

# REDRESS

*Ending Torture. Seeking Justice for Survivors*

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## **FOREIGN AFFAIRS COMMITTEE: INQUIRY INTO FCO CONSULAR SERVICES**

**SUBMISSIONS OF THE REDRESS TRUST (REDRESS): 24 JANUARY 2014**

### **SUMMARY OF SUBMISSIONS**

- The number of reports of torture/mistreatment of British nationals abroad is increasing, as is the number of British nationals in prisons abroad, underlining the need for the concerted and effective exercise of consular assistance in support of such persons;
- Torture/mistreatment occurs not only in detention or in the context of formal police interrogations but can take place anywhere in a foreign State, and such persons too need proper consular assistance;
- Consular assistance for British nationals in torture cases needs to be understood and approached holistically. International law, EU law and UK law may be applicable; a variety of intersecting policy issues will be engaged; and in addition, practical and procedural issues about how best assistance can be afforded to maximum effect in the particular circumstances of any given case are central;
- Recently revised and improved Guidelines for consular officials dealing with torture/mistreatment of British nationals are a welcome step forward, but they must be properly and consistently implemented in practice in an accountable manner;
- Although consular assistance and diplomatic protection are separate processes they are inextricably linked in torture cases where the British survivor seeks reparation;
- The present Government's reluctance to hold an independent inquiry into torture complicity allegations is inconsistent with its declared anti-torture strategy, and potentially undermines the provision of consular assistance to UK nationals abroad facing or suffering torture/mistreatment.

### **INTRODUCTION**

1. The Redress Trust (REDRESS) is an international human rights NGO which seeks justice and reparation for torture survivors. REDRESS has long had an interest in consular assistance and diplomatic protection for British nationals facing or suffering torture or other

mistreatment abroad.<sup>1</sup> This aspect of consular services – consular assistance - is the focus of our submission; our mandate does not extend to other aspects of consular services.

2. In early 2013 REDRESS was invited to make recommendations to the Consular Services Directorate which was engaged in revising its internal guidelines to consular officials on torture and mistreatment (the revised Guidelines), which we did in March 2013. We have had subsequent discussions with the Directorate on this work, and have seen the revised Guidelines; however, as they are not a public document we only make some general reference to them hereafter and will not consider them in detail. REDRESS also helped organise and participated in a roundtable discussion under the auspices of the All Party Parliamentary Human Rights Group on 9 July 2013, to examine ways of improving consular assistance for British torture victims and those at risk of torture; this event was attended by MPs and Peers, FCO officials, other NGOs and UK nationals (and family representatives) who had suffered torture/mistreatment abroad, including a REDRESS client.<sup>2</sup>
3. REDRESS' submission focuses on one of the areas the Committee has raised, namely "the FCO's consular support for UK nationals in situations of particular difficulty or distress abroad, and their families, such as UK nationals in foreign criminal justice systems..."<sup>3</sup> Consular assistance for UK nationals in danger of torture/mistreatment abroad, or who are actually suffering such torture/mistreatment, is an aspect of consular services which requires special attention; the FCO has recognised this for several years and its revised Guidelines are but the latest effort it is making in these regards, which we welcome.<sup>4</sup>
4. It should be noted that the need for consular assistance does not only arise when British nationals are in custody abroad, that is, when embroiled in "foreign criminal justice systems", but can also arise for those tortured/mistreated *outside* of custody, detention or prison. This is now recognised in the revised Guidelines, and is an important improvement.<sup>5</sup>
5. The number of allegations of ill-treatment of British nationals overseas appears to be increasing rather sharply, with over 100 new reports in 2012 (the latest year available).<sup>6</sup> This compares, according to figures obtained under the Freedom of Information Act, with an average of about 50 cases per year for the period 2005-2010, in 67 different states altogether.<sup>7</sup> The increasing number of reported incidents could be a function of improved

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<sup>1</sup> REDRESS was formed in 1992 by a British torture survivor who was himself in need of help from HMG. For our work generally see our website [www.redress.org](http://www.redress.org). Our most recent substantive publication on the issue of consular assistance and diplomatic protection is *Tortured Abroad: The UK's obligations to British Nationals and Residents*, September 2012, available at [http://www.redress.org/downloads/publications/121001tortured\\_abroad.pdf](http://www.redress.org/downloads/publications/121001tortured_abroad.pdf). See also an earlier discussion paper prepared for the FCO: REDRESS, *The Protection of British Nationals Detained Abroad: A discussion paper concerning consular and diplomatic protection*, February 2005, available at <http://www.redress.org/downloads/publications/DiplomaticProtectionFeb2005.pdf>.

<sup>2</sup> We have made several submissions to the Foreign Affairs Committee in recent years, the most recent being *Submission to the Foreign Affairs Committee for its Annual Inquiry into the Foreign and Commonwealth Office's Human Rights work in 2012*, 24 May 2013, available at <http://www.redress.org/downloads/publications/130626%20FAC.pdf>.

<sup>3</sup> In this context of assistance for torture victims/potential torture victims abroad we will also briefly comment on how this assistance compares with other EU countries and what British nationals can legitimately expect from UK consular services and whether current consular service provision meets these expectations. It should be noted that the need for consular assistance arises in other circumstances too - for example, for victims of ordinary crime – though we do not focus on this in our submission.

<sup>4</sup> We use the term "consular assistance" rather than "consular support", as the former term is used by HMG.

<sup>5</sup> It was one of REDRESS' recommendations which the Consular Directorate has recently accepted, and arose directly from the case of a REDRESS client, a British woman, raped by an army officer at a military checkpoint abroad in 2012. At the time, consular officials from whom she sought assistance did not respond as they ought to have: as the rape had been committed by a state agent it clearly fell within the meaning of torture as developed in international jurisprudence. The consular officials treated it as an 'ordinary' rape and therefore purported to follow other guidelines, although even these were not properly adhered to. The revised torture Guidelines should ensure that this type of incident is not repeated.

