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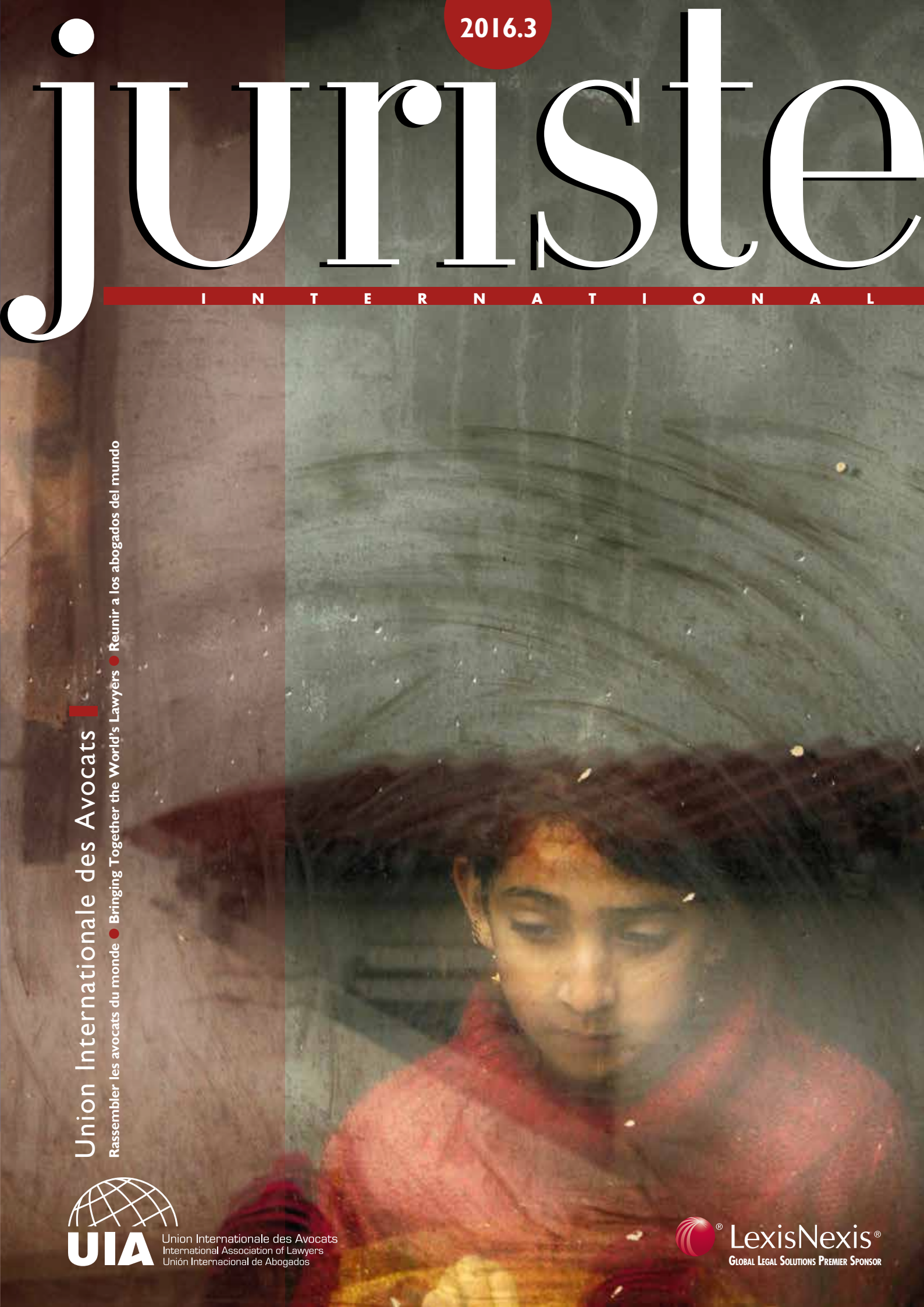

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Éditorial du Président

Jean-Jacques UETTWILLER

Chers Amis,

Une part importante du travail de l'UIA pendant le second semestre de 2016 a été consacrée à la préparation des « Principes de Base du statut des réfugiés », destinés à devenir les « Principes de Budapest ». Ces principes, après avoir été approuvés par le Comité de Direction et par le Conseil de Présidence, vont être soumis à l'Assemblée générale de l'UIA réunie à Budapest le 28 octobre 2016.

Il nous a semblé en effet de la mission de l'UIA de contribuer aux recherches de solutions aux difficultés multiples que pose actuellement l'une des plus grandes crises migratoires de l'histoire.

Les actuels instruments, nationaux et internationaux, normatifs ou para-normatifs régulant les droits et obligations des réfugiés et demandeurs d'asile sont très nombreux mais doivent être harmonisés. A titre d'exemple, la définition des réfugiés tels qu'elle figure dans la convention de Genève de 1951 ne couvre que les personnes fuyant les persécutions mais pas celles obligées de fuir leur pays en raison de faits de guerre ou d'actes de violence. Certes, le consensus international les intègre mais sans support légal obligatoire (sauf en Afrique et dans les pays liés par la déclaration de Carthagène).

Notre travail vise donc à créer une rédaction conforme au consensus international tel que le matérialise le HCR, mais aussi à anticiper la prochaine crise majeure qui sera celle des réfugiés climatiques.

Bien entendu, nous ne pouvons nous contenter de dire, mais nous devons aussi faire et engager les actions.

En effet, il appartient aux barreaux et organisations professionnelles d'agir auprès de leurs autorités nationales en vue de la ratification des actes internationaux non encore ratifiés et de l'adoption des mesures nationales de mise en œuvre lorsque celles-ci sont nécessaires. Il faut par conséquent que nos organisations professionnelles participent activement aux débats politiques autour des initiatives législatives relatives au statut des réfugiés, demandeurs d'asile ou à la réglementation de l'asile et d'y assurer le rôle de gardien des standards internationaux.

Dans la pratique, nos barreaux doivent mener toutes les actions nécessaires auprès des pouvoirs publics et des instances internationales pour que soient respectées dans les centres d'accueil des conditions de vie dignes.

Une question majeure pour les réfugiés est celle de l'accès au droit et à un avocat. Pouvons-nous accepter que 90 % des enfants de réfugiés qui naissent dans les camps de certains pays ne soient enregistrés nulle part et n'aient aucune existence juridique contrairement à tous les traités internationaux ? Pouvons-nous accepter que les avocats ne soient pas présents dans l'accueil des réfugiés et aux points d'accueil (ce qu'on appelle les *hot spots)* ?

Il est effectivement nécessaire d'agir auprès des autorités nationales et supranationales pour la mise en place de l'assistance juridique et de l'aide légale, dans la mesure des possibilités de chaque pays, et bien sûr de veiller à ce que la gestion de l'aide légale s'effectue en transparence et ne génère pas de formalités excessives pour les avocats intervenant à ce titre.

En liaison avec les autres organisations d'avocats, il faut former activement les « avocats de première ligne », ceux qui assureront ce rôle sur le terrain.

Le rôle des barreaux et celui des organisations comme l'UIA est d'assurer dans toute la mesure du possible cette formation, de veiller au respect des règles déontologiques dans les prestations à apporter aux réfugiés et d'assurer la défense et la protection des avocats sur le terrain lorsqu'ils sont susceptibles de faire l'objet d'intimidations ou représailles de la part des régimes hostiles ou défavorables, dans les régions où ils agissent en défense des droits des réfugiés.

Un premier séminaire est ainsi organisé par l'UIA le 27 octobre 2016 à Budapest, la veille de l'ouverture de notre congrès, avec pour objectif de créer un programme de travail et de formation, mais aussi un programme d'action pour que les États assument leur rôle de financement de cette aide juridique conformément aux Principes de la Havane.

Il est important que l'Assemblée générale de l'UIA qui doit statuer sur ces Principes à Budapest soit la plus représentative possible. Même si vous ne pouvez venir que ce jour-là, alors faites-le et venez nous apporter le soutien de votre présence et, pour les membres collectifs, de votre organisation. C'est par une coopération accrue entre nos organismes professionnels que nous pourrons accomplir cette importante mission et mettre en place un mécanisme mondial de concertation et de coopération.

Je vous attends avec une grande impatience.

Votre bien dévoué confrère.

Jean-Jacques UETTWILLER
Président de l'UIA
jju@uggc.com

President's Editorial

Jean-Jacques UETTWILLER

Dear Friends,

An important part of the UIA's work during the second half of 2016 consisted of drafting the "Basic Principles on the Status of Refugees", destined to become the "Budapest Principles". After being approved by the Executive Committee and the Governing Board, these principles shall be submitted to the UIA's General Assembly when it meets in Budapest on October 28, 2016.

In fact, we felt that it was part of the UIA's mission to contribute to the search for solutions to the multiple problems currently being raised by one of the biggest migratory crises in human history.

The current national and international, normative or para-normative instruments governing the rights and obligations of refugees and asylum-seekers are very large in number, but they need to be harmonised. For instance, the definition of refugees as given in the 1951 Geneva Convention only covers those fleeing from persecution, but not those forced to flee their countries due to acts of war or violence. It is true that they may be included in the international consensus on this issue, but without any mandatory legal support (except in Africa and in countries bound by the Cartagena Declaration).

Hence, our work aims at creating a draft that is in accordance with the international consensus, as given shape by the UNHCR, but also at anticipating the next major crisis, which will be that of climate refugees.

Of course, we cannot stop at just putting down the words – we also need to do what we say and take the necessary actions.

In fact, it is the responsibility of bar associations and professional organisations to take action with regard to their national authorities, with a view to the ratification of international instruments that have not yet been ratified and the adoption of national measures in view of their implementation, when necessary. Consequently, our professional organisations must actively participate in political debates on legislative initiatives concerning the status of refugees and asylum-seekers or the regulations on asylum and in so doing to act as the guardian of international standards.

In practice, our bars must take all necessary actions with regard to the public authorities and international bodies to ensure that there are appropriate living conditions in refugee centres.

A major issue for refugees is that of their access to law and to lawyers. Is it acceptable that 90% of refugee children who are born in refugee camps in some countries are not registered anywhere and have no legal identity, contrary to all international treaties? Is it acceptable that lawyers are not present at refugee reception and in the so-called "hot spots"?

It is indeed necessary to take action with regard to the national and supranational authorities for the implementation of the above-mentioned legal aid and legal assistance to the extent possible in each country and, of course, to ensure that legal aid is managed transparently and does not generate excessive formalities for lawyers who provide legal aid.

In liaison with other lawyers' organisations, "front line lawyers" need to be actively trained, so, that they can play this role in the field.

The role of bars and of organisations like the UIA is, to the extent possible, to ensure that lawyers are trained in refugee law, to ensure compliance with ethics rules in the services to be provided to refugees and to ensure the defence and protection of "front line" lawyers who may be subject to intimidation or retaliation by hostile or unfriendly regimes, in the areas where they act to defend refugee rights.

UIA is therefore holding a first seminar on October 27, 2016 in Budapest, on the eve of the inauguration of our Congress, with the aim of creating a work and training programme, but also a programme of action so that governments play their role of funding such legal aid in line with the Havana Principles.

It is important for the UIA's General Assembly to be as representative as possible as it has to give its ruling on the Budapest Principles. Even if you are able to attend the meeting only on that one day, please do so and lend us the support of your presence and, in the case of collective members, that of your organisation. It is through greater cooperation between our professional organisations that we will be able to fulfil this important mission and set up a global structure for consultation and cooperation.

I will be waiting for you impatiently.

Your devoted colleague,

Jean-Jacques UETTWILLER
President of the UIA
jju@uggc.com

Editorial del Presidente

Jean-Jacques UETTWILLER

Queridos amigos:

Durante el segundo semestre de 2016 la UIA ha dedicado una parte importante de su trabajo a la preparación de los «Principios básicos del estatuto de los refugiados», destinados a convertirse en los «Principios de Budapest». Después de haber sido aprobados por el Comité de Dirección y por el Consejo de Presidencia, estos principios serán sometidos a la Asamblea General de la UIA reunida en Budapest el 28 de octubre de 2016.

Nos ha parecido que, en efecto, le correspondía a la UIA ayudar a buscar soluciones a las múltiples dificultades que plantea en la actualidad una de las mayores crisis migratorias de la historia.

Actualmente existe una multitud de instrumentos normativos o paranormativos – tanto nacionales como internacionales – que regulan los derechos y deberes de los refugiados y solicitantes de asilo, pero es necesario armonizarlos. Por ejemplo, la definición de los refugiados tal como figura en la Convención de Ginebra de 1951 cubre solamente a las personas que huyen de persecuciones, pero no a las que se ven obligadas a huir de su país por guerras o actos de violencia. Está claro que el consenso internacional las incluye pero sin el respaldo jurídico obligatorio (excepto en África y en los países vinculados por la Declaración de Cartagena).

Así pues, nuestro trabajo está orientado a crear una redacción conforme al consenso internacional materializado por ACNUR, así como a anticiparse a la próxima crisis importante, que será la de los refugiados climáticos.

Naturalmente, no podemos conformarnos con hablar, sino que además hemos de actuar y emprender iniciativas.

En efecto, compete a los colegios de abogados y a las organizaciones profesionales actuar ante sus respectivas autoridades nacionales, con el fin de que se ratifiquen los actos internacionales aún sin ratificar, y que se adopten las medidas nacionales necesarias para su implementación, cuando sea necesario. Por lo tanto, nuestras organizaciones profesionales deben participar activamente en los debates políticos en torno a las iniciativas legislativas relativas al estatuto de los refugiados, solicitantes de asilo o a la reglamentación del asilo y desempeñar la función de guardián de los estándares internacionales.

En la práctica, nuestros colegios de abogados deben llevar a cabo todas las acciones necesarias ante los poderes públicos e instancias internacionales con el fin de que se garantice en los centros de acogida el acceso a unas condiciones de vida dignas.

Una cuestión importante para los refugiados es el acceso al derecho y a un abogado. ¿Podemos aceptar que el 90% de los hijos de refugiados que nacen en los campamentos de determinados países no estén registrados en ninguna parte y no tengan existencia jurídica, contrariamente a lo que establecen los tratados internacionales? ¿Podemos aceptar que los abogados no estén presentes en el momento de la acogida de los refugiados y en los puntos de información (los llamados *hotsposts*)?

Es, en efecto, necesario actuar ante las autoridades nacionales y supranacionales para que tanto el asesoramiento letrado como la asistencia justicia gratuita precitados sean implementados, en la medida que lo que sea posible en cada país y, por supuesto, velar por que la gestión de la asistencia jurídica gratuita se efectúe con transparencia y no genere excesivas formalidades para los abogados que intervienen en el marco de dicha asistencia.

En relación con las demás organizaciones de abogados hay que formar activamente a los «abogados de primera línea», quienes desempeñarán esta labor sobre el terreno. El papel de los colegios de abogados y organizaciones como la UIA es garantizar en la medida posible esta formación, velar por el respeto de las reglas deontológicas en los servicios que se presten a los refugiados y garantizar la defensa y la protección de los abogados sobre el terreno cuando estén expuestos a intimidaciones o represalias por parte de regímenes hostiles o desfavorables, en las regiones donde actúen en defensa de los derechos de los refugiados.

Así pues, la UIA ha organizado un primer seminario el 27 de octubre de 2016 en Budapest, la víspera de la inauguración de nuestro congreso, con el objetivo de crear un programa de trabajo y formación, así como un programa de acción para que los Estados asuman su función de financiar esta asistencia jurídica de conformidad con los Principios de La Habana.

Es importante que la Asamblea General de la UIA que debe decidir sobre estos Principios en Budapest sea lo más representativa posible. Aunque solo puedan acudir ese día, háganlo y apóyennos con su presencia y para los miembros colectivos de su organización. Mediante una mayor cooperación entre nuestros organismos profesionales podremos cumplir esta importante misión y crear una estructura mundial de diálogo y cooperación.

Les espero con impaciencia.

Un cordial saludo de su compañero,

Jean-Jacques UETTWILLER
Presidente de la UIA
jju@uggc.com

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Message du rédacteur en chef

Nicole VAN CROMBRUGGHE

Notre société, son mode de vie et ses valeurs se voient profondément remis en question et bouleversés par une actualité qui la confronte régulièrement à ses zones d'ombre.

C'est le cas de ce phénomène qui s'amplifie chaque jour et auquel nous peinons à apporter une réponse adéquate, digne et efficace : l'afflux constant de demandeurs d'asile toujours plus nombreux dans nos pays.

Parmi les différents acteurs de ce drame, les avocats, ces vigies de l'État de droit, comme le rappelait récemment Christiane Taubira au cours d'une conférence tenue à Bruxelles, ont un rôle essentiel à tenir.

Comme le souligne l'éditorial de notre Président, notre association a immédiatement saisi toute l'importance de l'enjeu.

Dans le droit fil de ces travaux, le *Juriste International* a lui aussi décidé de consacrer, dans cette édition, une place importante à cette question qui taraude le monde, et en particulier les pays membres de l'Union européenne, depuis plusieurs mois.

A côté de cette problématique dramatique qui s'amplifie de jour en jour et nous atterre par la violence des réactions qu'elle suscite parfois et par sa complexité, toute autre semble presque futile. Et pourtant notre société est interpellée par bien d'autres questions auxquelles elle ne peut rester indifférente, car si elle veut être en mesure de porter secours aux migrants qui frappent à ses portes, elle se doit de rester organisée et prospère.

Parmi ces questions, figurent les interrogations suscitées par le Brexit. Le tsunami d'émotions qu'il a provoqué à tort ou à raison a aujourd'hui quelque peu perdu de son acuité. Toutefois, s'il a lieu, ce qui paraît plus que probable après l'annonce récente par Theresa May de sa volonté de « lancer » le Brexit avant mars 2017, l'exil volontaire choisi par le Royaume-Uni aura un impact certain notamment sur nos activités de conseils. L'article de Florentino Carreño nous éclaire sur les défis que présentent ce Brexit dans le cadre juridique.

Les propositions formulées par le très impétueux et très imprévisible Donald Trump, adepte des formules choc, mettent elles aussi en exergue l'importance du rôle de garant de l'État de droit qui incombe à notre profession. Ainsi l'article du Professeur Cindy G. Buys confronte l'appel qu'il lançait en décembre dernier visant à interdire l'accès des États-Unis à tout Musulman, aux principes contenus dans la constitution et le droit des États-Unis ainsi que dans les traités internationaux dont ils sont parties.

Les nouvelles technologies, les dérives qu'elles peuvent engendrer, mais aussi les avantages indiscutables qu'elles recèlent comme les défis auxquels elles nous confrontent, ne peuvent pas non plus nous laisser indifférents. La nouvelle officielle de l'engagement par un cabinet américain traitant des affaires de faillite de notre premier « confrère » issu de la robotique et dénommé Ross est indiscutablement un signe avant-coureur qu'il nous faut de toute urgence être partie prenante d'une (r)évolution à laquelle nous n'échapperons pas et revoir nos modes d'organisation.

La confidentialité et la protection des données personnelles, problématique majeure de ce monde de plus en plus numérique, fera l'objet du second thème principal.

La question de la confidentialité et de ses limites est également au centre du débat suscité par les *leaks* en rafale qui animent notre actualité. L'importance que les entreprises accordent à la confidentialité qu'elles considèrent un outil de compétitivité et de gestion de l'innovation est rappelée par la proposition de directive récemment adoptée par le Parlement européen en vue de protéger les secrets d'affaires contre l'obtention, l'utilisation et la divulgation illicites. Les considérants de cette proposition soulignent la hausse des risques d'appropriation illégitime de ces secrets d'affaires résultant, notamment, de l'usage accru des technologies de l'information et de la communication. Reste, bien sûr, que la divulgation d'un secret d'affaires peut servir l'intérêt public dans certaines circonstances et que les activités des lanceurs d'alerte ne devraient pas être indûment entravées. En l'état actuel des textes, le sort que la proposition de directive leur réserve fait toutefois débat. Certes leur existence se voit reconnue bien que de manière trop floue selon certains, mais les circonstances dans lesquelles ils se verraient exonérés des mesures, procédures et réparations que la directive prévoit semblent de nature à limiter sensiblement la protection qu'elle leur accorde. Ainsi que le rappelle l'article qu'Anna Windemuth y consacre, en France, le projet de loi « Sapin II » pour la transparence et la modernisation de la vie économique, visant à protéger les lanceurs d'alerte dans un certain nombre de secteurs, a, elle aussi, fait l'objet de critiques. L'une d'elles visait les limites posées à la définition du lanceur d'alerte. Cette critique semble avoir été entendue puisque la définition adoptée par le Sénat a été récemment élargie par la Commission des Lois pour s'étendre à toute « *personne physique qui révèle ou signale, de manière désintéressée et de bonne foi, un crime ou un délit, une violation grave et manifeste d'un engagement international régulièrement ratifié ou approuvé par la France (...) de la loi ou du règlement, ou une menace ou un préjudice graves pour l'intérêt général, dont elle a eu personnellement connaissance* ».

Bonne lecture !

Nicole VAN CROMBRUGGHE
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Message from the Chief Editor

Nicole VAN CROMBRUGGHE

Our society, its lifestyle and its values are being deeply challenged and disturbed by current affairs that regularly highlight their darker side.

That is the case with the phenomenon which is growing every day now and for which we are struggling to provide an adequate, dignified and effective response: the constant influx of an increasing number of asylum-seekers in our countries.

Among the different actors in this drama, lawyers – the sentinels of the rule of law, as recalled recently by Christiane Taubira during a conference in Brussels – have an essential role to play.

As noted in our President's editorial, our Association immediately grasped the importance of this issue.

In line with all the work being done in this regard, this issue of the *Juriste international* has also decided to pay special attention to this topic that the entire world has been agonising about, particularly the European Union' member countries, for several months.

As compared to this dramatic problem which is growing day by day and terrifying us by the violence of the reactions it sometimes arouses and its complexity, others seem almost futile. And yet, our society is being challenged by many other issues to which it cannot remain indifferent, for if it wants to be able to provide assistance to the migrants knocking at its doors, it needs to remain organised and prosperous.

Among these issues are the questions raised by Brexit. The tsunami of emotions it has aroused – rightly or wrongly – has now lost some of its force. However, if it does take place, which seems more than likely after the recent announcement by Theresa May of her desire to "launch" the Brexit process before March 2017, the voluntary exile chosen by the United Kingdom will have a certain impact, notably on our consulting activities. Florentino Carreño's article sheds light on Brexit's challenges within the legal framework.

The proposals made by the very impetuous and very unpredictable Donald Trump, adept at coming up with shock phrases, also highlight the importance of the role that falls to our profession as a guarantor of the rule of law. Hence the article by Professor Cindy G. Buys, which compares the appeal he made last December to ban access to the United States to all Muslims, with the principles contained in the United States constitution and laws, and in the international treaties to which it is a party.

New technologies – the excesses they might generate, but also the indisputable benefits they offer, along with the challenges they raise – cannot leave us indifferent either. The official news about a US firm handling bankruptcy cases inducting our first robotics 'colleague' called Ross is undoubtedly a harbinger of the fact that we urgently need to play a part in a (r)evolution that we cannot escape, and review our modes of organisation.

Privacy and personal data protection, a major issue in this increasingly digital world, will be the second main theme.

The issue of confidentiality and its limits is also central to the debate sparked by the explosion of "leaks" that have been the driving force behind the news lately. The importance companies give to privacy, which they consider a tool for competitiveness and innovation management, has been echoed in the proposed directive recently adopted by the European Parliament to protect business secrets against the procurement, unlawful use and disclosure of information. The grounds laid down in the proposal underline the increased risk of the illegal misappropriation of trade secrets, resulting in particular from the increased use of information and communication technologies. What remains, of course, is that the disclosure of a trade secret may serve the public interest in certain circumstances and that whistleblowers' activities should not be unduly hampered. However, given the current condition of legal texts, the fate the proposal reserves for them is debatable. It is true that their existence is being recognised, although too vaguely according to some, but the circumstances in which they would be exempt from the measures, procedures and remedies the Directive provides for seem likely to significantly limit the protection it confers upon them. As stated in the article Anna Windemuth has devoted to the subject, the "Sapin II" bill in France on transparency and the modernisation of the economy, aimed at protecting whistleblowers in a certain number of sectors, has also been criticised. One of the criticisms concerns the limitations in the definition of a whistleblower. This criticism seems to have been heard, since the definition adopted by the Senate was recently expanded by the Law Commission to include any *"individual who discloses or reports, selflessly and in good faith, a crime or an offense, a serious and manifest breach of an international commitment legally ratified or approved by France (...) of the Act or regulations, or a threat or serious damage to the public interest, of which he/she has personal knowledge."*

Happy reading!

Nicole VAN CROMBRUGGHE
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Mensaje del Redactor Jefe

Nicole VAN CROMBRUGGHE

Nuestra sociedad, su modo de vida y sus valores se ven profundamente cuestionados y vapuleados por una actualidad que la enfrenta constantemente a sus zonas oscuras.

Es el caso de ese fenómeno que aumenta día a día y al que nos cuesta dar una respuesta adecuada, digna y eficaz: la llegada constante y cada vez mayor de solicitantes de asilo a nuestros países.

Entre los distintos protagonistas de este drama, los abogados, esos guardianes del estado de derecho – así lo recordaba recientemente Christiane Taubira durante una conferencia celebrada en Bruselas – tienen un papel fundamental que desempeñar.

Tal como pone de relieve el editorial de nuestro Presidente, nuestra asociación ha entendido enseguida la gran importancia de esta problemática.

En línea con estos trabajos, el *Juriste International* ha querido dedicar en esta edición un lugar destacado a esta cuestión que azota al mundo, y en particular a los países miembros de la Unión Europea desde hace varios meses.

Junto a esta problemática dramática que aumenta día a día y nos aterra por la violencia de las reacciones que suscita a veces y por su complejidad, cualquier otra parece casi baladí. Y eso que nuestra sociedad se enfrenta a muchas otras cuestiones ante las que no puede permanecer impasible, ya que si quiere ser capaz de ayudar a los migrantes que llaman a sus puertas.
s, debe estar organizada y ser próspera.

Entre estas cuestiones están los interrogantes que suscita el Brexit. El sunami de emociones que despierta con o sin motivo ha perdido hoy algo de fuelle. Sin embargo, si procede — lo cual parece más que probable tras el reciente anuncio por Theresa May de su voluntad de «lanzar» el Brexit antes de marzo de 2017 —, el exilio voluntario elegido por el Reino Unido repercutirá sin duda en nuestras actividades de asesoría. El artículo de Florentino Carreño nos esclarece los retos que presenta el Brexit en el marco jurídico.

Las propuestas pronunciadas por el más que impetuoso e imprevisible Donald Trump, aficionado a las fórmulas polémicas, ponen también de manifiesto la importancia del papel de garante del Estado de derecho que corresponde a nuestra profesión. Así, el artículo del Profesor Cindy G. Buys confronta el llamamiento que hacía aquél en diciembre pasado para prohibir a todos los musulmanes la entrada a Estados Unidos, con los principios establecidos en la constitución y el derecho de Estados Unidos, así como en los tratados internacionales de los que es parte.

Las nuevas tecnologías, las derivas que pueden generar, pero también las ventajas indiscutibles que ocultan, así como los retos a los que nos enfrentan, no pueden dejarnos tampoco indiferentes. La noticia oficial de la contratación por un despacho americano que trata asuntos de derecho concursal de nuestro primer «compañero» producto de la robótica, bautizado como Ross, es sin lugar a dudas un pequeño aviso de que hemos de sumarnos urgentemente a una (r)evolución de la que no escaparemos y revisar nuestras modalidades organizativas.

La confidencialidad y la protección de datos personales —que constituye una problemática importante de este mundo cada vez más digitalizado — será el segundo tema principal.

La cuestión de la confidencialidad y sus límites es también el centro del debate planteado por las «fugas de datos» masivas que se dan en la actualidad. La importancia que conceden las empresas a la confidencialidad, que consideran una herramienta de competitividad y de gestión de la innovación, queda plasmada en la propuesta de directiva aprobada recientemente por el Parlamento Europeo para proteger el secreto de los negocios contra la obtención, el uso y la divulgación ilícitos. Los considerandos de esta propuesta destacan el incremento del riesgo de apropiación indebida de este secreto profesional, que es el resultado del uso cada vez mayor de las tecnologías de la información y de la comunicación. Bien es cierto que la divulgación de un secreto profesional puede servir al interés general en determinadas circunstancias y que las actividades de los denunciantes no deberían verse impedidas indebidamente. Sin embargo, en el estado actual de los textos, el destino que les depara la propuesta de directiva suscita debates. Es evidente que su existencia se ve reconocida – aunque, en opinión de algunos, de forma demasiado confusa – pero parece que las circunstancias en las que se verían exonerados de las medidas, procedimientos y reparaciones establecidos por la directiva podrían limitar sensiblemente la protección que les otorga. Tal como recuerda el artículo que dedica Anna Windemuth a este tema, en Francia también se ha criticado el proyecto de ley «Sapin II» para la transparencia y la modernización de la vida económica, orientado a proteger a los denunciantes en determinados sectores. Una de las críticas se refería a los límites que se pone a la definición del denunciante. Al parecer, se ha escuchado esta crítica ya que la comisión legislativa ha ampliado recientemente la definición aprobada por el Senado para hacerla extensiva a toda «persona física que revele o señale, de forma desinteresada y de buena fe, un crimen o un delito, una violación grave y manifiesta de un compromiso internacional ratificado de forma regular o aprobado por Francia [...] de la ley o del reglamento, o una amenaza o un perjuicio grave para el interés general, del que tenga personalmente conocimiento».

¡Feliz lectura!

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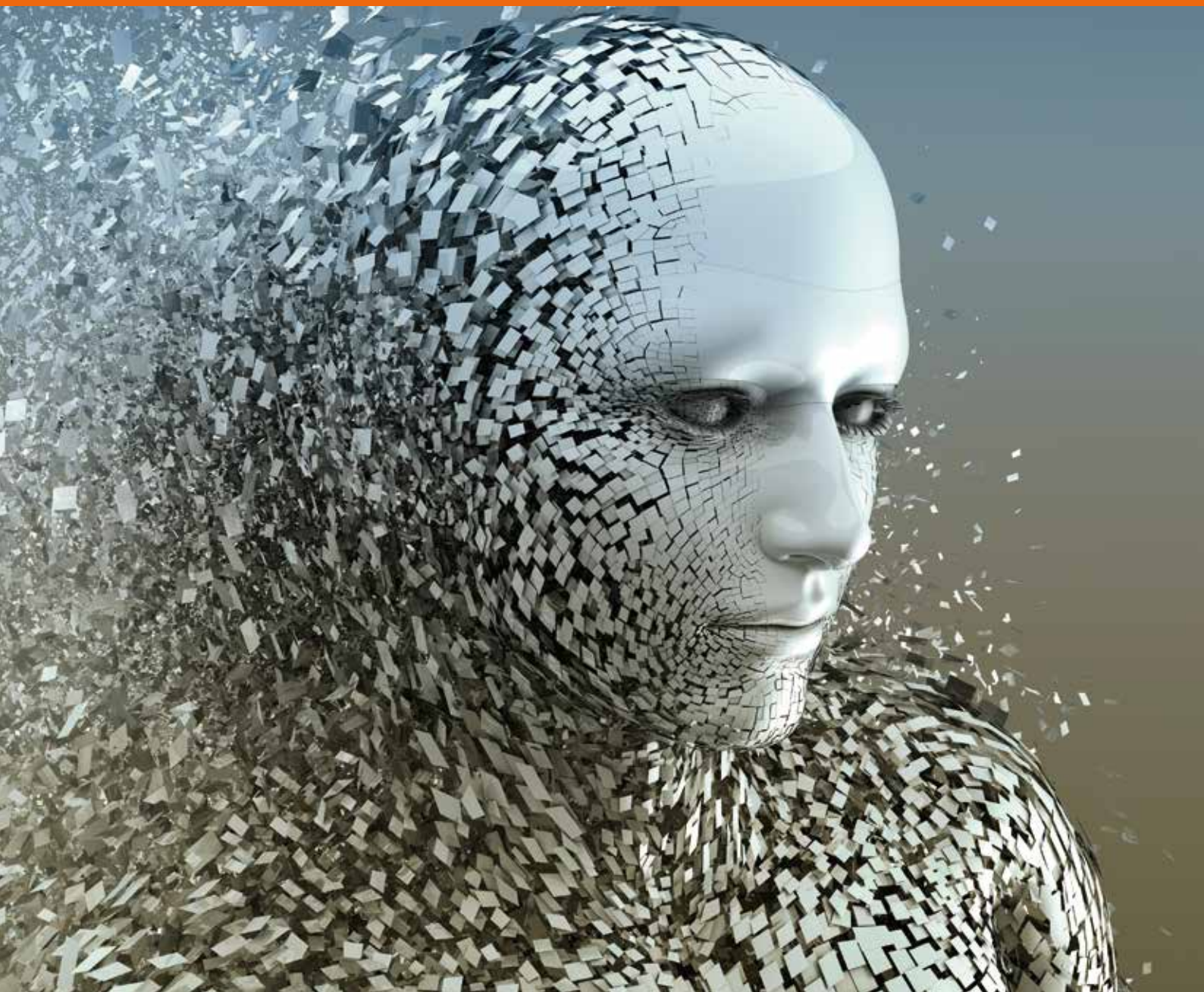
Actualités de l'UIA
UIA News
Novedades de la UIA



Robots et droit

Jérôme CAYOL

Le groupe de travail droit de la robotique de l'UIA a organisé au Conseil National des Barreaux français un séminaire le 24 juin dernier. Ce séminaire se rapportait sur les problèmes juridiques et éthiques que pose le développement de la robotique.

Le développement de la robotique est une évolution majeure du 21e siècle. Ce qui pouvait passer pour des projets utopiques il y a quelques années, est aujourd'hui une réalité, ainsi les voitures intuitives sans chauffeur, mais aussi les drones, ainsi que toutes les formes de cohabitation homme/robot dans les milieux industriels.

De nombreux obstacles juridiques doivent être aujourd'hui levés pour permettre que les robots trouvent leur place dans notre système juridique. L'enjeu pour les fabricants et les porteurs de projets est de connaître la règlementation applicable à l'acquisition, la production, la mise à disposition et éventuellement l'utilisation d'un robot domestique, de surveillance, de gardiennage, de divertissement ou encore d'assistance à la personne.

L'autre enjeu pour les utilisateurs est celui du régime de responsabilité en cas d'accident. M. Malaurie, professeur émérite à l'université Paris II Panthéon Assas, a écrit que « l'enjeu du 3e millénaire serait celui de la distinction des personnes et des choses », c'est bien aujourd'hui l'enjeu du droit des robots.

Ont été abordés lors de ce séminaire, différentes sortes de robots, comme la voiture intelligente, les drones, les robots médicaux.

D'autres sujets plus directement juridiques ont été étudiés, comme le robot et la propriété intellectuelle, la responsabilité pénale des robots, ainsi que des problèmes éthiques comme la vie privée dans un monde robotisé et l'homme augmenté.

Le séminaire a commencé par un exposé magistral d'Alain Bensoussan sur la voiture autonome, voiture intelligente ou voiture numérique. La voiture connectée est déjà sur nos routes, elle est équipée d'applications connectées lui permettant d'échanger des données et d'interagir avec d'autres voitures. La voiture autonome est actuellement testée sur les voies publiques ou en circuit fermé pour circuler sur les routes dans les cinq prochaines années, il s'agit d'un véhicule à moteur équipé d'un système autonome, c'est-à-dire d'un système qui a la capacité de conduire le véhicule sans le contrôle actif ou l'intervention d'un être humain.

Il a été rappelé le cadre légal dans l'État du Nevada qui est, en effet, le premier État des États-Unis à avoir adopté depuis mars 2012 une législation spécifique autorisant la circulation sur autoroute fluide de véhicules autonomes dotés d'un système de pilotage ne nécessitant pas pour fonctionner de personne humaine.

En France, les véhicules autonomes sont prévus par la loi sur la transition énergétique pour la croissance verte qui autorise le gouvernement à prendre par ordonnance des mesures afin de permettre la circulation sur la voie publique de véhicules autonomes. Une ordonnance devrait donc intervenir très prochainement.

Alain Bensoussan a rappelé que les avions sont d'ores et déjà totalement autonomes et que le pilote ne peut prendre le contrôle que si les paramètres sont normaux.

La question des drones en Suisse a été abordée par Sébastien Fanti. Ce dernier a insisté sur les risques que représente leur prolifération, aujourd'hui ils ne sont pas immatriculés alors qu'on en compte vingt mille en Suisse. Les risques sont protéiformes, les drones survolent des prisons et il y a déjà eu un accident avec un skieur.

Les drones posent également des problèmes en termes d'éthique et de vie privée. En Suisse, les prises de vue sont admises sous réserve de la règlementation sur les installations militaires et la protection de la vie privée.

Il a été ensuite abordé par Jérôme Cayol la question du développement de la robotique médicale. Il existe d'ores et déjà des machines capables de détecter certaines maladies grâce au son de la voix. L'ordinateur Watson est célèbre pour être capable de diagnostiquer les cancers et proposer les traitements les plus adaptés aux malades. Des tests ont été réalisés pour le cancer du poumon avec un taux de réussite de 90 %. Des robots comme Da Vinci sont d'ores et déjà présents dans les salles d'opération, bientôt les robots Star dotés d'une intelligence artificielle pourront opérer en autonomie. Aujourd'hui, le droit de la responsabilité n'a pas évolué et les malades se retourneront le plus souvent contre leur chirurgien.

Néanmoins, de nouveaux problèmes se posent, comme le consentement des patients, des problèmes de preuves et la nécessité d'équiper les robots d'une boîte noire. En tout état de cause, il apparaît que le droit de la responsabilité médicale devrait être modifié pour prendre compte l'autonomie de plus en plus grande des robots.

