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HRA Fall Event

By Jeffrey Kaloustian and Birte Scholz

Human Rights Advocates (HRA) held its Annual Fall Educational Event at the University of San Francisco School of Law on October 21, 2014. Entitled *From Oakland to Ferguson: Stories from Lawyers Challenging Racial Discrimination in the U.S. Criminal Justice System*, the event was inspired by the recent murder of unarmed Michael Brown by a police officer in Ferguson, Missouri, as well as Alan Blueford, Oscar Grant, Trayvon Martin, and other African American men and boys who have lost their lives in the United States at the hands of white police officers and have not received justice.

The panel agreed that racial discrimination and disparities persist within the U.S., and are especially rampant within its criminal justice system. Panelists shared efforts of local attorneys and civil rights activists to use the law to combat racial discrimination and protect human rights. The panelists spoke about bringing justice to victims of police misconduct, advocating against the practice of racial profiling, and calling on the U.S. to live up to its international human rights obligations to prevent racial discrimination.

Professor Connie de la Vega, HRA Founder, discussed using international human rights law to combat racial discrimination and disparities. In response to written interventions submitted by HRA and other U.S.-based human rights groups in 2014, a UN committee that enforces the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), called on the U.S. in August to eliminate all forms of discrimination, including discrimination involved in juvenile life without parole (JLWOP) sentencing, racial profiling, hate speech, criminalization of homelessness, and militarized borders. In addressing one issue covered in HRA's intervention, the Committee also recommended that the U.S. implement affirmative action policies to correct racial disparities in schools and employment (for more information, see her article below, "HRA Activities at the UN"). While recommendations from UN bodies are not directly enforceable in U.S. courts they do constitute part of U.S. treaty obligations and as soft law they constitute evidence of customary international law and can be used in advocacy and to raise awareness. For example, Supreme Court Justice Kennedy cited international human rights arguments made by HRA and other *amici* in his opinion in the *Roper v. Simmons*, 543 U.S. 551 (2005), which outlawed the juvenile death penalty. For more references to international human rights arguments, see also Justice Kennedy's opinion in Graham v. Florida, 560 U.S. 48 (2010) and Justice Ginsburg's concurring opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Nadia Kaayali of the Electronic Frontier Foundation discussed the racial disperate impact and other human rights violations by National Security Agency (NSA) surveillance and racial profiling by federal and state law enforcement. For example, state and local clearing housing ("fusion centers") that sift through NSA surveillance data routinely make racially-biased determinations on what information is relevant and should be acted upon. She argued that the government has not made a strong enough showing of a need for NSA surveillance to justify the invasion of people's right to privacy as it is being administered now. She also shared stories from the protests in Ferguson following the death of Michael Brown in August. She witnessed people of color who were unaccompanied by legal observers being stopped, while white people were not. She likened law enforcement surveillance by NSA and in Ferguson to

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COINTEL PRO, a covert FBI surveillance operation used in the 1950s and 60s against civil rights leaders. Kaayali observed that just like during the civil rights movement, "when people are politically unfavorable, tools like police brutality, racial profiling and surveillance are used" by the government, and "we are letting this happen."

Criminal defense, mass defense specialist and professor, John Viola supports social movements that challenge racial injustice. He argued that the American legal system left to its own devices will not support racial justice. Viola, who provides legal support as part of a coalition of lawyers from the National Lawyer Guild and other organizations, said that out of the 350 arrests made in Ferguson in connection with protests since August 2014, most of them had been for municipal ordinance violations (only 40 felony arrests). The arrests appear to be a shift on policing strategy from crowd control tactics to heavy handed policing involving checkpoints, targeted arrests and infiltrating movements. He argued that traditional criminal justice models will not change the system; legal collective models are needed to confront large scale arrests. Grassroots and social movements must empower and protect people on the streets.

Walter Riley, Oakland-based civil rights attorney and recipient of the National Lawyers Guild 2013 Champion of Justice Award, was the final speaker for the evening. Mr. Riley's distinguished career as a civil rights activist and lawyer has spanned many decades. He said that what happened in Ferguson is not that different from what happens in Oakland, and is the result of a system that maintains a level of oppression. He represents the family of Alan Blueford, an African American teenager shot by an Oakland police officer in 2012. According to him, this police system is a legacy of slavery, created by the small minority in power to intimidate slaves, and now working people. Riley argued that attorneys have tremendous power in the system. They can make up and reinforce these repressive norms when they act in court. "Going to court to defend our clients is not enough; we must also work with the people we defend. We must find a moral center."

