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Legal aid for intervenors in proceedings before the European Court of Human Rights



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ABSTRACT

Article 36 of the European Convention on Human Rights (ECHR) enables third parties to intervene in cases before the European Court of Human Rights (ECtHR). Access to justice is a very important principle which has been developed both in international law and in the context of the ECHR. There is, however, no clear answer regarding the question of how legal aid is accessible for third persons who are affected by proceedings without being a party to them. Taking the example of German law introducing Legal Aid for affected third parties, the authors ask if such a national act is necessary from the perspective of the access to justice. The law described here adds an additional national layer to internationalized proceedings and the authors seek to answer the question how helpful the enacted law could be in practice. In light of recent controversies concerning permits for major infrastructure projects in Germany the question of legal aid is also of importance for corporate applicants before the European Court of Human Rights because affected third persons who may be eligible for legal aid under the new law can also be those who had, in Administrative Law courts, challenged permits issued to the person who then is the applicant in proceedings before the European Court of Human Rights. The authors also look at the right to legal aid for affected third parties under the European Union's Charter of Fundamental Rights and the potential divergence between the Charter and the European Convention of Human Rights against the backdrop of the potential accession of the European Union to the Convention and conclude that, notwithstanding some small shortcomings, the new law is necessary and should be sufficiently effective in assistance of third persons intervening before the ECHR.

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"Legally enforceable rights and duties underpin a democratic society, and Access to justice is essential in order to make these rights and duties real."

T. Blair ([Bean in Sommerland, 2004](#), p. 345).

1. Introduction

Legal aid is often an essential element for the effective protection of rights. This is particularly true in instances in which the person who is in need of financial support finds him- or herself already in a structurally weaker position than the other party, for example in cases in which a citizen faces the government. It is due to this imbalance e.g. in criminal cases that defendants are assigned an attorney when they cannot afford one. But this idea also applies to the financial support which is provided in civil or administrative law cases. What is often overlooked, though, is that not only the parties to a legal dispute can be affected

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by its outcome. If your neighbor sues the municipality for a building permit, you have an interest in being protected against construction noise and in maintaining the value of your property. These interests can be affected significantly by the outcome of this trial. In many cases the law foresees some role for third persons who are not a party to the dispute but are nevertheless affected by its outcome. Yet, without being full parties to the legal proceedings in question, they will often be unable to secure legal aid, even if they are in need of financial support in order to adequately defend their rights and interests.

In the opinion of the Council of Bars and Law Societies of Europe (CCBE, 2010), the right to access legal aid must “cover[...] the various parties within the proceedings”. This could be explained as the including third persons within the personal scope of the right to legal aid.

On the 25th of April 2013, the Law to introduce Legal Aid for affected Third Persons in Proceedings before the ECtHR or *Gesetz zur Einführung von Kostenhilfe für Drittbetroffene in Verfahren vor dem Europäischen Gerichtshof für Menschenrechte* (EGMRKHG, 2013) entered into force in Germany. This law also allows interveners to apply for legal aid. This raises the question as to whether this law is truly necessary in that it adds an additional national layer to internationalized proceedings but also the issue how helpful the proposed legal aid can be.

In order to answer this question, the law is to be evaluated from an international perspective, more precisely, from the perspective of the ECHR (1950). Here, two aspects are taken into account: the right to legal aid as a right under the European Convention on Human Rights and legal aid in cases before the European Court of Human Rights. In addition, we will have a closer look at the aforementioned German law before we assess its benefits in the final part of this text.

The aim of our research is not only to familiarize the reader with the need of affected third persons for legal aid as a prerequisite for effective access to court, but also to describe one possible solution in national law with which the currently existing shortcomings in the legal aid scheme provided by the ECtHR could be remedied at least indirectly. Doing so also requires an in depth look at legal aid in general. From the perspective of potential interveners, here is hardly any information available with regard to the support possible for interveners before the ECtHR and this text also aims at drawing attention to their particular situation. This more descriptive part of the current situation concerning legal aid is analyzed through two lenses, the European as well as the national dimension. Doing so appears to be essential as the European human rights system does not provide an adequate protection of intervening third persons, despite emphasizing the importance of access to the court as a human right.

