REDRESS

Seeking Reparation for Torture Survivors

THE PROTECTION OF BRITISH NATIONALS DETAINED ABROAD

A DISCUSSION PAPER CONCERNING CONSULAR AND DIPLOMATIC PROTECTION

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I. INTRODUCTION

This discussion paper focuses on the challenges facing British survivors of torture when seeking the intervention of the United Kingdom Government before, during or after having been tortured abroad. Usually these survivors will be looking for some form of consular support (*consular protection)* 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*)[1].

REDRESS has dealt with numerous UK nationals who have suffered torture abroad, and this paper collates how these survivors viewed and, in some on-going cases, still view the actions of the UK Government in respect of both *consular* and *diplomatic protection.* These nationals were tortured in a number of different countries and at different times, going as far back as twenty years. While these accumulated views can only ever serve as anecdotal illustrations of problems, there are certain disturbing patterns in survivors' perspectives.

The paper is written in order to i) highlight the obligations of the UK Government and the scope of actions available to it in respect of its nationals tortured abroad; ii) illustrate some of the principle difficulties faced by survivors in their efforts to secure the intervention of the UK Government and highlight their perceptions of Government actions; and iii) suggest ways in which services to such nationals might be improved and policies clarified. Recent instances of UK nationals tortured abroad, whether they relate to incidents in Saudi Arabia, Guantanamo Bay or elsewhere, highlight the need for a consistent policy on the part of the Government.

REDRESS hopes that this paper will feed into the Consular Directorate's strategy to provide British nationals abroad with "consistent, high quality public services." [2]

II. CONSULAR PROTECTION – INTERNATIONAL LAW AND UK PRACTICE

A. International Law

Consular protection refers to the support and assistance provided by consulates to their nationals abroad. The 1963 Vienna Convention on Consular Relations (Vienna Convention)[3] regulates the rights, duties and privileges of consulates and their officials. For foreign nationals detained abroad, the source of consular protection is found in Articles 5 and 36. Article 5 outlines broad, general consular functions, including those relevant to imprisoned or detained nationals. Article 36 codifies some of the key rights, which developed in customary international law, including the right of consuls to communicate with and assist their detained nationals, and the rights of the detained or imprisoned nationals themselves. A number of cases have been

[1] The ways in which the concepts *consular protection* and *diplomatic protection* are used by governments, academics and courts is not always consistent and can be confusing. Sometimes other terms like 'diplomatic consular protection', 'diplomatic action' and 'diplomatic representation' are also used, often interchangeably, and it can depend on the context whether *consular protection* or *diplomatic protection* is meant, or even something else. *Consular protection* is what a national that is abroad seeks and expects when looking to his/her consulate for help. *Diplomatic protection* is an established term of international law for when a State adopts in its own right the cause of its national in respect of an injury to that national arising from an international wrongful act of another State.

[2] Commitment expressed by Jack Straw in "UK International Priorities – A Strategy for the FCO," 2003 and referred to in Consular Directorate Foreign and Commonwealth Office, "In partnership: Delivering High-Quality Consular Services" of July 2004.

[3] U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963.

brought before international courts or tribunals for violations of consular rights, when diplomatic or domestic legal remedies have proven ineffectual. From these it has been clearly established that Article 36 confers rights not only on consular officers but also on the detained individuals.[4] 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."[5]

Consequently, consular rights do not belong exclusively to governments; they also involve the nationals themselves. In the context of torture, the national will be seeking to have consular officials do everything possible to prevent torture from being inflicted at all, to get the local authorities to cease the torture, as well as to help the national with access to local lawyers and doctors, and to communicate with family or friends. UK consular officials will be expected to take an urgent and proactive approach in the foreign State. As events unfold, consular officials will be informing the UK Government of developments, and 'diplomatic pressure' may be exerted on the foreign State as well.

B. UK Policy and Practice

The UK is a party to the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes, and has bilateral agreements of various kinds with many States. Furthermore, as a member State of the EU it acts as consul for all other EU nationals in States where they have no consular representation, and the same arrangement extends to UK nationals in States where the UK has no consulate.

Existing consular policy can be identified through travel advice and other publications issued by the FCO as well as Ministerial statements. The FCO's website has a section dedicated to travel advice which sets out in broad and simple terms, the remit of its consular services.[6] The advice also states that any UK national detained should "Insist that the British Consul be notified. IT IS YOUR RIGHT" and that "The Consul will do everything possible to help British Nationals who have been arrested or detained overseas."

The advice equally sets out what the Consul cannot do, including:

- "Get you out of jail. But the Consul will take action if your rights have been denied or abused.
- Get you better treatment than is given to locals.
- Give or pay for legal advice, start court proceedings on your behalf, or interfere in local judicial procedures to get you out of prison.
- Investigate a crime."

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[4] After the execution of two Mexican citizens in the USA who were not notified of their rights under Article 36, Mexico sought an advisory ruling from the Inter-American Court of Human Rights on the nature of Article 36 obligations. It was held that the right to consular notification and access is a fundamental human right essential to the protection of due process, and its denial renders any subsequent execution arbitrary and illegal under international law. See, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due process of Law*, Inter- American Court of Human Rights, Advisory Opinion No. OC- 16/99. The International Court of Justice held in *LaGrand,* that article 36 confers specific rights on individual nationals as well as on States: "Based on the text of [article 36], the Court concludes that article 36 paragraph 1, creates individual rights, which, by virtue of article 1 of the Optional Protocol, may be invoked in this court by the State of the detained person." Germany v U.S.A. ICJ (2001), para. 77.

[5] Mexico v U.S.A., ICJ (2004), para. 40.

[6] See http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1100184342050.

Further, the publication 'In Prison Abroad'[7] broadly reiterates this information and some of the essentials also appear in the publication "Help for Britons Abroad" (also displayed on the website) including the key right to contact the British consul on arrest.

REDRESS welcomes the updated information on the FCO's website. However, in REDRESS' view a number of issues require further clarification in order to guarantee a more consistent consular service. For example, the publication, "In Prison Abroad" states that a Consul can: "Make appropriate representations to local authorities if you are not treated ***in accordance with international human rights standards***. This may include where your trial is unreasonably delayed or is not conducted according to due process" (emphasis added). The reference to international human rights standards as a benchmark is also found in various annual reports of the FCO and in Ministerial statements about assistance given to Britons detained abroad.[8] However, no reference to this general standard appears in the current travel advice under "arrest" or "in prison".[9] The matter is further confused by the lack of cross-reference to the rule that a Consul will not interfere in judicial proceedings.

- Where a person's right to a fair trial has been denied or in the event that a British national is forced to sign a confession, and that confession is used as evidence against the national, surely consular officials should be making representations at the earliest stage possible even though this may *prima facie* appear to be intervening in judicial proceedings?

