



COMMENTS ON THE GREEN PAPER:
Diplomatic and consular protection of Union citizens in third countries
COM(2006)712 final

30TH April 2007

Introduction

1. These submissions are put forward in response to the European Commission's call for comments on its Green Paper on diplomatic and consular protection of Union citizens in third countries, COM(2006)712 final.
2. The **Redress Trust (REDRESS)** is an international non-governmental organisation with a mandate to assist torture survivors to obtain adequate and effective remedies and reparation for their suffering. It has accumulated a wide expertise on the rights of victims of torture and related international crimes and has a successful track record of interventions before regional human rights courts, international criminal courts and human rights treaty mechanisms as well as national courts, in which its expertise on issues relating to the prohibition of torture has been duly recognized.¹
3. REDRESS has had occasion to consider the challenges facing survivors in seeking the intervention of their governments before, during or after having been tortured abroad. Usually these survivors will be looking for some form of consular support during or immediately following detention, and/or assistance at a later stage when they are seeking remedies and reparation for the harm suffered (*diplomatic protection*).²
4. REDRESS welcomes the Commission's *Green Paper on diplomatic and consular protection of Union citizens in third countries*. Its submissions reflect the experiences of torture survivors in particular, though some of its comments are of wider application. Its comments are focused on (i) the scope of protection for citizens; (ii) Protection to be afforded to long-term residents and others in need of protection; and (iii) Practical measures aimed at ensuring adequate consular protection to those undergoing or at risk of torture.

¹ More information on REDRESS' most recent case submissions can be found on its website at :
http://www.redress.org/case_submissions.html.

² See in particular, REDRESS. THE PROTECTION OF BRITISH NATIONALS DETAINED ABROAD: A Discussion Paper Concerning Consular and Diplomatic Protection, February 2005, available at:
<http://www.redress.org/publications/DiplomaticProtectionFeb2005.pdf>.

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The Scope of Consular Protection for Citizens

5. Article 20 of the EU Treaty recognises the right of every citizen of the Union in the territory of a third country in which the Member State of which he is a national is not represented, to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. This is further enshrined in Article 1 of the Decision 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.
6. The above provisions recognize a right to consular assistance which is consistent with recent interpretations of Article 36 of the Vienna Convention on Consular Relations. In the *Avena* case, the International Court of Justice recognised that: “[V]iolations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and ... violations of the rights of the latter may entail a violation of the rights of the individual.”³ It is also consistent with certain modern understandings of diplomatic protection which recognise an obligation to exercise diplomatic protection in respect of violations of serious violations of human rights.

“According to whether one opts for the right of States or for the right of the national, one is placing emphasis either on an extremely old custom which gave sovereignty more than its due, even resorting to a fiction, or on progressive development and adoption of custom, taking account of reality by means of international recognition of human rights.”⁴

7. Despite this, the recognition of the right to consular assistance is at odds with certain Member States’ understanding of their obligations.⁵
8. Article 20 of the EU Treaty and Article 1 of the Council Decision of 19th December 1995 are rendered meaningless when the right of every citizen of the Union to protection by the diplomatic or consular authorities as enshrined in these texts, gives rise to no rights whatsoever because certain Member States have chosen not to afford any such rights to their own citizens.
9. In order for Article 20 of the EU Treaty and Article 1 of the Council Decision of 19th December 2005 to be effectively implemented, it is respectfully submitted that a modicum of parity of rights between Member States is required.
10. REDRESS therefore agrees that “the differences between the various aspects of protection should be examined over the longer term, with a view to considering the possibilities of offering citizens similar protection irrespective of their

³ Mexico v U.S.A., ICJ (2004), para. 40.

⁴ Special Rapporteur’s Preliminary Report on Diplomatic Protection, UN Doc. A/C N.4/ 84, 4 February 1998. at p.14.

