

New European Justice Stakeholders Forum ('EJSF'): Opening Event

'The Future of Justice in the EU: challenges & opportunities'

Session II: 'Migration and the Rule of Law'

Short Presentation

by

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Distinguished participants,

Thank you very much for inviting me to make a short presentation on this occasion relating to the topic *Migration and the Rule of Law*. A question put to us is: What is the outlook for the rule of law if the crisis persists for years?

Let me first say that I find the New European Justice Stakeholders Forum an excellent idea. I see from the concept note that it is a forum where all relevant stakeholders and policymakers from the European Commission, the European Parliament, Member States, the European Economic and Social Committee, and the Council of Bars and Law Societies of Europe can meet to get to know one another, discuss key issues and new challenges, share best practices, support and inform policymakers and engage in policymaking. This should be a very important contribution to our efforts to establish the rule of law.

You have just heard presentations by three experts in the field of migration: Morten Kjaerum, Chairman of the Board of the European Council for Refugees and Exiles, Christos Giakoumopoulos, Director of Human Rights, and Migration Co-ordinator of the Council of Europe, and Gabrielle H. Williamson, Partner in the Brussels and Düsseldorf offices of Luther. Let me say that I fully concur with what they just said. The obvious conclusion to draw here is that existing international law must be applied in the situation that Europe faces at the moment.

What I would like to do is to approach the topic in a more overarching perspective, focusing on the need for the rule of law at the national and international levels and the need to *prevent* conflicts that give rise to situations like the one that we are now experiencing in Europe.

After the Second World War, determined efforts were made to strengthen the protection of human rights. The United Nations was established in 1945. In 1948, the Universal Declaration of Human Rights was adopted by the UN General Assembly. In Europe, countries came together to create the Council of Europe to protect human rights and the rule of law and to promote democracy across Europe. Already in 1950, the Council adopted the European Convention on Human Rights, establishing the European Court of Human Rights. This Court has served Europe greatly. I know from personal experience; I was the agent of the Swedish government before this Court for 11 years (1983-1994).

The European Union is also engaged in human rights protection. As you are well aware, there is now a process under way with the aim of making it possible for the European Union to accede to the European Convention on Human Rights.

Basically, this means that Europe is built on a common belief in individual freedom. Our values include a commitment to human rights, democracy, freedom of speech, freedom of religion, gender equality – and also the right to asylum. We still believe in those values, but they are now under threat.

Some years ago all of a sudden things started to go wrong. It is difficult to explain exactly why. One explanation can be 9/11 – the attack on the World Trade Center in New York and the destruction of the twin towers. Extraordinary measures were taken. Fundamental rules were set aside. People were incarcerated without due process. Secret detention centres were established. Extraordinary renditions became practice. This also affected Europe. Among the countries that failed here is my own.

It is sad to note that Europe has been backtracking in the field of human rights and the rule of law in later years. An authoritative source of information here is the report of 29 April 2015 by the Secretary General of the Council of Europe Thorbjørn Jagland: *State of Democracy, Human Rights and the Rule of Law in Europe - A shared responsibility for democratic security in Europe - Report by the Secretary General of the Council of Europe*.¹ This report contains an overview of human rights, democracy and the rule of law in the 47 Council of Europe member states.

According to the report, Europe's democratic shortcomings are bigger, deeper and geographically more widespread than previously understood. The two biggest challenges to democratic security are the lack of judicial independence in many countries and threats to media freedom across the continent. According to the Secretary General, honest and decent courts are essential for supporting democracy and maintaining stability. Yet, according to the Secretary General, over a third of the member countries are failing to ensure that their legal systems are sufficiently independent and impartial. The Secretary General also concludes that media freedom is under pressure across the whole continent. In his opinion journalists face physical threats in many places, anti-terror laws are being used to limit free speech and certain media arrangements unfairly favour those who are in power. Further areas of concern identified in the report are shortcomings in the conduct of elections, inadequate anti-discrimination rules and pressure on non-governmental organisations in many countries. Since the report was issued, the situation has worsened due to the refugee crisis.

In my analyses, irrespective of the subject matter – be it peace and security, climate change, the Sustainable Development Goals, empowerment of women – I have a tendency to end up in the Security Council of the United Nations, and in particular among the five permanent members of the Council. After the fall of the Berlin Wall in 1989, things started going in the right direction. However, in 2003 we experienced a serious turning point. I refer to the attack by the United States and the United Kingdom, both permanent members of the Security Council, on Iraq in flagrant violation of the UN Charter. In my view, this was also the seed of what is now Daesh or ISIS. The United Kingdom is a member of the Council of Europe and the European Union.

Next came the attack by Russia, another permanent member of the UN Security Council, on Georgia in 2008. And now we have the situation in Ukraine. Both attacks are flagrant violations of the UN Charter and have resulted in extensive violations of human rights. I understand that the situation in Ukraine has generated a large number of applications to the European Court of Human Rights.

This is where I see a real need for reform and where Europe should make a determined effort to contribute.² The present situation in Europe is actually the result of the inability of the members of the Security Council to unite and act with determination and consequence when this is needed the most. If they were able to do so, they would actually *prevent* conflicts of the

¹ SG(2015)1E 29 April 2015, available at.