Jeffrey Kaloustian, HRA Board Secretary, moderated the panel on behalf of HRA and thanked our co-sponsors: Amnesty International USA, International Justice Resource Center, and the USF Frank C. Newman International Human Rights Law Clinic.

HRA Highlights Racial Inequalities in Education and JLWOP before UN Anti-Discrimination Committee

By Alen Mirza

I had the privilege of representing Human Rights Advocates (HRA) during the United States' two-day review this year before the Committee on the Elimination of Racial Discrimination (CERD) at its 85th Session in Geneva. CERD is a body of 18 independent human rights experts that monitor implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The session marked the third time the United States has undergone a review before the Committee since ratifying the ICERD in 1994.

HRA's submission addressed the requirements of special measures or affirmative action as they relate to education and employment, as well as the racially discriminatory effect of Juvenile Life Without Parole Sentences (JLWOP) in the U.S. These issues were mentioned as part of the List of Themes published by the Committee to guide discussions during the consideration of U.S. report (CERD/C/USA/Q/7-9).

In Geneva, I joined with the US Human Rights Network (USHRN), a coalition of 300 member and partner organizations working on multiple human rights issues. The USHRN was instrumental in organizing a consultation with the high-level U.S. delegation and civil society organizations, and facilitating the active participation of non-governmental organizations (NGOs). The U.S. delegation reflected local, state and federal officials including Keith Harper, Permanent Representative of

Alen Mirza, former Frank C. Newman intern, and Jose Alves Lindgren, independent expert on CERD.

the United States to the United Nations Human Rights Council and the first indigenous American ambassador; Paula Schriefer, Deputy Assistant Secretary, Bureau of International Organization Affairs; Catherine Lhamon, Assistant Secretary, Office for Civil Rights, United States Department of Education; Dustin McDaniel, Attorney General of the State of Arkansas; and William Bell, Mayor, City of Birmingham, Alabama.

On the civil society side, over 80 NGOs provided written submissions to the Committee, and about a half-dozen groups traveled to Geneva to join in the session. The sizable participation among civil society forced the Committee to convene outside its traditional location at the historic Palais Wilson building along Lake Geneva, to a conference room inside Palais des Nations. The experts on the Committee humorously reflected on the large number of reports from civil society they reviewed before the session, thanking those who wrote succinct executive summaries.

CERD Chairperson Jose Francisco Cali Tzay from Guatemala, the first indigenous expert to serve on the UN human rights body, opened the session by thanking the U.S for its commitment to meaningfully participating in the dialogue, as evidenced by the large high-level delegation in attendance. His statements were later followed by the report from the Mr. Noureddine Amir, the CERD expert charged with leading the discussion of the U.S. review. Among the issues raised by Mr. Amir were the racial disparities in the treatment of minority youth in the criminal justice system, as well as measures passed in eight States against the use of affirmative action in school admissions, citing statistics reflected in HRA's written submission.

While the large number of participating civil society groups reflected the importance of engaging in the review, the numerous questions posed by the experts addressing various concerns did not allow time for a meaningful interactive dialogue between the delegation and the Committee members. Nonetheless, CERD's Concluding Observations, the Committee's final report showcasing positive practices, concerns and recommendations, offered strong language to the U.S. Government with regards to commitments under ICERD. The Observations noted with concern the two issues raised by HRA: racial disparities in the juvenile justice system, and the increasing restrictions on affirmative action following the Supreme Court's decision in Schuette (discussed in the article that follows). The Observations also urged the Government to end discriminatory practices and apply special measures in line with its treaty obligations to reverse such disparities (CERD/C/USA/CO/7-9).

HRA Activities at the UN

By Connie de la Vega

This summer, Human Rights Advocates submitted Shadow Reports regarding human rights in the United States to the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Human Rights Council. HRA member Claudio Marinucci attended the 26th and 27th sessions of the Human Rights Council. Following are summaries of the three shadow reports followed by a report by Claudio Marinucci regarding the topic of business and human rights.

Committee on the Elimination of Racial Discrimination (CERD)

HRA was joined by the Rocky Mountain Collective on Race, Place and Law (RPL), and the University of San Francisco School of Law (USF) Center for Law and Global Justice in the report to CERD regarding the U.S. compliance with the Convention on the Elimination of All Forms of Racial Discrimination. The HRA report addressed special measures (affirmative action) under Articles 1(4), 2, 5 and 7, and juvenile life without parole sentences (JLWOP) under Articles 1, 2, and 5 of the Convention. The report focused on the mandate under the treaty to take "special and concrete measures" in order to achieve equality of "human rights and fundamental freedoms."