Marie Soulez a fait ensuite un exposé sur la propriété intellectuelle et la robotique. De nombreux brevets sont déposés sur l'intelligence artificielle, dont 80 % en Chine, Japon et Corée. Des questions nouvelles se posent, comme la protection des œuvres créées avec l'assistance d'un robot. Aujourd'hui la jurisprudence les protège en France. Se pose également la protection des œuvres du robot, les articles ou les scénarios de film écrits par des robots. Actuellement, seules les œuvres créées par une personne physique peuvent être protégées.

L'exposé suivant portait sur l'homme augmenté.

Catherine Chabert a fait un historique passionnant sur le transhumanisme en

partant de prothèses d'orteils dans l'Egypte ancienne pour aboutir aux prothèses neuroconnectées. La question que posent ces prothèses est de savoir si elles sont intégrées ou non au corps humain.

Frédéric Auster nous a fait part des nombreux problèmes que posent les développements des robots en termes de protection de la vie privée. Il a centré son exposé sur le nouveau règlement (UE 2016-670 du Parlement Européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel). Les principales nouveautés sont l'introduction des principes de droit anglo-saxon dans notre droit.

Odile Siary a ensuite fait un exposé très prospectif sur la responsabilité pénale en matière de robot. Après l'application du droit pénal aux sociétés, va-t-on vers une responsabilité pénale des robots ? Un véhicule automobile autonome pourra-t-il être poursuivi pénalement pour avoir écrasé quelqu'un ?

La journée s'est terminée par un exposé sur les instruments légaux internationaux mis en place en Amérique Latine, notamment au Costa Rica, pour permettre le développement de l'intelligence artificielle. Gabriel Lizama Oliger a particulièrement insisté sur les actions mises en place au Costa Rica pour l'éducation des enfants dans le domaine de la robotique.

En conclusion, cette journée nous a permis de prendre conscience de ce que le monde des robots n'est pas le monde de demain, mais le monde d'aujourd'hui. Nous sommes face à d'énormes défis éthiques et juridiques.

Pour les résoudre, des solutions juridiques doivent être mises en place : faut-il créer un statut particulier du robot, en allant jusqu'à le doter d'une personnalité juridique ou faut-il simplement adapter le droit existant ?

La question est ouverte et annonce beaucoup de réflexions et de travail pour le groupe de travail de l'UIA.

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Preventing Criminal Liability of Directors and Corporations in France and Abroad

Is Merely Delegating Authority Enough?

Bénédicte QUERENET-HAHN

In an increasingly complex international legal environment, one of the difficulties faced by international corporations is the implementation of a governance to ensure the supervising of the activities of subsidiaries, whilst preventing the incurrence of criminal liability both of the officers and top managers and the companies, at the level of both the subsidiaries and the parent company, . In order to respond to these concerns regarding the management and compliance of International company groups with legislation, the International Union of Lawyers and the French association of and in-House Lawyers organised a seminar on the issue of *The Prevention of Criminal Liability of Directors and Companies, in France and Abroad*.

Criminal liability has developed considerably with the rise of globalisation. In the past, the concept of criminal liability of companies and their officers and top managers was understood in light of the law to which they were naturally bound, namely the law of the country in which their head office is situated. With the expansion of their activities on a global scale, companies are faced with novel risks of criminal liability:

- because they operate in other jurisdictions, they can be bound by foreign laws, in addition to the laws in their country of origin, for the acts that are committed directly or indirectly overseas;
- they are also likely to be bound by laws of extra-territorial application.

Criminal law is not universal. There are many differences, according to different legislation, different cultures and values and the severity of the criminal policy priorities in each country.

Moreover, there are new concerns about criminal liability emerging with the passing of new legislation, such as those seeking to eliminate modern slavery.

In the prevention of criminal liability, the protection of officers and top managers against the threat of criminal sanction is imperative as the potential risks are particularly serious for the company and its officers and top managers. The possibility of having sanctions imposed, being excluded from public tenders, and damage to the company's reputation are amongst the potential consequences of a company and its officers and top managers being sued in criminal law. Accusations of criminal wrongdoing force a company to use its resources to defend itself instead of investing in expansion and can be, in certain cases, fatal to the company leading to many consequences for its employees, its shareholders, its suppliers and its customers.

There is, therefore, a necessity for companies and their officers and top managers to anticipate and also to prevent criminal liability: not to allow officers and top managers to evade responsibility, but to protect the company.

In the prevention of criminal liability in multinational organisations, the governance of the parent company and of the subsidiaries is an aspect that is often overlooked. In many corporations, the officers and top managers of the parent company are also placed at the head of the subsidiaries which allows them to supervise their activity. But, this organisational structure can entail many risks in relation to the officers and top managers and the parent company, and therefore to the organisation as a whole, and does not automatically lead to an effective supervision of the subsidiaries.

This seminar concentrated on the prevention of criminal liability incurring in international company groups, with a particular focus on governance (in the sense of dividing up roles and responsibilities) on the part of parent companies and of their subsidiaries.

The aim of the organisers of the seminar was primarily to bring together experts

from all over the world to both compare differing legislation but also to understand the way various courts have dealt with proceedings of this nature, the severity of the criminal law in each country, and also to identify the cultural aspects which render one country more sensitive to a particular issue than another.

In order to prevent criminal liability, raise awareness amongst employees and to foresee potential litigation, it is vital to be familiar with the legislation of the countries in which the company operates and also the way in which the legislative provisions are applied in practice.

Comparison of the different systems of law showed that, despite large disparities in legislation and attitudes to criminalisation of corporate activity across jurisdictions, there is a common theme in the solutions offered and in good practices concerning the monitoring and prevention of criminal liability.
On the matter of supervision, certain important principles of organisation relevant to the prevention of criminal liability were discussed. The speakers highlighted the importance of the following actions:

- To appoint the operative managers as the legal representatives of the subsidiaries;
- To implement a governance committee;
- To distinguish which activities require the approval of the shareholders (investments, etc.) from those only requiring the approval of the governance committee and from those approved in the normal course of business delegated to the legal representatives of the subsidiaries;
- To oversee the balance between the roles and responsibilities of officers and top managers and employees, with regular updating;
- To regularly train officers and top managers and employees on their roles and responsibilities, as well as on the potential risks they are exposed to and as to how they can put at risk the company;
- Monitor the adherence to rules and procedures.

In terms of preventing criminal liability, the speakers confirmed the general tendency of the various legislations to hold officers and top managers and companies responsible for not preventing misconduct, which effectively amounts to an obligation to implement a compliance programme. Note though, the impact of the absence or the existence of a compliance programme is not in any way standardised, although the tendency is to view an effective compliance programme as a mitigating factor.

Finally, the seminar also discussed the legislative and judicial development towards a criminalisation of officers and top managers and companies for failing to organise suitable procedures for the prevention of criminal offenses as well as for failing to monitor and oversee the company's activity.

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The UIA Forum of Lawyers from Central and Eastern Europe

Mihai TANASESCU

First of all, I have to say that I am very grateful to Jean Jacques Uettwiller, the UIA President, for the idea to re-start the Forum of lawyers from Central and Eastern Europe.

The advantages for a UIA Congress member to participate in this Forum (in a limited list, I am sure some more are also to be discovered during our meeting) are:

- The history of our profession in the 20th Century; mistakes we have to avoid in the future;
- How was our profession organized in Central and Eastern Europe during the Communist period, comparing to the evolution in Western Europe;
- Will communism ever be condemned by History?
- The importance of the Iron Curtain and of the Berlin Wall in the development of our profession;
- How different were we? How different are we still now?
- What does the future hold?

We have tried to organize such a Forum some years ago, during the congress in Dresden, but the timing – the Forum was just before the gala dinner – and the fact that no one from the German lawyers participants at the congress where from Dresden, but from what was called before "Western Germany" did not allow us to have a good local support.

Now, we have Mr Andras Szecskay, President of the 60th Congress, who will be the special guest of our Forum and Mrs Judit Budai, who is helping us a lot and we have also two speakers from the Budapest Bar Association, Mr Laszlo Reti, President and Mr Peter S. Szabo, Secretary, member of the Hungarian Delegation to the CCBE. These colleagues from the Budapest Bar Association have helped me a lot in my capacity of UIA Regional Secretary and I am very proud to say that their friendship is an honour for me.

If already some speaker names have been mentioned, please allow me to also introduce you to the other speakers for our Forum (please be so kind as to accept the alphabetical order).

We shall have, from Belgrade, Mr Dragoljub Djordjevic, who is the President of the Serbian Bar Association. It is hard to explain, as a lawyer, how, about 20 years ago, you could go to represent your client from Belgrade to Ljubljana, Skopje, Zagreb, Sarajevo, Kosovo, Pristina and now you are limited to a restrictive territory, due to "historical major changes" that not everyone could understand.

From Bucharest, we shall have Mr Ion Dragne. Mr Dragne, President of the Bucharest Bar Association, who has a great capacity to express the actual evolution of our profession in Romania.

The conclusions of our Forum will be presented by Mr Paul Nemo from Paris, UIA President of Honor, who is very familiar with the development of our profession in Central and Eastern Europe.

I, as Regional Secretary for Europe (Region IX), shall try to be the moderator of the Forum.

The theme that we have selected is:

- The Legal Profession in Central and Eastern Europe: from expectations (1989) to reality (2016);
- *La profession d'avocat en Europe Centrale et de l'Est : des attentes (1989) à la réalité (2016);*
- *La abogacía en Europa Central y del Este: de las expectativas (1989) a la realidad (2016).*

I have to explain that the theme of our Forum was selected thinking about Charles Dickens's novel, *Great Expectations.*

There is a difference between what we expected in 1989, as lawyers from Central and Eastern Europe, and what we have now, in 2016, as lawyer members of the EU family.

From Bucharest, but also from Paris, Mrs Dana Gruia Dufaut will also take the floor. I am sure that she will have a lot to say. Mrs. Gruia Dufaut is a French/Romanian lawyer. Her family immigrated to France during the communist regime in Romania. They left Romania when she was at school and she studied law in Paris. Her father, Iordan Gruia, a Romanian lawyer who took the decision to immigrate with his family to Paris, was the UIA General Secretary at the end of the 80s beginning of the 90s. All Central and East European Bar Associations have restarted their activity at the beginning of the nineties also with the intense help of Mr Iordan Gruia.

From Warsaw we shall have as a speaker Mr Robert Malecki, who has made a great contribution to the development of the profession in his country and in our geographical area.

There is a difference between what we expected in 1989, as lawyers from Central and Eastern Europe, and what we have now, in 2016, as lawyer members of the EU family.

I, personally, have been a lawyer in Romania since 1983 – Ceausescu came to power in Romania from 1966 until the end of 1989 – so I have spent six years of experience in the communist system.

In the communist period, only lawyers and priests where not "fully included" in the system. These were the only two professions to be allowed, at an individual level, to defend human rights. (I do not speak about collective human rights, the situation was more complicated). I do believe that it was not only by chance that the Priest Karol Józef Wojtyła, the future

Pope John Paul II, started the movement against communism in Central and Eastern Europe. Lawyers in the same geographical area, without substantial financial help, but with a lot of hope in the future, did the same thing.

What I may say is that, for me, our profession is a mirror of democracy.

Let us go only 30 years back, in China, where lawyers did not exist, "Justice" was then practiced only by judges and prosecutors. Let us see how much China has developed, only by witnessing the importance of our profession in this country today.

From these perspectives, I do believe that we have to make some comments.

First of all, we all have had the impression, from both sides, that what is on the other side of the Iron Curtain is the same. We have forgotten about diversity and this is so important in order to understand well a person or a profession.

We, lawyers in Central and Eastern Europe, have fought, within the limits that the legislation allowed us, for democracy and we wanted to have a democratic frame, like in Western Europe, for practicing our profession.

After 1990, this democratic frame came, step by step, but this is when the paradox started.

We went out from a very restrictive and artificial system, hoping to act in a new democratic frame, like in Western Europe, but now we may see that this democratic frame we have achieved, is becoming more restrictive.

If we only take the example of the protection of the professional secret, it is hard for me to observe that the current legislation, based on the EU Directives, regarding the protection of the professional secret – the client-attorney privilege – is more restrictive than it was before 1990, during Ceausescu's times. It is also hard to see that, for the so-called general security, more individual human rights are less protected.

We have to understand that democracy is not a gift, but a day-by-day fight and I do believe that we have some experience to share. As we also may share our experience in the new technologies that are implemented in our profession.

But these are only some examples.

I do believe that we have a lot to talk about and I hope that the initiative of our President, Jean-Jacques Uettwiller, to organize this Forum is just the beginning.

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Sextorción: Un proyecto liderado por la Sección de Estado de Derecho

Patricia LOPEZ AUFRANC

Sextorsión es un tipo de corrupción en el que se exige sexo, en vez de dinero como pago del soborno.

Durante 2016, el Instituto de Estado de Derecho de la UIA (UIA-IROL) de la Unión Internacional de Abogados (UIA), promovió la ampliación de un estudio sobre la legislación y prácticas sobre esta conducta en nueve jurisdicciones europeas.

En este equipo internacional liderado por Patricia López Aufranc de Marval O'Farrell & Mairal, participaron Oppenhoff & Partner de Alemania; Uría Menéndez de España; A&L Goodbody de Irlanda; August & Debouzy de Francia; Felios & Associates de Grecia; Szecskay & Ügyvédi Iroda de Hungría; WKB Wierciński, Kwieciński, Baehr Sp. K, de Polonia; Novais Advogados de Portugal y Ducrest Nerfin Berta Spira & Bory de Suiza.

Continuó la tarea realizada durante 2015 por Marval O'Farrell & Mairal, conjuntamente con estudios jurídicos líderes en otras nueve jurisdicciones, que resultó en la publicación una guía sobre: "Combatiendo la Sextorsión: un Estudio Comparativo de las Leyes que Condenan la Corrupción que Implica Explotación Sexual", efectuada por la Fundación Thompson Reuters, en colaboración con la Asociación Internacional de Mujeres Jueces (AIMJ)[1].

Mediante este esfuerzo conjunto, el IROL proveerá a la UIA y a la AIMJ de un completo informe sobre una conducta que afecta a las mujeres alrededor del mundo, pero que rara vez ha sido abordada por las autoridades.

Creemos que será un importante aporte para atraer la atención sobre este importante tema y contribuirá a promover la adopción de medidas legales que combatan la sextorsión.

Esperamos contar con la entusiasta colaboración de otros miembros de la UIA para seguir ampliando este estudio, único en su género.

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1. http://www.trust.org/publications/i/?id=588013e6-2f99-4d54-8dd8-9a65ae2e0802

Privacidad y protección de datos en el mundo digital

Tema principal del congreso de la UIA en Budapest

Marc GALLARDO

SAVE THE DATE: ***The session will take place on Sunday October 30 from 9:00 am to 12:30 pm, Marriott Hotel, Budapest***

The main theme on Privacy and Data Protection will, in general, be devoted to the issue of government surveillance of citizens for criminal profiling purposes as well as the corporate use of the personal data of clients/users for commercial profiling purposes in the context of a society where the processing of citizen and consumer data is increasingly prevalent.

These issues are certainly common to many countries and the challenge is how to ensure effective protection of the fundamental right to privacy and the protection of data in the public and private sector, while including the protection of lawyers' professional privilege in response to electronic surveillance.

An international approach to this issue is required and must be implemented at various levels (governments, corporations and international organizations), as was the case in the ***UIA resolution on "Privacy in Digital Communications"*** *adopted at the Valencia Congress in 2015.*

1- La importancia de la privacidad en un mundo digitalizado y conectado

El derecho a la privacidad y a la protección de datos no ha estado nunca en el centro de tantos debates jurídicos como en la actualidad y ello se debe, en buena parte, por la omnipresencia de las tecnologías digitales de la información y la comunicación (TIC) tales como los ordenadores, teléfonos móviles, tabletas y otros dispositivos conectados a Internet, que invaden nuestra vida cotidiana.

Es innegable que el uso de estas tecnologías va en aumento y cada vez se hace más difícil que una persona no deje rastro en Internet de sus actos, opiniones, entre otros datos personales que le conciernen, creando en ocasiones un perfil muy preciso de su persona. Un perfil que puede resultar fácilmente accesible no sólo a su esfera de "amigos"; esto es, a aquellas personas con las que la persona afectada quiere de forma consciente compartir la información, sino también, muy a menudo, es igualmente accesible a gobiernos y empresas, para fines de vigilancia no siempre lícitos.

2- Un derecho en constante evolución y necesidad de adaptación

El derecho a la privacidad y a la protección de datos está consagrado en el artículo 12 de la Declaración Universal de Derechos Humanos, el cual establece que *"nadie será objeto de injerencias arbitrarias en su vida privada, su familia, su domicilio o su correspondencia, ni de ataques a su honra o a su reputación. Toda persona tiene derecho a la protección de la ley contra tales injerencias o ataques"*. En términos muy similares, el artículo 17 del Pacto Internacional de Derechos Civiles y Políticos, establece que *"nadie será objeto de injerencias arbitrarias o ilegales en su vida privada, su familia, su domicilio o su correspondencia, ni de ataques ilegales a su honra y reputación"*. Afirma además *que "toda persona tiene derecho a la protección de la ley contra esas injerencias o esos ataques"*.

La legislación a nivel regional y nacional, en todos los continentes, refleja también el derecho de todas las personas al respeto de su vida privada y familiar, su domicilio y su correspondencia, o su derecho al reconocimiento y respeto de su dignidad, su integridad personal o su reputación.

No obstante, el uso de ciertos avances tecnológicos por parte de gobiernos y empresas con fines de vigilancia masiva han puesto seriamente en jaque el derecho a la privacidad y a la protección de datos. Y la situación tiende a agravarse, puesto que cada vez entregamos, conscientemente o no, más datos como usuarios de múltiples dispositivos conectados a Internet, alentando de este modo las prácticas de vigilancia de los Estados y de las empresas con los recursos suficientes para realizarla.

La confidencialidad de las comunicaciones abogado-cliente es un principio fundamental para proteger la confianza de éste.

3- La privacidad en el marco de la vigilancia estatal

A pesar de que tanto el derecho internacional como el derecho regional y nacional de muchos países proporciona un marco claro para la protección del derecho a la privacidad y a la protección de datos, lo cierto es que la práctica en muchos Estados ha puesto de manifiesto la carencia de leyes adecuadas, la insuficiencia de garantías procesales y la ineficacia de las capacidades de supervisión.

Los Estados, gracias a la tecnología, nunca han tenido la capacidad de la que disponen actualmente para realizar actividades de vigilancia masiva y a gran escala. Desde las revelaciones de Snowden, los ejemplos de actividades de vigilancia electrónica se han multiplicado hasta el punto que se han

revelado como un hábito muy extendido, y no como una medida excepcional sobre la que es necesario rendir cuentas.

Toda esta captura y utilización de datos de las comunicaciones es potencialmente una injerencia en la vida privada de las personas y puede tener un efecto muy negativo en otros derechos como la libertad de expresión y de asociación. Correspondería en todo caso a los Estados demostrar que tal injerencia no es arbitraria ni ilegal.

También hay numerosas pruebas de que los gobiernos recurren cada vez más al sector privado para que realice y facilite las actividades de vigilancia electrónica.

Por tanto, la promulgación de leyes que obligan a las empresas a preparar sus redes para la interceptación es un motivo de especial preocupación, en particular porque crea un ambiente que facilita las medidas de vigilancia masiva y exhaustiva.

Distintos tribunales nacionales y regionales han examinado o están examinando la legalidad de las políticas y medidas de vigilancia electrónica. Y este trabajo de escrutinio continuará a buen seguro, puesto que seguirá existiendo la necesidad de supervisión para asegurar que toda política o práctica de vigilancia estatal es compatible con los derechos humanos en general y el derecho a la privacidad y protección de datos en particular, adoptando salvaguardias eficaces e independientes contra los abusos, aunque éstos parecen abonados en un momento de especial tensión social, en plena lucha de los Estados contra el terrorismo.

4- La privacidad en el marco de la vigilancia empresarial

Las injerencias en la privacidad de las personas no provienen únicamente de los Estados, sino que buena parte de ellas derivan de las prácticas intrusivas de muchas empresas que explotan los datos de sus clientes o usuarios sin su conocimiento ni consentimiento. Con estos datos elaboran perfiles de las personas para revender esta información a terceros y/o para ofrecer productos y servicios adaptados a cada uno de estos perfiles, lo que les permite hacer campañas de marketing cada vez más efectivas. Esto explica que el principal reto de muchas empresas sea conseguir el mayor número de datos posible, y con este objetivo también ofrecen servicios gratuitos, que el destinatario de los mismos "paga" en realidad con sus datos, convertidos de este modo en el nuevo "petróleo del siglo XXI".

Frente a estas prácticas de auténtica vigilancia, orientadas a la máxima obtención de beneficios económicos y espoleadas por tecnologías que facilitan la captación y uso de datos en una escala sin precedentes, es necesario establecer unos principios claros y homogéneos a nivel internacional que permitan equilibrar la explotación de los datos con la garantía del respeto al derecho a la privacidad y a la protección de los datos de las personas interesadas, dada la importancia de generar la confianza que permita a la economía digital desarrollarse.

En esta dirección, cabe destacar la aprobación del Reglamento Europeo de Protección de Datos[1], cuya entrada en vigor tendrá lugar a finales de mayo de 2018, y que introduce nuevos principios como la "Privacidad por defecto", "Privacidad desde el diseño", "Evaluaciones de impacto de la privacidad", "Derecho al olvido" y que, en particular, respecto a la elaboración de perfiles reconoce el derecho de todo interesado *"a no ser objeto de una decisión basada únicamente en el tratamiento automatizado que produzca efectos jurídicos en él o le afecte negativamente de modo similar"*.

5- El secreto profesional del abogado en el marco de las actividades de vigilancia

La confidencialidad de las comunicaciones abogado-cliente es un principio fundamental para proteger la confianza de éste. Si quiebra esta confianza, el cliente carecerá de la seguridad suficiente para ser exhaustivo y franco en las comunicaciones con su abogado, lo cual impediría un asesoramiento y soporte jurídico completo y preciso.

A fin de preservar dicho principio de manera eficaz, es necesario que las leyes garanticen la inviolabilidad de los datos y confieran protección tanto a los contenidos de las comunicaciones como a los datos relativos al tráfico y los metadatos. Además, cualquier política y procedimiento gubernamental destinado a interferir con este secreto profesional deberá ser cuestionado si carece de un control y un equilibro jurídico adecuados.

En este sentido, se alinean las **"Recomendaciones de la CCBE sobre el secreto profesional en el marco de las actividades de vigilancia**[2]**"**, al establecer las siguientes condiciones esenciales para preservar el respeto del secreto profesional en las comunicaciones electrónicas:

- Como principio general, la inviolabilidad de las comunicaciones cubiertas por el secreto profesional, sin que puedan ser objeto de interceptaciones o sometidas a ningún tipo de vigilancia;
- Toda injerencia en las comunicaciones deberá estar regulada en la Ley con un grado de precisión suficiente;
- Únicamente las comunicaciones que salgan del campo de aplicación del secreto profesional pueden ser interceptadas, aunque este hecho deberá ser demostrado con pruebas convincentes;
- Cualquier interceptación de las comunicaciones abogado-cliente debe estar previamente autorizada por la autoridad judicial. En caso de no ser así, la prueba obtenida deberá declararse inadmisible y ser destruída;
- Cualquier medida de vigilancia ilegal que afecte a las comunicaciones cubiertas por el secreto profesional podrá ser recurrida judicialmente y dar derecho a un resarcimiento adecuado en favor de las personas afectadas.

6- La resolución de la UIA sobre privacidad en las comunicaciones electrónicas

Sensible a las problemáticas derivadas de la vigilancia de los datos por parte de gobiernos y empresas, la UIA, por medio de la Comisión de privacidad y derechos de la persona digital inició en 2014 unos trabajos internos que culminaron con la adopción de la **Resolución "Privacidad en las comunicaciones digitales"** [3] en la Asamblea General de la UIA celebrada en el Congreso de Valencia de 2015.

Considerando que para abordar efectivamente los desafíos relacionados con el derecho a la privacidad en el contexto de las TIC será necesario un compromiso multilateral, concertado y constante, la Resolución hace un llamamiento a los siguientes colectivos:

- A los **abogados y asociaciones profesionales de abogados,** para que asuman el importante papel que deben desempeñar en la defensa de la privacidad en la era digital, y busquen una protección eficaz de las comunicaciones confidenciales entre los abogados y sus clientes, que son sagradas en virtud del secreto profesional del abogado, incluyendo tanto las comunicaciones transmitidas por vías electrónicas como las almacenadas en forma digital, cualquiera que sea la ubicación física de los datos.
- A los **Estados**, para que se aseguren que sus sistemas jurídicos cumplen plenamente el derecho internacional en materia de derechos humanos contra las intrusiones ilegales o arbitrarias sobre el derecho a la privacidad; en particular que cualquier medida de vigilancia de las comunicaciones electrónicas cumpla los principios de minimización de datos, transparencia, legitimidad, necesidad, proporcionalidad y subsidiariedad. Así mismo, los Estados deberían adoptar las medidas oportunas para evitar y sancionar la aprobación de cualquier política, práctica y procedimiento gubernamental que menoscabe el secreto profesional del abogado, en particular mediante cualquier forma de intrusión en los sistemas informáticos y las comunicaciones de los abogados y despachos de abogados. Los Estados también deberían abstenerse de adoptar o mantener cualquier normativa o práctica que imponga brechas en la seguridad de las TIC con el fin de facilitar la vigilancia o impedir y restringir el uso de la criptografía.
- A las **empresas**, para que revelen claramente a las personas cuyos datos recopilan su identidad, cuál es la información personal que tratan de ellos y con qué fines; cuáles son las medidas de protección implantadas para preservar la privacidad de las personas cuyos datos recopilan, su almacenamiento y los períodos de conservación, y bajo qué circunstancias pueden dar acceso a los datos personales a terceros, incluidos los gobiernos. Con carácter general, las empresas deberían igualmente promover el uso de las tecnologías que fomenten la privacidad y, en consecuencia, implantar principios tales como la "Privacidad desde el diseño" y la "Privacidad por defecto" desde las fases iniciales del diseño de productos y servicios.
- A las **organizaciones internacionales y regionales**, para que continúen con sus esfuerzos por debatir y crear principios y normas susceptibles de generar el cambio necesario hacia una mejor protección del derecho a la privacidad en el contexto de las comunicaciones digitales.
- Y finalmente, a las **personas cuyos datos se recopilan**, para que sean proactivos en la defensa de su derecho a la privacidad y a la protección de sus datos y utilicen la tecnología como herramienta para evitar o, como mínimo minimizar, cualquier interferencia ilícita y arbitraria sobre su derecho a la privacidad cuando envíen o guarden comunicaciones digitales.

7- El debate sobre la vigilancia en el congreso de Budapest

La sesión dedicada a este tema principal abordará de forma general la problemática de la vigilancia estatal de los ciudadanos con el fin de la elaboración de perfiles delictivos, así como la utilización por parte de las empresas de los datos de los clientes y usuarios de sus servicios, con fines de elaboración de perfiles comerciales en el contexto de una sociedad cada vez más caracterizada por el tratamiento de los datos de los ciudadanos y consumidores.

Estos problemas son, sin duda, compartidos por numerosos países y el desafío está en asegurar con eficacia el derecho fundamental a la privacidad y a la protección de datos en el sector público y privado, incluyendo la protección del secreto profesional de los abogados frente a la vigilancia electrónica.

Es necesario un enfoque internacional de esta problemática, que debe aplicarse a diferentes niveles (gobiernos, empresas, organismos internacionales, etc.) tal y como lo ha hace la precitada Resolución de la UIA sobre la "Privacidad en las comunicaciones digitales".

Sin olvidar que los abogados de todo el mundo tenemos un papel central en este debate y es necesario que trabajemos juntos para defender el derecho a la privacidad en la era digital.

Les esperamos en Budapest.

Marc GALLARDO
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1 Reglamento (UE) 2016/679 del Parlamento Europeo y del Consejo, de 27 de abril de 2016, relativo a la protección de las personas físicas en lo que respecta al tratamiento de datos personales y a la libre circulación de estos datos y por el que se deroga loa Directiva 95/46/CE.

2 Texto de la Resolución en francés: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/fr_it_law_ccbe_recom2_1182246703.pdf

En inglés: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_pr_0314pdf1_1411543804.pdf

3 Se puede consultar el texto íntegro de esta Resolución en español, francés e inglés en el siguiente enlace:
http://www.uianet.org/es/documentation/resolutions

Agenda

Dimanche 30 octobre 2016, de 9h00 à 12h30

09:00 – 09:10	***Mots de bienvenue et début de la séance sur le thème principal***
09:10 – 10:30	***Part. 1 : La surveillance et le secteur public***
09:10 – 09:30	***Présentation 1 :*** *Comment réconcilier la sécurité avec la vie privée pour combattre le crime et le terrorisme*
09:30 – 10:10	***Panel 2 :*** *L'accès des gouvernements aux données: quelles devraient être les limites ?*
10:10 – 10:30	***Présentation 2 :*** *Recommandations sur la protection du secret professionnel dans le cadre des activités de surveillance*
10:30 – 11:00	**Pause-Café**
11:00 – 12:20	***Part. 2 : La surveillance et le secteur privé***
11:00 – 11:40	***Panel1*** *: Comment les entreprises nous «profilent» et quelles voies de recours ?*
11:40 – 12:20	***PANEL 2 :*** *Problèmes de cybersecurité : Comment gérer les brèches de sécurité ?*
12:20 – 12:30	***Remarques finales***
12:30	**Fin de la séance**

L'UIA à Niseko, Japon

Enlighten your winter at the next UIA Winter Seminar in Japan

Francisco RAMOS ROMEU

There are opportunities that you should not miss. The next is to meet UIA friends and colleagues in Niseko, Hokkaido Island, northern Japan, from February 25-March 4, 2017 in a relaxed and friendly mountain atmosphere, to update yourself on hot legal issues and practical tips in Asia and around the world, make professional connections that can last for a lifetime, while enjoying the winter with side activities such as skiing or snowboarding on Mount Niseko, exploring the outdoors on snowshoes, snowmobiling, snow-rafting or tubing, horse riding, or simply eating sushi and other Japanese cuisine delights.

Discovering or digging into Japanese culture is an experience in itself, and you will find yourself lost in translation many times. But Niseko also promises to offer amazing conic shaped winter landscapes, small rural villages made of colored wooden houses, and an exquisite attention for which Japanese have a reputation. Last but not least, Niseko has six ski areas, and it has been dubbed as one of Japan's top ski resorts, and a top ski resort worldwide, so it will surely become an appreciated gem in your collection of amazing winter spots worldwide.

You shall be able to meet there with the Organizing Committee members, Louis F. Burke, Enrico Fadani, Yoshihisa Hayakawa, Veronique Moissinac, Winfried Schmitz, Franz Schubiger, and myself Francisco Ramos Romeu, who shall be very glad to welcome you and host you during your stay. As in previous editions, for our working sessions, we are trying to bring together colleagues and friends from all over the world, a delicate mixture including Asian and non-Asian practitioners, who are willing to share their expert legal knowledge and know-how. The support of the Tokyo Bar Association and the Sapporo Bar Associations also guarantees that colleagues from abroad shall be able to meet and interact with local lawyers and other legal professionals.

Starting on Monday February 27, we are organizing a five-day scientific program with morning and afternoon sessions that will include, from Monday to Wednesday, a variety of transactional topics such as among others "Chances and Risks relating to Cross-Border Investments and Transactions", both to and from Asia, the "Establishment and Operation of Subsidiaries in Local Markets", "Chances and Risks of Internal Investigations within Companies in the Context of the Alleged Illegal Acts or Omissions with an Emphasis on Deferred Prosecution Agreements". And, from Wednesday afternoon to Friday morning, we shall touch upon dispute resolution issues such as for example "Handling a Legal Dispute Between Asian and non-Asian parties", "Where to Litigate a Dispute related to an Investment in Asia", "Judicial Powers in Comparative Perspective", "The Pros and Cons of Different Seats of Arbitration in Asia", "Third Party Funding of Arbitration", and "Cultural and Legal Differences in International Mediation of Asia related Disputes". You are most welcome to come for the full week, but you can also register for the first half or the second half!

If you wish to participate as a speaker for any of the proposed topics or any other topic, please do not hesitate to contact any of the Organizing Committee members who will direct you on how you should proceed.

We hope that Niseko provides you with an enlightening and recovering escape from daily work. But we hope also to contribute to build a true community of lawyers and other legal professionals that realize that we live in a global world and face the same legal challenges sooner or later, that there are various legal solutions to the same problem and we can strive to do better in our countries and in our practice, and that truly believe that law can provide solutions to our coexistence problems.

This is the UIA and its members. We are part of a truly worldwide, multilingual organization. This time, we shall convene in the surprising Japan. For many of us, it shall probably be a once in a lifetime opportunity.

We look forward to welcoming you in Niseko.

On behalf of the Organizing Committee
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Lesbos island, Greece, November 2015

Droits de l'Homme et de la Défense
Human Rights and Protection of Lawyers
Derechos Humanos y de la Defensa

Lesbos island, Greece, February 2016

Les Principes de base du statut des réfugiés

Julie GOFFIN

Les Principes de base de l'UIA relatifs au statut des réfugiés (les principes de base) constituent l'un des volets des différents projets mis sur pied par l'UIA autour de ce que l'on a appelé la « crise migratoire ».

Il est apparu nécessaire à l'UIA de développer autour des mouvements migratoires de masse une réflexion qui s'inscrive dans les différentes initiatives qui doivent être prises par la profession et ses organisations représentatives en soutien aux individus concernés.

Une réaction s'imposait face au constat d'une violation massive, y compris dans les États les plus démocratiques, des droits fondamentaux des populations migrantes et des atteintes répétées au statut des réfugiés tels qu'il a été établi par les textes internationaux et régionaux ratifiés par des États qui aujourd'hui remettent en cause ce statut.

Les principes de base font tout d'abord le point sur la notion du réfugié, partant du constat que la plupart des déplacements de populations à l'heure actuelle sont le résultat de situations de violence ou de conflit armés et que ces situations trouvent leurs racines ou leur cause directe dans des questions ethniques, religieuses, ou impliquent des persécutions de nature politique, religieuse, ethnique, sociale, ou même de genre. Ils adoptent donc une définition de la notion de réfugié qui ne se limite pas à celle de la Convention de Genève de 1951 (CG de 1951) en son interprétation originelle mais couvre une définition pragmatique, en lien avec l'époque et qui rejoint tant celle des textes latino-américain et africain relatifs au statut des réfugiés que celle récemment formalisée par le HCR[1], suivie d'ailleurs par de nombreux États parties à la CG de 1951.

Les Principes abordent également la problématique des réfugiés climatiques ou environnementaux. A l'exception de la Convention de Kampala sur la protection et l'assistance des personnes déplacées en Afrique, entrée en vigueur en 2012 et qui contient une disposition sur la protection des personnes subissant des déplacements internes liés aux changements climatiques et catastrophes naturelles, il n'existe pas de cadre normatif développant les obligations des Etats en la matière. Il est donc nécessaire que ceux-ci travaillent avec les institutions internationales pour organier un statut des réfugiés climatiques.

Les principes de base rappellent ensuite les droits et obligations des demandeurs d'asile et réfugiés et abordent la situation des demandeurs d'asile ayant des besoins spécifiques, tels les enfants, les femmes enceintes, les victimes de violences sexuelles et autres violences ayant engendré des syndromes de stress post-traumatique, lesquels doivent bénéficier des droits spécifiques accordés en droit international aux personnes particulièrement vulnérables.

Ils abordent également les responsabilités des États notamment en termes de ratification des textes protecteurs, de leur mise en œuvre et de l'adoption de toutes les mesures nécessaires en particulier à l'accès au droit et à la justice. S'il apparaît évident qu'une protection des droits fondamentaux des individus concernés passe par un accès à l'information juridique et à un avocat formé, nombreux sont les systèmes étatiques qui sont totalement défaillant en matière d'organisation de l'assistance juridique et de la formation des avocats sur l'asile.

Enfin, la responsabilité des organisations professionnelles fait l'objet de plusieurs dispositions insistant sur l'organisation d'une aide légale performante, le développement de formations à l'attention des avocats, la mise en place de structures de soutien aux avocats assistant les demandeurs d'asile, le contrôle des abus et le développement de structures de dialogue avec les autorités nationales en charge de l'asile et les organes internationaux disposant d'une expertise en la matière.

La coopération entre ces organisations professionnelles est aussi primordiale. Certaines d'entre elles ont développé une expérience voir une forte expertise dans la gestion de ces questions et elles doivent pouvoir en faire bénéficier les barreaux et *law societies* qui ne parviennent pas à faire face à l'ensemble des difficultés qu'implique l'organisation de l'aide légale aux candidats réfugiés.

Lors du prochain congrès de Budapest, l'UIA en appellera à une adhésion la plus large possible de la profession aux principes de base, rappelant « la nécessité d'un consensus aussi large que possible de l'ensemble de la collectivité mondiale des avocats ».

Julie GOFFIN
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1 Voir not. "UNHCR Guidelines on International Protection – *Call for comments on:* Claims to refugee status related to situations of armed violence and conflict under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions", mars 2016.

UNHCR's Mandate: A Legal Perspective

A. General Background

Forced displacement and statelessness are undoubtedly matters of concern to the international community. It is in response to these challenges that the UNHCR, The UN Refugee Agency, was created as the global refugee institution in the wake of the Second World War. The mandate of the UN Refugee Agency was established by the UN General Assembly [GA] in 1950, born from the experience of different international refugee institutions that had existed in the inter-war period.

It was the intention of the GA to ensure that the High Commissioner, "*would enjoy a special status within the UN … possess[ing] the degree of independence and the prestige which would seem to be required for the effective performance of his functions*." UNHCR's High Commissioner is elected directly by the GA, acting under its authority and reporting to it annually.

