LEBOIS v. BULGARIA AN ALMOST OBITER DICTUM OF FUNDAMENTAL CHARACTER ON THE CONSULAR RITGHS OF FOREIGN NATIONALS

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The case of *Lebois v. Bulgaria* once more raises the question of the relationship between individual rights of information on consular rights and consular communication and assistance rights, as determined by Article 36.1 (b) of the Vienna Convention on Consular Relations of 1963 (VCCR '63) and human rights law.[1]

This connection has been previously established by the Inter-American Court of Human Rights (IACHR). In 1999, in an advisory opinion concerning death penalty cases, the IACHR stated that 'failure to observe a detained foreign national's right' according to Article 36 VCCR '63 'is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of the human rights treaties.'[2] On the other hand, the International Court of Justice (ICJ), confronted with the domestic implementation of consular rights of foreign nationals in the United States since 1998 (*Breard* case, *Paraguay v. United States of America*[3]), rendered a first judgment in June 2001 in the *LaGrand* case (*Germany v. Unites States of America*[4]), and in a more detailed manner in 2004 (in the *Avena and Other Mexican Nationals* case, *Mexico v. United States of America*[5]). Notwithstanding the applicants' claim, the ICJ avoided an express discussion of the fundamental character of those individual rights.[6]

In *Lebois v. Bulgaria*, the European Court of Human Rights (ECtHR), unsolicited, took its time to write state-of-the-art provisions concerning international, European, and Bulgarian law on consular access and assistance. It was precluded to take any further steps, given the absence of any express allegation by the applicant and taking into consideration that the period during which the specific problem of non-respect of consular rights arose was overridden by a timed-out conclusion. Nevertheless, the mere drawing of a scenario of potential violation is already a step forwards in the path of acknowledgement that consular rights of foreign nationals are leaning towards a fundamental rights Mt. Olympus.

On the eve of a new ICJ decision concerning consular rights (*Jadhav* case, *India v. Pakistan*), this essay will comment upon *Lebois* in the context of the—recent—case law developments by the ECtHR on consular rights of foreign nationals. The European Court is actively contributing to a more general trend concerning the interaction between the so-called classical international law ruling the intercourse among nations and a more contemporary approach to a 'humanized' international law. The characterization of the rights of individuals to consular assistance, ruled by VCCR '63 and as part of the fundamental guarantees for the respect of human rights, is currently on the rise.

I. THE CASE OF *LEBOIS V. BULGARIA*: FACTS, CLAIMS, AND THE ECtHR'S ADJUDICATION

On 11 October 2014, an application was lodged in the ECtHR Registry on behalf of Mr Vincent Lebois, a French national alleging fundamental rights violations while in detention

1 The UN General Assembly has already recognised consular communication rights of foreign nationals as part of human rights law: see *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, A/RES/40/144, Art. 10, passed without vote on 13 December 1985, although this does not specifically refer to those rights in the specific context of an arrest or detention.

2 IACHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law: Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 1. This advisory opinion has been cited afterwards by the ECtHR, for example in *Öcalan v. Turkey*, no. 46221/99, 12 May 2005, point 7.

3 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.

4 Germany instituted proceedings on 2 March 1999, and the Court ruled on 27 June 2001.

5 Mexico instituted proceedings on 9 January 2003, and the Court ruled on 31 March 2004.

6 Scholarly literature on these cases is huge, although it is related to a variety of points of law; for instance, the compulsory character of the ICJ directives for provisional measures and US domestic law procedures concerning review and reconsideration when an international law violation takes place in judicial proceedings.

in Sofia, Bulgaria[7]. The application was filed against Bulgaria, and when communicated to France, the French Government declined to exercise their right under Article 36.1 of the Convention to submit written comments[8].

The alleged violations concerned a period of detention in three different facilities. He was first detained from 24 to 25 January 2014 in the 1st District Police Directorate in Sofia and then transferred to the Sofia Investigation Detention Facility from 25 January to 18 April 2014 (pre-trial detention). He was later sent into custody—from 18 to 24 April 2014—to Sofia Prison, where he was to serve his sentence.

The decision of the Court was delivered by the Fifth Section on 19 October 2017, declaring the claim partly inadmissible for non-exhaustion of domestic remedies, partly inadmissible for out-of-time submission, and, ultimately, partly admissible due to a violation of Article 8 of the Convention, granting €1000 in respect of non-pecuniary damages, plus €400 in respect of costs, expenses, and interests until the day of payment by the respondent State, within a three-month period, at any stake.

