

IML INFORMATION NOTE ON CONSULAR ASSISTANCE

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CONTENTS

- I. INTRODUCTION AND PURPOSE 3

- II. GENERAL PRINCIPLES 4
 - 1. DEFINITIONS 4
 - 2. LEGAL FRAMEWORK FOR CONSULAR ASSISTANCE 7
 - i. The Vienna Convention on Consular Relations 7
 - ii. Consular Assistance and Human Rights Law 8
 - a. Obligations of the Host State to Facilitate Access to Consular Assistance 9
 - b. Obligations of the Sending State to Provide Consular Assistance 11
 - c. To Whom is Consular Assistance Provided? 13
 - d. Consular Protection and Assistance in Special Situations 15
 - Detention and Expulsion 15
 - Preventing Statelessness 17
 - Assistance in the Event of Emergency or Crisis Abroad 18
 - Non State Actors Providing Consular Support 19

- III. CONCLUSION 19

I. INTRODUCTION AND PURPOSE

Consular assistance is the aid provided by the consular or diplomatic agents of a State to its nationals abroad. It is a well-established and a powerful practical mechanism that substantially contributes to the protection and fulfilment of migrants' rights abroad. Access to consular assistance is classified as "customary law foundations of international migration law".¹

Increased international mobility and migration in the past centuries has meant that States need to provide consular assistance to its citizens abroad, including but not limited to migrant workers, international students, and short term visitors including tourists and those travelling for business. Typically, this form of assistance to States' nationals, living or travelling in another country, includes: a) issuing legal identity documents, b) registering births and other civil acts, c) providing support, including admission and stay related assistance, and d) facilitating evacuation in case of emergency - including medical emergency, crises or conflict. It also provides support and arranges for legal representation in case of arrest or detention and expulsion from a territory.

In addition to securing the interests of their nationals, by providing individual assistance, States also ensure the protection of the rights of its nationals abroad, through monitoring situations or advocating on their behalf with host country officials to prevent violations of their rights by the host State. Migrants often face various situations of vulnerability and violations of their rights, and because they are often unacquainted with the language, culture, and legal systems of foreign States, consular assistance can be essential to addressing their specific needs. Such assistance is also particularly necessary in cases of arrest, detention and expulsion, for protection of property rights, when proof of legal identity or travel documents are required, or in the event of emergencies and disasters. Similarly, by facilitating access to legal representation in criminal cases, consular assistance can help protect a migrant's right to liberty, and even their right to life, and is an important component of the right to access justice, which in turn contributes to the protection of other rights.

Despite the integral role of consular assistance in ensuring rights protection, it is often overlooked within the discussions on the protection of migrant rights, with the focus instead on human rights law. Yet, in practice, the protection of human rights and the provision of consular assistance are complementary.² For example, consular services such as registration of births and the issuance of legal identity and travel documents contribute to an individual's legal identity, which can facilitate access to his or her human rights, including access to justice, education, health care social protection, as well as the right to return to one's country, among others. It bears noting here that ensuring legal identity is considered critical to facilitate optimal access to rights, including through birth registration.³ **Therefore, consular assistance should be at the forefront of discussions and responses from States and organizations to better protect and fulfil the rights of migrants.**

In the Global Compact for Migration (GCM), States recognized the importance of consular assistance in better safeguarding the rights and interests of all migrants at all times by committing to enhancing "consular protection, assistance and cooperation throughout the migration cycle".⁴ In addition, the GCM also aims to build the capacities of consular staff to better assist nationals abroad and enhance regional and international cooperation for the provision of consular assistance. Furthermore, the clear linkages established between Objective 14 on consular protection and other objectives, evidences the centrality of the role that consular support plays in the protection of migrant rights.

1 Vincent Chetail, *International Migration Law*, Oxford University Press, 2019, p. 164.

2 See Section 2(ii) Consular Assistance and Human Rights Law.

3 UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, adopted on 21 October 2015, U.N. Doc. A/RES/70/1, Sustainable Development Goal 16.9.

4 UN General Assembly, The Global Compact for Safe, Orderly and Regular Migration (GCM), adopted on 11 January 2019, U.N. Doc. A/RES/73/195, Objective 14.

Consular assistance plays a pivotal role not only in establishing legal identity,⁵ and addressing vulnerabilities of migrants including victims of exploitation and abuse,⁶ detained migrants,⁷ and missing migrants⁸ but also in the provision of timely and accurate information to migrants,⁹ in strengthening migration procedures and enhancing predictability,¹⁰ supporting diaspora engagement in development,¹¹ and in facilitating return and reintegration.¹²

Given the importance of this topic, the purpose of this Information Note is to provide a general overview of the international legal framework for consular assistance, the extent of the obligation **for sending States to provide and receiving States to facilitate access¹³ to such assistance**, as well as the legal and practical implications for States, migrants, and the civil society and UN actors supporting them. Finally, this Information Note provides examples of ways in which consular assistance, the duty of States, can support migrants, mitigate their vulnerabilities and protect their rights in specific situations.

II. GENERAL PRINCIPLES

1. Definitions

Consular assistance is the assistance rendered by States to their nationals, and in some cases to non-nationals (based on bilateral or multilateral agreements), including those who find themselves in difficulties in a foreign State. Consular assistance is provided by consuls or other diplomatic agents not engaged in political representation.¹⁴ There is a close relation between the State and its citizens abroad, with “nationality” (a human right) at its core, that is, “the legal bond connecting State and individual, and the ways through which a state may protect its nationals abroad”.¹⁵

To be able to render consular assistance, consular posts or diplomatic missions are entrusted, consistent with international law, with specific functions by the sending State. The **consular functions** that are permissible as a matter of international law are listed in Article 5 of the **Vienna Convention on Consular Relations (VCCR)**, which include helping and assisting nationals of the sending State, representing their interests, issuing passports and travel documents to nationals, arranging representation for nationals before tribunals, and safeguarding the interests of children and other nationals lacking full capacity.¹⁶ **The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)** also sets out obligations for State Parties with respect to the provision of consular assistance (See section 2 below).

5 *Ibid.*, para. 20(c).

6 *Ibid.*, para. 23(e), (j) and para. 30(d).

7 *Ibid.*, para. 29(e).

8 *Ibid.*

9 *Ibid.*, para. 19(c), (e).

10 *Ibid.*, para. 28(b).

11 *Ibid.*, para. 35(d), (f).

12 *Ibid.*, para. 37(d).

13 Vienna Convention on Consular Relations (VCCR), adopted 24 April 1963, entered into force 19 March 1967, Article 36; *Avena and Other Mexican Nationals* (Mexico v. United States of America), International Court of Justice (ICJ), 31 March 2004.

14 John Dugard, Seventh report on diplomatic protection, 7 March 2006, U.N. Doc. A/CN.4/567, para. 20.

15 Marques, Rodolfo Ribeiro C. The Right to Access Consular Assistance and Protection and its Relevance to the Architecture of a Safe, Orderly, and Regular Migration. *Interventions* 23(2) (2021): 313-325.

16 VCCR, *supra* note 13, Article 5.

All nationals of a sending State, regardless of their migration status, have the right to access consular assistance, in both emergency and non-emergency contexts. Typically, consular assistance includes, citizen registration, issuance and extension of travel documents, transfer of funds in case of urgent financial assistance, registration of birth or death, repatriation, and liaising with family members in the country of origin in case of a personal emergency.¹⁷

Moreover, the GCM sets out that consular assistance should be provided to all nationals abroad, including “victims of human and labour rights violations or abuse, victims of crime, victims of trafficking in persons, migrants subject to smuggling under aggravating circumstances, and migrant workers exploited in the process of recruitment”.¹⁸ This includes utilizing both technology and community outreach, to support nationals in remote areas,¹⁹ enabling migrants to communicate with their families, specifically in cases of unaccompanied and separated children,²⁰ facilitating effective access to relevant information in the context of their migration,²¹ providing admission and stay related support through consular advice and assistance, enabling migrants to access all services available to migrants in the host destination,²² and also supporting diasporas to contribute to their countries of origin.²³

The terms consular protection and consular assistance are most often used interchangeably, or side by side, with no distinction being made between them. In this Note, the term “**consular assistance**” is used to encompass functions relating to both consular protection and assistance.

