

AMERICAN BAR ASSOCIATION
Directory of Law Governing Appointment of
Counsel in State Civil Proceedings

APPENDIX:
International Law Relating to
Appointment of Counsel in Civil Proceedings

Copyright © 2014 American Bar Association
All rights reserved.

Standing Committee on Legal Aid and Indigent Defendants

321 N. Clark Street

Chicago, IL 60610

Phone: 312-988-5765; FAX: 312-988-5483

http://www.americanbar.org/groups/legal_aid_indigent_defendants.html

The materials herein may be reproduced, in whole or in part, provided that such use is for informational, non-commercial purposes only and any copy of the materials or portion thereof acknowledges original publication by the American Bar Association and includes the title of the publication, the name of the author, and the legend "Copyright 2014 American Bar Association. Reprinted by permission." Requests to reproduce materials in any other manner should be addressed to: Copyrights and Contracts Department, American Bar Association, 321 N. Clark Street, Chicago, IL 60610; Phone: 312-988-6102; FAX: 312-988-6030; E-mail: copyright@abanet.org.

Appendix:

International Law Relating to Appointment of Counsel in Civil Proceedings*

The right to counsel in civil matters is a well-established human right, recognized by the international community and regional authorities as well as individual nations, especially where the civil matter involves fundamental rights and basic human needs. This appendix examines the standards set by the United Nations (“U.N.”) through U.N. declarations, treaties and their respective monitoring bodies, as well as the work of U.N. Special Rapporteurs and Independent Experts. It also explores the right to counsel in civil matters as addressed by regional human rights law and surveys the civil right to counsel as established in foreign domestic law.

I. International Authority for the Right to Civil Counsel

A. Universal Declaration of Human Rights

In 1948, the United Nations proclaimed the Universal Declaration of Human Rights (“UDHR”) as a common standard of achievement for all peoples and all nations.¹

The basic right to a fair trial is included among the procedural and substantive human rights articulated by the UDHR.² Article 10 extends that right to both civil and criminal cases, stating that “[e]veryone 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.”³ Earlier drafts of the UDHR were more specific in explicitly stating that everyone in both civil and criminal matters “shall have the right to consult with and to be represented by counsel.”⁴ Ultimately, however, the General Assembly of the United Nations adopted the more general language of the final version of Article 10, as the national delegations agreed that more detailed language should be included in a treaty rather than in the UDHR.⁵

* This Appendix was prepared by Katherine Radtke, Northeastern University School of Law (NUSL) Class of 2013, Gregory Dorchak, NUSL Class of 2014, Katherine Tirenzi, NUSL Class of 2016 and NUSL Professor Martha F. Davis.

¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

² *See id.*, art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (stating that all people are entitled to a “fair and public hearing”).

³ *Id.* (emphasis added).

⁴ David Weissbrodt, ARTICLES 8, 10, AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE RIGHT TO A FAIR TRIAL 13 (2001) (describing early drafts of the UDHR).

⁵ *Id.* at 14 (observing that India and the United Kingdom initially proposed the right to counsel language be omitted); *See also* David Weissbrodt & Mattias Hallendorff, *Travaux Préparatoires of the Fair Trial Provisions – Articles 8 to 11 – of the Universal Declaration of Human Rights*, 21 Hum. Rts. Q. 1061, 1071 (1999).

Although the UDHR is not a treaty with binding legal force, it is widely recognized as a fundamental statement of international human rights principles.⁶

B. United Nations Human Rights Treaties

Since the creation of the United Nations in 1945, a series of human rights treaties have developed the body of international human rights.⁷ There are nine core international human rights treaties, each of which has an established committee of experts charged with monitoring implementation of the treaty provisions by its States parties.⁸ States that choose to sign and ratify a treaty are bound by the treaty and must perform their obligations under the treaty in good faith.⁹

The International Covenant on Civil and Political Rights (“ICCPR”) and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) are among the treaties that the United States has signed and ratified. Both ICCPR and CERD have been construed by their respective U.N. monitoring bodies to encompass the right to civil counsel.¹⁰

Other treaties, which the United States has signed but not ratified, such as the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) have also been understood by their respective treaty bodies to implicate the right to counsel in certain civil matters. Although the United States is not bound by either treaty, ICESCR and CEDAW nevertheless provide valuable insight into international standards and norms with respect to the right to counsel in civil matters.

The following subsections explore not only the language of the above-mentioned treaties, but more importantly, the interpretation and application of the treaties by their respective monitoring bodies as related to the civil right to counsel.

i. International Covenant on Civil and Political Rights

In the late 1940s, concurrent with the drafting of the UDHR, the United Nations Commission on Human Rights began developing the “International Bill of Human Rights,”

⁶ Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *TOURO L. REV.* 147, 149 (2009).

⁷ *International Human Rights Law*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Jul. 10, 2014).

⁸ *Monitoring the core international human rights treaties*, Office of the United Nations High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last visited Jul. 10, 2014).

⁹ Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

¹⁰ Davis, *supra* n. 6, at 147.

consisting of the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).¹¹ The ICCPR and ICESCR were completed and adopted by the United Nations General Assembly in 1966, and entered into force on March 23, 1976¹² and January 3, 1976¹³ respectively.

The United States signed the ICCPR on October 5, 1977 and formally ratified the treaty on June 8, 1992.¹⁴ The United States has not ratified the ICESCR, which is discussed in more depth in subsection (iii) of this appendix below.

Article 2 of the ICCPR requires that State Parties undertake “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”¹⁵ The ICCPR specifically addresses fairness before courts and tribunals in determination of not only a criminal charge, but also in determination of other rights and obligations in a suit at law. Article 14(1) states that:

All persons shall be equal before 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.¹⁶

Although the final text of ICCPR does not explicitly address the right to counsel in civil matters, earlier drafts of the ICCPR made clear that the issue was encompassed by the treaty language.¹⁷

¹¹ *Id.* at 157.

¹² International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1495th plen. mtg., U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

¹³ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1495th plen. mtg., UN Doc. A/6316 (1966); 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].

¹⁴ The United States adopted specific reservations, understandings, and declarations when it ratified the ICCPR. For example, the United States declared that the treaty would not be “self-executing,” but rather would require implementation by the United States Congress. *International Covenant on Civil and Political Rights*, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jul. 10, 2014). These reservations, understandings, and declarations, however, do not impact the United States’ obligation to comply with the ICCPR; rather, they limit the ability of litigants to rely directly on the treaty in domestic litigation. *Davis, supra* n. 6, at 158.

¹⁵ ICCPR, art. 2, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1495th plen. mtg., U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

¹⁶ *Id.* at art. 14(1).

¹⁷ *Davis, supra* n. 6, at 159, *citing* David Weissbrodt, ARTICLES 8, 10, AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE RIGHT TO A FAIR TRIAL (2001).

The Human Rights Committee (“HRC”) is the body of independent experts charged with monitoring implementation of the ICCPR. The HRC reviews States’ periodic reports on their compliance with ICCPR, responds to individuals who allege that their rights have been violated by one of the States that has ratified the Optional Protocol to the ICCPR, and adopts General Comments interpreting the provisions of the Covenant.¹⁸

The HRC has interpreted the ICCPR as encompassing procedural fairness in civil adjudication, including the right to counsel in civil matters. In 1984, the HRC issued General Comment No. 13 on “Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14).”¹⁹ In that Comment, the HRC observed that “the reports of States parties fail to recognize that [A]rticle 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law.”²⁰ In 2007, the HRC replaced General Comment No. 13 with General Comment No. 32, which explains that access to administration of justice must effectively be guaranteed in *all* cases “to ensure that no individual is deprived in procedural terms, of his/her right to claim justice.”²¹ Furthermore, General Comment No. 32 recognizes that “[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”²² Thus, while Article 14 only explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3(d),²³ the HRC notes that “States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”²⁴

Beyond issuance of General Comments, the HRC has also emphasized the importance of offering legal assistance in civil cases during States parties’ reporting processes. For example, the HRC has inquired whether State parties make legal aid available in both civil and criminal

¹⁸ *Id.* at 161.