1.1. Once upon a time mistreatment was claimed

Mr Lebois was born in France in 1986. In 2013, he moved to Romania. He was arrested in Sofia on 24 January 2014 while trying to break into cars in order to steal items from them. 'He was taken to the First District Police Station and placed under police detention.'[9] 'In the late afternoon or evening of 24 January 2014, the applicant was taken to a hospital for a medical examination, and then, at about 10 p.m. the same day, he was taken to a pre-trial detention facility in Sofia.'[10]

'[T]he next day, or one of the following days, the applicant was brought before the Sofia District Court with a view to a decision on whether he should be remanded in detention, and it was decided that he should remain in custody pending trial. A subsequent request for release apparently made by his counsel at the end of February 2014 was rejected as well.'[11]

'On 17 April 2014 the applicant and the prosecution entered into an agreement whereby he pleaded guilty and accepted to serve a sentence of three months' imprisonment. That same day the Sofia District Court approved the agreement, and the next day, 18 April 2014, the applicant was moved to Sofia Prison. Since his pre-trial detention was taken into account when calculating the amount of time that he had to serve under his sentence of imprisonment, he spent only six days there, until 24 April 2014, when he was released.'[12]

Mr Lebois's complaints comprised all his detention time, from police to pre-trial and after-sentencing detention. But the specific facts alleged differed in every one of those periods. Besides, he alleged simultaneously two different sets of violations: Article 3 (Prohibition of torture) and Article 8 (Right to respect for private and family life) of the Convention.

The applicant considered the conditions during his detention were contrary to Article 3 of the Convention, which prohibits torture, inhuman or degrading treatment or punishment.

During police detention, he complained that 'he had not been given any food or drink or allowed to go to the toilet.'[13] During pre-trial detention and in Sofia Prison conditions 'had been very poor; and as a result of those conditions he had developed a staphylococcus infection, for which he had not been given proper medical treatment'[14].

7 Application no. 67482/14.
8 'Article 36. Third party intervention. 1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings', Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.
9 *Lebois v. Bulgaria*, no. 67482/14, 19 October 2017, para. 6.
10 Ibid., para. 8.
11 Ibid., para. 9.
12 Ibid., para. 20.
13 Ibid., para. 33
14 Ibid.

Furthermore, he claimed a violation of Article 8 of the Convention, which states that 'Everyone has the right to respect for his private and family life […] and his correspondence.' Paragraph 2 of this article states that '[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

He argued that 'for twelve days after his arrest he had been unable to contact his family or anyone else and inform them of his deprivation of liberty, and that during his time in custody he had not been provided with sufficient possibilities to receive visits or to speak on the telephone to his family and friends.'[15] The period covered in this claim encompasses police detention and the first ten days of pre-trial detention.

1.2. And the ECHR granted —partial— protection

On 19 October 2017, the Fifth Section of ECtHR declared this application partly inadmissible based on non-exhaustion of domestic remedies in certain particulars and, to some extent, on untimely submission. Notwithstanding the above, the Court granted protection for an Article 8 violation as regards the final section of the period covered by the application.

1.2.1. The Article 3 submissions and the Court's decision

The Bulgarian Government considered that Article 3 violation allegations during the police detention period were out of time, as the application had been submitted after the six-month period established in Article 35 of the Convention. The applicant had neither sought judicial review for the conducts during detention nor damages under the 1988 Act. Moreover, the Government alleged that the detention period was short enough, so it did not trespass the severity threshold for an Article 3 violation to be considered. The Government further contested the alleged bad conditions and poor medical care afforded in the pre-trial and post-conviction facilities[16].

On his part, the applicant established that he 'has applied to the Court less than six months after his release, and argued that the different phases of his detention should not be considered in isolation'[17], for the conditions in pre-trial and post-conviction facilities were also inadequate. Besides, he submitted that remedies under the 1988 Act had already been considered ineffective by the ECHR in a pilot judgment[18]. On the other hand, the new remedies introduced by the Bulgarian Government in 2017 after the said

15 *Lebois v. Bulgaria*, no. 67482/14, para. 48.
16 Ibid., paras. 35–36.
17 Ibid., para. 37.
18 In *Neshkov and Others v. Bulgaria*, nos. 36925/10 and five others, 27 January 2015. This new creative development by the ECtHR to face increasing demands on repeated human rights violations in a country, specifically after East and Centre Europe States accession and especially concerning Arts. 3 and 6 ECHR violations, has been considered a quasi-legislative tool and a dual-nature review between legal cassation and constitutional redress. There is a growing scholar body of work on the relevance and impact of pilot judgments. See, among others: L. Garlick, 'Broniowski and After: on the Dual Nature of Pilot Judgments', in L. Caflish et al (eds.), *Liber amicorum Luzius Wildhaber: Human rights, Strasbourg views* (Kehl–Strasbourg–Arlington: N. P. Engel, 2007), 177–192; A. Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges', *Greek Law Journal* 57 (2009): 1890–1902; Ph. Leach, H. Hardman, and S. Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia', *Human Rights Law Review* 10, no. 2 (2010): 346–359, https://doi.org/10.1093/hrlr/ngq011; Ph. Leach, H. Hardman, S. Stephenson, and B. Blitz, *Responding to Systematic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and Their Impact at National Level* (Antwerp–Oxford–Portland: Intersentia, 2010); J. Abrisketa Uriarte, "Las sentencias piloto: el Tribunal Europeo de Derechos Humanos, de juez a legislador", *Revista Española de Derecho Internacional* 65 (2013): 73–99; D. Haider, *The Pilot Judgment Procedure of the European Court of Human Rights* (Leiden: Martinus Nijhoff Publishers, 2013); L. Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice', *Netherlands Quarterly of Human Rights* 34, no. 1 (2016): 41–70.

pilot judgment did not consider an Article 8 violation allegation for the breach of his right to private and family life to be valid in this case.