Diplomatic protection is another form of intervention that States can employ to assist their nationals abroad within the territory of another State.²⁴ **Diplomatic protection is when a State intervenes when an internationally wrongful act has been committed against its nationals by a natural or legal person who is the national of another State.**²⁵ Before diplomatic protection can be exercised, a violation of international law for which the receiving State may be held responsible must have been committed, the individual concerned must have exhausted local remedies, and such individual must have the nationality of the acting State. In such cases, the State acts in its own right to ensure respect for the rules of international law through the person of its subjects,²⁶ since an injury to its national is considered to be an injury to the State itself.²⁷ Intervention by the State can take many forms including protest, negotiation aimed at settlement, and judicial dispute settlement.²⁸

Although diplomatic protection and consular assistance are closely related, the key distinction is that diplomatic protection is an inter-State intervention conducted by diplomatic officials or government representatives attached to the foreign ministry acting on behalf of the State. Conversely, consular assistance is rendered by consuls not engaged in political representation, acting on behalf of a national. In cases where an individual’s rights are violated by a host State, and consular assistance is unduly limited or prevented,

17 [IOM Consular support and citizen services.](#)

18 GCM, *supra* note 4, Objective 14 (d).

19 *Ibid.*, Objective 4 (c).

20 *Ibid.*, Objective 8 (c).

21 *Ibid.*, Objective 14 (e).

22 *Ibid.*, Objective 14 (f).

23 *Ibid.*, Objective 19 (d), (f).

24 United Nations. *Draft articles on diplomatic protection with commentaries.* Yearbook of the International Law Commission, II(2) (2006).

25 *Ibid.*, Article 1 (“...diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the legal responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State...”); *Ibid.*, Commentary (8) (“Diplomatic protection does not include *démarches* or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.”)

26 *Mavrommatis Palestine Concessions* (Greece v. UK) Permanent Court of International Justice (PCIJ), No. 3, 30 August 1924, para. 21; *Panevezys-Saldutiskis Railway* (Estonia v. Lithuania) PCIJ, No. 76, 28 February 1939, para. 16.

27 Draft articles on diplomatic protection with commentaries, *supra* note 24, Article 1, Commentary (3).

28 *Ibid.*, Article 1, Commentary (8).

“a situation that started as an exercise in consular assistance may evolve into a case of diplomatic protection.”²⁹ However, these are two distinct concepts that should not be conflated and treated as one.

Furthermore, for diplomatic protection, a violation of international law (unremedied locally) must have already been committed, with the State seeking to obtain redress; whereas consular assistance normally aims to prevent the occurrence of such an international wrong or to provide assistance to nationals at their request.³⁰

Diplomatic protection and consular assistance are also distinguishable by the legal frameworks governing them.³¹ International law with respect to consular assistance is primarily codified in the VCCR,³² and further obligations with respect thereto, in connection with migrant workers and their families, are elaborated in the ICRMW. Conversely, diplomatic protection is mostly governed by customary international law, as elaborated in the International Law Commission’s Draft Articles on Diplomatic Protection.³³

The table in [the Annex](#) further outlines the main differences between the two legal mechanisms. As a remedial measure that requires exhaustion of remedies, diplomatic protection does not encompass preventive actions that are often most appropriate to address migrants’ pressing needs.³⁴ [Consular assistance as both a reactive and preventive mechanism is thus more relevant in the context of protecting and fulfilling migrants’ rights due to the immediate nature of their needs \(providing documents, registering births, etc.\).](#)³⁵

Therefore, this Note will focus only on consular assistance as a mechanism to ensure the respect, protection and fulfillment of the rights of migrants facing adversity outside their country of nationality, as well as on consular assistance in the form of regular provision of administrative services, such as documentation and registration, which migrants require to preserve their legal identity,³⁶ and which may facilitate their mobility and residence abroad.

29 See *LaGrand* in Annemarieke Vermeer-Künzli. Diplomatic protection and consular assistance of migrants. In: *Research Handbook on International Law and Migration*, (Vincent Chetail and Céline Bauloz, eds.). Edward Elgar Publishing, 2014, p. 266; See *LaGrand* (Germany v. United States of America), ICJ, 27 June 2001, and *Avena* case, *supra* note 13. Germany and Mexico filed lawsuits before the ICJ, alleging that the United States had violated Article 36 of the VCCR. Although the mechanism to file this suit was through diplomatic protection, the merits of the case were related to the exercise of consular assistance.

30 Draft articles on diplomatic protection with commentaries, *supra* note 24, Article 1.

31 *Ibid.*, Article 1, Commentary (13).

32 VCCR, and there are also two Optional Protocols to the VCCR: Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, adopted 24 April 1963, entry into force on 19 March 1967; and the Optional Protocol concerning the Compulsory Settlement of Disputes, adopted 24 April 1963, entry into force on 19 March 1967.

33 “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.”, in *Mavrommatis Palestine Concessions*, *supra* note 26, para. 21. “Although the articles on diplomatic protection have not been translated into treaty form, there is no doubt that they are today seen as the definitive statement of the rules of customary international law on this subject. This is shown by the manner in which they were cited by the International Court of Justice in the Diallo case (*Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, paras. 39, 91-94) and the impact they have had on legal writing (see, for example, C.F. Amerasinghe, *Diplomatic Protection* (2008)).”, in John Dugard, [Articles on Diplomatic Protection, 2006](#), United Nations Audiovisual Library of International Law.

34 Alice Sironi and Lorenzo Guadagno. The Protection of Migrants in Disasters. In: *Routledge Handbook of Human Rights and Disasters* (Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari and Giulio Bartolini, eds.). Routledge, London, 2018, p. 310.

35 *Ibid.*, at p. 311.

36 However, diplomatic protection should not be discounted as a remedial measure that can also be sought by migrants in the event that their rights are violated in a transit or destination State, provided that the requisite conditions are met, and their State of nationality agrees to its exercise.

2. Legal Framework for Consular Assistance

Rules governing the provision of consular assistance have developed under international law over centuries and are rooted in the reciprocal interest of States in protecting their nationals abroad.³⁷ The provision of **consular assistance is therefore primarily a right of States to provide consular services to their nationals abroad**, such as providing evidence of legal identity and civil documentation, ensuring that they are recognized as persons before the law in foreign countries and assisting with protection of rights, and/or providing assistance in emergencies, among others.³⁸ **The principle of State sovereignty provides States autonomy in the provision of assistance to and protection of their nationals abroad.**³⁹ Hence, **States generally have discretion in determining the type of consular assistance that they provide to their citizens abroad.**⁴⁰

Consular assistance is governed by consular law, codified in the VCCR and regional instruments. While consular law primarily defines the competence and rights of States, Article 36(1) of the VCCR has been interpreted as creating not only rights for States, but also individual rights for a migrant, in the event of detention abroad, to have the consular officials of his or her State notified, to communicate with such officials, and to be informed “without delay” of his or her rights in this regard.⁴¹ These rights have recently been linked to the right to a fair trial.⁴²

i. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations (VCCR), the legal instrument that codifies consular functions including the provision of consular assistance, does not create a legal obligation for States to provide consular assistance, but provides them the authority to do so as a matter of international law.

