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INTERTWINING CONSULAR AND HUMAN RIGHTS LAW: A EUROPEAN CONTRIBUTION TO THE HUMANISATION OF INTERNATIONAL LAW[1]

A RELAÇÃO ENTRE DIREITO DE ASSISTÊNCIA CONSULAR E DIREITOS HUMANOS: UMA CONTRIBUIÇÃO EUROPEIA PARA A HUMANIZAÇÃO DO DIREITO INTERNACIONAL

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Abstract: In the context of Article 36.1 (b) of the 1963 Vienna Convention on Consular Relations (VCCR'63) interpretation by the International Court of Justice and the Inter-American Court of Human Rights, this paper helps to clarify how European Law developments reinforce a renewed understanding of Article 36 VCCR '63 as regards its interaction with Human Rights Law. How could a developing case law of the European Court of Human Rights linking individual consular rights with several different rights guaranteed by the European Convention on Human Rights—along with the European Union's quasi-constitutional normative approach, including consular rights within citizenship rights and due process common guarantees—condition the strongly State-centred interpretation of Article 36 VCCR '63 by the International Court of Justice? The need for a reflection on an interpretative framework for a possible evolutionary, practice-based and teleological approach is highlighted by the ICJ's decision on the *Jadhav* case (India *v.* Pakistan).
Keywords: consular assistance rights; human rights law; *Jadhav* case; humanisation of international law; European Court of Human Rights.

Resumo: No contexto da interpretação do Artigo 36.1 (b) da Convenção de Viena sobre Relações Consulares (VCCR'63) de 1963 pela Corte Internacional de Justiça e pela Corte Interamericana de Direitos Humanos, este artigo ajuda a esclarecer como os desenvolvimentos do Direito Europeu reforçam a entendimento renovado do Artigo 36 VCCR '63 no que diz respeito à sua interação com o direito internacional dos direitos humanos. Como poderia uma jurisprudência em desenvolvimento do Tribunal Europeu dos Direitos do Humanos ligando os direitos consulares individuais a vários direitos diferentes garantidos pela Convenção Europeia dos Direitos Humanos - juntamente com a abordagem normativa quase constitucional da União Europeia, incluindo direitos consulares dentro dos direitos de cidadania e devido processo legal garantias comuns - condicionam a interpretação fortemente centrada no Estado do Artigo 36 VCCR '63 pela Corte Internacional de Justiça? O artigo objetiva enfatizar a necessidade de uma reflexão sobre um parâmetro para uma possível interpretação evolutiva, baseado numa abordagem prática e teleológica da decisão da Corte Internacional de Justiça no caso *Jadhav* (Índia *v.* Paquistão).
Palavras-chave: direitos de assistência consular; direitos humanos; caso Jadhav; humanização do direito internacional; Tribunal Europeu de Direitos Humanos.

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Nothing great is created suddenly, any more than a bunch of grapes or a fig.
If you tell me that you desire a fig, I answer you that there must be time.
Let it first blossom, then bear fruit, then ripen.
Epictetus (55–135 AD)

Introduction: a blooming interest in article 36 of the 1963 Vienna Convention on consular relations

Article 36 of the 1963 Vienna Convention on Consular Relations (VCCR '63) concerns the right of consular authorities to communicate and contact with nationals of the sending State when in the receiving State. As such, it governs the international rights and obligations of both the sending and the receiving States. At the same time, this Article spells out individual rights for nationals abroad and, more specifically in paragraph 1 (b), specific rights in case of arrest, prison or custody.[3]

Although the consular institution is one of the oldest that can be retraced in the intercourse among nations, public service to nationals abroad (including the norms governing assistance to detainees) has been mostly ruled by treaties, and particularly by bilateral agreements (Heyking, 1930, p. 816; Stuart, 1934, p. 498) rather than customary law, as was evinced in 1931 in the Affaire Chevreau (France *v.* United Kingdom).[4] Efforts to codify this area have been first attempted by scholars[5] and private societies,[6] and later at public level[7] and finally by the

[3] Article 36 Vienna Convention on Consular Relations 1963, 596 UNTS 261.

[4] France pleaded the foreign national's right to consular assistance in the following terms: '[D']*aprés le droit international commun, il y a une obligation de donner à la personne poursuivie, si elle le demande, l'occasion de communiquer avec son Consul, et qu'il y a aussi une obligation internationale de donner des informations aux autorités nationales de la personne poursuivie, si elles les demandent*'. The arbitrator—the Norwegian FVN Beichmann—concluded that there was no such a thing as a rule of law: '[L']*Arbitre n'estime pas qu'elle presente le caractère d'une règle de droit*', 'Affaire Chevreau (France contre Royaume-Uni)' (9 June 1931) 2 Recueil des Sentences Arbitrales 1123–1124.

[5] There are several compilations by well-known nineteenth-century scholars. See, for instance, Bluntschli (1881) in which he dedicates Articles 244–275 to consular rules; Field (1876) at 58–77, where Articles 159–185 are devoted to consular norms; Fiore (1890), specifically Articles 475–529.

[6] The Institut de Droit International in the sessions in Lausanne (1888), Hamburg (1891), Geneva (1892) and Venice (1896) with Engelhardt as special rapporteur: (1888–1889) 10 Annuaire de l'Institut de Droit International 272; (1891–1892) 11 Annuaire de l'Institut de Droit International 348; (1892–1894) 12 Annuaire de l'Institut de Droit International 275; (1896) 15 Annuaire de l'Institut de Droit International 272. In 1926, the topic was again addressed and it was concluded that no relevant transformations had occurred, see (1927) 33 Annuaire de l'Institut de Droit International 417. The American Institute of International Law addressed the topic in 1925, adopting a draft of eleven Articles (Project No. 23) sent to the American States through the Pan American Union. See 'American Institute of International Law: Texts of Projects. Project No. 23 "Consuls"', in 'Collaboration of the American Institute of International Law with the Pan American Union', supplement, (October 1926) 20 American Journal of International Law 300 pp. 356–357, https://doi.org/10.2307/2212868. The International Law Association analysed it in 1926 and 1928, with reports from Strupp and Wehr: Report of the Thirty-Fourth Conference (Vienna 1926) (1927) p. 433; Report of the Thirty-Fifth Conference, Warsaw (Warsaw 1928) (1929) pp. 356-375. Finally, the Harvard Law School also studied the Consular Relations regime: Wright prepared a 34-Articles draft project, 'The Legal Position and Functions of Consuls' (1932).

[7] See 'Convention relative aux agents consulaires' in CLV (1934–35) Société de Nations, Recueil des Traités 289. At a universal level, it was in 1926 when the topic was included in the Committee of Experts for the Progressive Codification of International agenda as one of the seven topics ripe for codification, although no convention would be prepared in the end.

International Law Commission (ILC).[8] Its draft convention was crucial to the adoption of the VCCR '63.[9]

Nevertheless, Article 36 was not an easy rule to settle during the negotiating conference in 1963. Its adoption underlines the progressive development character of this convention in certain aspects (Ahmad, 1973, p. 60; Lee, 1966, p. 218, 1969, p. 41; Maresca, 1965, pp. 323-325, 1971, pp. 122-123, 1974, p. 49; Torres Bernárdez, 1963, p. 78; Venneman, 1965, p. 148; Vilariño Pintos, 2016, p. 122; Žourek, 1962, pp. 357, 368, 386-387). For some scholars, it represented the most difficult Article to agree on in the conference (Lee, 1966, p. 107; Torres Bernárdez, 1963, p. 99). Its basic dimension—the right of consular authorities to communicate with their nationals abroad—went undisputed during the 1963 intergovernmental conference, but the role of individual will in accepting or rejecting consular assistance and the nature of the information regarding this right under the convention both remained unclear.

The text we read today is the result of complex deliberations, and it was agreed on the last day of the conference after several proposals and different versions were rejected. Its final wording includes: a) the right of the sending State to communicate with its national while in detention abroad and b) the rights of the national to be informed of his consular rights, get consul authorities informed of his detention and communicate with the sending State consular authorities. It was the outcome of a transaction between the intent to return to the original ILC proposal, consisting in a compulsory and immediate communication of the detention to the sending State,[10] the option of compulsory communication unless otherwise expressed by the detainee's opposition[11] and a third approach, subjecting that communication to the will of the detainee.[12] The United Kingdom's vote for the last option was made conditional to the introduction of an obligation to inform the individual of his consular rights;[13] Article 36 was then approved (Petit de Gabriel, 2017b, pp. 10-12).

At present, the State's right to communicate and assist is dependent on the individual's previous right to be informed of consular rights and the individual's acceptance of the communication

[8] See Yearbook of the International Law Commission 1957, v. I (1957) p. 81 (Doc. A/CN 4/108); Yearbook of the International Law Commission 1960, v. II (1960) p. 2 (Doc A/CN 4/131); Yearbook of the International Law Commission 1961, v. II (1961) pp. 57, 134 (Doc A/CN 4/137). The General Assembly—Res 1685 (XVI)—convened an international conference in Vienna, beginning in March 1963 and ending on 22 April 1963. On 24 April, the VCCR '63 was adopted by unanimity.

[9] See also Vienna Convention on Consular Relations, Doc Of A/Conf 25/16, Add 1, vol II, pp. 179-192.

[10] This was proposed by Czechoslovakia and the Ukrainian Soviet Socialist Republic, Doc A/CONF 25/L 40, Official Records of the United Nations Conference on Consular Relations, v. II.

[11] This was the position of Algeria, Ceylon, Congo (Brazzaville), Congo (Leopoldville), Guinea, India, Indonesia, Iran, Lebanon, Liberia, Mali, Nigeria, Pakistan, Republic de Korea, Sierra Leone, Tunisia and Upper Volta, Doc A/CONF 25/L 41 y Add 1, Official Records of the United Nations Conference on Consular Relations, v. II.

[12] This was supported by Canada, Ceylon, Congo (Brazzaville), Congo (Leopoldville), Ecuador, Malaysia, Guinea, India, Indonesia, Japan, Liberia, Mali, Pakistan, Philippines, Republic de Korea, Sierra Leone, Syria, Thailand, United Arab Republic and Venezuela, Doc A/CONF 25/L 49, Official Records of the United Nations Conference on Consular Relations, v. II.

[13] Doc A/CONF 25/L 50, Official Records of the United Nations Conference on Consular Relations, v. II. Discussions during the final day, prior to vote, in Doc A/CONF 25/SR 20, twentieth meeting of the Plenary, Official Records of the United Nations Conference on Consular Relations, v. I, pp. 81-87.

of arrest to the consul and the assistance provided thereafter, unless, of course, a special rule applies (such as bilateral agreements that provide for compulsory notification of the arrest or detention, as is highlighted by the United States' regulations on the matter).[14] But neither the State's right to communicate nor the detainee's rights to receive assistance create per se an obligation for the State to assist. The emergence of such an obligation by the sending State has been scarcely studied.[15]

This provision has become relevant since 1999 by virtue of an advisory opinion of the Inter-American Court of Human Rights (IACtHR) (Aceves, 2000, p. 555), lately confirmed in its contentious case law, and a series of cases decided upon by the International Court of Justice (ICJ) since 1998 (Breard, 1998,[16] LaGrand, 2001,[17] Avena and Other Mexican Nationals, 2004, hereinafter Avena,[18] and *Jadhav*, 2019[19]) concerning the United States and Pakistan's international responsibility for violation of the VCCR '63. Up to *Jadhav*, these cases generated very interesting scholarly contributions to several points of law, such as the compulsory nature of provisional measures orders, the guarantees of non-repetition for similar and recurrent violations, the effects of ICJ decisions and their application by domestic courts, among others. But since "LaGrand", the relationship between an individual's right to information on consular rights and consular communication and assistance rights, as determined by Article 36.1 (b) VCCR '63 and human rights law, respectively, constitutes a new field for research.[20]

The consideration of consular rights as more than ordinary rights, as rights connected to international human rights law, has already been raised on previous occasions: in 1985 the United Nations General Assembly (UNGA) adopted a Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, albeit without referring specifically to the

[14] See Code of Federal Regulations, Title 28, Chapter I, Part 50, Section 50.5, Notification of Consular Officers upon the arrest of foreign nationals, available from: https://www.law.cornell.edu/cfr/text/28/50.5.https://www.law.cornell.edu/cfr/text/28/50.5

[15] The IACHR advanced the issue in OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, IACtHR Series A 16 (1999) at paras 126–127, but it eventually did not address the question in substance. For an analysis of such an obligation in the context of abolitionism, see Mallory (2016, p. 51).