2. Legal Aid in Europe

2.1. The right to legal aid under the ECHR and the EU charter of fundamental rights

et al., 2014, p. 26), but apparently not to interveners. The right to legal aid is closely linked to the right to access to justice. However, there is still a gap in the protection afforded by the ECHR. It could be argued that proceedings under Article 34 ECHR are not covered by Article 6 ECHR because they are not proceedings which are organized by the state. Unlike the states which have ratified the ECHR, the Council of Europe (CoE) is not a party to the ECHR and hence is not directly bound to the ECHR when it comes to the proceedings before the CoE's ECtHR. However, the proceedings before the ECtHR can be thought to be offered by the state by virtue of its ratification of the ECHR. Therefore it can be argued that the applicant remains under the jurisdiction of the respondent state within the meaning of Article 1 ECHR when trying to access the ECtHR. Accordingly there is still an obligation of the state to enable access to the Court in Strasbourg. Such an obligation would be closely related to the spirit of Article 13 ECHR (which explicitly only refers to domestic legal remedies and not to the ECtHR). The question which follows is whether the right to a fair trial under Article 6 ECHR provides for a similar obligation which would also cover access to the ECtHR. Here there are two issues which must be taken into account. In addition to the aforementioned issue that the Court in Strasbourg is not a state's court, the applicability of Article 6 ECHR could be limited by the legal nature of the proceedings. Article 6 ECHR only guarantees a right to fair trial in criminal and civil law cases. The absence of a right to a fair trial in public law proceedings is one of the most important shortcomings of the ECHR.

Proceedings before the ECtHR may have their roots in a range of different cases in domestic law, but even if one wants to extend the states' obligation to provide access to justice to applications under Article 34 ECHR and interventions under Article 36 ECHR it seems likely that such cases would be excluded from Article 6 ECHR not only on grounds of organization and operation of the court (by the Council of Europe as opposed to the state party to the Convention) but also due to the nature of the proceedings in Strasbourg, be they under Article 34 or Article 33 ECHR. A case can change from e.g. criminal to public law if an appeal at the highest instance of criminal law courts is followed by an application to a national constitutional court. The legal nature of the procedure cannot be dependent on the last domestic procedure as it cannot be a consequence of the domestic legal system's random (i.e., random from the perspective of the ECHR) answer to the question if the respondent state's domestic law allows for constitutional complaints or not. Therefore there has to be a universal answer to the question if the state's obligation to provide access to justice in the form of access to the ECtHR is covered by the material scope of Article 6 ECHR.

From the perspective of the ECHR, legal aid is relevant in the context of the right to a fair trial under Article 6 ECHR. Article 6 (3) (c) ECHR provides for a right to legal aid in criminal cases¹ but not in private law cases.

Apart from that, though, the right to a fair trial does not include an automatic obligation to provide legal aid (Reid,

¹ See in detail (Harris et al, 2014, p. 480)

2007, p. 147), even though the right to a fair trial includes the concept of equality of arms between the parties to legal proceedings (Leach, 2005, p. 257). Rather, the lack of legal aid can result in a denial of the right to access to court (Reid, 2007, p. 147), which is a key component of the right to a fair hearing under Article 6 ECHR. While the Court has been described as “reluctant to determine a right to access to court when the applicant is refused legal aid” (Grabenwarter, 2014, p. 127), this view has been exemplified (Reid, 2007, p. 147) in *Airey v. Ireland*. On the other hand legal aid might not even be enough to satisfy the requirements of Article 6 ECHR (Reid, 2007, p. 148). What is necessary is that there is an “opportunity to be heard under the proper and effective control of the fairness and conduct of the proceedings by the court” (Reid, 2007, p. 148). In any case is the provision of legal aid if not always then at least often an important way in which states can fulfill their obligations with regard to the right to a fair trial.

The situation will become slightly more complicated should the European Union become a party to the ECHR. This possibility has been discussed for decades (Kuijer, 2011, p. 17) and has in recent years been given a legal foundation both in European Union (EU) Law² as well as in the ECHR (article 59 para. 2). Also under the European Union’s own Charter of Fundamental Rights (2000), the right to a fair trial is protected. Indeed, at least as far as criminal law cases are concerned, legal aid is essential for the realization of the right to a fair trial (Gruodytė and Kirchner, 2012, p. 80–81). But does Article 47 of the Charter also require that legal aid is paid to affected third persons? The Charter applies also to the implementation of EU Law through domestic law (article 51 para. 1) and the ECtHR has ruled in cases such as *Bosphorus* (*Bosphorus Aisliner v Ireland*, 2005) or *Kokkelvisserij* (*Kokkelvisserij U.A. v the Netherlands*) in which the Strasbourg court found the implementation of EU Law by States to fall short of the requirements of the Convention. A joint declaration by the Presidents of the ECtHR and the European Court of Justice (2011) aimed at securing the parallel interpretation of the Convention and the Charter (Gruodytė & Kirchner, 2014, p. 73). If the EU becomes a party to the ECHR³ the court in Strasbourg will be the ultimate guardian of human rights also with regard to EU Law (Kuijer, 2011, p. 21). This raises an important question because the wording of Article 47 of the Charter goes beyond Article 6 ECHR. Unlike in the case of Article 47 sentence 1 of the Charter, “[e]veryone” within the meaning of Article 47 sentences 2 and 3 of the Charter can really mean everyone, not just those who are covered by the first sentence of the norm. But who has a right to legal aid under Article 47 sentence 4 of the Charter? It appears from a cursory reading of the norm that this would be everyone who is in need of access to justice. This would not only be those who want to bring a case before a

