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DERIVING SUPPORT FROM INTERNATIONAL LAW FOR THE RIGHT TO COUNSEL IN CIVIL CASES

by SARAH PAOLETTI*

INTRODUCTION

Advocates seeking to pursue social change to advance the goals of justice for all, without regard for race, gender, national origin, sexual orientation or social class are beginning to look to international law and international human rights fora as a useful and sometimes powerful tool. I am pleased to have been invited to participate in the 23rd Annual Edward V. Sparer Symposium, Civil Gideon: Making the Case and to speak on a panel specifically devoted to the role of international and comparative law titled “The International Framework for Recognition of a Civil Right to Counsel,” and to contribute my comments to the Temple Political & Civil Rights Law Review.

Professor Raven Lidman provided a thorough review of the comparative law addressing the right to counsel in civil cases as a matter of right either by constitutional provision, statute, or through implementation of an international human rights treaty provision across the globe. My goal in this essay, mirroring the presentation I gave at the Symposium, is to highlight applicable provisions of international treaties and norms from which advocates in the United States may craft arguments supporting the right to counsel in civil proceedings under international law. I begin by outlining those provisions relating to the right to equal protection before the law and to a fair trial included in human rights treaties and declarations under both the United Nations and the Inter-American Human Rights systems. I will then look at how an argument for the right to counsel in civil cases may be crafted as a right embodied in the principle of equality and non-

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1. For example, in May 2006, 142 U.S. based organizations and non-profits coordinated in submitting a shadow report to the United Nations Human Rights Committee on U.S. (non)compliance with its obligations under the International Covenant on Civil and Political Rights. See also the Mission Statement for the Poor People's Economic Human Rights Campaign, available at http://www.economichumanrights.org/about/mission.html (“The Poor People’s Economic Human Rights Campaign is committed to unite the poor across color lines as the leadership base for a broad movement to abolish poverty. We work to accomplish this through advancing economic human rights as named in the Universal Declaration of Human Rights, such as the rights to food, housing, health, education, communication and a living wage.”).

discrimination. Beyond the scope of my comments here is the application of these international norms in United States courts, a subject Professor Beth Lyon eloquently and persuasively discussed to conclude our panel.

**RIGHT TO COUNSEL IN CIVIL CASES UNDER INTERNATIONAL TREATY LAW**

**A. Right to Equal Protection and a Fair Trial**

International treaty law, as with the U.S. Constitution, guarantees the right to equal protection of the law and the right to a fair trial.[^3] International law is silent, however, on the express question as to whether counsel must be provided to ensure a fair trial in civil cases.[^4] But silence does not mark the end of the inquiry. As discussed in greater detail in Professor Lidman’s article[^5], the right to counsel in civil cases in the European Union arose out of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a document, which similarly does not explicitly reference the right to counsel in civil cases.[^6] Instead, the European Court of Human Rights in *Airey v. Ireland*,[^7] determined the provision of counsel is necessary to achieve full recognition of the right to a fair trial.[^8]

[^3]: *Universal Declaration of Human Rights*, G.A. res. 217 A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR], Article 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”) and Article 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.”); *International Covenant on Civil and Political Rights* [hereinafter ICCPR], G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1977, ratified by the United States in 1992, Article 6(1) (“All persons shall be entitled to the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”); *American Declaration on the Rights and Duties of Man*, adopted in 1948, OAS Res. XXX, OAS Off. Rec. OEA/Ser.L/V/1.4 Rev. (1965), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser. L/VII.82, doc. 6 rev. 1 (1992) [hereinafter Am. Dec.], Art. 18 (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”).

[^4]: While silent on the right to counsel in civil cases, both the UDHR and the ICCPR elaborate upon protections that must be afforded defendants in criminal proceedings. See UDHR, Art. 14(3) (“In the determination of any criminal charge against him, everyone is entitled to the following minimum guarantees, in full equality: . . . (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”).

[^5]: Lidman, *supra* note 2, passim.


[^7]: *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 4, 15 (1979) (concluding that a litigant’s right to effective access to the courts may sometimes require the State to provide for the assistance of a lawyer).