- Likewise there is no explanation on the interplay between securing British nationals' human rights on the one hand and not securing better treatment than what is afforded to the local population. Again, it needs to be made clear that where human rights violations are endemic, Consul officials use international standards as their benchmark to protect the rights of British nationals abroad.

- Further clarification is needed in relation to how consular officials will address circumstances where a British national has been tortured or is at risk of torture. At present, the advice states that representations will be made to "police or prison authorities". However such action may result in the representation being made to an official who either condoned or instigated the torture. It may also put the British national at risk of further ill treatment and may even deter the British national from seeking consular protection.

In addition to the advice and publications issued by the FCO, Ministers have issued a number of policy statements in relation to consular assistance to British nationals detained abroad. These include the Government's commitment to intervening in cases involving British nationals subject to the death penalty and to make representations "at whatever stage and level is judged appropriate from the moment when the imposition of a death sentence on a British national becomes a possibility".[10] Ministers have also made a statement on the types of clemency pleas

[7] September 2003. 8/1128C.

[8] See for example, Consular Work Annual Review 2001, FCO Human Rights Annual Reports 2004, at page 194 and 2003 at page 79. See also Ministerial statements to Parliament on Clemency Pleas.

[9] However a passing reference to human rights is made in relation to assisting the national to find an interpreter.

[10] "Our overriding objective is to avoid the execution of British nationals**.** We will now express our opposition to the death penalty and its use on a British national at whatever stage and level is judged appropriate from the moment when the imposition of a death sentence on a British national becomes a possibility. Our previous policy was to make these representations only when the judicial

the Government will consider supporting and bases its criteria on the "compelling compassionate circumstances" of the British national's case, "such as where a prisoner is chronically ill or dying (particularly when prison conditions overseas are poor) or when a close family member is chronically ill or dying; where continued incarceration is likely to endanger life or is likely to reduce life expectancy significantly", or where the British national is a minor, or in miscarriage or denial of justice cases where the Government's "representations have failed to secure a remedy".[11]

The latest Ministerial statement, "*Consular assistance for British nationals detained overseas,"* reiterates the Government's commitment that "[t]he welfare of British nationals in foreign prisons is one of the key concerns of consular staff. Our staff seek to ensure that prisoners' rights are respected in accordance with international standards. This includes ensuring that they have access to legal representation and that their welfare needs are met during their detention." The statement sets out its new policy on the reduction of consular officials in countries or regions where it is satisfied that the standards generally found in these prisons meet international standards. The statement also confirms that: "In all other countries, where prison conditions give us more cause for concern, the aim of consular staff will be to continue to visit prisoners on a regular basis. This is likely to be at least once a year, and as often as once a month where circumstances warrant it."[12]

In addition to this, statements made in 1999 to both the House of Commons and Lords, set out Government policy on when it will make representations on behalf of a detained British National:

> "At present we consider making such representations if, when all legal remedies have been exhausted, the British national **and** their lawyer have evidence of a miscarriage or denial of justice.
>
> We are extending this to include those cases where fundamental violations of the British national's human rights had demonstrably altered the course of justice. In such **cases**, we would also consider supporting their request for an appeal to any official human rights body in the country concerned, and subsequently giving advice on how to take their cases to relevant international human rights mechanisms."[13]

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process had been exhausted," Written answer given by Baroness Scotland of Asthal published in Hansard 28 Feb 2001 : Column WA134.

[11] "Our objective is to support pleas for clemency in deserving cases, while respecting the sovereign right of foreign governments to sentence prisoners according to their own laws. Following an internal review, we have decided to widen our existing criteria for supporting clemency pleas. We will now consider supporting clemency pleas from British nationals imprisoned overseas in the following cases: in compelling compassionate circumstances, such as where a prisoner is chronically ill or dying (particularly when prison conditions overseas are poor) or when a close family member is chronically ill or dying; where continued incarceration is likely to endanger life or is likely to reduce life expectancy significantly; in cases of minors imprisoned overseas; as a last resort, in cases where we have prima facie evidence of a denial or miscarriage of justice, where we have made representations, but where those representations have failed to secure a remedy. In these cases, our reasons for supporting a plea would not normally be mentioned explicitly in the plea itself. We will also take the prisoner's family circumstances into account when considering whether to support a plea for clemency. We will examine all pleas on a case-by- case basis. Our previous policy was to support clemency pleas in compelling compassionate circumstances, such as where a prisoner was terminally ill, or where the death of a spouse would leave young children with no one to care for them. The new policy demonstrates our commitment to protecting the human rights of British nationals." Written answer given by Mr. Wilson: published in Hansard 2 May 2001 : Column: 629W updating the statement by Baroness Scotland of Asthal on 16 December 1999.

[12] Issued by the Foreign Secretary, the Rt Hon Jack Straw MP to the House of Commons on 14 July 2003, reported in Hansard.

[13] Written answer given by Baroness Scotland of Asthal, supra. n. 10, and an identical statement by Mr Hain on the same day to the House of Commons, Hansard 16 December 1999 Column 254W.

These policy statements add some clarity to the type of services that a British national detained abroad can expect to receive from the Government, both from its consular officials and other Government representatives. However a number of changes are needed in order to make the overall policy of consular assistance more consistent and transparent.

- First, it would be helpful if Ministerial statements relating to the assistance offered to British nationals detained abroad were comprehensively listed in one place on the FCO website, and linked in to the advice given in the travel advice section.

- Second, reference to interventions in death penalty cases and supporting clemency pleas should be included in the information "on arrest".

- Third, the 1999 Ministerial statement setting out the Government's policy on making representations in cases of fundamental violations of the British National's human rights makes no reference to the representations specified in the travel advice section "on arrest" or "in prison" or its publication on "in prison abroad". As a result it leaves the Government's policy on making representations ambiguous and unclear.

- Also, despite the recent serious cases of torture of British nationals detained abroad, it is surprising that no specific statement has been made in relation to those British nationals who have been tortured or at risk of torture abroad. Such a statement could include the Government's abhorrence of torture and reiterate its commitment to eradicating torture globally, which is already part of its general foreign policy aims. This should also mention how and when representations will be made, and that representations will be made to a body which has the power to prevent recurrence of the torture and that such representations are made as soon as the British national informs the consul of the ill treatment.

- Wherever possible, the Consul should insist on meeting with the British nationals in surroundings that enable them to discuss matters freely and in confidence.

- In order to enhance the protection afforded to British nationals detained abroad, clarification is needed on what action the British Government will take where an arresting authority fails to notify a British national of its right to contact consular officials or where the arresting authority refuses to allow a British national to contact the consular official as stipulated by the Vienna Convention. The International Court of Justice has set out remedies where such a breach unfairly prejudices judicial proceedings, "to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention" and to seek guarantees of non-repetition.[14] These remedies at the very least should become part of the Government stated policy with consideration given to other appropriate remedies.

