Human Rights Advocates

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HRA's Fall Educational Event on the United States, Racial Discrimination, and the United Nations

By Jeremiah Johnson

Human Rights Advocates' Annual Educational Event this year, which was co-sponsored with the Women's Institute for Leadership Development for Human Rights, presented a panel discussion by Alison Parker, Senior Researcher for Human Rights Watch, and HRA Board Members Connie de la Vega, Jeremiah Johnson and Kristina Zinnen, about the U.S. failure to prevent racism in its policies on affirmative action, juvenile sentencing, immigration, and workers' rights. The United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD) Committee is expected to address these issues and others during their review of U.S. compliance with the treaty in Geneva in February 2008. HRA Board President Julianne Cartwright Traylor moderated the panel discussion.

Professor Connie de la Vega (Professor of Law and Academic Director of International Programs at USF and a Member of HRA's Board of Directors) explained that while the U.S. has taken steps in the last half century to eliminate *de jure* discrimination, *de facto* and structural racial discrimination continue in education, employment, criminal justice, health care, and political participation. In many instances, local bodies and public schools have been prevented from attempting to address *de facto* segregation unless there has been specific discrimination or there is an attempt to attain diversity. CERD encourages affirmative action as special measures to secure adequate advancement of certain racial or ethnic groups or individuals.

Professor de la Vega also discussed her work with Michelle Leighton (Director of International Programs of the Center for Law and Global Justice at USF, Co-Founder of the Natural Heritage Institute and Member of HRA's National Advisory Board) on preparing a comprehensive report on the countries worldwide that would allow juvenile life without the possibility of parole (LWOP) sentencing, a sentence which equates to death in prison for the juvenile. The U.S. is the only violator – with 2,381 juveniles sentenced to LWOP. In the past, it was reported that three other countries had a total of 12. Through HRA's work last Fall, those other countries changed or clarified their law so that all child offenders are allowed parole review. In the U.S., African American and Latino juveniles are disproportionately sentenced to LWOP, compared to white juveniles who have committed equivalent crimes.

Ms. Leighton on behalf of HRA will report to the CERD Committee, urging the U.S. to undertake a method for gathering data on JLWOP sentences. With such data, the U.S. should develop a plan for ending the imposition of the sentence altogether that violates both treaties and the practice of nations.

Jeremiah Johnson (Partner at Reeves and Associates and Member of HRA's Board of Directors) and Allison Parker (Senior Researcher for Human Rights Watch) addressed CERD and immigration. Recognizing the increasing discrimination and mistreatment suffered by non-citizens because of their race or national origin, the CERD Committee recently clarified that Article 5 of CERD protects rights enunciated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

Mr. Johnson addressed the rise of vigilantism and violation of human rights along the U.S. border.

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Hundreds of migrants die due to dehydration and anti-immigrant violence along the U.S.-Mexico border each year. The U.S. is obligated under CERD to provide the same protection for the health and safety of non-citizens as it would any of its citizens. Similarly, recent sweeping raids within immigrant communities, differentiating between citizens and non-citizens using skin color and use of Spanish language, violate non-citizens' human rights and are at odds with U.S. obligations under CERD.

Ms. Parker discussed the devastating effect that the U.S. criminal deportation policy has on family members, especially children. Since the 1996 Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), mandating deportation for numerous non-violent offenses, 1.6 million spouses and children have been separated. Often the deported family member was the sole breadwinner of the family, leaving the spouse and children, often U.S. citizens themselves, without their loved one or a source of income. There have been over 672,000 deportations since 1996. In 2005, 64% of the deportations were for non-violent offenses.

Under several international treaties, including CERD, the right to family life requires procedural protection. The U.S. immigration and deportation procedures do not provide any protection to family life, including the family life of citizen children and spouses.

For more information on U.S. deportation policy and the right to family life, see Human Rights Watch's July 2007 report, written by Alison Parker, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, which is available online at *http://hrw.org/reports/2007/us0707/us0707web.pdf* .

Concluding the presentation was Kristina Zinnen (Associate at Weinberg, Roger and Rosenfeld and Member of HRA's Board of Directors), discussing *Hoffman Plastics* and its aftermath. In a 2002 case referred to as *Hoffman Plastics*, the U.S. Supreme Court held that the traditional back pay remedy for violating a worker's rights under the National Labor Relations Act (NLRA) was foreclosed to undocumented workers by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986. *Hoffman Plastics Compounds, Inc., v. National Labor Relations Board, 535 U.S. 137 (2002)*. Some employers have attempted to use Hoffman Plastics to deter migrants from asserting their rights. Other employers have attempted to use Hoffman Plastics to prevent undocumented migrants from voting in union elections. The result has been an increase in labor rights violations of migrant workers in violation of U.S. obligations under CERD.