The Court recalled that it had already established in June 2017 that remedies set in place by Bulgaria in early 2017 'to provide redress in respect of inhuman or degrading conditions in correctional and pre-trial detention facilities' should also 'be used by pre-trial detainees and prisoners who had been released before its introduction and had in the meantime complained to the Court about the conditions of their detention' [19]. Therefore, the Court concluded that 'it is open to the applicant to seek compensation under the relevant provisions of the 2009 Act, as amended in 2017.'[20] The Court underscored that the difficulties in doing so 'due to his being a foreigner who does not speak Bulgarian do not exempt him from the obligation to exhaust domestic remedies'[21].

But the 2017 reformation of the 2009 Act only covered pre-trial detention and detention under a sentence of imprisonment[22], so the Court stated that 'insofar as he complained about the conditions of his police detention, the applicant did not have at his disposal an effective domestic remedy. His complaint in that respect is, however, inadmissible for failure to comply with the six-month time limit under Article 35.1 of the Convention' [23]. To reach this conclusion, the Court explains the previous jurisprudence in terms of a 'continuing situation' as regards violations occurred in successive detention facilities, stating that 'the conditions in those facilities, as well as the nature of his grievances in respect of them' must not substantially differ. The Court considered this was not the case; thus, the time limit for the police detention conditions did not run from the date of his release (24 April 2014), but rather from the day he was transferred to the pre-trial detention facility (24 January 2014). Accordingly, when he submitted his application (11 October 2014) the six-month period had already elapsed.

1.2.2. The Article 8 submissions and the Court's decision

The Bulgarian Government asserted that the applicant's failure to recharge his phone card could not be imputed to the authorities, and no interference with Article 8 could be attributed in this case as a result: he had received family and friends' visits, along with those of his legal counsellor and consular staff. He had received parcels on two occasions; therefore 'no undue restrictions on his contacts with the outside world' had taken place[24]. He also alleged the non-exhaustion of local remedies.

The applicant said it was twelve days before he could get in touch with the Consulate of France in Sofia, and even later with his family and friends. Furthermore, the contacts were brief, and their frequency did not increase during the subsequent period of detention[25].

The Court deemed that any eventual violation of Article 8 during his arrest and police detention constituted an out-of-time allegation: to comply with the six-month time limit, it should have been raised 'not later than 5 August 2014, but only did so on 11 October 2014'. Yet, before concluding, the Court considered that the facts of the case raised more than a 'potentially serious issue under Article 8 of the Convention'[26], 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.'[27] We will return to this issue later, for it constitutes our core concern.

For the later period of detention in the pre-trial facility, which lasted until 18 April 2014, the time limit was still not due on 11 October 2014,

19 *Lebois v. Bulgaria*, no. 67482/14, para. 39, specifically in *Atanasov and Apostolov v. Bulgaria*, nos. 65540/16 and 22368/17, paras. 44–68, 27 June 2017.
20 Ibid., para. 41.
21 Ibid.
22 *Lebois v. Bulgaria*, no. 67482/14, para. 43.
23 Ibid., para. 44.
24 Ibid., para. 51.
25 Ibid., para. 52.
26 Ibid., paras. 55 & 54.
27 Ibid., para. 53.

when the application was filed. The Court then deliberated whether domestic remedies had been exhausted before the filing of said application. It stated that the Government had not clarified which were the non-exhausted remedies and what redress they could have provided to the applicant, so it declared the application admissible[28] and considered the merits of this case.

The Court recalled its previous jurisprudence regarding the legality of certain constraints on the right to family life when someone is remanded in custody: the limitations must be 'in accordance with the law' and 'necessary in a democratic society'[29]. In the present case, the Court considered that the aforementioned requisite 'in accordance with the law' was not respected, given that the rules governing visiting rights and the use of a telephone 'were not accessible in a standardised form' and were not brought to the applicant's attention[30]. Thus, without turning into an analysis of a limitation 'necessary in a democratic society', the Court declared the existence of a violation of Article 8.

II. WHAT THE CASE WAS FINALLY NOT ABOUT DEMANDS ATTENTION

As the Court considered that no 'continuing situation' existed throughout the whole detention period of Mr Lebois, it could not enter into the merits concerning the violation of rights during the very first hours of detention, as it was barred by the out-of-time filing of the allegation.

2.1. The 'almost obiter dictum'

The Court dared to go quite far by affirming obiter dictum that the 'state of affairs *raised a potentially serious issue under Article 8* of the Convention, but came to an end more than six months before the applicant lodged his application' (emphasis added).

The Court's suspicions were based on the allegation by the applicant that 'the authorities had not done enough to enable him to inform his family of his arrest and placement in detention.'[31] The Court underlined the fact that not speaking Bulgarian was an aggravating circumstance, as interpretation facilities were apparently absent. For the Court, this 'raises an issue under the authorities' positive obligations flowing from Article 8 of the Convention' concerning the detainee's early contact with his family: this is a situation of distress for the family (disappearance of the detainee) and of extraordinary importance to prevent arbitrary detention[32].