The VCCR enjoys widespread ratification by UN member States, with almost 180 States having ratified the Convention.⁴³ Article 5 of the VCCR outlines permissible consular functions, including:

- Protection of the interests of the sending State and its nationals in the receiving State;⁴⁴
- The development of economic and cultural relations and promotion of friendly relations;⁴⁵
- The issuance of passports, travel documents and visas;⁴⁶
- Helping and assisting nationals of the sending state;⁴⁷
- The registration of deaths, births, and the like, undertaking functions of a notary or civil registrar;⁴⁸
- Representing or arranging appropriate representation for nationals of the sending State before tribunals and other authorities of the receiving State for the purpose of preserving their rights and interests;⁴⁹
- Safeguarding the interests of children and other persons lacking full capacity who are nationals of the sending State;⁵⁰
- The administration of the property of nationals of the sending State.

37 *Ibid.*

38 Sandra Sfeir, [Consular Protection, Legal Identity and Migrants' Rights: Time for Convergence?](#), LSE Blogs, 27 May 2019.

39 The Protection of Migrants in Disasters, *supra* note 34, p. 313.

40 Diplomatic protection and consular assistance of migrants, *supra* note 29, p. 266.

41 See *Avena*, *supra* note 13, paras. 87-88; and *LaGrand*, *supra* note 29, paras. 77-78.

42 *Jadhav (India v. Pakistan)*, ICJ, 17 July 2019, p. 418.

43 See *supra* note 32.

44 VCCR, Article 5(a).

45 *Ibid.*, Article 5(b).

46 *Ibid.*, Article 5(d).

47 *Ibid.*, Article 5(e).

48 *Ibid.*, Article 5(f).

49 *Ibid.*, Article 5(i).

50 *Ibid.*, Article 5(h).

In addition to the consular functions mentioned above, Article 5(m) of the VCCR provides that consulates may perform “any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State, or to which no objection is taken by the receiving State, or which are referred to in the international agreements in force between the sending State and the receiving State.”⁵¹

Moreover, the VCCR outlines certain rights of States relevant to facilitating the provision of consular assistance in specific circumstance, in particular, those set forth in Article 36 relating to “communication and contact with nationals of the sending state.”⁵² Article 36 grants to consular officials the freedom to communicate with and have access to the sending States’ nationals, to be notified of their nationals’ arrest or detention (at the detained person’s request), and to visit their nationals in detention. Thus, the scope of consular assistance is broad. Nevertheless, consular officials are also bound not to interfere with the internal affairs of the receiving State.⁵³

ii. Consular Assistance and Human Rights Law

Consular assistance and human rights are primarily derived from *separate legal frameworks* under international law⁵⁴ The provision of consular assistance is generally considered a right of a State, and its corollary duty, to protect its own interests and those of its nationals abroad, and its scope and content determined by national policy. Whereas human rights are inherent rights belonging to all individuals, and States have the obligations to respect, protect and fulfill these rights. Nevertheless, there are important convergences between these two areas, particularly where the provision of consular assistance can, or is necessary, to protect human rights.⁵⁵

In the 1985 UN *Declaration on the Human Rights of Individuals who are not nationals of the country in which they live*, the right of an alien to communicate with the consulate or diplomatic mission of their sending State was recognized.⁵⁶ This right has been reiterated in several UN resolutions on the protection of migrants. Moreover, the ICRMW establishes a human right to consular assistance, to which migrants workers and their families are entitled, pursuant to Article 65(2) of the Convention, as well as Articles 16(7)(a) and 23, in cases of detention or expulsion, respectively. The ICRMW sets out obligations for State Parties with respect to the provision of consular assistance, including to facilitate “the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.”⁵⁷ The ICRMW notably insists on the duty of sending countries to provide effective consular protection.⁵⁸ This is particular to the ICRMW.⁵⁹

51 *Ibid.*, Article 5(m).

52 *Ibid.*, Articles 36 and 37 (regarding rights of consular officers to receive information about the death of a national, appointment of a guardian for a national, or accidents involving an aircraft or ship holding the sending States’ nationality).

53 *Ibid.*, Article 55(1).

54 Consular Protection, Legal Identity and Migrants’ Rights: Time for Convergence?, *supra* note 38.

55 *Ibid.*

56 UN General Assembly, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted on 13 December 1985, U.N. Doc. A/RES/40/144, Article 10.

57 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), adopted 18 December 1990, entered into force 1 July 2003, Article 65(2).

58 *Ibid.*, Article 65.

59 While the ICRMW creates a specific obligation on State parties regarding the extent of consular assistance that should be provided, the definition of consular assistance must reflect all exercises of the consular functions in the VCCR to the benefit of individuals, whether or not they meet the ICRMW standard.

Moreover, international bodies and instruments are increasingly finding that State obligations under consular law can give rise to corresponding rights for migrants related to consular assistance.⁶⁰ This evolution of international law norms related to consular assistance and human rights is reflected in the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact for Safe, Orderly and Regular Migration (GCM), where States committed to “strengthen consular protection of and assistance to our nationals abroad, as well as consular cooperation between States in order to better safeguard the rights and interests of all migrants at all times.”⁶¹ Objective 14 of the GCM acknowledges both the right of States to protect and assist their nationals abroad, and provides for a commitment to cooperate to render this effective for migrants throughout the migration cycle and in accordance with international law.⁶² The nature and scope of such rights is discussed below.

a. Obligations of the Host State to Facilitate Access to Consular Assistance

Under the VCCR, once a consular post is established by a sending State, with the permission of the receiving State, it is free to communicate with its nationals in the receiving State and vice versa.⁶³ Article 36 of VCCR in fact reflects international customary law.⁶⁴

Migrant-hosting States have an obligation under the VCCR to facilitate access to consular assistance, specifically in the case of a migrant’s arrest or detention. Additionally, based on the judgments of the [International Court of Justice \(ICJ\)](#), these obligations *create corresponding rights for affected migrants*.

Although the ICJ has consistently held that it does not have jurisdiction to determine whether facilitating consular assistance pursuant to Article 36(1) VCCR can be regarded as a *human rights* obligation of the host country,⁶⁵ it has nevertheless clarified, through a series of cases, that the provision creates an *individual right* for a foreign national abroad which may be invoked by the national State of the detained person.⁶⁶ This individual right includes the right to have the consular officials of the migrant’s country of nationality notified “without delay” in the event of their arrest or detention (“consular notification”), the right to communicate with such officials (“consular communication”), and the right to be informed by the host country authorities of these rights (“consular information”).⁶⁷ Most recently, in the *Jadhav* judgment, the ICJ linked the individual right to access consular protection to the right to a fair trial (Art. 14 ICCPR).⁶⁸

The [Inter-American Court of Human Rights \(IACtHR\)](#) has stated that the right to information about consular assistance guaranteed by the VCCR under Article 36(1)(b) “must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their

60 The Protection of Migrants in Disasters, *supra* note 34, pp. 312-313.

61 GCM, *supra* note 4, Objective 14.

62 The Right to Access Consular Assistance and Protection and its Relevance to the Architecture of a Safe, Orderly, and Regular Migration., *supra* note 15.

63 VCCR, *supra* note 16, Article 36.

64 International Law Commission, [Identification of customary international law: Information provided by the United Kingdom](#), p. 100.

