# SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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## I. *Prolegomena*

1. I have voted in support of the adoption today, 17 July 2019, of the present Judgment of the International Court of Justice (ICJ) in the case of *Jadhav (India* v. *Pakistan)*. I arrive at the conclusions of the ICJ set forth in the *dispositif* of the present Judgment on the basis of a reasoning encompassing some points which, in my understanding, deserve more attention. Resolutory points Nos. (7) and (8) of the *dispositif*, for example, appear insufficient to me. And, in respect of such key points in the *cas d'espèce*, examined in detail herein, my reasoning goes well beyond that of the Court. I thus feel obliged, in the present separate opinion, to dwell upon them, — under the usual and unwise pressure of time, — so as to lay on the records the foundations of my own personal position thereon.

2. To that end, I begin by addressing a point once again brought to the attention of the ICJ in the course of the present proceedings in the case of *Jadhav* (paras. 24-25, India; and para. 26, Pakistan, — *infra*), namely, the jurisprudential construction with the legacy of the pioneering Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights (IACtHR) on the matter at issue, followed by the Advisory Opinion No. 18 (2003) of the IACtHR. In logical sequence, I then dwell upon the case law of the ICJ itself (2001-2004), subsequent to the Advisory Opinion No. 16 (1999) of the IACtHR.

3. Following that, I identify the insufficiencies of the ICJ's reasoning in the cases of *LaGrand (Germany* v. *United States of America)* (2001) and of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (2004). Next, I turn attention to the interrelationship between the right to information on consular assistance, and human rights to due process of law and fair trial. I then address the trend towards the abolition of the death penalty, as seen nowadays in the *corpus juris gentium* acknowledging the wrongfulness in the death penalty as a breach of human rights, as well as in initiatives and endeavours in the United Nations in condemnation of the death penalty at world level. This is followed by my observations on the large extent of the harm done to human rights by the death penalty.

4. The way is then paved for my consideration of long-standing humanist thinking, in its denunciation of the cruelty of the death penalty as a breach of human rights. In logical sequence, I then address the importance of providing redress. Last but not least, I proceed, in an epilogue, to a recapitulation of the points of my position sustained in my present separate

opinion. I thus purport herein to make it quite clear that my own understanding goes beyond the ICJ's reasoning, in that I focus on the needed transcending of the strictly inter-State outlook, and, moreover, on the right to information on consular assistance in the framework of the guarantees of the due process of law transcending the nature of an individual right, as a true human right, with all legal consequences ensuing therefrom.

## II. Jurisprudential Construction: The Legacy of the Pioneering Advisory Opinion No. 16 (1999) of the IACtHR

5. To start with, it should not pass unnoticed that we are completing two decades since international jurisprudence started being constructed for the proper interpretation and application of Article 36 (1) *(b)* of the 1963 Vienna Convention on Consular Relations (VCCR), with the adoption of the pioneering Advisory Opinion No. 16 of the IACtHR on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 1 October 1999). In advancing, for the first time, the proper hermeneutics of the key provision of Article 36 (1) *(b)* of the VCCR, the IACtHR underlined the impact thereon of the *corpus juris* of the International Law of Human Rights (ILHR).

6. The IACtHR singled out therein that the rights under Article 36 (1) *(b)* of the VCCR had as a characteristic the fact that their *titulaire* is the individual, — being thus "a notable advance over international law's traditional conceptions of this subject" (Advisory Opinion No. 16, paras. 81-82); the rights accorded thereunder are "rights of individuals" (*ibid.*, para. 83), being the

> "the counterpart to the host State's correlative duties. This interpretation is supported by the Article's legislative history. [T]here was no reason why that instrument should not confer rights upon individuals. (. . .)
>
> Therefore, the consular communication to which Article 36 of the Vienna Convention on Consular Relations refers, does indeed concern the protection of the rights of the national of the sending State (. . .). This is the proper interpretation of the functions of 'protecting the interests' of that national and the possibility of his receiving 'help and assistance', particularly with arranging appropriate 'representation before the tribunals.'" (*Ibid.*, paras. 84 and 87.)

7. In this ground-breaking Advisory Opinion No. 16 (1999), the IACtHR held that Article 36 of the 1963 VCCR recognizes to the foreigner under detention individual rights, — among which the right to information on consular assistance, — as true human rights to which correspond duties incumbent upon the receiving State (irrespective of its federal or unitary structure) (*ibid.*, paras. 84 and 140).

8. The IACtHR further pointed out that the evolutive interpretation and application of the *corpus juris* of the ILHR have had "a positive impact on international law in affirming and developing the aptitude of this latter to regulate the relations between States and human beings under their respective jurisdictions" (Advisory Opinion No. 16, paras. 114-115). The IACtHR expressed the view that the individual right to information under Article 36 (1) *(b)* of the VCCR renders effective the right to the due process of law (*ibid.*, para. 124).

9. The IACtHR in this way linked the right at issue to the evolving guarantees of due process of law, and added that its non-observance in cases of imposition and execution of the death penalty amounts to an arbitrary deprivation of the right to life itself (in the terms of Article 4 of the American Convention on Human Rights and Article 6 of the UN Covenant on Civil and Political Rights — CCPR), with all the juridical consequences inherent to a violation of the kind, that is, those pertaining to the international responsibility of the State and to the duty of reparation (*ibid.*, para. 137). This historical Advisory Opinion No. 16 (1999) of the IACtHR, truly pioneering, has served as inspiration for the emerging international case law, *in statu nascendi*, on the matter, and promptly had a sensible impact on the practice of the States of the region on the matter.

## III. The Evolution with the Advisory Opinion No. 18 (2003) of the IACtHR

10. This Advisory Opinion No. 16 (1999) was succeeded by the likewise relevant Advisory Opinion No. 18 of the IACtHR on the *Juridical Condition and Rights of Undocumented Migrants* (2003), wherein the IACtHR held that States ought to respect and ensure respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the IACtHR, the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*.

11. The IACtHR added that States cannot discriminate or tolerate discriminatory situations to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of her migratory status. This latter cannot be a justification for depriving a person of the enjoyment and exercise of her human rights, including labour rights. Undocumented migrant workers have the same labour rights as other workers of the State of employment, and this latter ought to ensure respect for those rights in practice. States cannot subordinate or condition the observance of the principle of equality before the law and non-discrimination to the aims of their migratory or other policies.

12. The Advisory Opinion No. 18 (2003) of the IACtHR promptly had, for all its implications, a considerable impact in the American continent, and its influence was to irradiate elsewhere as well, given the importance of the matter. It propounded the same dynamic or evolutive interpretation of the ILHR heralded by the IACtHR, four years earlier, in its historical Advisory Opinion No. 16 (1999)[1].

13. Furthermore, Advisory Opinion No. 18 (2003) was constructed on the basis of the evolving concepts of *jus cogens* and obligations *erga omnes* of protection. The repercussions of the Advisory Opinions Nos. 16 and 18 of the IACtHR drew attention to the necessity and relevance of securing the protection of those in great need of it, in situations of vulnerability and defencelessness, — as illustrated by the pitiless world nowadays, marked by a profound crisis of values, appearing to be marked by a social blindness.

14. In both Advisory Opinions Nos. 16 and 18, of utmost importance, the IACtHR clarified that, in its interpretation of the norms of the American Convention on Human Rights, it should extend protection in new situations (such as those concerning the observance of the right to information on consular assistance, and the rights of undocumented migrants, respectively) on the basis of preexisting rights. Advisory Opinion No. 18 (2003) was constructed on the basis of the evolving concepts of *jus cogens* and obligations *erga omnes* of protection.

## IV. The Case Law of the ICJ (2001-2004) Subsequent to the Advisory Opinion No. 16 (1999) of the IACtHR

15. As already pointed out, the IACtHR, by means of its historical Advisory Opinion No. 16 (1999), became the first international tribunal to warn that non-compliance with Article 36 (1) *(b)* of the VCCR would be to the detriment not only of a State party but also of the human beings concerned, as well as to affirm the existence of an individual right to information on consular assistance in the framework of the guarantees of the due process of law (paras. 1-141).

16. As I explained in detail in my separate opinion (paras. 75, 81, 87, 158-162, and 169) appended to the ICJ's Judgment (of 30 November

[1] Cf. A. A. Cançado Trindade "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case Law and Practice", 6 *Chinese Journal of International Law* (2007), No. 1, pp. 1-16; A. A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l'homme", 19 *Revue trimestrielle des droits de l'homme*, Brussels (2008), No. 74, pp. 289-328.

2010) in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (merits), the Advisory Opinion No. 16 (1999) of the IACtHR paved the way for the subsequent case law of the ICJ on the matter (in the cases, e.g., of *LaGrand* (2001) and *Avena* (2004)). In the aforementioned separate opinion of 2010 in the case of *Ahmadou Sadio Diallo*, furthermore, I examined the advanced and irreversible *humanization* of consular law (*I.C.J. Reports 2010 (II)*, pp. 790-792, paras. 163-172), and I recalled, in this respect, relevant passages of the *travaux préparatoires* of the VCCR (*ibid.*, pp. 784-788, paras. 176-181) from the *Official Records of the UN Conference on Consular Relations (Vienna, 4 March-22 April 1963)*.

17. The strict inter-State outlook was transcended already on that occasion, as, in respect of Article 36 (1) *(b)* of the Draft VCCR, several delegates drew attention to the incidence thereon of the rights of individuals, even three years before the adoption of the two UN Covenants on Human Rights of 1966. I do not find it necessary to reiterate here all statements made, in support of fundamental rights of the individual, in the course of the *travaux préparatoires* of Article 36 (1) *(b)* of the VCCR, which I examined at length in my aforementioned separate opinion (*ibid.*,p. 739, paras. 33-34, pp. 755-759, paras. 82-92 and pp. 782-794, paras. 158-188) in the case of *Ahmadou Sadio Diallo* (merits, Judgment of 30 November 2010).

