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Beyond Crisis? The State of Immigration and Asylum Law and Policy in the EU
Workshop 2:

"Judicial Interactions in Control of Return and Asylum Detention"

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"Beyond crisis?" is the question in the title of this conference. My initial reaction to this open question was to rephrase it. For me – as an active judge – the relevant question is: "*Is there a crisis of the rule of law in the EU?"* And if the answer is yes, then the next question would be: "*What should judges with assistance of EU policy makers do to start dealing with the crisis effectively?"* Based on my observations and experiences training judges in Europe, I can confirm that there is indeed a crisis of the rule of law in Europe, especially in the judicial control of detention, which is the subject of this session; and here I should emphasise that the crisis of the rule of law may be an independent variable; it is not necessarily a consequence of the crisis of the EU's asylum policy.

I notice a huge discrepancy between what is in European law and what is going on in national practices. More precisely: primary and secondary EU law, including the case-law of the Luxembourg Court and the case-law of the Strasbourg Court in relation to Articles 5 and 3 of the ECHR provide very extensive and detailed standards and rules that should be applicable in the detention cases. However, the level of implementation of those standards and rules in administrative and judicial practices is far from satisfactory. The fact that perhaps no political party in Europe raises this issue should have no significant impact on our future actions.

The relevant actors and experts outside the judiciary can influence the quality of adjudication in detention cases to a very limited extent. This is possible through better organisation and improved provision of training services for judges, where non-judges can participate to a limited extent. In light of this, I can say that both the "Contention" and "Redial" projects of the European University Institute have already influenced my work and the interpretations that I have subsequently introduced into Slovenian case-law. However, the results of these projects will only bring significant "moments" of horizontal judicial interactions if they reach larger circles of judges effectively. For this occasion, I would also like to bring your attention to the project entitled "Detention of Asylum Seekers and Irregular Migrants and the Rule of Law", which is conducted by the European Law Institute (ELI). The methodology of this project is different from the methodologies in the Redial and Contention projects, because in the ELI project we are not dealing with the national legislative problems and jurisprudential solutions of national courts in the light of the European standards. The ELI will develop

check-lists of basic standards of the rule of law that are relevant in each individual case of judicial control of detention under the Dublin Regulation, the Returns Directive and the Reception Directive. These check-lists are based solely on the integration of the rules of primary and secondary EU law, all the case-law of the Luxembourg Court and the relevant case-law and standards of the Strasbourg Court; this includes conditions for detention, with special attention devoted to vulnerable individuals. The aim of the ELI project is for a judge to be able to find in the respective check-list all relevant information on EU law and Strasbourg case-law standards for every major aspect of judicial control of detention. However, I have reservations as to whether the immense work which has been done in the Contention, Redial and the ELI project will have a satisfactory impact on judicial work unless a much more strategic approach towards capacity building of judges is coordinated at the EU level with full respect for the principle of judicial independence and accountability for the quality of knowledge management systems at the respective courts. During the last 7 years, the European Chapter of the IARLJ has been attempting to contribute to a more strategic approach through network governance, the ultimate aim of which is to bring institutions such as the EASO, the EJTN, national judicial training centres and international judges' associations closer together. However, ad hoc and collaborative networks will not be enough. We cannot improve the rule of law through better training services and knowledge management system based solely on pro bono work and ad hoc initiatives and the enthusiasm of some judges and some experts from EU institutions. We need much more support in EU law in terms of a defined institutional structure; for example, the envisaged regulation on the establishment of the Asylum Agency represents such an opportunity. Stronger institutional support would also bring more legal opportunities for the allocation of EU funds, which judges do not possess. For example, if the checklist of basic European standards for judicial control of detention is not translated into French, Hungarian, Bulgarian and some other languages where the numbers of detained aliens are the highest in Europe, those tools will not reach the judges effectively. The IARLJ played an active role in the deliberations on the new Regulation on Asylum Agency and hopefully the EU legislator will take our proposals seriously enough to set a better institutional structure for the capacity building of courts and tribunals over the long-term and with a full and sensitive respect for judicial independence and accountability.