65 See *Jadhav*, *supra* note 42, para. 36; *Avena*, *supra* note 13, para. 124; *LaGrand*, *supra* note 29, para. 78.

66 See *LaGrand*, *supra* note 29, paras. 77-78 (holding that “Article 36, paragraph 1, creates individual rights, which . . . may be invoked in this Court by the national State of the detained person” and which the United States violated by failing to provide a detained German national with his consular right, but also finding it unnecessary “to consider the additional argument that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but a human right.”); *Avena*, *supra* note 13, para. 40 (“[w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in this regard”); See also *Jadhav*, *supra* note 42, para. 116 (citing *LaGrand* for the proposition that Article 36, para. 1 creates individual rights).

67 *Ibid.*

68 See *Jadhav*, *supra* note 42, para. 145 (finding a violation of Article 36(1) of the VCCR by Pakistan in denying India consular access to its detained national and noting that “[t]he Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process.”).

defense and receive a fair trial.”⁶⁹

Human rights bodies have also recognized the connection between accessing consular assistance and specific human rights provisions. The right to access consular assistance as a human right is well-established for those individuals subject to the jurisdiction of States that have ratified the ICRMW.

Article 23 of the [ICRMW](#) provides migrant workers and members of their families with a right to have “recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin” whenever *any* of the rights recognized in the ICRMW are impaired.⁷⁰ As the ICRMW covers a wide range of civil and political, as well as economic, social, and cultural rights, this provides migrants with a broad right to access consular assistance to help protect their rights abroad. The ICRMW applies to any “migrant worker,” broadly defined as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national,” as well as members of their family.⁷¹ Thus, the majority of migrants (subject to the jurisdiction of a State party) benefit from these guarantees.⁷²

Furthermore, in cases of arrest or detention, Article 16.7 of the ICRMW reiterates the above-mentioned rights to information on consular protection and assistance, consular notification and consular communication with respect to migrant workers.⁷³ The ICRMW also specifies in Article 23 that migrant workers and members of their families subject to an expulsion decision must be informed of their right to access consular or diplomatic officials of their State of origin “without delay,” and that the authorities of the expelling State must “facilitate the exercise of this right.” The Committee on Migrant Workers (CMW) has elaborated that in cases of expulsion, “without delay” means that the expelling State must inform the person of his consular rights “at the time of, or shortly after notifying the person of the expulsion decision, and preferably in a language he or she understands”, and that the expelling State must “facilitate any communication between the person concerned and the consular or diplomatic authorities of the State of origin.”⁷⁴

Thus, whether characterized as a human or individual right, it is well-established that authorities of the host State must allow, and in the case of arrest or detention, facilitate a migrant’s access to consular authorities and to their assistance. In addition, where the ICRMW applies, migrants must be afforded recourse to consular authorities in a broad range of situations implicating their rights.

69 *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (IACtHR), 1 October 1999, para. 122.

70 ICRMW, *supra* note 57, Article 23.

71 *Ibid.*, Article 16(7).

72 Although, the ICRMW is only binding on a minority of States to date, with a lack of ratifications by some important receiving States, it is still highly relevant in many regions of the world, including in many African States.

73 *Ibid.*, Article 16(7) stipulates that “[w]hen a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore; (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay; (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.”

(a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;

(b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.”

International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

74 UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, 28 August 2013, U.N. Doc. CMW/C/GC/2, para. 59.

b. Obligations of the Sending State to Provide Consular Assistance

Beyond the question of a host State's obligations to allow and/or facilitate consular access, is the more complex question of whether and to what extent consular officials of the sending State must provide their nationals abroad with the protection and assistance sought. Although, as a general matter, consular assistance is provided solely at the discretion of the sending State, there are notable exceptions.

In a UN Resolution on the protection of migrants (2000), the need for protection of the universally recognized human rights of all migrants was reiterated, including the right to receive consular assistance from their country of origin.⁷⁵ Moreover, in a report of the Special Rapporteur on the Human Rights of Migrants, the Special Rapporteur urged countries of origin to “offer proper consular protection” when the rights of their citizens abroad were infringed upon, including in cases of detention.⁷⁶

The ICRMW requires the provision of consular assistance by State Parties to the Convention, which, per Article 65(2) must “facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.”⁷⁷ This obligation complements the “right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State,” set forth in Article 23 of the ICRMW.

The Committee on Migrant Workers (CMW) has further elaborated that embassies and consulates of countries of origin should play an “active role” in protecting the rights of their nationals abroad, and encourages such officials to, *inter alia*, ensure that its staff are trained to receive and address complaints by migrant workers – including through the provision of legal aid, expediting the processing of travel documents for those fleeing from abusive employment circumstances, and contacting detained migrant workers with a view to arranging visits.⁷⁸ Sending States are also encouraged to coordinate with local authorities with a view to better protecting their migrant workers.⁷⁹

Moreover, outside the ICRMW context, the provision of consular assistance can facilitate the enjoyment of other recognized human rights and may even be regarded as part of a State's obligations to respect, protect, and fulfill such rights. Thus, individuals from States that have not ratified the ICRMW may be able to claim rights related to consular assistance through their States' human rights obligations in certain cases. For example, the exercise of the consular function set forth in Article 5(h) of the VCCR to safeguard the interests of children, may be regarded as necessary for States' compliance with the “best interests of the child” principle.⁸⁰ The Committee on the Rights of the Child has clarified that the “best interests of the child” should be integrated into all policies and programmes that impact children, “including consular protection policies and services”⁸¹ and that “adequate resources should be put in place in order to ensure this principle is applied in practice.”⁸² The Committee further explained that in the context of best interest assessments,

75 UN General Assembly, Resolution on the protection of migrants, adopted on 24 February 2000, U.N. Doc. A/RES/54/166.

76 UN Commission on Human Rights, Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers, 15 February 2002, U.N. Doc. E/CN.4/2002/94, para. 108.

77 ICRMW, *supra* note 57, Article 65(2).

78 CMW, General Comment No. 1 on Migrant Domestic Workers, 23 February 2011, U.N. Doc. CMW/C/GC/1/, para. 62-64 (providing these recommendations in the context of and with respect to migrant domestic workers, though many would seem to be broadly applicable to all migrant workers); See also CMW, Concluding Observations: Sri Lanka, 14 December 2009, U.N. Doc. CMW/C/LKA/CO/1, para. 40 (recommending that Sri Lanka take steps to improve consular services to migrant workers, including through the provision of legal assistance and psychosocial counselling and that it strengthen collaboration between its consular services and local authorities to promote conditions for migrant workers).

79 *Ibid.*

80 See Convention on the Rights of the Child (CRC), 20 November 1989, adopted 20 November 1989, entered into force 2 September 1990, Article 3. Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3

81 CMW, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22, para. 32(b).

82 *Ibid.*

children should be guaranteed the right to “have effective access to [...] consular assistance, and to receive child-sensitive rights-based consular protection.”⁸³

Similarly, birth registration is both a normal consular function and a right of the child under both the Convention on the Rights of the Child (CRC) and the ICCPR.⁸⁴ Not only is birth registration a right in and of itself, but is also a key basis for realizing the right to nationality and all rights that are linked to it, since birth registration records the key elements that typically govern transmission of nationality: birthplace and parentage. Consular registration of birth facilitates a child’s right to have his or her birth registered and to acquire a legal identity and a nationality, and is also necessary to protect these rights, particularly for migrant children in an irregular situation, who are unable or deterred from registering locally.⁸⁵ The lack of such a procedure often places undocumented migrants at risk of statelessness.⁸⁶ It can thus be argued that a right to consular assistance for migrant children, to allow them to access birth registration and legal identity documentation, can be derived from the human rights obligations of States in this regards.⁸⁷

Related to the right to nationality, there are rights related to freedom of movement, which are recognized under Article 12 of the ICCPR, including “the right to leave any country, including one’s own” and to not be “arbitrarily deprived of the right to enter his own country.”⁸⁸ As explained by the Human Rights Committee, “[s]ince international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere.”⁸⁹ The same reasoning would seem to apply to the travel documents needed for a migrant to return to his country of nationality, which the sending State would have to issue through its consular authorities. A migrant can thus assert a right to consular assistance to access travel documents needed to be able to realize in practice his/her right to freedom of movement.