In addition to the above (which sets out the Government's current policy on consular assistance), the FCO's Pro bono lawyers Panel (launched in 2001) has the objective to "help protect the human rights of British prisoners overseas" by providing "free legal advice to British prisoners who are unable to afford a lawyer and be available to assist local lawyers on human

[14] In *LaGrand* and *Avena*, supra., notes 4 and 5.

rights questions such as fair trials".[15] The website also includes lists of English speaking local lawyers and their areas of expertise in different countries, including those with expertise in criminal matters. The FCO has also launched a Pro bono medical panel, which "will advise the FCO on serious medical cases involving British nationals in prisons overseas. It will also help implement the FCO's new clemency policy by considering the medical evidence in support of a plea on compassionate grounds".[16] Although these two panels can play a vital role of protecting the rights of British nationals, reference to these initiatives does not appear to be included in travel advice or in publications relating to British nationals detained abroad. It also appears that the British nationals are referred by the FCO to a specific pro bono lawyer on the panel rather than being given a choice.[17]

Duty to provide consular protection

As pointed out in "In Partnership: Delivering High-Quality Consular Services Strategy 2004-2007," "assistance itself is a matter for states' discretion rather than a legal obligation." This policy document rightly states that the Vienna Convention does not provide the individual with any expressed right against their own state for failure to provide such services.[18] Nevertheless, the current policy statements would appear to create some legitimate expectation that such assistance as set out in these statements will be provided to British nationals detained abroad in all cases.[19]

III. DIPLOMATIC PROTECTION – INTERNATIONAL LAW AND UK PRACTICE

The exercise of ***diplomatic protection***[20] often arises *after* the survivor has returned to the UK and is claiming reparations; the UK Government is asked to deal directly with the foreign State to have the claim effectively processed and satisfactorily dealt with.

A. International Law

Discretion of the State or right of the injured national?

In the traditional view, diplomatic protection was understood as a sole and discretionary right of an injured alien's State of nationality to assert against a foreign State.[21] If the State of nationality

[15] FCO announces pro bono lawyers panel (08/06/01) http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1013618411822 The panel also gives advice on miscarriages of justice and sentencing as part of the FCO's new clemency policy.

[16] FCO announces pro bono medical panel (11/02/01) http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1035368227585&a=KArticle&aid=1013618417635.

[17] According to the FCO Human Rights Annual Report 2004, page 196.

[18] Page 5 of the report published by the Consular Directorate Foreign and Commonwealth Office July 2004.

[19] It was noted in *Abbasi* that "in light of the concession made by the Secretary of State it would have been difficult, in that case [*Butt*] at least, for him to have denied that there was a legitimate expectation that such assistance as was proffered in the leaflets [available to those traveling abroad] would be provided" [2002] EWCA Civ.1598, para 94.

[20] The nature and scope of *diplomatic protection* has been the subject of investigations by the International Law Commission since 1996. In May 2004, it submitted nineteen Draft Articles to governments for comments and observations, with requests that that such comments and observations be submitted by 1 January 2006.

[21] "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

felt the claim was unfounded, or decided that to espouse the claim would be contrary to its broader foreign policy needs, it was not obliged to give these or any other reasons to its national. Similarly, if the State of nationality *did* bring the claim, it always had full discretion to settle the case in any way it saw fit, by accepting, for example, the foreign State's lump sum payment as reparation: whether any actual compensation ultimately reached the individual or not was "of little importance from the standpoint of international law."[22]

With the now large body of international human rights law, which recognises the rights of individuals to seek and enforce their rights before national and international jurisdictions,[23] the question arises as to whether the action of the State of nationality to bring an international claim in order to protect its national is an enforcement of its own right[24] or an action as the agent or representative of its national who has a right of his or her own:

> "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."[25]

This question is crucial in the context of torture survivors, because in invoking the right of survivors a State is arguably obliged in some way to involve them in the procedure. Furthermore, the State could not bring an international claim against the will of the injured national; and finally, if a national declines *diplomatic protection* he or she is not infringing the State's right but merely acting within his or her own right.

A view was expressed during an International Law Commission debate that in the exercise of *diplomatic protection* no rigid distinction should be drawn between the rights of the State and the rights of its nationals; the national is one of the State's constituent elements and the protection of its nationals is one of the State's fundamental obligations (on the same level as the preservation of territory and sovereignty); at the same time the State defends the specific rights and interests of the injured individual. This perspective sees the two sets of rights as complementary and capable of being defended in concert, with the State having a general interest in seeing that its nationals abroad are treated fairly.[26] Nonetheless, article 1 of the draft articles makes clear that the right of *diplomatic protection* belongs to the State, and in exercising

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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…Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant." *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, Judgment of 30 August 1924, p.12. See, also, the Special Rapporteur's Preliminary Report on Diplomatic Protection, UN Doc. A/C N.4/ 84, 4 February 1998. p.6.

[22] Special Rapporteur's Preliminary Report on Diplomatic Protection, *Ibid.* p.7.

[23] See D Shelton, "Remedies in Human Rights Law", Oxford University Press, (1999), 1-37.

[24] See the *Barcelona Traction* case, ICJ Reports, 1970: "The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress... The State must be viewed as the sole judge to decide whether its protection will be granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action." para. 78-9.

[25] Special Rapporteur, supra., n. 21, at p.14.

[26] Draft Report of the International Law Commission on the Work of its Fiftieth Session, UN Doc. A/CN.4/L.552, Chapter IV, p.9-10.

it the State adopts in its own right the cause of its national arising from the internationally wrongful act of another State.[27]

In introducing the original draft article 4,[28] the UN Special Rapporteur noted that many States have Constitutions indicating that the individual does have a right to *diplomatic protection.* For example, the Hungarian Constitution provides: "Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal staying abroad." Other Constitutions providing for a similar right are those of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Turkey, Ukraine and Vietnam.[29]

The original draft article 4 was clearly restricted to the violation of *jus cogens* norms, such as the prohibition against torture. Furthermore, other restrictions were proposed: States would have a wide margin of appreciation and would not be compelled to protect a national if its international interests would be compromised, or if the individual had a remedy before an international tribunal, or if a dual or multiple national could be protected by another State, or if there was no genuine or effective link between the individual and the State of nationality. In this context the Special Rapporteur brought the matter before the ILC as an exercise in progressive development.[30] However, the general view was that the issue was not yet ripe for the attention of the ILC: "…[T]here was a need for more State practice and, particularly, more *opinio juris* before it could be considered."[31]

In an important recent decision of the South African Constitutional Court the majority found that there was no duty to exercise *diplomatic protection* under international law, and also no such clear right under South African municipal law.[32] However, in a detailed minority judgment, Justice O'Regan took a different view, approaching the matter from the viewpoint of "violations of internationally recognised human rights norms" where "there can be no doubt …that at international law, the State is entitled to take steps to protect its nationals." She then went on as follows:

> "This entitlement [under international law] in turn gives rise to two more difficult questions: does the State, under our Constitution, bear an obligation to exercise its

[27] "Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State." The formulation in draft article 1 "adopting… the cause of its national" is derived from the *Interhandel* (Switzerland v. USA) case, ICJ Rep. 1959.

