

Comment to Petition 10-08

Submitted by the Program on Human Rights and Global Economy
Northeastern University School of Law

September 12, 2011

I. Introduction

Petition 10-08 proposes changes to Wisconsin Supreme Court Rule 11.02. Under the proposed changes, Circuit Court Judges would be required to appoint attorneys at public expense for indigent persons in certain civil cases. This important legal concept, known as the right to counsel in civil proceedings or Civil Gideon, is a central aspect of ensuring equal access to our legal system.

In addition to the strong support for Civil Gideon under domestic law and policy, the Civil Gideon principle is consistent with practices of nations worldwide and is clearly reflected in international law. Many nations have recognized that procedural fairness requires appointed counsel in certain civil matters. Indeed, providing counsel to low-income persons in civil cases where basic human needs are at stake is an important step in complying with the United States' international obligations and upholding the interests of justice. In the United States, the right to counsel in civil matters is often a matter of state law; therefore reform on the state level, such as Petition 10-08, is critical to ensuring that individual human rights are respected in the United States. For these reasons, the Program on Human Rights and Global Economy at Northeastern University School of Law submits this comment in strong support of Petition 10-08.¹

II. The United States Has Been Urged by the International Community to Expand the Right to Counsel in Civil Matters

In some important respects, the United States has taken positive steps toward the recognition of the right to counsel in civil proceedings, including ratifying the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). The United States became a signatory to CERD on September 28, 1966 and formally ratified the document on October 21, 1994. In ratifying CERD, the United States agreed to be

¹Submission by Martha F. Davis, Professor of Law, Faculty Co-Director, Program on Human Rights and the Global Economy, Northeastern University School of Law. Kate Richardson, NUSL Class of 2012, provided excellent assistance in the preparation of this submission. This Comment draws extensively on the amicus brief in *King v. King*, Wash. Sup. Ct., No. 79978 (Dec. 6, 2007), WL 6546351 reprinted at 9 SEATTLE J. SOC. JUST. 185 (2010); Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147 (2009); and 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. 768, 774 (2006). In addition, this Comment relies on the extensive work of Justice Earl Johnson, including his article, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985).

bound by the treaty's requirements, including the obligation to protect and promote non-discrimination in the enjoyment of human rights such as housing, health, education, labor and access to justice. Importantly, these obligations do not end with the federal government. Individual states have an important role to play in the United States' compliance with these treaty obligations, particularly in areas that, under our federalist system, are reserved to the states.

Several provisions of CERD address fair procedure and adjudication through the lens of equality and nondiscrimination. For example, Article 5 requires that States Parties undertake "to guarantee . . . [t]he right to equal treatment before the tribunals and all other organs administering justice."² Similarly, in addressing the 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 the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.³

Both of these formulations encompass civil matters, and explicitly require that ratifying nations take positive steps to ensure effective access to the apparatus of the government's justice system.

The CERD Committee which monitors country compliance with CERD has gone beyond generalities, however, and has specifically addressed the right to counsel in civil matters. For example, as the principal body with responsibility for interpreting and implementing CERD, the CERD Committee issues General Recommendations to assist nations with the task of implementing such provisions. In General Recommendation 31 "on the prevention of racial discrimination in the administration and function of the criminal justice system," the CERD Committee highlighted the importance of making it easier for victims of acts of racism to seek civil redress in the courts by, inter alia, providing free assistance of counsel. Specifically, in Section C, paragraph (17)(b), the CERD Committee stated that in order to make it easier for victims of acts of racism to bring claims in the courts, the steps to be taken should include: "Granting victims effective judicial cooperation and legal aid, including the assistance of counsel and an interpreter free of charge."⁴ Further, General Recommendation No. 29 addressing "[d]iscrimination based on [d]escent," similarly recommends that States Parties "[t]ake the necessary steps to secure equal access to the justice system for all members of

² International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(a), opened for signature Dec. 21, 1965, S. Exec. Doc. C, 95-2, at 3 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969; for United States Nov. 20, 1994).

³ International Convention on the Elimination of All Forms of Racial Discrimination, at art. 6.