18. May I further recall that, throughout the contentious proceedings in the ICJ in the case of *LaGrand (Germany* v. *United States of America)*, the earlier advisory proceedings conducive to the Advisory Opinion No. 16 (1999) of the IACtHR as well as its Advisory Opinion itself, were constantly brought to the attention of the ICJ, in both the written and oral phases. Thus, in the written phase of the proceedings in the *LaGrand* case, Germany, in its Memorial (of 16 September 1999), expressly referred to the request by Mexico for an Advisory Opinion pending before the IACtHR[2].

19. Likewise, in its Counter-Memorial (of 27 March 2000) in the *LaGrand* case, the United States expressly referred to the Advisory Opinion No. 16 of the IACtHR[3]. This latter was extensively referred to, also in the oral arguments before the ICJ[4]. In its Judgment of 27 June 2001 in the *LaGrand* case, the ICJ found that the United States breached its obligations to Germany and to the LaGrand brothers under Article 36 (1) and (2) of the 1963 VCCR[5]. Yet, the ICJ, in so deciding, did not refer to the pioneering contribution of the IACtHR's Advisory Opinion No. 16

[2] Memorial of the Federal Republic of Germany (*LaGrand* case), Vol. I, 16 September 1999, p. 69, para. 4.13.

[3] Counter-Memorial of the United States (*LaGrand* case), 27 March 2000, pp. 85-86, para. 102, note 110.

[4] Cf., in particular, pleadings of the Co-Agent and Counsel for Germany (B. Simma), CR 2000/26, of 13 November 2000, pp. 60-62; and CR 2000/27, of 13 November 2000, pp. 9-11, 32 and 36.

[5] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 515-516 (resolutory points 3 and 4).

(1999), continuously brought to its attention by the contending parties. This attitude of the ICJ of apparent indifference promptly generated strong criticism in expert writing[6].

20. Subsequently, in the case of *Avena and Other Mexican Nationals* (2004), once again the complainant State before the ICJ, this time Mexico, referred in its Memorial (of 20 June 2003) extensively to the Advisory Opinion No. 16 (of 1999) of the IACtHR, quoting excerpts of it reiteratedly[7]. The ICJ, once again, established a breach by the respondent State, the United States, of the obligations, this time to Mexico, under Article 36 (1) *(b)* and *(c)* of the 1963 VCCR, again failing to refer to the relevant precedent of the IACtHR's Advisory Opinion No. 16 (1999).

21. In the meantime, expert writing continued to reproach the ICJ's failing to refer to the initial contribution of the IACtHR's Advisory Opinion No. 16 (1999)[8], and to emphasize that it should have done so. This criticism stressed the points I made in my own concurring opinion appended to Advisory Opinion No. 16 (1999)[9], among which the ponderation I made, 36 years after the adoption of the 1963 VCCR, then at the end of the twentieth century, that "one can no longer pretend to dissociate the (. . .) right to information on consular assistance from the *corpus juris* of human rights" (para. 1).

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[6] On the "diffident" attitude of the ICJ, which "failed to mention" the judicial precedent of the Advisory Opinion No. 16 (1999) of the IACtHR holding that Article 36 of the 1963 VCCR was among the minimum guarantees essential for a fair trial of foreign nationals, cf. J. Fitzpatrick, "Consular Rights and the Death Penalty after *LaGrand*", American Society of International Law, *Proceedings of the 96th Annual Meeting* (2002), p. 309; and cf. J. Fitzpatrick, "The Unreality of International Law in the United States and the *LaGrand* Case", 27 *Yale Journal of International Law* (2002), pp. 429-430 and 432. Cf. also, on the "lamentable" and "narrower" outlook of the ICJ: M. Mennecke and C. J. Tams, "[Decisions of International Tribunals: The International Court of Justice] *LaGrand* Case *(Germany* v. *United States of America)*", 51 *International and Comparative Law Quarterly* (2002), pp. 454-455. And cf. also, Ph. Weckel, M. S. E. Helali and M. Sastre, "Chronique de jurisprudence internationale", 105 *Revue générale de droit international public* (2000), pp. 770, 791 and 794; Ph. Weckel, "Chronique de jurisprudence internationale", 105 *Revue générale de droit international public* (2001), pp. 764-765 and 770.

[7] *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, Memorial of Mexico, 20 June 2003, pp. 80-81, 136-137, 140-141 and 144, and cf. p. 65. — It further referred expressly to other decisions of the IACtHR, also in contentious cases (cf. *ibid.*, pp. 119-121, 151, 153 and 155-157, and cf. p. 55), pertinent to the matter at issue before the ICJ, in sum, to the relevant *jurisprudence constante* of the IACtHR on the subject.

[8] Cf. criticism to this effect in M. Mennecke, "Towards the Humanization of the Vienna Convention of Consular Rights — The *LaGrand* Case before the International Court of Justice", 44 *German Yearbook of International Law/Jahrbuch für internationales Recht* (2001), pp. 431-432, 451-455, 459-460 and 467-468.

[9] Cf. *ibid.*, pp. 451, 453 and 467.

22. By then, a gradually larger understanding was being formed that the right to consular assistance accorded to the detained foreign national a human rights safeguard, there being interrelationship between consular law and human rights[10]. By the time the ICJ's Judgment in *LaGrand* case (2001) was delivered, there was a strong criticism of the overlooking of "the best, and most comprehensive, judicial opinion regarding the enforcement of the Vienna Convention in death penalty cases", namely, the IACtHR's Advisory Opinion No. 16 (1999), which "concluded that the execution of a foreign national violates international law, if that person was not afforded the right to consular notification and assistance"[11]. It then quoted a paragraph of my own concurring opinion appended to Advisory Opinion No. 16 (1999), wherein I observed that

> "The action of protection, in the ambit of the international law of human rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. Such action of protection assumes growing importance in a world torn by distinctions between nationals and foreigners (including *de jure* discriminations, notably vis-à-vis migrants), in a 'globalized' world in which the frontiers open themselves to capitals, inversions and services but not necessarily to human beings. Foreigners under detention, in a social and juridical milieu and in an idiom different from their own and that they do not know sufficiently, experience often a condition of particular vulnerability, which the right to information on consular assistance, inserted into the conceptual universe of human rights, seeks to remedy." (Para. 23.)

23. Over the last decade, the strong criticism of the ICJ's reasoning in the cases of *LaGrand* (2001) and of *Avena* (2004) for not having expressly acknowledged its debt to the pioneering contribution of the IACtHR's

[10] V. S. Mani, "The Right to Consular Assistance as a Basic Human Right of Aliens — A Review of the ICJ Order Dated 3 March 1999", 39 *Indian Journal of International Law* (1999), pp. 438-439; and cf. also E. Decaux, "La protection consulaire et les droits de l'homme", Société française pour le droit international, *La Protection consulaire* (Journée d'Etudes de Lyon), Paris, Ed. Pedone, 2006, pp. 57 and 71-72. Subsequently, it was stated that the right of consular assistance under Article 36 of the VCCR is generally recognized nowadays as "a customary right in the law of human rights", and the ICJ has been "too restrained, in particular on the issue of remedies for a consular access violation"; J. B. Quigley, "Vienna Convention on Consular Relations: In Retrospect and into the Future", 38 *Southern Illinois University Law Journal* (2013), p. 25, and cf. pp. 12-13 and 16-17.

[11] S. L. Babcock, "The Vienna Convention on Consular Relations (VCCR): Litigation Strategies", www.capdefnet.org/fdprc/contents/relevant_reading/101001-01, of 2001, pp. 2 and 9, and cf. p. 7.

ground-breaking Advisory Opinion No. 16 (1999) persisted[12]. The perception was that those two ICJ decisions were "strongly influenced" by the IACtHR's Advisory Opinion No. 16, which considered the "right to consular notification" as part of the "minimum guarantees of due process required for a fair trial", without which there would be "a violation of the alien's human rights" incurring the State's duty to provide reparations[13]. A quotation was again made of another paragraph of my own concurring opinion appended to the IACtHR's Advisory Opinion No. 16, wherein I sustained that

> "At this end of century, we have the privilege to witness the process of *humanization* of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right[14] to information on consular assistance, of which are *titulaires* all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law." (Para. 35.)

24. In the proceedings of the present case of *Jadhav (India* v. *Pakistan)* before the ICJ, references have been made to the aforementioned pioneering contribution of the IACtHR by India, but not so by Pakistan. Thus, the Memorial of India contains a section (paras. 151-163) carefully devoted to the jurisprudence of the IACtHR. India focuses on the interpretation and application of Article 36 of the VCCR by the IACtHR, finding them instructive for the interpretation and application by the ICJ of the same provision of the VCCR in the present case of *Jadhav* (para. 151).

25. India highlights several key points in the IACtHR's Advisory Opinion No. 16 (1999), including the notion that a treaty can serve to protect human rights, even if its principal or central purpose is not concerned with human rights (para. 154)[15]. Still in its Memorial, India stresses the IACtHR's finding that the evolving *corpus juris* of the ILHR enshrining due process standards ought to guide the interpretation of

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[12] Cf. C. M. Cerna, "Impact on the Right to Consular Notification", *The Impact of Human Rights Law on General International Law* (eds. M. T. Kamminga and M. Scheinin), Oxford University Press, 2009, pp. 171, 173, 175, 180, 182-183 and 186; C. M. Cerna, "The Right to Consular Notification as a Human Right", 31 *Suffolk Transnational Law Review* (2008), pp. 420, 422-423, 425, 430-435, 437-439, 449 and 451-455.