court but also affected third persons who are not parties to proceedings. Keeping in mind the intended parallel interpretation of the Charter and the Convention this might require an interpretation of Article 6 ECHR which reaches the standard secured by Article 47 of the Charter and which thereby goes beyond the interpretation which is common today. This can be problematic with respect to all States which are parties to the ECHR but not members of the European Union because they have never consented to such a wide interpretation. This, however, appears not necessary if the ECtHR reaches this interpretation not only based on the political will of the European Union and the Council of Europe or the presidents of the two courts but rather by the traditional means of interpretation which have long been employed by the European Court of Human Rights. These interpretative methods are those which are also reflected in Articles 31 et seq. of the *Vienna Convention on the Law of Treaties* (1969) and which have been explained by the Court in detail in *Golder v. United Kingdom* (1973). Under Article 47 of the Charter, a right to legal aid for affected third parties already seems to exist today and it is not inconceivable that the ECtHR might find such a right also in Article 6 ECHR. However the factual situation in selected EU member states regarding legal aid is revealed in the next chapter.

2.2. Legal Aid in national legal systems

The beginning of the legal aid in Europe is usually seen in the 17th and 18th centuries and the Age of Enlightenment, when equality before the law and equal rights were codified with an aim to create equal opportunities for individuals in obtaining justice (Kiraly, 2010, p. 59). But in some European countries the provision of legal aid to the poorest people can already be dated back to the 15th century: for example in England a 1495 statute by Henry VII abolished court fees for poor civil litigants and the courts were given the right to appoint lawyers to provide representation in a court without compensation (Johnson, 1994, p. 204; Skinnider, 1999, p. 2). Initially, legal aid was known as the law for the underprivileged, aimed at ensuring possibility of participation in a legal procedure for all individuals, not only for wealthy ones (Kiraly, 2010, p. 57). Only in the 18th and 19th centuries, the law for the underprivileged became a social duty of the state, as most European countries laws provided court fee waivers and appointments of lawyers for the very poor; usually this was limited to the assistance concerning access to courts but did not include substantial legal advice as such (Skinnider, 1999, p. 2). Broader schemes of legal aid were established by states only after World War II (Regan, 1999–2000, p. 386) in the context of a veritable “access to justice” movement (Skinnider, 1999, p. 5), for example in the United Kingdom with the establishment of a national *Judicare* legal aid scheme in 1949. *Judicare* heralded an unprecedented emphasis on legal aid around the world (Fleming, 2007, p. 1). Denmark, Finland, France, the Netherlands, Norway, Sweden reformed their legal aid systems and established *Judicare* or mixed model schemes that for the first time offered poor and low-income citizens a comprehensive range of legal aid services (Fleming, 2007, p. 1). Especially the schemes especially in the Scandinavian countries were considered to have

² Article 6 para. 2 (Treaty on European Union as amended by the Lisbon Treaty, 2012).

³ On this issue see in particular (European Court of Justice, (2014) Case C-2/13; Lazowski and Wessel, 2015, p. 179–212; Johansen, 2015, p. 169–178; Krenn, 2015, p. 147–167; Peers, 2015, p. 213–222; Halberstam, 2015, p. 105–146).

been very generous. However, in the 1980s and 1990s, legal aid started to decline in various countries. In the most generous countries such as the Netherlands and Sweden, legal aid expenses were cut severely. Aid was tied more closely to an increasing number of obligations with which the applicants were burdened (usually requiring financial contributions), which resulted in limitations of both the actual payments and the services provided to litigants who were in need of support (Fleming, 2007, p. 1). Today, the experience on the domestic level is mixed and diverse: charitable systems, *Judicare* (for example in Poland),⁴ mixed models (for example in the Netherlands (Ohm, 2009, p. 47)) and complex mixed model schemes of legal aid services operate in different societies, orientated to the poor and disadvantaged (Fleming, 2007, p. 26). The situation in national courts varies considerably as far as the availability of legal aid is concerned (Esposito, 2001, p. 10). Belgium, Latvia and France face problems with lawyer compensation and poor remuneration for the legal aid services which are actually provided. For this reason, some practitioners are not willing to participate in provision of a legal aid (2012). In Austria, Bulgaria, Cyprus, Finland and Greece no provision is made for an emergency lawyer system even in criminal cases, which means that usually first interrogations may be without a lawyer. In many States (for example the Scandinavian nations or the United Kingdom), various reforms are being undertaken in order to reduce the costs of legal aid - which usually will mean less protection for those seeking help. In other States, existing rules are in practice inefficient as do not grant effective access to justice (Esposito, 2001, p. 10). In the Czech Republic, suspects in criminal proceedings cannot choose their lawyer freely and if found guilty must compensate their legal aid costs; in practice this means that in some cases the defendant will waive the right to a defense lawyer because of the financial burden involved (Fair Trials International, 2012, p. 3). In some states the legal aid may be provided only with the approval of the court, for example in Germany or Finland. This procedure can also be time consuming (Fair Trials International, 2012, p. 3). In Italy the process is very bureaucratic and requires various forms of documentation which are related to the financial abilities of a suspect which usually cannot be provided during the police custody stage (Fair Trial International, 2012, p. 3). In other States, legal aid schemes do not exist and have to be set up. In many states, there are more or less serious economic problems which make the establishment of such a scheme difficult. Finally, there are States which have set up a legal aid system completely financed by other States' voluntary contributions (Esposito, 2001, p. 10).