⁵ The United Kingdom has asserted that “British nationals do not have a legal right to consular assistance overseas. The UK Government is under no general obligation under domestic or international law to provide consular assistance (or exercise diplomatic protection). Consular assistance is provided as a matter of policy...”. See, UK response to the Commission’s Green Paper on Diplomatic and consular protection of Union citizens in third countries, March 2007.

nationality.” The European Commission should investigate further the systems in place within Member States with a view to promoting greater parity for the benefit of all citizens of the Union.

Protection to be afforded to long-term residents and others in need of protection

11. The Commission has raised the important issue of citizen’s family members who are not nationals of a Member State with a view to affording joint protection to families in the context of evacuations and repatriations.
12. REDRESS also encourages the Commission to consider the protection that ought to be afforded to dual nationals, stateless persons or recognised refugees and other habitual residents where it is not feasible for the State of nationality or other State to afford protection,⁶ particularly in cases where torture and other serious violations of human rights are at stake.
13. Recent cases of detainees at Guantanamo Bay illustrate the need for greater clarity. The European Parliament’s Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners points out in its 26 January 2007 Report “Murat Kurnaz’s lawyer was told by the German Government that it was impossible to open negotiations with the US Government on his release because Murat Kurnaz was a Turkish citizen” and regretted “the fact that Murat Kurnaz was interrogated twice, in 2002 and in 2004, by German officials at Guantánamo, where he was detained without formal charge or trial and without judicial assistance; regrets the fact that German officials denied him any assistance because they were only interested in questioning him.”⁷ Whilst the German Government eventually took steps to facilitate Mr. Kurnaz’ release and return to Germany and launched an investigation into the potential role of German soldiers, the United Kingdom Government has to date failed to take appropriate steps to effect the release of long-term British residents, some of whom have refugee status. In the same report, the European Parliament “Criticises the unwillingness of the UK Government to provide consular assistance to Bisher Al-Rawi and Jamil El-Banna on the grounds that they are not UK citizens.” (at para. 71)

Practical measures aimed at ensuring adequate consular protection to those undergoing or at risk of torture

14. The Commission’s Green Paper recognises the importance of ensuring that citizens are more fully informed about consular protection. Adequate information about rights is vital. Equally important is ensuring an adequate and appropriate level of consular protection.

⁶ For example, the International Law Commission recommendations extend to enable a state to exercise diplomatic protection in respect of stateless persons or recognized refugees habitually resident in the state seeking to exercise diplomatic protection.

⁷ FINAL REPORT on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (A6-9999/2007), at paras. 84 and 85.

15. REDRESS' experiences in dealing with UK citizens who were tortured abroad reveal a number of concerns, as follows:⁸

Insufficient prior warnings of the risks

16. Some countries are notorious for torturing their own nationals and foreigners. While governments usually advise travellers to obey the laws and customs of foreign countries in which they find themselves, this is not the same as mentioning the consequences of falling foul of the authorities or of the treatment to which they may be subjected if detained *in those countries where it is undisputed that nationals have been tortured in the recent past*. This is in contrast to the detailed warnings which governments give in respect of war zones, rebel groups, civil unrest, ordinary crime, HIV/AIDS risks etcetera.

Belatedly visiting the detainee

17. Invariably, a detaining State which is torturing or planning to torture a foreign national will not inform the victim “without delay” or indeed at all of their right to have their consulate notified; *a fortiori*, such a detaining State will not then “without delay” at the detainee’s request notify the consul and permit access. In virtually all cases with which REDRESS has dealt, there was an initial delay of at least days, if not weeks or longer, before the consulate was officially informed that a national is in custody, and not infrequently the information reached the consul through other sources first: media reports, family, friends. The significance of these failures, breaches and delays *on the part of the detaining State* is twofold: firstly, in themselves they already constitute clear grounds for the consulate to raise a vigorous complaint (once they have been confirmed by the detainee, who in theory may have waived his/her rights to access); secondly, if the consulate itself then drags its heels in asserting its right to visit once it *is* aware of the detention, this will exacerbate the delay even further.
18. Where there is no consulate of the detainee’s nationality, it is even more likely that detaining States will refrain or delay notification, and less likely that the consulate of another EU State will learn independently of the detention of a citizen of the Union or take proactive steps to determine same.