[28] The original draft article 4 read as follows: "1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has ***a legal duty*** to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State. 2. The State of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interest of the State and/or its people; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. 3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority." [emphasis added]

[29] First Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur, ILC, 52nd session, 7 March 2000, A/CN.4/506 at paras. 80 – 86. Another country with a similar provision is the Federal Republic of Germany.

[30] Ibid., paras. 87 - 89.

[31] Report of the International Law Commission on the work of its fifty-second session, Para 456.

[32] *Kaunda & others v The President of the Republic of South Africa & others* Case CCT 23/04, decided on 4 August 2004.

> international law rights in respect of its nationals? And if it does bear such an obligation, in what circumstances is that obligation justiciable in our courts?"[33]

She concluded that in light of certain Constitutional imperatives to protect human rights the South African Government "would not be constitutionally permitted simply to ignore a citizen who is threatened with or has experienced an egregious violation of human rights norms at the hands of another State."[34] She opined that:

> "…[It] is proper to understand section 3 [of the Constitution] as imposing upon government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international law norms. Where a citizen faces or has experienced a breach of international human rights norms that falls short of the standard of egregiousness, the situation may well be different."[35]

She further indicated that "like other powers of the executive, the power must be exercised lawfully and rationally."[36]

International Minimum Standards?

Historically, when seeking to exercise *diplomatic protection* in the case of personal injuries to an alien, some States acknowledged an "international minimum standard" of treatment which must be accorded to aliens by all States irrespective of how they treat their own nationals, and others argued that aliens may only insist upon "national treatment" i.e. treatment equal to that given by the State concerned to its own nationals.[37] In a Draft Declaration on the Rights and Duties of States, governments were asked to comment on draft article 7 that read in part: "Foreigners may not claim rights different from, or more extensive than, those enjoyed by nationals."[38] The UK delegation responded as follows:

> "… There is much international authority for the existence of a minimum international standard, with which states are obliged to comply in their treatment of foreigners, whether or not they do so in the treatment of their nationals. If, and in so far as international law develops so as to limit the domestic jurisdiction of states in the treatment of their nationals to such an extent that every treatment of a national, which falls below the international standard, is a breach of international law (and therefore a matter on which other States may intervene), then the existing principle of international law with regard to the "international standard" will apply to both nationals and foreigners. Unless and until that position is reached, His Majesty's Government consider that the doctrine of the international minimum standard, with regard to the treatment of foreigners,

[33] *Kaunda*, at p. 101-102.

[34] Ibid., p.114-115.

[35] Id.

[36] Id, at.119. The learned judge referred to the leading constitutional case of *Rudolf Hess* in the Federal Republic of Germany (Case No 2BvR 419/80) reported in 90 ILR 386, particularly at 395-396. The Court held in this case that the Government is under a constitutional duty to provide diplomatic protection to German nationals and their interests in relation to foreign states.

[37] US v Mexico, (1926) *US-Mexico General Claims Commission*, 4 R.I.A.A. 60. See, also, D. J. Harris, Cases and Materials in International Law (London, 1998, 5th Edition), p. 520.

[38] Preparatory Study Concerning a Draft Declaration on Rights and Duties of States: *Memorandum submitted by the UN Secretary-General*, UN Doc. A/CN.4/2, p.71, 1949.

remains part of international law and that agreement to abolish the doctrine will not be attained."[39]

B. UK Law and practice

The UK has not incorporated the doctrine of diplomatic protection into domestic legislation, however, during the course of the International Law Commission's work it outlined its then current practice of diplomatic protection in the "Rules Applying to International Claims". This more or less follows the traditional concept of diplomatic protection.

The UK law relating to *diplomatic protection* is summarised in the recent leading Court of Appeal case of *Abbasi and Another v Secretary of State for Foreign Affairs and Another:*[40] Here, the Foreign and Commonwealth Office summarised its position on diplomatic representations as follows:

> "In cases that come to us with a request for assistance, Foreign and Commonwealth Ministers and Her Majesty's diplomatic and consular officers have to make an informed and considered judgment about the most appropriate way in which the interests of the British national may be protected, including the nature, manner and timing of any diplomatic representations to the country concerned…"

Unfortunately for the injured national this statement adds little to the Government's statement on diplomatic protection to the ILC. Despite this, the Court of Appeal in *Abbasi* clarifies the position on the justiciability of diplomatic protection and modifies the Government's position that "this is a matter 'falling within the prerogative of the Crown" and the Claim rules are "a statement of general policy and have no direct effect in domestic law."[41]

The UK Government's discretion to exercise diplomatic protection

In *Abbasi*, the Court of Appeal considered the United Nations Special Rapporteur's attempt to insert a draft article which would impose a **duty** on States to exercise *diplomatic protection* to nationals who have suffered a breach of a *jus cogens* norm,[42] and indicated that like many States, Britain does not accept that such a right either exists in international law or can be introduced at this stage on the basis of "progressive development."[43] Further, the Court of Appeal found nothing in the European Court of Human Rights and the Human Rights Act which imposed an obligation on the Government to extend *diplomatic protection* to a national. After examining *Al Adsani*[44] and *Soering,*[45] as well as other jurisprudence of the Strasbourg Court,[46] it

[39] Ibid.

[40] [2002] EWCA Civ.1598.

[41] *Abassi*, paras 88 and 89.

[42] Id. pp. 19-22.

[43] P. 20.

[44] (2002) 34 EHRR 11.

[45] [1989] ECHR 14308/88.

[46] Including *Bankovic and Others v Belgium and Others* (App. No. 52207/99) [11 BHRC 435] and *Bertrand Russell Peace Foundation v United Kingdom* (Commission decision 2 May 1978.)

found that neither treaties, legislation nor case law afforded "any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf."[47]

Formal claims and informal representations

During the course of the International Law Commission's (ILC) work on the topic of *diplomatic protection*, under the heading "Diplomatic protection: United Kingdom practice" it was said that "there is no legislation or case law governing this area in domestic law." It was said that there is a distinction between "**formal claims**" and "**informal representations**." As far as formal claims are concerned the practice rules[48] are "a considered statement of Government's policy" which are said to be based on customary international law.[49]

This has been further clarified in a ministerial statement of its policy on informal representation, found in the 1999 British Year Book of International Law:

> "At present we consider making representations if, when all legal remedies have been exhausted, the British national and their lawyer have evidence of a miscarriage or denial of justice. We are extending this to cases where fundamental violations of the British national's human rights had demonstrably altered the course of justice. In such cases, we would consider supporting their request for an appeal to any official human rights body in the country concerned, and subsequently giving advice on how to take their cases to relevant international human rights mechanisms."[50]

The second policy statement is as follows:

> "We are very conscious of the other government's obligations to ensure the respect of the rights of British citizens within their jurisdiction. This includes the right to a fair trial. In cases where a British citizen may have suffered a miscarriage of justice we believe that the most appropriate course of action is for the defendant's lawyers to take action through the local courts. If concerns remain, their lawyers can take the case to the United Nations Human Rights Committee, where the state in question has accepted the right of individual petition under the ICCPR. The UK government would also consider making direct representations to third governments on behalf of British citizens where we believe that they were in breach of their international obligations."[51]

This important distinction between "formal claims" and "informal representations" is also reflected in the rules themselves, as expressed in the preamble:

> "It may sometimes be permissible and appropriate to make informal representations even where the strict application of the following rules would bar the presentation of a formal claim."