[13] Cf. C. M. Cerna, "Impact on the Right to Consular Notification", *op. cit. supra* note (12), pp. 173 and 175.

[14] Already by the middle of the century one warned as to the impossibility of the evolution of law without the subjective individual right, the expression of a true "human right"; J. Dabin, *El Derecho Subjetivo*, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.

[15] Referring to paragraph 76 of the IACtHR's Advisory Opinion No. 16 (1999).

Article 36 of the 1963 VCCR (paras. 157-159)[16]. Furthermore, India again singles out the significance and contribution of the IACtHR's Advisory Opinion No. 16 (1999) also in its oral arguments presented in the public hearing of 18 February 2019 before the ICJ[17].

26. Pakistan, for its part, in the oral proceedings (public hearing of 19 February 2019 before the ICJ), taking issue with India's arguments and invocation of the IACtHR's Advisory Opinion, contends that it would not be appropriate to raise them before the ICJ — making reference to decisions of the Inter-American Commission (not Court) of Human Rights — and finding India's quotation of such decisions incomplete[18]. This divergence between the two Contending Parties in the *cas d'espèce*, in my perception, calls for a careful consideration of the matter by the ICJ — not given by it — to which I now proceed in the present separate opinion.

## V. Insufficiencies of the ICJ's Reasoning in the Cases of *LaGrand* (2001) and of *Avena* (2004)

27. In its Judgment in the case of *LaGrand* (2001), the ICJ acknowledged that Article 36 (1) *(b)* and *(c)* of the VCCR creates "individual rights", which may be invoked by the national State of the detained person (*I.C.J. Reports 2001*, p. 494, para. 77). Subsequently, in its Judgment in the case of *Avena* (2004), the ICJ reiterated its finding that Article 36 (1) *(b)* and *(c)* sets forth "individual rights" (*I.C.J. Reports 2004 (I)*, p. 36, para. 40), coexisting with rights of the sending State. However, the ICJ avoided to consider that the individual's right under Article 36 of the VCCR has the character of a human right.

28. Earlier on, in its aforementioned pioneering Advisory Opinion No. 16 (1999), the IACtHR held that a provision of a treaty "can *concern* the protection of human rights" (like Article 36 of the VCCR), irrespective of what the main purpose of the treaty at issue might be (paras. 76 and 85). It added that the individual rights guaranteed by Article 36 of the VCCR help to guarantee that the individual concerned enjoys the guarantees of a fair trial and the due process of law (paras. 121-123). And it further added that:

> "the individual's right to information, conferred in Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in

[16] Referring to paragraphs 113-122 of the IACtHR's Advisory Opinion No. 16 (1999).
[17] CR 2019/1, of 18 February 2019, pp. 39-42, paras. 145-153.
[18] CR 2019/2, of 19 February 2019, pp. 47-49, paras. 101-104; Pakistan also criticizes India's arguments relating to "minimum due process" (*ibid.*, para. 104).

> Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused.
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> . . . . . .
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> Because the right to information is an element of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, the detained foreign national must have the opportunity to avail himself of this right in his own defence. Non-observance or impairment of the detainee's right to information is prejudicial to the judicial guarantees." (Paras. 124 and 129.)

29. May I reiteratedly recall, in the present separate opinion, now that we approach the twentieth anniversary of the historical Advisory Opinion No. 16 (1999) of the IACtHR, that this latter considered therein that the individual rights guaranteed by Article 36 of the VCCR are directly related to the human rights to due process of law and a fair trial. The IACtHR stressed that the observance of the right of a detained individual to be informed of his rights guaranteed by Article 36 (1) *(b)* becomes "all the more imperative" in face of a sentence to death (paras. 135-137).

30. The ICJ, for its part, in the case of *LaGrand* (2001), after establishing a breach of the individual rights under Article 36 (1) of the VCCR, found it unnecessary to further consider Germany's argument that the right of the individual to be informed without delay guaranteed by Article 36 (1) of the VCCR "has today assumed the character of a human right" (para. 78). And, subsequently, in the case of *Avena* (2004), the ICJ dismissed Mexico's argument that "the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings" (para. 124). The ICJ did not examine the issue whether the VCCR (Article 36) established human rights; it noted that "[w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide" (para. 124).

31. There was, in my perception, no reason for the ICJ to have adopted such an insufficient approach to the matter dealt with in its Judgments in the two aforementioned cases of *LaGrand* and *Avena*, which were both followed by non-compliance on the part of the respondent State. The factual context of the present case of *Jadhav* (2019) provides yet another occasion to examine the individual rights under Article 36 of the VCCR as directly related to the human rights to due process of law and a fair trial. In my understanding, it is necessary to do so, but, once again, the ICJ followed its own insufficient approach.

## VI. Interrelationship between Right to Information on Consular Assistance, and Human Rights to Due Process of Law and Fair Trial, on the Twentieth Anniversary of a Ground-Breaking Advisory Opinion

32. As, by the turn of the century, two decades ago, the ground-breaking IACtHR's Advisory Opinion No. 16 (1999) on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, inspiring the emerging case law, *in statu nascendi*, on the matter, correctly determined the interrelationship between the individual rights under Article 36 of the VCCR and the human rights to due process of law and fair trial under the CCPR (Article 14) and general international law, it appears necessary to me to consider this issue in the framework of the *hermeneutics* of the breach of the rights under Article 36 of the VCCR established by the ICJ in the present case of *Jadhav*.

33. After all, consular assistance is essential to the effectiveness of the human rights to due process of law and fair trial. In its Advisory Opinion No. 16 (1999), the IACtHR, in its hermeneutics, did not hesitate to interrelate Article 36 (1) *(b)* of the VCCR and Article 14 of the CCPR (paras. 117 and 124). In the present case of *Jadhav*, the ICJ now has had the proper occasion to perfect its own restrained case law on the matter, provided to it by the factual context of the *cas d'espèce*.

34. The contemporary international legal order counts on, and is benefited by, the coexistence of international tribunals. This could not have been foreseen some decades ago, and has been contributing to advances achieved in the new *jus gentium*. International tribunals have identified the need of, and have become used to, taking into account the relevant case law of each other; in this way, they have been contributing to a harmoniously progressive development of international law.

35. Although their jurisdictions are distinct, they have a common mission of realization of justice. In the accomplishment of this common mission, they foster the prevalence of a universal law of nations, and a growing compliance with the *rule of law (état de droit)*, a key item inserted and continuously present in the agenda of the UN General Assembly since 2006 until presently.

36. The right to consular notification under Article 36 of the VCCR is, in my understanding, closely interrelated with the fundamental rights of due process of law and fair trial. Not only did the IACtHR establish this in its Advisory Opinion No. 16, of 1 October 1999 (paras. 124 and 129), but also, subsequently to it, several countries, in their practice, equated the right of notification to consular assistance with the *corpus juris* of human rights, given its close relationship with the rights of due process of law and to a fair trial[19].

[19] Cf. A. A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on Inter-

37. There is reason to proceed in this constructive hermeneutics (without the need to establish an additional violation of the CCPR in the *cas d'espèce*), as we are here in the realm not only of the VCCR (Article 36) but also of human rights in general or customary international law. In my understanding, the right to information on consular assistance under the VCCR (Article 36) is an individual right, and is undoubtedly interrelated with human rights.

38. It is beyond doubt that a foreign national facing criminal proceedings abroad will only be able to obtain full procedural equality if granted access to consular assistance. Therefore, a breach of a foreign national's right to consular notification set forth in Article 36 of the VCCR necessarily entails a breach of the human rights to due process of law and a fair trial in general or customary international law. It is clear that we are here in the domain of human rights, and this is to be duly acknowledged.

39. In the absence of consular assistance, there are no guarantees of due process of law and fair trial, and the execution of a death penalty ensuing therefrom is a breach of general and basic principles of international law — such as that of equality and non-discrimination — and of human rights themselves, entailing the international responsibility of the State concerned[20]. Two decades ago, the IACtHR's Advisory Opinion No. 16 gave the initial contribution and paved the way for the process — advanced today — of humanization of consular law[21].

40. In Advisory Opinion No. 16 (1999), the IACtHR, besides referring to its own ongoing case law, had no difficulty to refer also to the pertinent case law of the ICJ: it recalled (para. 113), e.g., the ICJ's Advisory Opinion on *Namibia* (1971), wherein the ICJ acknowledged its own duty to

> "take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law. (. . .) Moreover, an international instrument has to be interpreted and applied within the

national Case Law and Practice", *op. cit. supra* No. (1), pp. 7-8, and cf. pp. 1-16; S. Veneziano, "The Right to Consular Notification: The Cultural Bridge to a Foreign National's Due Process Rights", 49 *Georgetown Journal of International Law* (2017), p. 533.

[20] Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, p. 508, and cf. pp. 499 and 504; L. Ortiz Ahlf, *Derecho Internacional Público*, 4th ed., Mexico/Oxford, OUP, 2015, pp. 553-557.

[21] Cf. A. A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case Law and Practice", *op. cit. supra* note 1, pp. 1-16.

framework of the entire legal system prevailing at the time of the interpretation. (. . .) [T]he *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53.)

41. The IACtHR's Advisory Opinion No. 16 further recalled (para. 75), *inter alia*, that, in the ICJ's proceedings in the case of *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* (Judgment of 24 May 1980), the applicant State linked Article 36 of the VCCR to "the rights of nationals of the sending State"; and the IACtHR added (para. 75) that, for its part, the ICJ cited (para. 91) the Universal Declaration of Human Rights in its Judgment of 24 May 1980)[22].