[16] Vienna Convention on Consular Relations (Paraguay *v.* United States of America) ICJ Reports 1998. Proceedings were instituted on 3 April 1998. Paraguay discontinued the proceedings on 2 November 1998, after Mr Breard's execution. The United States concurred, and the Court removed this case from its list on 10 November 1998.

[17] LaGrand (Germany *v.* United States of America) ICJ Reports 2001. Germany instituted proceedings on 2 March 1999, and the Court ruled on 27 June 2001.

[18] Avena and Other Mexican Nationals (Mexico *v.* United States of America) ICJ Reports 2004. Mexico instituted proceedings on 9 January 2003, and the Court ruled on 31 March 2004. In 2015, Mexico filed an application for interpretation concerning implementation of the 2004 ICJ decision and a new request for provisional measures on behalf of certain nationals with death penalty dates already fixed. A new order demanding a stay of execution was delivered by the ICC. See Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico *v.* United States of America), Provisional measures, ICC, Order of 16 July 2008 (ICJ, 2003).

[19] Jadhav (India *v.* Pakistan), ICJ Reports 2019. India instituted proceedings on 8 May 2017; the Court ordered provisional measures on 18 May 2017 (Order, ICJ Reports 2017) and delivered its judgment on 17 July 2019 (ICJ, 2017). The very first comments on the application and the demand on provisional measures are already published (Dubey, 2017; Pratap, 2017; Wasilewski & Żenkiewicz, 2017).

[20] In Jadhav pleadings, India's memorial, submitted on 13 September 2017, mentions the term 'human rights' in at least 92 occasions. Pakistan's counter-memorial, submitted on 17 December 2017, includes the expression 'human rights' in 12 occasions. India's reply, dated 17 April 2018, includes 11 mentions of this very term; and Pakistan's rejoinder, submitted on 17 July 2018, none. Public hearings on the merits were held from 18 to 21 February 2019.

cases of arrest or detention.[21] In 1988, the UNGA adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, where Principle 16 includes, along with the right to contact a relative, the right to be informed on consular rights (communication with and assistance from consular agents).[22] Although those texts were to be considered soft law, soon after, in 1990, the UNGA adopted a hard law instrument, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, in force since 1 July 2003),[23] whose Article 16, para 7, reproduces the rights contained in Article 36.1 (b) VCCR '63. This convention, however, is of limited effectiveness, as its current 53 Parties are all countries of migrant origin, not destination.

Moreover, in 2008, the Special Rapporteur on the human rights of migrants, Jorge Bustamante, whose mandate extends to all countries whether they are a party to the 1990 Convention or not, devoted part of his annual report to the "key challenges with regard to the criminalization of irregular migration". Analysing "detention and expulsion" situations in his report, he stated that "in certain cases irregular migrants have been denied the right to communication", which qualifies for "ill treatment" along with physical or sexual assault, contrary to the International Covenant on Civil and Political Rights (ICCPR), the CMW and the VCCR '63. Among his final recommendations, he proposed that States should "fully and without prejudice investigate cases on an individual basis, provid[ing] due process guarantees and consular assistance."[24]

Over the last few years, the Human Rights Council (HRC) has revisited two previous general comments and has included a reference to individual consular rights in relation to specific ICCPR Articles. In particular, in 2014, General Comment 35 (GC 35) on the right to liberty and security of persons (Article 9 ICCPR) was adopted, replacing GC 8 (1982) and including a reference to the right to communicate with consular authorities as a common safeguard to this right and for the prohibition of torture.[25] The 2018 GC 36 on Article 6 ICCPR, the right to life (replacing GC 6 and 14), describes the failure to "promptly inform detained foreign nationals charged with a capital crime of their right to consular notification" as a serious procedural flaw, although not explicitly covered by Article 14 ICCPR, citing also the common safeguards described in GC 35 concerning the right to liberty and security.[26]

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[21] Res 40/144, 13 December 1985, A/RES/40/144, Article 10, passed without a vote.

[22] Res 43/173, 9 December 1988, A/RES/43/173.

[23] Res 45/158, 18 December 1990, A/45/158, passed without a vote.

[24] Special Rapporteur on the Human Rights of Migrants, Report on Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including Right to Development, 25 February 2008, A/HRC/7/12, para 44, n 34, and para 71.

[25] Human Rights Committee, General Comment No 35: Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, at para 58. Reference is made to the 1988 UNGA Body of Principles but not to the VCCR '63.

[26] Human Rights Committee, General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, 30 October 2018, CCPR/C/GC/36, at para 42 referring explicitly to Article 36 VCCR '63 and citing IACtHR OC-16/99 at n 197; and *ibid*. at para 57, n 238 referring to GC 35, para 58.

The 1999 IACHR advisory opinion made reference to the soft law UNGA instruments (although not to the CMW) and elaborated on the idea of individual consular rights as a fundamental guarantee in the context of death penalty cases (IACtHR, 1999). The ICJ has taken a different approach, yet in practice its position was not that far away from the topic. Alongside the universal level, the European context has produced several moves that strengthen the connection between consular and human rights law. A developing case law of the European Court of Human Rights (ECtHR) has established a link between individual consular rights and several different rights guaranteed by the European Convention on Human Rights (ECHR). Also, the European Union has undertaken a quasi-constitutional normative approach by including consular rights within citizenship rights and due process common guarantees, two initiatives that seek to develop the Lisbon Treaty and the Charter of Fundamental Rights of the European Union (CFREU).

Whether all this has conditioned the strongly State-centred ICJ's interpretation of Article 36 VCCR '63 when deciding upon *Jadhav* is uncertain. However, this topic highlights more transversal issues, such as the potential risk of fragmentation of international law and the confrontation between different understandings of the same rules; namely, universal (as expressed in ICJ case law) versus regional (as shown in IACHR and ECtHR case law) and general (consular law) versus specialised (human rights law, European law). Another aspect worth mentioning is that this topic underscores the interaction between the so-called classical international law governing the intercourse among nations and a more contemporary approach to a "humanised" international law establishing legal limits for State sovereignty over individuals—and their rights and freedoms—under its jurisdiction. The European contribution should help to bridge these seemingly opposed perceptions, offering fertile ground for systemic integration of international law. This could be compatible with the ICJ's decision on *Jadhav* if we are to retain the original object and purpose of consular law in relation to the alleged violation of Article 14 ICCPR and due process rights in the case.

1 **The end of fallow: old rules applied to a new context**

As traditional as consular law may seem, the dawn of the twenty-first century has provided new opportunities for its progressive development. First, a relation between individual consular rights and fair process guarantees has been highlighted as regards death penalty cases. Along with it, a new approach to the right to liberty and security, and the guarantees for lawful detention, has been tested. And second, a broader spectrum of cases has been opened, no longer related to the death penalty, which highlight the connection with other rights such as the prohibition of torture or the right to family life. These factors may lead to a reinterpretation of the interdependence of conventional and fundamental rights.

1.1 **Sowing the seeds: the Inter-American court of human rights and the international court of juzstice momentum**

The IACtHR's Advisory Opinion OC-16/99 was the first opportunity for an international tribunal—and a human rights tribunal as well—to address the issue of minimum judicial guarantees and the requirement of the due process "when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals."[27] On 9 December 1997, "after the bilateral representations that the Government of Mexico had made on behalf of some of its nationals, whom the host State [the United States] had allegedly not informed of their right to communicate with Mexican consular authorities and who had been sentenced to death in ten states in the United States", Mexico sought an advisory opinion from the IACtHR on Article 36 VCCR '63 in relation to due process guarantees. This same context would later lead Mexico to submit an application to the ICJ, claiming the international responsibility of the United States for violating the VCCR '63 (Avena case). Mexico was seeking the IACtHR to assert that Article 36 of the VCCR '63 contained provisions concerning the protection of human rights, "applied and interpreted in the light of the expression 'all possible safeguards to ensure a fair trial'", as determined in Article 14 of the ICCPR. It further enquired about "the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention"[28] with respect to the VCCR '63, the ICCPR, the Organization of American States Charter and the American Declaration.

For the IACtHR, Article 36 VCCR'63 unanimously confers rights upon detained foreign nationals, among them the right to information on consular assistance, with said rights carrying with them "correlative obligations for the host State"; it "concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law." The Court further stated that "the individual's right to information established in Article 36(1)(b) allows the right to the due process of law recognised in Article 14 of the ICCPR to have practical effects in concrete cases", arguing that Article 14 provides minimum guarantees that can be amplified in the light of other international instruments such as the Vienna Convention on Consular Relations, which expand the scope of the protection afforded to the accused. This has, in turn, been subsequently confirmed by later contentious case law.[29]

The IACtHR established the final purpose of due process guarantees, according to which they "recognize and correct any real disadvantages that those brought before the bar might have,

[27] IACtHR, OC-16/99, at para 1.

[28] *Ibid.* at paras 4.4, 4.10, 4.12.

[29] *Ibid.* opinion points 1, 2, 3, 5 & 6, adopted by unanimity; Acosta Calderón, IACtHR Series C 129 (2005) at para 125; Bueno Alves, IACtHR Series C 164 (2007), at para 116; Chaparro Álvarez and Lapo *Íñiguez*, IACtHR Series C 170 (2007) at para 164; Vélez Loor, IACtHR Series C 218 (2010) at para 157.

thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination."[30] The Court further affirmed that the impact of the VCCR '63 violation over due process rights depends on the circumstances of the case. Concerning death penalty cases, the IACtHR stated that:

> those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive (IACtHR, OC-16/99, at para 135).[31]

The Court concluded that

> nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (*eg* the American Convention on Human Rights, Article 4; the ICCPR, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations (IACtHR, OC-16/99, at para 137).

The IACHR's conclusions were assumed by unanimity, except on the matter of consequences, which the presiding judge Jackman rejected.

The impact of this opinion must not be underestimated. In 2000, the UN General Assembly "[t]aking note of the decisions of the relevant international juridical bodies . . . particularly advisory opinion OC-16/99, issued by the Inter-American Court of Human Rights . . . , regarding the right to information about consular assistance within the framework of due process guarantees", adopted a resolution requesting "all Member States, in conformity with their respective constitutional systems, effectively to promote and protect the human rights of all migrants" by means of all available human rights instruments.[32] Its impact on the most recent HRC general comments has already been advanced, and it has also been cited by the ECtHR in the case *Öcalan v*. Turkey.[33]

The ICJ, on the other hand, has analysed the domestic implementation of consular rights of foreign nationals since 1998 (eg. Breard case, Paraguay *v.* United States of America) (International Court of Justice [ICJ], 1998). The Court has defined its rationale in its June 2001 judgment on the

[30] IACtHR, OC-16/99, at para 119 and later in Vélez Loor, IACtHR Series C 218 (2010) at para 152; and Nadege Dorzema and Others, IACtHR Series C 251 (2012) at para 165.