While the United States has taken steps to end *de jure* discrimination, *de facto* discrimination persists. HRA's report focused on the effects of bans of affirmative action in California and Michigan which resulted in huge drops in minority enrollment in its universities and employment in certain professions. In Michigan, where the recent Supreme Court case of *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S.__ 2014) originated, there has been a drastic reduction in the enrollment of Black students since its affirmative action ban went into effect. The University of Michigan has seen a 30 percent reduction in Black enrollment since 2006, the year before the ban came into effect. The report also noted the recent case of *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) where the U.S. Supreme Court recently considered whether the University of Texas's use of race as one factor in its holistic approach to admissions was constitutional. The Court followed its decision in *Grutter v. Bollinger,* 539 U.S. 306 (2003), but adopted a more stringent test for when race-based admissions policies would be allowed. HRA urged

CERD to request that the U.S. report on what special measures it had undertaken to address the *de facto* discrimination that persists in the areas of education and employment as well as assess the impact of the recent U.S. Supreme Court decisions.

Regarding JLWOP, the report focused on the bias that results in the disproportionate use of this sentence on minority youth. The result of this bias at the national level has meant that Black youth "are serving life without parole at a rate that is ten times higher than that of White youth. While 23.3 percent of juveniles arrested on suspicion of killing a White person are African-American, African-American youth constitute 42.4 percent of those receiving juvenile life without parole sentences for this crime. White youth, in stark contrast, comprise 6.4 percent of those arrested on suspicion of killing an African-American, but only 3.6 percent of those serving juvenile life without parole sentences for such killings." (*Hill v. United States of America*, Case. No. 12.866, Petitioners' Observations & Responses Concerning the March 25, 2014 Hearing before the Inter-American Commission on Human Rights, pp. 9-14 (June 13, 2014). The report urged CERD to request that the U.S. continue to work towards legislative change at the federal level regarding the use of JLWOP as well as undertake programs to educate state legislators and policy makers regarding the international prohibition of life without parole sentences for juvenile offenders.

The CERD Concluding Observations issued on 29 August 2014 (CERD/C/USA/CO/7-9) noted that the U.S. is not in compliance with Article 1 of the Convention which requires State Parties to eliminate discrimination in all forms, expressed concern about the *Schuette* decision and state restrictions on affirmative action as well as a number of areas in which racial discrimination persists (¶ 7), such as disproportional arrests in the criminal justice system (¶ 20) and juvenile justice systems (¶ 21: disproportional rate of minorities arrested, prosecuted as adults, incarcerated, and sentenced to JLWOP).

Human Rights Committee

HRA was joined by the USF Center for Law and Global Justice in its report to the Human Rights Committee. The report covers the issues of private prisons, the death row phenomenon, the right to retroactive application of beneficial law as applied to the death penalty, juvenile life without parole sentences, the transfer of juveniles to adult court, life without parole sentences, and affirmative action in education. The following are summaries of those issues:

1. The fact that private companies are profiting from imprisonment creates a need for greater government transparency and vigilance against potential abuses. Private companies have an incentive for higher rates of imprisonment in order to maximize profit. In turn the facilities cut costs in order to create a greater profit margin at the expense of those held in detention.
2. The death row phenomenon occurs when people are sentenced to death and consequently spend long periods of time awaiting execution. Consequently, the permanent stress and rising fear leads to extreme psychological and physical harm, amounting to cruel, inhuman and degrading treatment. This is aggravated by poor and dehumanizing conditions and inhumane methods of executions used today. The Special Rapporteur on Torture's August 2012 report notes: "Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held." (UN General Assembly, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, August 9, 2012, A/67/279 at ¶43.)
3. Currently the law in the United States does not enshrine the right to retroactive application of a lighter penalty. Federal law prevents retroactive application of a law unless specifically mandated by the legislature. States have different approaches to retroactivity. Some have statutes that provide for retroactive amelioration, while others leave it to the discretion of the legislature.
4. The United States is the only country in the world that sentences juveniles to life without parole in practice and does so at a staggering rate: as of April, 2011, an estimated 2,594 juveniles were serving life without parole sentences across the country. (Connie de la Vega, Amanda Solter, Soo-Ryun Kwon, Dana Isaac, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* (2012) [hereinafter *Cruel and Unusual*]. Forty-two States in the U.S. allow juvenile life without parole sentences.(Id.) Before last year's Supreme Court decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which held that mandatory juvenile life without parole sentences are unconstitutional