In addition, in the case of a foreign national who is detained or facing trial, and as recognized by the ICJ in *Jadhav* and by the Inter-American Court of Human Rights, the provision of consular assistance, such as assistance with securing legal representation in the event of a criminal charge, can help ensure the protection of procedural rights necessary for a fair trial (e.g., ICCPR, Art. 14).⁹⁰

83 *Ibid.*, para. 17(e). More broadly, the Committee on the Rights of the Child and the CMW have jointly opined that “a comprehensive interpretation of the Convention on the Rights of the Child with articles 7 (a), 23 and 65 (2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should imply the development and implementation of effective consular protection policies which include specific measures directed to protecting children’s rights, such as providing ongoing training to consular staff on the two Conventions, as well as on other human rights instruments, and promoting protocols on consular protection services.” CMW, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23, para. 19.

84 The right of the child to birth registration immediately after birth and the right to acquire a nationality are protected by the CRC, Article 7(1) and International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, Article 24.

85 UN Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights, 17 June 2014, U.N. Doc. A/HRC/27/22, paras. 63-64. (“In many countries, parents are required to present their own identity documents in order to be able to register their child. In cases where the parents themselves have not been registered or are [irregular] migrants, this may prevent their children from having access to their rights, perpetuating marginalization. In addition, such parents may fear approaching the authorities to register their children as reporting may lead to their own detection by the authorities. Some States refuse to register the children of non-citizens, in particular when they do not have permanent residence, or are refugees or asylum seekers.”)

86 See Alice Sironi, [The Double Plight of Stateless Migrants](#), European Network on Statelessness, 13 May 2016.

87 See generally, Legal Identity and Migrants’ Rights: Time for Convergence?, *supra* note 38.

88 See ICCPR, *supra* note 84, Articles 12(2), 12(4).

89 Human Rights Committee, General Comment No. 27, Freedom of movement (Art.12), 1999, U.N. Doc. CCPR/C/21/Rev.1/Add.9.

90 *Jadhav*, *supra* note 42; *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, *supra* note 69, para. 124 (“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”); *Vélez Loor v. Panama*, IACtHR, 23 November 2010, para. 153 (“From the point of view of the rights of a detained person, there are three essential components of the right due to a person by the State Party: 1) the right to be informed of his rights under the Vienna Convention; 2) the right to have effective access to communication with the consular official; and 3) the right to the assistance itself.”).

The Special Rapporteur on Summary Executions has argued, at least with respect to foreign nationals facing the death penalty, that sending States are under a human rights obligation to provide consular assistance and that such assistance constitutes a “fair trial guarantee helping to balance out the difficulties confronted by all foreign detainees and compounded by multiple forms of discrimination, such as race, immigration status, gender or class.”⁹¹ According to the Special Rapporteur, such obligation, in the case of the death penalty, is also derived at least in part from an obligation of the sending State to protect the right to life against an immediate and foreseeable threat thereto. Although “[n]o clear consensus has yet been reached as to the quality of consular assistance to be provided in order to meet a State’s obligation under law,” the Rapporteur noted that States are under an international human rights duty to provide an “adequate” level of consular assistance to their nationals facing the death penalty.⁹²

Thus, whether or not consular assistance is recognized as a standalone human right outside the ICRMW context, it is nevertheless clear that in practice, consular assistance does often converge with human rights and helps ensure the protection thereof.⁹³

c. To Whom is Consular Assistance Provided?

Consular assistance is generally provided by a State to its nationals abroad. As a result, complications may arise when the individual in question is a refugee, stateless, a dual national, or when a foreign national otherwise lacks access to one of their State’s consular posts.

The VCCR does not fully address these complications related to nationality, or lack of it, and international protection. However, other bilateral or multilateral agreements seek to address aspects thereof. For example, Member States of the European Union (EU) are required to provide consular assistance to nationals of other EU Member States on the same conditions as to their own nationals if the individual who needs assistance is visiting a third country (a State of which that person is not a national) where their own State does not have a consular post.⁹⁴ Several other bilateral agreements have had the same effect in other States.⁹⁵

This is consistent with Article 8 of the VCCR, which authorizes a consular post, upon appropriate notification, to exercise consular functions in the receiving State on behalf of a third State.⁹⁶ Such exercise of consular functions on behalf of a third State’s nationals may also be arranged, normally pursuant to a bilateral agreement, in situations where the third State and the receiving State have severed consular (usually along with diplomatic) relations, and the protection of the interests of the third State’s nationals are entrusted to a friendly power

91 United Nations, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Application of the death penalty to foreign nationals and the provision of consular assistance by the home State, 20 August 2019, U.N. Doc. A/74/318.

92 *Ibid.*, paras. 51 and 63.

93 Consular Protection, Legal Identity and Migrants’ Rights: Time for Convergence?, *supra* note 38.

94 Treaty on the Functioning of the European Union (TFEU), signed 25 March 1957, Article 23 (“Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.”); Council of the European Union, Council Directive (EU) 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision, OJ L 106, 20 April 2015, Articles 2, 4, 6.

95 For example, Canada and Australia agree that “[i]n the interest of providing consular protection and assistance to the citizens of Canada and Australia travelling or resident in consular areas... where there is not a consular officer of their own country, the missions of the other country... will extend to the citizens of the other country the consular services...” Memorandum of Understanding between the Department of Foreign Affairs, Trade and Development of Canada and the Department of Foreign Affairs and Trade of Australia concerning the Sharing of Consular Services (2001); see also Argentina-Chile, Supplementary Protocol to the Maipú Treaty of integration and cooperation... on consular assistance to the nationals of the other Party who find themselves on the territory of States in which there is no consular representation of their country (2011); Brazil-Argentina, Convention... on consular assistance to nationals of the other party who are in the territory of states which have no diplomatic or consular representation of their country (2003); Brazil-Portugal, Agreement on consular cooperation for the protection and consular assistance to their nationals in third countries (1997).

96 This represents another way in which diplomatic protection and consular assistance differ, in that diplomatic protection can only be exercised for that State’s own nationals, whereas with respect to consular assistance, the nationality criterion is not required to be applied as strictly; See Seventh report on diplomatic protection, *supra* note 14, para. 19.

that maintains a consular presence.⁹⁷ In the GCM, States committed to concluding “bilateral or regional agreements on consular assistance and representation in places where States have an interest in strengthening effective consular services related to migration, but do not have a diplomatic or consular presence.”⁹⁸

Whether and how dual nationality, refugee status, or statelessness affects an individual’s eligibility to receive consular assistance from any particular State is not addressed by the VCCR. Instead it is determined by the law and policy applicable for each State. Concerning dual nationality, many States will offer consular assistance to dual nationals, who hold their nationality among others, if they are visiting a third country (a State of which that person is not a national).⁹⁹ Other States may extend that protection when a dual national is traveling in a second country (a State of which that person is also a national); however, assistance may be limited by the laws of the second country, which, for example, may not recognize the first nationality, and therefore, the consular rights of the sending State.¹⁰⁰ Assistance in a second country may also be restricted depending on the passport with which the individual travelled.¹⁰¹