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[47] Page 22 of the judgment, para. 79.

[48] Rules Applying to International Claims, published by the Government in 1985. The preamble to them begins: "The following are the most important general rules which apply when a United kingdom national complains of injuries suffered at the hands of another State and appeals to HMG to take up his claim under international law."

[49] This examination of the Government's position is from *Abbasi* at p. 24.

[50] Ibid, para. 90.

[51] Ibid. para. 91.

A formal claim can only be said to have been espoused when the UK Government "resort[s] to diplomatic action or other means of peaceful settlement [by the UK] adopting in its own right the cause of its national in respect of an injury to that national arising from an intentionally wrongful act of another State."[52]

As Professor Warbrick has also pointed out there is nothing in the two policy statements (nor indeed in the rules) which suggests that for the UK Government "the making of representations is anything other than a matter of executive discretion, as would be the case about any further action which might more properly be seen as a form of claims protection, even if the sentiments of the statements could be extended to other violations of human rights. *In particular, there is nothing to suggest that allegations of torture necessarily would induce a more positive reaction from the British Government*."[53] (emphasis added)

Nationality

The UK Government will only take up the claim if the claimant is a UK national, with the additional requirement in rule I that the claimant was also a UK national at the date of the injury.[54]

There are some differences between the ILC draft articles and the UK rules in regard to aspects of "**continuous nationality**", as well as in regard to aspects of **"multiple (dual) nationality."**

In *Al Adsani*[55] where the applicant was a dual UK-Kuwaiti national and his complaint of having been tortured was against his other State of nationality, Kuwait, the applicant submitted as follows:

> "He had attempted to make use of diplomatic channels but the [UK] Government refused to assist him…"[56]

Interestingly, in that case the UK Government submitted as follows:

> "There were other [i.e. other than litigation] traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim."[57]

It is not known why the UK refused to take up the claim as one of *diplomatic protection* or even whether it had or had not refused to make "[informal] diplomatic representations." On the facts of the case it was apparently arguable that the applicant's UK nationality was predominant at both the requisite times as set out in the ILC draft article, but it also appears that Kuwait did **not** treat the applicant as a UK national. The difficulty in knowing the basis on which the UK "refused to

[52] Draft article 1.

[53] Colin Warbrick, *Diplomatic representations and diplomatic protection,* in 51 Int'l & Comp. L.Q. 723-733 (2002), at pp. 724-725.

[54] The rule is couched in the negative: "HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury".

[55] Supra., n. 44.

[56] Para 51 of the judgment.

[57] Ibid., para 50.

assist" lies in that it has not given reasons for its decision. Thus it may have been acting in terms of the second part of rule III[58], or on some other foreign policy basis, or for another reason altogether. In any event the wording and meaning of rule III indeed indicates that in cases of dual nationality when the other State of nationality is the alleged wrongdoer UK practice is to "take a particularly narrow position" compared to the norm contained in draft article 7.[59]

Exhausting local remedies

Rule VII and the Comment thereto, along with rule VIII, place the UK broadly within the ILC draft articles. Rule VII provides as follows:

> "HMG will not normally take over and formally espouse a claim of a UK national against another State until all the legal remedies, if any, available to him in the State concerned have been exhausted."

Comparing these to the four exceptions listed in draft article 16[60] the UK rules appear to be narrower and stricter than the principles laid down in the draft articles, and thus make it more difficult for a UK national to persuade the Government to espouse a claim than should otherwise be so.

Judicial review

The earlier view was that diplomatic protection, falling as it did into the sovereign prerogative, was by this very fact alone not justiciable. However, the landmark decision of the House of Lords in the *GCHQ Case*[61] established that the mere derivation of a power from the sovereign prerogative did not render it incapable of review by the courts. Nevertheless, the House of Lords stated that certain areas would remain incapable of review - these included control of the armed forces and areas of foreign policy. Since then the scope of the "forbidden areas" has been narrowed from time to time, for example, by the Privy Council confirming that the exercise of the prerogative power of mercy was justiciable,[62] as was the decision whether or not to issue a

[58] Rule III states: "Where the claimant is a dual national HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other government entitled to do so). HMG will not normally take up his claim as a UK national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a UK national." Professor Warbrick has commented: "The Claims Rules take a particularly narrow position on the right of the UK to protect dual UK/State X nationals against the other State of nationality…"- supra., n. 53, p.725.

[59] Draft article 7 provides as follows: "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim."

[60] "Local remedies do not need to be exhausted where: (a) The local remedies provide no reasonable possibility of effective redress; (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable; (d) The State alleged to be responsible has waived the requirement that local remedies be exhausted."

[61] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[62] *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50, approving *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349.

passport.[63] In *Pirbai*[64] it is said that "there was a hint that there might be a justiciable issue in some cases between an individual and the FCO."[65]

In *Abbasi* the Court of Appeal referred to the doctrine of legitimate expectation as providing "well established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion… [and] the subject is entitled to have it properly taken into account in considering his individual case."[66] The Court rejected the submission that *diplomatic protection* should naturally follow if the conditions laid down in the Government's rules are met; instead, the legitimate expectation is not that *diplomatic protection* would be exercised but that the national's **request** for *diplomatic protection* will be considered and that all relevant factors relating to the request will be examined.

Accordingly, the present position in the UK appears to be that while there is no obligation on the Government to exercise *diplomatic protection* there remains scope for judicial review of any refusal to do so. The Government will not have breached its duty if it has properly considered whether to offer *diplomatic protection,* but once it has made such a consideration its reason for any refusal, if based on foreign policy considerations, will not be justiciable. The Court of Appeal recognised that it is vital that the Government examines the nature and extent of the injustice claimed so that a balance can be struck between the interest of the individual and foreign policy considerations:

> "Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted."[67]

Commenting on *Abbasi,* it has been said that the decision makes it difficult in future for the Government to argue that the principle of comity may be used to prevent a court from considering whether the fundamental human rights of a claimant are being infringed by another State, particularly where that breach is clear and flagrant; this will be the case whether or not compliance with that fundamental human right is a matter which the court is required to consider by domestic statute.[68] Also, it highlights the jurisdictional limitations of the European Convention on Human Rights, and the unsatisfactory distinction between the responsibility of States for expelling individuals to countries where they will suffer violation of their ECHR rights,[69] and States' responsibility to protect against violations of ECHR rights by other States which they could take action to prevent.