⁴ U.N. Report of the CERD, General Recommendation No. 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Comm. on the Elimination of Racial Discrimination, 60th Sess., Supp. No. 18, at 103 ¶ C(17)(b), U.N. Doc. A/60/18 (2005).

descent-based communities, including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights.”⁵

The CERD Committee has also commented favorably on participating States' efforts to expand and improve civil legal aid.⁶ When countries have fallen short in implementing CERD's provisions, the CERD Committee has specifically urged that they expand access to civil legal aid as one aspect of improving their compliance with CERD.⁷ These recommendations often focus on the inequalities that arise when legal aid is not accessible to disadvantaged groups in civil proceedings, often in the context of forced eviction, territorial disputes, and cases involving ethnic discrimination.

Importantly, the CERD Committee has recognized that the United States' failure to provide a right to civil counsel in certain matters raises human rights concerns under CERD. In its 2008 Concluding Observations to the United States, the Committee noted “with concern the disproportionate impact that the lack of a generally recognised right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities.”⁸ In light of these disparities, and echoing the ABA's Resolution on civil counsel, the Committee recommended 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.”⁹

The CERD Committee has made similar findings regarding other countries' failure to adhere to their obligations under the Convention. In its report on Botswana in 2006, the Committee expressed concern regarding “the reported difficulties experienced by poor people, many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts, due in particular to high fees [and] the absence of legal aid in most cases.”¹⁰ The Committee recommended that legal aid be provided “especially to persons belonging to the most disadvantaged ethnic groups, to ensure their full access to justice.”¹¹ Similarly, in 2004, the Committee urged Madagascar to “make it

⁵ U.N. Report of the CERD, General Recommendation No. 29: Discrimination Based on Descent, U.N. Comm. on the Elimination of Racial Discrimination, 61st Sess., at 111 ¶ 5(u), U.N. Doc. A/57/18 (2002).

⁶U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination--Norway, ¶ 3, U.N. Doc. CERD/C/304/Add.40 (1997) (noting Norway's establishment of a “working group which has a mandate to improve legal aid available to victims of racial discrimination”).

⁷ See, e.g., U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination--Republic of Korea, ¶ 19, U.N. Doc. CERD/C/304/Add.65 (1999) (recommending that “the State party provide legal aid to victims of acts of racial discrimination and facilitate access to recourse procedures by vulnerable groups”).

⁸ U.N. CERD Report, Concluding Observations of the Comm. on the Elimination of Racial Discrimination--United States of America, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (2008).

⁹ *Id.*

¹⁰U.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).

¹¹ *Id.*

easier for victims to gain access to justice, in particular through the effective application of a system of legal aid.”¹² In 2010, the CERD Committee found that land disputes affecting individuals’ substantive rights in Argentina necessitated the use of free legal services. The Committee noted that the State party should ensure that these services are available and “accessible to the [indigenous communities] as a whole.”¹³ The CERD Committee also expressed concern regarding Norway’s legislation concerning free legal aid, which did not apply to civil cases of ethnic discrimination.¹⁴

In sum, the CERD Committee clearly recognizes that implementation of the equality mandated under the CERD treaty requires access to legal aid in civil matters. As part of our federal structure, individual States have an obligation to help ensure our national compliance with CERD. The increasing focus of the CERD Committee underscores the emergence of the right to counsel as a recognized human right. Wisconsin’s expansion of a right to counsel in civil matters would aid in bringing the United States into compliance with its international human rights treaty obligations.

III. The Right to Counsel in Civil Matters is a Well-established, General Principle of National and Regional Law Worldwide

Recognition of the right to civil counsel is not limited to CERD. The Inter-American human rights system, in which the U.S. participates, has issued several strong statements recognizing the importance of a right to counsel to ensure both procedural and substantive fairness in adjudication. In addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms follows international law standards of the right to counsel in civil matters.

¹² U.N. CERD Report, Consideration, Concluding Observations of the Comm. on the Elimination of Racial Discrimination--Madagascar, ¶ 19, U.N. Doc. CERD/C/65/CO/4 (2004).