HRA's Fall Educational Event was held on October 22, 2007, at the University of San Francisco, School of Law. For more information on HRA's report on the U.S. to the CERD Committee, see Kristina Zinnen's article that follows. HRA's report is available online at *http://www.humanrightsadvocates.org/images/CERD_Report_HRA_Final.doc*.

Human Rights Advocates Submits Its Report on the U.S. to the CERD Committee

By Kristina Zinnen

In October 2007, HRA and Equal Justice Society submitted a report on the U.S.'s compliance with the to the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD). The CERD Committee will review the U.S. government's compliance in Geneva on February 21 and 22 during its 72nd Session.

HRA's report addressed three issues related to the second report the U.S. submitted to the CERD Committee in 2007: (1) the requirements of special measures or affirmative action, (2) the rights of immigrants/non-citizens, and (3) the application of life sentences for persons under 18 years of age at the time they committed their crime.

Special Measures/Affirmative Action – Articles 1(4), 2, 5, and 7

While the U.S. has taken steps in the last half century to eliminate *de jure* discrimination in America, *de facto* and structural racial discrimination continue. Extreme racial disparities in education, employment, criminal justice, health care, and political participation persist. Significant social science research has shown that this discrimination is the result of unconscious or implicit bias. CERD Articles 1(4) and 2 require State Parties to take affirmative steps to establish special measures aimed at prohibiting and preventing racial discrimination, commonly known in the U.S. as "affirmative action." Committee jurisprudence suggests that CERD's affirmative measures are mandatory.

Backlash against corrective measures have developed at both the federal and state level. The U.S. government filed an *amicus* brief in support of the white parents in the Seattle case *Parents Involved v. Seattle School District No. 1*, challenging the district's affirmative

action plans rather than supporting the school district. *Parents Involved v. Seattle School District No. 1*, 551 U.S. ___ (2007). In 1996, California voters passed Proposition 209, a measure that prohibited affirmative action in public institutions. Washington, Texas, Florida and, most recently Michigan, all followed suit, and similar initiatives are presently being pushed in Missouri, Colorado, Oklahoma, Arizona, and Nebraska in the November 2008 elections.

The structural inequalities that have characterized the American public school system not only result in educational disparities, but they also have contributed to psychological societal bias toward certain race groups. This bias often materializes in the form of discriminatory hiring practices. Statistical evidence demonstrates the huge disparities in employment by race. As the stark educational and employment statistics make clear, state legislatures and the federal government are failing to act to remedy systematic segregation. As evidenced by the *Seattle* case, in many instances, when local bodies and public schools attempt to address *de facto* segregation they have been prohibited from doing so unless there has been specific discrimination or there is an attempt to attain diversity, a worthy goal but not one that is sufficient for addressing structural discrimination. This dismal lack of equality in the U.S. can start to be resolved through the implementation of the special measures as mandated by CERD.

As a result of the continuing segregation, lack of equality in the enjoyment of basic rights, and the existence of bias, HRA recommended in its report that the CERD Committee ask the U.S. to address the following questions: (1) How have the special measures that were reported to have taken helped to address the increasing segregation in education and in employment in certain professions across the United States and in particular states like California?; (2) What measures have been taken to address structural inequality in the United States?; (3) What steps has the United States taken to address actions taken by the states that prohibit special measures/affirmative action by local entities and schools of higher education, in violation of the obligations under CERD?; (4) What special measures have been undertaken to address both *de facto* as well as *de jure* discrimination?; and (5) What special measures has the United States undertaken to combat prejudices that lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnical groups as well as propagating the purposes of the UDHR and CERD, as required by Article 7?

Discrimination Against Noncitizens/Migrant Workers - Articles 1(2), 2, and 5

Since the terrorist attacks of 11 September 2001, migrants, due to their status as non-citizens in their host countries, have been used as scapegoats for societal ills, negatively stereotyped and unjustifiably linked with criminality. Low-skilled migrant workers have been forced to work long hours, live in poor conditions and remain separated from their families for long periods of time.