As stated above, the case pertains to the contact between Mr Lebois and his family, since he 'was not able to inform anyone of his deprivation of liberty for twelve days, until, with the help of a co-detainee, he obtained access to a telephone and contacted the consulate of France in Sofia on 5 February 2014, which in turn informed his parents of his arrest and detention'[33]. The applicant never claimed violation of his right to be informed of consular rights or his right to contact national consular authorities, 'without undue delay', as the Vienna Convention on Consular Relations of 1963 (VCCR '63) establishes in Article 36.1 (b).

However, moving further and beyond this family contact, the Court included the international norms ruling consular contact rights between an alien detainee and his national consular officer in its analysis of the 'Relevant domestic law and practice', under the heading of 'the obligations to inform other that someone has been placed in pre-trial detention and to enable pre-trial detainees to contact their families and relatives'.

Specifically when stating the law and after taking notice that domestic law (Article 63, para. 7 of the 2005 Code of Criminal Procedure) ruled that 'after placing an accused in pre-trial detention, the authorities must notify (a) his or her family; (b) his or her employer, unless the accused opposes that; and (c) the Ministry of

28 Ibid., para. 58.
29 Ibid., paras. 61–64.
30 Ibid., paras. 65–67.
31 Ibid., paras. 53–54.
32 Ibid., para. 53.
33 Ibid., para. 54.

Foreign Affairs, if the accused is a foreign national', the Court pointed out that Bulgaria had acceded in 1989 to the VCCR '63, whereby Article 36.1 (b) specifically lays down 'the obligations to (a) inform a consular post if a national of the sending State is arrested or detained; (b) forward without delay any communication addressed to that post by the detainee; and (c) inform the detainee without delay of those rights. The Convention was published in the State Gazette on 25 May 1999, and is thus, by virtue of Article 5.4 of the 1991 Constitution, part of Bulgarian domestic law'[34].

In the same vein, the Court identified a later Ministry of Internal Affairs Act that 'came into force on 1 July 2014' (after the facts of the case occurred), which provides that 'an order for police detention must set out the detainees' rights to contact the consular authorities of their State of nationality if they are not Bulgarian nationals', further detailing other domestic rules concerning early contact of detainees with a person of their choosing.

A specific right to inform the family or a relative is established again in Section 243 (1) of the 2009 Act, whereby the accused is put in pre-trial detention, having to sign a declaration in case he refuses to contact his family. This same act provides the rights to visits, telephone contacts, and 'to be informed of their right to contact the diplomatic or consular authorities of their State of origin, and must immediately be provided with facilities to do so'[35].

The ECtHR incorporates Directive 2013/48 of the European Union (EU) of 22 October 2013 to the state of the law, with a transposition deadline of 27 November 2016, which states that detainees have a 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'[36]. Bulgaria had not yet, at the date of judgment, approved the 2016 transposition-amendment of the 2005 Code of Criminal Procedure in that sense. Those rights were already established under the Ministry of Internal Affairs Act of 2014. In any case, the invocation of the EU Directive in the judgment should be regarded as legally irrelevant, for it was not applicable to the case. Nevertheless, the Court of Justice of the European Union (CJEU) jurisprudence has detailed the obligations of a member State as arising out of EU Directives, in force but pending timely transposition. This represents the situation as regards EU Directive 2013/48 in the present case[37]. None of this is considered by the ECtHR. Mentioning this directive only served the purpose of stressing the connection between consular rights and the right to family contact, since they are both ruled by the same directive. There is no mention, however, of Directive 2012/13/EU on the right to information in criminal proceedings, which includes the right to information on consular rights[38].

Let us summarise Mr Lebois's case related rights according to Bulgarian law:

Concerning his *right to family contact* following *detention*, as per the 2006 Act, there existed an obligation on the part of the detaining

34 Ibid., paras. 23–24. Art. 36.1 of the VCCR '63, under the heading 'Communication and contact with nationals of the sending state', expressly states that '1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: […] (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.'

35 *Lebois v. Bulgaria*, no. 67482/14, para. 26.

36 Ibid., para. 27.

37 An obligation of not impeding the object of the Directive had already been established by the European Union Court before the end of the transposition period. On this question, see V. Faggiani, *Los derechos procesales en el espacio europeo de justicia penal* (Navarra: Aranzadi, 2017), 218–224.

38 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ* L 142, 1.6.2012.

authority to communicate the detention to the person specified by the detainee. This became a detainee right only with the enactment of the Ministry of Internal Affairs Act of 2014, in force on 1 July, sometime after the detention, trial, sentence, and release of Mr Lebois. That said, the right to contact a relative and the right to visits and telephone contacts were currently applicable, given that the accused was sent to *pre-trial detention* in accordance with the 2005 Code of Criminal Procedure and the 2009 Act. These pre-trial rights would become effective as rights to be granted immediately upon detention and independently of a pre-trial decision by virtue of the EU Directive 2013/48 (transposition deadline ended 27 November 2016, so it was not applicable on the date of Mr Lebois's detention).