Some EU countries make legal aid available to persons taking complaints to Strasbourg. For example in the Netherlands the Legal Aid Act allows legal aid for international human rights complaints, provided that the initial body does not itself offer the possibility of legal aid provision (section 12(2)(f)) (Esposito, 2001, p. 10). In Norway, Section 4 of the Free Legal Aid Act provides that, when

special reasons so require, legal aid may be granted before a foreign court or a foreign administrative authority (Butler, 2000, p. 365-366). The term "foreign" might be interpreted as possibly including international bodies as well. However, the majority of States do not include litigation before the ECtHR in their domestic legal aid schemes, whether criminal or civil. This includes i.a. Belgium, the Czech Republic, France, Ireland, Italy, Sweden, the United Kingdom and Denmark (Butler, 2000, p. 365-366).

Despite the fact that the ECHR often requires states to provide legal aid in domestic proceedings, it is still considered rare that the state (which often will also be the respondent) will provide legal aid for proceedings before the ECtHR (Leach, 2005, p. 26) even for applicants, let alone intervenors. This comes as no surprise as the Council of Europe, which runs the ECtHR, is itself not bound by the Convention. The states which are parties to the Convention, though, might have to provide legal aid in the context of the right to a fair trial. In addition to a number of states which do provide legal aid, the ECtHR at times provides limited legal aid (Leach, 2015, p. 26), covering e.g. travel expenses to enable applicants to attend hearings in Strasbourg (Leach, 2005, p. 26). The application to the ECtHR for legal aid is only permissible after the case has been communicated to the respondent state (Leach, 2005, p. 26), which prevents unnecessary work for the Court in case legal aid is requested in a case which is obviously inadmissible. Legal aid to cover the expenses of the application can then be paid retroactively (Leach, 2005, p. 27). In general, though, applicants will usually find it difficult to receive legal aid from their home states. Intervenor appear not to be taken into account by the Court, nor by many states which are parties to the Convention.

Despite the progress made in national legal systems "we are still a long way from an EU where every Member State offers sufficient fundamental rights protections for suspects and defendants" (Fair Trials International, 2012) so we may presume that provision of legal aid in civil cases or for intervenors might be even more problematic.

2.3. Access to justice and legal aid as human rights

Access to justice is one of the principles which can be considered to have already rather developed to a high degree on the national and international level but little attention had been given to the connections between legal aid and human rights until about 2005 (Fleming, 2007, p. 1). *The responsibility of states to provide legal assistance has been defined throughout this past century on several different bases, including moral, political, social-justice and legal term.* (Skinnider, 1999, p. 2) Currently there exists a range of international norms and standards that are relevant to the question of a state's responsibility to provide legal aid, such as International Covenant on Civil and Political Rights (ICCPR 1966), the Convention on the Rights of the Child (CRC) (1989), the United Nations Basic Principles on the Role of Lawyers (1990) (according to which States should ensure finances for the legal aid of the poor) and of course regional instruments, such as the ECHR and Fundamental Freedoms (ECHR or Convention), the EU Charter of Human Rights (EuChHR or Charter) etc. However,

⁴ Where a particular court is responsible both for determination of eligibility for a legal aid and for legal aid compensation (Bojarski, 2009, p. 127).

these norms do not directly address the question of how to ensure that legal aid is provided (Skinnider, 1999, p. 11) and these regimes do not proclaim legal aid as a civil or political right (Fleming, 2007, p. 3). In opinion of the authors, after evaluating the jurisprudence of the Court of Human Rights, States should guarantee access to justice as a human right and not just in the context of the rule of law (Gruodytė and Kirchner, 2012, p. 43). In 1970, the European Conference of Ministers (1970) issued a declaration on legal aid and advice stating that access to justice is an essential feature of any democratic society and that its provision is an obligation of the community as a whole.