In legal terms, UNHCR is a multilateral, intergovernmental institution, established by the GA as its subsidiary organ through resolution 319 A (IV) of 3 December 1949, and provided with its Statute in resolution 428 (V) of 14 December 1950 (Annex). The Statute stipulates that UNHCR "*acting under the authority of the General Assembly, shall assume the function of providing international protection … and of seeking permanent solutions for the problem of refugees*." The Statute is, however, not the only source of law of the mandate of UNHCR. Paragraph 9 of the Statute provides for the further evolution of its functions and activities. Since 1950, the GA and, to some extent, the Economic and Social Council [ECOSOC], have developed the mandate further. From time to time, the mandate of UNHCR has also been extended via "*good offices*" arrangements [discussed in F below]. Other activities may include action and participation "*at the invitation of the Secretary-General, in those humanitarian endeavours of the United Nations for which the Office has particular expertise and experience*."

Additionally, UNHCR's refugee mandate is embedded in public international law, and in particular international treaty law. The obligation of states to cooperate with UNHCR is, for instance, explicitly mentioned in international and regional legal instruments for the protection of refugees, notably the 1951 Convention relating to the Status of Refugees [hereafter 1951 Convention] and the 1967 Protocol relating to the Status of Refugees [hereafter 1967 Protocol]. Some of the functions and responsibilities are also embedded in international law concepts more broadly, such as the surrogate function of diplomatic and consular protection for refugees and stateless persons or international human rights protection concepts. UNHCR is also legally entitled to and responsible for interceding directly on behalf of refugees and stateless persons who would otherwise not be represented legally on the international plane. The effective exercise of this mandate both presupposes and is underpinned by the commitment from states to cooperate with UNHCR. UNHCR is also empowered to "*invite the co-operation of the various specialized agencies*" to assist UNHCR in the performance of its mandate.

This two-pronged legal foundation has given UNHCR its unique identity, specific legal authority and independence. The GA decided in 2003 to remove the temporal limitation on the continuation of UNHCR, granting a permanent mandate "*until the refugee problem is solved*."

As for the nature of UNHCR's mandate, in line with paragraph 2 of the Statute, the position is that it is non-political [that is, impartial], humanitarian and social in character. The budgetary and administrative parts of the Statute clarify that administrative expenditures shall be borne by the UN budget, while "*all other activities*" of UNHCR are to be financed through voluntary contributions. UNHCR's budget and operational activities are guided by a smaller intergovernmental body, the Executive Committee of the High Commissioner's Programme [hereafter ExCom]. As regards international protection, the role of the ExCom is to advise UNHCR at its request. In response to reporting by UNHCR, two different sets of GA resolutions are adopted annually: (i) so-called "omnibus" resolutions referring to UNHCR in general, to its reports and to broader global developments in the area of forced displacement; and (ii) "situational" resolutions which are country- or region-specific. In addition, the aforementioned ExCom adopts annually conclusions on international protection, thus setting standards in the area of forced displacement and statelessness.

> The exercise of UNHCR's supervisory role is unique in many respects.

Activities not central to the core mandate are often integrated into subsequent omnibus resolutions. The repeated requirement or subsequent endorsement by the GA that UNHCR undertakes certain responsibilities for protecting and assisting specific categories of persons elaborates upon and gives substance to UNHCR's general mandate covering such persons. Repeated GA resolutions and the acquiescence of states, therefore, lay down provisions of a "*constitutional*" nature for UNHCR.

B. Refugees and Asylum-Seekers [core mandate]

UNHCR's core mandate covers refugees, that is, all persons outside their country of

origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and who, as a result, require international protection. Given the particular character of refugees as people who lack the protection of their own countries, UNHCR was established as the legal entity to be able to intercede on their behalf, as best illustrated by its supervisory responsibilities in respect of international refugee instruments.

The refugee mandate applies in both emergency and non-emergency asylum-seeker and refugee situations, as well as in situations of emergency and non-emergency mixed movements involving asylum-seekers and refugees. The refugee mandate also applies in both camp and outside camp settings. In fact, UNHCR has a mandate with respect to refugees globally, regardless of the location of the refugees.

Asylum-seekers also fall within UNHCR's competence *ratione personae*. The GA has adopted the term in resolutions relating to UNHCR since 1981. It can either refer to an individual whose refugee status has not yet been determined by the authorities but whose claim to international protection entitles him or her to a certain protective status on the basis that he or she could be a refugee, or to persons forming part of large-scale influxes of mixed groups in a situation where individual refugee status determination is impractical.

UNHCR is authorized to declare which individuals or groups may be of concern to UNHCR under its core mandate. This may be in relation to a specific individual or a wider group. The effect of exercising the mandate in this way lets other external actors know of UNHCR's international protection interest in and responsibilities towards persons covered by the designation.

The activities which UNHCR is required to carry out for refugees are set out both in the Statute [in particular paras. 1, 8, 9, and 10] and in subsequent GA and ECOSOC resolutions. UNHCR is primarily mandated to provide international protection and humanitarian assistance and to seek permanent solutions for persons within UNHCR's core mandate responsibilities. The effective exercise of its mandate both presupposes, and is underpinned by, the commitment from states to cooperate with UNHCR, and acknowledges UNHCR's role in the "*effective coordination of measures taken to deal with this problem [the refugee problem]*", as evidenced by the final preambular paragraph of the 1951 Convention.

In delivering these functions, UNHCR has a history of over sixty years of collaborating with Governments and developing partnerships with other international agencies and non-governmental organizations. Through annual consultations with non-governmental organizations (NGOs) and structured dialogues with key partners, as well as countless Memorandums and Letters of Understanding with other UN agencies, other inter-governmental organizations and NGOs, UNHCR has, over time, established a solid network of collaboration in order to advance the protection and assistance of persons of concern. More specifically on collaboration and coordination, the Statute stipulates, for example, that the High Commissioner, through his Office, shall provide for the protection of refugees by: (a) "*Keeping in close touch with the Governments and inter-governmental organizations concerned*"; (b) "*Establishing contact in such manner as he may think best with private organizations dealing with refugee questions*"; (c) "*Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees*"; (d) "*The High Commissioner may invite the co-operation of the various specialized agencies*" and (e) "*The High Commissioner and the Secretary-General shall make appropriate arrangements for liaison and consultation on matters of mutual interest*" (see para. 8 (g), (h) and (i), para. 12 and para. 17 of the UNHCR Statute).

These legal provisions show that UNHCR was established as the global refugee organization of the UN and as such, the Statute places UNHCR at the centre of the international refugee response system, including in respect of coordination functions.

In terms of assistance the Statute refers to assistance in a number of provisions and obliges UNHCR to carry out various activities in relation to assistance: (a) The High Commissioner "*[shall] assist[-] governmental and private efforts to promote voluntary repatriation or their assimilation with new national communities*"; (b) The High Commissioner shall also "*promot[e] through special agreements with Governments the execution of any measures calculated to improve the situation of refugees*"; (c) The High Commissioner "*shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal*"; (d) The High Commissioner "*shall administer any funds, public or private, which he receives for assistance to refugees, and shall distribute them among the private and, as appropriate, public agencies which he deems best qualified to administer such assistance. The High Commissioner may reject any offers which he does not consider appropriate or which cannot be utilized.*" (see para 8 (c), and (b), para. 9 and para. 10 of the UNHCR Statute).

The role of UNHCR in providing assistance, which is intricately linked with its international protection and durable solutions functions, is also reflected in numerous subsequent GA resolutions, including the annual omnibus resolution and the annual resolution on assistance to refugees, returnees and displaced persons in Africa.

Other standard functions have, for instance, included relief distribution, emergency preparedness, special humanitarian activities, broader development work, as well as registration, determination of status and issuance of documentation for persons falling under the mandate. In addition, the institution of "*good offices*" remains a useful tool for situations outside mandated activities [see below under F]. While UNHCR's mandate does not extend to migrants generally, it is clear that asylum-seekers and refugees are often part of mixed migratory flows, thus necessitating a response on the part of UNHCR.

By way of further background, UNHCR's supervisory role in relation to states' compliance with their international obligations towards refugees and asylum-seekers [as well as stateless persons, discussed below] is an integral part of its core mandate and directly linked to ensuring a principled application of the international protection regime [see also above under A.]. The rationale behind this role is that strengthened supervision by an

international organization is indispensable for a predictable framework of international cooperation and to ensure the proper functioning of such a system.

UNHCR's supervisory responsibility is laid down explicitly in paragraph 8(a) of the Statute, in Articles 35 of the 1951 Convention and Article II of the 1967 Protocol, and requires the 148 states parties to one or both of these treaties to cooperate with UNHCR in the exercise of its supervisory responsibilities [see also above under A.]. UNHCR is therefore competent qua its Statute and international treaty law to supervise all instruments relevant to refugee protection. Moreover, most regional refugee instruments also explicitly establish a link to UNHCR's supervisory function as regards the application of their provisions. In essence, states parties to these international refugee instruments undertake to cooperate with UNHCR in the exercise of its functions, and in particular to facilitate its duty of supervising the application of the provisions of these instruments. They also agree to "*provid[e] the High Commissioner with information concerning the number and condition of refugees, and laws and regulations concerning them.*"

The exercise of UNHCR's supervisory role is unique in many respects. In fact, UNHCR has in some country operations been directly involved in national status determination procedures and national decision-making. UNHCR has also worked closely with the judiciary by providing *amicus curiae* briefs on leading cases to set out UNHCR's legal position. A direct emanation of UNHCR's supervisory responsibility is, *inter alia*, that UNHCR be given prompt and unhindered access to asylum-seekers and refugees, wherever they are, and be allowed to supervise their well-being.

C. Returnees [core mandate]

Returnees are former refugees who have returned to their country of origin spontaneously or in an organized fashion but are yet to be fully integrated, including those returning as part of the operationalisation of the cessation clauses in the 1951 Convention and regional equivalents. Such return would normally only take place in conditions of voluntariness, safety and dignity. UNHCR has a protection and solutions mandate for returnees as former refugees. Paragraph (l) of ExCom Conclusion No. 40, which was endorsed by the GA, 30 acknowledges UNHCR's role on their behalf in connection with voluntary repatriation operations while recognizing UNHCR's legitimate concern for the consequences of the return of refugees to their home countries. UNHCR's mandate in this area has been refined and extended, from an initial premise that its responsibility ended when refugees crossed the border into their country of origin, to providing reintegration assistance and monitoring their treatment after return. UNHCR regularly enters into tripartite agreements on return and reintegration with the country of origin and the country(ies) of asylum. The role of UNHCR also involves making transitional arrangements for development assistance with development actors. While UNHCR has a mandate for the return and reintegration of former refugees, its role is to be integrated into the overall strategy on durable solutions, in line with the Secretary-General's Policy Committee Decision on Durable Solutions.

D. Stateless Persons [core mandate]

UNHCR has stipulated responsibilities for refugees who are stateless, pursuant to paragraph 6 (A) (II) of the Statute and Article 1 (A) (2) of the 1951 Convention, both of which specifically refer to stateless persons who meet the refugee criteria. Moreover, in accordance with GA resolutions 3274 XXIX and 31/36, UNHCR has been designated, pursuant to Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities.

In 1995, the ExCom adopted a comprehensive Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons, which was endorsed by the GA. This text consolidated the evolution of UNHCR's mandate with regard to non-refugee stateless persons and the prevention and reduction of statelessness more broadly. It recognized explicitly in paragraph (a) that its activities on behalf of stateless persons are part of its "*statutory function of providing international protection and of seeking preventive action*." The Conclusion requested UNHCR, *inter alia*, actively to promote accession to the international statelessness instruments and to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation. This is significant because it requires action not only with regard to protection and solutions for stateless persons but also to prevent statelessness from occurring. Subsequent ExCom Conclusions and GA Resolutions have further developed and refined UNHCR's mandate and have referred to four distinct areas in which UNHCR is authorized to act: identification, prevention and reduction of statelessness and the protection of stateless persons.

E. The Internally Displaced

UNHCR does not have a general or exclusive mandate for internally displaced people but has been authorized by the GA to be involved operationally under certain circumstances in enhancing protection and providing humanitarian assistance to internally displaced persons through special operations. UNHCR's engagement with the internally displaced has traditionally been related to situations where there is a strong link with refugee outflows [for instance, in Angola, Colombia or Sudan] or in the context of refugee return, such as in Bosnia and Herzegovina and in Serbia [Kosovo]. The GA referred for the first time in 1972 to internally displaced persons in connection with UNHCR's operational activities in Sudan. In 1992, the GA, for the first time in an omnibus resolution, acknowledged UNHCR's activities in favour of internally displaced persons. In 1993, the GA clarified UNHCR's role by way of setting out the formal criteria for UNHCR's involvement.

The requirements for UNHCR's activities in favour of internally displaced persons are: a specific request/authorization from the Secretary-General or a competent principal organ of the UN; the consent of the state or other entities concerned; assurance of access to the internally displaced; availability of adequate resources and UNHCR's particular expertise and experience; complementarity with other agencies; and adequate staff safety.

UNHCR's involvement with the internally displaced today is largely defined by the interagency coordination approach of the Humanitarian Reform and the Transformative Agenda, which have been developed in the Inter-Agency Standing Committee context under the leadership of the Emergency Relief Coordinator [ERC], albeit operating in full respect of the mandates of the respective entities. In this connection, it was agreed in mid- 2005 that UNHCR would assume global cluster leadership for protection and co-leadership in the area of camp coordination/management and emergency shelter.

In the context of mixed situations which involve refugees, the mandate, responsibilities and accountability of UNHCR remain unchanged [see above under A. and B.]. Its mandate responsibilities for refugees need to be respected even where coordination mechanisms are set up for other persons in need, such as the cluster system for IDPs. UNHCR is obliged to continue to exercise its mandate in respect of refugees, including advocating and interceding on their behalf directly with governments, and exercising its supervisory responsibility over the enjoyment of their rights. In order to do this, the High Commissioner through his Representative must maintain a direct line of communication with the government. UNHCR's mandate responsibilities, combined with its supervisory role, also mean that UNHCR must retain an oversight and monitoring role, within the UN response, over the delivery of services to refugees.

That said, in situations where refugees are part of mixed movements of IDPs, the coordination of the response would need to be driven by both mandate and practical considerations in the interest of refugees. It is preferable that the shape of the response is designed on a case-by-case basis given the wide variation in situations, actors and populations.

F. "Good Offices" Function

"*Good offices*" are a typical feature of international organizations. Various GA resolutions have called on UNHCR to extend its "*good offices*" to assist different groups of persons outside its mandated functions, dating back to 1959. As a result, UNHCR has on occasions been involved with local communities, war-affected civilians or besieged populations, especially in circumstances where it was neither feasible nor reasonable to treat them differently from other categories of concern to UNHCR [particularly in the context of voluntary repatriation or special humanitarian coordination functions for internally displaced populations]. Such operational involvement has been of a humanitarian character and largely meant channelling international assistance or providing protection. Humanitarian assistance through airlifts was, for instance, delivered to the besieged local population in Sarajevo during the armed conflict in Bosnia and Herzegovina. Other examples were UNHCR's engagement with minority groups at risk in Serbia [Kosovo], or when, at the end of December 2004, UNHCR, upon the request of the Secretary-General, provided humanitarian relief to victims affected by the tsunami disaster in Sri Lanka and the Indonesian province of Aceh.

UNHCR
The UN Refugee Agency

Promoting Legal Awareness and Information for Syrian Refugees in Turkey

ABA ROLI Turkey

Introduction

Starting in September 2014, the American Bar Association Rule of Law Initiative (ABA ROLI)[1] has been working with Turkish bar associations, local and international non-governmental organizations (NGOs), municipalities, Syrian civil society and relevant stakeholders to promote legal awareness among Syrian refugees living in Turkey. To date, ABA ROLI has trained 106 lawyers to provide legal awareness and information sessions to Syrians, reaching over 9,000 Syrians through 350 legal education sessions in Southeast Turkey and Istanbul.

Background of the Situation in Turkey

According to the latest figures, nearly 4.8 million Syrians have fled their country from civil war, which started in March 2011, to neighboring countries – Turkey, Lebanon, Jordan, Egypt and Iraq – while 6.6 million are internally displaced within Syria.[2] About one million Syrians have requested asylum in Europe. Turkey has the largest number of refugees in the region, hosting over 2.7 million registered Syrians.[3] While refugees across the region struggle to make ends meet and the region grapples with supporting this influx, Syrians living in Turkey are entitled to benefits that Syrians living elsewhere in the region do not have. Less than 10 percent live in Turkish government-sponsored camps, and the remaining Syrian "urban" population lives throughout Turkey, with the largest populations in Gaziantep, Hatay, and Sanliurfa provinces, as well as Istanbul. While Turkey is a party to the 1951 Refugee Convention and to the 1967 additional protocol, Turkey expressly maintains its declaration of geographical limitation: only people arriving from Europe can be recognized as refugees in Turkey. However, Turkey grants "conditional refugee" status to non-European asylum seekers like Iranians and "humanitarian residence permits" to Iraqis while waiting to be resettled to a third country, and provides "temporary protection" status to Syrians. In 2014, Turkey overhauled its legislation on international protection by passing a new law on International Protection and Foreigners and introduced the Temporary Protection Regulation (TPR). Although the temporary protection status does not grant all the rights afforded under the Refugee Convention, the status is in line with the basic principles of protection and *non-refoulement,* and provides similar provisions such as access to education and free healthcare. The TPR is also designed to provide humanitarian protection in cases of mass influx of refugees, when no individual refugee status determination is possible. Under the TPR, Syrians who enter Turkey without a passport or identification documents are not punished. The TPR provides for certain rights and benefits such as access to healthcare, education, work, legal aid and social welfare. The TPR is not without its restrictions, however. Registration is at the province level, therefore Syrians must seek a travel permit before traveling outside of their registered province, and must seek authorization before moving to another province. The TPR is also "temporary" and technically could end, creating a great sense of uncertainty among Syrians living in Turkey.

Despite the introduction of the TPR, Syrians are largely unaware of or unable to access basic rights such as access to medical care, education and work permits. ABA ROLI's program seeks to address this information gap, by building the capacity of Turkish lawyers to provide legal information to Syrians in Turkey and promote awareness of Syrians' basic rights. Turkish lawyers address the specific rights and obligations of Syrians under the TPR as well as Turkish laws that apply to Syrians, including family law, labor law, landlord and tenants' rights, citizenship, and criminal law, among other topics.

In order to promote legal awareness widely among Syrians, ABA ROLI has developed a multi-pronged approach.

Legal Needs of Refugees

As a marginalized population, with a language barrier to communication with Turkish people and institutions, Syrians face many challenges in their daily lives. For instance, landlords may increase the amount of rent several times per year, while legally this can be done only once a year, putting the Syrian family in a dire financial situation. Because Syrians are often not aware of their rights and are regularly discriminated against, they are reluctant to complain to the police about an abusive landlord or employer.

In order to promote legal awareness widely among Syrians, ABA ROLI has developed a multi-pronged approach, facilitating information sessions and dialogue between Turkish lawyers and Syrian refugees, disseminating legal information online,

and training the staff of NGOs and other institutions providing assistance to Syrians, as well as Syrians who act as "resource persons" within their communities.

Registration under the TPR

While the TPR provides Syrians with basic rights and public services, in practice it may be challenging to access these benefits for numerous reasons. Only Syrians who fled by land directly from Syria to Turkey are eligible for Temporary Protection. Those who first took refuge in another country, and then Turkey cannot benefit from Temporary Protection. In addition, over the past year, in certain regions, it proved difficult to apply for Temporary Protection. For example, some Provincial Directorates of Migration Management (the governmental institution in charge of all migrant and refugee issues) froze new applications in order to finish the backlog of applications and to put in place new security checks. Once the application is complete, the process of obtaining a Temporary Protection ID card may take several months. Syrian refugees may also be very mobile within Turkey, in search of livelihood opportunities or family members. However, the registration under the TPR is locally-based, meaning that people under Temporary Protection can only benefit from the rights conferred to them in the province where they are registered. If they move to another province, without going through the process of obtaining authorization to do so, they are not able to access free public healthcare, register their children at school or benefit from any of the other rights and services guaranteed under the TPR.

Syrians who cannot or chose not to apply for Temporary Protection, may apply for a residence permit, as any other foreign national wanting to stay in Turkey. However, foreign residency entails a different set of rights and obligations, which can be confusing for Syrians.

Livelihoods

Until early 2016, there was no legal mechanism that permitted Syrians under Temporary Protection to legally work, and many were underpaid or failed to receive wages in a timely manner, were overworked, and were at risk of serious work accidents. As a result, exploitative labor, including child labor, is common. Turkey recently issued legislation providing for work permits for Syrians under Temporary Protection; however, in practice, less than one percent of Syrians have work permits,[4] and employers may engage those without valid work permits, as they work for lower wages and longer hours. Since this mechanism is relatively new, both the employers and the employees need greater information on the application process for work permits. For example, there have been cases of fraud when intermediaries asked either employers or employees to pay exorbitant fees to obtain work permits, while the whole process is actually free of charge. Syrians also need to be informed about the minimum wage, which is the same for Turks and Syrians, the working hours, employment contracts and more.

Civil Documentation and Family Law

Many Syrians fled their country without identity papers such as passports, birth certificates and marriage licenses. Civil documentation, including the registration of marriages, births, deaths and divorce certificates, is a priority. For example, in Syria, marriage ceremonies conducted by Sheikhs (religious marriages) are common and legally valid. Oftentimes couples do not register their marriage with the relevant authority until after their children are born, or sometimes, not at all. Turkey requires marriages be performed by the municipality; a certificate of marriage signed by a religious leader alone has no legal validity. Citizenship is another complicated issue as Turkey does not grant birthright citizenship. Syria's nationality law only permits Syrian fathers to transmit citizenship. In Turkey, if the father is not present, or there is no marriage certificate to provide to authorities, the father's name will not be part of the child's birth certificate registration. This means, if the child returns to Syria, s/he will have no Syrian citizenship. Civil documentation, such as marriage or birth certificates, is thus important for Syrian families and will enable them to prove their filiation, uphold their rights as spouses, access Syrian citizenship, claim inheritance rights and more.

ABA ROLI also has an SMS platform that sends out blast legal information via SMS to Syrians.

Independently from their status under Temporary Protection, Syrians living in Turkey also need to familiarize themselves with other sets of laws regulating their daily life. Turkish family law, which applies to Syrians in Turkey, is very different than Syrian family law: in Turkey religious marriages have no legal validity, polygamy is not permitted, and the legal age of marriage for both spouses is 18.

Access to Education and Healthcare

Free public healthcare and education for Syrians under Temporary Protection is largely well-known by both Syrians and service providers. However, young Syrians and their parents still have to navigate the education system and its different options. Syrian students may be enrolled at Turkish schools if they speak Turkish, or follow the Syrian curriculum in Temporary Education Centers supervised by the Turkish Ministry of Education. Private Syrian schools of questionable quality and no official status have also proliferated. Although Syrian students are welcome in Turkish universities (and some public universities have even set up Arabic-language tracks), as each university has its own requirements in terms of diploma equivalence, such as language tests and entry exams, Syrian students are in great need of practical information on

how to register, what documents they need to submit, and which tests to take.

Visas/resettlement

Syrians have demonstrated a strong interest in obtaining an entry visa to Turkey for family members who remain in Syria or who are currently living elsewhere in the region such as Lebanon or Jordan. Resettlement to Western countries and family reunification either in Turkey or in Western countries, as well as on citizenship-related issues, is also of interest.

ABA ROLI Program

ABA ROLI provides Syrian refugees in Turkey's urban areas with the knowledge in order to utilize the local legal system to access their rights. ABA ROLI has supported training for local lawyers on the TPR and laws as they apply to Syrians, as well as on cultural sensitivity and other techniques to foster sensitivities when working with individuals who have escaped violent conflict, including those who have been injured or tortured, suffered sexual abuse or lost family members or property. This trained network of Turkish lawyers delivers weekly or bi-weekly legal awareness sessions to Syrian populations primarily in Southeast Turkey and Istanbul, where they provide information on issues such as registration, family law, legal documentation, access to education and healthcare, and employment. The lawyers also provide separate, targeted sessions for vulnerable populations including women and youth, discussing issues that face these populations disproportionately, such as early and forced marriage, domestic and sexual and gender-based violence, and family law.

ABA ROLI's partner bar association lawyers acknowledge the legal framework is not fully developed, and can be confusing and difficult for an ordinary person to navigate. Several of the lawyers joined ABA ROLI's project out of what they called "a moral obligation," or felt compelled by the sheer complexity of the problem. Between April 2015 and August 2016, ABA ROLI-trained lawyers conducted over 350 awareness sessions and provided legal information to more than 9,000 Syrians.

ABA ROLI also distributes informational brochures written in Arabic to complement the awareness sessions. These "know your rights brochures" cover nine topics: temporary protection, housing, access to health, labor, access to education, legal aid and criminal law, family law, Turkish citizenship and residence permits. Over 100,000 of these brochures have been disseminated throughout the Southeast and in Istanbul in places where Syrians often gather, including information hubs, and community centers.

Use of Innovation and Technology

To complement the in-person awareness sessions, ABA ROLI also has an SMS helpline, which enables Syrians to text in questions over secure lines to Turkish lawyers. These texts are stored, tagged and translated by ABA ROLI into Turkish. The trained lawyers can reply from anywhere in Turkey, and ABA ROLI translates the texts back into Arabic which are then sent to the user. As of August 31, the helpline has responded to over 1,400 information requests.

ABA ROLI also supports an "SMS Blast" know-your-rights campaign, in which text messages are sent to over 8,500 agreed participants with short informational messages about their rights in Turkey. Forty-seven alerts have been sent on the nine informational topics. In addition, messages regarding fraudulent resettlement procedures and illegal migration to Europe from the UN Refugee Agency (UNHCR) have also been shared through the helpline.

Challenges in the Field

While ABA ROLI-trained lawyers work tirelessly to bring a better awareness and understanding of the law and entitlements to Syrians, challenges remain. One lawyer from Istanbul said one of his biggest challenges is "when I cannot answer [the participants'] questions and I cannot help. Sometimes they want me to help [expedite] the application process to get temporary protection or other administrative issues, or they need money. And I cannot do that."

Differences between the two countries' legal systems prove challenging. A lawyer from Gaziantep said, "As the legal systems of the two countries are very different especially on family law such as marriage, divorce [and] child custody, it can be challenging to explain the rules in Turkey."

Oftentimes, there is no legal solution, which can conjure feelings of helplessness. "A Syrian mother with a child suffering from a chronic disease asked me how to get access to medicine for her child. Because they were not under temporary protection, they could not access public healthcare within the Turkish system and she could not access [a] private health facility. It was a difficult situation, because as a lawyer I had no solution for her."

There is also a perceived lack of uniformity of the implementation of the regulations

in place across all local governments. New provisions are sometimes established suddenly without explanation, which can cause confusion not just among Syrians and the legal community, but also the government workers whose job it is to implement the regulations. "We tell Syrians the legal system but the practice can be very varied," across the country said a lawyer from Sanliurfa. The lawyer from Istanbul noted that, "the practice is different from the law; this is why we need [to establish relationships with] government officials to know, to get to understand their practices."

Language issues can add another layer of difficulty. Most Syrians living in Turkey did not speak Turkish before arriving. "It is difficult to find qualified translators as they sometimes add their own opinions rather than making a precise translation," said the lawyer who performs awareness sessions in Gaziantep province. This may result in inaccurate information relayed to Syrians. There have been efforts at integrating the refugees into the host community. NGOs offer Turkish language and culture classes, and community centers host events engaging both the communities. However, with the war in Syria now in its sixth year and Turkey's infrastructure heavily burdened, the relationships between Turks and Syrians are strained. In order to provide the most relevant and helpful information, lawyers must instill trust with the participants. The lawyer from Istanbul said, "before starting the sessions, I had prejudices. I thought that the Syrian women [would] be not attending such sessions, or not asking anything. I was wrong."

Impact of ABA ROLI's Program

The program encourages lawyers to present complex information in a simple, straightforward manner, in front of a large number of people, using interactive techniques. In some areas, the lawyers work as teams to present the information however they find most effective.

In addition to learning more about refugee rights and the laws as they pertain to Syrians in Turkey, the lawyers all acknowledge that they have gained new skills and knowledge by working on this program. This includes increased confidence in public speaking,

improved listening and interviewing skills, increased networking and connections with NGOs, learning to work with different people from different cultures and overcoming prejudices.

The lawyers often encourage fellow lawyers to join them in undertaking this work. "It is a life lesson to help these people, and you realize how important [it] is to have a country," said the lawyer from Istanbul. Sometimes the lawyers find themselves having to explain to their family, friends and fellow lawyers the importance of this program, thereby encouraging important dialogue among the Turkish community of the challenges of the refugees and the need for the program. "People have a lot of prejudices against the other groups from different [ethnicities], [and] culture[s]. I try to explain that the vulnerable groups have different living conditions than the rest of the society. I try to emphasize the needs of the integration between the refugees and the Turkish society," said the lawyer from Sanliurfa. The lawyer from Gaziantep put it simply: "I would say that everybody has a right to access justice."

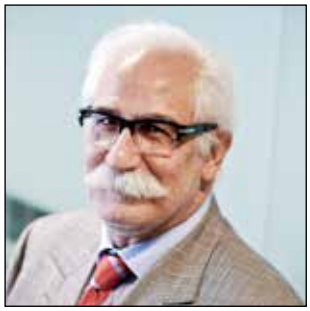
ABA ROLI Turkey

1 The mission of the American Bar Association Rule of Law Initiative is to promote justice, economic opportunity and human dignity through the rule of law. For more information, please visit: www.abaroli.org.

2 Syrian Refugee Response: http://data.unhcr.org/syrianrefugees/regional.php, as of September 9, 2016.

3 The number of Syrians in Turkey may be much higher. A significant number of Syrians cannot register because they have transited through a third country before reaching Turkey, because they are unable to obtain an appointment to apply, or because they have gone through the first phase of the temporary protection registration and are waiting for the decision. For others, there is a lack of understanding of what registration brings, a fear among Syrians that the Assad regime may become aware of their whereabouts, or rumors that by registering, they would not be able to apply for asylum in Europe. Other Syrians made the choice to apply for a residence permit instead.

4 *Fewer than 0.1% of Syrians in Turkey in line for work permits*, the Guardian, by Patrick Kingsley, April 11, 2016: https://www.theguardian.com/world/2016/apr/11/fewer-than-01-of-syrians-in-turkey-in-line-for-work-permits.



Des avocats européens à Lesbos

Michel BENICHOU

Nous avons vécu, nous vivons et nous vivrons une immigration importante de personnes venant de Syrie, d'Irak et d'Afghanistan puisque la situation se détériore constamment.

Parallèlement, d'autres migrants, parfois pour des raisons économiques ou alimentaires, souhaitent – venant d'Afrique – entrer en Europe. Nous ne connaissons pas véritablement le nombre de personnes arrivées et nous ignorons celles susceptibles de quitter ces pays pour gagner l'Europe. Cette crise a été, pour partie, provoquée par les interventions extérieures des pays occidentaux et notamment en Lybie, l'intervention qui – si elle était nécessaire pour chasser un tyran – n'avait pas prévu l'organisation du futur État libyen et a généré un tel chaos que cela permet toutes les aventures. Par ailleurs, en Syrie, la guerre continue du fait de la non-intervention des pays occidentaux et tant que la situation ne sera pas apaisée, que la paix ne sera pas revenue, cet afflux de migrants en provenance des pays du Moyen-Orient ne pourra se tarir et aucun de ceux arrivés en Europe ne repartira.

Mais, il faut rappeler que l'Europe a toujours été une terre d'immigration et souvent d'émigration. En 2012, au début de la guerre civile syrienne, il y avait déjà 230 millions de migrants dans le monde soit 3 % de la population mondiale. Pour l'Europe, la même année, il y a eu 1 700 000 immigrés arrivés dans les pays de l'Union européenne et 1 800 000 migrants internes à l'Union. Parallèlement, 2,7 millions de personnes ont quitté l'Union européenne.

Il y a 500 millions d'européens. Actuellement, il y aurait 20 millions de résidents qui ne sont pas citoyens de l'Union. Cela représente 4 % de la population avec, en tête, une immigration turque, puis marocaine, puis chinoise, …

Depuis janvier 2015, l'Office International de Migration a estimé que le total des migrants s'est élevé à 1 103 496 arrivés par terre ou par mer et en majorité par la Grèce (910 663), ou par l'Italie (157 083). D'autre évoquent plutôt un chiffre de 1,5 million de réfugiés ayant traversé les frontières.

Cela, à chaque fois, constitue des drames inimaginables. Les réfugiés sont rackettés par les passeurs ; Les femmes subissent des violences physiques. Ils sont souvent les rescapés d'un voyage de la mort où la Méditerranée prélève chaque jour, chaque nuit, son butin humain comme un éternel cimetière marin. 30 % des personnes arrivant sont des enfants souvent non accompagnés.

Face à cette crise humanitaire, l'Europe aurait pu, comme les États-Unis en 1903, élever une statue, une célèbre new-yorkaise, emblème de la liberté et de l'émancipation des peuples et symbole de l'hospitalité. On aurait pu, à l'entrée de la route des Balkans, ériger cette statue et y graver, une nouvelle fois, le poème d'Emma Lazarus écrit en 1883 et se terminant ainsi : «*Donne-moi tes pauvres, tes exténués, tes masses innombrables aspirant à vivre libres. Le rebus de tes rivages surpeuplés. Envoie-les moi, les déshérités, que la tempête me les rapporte. Je dresse ma lumière au-dessus de la porte d'or !*»

Telle n'a pas été l'attitude de l'Europe. On la transforme en une Europe forteresse. Aucune approche européenne commune n'a été adoptée. Lorsqu'on a évoqué une politique de relocalisation ou de quotas, elle a été immédiatement refusée par de nombreux États. Aucun consensus n'existe entre les États membres sur la façon de gérer la crise, ni sur les méthodes à utiliser.

Pourtant, la crise était parfaitement prévisible. Ainsi, les États membres sont toujours d'accord pour ouvrir nos frontières aux marchandises et aux capitaux, mais veulent les fermer aux humains. Dans l'urgence, on va tenter de contrôler les frontières extérieures de l'Union européenne en renforçant le périmètre d'action et tous les moyens de l'Agence européenne Frontex (contraction de « frontières extérieures »). Cette agence a été créée par un règlement de l'Union européenne en octobre 2004 et son budget est passé de 19 millions d'euros en 2006 à 143 millions d'euros en 2015. Il va certainement encore augmenter en 2016.

Il faut dire que Frontex contribue à la mise en forme des statistiques migratoires adressées à la Commission européenne. Parallèlement, elle propose des moyens d'interventions. En bref, elle négocie ses budgets en fonction des chiffres qu'elle a précédemment déterminés, des besoins qu'elle a elle-même évalués.

Notre rôle est de parler et de dénoncer. Il nous faut responsabiliser les dirigeants et rappeler aux puissants que la tentation de la forteresse n'a aucun avenir.

L'Europe forteresse se met en place. On inculque une peur des populations migrantes. On considère que le migrant est un criminel ou, au moins, un délinquant et on adapte les législations en fonction de ce préjugé. On construit des murs. La raison d'État est devenue la raison de sécurité. On veut établir une nouvelle relation avec les habitants à l'intérieur du pays et cette relation vise un contrôle généralisé, sans limites, un développement de xénophobie. Cette peur de l'Autre ne va cesser de se développer si les hommes et les femmes de bonne volonté n'interviennent pas. Les États ont d'ailleurs besoin de cette peur pour entretenir des systèmes de contrôle de plus en plus perfectionnés.

On veut établir des barrières physiques et mentales autour de l'Europe. Certains demandent la création de véritables murailles à l'exemple de la muraille de Chine.

Cette Grande Muraille avait pour objectif de faire cesser les attaques des nomades venus du Nord.

Cela n'a jamais marché sur le plan militaire. Des dynasties d'empereurs de Chine sont venues de Mongolie ou de Mandchourie. Et pourtant, même après les invasions, le mur a été maintenu et entretenu pendant des siècles. Il s'agissait, en réalité, de séparer la civilisation des barbares. L'Empire de Chine était la civilisation. Le reste du Monde n'était que barbarie.

Ainsi, le mur que veulent certains autour de l'Europe n'a pas pour objectif de protéger les citoyens européens mais de définir une civilisation contre ceux dont on prétend qu'ils sont des « barbares ». On ne défend pas une frontière mais on invente une frontière mentale pour tenir à distance ce qui nous fait peur et lui donner un nom. On construit une idée avec des barbelés

Cette infamie n'est pas la dernière.

L'Union européenne, débordée, a signé un accord avec la Turquie aux fins de créer des camps de rétention en Turquie. Les migrants, arrivés en Grèce après le 18 mars 2016, doivent être ramenés en Turquie et on va déployer une flottille de l'OTAN. La Turquie devient un immense camp de rétention et on confie les clefs de ce camp à Monsieur Erdogan. C'est un gardien de camp fréquemment condamné par la Cour européenne des droits de l'homme pour des manquements aux libertés. C'est un gardien dont le régime devient autoritaire et attentatoire à l'État de droit. C'est un gouvernement et un président qui emprisonnent les avocats et multiplient les atteintes à la liberté d'expression. C'est un président qui vient de mettre 35 000 personnes en détention et de limoger juges, fonctionnaires, journalistes et autres par simples soupçons.

Le fondement juridique de cet accord est fragile et improbable. Il soulève plusieurs questions importantes en matière de droits de l'homme. Cela a été clairement relevé par le Conseil de l'Europe en son Assemblée, lors d'une résolution 2109 adoptée le 20 avril 2016.

Il a été rappelé l'avis du Haut-Commissariat des Nations-Unies pour les réfugiés (HCR) qui indique que la protection assurée par la Turquie pourrait ne pas être « suffisante » puisque des cas de refoulement de syriens en Syrie ont été signalés et sont avérés.

De surcroit, le fondement de cet accord serait de considérer que la Turquie est un « pays tiers sûr ». Or, cela est contraire au droit de l'Union européenne et au droit international.

