



Deutscher**Anwalt**Verein

Position Paper

of the German Bar Association

„Opening up access to law for people who need it most urgently”

Establishing independent and individual legal advice as standard measure of humanitarian aid

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The German Bar Association (Deutscher Anwaltverein – DAV, Transparency Register identification number 87980341522-66) is the professional body comprising more than 66.000 German lawyers. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession.

„Opening up access to law for people who need it most urgently”

A project aiming at establishing independent and individual legal advice as a standard measure of humanitarian aid

I. Current Challenges

What is needed in times of distress?

And how can lawyers contribute to alleviate humanitarian crises?

There is overwhelming consensus among the global community that, in times of humanitarian crises, measures of emergency aid and early recovery measures have to be carried out in order to secure the livelihood of the people affected without making distinctions on the basis of nationality, ethnicity, gender, religious belief or political opinions. Therefore, all humanitarian activities have to be provided for pursuing a human rights based approach and following a needs assessment. In this train of thought, the physical need for tangible support measures such as shelter, food and health care is obvious and widely recognised.

However, immaterial and intangible needs of affected persons are often, even by many actors of humanitarian aid, fully ignored or neglected. One of those immaterial needs is the need for independent and individual legal advice. When life is falling apart, be it on grounds of military conflicts, natural disaster or flight, those affected want to immediately be able to take informed decisions. Permanent fear and continuous uncertainty as to their own legal status, administrative procedures and legal chances or restrictions – in short, the legal framework determining their personal future – is going to negatively affect their mental health to a great extent.

The German Bar Association is striving to contribute to the recognition of independent and individual legal advice as a standard measure of humanitarian aid. For the time being, there is no legal right to claim individual and independent legal advice in humanitarian crises in public international law.

Legal patchwork

Though, there are several norms of international law that guarantee individual access to law, the overall legal landscape, however, remains a legal patchwork:

On a global level, fundamental human rights guarantee legal assistance in criminal proceedings free of charge for defendants, if they are lacking sufficient means to pay for it. On the European level, European asylum law grants applicants a right to be provided with legal and procedural *information* free of charge. Applicants are only entitled to free legal *assistance* and *representation* on request in appeals procedures. In some particular cases, it can be argued that a claim for legal advice prior to removal decisions has a legal basis in Art. 13 ECHR read in conjunction with Art. 3 ECHR, because anyone subject to a removal measure, the consequences of which are potentially irreversible, has the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.

To cut a long story short, there is no universal legal right in public international law to claim independent and individual legal advice covering all kind of humanitarian activities and with respect to all sectors of humanitarian aid.

Furthermore, in the area of humanitarian aid, individual legal advice provided for by lawyers is not yet part of the 'traditional' mainstream set of humanitarian action. In fact, qualified individual legal advice is sporadically provided for in the field of humanitarian aid by actors of civil society. However, there is no recognised and common practice in this regard.

Practice has shown the need for independent and individual legal advice

The demand for first aid individual and independent legal advice has, inter alia, been proved by numerous project examples on the ground. This demand is a strong sign that that the provision of individual legal advice in humanitarian crises should henceforth not be left to ad-hoc initiatives, but requires a normative embedment making individual legal advice in humanitarian crises available systematically.

The Norwegian Refugee Council, for instance, has provided qualified and individual legal advice in Pakistan to approximately 100,000 refugees from Afghanistan with the help of pro bono lawyers. Thereby they achieved the release of hundreds of illegally detained refugees from Pakistani prisons.

In the aftermath of the tsunami on 26 December 2004, the Swedish Bar Association convinced 270 law firms to give victims of this natural disaster legal advice free of charge. Likewise, the German Bar Association made legal advice available to survivors and to relatives of victims of the tsunami promptly and unbureaucratically through a telephone hotline. The latter gave 70 individuals the opportunity to seek for legal advice free of charge. The New Zealand Law Society took similar measures following the earthquake in the surroundings of Christchurch in 2011.

The American Refugee Committee (ARC) offered legal advice to refugee women who had become victims of sexual assault on their journey in two hospitals in Guinea. In consideration of the particular vulnerability of refugee girls and women, legal advice was offered for instance in matters related to custody and maintenance.

Not least, 45 volunteers from twelve European countries have so far provided individual and qualified legal advice for 770 individuals seeking for international protection within the project "European Lawyers in Lesvos".

This project has been initiated by the German Bar Association and the Council of European Bars and Law Societies (CCBE) and has been running since late summer 2016 (effective: February 2017).

II. Objective

The understanding of humanitarian aid has to be enlarged and become holistic in order to be able to guarantee access to justice to people in various possible vulnerable circumstances.

Qualified and independent legal advice is the key element to guarantee the right of access to justice. In general it requires legal advice to be provided by lawyers admitted to the bar.

“Protection Officers” who offer general legal advice cannot guarantee effective access to justice, since their activity is neither subject to professional qualification requirements in law¹, nor can it guarantee individual and independent advice in every single case.

Therefore, the objective is that individual and independent initial legal advice be established as standard measure of humanitarian aid and that it be included in the fundamental documents on humanitarian aid. Moreover individual and independent initial legal advice should also be included in the respective funding guidelines, since the independence of legal advice can only be guaranteed with the help of non-governmental actors.