If up until the end of the 20th century it was not always clear for states what it means for states to have to guarantee a fair trial within the meaning of the Article 6 of the ECHR, the ECtHR has developed jurisprudence over the years which addresses various issues. For example, individuals are entitled to legal assistance in order to guarantee the right to a fair trial, “as providing for a general requirement of some measure of “equality of arms” between the state and the individual or between the parties in the case” (Public Interest Law Institute, 2006, p. 2). Article 6 (3) (c) of the Convention requires effective assistance of a lawyer which means that a mere formal appointment is not sufficient. Meaningful access to justice can only be realized if individuals have an effective right in practice to enforce their legal rights and challenge unlawful acts (Esposito, 2001, p. 10).

The European Union emphasizes the compliance of member states with human rights obligations and the duty to ensure access to justice in accordance with Articles 2, 6, and 7, of the Treaty on the European Union and in the Charter. The Legal Aid Directive (Directive 2003/8/EC) adopted on 27 January 2003, furthermore, aimed to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

The establishment of legal aid represented the beginning of a new stage in the relationship between law and society and was thus fundamental to the development of an inclusionary form of citizenship (Bean in Sommerland, 2004, p. 348). “Legal aid is an essential tool in ensuring access to justice [...] and [“it is the duty of states and governments to guarantee organise and finance such legal-aid systems, which permit those with the least means to obtain access to justice[”]” (The Legal Aid Directive, 2003). This is particularly true in instances in which the person who is in need of financial support find him- or herself already in a structurally weaker position than the other party, for example in cases in which a citizen faces the government. Therefore in many cases the law foresees some role for third persons which are not a party to the dispute but which are nevertheless affected by its outcome. Yet, without being full parties to the legal proceedings in question, these persons often are unable to secure legal aid, even if they are in need of financial support in order to adequately defend their rights and interests.

3. Interventions in the context of the ECHR

Article 36 para. 2 of the ECHR (1950) enables third parties to intervene in cases before the ECtHR if given

permission to do so:

“The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”

Like elsewhere in the Convention the term ‘person’ is first to be understood as to include both natural and legal persons. Legal persons in this context can also be legal persons of a public law character (which usually could not be able to be applicants in the context of Art. 34 ECHR), including states (Leach, 2005, p. 55). The person in question has to be ‘concerned’, hence a minimum connection to the case is required, though this requirement is much weaker than the victimhood requirement under Art. 34 ECHR. The real hurdle for would-be interveners is described in the preceding words which require the intervention to be “in the interest of the proper administration of justice” (ECHR, 1950). Rule 44 of the Rules of Court of the ECtHR (RoC, 2015) spells out the procedure in more detail, Rule 44 para. 3 of the Rules of Court being concerned with interventions by non-states. An intervention is possible only after the application has been communicated to the respondent state. After the communication of the application to the respondent, the President of the Chamber⁵ decides whether to grant leave to or even to invite non-applicants “to submit written comments or, in exceptional cases, to take part in a hearing.” (Rule 44 para. 3 lit (a) RoC) The fact that the President of the Chamber can both invite comments and grant leave to submit comments indicates that would-be interveners can apply for leave to submit comments. Such requests “must be duly reasoned and submitted in writing” (Rule 44 para. 3 lit. (b) sentence 1 RoC) in English or French (Rule 44 para. 3 lit. (b) sentence 2, read together with Rule 34 para. 4 and 1 RoC). Unless another deadline has been set by the President of the Chamber (Rule 44 para. 3 lit. (b) sentence 2 RoC), the deadline to do so is twelve weeks after the respondent state has been notified of the application (Rule 44 para. 3 lit. (b) sentence 1 RoC) or, if the case is before the Grand Chamber, since the parties have been notified of the Chamber’s relinquishment of jurisdiction in favor of the Grand Chamber (Rule 44 para. 4 lit. (a) RoC) or to accept a party’s request that the case is referred to the Grand Chamber (Rule 44 para. 4 lit. (a) RoC). The President of the Chamber may set another time-limit “for exceptional reasons” (Rule 44 para. 3 lit. (b) sentence 2RoC) which indicates that in theory a time-limit determined in such a manner may be longer (Rule 44 para. 4 lit. (b) RoC) or shorter (Rule 44 para. 5 sentence 1 RoC). In addition, the President can establish additional conditions (Rule 44 para. 5 RoC), although it is notable that the Rules of Court give the president a large degree of freedom in this regard as the Rules of Court allow submissions to be taken into

⁵ The difference between Art. 36 ECHR (which refers to the President of the Court) and Rule 44 para. 3 RoC (which refers to the President of the Chamber) appears to be indicative of the transfer of competencies to smaller organizational units within the Court.

account even if the previously set conditions have not been met (Rule 44 para. 5 RoC). This, though, is in line with the fact that interventions are meant to be in the interest of justice, which means that intervener needs less of a connection to the case than the victim.