<sup>6</sup> See Foreign and Commonwealth Office, *"Human Rights and Democracy: The 2012 Foreign and Commonwealth Office Report"*, 15 April 2013, p.100, available at: <http://www.hrdreport.fco.gov.uk/wp-content/uploads/2011/01/2012-Human-Rights-and-Democracy.pdf>.

<sup>7</sup> REDRESS, *Tortured Abroad*, above n.1, pp. 47-48, Annex C. The Annual Report for 2011 did not give the number of new cases which had arisen that year.

recording keeping and/or increased attention being paid to the issue. Nonetheless, the scale of the problem is of continued concern.

6. The number of British nationals known to be detained overseas has also increased from 2,572 in 2011<sup>8</sup> to over 2,600 in 2012,<sup>9</sup> as has the number of States in which they are held from 87 to 95. To combat torture abroad, HMG has developed a commendable foreign policy document, the *FCO's Strategy for the Prevention of Torture 2011-15*,<sup>10</sup> and yet its approach to protecting and assisting its own nationals and residents ill-treated abroad remains somewhat opaque, despite the improvements contained in the revised Guidelines.
7. Consular assistance in torture cases comprises law, policy and practice. We submit that the Committee should evaluate the degree to which the FCO is meeting the challenge of helping British nationals facing serious violations at the hands of foreign states holistically, within the inter-locking context of these three areas.

## LAW

### International law

8. The right of a state to intervene in matters concerning its nationals abroad has been codified in the 1963 Vienna Convention on Consular Relations (the Vienna Convention),<sup>11</sup> to which the UK is a party.<sup>12</sup> Various articles of this Convention describe consular functions relevant to imprisoned or detained nationals abroad.<sup>13</sup> While the Vienna Convention refers to “protecting” the interests of its nationals as well as helping and assisting them, HMG eschews the use of “protection” and insists on “consular assistance.”<sup>14</sup>
9. The Vienna Convention sets out the rights of consuls<sup>15</sup> to communicate with and assist detained foreign nationals. It also sets out the rights of detained or imprisoned nationals

<sup>8</sup> Foreign & Commonwealth Office, *Human Rights and Democracy: The 2011 Foreign & Commonwealth Office Report*, April 2012, p. 120, available at: <http://centralcontent.fco.gov.uk/pdf/pdf1/hrd-report-2011>. During 2011-2012, 6,015 arrests were handled in 181 countries – see Guardian 28 June 2012 ‘Britons arrested abroad mapped’, available at: <http://www.guardian.co.uk/news/datablog/interactive/2012/jun/28/britons-arrested-abroad-2012>.

<sup>9</sup> Above, n.6, p.100.

<sup>10</sup> FCO, *Strategy for the Prevention of Torture 2011-15*, 27 October 2011, available at:

<http://www.fco.gov.uk/resources/en/pdf/fcostrategy-tortureprevention>. The Committee will recall it looked closely at the Strategy in its 2012 inquiry into the FCO's 2011 *Human Rights and Democracy Report* – see REDRESS, *Submission to the Foreign Affairs Committee's Annual Inquiry into the FCO's Human Rights Work in 2011*, 25 May 2012, available at: <http://www.redress.org/downloads/publications/121017FACsubmission.pdf>.

<sup>11</sup> U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf).

<sup>12</sup> Britain signed the VCCR on 27 March 1964 and ratified it on 9 May 1974. There are presently 173 state parties.

<sup>13</sup> Amongst the consular functions described in the Vienna Convention, particular importance is given to consular assistance. Relevant provisions include Article 5(a): protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; Article 5(e): helping and assisting nationals, both individuals and bodies corporate, of the sending State. Article 5(i) sets out a further consular function as follows: “Subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests.” (Emphasis added)

<sup>14</sup> United Kingdom Government (2007) ‘UK response to the Commissions Green Paper on Diplomatic and consular protection of Union citizens in third countries’, available at

<http://www.careproject.eu/database/upload/UKresponseGP/UKresponseGPText.pdf>. HMG also made this clear in its response to more recent EU initiatives to harmonise consular and diplomatic action in relation to EU nationals abroad who require help – see CARE Project, *Consular and Diplomatic Protection Legal framework in the EU Member States*, December 2010, available at <http://www.itiq.cnr.it/Ricerca/ConsularAndDiplomaticProtection.pdf>. Thus at p. 521 it is stated that from interviews the FCO position is that “from the perspective of the United Kingdom ...[c]onsular assistance is wrongfully referred to as ‘consular protection’”; at p. 522 the FCO is quoted as saying “it is essential that unnecessary phrase such as ‘consular protection’...should be avoided.”

<sup>15</sup> These specifically include: the right of the consular officer to be informed without delay of any arrest, detention or pending trial; the right of consular officers to communicate with the individuals, to have access to them through visits, conversations, correspondence and arrangement of their legal representation (unless the individual opposes such action); the right of the detained person to be informed about his or her consular rights under the Vienna Convention without delay; the right of the

themselves. A failure to properly comply with rights of either the State in a position to afford consular assistance or the individual concerned amounts to a breach of consular rights under the Vienna Convention, giving rise to a duty on the offending State to remedy such a breach as a matter of international law.<sup>16</sup>

10. A number of cases have been brought before international courts or tribunals for violations of consular rights involving consular assistance, when diplomatic or domestic legal remedies have proven ineffectual.<sup>17</sup> International litigation of consular rights has also established that the Vienna Convention confers rights on individual nationals as well as on states.<sup>18</sup>
11. The ICJ in the *Avena Case* elaborated on the inter-relationship between the rights of the individual and the sending state:

[V]iolations of the rights of the individual under article 36 [of the Vienna Convention] 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. In these special circumstances of the interdependence of the rights of the State and individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of the individual rights conferred on Mexican nationals under article 36, paragraph 1(b)...<sup>19</sup>

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detained individual to communicate with and access consular officers, and for communications addressed to the consular officer to be forwarded without delay - Vienna Convention, Article 36 (1). Dual (or multiple) nationalities can raise challenges, especially when individuals are detained in a country of which they are also a national. Where a person holds dual nationalities but *not* also that of the state in which the national is detained, local authorities in that state are required to comply with all aspects of article 36, including promptly contacting the consulate(s) at the detainee's request. Some states take the position that dual nationals arrested in one of their states of nationality are not entitled to notification of consular rights upon arrest; other states do not recognise dual or multiple nationalities at all.