[^8]: Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: “In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . .” *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 6, at art. 6.
Specifically, the court held the State has “an obligation to secure an effective right of access to the courts,” and such an obligation may require the state to provide legal counsel. The European Court’s analysis provides a useful framework for reviewing international norms and treaty provisions applicable to the United States and in crafting an argument that the right of counsel extends beyond criminal defendants.

The Universal Declaration of Human Rights (UDHR) is a comprehensive statement of human rights principles, the full realization of which all Member States to the United Nations shall strive to achieve. Among the core principles elaborated in the Declaration are: the right to equality before the law and the right to equal protection; the right to a fair hearing in the determination of rights; and to judicial recourse and an effective remedy when fundamental rights have been violated. Many of the “fundamental rights” encompassed in the Universal Declaration mirror the fundamental rights provided under the United States Constitution and throughout the United States legal system, such as: “the right to life, liberty and the security of person;” the right to be free from arbitrary interference with privacy, family, home, or correspondence; the right to be free from libel or slander; the right to marry and to equal rights during marriage and at dissolution; the right to own property; social security; the right to work and to

10. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR] (“The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . . .”).
11. See id. at art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”).
12. See id. at art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him.”).
13. See id. at art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).
14. In Maryland, the Public Justice Center determined that the right to counsel should attach when the case “implicate[s] the applicant’s fundamental rights or basic human needs. Such needs would include (but not necessarily be limited to) life-affecting matters such as child custody, the potential loss of housing, issues affecting access to health care, and employment matters that determine the applicant’s ability to earn a living.” John Nethercut, “This Issue Will Not Go Away: Continuing to Seek the Right to Counsel in Civil Cases,” 38 CLEARINGHOUSE REV. 481, 487 (2004).
15. G.A. Res. 217A (III), supra note 10, art. 3; U.S. CONST. amend. V.
16. G.A. Res. 217A (III), supra note 10, art. 12; U.S. CONST. amend. IV.
17. G.A. Res. 217A (III), supra note 10, art. 12; U.S. CONST. amend. I.
just and favorable work conditions, including equal pay for equal work;\(^{21}\) and the right to an education.\(^{22}\) When individuals seek to protect against the violation of those rights, or seek affirmatively to enforce those rights, they often do so through the legal system. Yet, when they cannot afford counsel and counsel is not provided, they are deprived, not just of their right to a fair hearing, judicial recourse, and an effective remedy, but also of the underlying rights that they rely on the legal system to guarantee.\(^{23}\)

While the Universal Declaration of Human Rights is not a treaty, and therefore arguably not binding on the United States,\(^{24}\) it serves as the foundation on which other international human rights documents have been built.\(^{25}\) Furthermore, many of the provisions articulated in the Declaration have attained the status of customary international law and therefore, the United States is bound to ensure their full protection.\(^{26}\) For example, the right to a fair hearing and equal protection before the law is found in numerous international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR).\(^{27}\) Specifically, Article 14 of the ICCPR obligates state parties to guarantee equal protection before the law, as well as a fair and public hearing “[i]n the determination . . . of . . . rights and obligations in a suit at law.”\(^{28}\) Provisions guaranteeing the right to equal protection of the law and to a fair hearing under international law are similar in

\(^{21}\) G.A. Res. 217 at Art. 23(1), (2); U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.


\(^{23}\) See Howard H. Dana Jr., Recommendation on Civil Right to Counsel, 122A ABA Presidential Task Force on Access to Civil Justice 1, 15 (August 2006), available at http://www.nlada.org/Civil%20Right%20to%20Counsel%20Resolution%20of%20the%20ABA%20Presidential%20Task%20Force%20on%20Access%20to%20Civil%20Justice (stating that “[r]eliable studies consistently show that 70-80% of the legal needs of the poor go unaddressed each year. These include problems that poor individuals face in obtaining the basic necessities of life: food, shelter, health care, protection from violence, and maintaining family stability.”). See also, Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (stating that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel”); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964) (acknowledging “Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . .”).

\(^{24}\) Minasse Haile, Comparing Human Rights in Two Ethiopian Constitutions: The Emperor’s and the “Republic’s” — Caculis Non Facit Monachum, 13 CARDOZO J. INT’L & COMP. L. 1, 26 (2005) (“[I]t is recognized that the Universal Declaration of Human Rights is not binding as a treaty.”).