Often, interveners will have a personal interest in the outcome of the case but neither the Convention nor the Rules of Court require them to. Yet, in many cases the intervention may be almost as important for the intervener as it may be for the applicant. One reason for this is that the case before the ECtHR is between the applicant and a state or states while the underlying reason for the case in Strasbourg is found in a case before domestic courts which e.g. in private law matters also concerned another party. This other party is not a party to the proceedings in Strasbourg but might have an equal interest in the outcome of the case as the ECtHR is seen as a *de facto* (albeit not *de jure*) court of appeals. Likewise, family members might be interested in the outcome of the case, e.g. children in child custody cases which concern them but in which the legal question before the ECtHR concerns the rights of a parent under the ECHR. In addition to such concrete interests, other interventions have been allowed based on more abstract or general interests (Leach, 2005, p. 57). In particular the interventions by human rights NGOs (Leach, 2005, p. 58) have turned interventions for practical purposes into *amicus curiae* briefs in the classical sense of the term. It is the earlier category of cases, though, in which a person might find him- or herself in a situation not dissimilar from that of the applicant but might be unable to afford the expenses associated with requesting leave to submit, and with eventually submitting, an intervention.

But the problem is by no means related to human rights law as it is commonly understood. In particular from a German perspective, third party interventions can play a crucial role in a regulatory context. In recent years, several large scale business projects have been seriously delayed due to legal action, in particular by persons claiming to be affected negatively, would these projects go forward. These issues affect not only infrastructure projects of national interest such as the deepening of the Elbe and Weser rivers, the construction of a new airport in Berlin or the renovation of the central railway station in Stuttgart but also locally active businesses which are seen as disturbing the status quo, such as large poultry farms, wind energy and the like. Many of these cases will reach not only the Federal Supreme Court for Administrative Law (*Bundesverwaltungsgericht*) but eventually also be brought before the ECtHR. After all, despite the important focus on human rights obligations of corporations,⁶ corporations, too, can be applicants under Article 34 ECHR. In cases before German administrative law courts, those who claim a violation of their rights if a planned project were allowed would bring a case against the public authority in question and the corporation which wants to engage in the controversial behavior would be a third party. If a corporation were to claim human rights violations because German courts had forbidden a planned project, the roles would however be changed. The corporation would bring a case

against Germany and those who had initiated the original case would be affected third parties. Neighbors of a factory the owner of which seeks a permit to increase the extent of operations would be directly affected by the outcome of that corporation's case against the Federal Republic of Germany before the ECtHR. They would be affected third parties within the meaning of the new German law and could now claim legal aid. Would German courts rule in favor of the factory owner and the neighbor would bring a case against Germany in Strasbourg, obviously the likelihood that the corporation would be in need of legal aid would be significantly smaller. The change in the law now increases the chance for non-corporate affected third parties to be heard in proceedings at the ECtHR.

While this might at first sight be seen as another measure directed against corporate interests, one needs to ask oneself if this is in fact the case. Rather, granting legal aid to affected third parties could follow the idea of the equality of arms between parties to a legal dispute. Equality of arms is an important aspect of the right to a fair trial under Article 6 ECHR – but Article 6 ECHR goes further than that (*Delcourt v. Belgium*, 1970; *Isgro v. Italy*, 1991; *Janis*, 2008, p. 792). What the norm requires is the fairness of the entire proceedings (*Vidal v. Belgium*, 1992; *Delta v. France*, 1990; *Kirchner*, 2013, p. 11) “as a whole” (*Vidal v. Belgium*, 1992). While the ECtHR is not directly bound by the Convention itself, States are. If Germany decides to grant legal aid to affected third parties, doing so must not destroy the equality of arms between the parties. If legal aid is granted to affected third parties, they, too, enter into the equation. Article 6 ECHR requires an overall fairness of the proceedings and granting legal aid may not result in a discrimination against others. By bringing affected third parties into the proceedings, the impression can be created that the applicant is now facing both the respondent State and the third party. The third party however is not a party to the legal proceedings at the ECtHR. Rather, the role of the inclusion of affected third parties into the proceedings is to safeguard their rights as far as it is necessary. The primary obligation for the protection of rights however lies with the nation State. It is the State which can have an obligation to limit the applicant's rights for the protection of the rights of others. Ideally, the including of affected third parties in the proceedings would not be necessary because the respondent State is already obliged to protect their rights, too. However, if third parties are involved, the overall fairness of the proceedings must be protected and the applicant may not find himself in a situation of structural weakness by *de facto* dealing with two opponents.

