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Limits of Law

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I would like to thank the organisers of today's conference for the very kind invitation to speak to you about the migration crisis and the challenges posed for the rule of law in Europe today.

I have been asked to speak in my capacity as Chairman of the Migration Working Group of the CCBE which was formed at the end of 2014 in response to the crisis. Our group is comprised of experts from many European Union countries and is involved in a broad range of activities in what is now a critical but controversial field of activity.

I plan to deal with three broad themes this morning: firstly, the necessity for our profession to ensure the maintenance of the rule of law in the face of the enormous challenges faced by our societies at present; secondly, to disseminate the experiences of a legal practitioner in an island hotspot; thirdly, I would like to give you a brief overview of the work carried out by the CCBE's Migration group.

I. The necessity to emphasise the rule of law in the face of the crisis

The migration crisis is one of the greatest challenges to the rule of law in democratic Europe since the Second World War with what appears to be the quasi criminalisation of migrants as a result of initiatives by many European countries.

Some facts and figures to start with to place this morning's colloquium in context:

Forced displacement worldwide is now at a record high of some 60.000.000 people.

Since January 2015 the International Organisation on Migration has estimated that a total of 1,103,496 migrants, many of whom are refugees, have reached Europe by land and sea. The vast majority of this number landed in Greece (910.663) and Italy (157.083).

Between 1st and 27th January 2016 the IOM estimates that at least 55.652 migrants arrived in Europe. Whilst it was thought that harsh winter conditions would reduce the numbers making the dangerous journey across the Aegean Sea this has not proved to be the case. Many people have lost their lives, for example in the first three weeks of January 2016 the Turkish coastguards were required to rescue over 4.100 migrants but 57 people died. That same coastguard rescued a total of 91.600 migrants in 2015. This represented an enormous increase from the near 15.000 who were rescued in 2014.

As a reminder you will recall that the response to this crisis at European level has been to provide for an EU relocation programme which has been stoutly resisted and voted against by certain Member States. The relocation programme provides for only 120.000 persons, which of course is simply a tiny fraction of the numbers arriving, to be relocated between the Member States. The total number who have been assisted in this relocation programme from Greece by IOM is 157 of whom 30 went to tiny Luxembourg.

Of the million refugees and migrants arriving in Europe last year around 850.000 of these crossed from Turkey to Greece with most continuing through the Balkans and towards Austria, Germany, Sweden and other Western European countries. The top five nationalities were Syria (56%), Afghanistan (24%), Iraq (10%), Pakistan (3%) and Somalia (1%). This constitutes the largest movement of displaced people through European borders since World War II. As you can see – and this is crucial – the vast majority come from war-torn countries.

There are significant numbers of very vulnerable persons amongst the population on the move. 30% of the total numbers from Turkey to Greece are children. The UNHCR estimates that in total 250.000 children were in need of special protection and assistance in 2015 alone. This may mean that they were unaccompanied or separated but there are also the elderly, people with disabilities and the sick and injured, single women, pregnant or breastfeeding women (who the UN describes in politically very incorrect terms as „lactating women“).

Of course there are also those who do not come from war-torn countries and who are economic migrants plain and simple. These include individuals from South West Asia, parts of North Africa and West Africa and are predominantly young single males.

My personal view is that the fundamental right to seek asylum has been undermined if not completely abrogated by some of the initiatives taken by certain European countries including the construction of fences or other physical obstacles, the introduction of unnecessarily strict border control checks with restricted opening hours in some cases or requiring passports or national identity cards from migrants which is clearly an impossible obstacle for those coming from war-torn countries especially for unaccompanied children. Some countries temper their policies by not requiring valid travel documents for Afghanistan, Iraq and Syria. The effect of course – as you all well know – has been

that large numbers of people have been stranded at border crossing points. In certain cases, this has led to migrants having to return to Greece where reception conditions are precarious.

In this regard it is timely to recall that the European Court of Human Rights in 2011 accepted in *MSS v. Belgium and Greece* that the reception conditions and asylum procedures operating in Greece amounted to breaches of Article 3 of the European Convention on Human Rights which absolutely prohibits inhuman or degrading treatment.

