la\\_am\\_ca/cb\\_haiti\\_fighting\\_for\\_lives](http://news.yahoo.com/s/ap/20100120/ap_on_re_la_am_ca/cb_haiti_fighting_for_lives).

<sup>78</sup> *Id.* See also, Jennifer Kay, Doctor: Quake victims dying with, Associated Press (Jan. 30, 2010), available at [http://abclocal.go.com/wpvi/story?section=news/national\\_world&id=7248363](http://abclocal.go.com/wpvi/story?section=news/national_world&id=7248363).

As the Cuban and Indochinese examples demonstrate, special immigration policies are not without precedent in the United States. These programs provide models for special policies that could be used in response to the Haitian crisis. For example, there are currently more than 50,000 people who have approved family petitions to reunite with family in the United States but who are waiting in Haiti for a visa number.<sup>79</sup> Humanitarian parole could be utilized to allow at least those from earthquake-devastated areas of Haiti to wait in the United States with their U.S. family pending the availability of visas, as is currently allowed for Cubans.<sup>80</sup> For those relocated for medical and other humanitarian reasons, the Departments of State and Homeland Security could activate its existing network of voluntary refugee resettlement agencies throughout the United States to assist with the resettlement of affected Haitians.<sup>81</sup>

### CONCLUSION

Since the January 12 earthquake that devastated Haiti, the United States has shown admirable leadership and devoted considerable resources to the massive international humanitarian relief effort. Domestically, it granted TPS status to Haitians awaiting deportation in the United States and has used the humanitarian parole power to allow Haitian orphans in the process of adoption immediate entry.

Yet the United States can and should do more. Current estimates place the number of injured in Haiti at 250,000. Nearly half of those are children.<sup>82</sup> According to the Department of Homeland Security, only 34 Haitians have been granted humanitarian parole to enter the U.S temporarily for lifesaving medical treatment. Every day, doctors, unable to provide adequate treatment in makeshift hospitals, are forced to make impossible choices about who will be sent to the United States for lifesaving treatment and who will stay and likely die. Haitians with approved immigration visa petitions still face a four-year minimum wait to join extended family who are lawfully in the United States. Under current U.S. immigration law, the DHS has the discretion to immediately extend the humanitarian parole power to these individuals. This power has been invoked in the past to aid Cuban and Indochinese migrants fleeing humanitarian crises that may have been less dire than the current catastrophe in Haiti. Finally, international law and human rights norms strongly support a grant of humanitarian parole, on family reunification and nondiscrimination grounds. The U.S. Citizenship and Immigration Services should act immediately and exercise its lawful discretion to grant humanitarian parole under 8 U.S.C. § 1182(d)(5) for earthquake victims requiring medical care and those with approved or likely-to-be-approved immigration visa petitions waiting to reunify with their families.

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<sup>79</sup> See Hetfield, *supra* note 76.

<sup>80</sup> *Id.* See also U.S. Dept. of State, The Cuban Family Reunification Parole Program, *supra* note 57.

<sup>81</sup> Hetfield, *supra* note 76.

<sup>82</sup> Almost Half of Injured Haitians Are Likely to Be Children, Pediatric Emergency Study Indicates, Science Daily, Jan. 29, 2010.