

The Diplomatic and Consular Protection of Refugees by Their State of Asylum: Challenges Facing the V4

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Abstract

This research makes a comparative analysis of the legislation and practice of V4 as to the consular (and diplomatic) protection and assistance of their own citizens abroad, of unrepresented V4 citizens in third countries and of refugees in V4. It aims at contributing to the work carried out by diplomats and consuls in order to effectively protect the legitimate rights and interests of individuals abroad.

This paper proceeds on the basis of examining diplomatic and consular protection from the perspective of international and national law, including EU regulations, but in relation to specifically delimited states: Slovak Republic, Poland, Czech Republic and Hungary.

Diplomatic and Consular Protection and Assistance of V4 Citizens by their State of Nationality

Introduction

The protection and assistance of citizens outside their country by the state of nationality brings many questions about citizenship, foreign relations, human rights standards, diplomacy and (national and international) law. In general, while the idea of the importance of the protection of citizens abroad is not contested, the nature of the harm and the means used by the state for achieving this is often disputed.

Diplomatic and consular protection provides potential remedies for V4 citizens abroad. States can take (diplomatic) actions on behalf of a national who has suffered a human rights violation abroad. When a V4 citizen is jailed abroad, he generally receives basic

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consular help from the national local embassy. This help could comprise anything from contacting his family to legal support.

The situation is essentially different when a V4 country were assert its diplomatic protection over one of its citizens abroad. Taking diplomatic protection actions against another state on behalf of its citizen whose rights and interests have been injured by that state would expand the case from an individual consular matter to a formal legal dispute between the V4 state and the other state. This would be a sign that the V4 state is treating the case as a legal dispute between the two states. The principle is that the V4 diplomats would no longer be representing the legitimate rights and interests of a citizen but the interests of their V4 state. The reason is because diplomatic protection is a mechanism under international law that the state of nationality can apply to help one of its citizens whose rights have been violated in another state.

Diplomatic protection can be granted in many forms that are not prohibited by international law. It can include negotiations with the other state, political and economic pressure, judicial or arbitral proceedings or other forms of peaceful dispute settlement. There are no many cases of diplomatic protection in relation to an individual person. In general, diplomatic relations imply political issues of interstate relation, being realized mostly via confidential dialogue, and, as consequence the information available on diplomatic process is quite limited.

V4 have discretionary right to exercise diplomatic protection but this does not prevent states from committing to exercise such a right through their domestic laws.

In practice, V4 provide mostly consular protection, because the conditions for exercising diplomatic protection are stricter, and include: the V4 nationality, a violation of international law by the host state, and the unsuccessful exhaustion of all available local remedies.

The basis for consular protection and assistance² in V4 serves the national legislations, multilateral and bilateral agreements related to consular activities (bilateral consular conventions, agreements on mutual legal aid, agreements on mutual legal aid, bilateral agreements on representation in the field of consular protection), EU law, limited states` case-law, as well as the international law, particularly the Vienna Convention on Consular Relations (VCCR) and domestic legislations.

² The concept of consular protection needs to be distinguished from other consular functions under international and national law. In this regard, it should be noted that whereas consular officials are assigned a range of administrative functions, consular protection refers to action aimed at providing relief in a situation of distress (detention, arrest). By consular protection, it is meant that when the rights of a citizen are violated in a receiving state, the national diplomatic or consular mission there will request the related local authorities of that state to handle the issue in a fair and proper way through diplomatic channels and with the respect of international conventions, bilateral treaties and the national laws of the national state and the receiving one.

Assistance might be provided in such cases as: need for an emergency travel document in case of loss/theft of passport, arrest/detention, being a victim of crime, serious accident or illness, relief and repatriation in case of emergency, death. Consular assistance is not free of charge.

The Ministry of Foreign Affairs of the respective state is the institution that provides protection of rights and interests of its citizens abroad. In practice, the ministry does not account for every single action taken by the consular personnel. Statistical records on the numbers and types of consular activities are registered in the annual reports drafted by the consular posts. As a primary source, the reports reflect the numbers of legal acts taken, including the number of citizens detained in the respective year, the number of consular interventions in defence of the rights and interests of national citizens, as well as of consular protection granted.