As for the right to be informed of *consular rights* and the right to contact consular authorities, they are now applicable from *detention* and without undue delay by virtue of the CVRC '63 being part of Bulgarian domestic law and, after 1 July 2014, by virtue of the Ministry of Internal Affairs Act of 2014, reinforced by the EU Directive 2013/48 (although transposition deadline of the latter ended on 27 November 2016).

What was, then, the interest of the ECtHR in defining consular rights in those cases where their violation has not been raised by the applicant?

If the Court went obiter dictum to state that the circumstances of the case 'raised a potential issue under Article 8 of the Convention', the state of the law concerning consular rights may be perceived as an *almost* obiter dictum, in the sense that the Court may have implied the idea that consular rights were potentially violated as well. Although the applicant did not raise the question and neither alleged a possible Article 6 violation thereof—right to due process—nor connected consular rights violations to family contact, later allowed by the Bulgarian authorities, the Court asserted in very general terms that 'as evidenced by that provision [Section 249 of the 2009 Act], as well as the other relevant provisions of Bulgarian law, European Union Law and international law […], that obligation [to enable the detainee to contact his or her family promptly] takes on an added importance when the detainee is an alien whose family may be in a different country.'[39]

In that reference to international law, the only norm—apart from European Union law, mentioned separately—expressly included by the ECtHR is the VCCR '63, although this Convention does not mention or relate to the right to contact a relative, the right to visits by family and friends, or the right to telephone calls, whose violation is the main object of Mr Lebois's application. There was no need, therefore, to refer to the VCCR '63.

Domestic law concerning the right to family contact was enough to weigh up—as it did—a potential Article 8 violation. The EU Directive 2013/48 connects both series of rights (consular and family contact) in the same text, along with the right of access to a lawyer, even though this norm was not applicable to the case due to time-related matters. It is clear that, for the ECtHR at least, a connection exists between this case and the VCCR '63, a link between consular and family contact rights.

The reasons for the intertwining of consular rights with other human rights violations must be looked into in further case law. We clearly perceive a smooth movement by the ECtHR to increasingly consider violations of consular rights of foreign nationals as related to certain human rights violations, as we shall see next.

2.2. The ECtHR has already drawn a case-law scenario

This is not the first time both consular assistance rights and Article 36.1 (b) VCCR '63 have been mentioned in ECtHR case law. The Court has referred previously to these on a few different occasions.

In *M. and Others v. Italy and Bulgaria*, the

[39] Ibid., para. 53.

applicants considered Bulgaria's concurrent responsibility (the bulk of the allegations were addressed to establish Italy's responsibility, where the facts occurred), given that no consular authority was present during the interrogation in police detention facilities[40]. The judgment of the Court during a Grand Chamber decision in 2012 rejected the allegations and considered that the case was exclusively conducted against Italy. The Court missed the chance to comment upon the nature of the individual rights to consular assistance and the existence of a corresponding duty by the sending State. In fact, a misunderstanding on the part of the Court is present obiter dictum, as it established 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. The applicant's allegations did not concern diplomatic protection, as an expression of a request for international responsibility, but rather the consular communication rights of the foreign national under Article 36.1 (b) VCCR '63 [41].

In *El-Masri v. the former Yugoslav Republic of Macedonia*[42], the Court was confronted with the problem of extraordinary renditions in the aftermath of the 11 September attacks and the so-called fight against terrorism, in which European States participated in the CIA program to transfer persons suspected of terrorism to the jurisdiction of the United States of America, either contributing to irregular detentions or permitting the unrestricted use of European States' airspace for rendition flights[43]. The *El-Masri* case was of utmost relevance: the United Nations Office of the High Commissioner for Human Rights, Interights, Redress, the International Commission of Jurists, and Amnesty International were all granted leave to intervene in the written procedure. The affair, first allocated to the Fifth Section (2010) and then to the First Section (2011), was later referred to the Great Chamber (2012).

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

[40] *M. and Others v. Italy and Bulgaria*, [GC], no. 40020/03, Judgment of 31 July 2012, 119.

[41] See ibid., para. 127. The IACHR advanced the point of a duty of the sending State to grant consular assistance, but finally did not address the question in substance. See IACHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law: Advisory Opinion OC-16/99 of October 1, 1999, paras. 126–127.

[42] *El-Masri v. the former Yugoslav Republic of Macedonia*, [GC], no. 39630/09, Judgment of 13 December 2012. There is a growing bibliography on the case, yet it is not specific to consular assistance rights. See Cerna, Ch. M., 'Introductory note to the European Court of Human Rights: El-Masri v. The Former Yugoslav Republic of Macedonia', *International Legal Materials* 52, no. 2 (2013): 558–622, doi 10.5305/intelegamate.52.2.0558.