La Turquie ne fournit pas la protection prévue par la convention de 1951 relative au statut des réfugiés. Les non-Syriens ne bénéficient pas d'un accès effectif à la procédure d'asile.

Les recours formés contre les décisions de renvoi des demandeurs d'asile vers la Turquie n'ont pas l'effet suspensif automatique prévu par la Convention européenne des droits de l'homme.

Ainsi, l'Europe a réussi à sauver l'Euro. Mais elle laisse mourir les migrants.

L'Europe se disloque et montre un triste visage d'égoïsme. Elle n'est qu'un rêve inutile si lors de chaque difficulté, certains pays peuvent se cacher derrière leur souveraineté pour prendre des mesures de défiance à l'égard des autres pays et se réfugier derrière leur égoïsme national, rouille de la société. Certains gouvernements ne veulent mettre en commun que la prospérité autour d'un marché avec échange de marchandises et de capitaux. Cela suffit à leur bonheur.

Ce qu'on enterre n'est pas le problème des migrants car l'immigration et l'émigration sont des questions éternelles. En réalité, les gouvernements sont les fossoyeurs de la passion pour l'Europe et pour « l'âme de l'Europe, ses valeurs » comme le rappelaient Messieurs Schulz et Juncker dans une tribune célébrant le Pape François, « symbole d'une Europe unie » (*Le Monde,* vendredi 16 mai 2016).

Mais, poussés par une fièvre ultra nationaliste et par des opinions qui ont peur de perdre leur confort et leur niveau de vie, certains pays européens ferment les yeux pour ne pas voir la mort des enfants.

Que peuvent faire les avocats ?

Les avocats et les organisations d'avocats ne peuvent rester insensibles et elles ne le sont pas. L'Union Internationale des Avocats prépare une « charte des réfugiés ». Le Conseil des Barreaux Européens refuse de se taire. Notre rôle est de parler et de dénoncer. Il nous faut responsabiliser les dirigeants et rappeler aux puissants que la tentation de la forteresse n'a aucun avenir. La Méditerranée ne doit pas être un éternel cimetière marin. En bref, il nous faut tenter d'humaniser la mondialisation. Nos seules armes sont la parole dont il nous faut user sans modération et le Droit.

Le Conseil des Barreaux Européens (CCBE) a décidé de procéder à une large réflexion concernant la réforme du Règlement Dublin II. Le règlement actuel est un véritable échec et il nous faut aider à son évolution.

Il faut réfléchir à l'abandon de la règle du pays de première entrée aux fins d'un enregistrement, uniformiser les procédures d'asile en Europe. Il faut que les organisations d'avocats travaillent ensemble à cette réforme. Il faudra que les recours aient un effet suspensif automatique tel que cela a été prévu par la Cour européenne des droits de l'homme. Dès lors, l'actuelle rétention des demandeurs d'asile devra cesser. On devra garantir le respect rigoureux des exigences prévues par les textes concernant les motifs et les conditions de rétention et on devra prévoir des solutions de remplacement satisfaisantes lorsque cette rétention ne sera pas justifiée ou appropriée.

L'Union européenne a publié une directive relative aux conditions d'accueil. Les dispositions de cette directive doivent être respectées pour tous les réfugiés et migrants arrivant dans l'Union européenne.

Il serait enfin souhaitable que la Cour de justice de l'Union européenne soit saisie de l'interprétation de l'accord UE-Turquie.

Le Conseil des Barreaux Européens collabore déjà avec l'American Bar Association Rule of Law Initiative (ABA ROLI). Cette fondation dépendant de l'American Bar Association a développé une plateforme SMS et un site internet regroupant de l'information ainsi qu'un réseau à travers un site internet pour les Barreaux des Balkans.

Le Conseil des Barreaux Européens (CCBE) et l'ABA coopèreront dans les domaines suivants :

- Développement de méthodes et moyens visant à informer les personnes nécessitant une protection internationale,

- Développement d'un programme visant à soutenir la formation des avocats locaux qui représentent les réfugiés – demandeurs d'asile – dans les Balkans et en Turquie,
- Développement de documentation pour les barreaux et les avocats, l'assistance aux gouvernements et aux parlements des États des Balkans souhaitant mettre en place des réformes de leur système d'asile ainsi qu'un partage des meilleures pratiques avec les Barreaux des Balkans.

Nous travaillons sur des documents qui pourront être diffusés dans les *hot spots* et qui donneront toutes indications concernant le droit d'asile.

Le Conseil des Barreaux Européens a également fait son travail de lobbying en intervenant auprès de la Commission européenne et notamment auprès :

- du Commissaire Avramopoulos, chargé de la migration,
- de la Commissaire Jurova, chargée de la Justice,
- et du Vice-Président de la Commission européenne, Monsieur Timmernans,

ainsi qu'auprès de la Présidence hollandaise et du ministre grec en charge de la migration pour rappeler la nécessité de l'État de droit et de l'assistance légale aux réfugiés.

D'autres actions ont été initiées ou sont prévues.

Nous participons également au Forum européen sur la migration lancé en 2015 pour lequel les réunions sont organisées conjointement par la Commission européenne et le Comité économique et social européen réunissant des experts nationaux et internationaux sur les questions de droit d'asile et de migrations.

Mais cela ne suffit pas.

Le Conseil des Barreaux Européens, avec le DAV, a lancé un projet dénommé : « Avocats européens à Lesbos".

Nous avons constaté que la situation dans les *hot spots* était inacceptable. Chacun s'accorde sur l'absence d'accès à la justice, l'absence de contrôle judiciaire des procédures administratives, la détention systématique avec absence de traducteur ce qui fait que le migrant ne sait pourquoi il est détenu et le développement de la précarité.

Or, les *hot spots* sont dans l'Union européenne. Si nous oublions, dans ces lieux, l'État de droit, cela aura un effet domino et cela entrainera une destruction du système des droits de l'homme dans tous les pays de l'Union.

Ponctuellement, des équipes de juristes se sont rendues sur place et ont constaté que le droit n'était pas respecté. La police contrôle tout. Il n'y a pas d'avocat. Il n'existe non plus aucun programme d'aide juridictionnelle. On assiste à l'instauration d'une véritable présomption de culpabilité et les personnes ne connaissent pas leurs droits.

En conséquence, le Conseil des Barreaux Européens a souhaité que les avocats européens soient présents dans les *hot spots*. Pour ce faire, la première tâche était d'obtenir le financement nécessaire et il faut le dire : les avocats sont parfois formidables !

En effet, après un appel lancé le 31 mars 2016 par le Conseil des Barreaux Européens, de nombreux barreaux locaux (Lyon, Grenoble, Paris, Rennes, Strasbourg, Seine-Saint-Denis, Tessin, ordre des avocats vaudois, Nederlandse Orde van Advocaten bij de Balie te Brussel, Ordem Advogados Lisboa…), des barreaux ou organisations nationales (barreau d'Andorre, Avocats.be, OVB, Conseil supérieur des avocats de Bulgarie, Czech Bar, Danish Bar & Law Society, Finnish Bar Association, Conseil national des barreaux, Conférence des Bâtonniers de France, Greek Bar, Law Society et Council of the Bar d'Irlande, Consiglio Nazionale Forense, DAV, BRAK allemands, Barreau du Liechtenstein, Lithuanian Bar Association, Norwegian Bar, Polish Bar of Legal Advisers, Barreau roumain, Barreau espagnol CGAE, Fédération suisse des avocats, Barreau hollandais, Law Society of Scotland, Bar Council of England and Wales, Law Society of Northern Ireland) et des organisations régionales (Fédération des Barreaux d'Europe) ont contribué par des dons à l'élaboration financière de cette opération.

Depuis le 1er aout 2016, un coordinateur est basé de façon permanente et gère l'arrivée des volontaires avocats. Il est responsable du planning des interventions des avocats, négocie avec les autres organisations. Il travaille avec le barreau grec qui a apporté un soutien fondamental et a permis la signature d'un accord avec le Ministère grec des migrants.

Sont également présents deux ou trois volontaires européens. De façon admirable, il y a eu en deux mois 177 candidatures d'avocats volontaires pour partir de leur cabinet et travailler gratuitement à Lesbos (leurs frais sont payés). Les 9 premiers volontaires viennent d'Allemagne, de France, de Grèce, de la République Tchèque, d'Espagne, des Pays-Bas et du Danemark. Ils donnent des consultations, des informations mais sont aussi des observateurs juridiques.

Nous avons toujours besoin de volontaires qui connaissent le droit d'asile et les législations sur la protection internationale qui parlent couramment l'anglais et ils seraient mieux qu'ils aient des connaissances en arabe ou en farsi.

L'Union Internationale des Avocats a aidé le Conseil des Barreaux Européens en diffusant largement l'appel financier et l'appel volontaire.

Il est encore possible de se porter volontaire. Il est encore possible pour les barreaux et organisations d'aider le Conseil des Barreaux Européens à maintenir cette opération par des dons financiers.

Nous voulons être présents pendant au moins une année. Nous souhaitons ensuite que la Commission européenne, les États membres prennent leurs responsabilités et que l'aide légale fasse partie des droits humanitaires fondamentaux. Le migrant qui arrive doit pouvoir connaitre ses droits. A défaut, il restera toujours un migrant et ne deviendra jamais un réfugié.

Les avocats, en 2016 et en 2017, vont payer pour faire leur travail et pour aider les réfugiés et les migrants. Il conviendrait que, par la suite, les États membres assument le coût de cette indispensable information juridique et, par des subventions, permettre le financement de cette opération. Chacun doit faire sa part.

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Legal Challenges for Transitory and Destination Countries

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In order to approach the concept of the refugee one must first conceive that the notion of "fear" reigns above the refugees.

The fear of prosecution exists due to the fact that a refugee is someone established as having "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and who therefore is not able to return to his/her country of origin.

But there are also other "fears":
What scares the refugee, the "metics" of our time acting as an "other", i.e. as a "congeneric other" without wanting to appear as a "different other" – nevertheless an adult who is responsible for his beliefs? Whether he will meet, in his new place of residence, everything he left behind, especially if resettlement was not his decision – as happens most of the time.

How and where he will set up his new residence? In the countryside, in basements, hovels or boarding houses? With what kind of support: with his "nest egg", by trading in manual labour, or with his specialist occupation? And before all this: will he be met with the support of the new country, of the government, of the Church, of volunteer groups, of activists, and of friendly political parties? And with what status: "citizenship" or "non-citizen"?

The above mentioned are "fears".

And also: within which category of the new "minorities" – fugitives this time around, and of multiple origins – will the refugee be placed?

How will the frame of risk be magnified to the point that any thought of returning home, where citizenship is treated with the "right of blood" (*«jus sanguinis»*), ends up having no significance. But here? What are the limits of "legality" and "illegality"?

If the "immigrant" himself is every time the sum of his phobias, the country which he entered – either with or without "papers" – has not become "permeable". That is to say that the country's authoritarian mechanisms have not lost their power as far as the monopoly of the legal order and all other primary functions are concerned.

The same applies to economic activity, which socially marginalizes cheap and "unregistered" labor and to the political class which does not recognize (almost) any civil right – more so as concerns "nationality". Where can they "seek refuge", even if this will stigmatise them for the whole of their lives through all forms of ghettoisation?

The above are also "fears".

How are "well-founded fears" defined?

The definition of "well-founded fears" is governed by the 1951 United Nations' convention, as amended by the 1967 protocol to the convention, pertaining to the status of refugees. **This is the "key" international law that defines refugee status.**

Consistent to these legal norms, it is improbable for a substantial amount of asylum seekers currently arriving in Europe to achieve refugee status. In contrast, they will be labelled as economic migrants who departed from their countries to find employment rather than to flee from oppression, mistreatment or violence, in general.

All the above "fears" reign both in the transitory and the destination country of the refugee. The end destination is where the fears concerning race, religion, nationality, membership of a particular social group or political opinion, are appeased. Transitory countries are the countries within which the refugees feel like they are heading to the place where these fears will vanish.

For political reasons, transitory countries may become, unwillingly, the destination countries of the refugees.

Consider the example of Greece:
Greece was a transitory country for the refugees. The moment the northern frontiers of Greece were closed by the neighbouring countries, Greece became a destination country for the refugees who were "trapped" there.

Bearing in mind the above, in my opinion, the main legal challenges are centered on three main issues:

Firstly, in identifying and categorising the responses to mass influx which have been cultivated; secondly, in describing and investigating the matters which are at risk and which need to be resolved; and, thirdly, in offering suggestions which could steer towards the expansion of rational and realistic methods to deal with the issues at hand, which will be "personalised" to the specific situation, are which are consistent with internationally conventional refugee protection ideologies centered on the 1951 Convention and 1967 Protocol.

The aim of the Convention is to act as a refugee protection instrument, rather than a migration instrument. It does not essentially necessitate permanency of refugee status. The ever changing disposition of circumstances in the country of origin is firmly connected with the refugee regime. The actions which are delivered for in

> It is not uncommon for the general public to be prejudiced by its perception of "crises" of refugees arriving in mass movements of people [...].

the Convention are made provisionally, on specific conditions which need to be met, some of which having an association to permanency of stay and others which are associated with urgent need, each in the language of the different provisions. Within the Convention, it is achievable, to expound a response to large-scale group arrivals which could be based on ephemerality and return.

Obviously, there are dissimilarities amid the methods in which each of these protection oriented reactions to mass displacement have been applied. The general goal is to make the most of the capacities of the various answers while, at the same time, making sure that their rapport with international refugee protection standards is warranted. At the same time, there needs to be a new examination of the flexibility which is a main characteristic of the 1951 Convention.

So as to proceed in a more effectual and comprehensible manner, in order to achieve protection in mass influx, it is essential that the ambiguities and insufficiencies which can be detected in the current prevailing answers are dealt with. The matters which need to be addressed, within this framework, specifically pertain to the kind of and the extent of the protection, to the nature of the beneficiaries, and to the complexity of attaining sustainable solutions.

It is not uncommon for the general public to be prejudiced by its perception of "crises" of refugees arriving in mass movements of people, such as is currently underway in Europe. Nevertheless, refugees can be "generated" on a much more individual level and may descend from any socioeconomic background.

There are also claims, known as *sur place,* in which any individual who moves away from his or her home country due to something other than claiming asylum can still make a claim if they have a well-founded fear of persecution at their home country or if there is a change of circumstances in the home country.

While keeping in mind these legal challenges, our responses are directed by a "No alternative": the choice is either "asylum right" or "inhumanity".

For many years, migrants from the South of the Mediterranean region attempting to flee from misery, war and repression drown at sea or hit fences. And when they manage to get past these barriers, having payed "ransoms" to traffickers, they are stopped, detained or thrown back into concealment by States, which call them "dangers", "threats" or "enemies".

The fact that our governments are not capable of putting an end to the causes of this phenomenon of migration does not exempt them however from the duty to help and welcome the refugees in full accordance with their fundamental rights, fundamental rights which derive, like the right of asylum, from the declarations and conventions, basis of the international law.

But apart from very few exceptions – I do not want to mention the names of these exceptional countries –, the vast majority of European governments refuse to really understand the situation, to explain it to their public opinion and to organize the solidarity in overcoming the national egoism. And therefore they rejected the minimal plan proposed by the European Commission for relocation of the refugees and, even worse, they opted for repression, stigmatization and brutality against the refugees and migrants.

Fortunately, on the other hand, the initiatives taken by ordinary European citizens, associations, artists and intellectuals "save the honor" of the governments. They showed to us the path for a solution.

We are therefore in the presence of two different faces of Europe which are not compatible. We need to choose between them and, by choosing them, the above mentioned legal challenges are present.

We must not forget that the millions of refugees who arrived in Europe in 2015 represents only 0,2% of its population when countries like Lebanon, Jordan or even Turkey welcome a number of refugees which represents respectively 20%, 12% and 3% of their population.

Together, the European countries not only have the capacity to receive the refugees and to treat them with dignity, but they are compelled to do so if they want to still be able to claim to adhere to human rights as a basis of their political constitution.

The discussions between Turkey and Greece regarding the return procedure that took place at the beginning of April 2016 under the auspices of the EU led to a series of changes in both countries' legislation. For Greece, it meant in particular to acknowledge Turkey as a safe third country and for Turkey it meant to proceed to legislative amendments for the protection of non-Syrian refugees. And therefore, when other European countries, for various reasons, still avoid acknowledging Turkey as safe third country, Greece has been "pushed forward" by the European Union to do so, as a first host country.

If these changes are effectuated, the implementation of the agreement between EU and Turkey may still pose difficulties due to the issue of resettlement. Indeed the said agreement provides that for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled to the EU from Turkey directly. In which Members States, though? Poland has already declared that it will not accept resettlement of refugees and other countries such as Hungary, Czech Republic, Slovakia, Balkan States, Austria, etc. will probably do the same. Negative reactions may also arise in France or Belgium due to the recent terrorists attacks.

The application of this agreement may therefore not be effective.

In any case, let's never forget that there is no alternative: asylum right, or inhumanity.

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Refugees in International Law and the EU-Turkey Agreement

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In law, language is not mere semantics, but essential in distinguishing those who are entitled to certain rights from those who are excluded from them. Citizens, residents, aliens, and migrants are important legal notions, since they grant certain rights in international and human rights law, with corresponding legal consequences. From these rights flow the very essence of the right to life and due process – the right to human dignity, the right to work, the right to travel, the right to family life, the right of protection of children, and the guarantor of these rights, the right to legal representation and a fair and impartial hearing. In addition, in human rights law, there is a responsibility to protect which is imposed on all states through customary international law to protect those in their effective control. In Europe, such an obligation is enforced in its most expansive definition by the European Convention on Human Rights and the European Court of Human Rights.

The source of the law on refugees is of the most basic nature. It is moral. To give refuge to those fleeing persecution is the most natural of rights, imbibed in common law, and needs no papal recognition or reiteration. Its status in customary was made into a positive right, though one with an ineffectual remedy in law, by the 1951 Convention on refugees and the 1967 Optional Protocol Relating to the Status of Refugees. The plight of refugees who found refuge in countries outside the region, primarily in Europe, may have spurred on Article 14(1) of the Universal Declaration of Human Rights, which enshrines the right to seek and be granted asylum in a foreign territory.

The distinction between refugee status and migrant status is not determined by a person's intermediary country of residence, but whether, as prescribed in Article 1(A)(2) of the 1951 Convention, the individual who is outside his or her country of nationality or habitual residence is unable or unwilling to return due to a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.

Other conventions and rights are even more expansive, such as the right to non-*refoulement,* or the right to not be returned, unwillingly, to a country where the life of a refugee could be threatened on account of the Refugee Convention criteria. European human rights decisions also consider the right to non-*refoulement,* for logical rationales, as part of the right to life. *See R (on the application of) ABC (a minor) (Afghanistan) v. Sec'y of State for the Home Dep't* [2011] EWHC 2937 (Admin.) (U.K.); ECtHR, *Case of M.S.S. v. Belgium and Greece* [GC], n° 30696109, ECHR 2011, Judgment of January 1, 2011. Further, the 1984 United Nations Convention against Torture also reiterates the principle of non-*refoulement* when the individual may face torture. The Genocide Convention places a positive obligation on all states to prevent genocide, and to thus implicitly not place members of vulnerable groups at risk of collective punishment for their race, religion, or ethnicity.

The European Convention of Human Rights, applicable wherever member states of the Council of Europe have "effective control", grants refugees rights through the right to life. The Responsibility to Protect, a customary international law doctrine, requires all states to protect those under their control.

The right is not limited to allowing refugees into a country, but also includes the right to travel, the right to be issued travel documents, freedom and movement, and the right to parity in law relating to the states' human rights obligations, including the right to fair trials and natural justice. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) grants everyone the right to freedom of movement and residence in a country they legally reside in, and the right to leave one's own country. Article 128 of the 1951 Convention refers to the issuance of travel documents to refugees who wish to travel outside their country, unless national security or public order requires otherwise.

The Convention also provides the right to family life, where family members have a right to be reunited across borders. As enshrined in many domestic legislations, the right to family members often flows from the presence of a refugee in one's territory.

The implementation of these rights, subject to national or regional enforcement, has been sporadic. The rights have not often prevailed against national border fences. In *Sale v. Haitian Ctr. Council,* 509 U.S. 155 (1993), the U.S. Supreme Court limited the granting of refugee rights to its shores, holding that Haitians trespassing territorial waters did not have the right to *non-refoulement.*

The European Union–Turkey agreement directs the return of "migrants" based on their country of origin, is seemingly entirely contrary to state obligations under European and international law, and violates the individual rights of citizens. Firstly, it is collective in its treatment, basing its measure of refugees returning to Turkey solely on their Syrian nationality, without individual determination. It is entirely unclear whether such collective treatment is compatible with the individualised human, refugee and constitutional rights. The implementation of the agreement confirms fears that the collective return of refugees is being done at the stage of admissibility, based on their nationality, or their passage through Turkey, rather than their individual cases. In newly transformed detention centres in Greece, there is no effective opportunity for refugees to apply for asylum.

The legal rights of refugees arriving, for example, in Greece, would be unclear. Would they be able to access the Greek legal system? Do lawyers have access to the detention centres? Would a complaint and adjudication of the complaint to the European Court of Human Rights lie? So far, the answer seems to be no.

According to Article 4 of Protocol n°.4, "collective expulsions of aliens is prohibited." In *Khalifa & Ors. v. Italy,* 16483 of 2012, the European Court of Human Rights adjudicated on the collective expulsions of Tunisians from Italy based on an agreement with Tunisia. The ECtHR considered that the migrants were subjected to an identification procedure, but no individual determination was carried out in violation of Article 4 of the Protocol.

Further, while Turkey is home to a vast number of refugees from Syria, it is unclear whether it meets the required standards for refugee adjudication and treatment. Turkey, although a signatory of the 1951 Refugee Convention, has an explicit reservation limiting the convention's application to refugees from European countries. There are complex concerns particular to Turkey, such as the country's treatment of Kurdish refugees given Turkey's own derogation of human rights with regard to Kurdish political parties and armed groups, particularly those belonging to the Kurdish minority.

The European Court of Human Rights has criticized the adjudication of asylum claims in Greece, often the first European Union country that refugees passing through Turkey land on. In *M.S.S. v. Belgium and Greece (2011),* the European Court of Human Rights (ECHR) held that the Belgian government had violated an Afghan refugee's right against torture by *refouling* him to Greece to adjudicate his asylum claim. And the EU-Turkey agreement, that calls for Turkey to prevent migrants from leaving the country is also, in its explicit terms and conditions, a violation of the right to leave the country, as enshrined in the ICPCR and the ECHR, Article 2 to Protocol n° 4. It may be recalled that Turkey is also subject to the ECHR. Further, Turkey's restriction of these rights may not be based on the public order and national security concerns of a third country. *See Jipa Case,* Case C-33/07, ECJ, decided on July 10, 2008.

Further, the protocol calls for creating "safe zones" within Syria, where refugees would presumably reside. It is unclear what status the refugees would have, and what the level of assurances to their protection would be. If the area was overrun by ISIS, for instance, would the EU or Turkey then proffer armed protection?

The treaty has no protection for vulnerable groups such as children and the elderly, or consideration for the reunifying of dispersed families. As a result, it fails in the obligation to protect children who are vulnerable, irrespective of their residency or citizenship status.

The "immigration" issue is of political concern in Europe, as evident from its resonance in the Brexit vote. However, the fundamental nature of the right to seek refuge cannot be deconstructed at a time of unprecedented conflict, particularly in West Asia, to political exigency. The European Union's role in promoting international law is under serious jeopardy if it derogates from these rights in the face of a refugee crisis.

Such derogation from the law is an infringement on the rights enjoyed by residents and citizens of the European Union, all due to the crises. The refugee crisis is a crisis due to the response. The rights of citizens and residents against arbitrary State actions are being derogated. It is a derogation which lawyers must not be guard against, but actively resist.

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El acuerdo entre la Unión Europea y Turquía sobre la situación de los refugiados e inmigrantes

Ángela DÍAZ-BASTIEN

El 18 de marzo de 2016 el Consejo de la Unión Europea (UE) y Turquía acordaron nuevas líneas de actuación y colaboración encaminadas a reafirmar el Plan de Acción Conjunto, puesto en marcha el 29 de noviembre de 2015, con el fin de poner término a una crisis migratoria tristemente protagonizada por millones de personas en su mayoría solicitantes de asilo, refugiados y desplazados.

La consecuencia inmediata tras el acuerdo fue que las autoridades griegas en materia de asilo (Greek Asylum Service, GAS), a la hora de examinar las solicitudes de asilo de aquellos que hubieran entrado en el país heleno después del 20 de marzo 2016 y que provenían de Turquía, tendrían en estimación – en el examen de la solicitud de asilo – que Turquía sería considerado "país de primer asilo" (ex artículo 35 Directiva 2013/32/EU, Asylum Procedures Directive) o "tercer país seguro" (ex artículo 38 APD).

Las consecuencias de tal medida, es decir, que Turquía fuera considerada como "país de primer asilo (First Country of Asylum, FIA)" o "tercer país seguro" (Safe Third country, STC)", no se hicieron esperar: el Parlamento del Consejo de Europa (PACE), el Alto Comisionado de Naciones Unidas para los Refugiados (ACNUR/UNHCR) y el Consejo Europeo para los Refugiados y Exiliados (ECRE), publicaron sendos informes en los que denunciaban que Turquía vulneraba la normativa europea e internacional en materia de refugiados y, por tanto, no cabía extenderle los conceptos legales recogidos en los artículos 35 y 38 de la Directiva 2013/32/EU (APD).

Los organismos internacionales y europeos antes mencionados consideraron en sus informes, además de denunciar graves irregularidades en que incurrían las autoridades griegas de asilo (GAS) debido, en especial, el elevado número de personas solicitantes de asilo y los escasos medios de acogida, que existían serios indicios de que Turquía no cumplía con uno de los principios fundamentales de la normativa en materia de asilo: la garantía del derecho al *non-refoulement*.

Si bien Turquía firmó la Convención de Ginebra de 1951, también elaboró su propia normativa en materia de asilo para los ciudadanos "no europeos": la Ley sobre Extranjeros y Protección Internacional (LFIP) y el Régimen Transitorio de Protección (TPR), establecido, este último, especialmente para nacionales sirios y palestinos originarios de Siria.

Por tanto, es notorio que el acuerdo de 18 de marzo entre la UE y Turquía, concordado para aliviar la crisis migratoria que afecta a más de tres millones de personas, se ha topado con la cruda realidad: el choque frontal entre las normas internacionales y europeas en materia de asilo y derechos humanos contra la legislación interna homónima de la cual se ha dotado el estado turco. Así pues, el primer obstáculo que debe ser removido por Turquía, tal y como recomienda la resolución 2109 (adoptada por la PACE), es la limitación sobre el origen del solicitante de asilo y aplicar, sin limitaciones geográficas la Convención de Ginebra de 1951, (se firmó para ciudadanos europeos y en Turquía hasta este año sigue existiendo dicha limitación).

Pero, siendo ecuánimes, el foco no sólo hay que ponerlo sobre uno de los partícipes del acuerdo (Turquía), también debemos recordar que Grecia está soportando casi toda la carga de tramitar cientos de miles de solicitudes de asilo y que, lamentablemente, el resto de Estados miembros de la UE incumplen con la promesa de realojar a los refugiados que se encuentran actualmente en Grecia de forma efectiva.

Ya para finalizar, no debemos olvidar que los Estados miembros UE también han hecho dejación de sus responsabilidades a la hora de aplicar Dublín III (EU 604/2013, 26 junio), por cuanto que el Reglamento también prevé mecanismos expresos para que cada Estado miembro examine aquella petición de asilo hecha en el caso de solicitantes miembros de una unidad familiar (Principio de unidad familiar) o cuando se está ante el caso de menores de edad sin acompañantes.

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Mineurs non accompagnés et demandeurs d'asile : Une catégorie oubliée par le droit ?

Marica SPINOZZI

Introduction

Il existe dans le monde des millions de mineurs obligés de quitter leur lieu de vie en raison de conflits, persécutions, violences généralisées et graves violations des droits humains, pour partir ailleurs à la recherche de protection, très souvent dans un autre pays où ils n'ont aucun lien familial.

Nombre d'entre eux proviennent d'Afrique subsaharienne, du Maghreb, du Moyen-Orient ou d'Asie. D'après les statistiques, le chiffre le plus élevé de déplacés dans le monde depuis la seconde guerre mondiale a été atteint à la fin de 2013. Il est question de 51,2 millions d'individus déplacés poussés par des raisons différentes. Mais l'élément le plus étonnant a été de découvrir que la moitié de ces déplacés sont des enfants de moins de 18 ans.

Beaucoup d'entre eux se déplacent seuls ou se séparent de leurs familles pendant le trajet. Ils constituent les « mineurs non-accompagnés ».

Cette composante migratoire a été récemment confirmée par les données publiées par l'agence européenne, Eurostat, le 2 mai 2016, et qui indiquent que « parmi les demandeurs d'asile qui ont sollicité en 2015 une protection internationale dans un pays de l'Union européenne, 88 300 étaient considérés comme des mineurs non accompagnés »[1].

Cette catégorie spéciale de demandeurs d'asile se caractérise par une grande fragilité et vulnérabilité, découlant directement de leur condition de minorité. Elle les expose à toute sorte de violations de leurs droits fondamentaux, et ce beaucoup plus facilement que les adultes. Ces violations se produisent tant pendant leur parcours, jusqu'à la présentation de la demande d'asile, qu'après. Même s'il s'agit d'un phénomène mondial en constante augmentation, les instruments internationaux et régionaux spécialisés dans la matière du droit des réfugiés et demandeurs d'asile, ne répondent pas forcement à la multiplicité des exigences qui caractérisent cette typologie de migrants.

Au cours des vingt dernières années, l'augmentation des sources, y compris au niveau européen via l'adoption de certaines importantes directives, n'a pas facilité la bonne gestion du phénomène migratoire. Elle a, au contraire, peut-être mis en évidence les vides normatifs considérables en la matière au niveau supra-étatique.

En effet, à ce jour, malgré l'urgence et l'évidence des problématiques liées aux mineurs migrants accompagnés ou non, demandeurs d'asile, il n'existe pas encore dans ce cadre un instrument normatif contraignant spécifiquement dédié à ces sujets et qui permette une gestion commune de ces situations par les États. Il faut, par contre, s'appuyer sur une combinaison de dispositions internationales, régionales et nationales, découlant du droit de l'immigration ou du droit des mineurs et donc plutôt générales.

1. Une catégorie faible

Le phénomène migratoire des mineurs n'est pas une nouveauté. Il remonte aux années 70 dans plusieurs États et après une augmentation dans les années 90, on a finalement assisté à son explosion ces derniers temps[2] au point de devenir l'un des objets principaux des grands flux de demandeurs d'asile fuyant les conflits ou tout genre de persécution.

Si les mineurs sont de façon générale considérés comme une catégorie faible et plus fragile que d'autres et donc à protéger avec une particulière attention, cette vulnérabilité aux violations de leurs droits est particulièrement amplifiée pour les mineurs demandeurs d'asile qui ont plus de risques de tomber dans les réseaux criminels engagées dans le trafic d'êtres humains, drogue, exploitation, etc.

Parmi les demandeurs d'asile qui ont sollicité en 2015 une protection internationale dans un pays de l'Union européenne, 88 300 étaient considérés comme des mineurs non accompagnés.

Tout cela a souvent été source d'incertitudes et parfois de divergences dans l'application des instruments existants, contribuant à ce que cette catégorie de migrants soient les premiers protagonistes des drames générés par la crise migratoire. Cet état de fait a récemment attiré l'intérêt de la presse et surtout des plusieurs organisations internationales qui travaillent dans le domaine et qui ont dénoncé à plusieurs reprises la gravité de la situation dans laquelle se trouvent aujourd'hui ces enfants.

La question spécifique des mineurs demandeurs d'asile non accompagnés va donc être décrite ici au vu de ses spécificités (1) par un exposé des principales dispositions utiles à la protection de cette catégorie aux fins de l'obtention du statut de réfugié (2) en mettant en évidence les points d'ombre les plus évidents du système de protection et les problématiques qui en découlent (3).

Tout cela devient malheureusement encore plus évident lorsqu'il s'agit de mineurs voyageant seuls. Sans famille et sans expérience, ils vivent souvent dans des conditions pénibles et incertaines qui les rendent encore plus vulnérables aux promesses des passeurs et donc aux problématiques mettant en danger leur vie et leur développement[3].

Cependant, malgré la particularité de leur profil, il n'en existe pas une définition précise.

Pour le Haut-commissariat aux réfugiés (HCR) le mineur non accompagné : « est une personne âgée de moins de 18 ans, sauf si la majorité est atteinte plus tôt en vertu de la législation qui lui est applicable, qui est séparé de ses deux parents et n'est pas pris en charge par un adulte ayant, de par la loi ou la coutume, la responsabilité de le faire ».[4] Une autre définition est

donnée dans le Programme en faveur des enfants séparés en Europe[5] qui a pour but de promouvoir des bonnes pratiques communes en la matière entre les pays européens: « il s'agit d'enfants de moins de 18 ans se trouvant en dehors de leur pays d'origine, séparés de leur(s) parent(s) ou de leur ancien répondant autorisé par la loi/par la coutume. Le PESE a pour but de défendre les droits et l'intérêt supérieur des enfants et des jeunes séparés, arrivés ou voyageant en Europe, en établissant une politique commune et en s'engageant à une bonne pratique aux niveaux national et européen. Dans cette optique, le programme crée des partenariats avec des organisations s'occupant des enfants séparés dans les pays européens et travaillant avec les institutions européennes ».

Dans le même sens se pose la résolution du Conseil de l'Europe du 26 juin 1997, adoptée comme premier instrument juridique traitant spécifiquement de la question des enfants migrants non accompagnés, pour laquelle, selon son art.1, il s'agit des « nationaux de pays tiers de moins de 18 ans qui entrent dans le territoire des États membres sans être accompagnés d'un adulte qui en soit responsable par effet de la loi ou de fait, et (…) les mineurs ressortissants de pays tiers qui ont été laissés seuls après être entrés sur le territoire des États membres ». Donc, « l'expression «mineurs non accompagnés» englobe les différentes autres expressions qui servent souvent à identifier les migrants mineurs, qu'il s'agisse des « enfants séparés » ou « des mineurs isolés étrangers ». Dans ce cas, l'expression mineurs non accompagnés semble plus appropriée, car elle fait référence aussi bien à la minorité (moins de 18 ans), à la vulnérabilité (séparés de leurs parents ou tuteurs) qu'à l'isolement (ne bénéficient d'aucun encadrement) de cette catégorie de migrants ».[6]

Le phénomène migratoire des mineurs n'est pas une nouveauté. Il remonte aux années 70 dans plusieurs États et après une augmentation dans les années 90, on a finalement assisté à son explosion ces derniers temps au point de devenir l'un des objets principaux des grands flux de demandeurs d'asile fuyant les conflits ou tout genre de persécution.

Les mineurs non accompagnés demandeurs d'asile ne figurent que de manière marginale dans les principaux instruments internationaux et régionaux de protection des réfugiés.

2. Une protection floue et générique : L'hésitation du droit international et européen

Malgré la croissance du phénomène, la protection juridique proposée reste insuffisante à ce jour. Les mineurs non accompagnés demandeurs d'asile ne figurent que de manière marginale dans les principaux instruments internationaux et régionaux de protection des réfugiés. Lorsqu'ils sont directement mentionnés, les questions qui les concernent sont visées de façon apparemment superficielle par rapport à la gravité des conséquences qu'elles pourraient avoir sur ces sujets.

Ils doivent donc se reposer sur la protection générale des différents instruments juridiques de défense des droits humains, ou, dans le meilleur des cas, des garanties prévues pour tous les mineurs, sans distinction de sorte.

Ainsi, le mineur non accompagné et demandeur d'asile bénéficie en tant qu'« enfant », de l'ensemble des droits prévus par la Convention internationale des droits de l'enfant de 1989, qui ne prévoit pas de dispositions s'appliquant directement aux mineurs migrants non accompagnés. En effet, le texte se limite à traiter de manière générale la situation du mineur demandeur d'asile à l'art. 22 où figure le rappel aux États afin d'adopter des mesures proportionnées aux conditions des mineurs. À cette fin, les États parties collaborent pour protéger et aider les enfants et pour rechercher éventuellement leurs parents ou d'autres membres de la famille (art.22, al.2).

De la même manière, aucune mention spécifique ne figure dans la Convention européenne des droits de l'homme de 1950, ni dans la Convention européenne sur l'exercice des droits des enfants de 1996, pas plus que dans les Pactes Internationaux de 1966, qui élargissent l'application de la Déclaration des droits de l'homme aux migrants.

Cette absence de traitement spécifique devient encore plus difficile à comprendre s'agissant des instruments spécifiques aux réfugiés et demandeurs d'asile.

Comme les adultes, les enfants non accompagnés victimes des persécutions sont protégés en général au titre de la Convention de Genève de 1951 (CG) sur le statut des réfugiés, élargie par le Protocole de New York de 1967, laquelle vise toute personne « craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques »[7].

Ils peuvent donc bénéficier pleinement du principe de non-refoulement énoncé aux articles 32 et 33 de la Convention, mais aucun article ne leur est dédié.

Même raisonnement pour la Convention Africaine OUA de 1969 et la Déclaration de Carthagène de 1889. Malgré l'élargissement de la définition de réfugié par rapport à celle de la CG, elles ne font pas mention des mineurs non accompagnés et demandeurs d'asile.

C'est donc pour faire face à l'incertitude juridique de leur statut qu'en 1994 l'UNHCR a mis au point des consignes à propos des problèmes relatifs à la culture, l'éducation, le bien-être, la liberté et la sûreté personnelle des enfants réfugiés en général, en posant l'accent sur l'application ample du « bénéfice du doute » en cas de traitement de demandes d'asile des mineurs non accompagnés.

Plusieurs textes européens ont été adoptés. Les États membres ne semblent toutefois pas être très actifs dans leur mise en œuvre.