Treatment of refugees or stateless persons also varies. The consular assistance framework relies on nationality. Stateless persons have no recognized nationality, which poses a problem for determining which State, if any, could provide consular assistance. Moreover, refugees are unable to rely on the State from which they came from to provide them with consular assistance, since by definition, a refugee is “unable or, owing to [his] fear [of persecution,] unwilling to avail himself of the protection of that country.”¹⁰² Indeed, in some cases, the State of nationality was unwilling to protect refugees from persecution, whereas in others, that State was directly responsible for their persecution. To respond to this predicament, some States include refugees and stateless persons who have ties to them, through residence for example, as expressly eligible for consular assistance; however, assistance may be given on a restricted basis, contingent on possession of a residence permit,¹⁰³ and in other States it may be denied.¹⁰⁴ Other States consider the matter in a more discretionary manner.¹⁰⁵

According to the Convention relating to the Status of Stateless Persons, stateless persons will enjoy assistance in the State’s territory in which they reside. In this regard, host States shall provide legal assistance, public relief, and assistance to stateless persons under the same treatment accorded to their nationals.¹⁰⁶ Concerning administrative assistance, the Convention establishes that “[w]hen the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him

97 See VCCR, *supra* note 16, Article 27(c) (“In the event of the severance of consular relations between two States, the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.”). Examples of protecting power arrangements include Switzerland representing U.S. interests in Iran since 21 May 1980 and in Cuba between 1991 and the reestablishment of relations in 2015.

98 GCM, *supra* note 4, Objective 14(c).

99 See, e.g., D. Avilia, Consular Assistance for Nationals Detained by a Foreign Government: States’ Policies and Practises, *Indonesia Law Review* 1:113-134 (2017) for an overview of the consular services provided by six States (the United Kingdom, the Netherlands, Germany, Malaysia, the United States, and Indonesia). Each of the six States surveyed considers dual nationals in a third country eligible to receive consular assistance.

100 See, e.g., Netherlands Worldwide, [Dutch nationals imprisoned in a foreign country](#). (“In some cases, the embassy or consulate will be unable to assist prisoners with dual nationality in the country of their other nationality. This is because of the laws in the country concerned”); See also Diplomatic protection and consular assistance of migrants, *supra* note 29, p. 277.

101 See, e.g., Dewi Avilia. Consular Assistance for Nationals Detained by a Foreign Government: States’ Policies and Practises. *Indon. L. Rev.* 7 (2017):125 (“According to the US Department of State’s Overseas Citizens Service (DSOCS), the passport that people travel with, matters only when dual nationals are in the country of their other nationality.”).

102 Convention Relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, Art I(A(2)) (definition of “refugee”).

103 See, Latvia. S. Faro and M. Moraru, Consular and Diplomatic Protection: Legal framework in the EU Member States, 2010, pp. 285, 295 (For an overview of EU Member States’ policies regarding consular assistance for refugees and stateless persons).

104 *Ibid.*, (For an overview of EU Member States’ policies regarding consular assistance for refugees and stateless persons).

105 *Ibid.*, p. 248 (“Consular protection is, in principle, not extended to recognized refugees [or] stateless persons... [h]owever, the official booklet says that Irish consular officials ‘will always do their best to provide assistance if requested to by a non-national who is a resident of, or has longstanding close ties, to Ireland’... Thus at their discretion—and only after the authorities of the host State have agreed—Irish missions may give such assistance to such persons.”).

106 Convention relating to the Status of Stateless Persons, adopted 28 September 1954, entered into force 6 June 1960, Articles 16 and 23.

by their own authorities.”¹⁰⁷ These authorities “shall deliver or cause to be delivered under their supervision to stateless persons such documents or certifications as would normally be delivered to aliens by or through their national authorities.”¹⁰⁸ The host States shall also issue identity papers and travel documents to stateless persons.¹⁰⁹

Related to cases where stateless persons may not be covered under the protection of the Convention,¹¹⁰ the United Nations High Commissioner for Refugees has noted the importance for stateless persons to access consular assistance within the State they stay. In those cases, it is desirable that host States improve «consular assistance or make changes in policy with regard to consular assistance for such individuals.»¹¹¹ Adopting the practice of providing identity papers and travel documents to stateless persons or giving them some form of immigration status to permit them to stay in their territory are some examples of measures to assist them.¹¹²

d. Consular Protection and Assistance in Special Situations

Migrants are confronted with a myriad of challenges and vulnerabilities, such as a foreign language and culture, barriers to accessing individual documentation, unfamiliarity with the legal system, fear of deportation, discrimination and exploitation – often on account of their irregular or undocumented status.¹¹³ These obstacles have serious consequences.¹¹⁴ **It is important for the international community to cooperate in facilitating access to consular assistance for migrants** – particularly when facing special circumstances, such as detention, expulsion, or issues with immigration and/or stay procedures or with proof of legal identity and nationality. Migrants facing expulsion may face not only the issues related to detention (needing legal representation, etc.) but also - in the event of a final expulsion decision – issues related to travel documents and assistance to facilitate reintegration.

Consular assistance should also be provided for migrants in vulnerable situations **returning** to their country of origin, including replacement or issuance of identity, nationality and travel documents, support for the pre-departure process, and help with international referrals for continuity of care in the country of origin.¹¹⁵ Finally, in cases of emergencies, such as natural or human-made disasters, consular assistance can ensure protection and safe evacuation.

Detention and Expulsion

Migrants in detention can face difficulties, such as proceedings in a foreign language, a different legal system, lack of familiarity with resources for legal defense, fear of deportation, and isolation from their family and community, among others. Consuls are uniquely positioned to address the needs of migrants and provide them with information to allow them to exercise their rights. The State of Mexico, for example, has highlighted the importance of consular assistance with respect to migrants in legal proceedings or detention: “Prompt consular assistance may be decisive in the outcome of a criminal proceeding, because it guarantees, inter alia, that the foreign detainee is advised of his constitutional and legal rights in his own language and in a manner accessible to him, receives proper legal counsel, and understands the legal consequences of the crime of which

¹⁰⁷ *Ibid.*, Art 25 (1).

¹⁰⁸ *Ibid.*, Art 25 (2).

¹⁰⁹ *Ibid.*, Art 27 and 28.

¹¹⁰ For example, they reside in countries which are not parties to the Convention, or they might be considered de facto stateless persons.

¹¹¹ UNHCR, *Handbook on Protection of Stateless Persons, Under the 1954 Convention relating to the Status of Stateless Persons*, Geneva, 2014, p. 58.

¹¹² *Ibid.*

¹¹³ Richard Perruchoud. Consular Protection and Assistance. In: *International Migration Law: Developing Paradigms and Key Challenges* (R. Cholewinski, R. Perruchoud and E. MacDonald, eds.). T.M.C. Asser Press, The Hague, 2006, p. 71.

¹¹⁴ Dainius Pūras, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 July 2018, UN Doc. A/73/216, para. 25.

¹¹⁵ See IOM, *Handbook on Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse*, 2019.

he is accused.”¹¹⁶ Moreover, “[c]onsular agents may assist in the preparation, coordination and supervision of the defense, play a decisive role in obtaining, in the State of which the accused is a national, evidence that attests to mitigating circumstances and help make the circumstances of the accused and his relatives “more humane,” thereby helping to compensate for the real disadvantage at which they find themselves.”¹¹⁷

In situations where a foreign national is detained in a foreign State, **Article 36 of the VCCR** guarantees the following rights to consular officers and to detained foreign nationals:¹¹⁸

Rights of consular officials (of the sending State)	Rights of detained foreign nationals
<ul style="list-style-type: none"> • To communicate with and visit their nationals who are detained. • To be promptly informed of the detention, at the request of the national. • To be forwarded communications addressed to the consulate from the detained foreign national without delay. • To arrange for the detainee’s legal representation. • To provide other forms of assistance with the permission of the detainee. 	<ul style="list-style-type: none"> • To have any communication addressed to the consulate of the sending State forwarded right away. • To communicate freely with the consulate of their sending State. • To be informed without delay by the arresting authority of the right to consular notification and communication. • To choose whether or not to have the consulate contacted by the detaining authorities. • To accept or decline any offered consular assistance.