4. Legal aid for intervenors: Legislative developments in Germany

Until recently, German law did not provide for legal aid in such cases because the intervener is not an applicant. On 25 April 2013, the Law to introduce Legal Aid for affected Third Persons in Proceedings before the ECtHR or *Gesetz zur Einführung von Kostenhilfe für Drittbetroffene in Verfahren vor dem Europäischen Gerichtshof für*

⁶ See for example (Hennings, 2009, p. 175).

Menschenrechte (EGMRKHG, 2013) entered into force, allowing also intervenors to apply for legal aid. In Germany what would be considered *pro bono* work elsewhere has long been fairly well regulated. With the exception of a few states in which legal advice is provided by specially appointed lawyers who work in courts of first instance, the standard model of legal aid consists of a client receiving a document from the local court of first instance which certifies that the client is impoverished with which the client can choose an attorney who then will counsel the client for no more than 10 Euros while being guaranteed a minimum payment by the court. In principle, every attorney participates in this system and an attorney can only refuse handling such a case if he or she shows a lack of specialized competence in the field in question. Essentially, this form of enforced *pro bono* work is the price attorneys pay for enjoying a monopoly when it comes to providing legal services. In Germany, this monopoly has been weakened in recent years and it remains to be seen how long attorneys will uphold their part of the deal (although it is hardly a deal if it imposed on attorneys by the legislature) if the lawmakers continue to undermine this basic understanding by allowing non-lawyers to provide legal services. In principle, though, Germany has a working system of legal aid which does not require an obligatory insurance model as is used elsewhere, somewhat protects attorneys against abuses and, arguably most importantly, allows a relatively easy access to legal services for those who otherwise could afford an attorney.

Now, legal aid is granted not only to the applicant but also to the intervenor in a case before the ECtHR after the application has been communicated to the Federal Republic of Germany (EGMRKHG, 2013, section 1 para. 1 No. 1). The timing indicates that German citizens or residents who intervene in a case against another state which is a party to the ECHR do not qualify for legal aid under the EGMRKHG, although it remains to be seen whether this restriction is compatible with European Union law and Germany's equality clause in Article 3 para. 1 of the Federal Constitution, the *Grundgesetz* (GG). Also, the would-be intervenor must have been invited (EGMRKHG, 2013, section 1 para. 1 No. 2 lit. a)) or granted leave (EGMRKHG, 2013, section 1 para. 1 No. 2 lit. b) aa)) (or at least if such a request appears likely to be successful (EGMRKHG, 2013, section 1 para. 1 No. 2 lit. b) bb))) to intervene. Most notably, in order to qualify for legal aid the intervenor has to be unable to cover the procedural costs in full or in part (EGMRKHG, 2013, section 1 para. 1 No. 3). Because the ECtHR does not charge legal fees, the costs (a term which in German law in this context would normally refer to court fees as well as attorney's fees) only include the fees charged by the attorney in question. Section 1 EGMRKHG regulates the procedure of applying for legal aid under the new law in more detail.

It has to be noted that the new German law suffers from a small flaw which indicates that the drafters are more familiar with European human rights law as it exists on paper rather than with the practice of European human rights law: Section 1 para. 1 no. 2 lit. a) EGMRKHG, like the ECHR but unlike the RoC, refers to the President of the Court rather than the President of a Chamber. Rather than

sticking strictly to the wording of Section 1 para. 1 no. 2 lit. (a) EGMRKHG and denying legal aid in all cases in which this decision is made by the President of a Chamber rather than by the President of the Court, the drafters' intent is best served by interpreting the norm widely, i.e. beyond its wording, as to including cases in which leave to intervene has been granted by the President of a Chamber. The applicant is referred to in Section 2 para. 1 sentence 1 EGMRKHG as the "*drittbetroffene[...]* Person", which can be loosely translated as the "third affected person". This wording expressly avoids any terminology which might refer to the person as a "party" to any proceedings, which clarifies that the person in question is not a party to the proceedings before the ECtHR. In other respects, the procedure to apply for legal aid is parallel to the established rules under the Code of Civil Procedure or *Zivilprozessordnung* (ZPO). In fact, Section 1 para. 2 sentence 1 EGMRKHG refers to a number of norms under the ZPO. While normally it would be the court which deals with the case decides on applications for legal aid, this task is not imposed on the ECtHR but is given to the *Bundesamt für Justiz* (Bfj), the Federal Agency for Justice (EGMRKHG, 2013, section 1 para. 2 sentence 2), a federal agency under the supervision of the Federal Ministry of Justice.⁷ If legal aid is granted, the applicant's expenses including expenses for legal representations will be paid from the federal budget, (EGMRKHG, 2013, section 2 para. 1 sentence 1) although there is no guarantee that all expenses will be paid. Rather, Section 2 para. 1 sentence 1 EGMRKHG refers to "*eine Hilfe*" ("an aid"), which might be less than the complete expenses.⁸ Among the expenses which will be covered are travel expenses and other necessary expenses which are incurred by the applicant and his or her lawyer (EGMRKHG, 2013, section 3 para. 1). This, too, indicates a significant orientation towards the model presented by domestic proceedings in which appearances in courts are still normal. At the ECtHR, though, actual hearings are the exception rather than the rule. In a sense, this transition to written proceedings has already entered the legal culture in Germany, too: in proceedings concerning constitutional complaints before Germany's Federal Constitutional Court, the *Bundesverfassungsgericht*, hearings are highly exceptional, too. Also, in many cases judges at the *Verwaltungsgerichte*, courts of first instance for administrative law, will ask parties for their consent to conduct proceedings exclusively in writing. Like elsewhere in German legal aid law, the EGMRKHG stipulates that the legal aid might have to be paid back in instalments (EGMRKHG, 2013, section 2 para. 2). If the proceedings advance to the Grand Chamber, legal aid, once granted, will be continued (EGMRKHG, 2013, section 2 para. 3).

