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LAWYERS UPHOLDING JUSTICE IN TIMES OF WAR



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The situation we are facing in Europe has been, and still is, shocking. Nobody was ready for a war to enter our lives and most of us still do not believe this is happening in 21st century Europe.

Apart from the unimaginable impact warfare has on civilians, victims of war, culture, economy and infrastructure, the war poses very specific challenges also to the justice system of the affected country. If a country is attacked by another state, an aggressor, it does not mean that there are no longer detained persons in the

prisons, that the courts do not conduct trials, that people are not prosecuted or claiming their rights. What would happen if all judges, prosecutors and lawyers would cease doing their job? The justice system would collapse.

But why is there a need to make a justice system work? A justice system, being a constant and perpetual mechanism, will render to each his due by way of a legal system which forms the foundation of a civilised society, Whereas war is a disgrace to civilisation, true peace is the presence of justice. In this regard, the role of lawyers in upholding justice in times of war can be perceived from several perspectives.

A crisis, such as war, brings about a high level of legal uncertainty. Lawyers are well equipped to weather the legislative storm, to provide legal aid and to solve what can be solved by ascertaining rights and obligations.

A crisis, such as war, brings about widespread violations of rights. Lawyers are well equipped to help gather evidence, to bring claims for damages and to defend victims.

However, a crisis, such as war, also brings about tendencies that can fall short of rule of law principles. Lawyers should be well equipped to provide defence counselling to all, including war criminals, in order to safeguard the fair trial rights of the accused, even in circumstances where society can fail to understand that everyone has the right to a lawyer and everyone deserves the right to a defence in order to ensure that a trial is a fair trial. Francis Biddle, an American lawyer and judge who was the United States Attorney General during World War II and who also served as the primary American judge during the postwar Nuremberg Trials, said: *“The lawyer knows how easy it is for powerful emotions to overcome a reasoned sense of justice, and he knows that in such cases it is particularly important to insist on a fair and thorough hearing. No nation ever benefits by the conviction of innocent men. The surest way to prevent this is to provide the accused person with counsel whose duty it is to make as strong a defense as possible (...). It is his duty to use that knowledge to combat any form of intolerance and short-sighted patriotic zeal.”*¹

In the whirl of war, it is easy to forget that unrelated war matters merit equal attention. Even when bombs are falling, there are people in detention waiting for their criminal trials to take place. There are two options - either to bring their proceedings to end in compliance with the principles of a fair trial or to release the prisoners without trial. The second option already occurred several times in history under the most extreme circumstances and those prisoners were released only to be sent to the front line of battle. But this is not acceptable in the 21st century when, at least in Europe, the rule of law should be an adamant doctrine.

We should explore ways to secure just proceedings in times of crisis. Recent events showed that digitalisation of court proceedings made it possible to at least proceed with open cases and to provide legal services remotely from another country or from bunkers and other shelters.

In extreme situations the war may lead to the establishment of national or international war tribunals and prosecutions of individuals for war crimes. However, to achieve justice before such tribunals, it is necessary to always hold on to fundamental procedural rights for prosecuted individuals. Even in the situation when there is well-founded suspicion and convincing evidence against the suspect, fair trial and defence rights must be guaranteed without exception. Otherwise, we do not talk about justice, and in a case of conviction, there will be doubts about the guilt of the sentenced person due to the absence of a fair trial. A major factor contributing to a fair trial is the right to a lawyer. Access to a lawyer, confidential consultation with a lawyer and a lawyer’s presence during the proceedings are indispensable even (or especially) during times of war.

The rule of law and the need for a full-fledged respect of fundamental rights are not only in the books of legal theory but are also enshrined in many international conventions. The main point of these strict rules is that even the prosecuted “enemy of the state” is a human being.

While international humanitarian law was an interesting subject at the law faculty, today lawyers in Europe have to brush up their knowledge as well as to study new areas. Lawyers, as professionals, have an ethical duty to proceed with due diligence and devote their time to training. As the statistics of training institutions show, there has been a significant increase in training events covering war-related topics, including novelties brought about by the fourth industrial revolution, such as cybercrime, cybersecurity and deep fake technology.

¹ Francis Biddle, *The Lawyer in Wartime*, 20 Dicta 154 (1943).

Lawyers in Europe may face new dilemmas – is it acceptable to provide legal services to persons on the sanctions list? Is it possible to refuse legal services to nationals of certain country? Now more than ever we should remind ourselves of the deontology of the legal profession and be guided by our obligations and principles.

Last but not least, lawyers must enjoy adequate protection in order to enable and facilitate the rights of citizens. Otherwise, there is a risk that individuals enjoy rights in theory but cannot find lawyers to represent them in court to ensure that those rights are fully realised. International human rights conventions and treaties and widely recognised non-binding instruments contain provisions on the right to legal representation. While international treaties may not explicitly articulate the obligation to protect lawyers, without the ability of lawyers to represent clients free from fear for their safety, the commitment to effective counsel would be compromised.

Humanity should be, and hopefully in many countries is, a sacred doctrine, not only in Europe but globally. We should not abandon high hopes that humankind is on the right track to achieve the point when wars no longer exist. As John Lennon sang: *“Imagine all the people, living life in peace...”* I am sure that lawyers are most competent for the task to protect the rule of law, fundamental rights and justice in general to help achieve true peace.