\(^{28}\) ICCPR, supra note 3, at art. 14(1).
nature to the right to due process found in the United States Constitution. Following an analysis correlative to arguments made under United States law that due process mandates the provision of counsel to ensure a litigant the opportunity to fully participate in the legal proceedings, the right to a fair hearing and to equal protection under the law under the ICCPR has been read to grant individuals the right to legal representation where such representation is needed to achieve equal protection and a fair hearing.

The United Nations Human Rights Committee has repeatedly recognized the importance of ensuring the right to equal protection and a fair trial as more than a right in name only, but also a right in fact. In Currie v. Jamaica, the Committee undertook this question in considering the complaint's admissibility. It held that the inability of Anthony Currie, a Jamaican citizen on death row, to obtain legal counsel to pursue constitutional claims that arose out of, but were not directly a part of, his criminal prosecution interfered with his ability to exhaust those claims. The Committee noted: "The State party has an obligation . . . to make the remedies in the Constitutional Court addressing violations of fundamental rights available and effective." The Committee agreed with Mr. Currie that legal aid was essential to his ability to pursue effective remedies, which the State had an obligation to ensure, and deemed his petition admissible. Though falling short of stating a right to counsel in non-criminal proceedings, the Committee recognized the role that legal aid provides in ensuring an individual his right to an effective remedy.

In a subsequent communication filed against Equatorial Guinea, Olo Bahamonde brought a claim for numerous violations of the ICCPR, including government confiscation of his agricultural crops and expropriation of his land. Prior to filing with the Human Rights Committee, he had sought to have his claims heard in the domestic courts of Equatorial Guinea, but his claims were repeatedly

30. See, e.g., Andrew Scherer, Securing a Civil Right to Counsel: The Importance of Collaborating, 30 N.Y.U. REV. L. & SOC. CHANGE 675, 677 (stating that due process is one of the "sound constitutional underpinnings for a civil right to counsel").
33. Id. at ¶ 13.2 (conceding that the Covenant "does not contain an express obligation as such for a State to provide legal aid for individuals in all cases, but only . . . in the determination of any criminal charge where the interests of justice so require").
34. Id. at ¶ 6.
35. Id. at ¶ 13.4.
36. Id.
denied and he subsequently fled to Spain.\textsuperscript{38} The Human Rights Committee ruled in favor of Mr. Bahmonde despite the fact that he had been able to file demarches with the State, finding the executive branch’s exercise of control over the judiciary was “incompatible with the notion of an independent and impartial tribunal.”\textsuperscript{39} The Committee further reasoned:

The Committee observes that the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual’s attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1.\textsuperscript{40}

While the Human Rights Committee’s discussion was limited to the right to a fair hearing in the context of the independence of the judiciary, and did not address the right to counsel, its analysis followed that utilized in determining Mr. Currie’s right to proceed in the case discussed above. When considering whether the right to a fair trial and to an effective remedy has been met, the Committee weighed multiple factors to determine not just whether certain mechanisms are in place, but whether those mechanisms are working to guarantee the individual’s rights in fact.\textsuperscript{41} It is therefore reasonable to posture that if faced with the direct question of the right to counsel in a particular case, the Committee would reach the same result as the European Court did in \textit{Airey v. Ireland}, and would find a violation of Article 14 where the failure to provide counsel frustrates an individual’s right to meaningful access to judicial recourse and an effective remedy.\textsuperscript{42}

In addition to the \textit{Universal Declaration} and the ICCPR, human rights documents operating under the purview of the United Nations, advocates in the United States also have at their disposal the regional human rights instruments operating under the Inter-American System. By virtue of its membership in the Organization of American States (“OAS”) and its ratification of the Charter of the Organization of American States,\textsuperscript{43} the United States is obligated to respect and take affirmative measures in pursuit of the rights articulated in both the OAS Charter and in the American Declaration of the Rights and Duties of Man.\textsuperscript{44} With