42. The two international tribunals, and others, have been sensitive to the progressive development of international law, in the framework of the historical process of humanization of the law of nations[23]. With all the more reason, in the present case of *Jadhav* (2019), the ICJ has before itself the ineluctable interrelationship — which it should have acknowledged — between the right to information on consular assistance, and the human rights to due process of law and fair trial, with all legal consequences ensuing therefrom.

## VII. *Corpus Juris Gentium*: Wrongfulness in the Death Penalty as a Breach of Human Rights

43. A person condemned to death abroad without having had consular assistance has had his individual right under Article 36 (1) *(b)* of the

[22] The ICJ stated therein that: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights" (*I.C.J. Reports 1980*, p. 42, para. 91).

[23] On the contribution of contemporary international tribunals to this historical process of humanization of the *droit des gens*, cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., *op. cit. supra* note 20, pp. 531-591; A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 3rd rev. ed., Belo Horizonte, Edit. Del Rey, 2019, pp. 1-507; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185; A. A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, Mexico, Edit. Porrúa/IMDPC, 2014, pp. 1-324; A. A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", 391 *Recueil des cours de l'Académie de droit international de La Haye* (2017), pp. 19-101; and, on the presence of natural law influence, cf. also A. Peters, *Beyond Human Rights — The Legal Status of the Individual in International Law*, Cambridge University Press, 2018 (reprint), pp. 23-25, 38, 48, 65 and 395-396.

VCCR, interrelated with his human rights, breached. His condemnation, in such circumstances, is by itself a breach of the ILHR, entailing the international responsibility of the State concerned. The death penalty is thereby outlawed, thus going beyond simple "review and reconsideration" of an unlawful conviction. A *corpus juris gentium* has been formed, in line with the trend towards the abolition of the death penalty in contemporary international law.

44. This is an important point which deserves closer attention. In my understanding, a decision of condemnation to death accompanying a violation of Article 36 (1) *(b)* of the VCCR — as in the present case of *Jadhav* — cannot serve as basis for "review and reconsideration" simply: it is an unlawful decision which does not generate any effects. An unlawful condemnation to death is clearly discarded, and cannot be restated or reformulated at all. In such circumstances, the death penalty itself is entirely discarded, not at all only opened simply to "review and reconsideration".

45. And there is another relevant aspect to consider, namely, the cruelty of the death penalty has been widely acknowledged: it goes beyond execution itself, the time spent by the convicted person contemplating his own death while waiting his own execution. Persons convicted to death are treated as persons without a future; they keep waiting for their execution in special cells, "death rows". Besides the right to life, other rights are affected and breached, also of other persons.

46. The cruelty of the death penalty, generally condemned by law, extends to relatives and friends of the convicted persons. The suffering generated does not lessen the loss to the close relatives of the executed person, nor does it put an end to their prolonged pain and anguish. They are simply not taken into account[24]. The execution of the death penalty is a violation of human rights. One cannot simply overlook the widespread reaction to the cruelty of the death penalty.

47. Such acknowledgement by human conscience finds nowadays expression in general international law, as well as in several international treaties along the last decades. Among these, there are conventions which strictly limit the death penalty, aiming to put an end to it, namely: the 1966 UN Covenant on Civil and Political Rights, Article 6 (2) and (4);

[24] Council of Europe, *The Death Penalty — Abolition in Europe*, Strasbourg, Council of Europe Publ., 1999, p. 18; Amnesty International, *When the State Kills: The Death Penalty vs. Human Rights*, London, Amnesty International Publ., 1989, pp. 61 and 68-70, and cf. p. 54.

the 1969 American Convention on Human Rights, Article 4 (2) to (5); the 2004 Arab Charter on Human Rights, Articles 10 to 12.

48. Furthermore, there are significantly international instruments which expressly prohibit, or seek abolition of, the death penalty, namely: the Protocol No. 6 (1983) to the European Convention of Human Rights, Article 1[25]; the Protocol No. 13 (2002) to the European Convention of Human Rights, Article 1[26]; the 1989 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Article 1[27]; the Second Optional Protocol (1989) to the UN Covenant on Civil and Political Rights, Article 1[28].

49. Such prohibition has, furthermore, found expression in international case law. For example, with its landmark judgment (merits and reparations, of 21 June 2002) in the case of *Hilaire, Constantine and Benjamin* v. *Trinidad and Tobago*, the IACtHR became the international tribunal which for the first time established the incompatibility with a human rights treaty (the American Convention on Human Rights) of the "mandatory" death penalty (for the delict of murder).

50. The IACtHR held therein that the right to life was violated by the automatic application of the death penalty, without individualization and without the guarantees of the due process of law, and it ordered, as one of the measures of reparation, the suspension of the execution of such penalty. Among those measures of reparation was also the duty of the respondent State to modify its penal legislation so as to harmonize it with the norms of international human rights protection, and to abstain itself, in any case, from executing the condemned person(s).

51. In my concurring opinion appended thereto, I pondered, *inter alia*, that in effect, the legal order which applies the death penalty resorts itself to the extreme violence which it intends to fight; by means of the application of the millennial *lex talionis*, the public power itself resorts to violence, disposing of the life of a person, in the same way that this latter deprived another person of his or her life, — and all this "despite the historical evolution, likewise millennial, of justice to overcome revenge (public and private)" (para. 4).

52. Still in that concurring opinion, I further recalled, in this respect, that, e.g., the Human Rights Committee (under the UN Covenant on

[25] Article 1: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed".

[26] Article 1: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed".

[27] Article 1: "The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction".

[28] Article 1: "1. No one within the jurisdiction of a State Party to the present Protocol shall be executed. 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."

Civil and Political Rights — CCPR) has consistently sustained that the imposition of the death penalty, at the end of a trial without the guarantees of the due process of law, and without the possibility of an appeal for revision of the respective judgment, constitutes per se a violation of the right to life (in breach of Article 6 of the CCPR)[29]. Such violation, I added, takes place irrespectively of the execution or not of the death penalty, *"even if those condemned to death are still alive"*; there is need "to avoid an additional harm" (para. 18)[30].

## VIII. Condemnation of the Death Penalty at World Level: Initiatives and Endeavours in the United Nations

53. In effect, there is an important aspect which cannot be overlooked in the *cas d'espèce*, namely, the condemnation of the death penalty at a world level, as shown by initiatives and endeavours in the United Nations over the years. The present case of *Jadhav* is focused on the established breach of Article 36 of the VCCR, but one cannot make abstraction of the factual context of the subject-matter. At United Nations level, attention can be drawn to conventional supervisory organs (such as the Human Rights Committee under the CCPR), as well as other United Nations organs (such as the former UN Commission on Human Rights, and presently the UN Council on Human Rights).

### *1. Human Rights Committee under the CCPR*

54. In effect, under the CCPR, the Human Rights Committee has sustained its condemnation of the death penalty in numerous deci-

[29] Cf., e.g., its earlier decisions in the cases *L. Simmonds* v. *Jamaica* (23 October 1992, para. 8.5), *C. Wright* v. *Jamaica* (27 July 1992, para. 8.7), *A. Little* v. *Jamaica* (1 November 1991, para. 8.6), and *R. Henry* v. *Jamaica* (1 November 1991, para. 8.5). Other decisions, to the same effect, were rendered by the Human Rights Committee, in the course of the last decade of the twentieth century, namely: cases *Brown* v. *Jamaica*, of 23 March 1999, para. 6.15; *Marshall* v. *Jamaica*, 3 November 1998, para. 6.6; *Morrison* v. *Jamaica*, 3 November 1998, para. 8.7; *Levy* v. *Jamaica*, 3 November 1998, para. 7.3; *Daley* v. *Jamaica*, 31 July 1998, para. 7.7; *Domukovsky et al.* v. *Georgia*, 6 April 1998, para. 18.10; *Shaw* v. *Jamaica*, 6 June 1996, para. 7.7; *Taylor* v. *Jamaica*, 2 April 1998, para. 7.5; *McLeod* v. *Jamaica*, 31 March 1998, para. 6.5; *Peart and Peart* v. *Jamaica*, 19 July 1995, para. 11.8; *Currie* v. *Jamaica*, 29 March 1994, para. 13.6; *Smith* v. *Jamaica*, 31 March 1993, para. 10.6; and *G. Campbell* v. *Jamaica*, 30 March 1992, para. 6.9.

[30] My concurring opinion appended to the aforementioned judgment (of 2002) in the case of *Hilaire, Constantine and Benjamin* v. *Trinidad and Tobago* is reproduced in *Judge A. A. Cançado Trindade, The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, Vol. I (IACtHR), Leiden/The Hague, Brill/Nijhoff, 2014, pp. 740-760; and A. A. Cançado Trindade, *Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos en la Corte Interamericana de Derechos Humanos, 1991-2008)*, Vol. I, 2nd rev. ed., Mexico D.F., Ed. Cam. Dips., 2015, pp. 447-467.

sions. Besides those rendered in the last decade of the twentieth century[31], in the last two decades it has likewise sustained that the imposition of a death sentence upon conclusion of a trial wherein the provisions of the CCPR have not been respected constitutes a violation of Article 6 (right to life) of the CCPR. It so upheld, during the first decade of the twenty-first century, in its decisions in 22 cases[32].

55. Among those decisions, in the case of *Kodirov* v. *Uzbekistan* (2009), the death sentence was commuted to life imprisonment, so that there was no violation of Article 6; and, likewise, in the case of *Dunaev* v. *Tajikistan* (2009), the death sentence was commuted by the Supreme Court of Tajikistan, so that there was no violation of Article 6 of the CCPR. More recently, along the present decade, the Human Rights Committee has, in new decisions in eight cases, recalled that the imposition of a death sentence upon conclusion of a trial wherein the provisions of the CCPR have not been respected constitutes a violation of Article 6 (right to life) of the CCPR[33].