Non-citizens in the U.S. have been assaulted when crossing the dangerous desert along the U.S./Mexico border, denied equal access to judicial remedies when exploited by their employers, and racially profiled, harassed and arbitrarily detained by immigration authorities and law enforcement. The U.S. is failing in its obligations under CERD to address these human rights violations. U.S. immigration policy was amended in 2006 with the Secure Fence Act, 8 U.S.C. § 1101, which authorized an additional 850 miles of fencing along the U.S.-Mexico border. There have been more than 3,000 reported migrant deaths at the border since 1994. The U.S. failure to protect migrants crossing the border is a violation of Articles 2(1) and 5(b). The U.S. violates Article 5(b) by authorizing vigilante groups to operate outside the law, murder Mexican immigrants and escape punishment. U.S. authorities have done little to stop the violence.

In a 2002 case called *Hoffman Plastics v. National Labor Relations Board*, 535 U.S. 137 (2002), the United States Supreme Court held that the traditional back pay remedy for violating a worker's rights under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. were "foreclosed" to undocumented workers "by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986." Without financial incentive for employers not to violate the NLRA or for workers to report NLRA violations, however, the Supreme Court effectively eliminated any legal bargaining rights for undocumented workers while rewarding employers for violating both immigration and labor policy. The U.S. violates Articles 5(d) and 5(e) by effectively eliminating freedom of association rights and labor protections for non-citizen migrant workers. The U.S. failure to amend, rescind or nullify the *Hoffman* decision perpetuates racial and national origin discrimination in its national labor laws and violates Article 2(1).

As part of the Secure Boarder Initiative, Immigration Customs and Enforcement (ICE) is currently conducting raids into immigrant communities and de-

taining undocumented non-citizens under a program known as Operation Return to Sender. It is well established that the right to liberty is a fundamental human right to be enjoyed by citizens and non-citizens alike. HRA is concerned that recent U.S. immigration raids violate non-citizen's human rights and are at odds with U.S. obligations under CERD Article 5.

HRA recommended to the CERD Committee that the U.S. must alter its border control policies to ensure that migrants' rights are protected, including (1) investigating, prosecuting, and punishing violators of migrants' right to life by private actors and law enforcement; and (2) educating law enforcement and communities on the causes of migration, the developmental benefits of transnational migration and the need to eliminate xenophobic misconceptions of migrant populations.

HRA also recommended that U.S. government officials: (1) enact legislation that would overturn the *Hoffman* decision and harmonize its national labour laws with Article 5, by guaranteeing full labour protections to all workers, regardless of citizenship status, and firmly prosecute violations of labour law with regard to migrant workers' conditions of work and right to freedom of association, including the right to form and join trade unions; (2) carry out impartial investigations into reports of human rights violations made by migrant workers in the U.S., and that migrants who claim to have been abused have access to reporting mechanisms; (3) take action against employers that hire migrants under false pretenses and subject them to conditions of slavery; and (4) include the rights of migrants as a priority in trade negotiations.

Lastly HRA recommended that the U.S. adopt and pursue a human rights approach to immigration policy. The U.S. should refrain from using race-based criteria or distinctions among nationalities in immigration enforcement contexts. The U.S. should affirm its human rights obligations under CERD and refrain from sweeping immigration raids resulting in mass detention of non-citizens.

Juvenile Life Sentences – Article 5(a)

Youth of color in the U.S. are sentenced to and incarcerated in juvenile detention facilities and adult prisons in far greater numbers than white youth and far above their demographic representation. Of all minorities, African-Americans are particularly disadvantaged in the sentencing process, most egregiously in receiving the harshest sentence possible, to die in prison. Minority youth regularly receive more severe sentencing than White youth across all types of crime categories adjudicated in juvenile court. On a state-by-state basis, the racial disparity in sentencing within the juvenile justice systems is startling. Youth of color are also held in custody and prosecuted "as adults" in criminal courts more often than White youth and given "adult" sentences. This is compounded by the significant racial disparity in the youths receiving the toughest adult sentences.

The U.S. does not systematically collect and evaluate racial disparities for juvenile offenders serving the life without parole sentence. This means that the U.S. has no way of tracking discrimination in the issuing of LWOP even though it is the harshest sentence that can be given to child offenders and has become pervasive in some states. Failure of the U.S. to monitor and redress this discrimination is a violation of its CERD obligations. Moreover, as this information became public and the discrimination more widely exposed over the past several years, the U.S. government has done little to address the most serious discriminatory practices leading to this disparity. Even after passing the 2002 Juvenile Justice and Delinquency Act, the government does not ensure that racial disparity is comprehensively analyzed and effective action is taken by states to address the offending problems in their jurisdictions. Without such a systematic effort, the U.S. cannot effectively ensure the eradication of discrimination as required by the CERD.