Il faut donc, notamment, remarquer :

- la directive dite « accueil[8] », qui établit à l'art. 19 la désignation d'un tuteur chargé du bien-être des mineurs dont le logement doit se faire auprès de membres adultes de leur famille, chez une famille d'adoption temporaire ou encore dans des centres d'accueil qui disposent de structures spécifiques (art.11) ; relativement à la détention elle ajoute que « les mineurs non accompagnés ne peuvent être placés en rétention que dans des circonstances exceptionnelles. Tout doit être mis en œuvre pour libérer le plus rapidement possible le mineur non accompagné placé en rétention. »
- la directive « procédure »[9], qui dispose que les État doivent « fixer des garanties de procédures spécifiques pour les mineurs non accompagnés, en raison de leur vulnérabilité » et ensuite que les agents de protection possèdent les «connaissances nécessaires sur les besoins particuliers des mineurs» pour l'entretien et la prise de décision;
- la directive « qualifications[10] », qui impose de manière plus générale que l'examen de la demande prenne en compte des « formes de persécution concernant spécifiquement les enfants ». Il faut toutefois noter que les législations et les pratiques des principaux États européens ne prennent presque jamais en compte l'ensemble des besoins spécifiques des mineurs non accompagnés.
- le Règlement Dublin III qui prévoit que l'État responsable du traitement des demandes de protection internationale formulées par des mineurs non accompagnés est celui dans lequel le mineur a introduit sa demande de protection internationale et que le traitement de la demande doit s'effectuer dans le respect des garanties prévues à l'art. 6[11]. Malheureusement, même dans ce cas, il semble que « les autorités nationales ne prennent pas en compte ces différentes dispositions, car de nombreux mineurs migrants non accompagnés voient leurs demandes rapidement expédiées et ils sont rapatriés sans que leur situation et leurs besoins ne soient pris en considération dans le pays de retour »[12].
- Enfin l'art. 17 de la « directive retour[13] », rappelant le principe de non refoulement et de l'intérêt supérieur de l'enfant, la protection de la vie familiale et de ses conditions de santé. Il prévoit qu'avant de rapatrier un mineur non accompagné, il faut lui assurer de l'assistance par des organismes spécifiques distincts des autorités qui exécutent le rapatriement. Ils doivent être reconduits chez un membre de la famille ou un tuteur ou près de structures d'accueil adaptées. En ce qui concerne la détention, il est prévu de manière générique qu'elle puisse être appliquée sur des mineurs qu'en absence d'autre solution et pour une période la plus brève possible, dans des structures conformes et avec la possibilité de mener des activités propres à leur âge[14].

Le risque de tomber entre les mains d'organisations criminelles et de disparaitre complètement des radars officiels sans laisser aucune trace est alors considérable.


Sanliurfa, Turkey, June 2015

3. Les principales problématiques au moment de la demande d'asile

Fondamentalement, la problématique majeure au vu de l'ensemble des textes relatifs aux réfugiés et demandeurs d'asile, est que les mineurs non accompagnés et demandeurs d'asile, finissent souvent par être assimilés aux adultes. Donc, la plupart du temps, la question de leur protection est occultée par leur assimilation sans distinction aux autres migrants.

Une chose est certaine : la procédure pour l'obtention du statut de réfugié est exactement la même pour tous. Comme indiqué plus haut, leur extrême vulnérabilité en font des cibles parfaites pour toutes les formes d'exploitation comme le travail forcé, la servitude domestique, l'esclavage, ou encore l'exploitation sexuelle.

Ils sont aussi victimes de la complexité et de la lenteur de la procédure d'asile dans de nombreux États qui n'ont pas les structures adaptées pour les accueillir durant cette procédure et sont souvent susceptibles de les soumettre à des traitements inhumains au regard de leur âge et de leur situation.[15]

L'absence d'information fournie de façon appropriée par les autorités en charge de l'accueil a pour effet le dépôt de demandes mal motivées, des récits incomplets ou même l'absence de demande légalement formulée. Les mineurs non accompagnés sont rarement accompagnés dans leurs démarches par des agents formés pour les aider à faire l'ensemble des démarches de façon régulière, et à fournir un récit

compréhensible pour les autorités en charge de l'asile.

Au vu de ces éléments, il arrive souvent que ces mineurs, effrayés par la manière brutale avec laquelle ils sont traités, la méfiance générale vis-à-vis des autorités publiques et la crainte de se faire arrêter, décident de partir des centres où ils se trouvent hébergés et de tenter des voies alternatives pour s'en sortir.

Le risque de tomber entre les mains d'organisations criminelles et de disparaitre complètement des radars officiels sans laisser aucune trace est alors considérable. Cette situation, combinée aux difficultés de collaboration entre les Agences Nationales qui s'occupent des mineurs, rend impossible l'établissement de statistiques précises. La portée réelle du phénomène au sein même de chacun des pays, et dans un sens plus large à l'échelle mondiale, est donc difficile à établir.

A la fin de janvier 2016, les États de l'Union avaient perdu la trace d'au moins 10 000 enfants migrants non accompagnés arrivés ces dernières années[16].

Conclusion

Marie-Pierre Poirier, Coordinatrice spéciale de l'UNICEF pour la crise des réfugiés et des migrants en Europe parle d'une réalité « *couverte par le silence* », en rappelant que dans ce domaine « *ce sont des dizaines de milliers les enfants qui sont en danger chaque jour et des centaines de milliers d'autres qui sont prêts à tout risquer* ».

En dépit de l'adoption au niveau européen de nombreux instruments juridiques venant compléter l'arsenal des textes internationaux, les lacunes restent toutefois bien visibles. Les textes abordent de façon imparfaite les nombreuses problématiques évoquées ci-dessus.

Les différences dans les mises en œuvre de ces textes au niveau national aboutissent au caractère totalement aléatoire de la protection accordée en fonction de l'État où arrive le migrant.

Dans ce sens il semblerait alors nécessaire de travailler à un standard de protection commun le plus élevé possible et qui prenne en compte : les normes déjà existantes de protection des droits fondamentaux, celles visant à protéger spécifiquement les enfants, le droit spécifique aux migrants dans ses dispositions applicables aux enfants et incluant les principes formulés dans les recommandations et rapports des spécialistes de la protection des mineurs au sein de la société civile. Le résultat serait ainsi mieux à même de répondre aux nécessités réelles des individus.

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1 Voir les chiffres sur : http://ec.europa.eu/eurostat/documents/2995521/7244687/3-02052016-AP-FR.pdf/270f3b41-2f43-48c1-ba6d-c465cd7f5c0c ; Marie Verdier, Réfugiés mineurs non accompagnés, l'explosion des chiffres en 2015, Mai 2016, sur la-croix.com: http://www.la-croix.com/Monde/Europe/Refugies-mineurs-non-accompagnes-l-explosion-des-chiffres-en-2015-2016-05-02-1200757351

2 L'accueil et la prise en charge des mineurs non accompagnés dans huit pays de l'Union européenne, Octobre 2010 disponibles sur : http://www.france-terre-asile.org/childrenstudies.

3 Amnesty International, Coordinamento Bambini/Minori, Minori rifugiati e richiedenti asilo, 2014.

4 Note sur les politiques et procédures à appliquer dans le cas des enfants non accompagnés en quête d'asile de février 1997.

5 Rédigé à partir de la collaboration entre NU, Save the Children et du HCR.

6 Nisrine Eba Nguema, « La protection des mineurs migrants non accompagnés en Europe », La Revue des droits de l'homme , 7 | 2015

7 L'accueil et la prise en charge des mineurs non accompagnés dans huit pays de l'Union Européenne, Octobre 2010, disponibles sur : http://www.france-terre-asile.org/childrenstudies

8 La directive 2013/33/UE du 26 juin 2013 établissant des normes pour l'accueil des personnes demandant la protection internationale (également appelée directive « accueil ») abroge, avec effet au 21 juillet 2015, la directive 2003/9/CE.

9 Directive 2013/32/UE.

10 Directive 2004/83/CE.

11 Ainsi, l'État responsable doit prendre en compte les possibilités de regroupement familial, le bien-être et le développement social, la sûreté et la sécurité du mineur et son avis selon l'alinéa 3 de l'art. 6.

12 L'accueil et la prise en charge des mineurs non accompagnés dans huit pays de l'Union Européenne, Octobre 2010, disponibles sur : http://www.france-terre-asile.org/childrenstudies.

13 Directive 2008/115/CE.

14 Dans sa recommandation Rec(2003)5 aux États membres sur les mesures de détention des demandeurs d'asile (adoptée le 16 avril 2003, lors de la 837e réunion des Délégués des Ministres), le Comité des ministres.

15 Cristina De Martino, « Une analyse des pratiques et politiques sur les mineurs non accompagnés", disponible sur : https://europe-liberte-securite-justice.org/2015/07/31/une-analyse-des-pratiques-et-politiques-sur-les-mineurs-non-accompagnes/.

16 Voir "Danger every step of the way – A harrowing journey to Europe for refugee and migrant children", UNICEF, CHILD ALERT - June 2016.

Does U.S. Law Permit a Ban on Entry into the United States Based on Religion?

Cindy G. BUYS

On December 7, 2015, U.S. Presidential hopeful Donald Trump issued a Press Release in which he called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." This article considers whether his proposal to ban persons from entering the United States based on their actual or perceived religion violates U.S. constitutional, statutory, or international law. It also considers some of the practical implications of implementing such a proposal.

U.S. Constitutional Law

The U.S. Constitution is considered the "Supreme Law of the Land," in the United States in part because it is listed first in the Supremacy Clause of the Constitution (Article VI). Thus, this article begins by considering whether a ban on entry to the United States for immigrants of a certain religion would violate the U.S. Constitution. In this regard, both the First Amendment, relating to freedom of religion, and the Fifth and Fourteenth Amendments, guaranteeing due process and equal protection, are relevant.

The First Amendment states in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It may be argued that by prohibiting persons of the Muslim faith from entering the United States, the federal government would be placing an unconstitutional burden on the free exercise of the Muslim faith. Current constitutional doctrine promotes the concept of religious equality (also sometimes referred to as religious neutrality), pursuant to which the government must not favor or disfavor a particular religion. In two cases involving challenges to school prayers, *Engel v. Vitale* (1962) and *Santa Fe Independent School District v. Doe* (2000), the U.S. Supreme Court has suggested at least three reasons why the government should be religiously neutral: (1) governments with established religions "tend to incur the hatred, disrespect and even contempt of those who hold contrary beliefs;" (2) governments that decide religious issues tend to encourage divisiveness along religious lines; and (3) government endorsement of religion tends to alienate dissenting citizens and creates an outsider status which weakens the political community.

The Free Exercise Clause, in particular, has been interpreted to prohibit discrimination against religion. The government cannot classify persons based on their religion in a way that confers a benefit or imposes a burden on a particular religious group. In addition, under the unconstitutional condition doctrine, the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether. A ban on immigration to the United States by Muslims would likely force such an unconstitutional choice: give up your religion or forgo the opportunity to immigrate.

Additional relevant constitutional provisions include the Fifth and Fourteenth Amendments, which together prohibit the federal and state governments from denying due process of law, and which guarantee equal protection of the law. In particular, the Fourteenth Amendment provides that: *"No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."* Beginning with the classic case of *United States v. Carolene Products Co.* (1938), the U.S. Supreme Court has held that when the government classifies between groups based on characteristics such as race or religion, the Court will carefully scrutinize the classification and require the government to demonstrate a sufficiently compelling justification to uphold the law.

In this case, Mr. Trump's proposal was made in response to certain terrorist attacks, both domestically and internationally, some of which involved persons of the Muslim faith. He has suggested that the United States at least temporarily ban entry to Muslims to give the U.S. government time to better assess the security threat and improve the screening process for persons entering the United States.

National security is certainly a compelling governmental interest. It was used by the U.S. government to justify the detention of Japanese Americans during World War II. However, the government has since apologized for those actions and the U.S. Supreme Court's 1944 decision in *Korematsu v. United States* upholding that governmental action has been highly criticized, including by the Supreme Court itself. More recently in the case of *Hamdi v. Rumsfeld* (2004), the U.S. Supreme Court reaffirmed that the security of the nation is "critical" and a "crucially important" government interest. Despite that recognition, national security was not a sufficient justification to justify many of the U.S. detention practices for persons accused of being enemy combatants.

Under current constitutional jurisprudence, the Supreme Court would likely require the government to demonstrate that excluding an entire religious group is the most narrowly tailored method of achieving its compelling interest in national security, a very high hurdle to meet. Administrative convenience would not meet this standard. The government would have to demonstrate that it considered less restrictive alternatives, but none could achieve its goal of protecting national security.

It is important to note that even if a good argument may be made that banning Muslims violates freedom of religion and equal protection, many Muslims who are barred entry could not successfully bring a legal challenge to the ban. The U.S. Supreme Court has generally interpreted the U.S. Constitution to apply only to persons on U.S. territory or within its jurisdiction. Thus, non-U.S. citizens outside the United States who are seeking to enter the country

generally do not receive the protections of the U.S. Constitution and would lack standing to challenge a ban on their entry.

Not all Muslim noncitizens may be barred from bringing a claim, however. U.S. Supreme Court jurisprudence recognizes that the longer a person has been in the United States, the more ties that person has developed to the country. As a result, the person is entitled to greater constitutional protections even if a noncitizen. In this regard, the U.S. Supreme Court has held in cases such as *Landon v. Plasencia* (1982) that returning lawful permanent residents (LPRs) of the United States who are not citizens are entitled to due process, which includes a fair hearing when threatened with exclusion or deportation. Thus, returning LPRs of the Muslim faith would be entitled to a hearing if the U.S. government were to exclude them based on their religious beliefs. In those hearings, they could claim due process and equal protection of the law.

There is an additional hurdle excluded Muslims would have to overcome, however. The U.S. Supreme Court has largely deferred to the political branches when it comes to making decisions about immigration under the "plenary power doctrine." Dating back to *The Chinese Exclusion Case* (1889), the Court has held that because decisions about immigration relate to national security and foreign relations, it is the role of the political branches to decide who to admit or exclude from the United States and it is not the role of the courts to second-guess the political branches in this regard. In more recent cases such *INS v. St. Cyr* (2001) and *Zadvydas v. Davis* (2001), the Court has been more willing to review actions of the political branches with respect to their treatment of aliens. However, these more recent cases involved aliens who were already in the United States, not aliens who were outside the country seeking admission. The executive branch authority over exclusion of immigrants is statutorily codified in the Immigration and Nationality Act, discussed in more detail below. Thus, even if a returning LPR of the Muslim faith could successfully argue that his or her constitutional rights were violated, the LPR would still have to convince the court that the exclusion is judicially reviewable and not an issue committed to the political departments of government.

The U.S. Immigration and Nationality Act

The second source listed in the Supremacy Clause are the laws of the United States. In this regard, the main statute governing immigration to the United States is the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. The INA contains a nondiscrimination provision, section 202(a)(1), which bans discrimination in the issuance of immigrant visas on a variety of grounds including "race, sex, nationality, place of birth and place of residence." Interestingly, it does not expressly ban discrimination based on religion.

History suggests Congress failed to include religion in the nondiscrimination provision of the INA because it did not believe it necessary. Beginning in the late 1800s and continuing into the 1950s, U.S. immigration law increasingly included racially discriminatory provisions that primarily were aimed at excluding Chinese, Japanese, and other Asians from the United States.[1] Following World War I, there were concerns about immigrant radicals and anarchists, particularly with respect to persons from southern and eastern Europe. Hence, Congress enacted national origin quotas in 1921 and again in 1924 that restricted immigration from southern and eastern Europe. Then in 1952, influenced by the cold war atmosphere, Congress passed the McCarran-Walter Act which continued the national origins quota system for the Eastern Hemisphere and favored immigration from northern and western Europe. In 1965, Congress made several significant changes to the INA including, *inter alia*, ending the national origins quota system; abolishing the special immigration restrictions relating to Orientals; and prohibiting immigration discrimination because of race, sex, nationality, place of birth, or place of residence.[2]

The adoption of a provision banning racial discrimination in the issuance of visas was a direct response to the racial discrimination that had been codified in the INA for the previous seventy years. Discrimination based on religion was never mentioned in the amendment likely because such discrimination had never been codified in the Act. This idea finds support in the legislative history. In debating the amendment, U.S. senators expressed the view that any religious discrimination was a secondary effect of discrimination based on ethnicity or national origin rather than a freestanding issue that required separate redress.[3] Consequently, there were no proposals to amend the nondiscrimination language of the INA to expressly address religious discrimination.

INA section 212(f) expressly gives the President broad authority to suspend the entry of aliens or classes of aliens who he believes would be detrimental to the interests of the United States for such period as he shall deem necessary. Recent U.S. Presidents have relied on this authority to deny entry to persons who were banned from travel pursuant to United Nations-sanctioned travel bans; persons who had engaged in serious human rights abuses; persons who participated in military coups; and persons who engaged in international corruption and other international criminal behavior, among other examples. No U.S. President has ever relied upon this authority to ban an entire religion, however, so it is unclear whether it would support such an action.

International Law

The third area of law listed in the Supremacy Clause of the Constitution is "Treaties made . . . under the Authority of the United States." In this regard, the United States belongs to a number of international treaties that ban discrimination based on religion, including the United Nations Charter, the International Covenant on Civil and Political Rights, and the Convention Relating to the Status of Refugees. Each of these are discussed in turn below.

The United Nations Charter affirms in its first article that promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion is a foundational purpose. Article 2 imposes on Member States the obligation to "fulfil in good faith the obligations assumed by them in accordance with the present Charter." Pursuant to Articles 55 and 56, Member States pledge to take joint and separate action to achieve the purposes of the United Nations, including "universal respect for, and observance of, human rights and fundamental freedoms

for all without distinction as to race, sex, language, or religion." Thus, as a member of the United Nations, the United States has a treaty-based obligation not to engage in discrimination based on religion.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) expands on this obligation as follows: *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."* Article 2 also obligates States to adopt measures that give effect to the rights recognized in the Covenant. Article 18 of the ICCPR states that everyone shall have the right to freedom of thought, conscience and religion. However, the ICCPR recognizes that this right may be subjected to limitations that are prescribed by law and necessary to protect public safety, order, health, and morals.

Based on its membership in the ICCPR, the United States has an international legal obligation to respect and ensure the rights guaranteed by the Covenant, including freedom of religion. It also has a duty to adopt measures that furthers those rights – not measures that infringes on them by discriminating against a particular religious group. However, there are two caveats that must be mentioned.

First, as noted above, the United States is authorized to place limits on the right to freedom of religion if it can show that it is necessary to protect national security. It would be a difficult argument to make, however, that all Muslims present a security threat regardless of their country of origin or individual beliefs and actions. Muslims are not an undifferentiated group. They come from many different countries and from different branches and schools of Islam. The U.S. government would have to demonstrate that it is necessary to bar every Muslim from entering the United States to protect national security.

Second, when the U.S. Senate gave its advice and consent to ratification of the ICCPR, it attached a declaration stating that the first twenty-seven articles of the ICCPR are considered non-self-executing. That declaration essentially forecloses the possibility of a private person bringing a lawsuit in a U.S. court based on a claim that his or her rights under those articles of the ICCPR have been violated. However, the United States has accepted the competence of the United Nations Human Rights Committee (HRC) under Article 41 of the ICCPR. As a result, another member state of the ICCPR could file a complaint against the United States before the HRC alleging that the United States is violating its treaty obligation to not discriminate on the basis of religion. The HRC does not have its own enforcement authority, however, and could not compel a change in U.S. law. If it found the United States in violation of the ICCPR, it could only hope to create public pressure to facilitate that change.

The third treaty of particular relevance is the 1951 Convention Relating to the Status of Refugees, to which the United States belongs by virtue of its ratification of the 1967 Protocol Relating to the Status of Refugees. Some of Mr. Trump's statements regarding a ban on the entry of Muslims and the need to improve the immigrant screening process were made in reference to the United States' acceptance and resettlement of refugees, particularly Syrian refugees. Article 1 of the Refugee Convention defines a refugee as a person who is outside his or her country of nationality and who is afraid to return to that country due to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. The United States has implemented the Refugee Convention into U.S. law through statutory provisions of the INA that largely mirror this definition of refugee.

Article 3 of the Refugee Convention contains a specific ban on religious discrimination: *"The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."* Thus, if the United States refused to consider all refugees of the Muslim faith, this would be a direct violation of its obligations under the Refugee Convention. Article IV of the 1967 Protocol provides that any disputes between States Parties to the Protocol which cannot be settled by other means shall be referred to the International Court of Justice (ICJ). Consequently, another State Party to the Protocol could bring a complaint against the United States at the ICJ if it believed the United States to be engaging in impermissible religious discrimination.

One of the ongoing weaknesses of the Refugee Convention, however, is that it does not expressly require Member States to accept any refugees. Member States have a general obligation to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR), which may imply a good faith duty to accept refugees in accordance with the terms of the Convention, but Member States generally decide for themselves how many and which refugees to accept. Those resettlement decisions are made jointly by the UNHCR and the receiving countries based on a number of factors, including the country's capacity provide services to the refugees, whether the refugee already has one or more family members in the receiving country, medical needs of the refugee, and other factors.[4] Accordingly, the United States has a significant amount of discretion in determining which refugees to accept.

Additionally, like the ICCPR, the Refugee Convention contains a national security exception. Article 9 of the Convention provides that nothing in the Convention *"prevents a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security."* The United States could argue that the ongoing terrorist threats and attacks against the United States and its allies constitute a "grave and exceptional circumstance" justifying a provisional measure such as a temporary ban on acceptance of certain refugees. However, the Convention also states that such measures may be taken "in the case of a particular person," not with respect to an entire group of persons belonging to a particular religion. A Contracting State must also demonstrate that such measures are necessary in the particular refugee's case in the interests of national security. This language requires an individual determination be made on a case-by-case basis. Hence, the United States could not rely on the national security exception to justify a blanket exclusion of an entire religious group.

In addition to the treaty law described above, the United States has long accepted that customary international law is part of U.S. law, and is be applied by judges in U.S. courts.[5] Because the principle of nondiscrimination is reflected in so many international instruments such as those described above, as well as resolutions such as the Universal Declaration on Human Rights (Article 2) and the American Declaration on the Rights and Duties of Man (Articles II and III), it may be said to reflect customary international law. Thus, it may be argued that regardless of its treaty obligations, the United States has a customary international law obligation not to engage in religious discrimination. As with treaty obligations, though, obligations under customary international law may be difficult to enforce.

Practical Problems relating to Implementation of the Proposed Ban

Finally, there are practical problems with the implementation of the proposal that must be considered. For example, it is not clear how a U.S. immigration official would know if an applicant for entry is a Muslim. While the immigration service may ask about a person's faith in the visa application, the Immigration Service could not always rely on an applicant's self-declaration. A person intending to cause harm to the United States due to his or her religious beliefs is not likely to be honest in declaring a religious affiliation if the person knows that the truth will result in being barred entry.

This quandary raises the question of how the United States will determine a person's religion in case of doubt. If the government were to investigate the person's background, what factors would be used to assess whether that person is a member of a particular religion? It is also not clear how would the United States treat a case where a person claims that past membership, but to have disavowed the faith or changed religions. Although the U.S. Constitution does not speak directly to this issue in the context of immigration, Article VI does forbid a religious test for public office, reaffirming support for religious neutrality.

Moreover, imposing an entry ban on all Muslims is likely to undermine the United States' international reputation, making it more difficult for the United States to secure cooperation from its allies on related issues, such as investigations into terrorist activities and sharing of intelligence information about crime and other matters. It also is likely to widen rifts between Muslims and non-Muslims at home and abroad by perpetuating dangerous stereotypes, which may lead to an increase in terrorist attacks against the United States by certain extremist Muslim groups in the future. Finally, such a ban is contrary to the ideals of the United States which has long stood for the promotion of human rights, including religious freedom.

Conclusion

It is not entirely clear whether Mr. Trump's proposed ban on the entry of Muslims into the United States could successfully be challenged as a violation of U.S. constitutional or statutory law. A better argument may be made that it violates the United States' international law obligations; however, enforcement of those obligations is notoriously difficult. Regardless of the legality of the ban, there are prudential arguments that counsel strongly against it. It would create or perpetuate negative stereotypes of all Muslims as threats, tending, in the words of the U.S. Supreme Court, *"to incur the hatred, disrespect and even contempt of those who hold contrary beliefs;"* to encourage divisiveness along religious lines; and to alienate dissenting citizens and create an outsider status which weakens the bonds of the political community. For all these reasons, the United States should continue to screen intending immigrants on an individual basis rather than labelling an entire religion a threat to national security.

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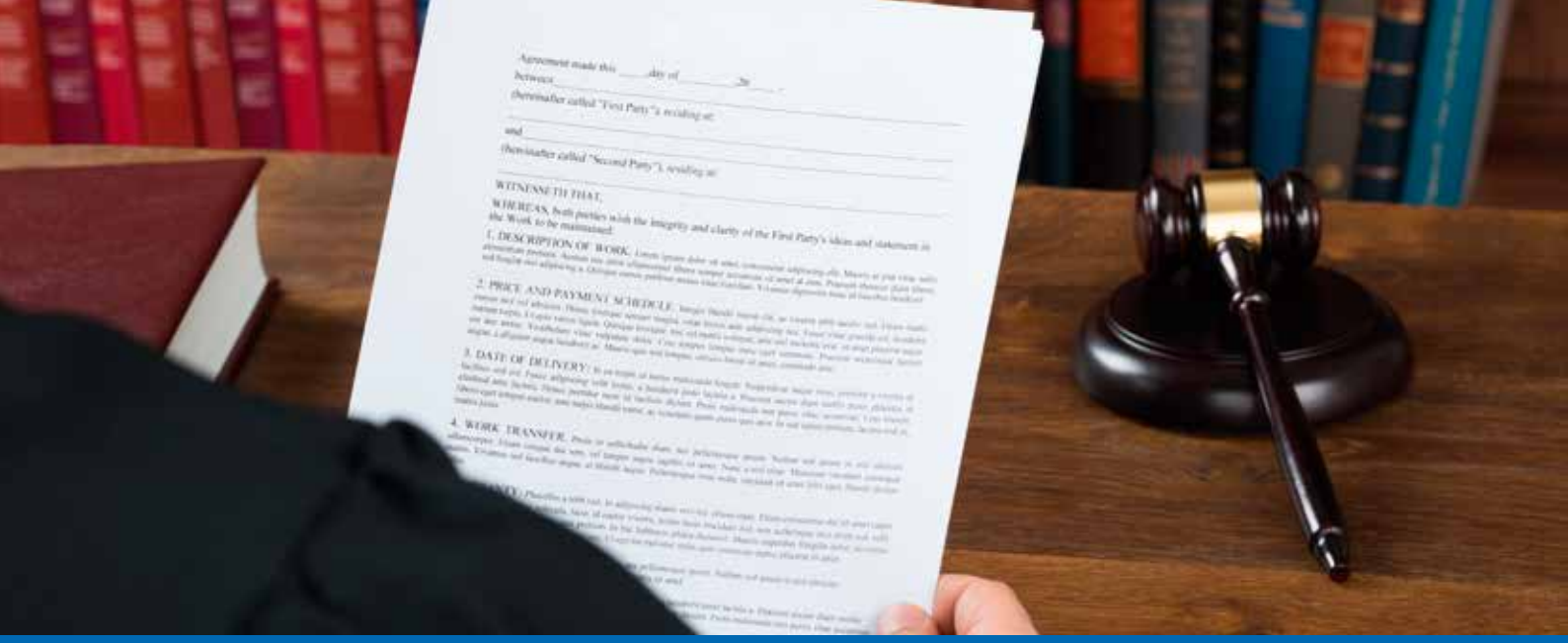
1 Much of this historical information is from Kevin R. Johnson, et al., Understanding Immigration Law 50-61(2009).

2 1 Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, Immigration Law and Procedure §§ 2.02-2.04 (2011).

3 Cindy Buys, Does the Immigration and Nationality Act Allow Discrimination Based on Religion? vol. 53, no. 7 The Globe (June 2016).

4 UNHCR Resettlement Handbook 243-287 (rev. ed. July 2011), available at http://www.unhcr.org/46f7c0ee2.pdf.

5 The Paquete Habana, 175 U.S. 677 (1900).



La profession d'avocat
The Legal Profession
La Abogacía

Tips for Young Lawyers

Patricia LÓPEZ AUFRANC

I was recently invited to give career advice to a group of young professionals, based on my 30 years of practice as a corporate lawyer. While reflecting on the challenge, certain key ideas came to mind. With hindsight, I could have used these tips to great advantage.

Be in charge of your career development. We have shifted from a working model developed at the time of the industrial revolution when tasks were repetitive and line production the norm, to the knowledge era, where innovation is key. Gone are the days when someone joined an organization as office boy and ended his career as general manager. While many organizations provide training for its personnel, it is of tantamount importance for each person to hold the reins of his or her career in view of achieving self-established goals. So much so, since staying more than a few years in any position or even in the same company, is increasingly rare.

Set goals. To be at the steering wheel of one's own career, setting goals early on is also crucial. Particularly relevant for women, inasmuch as they still carry a heavier burden regarding caring and nurturing, both siblings and relatives, a circumstance that raises barriers to women's career development more frequently than in the case of men. Improving one's employability should be a permanent goal.

Discover your core values. Make sure your values and the values of the organization you work for are aligned. This is in line with being your true self and finding passion and flow in what you do. It is difficult to find happiness, let alone passion in the work one does, if one's values are constantly challenged.

Have a life-long learning attitude. To dive into this mindset, "proactive humility" is most helpful. "Humility" to admit one's constant need to update our knowledge, not only on the subject matter of our core practice, but also in many other subjects that help us better carry out our task (such as communication skills), and "proactivity" to seek the knowledge. Being open to new ideas, and thinking not only "out of the box", but "out of the building" is the right approach. In this respect, as mentioned below, seeking reciprocal mentoring relationships can prove most useful to all parties involved.

Take advantage of all opportunities to learn and teach. Attend training programs and teach what you know as a way to keep updated. There is no better way to master something than by imparting your skills and knowledge to others. Don't let the fast pace of life prevent you from developing as a great professional and as a leader. Write regularly as another way to master a field. It will help you improve your critical thinking and communication skills. The more you write and teach the better you will become, let alone building your reputation as expert on your field as you go along. Besides, teaching is a great training towards mastering public speaking.

Invest in yourself. This is directly related with being in charge of one's own career and with enhancing one´s employability. Developing self-awareness, i.e. having a deep knowledge of one's strengths and weaknesses is a good starting point. We can change character traits all along our lives – albeit not necessarily as easily as in an early age – if we devote time and energy. This will allow us to enhance our strengths and work on our weaknesses.

In the past, I recommended those who were interested in an international career to learn languages. It is still important. However, looking forward, I would advise young professionals to learn how to code and interpret big data. Innovation in legal practice will come from analysis of big data and artificial intelligence. Artificial intelligence will transform the legal profession, by reshaping the way lawyers think, develop strategies and interact with clients and the judiciary.

The development of soft skills is the next important step. In a knowledge economy and beyond a certain basic intelligence and competence threshold, emotional intelligence is key to success: active listening, communication skills, empathy, learning to give and receive feedback, team-work, team building, are all essential components of leadership, and will be increasingly important as one climbs up the ladder. "Walk and talk" should be every leader's moto, to learn about the organizations' problems and the worries of the team.

> One should not be afraid of taking controlled risks and daring outside of one's comfort zone.

Round up your education, broaden your culture. The humanities are increasingly valued in modern times. The mythic Massachusetts Institute of Technology (MIT) brings poets and artists to work side by side with engineers and computer scientists to create jaw dropping scientific developments. Find time to read widely, not only about your field of expertise, but to widen your horizons. Learn to enjoy poetry, music and art. Individuals, and in particular professionals, start as "raw diamonds" and get faceted during their lives. The more facets, the brighter they shine, both in their personal lives and in their profession.

Move out of your comfort zone as frequently as possible. Constantly learn new skills. Perfectionism inhibits and deprives one of experience. One should

not be afraid of taking controlled risks and daring outside of one's comfort zone. With the right attitude, we learn when confronted with challenges. Innovation rarely happens within someone's comfort zone. Failure and mistakes should not be feared. They should be considered part of the process of growth and a great opportunity to learn from and develop resilience.

Be self-motivated. In addition to what has been mentioned above, actively seek out opportunities, learn how to create them, learn to overcome setbacks and continue to pursue goals despite obstacles. Self-motivated people can more easily motivate others. This also will put you on the road to leadership.

Network. When it comes to advancing in your career, "who you know" becomes most important. They are sources of information and opportunities. Start at an early stage, with people of your generation. Build a network and learn to use it by developing "connectional intelligence", combining knowledge, ambition and human capital. Bring people together, be a contact broker. Remember that it's the quality and not the quantity of your contacts that matter. Learn to leverage your connections to create value in your life, your organization and your community, while helping to create value for them, and others. Always keep in mind that "networking is about giving, receiving is a side effect". Making the contact is easy, what is difficult is keeping the relationship alive. Don't be impatient. Relationships take time and nurturing, and each relationship moves at its own pace. NGOs and professional associations offer unique opportunities to meet important people when you are willing to participate actively. If you are going to keep a passive role, avoid. Regularly assess the interest in belonging to these networks and associations. Don't bite more than you can chew!

Develop a reputation as a *"giver"* and not as a *"taker"*. Be helpful. It pays in the long run even if the scale may seem unbalanced at the outset.

Work for a great boss. Few other elements compare to this one, at least in the early stages of one's career. We become successful professionals not only after acquiring a sound academic background, but most importantly, because we learn the trade from great role models. Make sure that your boss is committed to your career development.

Seek constant feedback. Learn to receive and give feedback. Feedback should be honest, objective, loyal and always constructive. It is another source of opportunities to learn and improve one's abilities and character. Giving good feedback is an art, which is not mastered by everybody. Notwithstanding, even feedback given by someone we don't respect – let alone admire, and that may seem unfair, may give us clues to dig deeper into our inner self, find some truth, and identify a trait that we can improve. When your time comes to give feedback, always remember to praise in public and criticize in private.

Find mentors and sponsors within and outside your organization. Mentors give you advice in connection with your profession and help you navigate the workplace and office politics. Sponsors advocate in your favor. Both are essential to help you advance in your career. Trust is crucial in these relationships. If reciprocal mentoring relationships can be developed, win-win situations are created. Teaching a more senior person to operate technical devices and navigate across social media may be a valuable contribution, if no other comes easily to mind.

Don´t linger in a position if you are not constantly learning new skills, if you don't get along well with your boss, if he or she is not invested in your career development, if you are not passionate about your work, or if you don't agree with the organization's values as they are lived daily by the leaders. Move on, seek new challenges. Life is too short to spend long hours in an unpleasant setting. It is difficult to develop one's full potential in such an environment.

Last but not least, remember that **CONFIDENCE** is as important as **COMPETENCE** to achieve success. Make sure you don't suffer from confidence gap. If you do, identify your flaws and work upon them. Ask for help when needed. Finally, beyond a certain threshold, the importance of **EMOTIONAL INTELLIGENCE** to achieve **SUCCESS** and **HAPPINESS** cannot be sufficiently underscored.

I hope these tips provide some useful guidelines. I wish you good luck, and great success in your endeavors!

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Rencontre avec… le réseau PremUp

Françoise HECQUET

RENCONTRE AVEC :
Le Réseau Femmes UIA vous propose de lancer dans le *Juriste International* les « Rencontre avec », destinées à engager des réflexions avec les femmes avocates – mais pas uniquement – autour de la pratique du métier d'avocat au féminin. Au vu de la féminisation croissante que connaît notre profession, ces « Rencontre avec » souhaitent aborder certaines des problématiques de plus en plus fréquentes qui en résultent et qui nécessitent peut-être, si ce n'est quelques adaptations, au moins un nouveau regard sur les interrogations qu'elles soulèvent.
Cette première « Rencontre » est consacrée à la Fondation française de coopération scientifique PremUp. L'action qu'elle développe en France peut utilement inspirer tout cabinet qui cherche comment conserver ses talents féminins et porter un autre regard sur la maternité.

Femme enceinte et travail : ensemble, agissons !

La France se révèle championne de la natalité avec un taux de 2 enfants par femme, mais elle fait malheureusement face à une situation périnatale qui se dégrade : en 2016, une grossesse sur cinq met en jeu la santé de la mère et/ou de l'enfant (Données d'hospitalisation lors de la grossesse).

Nous savons également aujourd'hui combien cette qualité de vie *in utero* a une incidence sur le capital santé de l'enfant tout au long de la vie. De nombreuses pathologies chroniques qui se développent à l'âge adulte – comme le diabète, l'hypertension, les maladies cardiovasculaires et certains cancers – trouvent leur origine au cours de cette vie fœtale.

Dans un pays où 2 femmes sur 3 travaillent, où le barreau se féminise (plus de 48 % d'avocates à Paris en 2014), organisations et institutions jouent un rôle fondamental dans la bonne prise en charge de ce moment déterminant qu'est la grossesse. C'est un enjeu de santé publique qui concerne également la responsabilité économique et sociétale, les ressources humaines, la santé et le bien-être au travail. A cet égard, l'enquête lancée par le barreau de Paris en 2015 sur la QVT (Qualité de Vie au Travail) est édifiante puisque la parentalité était considérée comme un point de progrès important. Seules 10 % des personnes ayant répondu au sondage considéraient que la coparentalité (congés maternité et paternité) n'était pas un frein au développement professionnel. Au sein de la profession, seules 7 % des sondés ont répondu que les femmes disposaient des mêmes chances d'évolution professionnelle que les hommes !

La maternité doit cesser d'être un tabou dans nos cabinets !

Et s'il était possible de changer les perceptions et les pratiques au sein de nos cabinets pour mieux protéger la santé de la femme enceinte et du nouveau-né ? Charte de la parentalité, dispositifs d'accompagnement de retour au travail… Les bonnes pratiques émergent partout. Pourtant, cela n'est pas suffisant si l'on en juge par le faible pourcentage de femmes associées dans les cabinets français ou par le nombre de celles qui quittent la profession après une seconde naissance.