[43] This raises a significant number of legal problems. Literature on the topic is important, among which we may find (from older to newer): J. Santos Vara, 'Extraordinary Renditions: The Interstate Transfer of Terrorist Suspects Without Human Rights Limits', in M. J. Glennon and S. Sur (eds.), *Terrorisme et droit international* (Leiden: Martinus Nijhoff Publishers, 2008), 551–583; P. Gaeta, 'Extraordinary renditions e giurisdizionie italiana nei confronti degli agenti statunitensi coinvolti nel c.d. caso Abu Omar', *Rivista di diritto internazionale* 96, no. 2 (2013): 530–537; M. Mussi, 'Extraordinary Renditions as Enforced Disappearances? The Jurisprudence of the European Court of Human Rights', *Diritti umani e diritto internazionale* 7, no. 2 (2013): 365–378; N. Napoletano, '"Extraordinary renditions", tortura, sparizioni forzate e "diritto alla verità": alcune riflessioni sul caso "El-Masri"', ibid.: 331–364; F. Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism', *Human Rights Law Review* 14, no. 1 (2014): 85–106; P. Sferrazza Taibi, 'Entregas extraordinarias en Europa. Un comentario a las sentencias del Tribunal Europeo de Derechos Humanos: Al Nashiri vs. Polonia y Abu Zubaydah vs. Polonia', *Revista de Derechos Fundamentales*, no. 12 (2014): 163–199; J. Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases', *Human Rights Quarterly* 38, no. 1 (2016): 58–84; A. Liguori, 'Extraordinary Renditions nella giurisprudenza della Corte europea dei diritti umani: il caso Abu Omar', *Rivista di diritto internazionale* 99, no. 3 (2016): 777–796.

months. The alleged ordeal lasted between 31 December 2003 and 29 May 2004, when the applicant returned to Germany'[44].

In 2012, the Court ruled that the detention had been irregular for a number of circumstances: 'There was no court order for the applicant's detention'; '[h]is 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'; '[d]uring 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'; '[f]urthermore, 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.'[45]

Thus, the Court concluded that 'during that period the applicant was held in unacknowledged detention in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation of his right to liberty and security as secured by Article 5 of the Convention'[46]. This case was cited and confirmed in 2016 in *Nasr and Ghali v. Italy*[47].

Substantially in the *El-Masri* case, the VCCR '63 rights mentioned 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 (and an added Article 3 violation—prohibition of torture) in the *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. In view of the established evidence, the Court considers that the interference with the applicant's right to respect for his private and family life was not "in accordance with the law".'[48]

As we have explained above, Article 8 of the ECHR—right to private and family life; but more specifically, the right to family life—is the object and purpose in the *Lebois* case. An interrelation appears once again between the exercise of VCCR '63 rights when a foreign national is held in detention and the right to family life, as can be perceived in the way the ECtHR presents the domestic legal framework of the case including VCCR '63 individual rights.

There are other recent cases where the ECtHR has referred to consular assistance denial 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 referred to the inexistence of consular assistance in the case of a stateless person as creating a 'particularly vulnerable situation'[49]. Taking into account the circumstances surrounding the applicant's detention—with a view to expulsion—said

44 *El-Masri v. the former Yugoslav Republic of Macedonia*, para. 3.
45 Ibid., para. 236.
46 Ibid., para. 237.
47 *Nasr and Ghali v. Italy*, no. 44883/09, 2016, citing the *El-Masri* case more than thirty times.
48 *El-Masri*, paras. 248–249, later confirmed in *Nashr and Ghali v. Italy*, paras. 308–310.
49 *Kim v. Russia* , no. 44260/13, Judgment of 17 July 2014, para. 54.

vulnerability was considered to be contrary to Article 5 (1) of the Convention[50].

A week after the *Lebois v. Bulgaria* judgment was rendered on 19 October 2017, the ECtHR decided upon *Azzolina and Others v. Italy*, a case of torture involving police harsh 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, as other rights of the applicants were violated as well, including the right to consular assistance for foreign nationals. 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.'[51]

In short, even if they are not considered fundamental rights, the consular rights of foreign nationals, when detained abroad, certainly represent a guarantee for the respect of the rule of law both in terms of detention and due process, as they 'recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination'[52]. Consular rights grant the detainee access to the basic information regarding procedural and substantive law for the process he is facing in the country of detention, may speed access to a lawyer and/or interpretation facilities in a foreign country, and may ease family contact, avoiding unacknowledged and/or arbitrary detentions.

The importance of this inter-rights 'connectivity' is at least being acknowledged at European level, as illustrated by the latest case-law of the ECtHR.

III. CONCLUDING REMARKS: *LEBOIS* AND BEYOND

Lebois v. Bulgaria was a low profile case on its own: a minor crime (breaking into cars with a view to stealing items from them) with 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 pre-trial detention, the applicant spent just six days in prison.

Also, *Lebois* was an example of partial compliance with a pilot judgment concerning Article 3 ECHR (prohibition of torture and inhuman and degrading treatment) and *Neshkov and Others v. Bulgaria*[53]. Bulgaria had approved new legislation on dedicated preventive and compensatory remedies with respect to inhuman or degrading conditions of detention in correctional and pre-trial detention facilities. These provisions had been in force since 7 February 2017 but were only applicable to those subjects who had spent time in such facilities before that date, whether they complained to the ECtHR under Article 3 or whether the Court declared inadmissible the claim on the basis of non-exhaustion of domestic remedies. The applicant should have looked for redress through this new legislation encompassing pre-trial and conviction detention, whereas no remedy was at his disposal for the conditions endured during police detention. Besides, he did not raise the question in a timely manner.