[31] In later case law, the Court affirmed the same principles even outside capital cases, see Tib*i*, IACtHR Series C 114 (2004) at paras 195–196; Acosta Calderón, IACtHR Series C 129 (2005) at para 125.

[32] Res 54/166, 24 February 2000, A/RES/54/166. Reference to the IACtHR OC-16/99 is again included in resolution Res 55/92, 26 February 2001, A/RES/55/92.

[33] Application No 46221/99, Merits and Just Satisfaction, 12 May 2005 (Grand Chamber), at paras 60, 166 (European Court of Human Rights, 2005).

LaGrand case (Germany *v.* United States of America) (ICJ, 1999) and, in a more detailed manner, in 2004 in the Avena case (Mexico *v.* United States of America). This approach has been reconfirmed and expanded in the 2019 *Jadhav* case decision (India *v.* Pakistan).

The ICJ has addressed the consular rights issue from a different perspective, recognising, however, the individual character of the rights concerned.[34] The Court described Article 36 as "an interrelated regime" of individual and State rights,[35] affirming that it needed not to enter into a discussion of the "character of the right under Article 36 as a human right",[36] as individual rights were to be preserved through diplomatic protection.

While the ICJ's perspective has not dwelled on the nature of rights as human rights when elaborating on the VCCR '63 violation, it has gone further than the IACtHR as regards the practical consequences of the violation. The applicants in the different cases (Paraguay, Germany, Mexico and India) asked for the restitutio in integrum. Under this concept, they claimed that the domestic procedures connected to the violation of the VCCR should be nullified and, consequently, also should the death sentences that had been imposed without respect for individual consular rights. The ICJ has not endorsed that petition (nullity). Yet, dissatisfied with a mere statement of due reparation for the breach of Article 36.2 VCCR '63, which expressly demands domestic law to enable full effect of the rights accorded, it ruled that the responsible State should grant a "review and reconsideration of the sentences" by any means of its choosing.[37] Nevertheless, the ICJ considered that the clemency process, as currently practised, did not meet the appropriate requirements, stressing in *Jadhav* the need for effectiveness in the review and the reconsideration means.[38]

Viewed from a human rights perspective, the reparation granted identifies itself as a procedural guarantee, i.e. by means of a judicial review, for the rights of both the individual and the sending State. However, the ICJ insisted that it was not considering a question of due process guarantees but rather one of violation of the VCCR.[39] The Court also analysed the "gravity of the consequences" in LaGrand and Avena cases, stating that the need for a "review and reconsideration" process was required specifically when "foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties."[40] In this sense, the ICJ contributed to the idea that the weight to be accorded to the violation of consular rights and the measures of redress

[34] LaGrand, at para 77, confirmed again in *Jadhav*, at para 116. Scholars who had previously written on this matter did not reach the same conclusions on the individual rights character of Article 36.1 (b) VCCR '63. See Maresca (1974, pp. 227-228).

[35] Ibid. 492 at para 74; Avena, 43 at para 61.

[36] LaGrand, at para 78.

[37] Ibid. 513 at para 125, and 571, at para 128 (7); *Jadhav*, 37 at para 139.

[38] Avena, 60 at para 122; *Jadhav*, 38 at para 143, although a different perspective is provided by Judge Cançado Trindade in his Separate Opinion, paras 85–93, who would have preferred to 'bar the execution of the death penalty against Mr. K. S. Jadhav, and call for redress for the violation of Article 36(1) of the VCCR' (at para 93).

[39] Ibid. at para 139; *Jadhav*, at para 137.

[40] LaGrand, at para 123; Avena, at para 140.

depended on its gravity, either in terms of the length of the detention or the penalty itself. Later, in *Jadhav*, the ICJ went a step further, expressly connecting the consequences of the violation of Article 36 VCCR '63 with fair trial, although using the concept of "principles" rather than "right" concerning fair trial:

> The Court points out that respect for the principles of a fair trial is of cardinal importance in any review and reconsideration, and that, in the circumstance of the present case, it is essential for the review and reconsideration of the conviction and sentence of Mr. *Jadhav* to be effective. The Court considers that the violation of the rights set forth in Article 36, Paragraph 1, of the Vienna Convention, and its implications for the principles of fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration (ICJ, *Jadhav*, at para 145).

Consequently, and although the ICJ had rejected to go into the specifics of Article 14 ICCPR violations,[41] it took notice of the Covenant for the interpretation of what the possible remedy should be.[42] This statement clearly highlights the role of individual rights violations, beyond the inter-State content of the relationship and the reparation to be granted. The human rights connection was underlined both by Judges Cançado Trindade and Robinson in their individual declarations.

Furthermore, when it came to the analysis of other consequences under the responsibility scheme in Avena case, particularly in terms of guarantees of non-repetition, the Court considered that

> [t]he provision of such information [rights under Article 36.1 (b) of the Vienna Convention on Consular Relations] could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the Miranda rule.[43]

By doing so, albeit eluding a "fundamental rights" designation, the Court placed the right granted by Article 36 VCCR '63 on the same level as the guarantees against arbitrary detention or procedural rights at the detention moment.

In sum, the addition of the IACtHR's consultative opinion and the ICJ's decisions places Article 36 VCCR '63 at a crossroads between the right to liberty and security (on the same level as Miranda rights) and the right to a fair trial (when invoking or rejecting Article 14 ICCPR). The IACtHR also acknowledged the intertwining nature of human rights violations in those cases when the death penalty imposed in violation of the right to a fair trial (including VCCR '63 rights as a due process

[41] *Jadhav*, paras 36–37.

[42] Ibid. para 135.

[43] Avena case, at para 64.

guarantee) becomes an arbitrary deprivation of life in accordance with human rights conventions. This radiant character is also seen, in a way, in ECtHR case law, which we will describe below.

1.2 **Sprouting and branching rights together: the European Court of Human Rights era**

In the last decade, the ECtHR has initiated—sometimes unsolicited—an interesting approach to Article 36 VCCR '63 violations. Before the VCCR'63 Convention was directly invoked, the consular assistance rights were considered a death penalty guarantee in Ökalan v. Turkey, by way of reference to the IAcHR OC-16/99, both in Chamber and Grand Chamber judgments on the case.[44]

One of the first cases where this Article was invoked is M and Others *v.* Italy and Bulgaria. The applicants claimed for Bulgaria's concurrent responsibility—the bulk of the allegations, however, were addressed to establish Italy's responsibility, for this was the State where the violations occurred—given that no consular authority was present during the interrogation in police detention facilities.[45] In 2012, the Court (in a Grand Chamber decision) rejected the allegations and considered that the case was exclusively conducted against Italy. In fact, a misunderstanding on the part of the ECtHR can be observed, as it concluded that "the Convention organs have repeatedly stated that the Convention does not contain a right which requires a High Contracting Party to exercise diplomatic protection, or espouse an applicant's complaints under international law or otherwise to intervene with the authorities of another State on his or her behalf", citing its previous case law on the matter.[46] The claimant's allegations did not concern diplomatic protection as an expression of a request for international responsibility nor the eventual existence of an obligation to assist but rather the consular communication rights of the foreign national under Article 36.1 (b) VCCR '63.

Also in 2012, in El-Masri *v.* the former Yugoslav Republic of Macedonia,[47] the Court was faced with the problem of extraordinary renditions in the aftermath of the 11 September attacks and the so-called fight against terrorism. Some European States participated in the CIA program to transfer persons suspected of terrorism to the jurisdiction of the United States of America, either tolerating or contributing to irregular detentions or permitting the unrestricted use of European States' airspace. The affair, first allocated to the Fifth Section (2010) and then to the First Section

[44] Application No. 46221/99, Merits and Just Satisfaction, 12 March 2003, at 20; and 12 May 2005 (Grand Chamber), at 166.

[45] Application No 40020/03, Merits and Just Satisfaction, 31 July 2012 (Grand Chamber), at 119 (European Court of Human Rights, 2012a).

[46] Ibid. at para 127.

[47] Application No 39630/09, Merits and Just Satisfaction, 13 December 2012 (Grand Chamber) (European Court of Human Rights, 2012b). There is a growing bibliography on the case, yet it is not specific to consular assistance rights. See Cerna (2013).

(2011), was later referred to the Great Chamber (2012), with the decision cited and confirmed in 2016 in Nasr and Ghali *v.* Italy.[48] In this case, a German national

> had been subjected to a secret rendition operation, namely that agents of the respondent State [the former Yugoslav Republic of Macedonia] had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the United States Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months. The alleged ordeal lasted between 31 December 2003 and 29 May 2004, when the applicant returned to Germany (ECtHR, El-Masri, at para 3).

In its decision, the Court stated that the detention had been irregular for a number of circumstances: "There was no court order for the applicant's detention"; "His confinement in the hotel was not authorised by a court. Furthermore, the applicant's detention in the respondent State has not been substantiated by any custody records"; "During his detention in the respondent State, the applicant did not have access to a lawyer, nor was he allowed to contact his family or a representative of the German embassy in the respondent State, as required by Article 36 § 1 (b) of the Vienna Convention on Consular Relations"; and "he was deprived of any possibility of being brought before a court to test the lawfulness of his detention."

> His unacknowledged and incommunicado detention means that he was left completely at the mercy of those holding him. . . . Lastly, the Court finds it wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework, as was the hotel in the present case. It considers that his detention in such a highly unusual location adds to the arbitrariness of the deprivation of liberty (ECtHR, El-Masri, at para 236).

Substantially in the El-Masri case, the VCCR '63 rights were merely one out of several guarantees integrated in a violation of Article 5 of the ECHR (right to liberty and security). That said, the VCCR violation—by itself and on its own—may have not trespassed the gravity threshold to be considered as an Article 5 violation, but concurrently with other failing guarantees, it allowed the Court to assert that violation. Further on, the Article 5 violation in El-Masri case compromised the right of the applicant to private and family life. For the Court, "an essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities"; therefore, "[h]aving regard to its conclusions concerning the respondent State's responsibility under Articles 3 and 5 of the Convention, the Court considers that the State's actions and omissions likewise engaged its responsibility under Article 8 of the Convention."[49]

[48] Application No 44883/09 Merits and Just Satisfaction, 23 February 2016, citing the *El-Masri* case more than thirty times (European Court of Human Rights, 2016). However, later case law on this topic does not take into account the VCCR '63 norms as legal framework to analyse the ECHR violation: Abu Zubaydah *v.* Lithuania Application No 46454/11, Merits and Just Satisfaction, 31 May 2018; Al Nashiri *v.* Romania Application No 33234/12, Merits and Just Satisfaction, 31 May 2018.

[49] Ibid. at paras 248–249; later confirmed in Nasr and Ghali *v.* Italy, at paras 308–310.

In 2017, in Lebois *v.* Bulgaria,[50] the ECtHR dealt with Article 36 VCCR '63 unsolicitedly. A French national submitted an application alleging Article 3 (prohibition of torture) and Article 8 (right to private and family life) violations while in detention in Sofia, Bulgaria, in 2014. These alleged violations concerned his detention in three different periods and facilities (police detention, pretrial detention and post-conviction prison). In its 2017 decision, the ECtHR rejected the Article 3 ECHR allegations. Although the Court acknowledged a violation of Article 8 for the final part of the pretrial detention and post-conviction period, it was barred from deciding on the previous police detention and initial days of the pretrial period due to an out-of-time submission of the claim. Nevertheless, the Court considered that, during those early days, the facts of the case raised more than a "potentially serious issue under Article 8 of the Convention", taking into account that:

> [a]s evidenced by that provision, as well as the other relevant provisions of Bulgarian law, European Union law and international law…that obligation [access to his family] takes on an added importance when the detainee is an alien whose family may be in a different country' and 'can also amount to an important safeguard to prevent arbitrary detention (ECtHR, Lebois, at para 53).