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[63] *R v Secretary of State ex parte Everett* [1994] 1 QB 811.

[64] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Pirbhai* 129 SJ 756.

[65] Colin Warbrick, *Diplomatic representations and diplomatic protection,* 51 Int'l & Comp. L.Q. 723-733 (2002), at p.732. The author says that subsequent attempts to persuade the courts to exercise this jurisdiction failed in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Butt* CA 1999 and *R v Secretary of State for Home Department ex parte Kamalposhany* 2001 where Sir Richard Tucker ruled that "there is no duty upon the Secretary of State to ensure that nations comply with their human rights obligations…There may be cases where the United Kingdom government has, for example, by diplomatic means, chosen to seek to persuade another State to take a certain course of action in its treatment of British nationals, but there is no *duty* to do so".

[66] Supra. n. 40, at pg. 27 of the judgment, para.106.

[67] Ibid, at para, 100.

[68] *Reviewing the Prerogative* Charlotte Kilroy EHRLR 2003 (2) 222-229.

[69] See *Soering,* supra., n. 45.

IV. SOME EXPERIENCES OF UK TORTURE SURVIVORS

UK nationals who have faced, suffered and survived torture abroad have frequently raised the following concerns, some of which are clearly matters relating to *diplomatic protection* as opposed to *consular protection*, or vice versa, while other views relate to both concepts.

A. Insufficient prior warnings of the risks

Some countries are notorious for torturing their own nationals and foreigners. While the FCO sensibly advises UK travelers 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 were it is undisputed that UK nationals have been tortured in the recent past.* This is in contrast to the detailed warnings which the FCO gives in many of its individual country reports on war zones, rebel groups, civil unrest, ordinary crime, HIV/AIDS risks and so on. To ignore the issue is regrettable.

B. Perception that consular officials who know about the situation do not do enough

This broad issue covers numerous aspects, including the following:

C. Belatedly visiting the detainee

Detainees have clear and fundamental rights under the Vienna Convention, on which the FCO's leaflets are based, to prompt consular access. It is not uncommon for a detaining State to breach these rights to some extent or another, even where torture is not at issue. When torture *is* an issue, it is to be expected that the offending State will also breach other international law norms such as its treaty obligations under the Vienna Convention.

Invariably, therefore, a detaining State which is torturing or planning to torture UK nationals will not inform the victim "without delay" or indeed at all of their right to have their consulate notified of their detention and their right to communicate with their consulate, or if the detaining State officials do it will be a cruel empty gesture devoid of any substance; *a fortiori,* such a detaining State will not then "without delay" at the detainee's request notify the consul and permit access. Thus, 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 UK authorities were 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 UK 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.

In one torture case where the consulate *did* know of the detention within 24 hours of its occurrence, it made its first visit four weeks later. In another case the first contact was forty-two days after arrest. It is not always possible for a torture survivor or anyone else to ascertain precisely when the consulate was first aware, officially or otherwise, of the detention; again, it can be difficult to know, once the consulate was (belatedly) aware of the detention, what caused

the further delay(s) in access actually being realised: did the detaining State continue to now actively block access in the face of UK authorities' demands for it, or was the fault with the consulate which was not vigorous enough, or did consular officials simply take their time, or was it a combination of all or some of these factors? Whatever in practice causes the belated first visit is of far less concern to somebody being tortured than is the *fact* that he/she is totally cut off from the consulate for days, weeks or even longer.

The fundamental point is that a torture victim is in the most vulnerable position imaginable. Furthermore, some States are notorious for torture, and in many cases by the time the consulate is aware of the detention (whether or not the detaining State has officially informed it) UK officials will or should strongly suspect that torture is a real possibility. It is therefore not surprising that UK torture survivors often accuse consular officials of failing to visit them as soon as they possibly can.

There are also reports of lack of consular consistency even within the same detaining State and at the same time, where more than one UK national has been detained; in addition, there appears to be variation in the practice from one consulate to another, raising the question as to whether there is a standard to which consular officials are expected to attain. Once a consulate knows (from whatever source) that a UK national is detained, is access sought immediately, or within 24 hours, or 36 hours, or 48 hours, or longer? If there is a standard, does it vary from State to State? What is the response procedure if the first attempted visit is blocked, or if this continues? Do any such procedures also vary from State to State? These are just some of the issues, which arise amongst UK torture survivors who blame consular officials for belatedness.

D. Failure to ensure access to a lawyer

This is linked to the point(s) above, and for some of the same reasons. 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 UK national has nobody to turn to but the consulate to try to get access to a lawyer. This issue is also to be seen in the context of the crucial importance of access to a lawyer during the (sometimes lengthy) period of *pre-trial detention* as well as when preparing for any trial *per se*, and/or during the trial itself.

Numerous different kinds of complaints have been raised in this regard. It is clear from the FCO leaflets and website that the minimum practice is to provide a list of English-speaking lawyers, but sometimes this does not appear to be carried out properly. In one case a detainee charged with an extremely serious offence was given a list of lawyers at the consular officials first, prompt visit, but they were all civil, not criminal lawyers. In another case the detainee received a list of English-speaking lawyers 11 months after arrest. Is there a standard policy as to *when* such a list should be provided? Other torture survivors have complained of the lists being out of date, or carrying incorrect information in respect of contact details, proficiency in English, or specialties and areas of expertise. It is emphasised here that these types of complaints go far beyond other problems relating to lawyers which UK nationals face, and which rightly or wrongly are sometimes laid at the door of the consulate. These would include the incompetence of the lawyer, or his/her failure or inability to have private, regular or effective consultations with the detainee, or the lawyer not being present at the very earliest opportunity, when had a simple

technical point been taken the detainee might have been released there and then. This latter example has been raised by one torture survivor, who remains convinced to this day that the consulate in the country concerned could easily and cheaply have avoided what turned out for him to be several years incarceration and periodic torture: all that was needed was for a lawyer to have attended on him shortly after his illegal arrest and while still at the police station, before he got sucked into the irreversible and corrupt judicial system. However, because no such arrangement exists, his subsequent gross sufferings, not to mention the consulate's far greater costs (in terms of time spent thereafter), was an inevitable consequence *which must have been foreseen in the State concerned whose 'way of doing things' was well understood.*

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. Many torture survivors with whom REDRESS has spoken believe that the UK Government ought at least to have an 'emergency lawyer' on standby if only for the most serious situations and for an initial consultation; thereafter, the client could be responsible for his/her own instructions and expenses. In any event, if for whatever reason or reasons the most that can be done is the provision of a list, then it always ought to be one correctly drawn, currently accurate and with lawyers known to be appropriate and competent, and it should be provided at the very earliest opportunity. Furthermore, the consulate should also then ensure that certain *practical* steps are possible, such as the detainee actually being able to contact someone on the list; for example, if access to a prison phone is denied, which is another complaint which has been recorded, there is little use in having a list of names.