Changer notre regard sur la maternité est indispensable car les nouveau-nés d'aujourd'hui sont les adultes de demain, parce que le « bien naître », c'est la santé de demain.

Les cabinets peuvent préparer le plus en amont possible la grossesse, respecter quelques règles sanitaires et médicales simples, changer les habitudes et pratiques et améliorer ainsi de façon tangible le déroulement des grossesses, la protection de la santé de la femme et du nouveau-né.

Parce que la santé au travail, c'est tout simplement la santé publique.

Pour mieux cerner la réalité du sujet, la Fondation PremUp a interrogé en avril 2015, 1 477 Français (1 000 femmes ayant été enceintes ou non et 477 hommes) sur leur perception de l'environnement professionnel et ses enjeux sur la santé de la mère et l'enfant[1]. Cette étude, menée par l'Institut Odoxa, révèle un manque d'information très net et l'absence totale de prévention santé dans les organisations autour de ce moment déterminant que représente une grossesse dans la vie d'une femme. Il en est malheureusement de même au sein du barreau de Paris.

Travailler tout en étant enceinte : à tous les niveaux, une situation plus compliquée pour les 25-34 ans

Être enceinte et travailler, quoi de plus banal aujourd'hui dans un pays où les ⅔ des femmes âgées de 15 à 64 ans sont présentes sur le marché du travail ; elles étaient 1 sur 2 en 1975. Elles étaient plus de 48 % au barreau de Paris en 2014. Pourtant, concilier emploi et grossesse ne semble pas si « évident ». Ainsi 45 % des femmes de moins de 40 ans redoutent de « travailler tout en étant enceintes ». Une sur 10 redoute même « beaucoup » cette situation.

Et, de fait, si une majorité de femmes – 55 % – parlent de leur grossesse alors qu'elles travaillaient comme d'un moment épanouissant, 43 % considèrent que ce fut un moment difficile. Les 25-34 ans, celles chez qui le souvenir est le plus « frais », sont 70 % à le dire. Nous ne disposons pas de telles statistiques pour le barreau de Paris mais l'on peut penser qu'elles ne seraient pas très différentes.

Cette appréhension de l'environnement professionnel peut même amener certaines

femmes à cacher leur grossesse le plus longtemps possible par crainte de la réaction de leur employeur : 17% des femmes ayant déjà été enceintes au travail ou actuellement enceintes et travaillant ont attendu 4 à 6 mois ou plus pour annoncer leur grossesse à leur employeur. Les 25-34 ans sont 21 % à le dire.

Les cabinets connaissent les mêmes problématiques, avec des grossesses qui arrivent plus tardivement dans le parcours professionnel et qui peuvent être vécues comme d'autant plus pénalisantes que les femmes se trouvent à un moment de leur carrière où la question de l'association peut se poser. Trop souvent, les femmes qui reviennent de congés maternité se voient confrontées à des changements subtils dans les responsabilités qui leur sont confiées ou dans les objectifs professionnels qu'on leur prête.

Femmes enceintes au travail : des stéréotypes toujours présents

La femme enceinte a beau faire partie des réalités quotidiennes de l'environnement professionnel, son « état » véhicule toujours des stéréotypes plus spontanément cités par les hommes, même si les femmes sont, contre toute attente, également critiques.

Ainsi, près d'un homme sur deux (42 %) déclare qu'« on ne sait jamais si elles reviendront après leur grossesse » (36 % des femmes). Près d'un individu sur trois pense qu'« elles font en sorte d'être arrêtées le plus tôt possible » (36 % des hommes, 31 % des femmes).

Dans un registre plus « émotionnel », une proportion importante des personnes interrogées considère aussi, qu'enceintes, les femmes « ont moins la tête au travail » (40 % des hommes, 31 % des femmes) et même qu'elles ont moins d'ambition (20 % des hommes, 16 % des femmes).

Environnement de travail : pas d'informations, pas d'aménagements

Force est de constater que les précautions à prendre et la prévention des risques liés à la grossesse ne semblent pas être des sujets très investis par les organisations. Ainsi 95% des femmes ayant un emploi n'ont reçu aucune information sur les risques liés à l'activité professionnelle et leurs conséquences sur la grossesse.

Un enjeu majeur pour nos cabinets en termes de recrutement, de fidélisation et de leadership au féminin

En France, les aménagements du poste de travail, par exemple, sont peu proposés dans les faits et/ou de nombreuses salariées ou avocates l'ignorent. Ainsi, seules 27 % des actives occupées déclarent par exemple que la limitation des déplacements professionnels est proposée dans leur entreprise et 9 % que le télétravail est possible. L'aménagement des horaires de travail semble être la seule pratique connue (citée à 42 %). Un meilleur niveau d'information est donc non seulement un enjeu de santé publique, mais aussi un enjeu économique important. Si la charte sur la qualité de vie au travail évoque ces sujets, combien de cabinet la connaissent et s'en préoccupent ?

Selon le dernier baromètre du Défenseur des droits, les principaux critères de discrimination au travail cités par les victimes renvoient avant tout au genre (29 % dans le public, 31 % dans le privé) et à la grossesse ou la maternité (19 % et 20 %). Preuve que le fait de devenir mère peut peser lourd dans une carrière.

Quelles politiques d'information et de prévention les cabinets peuvent-ils déployer pour accompagner au mieux leurs collaboratrices et associées ? C'est un enjeu de diversité, de bien-être en entreprise, de santé publique mais également un enjeu de performance pour ces derniers.

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En savoir plus sur la fondation PremUp ?

Opérateur unique en Europe dans le domaine de la périnatalité, la Fondation de coopération scientifique PremUp, reconnue d'utilité publique, a pour mission la protection de la santé de la femme enceinte et du nouveau-né. Ses champs d'intervention sont : la recherche scientifique, la formation des professionnels de santé et la sensibilisation de la société civile à cet enjeu de santé publique.

Si vous souhaitez soutenir le financement les projets de recherche de PremUp et faire progresser la connaissance sur la périnatalité, vous pouvez faire un don en vous rendant sur le site de la Fondation PremUp (wwwpremup.org).

Témoignages [2] **:**

« Le message que nous, les professionnels de santé de la périnatalité, essayons toujours de véhiculer, c'est qu'évidemment la grossesse n'est pas une maladie mais un moment de bouleversement physiologique et de bouleversement émotionnel qui peuvent rendre difficiles les conditions du travail. Aujourd'hui, à part l'arrêt de travail, nous n'avons pas de solutions plus souples à proposer aux entreprises afin de maintenir les femmes enceintes dans leur environnement professionnel. Et l'on sait que cette forme de socialisation est importante pour le bon déroulement de la grossesse. »

Professeur Philippe Deruelle, Professeur de gynécologie-obstétrique maternité Jeanne de Flandre, Lille

« Présumer de la moindre disponibilité et de la moindre productivité des femmes au motif que les charges afférentes à la maternité les accaparent, c'est tout simplement refuser de leur reconnaître une capacité à assumer tous ces impératifs ensemble. C'est aussi, et le point est crucial, faire bien peu de cas du rôle que les hommes jouent, désormais de plus en plus, sur le terrain de la parentalité. Lorsqu'on réfléchit aux mutations qui découlent des combats féministes, les questions relatives aux préoccupations privées des femmes, notamment celles qui regardent la maternité, sont généralement considérées de façon négative. Or je crois que l'on ne comprend pas grand-chose de la condition des femmes aujourd'hui si l'on ne saisit pas la nature désormais intrinsèquement duale qui est la leur. Je crois que cette dualité qui concerne aussi les hommes condense tout l'inédit et tous les défis de la condition féminine contemporaine. »

Camille Froidevaux-Metterie, Professeur en science politique, Université de Reims Champagne Ardenne et membre de l'institut universitaire de France
« La révolution du féminin, éditions Gallimard-NRF, 2015 »

« J'ai rédigé un guide dédié à la gestion de la maternité au sein des 73 pays du Groupe Mazars, pour décrire la responsabilité, les droits et les devoirs de la femme et de l'homme. Dans ce guide, je poussais à expliquer aux managers que c'était mieux de discuter du départ en congé de maternité pour le préparer, et d'anticiper les conditions du retour. Ce guide envoyé dans tous nos pays a aussi été utilisé par des jeunes femmes qui se sentaient discriminées pour dire : « Il faut parler, la situation que vous me faites vivre n'est pas normale ». Cela a complètement changé la façon dont on a appréhendé le congé de maternité. Il reste une grande marge de progrès, mais cela a libéré la parole. »

Muriel de Saint-Sauveur, consultante, ex-Directrice diversité, Groupe Mazars

En savoir plus : Vidéo Maternité et travail, par Muriel de Saint-Sauveur, Directrice Diversité au sein du Groupe Mazars.

Pour développer votre réseau et échanger sur des thématiques propres aux femmes avocates, rejoignez le Réseau Femmes UIA sur LinkedIn – Groupe UIA Women's Network.

1 Enquête en ligne Odoxa, réalisée du 22 au 28 avril 2015, auprès d'un échantillon de 1 477 Français (1 000 femmes et 477 hommes) âgés de 18 ans et plus (au regard des critères d'âge, de catégorie socioprofessionnelle, de région, de résidence et de catégorie d'agglomération).

2 Témoignages disponibles sur le site www.sweetbypremup.org

Has Technology Affected the Core Values of the Legal Profession in the United States?

Jim MOORE

At the UIA's Budapest Congress on Sunday, October 30, speakers during the meeting of the Commission on the Future of the Lawyer will address some of the ways in which technology has impacted members of the profession and the delivery of legal services. The following article is an adaption of the remarks which James Moore, a member of the UIA's Governing Board and a former president of the New York State Bar Association, will deliver.

In prior years, speakers at the UIA's Commission on the Future of the Lawyer's meetings have attempted to address the ways in which factors such as globalization, competition and advertising in their respective countries have affected the core values of the legal profession. This article will consider whether another factor – technology in the law office – is or may affect those core values.

Core Values of the Legal Profession

To restating what is generally accepted as the core values of the profession as they appear in the American Bar Association's Model Rules of Professional Conduct is an important first step. Those values are:

- Undivided loyalty to his or her client.
- Independent legal judgment for the benefit of the client.
- To hold all client confidences inviolate.
- To provide access to justice for all people.
- To avoid conflicts with the interests of the client. And
- To maintain the integrity and competence of the profession[1].

And although there are other accepted professional values such as diligence, candor and civility, it is these six principle values which American lawyers regard as the essence of the profession. Furthermore, as has been noted in prior meetings of the commission, those core values are not unique to the United States; indeed, they constitute the framework of the legal profession in most common and civil law countries.

Significance of Technology in the Legal Profession

The question of how technology might affect those values is of paramount importance. Of course, the role of technology in the law office is neither surprising nor can it be doubted. I have now been licensed to practice law for exactly 52 years and the changes in the practice of law which have occurred during that interval are truly remarkable. Long gone from law offices are manual typewriters, large libraries filled with case books, and secretaries who worked for a single attorney. When I began in 1964, we communicated with other lawyers in person or by telephone or through the postal service. We met with our clients in offices. Letters and contracts and pleadings were outlined first on paper by the attorney and then into a dictating machine after which a secretary would type multiple drafts. The practice of law at that time was a slow, laborious and sometimes frustrating process. Looking back, however, because that process took so long it had the estimable virtue of lending itself to contemplation, deliberate analysis and important revisions.

Now consider the way in which a lawyer in the United States – and I suspect elsewhere – provides his or her legal services in 2016. Lawyers conduct research on a computer. Sometimes the research is conducted by a third party who may or may not be a lawyer. Indeed, that researcher may even be a computer. Communication with clients and other lawyers is usually either by cell phone or email rather than in an office. Before retiring from active practice, I recall being retained by clients whom I never met or spoke with; our communications were entirely electronic. Today, lawyers frequently prepare and electronically file their own documents with the courts, meaning that secretaries work with three or four attorneys rather than just one. Consequently, with fewer staff members, the physical footprint of many law offices has been reduced. Office size is also reduced because documents which formerly were stored in file cabinets or on shelves can now be stored in the amazing cloud. And because of mobile devices – cell phones and portable computers – lawyers can work in many settings other than their offices – at home, in a car, or even outside, or as our French colleagues like to say – *en plein air.*

Today, lawyers frequently prepare and electronically file their own documents with the courts, meaning that secretaries work with three or four attorneys rather than just one.

Outsourcing of Functions to Non-Lawyers

Another important development in recent years has been the outsourcing to third parties of some functions previously performed by lawyers; tasks, for example, which do not require great skill such as drafting basic documents, leases, contracts and even some court pleadings. And as I mentioned, the parties providing these services may not even be lawyers. Legal Zoom, a U.S. business corporation, for example, is an "online technology company" which will help you to "make a will online" or to form a corporation "to shield your personal assets from business liabilities". Licensed attorneys often play no part in producing those documents. Additionally, there are several non-lawyer businesses in the United States which provide comprehensive and very precise legal

research for law firms which lack the time, skill or resources to perform that function. Of course, one of the reasons for the outsourcing of these functions is that of client demands to reduce the cost of legal services.

We come then to the issue of whether these truly remarkable advances are having any undesirable affect on the core values of the profession.

Technology and the Client Secret

The first area of concern on this issue must be that of the client secret – the attorney's duty to hold in confidence all that which the client reveals to counsel. Here technology in the form of cloud server providers presents a serious risk. Because of the volume of documents typically created in today's law practice and because of the cost of storing these documents, an increasing number of law firms choose to store documents and emails in the cloud. Two of the largest cloud providers in the U.S. are Amazon and Microsoft. Many of these documents contain sensitive and confidential information. There is a risk therefore that some unrelated party may gain access to those documents either intentionally or unintentionally as a result of which the client confidence will be violated.

There are of course advantages to storing information in a commercial cloud server: storage can be achieved quickly, recovery of documents takes almost no time and physical space to store paper documents can be reduced or eliminated. But because cloud servers place the client's data beyond the lawyer's control, risk exists. No cloud server is 100% secure. Even when the cloud server agrees to encrypt all documents, there are people, companies and even other nation states who are constantly attempting to invade – or hack into – cloud storage. Within the past year, for example, the U.S. Department of Justice was able to gain access to supposedly privileged information on an Apple cell phone which had been used by a terrorist. And more recently, foreign countries gained access to the confidential records of the Democratic Party in the U.S. and possibly the use of U.S. intelligence agencies. As a consequence, attorneys must recognize that by storing client confidential information in the cloud there exists a realistic possibility that the information will be revealed to a third party, sometimes at great risk to the client. Taking steps to avoid that risk is therefore essential.

In the U.S., many state bar associations have issued opinions defining the attorney's obligation regarding cloud storage. In New York, for example, an attorney must use reasonable care to insure that the cloud server provider is contractually obligated to make all records secure and also, that the attorney must investigate any security breach to be certain that client information was not compromised.[2]

It is also important to bear in mind that other devices upon which we rely both in our professional and personal lives – cell phones, iPads, and laptops – can all be invaded by a skilled third party. In fact, a device known as a Stingray which was originally developed for military and intelligence work, and which is capable of connecting with any cellular device and extracting information from it, can now be obtained commercially. Not to be overlooked in connection with all of these portable devices is the risk of theft and the consequent loss of confidential information.

On this issue of client confidentiality, we must concede that much of the new technology used by attorneys has created risks for the client secret and that attorneys must use care to minimize those risks.[3]

Technology and Independent Judgment

A second area of concern relates to the lawyer's obligation to exercise independent judgment. In the past, when our personal experiences, our training in law school, and our individual research led us to recommend a course of action to the client, there was little doubt about the fact that it was the attorney's independent thought process which led to his or her recommendation. Furthermore, it was we or our associates who examined the records and the witnesses. Now, however, our clients – perhaps in the interests of economy – may demand that the attorney employ third parties to conduct research, or witness discovery, or to draft documents. Third parties whom we do not know personally, whose work we have not supervised and who may work in a remote location, possibly even in another country. For example, two businesses in the U.S., Fastcase and Ravel Law, use "powerful tools" to help "lawyers [to] understand the law and prepare for litigation". The result of those efforts may be a product in which the attorney played only a limited role and which no responsible lawyer could honestly claim resulted entirely from his or her independent judgment.

On this issue, the American Bar Association and several state bar associations have stated that the lawyer must assume full responsibility for the work of all parties upon whom his or her opinion is based. Furthermore, the client's consent to the outsourcing must be obtained.[4]

Technology and Duty to Protect the Profession

Technology has also had an impact upon the attorney's obligation to protect the profession. As is well known, technology now permits attorneys to market their skills not only in print – in magazines or newspapers – or on television – but also in what is called the social media – electronic documents such as LinkedIn, Facebook, Twitter and Google. There is no doubt about the fact that long ago we stopped debating whether lawyer advertising was inconsistent with the profession's core values. The only question today is whether this technological advance – electronic marketing – violates some core value – for example, the duty to protect the integrity of the profession. The answer to that question is quite clearly no. Advertising in any form may be distasteful but it is not inconsistent with our duty to protect the profession. In fact, one could argue that by extending the scope of lawyer advertising to the electronic media, the profession is honoring another of its core values that of providing access to justice to more people.

Conflicts of Interest

There is also the possibility that technology may have the effect of increasing the likelihood of producing conflicts of interest. That is so because of the speed with which an attorney feels compelled to respond to an email requesting advice – invariably the client wants an immediate answer –

and sometime neglecting to conduct the essential check for conflicts of interest. On this issue, only constant attention to the potential for conflicts of interest in these technology driven times will prevent the erosion of this core value.

Ultimately, the extraordinary ways in which technology has changed the manner in which legal services are delivered means that only through constant attention to the core values of our profession, will we be able to prevent those technological advances from producing undesirable effects.

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1 American Bar Association, *Model Rules of Professional Conduct,* Dec. 1, 2014. See also *Restatement of the Law Governing Lawyers,* American Law Institute (2000).

2 Opinion 842, New York State Bar Association.

3 See, ABA Commission on Ethics 20/20, Working Group on the Implications of New Technologies (Sept. 2010a).

4 ABA, *Model Rules of Professional Conduct,* Rule 1.1; see, also, ABA Commission on Ethics 20/20 (May 2011a) at p. 1. In addition, Rule 1.1 states that a lawyer should maintain competence in technology.

L'indépendance de l'avocat menacée ?

Francis GERVAIS

C'était le thème choisi par le Sénat International des Barreaux pour sa séance de travail tenue à Valence, le 29 octobre 2015 dans le cadre du Congrès de l'Union Internationale des Avocats. Le Sénat International des Barreaux est le lieu de rencontres et d'échanges entre les bâtonniers, les présidents de barreaux et d'organisations locales, nationales et internationales d'avocats. Cette séance a pour but de susciter la réflexion permettant de confronter les opinions sur des sujets d'actualités ayant trait en particulier aux valeurs fondamentales de la profession.

Le thème de 2015 était sans contredit l'un des plus actuels dans la démarche des avocats relativement au maintien des valeurs fondamentales de la profession.

La séance du Sénat était sous l'égide du Président de l'Union Internationale des Avocats, Miguel A. Loinaz Ramos et était présidée par la Vice-Présidente du Sénat, Huguette André-Coret, ancienne Présidente de la Conférence des Bâtonniers de France et d'Outre-mer.

Les invités ainsi que les orateurs avaient été sensibilisés au thème choisi par les dirigeants du Sénat International des Barreaux pour favoriser le débat quant à l'importance de la défense du principe de l'indépendance de l'avocat, une des valeurs fondamentales de la profession d'avocat. En corollaire, étaient également objets de discussion et de réflexion, les différentes sources de menaces envers l'indépendance de l'avocat.

Trois sous-thèmes avaient été proposés aux orateurs :

- **Les menaces inhérentes à des modifications des systèmes traditionnels** : Sur ce sujet, les dirigeants avaient soulevé différents aspects de la pratique moderne, soit la multidisciplinarité, les ABS, l'entrée et l'arrivée de capitaux extérieurs, l'entrée et l'arrivée d'actionnaires ainsi que leur droit de vote, de même que la dépendance dans la relation avec l'avocat.
- **Les attaques externes à l'indépendance de l'avocat** : Avaient été ciblées : les écoutes électroniques, l'emprise des pouvoirs publics, l'obligation de dénoncer en matière fiscale, l'obligation de dénoncer en matière de terrorisme et de blanchiment d'argent.
- **Le rôle des défenseurs et des garants** : Les dirigeants du Sénat voulaient également que les participants traitent du rôle des ordres professionnels et des associations professionnelles d'avocats, s'il en est, dans la défense de l'indépendance de l'avocat et du Barreau. De même, nous souhaitions aborder, si possible, le rôle des juges garants de l'indépendance des avocats.

Le Bâtonnier de l'Ordre des avocats de Kinshasa, Me. Coco Kayudi, fut le premier orateur entendu après l'introduction et la présentation de la présidente de la séance, madame Huguette André-Coret. Soulignons, au passage, que madame Huguette André-Coret s'est vue remettre la médaille de l'Union Internationale des Avocats pour l'état de ses services.

Le Bâtonnier du Kinshasa rappelait aux membres que les menaces faites au système traditionnel constituaient une menace réelle à l'exercice de la profession et à l'indépendance de l'avocat. Il signalait particulièrement les risques découlant de la multidisciplinarité, particulièrement quant à la protection du secret professionnel et des autres devoirs de la profession. Il rappelait toutefois que la profession telle qu'exercée aujourd'hui, n'était pas à l'abri de la compétition et qu'il fallait vivre avec ces nouveaux phénomènes. Il mettait en garde les participants rappelant que le raisonnement économique à la base de la création de certaines formes d'activités professionnelles, telles que les ABS, répondaient davantage à une logique industrielle qu'à une logique professionnelle, tout en reconnaissant toutefois que la mondialisation avait ouvert de nouveaux horizons pour les avocats.

Toutefois, en contrepartie, il rappelait que la mondialisation et la multidisciplinarité nous amènent à côtoyer d'autres professionnels dont les règles et les obligations déontologiques et professionnelles ne sont pas aussi astreignantes que celles des avocats : il y voyait là une autre source de menace.

Il fut suivi par Me Wilfrido Fernandez, Président de la Fédération Interaméricaine des Avocats. Ce dernier s'interrogeait sur la possibilité que les avocats puissent conserver le monopole des services juridiques alors que nous retrouvons de plus en plus sur les sites Web de différentes entreprises des programmes ou des boîtes à outils juridiques pour les citoyens. Il a fait état de la concurrence toujours plus grande au niveau de la fourniture des services juridiques.

Le Bâtonnier de l'Ordre des Avocats du Luxembourg, Rosario Grasso, s'insurgeait contre des situations survenues plus récemment où des avocats ont fait l'objet d'interception téléphonique, allant à l'encontre d'une des valeurs fondamentales de la profession, soit l'exigence du maintien du secret professionnel et de la confidentialité des informations transmises par le client à son avocat.

Il faisait part de certaines brèches dans la législation européenne, particulièrement en relation avec les déclarations des opérations suspectes du client. Il voit se pointer à l'horizon d'autres menaces externes de même nature, alors que les États sont de plus en plus envahissants et possiblement pour des raisons politiques et de sécurité nationale défendables, adoptent ou recommandent des législations qui affectent l'indépendance de l'avocat.

Me. Maria Slazak, Présidente du Conseil des Barreaux Européens (CCBE), a rappelé les travaux mis en place par l'organisme qu'elle présidait pour lutter contre les dangers pouvant exister dans les relations de confidentialité entre l'avocat et son client, particulièrement dans le domaine de la fiscalité et du blanchiment d'argent. Elle a traité également des travaux qui ont été entrepris pour éviter des pertes de données et aussi, augmenter la protection de ces données, propriété des clients des avocats.

Toutefois, elle reconnaît que les pressions du marché obligent la profession ainsi que les ordres professionnels à s'ouvrir davantage vers ces nouvelles réalités : sinon dit-elle, il faudrait retourner à la machine à écrire, ce qui s'avère certainement impossible à la lumière de l'évolution technologique à laquelle nous faisons face et qui doit faire partie maintenant de notre vie professionnelle. Il faut rechercher des solutions qui permettront de vivre cette nouvelle technologie tout en préservant les valeurs fondamentales de notre profession.

Me Paulette Brown, Présidente de l'American Bar Association (ABA), a pris la parole pour rappeler l'importance dans les pays démocratiques de l'indépendance de l'avocat ainsi que de celle des magistrats. Elle a rappelé que, non seulement, il s'agissait d'un principe mais encore, d'un canon qu'il faut respecter et qu'il fallait faire en sorte de tout mettre en œuvre pour assurer à la protection de cette indépendance, base et source d'une démocratie saine et efficace.

Elle a rappelé que la protection de l'indépendance de l'avocat et du barreau est la source de la confiance que le public aura à l'égard des avocats et envers la justice en général.

Le Bâtonnier de l'Ordre des Avocats de Beyrouth, Me Georges Jreij, rappelait que l'indépendance de l'avocat est une des règles à la base même d'un État de droit. Il rappelait le danger de l'immixtion des autorités religieuses dans les pouvoirs et de ce fait, dans l'appareil de justice dans certaines régions du monde. Il salue les avocats qui, dans cette lutte contre les pouvoirs envahissants des États, sont prêts à tout perdre sauf leur indépendance ainsi que leur liberté de parole et d'expression.

Il craint le rôle que pourraient être appelés à jouer les robots ainsi que ce qu'on appelle l'intelligence artificielle dans la dispense de services juridiques.

Finalement, est intervenu le Président de la Law Society of England and Wales, Me Jonathan Smithers, qui a fait une présentation sous le titre *« Lawyers replaced by robots : Will artificial intelligence replace the judgement and independence of the lawyers ? »*

Le Président Smithers a mentionné qu'il ne pouvait que constater l'amélioration des services fournis par les moyens technologiques modernes, qu'on appelle également intelligence artificielle.

Il suffit de s'ouvrir sur le monde extérieur pour constater que de plus en plus les moyens technologiques sont présents et rendent plus efficace l'exercice de plusieurs professions, dont celle d'avocat.

Le Président Smithers concluait qu'il était inutile de vouloir combattre à tout prix les équipements ou les technologies découlant de l'intelligence artificielle, parce qu'il est évident que le monde ne régressera pas et que déjà le futur nous annonce une plus grande présence de ces éléments technologiques dans notre vie ainsi que dans l'exercice de nos métiers et professions.

Toutefois, il nous faut être prudent quant à l'utilisation de l'intelligence artificielle : de nombreuses données circulent beaucoup plus librement et mettent en péril les obligations de confidentialité à l'égard de nos clients. Il faut mettre en place les moyens de protéger cette information et faire en sorte que les éléments de confidentialité ne puissent circuler librement sur les réseaux technologiques qui, au contraire, recherchent cette plus grande circulation de données.

Le Président Smithers rappelait que ces nouvelles données technologiques vont changer notre façon de faire, de même qu'elles vont changer les limites de nos pratiques du droit et des domaines dans lesquels nous exerçons. Ces nouvelles technologies nous amèneront à nous interroger sérieusement sur des questions qui encore, il y a quelques années, nous semblaient tout à fait irréalistes : Qui est le propriétaire des biens qui sont transmis ou imprimés sous forme 3D ou virtuelle ? Qui est responsable des défauts de ces appareils résultats de l'utilisation des nouvelles technologies ?

Il ne s'agit là que de quelques exemples du nouveau monde technologique dans lequel nous évoluons.

Le Président Smithers concluait que malgré l'acquisition à une vitesse vertigineuse de ces nouvelles technologies et de leur utilisation, jamais ces dernières ne doivent remplacer l'avocat. Les clients ne désirent pas être servis par des robots mais par des

professionnels : nos clients accepteront que nous utilisions la nouvelle technologie pour améliorer nos services mais refuseront que nous abandonnions et cédions les caractéristiques chères à notre profession, soit le respect des valeurs fondamentales conjuguées à l'utilisation de notre jugement que l'on verra à appliquer de façon judicieuse aux circonstances et aux droits que veulent défendre nos clients.

Le Président Smithers rappelait que l'émergence de ces nouvelles technologies étant mondiale, elles appellent les dirigeants des ordres professionnels du monde entier à se regrouper pour discuter de ces questions et mettre en place les mesures qui ne pourront certainement pas ralentir ces nouvelles technologies mais qui feront en sorte qu'elles soient bien utilisées dans la protection des valeurs de notre profession et particulièrement, dans la protection des droits de nos clients.

La séance s'est terminée par des échanges avec les représentants de la salle et là, encore, nous avons pu voir les différentes positions exprimées entre les tenants des nouvelles technologies et ceux qui y voient des menaces à nos valeurs fondamentales.

C'est finalement le Président d'Honneur de l'Union Internationale des Avocats, ancien Bâtonnier de Paris et ancien Président du Conseil National des Barreaux, Jean-Marie Burguburu, qui a présenté la conclusion de cette séance.

« Je n'ai rien appris ».

C'est la façon « brutale » mais si véridique avec laquelle Jean-Marie Burguburu a résumé les présentations des orateurs en rappelant que la profession « moderne » ne fait pas nécessairement face à de nouvelles menaces à son indépendance, mais qu'elle fait plutôt face à de vieux démons qui existent depuis toujours mais qui, sous des atouts plus modernes, refont régulièrement surface et viennent nous hanter. Il faut continuer dans notre « chasser aux sorcières ! »

Dans ce cadre, vous me permettrez de reproduire ici un extrait d'une présentation faite par monsieur Ramon Mullerat, Ancien Président du CCBE, dans le cadre du 28è Colloque de Droit Européen tenu à Bayonne en France en 2002, intitulé « *L'indépendance de l'avocat!* »

Ce dernier reprenait une citation de Will Utton et Anthony Giddens, de leur volume *On the Edge* de 2000, (extrait de la préface), démontrant que depuis toujours la profession fait face à des attaques à son indépendance, et qu'il nous faut être prêt à y répondre, à protéger nos valeurs fondamentales tout en acceptant l'évolution technologique de la société :

> *Chaque génération pense vivre de grand changement, et la nôtre n'est pas différente. Si nous estimons que les technologies de l'information et la numérisation vont sans doute transformer notre vie, les générations antérieures pensaient que l'aviation, l'électricité ou la vapeur allaient transformer la leur : elles avaient raison.*

Quand il est question de l'indépendance des avocats, des avenues différentes s'ouvrent et font l'objet d'opinions différentes.

Dans le volume intitulé « *L'indépendance des avocats* », sous la direction de Louis Assier-Andrieu, (Dalloz 2015) ce dernier rappelle dans son introduction que l'indépendance de l'avocat est toujours considérée par plusieurs comme étant l'une des valeurs fondamentales rattachées à l'exercice de la profession, alors que d'autres ont une perspective totalement inversée : pour ces derniers, ce n'est pas l'avocat qui doit être libre mais la concurrence qui doit être libre (page 12).

Ce sont deux visions de l'indépendance qui continueront de s'affronter et ce sera aux avocats, aux ordres professionnels et aux organisations professionnelles de faire en sorte que nous maintenions en place les éléments nécessaires à la protection des intérêts de nos clients et de notre profession.

Du même coup, nous vous invitons à la séance du Sénat International des Barreaux qui aura lieu dans le cadre du congrès de l'Union Internationale des Avocats qui se déroulera à Budapest, à la fin du mois d'octobre 2016.

Il y sera question du secret professionnel alors qu'on remettra sur le métier cette valeur fondamentale de notre profession : d'une part, les orateurs seront appelés à commenter l'intransigeance de certains tribunaux qui protègent tout azimut la confidentialité des informations que le client transmet à son avocat, alors que l'on voit de l'autre côté, pour des raisons qui pourraient être justifiables, la mise en place de législations qui, au contraire, amoindriraient cette protection.

L'invitation est lancée à tous.

Au plaisir de vous revoir à Budapest !

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Quelques réflexions au sujet de l'organisation et du marketing des cabinets d'avocats

Giulia FACCHINI & Franco VILLA

Interrogé, à la fin de l'année 2014 sur la question de « *Comment positionner (un) cabinet d'avocat en 2015 ?* » (cf. *http://www.village-justice.com*) Francesc Dominguez, associé du Cabinet Barton Consultants, indiquait :

« *Pour positionner votre cabinet d'avocats, il faut savoir ce que vous vendez en tant qu'avocat et quelles sont les attentes de votre clientèle (potentielle) ? Le savez-vous ?*

Quels sont les besoins précis du client ? Si un cabinet d'avocats n'a pas de réponse claire à cette question, c'est probablement qu'il est en train de perdre systématiquement des opportunités sans le savoir. Il est un fait que celui qui ne connaît pas les réelles attentes du client est limité, consciemment ou inconsciemment. Il n'y a que si vous savez ce que vous « vendez » que le client appréciera réellement votre travail.

Pour « vendre » votre capacité, vous devez connaître les besoins réels du client, qu'il en soit lui-même conscient ou pas. Le client peut vous dire qu'il veut des solutions, des résultats, « se venger » d'une autre personne, ou qu'il souhaite un service efficace et rapide, etc. Tous ces bienfaits qu'il recherche peuvent se résumer à un seul besoin personnel et émotionnel.

En plus de connaître ce que vous vendez en tant qu'avocat et quelles sont les attentes de votre client (potentiel), il est nécessaire d'organiser votre cabinet selon les besoins du client. Une bonne organisation facilite la mise en œuvre de la stratégie.

L'organisation du cabinet doit répondre à plusieurs critères car pour faire fonctionner l'engrenage correctement, il faut aussi que les différentes pièces fonctionnent. Nous vous invitons à réfléchir à toutes ces questions et à prendre au sein de votre cabinet les mesures nécessaires pour offrir au client le seul bienfait qu'il recherche…

Les idées sont la fondation intangible du progrès. Il suffit de disposer d'un plan de mise en œuvre détaillé permettant de les développer ».

Face à ces observations, assurément pertinentes, le problème qui se pose est le suivant : combien d'avocats, du moins en Europe, connaissent parfaitement le « marché » dans lequel ils agissent et sont donc en mesure de planifier et d'organiser leur activité en fonction du marché de services juridiques auquel ils s'adressent, tout en respectant l'objectif de conjuguer l'indispensable rentabilité de nos cabinets avec le sacrosaint droit de défense des citoyens ?

Si le thème de l'organisation de nos cabinets relève du modèle économique que nous avons choisi pour offrir nos services sur le « marché des services juridiques », les questions que nous devons nous poser en amont sont les suivantes :

1. Quels services entendons-nous offrir sur le marché de la demande de services juridiques ?

Pour répondre à cette question, il convient de relever que dans le cadre des activités exercées génériquement sous le titre d'« avocat » se déclinent le plus souvent des activités ayant des caractéristiques bien différentes, qui requièrent une organisation et une structure qui divergent d'un cabinet à l'autre, puisqu'en fonction des branches du droit que nous avons choisi de pratiquer, du genre d'affaires traitées, du domaine de spécialisation exercé, du type de clientèle (locale ou transfrontalière) qui s'adresse à nous ou du lieu d'activité, s'en suivront une manière d'exercer l'activité professionnelle et une structure des cabinets qui ne seront pas forcément semblables.

A cet égard, il suffit de songer aux cabinets sis dans des grandes villes industrielles, qui s'occupent de droit commercial ou de *mergers & acquisitions* et ont comme clients de grandes sociétés multinationales. Ces « firmes » ont forcément une structure, une organisation, des coûts de gestion et des rythmes de travail différents par rapport à ceux des cabinets sis dans des villes périphériques et qui traitent des dossiers de droit commercial et de contentieux pour des PME.

En dépit de ces différences, beaucoup de cabinets pensent être ou se présentent encore comme des études « généralistes », soit parce qu'ils exercent les activités dans les trois domaines usuellement reconnus du droit, à savoir : droit civil, droit pénal et droit administratif, soit parce que, tout en limitant leur activité à un seul de ces domaines, ils fournissent des services juridiques dans toutes les sous-catégories dérivant de ce domaine.

En réalité, il est devenu aujourd'hui pratiquement impossible de se définir « avocat généraliste ».

En effet, le foisonnement des lois, règlements et directives en tous genres, en d'autres termes la surrèglementation, à laquelle l'on assiste dans tous les domaines du droit, pose désormais le problème de leur assimilation et ne consent plus à un seul avocat d'en connaître tous les contours.

Cela étant et tout en s'adaptant aux nouvelles réalités du marché, il appert que, dans tout cabinet, même lorsqu'il s'agit d'une grande « firme » internationale, l'on retrouve un ou plusieurs domaines d'activité ou des groupes de clients qui à eux seuls génèrent la plus grande partie du chiffre d'affaires du cabinet. Malheureusement, le faible penchant démontré par un bon nombre d'avocats de pratiquer un « contrôle de gestion » régulier et objectif, qui permettrait de définir le *trend* de leur activité et déterminer les motifs qui justifient des variations, positives ou négatives, de leur chiffre d'affaires ou du nombre de dossiers traités dans un domaine déterminé, fait que, en règle générale, la plupart des avocats n'a absolument pas une idée très claire de quel est – ou devrait être – son *core business* et, par conséquent, du « réel » service juridique qu'il entend offrir sur le marché.

C'est dire qu'avant de se poser toute autre question pertinente, il faudrait examiner, avec objectivité et surtout avec le support des chiffres qui ressortent du « contrôle de gestion », quelle est l'activité que nous entendons exercer de manière à pouvoir évaluer toujours avec objectivité les compétences et les aspirations du cabinet et déterminer ainsi d'une part le « positionnement » de ce dernier sur le marché et d'autre part, quelle sorte de « produits ou services » il est en mesure d'offrir à sa potentielle clientèle.

2. Quels sont et où se trouvent les sujets (clients) qui profitent ou pourraient profiter de nos services ?

A cet égard, il faudra procéder à une « segmentation du marché », soit à la subdivision du marché en groupes de consommateurs ayant des caractéristiques similaires, afin de déterminer leurs attentes lors de l'« achat » d'un produit ou d'un service.