Domestic law concerning the right to contact family and make telephone calls was enough to weigh up—as it did—a potential Article 8 violation. The applicant never claimed violation of his right to be informed of consular rights or his right to contact national consular authorities. But, in this case, individual consular rights (right to be informed on the consular rights themselves, right to inform the consular post and right to communicate with consular authorities) governed the right to contact his family, as the Court had already verified in El-Masri case: the applicant was not able to inform anyone of his deprivation of liberty for twelve days, until, with the help of a co-detainee, he contacted the consulate of France in Sofia on 5 February 2014, which in turn informed his parents of his arrest and detention.

That may be the reason why the Court included the international norms ruling consular contact rights in its analysis of the "Relevant domestic law and practice". Particularly when stating the law, the Court pointed out Bulgaria's accession to the VCCR '63 in 1989, which was published in the State Gazette on 25 May 1999 and is, by virtue of Article 5.4 of the 1991 Constitution, part of Bulgarian domestic law. Along with other domestic pieces of legislation, it also resorted to Directive 2013/48 of the European Union (EU) of 22 October 2013, which governs the right to

> (a) have a third person informed of the deprivation of liberty, (b) communicate, while deprived of liberty, with third persons, and (c) have the consular authorities of one's State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities.

[50] Application No 67482/14, Merits and Just Satisfaction, 19 October 2017 (European Court of Human Rights, 2017). On this case, see Petit de Gabriel (2017a).

Bulgaria had not yet, at the date of judgment, approved the 2016 transposition-amendment of the 2005 Code of Criminal Procedure. Therefore, the invocation of the EU Directive in the judgment should have been regarded as legally irrelevant: it had not been transposed and, as a result, was not applicable to the case. It served, however, to stress the connection between consular rights and the right to family contact, since they are both ruled by this same directive.

The novelty is that Lebois case was a low profile case on its own: a minor crime (breaking into cars with a view to stealing items from them), a "short" period of twelve days without consular and/or family contact, a minor prison sentence (three months' imprisonment) due to a guilty pledge and an agreement with the prosecutor, as well as a short detention—having served most of the sentenced time in pretrial detention, the applicant spent only six days in prison.

There are other cases where the ECtHR has referred to individual consular rights in connection to ECHR violations but without a specific reference to Article 36.1 (b) VCCR '63. In 2014, in Kim *v.* Russia, the Court qualified the inexistence of consular assistance in the case of a stateless person as creating a "particularly vulnerable situation"._Taking into account the circumstances surrounding the applicant's detention—with a view to expulsion—said vulnerability was considered to be contrary to Article 5.1 ECHR.[51] On 26 October 2017, the ECtHR decided upon a case of torture involving police mistreatment of detainees during the G8 summit held in Genoa in 2001. In that judgment, the Court reinforced the qualification of Article 3 ECHR violations, since other rights were also violated, including the right to consular assistance for foreign nationals. More specifically, the Court stated that

> Outres les épisodes de violence susmentionnés, la Cour ne saurait ignorer les autres atteintes aux droits des requérants s'étant produites à la caserne de Bolzaneto. Aucun requérant n'a pu prendre contact avec un proche, un avocat de son choix ou, le cas échéant, un représentant consulaire.[52]

In 2020, the ECHR has found a sound justification for a forced transfer of a consular agent who, due to consecutive pregnancies, made difficult for the State to assure proper consular assistance to nationals abroad. This case Napotnik *v.* Romania, although not directly related to our subject matter, showcases the relevance accorded to consular assistance as a public interest and a mean for the protection of the rights of others, balanced against the right to non-discrimination on situations such as gestation periods,[53] which should not go unnoticed.

In summary, Article 36 VCCR '63 has already been connected to at least the following human rights in the aforementioned case law:

[51] Application No 44260/13, Merits and Just Satisfaction, 17 July 2014 (ECtHR), at paras 54–56.

[52] Azzolina and Others *v.* Italy, Application Nos 28923/09 and 67599/10, Merits and Just Satisfaction, 26 October 2017, at para 135, official translation not yet available (European Court of Human Rights, 2018).

[53] Application No. 33139/13, Merits and Just Satisfaction, 20 October 2020, at 80-86.

a) the right not to be arbitrarily deprived of one's life[54] as a result of a violation of fair trial guarantees, in IACtHR OC-16/99 and by reference to this, in *Öcalan v.* Turkey, by the ECtHR;
b) the prohibition of torture,[55] in Azzolina and Others *v,* Italy, 2017;
c) the right to liberty and security,[56] in El-Masri, 2012, and Kim *v.* Russia, 2014, by the ECtHR;
d) the right to a fair trial,[57] in IACtHR OC-16/99, 1999; Breard, 1998; LaGrand, 2001; and Avena, 2004, as alleged by the applicants, although unacknowledged by the ICJ. Currently alleged by India in *Jadhav*;
e) the right to respect for private and family life,[58] in El-Masri, by the ECtHR, and in *Lebois*, by way of construction on the ECtHR statement of the law in the case.

This trend is being taken forward at the universal level, since Article 36 VCCR '63 rights have been incorporated into the Human Rights Committee (HRC) General Comment 35 on Liberty and Security of Persons[59] details the common safeguards for the prevention of torture and the protection against arbitrary detention, qualifying the denial of consular assistance as a contributing factor for its violation. It has also been included in GC 36 on the Right to Life.[60] Concerning the draft of this GC, only the United States had opposed the correlation between death penalty guarantees and Article 36 VCCR '63 rights.[61] A softer critique was presented by Japan, who finally proposed a draft conceding a margin of appreciation on the impact of the violation of consular rights in the due guarantees in capital cases.[62] Beyond this cumulative case law, normative developments in the European Union have elevated consular assistance rights to fundamental rights status, as it is now addressed.

[54] Article 1 ECHR, Article 2 CFREU (absolute prohibition of death penalty), Article 4 American Convention on Human Rights (ACHR), and Article 6 ICCPR.

[55] Article 3 ECHR, Article 4 CFREU, Article 5 ACHR, and Article 7 ICCPR.

[56] Article 5 ECHR, Article 6 CFREU, Article 7 ACHR, and Article 9 ICCPR.

[57] Article 6 ECHR, Article 47 CFREU, Article 8 ACHR, and Article 14 ICCPR.

[58] Article 8 ECHR, Article 7 CFREU, Article 11 ACHR, and Article 17 ICCPR.

[59] GC No 35, at para 58. None of the comments presented by States were in opposition to this connection.

[60] GC No 36, at para 42 referring explicitly to Article 36 VCCR '63.

[61] Observations of the United States of America on the Human Rights Committee's Draft General Comment No. 36 on Article 6 - Right to Life at para 44: 'We cannot agree with the Committee's view', 'consular notification is not expressly required under Article 14 or any other Covenant provision…. Nor is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings.' The US Congress also submitted some comments, but it did not mention this point of law.

[62] Japan's Comments on the Draft General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights at para 46.

2 **Ripening days: towards a European, quasi-constitutional approach**

The European Union has addressed consular assistance, impacting the life of individuals under EU Member States (EUMS) jurisdiction both inland and abroad, with a twofold approach, either as citizenship rights or as common procedural guarantees that develop the Area of Freedom, Security and Justice (AFSJ). By incorporating the CFREU, the Lisbon Treaty has consolidated both normative trends and, as a result, the link between individual consular rights and fundamental rights.

2.1 **Unexpected fruits of deepening integration: citizenship rights or the 'extended' protection of nationals abroad**

The transformation of the European Communities into a European Union in 1992 was partly conceived in terms of democratising the initial project created in the 1950s (Pausch, 2014). As a piece of this process, the Treaty of Maastricht created the status of European Union citizenship,[63] including a form of "extended" consular assistance[64] whereby European citizens can be assisted by consul officials from any member State in case no consular agency of their own country of origin exists in the country of destination. Today, this is ruled by virtue of Article 20.2 (c) of the Treaty on the Functioning of the European Union (TFEU), representing one of those citizenship rights. The current Article 35 of the Treaty on European Union recalls the duty of "diplomatic and consular missions of the Member States . . . in third countries" to "contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in Article 20(2)(c)" TFEU.

The idea of granting "extended" consular assistance—i.e. consular assistance given by a third State—is not a new one, and it is foreseen in Article 8 VCCR '63. Precedents can be traced to as early as 1911, with the Treaty of Caracas, signed between Colombia, Ecuador, Peru and Venezuela;[65] modern European practice, however, is much more comprehensive in scope.[66] Just like the rights encompassed in Article 36 VCCR '63, the EU's 'extended' consular assistance right was originally just a 'conventional' right, an individual right granted by an international treaty (TEU/TFEU) to a European Union Member State national. Nevertheless, since the adoption of the CFREU in 2001 and, more specifically, its granting of "the same legal value" as the "constituent" treaties by virtue of Article 6.1 TEU as of 2007 (in force 2009), it has reached a fundamental right status of its own,

[63] Treaty on European Union [1992] OJ C 191/1, Article 8C; currently, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C 202/1, Article 9.

[64] Otherwise called 'protection by affinity', see Crespo Navarro (2017, p. 119).

[65] The Legal Position and Functions of Consuls, at 381–3, http://doi.org/10.2307/2213739.

[66] See CARE Project Report, *Consular and Diplomatic Protection Legal Framework in the EU Member States*, December 2010, although it is non-exhaustive and has not been updated since then.

in accordance with Article 46 CFREU. Still, the real impact of this measure is difficult to assess, for the difficulties of its implementation have not been satisfactorily overcome yet.

The original 1992 provision was first developed on 19 December 1995 in Decision 95/553/EC,[67] in force since 2002. It detailed the content of "extended" consular assistance, expressly including in Article 5.1 (c) the assistance "in cases of arrest or detention". This decision called for a follow-up plan within five years. The Council of the European Union created a working group on consular cooperation (known as COCON, or Working Party on Consular Affairs). In 2006, this group laid down the Guidelines on Consular Protection of EU Citizens in Third Countries.[68] Simultaneously, the European Commission prepared a Green Paper on 'Diplomatic and consular protection of Union citizens in third countries'[69] where attention was drawn to the need of consent from third countries for this consular assistance to be granted, although according to Article 8 VCCR '63, tacit consent would suffice. After the Green Paper, an Action Plan 2007–2010 was proposed. This plan suggested easing the access to this right through the creation of an e-portal on consular assistance and protection, which is already in operation. The European Commission recommended obtaining the express consent of the receiving State[70] by negotiating bilateral agreements with third countries; the Commission itself should negotiate a clause for mixed agreements. It also proposed the need to analyse whether such a protection could be provided by the Commission's delegations (currently the European External Action Service) in case the assistance required were specifically part of the European Union competences.

According to the CARE Project Report (CARE Report), there is no regular practice concerning the renegotiation of bilateral agreements for such a clause by EUMS, and notification is generally given on a case-by-case basis.[71] On the other hand, the option of introducing a clause in mixed agreements has already been implemented at least twice, i.e. in the cases of the Republic of Kazakhstan and Afghanistan.[72]

The Lisbon Treaty signified a change in the wording of citizenship rights, evincing that consular protection was a direct-effect disposition that concerned an individual right whose denial

[67] Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council regarding the protection for citizens of the European Union by diplomatic and consular representations [1995] OJ L314.

[68] Council of the European Union, 2 June 2006, Doc 10109/06.

[69] European Commission, Green Paper on Diplomatic and consular protection of Union citizens in third countries, 28 November 2006, COM (2006) 712.

[70] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Effective consular protection in third countries: the contribution of the European Union. Action Plan 2007–09, 5 December 2007, COM/2007/767.

[71] CARE Project Report, at 22. The report describes those cases (Italy and Portugal) in which bilateral treaties include a clause on 'extended' consular assistance for EU citizens, noting the current scarce practice of prior notification at a national level.