It hardly needs to be said that the more rigorous the restrictions imposed by European countries become, the more likely it is that migrants will fall prey to the malign influences of people traffickers and smugglers. Of course we must recognise the enormous challenges posed to domestic economies and local municipalities by the continuous and apparently never-ending flow of migrants. Local authorities are struggling and in many cases failing, to cope with the increased demand for matters such as sewage treatment, waste management, water supply and electricity for huge numbers of persons most of whom have no intention of staying but wish to move onward.

And what of 2016? It is anticipated that 1.000.000 refugees and migrants will endeavour to use the Eastern Mediterranean and Western Balkan route into Europe. More families are travelling. The increased percentage of women and children arriving on European shores in the past few months suggests that they are being sent ahead of their male relatives or alternatively are joining male relatives who have already established themselves in destination countries.

The conflict in Syria will continue and there appears to be no end in sight given the breakdown in talks in Geneva this week. Of a total population of over 17 million Syrians (estimated in 2014), – 6,5 million are already internally displaced within their own country. 4 million more Syrians are in Egypt, Iraq, Jordan, Lebanon and Turkey. Many more than 1,2 million are in tiny and poor Lebanon which stopped counting at that number for what were described as budgetary reasons.

Turkey has over 2 million. There is no doubt that many of these Syrians will move from Turkey towards Europe. With the encouragement of the European Union the Turkish government decided on 30th December last to change its visa policy for Syrians. Remarkably that requires all Syrians arriving in Turkey by air and sea to have an entry visa as of 8th January although those arriving through the land border will continue to be exempted from entry visa requirements if they are admitted. The deteriorating security situation in most provinces in Afghanistan and desperate levels of poverty will ensure increased movement of Afghans towards Europe. Ongoing conflict in Iraq will as a certainty produce the same effect.

Turning now to the situation in Europe on 26th January last Denmark passed a controversial law to take valuables from refugees to pay for their stay and extended the length of time from one year to three years for family reunification for refugees. This is an especially harsh measure which certainly in my personal view conflicts with the spirit of the Geneva Convention and the fundamental right to asylum enshrined in Article 21 of the EU Charter of Fundamental Rights.

Measures in the proposal to amend Denmark's Alien Act apparently would allow the authorities to search the clothing and luggage of asylum seekers arriving in the country and requisition cash or belongings exceeding KR 10.000,- (approximately € 1.350,-) in value in order to finance their stay. The Bill, following pressure both domestic and international, was amended from its original form to specify that items considered to be of special sentimental value will not be seized. This is clearly a dangerous precedent for other European countries in terms of how to handle the refugee situation.

Of course Denmark is not alone in targeting migrants with harsh new legal regimes. Switzerland and the German State of Baden Württemberg are reported to be planning such measures also. I could spend an hour listing many other initiatives or proposed initiatives in Europe presently that are of grave concern.

Of course initiatives against migrants are not a specifically European phenomenon. If you want to have a good laugh have a look at some of the American presidential candidates and what they have to say about migration and indeed everything. You could start with the *Donald J Trump* website entitled „DONALD TRUMP MAKE AMERICA GREAT AGAIN“ and then have a look at Texas Senator *Ted Cruz's* website. Once you wade through the lengthy sections on the National Prayer Team, Restoring the Constitution, Why Guns are Good for Children (not quite but nearly) and bizarrely the *Cruz* promise to require his Attorney General to investigate „Planned Parenthood“ starting on the first day of a *Cruz* Presidency you come to the sections on migration and refugees. Enormous emphasis is placed on building a border wall with Mexico by both candidates – and Mexico paying for it in the case of Mr *Trump* – but listen to what Mr *Trump* has to say about refugees: this is the entire policy:

„There should be a Refugee program for American children.“ Is this to assist them to leave if he comes to power? The *Donald* goes on to say: *„We should increase standards for the admission of refugees and asylum-seekers to crack down on abuses.“* There is no attempt made to define what this means. He then goes on to tell us: *„We should use the monies saved on expensive refugee programs to help place American chil-*

dren without parents in safer homes and communities, and to improve community safety in high crime neighborhoods in the United States.“ That is the totality of the *Trump* policy on refugees and asylum seekers.

Senator *Cruz* is not much better. He talks about „*Enforcing the rule of law*“ as meaning regaining control of immigration courts.