Or, si cet exercice est peu couru parmi les cabinets d'avocats, il n'en demeure pas moins que tout cabinet concourt ou se positionne *de facto* de par le lieu d'exécution de ses services (même si Internet a passablement changé la donne) et/ou des services proposés ou encore des exigences manifestées par la clientèle quant au service attendu, sur un segment particulier d'activité d'un marché déterminé.

Ainsi, la tentation d'un bon nombre de cabinets de vouloir accepter toute sorte de mandat constitue une erreur majeure par rapport aux perspectives de marketing.

Il suffit de se référer à la théorie dite du *long tail*, conçue par Chris Anderson sur la base du modèle économique développé par Amazon, pour s'apercevoir qu'il est plus rentable de vendre peu de produits (ou fournir peu de services) bien ciblés sur un marché de niche, c'est-à-dire sur un segment du marché à la taille réduite, mais bien défini, plutôt que la vente de tout produit à une masse indéterminée de clients.

Les raisons en sont assez simples. En effet, tout client a besoin d'une approche spécifique qui soit à l'écoute de ses préoccupations propres. Ainsi, ce dernier cherchera, à ne pas en douter, un fournisseur de services juridiques qui possède les compétences, tant en ce qui concerne le *know how* que l'expérience, pour lui amener, dans les meilleurs délais, la réponse appropriée auxdites préoccupations.

Aujourd'hui, le client est à la recherche d'une véritable plus-value, soit de toute valeur ajoutée qu'un cabinet ou un avocat peut lui amener dans un secteur déterminé.

C'est ainsi que désormais le client demande des références, requiert la démonstration d'une expertise approfondie dans un domaine déterminé et exige souvent, en sus de qualités juridiques et techniques reconnues, la mise en place d'une organisation et d'un processus de suivi de mandat plus efficace.

En dépit de ces exigences accrues, des analyses de marketing ont démontré que le client, tout en étant mieux informé de par ses recherches sur nos qualités et aptitudes, reste souvent « infidèle » et peu reconnaissant.

En effet, même quand il a été satisfait par nos prestations précédentes, il préfère continuer à nous mettre en concurrence afin de disposer, non seulement, du meilleur fournisseur de services dans le domaine qui le préoccupe à un moment déterminé, mais aussi du meilleur rapport qualité/prix.

Dès lors, la plus-value d'un avocat ou un cabinet ne se limite pas au *know how* et à l'expérience dont il dispose, mais s'étend au contrôle des coûts et à la manière dont le client perçoit tous ces éléments.

C'est dire que le marché des services juridiques est devenu un véritable *buyer's market*, au sein duquel il faut adapter nos stratégies en fonction de l'environnement dans lequel nous évoluons, améliorer l'organisation de nos cabinets et surtout rechercher les secteurs d'activités dans lesquels nous pouvons apporter une véritable valeur ajoutée et puiser ainsi des nouveaux dossiers à traiter.

3. Quel prix nos clients potentiels sont-ils prêts à payer pour les services que nous pouvons leur offrir ?

Si pour répondre aux questions précédentes, il a fallu se référer à des facteurs qui relèvent de la gestion « interne » d'un cabinet, la réponse à cette troisième question dépendra, en revanche, d'éléments extérieurs et plus particulièrement du facteur concurrentiel.

En effet, tout avocat agissant dans le même secteur d'activités que le nôtre, tout en restant un confrère, est un potentiel « concurrent », puisqu'il offre, à priori, des services analogues aux nôtres et s'adresse aux mêmes groupes de clients.

Il existe ainsi, vue l'importante marge de manœuvre dont disposent aujourd'hui les avocats lors de la détermination de leurs honoraires, un risque accru de déclencher une « guerre des prix » entre confrères, alors qu'en réalité il s'agit plutôt de déterminer dans le cadre d'une « concurrence efficace » sur le marché des services juridiques, une fois définis le(s) secteur(s) d'activités dans lequel (lesquels) un avocat ou un cabinet entend offrir ses services, quel est le « juste prix » de la prestation attendue par le client.

Or, à l'heure où les clients nous mettent de plus en plus en concurrence, afin de négocier le « meilleur » prix pour la défense de leurs intérêts, la question de la détermination

de nos honoraires est un exercice souvent complexe, auquel bon nombre d'avocats n'est pas véritablement préparé, ce d'autant que les règles applicables à la rémunération de l'avocat ont longtemps et notablement différé entre un pays et l'autre.

Pensons ainsi à tous ces avocats qui ont grandi et évolué dans un marché où les honoraires étaient fixés sur la base d'un « tarif étatique » ou « professionnel » obligatoire et qui n'ont, par conséquent, jamais dû - voire pu - se poser ni la question concernant la « réelle valeur » de la prestation qu'ils offraient à leur clientèle, ni celle relative au rapport existant entre l'application de ces tarifs obligatoires et les coûts de gestion de leurs cabinets.

Pour déterminer la réelle valeur de nos prestations, l'on peut s'inspirer de la règle du *quantum meruit* applicable dans les droits de la common law, lorsque le montant de la rémunération n'est pas fixé.

Selon ladite règle, les critères déterminants pour la fixation des honoraires d'un avocat sont : le temps consacré à l'affaire, la compétence du mandataire, la nature et la complexité de l'affaire, la pratique observée par les professionnels de la même catégorie et, enfin, la qualité du résultat obtenu.

Cela étant, entre la vision subjective de l'avocat quant à sa « juste » rémunération et l'appréciation objective que voudrait en faire son client, il faudra également tenir compte de l'offre et la demande en vigueur sur un marché déterminé.

Ainsi, pour des prestations particulièrement usuelles ou fréquentes dont l'activité requise ne comporte pas des compétences accrues, le prix de nos prestations devra, ne fut-ce que par le nombre de confrères qui sont en mesure de fournir la même prestation et donc de nous concurrencer, rester relativement bas, alors que, inversement, plus nos prestations se situent sur un « marché de niche » et requièrent une haute spécialisation, plus le client sera enclin à payer un prix élevé, puisque notre prestation constitue une véritable plus-value et le nombre de potentiels concurrents aptes à fournir des prestations semblables ou équivalentes sera sensiblement réduit.

Ceci dit, indépendamment du fait que nos prestations se situent sur un « marché de masse » à fort caractère concurrentiel ou soient des prestations *tailor made*, à savoir des services à forte valeur ajoutée rendus par une « boutique juridique », il faudra veiller à ne pas accepter des mandats à n'importe quel prix ou de ne pas répondre favorablement à toute réduction de nos honoraires formulée par les clients.

Dès lors, dans la détermination de la réelle valeur de nos prestations, il faudra également définir quel est le seuil de rentabilité de nos services, qui évidemment varie, non seulement, d'un cabinet à l'autre, mais aussi d'un avocat à l'autre.

En effet, ce seuil de rentabilité ne doit pas être interprété comme la preuve irréfutable d'un prétendu esprit mercantile voué à la recherche du seul profit financier, mais constitue, au contraire, le gage que le cabinet entend continuer à améliorer et parfaire, par des investissements tant dans des domaines purement matériels (locaux, outils informatiques, etc.) qu'au sujet des ressources humaines et de la formation continue, la qualité des services qu'il souhaite fournir à ses clients.

Ce bref survol de la problématique de la détermination du « juste prix » de nos prestations laissera sans doute le lecteur sur sa faim.

La raison en est que, l'exercice reste difficile, ce d'autant qu'il est soumis de plus en plus aux pressions, tantôt convergentes, tantôt divergentes, des organismes et associations chargés de faire respecter la libre concurrence ou les intérêts des consommateurs ou encore d'assurer l'accès le plus large possible à la justice.

Il n'en demeure qu'une fois défini, quel rôle entendons-nous jouer sur le marché des services juridiques, quelles prestations souhaitons-nous offrir à nos potentiels clients, quelles sont les attentes de ces derniers à cet égard, qui sont nos concurrents et quel est le « juste prix » que nous devons proposer pour nos prestations, il reste une dernière question à examiner, celle liée à la communication et au marketing.

4. De quelle manière faut-il communiquer avec nos potentiels clients ?

Dans un marché devenu global, où les nouvelles technologies sont devenues une partie intégrante de notre mode de vie et de la façon de travailler de la plupart des industries, le monde juridique lui aussi voit déferler une vague de technologies attractives mais qui suscitent encore inquiétude et méfiance.

Ainsi, il est devenu presque inconcevable, dans ce marché global, d'exercer quelque activité professionnelle que ce soit sans disposer d'un site Internet, même rudimentaire.

Et pourtant, alors qu'il devient possible d'acheter presque tout sur le net, que notre *privacy* est quotidiennement mise à nue par toutes sortes d'informations qui circulent sur la toile, les avocats en sont encore souvent absents.

Mises à part les grandes « firmes » ou cabinets exerçant une activité internationale, combien de cabinets, lorsqu'ils se profilent au niveau national, disposent d'un site Internet digne de ce nom et le tiennent constamment à jour ?

Proportionnellement, très peu !

Or, s'il est vrai que l'avocat ne doit certes perdre son âme en se lançant sans retenue dans une publicité tapageuse et débridée, il ne peut non plus rester hors de l'évolution du monde, soit en marge du marché où juristes indépendants, avocats étrangers, banques, sociétés fiduciaires offrent quotidiennement de services *on-line*. Ce d'autant que le client, lui, a su s'adapter à ce déferlement de nouvelles technologies.

Ainsi, c'est en surfant sur le *Web* qu'il nous cherche, qu'il se renseigne sur notre « *know how* » et notre expérience, qu'il nous met en concurrence avec nos confrères et d'autres sociétés actives dans le domaine juridique, qu'il compare les honoraires.

C'est dire l'importance des informations contenues sur le site web d'un cabinet, notamment en ce qui concerne la description de ce dernier et des services qu'il rend, la mise en évidence des mesures organisationnelles prises pour assurer le respect des règles professionnelles en son sein, la mise en exergue d'éventuelles activités *pro bono*, la référence aux affaires dont le cabinet s'est occupé, l'indication

d'évènements ou de conférences lors desquelles des avocats du cabinet se sont exprimés.

C'est dire également que l'avocat moderne doit, sous peine de disparition, ouvertement se promouvoir.

Cette promotion de ses activités a toutefois un coût qui peut être relevant, ce qui risque, s'il n'est pas limité, de favoriser les grandes « firmes » internationales qui disposeront de gros budgets.

La surenchère, dans ce domaine, nous guette. C'est donc à cela qu'il faudra être particulièrement attentif dans le futur.

5. Conclusion

Comme on vient de le voir, une révolution s'est accomplie… Et comme l'indiquait déjà en 2008 le Bâtonnier Michel Halpérin : « *Elle nous ramène à son point de départ, en rappelant aux uns, en révélant aux autres, que les avocats n'ont de raison d'être que s'ils occupent une place particulière dans la vie collective. S'ils sont des entrepreneurs et des concurrents, s'ils doivent à ce titre accepter certaines nécessités d'ordre économique, se faire connaître du public et même apprendre à se vendre, ce ne peut être en effet qu'avec délicatesse et modération et surtout sans jamais perdre de vue ce qui, toujours, fait leur raison d'être : l'indépendance et le secret* ».

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1 Michel Halpérin, La publicité et les avocats : révolution et révélations, *in* : Défis de l'avocat au XXIe siècle, Mélange en l'honneur de Madame Le Bâtonnier Dominique Burger, Editions Slatkine, Genève, p. 178.

L'Avocat dans la Cité : un succès à Genève également

Grégoire MANGEAT & Mitra SOHRABI

En ce dernier jeudi du mois d'octobre 2015, les membres du Conseil de l'Ordre et du Comité du Jeune Barreau supervisent l'installation d'une tente de 80 m² au cœur de la Vieille-Ville de Genève. Des banderoles et des ballons aux couleurs de l'Ordre flottent au-dessus de la place publique, ce qui tranche avec la discrétion habituellement de rigueur dans la Cité de Calvin. L'Avocat dans la Cité débute le lendemain.

Pendant deux jours, des avocats genevois ont mis leur temps et leurs compétences au service du citoyen. Une centaine d'avocats, jeunes et moins jeunes, ont répondu présents et ont offert plusieurs centaines de consultations gratuites dans près d'une dizaine de domaines juridiques. Il y avait de l'enthousiasme à l'idée de participer à un événement donnant si simplement à voir que l'avocat est accessible, qu'il peut aider.

Au cœur des rues commerçantes, un dispositif de sensibilisation avait été mis en place. De jeunes avocats étaient là pour expliquer l'évènement. Les passants étaient ainsi invités à faire quelques pas pour rejoindre la tente des consultations, un peu en amont.

Cafés, croissants, fauteuils et sourires pour faire oublier le temps d'attente.

Et puis des consultations diverses et variées, allant de la contestation d'un congé donné à un directeur d'entreprise à l'assignation d'extra-terrestres, qu'un homme avait vus récemment et qui lui avaient causé du tort.

En Suisse, où l'accès à la justice reste cher pour une très grande partie de la classe moyenne, tout reste à inventer pour aller à la rencontre de ces quantités impressionnantes d'hommes et de femmes qui ont mille questions juridiques à poser, mais qui n'osent pas approcher l'avocat.

L'Avocat dans la Cité, en attendant que les modèles d'affaires aient été un peu revisités, est une transition intelligente, qui remet l'avocat à la portée facile et immédiate des gens.

L'Avocat dans la Cité, en attendant que les modèles d'affaires aient été un peu revisités, est une transition intelligente, qui remet l'avocat à la portée facile et immédiate des gens. Cela peut paraître secondaire, mais les témoignages recueillis se rejoignent souvent : la surprise vient avant tout du fait que l'on s'imaginait l'avocat autrement, l'on pensait que l'avocat, ce n'était pas pour nous, que c'était pour les autres.

Le Bâtonnier Jean-Marc Carnicé avait également intelligemment choisi d'insérer, dans le cadre de cette semaine consacrée à la citoyenneté, un volet pédagogique de sensibilisation des enfants de 11 à 13 ans à quelques notions juridiques très importantes (les droits et les obligations ; la différence entre droit civil et droit pénal ; l'intention et la négligence ; la mise en œuvre du droit dans le cadre du procès ; les droits et libertés publiques ; les droits de la défenses ; les acteurs du procès et leurs rôles respectifs ; etc.)

Au terme d'une préparation de plusieurs mois avec le Département de l'Instruction publique du canton de Genève, le Conseil de l'Ordre a réuni une quarantaine d'avocats désireux d'officier dans les écoles.

Pendant deux périodes de 45 minutes, séparées d'une courte pause de cinq minutes, les maîtres d'école d'un jour ont présenté un cas pratique aux élèves. Une rixe éclate pendant la Fête de la musique. Dommage à la propriété et voies de fait sont commis. Des personnes sont arrêtées par la police. L'un des protagonistes filme la scène et la poste sur Internet, tout en l'accompagnant de menaces.

La première chose qui frappe, c'est que les élèves ne sont pas surpris par l'énonciation des faits. Ils ont l'habitude, mais n'y ont bien évidemment jamais prêté une attention très juridique. Si du droit affleure un peu à leur esprit, c'est peut-être sous la forme de la loi du talion, du moins au début de l'exercice. Après la présentation du cas pratique et sa résolution sous forme de questions réponses et d'échanges vifs avec les élèves, les questions fusent. Les avocats-enseignants ne s'énervent bien sûr jamais : « *Pourquoi la peine de mort n'existe plus en Suisse ?* ». Les élèves, souvent bien plus curieux que nous l'avions imaginé, attendent des réponses et n'acceptent pas que l'avocat se dérobe.

La première période se termine par la transformation de la salle de classe en salle d'audience. Les pupitres glissent. Ils finissent par dessiner le lieu des débats. C'est l'heure du procès fictif. Trois élèves pour juger. Un élève pour requérir. Trois élèves pour défendre. Deux pour témoigner. Trois pour les parties. Un greffier. Un huissier, le balai de la classe à la main, pour frapper des coups sur le bois des tables et obtenir le silence. Quelques élèves jouent les journalistes. D'autres enfin, plus discrets, se contenteront de personnifier le public venu repaître sa curiosité.

Les élèves jouent avec enthousiasme et intelligence. Les juges sont sévères. Cinq ans de prison. L'avocat explique pourquoi ces peines paraissent sévères à des élèves qui comprennent vite. L'intransigeance des débuts cède le pas à une appréciation plus nuancée des choses, puis de la vie.

Cet exercice a enthousiasmé les avocats enseignants. Les élèves également, qui semblent avoir compris son intérêt. De futurs avocats apparaissent, déjà, au gré de deux questions. Les timides, une fois mis à l'aise, surprennent par la qualité de leurs interventions. Les bavards font rigoler, ce qui fait du bien, mais ne font pas avancer la cause qu'ils sont censés porter.

L'exigence du débat contradictoire, la difficulté de juger, l'exigence de la nuance… Aborder ces questions, les rendre sensibles, même avec des enfants si jeunes, c'est cultiver la réflexion, le doute, et le respect de l'autre. C'est aussi une forme d'éducation contre les extrêmes, quelles qu'en soient les manifestations.

Le Département de l'instruction publique y a certainement été sensible, puisque l'exercice sera réédité dans quelques jours, et qu'il est prévu que le nombre de classes visitées soit sensiblement augmenté.

Si depuis Rabelais au moins, les avocats sont vilipendés et qu'il faudrait être naïf de penser que leur image pourrait changer sensiblement et rapidement dans le public, tout effort doit être entrepris pour rapprocher l'avocat du citoyen, et aider les hommes et les femmes à comprendre son rôle, son quotidien, ce qui l'anime. En allant à la rencontre du public et des élèves, c'est un peu de cet effort dans le temps long qui a été commencé avec succès à Genève.

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Pratique du Droit
Legal Practice
Ejercicio de la Abogacía

Software - Goods or Not to Be Goods? That Is the Question

Stephen SIDKIN & Elisa PERLINI

[with apologies to William Shakespeare in the year marking the 400th anniversary of his death]

Prologue

What would Shakespeare have made of software? Would it have enabled him to more easily plagiarise the works of others as is oft alleged? Or to filch the ideas of third parties which too is a claim which has so easily been made down the centuries?

In a year which has also seen the UK engage in a Brexit referendum, the machinations of UK politicians would have given Shakespeare so much material that it can be confidently asserted that without Microsoft Word the geese population of England would have been mightily depleted in the provision of feathers for his quills!

But no matter – our story starts not in Elsinore, Denmark, but in Whitehall (the government quarter of London) where some decades earlier a decision was taken by the Thatcher government to apply the so-called copy-out (that is, lazy) technique to the drafting of the UK law which implemented the EU Agents Directive (86/653/EC).

The Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") (as it is that law with which we are concerned) apply to agents with the authority "to negotiate the sale or purchase of goods on behalf of another person". But no definition was provided of goods in the Directive and, as a consequence, nor in the Regulations.

To set the scene

On March 23, 2013, the Claimant, Software Incubator Limited ("TSI"), entered into a written agency agreement with the Defendant, Computer Associates UK Limited ("CA") to act as its non-exclusive agent for the marketing and sale of an application release automation software ("RAS") in the UK (the "Agreement").

Shortly after, on September 13, 2013, CA decided to terminate the Agreement by giving TSI a 3-month written notice. However, on October 9, 2013, CA wrote again to say that TSI had committed repudiatory breaches which entitled CA to terminate the Agreement with immediate effect. These breaches were denied by the Claimant and formed the subject of the dispute that was heard at first instance in April 2016 by Judge Waksman QC (sitting as a High Court judge).

So can software be goods for the purpose of the Regulations?

The Agreement

Amongst other things, the Agreement provided that:

1. TSI's owner, Mr Scott Dainty, would devote "a substantial amount of time and effort in providing the Services"; and
2. TSI would not throughout the term of the Agreement and for the 12 months after its termination compete with the RAS nor entice away from CA any person or company with whom CA had a relationship, including its employees.

The working relationship did not get off to a good start and in around mid-2013 Mr Dainty entered into discussions with another company, Intigua, with a view to possibly leaving CA. This led CA to assert in its termination notice of 9 October 2013 that Mr Dainty was in "breach of the [Agreement]… by asserting [his] employment or engagement with Intigua".

> The ECJ found that an unlimited licence of software to consumers in exchange for the payment of a fee was tantamount to a sale of that software.

Software is 'goods' within the meaning of the Regulations

On termination of the Agreement, the Claimant sought compensation pursuant to the Regulations. Given the lack of statutory definition of "goods" in the Regulations, the Defendant sought to argue that software are not goods.

By way of background, RAS is sophisticated and complex software generally used by large organisations such as banks and FTSE 250 companies. It works to automatically coordinate and implement the deployment and upgrades of other software applications

and as such was described by Judge Waksman as a "software about softwares".

Judge Waksman ruled that whilst software itself is intangible, it can only operate in a tangible environment (by being loaded onto a hard disc or a server and then being used on a computer, tablet or similar device) and it should importantly not be considered simply as intellectual property. The RAS would indeed be commonly described as a 'product" and not a "service". The fact that software is licensed and as such no outright transfer of ownership by way of an assignment occurs is not sufficient for it to fall outside the scope of "goods" for the purposes of the Regulations.

He considered whether software falls within the definition of 'goods' in the context of section 61 of the Sale of Goods Act 1979 ("SGA"). Section 61 of the SGA provides that "goods includes all personal chattels other than things in action and money" and this would seem to imply a requirement for goods to be tangible. Judge Waksman accepted that whilst the case law interpreting the SGA suggests that software are not goods due to their intangible nature, this "misses the point that… a definition which is apt for pure sale of goods purposes may not be apt for the purposes of the Regulations". Nothing in the Regulations points to the suggestion that "goods" should be given as narrow an interpretation as in the SGA, where by implication the definition appears to be limited to tangible goods.

Judge Waksman went on to analyse two cases that dealt with the issue of whether the supply of software can constitute the sale of goods under the Regulations. The first was *Accentuate v Asigra Inc [2009] EWHC 2655* and Judge Waksman respectfully disagreed with Tugendhat J's comment in that case that "software is intellectual property not a chattel, but hardware is a chattel".

The second case was that of *Fern Computer Consultancy v Intergraph [2014] EWHC 2908* in which the specific issue to be decided was whether the court had permission to grant service outside of the jurisdiction. An interesting passage from Mann J's judgment in that case which was cited by Judge Waksman supported the view that: "There could be policy arguments which might persuade the European Court that, on a policy basis, "goods" should bear a wide interpretation, particularly bearing in mind that the present digital age has demonstrated a widespread use of the download of digital material which does not correspond to a traditional view of "goods" but which has the same net effect as the provision of physical media – downloads of books and music spring to mind".

Turning to the Defendant's argument that software are not goods because it can only generally be licensed and not "sold", Judge Waksman rejected this proposition. On the contrary, customers receive what is effectively an "unfettered" perpetual licence of the RAS and therefore there "can be no doubt that there is a sale". Judge Waksman availed himself of the decision of the Court of Justice of the European Union ("ECJ") in *Usedsoft v. Oracle [2012] 3 CMLR 44* in reaching this conclusion. Despite the fact that the ECJ decision arose out of a different context, namely the interpretation of the EU Directive on the protection of computer programs, the case provided useful guidance. The ECJ found that an unlimited licence of software to consumers in exchange for the payment of a fee was tantamount to a sale of that software. This wide interpretation was also required to give real meaning to the wording of the EU Directive, failing which suppliers of the software could have simply used the term "licence" instead of "sale" in their contracts to come outside the scope of the Directive's provisions. Applied to the present case, Judge Waksman found that the ECJ decision supported his view that software can be sold and that any interpretation of the meaning of "sale" would depend on the context.

As a result of the reasoning set out above, Judge Waksman also went on to reject the Defendant's other contention that even if part of the Claimant's activities did amount to the negotiation of the sale of goods, these activities were to be regarded as "secondary" for the purposes of the Regulations.

The Regulations were therefore found to apply.

Repudiatory breaches alleged by the Defendant

The Defendant tried to argue breach of the Agreement by reason of Mr Dainty's dealings with Intigua.

Judge Waksman considered that the real question to be asked was whether or not Mr Dainty had been devoting a substantial amount of time and effort to the marketing and sale of the RAS during the period leading up to the termination notice on October 9, 2013.

On the basis of the considerable amount of evidence advanced by both parties, no such breach was found. Although the Judge accepted that Mr Dainty was writing emails and making calls to get "himself up to speed on Intigua", the sporadic cancelled meetings and telephone calls with CA were isolated episodes which had ultimately not prevented Mr Dainty from working for a substantial time for the Defendant. Furthermore, it was in Mr Dainty's interest to conclude sales in respect of the RAS on which he would have earned a commission and evidence that Mr Dainty entered into a contract with Intigua with a start date of January 1, 2014 further supported the finding in favour of the Claimant.

The Claimant was also found not to have breached the restrictive covenants in the Agreement. Indeed the Defendant itself accepted that Intigua's software differed from the RAS and ultimately it was decided that they were not competing products after all.

Quantum

Judge Waksman briefly reiterated the alternative remedies provided by Regulation 17 for agents on termination of an agency, namely the payment of an indemnity or compensation. *Lonsdale v Howard and Hallam Limited [2007] UKHL 32* was cited as the leading authority to calculate compensation by determining how much a hypothetical purchaser would have reasonably paid for the agency at the date of termination.

In this case, the difficulty in assessing compensation in accordance with the above test resulted from the following factors:

1. Whilst sales for the RAS had been strong in 2013 mainly due to negotiations that had taken place in 2012, the future prospects of the software were less certain given the declining sales figures.
2. The non-exclusive nature of the Agreement increased the risk of competition from other agents or from CA itself.

Having considered and dismissed most of the evidence adduced by the quantum experts for both sides, the Judge proceeded to award the Claimant compensation in the sum of GBP475,000. In reaching this valuation he took into account the following:

1. A 25% discount factor due to the non-exclusivity of the agency.
2. The salary of a notional professional employed to run the agency in question at GBP90,000 per annum (somewhere in between the experts' estimates of GBP48,000 and GBP120,000 respectively).
3. The incidence of tax.
4. The Claimant was additionally awarded common law damages for transactions concluded after termination of the agency which were the result of the agent's actions during the agency and GBP15,631.06 for breach of contract due to the Defendant's wrongful termination of the Agreement.

Epilogue

1. *The Software Incubator Limited v Computer Associates Limited [2016] EWHC 1587 (QB)* is of significance as it establishes for the first time that software should be considered 'goods' within the meaning of the Regulations.
2. This case is a reminder that experts must understand that they have an obligation to produce evidence that is accurate and impartial. The Judge was critical of the experts on both sides. Mr Lazarevic (for the Claimant) was criticised for "cherry-picking" information, making the expert's reasoning "suspicious" in the judge's view. Mr Ryan (for the Defendant) was criticised for assuming that the agency would end after just 1 year and again this meant that the judge could not rely on his primary calculation of value. Mr Dainty was instead generally praised for his reliability as a witness.
3. Agency agreements should be checked by agents so that they are aware of any provisions limiting the applicability of the Regulations. Had the Agreement not included a clause validly excluding Regulation 8, TSI would have been entitled under the Regulations to commission for post-termination transactions mainly attributable to efforts during the agency. Luckily, it made no real difference to this case as common law damages for the same amount were awarded instead.
4. In some of the correspondence introduced as evidence in the case, Mr Dainty made disparaging comments of CA that had the potential of damaging his testimony. Parties are strongly reminded to always think carefully before putting pen to paper (although no doubt Shakespeare would have thought LOL!)

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Unmanned Aerial Systems: The Commercial Drones Are Here. Who is Going to Regulate them?

Mia WOUTERS

1. Defining the subject, in what forms do drones exist?

Two categories of Unmanned Aerial Systems – UAS – can be distinguished: (i) Remotely operated vehicles (RPAS) which are operated in real time and managed and controlled from a distance, without human pilot on board and (ii) Autonomous Vehicles – UAV's – which are preprogrammed and fly autonomously. There is no human interference during the operation and they operate on the basis of preprogrammed instructions or artificial intelligence.

In Europe and in accordance with EASA[1] vocabulary we currently use the word "drone" for the first category of UAS, i.e. the RPAS.

In this article we discuss the legal *raison d'être* of the drones, the importance of drones in the European Union and the legal issues that need to be resolved before drones can be put to use to their full potential. (The second category, the Autonomous Vehicles need much more technological refinement before they can be put to commercial use.)

Drones used to be and to some extent still are, associated with military raids and intended for military use only. On the civil side drones originally were the equivalent of toys to be used for recreational purposes. The popularization of the technology and a dramatic drop in retail prices, partially due to the mass production of drones, has, however, contributed to a situation where drones are becoming instruments of high commercial value. Drones are increasingly being integrated into everyday life and the drone industry is fast increasing. It has become a booming business with potentially unlimited opportunities. The ways in which drones are and will be put to use is only limited by our imagination[2]. In a few years time, drones will be an essential part of our way of life. Integration will be as fast and as comprehensive as the Internet was. We will not be able to imagine a time when drones did not exist.

A drone is an unmanned aerial system consisting of a flying component (*the "drone"*), a control station, a data link (C2 link) and any other element that is necessary for the use of the drone such as, for instance, detection an evasion functions, a take-off or landing field, all of which must be taken into account when a certificate of airworthiness needs to be issued[3]. A drone is also a vehicle, and hence it carries a payload. The payload is the most important part of the drone since a drone's sole purpose it to deliver its payload to a specific point. Even a surveillance drone is built solely to deliver the onboard cameras to a point where they can be put to work[4].

Like aircraft, when drones fly they are not intended to stay within national boundaries, hence a worldwide regulation by the International Civil Aviation Organization – ICAO – should be favored[5]. IACO's regulations are, however, based on worldwide consensus, an international coordinated and harmonized regime for drones is thus not to be expected in the near future. We therefore fall back on regional and national regulations.

> Certainly legislation is needed to be able to identify the operator/owner of a drone under all circumstances. However today, and for the foreseeable future, such is not possible.

3. Is there an existing legal framework for drones?

Legally drones are to be considered as "aircraft" and they enjoy, to a large extent, the same legal regime as aircraft. This follows from Article 8 on "Pilotless Aircraft" of the Chicago Convention:

"No aircraft capable of being flown without a pilot[6] shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft."

Besides the implied qualifications of pilotless aircraft in Article 8, a drone comes within the definition of aircraft as classified by Annex 2, Annex 7 and Annex 11 to the Chicago Convention[7].

Autonomous UAS, programmed to fly a route without human interference do not fall under Article 8 and are at present not authorized by ICAO. Also model drones/ aircraft, which are intended for recreational purposes only, will not fall within the scope of the Chicago Convention.[8]

At the European level, Regulation 261/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency – EASA –, mandated EASA[9] to regulate unmanned aircraft systems when used for civil applications[10]. Currently only drones above MTOW[11] of 150 kg. that are not being used for military, customs, police, firefighting, search and rescue or experimental work[12] are regulated and are subject to the same rules as manned aircraft. This classification was based on the assumption that "smaller" drones will only be operated locally. The design and the construction however of small, and even micro drones capable of flying long distances and at high altitudes, had as a consequence that the majority of the drones no longer fall within the ambit of current European legislation. The different national legislative regimes, as they exist, are today not harmonized and so far not one Member State recognizes the accreditation of another Member State.

This means that a drone operator, who receives permission to operate in one Member State, is required to go again through all the formalities if he wishes to operate his drone in another Member State. The European Union thought it was time to draw the whole subject into its acquis.

3. The European Union and drones

The European Union recognizes that drones demonstrate a huge potential for developing new technologies and commercial activities, thus creating jobs and offering new opportunities. On March 6, 2015 under Latvian presidency, the European Commission and the relevant stakeholders promulgated the Riga Declaration[13] on drones. The Riga Declaration reiterates that drones need to be treated as new types of aircraft and focuses in the first place on the issues of safety, liability for damage and the citizen's fundamental rights. The Riga Declaration identified the need for EU-wide rules, since today the European market is hampered by a diversity of legal requirements all different in each Member State. The stakeholders agreed that this European regime needs to be based proportionally on the risk of the drone operation. They seek to find the right balance between reliable safety requirements and an industry-friendly regulatory environment[14]. Rules should thus be simple and performance-based. This will be an exercise between keeping regulations as light as possible but at the same time, safety cannot be compromised and the operator of the drone should be responsible for its operations under all circumstances.

In line with the risk-based approach as laid down in the Riga Declaration, EASA proposed to set up 3 categories of UAS drone operations. As indicated earlier, the current European legislation only regulates drones with a MTOW of more than 150 kg. The proposal currently tabled[15] by EASA sets aside this limit of 150 kg. Depending on the risk that the operation of the drone will entail, drones will fall within one of the 3 defined categories. Each category has its own requirements and regime. Weight is no longer the decisive factor and drones will be categorized whether into

- (1) the Open Category - This category encompasses drones that represent a low risk. Safety of operation of these drones is secured by limiting their operation and demanding that they have certain functionalities such as Geofencing[16] and I-Drone[17]. Enforcement of the rules under this category should be mainly carried out by the national police force; or
- (2) the Specific Category - Operation of these drones represents a medium risk. They will need authorization from a National Civil Aviation Authority, possibly assisted by a specialized entity[18]. The operation of this category of drones must be carried out according to a manual of operations; or
- (3) the Certified Category - This category represents the highest risk and drones that fall within this category can only be operated under conditions comparable to those of commercial manned aircraft. Supervision with regards to, for instance, licensing, maintenance, operations, training etc. is carried out by the National Civil Aviation Authority and by EASA.

4. Issues that will need further refinement

For the time being, drones are the subject of more questions than answers. The operation of drones causes a few concerns, some of which will now be discussed.

A. Safety & Security

Safety and security are the major challenges that must be overcome rather soon. There seems to be a general consensus that unmanned aircraft must not be segregated from other airspace users in order to reach its full potential and should be integrated into the existing manned aviation space[19]. The integration of drones into non-segregated airspace does bear, however, risks for manned aircraft. Thus the major concern is the avoidance of mid-air collisions of manned and unmanned aircraft. Technology may be of great help to introduce specific anti-collision systems. Air Traffic Management will have to support drone traffic, and airspace restrictions may be required.

B. Civil Liability in International Transport

Since the regime of aircraft is applicable to drones, the Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 1999 will need to be fully applied in case of (future) transport of passengers and cargo by drones.

Third Party liability on the other hand is a bit of a vacuum. Although in aviation, the Rome Convention[20] was drafted to cover liability for persons on the ground suffering damage caused by aircraft in flight or any person or anything falling there from, it will be of little use when we are dealing with drones. Under the Rome Convention it is "the operator" who bears the consequences of the damage and the owner of the aircraft is presumed to be the operator unless proven differently. This "operators' criterion" of the Rome Convention will, however, be difficult to define with regard to drones. Who is operating the drone and who is the owner of the drone will remain, more often than not, an enigma under the current state of affairs. Certainly legislation is needed to be able to identify the operator/owner of a drone under all circumstances. However today, and for the foreseeable future, such is not possible. Also damage from "in flight collision" is not covered by the Rome Convention, whilst for drones this might be the larger part of the third party liability. Furthermore, the Rome Convention imposes strict liability on the operator but it also provides for a monetary limitation of this liability depending on the weight of the aircraft. Drones might not weigh a lot but the damages they can inflict can be tremendous. The monetary limitation will not be in proportion to the potential damage a drone can inflict. It could lead to an exoneration of liability for lightweight drones[21]. The Rome Convention, further, only seeks to give relief for damage caused to people on the ground brought about by "foreign" aircraft. The aircraft needs to be registered in a different country than that where the damage originated. This, however, could easily be overcome by expanding the field of application and making the Rome Convention applicable to both foreign and native aircraft as was carried out in Belgium. As a last remark, it should be noted that the Rome Convention has not been ratified by a sufficient number of Member States to be of importance.

We can only but conclude that there certainly is a need for an international regulatory framework governing third party liability and regulating situations of damage suffered by third parties on the ground

(for instance crashes) and for damages generated by in-flight collisions[22].

C. Data Protection and Privacy

As drones become readily available at lower costs, the threat to privacy becomes more eminent and more invasive. The risk of privacy does not emanate from the drone itself but from the technological level of the payload it carries. Due to their mobility and their ability to combine several techniques such as cameras, microphones, tracking systems, etc. drones can give rise to the unqualified collection and processing of personal data.

The relevant European legal framework on information gathered by drones is currently laid down in the EC Data Protection Directive 95/46[23] which states that the processing of data gathered by drones needs to be fair and used for specific purposes. The Data Protection Directive prohibits the processing of personal data unless consent has been provided. The only exceptions hereto are the use of data related to activities which are carried out in the course of private or family life, for reasons of law enforcement or national security, and the prohibition only applies in a restricted manner to journalism and for artistic or literary expression.

On 4 May 2016, the official texts of the new General Data Protection Regulation – GDPR – and the Directive have been published in the Official EU Journal. They will apply as of May 2018[24]. New in the GDPR is the privacy by design and privacy by default which requires the manufacturers of drones to build in physical mechanisms, at the latest by 2018, to protect the processing and use of personal data. The GDPR also requires that companies operating commercial drones for collection of personal data undertake a Privacy Impact Assessment, thus assessing the potential risk of a project interfering with an individual's privacy[25].

However in sum, however crucial privacy laws might be, it is not an absolute right and it must be counterbalanced by the use of data for legitimate purposes.

D. Cyber-crime

The threat to drones from cyber-attacks is real and imminent. As a first step we need to understand, identify and accept the existence of cyber-attacks.

Drones with their total dependence on digital components are potentially highly vulnerable to the cyber attacks of hacking, jamming and spoofing. Sadly the laws in relation to cyber security have not yet matured. National efforts are either inadequate or non-existent and possible enforcement provisions are often poorly designed with a punishment which is disproportionate to the resulting economic loss or the breach of safety. Although some local laws may tackle a few issues, it remains necessary to take a comprehensive look at the problem and come up with a unified approach on how to address cyber-attacks[26].