cruel and unusual punishment, 26 of these States had mandatory juvenile life without parole for certain crimes. While *Miller* abolished mandatory juvenile life without parole sentences, it did not touch on discretionary juvenile life without parole, whether the decision was retroactive, or whether it applies to only to those limited range of sentences that are actually called "juvenile life without parole" and does not take into account other sentencing schemes which operate as *de facto* life without parole sentences for minors. *Miller* does not foreclose the possibility of sentencing a juvenile to extremely long sentences, such as 90 years, which amount to life sentences without meaningful review.

5. By virtue of the transfer to adult court, juveniles are subject to adult punishments and in nearly all states are incarcerated in adult institutions. Also, transfer to an adult court brings an adult sentence, which can include a sentence of life without parole in many states. This means that the age of the offender is also not considered at sentencing, and that a juvenile is *de facto* treated as an adult throughout the entire trial and sentencing process in violation of the ICCPR requirement. The United States remains one of only a handful of countries in the world where a juvenile remains a minor for all other legal purposes, but is treated as an adult in the criminal justice system.
6. The United States is one of only a handful of countries that uses life without parole (LWOP) sentences, and is by far the world's leader in the number of persons serving such a sentence. There are approximately 41,000 prisoners serving life without parole sentences in the U.S. (Ashley Nellis & Ryan S. King, The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America*, (2009) (this 41,000 figure also includes roughly 2,000 juveniles sentenced to LWOP). LWOP is mandatory upon conviction for at least one specified offense in 27 states. (Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, at 27.) The mandatory nature of LWOP in these states removes any discretion for judges or juries and deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court.
7. The report addressed issues similar to those addressed above in the report to CERD regarding affirmative action.

On 23 April 2014, the Human Rights Committee issued its Concluding Observations on the U.S. (CCPR/C/USA/CO/4.) The Concluding Observations included concern about racial disparities in the criminal justice system (¶ 6), various issues related to the use of the death penalty (¶ 8), and juvenile justice and JLWOP, including recommendations to abolish and prohibit JLWOP and the transfer of juveniles to adult courts (¶23).

UPR Report to Human Rights Council

HRA was joined by The Campaign for the Fair Sentencing of Youth and Human Rights Watch in its Universal Periodic Review (UPR) on the U.S. to the Human Rights Council.

The United States remains the only country in the world known to sentence children to life in prison without the possibility of release or parole—a sentence to die in prison. The Human Rights Council addressed this issue in its first review of the United States under the UPR in 2010. Recommendation 92.180, issued in 2011, is below:

> *"Incorporate in its legal system the possibility of granting parole to offenders under 18 sentenced to life imprisonment for murder (Switzerland); Renounce to life in prison without parole sentences for minors at the moment of the actions for which they were charged and introduce for those who have already been sentenced in these circumstances the possibility of a remission (Belgium); Prohibit sentencing of juvenile offenders under the age of 18 without the possibility of parole at the federal and state level (Austria); Cease application of life imprisonment without parole for juvenile offenders and to review all existing sentences to provide for a possibility of parole (Slovakia)."*

The United States had not adopted these earlier recommendations. Thus, the report summarized some positive recent developments with respect to this sentence, and updated the status of the various laws in the United States with respect to this sentence. In general, the report noted that while the permissibility of using the sentence has been narrowed, it is still allowed in most states and under the federal criminal justice system.

More specifically, the report updated the state laws and number of persons serving JLWOP following *Miller v. Alabama*, 132 S.Ct. 2455 (2012). It also

addressed the racial impact of the sentence and the issue of de facto sentences which are not covered by the *Miller* decision. The report urges the Human Rights Council to recommend to the United States that it accept the recommendations from the Council and the two treaty bodies and that it take steps to abolish the sentence of life without parole for child offenders at the federal level, and urge the states to do likewise, and encourage them to prevent the transfer of offenders younger than 18 to adult court. Furthermore, the report also includes a number of specific recommendations for reducing the use of the sentence including using financial incentives similar to those used to urge states to set the drinking age at 21 to urge states to raise the minimum age for life without parole sentences to 18. The Human Rights Council will review the U.S. under the UPR agenda next May.