\begin{itemize}
\item \textsuperscript{38} Id. at ¶ 1.2-1.2-3.9.4.
\item \textsuperscript{39} Id. at ¶ 9.4.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} See id. at ¶ 9.1 (concluding that in failing to bring author before a judge upon detention, the State failed to comply with its obligations under article 9, paragraph 3 of the Optional Protocol to the ICCPR).
\item \textsuperscript{42} The Human Rights Committee more recently stated, in its concluding observations on Lithuania’s compliance with the ICCPR, that “[t]he State party should ensure that Covenant rights are not restricted by legislation inconsistent with it and take all necessary steps to allow individuals to challenge the application of laws which affect their rights and freedoms under the Covenant in the courts.” Human Rights Comm., \textit{Report of the Human Rights Comm.}, vol.1, ¶ 166, A/53/40 (Sept. 15, 1998) (emphasis added).
\item \textsuperscript{44} American Declaration of the Rights and Duties of Man, OAS Res. XXX, OEA/Ser.L/V/114 Rev. (1965), reprinted in \textit{Basic Documents Pertaining to Human Rights in the Inter-American System}, OEA/Ser. L/VIII.82, doc. 6 rev. 1 (1992) [hereinafter Am. Decl.]. Although the American Declaration is
regard to the right to counsel, Article 45 of the Charter of the OAS specifically calls upon the member states to “dedicate every effort to the application of . . . adequate provision for all persons to have due legal aid in order to secure their rights.”45 And Article XVIII of the American Declaration further provides: “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts that, to his prejudice, violate any fundamental constitutional rights.”46 Though not explicitly requiring legal aid, it can be argued that such a mechanism is necessary to protect an individual from violations of fundamental rights.

As with the United Nations’ Human Rights Committee’s consideration of Anthony Currie’s communication, the Inter-American Court on Human Rights addressed the right to civil legal aid in the context of exhaustion of domestic remedies.47 The Inter-American Commission on Human Rights had sought an Advisory Opinion from the Inter-American Court on whether the exhaustion requirement applies to indigents unable to avail themselves of legal remedies within a country because of their economic circumstances.48 In considering this question, the court noted that it must give due consideration to other obligations contained in the American Convention.49 Specifically, the court looked at Article 1, which calls upon States Parties to “undertake to respect the rights and freedoms” contained in the Convention and to “ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of . . . economic status . . . or any other social condition.”50 The court also looked at Article 24, which guarantees all equality before the law and equal protection of the law, and Article 8, which grants the right to a hearing “with due guarantees . . . for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.”51 The Inter-American Court, calling attention to the provision of Article 1(1) prohibiting discrimination on account of economic status, among other grounds, held:

not a legally binding treaty, it has been held to be indirectly binding on OAS member states. See Melish, Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims, Orville Schelle Jr. Center for International Human Rights, Yale Law School, p. 10, citing to Inter-Am. Comm. H.R., Roach and Pinkerton cases, Res. 3/87, Case 9647 (U.S.), in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987, at 147, para. 48, OEA/Ser.L/V/II.71 Doc. 9 rev. 1 (1987). The United States has not ratified the American Convention on Human Rights, but to the extent that Convention enumerates principles provided for under the American Declaration, to which the United States is bound by virtue of its membership in the OAS, the United States may also be bound by the American Convention.

46. Am. Decl., supra note 44, art. XVIII.
48. Id. at ¶ 1, 2.1.
49. Id. at ¶ 21.
50. Id. at ¶ 21.
51. Id. at ¶ 21.
If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.\footnote{52}

The court acknowledged that the American Convention provides specific minimum guarantees under Article 8 only for the provision of counsel to criminal defendants, but went on to recognize that Article 8 also provides for “due guarantees” in a hearing to determine civil, labor, fiscal, or other matters, and noted that the circumstances and nature of the proceedings determine whether legal representation is necessary to meet that requirement.\footnote{53} The court fell short of holding that the Convention guarantees a legal right to counsel. However, it concluded that where an indigent person needs counsel to protect rights guaranteed by the Convention, the individual cannot be required to exhaust domestic remedies where economic circumstances make it impossible for him to do so.\footnote{54}