<sup>16</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission 2001, Vol. II (Part Two) 31, annexed to UN Doc. A/RES/56/83 of 12 December 2001, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). See, Chapter I, GENERAL PRINCIPLES, *Article 1. Responsibility of a State for its internationally wrongful acts*: "Every internationally wrongful act of a State entails the international responsibility of that State".

<sup>17</sup> For instance, when two Mexican citizens on death row and subsequently executed in the United States of America, were not notified of their rights to consular assistance, Mexico sought an advisory ruling from the Inter-American Court on Human Rights (IACHR) on the nature of the 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 Inter-American Court of Human Rights, Advisory Opinion OC -16/99 of October 1, 1999, requested by Mexico, '*The right to information on consular assistance in the framework of the guarantees of the due process of law*', available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_16\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf). The Court also ruled that the term "without delay" in article 36 requires notification of consular rights from the moment of detention, and before any interrogation takes place. See too *Case Concerning U.S. Diplomatic and Consular Staff in Teheran* (USA v Iran), 1980 ICJ Rep.3 (Judgment of 24 May 1980), available at <http://www.icj-cij.org/doCKET/files/64/6291.pdf>. In its earlier order relating to provisional measures in the same case, the ICJ observed that the Vienna Convention laid down certain standards to be observed by all state parties "ensuring protection and assistance for aliens resident in the territories of other States" – Order of 15 December 1979, ICJ (1979) para. 40, available at <http://www.icj-cij.org/doCKET/files/64/6283.pdf>.

<sup>18</sup> *LaGrand Case* (Germany v USA.) ICJ (2001) (Judgment of 27 June 2001), available at <http://www.icj-cij.org/doCKET/files/104/7736.pdf>. At para. 77 the Court held: "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." If a foreign national has been subject to lengthy detention or a severe sentence without notification of consular rights, then the receiving state must provide a forum for the review and reconsideration of the case, and an offending state cannot legitimately use its domestic legal procedures to justify its failure to give full effect to these rights. In addition, apologies by the receiving state are not an adequate response to grave violations of consular rights. In *LaGrand*, despite the ICJ's ruling, the two Germans were executed. There have also been several recent cases before the Inter American Commission on Human Rights dealing with the USA's "failure to respect its obligation under Article 36.1 of the Vienna Convention on Consular Relation"-see Organisation of American States, *IACHR Concludes that the United States Violated Tamayo's Fundamental Rights and Requests that his Execution be Suspended*, 17 January 2014, available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/002.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/002.asp).

<sup>19</sup> *Avena Case* (Mexico v USA.) ICJ (2004) (Judgment of 31 March 2004), para. 40, available at <http://www.icj-cij.org/doCKET/files/128/8188.pdf>. Some of the Mexicans were possibly dual U.S. nationals. Mexico accepted for the purposes of the case the principle, invoked by the USA in arguing that the Mexican claim was therefore inadmissible, that when a person arrested or detained in the receiving state is a national of that state, then even if he is also a national of another state party to the Vienna Convention, article 36 has no application. However, on the same basis as in the extract just quoted in the main text above, the Court recalled that in addition to seeking to exercise diplomatic protection of its nationals, Mexico was making a claim "in its own right on the basis of the alleged breaches by the USA of article 36 of the [Vienna Convention and] seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits." Subsequently, the Court found that on the merits the USA had not met its burden of proof in its attempt to show that persons of Mexican nationality were also USA nationals.

## UK law

12. The Vienna Convention was partially incorporated into UK law by the Consular Relations Act 1968.<sup>20</sup> The Act did not create any consular rights for UK nationals - it merely brought the Vienna Convention into force under UK law thereby enabling it to be used as the basis for international consular relations. The Act does not incorporate every article of the Vienna Convention into UK law.<sup>21</sup>
13. The FCO regards consular assistance as “the provision of assistance by consular officials or diplomatic authorities to nationals in difficulty overseas”.<sup>22</sup> It emphasises that consular assistance (or diplomatic protection) is not a legal right:
- 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).<sup>23</sup>
14. HMG therefore maintains that consular assistance is a matter of policy and is exercised on the basis of administrative discretion.<sup>24</sup> There has been some litigation touching on consular assistance although the cases dealt more with diplomatic protection, a related but separate topic.<sup>25</sup> UK courts have held that there is no legal right to consular protection as such, although British nationals do have a legitimate expectation that HMG will *consider* requests for consular assistance/diplomatic protection, and in this sense any failure to adequately consider such requests may be justiciable.<sup>26</sup>

## EU developments

15. In accordance with the 1993 Treaty on the Functioning of the European Union (TFEU), British citizens have a right to protection from any EU Member State on the same conditions as the nationals of that State, should their own State not be represented in the relevant third country.<sup>27</sup> Article 23 of the Treaty on the TFEU states:<sup>28</sup>

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<sup>20</sup> Chapter 18, available at <http://www.legislation.gov.uk/ukpga/1968/18/contents>. Under the UK’s dualistic system it is necessary for an Act of Parliament to be passed to give effect to an international treaty. The Consular Relations Act’s purpose is also “to enable effect to be given to other agreements concerning consular relations and to make further provision with respect to consular relations between the United Kingdom and other countries...”

<sup>21</sup> Schedule 1 to the Act lists those provisions of the VCCR having the force of law in the UK, including article 5 but not article 36.

<sup>22</sup> UK response to the European Commission’s Green Paper on *Diplomatic and consular protection of Union citizens in third countries*, March 2007, para. 1.5, available at <http://www.careproject.eu/database/upload/UKresponseGP/UKresponseGPTText.pdf>. The Government distinguishes between “consular assistance” and “consular services” and it is only the former which is relevant to this submission, as consular services covers matters such as passport issuance, notarial services and visa applications.

<sup>23</sup> *Ibid.*, para. 1.7.