[72] Council Decision 2016/123/EU on behalf of the European Union, on the signing and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States and the Republic of Kazakhstan, [2016] OJ L29/1, Article 239. Council Decision 2017/434/EU on behalf of the Union, on the signing and provisional application of the Cooperation Agreement on Partnership and Development between the European Union and its Member States and the Islamic Republic of Afghanistan, [2017] OJ L67/1, Article 29.

could generate State responsibility for damages and be judged by the European Court of Justice, as the European Commission clearly informed the Council, the European Parliament, the Economic and Social Council and the Committee of the Regions.[73] Such a conclusion did not exist before the signing of the Lisbon Treaty.[74] Besides, after the ratification of the Lisbon Treaty, new legal acts—and the possibility of control by the Court of Justice—became available, so the Commission recommended the adoption of new cooperation rules by means of a directive and in accordance with a special legislative procedure. A proposal was submitted in 2011 and passed with amendments in the European Parliament before the end of 2012. The Council took its time and passed it on 20 April 2015 as Directive (EU) 2015/637.[75] Transposition period ended on 1 May 2018.[76]

The specific rules on consular assistance to detainees in the Directive (in case of detention or prison, according to Article 9 (a) Directive (EU) 2015/637) are rare, just as in the previous 1995 decision. Nevertheless, direct effect would be easily deduced by courts in the event of late or non-transposition by any Member State. The most significant provision in this Directive is the possibility for Member States to conclude intra-EU bilateral agreements for this type of assistance, which would preclude the individual right of choosing the assistance of any other Member State once the agreements are made public (Article 7 Directive (EU) 2015/637).

In other words, by being included as part of citizenship rights in EU treaties and the CFREU, consular assistance in case of detention abroad is granted a double status, both as a citizenship right and as a fundamental right. It is currently considered a direct-effect Article in the treaties; further, the directive specifically ruling on the matter must also be seen as including direct-effect rules, even if transposition is inadequately made or not made at all. As a CFREU rule, a pleading before the Court of Justice of the European Union (CJEU) should be linked with the implementation of European law. However, Article 20.2 (c) TFEU can be claimed in that context, given that EU treaties are a primary source for EU law.[77] No case law on this Article—or any related secondary legislation—is yet available. However, the problems that may arise are significant, considering that 'extended' consular rights are based on the non-discrimination and application of the national standard of the State granting assistance to a non-national European citizen. National legislations

[73] Communication from the Commission to the European Parliament and the Council on Consular protection for EU citizens in third countries: State of play and way forward, 23 March 2011, COM/2011/149. In this vein, a similar provision is included in the draft agreement with Malaysia, still under consideration: Joint Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, and provisional application of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Government of Malaysia, of the other part, JOIN/2018/20 final, 3 July 2018.

[74] CARE Project Report, at 29–30 and the literature cited therein on the direct-effect disposition.

[75] Council Directive 2015/637/EU on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, [2015] OJ L106/1.

[76] Spain, Greece and Austria adopted domestic transposition rules later than established: in June 2018, October 2018, and May 2019, respectively.

[77] The CJEU has already been confronted with this question in relation to Article 14 (3) TEU and Article 39.2 CFREU concerning the right of Union citizens to vote in elections to the European Parliament. See C-650/13 Delvigne 6 October 2015 (Grand Chamber) at para 648 (Court of Justice of the European Union [CJEU], 2015).

have different conceptions regarding consular assistance to detainees, from a right guaranteed by means of a judicial review due to the refusal to provide assistance, to a mere matter of policy of discretionary character.[78] This recalls the need for a debate on the obligation of the State to grant consular assistance in case of arrest or detention and the consequences of failing to provide it.

A more wilful approach has been adopted to ensure consular assistance within the territorial jurisdiction of EUMS. Part of the normative program to achieve an Area of Freedom, Security and Justice (AFSJ) included individual consular rights in the framework of common procedural guarantees in case of detention and conviction. ICJ case law (particularly Germany's involvement in LaGrand case) has not been exempt from this new approach.

2.2 **Voluntary cross-fertilisation in the area of freedom, security and justice: common procedural guarantees for all**

The EU has underscored the procedural safeguards and the fairness of proceedings as a keystone of the process to build an AFSJ, which is based on creating mutual confidence among the judiciaries of each Member State. From the very first document on the creation of an AFSJ in 2003, the European Commission identified the common procedural guarantees topic as the human rights aspect of criminal proceedings._That same year, a Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union was published, clearly stating that no new rights were to be created.[79] To identify the rights concerned, the concept of "fair trial rights" should be given priority, thereby comprising the rights to legal assistance and representation; competent, qualified (or certified) interpreter and/or translator; proper protection for especially vulnerable categories and consular assistance. The Green Paper took into account different expressions of the right to a fair trial, as ruled by Article 6 of the ECHR, Article 14 ICCPR, Article 52 of the Rome Statute, Article 18 of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, Article 20 of the International Criminal Tribunal for Rwanda (ICTR) Statute and Article 47 of the CFREU.

As regards the right to consular assistance (when the arrestee is not a national of the prosecuting State), the 2003 Green Paper included an express mention to Article 36 VCCR '63 and the eventual causes of action in the International Court of Justice in case of non-compliance. It stated, however, that:

> [t]his does not represent a remedy for the actual individual who has been the victim of the breach. Even if his home State is prepared to bring an action against the offending State, it will not provide an effective and practical remedy for the individual concerned. It is therefore worth considering what remedies should or could be available to an individual in this situation (COM/2003/75, pp. 36-37).

[78] CARE Project Report, at 668–672.

[79] European Commission, 19 February 2003, COM/2003/75 (Commission of the European Communities, 2003).

It is undeniable that the LaGrand case, where Germany was the applicant, had an impact on the paper. The Commission proposed to rule on those "basic rights"—including consular rights—by developing a European common Letter of Rights which should be provided to individuals upon detention, in line with what the ICJ advanced in 2001 in LaGrand case for the possible inclusion of consular rights in the American "Miranda rights", later affirmed in Avena case (2004).

After a public audience in June 2003, the Commission proposed a Framework Decision on certain procedural rights for criminal proceedings, based on Article 31 TEU (then referring to criminal judicial cooperation).[80] In June 2007, following several unproductive years of discussions in the Council of the EU, the door was opened to an enhanced cooperation on the matter. Eventually, a new approach was taken[81] whereby the different rights and guarantees would be addressed in separate norms.[82] With the entry into force of the Treaty of Lisbon in 2009, new competences and an access to general legal acts—such as directives and regulations—were promptly available for the development of the AFSJ. This led the Council to adopt a Plan for Action in which consular rights were again included.[83] The Plan for Action was followed by a set of directives for the different common procedural guarantees, with two of these Directives addressing individual consular rights.[84] Although the EU is neither a State nor a party to the Vienna Convention on Consular Relations, which certainly does not consider participation of international organisations, these directives must be seen as equivalent to "the laws and regulations of the receiving State", as they rule the exercise of a detainee's individual rights in the European Union Member States, although domestic norms of compliance are requested (the so-called national transposition).[85]

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[80] European Commission, 28 April 2004, COM/2004/328.

[81] Several options were discussed, as can be seen in 'Commission staff working document. Accompanying the Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings. Summary of the impact assessment', 8 July 2009, SEC/2009/0916 (Commission of the European Communities, 2004).

[82] A first Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, 8 July 2009, COM/2009/0338, was soon abandoned because of the entry into force of the Treaty of Lisbon. See Communication from the Commission to the European Parliament and the Council. Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, 2 December 2009, COM/2009/0665.

[83] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1.

[84] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L294/1. The rest of the set of directives is composed of Directive 2010/64/EU, on the right to interpretation and translation in criminal proceedings [2016] OJ L 280/1; Directive (EU) 2016/343, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1; Directive (EU) 2016/800, on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; Directive (EU) 2016/1919, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.

[85] See Article 36 of the 1963 Vienna Convention on Consular Relations at para 2.

First, Directive 2012/13 includes—among other rights described in Articles 3 and 4—the right to be informed of the right to communicate with the consul by means of a written "Letter of Rights", which should be "promptly" provided to those arrested or detained in a language that they understand. According to Point 19 of the Preamble, "promptly" must be interpreted as "in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority." A model Letter of Rights is annexed to the Directive, which includes the following statement: "If you are a foreigner, tell the police if you want your consular authority or embassy to be informed of your detention. Please also tell the police if you want to contact an official of your consular authority or embassy."[86]

Second, Directive 2013/48 governs the legal assistance and access to a third person (a relative, employer or other, as mentioned by the ECtHR in Lebois case). It includes the rights to inform consular officials and to communicate with them. Paragraph 37 of the Preamble expressly mentions Article 36 VCCR '63. Article 7 of the Directive reflects the content of VCCR '63 rules, making consular assistance dependent on a detainee's will. This Article is excluded from the possibility of any temporary derogation, contrary to the right to legal assistance and the right to have a third person informed, which can be temporarily suspended under certain circumstances.[87]

Both Directives are conceived as the normative development of Article 47 CFREU, which concerns the "Right to an effective remedy and to a fair trial".[88] Moreover, Member States are required to "ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive" (Directive 2012/13, Article 8.2). Paragraph 1 further mandates Member States to record "when information is provided to suspects or accused persons in accordance with Articles 3 to 6"; therefore, a national procedure must be established. Directive 2013/48 adds the need to have "an effective remedy under national law in the event of a breach of the rights under this Directive". Remedies are, nevertheless, the realm of Member States provided they are effective. In relation to consular rights, this would go in line with the "review and reconsideration" ruling by the ICJ on the failure of the United States to comply with the VCCR '63 or the need for procedural consequences stated by the OC-16/99 in death penalty cases. A vast majority of EUMS transposition rules (24 out of 28) include, among an

[86] Directive 2012/13, transposition period ended on 2 June 2014. All Member States except Belgium needed and adopted specific measures. The United Kingdom and Ireland notified their wish to take part in the adoption and application of this Directive. Denmark opted out and is not bound by it.

[87] Directive 2013/48, transposition period ended on 27 November 2016. All Member States affected have already adopted timely transposition measures. The United Kingdom, Ireland and Denmark have opted out and are not bound by it, according to Protocols nos 21 and 22.

[88] Directive 2012/13, Preamble, at para 14 and Directive 2013/48, at para 12.

array of remedies, the possibility of an annulment of the Court's judgement and retrial.[89] There is no CJEU case law on Directives 2012/13 and 2013/48 as regards consular rights yet.[90]

To summarise the European Union's contribution to the consular and human rights relationship, we could state that these two EU normative developments help to anchor the fundamental nature of consular assistance as one of the guarantees of contemporary human rights law. Both aspects ("extended" consular assistance as part of citizenship rights and consular rights as part of common procedural guarantees) are comprised in Articles 46 and 47 CFREU. Nevertheless, their respective purpose and scope differs: the former is to be implemented outside EUMS territory, and might be subject to CJEU control, which calls for the very interesting topic of extraterritorial application of human rights (Gondek, 2005; King, 2009; Meron, 1995), whereas the latter relates to the territorial obligations of EUMS and, as a result, is subject to control by the CJEU and, on specific cases, by the ECtHR.[91]

Further, these EU developments do not cover fully and completely the scope of consular rights included in Article 36 VCCR '63. The two Directives on common procedural guarantees have a more restrained scope than the VCCR '63. They apply "to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights."[92] In fact, the ECHR procedural guarantees apply both to civil and criminal proceedings, although the ECtHR has already recognised obiter dictum the applicability of consular assistance rights in cases of detention with a view to expulsion of foreign nationals in irregular migrant situations, which in most States is an administrative, rather than a criminal, proceeding. The Directives also have a reduced scope compared to Article 47 CFREU on the right to a fair trial. This right simultaneously covers a broader range of situations than the ECHR,[93] applying to any type of proceeding, and not only civil or criminal ones.[94] Article 47 CFREU, then, encompasses Article 36 VCCR '63, which applies to other forms of detention unrelated to criminal proceedings, such as detention of migrants prior to expulsion, psychiatric internment, or admission of elderly people in geriatric centres against their

[89] Remedies under Art. 12 should be domestically sought for the violation of any of the rights ruled by Directive 2013/48, where emphasis is put on the 'effectiveness' idea. Although analysing specifically the violation of the right to counsel, see Soo (2016, 2017a, 2017b, 2018).