B. Principle of Equality and Non-Discrimination

In addition to arguments available to advocates under international human rights norms correlative to the Due Process arguments made under United States law, advocates may also examine the right to equality and non-discrimination under international human rights norms to further strengthen their claims. As noted above, the ICCPR, the UDHR and the OAS Charter, as well as other statements of international human rights norms, clearly provide that all persons are equal before the law and shall not be discriminated against — and the protected categories for examining discrimination are all-inclusive, including not only race, sex, religion, or national origin, but also language, political, or other opinion, social origin, property, birth, or other status.\footnote{55}

The principle of equality and non-discrimination applies on two different levels, both of which merit consideration here. The first is at the level of application of the laws of the State, such that a State must take affirmative steps to ensure that all persons within its jurisdiction are free from discrimination, and can be thought of as the international — and much more comprehensive version — of...
The Civil Rights Act.\textsuperscript{56} The Human Rights Committee has paid particular attention to both de jure and de facto discrimination in its reviews of State Parties’ compliance with the ICCPR, and has called on States to be proactive in addressing and remediating discrimination, and has acknowledged the important role that legal aid can play.\textsuperscript{57}

The second level of application is in the realization of the rights guaranteed under international law, such as — discussed above — the right to equal protection before the law, to a fair hearing, and to effective remedies. The case of \textit{Afo del Avellanal v. Peru}\textsuperscript{58} is instructional on where discrimination can both interfere with the underlying property right as well as on the right to a fair trial and effective remedy.\textsuperscript{59} Graciela Ato del Avellanal had sought to sue tenants for unpaid rent on two apartment buildings that she owned.\textsuperscript{60} Although a court found that she was in fact owed unpaid rent, that decision was overturned on procedural grounds: Article 168 of the Peruvian Civil Code provided that only the husband was permitted to represent matrimonial property before the courts.\textsuperscript{61} The Human Rights Committee found the Civil Code violated Ms. Ato del Avellanal’s right to equality before the courts, and discriminated on the ground of sex.\textsuperscript{62}

The United Nations Human Rights Committee has paid particular attention to situations where groups are discriminated against in their access to the judicial system, such as in Ms. Ato del Avellanal’s case, and its commentaries provide a useful departure point for developing an argument for the right to civil legal aid under international law.\textsuperscript{63} Specifically, with regard to Norway, the Committee noted the legal costs for the Sami people as a barrier to their full enjoyment of their property rights, stating that “high legal costs for the Sami are a particular concern

\begin{itemize}
\item[56.] 42 U.S.C. § 2000 et seq.
\item[57.] See, e.g., Human Rights Committee, \textit{Report of the Human Rights Committee}, ¶ 215, delivered to General Assembly, U.N. Doc. A/53/40 vol. I (Sept. 15, 1998) (“While welcoming the Decedent Estate Succession Act of 1997, under which a widow may inherit part of her deceased husband’s estate, the Committee would appreciate further information on the steps taken to ensure that widows are made aware of this right and that legal assistance be provided for their benefit.”); Human Rights Committee, \textit{Report of the Human Rights Committee}, ¶ 260 (recommending that Finnish authorities continue to “give priority to positive measures and to civil processes which are able to determine issues of compensation or other remedies, especially in cases of discrimination”).
\item[59.] Id. at ¶ 1.
\item[60.] Id. at ¶ 2.1.
\item[61.] Id.
\item[62.] Id. at ¶ 10.2.
\item[63.] Human Rights Committee, \textit{Report of the Human Rights Committee}, Annex VI, ¶ 18, delivered to General Assembly, U.N. Doc. A/55/40 vol. I (Dec. 1, 2000) (directing that “[s]tates parties should provide information to the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, states parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, \textit{Afo del Avellanal v. Peru}, Views of 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters.”) (emphasis added).
\end{itemize}
in the absence of satisfactory legal aid. Following the Committee’s rationale, advocates may look to arguments that the failure to provide legal aid results in unlawful discrimination against persons on the basis of their “social origin,” property and “other status,” thus furthering, in fact, the underlying discrimination the individuals are seeking to remedy.

As with the ICCPR, The International Convention on the Elimination of All Forms of Racial Discrimination (CED) also provides a framework through which advocates can craft arguments for civil legal aid based on the lack of true access for minorities in the judicial system. The Human Rights Committee, in its consideration of State compliance with CED, has found that guaranteeing access to the judicial system may serve as a means by which States can redress discrimination, and has held that States should make efforts to ensure de facto equal access to the courts.