Human Rights Council

Claudio Marinucci attended June 26th and September 27th sessions of the Human Rights Council. One of the topics of discussion of interest to HRA at the 26th session was that of transnational corporations and human rights. One side event of interest was "Transnational corporation and human rights: time has come for the Human Rights Council to adopt binding norms!" organized by Europe – Third World Center (CETIM)

The first speaker introduced the topic, stressing (a) the dramatic effects of extractive industries on indigenous peoples and (b) the responsibility of food corporations towards the right to adequate food and health, (c) the responsibility of transnational corporations (TNC) for massive human rights violations which undermine the principles of democracy, and (d) the efforts to create an international legally binding instrument to hold TNC accountable for human rights abuses. The speaker stressed that methods to address violations by the TNCs have proven to be ineffective at the national level and must be used along with treaties at the international level. Two days after this event, the Human Rights Council adopted a resolution that establishes an intergovernmental working group with the mandate to "elaborate an international legally binding instrument to regulate, in international law, the activities of transnational corporations and other business enterprises." A/HRC/26/9 ¶ 1(26 June 2014). Other speakers discussed cases of corporate violations in Colombia, Nigeria, Ecuador, El Salvador and the Occupied Territories.

UN Human Rights Committee Concerned About Haiti

By Nicole Phillips

In October, Human Rights Advocates participated in Haiti's review by the UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR). HRA joined a coalition of ten Haitian and international organizations that submitted six reports to the Committee ranging on issues from freedom of press, to the right to vote, to access to justice.

About a dozen representatives from Haitian human rights organizations attended Haiti's review in Geneva and met with Committee members about current ICCPR violations. The review was significant to this group of human rights defenders, as the Haitian government led by President Michel Martelly continued to descend toward political crisis in 2014. Legislative and municipal elections due in 2011 and 2012 continue to be delayed, concentrating power in the executive branch. Political opposition, anti-government protestors, human rights defenders, and journalists face violence, harassment and illegal arrests.

The Haitian groups were encouraged by the informative questions the Committee posed to the Government of Haiti during the review, as well as the concluding observations released last month (http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fHTI%2fCO%2f1&Lang=en). The observations expressed concern for the lack of judicial independence, long-overdue elections, an increase in firearm deaths by police officers, and threats and intimidation to human rights defenders, journalists and political opponents. In light of the recent death of former dictator Jean-Claude Duvalier, the Committee recommended the Haitian government continue with the prosecution against all persons responsible for violations committed during Duvalier's presidency and grant victims reparations.

The Committee addressed the more than 100,000 Haitians still living in internally displaced persons (IDP) camps since the January 12, 2010 earthquake, urging the government to guarantee that each displaced person receive a durable solution, and no one be evicted from a camp without an alternative for them and their families.

The Committee was also concerned about discrimination and an increase in violence against women and lesbian, gay, bisexual and transgender persons (LGBT). The Committee urged the government

to conduct gender-sensitivity training to reduce negative gender stereotypes. Courts were encouraged to recognize that medical certificates are not required to prosecute rape crimes; the testimony of a victim is sufficient to trigger a criminal investigation for rape.

The *Bureau des Avocats International* (BAI) and the Institute for Justice & Democracy in Haiti (IJDH) led the coalition of ten Haitian and international organizations, including HRA, which submitted six reports to the Human Rights Committee. These reports included: ICCPR violations in the context of the Cholera Epidemic in Haiti; the Plight of Restavèk (Child Domestic Servants); Freedom of Expression in Haiti: Violations of the Freedom of Press; Prison Conditions and Pre-Trial Detention in Haiti; the Right to Vote; and Access to Judicial Remedies. HRA signed on to three of the reports: the ICCPR violations in the context of the Cholera Epidemic in Haiti and Prison Conditions, the Plight of Restavèk, and Pre-Trial Detention in Haiti. The reports and other relevant information are available at http://www.ijdh.org/2014/09/topics/law-justice/reports-sent-to-un-human-rights-committee/.

Haitian groups hope that the Haitian government heeds these recommendations from the Committee. In press releases recently issued in Haiti, the groups said they would continue to document human rights abuses and file legal cases to force the government to respect Haitians' human rights.