In light of the racial impact that has been identified in relation to the sentencing of offenders under the age of 18 to life sentences without parole, HRA recommended to the CERD Committee that the United States should undertake a method for gathering data on those sentences and develop a plan for ending the imposition of the sentence altogether which violates both treaties and the practice of nations.

This following people contributed to the report: Professor Connie de la Vega, University of San Francisco School of Law; Michelle Leighton, Director of Human Rights Program, Center for Law and Global Justice, University of San Francisco School of Law; Conchita Lozano-Batista, Nicole Phillips, and Kristina Zinnen, of Weinberg, Roger and Rosenfeld; and Jeremiah Johnson of Reeves & Associates. The following students from the Frank C. Newman International Human Rights Clinic of the University of San Francisco also contributed to this report: Nicole Skibola, Danielle Tizol, Erika Dahlstrom, Kimberly Irish, Mary Johnson, and Jennifer Porter. To view the full report, please visit http://www.humanrightsadvocates.org/images/CERD_Report_HRA_Final.doc.

Thoughts from the USF Frank C. Newman International Human Rights Law Clinic – Memories of Geneva 2003 Revisited

*By Matthew Heaphy**

Despite its non-membership at the 59th Session of the Commission on Human Rights in 2003, the U.S. enlisted one of its seasoned diplomats to make the case for the Iraq war at the Commission. I vaguely remember a briefing for NGOs by the U.S. delegation in Geneva in April 2003, where for ten days Manish Daftari and I were making the case for strengthening the human rights norms against arbitrary detention under Agenda Item 11.

In one of the conference rooms in the Palais des Nations, U.S. delegates answered questions about various issues, including the U.S. government's unwillingness to recognize as fundamental economic and social rights. It was one of several memorable moments during my time at the Commission as a Frank C. Newman Intern. I knew from the International Human Rights course at USF that the U.S. had such a policy, but hearing it from the U.S. delegation made it real and a little depressing. After all, South Africa affirmed the right to housing – why not the U.S.?

This briefing came to my mind when I read the article "Not all conservatives hate the United Nations" in The Guardian in October 2007 by Allan Gerson who was part of the U.S. delegation, led by his mentor Jeane Kirkpatrick, to the 59th session. (The article is online at *http://www.guardian.co.uk/Iraq/Story/0,,2196968,00.html*). What's really sad is how a distinguished diplomat – the first woman to serve as U.S. Permanent Representative to the U.N. – could be used by the Bush Administration to try to justify the war in Iraq. Like many conservatives who lined up with the Bush Administration, Mr. Gerson reveals his own reservations as well as Ambassador Kirkpatrick's.

Mr. Gerson may have been among those answering our questions from their perch at the long elevated table at the front of the conference room. At one point, though, someone came in and whispered into the ear of one of the U.S. delegates. A moment later, one of the delegates interrupted the US-NGO discourse to announce that the U.S. had been greeted as liberators in Baghdad. I don't remember the exact images the delegate relayed, but there was talk of hugging soldiers and airborne flowers before the briefing got back on track.

As we left the briefing, Professor de la Vega caught Ambassador Kirkpatrick's attention to ask her about the unwillingness of the U.S. to ban the juvenile death penalty. Ambassador Kirkpatrick, who died in December 2006, responded that the U.S. government could not do anything about the juvenile death penalty because, under the U.S. Constitution, it is up to each state to decide. When I shared this memory with Professor de la Vega, as well as the Iraq liberator moment, she rightly pointed out that the U.S. will make whatever arguments it wants to justify what it does. Less than two years later, the U.S. Supreme Court barred the juvenile death penalty as unconstitutional.

**Matthew Heaphy is an HRA member and Deputy Convenor of the American NGO Coalition for the International Criminal Court, a program of the United Nations Association of the U.S.A. He is writing this article in his personal capacity.*

HRA Newsmakers

Reviews of Recent Publications from HRA Members

In September 2007, the University of Oklahoma Press released a new and revised edition of **Roxanne Dunbar-Ortiz's** *Roots of Resistance: A History of Land Tenure In New Mexico*. Ms. Dunbar-Ortiz is a National Advisory Board Member of HRA and a Professor Emerita of Ethnic Studies at California State University at Hayward.

