Conference of the IARMJ-Europe
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Refugee and Migration Law Judges – Loyal to Whom or Loyal to What?

Introductory Address

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Dear Colleagues, Dear Presidents of the Supreme and Constitutional Courts of Slovenia, Madame Executive Director of the EU Agency for Asylum, Representatives of the UNHCR, Dear Guests,

In 1970 a dispute reached the British court wherein the plaintiff feared ill-treatment by the military junta in the case of his return to Brazil. The Court of Appeal reasoned that the decision whether to deport a foreigner is solely a matter for the Home Office, because this is a political decision for the executive regarding which the court had no knowledge of its own and no reliable means of acquiring such.[1]

Nineteen years later, the extradition case of *Soering* was decided by the Strasbourg Court and two years later the first deportation case of an asylum seeker was decided in Strasbourg. This was the Vilvarajah case[2] from October 1991. Subsequently, in 1996, the Grand Chamber of the Strasbourg Court decided the Chahal case.[3] So, naturally, we are very pleased to have two judges of the Strasbourg Court in our programme: Judge Schukking in person and Judge Guyomar, who will address the audience via tele-conference.

In both of the aforementioned Strasbourg cases, the applicants were represented by a lawyer named Nicholas Blake, who later became a judge and President of the Upper Tribunal in London and a good friend of the IARLJ – one of our best trainers in refugee law, and indeed mine as well.

But already half a year before the *Chahal* case, in December 1995, the first international conference of judges in the field of refugee law was held in London, which was co-funded by the UNHCR. The UNHCR contributed to this conference in Brdo substantially in financial and organisational terms. We are very grateful for this. There were 53 participants in the London conference, among them 38

[1]Blake, Nicholas, 2017, What is the role of the judge in determining claims for protection? (speech at the Faculty of Law, University of Ljubljana).

[2]Vilvarajah and others v. the United Kingdom, App. No. 13163/87; 13164/87; 13165/87; 13447/87 13448/87, 30 October 1991.

[3]Chahal v. the United Kingdom, App. No. 22414/93, 15 November 1996.

judges. To my surprise, the subjects of discussion were the same as are relevant today in Europe, for example: women as members of a particular social group; internal flight alternatives; the safe third country concept; detention; the effectiveness of legal remedies, the Dublin Agreement, which was concluded back in 1990, and the question whether states have a responsibility to facilitate the filing of asylum claims. From this very early period, the EU Temporary Protection Directive needs to be mentioned, which was adopted in the context of the wars in former Yugoslavia and is now being implemented for the first time due to the Russian war of aggression in Ukraine. We will touch upon this issue tomorrow morning and we will have a chance to listen to our colleague, a judge from Odessa. The Higher Administrative Court in Odessa was our original choice for the location of this conference.

The Steering Committee was established during the London conference in 1995. Two years later, the Steering Committee evolved into the establishment of the global IARLJ. This happened at the conference in Warsaw in 1997.

Since then, refugee law has expanded rapidly in the European Union with the Family Reunification Directive and the Return Directive; there were two waves of procedures and qualification directives; the Charter of Fundamental Rights entered into force in December 2009. The year 2009 was also a period when, based on judicial dialogue, we started to develop the case law of the Court of Justice of the EU on refugee law, detention, and returns. We are very grateful for having here in Brdo the Vice President of the CJEU, Lars Bay Larsen, who is a strong pillar in our network. I hope I do not say too much if I add that Judge Larsen came yesterday afteroon with a car from Luxembourg and needs to leave this afternoon, because tomorrow he has a session of the court in Luxembourg.