¹⁹ United Nations Human Rights Comm., *General Comment No. 13 Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)* (21st sess., 1984).

²⁰ *Id.* at ¶2.

²¹ United Nations Human Rights Comm., *General Comment No. 32 - Article 14: Right to equality before courts and tribunals and to a fair trial*, ¶9 (90th sess., 2007) U.N. Doc. CCPR/C/GC/32 (Aug. 27, 2007).

²² *Id.* at ¶10.

²³ ICCPR, art. 14(3)(d) states, “In determination of any criminal charge against him, everyone shall be 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 . . .” (emphasis added) ICCPR art. 14(3)(d), *supra* n.12.

²⁴ *Id.*

cases,²⁵ and has considered the availability of civil legal assistance as a factor in assessing a States' compliance with the ICCPR.²⁶

The HRC has expressed "satisfaction" concerning State parties' efforts to provide legal services "to persons of modest means at little or no cost,"²⁷ and has welcomed improvements in free legal aid schemes.²⁸ By the same token, the HRC has expressed concern where free civil aid is lacking and made recommendations to expand legal aid, particularly where the interests of justice so require.

Most recently, in 2014 the HRC issued concluding observations from its review of the United States' compliance with ICCPR. In these observations, the HRC expressed concern about the mandatory detention of some immigrants to the United States and recommended that the government "take measures to ensure that affected persons have access to legal representation."²⁹ The report went on to comment on the HRC's concerns regarding domestic violence in the United States. Here, too, the HRC recommended that the United States "take steps to improve the provision of ... legal representation for women victims of domestic violence."³⁰

The HRC has also noted the importance of the right to civil counsel when addressing other countries. For example, in 1998, the HRC commented that legal assistance should be provided for the benefit of widows seeking to inherit the estate of a deceased husband in Zimbabwe³¹ and in 2007, the HRC urged the Czech Republic to "[p]rovide legal aid for victims of discrimination"³² and Chile to make "legal aid available to workers to enable their complaints to be successfully heard."³³ More recently, in 2011, the HRC expressed concern with respect to

²⁵ In 1985, the HRC asked "whether legal aid [in Spain] was available in both civil and criminal cases." Annual Report of the Comm. to the General Assembly: 9th Report, Spain, ¶ 419, U.N. Doc. A/40/40 (1985). In 1985, the HRC also sought clarification "whether legal aid was provided for in both civil and criminal cases" in the United Kingdom. Annual Report of the Comm. to the General Assembly: 9th Report, United Kingdom, ¶ 561, U.N. Doc. A/40/40 (1985).

²⁶ Davis, *supra* n. 6, at 164.

²⁷ U.N. Report of the Human Rights Comm., Concluding Observations – CCPR – Ireland, ¶ 430, U.N. Doc. A/55/40 (2000).

²⁸ See U.N. Report of the Human Rights Comm., Concluding Observations – Italy, ¶¶ 271-90, CCPR/C/79/Add.37; A/49/40 (1994).

²⁹ U.N. Report of the Human Rights Comm., Concluding Observations – United States of America, ¶ 15, CCPR/C/USA/CO/4.

³⁰ U.N. Report of the Human Rights Comm., Concluding Observations – United States of America, ¶ 16, CCPR/C/USA/CO/4.

³¹ U.N. Report of the Human Rights Comm., Concluding Observations – Zimbabwe, ¶ 13, CCPR/C/79/Add.89 (1998).

³² U.N. Report of the Human Rights Comm., Concluding Observations – Czech Republic, ¶16, CCPR/C/CZE/CO/2 (2007).

³³ U.N. Report of the Human Rights Comm., Concluding Observations – Chile, ¶14, CCPR/C/CHL/CO/5 (2007).

the “inordinate delays in the dispensation of justice” in Jamaica; the HRC observed that “limited availability of legal aid services due to the shortage of lawyers...and the uncompetitive rates paid to legal counsel,” may be a factor, and that “the State party should enhance the availability of lawyers that provide legal services on a pro bono basis and continuously review the fee structure for legal aid services to keep these rates competitive.”³⁴ In 2011, the HRC also expressed concern that Norway’s “means-tested legal aid” failed to take into account the circumstances of applicants or the cost of the legal service being sought, and that legal aid was not available in certain categories of cases; the HRC recommended that Norway “[s]hould review its free legal aid scheme to provide for free legal assistance in any case where “the interests of justice so require.”³⁵

ii. Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) was adopted and opened for signature and ratification on December 21, 1965.³⁶ The United States became a signatory to CERD on September 28, 1966 and formally ratified CERD on October 21, 1994.³⁷ As with the ICCPR, by ratifying CERD, the United States agreed to become bound by the treaty and to perform its obligations under the treaty in good faith.³⁸

CERD addresses procedural fairness through the lens of equality and nondiscrimination.³⁹ States parties have an obligation to take affirmative steps to ensure that guarantees of fair procedure and adjudication are met. Article 5(a) of CERD requires States parties to undertake to prohibit and to eliminate racial discrimination in the enjoyment of “[t]he right to equal treatment before the tribunals and all other organs administering justice.”⁴⁰ Furthermore, with respect to remedies available to victims of discrimination, Article 6 provides 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

³⁴ U.N. Report of the Human Rights Comm., Concluding Observations – Jamaica, ¶124, CCPR/C/JAM/CO/3 (2011).

³⁵ U.N. Report of the Human Rights Comm., Concluding Observations – Norway, ¶16, CCPR/C/NOR/CO/6 (2011).

³⁶ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter CERD].

³⁷ See 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994).

³⁸ Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).

³⁹ Davis, *supra* n. 6, at 169.

⁴⁰ CERD, art. 5(a), *opened for signature* Dec. 21, 1965, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969).

the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.⁴¹

Articles 5 and 6 encompass civil matters, as these articles provide for fair treatment and effective remedies before *all* organs administering justice.

The United Nations Committee on the Elimination of Racial Discrimination (“CERD Committee”) monitors and reviews implementation of CERD by States parties. The CERD Committee examines reports submitted by State parties on how rights guaranteed under CERD are being implemented, and issues “concluding observations” which express the Committee’s concerns and provide recommendations concerning States parties’ implementation of CERD.⁴² Additionally the CERD Committee interprets the content of CERD’s human rights provisions through General Recommendations and publishes opinions on other related thematic issues.⁴³

The CERD Committee has explicitly addressed the right to counsel in civil matters, in several of its General Recommendations. In General Recommendation No. 29, the CERD Committee recommended that States parties “[t]ake the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights.”⁴⁴

In General Recommendation 31, the CERD Committee also made several recommendations to States parties in order to facilitate access to justice for victims of racism, addressing “the prevention of racial discrimination in the administration and functioning of the criminal justice system.” With respect to States parties’ obligation under Article 6 of CERD, to guarantee victims of discrimination the right to an effective remedy, the CERD Committee encouraged States parties to promote “institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation.”⁴⁵ Furthermore, “[i]n order to make it easier for the victims of acts of racism to bring actions in the courts,” the CERD Committee recommended “the steps to be taken should include . . . [g]ranteeing victims effective judicial cooperating and legal aid, including the assistance of counsel and an interpreter free of charge.”⁴⁶

⁴¹ *Id.* at art. 6.

⁴² *Committee on the Elimination of Racial Discrimination*, Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/cerd/> (last visited Jul. 10, 2012).

⁴³ *Id.*

⁴⁴ U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 29: Discrimination Based on Descent* ¶ 21 (61st sess., 2002) U.N. Doc. A/57/18 (2002).

⁴⁵ U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation No.31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System* ¶ 8 (60th sess., 2005) U.N. Doc. A/60/18 (2005).

⁴⁶ *Id.* at ¶ 17(b) (60th sess., 2005) U.N. Doc. A/60/18 (2005).