Roots of Resistance, a classic study first published in 1980, has been revised and updated and contains a new foreword by Acoma Pueblo Indian poet and writer Simon J. Ortiz, a revised preface and introduction, a new final chapter, and an updated bibliographical essay. It is the only comprehensive book focusing on land grants and land tenure in New Mexico, including both Pueblo Indian lands and the Hispanic land grants. The book will interest anyone concerned with American Indian and Mexican American histories, environmental studies in the West, as well as the colonization of the Southwest, and particularly the

continued importance of land stewardship. This is a concise and clear treatment by a renowned scholar, writer, and activist.

Roots of Resistance: A History of Land Tenure in New Mexico
By Roxanne Dunbar-Ortiz
ISBN 978-0-8061-3833-6, University of Oklahoma Press

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The University of Pennsylavania Press (Penn Press) recently published *International Human Rights Law – An Introduction* by **David Weissbrodt**, Regents Professor and Fredrikson & Byron Professor of Law at the University of Minnesota and HRA National Advisory Board member and **Connie de la Vega**, Professor of Law and Director of the Frank C. Newman International Human Rights Law Clinic at the University of San Francisco and HRA Board Member.

A volume in the Pennsylvania Studies in Human Rights series, International Human Rights Law is a comprehensive introductory treatise, intended for all concerned about this critical area of international law, including students, lawyers, other advocates, teachers, and academics.

The book comprises three sections: an overview of the development of human rights as a domain of international law; a collection of brief summaries of each of the rights specified in the Universal Declaration of Human Rights and other critical human rights instruments; and a review of the national, regional, and international procedures for implementing human rights precepts.

The overview traces the history of human rights, from early philosophical and religious ideas and theories of natural law to modern formulations. The second section contains concise summaries of the substantive principles of and practices relevant to self-determination, equality, life, slavery, torture, fair trial, detention, privacy, health, food, housing, and clothing, as well as emerging rights such as sustainable development, environmental health, peace, and security from terrorism.

A final section describes U.N. human rights procedures (both Charter-based and treaty-based); criminal procedures; African, European, inter-American, and other regional systems; national institutions and processes, truth and reconciliation commissions, and nongovernmental organizations. Throughout, example cases are cited, and each chapter concludes with a list of the most useful print and web resources.

International Human Rights Law – An Introduction
By David Weissbrodt and Connie de la Vega
448 pages / Cloth 2007 | ISBN 978-0-8122-4032-0, University of Pennsylvania Press.

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In November 2007, the USF School of Law's Center for Law and Global Justice released a report entitled *Sentencing Our Children to Die in Prison*, co-authored by Michelle Leighton, Director of Human Rights Programs for the Center and an HRA National Advisory Board Member, and Professor Connie de la Vega. The Center's report is the most comprehensive of its kind. With at least 2,381 children sentenced to life without the possibility of parole in the United States, and seven such cases in reported in Israel, they were the only two countries continuing to impose the sentence. Since that report, Israel ha clarified that they allow parole review even for child offenders sentenced in the Occupied Territories.

The juvenile death penalty was eliminated in the U.S. in 2005 by the Supreme Court's ruling in *Roper v. Simmons*. In that decision, the court cited a brief authored by Professor Connie de la Vega, which pointed out that most countries prohibit the execution of criminals who were under 18 at the time of their crime.

The practice of sentencing juvenile offenders to die in prison by imposing life without parole has been abolished by the vast majority of countries in the world, yet thousands of children are serving the sentences in prisons across the U.S. The sentence violates customary law binding all nations, and is prohibited by the U.N. Convention on the Rights of the Child. This is the harshest sentence that can be given short of execution. By clarifying the law and facts surrounding the use of life sentences without parole for juvenile offenders, this new report highlights how alone the U.S. is as a violator of the prohibition against such sentences. Documentation of the abuse is but the first step in remedying that violation which helps to mobilize shame in the international community as well as in the U.S. so that steps can be taken to stop it.

According to the report, children of color in the U.S. are 10 times more likely to receive life without parole than white child offenders. In some states, including California, the rate is 20 to 1. California lawmakers in January 2008 considered a bill that would abolish the

practice. The California Supreme Court is also considering the case of a 14-year-old boy who is the youngest person ever to be given the LWOP sentence for a crime involving no physical injury to the victim.

The authors hope the report will raise awareness of the issue among the United Nations, individual governments, and the general public.

To read the full report, go to: *http://www.law.usfca.edu/home/CenterforLawandGlobalJustice/Juvenile%20LWOP.html*.

Human Rights Advocates is accepting nominations for the Board of Directors. The Board will be elected at the Spring Annual Meeting on April 22, 2008. Board meetings are held once a month in Berkeley. If you would like to apply, please contact Julianne Traylor at *jtraylor@igc.org* by March 1, 2008.

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