56. During three decades of work, the Human Rights Committee has upheld that the imposition of a death sentence upon conclusion of a trial by a military court without the guarantees of a fair trial amounts to a violation of Articles 6 and 14 of the CCPR (as stated, e.g., in its decisions in the cases of *S. Kurbanova* v. *Tajikistan*, of 6 November 2003, paras. 7.6-7.7 and 8; and of *K. Turaeva* v. *Uzbekistan*, of 20 October 2009, para. 9.4). The Committee has furthermore found that the seeking by the condemned person of clemency or pardon "does not secure adequate protection to the right to life" under Article 6 of the CCPR: such as "discretionary measures by the executive", in comparison with "appropriate judicial review of all aspects of a criminal case" (decision in the case of *E. Thompson* v. *St. Vincent and Grenadines*, of 18 October 2000, para. 8.2).

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[31] Cf. note 29, *supra*.

[32] Namely: cases *Kodirov* v. *Uzbekistan*, of 20 October 2009, para. 9.4; *Tolipkhuzhaev* v. *Uzbekistan*, of 22 July 2009, para. 8.5; *Dunaev* v. *Tajikistan*, of 30 March 2009, para. 7.4; *Uteeva* v. *Uzbekistan*, of 26 October 2007, para. 7.4; *Tulyaganova* v. *Uzbekistan*, of 30 July 2007, para. 8.3; *Strakhov and Fayzullaev* v. *Uzbekistan*, of 20 July 2007, para. 8.4; *Chikunova* v. *Uzbekistan*, of 16 March 2007, para. 7.5; *Gunan* v. *Kyrgystan*, of 29 January 2007, para. 6.5; *Sultanova* v. *Uzbekistan*, of 30 March 2006, para. 7.6; *Shukurova* v. *Tajikistan*, of 17 March 2006, para. 8.6; *Sigareva* v. *Uzbekistan*, of 1 November 2005, para. 6.4; *Chan* v. *Guyana*, of 31 October 2005, para. 6.4; *Aliboeva* v. *Tajikistan*, of 18 October 2005, para. 6.6; *Deolall* v. *Guyana*, of 1 November 2004, para. 5.3; *Khodimova* v. *Tajikistan*, of 29 July 2004, para. 6.6; *Mulai* v. *Guyana*, of 20 July 2004, para. 6.3; *Saidova* v. *Tajikistan*, of 8 July 2004, para. 6.9; *Smartt* v. *Guyana*, of 6 July 2004, para. 6.4; *Arutyunyan* v. *Uzbekistan*, of 29 March 2004, para. 6.4; *Kurbanova* v. *Tajikistan*, of 12 November 2003, para. 7.7; *Aliev* v. *Ukraine*, of 7 August 2003, para. 7.4; *Hendricks* v. *Guyana*, of 28 October 2002, paras. 6.4 and 7; *E. Thompson* v. *St. Vincent and Grenadines*, of 18 October 2000, para. 8.2.

[33] Namely: cases *P. Selyun* v. *Belarus*, of 6 November 2015, para 7.7; *Burdyko* v. *Belarus*, of 15 July 2015, para. 8.6; *Grishkovtsov* v. *Belarus*, of 1 April 2015, para. 8.6; *Yuzepchuk* v. *Belarus*, of 24 October 2014, para. 8.6; *S. Zhuk* v. *Belarus*, of 30 October 2013, para. 8.7; *Kovaleva and Kozyar* v. *Belarus*, of 29 October 2012, para. 11.8; *Kamoyo* v. *Zambia*, of 23 March 2012, para. 6.4; *Mwamba* v. *Zambia*, of 10 March 2010, para. 6.7.

57. In its relatively recent decision in the case of *P. Selyun* v. *Belarus*, of 6 November 2015, the Human Rights Committee, in reiterating its position that a death penalty imposed at the end of a trial without the guarantees of due process under Article 14 of the CCPR is a breach of it as well as of the right to life under Article 6 of the CCPR (para. 7.7). The Committee deemed it fit to refer to its own General Comment No. 6 (of 1982) on the right to life, comprising also procedural guarantees.

58. May I here recall some significant ponderations of the Committee's very early General Comment No. 6 (of 30 April 1982), namely:

> "The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6 (1) [of the CCPR] is of paramount importance. (. . .) The deprivation of life by the authorities of the State is a matter of the utmost gravity. (. . .)
>
> The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. (. . .)
>
> The procedural guarantees (. . .) prescribed [in Article 6 of the CCPR] must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal." (Paras. 3, 5 and 7.)

59. The international treaties prohibiting, or seeking abolition of, the death penalty, which I have already listed (in paragraph 48, *supra*), have furthermore had repercussion in international institutions (at global — UN — and regional levels), in the world-wide condemnation of the death penalty. Within the United Nations, for example, the Second Optional Protocol to the CCPR has kept on attracting attention for the realization of its mission of prohibition of the death penalty[34]. Parallel to the conventional supervisory organs, such as the Human Rights Committee, the United Nations human rights organs have kept on encouraging Member States to ratify or accede to that Protocol, among other instruments, bearing in mind the cruel and irreversible nature of the death penalty.

### *2. Former UN Commission on Human Rights*

60. As already pointed out, attention is here, in this respect, to focus also on the initiatives and endeavours of United Nations human rights organs along the years. The former UN Commission on Human Rights, for instance, from 1997 to 2005, adopted successive resolutions calling for the abolition of the death penalty, and invoking to that effect the Second

[34] It contains no provisions for denunciation or withdrawal.

Optional Protocol to the CCPR, namely: resolution 1997/12, of 3 April 1997 (preamble and para. 1); resolution 1998/54, of 3 April 1998 (preamble and para. 2); resolution 1999/61, of 28 April 1999 (preamble and para. 2); resolution 2000/65, of 26 April 2000 (preamble and para. 2); resolution 2001/68, of 25 April 2001 (preamble and para. 3); resolution 2002/77, of 25 April 2002 (preamble and para. 3); resolution 2003/67, of 24 April 2003 (preamble and para. 3); resolution 2004/67, of 21 April 2004 (preamble and para. 3); and resolution 2005/59, of 20 April 2005 (preamble and para. 6).

61. In the sequence of those resolutions, the former UN Commission on Human Rights expressed, in their preambles, its belief that the abolition of the death penalty contributes to the "enhancement of human dignity" and to the "progressive development of human rights". From 2001 onwards, it made, in its own resolutions, references to a pertinent resolution (of 2000) of its former Sub-Commission on the Promotion and Protection of Human Rights (resolution 2001/68, para. 2; resolution 2002/77, para. 2; resolution 2003/67, para. 2; resolution 2004/67, para. 2; and resolution 2005/59, preamble).

62. From 2003 onwards, the former UN Commission on Human Rights enhanced its expression of concern, in calling upon all States that still maintained the death penalty to abolish it "completely and, in the meantime, to establish a moratorium on executions" (resolution 2003/67, para. 5 *(a)*; resolution 2004/67, para. 5 *(a)*; and resolution 2005/59, para. 5 *(a)*). And from 1999 to 2005, the former Commission significantly and correctly interrelated the obligations attached to certain rights protected under the CCPR — such as the right to life in Article 6, and procedural guarantees in Article 14 — with those in respect of the rights under Article 36 of the VCCR (resolution 1999/61, para. 3 *(d)*; resolution 2000/65, para. 3 *(d)*; resolution 2001/68, para. 4 *(d)*; resolution 2002/77, para. 4 *(e)*; resolution 2003/67, para. 4 *(f)*; resolution 2004/67, para. 4 *(h)*; and resolution 2005/59, para. 6 *(h)*).

### *3. UN Council on Human Rights*

63. Subsequently to the former UN Commission on Human Rights, in the current new era (2006 onwards) of the UN Council on Human Rights, this latter recalled all resolutions of the former UN Commission on Human Rights *(supra)* in its more recent endeavours to the same effect. After doing so, e.g., in the preamble of its resolution 36/17, of 29 September 2017, the UN Council on Human Rights recognized also the role of regional and subregional instruments and initiatives towards the abolition of the death penalty, and drew attention, *inter alia*, to the importance of access to consular assistance for foreign nationals provided for in the VCCR.

64. In its operative part, the same resolution 36/17 of 2017, stressing the need of fully abolishing the death penalty, called upon all States that

have not yet done so to accede to, or ratify, the Second Optional Protocol to the CCPR (para. 2); it also called upon States to comply with their obligations under Article 36 of the VCCR (para. 7). The UN Council on Human Rights thus considered those international instruments in their interrelated way.

65. Its resolution has been followed by the very recent Report of the UN Secretary-General on the "Question of the Death Penalty", submitted to the UN Council on Human Rights[35], at the request of this latter, to update previous reports on the matter. The Report, *inter alia*, records that, until then, 85 States have ratified the Second Optional Protocol to the CCPR[36]; it concludes with recommendations "towards the universal abolition of the death penalty"[37].

66. This factual context, in my perception, cannot simply be overlooked in the handling by the ICJ of the present case of *Jadhav*. One cannot at all dissociate the violation of the individual human right under Article 36 (1) *(b)* of the VCCR rightly established by the ICJ in the present Judgment[38] from its effects on the human rights under Articles 6 and 14 (right to life and procedural guarantees) of the CCPR. It is, in my view, a duty to consider these effects, so as to render possible the proper and necessary consideration of *redress* (Part XI, *infra*).

## IX. The Death Penalty and the Large Extent of the Harm Done to Human Rights

67. In the present case of *Jadhav*, however, the ICJ has pursued a very restrictive reasoning in light of its finding of jurisdiction (para. 38) under Article I of the Optional Protocol to the VCCR. The Court is used to being attentive in particular to the "will" of States. In my understanding, the fact that its jurisdiction is grounded thereon, does not mean that it can only consider the breaches of rights under Article 36 of the VCCR, in isolation. Not at all; in my understanding, should the Court have considered the interrelationship of the violation it established of Article 36 (1) *(b)* of the VCCR with human rights affected under the CCPR as well. They are all interrelated.