In its most recently issued General Recommendation No. 34 on “Racial discrimination against people of African descent,” the CERD Committee reaffirmed General Recommendation No. 31 by encouraging States parties to consider General Recommendation No. 31 “in assessing the impact of a county’s system of administration of justice...and pay particular attention to the measures...where they pertain to people of African descent.”⁴⁷ In particular, the CERD Committee recommended States parties “[t]ake all the necessary steps to secure equal access to the justice system for all people of African descent including by providing legal aid, facilitating individual or group claims, and encouraging non-governmental organizations to defend their rights.”⁴⁸

Beyond General Recommendations, the CERD Committee has also used States parties’ reporting processes to underscore the importance of offering civil legal aid. In evaluating States parties’ compliance with CERD, the CERD Committee has commented favorably on States parties’ efforts to provide and improve civil legal aid, expressed concern regarding the absence of free legal aid in certain civil matters, and made explicit recommendations to extend free legal aid in certain civil matters.

For example, in 2008, after reviewing the United States’ Report, the CERD Committee expressed concern regarding “the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5 (a)).” As such, the CERD Committee recommended that the United States “increas[e] its efforts to improve the quality of legal representation provided to indigent defendants and ensur[e] that public legal aid systems are adequately funded and supervised” and further, that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake.”⁴⁹

The CERD Committee has expressed similar concern with respect to other States parties’ failure to meet their obligations under CERD. In 2004, the Committee recommended that Madagascar “make it easier for victims to gain access to justice, in particular through the effective application of a system of legal aid.”⁵⁰ In its 2006 report on Botswana, the CERD Committee attributed the “difficulties experienced by poor people, many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts...to high

⁴⁷ U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 34 on racial discrimination against people of African descent - 2011* ¶ 34 (79th sess., 2011) U.N. Doc. CERD/C/GC/34 (2011).

⁴⁸ *Id.* at ¶ 35.

⁴⁹ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination – United States of America, ¶ 22, UN Doc. CERD/C/USA/CO/6 (2008).

⁵⁰ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination – Madagascar, ¶ 19, U.N. Doc. CERD/C/65/CO/4 (2004).

fees [and] the absence of legal aid in most cases”⁵¹ and recommended that legal aid be provided “especially to persons belonging to the most disadvantaged ethnic groups, to ensure their full access to justice.”⁵² In 2010, the CERD Committee found that land disputes implicating individuals’ substantive rights in Argentina required the use of free legal services, which the Committee recommended should be available and “accessible to the [indigenous communities] as a whole.”⁵³ In 2011, the CERD Committee expressed concern that Norway’s legislation concerning free civil aid does not cover cases of ethnic discrimination, and suggested that recommendations for free legal aid made by the Anti-Discrimination Ombudsman and Tribunal be placed on equal legal footing as recommendations for free legal aid made by the Parliamentary Ombudsman.⁵⁴ Most recently, in 2012 the CERD Committee made note of “the persistently low number of proceedings and convictions for racial discrimination despite many manifestations of racial or ethnic stereotypes” in Italy and recommended that Italy “raise awareness among the population, including the most vulnerable social groups, about legal and administrative remedies and increase free legal services for such groups.”⁵⁵

iii. International Covenant on Economic, Social and Cultural Rights

As mentioned above, the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) makes up the other half of the “International Bill of Human Rights” with the ICCPR. The United States signed the ICESCR on October 5, 1977,⁵⁶ but has not ratified the treaty. Although not bound by the ICESCR, the United States, as a signatory, is legally required to act in good faith not to defeat the object and purpose of the treaty.⁵⁷

The ICESCR does not explicitly address the right to counsel in civil matters, but the Committee on Economic, Social and Cultural Rights (ESCR Committee) has addressed the issue through interpretive general commentary. In 1977, the ESCR Committee issued General Comment No. 7 on “the right to adequate housing,” which outlined appropriate procedural protections necessary to ensure the maintenance of human rights in connection with forced

⁵¹ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination – Botswana, ¶ 14, U.N. Doc. CERD/C/BWA/CO/16 (2006).

⁵² *Id.*

⁵³ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination – Argentina, ¶ 21, U.N. Doc. CERD/C/ARG/CO/19-20 (2010).

⁵⁴ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination – Norway, ¶ 14, U.N. Doc. CERD/C/NOR/CO/19-20 (2011).

⁵⁵ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination – Italy, ¶ 25, U.N. Doc. CERD/C/ITA/CO/16-18 (2012).

⁵⁶ *International Covenant on Economic, Social and Cultural Rights*, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en (May 10, 2012).

⁵⁷ Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

evictions. In this context, the Committee explained that due process requires the “provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”⁵⁸

iv. The Convention on the Elimination of All Forms of Discrimination against Women

In 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).⁵⁹ CEDAW defines what constitutes discrimination against women and prescribes an agenda for national action to eliminate such discrimination.⁶⁰

As with the ICESCR, the United States has signed but not ratified CEDAW,⁶¹ and thus while the United States is not bound by the treaty, it must act in good faith not to defeat the treaty’s object and purpose.⁶²

CEDAW compels States to incorporate the principle of equality of men and women in the legal system. Article 2(c) states that “States Parties shall undertake “[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.” Furthermore, Article 15(1) asserts, “States Parties shall accord to women equality with men before the law.”

As with the above-mentioned treaties, CEDAW also has a monitoring body: the United Nations Committee on the Elimination of Discrimination Against Women (the “CEDAW Committee”). The CEDAW Committee monitors the progress of women in countries that are States parties by reviewing national reports submitted by States parties, and also by making General Recommendations on issues affecting women, which the CEDAW Committee believes need particular attention.⁶³

⁵⁸ U.N Human Rights Comm. – General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions: 20/05/97, ¶ 15, 16th Sess., U.N. Doc. E/1998/22, Annex IV (1997).

⁵⁹ Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S 13 (*entered into force* Sept. 3, 1981).

⁶⁰ Convention on the Elimination of All Forms of Discrimination Against Women: Text of the Convention, United Nations Division for the Advancement of Women, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (May 10, 2012)

⁶¹ The United States signed CEDAW on July 17, 1980, but the United States has not ratified the Convention. *Convention on the Elimination of All Forms of Discrimination against Women*, United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en (May 10, 2012).

⁶² Vienna Convention on the Law of Treaties, art. 18, *supra* n. 55.

⁶³ *Committee on the Elimination of Discrimination against Women*, United Nations Division for the Advancement of Women, <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (May 10, 2012).

In General Recommendation No. 21 on “equality in marriage and family relations,” the CEDAW Committee observed “[a] woman’s right to bring litigation is limited in some countries by law or by her access to legal advice and her ability to seek redress from the courts.”⁶⁴ More recently, in General Recommendation No. 28 on the “core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,” the CEDAW Committee called upon States parties to “invoke the principle of equality in support of complaints of acts of discrimination contrary to the Convention” and to “ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary. . . .” in order to assist women in pursuing remedies for discrimination.⁶⁵

C. Other United Nations Documents

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Role of Lawyers in 1990. Although they are not part of a treaty nor are they monitored by any international monitoring body, the Basic Principles establish accepted standards for provision of legal services. Among these standards, is the expectation that “[g]overnments shall ensure the provision of sufficient funding . . . for legal services to the poor . . . and other disadvantaged individuals.”⁶⁶

D. United Nations Special Procedures Mandate Holders: United Nations Special Rapporteurs and Independent Experts

Special Rapporteurs and Independent Experts are part of the Special Procedures of the United Nations Human Rights Council. The United Nations Human Rights Council uses Special Procedures to address thematic or country specific issues around the world.⁶⁷ As of January 2012, there are 45 Special Procedures, including 35 thematic mandates and 10 mandates related to specific countries or territories. The Human Rights Council entrusts Special Procedure mandates to individual experts or a working group of experts,⁶⁸ all of whom are

⁶⁴ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21 on Equality in marriage and family relations* ¶ 8 (13th sess., 1994).

⁶⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on The Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women* ¶ 34 (47th session, 2010).

⁶⁶ Davis, *supra* n. 6, at 176, *citing* Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Aug.27-Sept.7, 1990, U.N. Doc. A/CONF.144/28 Rev.1 at 118 (1990).

⁶⁷ *Special Procedures of the Human Rights Council*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (May 7, 2012).