<sup>24</sup> *Ibid.*

<sup>25</sup> HMG emphasises the distinction between consular assistance and diplomatic protection as follows: “[D]iplomatic protection [...] is formally a state-to-state process by which a state may bring a claim against another state in the name of a national who has suffered an internationally wrongful act at the hands of that other state. Conversely, consular assistance is the provision of support and assistance by a state to its nationals... who are in distress overseas” – *Ibid.*, para 1.5. For an examination of the two leading cases see REDRESS, *Tortured Abroad: The UK’s obligations to British Nationals and Residents*, September 2012, pp.29-33, available at [http://www.redress.org/downloads/publications/121001tortured\\_abroad.pdf](http://www.redress.org/downloads/publications/121001tortured_abroad.pdf).

<sup>26</sup> *Abbasi and Another v Secretary of State for Foreign Affairs and Another* [2002] EWCA Civ.1598, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html>. See also *Al Rawi and Others v Secretary of State for Foreign Affairs and Another* [2006] EWHC 458 (Admin) available at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1279.html>.

<sup>27</sup> Annemarieke Vermeer-Künzli, ‘Where the law becomes irrelevant: Consular assistance and the European Union’ (2011) 60 ICLQ 965. The author refers to the 1993 Treaty of Maastricht (subsequently known as the Treaty on European Union (TEU)) which created European citizenship.

<sup>28</sup> *Consolidated Version of the Treaty on the Functioning of the European Union*, Article 23 (ex Article 20 TEC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>. Vermeer-Künzli points out that “A similar entitlement is enshrined in article 46 of the EU Charter, which reads: ‘Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.’ Although the wording of the provision and its position in the TFEU already supports this, the inclusion in the Charter makes irrefutably clear that this entitlement is part of the rights of EU citizens, as part of EU citizenship” – *op. cit.*, ICLQ, p. 966.

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, *on the same conditions as the nationals of that State...*[Emphasis added]

16. In 2006 the European Commission published a Green Paper setting out a range of “ideas to be considered for strengthening the right to Community diplomatic and consular protection.”<sup>29</sup> It proposed courses of action to inform citizens more fully of their rights, examine the scope of the protection that they should be offered as well as the structures, resources and the links to be developed with third-country authorities.<sup>30</sup> REDRESS submitted comments on the Green Paper in 2007,<sup>31</sup> including concerns voiced by UK nationals tortured abroad over the years, expressing failures by UK consular officials to properly assist them.<sup>32</sup>
17. In response to the Commission’s interest in improving help for EU citizens abroad, the group Citizens Consular Assistance Regulation in Europe (CARE) undertook a detailed comparative study of the legal and regulatory frameworks of the 27 EU Member States regarding diplomatic and consular protection of EU nationals in third countries.<sup>33</sup> The resulting 700-page comparative study sets out the practice of all EU Member States. As highlighted in CARE’s analysis of the UK position, HMG considers the TFEU as “problematic”<sup>34</sup> and that the word “entitled” in article 23 does not create a right to consular assistance but only a right to non-discrimination. CARE found that most EU Member States, and in particular the UK and Ireland, regarded article 23 TFEU “as a simple clause of non-discrimination which may be developed and upgraded to a ‘right’ in the future”.<sup>35</sup>
18. Subsequent developments appear to indicate that any new EU directives will not seek to shift the UK (and other States) from the aforesaid non-discrimination position towards a right to consular assistance. Thus the European Parliament (EP) recommended that “Member States’ diplomatic and consular authorities shall closely cooperate and coordinate among each other and with the Union to ensure protection of unrepresented citizens *under the same conditions as for nationals.*” [Emphasis added].<sup>36</sup>
19. However, REDRESS believes best practice is exemplified by States such as Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania which have “a constitutional provision that is widely accepted as providing a fundamental right to consular

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<sup>29</sup> *Diplomatic and consular protection of Union citizens in third countries*, Brussels, 28.11.2006 COM (2006)712 final, p. 12 available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0712en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0712en01.pdf).

<sup>30</sup> *Ibid.*, p. 4. The Green Paper was followed by an “Action Plan” in 2007, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0767:en:NOT>.

<sup>31</sup> REDRESS, *Comments on the Green Paper: Diplomatic and consular protection of Union citizens in third countries*, COM (2006)712 final, 30 April 2007, available at [http://www.redress.org/downloads/publications/Comments\\_Green%20Paper\\_Consular\\_DipProtection.pdf](http://www.redress.org/downloads/publications/Comments_Green%20Paper_Consular_DipProtection.pdf).

<sup>32</sup> *Ibid.*, pp. 4-7. These concerns were set out under the following headings: insufficient prior warning of the risks; belatedly visiting the detainee; failure to ensure access to a lawyer; taking up complaints in an inappropriate way; failure to address special needs; failure to insist on the detainee being granted private consultations with consular officials and/or lawyers; failure to obtain an independent medical examination; failure to provide proper information as to what was being done to alleviate complaints.

<sup>33</sup> CARE Project, *Consular and Diplomatic Protection Legal framework in the EU Member States*, December 2010, p. 7, available at <http://www.ittig.cnr.it/Ricerca/ConsularAndDiplomaticProtection.pdf>.

<sup>34</sup> The CARE Project provides the most recent and comprehensive summary of the Government’s approach to consular assistance and diplomatic protection. The UK section is the longest of the 27 national reports, indicating both the seriousness with which the UK regards these matters as well as its wish to make its position clear. CARE Project, *op. cit.*, p.42, 521-556.

<sup>35</sup> *Ibid.*, p. 675.