You will also be aware that Mr *Trump* notoriously announced that every Muslim should be barred from the USA until proper verification systems could be introduced. He's not alone as Senator *Cruz* says the USA should prioritize persecuted religious minorities for refugee status. His words are: „*We should prioritize Christians, Jews, and others being systematically tortured and murdered by radical Islamists in Iraq and Syria today. As President, I will see to it that we focus future refugee relief on those persecuted for their faith.*“

Returning to Europe there is no question but that a comprehensive immigration reform at national and European level is required.

So what has happened?

The European Union's Council of Ministers adopted its 10-point action plan on migration on 20th April 2015. The European Council meeting on migration of 23rd April 2015 sought to establish a stronger presence at sea in order to tackle the flow of illegal migrants and resolved to, reinforce legal and political instruments to prevent illegal migration flows and fight trafficking of human beings in the Mediterranean and reinforce solidarity and responsibility amongst countries in order to attain a common legal framework on the right to asylum. Most controversially the European Commission decided its new migration agenda on 13th May 2015 establishing re-settlement mechanisms and country specific quotas for the distribution of migrants in EU Member States.

It is important not to be completely carried away with the present situation. We all need to recall that asylum seekers represent only about 0,1% of the total OECD population and even in Europe they represent less than 0,3% of the total EU population. The OECD expects that of the 1 million asylum applications in 2015 an estimated 350.000 to 450.000 people could be granted refugee or similar protection status. Many of these people will go on to contribute substantially to their host countries some of which need immigration in the years ahead for demographic reasons.

There is also no doubt that Europe has better legal and institutional systems in place for asylum seekers and migrants than it did even ten years ago and certainly than since the Yugoslav wars of the early 1990s. These range from Schengen to the Dublin system for allocating responsibility for assessing asylum applications and preventing multiple applications to the various Directives on qualification for asylum, asy-

lum procedures and reception conditions that are the stepping stones to creating a Common European Asylum System. There was also the creation of the European Refugee Fund and the successor funds today. I also speak of the European Asylum Support Office (EASO) that started its operations in 2011 with the objective of developing practical cooperation on asylum to support EU Member States under particular pressure and to collect and share information. Mention should also be made of Frontex created in 2004 to foster cooperation to secure EU external borders. Until the current crisis this package of legislation and measures formed a solid basis for the evolving EU common asylum policy. It aimed to reduce disparities in treatment, in procedures and in entitlements between the Member States.

However, Europe today is returning to walls and fences, Schengen is near to collapse and the Dublin system does not ensure fair burden sharing between countries and has certainly not prevented people from choosing smuggling routes. Both Schengen and Dublin appear mutually inoperable at present and the rule of law is seriously imperilled by national initiatives adopted unilaterally. Of course the direct consequence of the reintroduction of controls internally at borders will no doubt revive smuggling networks and further increase the pressure on frontline States simply because of their location.

II. The frontline lawyer

So turning to the second issue – what is it like for a protection lawyer working on the frontline this morning? I want to tell you about the experiences of one of our colleagues – a lawyer – who is today working on a Greek island which is a designated hotspot.

This is an island where it can be expected that up to 100 persons per day will arrive despite the bad weather at the moment. The lawyer wants to remain anonymous but would like me to outline their experiences in recent weeks and months so that we all understand how the rule of law is actually operating in practice in the face of the crisis.

I must emphasise that this is not an attack on Greece. There is no doubt that many of the Greek authorities are doing their best. It is however an indictment of how the crisis can destroy the day to day operation of the rule of law especially in a frontline country subject to a troika bailout.

I am using the lawyer's words which I have edited slightly:

„*There is no legal aid programme currently running on the island for registration of arrivals. Some information regarding asylum and a relocation system is provided through a tape recording in Arabic and Farsi on a short bus route*

from the shore to the registration centre. No information leaflet has in fact been printed but it is supposed to be coming. Identification and referral of vulnerable cases both on the shoreline and also inside the camp remains a major challenge.

Registration of migrants is a major concern for a number of reasons as nobody monitors the registration process and no legal assistance is provided to new arrivals. The focus is, understandably, initially on covering basic subsistence needs such as food and blankets and clothing, etc.

There are however real concerns for the rule of law in relation to three aspects of the registration process at present.