⁶⁸ Office of the United Nations High Commissioner for Human Rights, *Human Right Fact Sheet No. 27: Seventeen frequently asked questions about the United Nations special rapporteurs* 5 (2001). The experts are accorded different titles, including “special rapporteur” or “independent expert.” The different titles are simply a reflection of political negotiations; they do not indicate a hierarchy nor are they an indication of the powers entrusted to the expert. *Id.* at 6.

referred to as “mandate-holders.” The human rights experts appointed by the Human Rights Council to carry out the mandates do not receive any financial reward from the United Nations.⁶⁹ While the experts may develop different approaches and methodologies to carry out their respective mandates, all experts report to intergovernmental bodies and “most experts research and study issues of concern, carry out country visits, receive and consider complaints from victims of human rights violations, and intervene with Governments on their behalf.”⁷⁰

i. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context

The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context (“Special Rapporteur on adequate housing”) is mandated “[t]o promote the full realization of adequate housing as a component of the right to an adequate standard of living,” “[t]o identify best practices as well as challenges and obstacles to the full realization of the right to adequate housing,” “[t]o give a particular emphasis to practical solutions,” “[t]o apply a gender perspective,” “[t]o facilitate the provision of technical assistance,” “[t]o work in close cooperation...with other special procedures special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies, the treaty bodies and regional human rights mechanisms,” and “[t]o submit a report on the implementation of the present resolution to the General Assembly and Council.”⁷¹

The Special Rapporteur on adequate housing has primarily addressed the right to civil legal aid in the context of forced evictions. In his 2004 annual report to the Commission on Human Rights, the Special Rapporteur on adequate housing focused on forced evictions as a priority issue. In this report, the Special Rapporteur cited to Resolution 1993/77 of the Commission on Human Rights, which states that the “practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing,” and cited to the Committee on Economic, Social, and Cultural Rights’ General Comment no. 7 to emphasize that “provision of legal remedies” and “provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts” are among the procedural protections and due process necessary to ensure that human rights are not violated in the course of forced evictions.⁷²

Several years later, in 2007, the Special Rapporteur published a set of “Basic principles and guidelines on development-based evictions and displacement,” which assert that “[a]ll persons threatened with or subject to forced evictions have the right to access to timely

⁶⁹ *Id.* at 8.

⁷⁰ *Id.*

⁷¹ Human Rights Council Res. 13/10, 13th sess. HRC, U.N. Doc. A/HRC/RES/6/27 (April 14, 2010).

⁷² U.N. Human Rights Comm. – General Comment No. 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions: 20/05/97, ¶ 15, 16th Sess. HRC, U.N. Doc. E/1998/22, Annex IV (1997).

remedy,” and “[a]ppropriate remedies include a fair hearing, access to legal counsel, legal aid”⁷³ The principles and guidelines call upon the state to compensate affected parties for costs required for legal assistance.⁷⁴

In 2011, the Special Rapporteur again turned to the issue of forced evictions, but within the context of the right to adequate housing in post-disaster settings; the Special Rapporteur emphasized that “[w]hen forced eviction has been proved (in a post-disaster setting), people should have access to remedies, including to a fair hearing, access to legal counsel”⁷⁵

Additionally, the Special Rapporteur has highlighted the impact that lack of legal aid in non-criminal matters has on women, in particular. In 2005, the Special Rapporteur focused on “homelessness and its causes and impacts, including on women, children, youth, indigenous peoples and people living with mental illness, from a human rights perspective.”⁷⁶ In this context, the Special Rapporteur observed that “women often lack the means to retain adequate legal counsel or access the courts to protect their personal interests” and that “[i]n jurisdictions offering some form of legal aid, this is too often restricted to criminal matters and fails to address family law, systematically disadvantaging women.”⁷⁷

ii. Special Rapporteur on violence against women, its causes and consequences

The Special Rapporteur on violence against women, its causes and consequences⁷⁸ (“Special Rapporteur on violence against women”) is mandated to seek and receive information

⁷³ U.N. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Annual Report: Implementation of General Assembly Resolution 60/251 of 15 March 2006, Entitled “Human Rights Council,” Annex 1: Basic Principles and Guidelines on Development-based Evictions and Displacement* ¶ 59, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari).

⁷⁴ *Id.* at ¶ 60.

⁷⁵ U.N. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, *Annual Rep. to General Assembly* ¶45, 66th sess. G.A., U.N. Doc. A/66/270 (Aug. 5, 2011) (by Raquel Rolnik).

⁷⁶ U.N. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, *Annual Rep. to Comm. on Human Rights*, 61st sess. CHR, U.N. Doc. E/CN.4/2005/48 (Mar. 3, 2005) (by Miloon Kothari).

⁷⁷ *Id.* at ¶47.

⁷⁸ The United Nations Commission on Human Rights appointed the first Special Rapporteur on violence against women, its causes and consequences in 1994 (Resolution 1994/45). The Commission on Human Rights extended the mandate in 2003 (Resolution 2003/45). The Special Rapporteur began reporting to the Human Rights Council in 2006 (Human Rights Council’s Decision 1/102). The Human Rights Council last renewed the Special Rapporteur’s mandate in 2013 (Resolution 23/25). *Special Rapporteur on violence against women, its causes and consequences*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx> (last visited Jul. 10, 2014).

on violence against women, its causes and consequences and to recommend measures to eliminate all forms of violence against women.⁷⁹

The Special Rapporteur on violence against women has explicitly recommended that states ensure legal assistance to victims of violence,⁸⁰ and stated “the obligation to provide adequate reparations involves ensuring the rights of women to access both criminal and civil remedies”⁸¹

In 1996, the Special Rapporteur on violence against women first recognized the challenges created by an absence of civil legal for victim-survivors of domestic violence; the Special Rapporteur on violence against women explained that “[s]ince legal aid is not available to individuals pressing civil claims, the victim-survivors of domestic violence must hire their own lawyers and cover all expenses themselves, the costs of which prohibit many women from pursuing justice.”⁸²

The Special Rapporteur on violence against women has acknowledged the role that CEDAW and other human rights instruments play in requiring states to take measures necessary to respect, promote and protect the rights of women, and to eliminate discrimination against women, including provision of legal services.⁸³ As such, in reviewing states’ compliance with their international obligations to eradicate violence against women, the Special Rapporteur on violence against women has specifically asked states for information regarding the legal resources available to victims of such violence.⁸⁴

⁷⁹ *Special Rapporteur on violence against women, its causes and consequences*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx> (last visited Jul. 10, 2014).

⁸⁰ See U.N. Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights: *International, regional and national developments in the area of violence against women (1994-2003)* ¶190, 59th sess. CHR, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003) (“States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including . . . legal aid. . . .”); U.N. Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights: *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women* ¶183, 62nd sess. CHR, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) (“States must ensure that quality physical and psychological health services and legal assistance are provided to victims of violence.”).

⁸¹ *Id.* at ¶184.

⁸² U.N. Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights ¶135, 52nd sess. CHR, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (by Ms. Radhika Coomaraswamy).

⁸³ U.N. Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights, Addendum 1: *International, regional and national developments in the area of violence against women (1994-2003)* ¶156, 59th sess. CHR, U.N. Doc. E/CN.4/2003/75/Add.1 (Feb. 27, 2003) (by Ms. Radhika Coomaraswamy).

⁸⁴ See “Working Methods” section of U.N. Special Rapporteur on violence against women, its causes and consequences, Annual Rep. to Comm. on Human Rights: *Cultural practices in the family that are violent towards women* at 5, 58th sess. CHR, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002) (by Ms. Radhika Coomaraswamy).

iii. Special Rapporteur on the human rights of migrants

The Special Rapporteur on the human rights of migrants⁸⁵ is mandated to “examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants.”⁸⁶ The Special Rapporteur on the human rights of migrants gathers information from relevant sources, formulates appropriate recommendations to prevent and remedy violations of human rights of migrants (with a particular emphasis on practical solutions), and promotes the effective application of relevant international standards.⁸⁷ The Special Rapporteur on the Human Rights of Migrants reports regularly to the Human Rights Council, and to the General Assembly at the request of the Council or the Assembly.⁸⁸ The mandate of the Special Rapporteur on the Human Rights of Migrants covers all countries, regardless of whether a country has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990.⁸⁹

The Special Rapporteur on the human rights of migrants has focused on access to civil legal aid in the context of human trafficking, administrative detention, deportation, and “age appropriate” due process of law.