<sup>36</sup> European Parliament, Report, 10 October 2012, *on the proposal for a Council directive on consular protection for citizens of the Union abroad* (COM(2011)0881 – C7-0017/2012 – 2011/0432(CNS)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0288+0+DOC+XML+V0//EN>. The recommendation is in the Draft Parliamentary Legislative Resolution for a Council directive, under Amendment 32, at this link. Although “consular protection” is used and not “consular assistance” it should be noted that the latter is the preferred UK term, to avoid confusion with “diplomatic protection” i.e. espousal of claims. See also above n.14 in these regards.

protection.<sup>37</sup> Additionally, Denmark, Finland, Greece, Slovakia and Slovenia have legislation interpreted as having a right to consular protection.<sup>38</sup>

## UK POLICY ON CONSULAR ASSISTANCE

20. Unlike with diplomatic protection where HMG has published Rules dealing with the UK's policy on "international claims",<sup>39</sup> there are no rules on the application of UK policy on consular assistance. Nevertheless, it is worth noting that around the time that these "international claims" Rules were published<sup>40</sup> the Parliamentary Under-Secretary issued a lengthy statement in Parliament in 1987, setting out the then policy on consular assistance.<sup>41</sup> This policy has subsequently been considerably developed, particularly more recently, as set out immediately below.
21. There are several information leaflets and other documents available online providing information to the British public as to what they might expect by way of support from HMG. These public domain materials include:
- *Support for British nationals abroad: A guide* (the Guide). First published in 2006, it covers the full range of areas in which consular assistance can operate purportedly as the first "single document" of UK policy;<sup>42</sup> a revised Guide was published in 2011 and contained the following addition: "There is no right to consular assistance. All assistance provided is at the discretion of the Consular Directorate of the Foreign and Commonwealth Office", which wording remains in the current (2013) version of the Guide.<sup>43</sup> The key section in the Guide concerning mistreatment is headed "British nationals in detention or prison overseas".<sup>44</sup>
  - *In prison abroad* (2012)<sup>45</sup> contains much the same information as found in the Guide, with various additional aspects, including advice to "Insist that the British Consulate be notified. **It is your right**". [Emphasis in the original].<sup>46</sup>

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<sup>37</sup> CARE Project, n. 32, p. 608.

<sup>38</sup> *Ibid.* Ultimately, a ruling from the European Court of Justice on the interpretation of the entitlements under the TFEU may provide clarity on the UK's obligations.

<sup>39</sup> See the Rules at Annex B in *Tortured Abroad*, above n. 1.

<sup>40</sup> 1986.

<sup>41</sup> This read in part as follows: "[I]t is internationally accepted practice that officials or representatives of one State cannot intervene in the judicial proceedings of another sovereign State...we in the United Kingdom would not tolerate attempted foreign intervention in our judicial system. The role of consular officials is limited to visiting the detainee as soon as possible after arrest or detention, unless the offence is a minor one, to ensure that the British citizen's rights under local law are fully explained and that they know how to obtain legal representation, if desired. A consular official will try to ensure that a British national is charged and brought to trial without delay, that the trial is conducted within the recognized canons of justice, that their alien status is not detrimental either at a trial or during imprisonment and that they are subject to the same standards as apply to the nationals of the country in which they were arrested. It is our policy that, after an initial visit, further consular visits will be made in the light of local conditions and the detainee's circumstances. Or consular visits will also ensure that a detainee's next of kin is informed of the detention, but only if so requested by the detainee. They will also arrange the transfer of funds from friends or family in the United Kingdom for prison comforts, and raise any complaints with the proper authorities. The United Nations approved minimum rules for the treatment of prisoners in 1957. While the rules have no binding force, our consular officials as a matter of policy would bring them to the attention of the local authorities, if it was seen that the rules were not being observed in respect of a British detainee. There are limitations on what consular officials can do. They cannot get a national out of jail, provide a lawyer at Her Majesty's Government's expense, put up bail or carry out investigations into any alleged crime, nor can they offer legal advice" - H.C. Hansard, Vol.116, cols.498-499, 15 May 1987. The extract is taken from Colin Warbrick, "Protection of Nationals Abroad" 37 *International and Comparative Law Quarterly* (1988), 1002-1012, at p. 1005.

<sup>42</sup> Available at <http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/files/kfile/consularfullguide.2.pdf>. At p. 2, the then Foreign Secretary Jack Straw said: "[I]f you do get into difficulty [abroad], it is important to know how we can help you and how you can contact us. Details of this help have never been available in a single document before. In the Labour Party's manifesto for the general election in May 2005, we committed ourselves to drawing up a full statement of the support which the government provides and the help which we can offer to British nationals abroad in times of need."

<sup>43</sup> Available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/224126/FCOBritsAbroadA4\\_0713xx.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224126/FCOBritsAbroadA4_0713xx.pdf).

The note is on p.2.

<sup>44</sup> *Ibid.*, pp.17-18.

<sup>45</sup> Available at <http://www.fco.gov.uk/resources/en/pdf/2855621/in-prison-abroad>. There were earlier versions.

<sup>46</sup> *Ibid.*, p. 1.

- *Torture and mistreatment reporting guidance* (March 2011)<sup>47</sup> provides guidance to consular and non-consular staff in foreign missions confronted with allegations of torture or mistreatment inflicted upon any British national (including dual nationals), or “others who may be eligible for or to whom we have extended consular assistance.”
- *Consular Strategy 2013-2016: Consular Excellence*.<sup>48</sup> This recent document refers to the FCO’s “commitment to customers” with a link to the Guide.<sup>49</sup>

22. In addition to these publically available policy documents, there are internal revised Guidelines for consular officials, the most recent version of which was implemented on 26 November 2013.<sup>50</sup> These internal revised Guidelines set out in considerable detail how UK consular officials should deal with allegations of torture or mistreatment of British nationals and dual nationals.