Failure to ensure access to a lawyer

19. States torturing or planning to torture a detainee pay scant regard to other established norms of international law, such as the right to prompt access to a lawyer. Even if the detaining State has a domestic law which clearly allows for this right, and even if it is usually observed in respect of arrested nationals, (and of course frequently neither of these will be the case), then it is precisely foreigners targeted for torture who are often likely to be denied proper and prompt access. In such a case the foreign national has nobody to turn to but the consulate to try to get access to a lawyer.

⁸ The comments below summarise recommendations put to the Consular Directorate of the Foreign and Commonwealth Office by REDRESS in its Report: THE PROTECTION OF BRITISH NATIONALS DETAINED ABROAD: A Discussion Paper Concerning Consular and Diplomatic Protection, February 2005, available at: <http://www.redress.org/publications/DiplomaticProtectionFeb2005.pdf>. These comments, however are of general relevance for other Member States, and for the Commission, in identifying problem areas and best practise.

20. Not only does the minimum practice of providing a proper list of lawyers not always take place, but in consulates' apparent insistence on never getting involved in the appointment of a lawyer (presumably for financial and/or 'ethical' reasons) certain specific deleterious consequences can and have resulted.

Taking up complaints in an inappropriate way

21. The word 'complaints' here includes not only the denial of prompt and proper access to consular officials and lawyers, but also the actual torture and everything arising therefrom, including the cessation of torture, independent and efficient medical treatment, regular visits and so on. These are all concerns in respect of which torture victims may legitimately look to consular officials for help.
22. Some torture survivors have averred that consular officials foolishly and ineffectively, or worse, raise complaints directly with the very officials carrying out the abuse, instead of at a higher level. As a result the perpetrators simply increased the abuse as punishment. Other survivors have said that complaints were put forward by a consular official without sufficient standing or authority to have any impact, or by a consular official without sufficient understanding of what was required or knowledge of the actual hierarchy involved. The only way for there to be a chance that complaints will be properly acted upon is if the consular officials are both determined and competent: they must actually know what is necessary to be done and how to go about doing it in order to achieve the end result, and then pursue a course of action with vigour.

Failure to address special needs

23. A common problem is that consular officials tend to approach nationals undergoing torture abroad with little understanding of how and why such detainees' special needs are not the same as 'ordinary' nationals arrested abroad. In other words, because the norm is that most nationals in foreign custody are not tortured, when torture *is* a real issue that consular officials sometimes prove to be ineffective and barely committed, just when they should be at their most effective and most committed.
24. Many torture survivors that REDRESS consulted with feel that the consular officials attending on them were simply out of their depth and unable or unwilling to respond with either the urgency, determination or understanding required. Too used to dealing with 'routine' issues, they were not equipped for the reality of torture as something they had to cope with. In some cases they didn't really understand what had been happening, in others they didn't know what to do, or indicated that there was nothing that they could do. At the root of the problem lay an unwillingness to confront the State with every means available. Some victims see this as a lack of compassion, as a display of callousness towards their predicament; others spoke of collusion or even bribery and corruption; many believe that sometimes consular officials would sooner turn a blind eye or go through the motions of helping, without wishing to rock the boat or upset the State for wider political, economic or strategic motives. Such perceptions add another

layer of suffering to survivors, who feel that they have been betrayed by their own Government at the time of their greatest need.

25. What has also been mentioned is the failure of consular officials to attend on victims who have been hospitalised in detention as a direct result of the torture, or whose previous medical ailments have been exacerbated as a result of the torture, necessitating hospitalisation. One such victim was in hospital three times: on the first two occasions he received no visits from the consulate even though officials there were aware of the position, and it was only during the third time that he was visited.