With respect to victims of trafficking, the Special Rapporteur on human rights of migrants has expressed concern that the needs of victims of trafficking for legal assistance is often not taken into account by States.⁹⁰ In an effort to safeguard the human rights of victims of human trafficking, the Special Rapporteur on human rights of migrants has recommended that States should take measures including “providing trafficked persons with legal assistance.”⁹¹

⁸⁵ The Commission on Human Rights created the mandate of the Special Rapporteur on the Human Rights of Migrants in 1999. The Commission on Human rights extended the in 2002 (resolution 2002/62) and 2005 resolution 2005/47). Since then, the Human Rights Council extended the mandate in 2008 (resolution 8/10). The Human Rights Council renewed the mandate in 2011 (resolution 17/12) and 2014 (resolution 26/19). *Special Rapporteur on the human rights of migrants*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> (last visited Jul. 10, 2014).

⁸⁶ *Special Rapporteur on the human rights of migrants*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> (last visited Jul. 10, 2014).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* This means, for example, that the mandate of the Special Rapporteur on the Human Rights of Migrants covers the United States, despite the fact that the United States has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtldsg_no=IV-13&chapter=4&lang=en (last visited Jul. 10, 2014).

⁹⁰ U.N. Special Rapporteur on the human rights of migrants, Annual Rep. to the General Assembly ¶ 22, 58th sess. G.A., U.N. Doc. A/58/275 (Aug. 12, 2003) (by Gabriela Rodríguez Pizarro).

⁹¹ U.N. Special Rapporteur on the human rights of migrants, Annual Rep. to the Comm. on Human Rights ¶ 44, 61st sess. CHR, U.N. Doc. E/CN.4/2005/85 (Dec. 27, 2004) (by Gabriela Rodríguez Pizarro).

In the context of the administrative detention of migrants, the Special Rapporteur on human rights of migrants has observed that when a migrant must take the initiative to appeal for judicial review of his administrative detention, a lack of access to free legal counsel negatively impacts the detainee's ability to understand and exercise this right; furthermore, in the absence of counsel, migrants can feel intimidated and obliged to sign papers without understanding their content.⁹² The Special Rapporteur on human rights of migrants has expressed concern that "[u]nder the legislation of a number of countries no free legal services are available for administrative proceedings," and recommended that "[m]igrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings."⁹³

Between April 30th and May 18th 2007, the Special Rapporteur on the human rights of migrants visited the United States, at the invitation of the Government, in order to examine and report on the status of the human rights of migrants living in the United States.⁹⁴ Based on this visit to the United States, the Special Rapporteur on the human rights of migrants expressed concern regarding the United States' detention and deportation procedures, especially in light of the United States' obligations under the International Covenant on Civil and Political Rights,⁹⁵ as well as the United States' obligations under the American Convention on Human Rights.⁹⁶

The Special Rapporteur stressed that "international conventions require that the decision to detain someone should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual," and that denial of detainees' access to legal

⁹² U.N. Special Rapporteur on the human rights of migrants, Annual Rep. to the Human Rights Council, ¶146, 7th sess. HRC, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008) (by Jorge Bustamante); *See also* U.N. Special Rapporteur on the human rights of migrants, Annual Rep. to the Comm. on Human Rights ¶124, 59th sess. CHR, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (by Gabriela Rodríguez Pizarro) ("When the migrant must take the initiative for such [administrative] review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice.").

⁹³ U.N. Special Rapporteur on the human rights of migrants, Annual Rep. to the Comm. on Human Rights ¶ 30, *supra* n. 89.

⁹⁴ U.N. Special Rapporteur on the human rights of migrants, Rep. to the Human Rights Council: *Mission to the United States of America* p. 2, 7th sess. HRC, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (by Jorge Bustamante).

⁹⁵ The Special Rapporteur on the human rights of migrants highlighted statements made by the monitoring body of the ICCPR, the Human Rights Committee: "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one." *Id.* at ¶12, 7th sess. HRC, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (by Jorge Bustamante).

⁹⁶ The Special Rapporteur on the human rights of migrants highlights article 8, paragraph 1 of the American Convention on Human Rights, which states: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." *Id.* at ¶13. For a more in depth discussion of the United States' obligations under the American Convention, see Section II(A)(iii) of this appendix.

counsel constitutes a serious violation of international due process standards.⁹⁷ Specifically, the Special Rapporteur explained that “the Inter-American Commission on Human Rights has stated that detention and deportation proceedings require “as broad as possible” an interpretation of due process requirements and include the right to a meaningful defense and to be represented by an attorney.”⁹⁸ Additionally, the Special Rapporteur on the human rights of migrants observed that:

the United States detention and deportation system for migrants lacks the kinds of safeguards that prevent certain deportation decisions and the detention of certain immigrants from being arbitrary within the meaning of the International Covenant on Civil and Political Rights (ICCPR), which the United States has signed and ratified.⁹⁹

The Special Rapporteur observed that “[i]n 2005, 65 per cent of immigrants appeared at their deportation hearings without benefit of counsel,” and that “[d]espite the adversarial and legally complex nature of removal proceedings and the severe consequences at stake, detainees are not afforded appointed counsel.”¹⁰⁰

Based on the United States’ obligations under international law, as well as the Special Rapporteur’s observations on the status of human rights of migrants living in the United States, the Special Rapporteur recommended:

Immigration detainees in the custody of the Department of Homeland Security and placed in removal proceedings, should have the right to appointed counsel. The right to counsel is a due process right that is fundamental to ensuring fairness and justice in proceedings. To ensure compliance with domestic international law, court-appointed counsel should be available to detained immigrants.”¹⁰¹

Lastly, and most recently, in 2009, in consideration of General Comment No. 6 of the Committee on the Rights of the Child,¹⁰² the Special Rapporteur on the Human Rights of

⁹⁷ U.N. Special Rapporteur on the human rights of migrants, Rep. to the Human Rights Council: *Mission to the United States of America* ¶123, *supra* n. 92.

⁹⁸ *Id.* at ¶14.

⁹⁹ *Id.* at ¶24.

¹⁰⁰ *Id.* at ¶68.

¹⁰¹ *Id.* at ¶114.

¹⁰² The United States signed the Convention on the Rights of the Child on February 16, 1995, but has not ratified the Convention. *Convention on the Rights of the Child*, United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Jul. 10, 2014).

Migrants recommended that “States should consider ‘age appropriate’ due process of law, including...a legal representative, free legal aid”¹⁰³

iv. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance (“Special Rapporteur on contemporary forms of racism”) is mandated to focus on incidents, situations, and elimination of contemporary forms of racism, racial discrimination, xenophobia, and related intolerance.¹⁰⁴

The Special Rapporteur on contemporary forms of racism has noted with satisfaction the adoption of national plans and policy actions to combat racism and racial discrimination, including measures regarding legal aid provided to victims,¹⁰⁵ and furthermore, has recommended that States ensure victims of racist or xenophobic crimes are provided with the necessary legal assistance.¹⁰⁶

In 2005, the Special Rapporteur on contemporary forms of racism urged the General Assembly to give attention to the discriminatory treatment of foreign nationals, asylum-seekers, refugees and immigrants in waiting areas.¹⁰⁷ He encouraged governments to take measures to ensure that persons held in waiting areas be given basic guarantees, such as the right to obtain legal assistance.¹⁰⁸

v. Special Rapporteur on extreme poverty and human rights

¹⁰³ U.N. Special Rapporteur on the human rights of migrants, Annual Rep. to the Human Rights Council ¶58, 11th sess. HRC, U.N. Doc. A/HRC/11/7 (May 14, 2009) (by Jorge Bustamante).

¹⁰⁴ *Overview of the Mandate*, United Nations Office of the High Commissioner on Human Rights, <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/OverviewMandate.aspx> (last visited Jul. 10, 2014).

¹⁰⁵ U.N. Special Rapporteur on the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Annual Rep. to the Human Rights Council ¶10, 18th sess. HRC, U.N. Doc. A/HRC/18/44 (July 21, 2011) (by Githu Muigai).