In fact, *Lebois* was a 'simple' case involving the violation of Article 8 (right to family life, and in this particular case, right to contact the family while in prison), which extended for twelve days and which was clearly established following this part of the pre-trial detention period.

But the interesting aspects of the case were those initial twelve days and the circumstances of detention during that period. Mr Lebois was held deprived of liberty without

50 Idem, para. 56.
51 *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, 26 October 2017, para. 135. (Official translation not available yet.)
52 IACHR, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 119.
53 *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, 27 January 2015.

informing anyone, and communications were restricted from him for a number of reasons (he did not speak Bulgarian and there was no interpretation facility available to him; he had no money to buy a telephone card or information on the country's telephone system, etc.). Yet the Court was unable to condemn Bulgaria for those twelve days because the six-month period for introducing an application had already expired (more than two months earlier). Despite this fact, the Court ruled that this twelve-day period and the circumstances experienced during that time raised 'a potentially serious issue under Article 8 of the Convention'.

The applicant did not raise the question of consular rights, neither in connection with Article 8 violation nor related to any sort of procedural guarantee of due process (Article 6 ECHR), and the Court did not elaborate on the issue, although it indirectly introduced the question in its ruling. This mere assertion—that is, this obiter dictum—is what makes the case so relevant to us. The case allowed the Court to a) announce obiter dictum that Article 8 was potentially violated during a twelve-day period when no family contact was allowed or facilitated, even though it was time-barred to declare the violation itself, and b) to consider, but not to discuss, that the violation of the right to family contact was partially dependent on the absence of information on consular rights to the detainee, what we have called the '*almost* obiter dictum'.

The mention of Article 36 VCHR '63 and, to a certain extent, EU Directive 2013/48 among the state of the law in the case (the Court did not mention EU Directive 2012/13) was singular at the very least, despite the Court only making a general reference to these provisions in the assessment of the alleged violation of Article 8.

As the Court confirmed 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. It was through another inmate that the applicant was able to contact the French Consulate, and not by notification of the detention authorities, who were obliged to inform him. It was not until this consular contact was established that Mr Lebois could communicate and afterwards receive visits from his family. As VCCR '63 establishes, consular information must be provided 'without undue delay'; hence, twelve days is too long a period for compliance with consular rights 'without undue delay'. In short, the Court considered this twelve-day period to be already too long.

For the Court, the right to quickly enable contact between the detainee and his family avoids 'the deep anxiety that the disappearance of a family member can cause', 'can also amount to an important safeguard to prevent arbitrary detention', and 'takes on an added importance when the detainee is an alien whose family may be in a different country'[54].

In a way, this radiant character is also present in the aforementioned ECtHR case law, as in the *El-Masri* and *Nasr* cases, when linking Article 5 violations (including violation of consular rights as a guarantee of liberty and security right) with Article 8 violations (private and family right). *Lebois* links again—although in an *almost* obiter dictum—the respect for family life to consular rights violations.

A difficult article to pass in the VCCR '63[55], it has already been connected in current accumulated case law with at least the following fundamental rights: prohibition of torture[56] (the denial of consular assistance being a contributing factor for the violation, in *Azzolina and Others v. Italy*, 2017, by the ECtHR), right to liberty and security[57] (in *El-Masri*, 2012, and *Kim v. Russia*, 2014, by the ECtHR), right to a fair trial[58] (in IACHR OC-16/99, 1999; *Breard*, 1998; *LaGrand*,

54 *Lebois v. Bulgaria*, no. 67482/14, para. 53.

55 See E. W. Petit de Gabriel, 'Los Derechos consulares de los extranjeros detenidos: ¿nuevas cartas en la baraja de los derechos fundamentales', *Revista Electrónica de Estudios Internacionales*, no. 33 (2016): 9–12 & 18, n. 59, doi: 10.17103/reei.33.07.

56 Art. 3 ECHR, Art. 4 CFREU, Art. 5 American Convention on Human Rights (ACHR), and Art. 7 ICCPR.

57 Art. 5 ECHR, Art. 6 CFREU, Art. 7 ACHR, and Art. 9 ICCPR.

58 Art. 6 ECHR, Art. 47 CFREU, Art. 8 ACHR, and Art. 14 ICCPR.

2001; and *Avena*, 2004, as alleged by the applicants, although unacknowledged by the ICJ; and currently alleged in *Jadhav*, by India), right not to be arbitrarily private of one's life[59] (as a result of a violation of fair trial guarantees, in IACHR OC-16/99), right to respect for private and family life[60] (in *El-Masri*, by the ECtHR, and in *Lebois*, by deduction on the ECtHR statement of the law in the case).