V4 National Rules on Consular Protection and Assistance

Slovak Republic

In the Slovak Republic, there is very basic information on the legal framework and practice on consular and diplomatic protection. The relevant legal basis for consular services represents the VCCR, EU legislation, Foreign Service Act and several internal acts of the Ministry of Foreign Affairs of the Slovak Republic.

So far, the Slovak legal framework contains no enforceable basic right to consular or diplomatic protection that would be expressly stipulated in a legal act. The diplomatic and consular personnel use several general legal acts in their practice: Law on State Nationality, Law on Foreigners' Stay, Law on Travel Documents, Law on Registry, Law on Notary, Law on Family, Law on Slovaks Living Abroad. Supplementary, there are several internal guidelines and directives enacted by the Ministry of Foreign Affairs of the Slovak Republic that expressly stipulate a right of a Slovak citizen to receive consular assistance. Yet, they do not regulate the situation when citizens are refused to be granted consular protection. Also, the text of these internal documents are not publically available.

Even though the Slovak legislation does not expressly stipulate the right to consular and diplomatic protection, following the Article 14 of the Competence Law, the Ministry shall insure protection of rights and interests of the Slovak Republic and its citizens abroad. This stipulation shows that consular functions are approached as an obligatory function towards citizens, approach that is also adopted by the ministerial internal guidelines and directives.

The issue of enforceability of the duty of consular officers to provide consular protection is vague. Nevertheless, in case there is a case in a court, legal stipulations might be interpreted in the favour of the citizen.

Consular officers should adopt all possible and available measures in order to ensure consular protection in international relations. In case of arrest or detention, the Slovak diplomatic or consular missions should ensure the respect of international law with regard to the treatment of foreigners, as well as the respect of the domestic law. Support in finding appropriate legal advice should also be provided.

Poland

The Polish legal framework is based on the 1997 Constitution, the VCCR, other international documents, some 40 bilateral conventions on consular relations and bilateral

agreements on legal aid. The right to consular protection is enshrined in the Polish Constitution as a fundamental right. Article 36 stipulates that “Polish citizens shall, during a stay abroad, have the right to protection by the Polish State”³. The Constitution does not determine whether it includes both diplomatic protection and consular assistance, thus, one might consider to include both types of protection. In addition, Article 37 of the Constitution establishes that “anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution”.

It is worth mentioning the 1984 Act on the Functions of Consuls of the Republic of Poland (Ustawa o funkcjach konsulów Polskiej Rzeczypospolitej Ludowej)⁴ that provides the most comprehensive regulations in the field. In case a Polish citizen is arrested or deprived of liberty abroad, Article 13 of the Act provides the modalities of how the consuls are to ensure legal protection to those citizens deprived of their liberty. In this respect, the consul may ask foreign state authorities for information on reasons of the arrest, detention, charges brought against that citizen, undertake visits, facilitate the communication with his family, etc.

The 1984 Act is, probably, a document more complex than most consular legislation in other European states. Articles 10-11 specify the general mechanism to protect the rights and interests of Poland and provide assistance to Polish citizens. More exactly, Article 11 states that consular officers should provide consular protection to individuals considering their rights to which they are entitled by both international law and the domestic law of the receiving state. If a consul does not provide adequate protection to a Polish citizen who finds himself in a distress situation, it is possible to bring the matter to the court’s attention and claim compensation for the damage suffered due to the inaction on the part of the consul. The lack of a consular office should not affect the granting of assistance measures. In such circumstances, the assistance will be rendered by the embassy.

Under Polish national law, only Polish citizens have the consular protection guaranteed. The legislation does not extend this protection to non-Polish family members of a Polish citizen. However, such assistance might be provided but granting consular protection to a non-national will raise the question of citizenship – a precondition for being eligible for requesting protection - as the nationality of the protecting state legitimizes consular activities against the receiving state.

Czech Republic

The majority of multilateral and bilateral conventions and agreements related to consular protection have been concluded by Czechoslovakia and the Czech Republic succeed to them due to principles of international law. An international treaty on consular assistance functions only with the Slovak Republic. There are no similar agreements on consular and diplomatic assistance in favour of nationals between any other countries. The agreement

³ Constitution of the Republic of Poland, available at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (15.03.2023).