¹³ 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) (noting that “The Committee observes that the State party’s national plan against discrimination is intended to ensure that indigenous peoples have access to justice, and that in this respect INADI is backing indigenous groups’ efforts to lodge complaints in the courts and helping to publicize their territorial disputes (regarding their ancestral lands and their opposition to logging operations and the pollution of rivers). It is concerned, however, about the failure to prosecute and punish those responsible for the perpetration of violent acts during the forced evictions, particularly in view of the fact that a person died in Tucumán Province on 12 October 2006 and that two violent evictions recently occurred in Neuquén Province. The Committee recommends that the State party increase its efforts to ensure that indigenous communities make effective use of free legal advice services (*guardia jurídica gratuita*) and take steps to ensure that such services are accessible to the population as a whole. It also urges the State party to investigate and punish those responsible for deaths and injuries occurring in connection with forced evictions in the provinces.”)

¹⁴ 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) (noting that “[t]he Committee is concerned that the legislation concerning free legal aid does not cover cases of ethnic discrimination. The Committee notes that the Parliament is currently considering whether free legal aid should be granted when legal proceedings are recommended by the Anti-Discrimination Ombud or the Anti-Discrimination Tribunal, as is the case with legal proceedings recommended by the Parliamentary Ombudsman. (arts. 2, 5 and 6) Recalling its general recommendation No. 31, the Committee recommends that recommendations for free legal aid made by the Anti-Discrimination Ombud and Anti-Discrimination Tribunal be placed on an equal legal footing as those made by the Parliamentary Ombudsman.”)

a. The Americas

The Organization of American States (“OAS”) Charter, with thirty-five participating nations, 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...*Adequate provision for all persons to have due legal aid in order to secure their rights.*¹⁵

The United States ratified the OAS Charter on June 15, 1951.

The Inter-American Commission on Human Rights (“IACHR”), created by the OAS in 1959, is headquartered in Washington, D.C. In 2007, the IACHR issued a report entitled “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.”¹⁶ The report included a specific discussion on the right to counsel in civil cases. As summarized in the report's introduction, “[b]oth the Inter-American Court and the IACHR have made it an obligation in certain circumstances to provide free legal services to persons without means in order to prevent infringement of their right to a fair trial and effective judicial protection.”¹⁷ The factors pertinent to determining when counsel must be provided are (1) the resources of the individual involved; (2) the difficulty of the issues raised; and (3) the significance of the rights at issue.¹⁸ Moreover, according to the Commission, certain constitutional proceedings always require the provision of counsel.¹⁹

The IACHR underscored the importance of counsel in civil matters most recently in 2008, with Guidance addressing of effective access to economic and social rights. The Guidance explicitly references the importance of measuring individuals’ capability to exercise the rights to which they are entitled by assessing their “access to legal advisory and representation services.”²⁰

¹⁵ Charter of the Organization of American States art. 45, 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) (emphasis added).

¹⁶Inter-Am. Comm’n on Human Rights, Access to Justice as a Guaranty of Economic, Social, and Cultural Rights A Review of the Standards Adopted by the Inter-American System of Human Rights 47 (2007) ¶ 182, OEA/Ser.L./V/II.129 doc. 4.

¹⁷ *Id.* at ¶ 6.

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 7.

²⁰ Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. Inter-American Court of Human Rights, ¶ 18, OEA/Ser.L./V/II.132 (2008).

b. Europe

The right to counsel in civil matters is also firmly established in Europe. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), ratified by forty-nine countries of Europe, provides that “everyone is entitled to a fair and public hearing” to determine civil rights and obligations.²¹ In 1979, the European Court of Human Rights ruled in *Airey v. Ireland* that to satisfy the requirements of fairness, governments may be required to provide free legal counsel to low income clients.²² The Court stated that “[t]he Convention is intended to guarantee. . . rights that are practical and effective. . . . This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.”²³ The Court has construed this basic principle broadly in subsequent cases, as exhibited by the 2005 case *Steel and Morris v. The United Kingdom*, where the Court ruled that England’s legal aid statute denying counsel to indigent defendants in defamation cases violated the right to counsel and therefore failed to satisfy the European Convention’s guarantee of a “fair hearing.”²⁴ This now well-established principle of law mandates that all members of the Council of Europe provide free civil lawyers as a human right.