Finally, in the Inter-American System, the Inter-American Court on Human Rights in its Advisory Opinion on the Political and Juridical Rights of Undocumented Migrants held that the principle of equality and nondiscrimination is a jus cogens principle and carries with it affirmative obligations of all States to ensure its respect. In elaborating the rights that undocumented workers should enjoy without discrimination, the Court noted “at times, undocumented migrant workers cannot even resort to the courts of justice to claim

64. Id. at ¶ 81 (expressing concern that “while legislative reform work in the field of Sami land and resource rights is in progress, traditional Sami means of livelihood, falling under article 27 of the Covenant, do not appear to enjoy full protection in relation to various forms of competing public and private uses of land. Lawsuits by private landowners leading to judicial prohibition of reindeer-herding and high legal costs for the Sami are a particular concern in the absence of satisfactory legal aid.”).

65. ICCPR. supra note 3, at Art. 2(1).


67. See id. at Art. 5 (“States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: the right to equal treatment before the tribunals and all other organs administering justice.”) (emphasis added); id. at Art. 6 (stating that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”) (emphasis added).

68. See Costa Rica. CERD. A/57/18 (2002) at ¶ 80 (“[T]he Committee expresses concern at information concerning the lack of equal access to the courts, particularly by minority and ethnic groups. The Committee encourages the State party to continue to make efforts to ensure de facto equal access to the courts to all persons, including members of minority and ethnic groups.”) (emphasis added). See also Czech Republic. CERD. ¶ 387, delivered to General Assembly, U.N. Doc. A/58/18 (August 22, 2003) (“The Committee is encouraged by the preparation of the new Act on Legal Aid, which will facilitate access to justice of victims of discrimination. However, it is concerned . . . . The Committee encourages the State party to establish promptly a legal aid system for alleged victims of racism.”).


70. Id. at ¶ 101.
their rights owing to their irregular situation. This should not occur... Similarly, it can reasonably be argued that those without the economic means to resort to justice cannot claim their rights owing to economic circumstances, and that this too should not occur.

CONCLUSION

In July 2006, the United Nations Human Rights Committee held hearings with the United States and members of Civil Society to review the United States' compliance with the ICCPR. In its concluding observations, the Human Rights Committee highlighted its concerns regarding a range of fundamental rights implicated under Articles 2 and 26 of the ICCPR, which guarantee non-discrimination in the implementation of rights guaranteed under the ICCPR, and right to equal treatment under the laws of the State respectively. Among its specific stated concerns were the disproportionate number of African-Americans who are homeless, de facto racial segregation in the public schools, racial profiling and racial disparities and discrimination in prosecuting and sentencing in the criminal justice system, employment discrimination on the basis of sexual orientation and gender, de facto discrimination against the poor, and in particular African-Americans, in the Hurricane Katrina rescue and reconstruction plans, and aboriginal and indigenous rights. While Civil Gideon was not addressed, the role legal aid can play in ensuring the realization of the right to non-discrimination and equal treatment under the law is clearly implicated, as it was in the cases and comments of the Human Rights Committee discussed above.

In 2007, the United States is expected to submit its report on compliance with the CERD. As advocates begin to formulate their responses, they should consider the role that civil legal aid could play in seeking redress for the violations they choose to highlight, and be explicit in their submissions about the need for Civil Gideon to effectuate the fundamental human rights guaranteed through CERD. It is an opportunity to seek an express statement from the Human Rights Committee on the issue of civil legal aid and its intersection with the right to non-discrimination. In addition, it serves as a valuable opportunity to clearly craft a right to counsel argument under international law in a way that supports the correlative arguments being made under state and federal law in the United States. That legal aid is

71. Id. at ¶ 159.
73. Id. at ¶ 22.
74. Id. at ¶ 23.
75. Id. at ¶ 24.
76. Id. at ¶ 25.
77. Id. at ¶ 28.
78. Article 40 Report, supra note 72, at ¶ 26.
79. Id. at ¶ 37.
necessary to ensure fundamental due process. International human rights law can provide both additional legal arguments and additional opportunities and pressure points for advancing the ultimate goal of achieving civil legal aid as a fundamental element of the right to equal protection and due process under the law.