⁴ Act on the Functions of Consular Officers of 13.02.1984 (Ustawa o funkcjach konsulów Polskiej Rzeczypospolitej Ludowej) available at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19840090034> (15.03.2023).

provides for mutual assistance in case of emergency in general but specific situations are not indicated. For example, the text of the agreement does not mention at all the arrest or detention.

Comprehensive national legislation on diplomatic and consular protection, such as a general consular Act, does not exist in the Czech Republic. The legal source for consular assistance constitutes the VCCR. Many Czech statutes, though, have scattered stipulations related to consular activities. For example, the consular assistance is found in the legislation related to issuance of passports, marriages abroad, engagement in the cooperation of courts. Consular protection to citizens abroad is regulated as a matter of policy and is regarded as a “service” offered to Czech citizens.

So far, there is no Czech legal standard for consular protection and there is no right of Czech citizens to consular protection. Accordingly, there is no appeal procedure against a refusal of a consular official to provide protection.

Hungary

The right to consular protection is a Constitutional right in Hungary, being stipulated in the Article XXVII (2) of the Fundamental Law of Hungary (into force on 1 January 2012): “Every Hungarian citizen shall have the right to be protected by Hungary during any stay abroad”⁵. Thus, every Hungarian citizen is entitled to the protection of Hungary whenever legally residing abroad. In addition, an extensive national legislation was adopted to ensure a more efficient regulation. Consular protection is granted under Hungarian national law as a legal right to Hungarian citizens and not as a matter of policy.

In cases when a consul refuses to grant consular protection, the affected Hungarian citizen can turn to the Head of the Department of Consular Affairs of the Ministry of Foreign Affairs in order to review the decision on appeal. Further, an appeal against the decision of the Minister of Foreign Affairs can be brought before the Metropolitan Court in Budapest. So far, there is no jurisprudence for such cases.

The Hungarian consular officers inform the arrested citizen about the relevant law applicable in the receiving state but they do not provide legal representation.

Consular Protection for Unrepresented EU (V4) citizens in Third Countries

The EU citizenship creates specific bonds between Member State nationals and the Union and it offers protection to EU (V4) citizens when they travel or reside abroad. As part of EU citizenship rights, Articles 20 (2) (c) and 23 of the Treaty on the Functioning of the European Union (TFEU) provide that every EU citizen is entitled, in the territory of a third (*i.e.* non-EU) country in which the Member State of which they are a national is not represented⁶, to protection by the diplomatic and consular authorities of any Member

⁵ Article XXVII of the Fundamental Law of Hungary. cf. § 69 (3) of the Constitution of the Republic of Hungary.

⁶ A V4 citizen can be unrepresented if there is no embassy or consulate from his own V4 state established in the country. A V4 citizen can also be unrepresented when the embassy or consulate established locally is unable for any reason to provide consular protection, for example because it is far away from where the V4 citizen is located.

State, on the same conditions as the nationals of that Member State. Unrepresented EU (V4) citizens are entitled to equal treatment, that is, to receive the same level of protection the assisting Member States would provide to its own nationals in the same situation. In practice, this means that unrepresented EU (V4) citizens may receive different types of protection and different levels of service depending on the Member State from which they seek protection, due to the differing protection provided by Member States to their own nationals.

The fundamental right for unrepresented EU (V4) citizens to receive consular protection from represented Member States on the same conditions as their own nationals is an expression of the external dimension of EU citizenship, a manifestation of Member States' solidarity, and strengthens the identity of the EU in third countries.

Over the last few years, several events have posed challenges relevant to consular protection, in particular the COVID-19 pandemic, the crisis in Afghanistan, and Russia's war of aggression against Ukraine. These crises demonstrated the benefits of consular protection to EU citizens, as part of the rights flowing from EU citizenship⁷.

On 20 April 2015, the Council adopted Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented EU citizens in third countries. It repealed the Decision 95/553/EC.