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[35] Cf. UN doc. A/HRC/39/19, of 14 September 2018, pp. 1-17.

[36] *Ibid.*, pp. 5-6, para. 10.

[37] *Ibid.*, p. 16, para. 48.

[38] In the present Judgment, the ICJ establishes the breach by the respondent State of the individual's right under Article 36 (1) *(b)* of the VCCR (para. 102), as well the breach of its obligations to the consular officers of the applicant State under Article 36 (1) *(a)* and *(c)* of the VCCR (para. 119).

68. In its present Judgment in the case of *Jadhav*, the ICJ makes brief and rather restrictive references to related human rights under the CCPR (paras. 36, 125-126 and 135), observing that it is beyond its jurisdiction to consider them in the *cas d'espèce*, as its jurisdiction "is limited to the interpretation and application" of the VCCR. I do not at all share such a strict outlook. One cannot simply make abstraction of the effects of the breach of Article 36 (1) *(b)* of the VCCR on interrelated human rights of the victim under the CCPR, which are also part of customary human rights law. Such a restrictive view overlooks the interrelationship between law and justice.

69. Law and justice come indeed together, and one cannot simply close one's eyes to affected rights, which have in effect been addressed in the course of the present proceedings. After all, in the present case of *Jadhav*, both Contending Parties (India and Pakistan) are States parties to the CCPR[39], and some of the rights thereunder (e.g., Articles 14 and 6) have been affected. As their corresponding provisions are also part of general international law, the ICJ could and should have considered and examined them. This being so, one cannot make abstraction of the rights under the CCPR affected by the established violation in the *cas d'espèce* of Article 36 (1) *(b)* of the VCCR.

70. In this understanding, moreover, it should not pass unnoticed that, in their written and oral arguments presented to the ICJ in the present case of *Jadhav*, both Contending Parties have made references also to affected human rights under the CCPR. India has done so to a much greater extent, in its Memorial[40], its Reply[41] and its oral arguments[42]; and Pakistan has also referred to them in its Counter-Memorial[43], and its oral arguments[44]. A consideration of those rights is essential for an assessment of the effects of the breach of the right under Article 36 (1) *(b)*, as well as of the importance of providing redress (cf. Part XI, *infra*).

[39] India became party to the CCPR in 1979, and Pakistan in 2010, but neither of them are parties to the Second Optional Protocol to the CCPR.

[40] Memorial of India, pp. 4-5, paras. 18-25; p. 10, para. 39; p. 19, para. 78; p. 38, paras. 130-131; pp. 40-42, paras. 140-143; pp. 47-48, paras. 157-158; pp. 55-57, paras. 164-168; p. 59, para. 173; pp. 60-61, paras. 175-179; p. 79, para. 192; p. 83, para. 204; p. 86, paras. 211-212; p. 88, para. 214.

[41] Reply of India, p. 16, para. 47 *(c)*.

[42] CR 2019/1, of 18 February 2019, p. 26, para. 83; pp. 35-38, paras. 127-139; pp. 41-46, paras. 150-163; p. 57, para. 195; p. 59, para. 204; and CR 2019/3, of 20 February 2019, p. 11, para. 21; pp. 34-35, para. 2 *(a)*; and p. 35, para. 5 (iii).

[43] Counter-Memorial of Pakistan, pp. 27-28, para. 91; and pp. 111-112, para. 387.

[44] CR 2019/2, of 19 February 2019, p. 47, para. 100.

## X. Long-standing Humanist Thinking: Cruelty of the Death Penalty as a Breach of Human Rights

71. Underlying the *corpus juris gentium* condemning the wrongfulness in the death penalty as a breach of human rights *(supra)*, there are the foundations of humanist thinking, which in my view cannot be overlooked: for a long time such precious thinking has been warning against the cruelty of the death penalty, and calling for its abolition all over the world. After all, an arbitrary deprivation of life can occur by means of "legal" actions and omissions of organs of the State on the basis of a law which by itself is the source of arbitrariness.

72. For a long time humanist thinking has emerged against State arbitrariness in this context[45]. Thus, it may be recalled that, e.g., already in the eighteenth century, in his classic book *Dei Diritti e delle Pene* (1764), Cesare Beccaria warned:

> "Which right can these [men] confer upon themselves to break into pieces their fellowmen? (. . .) Who has wished to leave to other men the discretion to make one die? (. . .) The death penalty is not useful for the example it gives to men of atrocity. (. . .) [A]ll the more dreadful as legal death is inflicted with a studious and planned formality. It seems absurd that the laws, that is, the expression of the public will, which detest and punish murder, commit it themselves, and, to separate the citizens from the intention to kill, order a public murder."[46]

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[45] In a more distant past, e.g., the Renaissance humanist philosopher Thomas More (author of *Utopia*, 1516) was himself unjustly condemned to death; he was beheaded on 6 July 1535, facing it naturally, in the belief that one may lose one's head without being spiritually harmed (for an account, cf., e.g., H. Corral Talciani, *El Proceso contra Tomás Moro*, Madrid, Ed. Rialp, 2015, pp. 107-111). His execution followed the ancient historical example of the influential philosopher Socrates, who was likewise unjustly condemned to death; Socrates preferred to die with injustice (drinking the poison) in 399 BC, than to commit injustice. Sensitive to this sad occurrence of his mentor and friend, Plato wrote, some years later, his *Apology of Socrates* (circa 390-385 BC), wherein the philosopher himself rebutted the arguments of his accusers and boldly assumed the unjust sentence. In this classical defence of Socrates, Plato referred to the victim's last address to the court that wrongly condemned him to death, in which Socrates pondered, *inter alia*, that

> "[n]o one (. . .) should try to escape death by any means he can devise. (. . .)
>
> [T]he difficult thing is not to avoid death, more difficult is avoiding viciousness, because viciousness is a faster runner than death" (lines 39a-39b).

[46] C. Beccaria, *De los Delitos y de las Penas* (1764), Madrid, Alianza Ed., 2000 (reed.), Chap. 28, pp. 81 and 86-87. In his comment, of 1766, on the aforementioned work of C. Beccaria, Voltaire underlined the deep pain — "much more terrible than that of death" — of the uncertainty and waiting, and pondered that "the refined punishments which human knowledge has invented in order to make death horrible, seem to have been

73. In sequence, in the first half of the nineteenth century, Victor Hugo, through his book *Le dernier jour d'un condamné [The Last Day of a Condemned Man]* (1829), referred himself to, and heavily condemned, judicial executions as "public crimes", which badly affected all members of the "social community"[47]. In upholding his view, Hugo was motivated by his own life experience when he was younger. Three years after the original appearance of his book in 1829, he included a preface in its reedition of 1832 (reproduced from then onwards), making therein quite clear that his book was meant to be a manifesto for the abolition of the death penalty[48]. In his own words, he added:

> "When one of those public crimes, called *legal executions*, was committed, his conscience told him that he was not conjointly liable; and he no longer felt that drop of blood on his forehead which spurted from La Grève upon the head of every member of the social community.
>
> But this was not enough. To wash one's hands is good, but to stop the flow of the blood is better.
>
> He knows no higher, no holier, no nobler aim than this,—to strive for the abolishment of capital punishment . . ., and enlarge as much as possible the gash made by Beccaria, sixty years ago, on the old gallows which has stood for so many centuries over Christendom . . . capital punishment is one of the instruments which [a revolution] is most loath to give up.[49]

74. In his own view, the death penalty was a "barbarous punishment", challenging the "inviolability of human life"; it amounts to "most irreparable of irreparable punishments", as, in executing a person, Hugo added, "you behead his whole family. And here, again, you kill innocent beings"[50]. Present and future societies, in his perception, call for the end of the death penalty given its cruelty. This critical humanist position was pursued by other influential thinkers.

75. Thus, later on, in the second half of the nineteenth century, another universal writer, Fyodor Dostoevsky, in his *Memoirs from the House of*

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invented by tyranny rather than by justice"; *cit. in ibid.*, pp. 129 and 149. In another essay, *The Price of Justice* (1777), Voltaire again referred to the "deep pain" which prison is, and added that one should not punish murder with another murder, as "death repairs nothing"; Voltaire, *O Preço da Justiça*, São Paulo, Martins Fontes, 2001, pp. 17-19 and 101; to him, the *raison d'Etat* was nothing but an "expression invented to serve as an excuse to the tyrants"; *ibid.*, p. 80.

[47] Cf. Victor Hugo, *The Last Day of a Condemned Man* (1829), Dover Publications; Victor Hugo, *Romans*, Vol. I, Paris, Eds. Seuil, 1963 (reed.), pp. 218, 220 and 234.

[48] Cf. *ibid.*, p. 205.

[49] *Ibid.*, p. 206.

[50] *Ibid.*, pp. 205-208 and 211-213. Also cf. Victor Hugo, *The Last Day of a Condemned Man* (1829), Dover Publications, Preface, pp. xvi and xxx. Hugo's abolitionist position and plea, to put an end to the death penalty, are recalled even nowadays: cf., e.g., R. Badinter, *Contre la peine de mort*, Paris, Fayard, 2006, pp. 272 and 294 ("le vœu de Victor Hugo"). Hugo's book has been reedited ever since; cf., recently, e.g., V. Hugo, *Le dernier jour d'un condamné [The Last Day of a Condemned Man]*, Paris, Gallimard, 2017 (reed.), pp. 15-175.