The enormous expansion of EU law on asylum and migration is most visible in the NEMIS and NEAIS Newsletters designed for judges and in the DiCTA digital database, which will be presented later today by a researcher from Radboud University. Indeed, national legislators in Member States of the EU had a difficult task following this expansion of EU law on asylum and migration, taking into account that the EU legislature and the CJEU fully embraced a dialogue with the well-established case law of the Strasbourg Court mainly in relation to Article 3 of the ECHR, i.e. its procedural and material dimensions, but definitely not exclusively in relation to Article 3. Many gaps and mistakes in transpositions of EU secondary law into national legislations are filled and corrected by national courts via preliminary references or sometimes without Article 267 TFEU. That is why session four in the programme is dedicated to some current developments in the high jurisdictions of national courts and their case law: in Germany, the Netherlands, France, and the Czech Republic. We added to this session a provocative topic on whether there is a link between the independence of judges and

the autonomy of EU law, which will be presented by a judge of the General Court of the EU.

The aforementioned expansion of asylum law is specific to the EU. However, the rapid development of rule-of-law standards in refugee law has also occurred elsewhere. That is why within our global association we also have the American Chapter, the African Chapter, and the Asia Pacific Chapter. Thus far, our global association has had 12 world conferences; the one held in Bled, Slovenia, was organised back in 2011 with 220 judges participating from every continent. The next world conference is to take place in the Hague in May next year.

Along with the expansion of EU law on asylum, the European Chapter has directed a great deal of its available resources to the development of common European training materials for judges. The European Asylum Support Office in its early period naturally needed judicial expertise for its mission to support the training of judges and we managed to maintain trust and productive collaboration even in the current period following the expansion and transformation of the EASO into the EU Agency. That is why the EU Agency for Asylum plays a significant role in two sessions of our programme.The results of our cooperation with the Agency are several thousands of pages of judicial analysis and judicial trainers' guidance notes on all major chapters of EU law on international protection. We have managed this (so far), because we share the same goals: the highest possible standards of quality, judicial independence, and accountability based on rigorous methodology, wherein judges produce training materials for judges and where judges design training programmes for judges. The Network of Contact Points of Courts and Tribunals, which is a body within the structure of the EU Agency, is essential in this regard, and it is worth noting that many contact points of this network will be present here today and tomorrow.

A special feature of our programme is that we have a speaker from another international court in Europe, i.e. the EFTA Court. The EFTA Court uses many legal sources from EU law and the topic of limits on the abuse of rights is relevant in migration disputes, but also in refugee law. This is a general principle of law regulated in Article 54 of the Charter of Fundamental Rights and is mentioned in the case law of all three European courts and in secondary EU law on asylum. We will discuss this issue regarding asylum and migration also from a non-European law perspective thanks to the previous President of the Asia Pacific Chapter of our association.

Ex officio powers of courts and tribunals will be presented by our Italian colleague. This is a highly relevant topic especially for those who advocate for civil law standards to be introduced in refugee law disputes. Namely, the *ex officio* obligations of courts is a judicially driven evidence law standard

that significantly shapes domestic administrative and civil procedures, and its origins go back to the very first case of *Soering* v. the United Kingdom from 1989.

The sessions towards the end of our conference on remote hearings and on the externalisation of asylum processing are a small, but purposive indication that today's legal challenges in refugee and migration law have actually already moved away from the very sophisticated subjects that we covered in our judicial analyses and in various training events organised hitherto with our partners. It has been ten years now since the *Hirsi Jamaa* judgment in Strasbourg, but we still have considerable problems with the externalisation of asylum processing. These rather robust problems of minimum international rule-of-law standards are now accompanied by the digitalisation of procedures, artificial intelligence, informational campaigns against coming to Europe, and public-private partnerships in the field of border enforcement and asylum. We will not have enough time for these important questions regarding access to procedures. We will have to explore them at our future events. But, let me just mention in this context that interestingly one of the first policy measure of our new Minister of the Interior in Slovenia was to start removing the 51 kilometres of barbed wire, after which the remaining 143 kilometres of wire fence between Slovenia and Croatia will be removed. The Minister will open the second day of our conference.

I will conclude this overview of the programme in the light of activities of our assocation, because ahead of us there awaits a very interesting combination of introductory addresses to be delivered by invited speakers.