Until the entry into force of the Lisbon Treaty, the right related to consular protection was governed by Article 20 of the Nice Treaty and, prior to that, Article 8c of the Maastricht Treaty, which left it to Member States to “establish the necessary rules among themselves” to secure this protection. To comply with Article 8c and considering that common protection arrangements would “strengthen the identity of the Union as perceived in third countries” and the “idea of European solidarity”, Member States adopted Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (OJ L 314, 28.12.1995). The Lisbon Treaty replaced this method of implementation. Under the new approach, the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, was empowered to adopt directives establishing the coordination and cooperation measures necessary to facilitate protection by the diplomatic or consular authorities of any Member State to EU citizens in the territory of a third country in which the Member State of which that person is a national is not represented. In view of the legal framework established by the Lisbon Treaty, the Directive also repealed Decision 95/553/EC.

Prior to a more detailed EU legislation in the field, the assistance to unrepresented citizens of other EU Member States used to form only a thin part of the consular agenda of EU (and V4) diplomatic and consular missions. Therefore, the legal and political attention paid to this issue was limited. In the past, the exercise of consular protection by a V4 consular post for the citizens of another EU state in the third country took place on the basis of

⁷ https://commission.europa.eu/system/files/2022-09/1_1_196921_impl_rep_cons_en_1.pdf (15.03.2023).

bilateral agreements on mutual representation and after proper notification to the receiving state and after no explicit objection on its part.

The protection of refugees abroad by their V4 state of asylum

Refugee population by V4 countries

Slovak Republic refugee statistics⁸

2021	1,046.00	3.98% increase from 2020
2020	1,006.00	4.25% increase from 2019
2019	965.00	2.88% increase from 2018
2018	938.00	2.85% increase from 2017

Poland refugee statistics⁹

2021	4,875.00	75.93% increase from 2020
2020	2,771.00	78.11% decline from 2019
2019	12,658.00	1.3% increase from 2018
2018	12,495.00	2.21% increase from 2017

Czech Republic refugee statistics¹⁰

2021	1,909.00	0.52% decline from 2020
2020	1,919.00	6.57% decline from 2019
2019	2,054.00	6.04% decline from 2018
2018	2,186.00	39.95% decline from 2017

Hungary refugee statistics¹¹

2021	5,676.00	2.77% decline from 2020
2020	5,838.00	1.53% increase from 2019
2019	5,750.00	4.47% decline from 2018
2018	6,019.00	6.14% increase from 2017

In the light of the increasing number of refugees in V4, the topic of diplomatic and consular protection of refugees outside their state of asylum is of particular importance. What was

⁸ <https://data.worldbank.org/indicator/SM.POP.REFG?locations=SK> (15.03.2023).

⁹ <https://data.worldbank.org/indicator/SM.POP.REFG?locations=PL> (15.03.2023).

¹⁰ <https://data.worldbank.org/indicator/SM.POP.REFG?locations=CZ> (15.03.2023).

¹¹ <https://data.worldbank.org/indicator/SM.POP.REFG?locations=HU> (15.03.2023).

once a theoretical topic, today became a reality and such cases have in fact occurred, prompting a number of complex issues.

The V4 lack legislation on consular protection of aliens who have however been granted international protection in their territories, *i.e.* in the form of subsidiary protection or refugee status. It is assumed that V4 states accept the term “refugee” that is used in the 1951 Convention relating to the Status of Refugees.