Haitian Cholera Victims Request Access to Justice from UN and Haitian Government

By Nicole Phillips

The ongoing cholera epidemic in Haiti has killed more than 8,500 Haitians and infected more than 705,000 since the United Nations introduced the disease to Haiti in 2010. The organization's gross negligence caused the epidemic, and has resulted in grave violations of the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). As described in a report submitted to the Human Rights Committee for Haiti's review in October 2014, entitled ICCPR Violations in the Context of the Cholera Epidemic, which HRA joined, the failure of the Haitian Government to diligently pursue access to legal remedies for the cholera victims violates its obligations to ensure an effective remedy under Article 2, and has resulted in further violations of the right to life under Article 6.

(See, *ICCPR Violations in the Context of the Cholera Epidemic*, Institute for Justice and Democracy in Haiti *et al.*, Submission for the 112th Session of the United Nations Human Rights Committee, October 8 & 9, 2014 (Sept. 12, 2014) available at http://www.ijdh.org/wp-content/uploads/2014/09/HRC_Cholera_Sept-12.pdf.)

The UN's Introduction of Cholera to Haiti and Denial of Responsibility

Cholera appeared in Haiti for the first time in the nation's recorded history in October 2010, and has since developed into "one of the largest cholera epidemics in modern history," according to the Pan American Health Organization. Extensive scientific evidence, including a report from a panel of independent experts commissioned by the UN, has established that the UN introduced the disease through reckless management of the sanitation systems on a peacekeeping base, where the UN discharged raw sewage into Haiti's principal river system, upon which tens of thousands of Haitians rely as their primary source of water. Despite the UN's legal and moral responsibility to remedy the situation, the organization has consistently denied responsibility and refused compensation to victims.

Several individuals within and affiliated with the UN have recognized the right of cholera victims to a legal remedy. In his recent report, UN Independent Expert on the Situation of Human Rights in Haiti Gustavo Gallón emphasized the need to "assure the Haitian people that the epidemic will be halted as soon as possible and that full reparation for damages will be provided." He further stated that "if necessary, those responsible for the tragedy should be punished, in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law." (Human Rights Council, *Report of the Independent Expert on the Situation of Human Rights in Haiti, Gustavo Gallón*, ¶ 77, U.N. Doc. A/HRC/25/71 (Feb. 7, 2014)). Former UN High Commissioner for Human Rights, Navanethem Pillay, announced that she "stand[s] by the call that...those who suffered as a result of that cholera be provided with compensation." (*UN Official Makes Rare Case For Compensation For Haiti Cholera Victims*, Huffington Post (Oct. 8, 2013)). Stephen Lewis, former Canadian Ambassador to the UN and Deputy Executive Director of UNICEF, said that in the case of Haiti and cholera, "the United Na-

tions has abandoned human rights, has spurned the rule of law, and has rendered democratic principles a travesty." (Stephen Lewis address in Raoul Wallenburg Lecture in Human Rights, McGill University Faculty of Law (Nov. 12, 2104)).

Violation of the Right to an Effective Remedy (Articles 2, 6)

The report submitted to the Committee by HRA and other organizations argues that the Haitian government's failure to demand justice on behalf of cholera victims contravenes its obligations under Article 2, which requires that it use all available means to ensure access to justice. The cholera epidemic constitutes a public health crisis and constitutes violations of the right to life under Article 6, for which Haitians have a right to a legal remedy. Additionally, the Status of Forces Agreement (SOFA) between the UN and the Government of Haiti accords immunity to the UN in Haitian courts, but in exchange for that immunity, requires the UN and the Haitian Government to establish a standing claims commission to resolve claims against the organization. The Haitian Government is thus obligated to ensure that victims have access to a remedy, either through the establishment of the standing claims commission or by negotiating a remedy from the UN.

To date, there is no evidence that the Haitian Government has taken any steps to establish the standing claims commission required by the SOFA or otherwise ensure that cholera victims have access to a legal remedy. Unfortunately, the Committee declines to take up this issue against the Haitian government.

Meanwhile, the UN has refused to provide access to an effective remedy to the cholera victims. When more than 5,000 victims filed claims with the UN seeking access to the standing claims commission, as well as remedies in the form of water and sanitation infrastructure, just compensation and a public acceptance of responsibility, the UN summarily dismissed the claims and subsequently refused to discuss out-of-court resolution of the claims, in violation of victims' right to a remedy.