Consistent with this mandate, many countries, including Italy, Spain, Portugal and the Netherlands have statutes that explicitly mandate the right to counsel for indigent litigants in civil proceedings.²⁵ Additionally, many countries expand on statutory language to provide a right to counsel in a broad range of civil matters and for a broad range of people. For instance, two-thirds of the countries in the Council of Europe find the right to counsel in civil matters including, family, housing, public benefits, employment and labor law.²⁶ In addition, some countries determine the existence of a right to counsel irrespective of financial need. In France, Finland, Greece, Poland and Belgium, elderly persons, persons with disabilities, and persons on social security are automatically eligible for free counsel. In France, Iceland, and Denmark, financial eligibility is waived if the issue is of significant public interest. The expansive recognition and application of the right to counsel in foreign systems create powerful arguments for the reform of our own system.

IV. The Provision of Counsel in Civil Matters Involving Basic Human Needs Is An Obligation Under the International Bill of Rights

The United States has also ratified the International Covenant on Civil and Political Rights (“ICCPR”) and is a signatory to the International Covenant on Economic, Social

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, P 1, Nov. 4, 1950, 213 U.N.T.S. 221.

²² *Airey v. Ireland*, 2 Eur.H.R.Rep. 305 (1979-80) at P 24-26.

²³ *Id.* at P 24-25.

²⁴ *Steel and Morris v. The United Kingdom*, 22 E.Ct. H.R. 403 (2005).

²⁵ Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access To Justice In United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863 (2004).

²⁶ See Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985).

and Cultural Rights (“ICESCR”). While not legally bound by the specific provisions and obligations of the ICESCR, the United States is still legally bound to act in good faith not to defeat the object and purpose of the treaty.²⁷ Both ICCPR and ICESCR contain powerful directives on the right to counsel in civil matters. Together, these treaties make up the International Bill of Rights.

a. The International Covenant on Civil and Political Rights

The United States formally ratified the ICCPR on September 8, 1992. By ratifying the treaty, the United States agreed "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the . . . Covenant, without distinction of any kind."²⁸

Two sections of the ICCPR address procedural fairness. Article 14 of the ICCPR creates positive duties on State Parties, meaning parties are required to take affirmative steps to implement its provisions. This article directly addresses fairness before domestic courts and tribunals in both civil and criminal matters, providing 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.²⁹

Similarly, Article 2 of the ICCPR requires that States Parties “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,” including the determination of rights by a “competent authority.”³⁰

These provisions have been interpreted to include the right to counsel in civil matters. In 2007, the interpretive body of the ICCPR, the Human Rights Committee (HRC), issued General Comment No. 32, which explains that Article 14 focuses on the right to equality before courts and tribunals and to a fair trial. In discussing the right to counsel, the Comment specifically notes that “[s]tates are encouraged to provide free legal aid in [non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”³¹

The HRC continues to make explicit recommendations for the provision of counsel in civil proceedings in its assessments of country compliance with the ICCPR. For example, responding to Zimbabwe's report in 1998, the HRC welcomed legislative

²⁷ 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).

²⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

²⁹ *Id.* at art. 14(1) (emphasis added).

³⁰ *Id.* at art. 2(3).

³¹ United Nations, Human Rights Committee--General Comment No. 32 (90th sess. 2007) CCPR/C/GC/32, para. 10, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gcart14.doc>.

changes that permitted a widow to inherit her deceased husband's estate, but sought additional information “on the steps taken to ensure that widows are made aware of this right and that legal assistance be provided for their benefit.”³² In 2007, the HRC expressed concern over the housing situations facing Roma in the Czech Republic, including forced evictions and substandard quality. Specifically, the HRC urged the Czech Republic to “[p]rovide legal aid for victims of discrimination” as part of its implementation of the ICCPR.³³ Similarly, when expressing concern about restrictions on trade unions and worker activism in Chile, the HRC concluded that “[t]he State party should . . . make legal aid available to workers to enable their complaints to be successfully heard.”³⁴ In its concluding observations to Sweden in 2009, the HRC found that de facto discrimination against the Sami people in civil land disputes triggered the right to counsel. Specifically, HRC recommended that the “State party should grant adequate legal aid to Sami villages in court disputes concerning land and grazing rights.”³⁵

Recently, the HRC made two important findings relating to civil counsel in immigration proceedings. In 2009, the HRC recommended that all asylum-seekers in Switzerland should be provided free legal assistance in both extraordinary and ordinary asylum procedures.³⁶ The following year, the HRC expressed concern over individuals facing deportation and expulsion proceedings in El Salvador and recommended that the State party ensure that these individuals have “an adequate defence” and the effective right to be heard in their civil deportation proceedings.³⁷

³² U.N. Report of the Human Rights Comm., Concluding Observations-- Zimbabwe, at ¶13, U.N. Doc. CCPR/C/79/Add. 89 (1998). Zimbabwe's legal system combines elements of common law and civil law.