[90] Date of revision, 23 May 2021.

[91] Legal questions may arise on the competent jurisdiction for protection of these rights, since they may concern both EU law application and ECHR application, as seen before. Specifically, concerning the European Union's perspective, see Article 51, on the 'Field of application', Article 53, on the 'Level of Protection' of the CFREU, and C-399/11 Stefano Melloni *v.* Ministerio Fiscal 26 February 2013 (Grand Chamber) at para 107, as opposed to Bosphorus Hava Yollari Turizm *v.* Ireland Application No 45036/98, Merits and Just Satisfaction, 30 June 2005 (Grand Chamber). For the Strasbourg perspective, see Kuhnert (2006); Lock (2010); De Hert and Korenica (2012).

[92] Directive 2012/13, Preamble, at para 21 and, in similar terms, Directive 2013/48, Preamble, at para 12.

[93] Kim *v.* Russia, at para 54 (European Court of Human Rights, 2014).

[94] See Explanation on Article 47—Right to an effective remedy and to a fair trial [2007] OJ C303/29; Faggiani (2017, p. 88).

will or without their consent.[95] Citizenship "extended" consular assistance rights (when abroad in a third country), however, are not expressly restricted to criminal proceedings but rather to "arrest" and "detention", fulfilling in a more comprehensive way the cases in which the VCCR applies. This broad understanding also represents the way in which "deprivation of liberty" is described by the Human Rights Committee when referring to examples of deprivation of liberty such as "police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement restricted to an area of an airport, as well as being involuntarily transported."[96]

Equally important, citizenship "extended" consular rights (for instance, Article 46 CFREU when abroad in a third country) only benefit European Member States nationals (thus enjoying European citizenship), whereas Directives 2012/13 and 2013/48 apply "to suspects and accused persons regardless of their legal status, citizenship or nationality."[97] Although it does not concern consular assistance rights themselves, applying only to the extended enforcement by a third European country, this subject-matter restriction of citizenship rights collides with the basic idea of fundamental rights as rights pertaining to every human being; yet, according to domestic constitutional practices, it discriminates between rights for nationals and foreign nationals. Hopefully, that is not the case for Article 47 CFREU on fair trial and its development through both directives concerning consular rights, given that these directives determine that "everyone" is entitled to such a right.

3 **What harvest is to be reaped?**

The relationship between the rules detailed in Article 36 VCCR '63 and human rights law has already come a long way since its establishment by the UNGA in soft law documents in 1985 and 1988. From that moment on, this connection has appeared in multiple references, increasing the number of correlated human rights specifically linked, thanks among other reasons to ECtHR jurisprudence. The European Union's contribution to this evolution is significant and has been firmly established in later years through both primary and secondary legislation.

This leads to a final reflection: on the one hand, and from a formal perspective, there is a process of confluence among legal regimes and adjudication bodies which should be analysed based on the ILC report on Fragmentation of International Law and the formal tools to integrate it, such as the varied techniques of interpretation. On the other hand, and from a teleological perspective, a reconsideration of the rationale behind the established relationship between consular and human

[95] When commenting on the draft Article in 1961, the International Law Commission established that "this provision [Article 36.1] applies also to other forms of detention (quarantine, detention in a mental institution)." See *Yearbook* (1961), pp. 112-113.

[96] GC 35, at para 5.

[97] Directive 2012/13, Preamble, at para 16 and Directive 2013/48, at Article 2 on the matter of scope.

rights law will lead to a concluding thought on the progressive "humanisation" of international law, asserting the original and true raison d'être of consular law.

3.1 **From fragmentation to complexity**

The described scenario involves at least three different normative orders and an array of adjudicatory or interpretative bodies, a fertile ground for the fragmentation debate. Nevertheless, in terms of liability for consular rights violations, confluence rather than fragmentation has been the chosen path. The European Union has readily followed the direction taken by the ICJ, starting with the consequences of Article 36 VCCR '63 violations. The ICJ initially opted for a two-tier system regarding guarantees of non-repetition for Article 36 VCCR '63 violations: first, the Court suggested the inclusion of individual consular rights in the Miranda Declaration of rights. This has been adopted by EU Directive 2012/13 when spelling consular rights information in the Letter of Rights. Second, the ICJ put forth a police training program on consular rights, which is also included—and extended to judges, prosecutors and judicial staff in general—in Article 9 of EU Directive 2012/13. Finally, and as a means of redress, an effective system of review and reconsideration was requested by the ICJ as an obligation of result, taking into account the impact on the principles of fair trial and the right of defence of the accused.[98] Article 8 of EU Directive 2012/13 and Article 12 of EU Directive 2013/48 adopt the same approach and affirm the fundamental right to an effective remedy when the rights of a detainee, whatever their nature, are violated.[99]

On its part, the European Convention on Human Rights has tended to limit the ECtHR's ability to prescribe the means of redress. The Court has historically established the responsibility of the State—leaving ample room for its choice of reparation—under the control of the Council of Ministers of the Council of Europe. This approach has been updated through the "pilot judgment" technique, developed to face the increasing number of applications on repeated human rights violation patterns in certain countries. By following this technique, the ECtHR determines the specific measures to be taken by the State in the form of reparation—including measures for prevention and guarantees of non-repetition—which should apply to similar cases in the future. This has been considered a quasi-legislative tool and a dual-nature review between legal cassation and constitutional redress.[100] It has not been used by the ECtHR in relation to VCCR violations, whereas the LaGrand/Avena scheme could be seen as a prospective ICJ essay of pilot judgment designed to face the United States pattern of repeated violations of Article 36 VCCR '63.

[98] *Jadhav*, at paras 145–146.

[99] Article 13 ECHR, Article 47 CFREU, Article 25 ACHR and Article 9 ICCPR.

[100] There is a growing scholarly body of work on this type of judgments. See, among others, Abrisketa Uriarte (2013); Buyse (2009); Garlick (2007); Glas (2016); Haider (2013); Leach, Hardman, and Stephenson (2010); Leach et al. (2010).

From this perspective, general international law and human rights adjudication bodies have come to address the matter in similar terms, too, as far as remedies for a violation are concerned. In the most recent case, Jadhav, the ICJ asserted for the very first time the interpretative role of Article 14 ICCPR when defining remedies for the violation, but not as part of the violation itself.[101] The remedial approach cannot but confirm the understanding of consular assistance rights as something more than mere conventional rights, yet it falls short of legal reasoning on the nature of the violated rights themselves.

Turning our attention to the interaction among the substantive rules involved, we may argue that there is a non-reciprocal, non-homogeneous relationship among these three systems of law: general non-specialised International Law rules and concepts move more easily into European Law and Human Rights Law—which are paradoxically called "self-contained regimes" in ILC terminology[102]—than the other way round. EU rules regularly introduce both references to the VCCR '63 and human rights law in the preambles and preparatory documents of the specific rules on citizenship or common procedural guarantees. ECtHR case law considers international law rules as part of the *ratio decidendi*, in opposition to ICJ jurisprudence, which rejects human rights rules considerations for the aforementioned cases as a base for substantive analysis, leaving the human rights consequential approach merely to the decision on remedies. The ICJ, in its 2019 decision on *Jadhav*, does not seem to have used the opportunity to take into account the substantive and evolutionary cross-references between the different international law regimes concerned.[103]

A "smart integration" of human rights law with general international law and European law is nevertheless undergoing consideration. The term "smart human rights integration"[104] has been previously used in the context of the proliferation of human rights standards, instruments, institutions and remedies. In the same vein, different interpretative pathways could be explored to achieve normative integration between the fields of law analysed in our study. Nevertheless, EU law and ECtHR case law must be addressed differently, as the former can be treated in terms of both regional international law and State practice, whereas the latter concerns a third adjudicatory activity. The legal mechanisms through which they could exert an influence on the interpretation of the VCCR in future cases are, therefore, at variance. The ICJ has not taken into account these developments for the statement of a VCCR '63 violation until today.

[101] *Jadhav*, paras 36 & 37, in relation to para 145.

[102] For the three different ways in which the term 'self-contained regimes' can be employed, see ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006, A/CN 4/L 682, at paras 123–137.

[103] Clearly pointed out by Judge Cançado Trindade, *Jadhav*: Separate Opinion of Judge Cançado Trindade, paras 97 & 98, and underlined by the number of references to human rights case law in the parties written memorial and oral pleadings. See note 18.

[104] This fortunate expression has been coined by Eva Brems (2014). Nevertheless, the author has more recently nuanced this integration will through a careful examination of the pros of fragmentation in human rights law, such as the benefits of specialisation, contextualisation, experimentation and strategic choice opportunities; see Brems (2018).

For ECtHR case law, the most direct interpretative means is at hand. It constitutes a set of "judicial decisions", and the ICJ can always resort to it "as subsidiary means for the determination of rules of law", according to Article 38.1 (d) of its own Statute. ECtHR case law should not to be excluded as a term of reference for this. Unfortunately, the ICJ has done so in its *Jadhav* case decision. Furthermore, the ICJ has already stated that, when it is called to apply a regional instrument for the protection of human rights or the ICCPR, it has to "ascribe great weight to the interpretation adopted by the independent body that was established specifically to supervise the application of that treaty", although the Court "is in no way obliged . . . to model its own interpretation" on it.[105] It may arrive the day for such a case.

As for the European Union primary and secondary legislation, several options can be advanced to define a contemporary human rights-related interpretation of Article 36.1 VCCR '63 for future cases. The ILC—in the context of the fragmentation report—referred in 2006 to a "systemic integration", based on Article 31.3 (c) of the Vienna Convention on the Law of Treaties (VCLT), as a way to establish "meaningful relationships" to determine whether general and specialised rules "could be applied in a mutually supportive way or whether one rule or principle should have definite priority over the other." It comprises both conventional and customary law, exclusively limited to the law applicable between the parties.[106] In this sense, the Court has expressly founded its 'effective review and reconsideration' approach on the effects of Article 36 VCCR '63 on Article 14 ICCPR rights,[107] although not all authors concur in the establishment of this conexion (Villegas Delgado, 2020, p. 42-43). In the same vein, another form of contextual interpretation—foreseen in Article 31.3 (b) VCLT and currently under study by the ILC—takes into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

The ILC also refers to the "conduct by one or more parties in the application of the treaty, after its conclusion", as a supplementary means under Article 32 VCLT. Outside the scope of VCLT interpretative avenues, ICJ jurisprudence has referred to two other integrative frameworks in order to reconcile the rules of international law. First, the ICJ stated in the Namibia case that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation', which is considered to be a 'principle of harmonization."[108] Additionally, the ICJ already has turned to the evolutionary interpretation of

[105] Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) ICJ Reports 2012, 664, at paras 66 & 67. On the relation between ICJ and HR bodies and tribunals and the possible convergence of different case law, see Decaux (2011, p. 604).

[106] ILC, Fragmentation, at paras 220 & 415–423. For an analysis of the related case law and the two requisites, see paras 433–460 and paras 461–480, respectively. Concerning the question of applicability, "to whom must relevant rules be applicable?", see French (2006, p. 305-307).