¹⁰⁶ *Id.* at ¶35.

¹⁰⁷ U.N. Special Rapporteur on the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Annual Rep. to the General Assembly ¶56, 60th sess. G.A., U.N. Doc. A/60/283 (Aug. 19, 2005) (by Doudou Diène).

¹⁰⁸ *Id.*

The mandate of the Special Rapporteur on extreme poverty and human rights (“Special Rapporteur on extreme poverty” or “Independent Expert on extreme poverty”¹⁰⁹) was established in order “to evaluate the relationship between the enjoyment of human rights and extreme poverty.”¹¹⁰

As far back as 1999, the Independent Expert on extreme poverty recommended that “[e]ach State should find specific ways of ensuring that legal aid and legal counsel is available free of charge to all persons living in extreme poverty.”¹¹¹ In examining initiatives taken to promote and protect the rights of those living in extreme poverty, the Independent Expert on extreme poverty asked governments, “Is there a mechanism (for example, positive action, financial assistance, legal aid) enabling the poor to have access to the machinery of justice?”¹¹²

The Special Rapporteur on extreme poverty has observed that a significant obstacle in breaking the cycle of poverty is “the inability of persons living in poverty to access legal assistance, as they are unable to afford private legal representation and legal aid is often unavailable or inadequate.”¹¹³ The Special Rapporteur on extreme poverty has warned that “[w]ithout effective access to justice, [persons living in extreme poverty] are unable to seek and obtain a remedy for breaches of domestic law and human rights standards, exacerbating their vulnerability, insecurity and isolation, and perpetuating their impoverishment.”¹¹⁴ In a different report, the Special Rapporteur on extreme poverty stated that “[w]ithout access to competent comprehensive legal assistance, the poorest and most excluded are further disadvantaged in their dealings with authorities, not only when they are facing criminal charges, but also with respect to administrative procedures such as child protection cases, benefit fraud matters or eviction and immigration proceedings.”¹¹⁵ Accordingly, the Special Rapporteur on extreme

¹⁰⁹ Although the role of the special expert mandated to tackle extreme poverty and human rights has primarily remained the same, the first three mandate-holders were given the title “Independent Expert,” while the most recent mandate-holder has been given the title “Special Rapporteur.” *Special Rapporteur on extreme poverty and human rights*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx> (last visited Jul. 10, 2014).

¹¹⁰ *Special Rapporteur on extreme poverty and human rights*, United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx> (last visited Jul. 10, 2014).

¹¹¹ U.N. Independent Expert on human rights and extreme poverty, Annual Rep. to the Comm. on Human Rights ¶141, 55th sess. CHR, U.N. Doc. E/CN.4/1999/48 (Jan. 29, 1999) (by A. M. Lizin).

¹¹² U.N. Independent Expert on human rights and extreme poverty, Annual Rep. to the Comm. on Human Rights: *Annex II: Questionnaire for National Human Rights Bodies* ¶8(c), 57th sess. CHR, U.N. Doc. E/CN.4/2001/54 (Feb. 16, 2001) (by A. M. Lizin).

¹¹³ U.N. Special Rapporteur on extreme poverty and human rights, Annual Rep. to the General Assembly ¶12, 66th sess. G.A., U.N. Doc. A/66/265 (Aug. 4, 2011) (by Magdalena Sepúlveda Carmona).

¹¹⁴ U.N. Independent Expert on human rights and extreme poverty, Annual Rep. to the Human Rights Council ¶71, 15th sess. HRC, U.N. Doc. A/HRC/15/41 (Aug. 6, 2010) (by Magdalena Sepúlveda Carmona).

¹¹⁵ U.N. Special Rapporteur on extreme poverty and human rights, Annual Rep. to the General Assembly ¶12, 66th sess. G.A., U.N. Doc. A/66/265 (Aug. 4, 2011) (by Magdalena Sepúlveda Carmona).

poverty has recommended that States ensure “quality legal aid for the poorest segments of society, not only for criminal proceedings but also with respect to issues which are particularly relevant for persons living in poverty, such as social benefit appeals, eviction and child protection procedures.”¹¹⁶

Access to justice, including the right to civil legal aid, remains a pressing contemporary issue for the Special Rapporteur on extreme poverty. At the United Nations General Assembly session in October 2012, the Special Rapporteur submitted a report concerning the obstacles to access to justice by people living in poverty. Among the reasons for working on such a report, the Special Rapporteur explained that “[i]n civil and administrative matters where legal aid is not available, persons living in poverty are often denied access to justice in matters involving property, welfare payments, social housing and evictions, and family matters such as child custody.”¹¹⁷

The Special Rapporteur devoted a significant portion of the report’s findings to access to civil counsel. The report found that:

Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions. Indeed, exclusion of certain categories of claims from the scope of free legal aid, such as housing or immigration proceedings, or exclusion from representation before quasi-judicial tribunals, such as welfare or employment appeal boards, discriminates against the poor. Moreover, the legal processes which relate to such civil matters are often extremely complex and their requirements onerous, creating insurmountable obstacles for those without the assistance of a lawyer, particularly if the State or other party enjoys such assistance. This is particularly troubling with respect to civil matters involving the most vulnerable groups, such as indigenous peoples, persons with disabilities and ethnic minorities, who often face serious deprivations and violations of their rights, and lack the means or ability to contest them.¹¹⁸

The Rapporteur emphasized that women “face compounded difficulties in accessing legal aid in ... civil matters.”¹¹⁹ The impact of this lack of access is particularly troubling for “poor female

¹¹⁶ *Id.* at ¶82(e).

¹¹⁷ *Access to justice by people living in poverty* (2012), United Nations Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/AccessToJustice.aspx> (last visited Jul. 10, 2014).

¹¹⁸ U.N. Special Rapporteur on extreme poverty and human rights, Report of the Special Rapporteur on extreme poverty and human rights ¶ 62, 67th sess. G.A., U.N. Doc. A/67/278 (Aug. 9, 2012) (by Magdalena Sepúlveda Carmona).

¹¹⁹ *Id.* at ¶ 63.

victims of criminal offences such as domestic violence, or those pursuing divorce, child custody or land inheritance.”¹²⁰

To rectify this lack of access, “States must take immediate and effective action to ensure that persons living in poverty are not denied enjoyment of their human rights because of insurmountable obstacles which prevent them from accessing the justice system.”¹²¹ Toward that end, the Special Rapporteur offered a number of recommendations related to legal representation including ensuring “that persons living in poverty have practical and effective access to competent legal advice and assistance.”¹²² The recommendations specifically state that states should ensure “access to free and competent civil legal assistance for persons living in poverty where the enjoyment of human rights — civil, political, economic, social and/or cultural — is at stake.”¹²³

vi. [Special Rapporteur on the independence of judges and lawyers](#)

In a report dedicated to encouraging States to develop and implement effective and sustainable legal aid schemes, the Special Rapporteur on the independence of judges and lawyers wrote that:

legal aid should be ensured both in criminal and in non-criminal cases, and encompass all stages of judicial or extrajudicial procedures, thus contributing to the elimination of obstacles that hamper access to justice through the provision of assistance to people otherwise unable to afford legal counsel, representation and access to the court system.¹²⁴

Concluded the Special Rapporteur, “legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel.”¹²⁵

II. Regional Authority

A. The Organization of American States

i. Charter of the Organization of American States

¹²⁰ *Id.*

¹²¹ *Id.* at ¶ 95.

¹²² *Id.* at ¶ 96.

¹²³ *Id.*

¹²⁴ Report of the Special Rapporteur on the independence of judges and lawyers, Summary, U.N. Doc A/HRC/23/43 (Mar. 15, 2013).

¹²⁵ *Id.* at ¶ 29.

The Organization of American States (“OAS”) brings together all 35 independent states of the Americas, providing unifying political, juridical, and social governmental forums for the American hemisphere.¹²⁶ The OAS emerged in 1948 with the signing of the Charter of the Organization of American States (“OAS Charter”), which entered into force in December 1951.¹²⁷ The OAS was established in order to achieve among its member states “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”¹²⁸

All 35 independent countries of the Americas, including the United States, have ratified the OAS Charter.¹²⁹ The OAS Charter, which is binding on OAS member States, contains an explicit right to free civil counsel:

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms...(i) Adequate provision for all persons to have legal aid in order to secure their rights.”