23. The revised Guidelines are significantly more comprehensive than the previous internal Guidelines.<sup>51</sup> REDRESS respectfully suggests that the Committee should ask to see the revised internal Guidelines, and recommend that they should be made available to the public. REDRESS’ understanding is that they include:

- expanded guidance on what may constitute torture and mistreatment;
- a greater emphasis on the steps to take when a member of staff is made aware of a case, including the need for urgent action and action out of hours where necessary;
- information on how to approach a victim of torture or mistreatment, how to build trust and how to avoid making the wrong assumptions about their behaviour;
- encouragement to posts to develop country specific information; highlighting the importance of identifying specialist organisations who can offer clinical, therapeutic or legal services and signposting victims to them for help;
- links with the rape and sexual assault guidance, and recognising that cases of this nature may require more tailored assistance.<sup>52</sup>

24. REDRESS welcomes all of these and other changes and improvements, which are consistent with some of our previous recommendations. If implemented in every case these Guidelines could constitute an important form of consular assistance. However, REDRESS’ understanding is that the FCO has not accepted that there should be a “default position” that the UK *will* raise concerns when a British national is not treated in accordance with internationally accepted standards, maintaining instead that “[c]ases, and countries, vary greatly and therefore we need to be flexible in our approach to cases. It may not always be appropriate to raise each concern as we need to consider a wide variety of issues when deciding the most suitable course of action, including the individual’s wishes, the impact on any criminal proceedings, the nature of the allegation etc.”<sup>53</sup>

<sup>47</sup> Available at <http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/torture-mistreatment-reporting-guidance>. There was an earlier version of this document. The current version is for all FCO staff, and is said (at para. 3) to be “consistent with the guidance already in place for staff whose work requires job specific instructions, e.g. consular officers”. Staff are instructed to ensure appropriate reporting ultimately to the Consular Directorate in London. Reporting specifically extends to allegations of torture “involving any specific public authority, part thereof or official with whom HMG is actively working, co-operating or assisting”; where there are allegations of torture “inflicted on any other person” - para 10, Part 1,2 and 4.

<sup>48</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/191053/CONSSTRAT10.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191053/CONSSTRAT10.pdf).

<sup>49</sup> At p.6.

<sup>50</sup> Email to REDRESS from FCO dated 20 December 2013, under the subject “*New guidance for how to handle cases involving torture or mistreatment.*”

<sup>51</sup> The previous Guidelines were also not published, but were reproduced as Annexure A to our report *Tortured Abroad: The UK’s obligations to British Nationals and Residents*, September 2012, available at [http://www.redress.org/downloads/publications/121001tortured\\_abroad.pdf](http://www.redress.org/downloads/publications/121001tortured_abroad.pdf). These previous Guidelines were analysed at pp. 12-13 of our said report. The new internal revised Guidelines form *Chapter 40: Torture and mistreatment* of what REDRESS understands is an FCO handbook for consular officials.

<sup>52</sup> Email to REDRESS, see above n.50.

<sup>53</sup> *Ibid.*



25. REDRESS had recommended that there should be a default position in every case of torture or other prohibited ill-treatment. Such treatment should always result in vigorous complaint and/or protest to the host state “if there is evidence that a person is being mistreated, or if there are breaches of fair trial standards” but subject to the individual’s expressed wishes if consular staff do have access, or to an assessment of other potential risk to the individual.”<sup>54</sup> We submit that the Committee should examine this issue with the FCO. The FCO wishes to maintain a wide discretion as the foundation of consular assistance, even where there is evidence of torture or mistreatment, which we question.
26. REDRESS’ view is that where there is evidence of torture/mistreatment a default position of consular assistance should apply. This default position should only be displaced if there are *compelling* reasons for consular officials not to complain/protest to the host State that relate to a well-founded concern that consular assistance may result in further ill-treatment. The wish to maintain good relations with a State that tortures British citizens should never on its own justify a decision not to afford consular assistance. Furthermore, any well-founded concern should be disclosed to appropriate parties (the person concerned, family members, lawyers). To put it differently, there ought to be a presumption that the Guidelines will be followed, unless there are legitimate reasons connected to the well-being of the individual, why they are not. Our concern is that an open-ended “flexible approach” could be a recipe for an inappropriate lack of transparency.
27. The Committee should therefore press the FCO to provide concrete examples of the types of cases which fall into the category/categories with which HMG is concerned. It should be possible to give such examples without going into details of individual cases or disclosing personal information but with sufficient clarity to elaborate more concretely some circumstances which HMG actually foresees as possibly occurring again, where it would (or might) not wish to complain/protest despite evidence of torture/mistreatment.
28. REDRESS also believes that HMG’s public policy still reflects too great a concern with limiting expectations, as well as arguably too much emphasis on *assistance* at the cost of *protection*. If the revised Guidelines were made public and consistently applied this would openly indicate a positive shift in direction, which REDRESS believes is necessary. Those at their most vulnerable – as people facing torture are - deserve to know what their government will do to intervene.

## UK PRACTICE ON CONSULAR ASSISTANCE

29. In the past REDRESS has been critical of a number of specific shortcomings in the provision of consular assistance, some of which we have referred to as systematic failures. In our 2012 Report<sup>55</sup> these were examined under three headings: protecting terrorism suspects; protecting (other) persons held in detention; and assisting those tortured/mistreated outside of formal places of detention.<sup>56</sup> Our analysis did not purport to be comprehensive, and was based on (limited) public domain materials concerning British terrorist suspects tortured abroad, and some experiences of some of our own British or dual-national clients over the last decade.
30. Regarding terrorism suspects, we concluded that “when consular assistance was most urgently required, it was frequently lacking, delayed or not provided. If and when there is a thorough and independent public inquiry into complicity allegations, it should also examine the role of UK consular officers who either willingly or at the behest of the security agencies failed in their duties.” Irrespective of past (in)action, it would be worrying if HMG’s *caveat*

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<sup>54</sup> This was a specific recommendation REDRESS made in March 2013 when invited to comment on the draft Guidelines.

<sup>55</sup> *Tortured Abroad*, above n.1.

<sup>56</sup> *Ibid.*, pp. 14-22.

examined in paragraphs 24-27 above is a coded reference to terrorism suspects. It would be unacceptable for consular officials not to complain/protest where there is evidence of torture/mistreatment of UK terrorist suspects abroad, solely under the guise of national security.