*the Dead* (1862), expressed himself eloquently against the "unlimited power" of certain individuals over others, generator of the brutality and perversion which contaminated society as a whole; to him, this is the case of the corporal punishments, applied amidst the indifference of the society "already contaminated" and in a state of decomposition[51].

76. Dostoevsky dwelt further upon the matter, in one of his subsequent books, *The Idiot* (1869). He pondered therein, that the death penalty, — was an "outrage on the soul", — that the worst pain is not in the "bodily suffering", but rather in waiting for the execution, the moment when "the soul will leave the body" and one will cease to be a human being; and he added:

> "To kill for murder is punishment incomparably worse than the crime itself. Murder by legal sentence is immeasurably more terrible than murder by brigands. (. . .) There is the sentence, and the whole awful torture lies in the fact that there is certainly no escape, and there is no torture in the world more terrible."[52]

77. At that time, the jurist Rudolph von Ihering, in his classic monograph *The Struggle for Law* (1872), in referring to capital punishment, observed that "the judicial murder, as our German language perfectly calls it, is the true mortal sin of the law"[53]. In his perception, a legal regime which orders to kill, resorting to the same methods of total elimination that it condemns in the acts of the murderers, is deprived of credibility. One should not lose sight of the fact that, underlying legal norms, there is a whole system of values[54].

78. In the mid-twentieth century, Albert Camus warned, in his penetrating *Reflections on the Guillotine* (1957), that "the *Talión* is of the order of nature and instinct", and not of law, which, "by definition, cannot obey the same rules than nature. If murder is in the nature of man, the law is not made to imitate or reproduce this nature", but to correct it. Even if one admits the arithmetic compensation of one death (that of the victim) by another (that of the criminal), the execution of capital punishment is not simply the death, as it adds to this latter a regulation, an organization, a "public premeditation", which are "a source of moral sufferings more terrible than death", there being, thus, no equivalence[55].

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[51] In his same book *Memoirs from the House of the Dead* (1862), he warned that the degree of civilization achieved by any society could be evaluated by entering into its prisons; F. Dostoevsky, *Memoirs from the House of the Dead*, Oxford University Press, 1983 (reprint).

[52] F. Dostoevsky, *The Idiot* (1869), Ware/Hertfordshire, Wordsworth Ed., 2010 (reprint), pp. 19-20.

[53] R. von Ihering, *La Lucha por el Derecho* (1872), Madrid, Ed. Civitas, 1989 (reprint), p. 110.

[54] The punishments also reflect the scale of values prevailing in a given social milieu; cf. R. von Ihering, *El Fin en el Derecho* (1877), Buenos Aires, Omeba Ed., 1960, p. 236.

[55] A. Camus, "Réflexions sur la guillotine", in A. Camus and A. Koestler, *Réflexions sur la peine capitale*, Paris, Calmann-Lévy, 1979 (reprint 1997), pp. 140-141.

79. Knowing with much anticipation that he is going to be executed (everything takes place "outside of him"), the condemned person, impotent in face of the public coalition that wants his death, is "maintained in absolute necessity, that of the inert matter, but with a conscience that is his main enemy". The condemned person is, in this way, Camus added, destroyed by the waiting for the execution of the capital punishment well before dying: "two deaths are inflicted upon him", the first one being "worse than the other. (. . .) Compared to this deep suffering, the penalty of *Talión* appears still as a law of civilization"[56]. Yet, Camus concluded, given the evil in the world, the right of living is necessary for "moral life", the deprivation of which should be outlawed[57].

80. Still in the mid-twentieth century, the jurist Gustav Radbruch, in his last years of teaching in Heidelberg, formulated an eloquent defence of jusnaturalism, with incursions into both international law and penal law[58]. It ought to be asked, Radbruch pondered,

> "what does the penalty mean for those in charge of imposing it and executing it, for the whole society, since this latter could also end up debilitated in its values by means of the imposition of inhuman penalties. (. . .) The death penalty, just like all corporal punishments, (. . .) is reproachable from the human point of view, as it downgrades man to the category of a purely corporal being.
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> . . . . . .

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[56] Cf. *op. cit. supra* note 55, pp. 143 and 146.

[57] In his own words, marked in my view by wisdom, he rightly pondered:

> "There are no just people — merely hearts more or less lacking in justice. Living at least allows us to discover this and to add to the sum of our actions a little of the good that will make up in part for the evil we have added to the world. Such a right to live, which allows a chance to make amends, is the natural right of every man, even the worst man . . . Without that right, moral life is utterly impossible . . . There will be no lasting peace either in the heart of individuals or in social customs until death is outlawed." (*Ibid.*, pp. 159-160, 164, 166 and 170.)

[58] Cf. also, on the matter, e.g., Association Internationale Vitoria-Suárez, *Vitoria et Suárez — Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 3-170; L. Le Fur, "La théorie du droit naturel depuis le XVII[e] siècle et la doctrine moderne", 18 *Recueil des cours de l'Académie de droit international de La Haye* (1927), pp. 297-399; A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 540-550 and 1048-1109. On the services rendered by jusnaturalism, G. Radbruch wrote that it "opened the eyes to humanity about its own chains, teaching it thus to shake them. It fought servitude, in the name of the inalienable human right to freedom (. . .); it undermined the absolutism of governments (. . .). It safeguarded the personality against the arbitrariness of police abuses and it proclaimed the idea of the rule of law *(Estado de Derecho)*; it fundamentally corrected penal law, in fighting justice based upon arbitrariness and establishing certain types of delict; it eliminated, as incompatible with human dignity, the corporal punishments of mutilation, it put an end to torment in penal procedure and persecuted those who persecuted witches." (G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 112-113.)

> The changes which become landmarks in the history of law are determined, more than by any other factor of juridical thinking, by the transformations that the image of man experiences, such as the legislator conceives it. (. . .) Every legal order has to start necessarily from a general image, of an average type of man. (. . .) The respect for subjective rights is almost as important for the legal order as the compliance with the legal duties."[59]

81. Shortly afterwards, in the 1960s, L. Recaséns Siches confessed his anguish in face of retribution as justification of the penalty *(lex talionis)*, warning that one is to be watchful as to the failings of human justice and the irreparable character of judicial error[60]. In his major work, Recaséns Siches went further, discarding the "objective idea" of retribution[61], in support of the necessary individualization of the penalty as an inherent faculty of the exercise of the judicial function.

82. Also in the 1960s, Marc Ancel identified the tendency, already then discernible, of the gradual general abandonment of the so-called "mandatory character" of the death penalty[62] (clearly in Western Europe and Latin America), and which persisted then only in a very small number of countries. Ancel observed that the anguish generated by the retributive punishment of the death penalty derived from the ancient *lex talionis*, was being contained, due to its gradual disappearance, under the new influence of the "philosophy of human rights" and "humanist aspirations"[63].

83. As it can be seen, lucid jurists, philosophers and writers, in condemning the wrongfulness of the death penalty, have converged in making it clear that law and justice come together, they cannot be separated one from the other. It is necessary to keep this point always in mind, including in our World Court, which is the International Court of *Justice*. Yet, there have been occasions when, at domestic law level, certain tribunals (such as military courts) only focus on methods to render their decisions effective, making abstraction of values.

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[59] Cf. *op. cit. supra* note 58, p. 156. To the author, the death penalty was, in historical perspective, the "final point" of a series of punishments, above all corporal (including the penalty of mutilation), — and is nowadays a remnant of those punishments, — which "is separated from the other types of penalty by an insurmountable abyss"; G. Radbruch, *Introdução à Ciência do Direito*, São Paulo, Martins Fontes, 1999, pp. 111-112.

[60] L. Recaséns Siches, "La Pena de Muerte, Grave Problema con Múltiples Facetas", *A Pena de Morte* (International Colloquy of Coimbra of 1967), Vol. II, Coimbra, University of Coimbra, 1967, pp. 12, 14-17 and 19-20.

[61] L. Recaséns Siches, *Panorama del Pensamiento Jurídico en el Siglo XX*, Vol. II (1st ed.), Mexico, Edit. Porrúa, 1963, p. 796.

[62] M. Ancel, *Capital Punishment* (1962), N.Y., United Nations Department of Economic and Social Affairs, 1968 (reed.), p. 13.

[63] M. Ancel, "Capital Punishment in the Second Half of the Twentieth Century", 2 *Review of the International Commission of Jurists* (1969), pp. 33 and 39-41, and cf. pp. 37-38.

84. The fact that such methods, when utilized by the public power, seem confirmed by positive law, in my view in no way justifies them. In my perception, legal positivism has always been a subservient servant of established power (irrespective of the orientation of this latter), paving the way for decisions that do not realize justice. This is a distortion that no true jurist can ignore. Law cannot prescind from justice. Law and justice come ineluctably together.

## XI. The Importance of Providing Redress

85. In order to keep law and justice together, one cannot accept being restrained by legal positivism: one is to transcend its regrettable limitations. In the present separate opinion, I find it necessary to address likewise, at this stage, the issue of redress for the unlawful act established by the ICJ in the present case of *Jadhav*, ensuing from the breach of Article 36 (1) *(b)* of the VCCR. The necessary redress is meant to wipe out all consequences of the unlawful act, i.e., in the *cas d'espèce*, the condemnation of Mr. K. S. Jadhav to death by a military court.

86. Redress, in my own understanding, goes well beyond the simple "review and reconsideration", as ordered by the ICJ, of the death sentence of the military court following a breach of consular law. The State's duty of redress encompasses putting an end to the unlawful act as well as preventing any continuing effects ensuing therefrom. It is, in sum, a duty of *restoration* of the situation existing before the occurrence of the unlawful act.