[107] *Jadhav*, at para 145, and on this point, Declaration of Judge Robinson, para 2.xi.

[108] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971 at 31.

international law in the past, without a reference to other extraneous rules of international law, in order to explore the very evolution of the terms and circumstances in which a treaty is applied (Helmersen, 2013).[109]

With respect to the systemic interpretation method (Article 31.3 (c) VCLT), the acceptance of EUMS extended consular assistance by the receiving State, based on EU mixed agreements or renegotiated EUMS consular agreements with that State that include extended consular assistance, will allow for the consideration of those bilateral treaties as 'international law applicable between the parties' in the sense given by VCLT interpretation rules. Nevertheless, according to the ILC's current approach in its Conclusion 4, which calls for the practice of (all) State parties to the specific convention, i.e. the VCCR, these treaties should better be invoked as "subsequent practice" in the application of the treaty under Article 32 VCLT's supplementary means of interpretation[110] in order "to confirm the meaning resulting from the application of Article 31."

A cautionary advice is yet to be provided. In *Jadhav*, the ICJ has been extremely restrictive when interpreting the 2008 bilateral agreement between India and Pakistan on consular access. It did not consider the bilateral convention a subsequent agreement or practice between the two States or, as Pakistan suggested, an agreement to modify a multilateral treaty between certain of the parties only (Article 41 VCLT '69). Moreover, the ICJ avoided, on the basis of Article 73 VCCR '63, to restrain the scope of consular assistance in cases of arrest or detention on political or security grounds, as the bilateral agreement was not "supplementing or extending or amplifying" the rights granted by the VCCR '63.[111] It is clear that EU law on consular rights is not restrictive; rather, it confirms VCCR '63 rights, underlines their human right dimension and establishes the obligation to grant judicial means of redress for failure to comply with those rights. In that sense, the ICJ should not find obstacles to expand its present interpretation of Article 36 VCCR '63 from a normative perspective for future cases.

EU rules on consular assistance as procedural guarantees will be of a more restricted interpretative scope. They will not qualify as "international law applicable in the relations between the parties" when the sending and the receiving State are non-EUMS. They will only qualify when both States are indeed EUMS. However, they could also be applicable when the receiving State is a European Union member, as Article 36.2 VCCR foresees that "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State."

[109] An inter-temporal and evolutionary interpretation are not exempted from scholarly critiques, since they may suggest "a rather non-voluntarist approach to treaty interpretation", see French (2006, pp. 295-300 and, particularly, p. 297).

[110] For the subsequent practice in terms of Article 31.3 (b) VCLT and Article 32 VCLT, see Conclusion 4 on the "Definition of subsequent agreement and subsequent practice" at paras 2 and 3, respectively. See also "Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties" at para 13, as well as the commentaries on both paras 1 & 2 at 31–37.

[111] *Jadhav*, at paras 91–97.

The law of the receiving State would comprise EU law, since it must be considered "domestic law" in EUMS.

This very idea—EU law as domestic law of the receiving State—is to be extended to all primary EU law on consular rights, as established in the CFREU, comprising both extended consular assistance and consular assistance as a guarantee of a fair trial: treaty rules having a direct effect and being incorporated to the domestic legal order. Consequently, all EU norms should qualify for "practice", as defined by the ILC's fifth conclusion on "subsequent practice in relation to the interpretation of treaties."[112]

Finally, and away from the realm of VCLT interpretation methods, we could also turn towards the principle of evolutionary interpretation. Although the parties to the convention did not apparently mean to open the concept of consular assistance rights to future developments, there is indeed a certain evolution in EU's approach: the intertwining of consular rights with a new version of procedural rights rekindles the purpose, rather than the concept, of consular assistance rights.

As regards the principle of harmonisation, Judge Robinson highlighted this method in *Jadhav* to take advantage of "the grand development of international law following the Second World War" and to connect Article 36 VCCR '63 with Article 14 ICCPR, although the Court did not elaborate on it.[113] In this regard, EU legislation comes to reinforce other relevant universal documents, such as the 1990 Migrant Workers' Rights Convention or, with a more precautionary approach, the statements relevant to our subject matter that are included in HRC GC 35 and GC 36. Yet the legal nature of these last two documents has been questioned by scholars. As Buergenthal (2006) writes:

> While one can debate the question of the nature of this law and whether or not is law at all, the fact remains that the normative findings of the treaty bodies have legal significance, as evidenced by references to them in international and domestic judicial decisions (pp. 783-789).

On its part, and although GC 35 and GC 36 were passed almost without critique, the United States expressed opposition to draft GC 36—which renewed Article 6 ICCPR interpretation—rejecting this "contextual and systemic interpretation". The United States also stated that the HRC's "importing requirements from other human rights treaties" was "inconsistent with a proper interpretative analysis under VCLT Articles 31 and 32, ignores the express terms of the ICCPR, and fails to consider that not all ICCPR States Parties have ratified those other treaties or

[112] The term "practice" in the ILC conclusions encompasses "any conduct of a party in the application of a treaty, whether in the exercise of executive, legislative, judicial or other functions". See ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties. Text of the draft conclusions adopted by the Drafting Committee on second reading, 11 May 2018, A/CN 4/L 907, Conclusion 5. Conduct as subsequent practice at 14 and commentary at 37-8.

[113] *Jadhav*, Declaration of Judge Robinson, para 2.xi. In the same vein, Separate Opinion of Judge Cançado Trindade, paras 40–42.

otherwise consented to such obligations."[114] The ILC Draft Conclusions on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" devotes Conclusion 13 to the "Pronouncements of expert treaty bodies", confining their role to the one granted by the rules of the treaty and stating that silence by a party "should not be presumed to constitute subsequent practice under Article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body."[115] The fact remains that the ICJ, in its 2012 decision on the Ahmadou Sadio Diallo case, has granted a core interpretative role to these documents when the concerned rights are at stake. When human rights treaties are to be applied, the ICJ should carry out a carefully reasoned analysis if it chooses to depart from the interpretation given by the human right treaty body.

Furthermore, these normative efforts could be seen as expressing an *opinio juris*, albeit *in statu nascendi*, which triggers a new universal customary rule regarding individual consular rights from a human rights law perspective. The fact that EU law and ECtHR case law take the same direction might be seen as a catalyst, which could eventually be considered as regional customary "international law applicable in the relations between the parties" (Article 31.1.3 VCLT) with regard to the concept and the very purpose of consular assistance rights. Some scholars have underlined, however, that such a trend is not a methodologically ordered approach but rather a more complex view on judicial interpretation, which runs the risk of encroaching on "judicial creativity" (French, 2006; Helmersen, 2013).

Allegations of violation of Article 14 ICCPR in *Jadhav* could have prompted this contextual, systemic and harmonising interpretation, although it could also have stirred up the debate on consensual jurisdiction limits and applicable law. As a matter of fact, systemic interpretation has already provoked an indirect debate among ICJ judges regarding the problems arising from the application of international law for which a jurisdiction has not been expressly accepted, as stated by Judge Buergenthal in his separate opinion of 6 November 2003, Judgment on the Oil Platforms case (Islamic Republic of Iran *v.* United States of America) (ICJ, 1992). A similar position was held by Judge Higgins, whereas opposite views were held by Judges Koroma and Simma.[116] The ICJ stated it clearly in *Jadhav* since the very beginning: it was not a case of violation of the ICCPR, although when it came to remedies, the ICCPR was the key element to define "effectiveness".

That said, our last key issue is built around ICJ case law, including the most recent decision on *Jadhav*, to analyse how an alternative interpretation to the contextual, evolutionary or harmonizing reading could be achieved, also taking into account European developments. To

[114] Observations of the United States of America on the Human Rights Committee's Draft General Comment No 36 on Article 6 - Right to Life, 6 October 2017, at para 7.

[115] ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, at 16 and commentaries at 106–16.

[116] On this point, see ILC, Fragmentation, at paras 451–458. French (2006, p. 289) underlines that "if one gives too broad an interpretation of what he [Buergenthal] is saying, Article 31 (3) (c) becomes almost a dead-letter."

explore and arrive at an answer, we must now turn to the rationale for the construction of the connection between individual consular rights and human rights and examine to what extent it affects the proper understanding of the general international law regime of consular law and the consequential problems which then arise.

3.2 **From state-centred to human-centred interpretation of law**

The final and most difficult question to answer is defining why general international law —and the ICJ as its interpreter—should take into account self-contained regimes such as human rights law and/or European law when interpreting Article 36.1 VCCR '63. To resolve this question, the logic for the intertwining of individual consular and human rights should be explored first, and, consequently, that logic should be exported into the VCCR's own rationale. We are therefore turning to the most classical teleological interpretation means, as set in Article 31.1 VCLT.

In seeking the logic of the human rights approach, ICJ and ECtHR cases and the terms of IACHR consultative opinion established a presumption whereby the impact of individual consular rights violations was dependent on the gravity of the cases: irreparable prejudice (death penalty cases)[117] or gross violations (like the ECtHR judgment in El-Masri) suggest the idea that respect for any guarantee and for any of the detainee's rights was of utmost importance and that this could have changed the course of the proceedings in those cases. Yet, after considering Lebois *v.* Bulgaria, gravity does not seem to be the ECtHR's main reason for establishing a link between consular rights and protected human rights: neither the detention period nor the penalty risk was long or extremely severe. In this particular case, the special situation of being a foreign national, not having translation services available nor specific indication on how the communication system inside the detention facility worked, coupled with the difficulty to get a phone card due to lack of money, constituted special circumstances for the Court and made the situation a risky one. A "potential violation" of the right to family life (in the case of a detention, the right to contact the family) was declared obiter dictum dependent on consular rights, despite procedural barriers preventing the Court to enter into the merits.

Besides, European Union legislation on consular assistance derives from the CFREU as a human rights normative expression and always involves a system of judicial review for violations, irrespective of the gravity of the case, when a potential violation of consular assistance rights takes place. At the same time, the progressive recollection of ECtHR cases has drawn a landscape where individual consular rights apparently guarantee an array of plural human rights: the right not to be arbitrarily deprived of one's life, the prohibition of torture, the right to liberty and security, the right to a fair trial, and the right to respect for private and family life. Ultimately, when a foreigner

[117] Stressed in *Jadhav*, Separate Opinion of Judge Cançado Trindade, paras 43–84 and 99–103.

is concerned, the burden on the State to guarantee certain rights is increased. This has already been highlighted by the IACHR in 1999:

> The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages (IACtHR, OC-16/99, at para 119).[118]

With respect to "due process" or other rights, consular rights guarantee that foreign nationals will not be subjected to unacknowledged detention, that they will understand the process and the rest of their rights, that they will have access to contact and be able to alert their family, that they will at least have access to the knowledge of the system of redress available in case of violation of their rights (either fundamental or not) and so on. The guarantee for respect and preservation of those rights lies in having the opportunity to be assisted by consular authorities from the very moment of detention or arrest. Consular information and communication rights must be respected for the sake of preservation of a broad range of human rights, a condition for equal treatment in a material sense. Hence, individual consular rights appear as a guarantee and a consequence of the non-discrimination provision present in all human rights instruments.[119]

We should now turn to the realm of general international law and the VCCR's rationale to fit the preceding understanding. It is argued that consular assistance rights are individual rights granted by international norms, which confer a right to the foreign national's State to demand international responsibility for their violation in the receiving State. Both dimensions of consular rights—State or individual rights; rights linked to general international law or human rights law—are rooted in the basic idea that Law is a tool for regulating human relations. This primary idea is also present at an international level.