With the entry into force of the EGMRKHG, Germany has established a legal aid system for intervenors in cases before the ECtHR which very much mirrors the existing rules for

⁷ The decision of the Bfj can be appealed (EGMRKHG, 2013, section 4 para. 1). The appeal is to be directed to the district court (*Landgericht*) of the location in which the Bfj has its seat (EGMRKHG, 2013, section 41 para. 2). Currently, this is the *Landgericht* in Bonn.

⁸ Section 3 para. 2 (EGMRKHG, 2013) spells out potential restrictions in more detail.

domestic proceedings. While the new law might not take into account the particular situation of an intervenor before the ECtHR in detail, the rules appear to be sufficiently effective to assist those who need to intervene in proceedings before the ECtHR. In enacting this law, despite some shortcomings, Germany has contributed to a more effective protection of human rights and has strengthened the relative position of the ECtHR. In particular if one still has in mind the debate in Germany in the context of the *Görgülü* case, this is a welcome development which reinforces the commitment of Europe's second most populous country to Human Rights and the Court. The legislative change in Germany therefore was not only necessary but it fills an important gap in the protection of human rights in Europe and can provide a model for legislation in other states.

5. Conclusions

Access to justice is one of the principles already rather developed both in national and international law, however little attention has been given to the connections between legal aid and human rights until 2005.

Currently there exists a range of international norms and standards that are relevant to the question of a state's responsibility to provide legal aid, such as International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the United Nations Basic Principles on the Role of Lawyers and regional instruments, such as the ECHR and Fundamental Freedoms, the EU Charter of Human Rights. However, these norms do not directly address the question of how to ensure that legal aid is provided and these regimes do not proclaim legal aid as a civil or political right.

The European Union emphasizes the compliance of member states with human rights obligations and the duty to ensure access to justice in accordance with Articles 2, 6, and 7, of the Treaty on the European Union and in the Charter. The Legal Aid Directive adopted on 27 January 2003, furthermore, aimed to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

Legal aid by the ECHR is available to applicants but apparently not to intervenors. Article 6 of ECHR only guarantees a right to fair trial in criminal and civil law cases. The absence of a right to a fair trial in public law proceedings is one of the most important shortcomings of the ECHR. Apart from that, though, the right to a fair trial does not include an automatic obligation to provide legal aid, even though the right to a fair trial includes the concept of equality of arms between the parties to legal proceedings. Rather, the lack of legal aid can result in a denial of the right to access to court, which is a key component of the right to a fair hearing under Article 6 ECHR.

Proceedings before the ECtHR may have their roots in a range of different cases in domestic law, but even if one wants to extend the states' obligation to provide access to justice to applications under Article 34 ECHR and interventions under Article 36 ECHR it seems likely that such cases would be excluded from Article 6 ECHR not only on grounds of organization and operation of the court but also due to the nature of the proceedings in Strasbourg, be

they under Article 34 or Article 33 ECHR.

Under Article 47 of the Charter, a right to legal aid for affected third parties already seems to exist today and it is not inconceivable that the ECtHR might find such a right also in Article 6 ECHR.

Despite the fact that the Convention in many cases requires states to provide legal aid in domestic proceedings, it is still considered rare that the state (which often will also be the respondent) will provide legal aid for proceedings before the ECtHR even for applicants, let alone intervenors.

The provision of legal aid in civil cases for intervenors is even more problematic.

On the 25th of April 2013, the Law to introduce Legal Aid for affected Third Persons in Proceedings before the ECtHR entered into force in Germany, allowing also intervenors to apply for legal aid. Germany is going one step further in protection of human rights. This law is really timely and necessary and appears to be sufficiently effective to assist those who need to intervene in the proceedings before the ECtHR despite some small shortcomings. It contributes to a more effective protection of human rights and strengthening the position of the ECtHR.

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