³³ U.N. Report of the Human Rights Comm., Concluding Observations-- Czech Republic, ¶ 16, U.N. Doc. CCPR/C/CZE/CO/2 (2007).

³⁴ U.N. Report of the Human Rights Comm., Concluding Observations-- Chile, ¶ 14, U.N. Doc. CCPR/C/CHL/CO/5 (2007).

³⁵ U.N. Report of the Human Rights Comm., Concluding Observations -- Sweden, ¶ 21, U.N. Doc. CCPR/C/SWE/CO/6 (2009) (noting that “[t]he Committee is concerned about de facto discrimination against the Sami in legal disputes, since the burden of proof for land ownership has been placed wholly on Sami claimants. The Committee also notes that, although legal aid may be granted to individuals who are parties in civil disputes, no such possibility exists for Sami villages, which are the only legal entities empowered to act as litigants in land disputes in respect of Sami lands and grazing rights (arts. 1, 2, 14, 26 and 27). The State party should grant adequate legal aid to Sami villages in court disputes concerning land and grazing rights and introduce legislation providing for a flexible burden of proof in cases regarding Sami land and grazing rights, especially where other parties possess relevant information.”

³⁶ U.N. Report of the Human Rights Comm., Concluding Observations--Switzerland, ¶ 18, U.N. Doc. CCPR/C/CHE/CO/3 (2009) (noting that “[t]he Committee takes note of the information that asylum-seekers are duly informed of their right to legal assistance and that free legal assistance is provided during the ordinary asylum procedure. It is concerned, however, that free legal assistance may be subject to restrictive conditions when asylum-seekers file an application in the framework of the extraordinary procedure. (art. 13). The State party should review its legislation in order to grant free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary”).

³⁷ U.N. Report of the Human Rights Comm., Concluding Observations--El Salvador, ¶ 17, U.N. Doc. CCPR/C/SLV/CO/6 (2010) (noting that [t]he Committee is concerned at the situation of foreigners facing deportation and expulsion proceedings in the State party, particularly with regard to an effective right to be heard, to have an adequate defence and to have their case reviewed by a competent authority (article 13 of the Covenant). The State party should ensure that persons subject to deportation proceedings benefit from

The HRC also continues to expand the types of civil proceedings that warrant the provision of counsel. In 2011, the HRC urged Serbia to ensure free legal assistance in any case “where the interests of justice so requires.”³⁸ The Committee noted that while the country’s law on criminal procedure allowed free legal aid in certain criminal cases, no comprehensive system exists to grant legal aid. The HRC found that in light of the fact that in Serbia, “neither the legislation nor practice provides for free legal aid in civil cases,” it was necessary to recommend a review of the country’s entire free legal aid scheme.³⁹ As recently as this year, the HRC explicitly recommended the provision of counsel in any proceeding “where the interests of justice so requires.”⁴⁰

b. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

While the United States has not ratified ICESCR, it became a signatory on October 5, 1977. As a signatory, the United States is legally bound to act in good faith not to defeat the object and purpose of the treaty.⁴¹

Like the HRC, the body that oversees the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR), has urged participating nations to expand the provision of counsel to civil proceedings. In 2009, the CESCR urged the Government of Cyprus to provide free legal aid for victims of discrimination.⁴² Specifically, the concluding observations expressed concern over legal representation for anti-discrimination claimants in Cyprus and urged the State party to “ensure that free legal aid is effectively provided to victims in order to pursue their claims before all appropriate courts [.]”⁴³ In addition, the ICESCR Committee followed the lead of the HRC when it urged Cyprus to provide asylum-seekers and third country migrants with free legal aid on their economic, social and cultural rights.⁴⁴

an effective right to be heard, to have an adequate defence and to request that their case be reviewed by a competent authority”).