This provision is understood as extending to both civil and criminal matters.¹³⁰

ii. The American Declaration of the Rights and Duties of Man

In 1948, in addition to adopting the OAS charter, the nations of the Americas also adopted the American Declaration of the Rights and Duties of Man (“American Declaration”).¹³¹ The American Declaration asserts the “Right to equality before the law” (Article II), as well as the “Right to a fair trial”(Article XVIII), which provides:

¹²⁶ *Who We Are*, Organization of American States, http://www.oas.org/en/about/who_we_are.asp (last visited Jul. 10, 2014).

¹²⁷ Charter of the Organization of American States, *opened for signature* Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119 (*entered into force* Dec. 13, 1951) *amended by* Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), *further amended by* Protocol of Cartagena, O.A.S.T.S. No. 66 (1985), *further amended by* Protocol of Washington, OEA/Ser.A/2 Add. 3 (SEPF) (1992), *further amended by* Protocol of Managua, OEA/Ser.A/2 Add. 4 (SEPF) (1993).

¹²⁸ *Id.* at art. 1.

¹²⁹ *Member States*, Organization of American States, http://www.oas.org/en/about/member_states.asp (last visited Jul. 10, 2014).

¹³⁰ Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step With the Rest of the Developed World*, 15 Temp. Pol. & Civ. Rts. L. Rev. 769, 784 (2006) (describing the right to counsel in civil proceedings in foreign jurisdictions).

¹³¹ Organization of American States, American Declaration of the Rights and Duties of Man, OAS Res. XXX, *adopted by* Ninth International Conference American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L. V/II.82 doc.6 rev.1 at 17 (1992).

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.¹³²

Although Article XVIII does not explicitly require provision of legal aid, scholars have argued that provision of legal aid is a mechanism necessary to enable an individual to realize the “Right to Fair Trial” of Article XVIII.¹³³ Unlike the OAS Charter, the American Declaration is not a binding treaty. However, it is considered by OAS bodies to be a source of binding obligation for OAS member states and thus, members of the OAS, including the United States are bound to the standards of the American Declaration.¹³⁴

iii. The Inter-American Commission on Human Rights

In 1959, the OAS created the Inter-American Commission on Human Rights (“IACHR”). The IACHR is an independent organ of the OAS, whose mission is “to promote and protect human rights in the American hemisphere.”¹³⁵ The work of the IACHR involves monitoring the general human rights situations of Member States, examining individual complaints or petitions regarding specific cases of human rights violations, and devoting attention to various thematic areas.¹³⁶

In addition to protecting human rights based on the OAS Charter and American Declaration (see above), the IACHR also relies on the American Convention of Human Rights (“American Convention”). The American Convention, which is a treaty, was adopted in 1969 and entered into force in 1978.¹³⁷ It defines the Human Rights which ratifying States have agreed to respect and ensure; it also created the Inter-American Court to adjudicate cases and to issue advisory opinions concerning member states compliance with the American Convention.¹³⁸

American Convention on Human Rights, Article 8, paragraph 1 states:

¹³² *Id.* at art. XVIII.

¹³³ Sarah Paoletti, *Deriving Support from International Law for the Right to Counsel in Civil Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 651 (2006).

¹³⁴ I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, ¶ 46; Davis, *supra* n. 6, at 178.

¹³⁵ *What is the IACHR?*, Organization of American States, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Jul. 10, 2014).

¹³⁶ *Id.*

¹³⁷ Organization of American States, *American Convention on Human Rights*, adopted Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹³⁸ *What is the IACHR?*, *supra* n. 125.

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.¹³⁹

The United States is a signatory, but has not ratified the American Convention. As with the other treaties in which the United States has signed, but not ratified, the United States is legally bound to act in good faith not to defeat the object and purpose of the treaty.¹⁴⁰

As mentioned above, in addition to monitoring the general human rights situations of Member States and examining individual complaints or petitions regarding specific cases of human rights violations, the IACHR devotes attention to various thematic areas.

In 2007, the IACHR issued a report, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, which synthesized the general human rights criteria for access to justice, including a specific discussion of the right to counsel, as applicable to both criminal and civil cases. The report explained that international human rights law confirms affirmative obligations upon States “to remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice.”¹⁴¹ In order to remove any obstacles to access justice based on the economic status of a person, the Inter-American Court and the IACHR have obligated states to provide free legal services to those individuals without means. To determine whether free legal counsel should be granted, the IACHR has developed guidelines including consideration of “a) the resources available to the person concerned; b) the complexity of the issues involved; and c) the significance of the rights involved.”¹⁴² With that being said, the IACHR has determined that the complexity of certain proceedings involving constitutional rights require free legal counsel in order for persons to be able to effectively protect those rights.¹⁴³

In 2008, the IACHR issued a set of *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights* in order to evaluate and monitor the implementation of economic, social, and cultural rights provided in the Protocol of San Salvador. The Protocol of San Salvador is a treaty, which the United States has not ratified. Nevertheless,

¹³⁹ Organization of American States, American Convention on Human Rights art. 8, ¶1, *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹⁴⁰ Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

¹⁴¹ Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights* ¶1, OEA/Ser.L/V/II.129 Doc. 4 (2007).

¹⁴² *Id.* at ¶6.

¹⁴³ *Id.* at ¶7.

the guidelines provide meaningful insight on how the IACHR believes that access to justice in a country should be measured. Among the indicators recommended to evaluate and monitor “access to justice” are structural indicators which measure the free legal aid provided by states for protection of social rights.¹⁴⁴

The IACHR has also addressed the right to civil counsel in other thematic reports. In 2010, the IACHR issued a *Report on Immigration in the United States: Detention and Due Process*. The Inter-American Commission was troubled by the lack of state-funded legal representation provided to immigrants in the United States, particularly for cases of “unaccompanied children, immigrants with mental disabilities and other persons unable to represent themselves.”¹⁴⁵ The IACHR specifically recommended that the United States “devote significant additional resources to improve access to legal representation” in order to improve the protection of immigrants’ due process rights in immigration proceedings.¹⁴⁶ Additionally, in 2011, the IACHR emphasized the right to be assisted by counsel, as an important component of due process in administrative proceedings in *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*.¹⁴⁷ Most recently, in 2014, in the context of reviewing other countries, the IACHR has also expressed concern over the lack of legal assistance for individuals with disabilities to address rights violations.¹⁴⁸

B. European Court of Human Rights

i. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (1950)

The European Convention on Human Rights established the European Court of Human Rights (“ECHR”).¹⁴⁹ There are 47 members of this treaty, all of which are Council of Europe member states.¹⁵⁰ The treaty is divided into 18 articles, each delineating specific human rights protections. Article 6 of the Convention is devoted to the right to a fair trial, and Article 6(1) reads:

¹⁴⁴ Inter-American Commission on Human Rights, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights* 25-33, OEA/Ser.L/V/II.132 Doc. 14 (2008).

¹⁴⁵ Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* ¶20, OEA/Ser.L/V/II. Doc. 78/10 (2010).

¹⁴⁶ *Id.* at ¶¶ 440, 441.

¹⁴⁷ Inter-American Commission on Human Rights, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143 Doc. 59 (2011).

¹⁴⁸ Inter-American Commission on Human Rights, *Report on the 150th Session of the IACHR*, 27 (2014), available at <http://www.oas.org/es/cidh/prensa/docs/report-150.pdf>.

¹⁴⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, EUROP.T.S. No. 5; 213 U.N.T.S. 211, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

¹⁵⁰ For a list of member states as well as the specific commitments of each states, see the Council of Europe’s website available at <http://hub.coe.int/>.