E. Taking up complaints in an inappropriate way

Again, this is inextricably linked to what has already been said above, as well as other issues still to be referred to hereunder. 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. If a lawyer has become involved, then it almost goes without saying that the lawyer and the consulate should work in tandem to deal with whatever requires doing. In the nature of their expertise and professional mandate lawyers, for example, will usually tend to seek relief through the courts, perhaps by way of an urgent application restraining State officials from perpetrating torture, or by seeking a writ of *habeas corpus*. In some situations, therefore, this will be the most appropriate way to counter the abuse, and by agreement with the consulate there will be no need for the UK officials to take steps themselves. However, in another case the lawyer may be helpless: perhaps there is no rule of law in that State, or no real domestic remedy, or the lawyer (invariably a national of the detaining State) may be intimidated or may even be in collusion with the torturers or their masters. In such circumstances the onus can remain with the consulate, or return to it, necessitating firm, urgent and determined action. Most likely this action will be of a different qualitative nature to that a lawyer might take, unless the consulate is seeking relief through its own legal representatives, but instead could consist of direct interventions, say, with the prison or police authorities, or frequently at a consular or diplomatic level with other organs or officials of the detaining State.

These are general but basic concerns, and clearly actions depend on the facts of each case as well as the *realpolitik* in the detaining State. That said, some torture survivors have averred that UK 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.

F. Irregular visits when asked to come more frequently

Because of the extreme vulnerability of those who have been tortured it is not surprising that they want and expect the absolute maximum protection and support which consulates can possibly provide. However, some survivors have complained of a failure on the part of consular officials to visit them regularly and/or as often as they (the victims) have wished. Again, the facts of each case will differ, as well the conditions and regulations in each State, and there would appear to be little use in trying to lay down rules as to how frequent visits ought to be, although there is perhaps a need for setting a bare minimum frequency and duration. Nevertheless, one torture survivor complained of being continuously "fobbed off" when he requested more visits, not because the consular officials were being hampered by the detaining State's officials, but because the consulate was understaffed. Whether or not this was the real reason is less important than the fact that it reflected a serious lack of priorities in that place at that time. More staff ought to have been made available when it was clear that torture was involved. If indeed it was merely an excuse then it is also disgraceful.

G. Failure to address special needs

An aspect running like a thread through the experiences of people tortured in different States at different times, where UK nationals have been arrested for varying reasons and held in a variety of conditions, is that consular officials tend to approach them with little understanding of how and why such detainees' special needs are not the same as 'ordinary' UK nationals arrested abroad. In other words, because the norm is that most UK 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. This is not to say that ordinary UK nationals (including non-tortured detainees) don't require a proper consular service too – of course they do and no doubt they get one - but the special needs of torture victims require special attention.

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, including those of non-tortured UK nationals in prison, 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 though 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.

What has also been mentioned is the failure of consular officials to attend on victims who have been hospitalized in detention as a direct result of the torture, or whose previous medical ailments have been exacerbated as a result of the torture, necessitating hospitalization. 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.

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

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 such as the UK.

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.

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. It is to be remembered that in most situations English will not be the first language of the interrogators present, who will also insist that an interpreter be there to relay to them everything said or written, and sometimes the interpreter may misconstrue matters.

In such circumstances the only way to achieve a free meeting or even a chance of such is if the consular official vigorously takes every possible step to have one. The points which have been made above, in regard to taking up and following through with complaints, are of course all relevant here: it is a fundamental right under the Vienna Convention. Again, a lawyer will know or ought to know how to deal with this problem as far as that lawyer's own position is concerned, and should be working together with the consulate, and vice versa. Some torture survivors have

noted bitterly how consular officials appeared to accept the dictates of the torturers and their colleagues in these matters of monitored consultations.

I. Failure to obtain an independent medical examination

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.

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.

Another complaint was that consular officials made no effort to be present during medical check-ups conducted by State doctors in prison, or to insist on seeing the results or talking to the doctors concerned. While it is true that in such cases there could be some procedural hurdles, including having the authority of the UK national to do so, as they arise when the consular official and the lawyer liaise with each other; the fact is that torture survivors have complained of the failure of consular officials to take these kinds of steps even when asked to do so, or when it was reasonable to believe or even obvious that it was in the best interests of the person to try.

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

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 UK 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.

One such torture survivor said that the lack of knowledge on the part of consular officials as to how to deal with the local State authorities led, in turn, to the detainee being kept ignorant of

what was being done (or not being done), giving rise to the perception that the consular officials were trying to 'cover-up' their incompetence, or at the very least failing to admit and communicate their lack of success. In another case the detainee said it was stupid to use a female consular official to try to resolve issues in a patriarchal country where women have few rights and little respect: her subsequent failure to achieve any tangible results was then kept from the detainee who felt it was obvious why nothing had been achieved.

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.

K. Only responding and visiting regularly when 'threatened' by the detainee

So desperate do some torture survivors become while in detention, and so disillusioned with the lack of effectiveness of consular services, that they resort to threatening to 'expose' the consular officials and to 'name names.' One such torture victim said that it was only when he threatened to talk to the media that he received any substantial support from the consulate, including more frequent and more regular visits. While it was impossible for him to communicate directly with the press, he had told consulate officials that his family in England was on standby to tell the newspapers how 'incompetent' and 'disinterested' the officials were, unless they dealt properly with his concerns. Thereafter, things did approve, which appeared to demonstrate that it was not lack of resources but lack of interest which had led to his neglect.

L. Reluctance on the part of the UK Government to espouse claims for redress through inter-State *diplomatic protection*

There appears to be little will and demonstrable commitment to take up the claims of torture survivors, even when they fall squarely within the Government's policy rules, and even where domestic remedies have been exhausted or are impractical or irrelevant. Torture survivors regard themselves as facing a triple Catch-22: if they sue the foreign State in tort in UK courts the defence of State Immunity is raised, which defence the UK Government supports in civil proceedings even when the tort is based on the breach of the *jus cogens* norm prohibiting torture; if instead of seeking UK judicial relief they ask the UK Government to espouse their claim, they are often met by obfuscation and delay, running at times into decades; if they sue the UK Government to challenge the non-espousal, they face the almost insurmountable problem of the Government's traditional discretion in matters of *diplomatic protection* and the "forbidden area" of foreign policy into which the courts will not tread.