Failure to insist on the detainee being granted private consultations with consular officials and/or lawyers

26. This is a very frequent complaint. Once more, it is only to be expected that States which condone or allow torture or practice it as a deliberate policy also dispense with other civilized standards and international safeguards of due process and basic human rights for those in custody. Furthermore, this is not merely a matter of default, but is frequently part and parcel of the torture process itself, a 'package of abuse.' A victim is physically and/or psychologically abused and then, just as few States will usually openly admit and defend what has occurred, they will also almost always take steps to prevent the facts and details of torture becoming known if they possibly can, especially where the victim is a foreign national of an influential State.
27. As a result, the State committing torture will almost invariably create deliberate obstacles in the path of those trying to help, beginning with the denial or delaying of initial access to consular officials and/or lawyers. Thereafter, complaints will be ignored, disputed or denied, whether raised in or out of court and whether by the lawyer or by the consulate. Once access to lawyers and consular officials can no longer be prevented, then other difficulties are raised, such as restricting the frequency of their visits or hampering the conditions under which interviews are conducted.
28. Commonest of all problems in this regard arise when State officials simply refuse to allow a detainee the right to have a private, confidential consultation, either with his/her consulate or lawyer, or both. More often than not the authorities will be present, or if not actually in the room will be monitoring the conversation. Sometimes the very persons who have carried out the torture are those who insist on being there to listen to everything being said, and the victim will have been told that if anything is mentioned about the torture then further abuse will result. Consultations are suddenly cut short if an attempt is made to inform the consulate/lawyer of the truth about mistreatment, or if the State officials suspect that some such communication is being hinted at.

Failure to obtain an independent medical examination

29. The fundamental importance of a torture victim being properly examined and treated by a competent and independent medical expert as soon as possible after torture has been inflicted, cannot be over-emphasised. Once more, this is almost

invariably a basic issue for both the consulate and the lawyer to deal with, and they ought to work together using all the mechanisms best suited to their respective roles to facilitate such an examination. Not only can such an examination reveal and record evidence of the torture, but it can go towards preventing further maltreatment of the individual, and even play a role in lessening the practice generally; most importantly of all, of course, the independent doctor will have an opportunity to treat and relieve some of the suffering being endured as a consequence of the torture.

30. It is very common for States which carry out or condone torture to make it extremely difficult, if not impossible, for such an examination to take place. They will simply refuse to allow it, or outside doctors (nationals of the State) may be intimidated, or State officials will say that it is not necessary as the victim's medical requirements have already been attended to, or that the person has no medical needs at all, or they may delay allowing such an independent examination until they believe that the signs of torture have disappeared or greatly diminished. In all these circumstances consular officials should be doing everything possible to insist on proper access to a proper independent doctor, but according to some torture survivors the energy and commitment put into this was not forthcoming.

Failure to provide proper information as to what was being done to alleviate complaints

31. This problem is linked to others, such as infrequent visits and difficulties relating to confidential consultations between the detainee and the consulate, as well as the kinds of complaints against the torturing State for which nationals have sought help, including those that have already been mentioned above: access to an appropriate lawyer (and to the consulate itself), private consultations with advisers, proper independent medical attention, and of course the cessation of torture itself, or progress towards the detainee's release where he/she is being detained without trial. In other words having raised or having tried to alert the consular officials to the kinds of issues which are of overwhelming concern to the individual, torture survivors have recorded a disappointing lack of feedback both as to what steps had already been taken and were intended, what the response of the State was, what the consulate's response to the State's response was and would be, and so on.
32. The kinds of things for which detainees seek the help of consular officials and which they rightly expect such officials to take up with the detaining authorities, and about which the detainees require progress reports, are not restricted to those already mentioned. Other common complaints include the following, which is also not an exhaustive list: prison food, cell conditions (overcrowding, solitary confinement, heat/cold, noise, threats and assaults from other in-mates), shackles, lack of any or sufficient exercise, lack of access to books, newspapers, radio, television and writing materials, restraints on receiving or sending letters, restrictions on visits from family and friends, restrictions on buying items in prison shops, money issues.