III. Next steps: Amendment of basic legal documents

In 2005, the United Nations, assisted by the Inter-Agency Standing Committee (IASC)², introduced a new coordination mechanism for humanitarian aid, the so-called cluster approach. The cluster approach was sought to better identify the needs in the respective sectors of humanitarian aid and to coordinate the humanitarian assistance accordingly. For example, clusters have been set up to deal with nutrition issues, shelter, education, water and sanitation³.

Global level with strong operative focus, but weak normative referencing

Granting individual and independent legal advice in humanitarian crises is thematically touching upon the work of the Global Protection Cluster (GPC)⁴.

¹ <http://www.unhcr.org/5242dcc89.pdf>.

² Find more information here: <https://interagencystandingcommittee.org/>.

³ Further information is available here: <https://www.humanitarianresponse.info/en/about-clusters/what-is-the-cluster-approach>.

⁴ The work undertaken by the Global Protection Cluster is introduced here:

http://www.globalprotectioncluster.org/_assets/files/about_us/GPC_strategy/gpcstrategicframework.pdf.

Whilst being called upon operating standard and policy setting relating to protection in complex and natural disaster humanitarian emergencies, the Global Protection Cluster has not yet come to address independent 'first aid' legal advice as an issue of concern.

With a view to lead and coordinate the work of other United Nations agencies, inter-governmental organisations and non-governmental organisations, Lead Agencies are designated within the particular clusters. The United Nations High Commissioner for Refugees (UNHCR) has been designated the Global Cluster Lead Agency for Protection.

As a Lead Agency, the work of UNHCR serves as a role model for the Global Protection Cluster. The UNHCR Handbook for Emergencies⁵ indicates numerous operative measures (e.g. concerning food, water, sanitation, health and education). Legal advice or the issuance of legal information, however, is not one of the issues dealt with.

Apart from the current lack of attention for individual and independent legal aid, operative priorities and non-legal standards along with their implementation options seem to be the key priority on a global level. Taking operational measures back to their normative roots hardly takes place. At best, a mere rhetoric reference is made to human rights in the context of carrying out the initial needs assessment⁶.

Taking this into account, efforts towards establishing individual and independent legal advice as a standard measure of humanitarian aid should, in the first instance, focus on amending EU law.

European law as preliminary focus of the project

Bearing in mind its Humanitarian Aid and Civil Protection Department (ECHO), the EU is one of the major global actors in the field of humanitarian aid. Though ECHO considers legal aid as a natural component of basic humanitarian assistance⁷, ECHO is just about to start pioneering approaches of mainstreaming legal aid into the practice of humanitarian aid⁸.

Though the needs assessment contained in a document on operational priorities fortunately notes that a lack of information in their own language on future options risk creating misunderstandings, false hope and stress⁹, these findings were not yet reflected in the General Guidelines on Operational Priorities for Humanitarian Aid in 2017¹⁰.

⁵ It may be accessed here:

http://www.ifrc.org/PageFiles/95884/D.01.03.%20Handbook%20for%20Emergencies_UNHCR.pdf.

⁶ For further information: <https://www.humanitarianresponse.info/programme-cycle/space/page/assessments-overview>.

⁷ http://ec.europa.eu/echo/refugee-crisis_en.

⁸ ECHO-Dokument „Emergency Support Financing Decision – Operational Priorities“, Ref. Ares(2017)294684, dated 19 January 2017.

⁹ Note already ECHO-Dokument „Emergency Support Financing Decision – Operational Priorities“, Ref. Ares(2016)2834625, dated 17 June 2016; available at: <http://ec.europa.eu/echo/sites/echo-site/files/esop.pdf>.

¹⁰ Commission Staff Working Document „General Guidelines on Operational Priorities for Humanitarian Aid in 2017“, SWD(2016) 432 final, dated 5 December 2016; available at: <http://data.consilium.europa.eu/doc/document/ST-15299-2016-INIT/en/pdf>.

In contrast to the global level, European law provides for a clear-cut legal norm suitable for amendment: Council Regulation (EC) No. 1257/96 of 20 June 1996 concerning humanitarian aid¹¹. Its amendment with individual and independent initial legal advice is a key step towards the aim of having legal advice recognised as standard measure of humanitarian aid in EU law. Regulation (EC) No. 1257/96 has a huge practical impact, since Commission Implementing Decisions on financing humanitarian aid are adopted on the basis of this Regulation¹².

Amending Regulation (EC) No. 1257/96 with individual and independent legal advice necessarily requires the support of a multitude of key players.

Next steps

The German Bar Association will contact the EU Commissioner for Humanitarian Aid and Crisis Management, and the European Civil Protection and Humanitarian Aid Operations (ECHO) to further discuss the issue and to evaluate options of how to amend individual and independent legal advice to Regulation (EC) No. 1257/96. With a view to broaden the support and to multiply the political backing, the German Bar Association likewise intends to discuss our concern with members of the European Parliament and politicians in Germany.

¹¹ Available at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996R1257&from=DE>.

¹² Note Commission Implementing Decision „Financing humanitarian aid operational priorities from the 2016 general budget of the European Union (ECHO/WWD/BUD/2016/01000)“, C(2015) 8936 final, dating 15. December 2016; available at:

http://ec.europa.eu/echo/files/funding/decisions/2016/HIPs/WWD_BUD_2016_en.pdf.