E. Insurance

Although still in their infancy, initiatives are emerging at a fast pace. The cover available presently is still molded on coverage for traditional aviation. However, drones present challenges for the insurance market which are different from conventional aviation risks. There is no specific international obligation to buy insurance, but the need to have insurance emanates from different rules which make insurance obligatory, depending on the kind of activity the drone is involved in. See, for instance, Regulation 785/2004[27] on insurance requirements for air carriers and aircraft operators.[28]

F. Rules of the air, awareness of operations (traffic rules)

Everybody operating a drone, albeit drones belonging to the open category, specific or certified, should at least have a basic knowledge of the rules of the Air. The more risky the operation, the more the knowledge and requirements to equal the operation of manned aircraft should exist.

Conclusion

The many advantages and potential benefits of drones cannot be ignored, but oversight and enforcement powers should keep pace with the technological developments. The fast emergence of civil drones as the cutting edge of technology has outpaced governments to produce adequate and harmonized rules. Aviation-based legal regimes for the civil use of drones exist or are underway at the international, regional and domestic levels, but they remain basic and more needs to be done. The legal framework for drones in Europe is for the larger part still a patchwork of national regulations which is in need of closing gaps and shortfalls.

At the European political level there is full support for the further development of drones and their ancillary legal regime[29]. In their opinion the development of civil drones hinges on 3 necessary preconditions:

- (1) There must be a regulatory framework that covers all aspects of the operation of the drone, but it should not be over burdensome. If the framework would be too heavy, drone operations will be pushed into illegality. The legislation needs to be drone-friendly but at the same time it needs to secure safety and security and protect the privacy of private citizens.
- (2) Drones must be able to use the same airspace as manned aircraft and technology must be sufficiently advanced to allow the full integration of drones in civil airspace.
- (3) There needs to be a sufficient frequency spectrum to allow drones to be safely operated from a distance which means that the current spectrum of frequencies is in need of a harmonized allocation and use. Reliable, stable and secure communication is an important factor in unmanned aviation. The physical control of the drone depends on it.

The civil use of drones is at the eve of exploding and not all rule makers have realized this in time. We are entering uncoordinated and badly regulated times. This situation will automatically correct itself in the end but in the meantime, unfortunately, the public is vulnerable and unprotected against legitimate operations which might cause damages, as well as against operators with a less honest character.

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1 The European Aviation Safety agency (EASA) is the European Union's Authority for aviation safety. The main activities of the organization include strategy and safety management, the certification of aviation products and the oversight of approved organizations and EU Member States.

2 Drones are used in the public field for dangerous missions where it is too hazardous to deploy manned aircraft, they are being used for purposes of journalism and creation of movies, monitoring of growth and crop spraying to prevent funguses. They are extensively used to inspect oil pipelines for transport in remote areas; micro drones are programmed to behave like bees and fertilize flowers, etc.

3 Under the Chicago Convention, the manipulator of the unmanned fight's control is "the pilot", the "controller" is the air traffic manager and the "operator" is the entity engaged in aircraft exploitation, see Kristian Bernauw, Drones: the emerging era of unmanned civil aviation. in Zbornik Pravnog fakulteta u Zagrebu 2016, p. 226.

4 Avner and Uria Yarkoni, Drones – a glimpse into the future of Air Traffic, IHT 16/2, Larcier, p. 192.

5 ICAO is a specialized agency of the United Nations, created in 1947 by the Convention on International Civil Aviation of 1944 also known as the Chicago Convention. The Chicago Convention currently counts 191 signatory states and ICAO is charged with coordinating and regulating international air transport. It develops international Standards and Recommended Practices which States will have to take into account when developing their own national civil aviation regulations and is presently the primary source of International Air Law. See also Michel Milde, International Air Law and ICAO, Eleven International Publishing, 2012.

6 The term "*aircraft capable of being flown without a pilot*" indicates, according to ICAO, a situation where the pilot is not on board. See: "Manual on Remotely Piloted Aircraft Systems" ICAO Doc 10019 AN/507 first Edition 2015.

7 Kristian Bernauw, Drones: the emerging era of unmanned civil aviation. in Zbornik Pravnog fakulteta u Zagrebu 2016, p. 231.

8 ICAO, Unmanned Aircraft Systems (UAS), Cir. 328 AN/190 (2011).

9 The European Aviation Safety Agency – EASA – entered into full operation in 2008 with the adoption of Regulation 261/2008 also called the Basic Regulation. It was established to maintain a uniform level of civil aviation safety in Europe.

10 Gustavo Boccardo, "European Aviation Safety Agency" in The Law of Unmanned Aircraft Systems, edited by B. Scott, p.135, Wolters Kluwer, 2016

11 MTOW means the 'Maximum Take Off Weight' which equals the maximum weight at which the pilot is allowed to attempt to take off, due to structural or other limits.

12 By virtue of a combination of article 2 and Annex II (i) of the consolidated text of Regulation (EC) No 216/2008 of February 20, 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC Basic Regulation, commonly referred to as the Basic Regulation

13 Full text of the Riga Declaration is to be found on: http://ec.europa.eu/transport/modes/air/news/doc/2015-03-06-drones/2015-03-06-riga-declaration-drones.pdf

14 Vincent Correia and Noura Rouissi, "The European Union and civil drones: the Riga declaration and the future of the European RPAS industry." edited by B. Scott, p.124, Wolters Kluwer, 2016.

15 Advance Notice of proposed Amendment 2015-10 of EASA.TE.RPRO.00040-003 Introduction of a regulatory framework for the operation of drones 31.7.2015.

16 Geofencing is the possibility to automatically limit the airspace a drone can enter.

17 I-Drone refers to the capability to interrogate the drone and request information regarding its operator, its operation etc.

18 Called: Qualified Entity (QE).

19 Kristian Bernauw, see infra, p. 234.

20 The Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, commonly called the Rome Convention, is an international treaty, concluded in Rome on October 7, 1952. It entered into force on February 4, 1958, and as of 2016 has been ratified by 49 states. Canada, Australia, and Nigeria were previous state parties but have denounced the treaty.

21 Kristian Bernauw, see infra, p. 246.

22 Anna Masutti, Drones for Civil Use: European perspective on third party liability and insurance, IHT 16/2, Larcier, p. 252.

23 Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, from the European Parliament & Council, OJ L281, 23/11/1995, p. 31-50.

24 The Regulation came into force on May 24, 2016, and will apply as from May 25, 2018. The Directive entered into force on May 5, 2016 and EU Member States have to transpose it into their national law by May 6, 2018.

25 Alan Meneghetti and Philippa Townley, Drones and the impact they may have on human rights under the ECHR, IHT 16/2, Larcier, p. 236.

26 Deepika Jeyakodi, "Cyber Security" in The Law of Unmanned Aircraft Systems, edited by B. Scott, p.67, Wolters Kluwer, 2016.

27 EU Regulation 785/2004 of 21 April 2004, OJ L 138/1 of April 30, 2004.

28 Nicholas Medniuk, "Aspects of Insurance for unmanned Aircraft Systems" in The Law of Unmanned Aircraft Systems, edited by B. Scott, p.89, Wolters Kluwer, 2016.

29 Eg: Communication from the Commission to the European Parliament and the Council COM (1014) 207; Working document of the European Parliament of 5.4.2015 on safe use of remotely piloted aircraft systems COM(2014)0207; Draft report of the European Parliament of 19.6.2015 on safe use of remotely piloted aircraft systems 2014/2243; Advance Notice of proposed Amendment 2015-10 of EASA. TE. RPRO.00040-003 Introduction of a regulatory framework for the operation of drones 31.7.2015

Tackling Corporate Corruption in France: Does the New Sapin II Bill Target the Right Issues?

Anna WINDEMUTH

With insights from:

Philippe Goossens
Partner at Altana Law

Kami Haeri
Partner at August & Debouzy

Bryan Sillaman
Partner at Hughes, Hubbard & Reed

Baptiste Pécriaux
Business Integrity Advocate at Transparency International

Although France signed the OECD's Convention on combating foreign bribery almost 20 years ago, the French judiciary has never convicted a company under its purview[1]. At the same time, French companies have sustained fines in the billions from foreign regulatory authorities like the U.S. Department of Justice[2], and the OECD has published several scathing reports on France's enforcement efforts[1].

"It's the French paradox", August & Debouzy partner Kami Haeri remarked in an interview at his law firm's Paris headquarters. "We already have the laws, but we're just not implementing them".

The French Penal Code has included legislation criminalizing foreign bribery for years, and features provisions that were only recently adopted in the 2010 UK Bribery Act, Haeri noted, yet the UK's system is praised worldwide. Across the Atlantic, the U.S. Foreign Corrupt Practices Act continues to fine companies around the globe[3].

Despite its somewhat late arrival to the active fight against corruption, France may have found its own brand of prevention through Sapin II. Named after its original sponsor, Minister of Finance Michel Sapin, the law was approved by the French Senate in July, and will be subject to public amendments before the General Assembly confirms its adoption in the fall[4].

Some of the law's most notable features on the fight against corruption include:

1. The creation of a French Anti-Corruption Agency charged with supervising compliance systems, investigating acts of corruption and imposing penalties.
2. An obligation for companies with at least 500 employees and an annual gross profit exceeding € 100 million to implement a compliance program that satisfies a list of criteria. If a company's president, CEO, manager or board of directors member fails to satisfy this requirement, they and the company can be subject to injunctions and respective fines of up to € 200,000 and € 1 million.
3. The creation of a "public interest" agreement, often referred to as a Deferred Prosecution Agreement (DPA) *à la française*, for companies facing corruption charges. Such an agreement would allow companies to avoid a criminal conviction, and thus exclusion from certain public markets, by paying a fine and instituting a compliance program.
3. Enhanced protection for whistleblowers and financial compensation from the new Anti-Corruption Agency for expenses incurred in reporting acts of corruption.
4. Additional fines and sanctions, including a requirement for convicted companies to fund and develop a compliance program under the agency's supervision.

> Sapin II also highlights individual engagement in compliance by providing enhanced support for whistleblowers.

While the law continues to develop provisions of the French Penal Code that existed before, many view its preventative measures, sanctions against top company executives, enhanced whistleblower protection and DPA provisions as reflections of Anglo-Saxon compliance legislation[5].

"The United States was one of the first OECD signatories to tackle corruption aggressively, and eventually pursued

companies in countries whose enforcement environments seemed lacking", Hughes, Hubbard & Reed partner Bryan Sillaman said in a phone interview.

"I think that the OECD's peer review process, driven not only by the United States but also by a growing international consensus against corruption, finally took hold in France", Sillaman explained.

Although companies that are explicitly targeted by the law probably have sufficient compliance programs in place already, Haeri noted that tweaks to their training programs, compliance budgets and internal sanctions will likely follow if the law is adopted.

"I also think that companies that are not explicitly targeted by the law will become more aware of anti-corruption measures and follow these as guidelines, even if they are not under a legal obligation to do so", Haeri added.

However, others have argued that putting an administrative agency in charge of monitoring companies would hurt the judiciary's authority, and that a determination by an administrative agency might not mean much on the international stage.

"I don't see why this accreditation system would keep a foreign authority from judging differently from the French authority", Altana Law partner Philippe Goossens said in a phone interview. "And what if the agency approves of a company's compliance system, and then two weeks later a prosecutor investigates and finds an act of corruption"?

Goossens said that while a French administrative agency's opinion is not worthless, it does not solve the root of France's problem: a lack of judicial follow-through. Instead of creating another body with a set of compliance criteria which he deems vague, Goossens said he would have increased the powers of French prosecutors, who do not have much investigative authority in the French civil law system.

Unlike in the common law system in Britain and the United States, where prosecutors collect relevant information for the case and argue their position in front of a judge, French prosecutors supervise the investigation led by a judge, who may act as an inquisitor rather than as an arbiter[6].

Goossens further suggested enhancing training on corporate operations so that prosecutors can have productive dialogues with companies rather than just impose sanctions.

"I also think there should be a European harmonization of judicial policies in the fight against corruption", Goossens said. "The problem is that each country is very attached to the policies of their own penal system".

Haeri noted that the agency would give more structure to France's authority against corruption, and that it would also embody French anti-corruption efforts on the international stage.

"We have to give the compliance system a stronger identity", Haeri said, adding that the agency would communicate extensively with companies before imposing sanctions.

Although the agency's effectiveness will depend on its final budget and substantive authority, it is not sufficient in isolation, Sillaman said.

"I think it's a very important element of an overall anti-corruption approach, but I think it has to be paired with a more aggressive enforcement environment", Sillaman, a member of his firm's anti-corruption and internal investigations practice group, explained.

He added that the United States initially faced the opposite problem. While the Department of Justice and the Securities and Exchange Commission provided strong enforcement, companies were not given explicit compliance instructions before the FCPA guidelines were released in 2012.

"In France, the question will be whether enforcement picks up as well", Sillaman noted.

The law also aims to personalize the anti-corruption movement by holding corporate leaders liable for their companies' infractions. Regulators have repeatedly found that by the time corporations are fined, they have already made a sizeable profit from their illegal activities that can offset the penalty. Prison sentences and personal fines are perceived as stronger deterrents[7].

"Executives will not agree to direct companies if they are personally exposed to sanction risks", Haeri said. "It makes top management the fundamental executors of this project, it implicates them personally", he added, predicting that their compliance budgets will surge in tandem.

While Goossens agrees that "compliance works in a very top-down manner", he noted that a CEO is not in charge of a company's code of ethics or training programs.

"I would have allowed the CEO to delegate this responsibility to a compliance officer", Goossens said, whose expertise he said would be more relevant.

Sapin II also highlights individual engagement in compliance by providing enhanced support for whistleblowers. Although it does not go so far as to compensate whistleblowers with a percentage of the company's fine, as does Dodd-Frank legislation in the United States, where whistleblowers have received millions in compensation[8], the law ensures compensation for possible costs such as legal fees, anonymity protection, and support in case of retaliation.

The new legislation would consolidate France's various statutes on whistleblowers, Business Integrity Advocate at Transparency International France Baptiste Pécriaux said in a phone interview. However, Pécriaux noted that the law's whistleblowing protection measures only apply to the denunciation of illegal activity, and would therefore exclude individuals like LuxLeaks whistleblower Antoine Deltour.

"Sapin II is definitely progress, but the law's definition of what constitutes a whistleblower is not expansive enough", Pécriaux said, noting that whistleblowers should be held to a standard of "severe threat or harm to the general good" rather than strict legality. However, Pécriaux applauded the notion of reimbursing whistleblowers for their legal fees and

any additional damages they may suffer from denunciation, such as restricted job prospects.

Haeri also supports the new whistleblower legislation, and suggested that France may have lagged on this effort because of a cultural aversion toward denunciation.

"It stems from our history", Haeri said, referring to denunciations against Jews and communists during the Second World War. "In French culture, one does not reward a denouncer".

Transparency International further vouched for the introduction of DPAs in corruption cases – allowing companies to avoid a criminal conviction – and was pleased to see a modified reintroduction of this provision after the Conseil d'État recommended its removal in March[9].

"The idea is to provide an additional mechanism for prosecutors that is more streamlined", Pécriaux said. France's civil law system is not well suited to pursuing corruption cases on a global scale, Pécriaux explained, citing limited funds, slow procedures and the inherent complexity of financial cases.

At the same time, Pécriaux said that publicizing the outcomes of DPAs and prosecuting natural persons are essential to the legislation's success. Critics have portrayed DPAs as a means for profitable companies to avoid their legal responsibilities, and have expressed concerns that the Anglo-Saxon practice would not translate well into the French penal system[10].

Sillaman agrees that the concept of negotiated settlements "doesn't seem to fit squarely in the French legal system", but said that the provision could help improve efficiency and encourage self-reporting.

"There has to be a very negative consequence hanging over the company's head for this type of resolution to gain traction and to work", Sillaman added, citing the U.S. case against Enron, the American energy company that collapsed after many of its executives were indicted[11].

Although Sapin II will still undergo changes before it is approved by the General Assembly, Goossens said that he does not find the law ambitious enough, and that it does not target France's procedural issues. "It doesn't take a long-term view of the fight against corruption", Goossens said, adding that ensuring an effective compliance system is not enough to vanquish the beast. "Corruption is a culture".

While the regulatory effort is well-intended, Goossens said, he hopes that future measures will be more exhaustive. "The fight against corruption isn't the Tour de France. We don't need all these intermediary stops", he noted.

Although Transparency International France denounced the removal of the DPA provision as a watering down of Sapin II, the organization's periodic reports on the law have grown more supportive since the provision was modified and reintroduced[12].

"Once Sapin II is approved, France will have one of the best legal instruments against corruption in the world, at least in terms of the actual text", Pécriaux said. "The real challenge will be implementing it", he added, noting that France's judicial system has suffered from budget cuts since the 2008 crisis.

Sillaman suggested that the initial interpretation and application of the law probably won't be perfect, like most laws of such magnitude, and that it will take time to determine which aspects of the law are most effective.

"I think it's overall a very positive development", Sillaman said. "That type of self-reflection for companies is essential".

For Haeri, the success of the law will depend on how well the new agency communicates with companies. He is also optimistic about the French DPA provisions, and hopes that France will be able to emulate the UK in its marketing of the law.

"We're heading in the right direction", Haeri said. "The question is whether we will be able to make Sapin II an attraction in the French business world. A real event".

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1 http://www.oecd.org/daf/anti-bribery/france-oecdanti-briberyconvention.htm

2 https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial

3 http://www.financierworldwide.com/the-foreign-corrupt-practices-act-not-just-a-us-company-concern/#.V5XrXZN94dU

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Extension of Family Law Arbitration to Disputes Regarding Children in England and Wales

Flora HARRAGIN

The Institute of Family Law Arbitrators (IFLA) launched the Family Law Arbitration Scheme in early 2012. The scheme created a new form of dispute resolution for family law disputes in England and Wales. It enabled couples to appoint a chosen arbitrator to deal with their dispute and impose a binding award.

Until very recently, Family Law arbitration was confined to financial and property-related disputes. However, the scheme was extended in mid-July 2016 to allow parents to arbitrate disputes regarding their children and 48 arbitrators have already been trained under The Children Arbitration Scheme.

There has been strong judicial support for arbitration in the family law context and standard arbitration orders have been developed which have been approved by the President of the Family Division.

For many parents, mediation provides the appropriate forum for resolving disputes regarding their children. It is far better for the children if their parents can agree matters between themselves. However, it is not possible or appropriate for parents to mediate their disputes in all types of cases. Sometimes, parents are able to co-operate to a certain extent, but need the input of an arbitrator who can determine the outcome, rather than a negotiated-agreement-facilitator / mediator.

Certain types of disputes regarding children will, at least initially, be excluded from the scope of The Children Arbitration Scheme; for example, cases involving disputes with a cross-border element. However, it is anticipated that the scope of The Children Arbitration Scheme will be extended further in the future.

What are the advantages of arbitration as opposed to court proceedings?

1. Informality

Arbitration hearings are typically conducted in more informal settings than court hearings. Parties tend to feel more relaxed and more able to deal with the issues at hand. The more informal format lends itself much better to effective co-parenting in the future. The court process can inhibit the parties' abilities to meet their children's or their own needs, and harm their future relationships. Arbitrators have the luxury of time and a manageable case-load and so take greater care to explain legal jargon and put the parties at ease, than their more abrupt court counterparts.

2. Efficiency

The arbitration process is neat and efficient. Cases can be heard much more quickly and therefore parties tend to get decisions much more quickly.

3. Cost

Greater efficiency also means greater costs savings. Although there will be the upfront cost of the arbitrator, which can put parties off initially, arbitration proceedings often cost less than court proceedings because they are dealt with much more quickly and therefore save a lot of solicitor correspondence. The process is also more stream-lined. Arbitration hearings do not tend to last as long as court hearings and so often cost less. They are more likely to start on time which means that the parties do not have to pay for their lawyers to wait around at court until the Judge is able to hear them.

4. Continuity

Although the court system is meant to ensure judicial continuity, in practice this is not always possible, and if it is, it can cause delay. Once appointed, the arbitrator will remain involved and conduct the entire arbitration up until the imposition of the award. Short notice hearings are possible and can be dealt with informally over the telephone or Skype. Unexpected problems can, therefore, be resolved quickly by someone who is familiar with the case and the family.

5. Confidentiality

This is one of the main attractions. The arbitration process is completely confidential and there is no risk of media intrusion. This is of course likely to appeal to high-profile parties and those in the public eye. With arbitration, the matter remains private.

6. Flexibility

The parties can choose the date and time for the arbitration hearing. They can choose a convenient venue and even the procedure to be adopted. For example, some issues may not require the parties' attendance and so can be dealt with by email. Most importantly, the parties can choose their arbitrator. The court process is much more prescriptive, which can also be expensive, and does not afford the parties anywhere near as much choice. For example, the parties cannot choose the date and time of a hearing, the venue, the procedure or the Judge.

7. Enforceability

Arbitration awards are binding and enforceable by the court as if they were judgments.

The extension of the Family Law Arbitration Scheme to disputes regarding children is good news for separating parents who will have access to a qualified, experienced and reliable arbitrator able to take their dispute from start to finish without the frustration, delay and change of judicial tack which is inherent in what is left of the family justice system in England and Wales.

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L'électrochoc du numérique

Jean-Pierre BUYLE & Stanislas van WASSENHOVE

Le numérique est l'outil de coopération incontournable entre les acteurs de justice du 21e siècle ?

Les nouvelles technologies se sont massivement développées dans le domaine du droit : courrier électronique, logiciel de gestion de la facturation, numérisation des documents, base de données, GED, CRM…. De nouveaux outils apparaissent destinés à l'amélioration de la communication, de la collaboration, de la recherche et de l'automatisation tant en interne qu'en externe (Extranet, Visio-conférence, plateformes collaboratives). Avec l'apport de l'intelligence artificielle, se développent des plateformes de recherche de la connaissance, de production automatisée de documents ou encore de gestion de projets.

Cette révolution technologique est accélérée par l'innovation disruptive des *Legal Techs*

Ces évolutions vont ouvrir des portes à des services juridiques de proximité par l'automatisation du service, la réduction des coûts et la mise à disposition gratuite de la connaissance. Elles vont pousser les acteurs juridiques à externaliser des tâches à la valeur ajoutée trop faible ou encore à revoir leurs structures de coûts.

En effet, nombreux sont, aujourd'hui, les particuliers ou les PME à se passer d'un avocat pour réaliser des actes juridiques simples ou des contrats mais aussi pour porter leurs affaires devant la justice. Simple d'utilisation, avec un service rendu immédiat, des explications claires et intelligibles, une transparence sur les prix, ces nouveaux acteurs séduisent de plus en plus d'utilisateurs. Mais ce qui fait aussi leur succès, au-delà de tous ces avantages, ce sont les tarifs proposés, bien en deçà de ceux des professionnels du droit. Les *Legal Techs* contribuent ainsi à démocratiser le droit et la justice. Ces nouveaux entrants vont augmenter la taille du marché du droit, en créant de nouveaux besoins – ou en répondant à des besoins non satisfaits (petits litiges, services en ligne...).

Les *start-ups* se sont multipliées dans des domaines divers : l'automatisation de documents, le référencement des avocats, la résolution des litiges en ligne, la prospective des décisions, l'accès à la connaissance en ligne.

Le marché du droit a donc entamé sa mue. Certains craignent "l'ubérisation» : une part de la valeur de la prestation juridique pourrait passer des mains de l'avocat à celles des intermédiaires et prestataires non réglementés, plus efficaces en marketing et créations de services.

Les professions juridiques ont tardé à développer leur présence en ligne ainsi qu'à remodeler leur offre afin de s'adapter aux particularités de la vente sur Internet. Les entrepreneurs ont su tirer parti de cette absence d'adaptation de la part des métiers du droit, et se spécialiser dans la mise en place de plateformes permettant aux avocats d'acquérir de la clientèle par le biais d'autres canaux.

Une vision prospective basée sur les valeurs fondamentales de l'avocat

Comment réagir à ce mouvement ? Non par la peur ou la résistance, mais en développant une vision prospective en se recentrant sur la plus-value de l'avocat. Celle-ci repose sur le capital de confiance que la profession véhicule avec ses valeurs essentielles d'indépendance et de secret professionnel. A cela s'ajoutent des compétences et des expertises pointues (savoir-faire) auxquelles devraient se combiner une attitude bienveillante d'écoute et de collaboration (savoir-être). C'est sur base de ce capital que la profession doit se réinventer. Tous les avocats sont concernés. Ils doivent être aidés à franchir cette étape et à utiliser les nouveaux outils pour construire leur avenir sereinement.

Et ce n'est pas seulement les avocats qui doivent se transformer mais tous les acteurs de justice. La Belgique a pris du retard. La Justice est en papier. Les communications se font pour la plupart par courrier. Les agendas ne sont pas en ligne. Les magistrats détiennent un matériel informatique obsolète.

« Nous devons être des acteurs de l'informatisation de la Justice et prendre nos responsabilités. En sachant que les caisses de l'État sont vides, si nous ne bougeons pas, la Justice, en Belgique, restera

ce qu'elle est : une Justice en papier. Ce qui a manqué à la Justice jusqu'à présent, c'est une administration forte et une vision » (Jean-Pierre Buyle, Président d'Avocats.be).

Il n'est pas trop tard, mais il est temps de monter dans le train du numérique, c'est pourquoi Avocats.be organise, en collaboration avec l'UIA et le Barreau de Bruxelles, une rencontre des acteurs de justice sur « L'Electrochoc du numérique », le 15 décembre 2016 au siège de la FEB, rue Ravenstein 4 à 1000 Bruxelles.

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Brexit: What Are the Challenges Ahead from a Legal Perspective?

Florentino CARRENO & Carolina FERNANDEZ

1. Introduction

On June 23, 2016, the United Kingdom's electorate voted for the UK to leave the European Union (UE). Following the vote, the UK Government and EU representatives initiated a process of negotiation towards an agreement that will set up the conditions on which the UK departure from the EU will take place.

The purpose of this article is to describe, from a legal perspective, the fundamental challenges that the UK and the EU will face in the coming months and years to define and accommodate the new relationship that must be negotiated and agreed as a result of the recent UK referendum. Accordingly, we will review the origin and fundamental pillars of the EU, the previous experience of EU negotiations with third countries and how they will most likely shape and define the scope of the negotiation with the UK.

It has been stressed that the UK is bound by its referendum but not less than the EU is bound by its own legal principles setting the limits that must be respected if the EU wants to protect its own identity. All EU member states are bound by EU treaties and required to attain the Union's objectives. Regardless of the final outcome, the new relationship will necessarily entail a paradigm change that will be defined not only by political negotiations but also by the rule of law, as Prof. Dougan stated clearly in the House of Commons: "We need to bear in mind the withdrawal agreement cannot offer the UK anything that would be incompatible with EU law itself. The EU, through this withdrawal agreement, cannot give us anything that the EU institutions are not competent to offer us."[1].

Thoroughly understanding this statement will be critical for the success of the future negotiations.

2. The Unique EU Legal Nature

The early European Communities, the heart and soul of the current European Union, were created as an instrument to keep peace among the 20th century traditional war enemies. The founders of the European dream rightfully believed that reinforcing the economics ties and the common goals would enable Europe to live in peace and enjoy an increasing level of welfare, previously unknown in Europe.

Cooperation started as an intergovernmental relation, without interfering with the sovereignty of the first member states. In 1949, France, Italy and the Benelux countries started a customs union negotiation with the intention of bringing some parts of Germany into the agreement. At the time, the UK government did not show any interest in participating in the negotiation. What started as a free trade agreement for coal and steel[2], signed in 1952 in addition to the Customs Union Treaty[3] already implemented among "the six" is now a single market ruled by the "Four freedoms" where goods, services, workers and capital move across Europe in without barriers[4].

Twenty-first century Europe does not know borders. Its citizens consume Spanish or Italian fresh products, shop in French supermarkets, drive German cars, study in Polish universities, fly with an Irish airline and relocate in different member States to work or to retire without having to apply and obtain visas or permits. That is the Europe where half of today's Europeans were born into and that we take for granted.

However, the result of cooperation among the member States could have been different, and the Single Market could have been like any other free trade area in the world. What has made the European integration process the big success that we enjoy nowadays?

One of the key factors to this success is the implicit understanding among the member States that a supranational law, originated in the European Community Treaties but with its own autonomous legal sources, was part of the deal. This supranational law has defined a whole new system of rights and obligations known as the *acquis communautaire*[5], which is effectively applied and enforced by individuals and economic operators in their activities across Europe.

This new legal system was a complete different category in itself. It was neither national law nor an international treaty, strictly speaking, but rather sourced and legitimated in the sovereignty transferred to the European institutions by the member States, as expressed or implied in the European Community Treaties, and endorsed by the member States along decades of European integration.

This new legal system allowed the Single Market to be founded on a number of shared principles and goals that went much further than the principle of reciprocity found in international conventions. These shared principles and goals were formulated and implemented by a new law, independent from the member States legislators, and enforced by a new court, independent from national courts.

Already in 1972, Judge Pierre Pescatore published "*The law of integration: emergence of a new phenomenon in international relations, based on the experience of the European Communities*"[6], where he outlined how this new European law could not be understood without the purpose of achieving European integration and its differences with traditional international law. In 2016, we must acknowledge that European integration cannot be explained without the role played by this new legal system created by the treaties.

The principles of primacy and direct effect of European law elaborated by the European Court of Justice (ECJ)[7], the possibility of enforcing this law before national courts in public and private controversies and the uniform interpretation of European law by the ECJ have been, and still are, fundamental pillars of the European integrations process. The Single Market has been built on ECJ's judgements.
Bearing this in mind, the future UK exit from the Union and the negotiation of a new set of rules to govern the relationship between the UK and the EU will have an impact no only on trade barriers, harmonization of standards, indirect taxation and the European passport of financial operators but also, and fundamentally, on the new paradigm and nature of the bond that will link us in the future.

One of the issues repeated and debated through the Brexit campaign was the desire of Brexit supporters to recover "full legal independence" and be released from subordination to the European Court of Justice. Therefore, we cannot expect the future relationship between the UK and Europe to be ruled by a common law rooted in a treaty with its own autonomous sources of uniform law. It is more likely that the relationship will be agreed in an international convention that will be subject to the principle of reciprocity and international law.

The different options currently being debated in the UK go from a very distant relationship in the framework of the WTO[8] to a very close relationship like the European Economic Area (EEA) Agreement reached with most of the EFTA[9] member states, or even just a Free Trade Agreement (FTA) like what the EU has with Canada. None of the different options requires subordination to a supranational legal system as does EU membership.

Free trade and single market are different concepts. Access to the Single Market presupposes respect for all four of the fundamental freedoms of the EU (including free movement). Currently, only the countries that are part to the EEA have full access to the Single Market.

As explained in a recent debate in the House of Commons, "The Single Market is a very clear and defined entity. It is based on an incredibly sophisticated set of legal, administrative and judicial arrangements which seek to overcome many of the types of disruptions to crossborder trade that other types of agreements could only ever dream of tackling."[10]

Free trade and single market are different concepts. Access to the Single Market presupposes respect for all four of the fundamental freedoms of the EU (including free movement).

The UK may seek to enter a free trade agreement or to gain access to the Single Market, but negotiators will have to bear in mind that the EU must respect the pillars of EU law and will not be able to offer the UK anything that is incompatible with EU law itself.

3. Previous Experience Negotiating Agreements With Third Countries

When the EEA Agreement was being negotiated, it became apparent that it was not possible to achieve a similar treaty with the EC member States in the internal market by entering an agreement for a particular sector only. EU legislation in one field is often dependent upon legislation in other neighboring fields to be applied efficiently.
The conclusion of the EEA Agreement

required all parties to identify and examine all aspects of the *acquis communautaire* that were relevant for accessing the Single Market and those that posed a problem for the EFTA countries. The process was a long and difficult five years, [11] but the EFTA countries finally agreed to go as far as "the fullest possible realization of the free movement of goods, services, capital and people with the aim of creating a dynamic and homogeneous EEA."

One of the main issues under discussion was whether the EU rules that were applicable and enforceable in the Single Market, regardless of its implementation by the member States, would also be applicable by the EEA contracting parties. During negotiations, it was clear that the Nordic EFTA States were not prepared to transfer any legislative competence to the EEA institutions; therefore, they were not prepared to accept including the principles of direct effect and primacy[12] in the EEA Agreement.

The EEA Agreement was very ambitious, but it only created obligations for its parties (States) and did not include the principles of supremacy and direct effect that were, and are, key to judicial protection of individuals and economic operators within the European Union who cannot rely directly on non-implemented EEA rules before national courts.

This understanding of the EEA Agreement was evident in:

Protocol 35 EEA, which stated that the Agreement aims at achieving a homogeneous European Economic Area based on common rules but without requiring any contracting party to transfer legislative powers to any EEA institution, and that the homogeneous rules would have to be achieved through national procedures.

The EFTA Court that has respected the will of the contracting parties and consistently rejected arguments defending the principles of primacy and direct effect in the EEA. ECJ rulings in Costa v. Enel, Van Gend & Loss and Van Duyn, among others, have been considered not "relevant" to the EEA Agreement.

The ECJ confirming the same understanding of the EEA Agreement in ECJ Opinions 1/91 and 1/92[13], where it stated that the EEA is an international treaty that creates rights and obligations only between the contracting parties but does not provide for transferring sovereign rights to inter-governmental institutions.

Therefore, the EEA countries had to respect the priority of EEA rules but only if the EEA State had already implemented the piece of legislation. The EEA Agreement rests on two fundamental principles: homogeneity and reciprocity. This entailed that the regulations could not be transformed but had to be incorporated into national law without any change that could jeopardize their homogeneous application through the EEA.

A second key issue that was discussed with the EFTA countries when the EEA was being negotiated was whether they were prepared to include ECJ jurisdiction over EEA matters in the EEA Agreement. The parties agreed on article 107 of the EEA that defined the possibility of the EFTA countries allowing their courts or tribunals to ask the ECJ to decide on the interpretation of an EEA rule. However, this provision was not mandatory, and it was clear from the beginning that, for constitutional reasons, no EFTA State was going to make use of that possibility.

In addition, the EFTA Court, which is the Court that interprets EEA Law, has no obligation to do it exactly the same way the European Court of Justice interprets EU law. The explicit obligation is that the EFTA Court *take due account* of developments in ECJ case law. In practice, the EFTA Court has bound itself to align its own case law to the interpretation of the European Court of Justice.

Although, there is a *de facto* consistent approach by the ECJ and the EFTA Court, there are certain differences that could also have an impact on individuals or economic operators.

4. Conclusion

Brexit's first immediate impact on individuals and economic operators will be that they will no longer be able to enforce the obligations agreed in any form of convention between the UK and the EU before the courts, unless there is a national law which creates individual rights and obligations.

In addition, the UK will not have full access to the Single Market, unless there is a strong will to share the same rules of the game, even if there is no formal agreement creating binding obligations to apply the same rules or to interpret them in a homogeneous way. This is why the EEA operates *de facto* as part of the Single Market, even though the contracting parties have a possibility not to do so.

Right now, the applicable national rules in the UK are the same as the EU rules applicable in the rest of the Union and will probably be when the UK exits. However, once the English courts have no obligation to follow ECJ case law, it is likely that English courts will approach similar matters differently, even if the UK implements national laws equivalent to EU laws to provide a homogeneous environment for individuals and economic operators, thus jeopardizing one of the pillars of European integration, i.e., uniform interpretation of the Single Market rules.

Will it be feasible to have full access to the Single Market under any kind of international convention without a clear commitment to respect the existing rules or to interpret the new ones in a homogeneous way as, in fact, the EEA countries do?

Will the UK be prepared to accept applying similar legal standards to access the Single Market? Will the UK be prepared to accept that national courts may not depart from ECJ interpretation on similar matters without legal subordination to the ECJ and EU Law? What will be the legal remedies available for economic operators if the UK fails to provide a homogeneous environment for free movement?

The EU and the UK must answer these questions as soon as possible to minimize the cost of the uncertainty. It is clear that it will take a huge investment in trust, not only by the EU member States and the UK, but also by economic operators, who will be requiring a level playing field and the certainty that they can conduct their

businesses in a global market according to certain standards and that appropriate remedies will be available. That is the challenge ahead for us all.

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1 Brexit - The UK's Future Economic Relationship with the European Union, HC 483. House of Commons. Oral Evidence. Tuesday 5 July 5, 2016.

2 Treaty establishing the European Coal and Steel Community, entered into force on July 23, 1952 and expired on July 23, 2002.

3 Treaty establishing the European Economic Community (EEC), signed in Rome in 1957, entered into force on January 1, 1958.

4 Single European Act, OJ L 169 of 29.6.1987. It was signed on February 28, 1986, and it entered into force on July 1, 1987. One of the main objectives of the Treaty was achieving a Single Market by December 31, 1992.

5 The notion includes the EU Treaties, legislative acts, declarations and resolutions, international agreements and the case law of the European Court of Justice. It should be noted that it also comprises the joint action of EU governments in the context of the Area of Freedom, Security and Justice, and the Common Foreign and Security Policy. The concept find its origins in the EU accession negotiations with Denmark, Ireland, Norway and the UK, and since, it has played a key role in the European Conditionality for accession.

6 P.PESCATORE, *The law of integration: emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Leiden, Sijthoff, 1974).

7 The principle of primacy was stated by the ECJ for the first time in Case 6/64, *Costa v. ENEL,* [1964] ECR 585, 594. The principle of direct effect was recognized in Case 26/62, *van Gend & Loos,* [1963] ECR 1, 13.

8 The World Trade Organization was established by the Marrakesh Agreement, signed April 15, 1994.

9 European Free Trade Association

10 Brexit - The UK's Future Economic Relationship with the European Union, HC 483. House of Commons. Oral Evidence. Tuesday July 5, 2016.

11 From the Delors Initiative on January 1989 to the January 1, 1994 when the EEA Agreement finally entered into force.

12 These principles had been developed by ECJ case law and were not imposed on EU Law through the treaties or through legislative acts.

13 Opinion 1/91 [1991], OJ. C 110 of 29.04.1992, pp. 1-15; and Opinion 1/92 [1992], OJ. C 136 of 26.05.1992, pp.1-12.

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