Regional tribunals have established that consular assistance is paramount in aiding migrants to defend their rights in another State, particularly in situations involving the death penalty.¹¹⁹ Consular notification is an important first step in securing consular assistance and a mechanism to protect the rights of both migrants and States.¹²⁰

States of origin should take the necessary measures to ensure that their consulates effectively address the needs of their nationals when facing situations of detention in a foreign State.¹²¹ Arranging legal representation to facilitate effective access to justice, assistance in securing evidence from abroad, and provision for legal aid are some of the ways in which consulates may address the needs of their nationals when detained abroad. To effectively address the needs of detained nationals abroad, States should allocate human and financial resources, and provide the appropriate training to their consular staff.¹²²

116 *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, supra note 69, para. 26 (Court’s summary of Mexico’s position).

117 *Ibid.*

118 Lists modified from: A. James and M. Warren, *A Universal Safeguard: Providing Consular Assistance to Nationals in Custody: An Introductory Guide for Consular Officers*, The International Justice Project, 2008, pp. 2-3.

119 *Tomic v. the United Kingdom*, European Court of Human rights (ECtHR), 17837/03, 14 October 2003, para. 3; *Case of Hilaire*, (Constantine and Benjamin et al v. Trinidad and Tobago), IACtHR, 1 September 2001, para.148; See *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, supra note 69, para. 134-136.

120 *Ibid.*, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, p.48

121 UN Human Rights Office of the High Commissioner, [Principles and Guidelines Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations](#), Principle 8.

122 *Ibid.*

States of destination must ensure that detaining authorities in their territory are trained to promptly inform detained foreign nationals of their rights to have their consular post informed of their detention and to communicate with consular officials. Such States must also ensure that detaining authorities are aware that the detained person should be consulted before notifying consulates of their detention, as this notification may place the migrant at risk (e.g. in the case of refugees and asylum seekers) and in such cases, notification would violate basic precepts of international protection by exposing them to the State that has persecuted them or tolerated their persecution.¹²³ If the person detained would like their consulate to be notified, this should be done as quickly as possible.

With respect to foreign nationals facing expulsion, consular officials can provide similar assistance, as in the case of arrest and detention, including providing information about their rights and arranging appropriate legal representation and legal aid to challenge the expulsion order. In the event that final orders of expulsion or removal are issued at the conclusion of legal proceedings and all avenues for challenging such orders have been exhausted, consular officials can also play a role in issuing requisite travel documents, facilitating humane repatriation, coordinating communication and keeping family apprised of the proceedings, and supporting reintegration in the country of nationality.

Preventing Statelessness

Statelessness can be both the cause for or a consequence of migration.¹²⁴ Conflicts in nationality laws, discrimination in application of laws to migrants, lack of access to identity documents, and lack of access to birth registration are frequent catalysts of statelessness that become harder to resolve in migratory contexts, and increasingly so with every generation of undocumented migrants and their descendants.¹²⁵ Whilst access to rights and corresponding services must not be conditioned on possessing documentary evidence of nationality, it is often still viewed as “a practical prerequisite for accessing political and judicial processes and for obtaining economic, social, and cultural rights.”¹²⁶ Stateless and at-risk migrants therefore face exacerbated vulnerability and oppression.¹²⁷

As such, leveraging consular assistance by sending States to help prevent statelessness should be a key priority for all stakeholders. This can be done by boosting the provision of services such as: locating migrants' birth certificates; ensuring the issuance of late birth certificates to migrants whose births were never registered in their birthplace both if they were born in the territory of the sending state, i.e. the country of nationality, and if they were born in a third country (making such a possibility available at consular level may require legal or policy reform in the Sending State's frameworks governing civil status documentation); issuing other documents of identification such as nationality certificates or national ID cards and passports; coordinating with local authorities to locate families of unaccompanied children; and registering births in country regardless of whether the migrant parent in question was able to register the birth in the civil registry of the host State.

An example of the systematization of registration of migrants to facilitate access to consular assistance includes the measures taken by the Government of Mexico in the 2005 wake of hurricane Stan, when Mexico agreed to cooperate with Guatemala and accept registration certificates (*matricula consular*) of Guatemalan nationals as a valid identification document to permit an exceptional stay of six months in Mexico.¹²⁸

¹²³ *Ibid.*

¹²⁴ The Double Plight of Stateless Migrants, *supra* note 86; Anne Althaus and Laura Parker, [Preventing statelessness among undocumented migrants: The role of the International Organization for Migration](#), LSE Blogs, 7 May 2019.

¹²⁵ *Ibid.*

¹²⁶ David Weissbrodt, *The Human Rights of Non-Citizens*, Oxford University Press, 2008, p. 97.

¹²⁷ Opeskin B, Perruchoud R and Redpath-Cross J (eds), *Foundations of International Migration Law*, Cambridge University Press, 2012, p. 108.

¹²⁸ Consular Protection and Assistance, *supra* note 113, p. 83.

Assistance in the Event of Emergency or Crisis Abroad

Consular assistance can also provide important assistance to migrants in the event of an emergency or crisis abroad, including terrorist attacks, natural disasters, major political unrest, or the eruption of armed conflict. Such assistance can include provision of up to date information regarding conditions and events on the ground in a language that the migrants understand, assistance with locating missing family members, issuance of travel documents on an emergency basis, and otherwise facilitating departure or providing transport for an evacuation to an appropriate place of safety. Consular officials can also provide support in emergencies of an individual nature, such as where migrants become victims of trafficking or other crimes, and need assistance accessing protection and justice.

During the **COVID-19 pandemic**, governments across the globe have adopted border management tools, such as travel restrictions, border closures, temporary suspension of visa renewal and processing, etc. to mitigate the spread of the pandemic. However, this also resulted in migrants, including those with regular status such as those with work permits, student visas, tourist visas, being pushed into situations of vulnerability, specifically regarding their migration status.

In many parts of the world, there has been increased uncertainty, with cancelled flights and strict border closures and lockdown measures, and, among migrant communities, the fear of being pushed into irregular status due to these circumstances. Temporary visa holders and international students facing the impending expiration of their visas, or an inability to comply with their visa requirements (e.g. attending classes on campus and in person) needed updated information about their options. Moreover, many migrants have been stranded for long periods of time in foreign countries with no financial assistance, and in many cases with no option to return to their countries of origin, despite impending expiration of visas. Consulates across the globe have been swamped with requests for assistance, having to keep up with both the avalanche of requests from their nationals abroad as well as keeping abreast of evolving government policies, both in origin and destination countries to combat the spread of COVID-19.¹²⁹

Many countries of origin and destination adopted flexible procedures and entered into bilateral agreements to ensure that individuals are not pushed into irregular situations, merely because of their inability to travel due to the pandemic. Consulates and embassies coordinated to provide assistance, including repatriation to countries of origin, in line with COVID-19 related travel restrictions in place in both countries of origin and destination. However, gaps identified during the pandemic should inform consular assistance activities, including consular preparedness for emergencies, in the future.