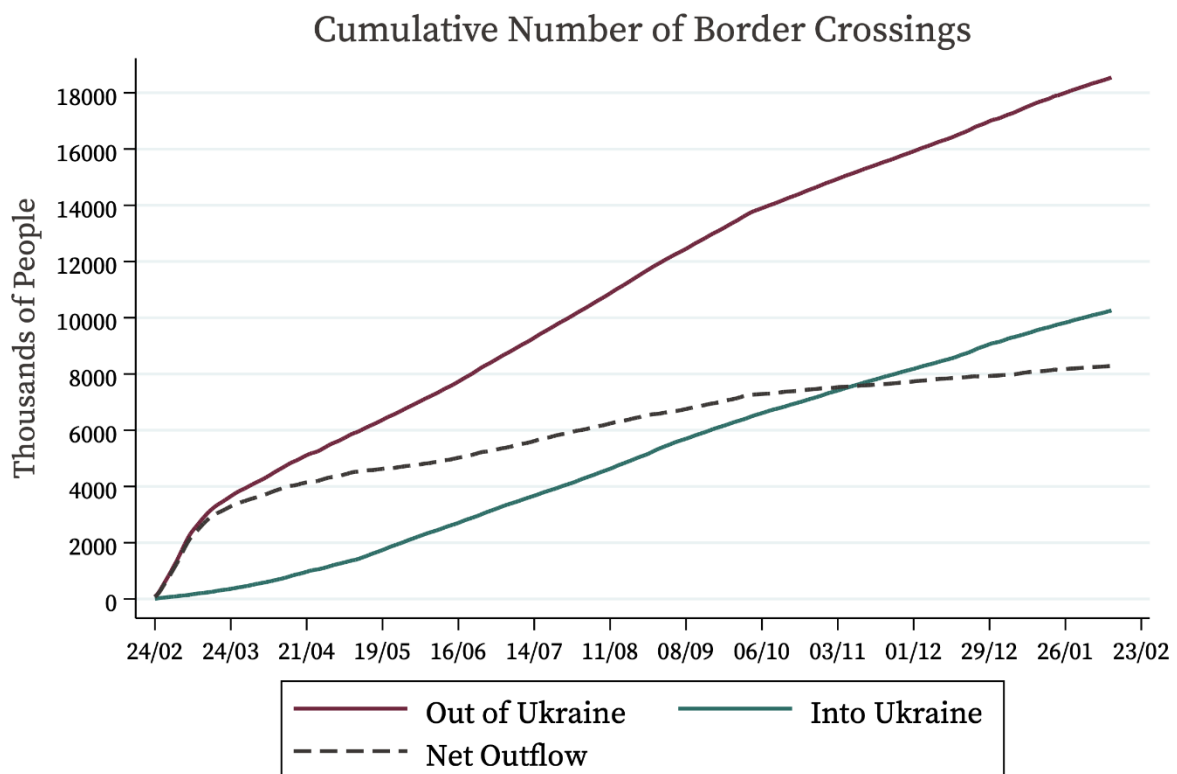
In consular practice, basic consular assistance might be provided to all persons who possess a V4 travel document. However, this will normally not involve financial assistance. It is advised, though, that consular officials should always do their best to provide assistance if requested to by a non-citizen/refugee who is a resident of, or has longstanding and close ties, to the requested V4 country. The requirement of lawful and habitual residence sets a relatively high standard, but is certainly needed in order to prevent abuse of such intervention.

V4 consular missions shall provide assistance, where necessary (mainly in emergency situations) and possible, to recognized refugees when they are abroad in accordance with internal and international law in force. But such legal duty is absent, V4 being free to decide whether or not to grant the protection. Nonetheless, if ill-treated by a third state, only V4 states can effectively grant protection to recognized refugees abroad, essentially replacing their state of nationality that fails to protect. The right of recognized V4 refugees to seek protection abroad under the national law of the V4 asylum state may not be transferred to other EU Member State on the basis of the Union provisions on consular protection of Union citizens. Yet, the V4 asylum state is not deprived from approaching other V4 state or other EU Member State with the request to provide assistance also to recognized refugees.

There is no information on whether V4 provide consular protection on their own recognized refugees. Also, there are no publically known cases where a refugee recognized as such in V4 has requested protection from V4 missions.

Protection of Ukrainian refugees by V4

Number of people who have crossed a border between Ukraine and a neighbouring country since February 24, 2022



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- The UNHCR records 8,113,170 refugees from Ukraine across Europe as of 14 March 2023;
- This amounts to around 20% of the Ukrainian population (estimated by Eurostat as at 2021);
- 4,901,557 refugees have registered for temporary protection in Europe;
- The number of people who fled Ukraine since February 24 is estimated at 19,505,596, while 11,003,323 have returned to the country since February 28;
- Since early May the number of people returning to Ukraine is growing and has been roughly 30,000 per day as of mid-February¹².

¹² <https://cream-migration.org/ukraine-detail.htm?article=3573#:~:text=People%20fleeing%20Ukraine&text=Around%208.1%20million%20people%20have,since%20returned%20to%20the%20country> (15.03.2023).



The temporary protection status (TPS) and asylum are designed to help individuals fleeing unsafe situations in their countries of nationality because local circumstances are unsafe for them. The two programs have similarities, but they are essentially different. The TPS is not individualized, while the asylum is. The asylum considers an individual's concrete circumstances and proof that he was persecuted based on different grounds: political opinions, religion, race, nationality, sexuality, membership to a particular social group. On the contrary, the TPS is granted by the government to countries undergoing armed conflicts, epidemics, hazardous environmental conditions, or other unsafe conditions that threaten their citizens.