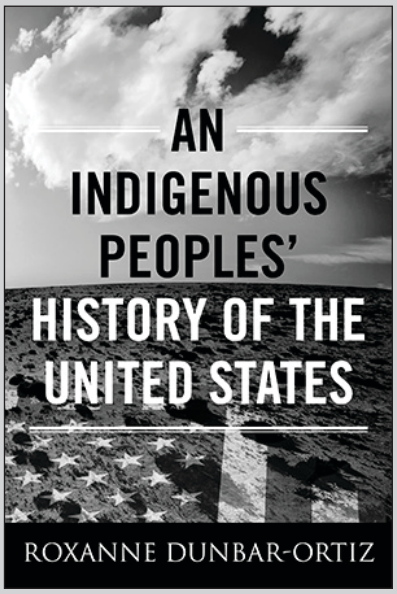
After the UN's dismissal, lawyers for cholera victims filed a lawsuit against the UN in New York Federal Court in October 2013. This past October, a judge heard oral arguments on the question of UN immunity. The UN Convention on Privileges and Immunities, Article 2, Section 2, provides the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." But lawyers for cholera victims argued that Article 2 is juxtaposed with Article 8, Section 29, which reads: "The United Nations shall make provisions for appropriate modes of settlement of… [d]isputes arising out of contracts or other disputes of private law character to which the United Nations is a party." Since the UN never offered a mode of settlement, it breached the contractual understanding of the Convention, thereby forfeiting immunity under Article 2. The U.S. attorneys' office appeared on behalf of the UN (the UN did not appear), arguing that even if the UN did violate Article 29, the Article 2 immunity clause is not conditioned on compliance with Article 29 and should be read separately.

While a number of cases have been brought in U.S. courts against the UN (mostly involving employment or basic contractual claims, all granting the UN immunity), this is the first case where the UN failed to provide the claimants any mode of settlement whatsoever – a quintessential breach of Article 29. Lawyers for the cholera victims are sensitive to the potential implications of piercing the Convention's immunity, but asked the court for a narrow ruling in this case based on the unprecedented and clear violation of Article 29.

We await the judge's decision, expected in the next few months, but for the time being UN advocacy continues. As Ambassador Lewis told an audience during a recent public speech, "the one thing we can collectively not permit is to allow the issue to go away."

HRA National Advisory Board member Roxanne Dunbar-Ortiz recently published a book entitled *An Indigenous Peoples' History of the United States* (Beacon Press, 2014).

Spanning 400 years of history, the book is described as a "classic bottom-up peoples' history" that "radically reframes US history and explodes the silences that have haunted our national narrative."



It is available from all major book sellers and direct from Beacon Press. We wish Roxanne every success and look forward to reading it ourselves.

HUMAN RIGHTS ADVOCATES FELLOWS

Human Rights Advocates awarded fellowships to two exceptional University of San Francisco School of Law graduates, Kendall Kozai and Rahman Popal, both former participants in the Frank C. Newman International Human Rights Law Clinic. Each fellow received a $2000 stipend to work with HRA partners this fall in San Francisco on human rights projects. Kendall Kozai helped the Institute for Justice & Democracy in Haiti (IJDH) prepare reports for Haiti's review in October before the UN Human Rights Committee. Rahman Popal analyzed U.S. immigration detention policies at Johnson & McDermed, LLP. They report on some of their work below.

By Kendall Kozai

This fall, I had the fortunate pleasure to work as a Human Rights Law Fellow with Human Rights Advocates (HRA) and the Institute for Justice & Democracy in Haiti (IJDH). In this role, I worked closely with HRA Board Member and IJDH Staff Attorney, Nicole Phillips, focusing primarily on civil and political issues currently facing Haitians, including access to justice, free and fair elections, women's rights, and human rights defenders.

On October 7-10, 2014, the Government of Haiti was reviewed by the UN Human Rights Committee in Geneva. During the Fellowship, I had the opportunity to draft and review reports submitted to the Committee on behalf of IJDH regarding obstacles confronting victims seeking access to judicial remedies in the areas of labor and employment, gender-based violence, extrajudicial forced evictions in internally displaced persons camps, cholera, and the prosecution of former dictator Jean Claude Duvalier. Access to justice in Haiti remains a serious issue as the Haitian justice system is susceptible to corruption and abuse by government officials. This weak justice system reinforces social, political, and economic exclusion that prevents women and Haiti's poor majority from asserting their fundamental rights.