87. In my perception, "review and reconsideration", repeated by the ICJ in the present case of *Jadhav*, in the line of its previous decisions in the cases of *LaGrand* (2001) and of *Avena* (2004), are manifestly insufficient and inadequate, leaving the whole matter in the hands of the respondent States at issue. As I have pointed out from the start of the present separate opinion, resolutory points Nos. (7) and (8) of the *dispositif* of the present ICJ Judgment are insufficient.

88. As the Court, once again in its case law, has ordered "review and reconsideration", it should moreover have taken care of overcoming their limitation in the present case of *Jadhav*, so as to make clear that a reiteration of the death penalty is discarded. In my understanding, Pakistan's effective "review and reconsideration" of the death sentence at issue against Mr. K. S. Jadhav cannot constitute again a death sentence. There are three compelling reasons for this.

89. *First*, as already clarified, there is evidence that there is an evolving customary international law of prohibition of the death penalty, as sustained by an *opinio juris communis* (cf. *supra*). There are nowadays, as already observed, international treaties on the abolition of the death penalty (para. 48, *supra*). There remain some States, however, that in practice seem to overlook this relevant development, in keeping on applying the death penalty; yet, they cannot at all pretend to exclude themselves from

the evolving customary international law in prohibition of the death penalty. This would amount to a breach of it, in the present case interrelated with the breach of Article 36 (1) *(b)* of the VCCR.

90. *Secondly*, the ICJ, as "the principal judicial organ of the United Nations" (Article 92 of its Charter), is bound to uphold the progressive development of international law in prohibition of the death penalty. The United Nations itself has endorsed such development (cf. *supra*). Among the aforementioned international instruments, may I here single out that the Second Optional Protocol to the UN Covenant on Civil and Political Rights[64], provides for the abolition of the death penalty, recognizing that such abolition contributes to the protection of the right to life. The ICJ, as the principal judicial organ of the United Nations, is to render justice in line with the progressive development of international law as applicable in the *cas d'espèce*, determining the abolition of the death penalty.

91. *Thirdly*, one must also turn attention to the basic principle of good faith *(bona fides)*. In effect, in the present case no records have been provided to the ICJ as to Mr. K. S. Jadhav's trial by a military court; there is lack of evidence of due process of law and observance of his fundamental human right to life. Lack of due process and a fair trial ensue from the respondent State's breach of its obligation to provide information on consular assistance (Article 36 (1) *(b)* of the VCCR), established by the ICJ (Judgment, paras. 140-141 and 143). The prosecution, conviction and sentencing of Mr. K. S. Jadhav in such circumstances disclose a lack of *bona fides*.

92. In the present Judgment in the case of *Jadhav*, the ICJ stated that "it is not clear whether judicial review of a decision of a military court is available on the ground that there has been a violation of the rights set forth" in Article 36 (1) of the VCCR (para. 141). It further asserted that there is "no evidence before the Court" as to the outcome of Mr. K. S. Jadhav's petitions or appeals of mercy (para. 140), and added that "[no] evidence has been submitted to the Court regarding the presidential clemency procedure" (para. 143).

93. The ICJ, though overtaken by such uncertainties, nonetheless points to "remedies" essentially at domestic law level (paras. 134-139, 142 and 144-148), limiting itself to "review and reconsideration" of the death penalty. In view of the lack of evidence before it, I find its position on this

[64] Of 15 December 1989, having entered into force on 11 July 1991.

particular point unsatisfactory, if not untenable. My own position is that the facts of the present case of *Jadhav*, as presented to the Court, 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.

## XII. Epilogue: A Recapitulation

94. From all the preceding considerations, it is crystal clear that my own reasoning goes well beyond that of the ICJ in the present Judgment on the case of *Jadhav*, in respect of the points examined in the present separate opinion. This being so, I deem it fit, last but not least, to recapitulate with clarity all the interrelated points that I have examined herein, in my present separate opinion. My position, as seen, is grounded above all on issues of principle, to which I attach much importance, in the search for the realization of justice.

95. *Primus*: Along the last two decades a reassuring jurisprudential construction has emerged and developed, as from the pioneering Advisory Opinion No. 16 (1999) of the IACtHR, on the right to information on consular assistance (Article 36 of the VCCR) as directly related to the international law of human rights. *Secundus*: This right under Article 36 (1) *(b)* of the VCCR is related in particular to the right to life and the guarantees of due process of law (Articles 6 and 14 of the CCPR).

96. *Tertius*: In sequence, the Advisory Opinion No. 18 (2003) of the IACtHR constructed on the basis of the evolving concepts of *jus cogens* (encompassing the fundamental principle of equality and non-discrimination) and obligations *erga omnes* of protection. *Quartus*: Subsequent to the Advisory Opinion No. 16 (1999) of the IACtHR, the ICJ, for its part, adjudicated the cases of *LaGrand* (2001), *Avena* (2004), and now *Jadhav* (2019); in the contentious proceedings of these three cases, the applicant States brought to the attention of the ICJ the historical importance of the construction of the pioneering Advisory Opinion No. 16 (1999) of the IACtHR, — not taken into account by the ICJ in its three aforementioned Judgments.

97. *Quintus*: Yet, in its Judgments in the three cases of *LaGrand*, *Avena* and *Jadhav*, the ICJ acknowledged the "individual rights" under Article 36 of the VCCR, but it avoided to consider their character as of human rights. *Sextus*: In effect, the individual rights under Article 36 of the VCCR are directly related to the right to life and to the human rights to due process of law and a fair trial (as under the CCPR, Articles 6 and 14).

98. *Septimus*: There was no reason for the ICJ to have adopted its insufficient approach to the matter in its Judgments in the cases of *LaGrand*, *Avena* and *Jadhav*. *Octavus*: Beyond what the ICJ has held, there is an ineluctable interrelationship between the right to information on consular assistance and the human rights to due process of law and fair trial, with an incidence on the fundamental right to life.

99. *Nonus*: There is need to proceed in this constructive hermeneutics, so as to keep on fostering the current historical process of humanization of consular law, and, ultimately, of international law itself. *Decimus*: There is a *corpus juris gentium* (international treaties and instruments, and general international law) on the wrongfulness in the death penalty as a breach of human rights. *Undecimus*: There is likewise the case law of the IACtHR to this effect.

100. *Duodecimus*: There has been a consistent and strong condemnation of the death penalty at world level, expressed in initiatives and endeavours in the United Nations. *Tertius decimus*: In face of the death penalty and the large extent of the human harm done to human rights, the ICJ has pursued (as from its own jurisdiction) a very restrictive reasoning. *Quartus decimus*: It is to be kept in mind that law and justice come together, this being essential when human rights are affected.

101. *Quintus decimus*: For a long time humanist thinking has emerged against State arbitrariness in the execution of the death penalty. *Sextus decimus*: There is, in effect, a long-standing humanist thinking on the part of lucid jurists, philosophers and writers, condemning the wrongfulness in the death penalty, and converging in making it clear that law and justice come together, and cannot be separated one from the other; their interrelationship is ineluctable.

102. *Septimus decimus*: Even when the death penalty is executed in conformity with positive law, despite its arbitrariness, this in no way justifies it; after all, legal positivism has always been a subservient servant of established power (irrespective of the orientation of this latter), paving the way for decisions that do not realize justice. *Duodevicesimus*: No such distortions can be acquiesced with, as positive law cannot prescind from justice.

103. *Undevicesimus*: Accordingly, it is necessary to address the issue of redress for the unlawful act established by the ICJ in the present case of *Jadhav*, ensuing from the breach of Article 36 (1) *(b)* of the VCCR. *Vicesimus*: The necessary redress is meant to wipe out all consequences of the unlawful act (the condemnation of Mr. K. S. Jadhav to death by a military court). *Vicesimus primus*: Redress in the *cas d'espèce* goes well beyond the simple "review and reconsideration", as ordered by the ICJ, of the death sentence of the military court following a breach of consular law.

104. *Vicesimus secundus*: The State's duty of redress amounts to *restoration* of the situation existing before the occurrence of the unlawful act, encompassing putting an end to it and preventing any continuing effects ensuing therefrom. *Vicesimus tertius*: "Review and reconsideration", once again repeated by the ICJ in the present case of *Jadhav* (like earlier in the cases of *LaGrand* and of *Avena*), are manifestly insufficient and inadequate, leaving the whole matter in the hands of the respondent State.

105. *Vicesimus quartus*: Resolutory points Nos. (7) and (8) of the *dispositif* of the present ICJ Judgment are insufficient. *Vicesimus quintus*: Pakistan's effective "review and reconsideration" of the death sentence against Mr. K. S. Jadhav cannot constitute again a death sentence. *Vicesimus sextus*: There is nowadays an evolving *opinio juris communis* on the prohibition and the abolition of the death penalty. *Vicesimus septimus*: The ICJ, as the principal judicial organ of the United Nations, is to render justice in line with the progressive development of international law on the prohibition and the abolition of the death penalty.

106. *Vicesimus octavus*: The prosecution, conviction and sentencing to the death penalty of Mr. K. S. Jadhav, in the circumstances of the *cas d'espèce*, disclose a lack of *bona fides*. *Vicesimus nonus*: In the present Judgment in the case of *Jadhav*, the ICJ has acknowledged the lack of evidence as to the availability of judicial review of a decision of a military court, and the outcome of Mr. K. S. Jadhav's petitions or appeals of mercy or clemency.

107. *Trigesimus*: Given such uncertainties, "remedies" essentially at domestic law level, as contemplated by the ICJ in limiting itself to "review and reconsideration" of the death penalty, disclose an unsatisfactory, if not untenable, position. *Trigesimus primus*: The facts of the present case of *Jadhav*, as presented to the ICJ, bar the execution of the death penalty against Mr. K. S. Jadhav, and call for redress for the violation established of Article 36 (1) of the VCCR.

*(Signed)* Antônio Augusto CANÇADO TRINDADE.