- ▶ There are reliable reports about flagrant mistakes being made during the registration process including such basic details as nationality, age and family status.
- ▶ The police currently hand out different kinds of registration and asylum application documents without the criteria always being transparent and with very frequent policy changes. For example, different geographical limitations, police notes for different deadlines etc. There is no overview at all of the kind of documents handed out and whether they are in compliance with national law and human rights standards.
- ▶ The police are systematically refusing to fingerprint and register certain nationalities that are presumed to be from certain African countries, that is registration in the sense of acknowledging their presence in the territory. As a result, many irregular migrants or potential asylum seekers are residing in a limbo situation on the island. They are unable to leave to work, to use public means of transport and unable to receive any kind of official support. Over the past few days there appears to be a change of policy again. The police are now apparently denying registration to single men. The only way to be registered is if the single men agree beforehand to be arrested, detained and repatriated.

Our colleague goes on to talk about the issue of detention:

„As to **detention** there is no legal aid programme and no monitoring of detention cases. People in detention get removed from the island and presumably, although this is not entirely clear, transferred to other free removal centres without having received any information about their situation or rights etc.“

I might pause for a moment to say that the CCBE Migration group has been credibly informed that in the few cases that are brought before the local Courts in Greece we understand that resources are so scarce that some Judges have not been provided with sufficient paper and therefore cannot hope to comply with the requirement to deliver a reasoned judgment where they have only a page or two per case.

Our colleague continues:

„In terms of hospitals, new arrivals and undocumented migrants who are hospitalised, do not get registered by the police. The reason for this is lack of capacity. In other words

there is no available police car. Only exceptionally if a transfer to Athens is required will registration take place. Even then registering the nuclear family of a patient is a struggle. This raises a series of issues – firstly, patients form a particularly vulnerable category as they are undocumented, unregistered and under the direct control of the authorities. Secondly, due to the anti-trafficking law in Greece, upon release from hospital these people and their families cannot board any public means of transport to reach the registration centre. In practice they rely on private cars and NGOs to transport them to the registration camp.“

As to Legal aid in general our colleague informs us:

„There is in general no legal aid programme for irregular migrants/asylum seekers on the Greek islands next to asylum relocation. Pertinent issues and systematic human rights violations that require legal assistance and for which no support is currently provided include:

- ▶ Deaths inside and outside camps (for example death due to cold);
- ▶ Conditions of detention;
- ▶ Conditions of reception such as lack of accommodation and basic items needed including beating, blankets, clothing even for vulnerable cases;
- ▶ Ill-treatment by authorities in camps and in detention;
- ▶ Discrimination on the basis of nationality.“



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The most pressing problem for frontline lawyers of course relates to children:

Dozens of unaccompanied children arrive each month, all of them needing particular help. They are placed in closed facilities for unaccompanied minors where they can receive visitors. For example, the closed facility for minors on the island of Lesbos resembles a detention centre with high wire fences and barred windows.

The process of identifying minors begins on the islands' beaches where hundreds of refugees and migrants land each day after taking short but dangerous boat crossings from Turkey. Volunteers, aid workers, NGOs and UNHCR protection officers work together to find the unaccompanied minors amongst the arrivals. Many minors declare they are adults in order to be avoid being placed in closed centres by Greek and other European authorities for safety. Minors often consider it as a sort of detention as they are not free to come and go.

There are no completely reliable figures on how many unaccompanied minors are arriving on the Greek islands but anecdotally child refugees in general are on the rise. According to UN statistics children now make up one in three of the refugees and migrants passing through France skyrocketing from one in ten earlier in 2015. From January to September child refugees lodged a record-breaking 214.000 asylum claims across Europe.

What is particularly distressing however is that it is estimated that 10.000 child asylum seekers or refugees went missing in Europe last year. Many of them have of course been reunited through unofficial channels with their family but no one knows the precise figures and how many have been trafficked. It is also worth recalling that the few lawyers who are dealing with the situation and in particular the children, have to manage the trauma of the children's experiences of the fighting and violence they have witnessed in their home countries of Syria, Iraq and Afghanistan but the journey made to Europe is also frightening. For example, crossing Aegean Sea by boat is the first many migrants have been on board a boat and must be especially distressing for children travelling without their parents or carers.

So what legal assistance exists or is planned?

Unfortunately, the legal assistance that is currently being provided on the islands in general – such as it is – is very much on an ad hoc basis. For example, the Ecumenical Refugee Programme (ERP) based in Athens is starting a new two-year legal assistance programme covering certain islands only. It has to be acknowledged that for many years the ERP was the only organisation providing any legal aid on the islands. The situation is not much better on the mainland.