31. Further, the UK's own alleged active and passive *complicity* in torture, rather than its failure to respond to the mistreatment of British nationals by the detaining State, has been the focus of certain allegations of torture abroad of terrorism suspects. Even without regard to allegations of UK complicity, HMG would still need to respond vigorously to reports that its nationals were tortured or mistreated, regardless of what these nationals were suspected of.<sup>57</sup> This is more accurately conceived of as diplomatic protection which we examine further below,<sup>58</sup> but as we will submit consular assistance and diplomatic protection cannot be wholly separated from each other.
32. Regarding other (non-terrorism related) cases, some of REDRESS' British clients have said they had suffered failures of practice, and we categorised these in our Report under headings including: the need for effective record keeping and vigorous complaints by consular officials; ensuring access to lawyers; raising complaints at the right level; ensuring sufficiently regular visits; dealing with the special needs of torture victims; insisting on private consultations with consular officials and/or lawyers; ensuring timely medical examinations; maintaining contact and providing adequate feedback on action taken.<sup>59</sup> Shortcomings led victims of torture feeling doubly wronged: harmed both by the State responsible for the torture, and upset and angry at the failure of the FCO to assist them.
33. Many of these problems have now been addressed in the revised Guidelines for consular officials, and it is to be hoped that the quality and effectiveness of consular assistance will be substantially enhanced in practice. Similarly in regard to violations outside of formal places of detention, which have also been of concern to REDRESS,<sup>60</sup> the proper consular response to these have been integrated into the revised Guidelines, based on REDRESS' recommendations.

## **COMBATING TORTURE: THE WAY FORWARD**

### Consular assistance

34. The latest annual FCO Human Rights and Democracy Report states:<sup>61</sup>

Promoting and protecting the human rights of British nationals overseas, with a special focus on helping the most vulnerable, is an integral part of the work of our global network of consular staff. We provide advice and support to British nationals... in detention who allege mistreatment or who have concerns about the fairness of their trial, and we will press governments, police and prison authorities to meet international human rights standards on their behalf.

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<sup>57</sup> As regards accountability, under the current consular assistance policy it is to be expected that the UK will follow-up allegations of abuse with the detaining state even after a person is no longer in detention, if the person so wishes. The question arises whether the UK has taken such steps in the case of terrorist suspects abused, for example, by Pakistan and the USA. Increased attention is needed on the UK's policy of when and how allegations of torture and ill-treatment are followed up by the Government.

<sup>58</sup> Para. 41et seq.

<sup>59</sup> *Tortured Abroad*, above n.1, pp. 16-20.

<sup>60</sup> *Ibid.*, pp.20-22.

<sup>61</sup> Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign and Commonwealth Office Report*, 15 April 2013, p.99, available at:

<http://www.hrdreport.fco.gov.uk/wp-content/uploads/2011/01/2012-Human-Rights-and-Democracy.pdf>. As in 2011 the annual Report again refers (at p.46) to the FCO's *Strategy for the Prevention of Torture 2011-2015*, published in October 2011, available at <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-1664.pdf>.

35. It is to be hoped that the clearer and more comprehensive policy of consular assistance in torture cases or those where there is a serious threat of mistreatment will lead to better protection for, and prevention of abuse to, British nationals. Nevertheless, REDRESS believes that consular assistance should be enshrined as a legal right, and should not remain a discretionary matter of policy. There is no legitimate reason why this should not be done: international law does not require HMG to refrain from affording its citizens with a right to consular assistance. REDRESS submits that there is a need for proper discussion on this issue, and the Committee should raise it with the FCO.
36. Affording a right of consular assistance would not impede diplomatic relations between States, as these would *not* change: HMG would not have any greater or lesser right to act in or vis a vis the host State. If there is a *right* to consular assistance this will only change the relationship between the British State and its own citizens, who could compel the State to act in prescribed circumstances. At present all the FCO *has* to do is *consider* providing consular assistance – this seems to be the only clear legitimate expectation.
37. Irrespective of the above, REDRESS submits that HMG needs to forthwith make clear to *every* State that the torture and ill-treatment of British nationals and others with a substantive link to the UK will not be tolerated. This requires not only having a clear and comprehensive policy of consular assistance which is put into practice, but also requires an ongoing and intensive diplomatic discussion – a concerted campaign in fact – especially with States where there are frequent problems.
38. While it is clear that HMG must be careful not to act in ways in which a torture survivor or person at risk of torture does not want and/or which will be counter-productive in any individual case, HMG should make it a cornerstone of its foreign policy that ill-treatment of its nationals is always unacceptable, and will always have consequences. Every State needs to be regularly informed that the UK will *always* follow-up allegations until such time as they are fully resolved.
39. REDRESS also submits that the FCO must pay particular regard not only to the collection of data and records in cases of reports/allegations of torture/mistreatment and requests for and the provision of consular assistance (and requests for diplomatic protection, dealt with below), but such data and records need to be monitored, analysed, collated and made available to the public, subject to privacy concerns. The revised Guidelines pay welcome regard to improving data collection and recording keeping, including follow up. This is important in individual cases both for prevention and reparation, but it is also important for wider reasons.
40. The UK needs to be transparent in all aspects of consular assistance (and diplomatic protection) in torture cases: clear information and details of patterns of torture of British nationals; the key problem States; strategies for dealing with those States; increasing or declining numbers; changing or consistent problems, and so on - all need to be available in order for those inside and outside of the FCO, including survivors, to find ways and means of enhancing prevention, protection and reparation.
41. One way of improving 'quality control' would be for the FCO to actively encourage British nationals safely back in the UK (or safe in third countries) to give feedback on the assistance provided, especially given the revised Guidelines. REDRESS submits the Committee should raise this with the FCO, as well as question it as to how it intends to ensure the Guidelines are properly adhered to in practice.