The need for **effective communication of accurate and timely information** to nationals stranded abroad, including but not limited to host government guidelines on visa renewal, extension, repatriation, access to essential services in host and destination countries, on emergency support in case of falling ill, and financial aid while stranded abroad, has been highlighted.¹³⁰ In addition, with many countries going into lockdown, the need to provide **remote consular services** was also identified as an immediate requirement during the pandemic.¹³¹ However, while going remote to provide timely consular assistance, the challenges posed by the **digital divide**, amongst different migrants, must also be taken into consideration. The inability to bridge the digital divide, specifically amongst migrant and refugee communities in need of essential services, has been highlighted several times during the pandemic. The need to adopt more **flexible procedures** to provide effective assistance to nationals abroad, as well as improved consular preparedness for managing emergency situations, has proven to be important and has been highlighted during the pandemic.

129 IOM, [COVID-19 Identification and Monitoring of Emerging Immigration, Consular and Visa Needs](#) [Issue Brief]; Aurélie Sgro, [National consular services are stretched to the limit by COVID-19](#), 2020, [ICMPD Expert Voice].

130 *Ibid.*

131 *Ibid.*; Corneliu Bjola and Ilan Manor, [Digital diplomacy in the time of the coronavirus pandemic](#), CPD Blog, 31 March 2020.

Non State Actors Providing Consular Support

In cases where the demand for consular services is high, private entities are often contracted to provide certain types of consular assistance.¹³² While the core consular services, including that of the protection of the rights of their nationals abroad, remain the prerogative of the State, certain others like processing visa, passport, ID or permit applications, call centers for consular queries and issuance of travel advisories has been outsourced to private entities.¹³³ Moreover, public-private partnerships are established and private contractors are also hired in cases of emergency response, crisis management and rapid response to name a few.¹³⁴

While efficiency and timely processing of citizens' claims may sometimes justify the outsourcing of certain functions to private actors, the security risks that arise out of privatization of consular assistance have also been raised.¹³⁵ The risks concerning the right to privacy due to the provision of citizens' data to private entities - making them vulnerable to private interests in the absence of strong accountable mechanisms and audits - remain one of the larger concerns in this regard. However, States have a responsibility to protect the human rights of all individuals in their territory or jurisdiction, including vis-à-vis the activities of business enterprises.¹³⁶

Nevertheless, using public organizations (such as IOM) can ensure that consular services are not commodified and remain guided by purely public interests, as opposed to commercial interests. IOM in this regard also supports consulates in evacuating citizens in cases of emergency and provides capacity building and logistical support.¹³⁷ IOM also regularly liaises with consular authorities to inform migrants of complex consular processes, and ensure that they have access to consular authorities to obtain civil status documentation and necessary travel documents.¹³⁸ Furthermore, IOM conducts capacity building activities for consular authorities, including to support family reunification and to determine the best interests of unaccompanied migrant children, as well as liaises with consulates to assist migrants under its voluntary humanitarian return program.¹³⁹

III. CONCLUSION

Under international migration law, consular assistance is a right of the State of origin corresponding to obligations of the State of destination. Although, as a general matter, consular assistance is provided at the discretion of the sending State, there are notable exceptions. Consular assistance entails some rights of the foreign national, i.e. migrant, abroad, with some corresponding obligations of his State or origin, as explained in the Note. It is fundamental in ensuring the protection of migrants facing special situations of vulnerability, such as the risk of statelessness, detention, the risk of expulsion, or those experiencing emergencies in the destination state. Consular assistance is therefore an important mechanism that enables migrants' rights to be realized and that prevents internationally wrongful acts against them, as nationals abroad. Consuls are often best equipped to address the specific needs of their nationals abroad, and in the case of certain rights – such as the right to

132 Maaïke Okano-Heijmans. Chapter One. Changes In Consular Assistance And The Emergence Of Consular Diplomacy. In: *Consular Affairs and Diplomacy* (Melissen J., and Fernández, A. M., eds.), Nijhoff, Leiden, 2011.

133 IOM, [Policy Principles Underlying Visa Processing](#); George Haynal, Michael Welsh, Louis Century & Sean Tyler: The Consular Function in the 21st Century A report for Foreign Affairs and International Trade Canada. Munk School of Global Affairs, University of Toronto, 2013.

134 Leira Halvard. Caring and carers: diplomatic personnel and the duty of care. *The Hague Journal of Diplomacy*, 13(2) (2018):147-166.

135 Ebru Tekin Bilbil. Neoliberal Governmentality and Consular Outsourcing: An Analysis on Visa Processing Arrangements. *Marmara University Journal of Political Science*, 6(1) (2018):97-122.

136 UN Human Rights Council, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, U.N. Doc. A/HRC/17/31, Principle I.A.1.

137 IOM, [Consular Contingency Plan Template-MICIC Capacity-Building Tool](#), 2017; Preventing Statelessness among Undocumented Migrants: The role of the International Organization for Migration, *supra* note 124.

138 *Ibid.*

139 *Ibid.*

nationality or freedom of movement – they can be the only appropriate actors to fulfil these obligations.

Thus, States of origin should adopt laws and implement policies that advance consular assistance for the protection of the rights of their nationals abroad. This also includes conducting training for their consular officials on the provision of adequate assistance to migrants abroad, particularly those in situations of vulnerability, and by entering into bilateral agreements for the provision of consular assistance by another State where the State of nationality lacks a consular presence. Furthermore, States of destination must train their authorities to respect migrants’ rights to consular information, notification, and communication, and also consult migrants before notifying consulates of their detention.

Annex : Differences between diplomatic protection and consular assistance

<i>Diplomatic Protection</i>	<i>Consular Assistance</i>
<ul style="list-style-type: none"> • Inter-State intervention conducted by diplomatic officials or government representatives attached to the foreign ministry, acting on behalf of the State. • Occurs when a national abroad is injured by an internationally wrongful act committed by another State (e.g., confiscation of property without compensation by the State, torture committed by the State, denial of access or unjust judgement.)¹⁴⁰ • National has exhausted local remedies. • Intervention with the intention of remedying an international wrong. • May take many forms, including protest, negotiation and judicial dispute settlement, all of which seek to invoke the legal responsibility of the other State. Exercised by a State in its own right, based on the foundation that an injury to its national is deemed to be an injury to the State itself.¹⁴¹ Can be pursued by a State without the effected individual’s consent/request.¹⁴² 	<ul style="list-style-type: none"> • Assistance rendered by career consuls or honorary consuls not engaged in political representation, acting on behalf of a national. • Occurs when nationals (and possible non-nationals) find themselves in need of assistance or services in a foreign State. • Exhaustion of local remedies not required. • Includes assistance that aims to prevent internationally wrongful acts. • Could include finding lawyers, visiting places of detention and contacting local authorities to ensure, for example, that an individual receives a fair trial (if charged with criminal offence), or that personal or proprietary interests are protected in the host State.¹⁴³ • Also refers to the provision of administrative services, such as civil status documentation or organizing for nationals to vote in elections from abroad. • Primarily concerned with the protection of the rights of the individual and requires the request and/or consent of the individual concerned.¹⁴⁴

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140 Chittharanjan Felix Amerasinghe, *Diplomatic Protection*, Oxford University Press, 2008, pp. 39 and 42.
 141 See Draft articles on diplomatic protection with commentaries, *supra* note 24, (which acknowledge that the notion that injury is to the state is both “a fiction and an exaggeration.”).
 142 See Seventh report on diplomatic protection, *supra* note 14, para. 17.
 143 [Consular officers, however, are not able to provide legal advice](#); Seventh report on diplomatic protection: Diplomatic Protection, *supra* note 14.
 144 *Ibid.*; See General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, *supra* note 74, para. 31 (“In relation to [the right to consular notification], the Committee emphasizes that the detaining State shall only contact the said authorities if this is explicitly requested by the detained migrant worker. In particular, migrant workers with potential protection needs shall not be brought to the attention of the said authorities without their knowledge and consent.”).