Many individual Greek lawyers try to help but they are simply not being paid or paid sufficiently and given the economic conditions in Greece they have to do other work first. One further difficulty in Greece is that there are real problems in terms of liaison between lawyers active on all of the hotspot islands in Greece. This may also be the case in Italy but the problem may be magnified in Greece by the number of local Bars.

I am aware that the AIRE centre in London is willing to assist with expertise and provide office supplies.

There is the possibility of UK and lawyers from other European Bars coming to hotspot islands to reinforce what actually exists and there are a number of initiatives in various Bars at present. This is something that is to be supported and you are encouraged to liaise with the CCBE Migration Group with any initiatives planned.

We will assist you to the best of our ability.

What would assist enormously of course is the provision of funding for two to four lawyers depending on the island concerned, office space and supplies and for Arabic and Farsi translators. Despite our efforts to date I regret to inform you that no funds have been directly allocated by the European Commission for the training of lawyers working on the frontline despite the enormous budget of over 3 billion euros in the European Asylum fund.

III. The Activities of the Migration Group

I would like to turn now to some of the activities of the CCBE Migration Group which may be of interest to your Bars.

One of our most important initiatives is the proposed execution in the very near future by CCBE of a Memorandum of Understanding with the American Bar Association's Rule of Law Initiative (ABA ROLI) in order to establish a basis to collaborate to respond to legal aspects of the migration crisis in Turkey and the Balkans.

ABA ROLI has an SMS based platform supporting communication with migrants as well as an internet site containing information for refugees and asylum seekers. It also has a Balkans Regional Rule of Law network information sharing website for Bar Associations.

It is envisaged that the CCBE and ABA ROLI will jointly:

- ▶ develop methods and resources for the provision of information to persons in need of international protection;
- ▶ develop a curriculum to help train local advocates in the Balkans and also in Turkey who represent refugees and asylum seekers;

- ▶ develop resource materials for Bars and lawyers participating in the initiative;
- ▶ possibly provide comparative assistance to Balkan legislatures as they undertake reform on their asylum systems in the wake of this crisis;
- ▶ share best practices with Balkans Bar Chambers on how to undertake and lead large scale legal aid efforts.

Our collaboration with ABA ROLI is partly inspired by the possibility of access to the very large resources of the US State Department (possibly amounting to tens of millions of dollars) which it has earmarked for programmes benefitting refugees and other vulnerable populations in Iraq, Jordan, Lebanon and Turkey. This money makes all the difference in terms of whether our contribution can be effective.

For example on January 5th the US State Department posted a funding opportunity in the area of overseas refugee assistance with an award ceiling of 4 million dollars which would involve the training of Turkish lawyers and NGO staff in person on legal conditions for refugees and migrants upon arrival in Europe. There is absolutely no equivalent to these programmes at present at European Union level.

Other initiatives of the Migration Group include cooperation on a proposal by the European Law Institute for a project on detention of asylum seekers and irregular migrants and the rule of law.

The continued lobbying of EU institutions and national governments to provide a budget for legal assistance to migrants under the Asylum, Migration and Integration Funds, participation in the European Lawyers Foundation project on training for lawyers in migration, and of course we plan to have a significant

input into the Commission's initiatives due to be published initially in March 2016 but now „sometime in the Spring“ on a) reform of the Dublin Regulation and b) the legal migration package.

The CCBE Migration Group is continuously looking for assistance from practitioners in the field especially from the frontline states and I would request that you ask your experts for their input into our activities and to contact us.

IV. Conclusion

Despite the near hysteria in the media regarding the migration crisis, Europe clearly if it chooses has the political and economic capacity to deal with this challenge. We are not simply referring to the absolute and unconditional legal obligation to afford protection to those who need it but also the fundamental moral obligation borne in particular from our collective history in the last century.

The necessity for speedy deportation processes to be introduced to deal with the undeserving must be matched by humanity and dignity to be afforded to those suffering persecution. We owe our forefathers no less. On behalf of the CCBE Migration Group we therefore ask you to monitor rules and practices introduced by your national governments in the months and years ahead and bring to our attention matters of concern in this field.

I would like to thank you for your very kind attention and would ask you to disseminate the work of our Migration Group to your bars upon your return home.