For some time, the State has been seen as the exclusive, privileged international law subject, whereas in fact it is a mediator agent between individuals across borders, and not only for fundamental rights concerns. This has been clearly stated in international law by different scholarly traditions, from those writing about individual rights under the common guarantee of "civilized States" (Fiore, 1890, pp. 15-16, 164-177) in the last decades of the nineteenth century, to those at the dawn of the twentieth century already reflecting on a Common Law for humankind (Pillet, 1894,

[118] This is also Judges Cançado Trindade and Robinson's approach in *Jadhav*: Separate Opinion of Judge Cançado Trindade, paras 38–39 and Declaration of Judge Robinson, paras 2.vi and vii.

[119] Non-discrimination may be a clause which is applicable in connection with a guaranteed right (such as in Article 14 ECHR and Article 1 ACHR) or it may be a right directly applicable in itself (as in Article 21 CFREU and Article 26 ICCPR).

1889[120]), long before Wilfred Jenks (1958) published his well-known The Common Law of Mankind. James Brown Scott (1930) wrote that:

> [t]he thesis which the present paper maintains, and will endeavour to establish, is that the individual inevitably is the primary unit of an international community; that the state is only a secondary and intermediate unit' and that 'the individual is the unit of law, and that the law of international community is but the generalized law of the individual (p. 15).

Along with Jenks (1958), Georges Scelle (1932), Nicolas Politis (1925) and Phillip C Jessup (1956) are but notable representatives of this approach, each of them with a different perspective but a common sensibility towards the role of the individual in international law. More recently, Emmanuel Roukounas e Hague Academy of International Law (2003), Theodor Meron (2006), Richard Falk (1993), Umberto Leanza (1997) and Antonio Augusto Cançado Trindade (2005, 2011), among others, have also proposed their views on the matter amid a rising movement for a new global law or constitutionalism approach to international law (Cebada Romero, 2013; Cottier & Hertig Randall, 2003; Domingo, 2011; Peters, 2006; Simma, 1994; Teubner, 1997; Von Bogdandy, 2006; Walter, 2007; Ziccardi Capaldo, 2008). This scholarly approach is today confirmed mainly, but not exclusively, by the humanisation process through normativity and international State control for the protection of human rights, as stated by Judge Robinson in his Declaration in *Jadhav*.[121]

Nevertheless, even when retaining a more traditionalist approach to international law as inter-state law, the rights discussed in this paper were apparently already part of the consular functions in 1846 with a view to protect the individual: "*[L]orsque les tribunaux du pays poursuivent un compatriote du consul, il peut se présenter en justice, non comme protecteur, mais comme conseil de l'inculpé, surtout si celui-ci* était *exposé à perdre la vie, la liberté ou ses propriétés*" (De Mensch, 1846, p. 58).[122] Further, the historical origin of consular functions and law, according to the Report of the ILC Special Rapporteur in 1957, was private trade, and the role of consuls was to settle disputes among merchants and protect nationals and their interests abroad.[123] The ILC's commentaries regarding draft Article 5 on consular functions, where it stated a general clause and a list of functions by way of example, stressed that consular functions are granted for "safeguarding the interests of the sending State and of its nationals", both at the same level and with the same degree of priority. The commentary also underscored the relevance of temporary protective functions, "where the person concerned is prevented from looking after his interests by serious illness or where he is detained or

[120] For an analysis of the literature of that period, see Petit de Gabriel (2003, pp. 103-110).

[121] *Jadhav*, Declaration of Judge Robinson, para 2.

[122] In the same vein, these assistance functions are described in Heyking (1930, pp. 811, 873, 889-909); Žourek (1962, pp. 392-393).

[123] Special Rapporteur, Report on Consular intercourse and immunities by Mr J Zourek, 15 April 1957, Doc A/CN 4/108, (1957) 2 Yearbook of the International Law Commission at 71–82.

imprisoned", and the extension of this protection in time for "safeguarding the interests of minors and persons lacking full capacity."[124]

Even before 1957, prior to the confirmation of the present reading of Article 36 VCCR '63, it was clearly established that consular law was a function not only for the intercourse among States but more specifically for a human-centred service, to protect and guarantee individuals in distress situations in which inequalities or vulnerabilities were at stake. It should not be hard to undertake an approach to the VCCR's interpretation and to rights defined in Article 36.1 (b) by resorting to the very object and purpose for which these rules were granted, as mandated by Article 31 VCLT '69. Currently, and taking into account that detention, custody and other related situations abroad are governed by international applicable standards for the protection of human rights, the ICJ should not be impeded to retain the connection between individual consular rights and human rights in a context of detention and judicial proceedings based on a multiple choice of interpretative pathways, starting with the most common "object and purpose" means, as consular law is—and has always been—a human-oriented set of rules, specifically created to serve individuals abroad. This should not be considered a "droit de l'hommisme" when addressing the case of individual consular rights, mainly because of the consular law object and purpose described above, but also because we are just proposing to reinforce the commitment to respect human rights through non-dedicated channels; namely, by resorting to traditional State diplomatic protection for individual rights violations when human rights mechanisms are non-existent, inapplicable or insufficient, without prejudice to the nature of the alleged rights nature—be them human rights or merely conventional rights—or the purpose and functions of the tribunal or institution concerned, as long as there is an interpretative means to force the pace in this intertwining process.

Conclusions

As a final reflection, the door is still open for the ultimate problem: the State's willingness to comply with its international obligations when they affect individuals—either in terms of plain conventional rights or related to fundamental/human rights. The ICJ has stressed it again in *Jadhav*: nullity of domestic judicial decisions is not the international sanction for violation of the VCCR '63. It is up to the State concerned to provide means of redress under the form of "effective review and reconsideration". Fortunately, the ICJ has finally included in Jadhav 2019 Article 14 ICCPR standards in the threshold to comply with this review and reconsideration path, initiated in Lagrand and Avena. Nullity would neither be the consequence in most international human rights enforcement regimes or in the EU regime for procedural guarantees. Effectiveness

[124] 'Report of the Commission to the General Assembly. Document A/4843: Report of the International Law Commission covering the work of its thirteenth session, 1 May–7 July 1961. Draft Article on Consular Relations, with commentaries 1961', (1961) 2 Yearbook of the International Law Commission, Article 5 and Commentaries at 95–99.

and national margin of appreciation to define remedies for such a violation is the option, too, in the EU construction of consular rights as procedural guarantees.[125] Nullity and re-trial are essentially dependent on domestic law compliance, including compliance with international judicial decisions themselves, as international law mechanisms are always subsidiary and sometimes indirect ways (like diplomatic protection) to guarantee individual legal rights.

When propositions for a world court of human rights have been put forth,[126] probably causing a further fragmentation among a growing number of judicial institutions, attention should be given both to a) the role and challenges of international adjudication bodies when applying these human-oriented rules and b) the role and challenges of domestic law for granting full respect for international awards, either in the field of human rights or in the field of general international law.

As it has been proved in the case of Medellín, one of the fifty persons concerned in the Avena ICJ judgment, the United States had no easy way out of its infringement of the primary rules on consular assistance rights and its compliance with the ICJ's decision.[127] In another case deriving from Avena, Judge Tom Price wrote that "[l]amentably, the applicant [Mr Leal] finds himself in possession of an apparent right under international law without an actual remedy under domestic law." According to Steve Charnovitz (2012),

> such a disconnection in the topology of rights and remedies should not exist in any country's law, but especially not in a country like the United States, whose Constitution and Supremacy Clause make clear that 'all treaties made . . . shall be the supreme Law of the Land'.[128] (pp. 572-575).

[125] Art. 12 Directive 2013/48 n 96 and analysis upon this rule, prospective models, the EU Member States transposition and a balanced critique referred to in n 101.

[126] Mainly a scholarly topic, and probably not rooted into the intergovernmental arena, the first occasion this issue was considered was in Trechsel (2004). Sometime later, and in the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights, a report was commissioned to Professor Martin Scheinin (European University Institute), entitled 'Towards a World Court of Human Rights Research report within the framework of the Swiss Initiative to commemorate the 60th Anniversary of the Universal Declaration of Human Rights' and published online on the EUI website. Other pertinent publications have been released and some roundtables have taken place, like the one held at the National Taiwan University in 2012. See also Nowak (2012) and the draft Statute prepared by Nowak, Kozma and Scheinin in 2010 and published online, 'A World Court of Human Rights: Consolidated Draft Statute and Commentaries', at https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf. A project webpage has been set up at http://www.worldcourtofhumanrights.net/. A so-called Treaty of Lucknow is the proposed Statute of the World Court of Human Rights. For arguments strongly opposing the idea, see Alston (2014).

[127] See, for instance, McGuinness, (2008a). On the difficult domestic question of the presidential powers to implement the ICJ decision and the opposition of the Supreme Court, see McGuinness, (2008b). In relation to judgment compliance in the case, see Rea Falcón (2017, pp. 549-556) and Romano (2017).

[128] 'Ex parte Humberto Leal, 2011 WL 2581917 (Tex. Crim. App. June 27) (Price, J., concurring) (internal footnote omitted)', as cited in Charnovitz (2012, pp. 572-575). The United States Supreme Court called for an Avena Act to be passed, but time went by and no such law ever came into existence, see Duffy (2010). A proposal for modification of the VCCR by way of bilateral conventions between the United States and third countries limiting individual consular rights has been advanced, but it has not been implemented yet, see Howell (2013).

Unfortunately, time has shown that "where there is a legal right, there is also a legal remedy" (*ubi jus ibi remedium*) is not an ever-lasting truth.[129]

A similar problem arises in European countries regarding compliance with ECtHR decisions. After a long period when judgments were considered exclusively declaratory and execution was only under the supervision of the Council of Ministers, the Court has now shown interest and has grown more concerned about this matter (Larsen, 2013; Sicilianos, 2014).[130] It is especially difficult for States to comply in those cases where the Convention violation stems from judicial proceedings whose decisions were final. In some cases—for instance, the Spanish Judiciary Act reformation in 2015—a cause of action ("procedimiento de revision", or review procedure) has been introduced based on ECtHR judgments where a final domestic judicial decision was adopted in violation of the rights guaranteed by the ECHR.[131] Although an important step, unfortunately it has not resolved other potential cases. It would not be possible to ask for such a review in Spain when a VCCR '63 individual rights violation is declared by an ICJ judgment in the same vein as in the LaGrand, Avena or *Jadhav* cases. Paradoxically, annulment of the judgment and re-trial could be claimed before domestic Spanish courts for a violation of consular rights as minimum procedural guarantee arising out of Directive 2012/13 and/or Directive 2013/49. Nevertheless, the effectiveness of international adjudication decisions in domestic legal orders is another topic that is worth reflecting on.

Law, be it international or domestic, is an instrument for peaceful human relations. And, as such, it is composed of a set of techniques—primary and secondary rules—to serve, preserve, guarantee, and realise individual and collective rights, whether fundamental or not. In international law, States act as fundamental subjects, rulers, keepers, and settlers of rights, of human beings, the pillars of Law. Classical and contemporary scholars have already acknowledged this. But international tribunals must follow current trends to reaffirm the undisputed evolution of International Law towards placing the individual at the heart of Law, as it already is the case with Consular, European and Human Rights Law.

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[129] Blackstone, Commentaries on the Laws of England (1765–1770) vol. III at 23, cited in Marbury *v.* Madison, 5 U.S. 137, 163 (1803).

[130] For an even broader perspective expressing, in our opinion, a very narrow and 'old-fashioned' view on ECtHR implementation of judgments, see Komanovics (2017). The situation regarding the Inter-American Court of Human Rights seems quite similar: see Bailliet (2013).

[131] Article 5 bis of the Ley Orgánica del Poder Judicial (LOPJ) (LO 6/1985, 1 July, BOE no 157, 2 July 1985), as modified by Article 3 of LO 7/2015, 21 July (BOE no 174, 22 July 2015). For more information, see Sáenz de Santamaría (2014); Queralt Jiménez (2018); Ruiz Miguel (2018).

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