Still, further case law is needed to settle an interpretation on this intertwined relation between 'classical' international law—law of consular relations—and human rights law. A new opportunity is present in the *Jadhav* case. The ICJ will have a chance to address the connection between consular rights and due process as a fundamental right. India, in its sought submissions and remedies, included, inter alia, 'a relief by way of restitution in integrum declaring that the sentence of military court arrived at, in brazen defiance of the Vienna Convention rights under Article 36, particularly Article 36, paragraph 1 *(b)*, and in defiance of the elementary human rights of an accused which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights, is violative of international law and the provisions of the Vienna Convention'[61], and also requested the Court to order Pakistan to annul the sentence or not give effect to it in any manner.

In this case, and if a proactive position is taken, the ICJ might discuss the relevance of consular assistance in terms of guarantees of due process. India has not alleged violation of the right to family life, but there is a scenario too to reflect on: the connection between the denial of consular assistance for more than a year, the right to a fair process, and the right to contact the family, whose demand for a visa to visit the detainee, already condemned to death penalty, has not been denied but simply ignored. Under these circumstances, the domestic appeal review could not be presented in hand in Pakistan, and it is not clear if it has been registered in the case. The issue could be discussed under the 'exhaustion of local remedies' rule.

Jadhav presents several similarities with the *Lebois* case, but with a threefold difference: consular assistance and family life rights have been denied for more than twelve months, and not days; it is a grave criminal case, risking execution as a death penalty sentence has already been pronounced; and last but not least, the ICJ is certainly not a human rights court.

Yet, after considering *Lebois v. Bulgaria*, gravity does not seem to be the ECtHR's main reason for addressing the relation between consular rights and protected rights. Although any human rights violation must be granted the same consideration, in *Lebois* neither the crime nor its consequences in terms of duration of detention and imprisonment were extremely grave or irreparable. As for the time spent before family contact was established, such a period was not extraordinarily long (compared to situations in cases like *El-Masri* or *Jadhav*, for example). But, for the Court, those twelve days—that is, the amount of days that went by until consular contact was satisfied—amounted to 'a potentially serious issue under Article 8 of the Convention'. The human rights violation (contact with a family member, as an expression of the right to private and family life according to Article 8 ECHR) ended the very moment consular contact was achieved. Should consular rights have been respected from the very moment of detention, then no Article 8 violation would have taken place.

In *Lebois*, 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—all those facts constituted special circumstances for the Court and made the situation a risky one. Being a foreigner does not diminish the conditions to be fulfilled for a claim in order for it to be

59 Art. 1 ECHR, Art. 2 CFREU (absolute prohibition of death penalty), Art. 4 ACHR, and Art. 6 ICCPR.
60 Art. 8 ECHR, Art. 7 CFREU, Art. 11 ACHR, and Art. 17 ICCPR.
61 *Jadhav* case (*India v. Pakistan*), ICC, Application instituting proceedings, para. 60 (2).

addressed by the European Court of Human Rights (a foreign national is not exempt from exhaustion of domestic remedies[62]), but it does increase the burden on the state to guarantee certain rights, such as legal detention, due process, or family life.

This path leads us to understand the consular rights of foreign nationals as a consequence and an avowal of the non-discrimination provision present in all human rights instruments[63]. Consular rights guarantee that foreign nationals will not be subjected to unacknowledged confinement, 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. And, thus, consular information and communication rights must be respected.

We should then conclude that the *rationale* for granting a fundamental right spirit to consular rights is not dependent on the gravity of the violation or the irreparable prejudice; rather, it is a function of the non-discrimination guarantee it offers. And that is a very powerful argument to not disregard those rights. Legal counsellors and scholars specialised on migrant population or procedural rights should not ignore these progressive developments of consular law, as has so often occurred in the past.

Other aspects of this problem should be addressed by adjudication bodies; as, for instance, the eventual obligation of the sending State to grant consular assistance to his national should he request it—due process guarantees—since Article 36 VCCR '63 does not create such an obligation on the sending State: the Convention only establishes an obligation of individual rights guarantees for the receiving State. Thus, the case may be that the individual, once informed of his right to consular contact, and after requesting the assistance of his consular authorities, does not actually receive it. Whether this should be considered a violation of the right to due process or a violation on the part of the detainee's State of nationality (the sending State), and not of the State processing him (the receiving State), has not been settled yet neither by the IACHR nor by the ECtHR, who missed the occasion to rule on the matter in *M. and Others v. Italy and Bulgaria*.

The issue of individual rights of foreign nationals became of concern with the last minute adoption of Article 36 VCCR '63 on the closing day of the Conference. But in the twenty-first century, the focus of this Article has turned from individual to fundamental rights. The first and most important arena where these rights must be applied and claimed, and its violations repaired, is the domestic realm. And that includes all domestic legal operators that must be trained to be aware of the relevance of consular assistance rights for foreign nationals in a world of migrations. Domestic compliance is the first arena to fight for them.

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62 *Lebois v. Bulgaria*, no. 67482/14, para. 41.

63 Non-discrimination may be a clause which applies connected to a guaranteed right (such as in Art. 14 ECHR and Art. 1 ACHR) or be a right directly applicable in itself (as in Art. 21 CFREU and Art. 26 ICCPR).

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