I also worked on the right to vote under the ICCPR, an extremely important issue, as Haitians have not been able to vote since 2011. The current administration had previously committed to holding elections multiple times, most recently by October 26, 2014, only to postpone and ultimately not follow through. While elections are desperately needed to ensure accountability, they will only remedy Haiti's ongoing political crisis if they are run freely and fairly by a lawfully mandated electoral council. In an effort to curb some of the problems that marred Haiti's prior elections in 2010 and 2011, including delays, unconstitutional electoral councils, arbitrary exclusion of political parties, voter fraud and intimidation, and poorly managed voter registration, I worked to help develop recommendations urging the Government of Haiti to protect Haitians' right to vote and run for political office, and on several other ICCPR reports on prison conditions and pretrial detention, child labor and slavery (rèstaveks), freedom of press, and cholera.

Additionally, I worked on several other projects, including conducting research regarding domestic violence against women and LGBT communities in Haiti, an endemic and heavily under-reported problem. I helped track and report recent incidents of violence against human rights defenders, such as arrests, teargas, extrajudicial shootings, and other arbitrary detentions by police, as well as updates on the ongoing investigation into the murder of prominent human rights defender Daniel Dorsinvil and his wife, Girldy Larèche, in February 2014. Finally, I helped draft the 2014 Freedom House Report on Haiti regarding political rights, functioning of government, and civil liberties, including freedom of expression and belief, associational and organizational rights, the rule of law, and individual rights.

By Rahman Popal

As a post-graduate Human Rights Advocates Fellow, I was tasked with researching and analyzing U.S. immigration detention policies in light of international human rights law obligations. I entered this Fellowship unfamiliar with immigration law, but aware of the criticisms regarding our immigration system. Now, in my final month, I leave knowing firsthand of the failures of the current U.S. immigration regime—its convoluted laws, draconian policies and denial of basic human dignity to those caught in its web.

Early on in my Fellowship, my supervising attorney Mr. Jeremiah Johnson—founding partner of Johnson & McDermed, LLP and HRA Board Member—and I decided that the most practical way to achieve this objective would be to use international human rights law as a legal basis for challenging the

detention of immigrants within the immigration court system. Far from radical, but even further away from being ubiquitous, the use of international human rights law as an interpretive guide has been championed by those seeking to ensure U.S. compliance with international law for a long time. Following in the great tradition of current HRA members, alumni and other human rights lawyers spanning the country, I interjected principles of international human rights law (such as freedom from arbitrary detention) while directly representing non-citizen detainees who, in some cases, had been in government custody for over a year.

With Jeremiah Johnson's guidance, I was fortunate enough to have the opportunity to challenge the Government's practice of prolonged detention. I filed motions with the immigration court arguing that international human rights law prohibited the continued detention of migrants without the ability to seek review before a truly neutral arbitrator. My motions were granted and then I was able to represent three immigrant detainees in their bond redetermination hearings in court, two of which resulted in the release of the detainee. For the two cases that were successful, the immigration judge found that the Government had not met its burden to show that continued detention was justified. However, at the close of the second hearing the judge ruled against our request for release. I left dejected. More than the loss, though, the process afforded to my client was what saddened me. I felt that the immigration judge made a spectacle of the notion of a "neutral arbitrator."

While it is a known fact within the immigration field, some outside of it may not know that the immigration court is housed under the Department of Justice (DOJ) within the executive branch and not a separate branch of the government. With the detainee on the stand, the immigration judge presiding over the hearing attacked my client and his character for truthfulness. But, she didn't just end her assault there. She attacked my client's family, accusing them of harboring an illegal immigrant and said that she wished they were in court because she suspected them of violating the law. A man that had been belittled, shackled, forced to abandon his children and wife and subject to months of detention was expected to answer not only for his own mistakes, but somehow make excuses for actions that any loving wife and mother would take. This man escaped persecution to seek protection in the United States and yet a judge that is supposed to symbolize impartiality wanted to make a case out of him. I was never able to ask him, but I suspect he felt shame, embarrassment, discomfort and a sense that he was being misjudged during that hearing.

President Obama recently announced an Executive Order that will have the effect of granting temporary relief to many immigrants. While many immigration reform-advocates champion this effort, human rights advocates must not forget the thousands of detained migrants denied an opportunity to an individualized hearing before a neutral arbitrator to argue for their release. And while this new executive order may provide temporary relief to some, what is truly needed is human rights for all.

Human Rights Advocates is accepting nominations for the Board of Directors. The Board will be elected at the Spring Annual meeting at the University of San Francisco School of Law. Board meetings are held once a month in San Francisco. If you would like to apply, please contact Julianne Cartwright Traylor at jtraylor@igc.org by January 23, 2015.

Your contributions are greatly appreciated by HRA!

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P.O. Box 5675
Berkeley
CA 94705

www.humanrightsadvocates.org

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