<https://edoc.coe.int/en/an-overview/6455-state-of-democracy-human-rights-and-the-rule-of-law-in-europe.html>.

² *The Mandate of the Security Council in a Changing World*. In: International Law and Changing Perceptions of Security. Eds. Jonas Ebbesson, Marie Jacobsson, Mark Klamberg, David Langlet and Pål Wrangé. Leiden/Boston: Brill/Martinus Nijhoff Publishers (2014) (p. 39-58), available at <http://www.havc.se/res/SelectedMaterial/20142224ilperceptionsofsecurity.pdf>.

nature that we are now experiencing, and which give rise to many of the problems that we are facing in Europe at present.

My response to the question concerning the outlook for the rule of law if the crisis persists for years is that the prospects are bleak unless we see a radical change. What is needed is statesmanship. And there must be an understanding among the permanent five members of the Council that they must fulfil their mandate under the UN Charter: the primary responsibility for the maintenance of international peace and security. This requires that they unite and that they stop using illegitimate vetoes.³ Incidentally, France and the United Kingdom have not used their veto after the fall of the Berlin Wall in 1989.

In later years, we have also seen a serious development in the political field in Europe. New political parties with strong nationalistic ideas have emerged, hostile to international cooperation and no real commitment to observing human rights standards. Lately, this has been exacerbated by the situation created by the influx of a large number of refugees.

This development has to be countered. What is needed here is a major educational effort. And here is where I see an important role for the New European Justice Stakeholders Forum. May I therefore suggest that one of the first topics on the agenda of the Forum should be education about the rule of law and human rights. A particular focus should be education of politicians who have a very special responsibility for establishing and maintaining the rule of law.

As I have said on many occasions before, this applies to politicians at all levels. However, it is obvious that politicians who serve in government and in the national legislative assembly have a particular responsibility. The same goes for politicians who serve at the international level, in this case the European Union.

In a meeting of the InterAction Council of Former Heads of State and Government in 2008 former Chancellor Helmut Schmidt of Germany questioned whether politicians really understand their responsibility for establishing the rule of law. This prompted the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Sweden – where Morten Kjaerum is now the Director – and The Hague Institute for Internationalisation of Law (HiiL) in the Netherlands to elaborate a short guide – some 40 pages – on the subject matter. The guide is entitled *Rule of Law – A guide for politicians* and is now available free of charge in 22 languages for downloading and printing from the web.⁴ Please use this guide in your Forum! As suggested in the Foreword to the guide, it should also be useful to other decision-makers and policy-makers and to journalists and others who need to orient themselves in the topic.

I note that one of the organisers of the New Forum is the Council of Bars and Law Societies of Europe (CCBE). As a former judge and former legal adviser in the Ministry of Justice and Ministry for Foreign Affairs of my country and the Legal Counsel of the United Nations for ten years (1994-2004) I have come to realise that national bar associations have a very important role in establishing the rule of law. I was invited to address this question at a conference in Tehran on 26 July 2015, organised by the Union of the Iranian Bar Associations and the International Bar Association. Allow me to refer to my presentation on that occasion,

³ See e.g. *Stop Illegitimate Vetoes*, available at <http://stopillegitimatevetoes.org/>.

⁴ Reference is made to <http://rwi.lu.se/what-we-do/academic-activities/rule-of-law-a-guide-for-politicians-2/>.

entitled *The function of Bar Associations to promote the rule of law – defending the rights of lawyers, educating the public about the rule of law*.⁵

National bar associations can also assist in explaining to the general public that there are certain rules that apply, including rules established by a generation that had experienced two world wars. If governments go astray, it is important to criticise them. As lawyers we must speak up.

Finally, allow me to refer to the work of the International Bar Association (IBA) and its Human Rights Institute (IBAHRI). The Institute was established in December 1995 and works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide. In this short presentation I cannot go into detail. Instead, I refer you to the Association's website.⁶ As an example of the work that the Institute engages in, reference could be made to our latest report on Hungary.⁷

Another example is the IBA report *Achieving Justice and Human Rights in an Era of Climate Disruption* with its recommendations.⁸ I encourage you to study this report. Let me just express the hope that the climate change will be addressed effectively following the Paris Agreement in December 2015. Otherwise there is a risk that we will experience a migration on the globe that will make the present flow of migrants across the Mediterranean appear as a trickle.

In closing, if there is anything that the IBA and the Institute can do for the Forum, please let us know.

I wish you all the best for a successful New Forum.

Thank you for your attention!

⁵ Available at <http://www.havc.se/res/SelectedMaterial/20150726thebarandtheruleoflaw.pdf>.

⁶ See <http://www.ibanet.org/> and See <http://www.ibanet.org/> <http://www.ibanet.org/IBAHRI.aspx>.

⁷ The 2015 IBAHRI report *Still under threat: The independence of the judiciary and the rule of law in Hungary* assesses the implementation of 23 recommendations set out in the 2012 IBAHRI report on Hungary, which examined the impact of regressive legislative steps on judicial independence and democratic checks and balances. The report is available at

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=93e2c33c-71e5-4ab5-89a7-299f5c5752ce>.

⁸ Available at <http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.