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

“The European Convention does not guarantee indigent litigants a right to free counsel in so many words. Article 6 of the European Convention, however, does guarantee all civil litigants a ‘fair hearing.’”¹⁵¹ Moreover, the ECHR interprets Article 6(1) as requiring the right to counsel for civil matters in certain situations. At the ECHR, persons who feel their treaty rights have been violated by a state party to the convention can submit a case. Judgments of this court are binding upon the signatory countries.

ii. Case law interpreting Article 6(1)

a. The right to equality of arms

The ECHR first interpreted Article 6(1) as requiring access to counsel in civil matters in the landmark 1979 decision in *Airey v. Ireland*.¹⁵² The court reasoned that there may be situations in which one party is so disadvantaged by a lack of access to legal counsel that this deficiency will effectively bar “access to the courts.”¹⁵³ Under these circumstances, the Convention requires the states to provide access to counsel, even in civil matters. Most frequently this arises in situations where the state bars *pro se* access to the courts or where the court’s procedures or the case itself is of such complexity that only a lawyer would be able to properly handle the proceedings. Counsel is then indispensable for access to the courts and the state is compelled to provide such aid. This reasoning is often referred to “equality of arms.”¹⁵⁴

At the time *Airey v. Ireland* was brought, divorce was illegal in Ireland so Mrs. Airey sought a decree of judicial separation to relieve her from the duty of cohabitation. Only Ireland’s High Court could provide the necessary decree. Mrs. Airey lacked the funds to obtain counsel to represent her at the High Court and Ireland did not provide legal aid for civil matters. Because she was unable to obtain this decree, Mrs. Airey made a complaint to the ECHR that Ireland failed to protect her from physical and mental cruelty because, amongst other reasons, the cost of the separation proceedings and obtaining counsel were prohibitive.

¹⁵¹ Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT’L L.J.* 83, 90 (2000).

¹⁵² Case of *Airey v. Ireland*, App. No. 6289/73 (1979), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420>.

¹⁵³ Case of *Airey v. Ireland*, App. No. 6289/73, 12 (1979), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420>.

¹⁵⁴ See generally Martha F. Davis, *Participation, Equality and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 *YALE L.J.* 2260 (2013).

While Ireland argued that Mrs. Airey was able to access the court without assistance of a lawyer, the ECHR rejected this claim. As part of its analysis, the ECHR factored in the prohibitive cost of obtaining counsel as one of the limitations preventing Mrs. Airey from access to Ireland's High Court.¹⁵⁵ The ECHR first found that Mrs. Airey would be at a disadvantage if her husband had a lawyer and she did not. The Court did not go as far as requiring the state to provide free legal aid for every civil dispute. However, they did find that "when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory ... or by reason of the complexity of the procedure or of the case" the state is "compel[led]" to provide such legal representation.¹⁵⁶

The ECHR further articulated the principle of equality of arms as a component of access to justice in the *Case of De Haes and Gijssels v. Belgium*.¹⁵⁷ In *De Haes and Gijssels*, both De Haes and Gijssels worked as journalists for a magazine that published articles critical of judges on the Antwerp Court of Appeal regarding their decision in a divorce proceeding. In this particular matter, a father had been accused of abusing his children. The court ruled in favor of the father, finding allegations of the father's abuse unreliable despite experts testifying to the contrary. An advocate general for the Court of Appeal along with the father brought suit accusing De Haes and Gijssels of making defamatory statements. In the defamation suit, De Haes and Gijssels requested that the expert testimony substantiating the father's abuse be produced in order to "safeguard the principle of equality of arms" since the journalists had based their criticisms of the court on this expert testimony. The Court of Appeal refused to produce these documents to De Haes and Gijssels. The ECHR found that the refusal to produce these documents created an inequality of arms, since the advocate general was familiar with the file, but the journalists had only limited sources. Such an inequality violates Article 6(1), which requires that each person is entitled to "a fair ... hearing ... by an ... impartial tribunal." Simply put, this principle requires that each party must be afforded a reasonable opportunity to present their case under conditions where no sides are at a substantive disadvantage when compared to their opponent.

In *Steel and Morris v. the United Kingdom*,¹⁵⁸ the ECHR cited the principle of equality of arms as the reason to mandate legal aid based on the financial situation of the litigant. In that case, the McDonald's Corporation sued Helen Steel and David Morris, two members of London Greenpeace, for publishing an anti-McDonald's leaflet. Steel and Morris received minimal *pro bono* support while McDonald's was represented by Queen's Counsel, junior counsel specializing in libel law, and a support staff of one of England's largest law firms. Further, the

¹⁵⁵ Case of Airey v. Ireland, App. No. 6289/73 (1979), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420>.

¹⁵⁶ Case of Airey v. Ireland, App. No. 6289/73, 12 (1979), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420>.

¹⁵⁷ Case of De Haas and Gijssels v. Belgium, App. No. 19983/92 (1997), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58015>

¹⁵⁸ Case of Steel and Morris v. The United Kingdom, App. No. 68416/01 (2005), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68224>

trial lasted 313 days of court, 40 of which were taken up with legal argument—the longest trial in English history. The ECHR found that the two sides’ resources reached an unacceptable level of inequality, violating Steel’s right to a “fair . . . hearing.” In the decision, the ECHR clarified that the goal is not to ensure complete equality in arms, but rather to ensure that each side is afforded a reasonable opportunity to present their case under conditions where they are not placed at a substantial disadvantage.

b. The right to institute proceedings, obtain a determination, and have a judgment enforced.

Other principles articulated by the ECHR provide indirect support for the right to counsel. The rights to institute proceedings, obtain a determination, and have a judgment enforced are all bolstered if the parties have a right to counsel. In the cases of *Multiplex v. Croatia*¹⁵⁹ and *Kutić v. Croatia*,¹⁶⁰ the ECHR held that article 6(1) of the Convention guarantees the right of access to a court for the determination of civil disputes, and further that this includes the right to “obtain a determination of the dispute by a court.” Both cases related to the Croatian Government’s implementation of legislation ordering that proceedings concerning claims for damages caused by members of the Croatian army or police, when acting in their official capacity during the Croatian War of Independence, were to be stayed. The ECHR saw this legislation as interfering with the right of access to a court. While Croatia argued that all proceedings were only stayed temporarily pending further legislation, the ECHR found that it would be illusory for a legal system to allow access to the court without ensuring that the case would be determined by a final judicial decision.

Similarly the ECHR in *Burdov v. Russia*¹⁶¹ held that the right to access courts would be illusory if a state’s legal system allowed a “final, binding judicial decision to remain inoperative to the detriment of one party.” The applicant in *Burdov* was exposed to radioactive emissions at the site of the Chernobyl nuclear disaster and suffered adverse health effects. He was awarded compensation by the Russian courts for the exposure. The State told Burdov that it could not pay the damages because of underfunding. The ECHR in *Burdov* did not accept the state’s “lack of funds” as an acceptable excuse for not honoring a judgment.

c. The right to counsel in civil matters where liberty may be deprived

¹⁵⁹ Case of *Multiplex v. Croatia*, App. No. 58112/00 (2003), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61204>

¹⁶⁰ Case of *Kutić v. Croatia*, App. No. 48778/99 (2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60174>

¹⁶¹ Case of *Burdov v. Russia*, App. No. 59498/00 (2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60449>

In *Benham v. the United Kingdom*,¹⁶² a man was jailed for failing to pay a poll tax, a civil offense in the United Kingdom. Benham complained that he was denied counsel as guaranteed to him under Article 6(3) of the Convention. Article 6(3) explicitly guarantees the right to counsel for criminal proceedings. The United Kingdom argued that Article 6(3) applied only to criminal proceedings, and that Benham was jailed as a result of a civil proceeding, making 6(1) the applicable provision. The ECHR held that, contrary to the U.K.'s designation of the matter as civil, there are three criteria to be taken into account when deciding whether a person is charged of a criminal offense. The first is the classification of the proceedings under national law, the second is the nature of the proceedings, and the last is the nature and degree of severity of the penalty. While the U.K. did indeed classify the proceedings as civil, the proceedings contained punitive elements and the defendant faced the penalty of imprisonment—both factors that determined the proceedings should be viewed as criminal. The ECHR went on to state that “where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.”

¹⁶² Case of *Benham v. The United Kingdom*, App. No. 19380/92 (1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57990>