On 4 March 2022, the EU activated its Temporary Protection Directive in response to the crisis. This provides Ukrainian citizens fleeing the war with permission to stay, a situation that enables families to reunite, people to be supported, and children to go to school.

Those fleeing Ukraine because of the war do not qualify as refugees under the V4 laws or under the Article 1A(2) of the 1951 Convention relating to the Status of Refugees, both of which narrowly define refugees not as people fleeing war but as those who fear being persecuted if returned. In consequence, they are not eligible for other forms of protection on behalf of any V4 asylum state.

Still, if a grave human rights violation registers, it is up to any V4 state to extend diplomatic or consular protection to any person that it considers and treats as a refugee. V4 states may intervene in support and on behalf of Ukrainians fulfilling the requirements of territorial connection to it and who in that state's judgement clearly are in need of protection without necessarily formally qualifying for status as a refugee.

In addition, Ukrainians fleeing the war can always count and get assistance from diplomatic or consular missions of Ukraine abroad, including those located in the V4.

The situation is different for Ukrainians that have received asylum in a V4 country, *i.e.* they have been recognized by the V4 state as refugees. Not only that they are the recipients of a permanent protection from the discrimination or unsafe conditions that made them flee Ukraine, but they have the legitimate expectation to qualify for diplomatic and consular protection similar to V4 citizens.

Conclusions and recommendations

Conclusions

- In a globalized world, the **effective protection of citizens abroad** have become a **challenge** for the national diplomatic and consular authorities (financial burden, lack of traditional relationships among states and the lack of missions in some third states, legal complexity, the extraterritorial character of diplomatic and consular protection);

- The decision of whether and how to protect nationals and refugees abroad is **half legal, half political**;
- V4 have **complete discretion** in the exercise of diplomatic and consular protection for nationals – let alone refugees;
- States **could act** on behalf of refugees to whom they granted asylum;
- Individuals that have received any form of protection by the state of asylum **can expect** the exercise of diplomatic or consular protection on their behalf. When the refugee applies for asylum, his intention is to sever his relationship with the country of origin, and on the other side, the state of asylum shows the preparedness to protect the refugee as may be inferred from the grant of asylum;
- In the absence of other means of protection, the intervention of the home/asylum state **can be the only possibility** to redress efficiently the wrong done to an individual on a foreign state;
- The suggestion to protect citizens/refugees is laudable, but states act rather in a **cautious approach**;
- The **level of access to the relevant information** on V4 state practice on diplomatic and consular protection is very low, as states, including V4, approach the issue of diplomatic and consular protection as falling under their sovereign powers;
- The **degree to which the national law covers** the field of consular protection and assistance is different in V4;
- Consular protection for **unrepresented citizens of V4 in third countries** has been enhanced by the transposition of the Council Directive (EU) 2015/637 of 20 April 2015 into their national law by 1 May 2018;
- For the public, the term “**protection**” is a **concept synonymous with national action**;
- Protection reflects the **proximity of the country and its citizen** that comes from the reciprocal rights and duties;
- Consular protection are diplomatic acts, which **might or might not succeed**.

Recommendations

- V4 should **consider the duty to exercise state protection** or to **be willing to provide justifications for its refusal**, particularly to cases of grave human rights violations. This approach calls for a special attention to the vulnerability of refugees recognized under V4 law and the 1951 Convention relating to the Status of Refugees;
- V4 policies should develop **in increasing recognition and protection of the rights of individuals**, in order to advance the protection of human rights in accordance with the values of the contemporary legal order;

- V4 should **reinforce the EU consular protection legal framework and make cooperation between consular authorities easier**, in particular to improve crisis preparedness;
- V4 states represented in a non-EU country should **coordinate contingency plans among themselves and with the EU Delegation** to ensure that unrepresented citizens are fully assisted in the event of a crisis;
- The **website of the Ministry of Foreign Affairs of each V4 country should provide comprehensive information on consular protection and assistance under a special section dedicated to the “consular information”**. In addition, information on consular assistance abroad should be published also on the individual websites of diplomatic and consular offices abroad.