V. RECOMMENDATIONS

Where does this leave *consular* and *diplomatic protection* in relation to UK torture survivors? REDRESS believes that what is required is for the Government to consider seriously the numerous issues which this report has raised concerning UK nationals facing, enduring or

having survived torture abroad. In this context and for a start there is need for a frank exchange of views to bring to the fore the problems of the past, as well as on-going ones, where UK torture survivors have felt let down by the Government. This should be the beginning of a wider process involving, amongst others, the torture survivors themselves, parliamentarians, the media and civil society. It is suggested that some of the questions which need to be addressed include the following:

1) Does the current UK view of the principles governing *diplomatic protection* fully accord with international developments as expressed in the ILC draft articles, particularly in regard to the protection of fundamental human rights? The UK played a significant role in the ILC debates, and like other States has until January 2006 to respond to the draft articles. It is important that there be close scrutiny and public debate on the issues involved, particularly from a human rights perspective, in order for the final position of the Government to be abreast of these developments and for them to reflected in UK practice.

2) Is it necessary to re-visit the 1985 FCO rules to bring them more into line with the ILC proposals, and to clarify more precisely their application in matters concerning allegations of torture? The past twenty years have seen some very significant changes in international law, especially in the field of human rights, including aspects directly concerned with the campaign against torture and the right to reparation. It is arguable that the time is indeed ripe for the FCO rules to be revised and clarified.

3) Should the Government's policy for the protection from torture of UK nationals abroad be more clearly and forcefully stated and publicised than it has been, and in the light of advancements in the field of international human rights law for the implementation of effective remedies? The policy statements which have been made from time to time need to be carefully examined in the light of other developments, including judicial decisions here and abroad, to determine whether they accurately cover all the major areas involved. Furthermore, it would be reasonable for some of the key issues and concerns to be more fully aired in the public arena.

4) Should there be a more clearly stated and consistent policy relating to *consular protection* in view of international developments, including and especially recent rulings of the International Court of Justice (ICJ)? The clear emphasis which the ICJ has laid on the fundamental rights embedded in the Vienna Convention, which includes both rights of State Parties and rights of individuals, calls for a careful re-examination of the principles behind the way the UK implements *consular protection.* Along with such a re-examination of principles should come greater detail of how the policy works in practice.

5) Should special training for FCO staff (in postings and centrally) be implemented dealing with the unique problems relating to torture which have been extensively developed in the last twenty years, so as to render the use of varies protective mechanisms more effective? There is evidence that UK nationals who have suffered torture have not always received optimum assistance from the Government, either in the form of *diplomatic protection* or *consular protection,* or both. The issues involved are not always simple or straightforward, especially given the special needs of the individual survivors involved and the wider contexts in which such protection operates. More training should lead to greater effectiveness.

6) Is there room for any statutory reform to assist torture survivors in their quest for reparations? REDRESS' draft Redress for Torture Bill, already in the public domain, has been

previously seen as one path towards statutory reform. Some important recent English judgments have increased the prospects for effective reparation in UK courts, and in doing so have interpreted UK legislation in new ways. Yet, the UK Government has forcefully intervened in such cases to counter survivors' access to justice in the United Kingdom. It would seem appropriate to now look closely at these developments to see how the law can be improved to assist torture survivors within the Government's stated policy of bringing human rights home.

7) In the field of foreign policy, are their clear ways of protecting UK nationals from torture in the context of the county's wider national interests and concerns? Some UK torture survivors and other persons and organisations believe that there have been and still are inconsistencies in the way the Government implements its human rights policies, including the vigour or lack of it with which some particular States are challenged when they breach the basic human rights of individual UK nationals. This problem needs to be addressed, and solutions considered, if contradictions or the perceptions arising are to be resolved.

8) Is there a recognized need for an over-arching ('joined-up') UK policy at all relevant levels to strengthen the UK's role in the international campaign for the protection from and abolition of torture, the rendering of reparations to torture survivors, and the punishment of perpetrators, which policy includes past, present and future UK nationals involved? Given the wide variety of issues concerned, both at the domestic and international level, a clear and detailed policy which properly embraces all aspects of the problem of torture would seem to be overdue. While a lot has already been done and in important ways the UK has been near the forefront of admirable developments, there are a number of specific problems facing UK nationals which remain, and which this report has discussed. There are further challenges which this report does not cover, such as providing returning survivors with uniform access to social benefits, rehabilitation and other longer term care in the United Kingdom, which would also need to be addressed. What is needed, therefore, are not piecemeal solutions but a clearer and more definite and detailed approach which incorporates ways of dealing with these remaining and additional issues.

9) Is there a serious commitment on the part of the UK Government to use all lawful means to prevent UK nationals being tortured abroad, and to assist UK survivors obtaining reparations? That some UK torture survivors have themselves raised this question indicates that it must be carefully examined. Stated policies are only as good as they operate in practice, and there is also a need for the policies to be clarified and improved and then, of course, implemented.

ANNEX 1: RULES APPLYING TO INTERNATIONAL CLAIMS

The following are the most important general rules which apply when a United Kingdom national complains of injuries suffered at the hands of another State and appeals to HMG to take up his claim under international law. It may sometimes be permissible and appropriate to make informal representations even where the strict application of the following rules would bar the presentation of a formal claim.

Rules regarding nationality

Rule I
HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury.

Comment *International law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of injury and of presentation of the claim (see "Nationality of Claims: British Practice" by I.M. Sinclair: (1950) xxvii B.Y.B.I.L. 125-144).*

The term "United Kingdom national" includes:
individuals who fall into one of the following categories under the British Nationality Act 1981 (or one of the corresponding categories under earlier legislation):
British citizens
British Dependent Territories citizens
British Overseas citizens
British subjects under Part IV of the Act
British Protected Person
companies incorporated under the law of the United Kingdom or any territory for which the United Kingdom is internationally responsible.

Rule II
Where the claimant has become or ceases to be a UK national after the date of the injury, HMG may in an appropriate case take up his claim in concert with the government of the country of his former or subsequent nationality.

Rule III
Where the claimant is a dual national HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other government entitled to do so). HMG will not normally take up his claim as a UK national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a UK national.

[Rule IV, Rule V and Rule VI]
[These relate to legal persons]

Rule VII
HMG will not normally take over and formally espouse a claim of a UK national against another State until all the legal remedies, if any, available to him in the State concerned have been exhausted.

Comment *Failure to exhaust any local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal tribunal would have had no effect. Nor is a claimant against another State required to exhaust justice in that State if there is no justice to exhaust.*

Rule VIII
If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice.

Rule IX
HMG will not take up a claim if there has been undue delay in its presentation to them unless the delay results from causes outside the control of the claimant, but no time limits are fixed and they are subject to equitable rather than legal definition.

Rule regarding remedies under a treaty

Rule X

Where an express provision in any treaty is inconsistent with one or more of Rules I to IX, the terms of the treaty will, to the extent of the inconsistency, prevail. In case of ambiguity, the terms of any treaty or international agreement will be interpreted according to these rules and other rules of international law.

Rule regarding devolution of claims

Rule XI

Where the claimant has died since the date of the injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependent of a deceased person for damages for his death.

Comment *Where the personal representatives are of a different nationality from that of the original claimant the rules set out above would probably be applied as if it were a single claimant who had changed his national status.*