³⁸ U.N. Report of the Human Rights Comm., Concluding Observations--Serbia, ¶ 18, U.N. Doc. CCPR/CCPR/C/SRB/CO/2 (2011) (noting that “[w]hile noting the information provided by the State party that the Law on Criminal Procedure allows for free legal aid to be granted in certain criminal cases, the Committee is concerned that no comprehensive system on the granting of legal aid exists in the State party and that neither legislation nor practice provides for free legal aid in civil cases. (art. 9, 14). The State party should review its free legal aid scheme to provide for free legal assistance in any case where the interests of justice so requires”).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 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).

⁴² U.N. CESR Report, Concluding Observations of the Comm. on Economic, Social and Cultural Rights--Cyprus, ¶ 10, U.N. Doc. E/C.12/CYP/CO/5 (2009).

⁴³ *Id.*

⁴⁴ *Id.* at ¶ 18.

V. Conclusion

The right to Civil Gideon resonates in the various international conventions and the right to counsel is now provided in a great number and variety of civil proceedings around the world. The CERD committee and the HRC have repeatedly recognized the importance of counsel “where the interests of justice so requires,” including for indigenous populations in land dispute proceedings, for immigrants in civil proceedings and for victims of ethnic discrimination.⁴⁵ In 2009, the Committee on Social, Economic and Cultural Rights for the first time recommended that a State party provide free legal aid to victims of discrimination and to asylum-seekers and third country migrants with regard to their economic, social and cultural rights, including medical care.⁴⁶ These international bodies recognize the right to counsel in civil matters where the loss of rights to basic human needs is placed at greater risk by the lack of legal assistance.

The formal recognition of the right to counsel in civil matters is not an amorphous aspiration; it is a reality for many other countries around the world. At least forty-nine European countries provide a right to counsel in civil matters under their domestic laws. The United States has taken positive steps toward this recognition by signing and ratifying international conventions. By ratifying CERD in 1994, the United States legally agreed to be bound by its requirements, including an obligation to protect and promote non-discrimination in the enjoyment of human rights including among others, the areas of housing, health, education, labor and access to justice. Under our national obligation, each state has a duty to help enforce the compliance and implementation of the necessary provisions, such as providing counsel in civil proceedings where necessary to protect and promote access to justice.

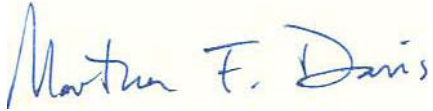
The Civil Gideon right is an emerging human right that is receiving increasing recognition on the international stage. The international jurisprudence concerning Civil Gideon is highly relevant to evaluating whether human rights and the interests of justice are adequately served by the current United States system. Wisconsin Petition 10-08 recognizes this right and helps to enforce the United States’ obligations under international conventions by providing counsel to otherwise *pro se* individuals in proceedings that threaten their basic human needs, thereby promoting and protecting access to justice. While the Petition takes a narrow approach, using discretionary power in the provision of counsel, when compared to the more extensive rights to counsel under other countries’ laws, it will establish important standards in the assurance of equal access to justice. Wisconsin has the unique opportunity to become a leader in this

⁴⁵ U.N. Report of the Human Rights Comm., Concluding Observations--Sweden, ¶ 21, U.N. Doc. CCPR/C/SWE/CO/6 (2009); U.N. Report of the Human Rights Comm., Concluding Observations--El Salvador, ¶ 17, U.N. Doc. CCPR/C/SLV/CO/6 (2010); 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).

⁴⁶ U.N. CESR Report, Concluding Observations of the Comm. on Economic, Social and Cultural Rights--Cyprus, ¶¶ 10, 18, U.N. Doc. E/C.12/CYP/CO/5 (2009).

emerging international and domestic legal trend. In the interests of justice and in accordance with the nation's international obligation, we strongly urge the Honorable Justices to amend Supreme Court Rule 11.02 as requested by Petition 10-08.

Respectfully submitted,

A handwritten signature in blue ink that reads "Martha F. Davis". The signature is written in a cursive style and is positioned above the typed name and title.

Program on Human Rights and the Global Economy
Northeastern University School of Law

By: Martha F. Davis
Professor of Law
Co-Director, Program on Human Rights and the Global Economy
Northeastern University School of Law
Contact: (517) 373-8921