## Diplomatic protection

42. It is not sufficient to focus primarily or only on consular assistance without making clear that HMG will also take effective diplomatic action where necessary, including espousing a claim for reparation when diplomatic protection becomes the only realistic prospect for justice. Diplomatic protection (espousal of the tortured individual's claim on a State-to-State basis) cannot be separated from consular assistance when it comes to reparation, although they are different processes. The difference between consular assistance and diplomatic protection is examined in our *Tortured Abroad* report.<sup>62</sup>
43. When British nationals have been tortured or are at risk of torture, the exercise of consular assistance (and diplomatic *representations* when needed) should be clear and unequivocal: they should come into play immediately and urgently to halt/prevent (further) abuse. Thereafter, once the individual's immediate situation is addressed, the link between consular assistance and diplomatic *protection* arises: if consular assistance is or was properly afforded in a torture case there will be a clear record of events documented in the consular system – consular officials will have been involved in the issues from the start.<sup>63</sup> Such records constitute part of the evidence and will facilitate the survivor being able to seek remedies in the offending State. When domestic remedies are exhausted or not available, such record keeping will then also facilitate the exercise of diplomatic protection.
44. Consular assistance should thus also lay the ground for reparation. Where British nationals have been tortured, HMG should take all possible steps to help the survivor obtain reparations, including espousing claims. The consideration of espousal of torture claims must be done regularly and consistently as an important part of HMG's overall torture prevention strategy, as well as an end in itself for the individuals concerned. Not only would this facilitate justice being obtained for such victims, but it would also have a preventive impact for other (and future) British nationals in detention, other foreigners detained abroad as well as local detainees.
45. The very recent European Court of Human Rights (ECtHR) decision in *Jones*<sup>64</sup> is a case in point, both for the British nationals involved and because of the consequences for other British nationals who have already been tortured abroad and those who may suffer torture in future. The ECtHR has upheld State Immunity for foreign States and individuals who commit torture against British nationals. Such torture survivors are therefore unable to seek reparation against the perpetrating foreign States/individuals in the UK's civil courts. Absent domestic law reform to amend the State Immunities Act 1978<sup>65</sup> the only prospect of any justice for individuals such as Ron Jones, Les Walker and Sandy Mitchell will be if the UK espouses their claims, which REDRESS has called on it to do if the men so wish.<sup>66</sup> REDRESS has analysed the law, policy and practice of diplomatic protection for British

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<sup>62</sup> Above, n.1.

<sup>63</sup> Indeed, the FCO is to be commended for improving its record keeping systems and emphasising the importance of this in its revised Guidelines.

<sup>64</sup> *Case of Jones and Others v. The United Kingdom*, (Applications nos. 34356/06 and 40528/06), 14 January 2014, available at <http://www.redress.org/downloads/case-of-jones-and-others-v.-the-united-kingdom.pdf>.

<sup>65</sup> REDRESS has long sought a further exception to the State Immunities Act 1978 so that in cases of torture foreign States/individuals could be sued in British courts once domestic remedies have been exhausted or if such remedies do not realistically exist. To this end the Torture (Damages) Bill initiated by the late Lord Peter Archer of Sandwell was passed in the House of Lords in 2008, but subsequently lapsed in the House of Commons. For full details of the issues see REDRESS website at <http://www.redress.org/the-torture-bill/the-torture-bill>.

<sup>66</sup> REDRESS statement: *Saudi torture judgment must not undermine international torture ban*, 14 January 2014, available at <http://www.redress.org/downloads/pr-jones-ecthr-judgment.pdf>. – “Carla Ferstman, Director of REDRESS, called on the UK government to take up the men's case directly with Saudi Arabia. ‘The men have no prospects of justice in Saudi Arabia, and the Court's decision leaves them with no legal options outside of it. Their only option is for the UK government to take up the case with Saudi Arabia. Pursuing this claim on the men's behalf, if that is what they wish, is now well overdue’ said Ms Ferstman.”

nationals in *Tortured Abroad*<sup>67</sup> and found that HMG has never espoused a claim in a torture case.<sup>68</sup> The *Jones* decision makes it even more imperative that it now does so.

46. The FCO is currently reviewing the Rules on “international claims” including diplomatic protection in torture cases, and REDRESS is already engaged and intends to continue to be involved in this process. It is to be hoped the outcome of the review will make diplomatic protection more than a theoretical avenue for justice. It is submitted the Committee should maintain a watch on and interest in this review.
47. Taking effective and consistent action (consular assistance and diplomatic protection) is more than protecting British nationals: it is a means of exposing and indeed denouncing States that need to address the illegal practices for which they are responsible. The UK can and should be taking the lead to develop the law and practice and to lend its expertise in consular assistance and diplomatic protection in torture cases if its claim to be aiming “for the best consular service in the world”<sup>69</sup> is serious. To do so would also be consistent with the FCO’s *Strategy for the Prevention of Torture 2011–2015*,<sup>70</sup> which the Committee previously examined and in regard to which REDRESS made submissions concerning the torture/mistreatment of British nationals.<sup>71</sup>

#### *The UK must itself have clean hands*

48. The FCO *Strategy for the Prevention of Torture 2011–2015* also acknowledges that the UK itself must have clean hands.<sup>72</sup> It is of serious concern to REDRESS that HMG has very recently backtracked on its promise to hold an independent inquiry into allegations of UK complicity in torture.<sup>73</sup> REDRESS submits that the Committee should ask the FCO how it can on the one hand purport to have a policy of challenging other States who commit torture of British nationals, when on the other hand it is failing to protect its own nationals (and others) from torture and is being seen to be so failing by not properly and promptly investigating its own allegedly complicit agents. This double-standard is wrong in itself (and a breach of domestic and international law) but also undermines the UK’s legitimacy and capacity to persuade States to act lawfully in regard to British nationals as well as towards those States’ own citizens. It reflects a serious weakness in any coherent, over-arching, effective and principled UK approach to torture abroad.

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<sup>67</sup> Above n.1.

<sup>68</sup> *Ibid.*, pp.39-40.

<sup>69</sup> This is the bold aim stated in *Consular Strategy 2013-2016: Consular Excellence*, above n.48.

<sup>70</sup> Above n.10.

<sup>71</sup> *Ibid.*

<sup>72</sup> “HMG must have a good record itself. As the Foreign Secretary has said, where problems have arisen that have affected the UK’s moral standing we will act on the lessons learnt and tackle the difficult issues head on. We will use these lessons to inform the torture prevention work that we do overseas. The position of the Government is clear: the prohibition on torture applies to all individuals. The Prime Minister has said, ‘I think torture is wrong ... there is ... a moral reason for being opposed to torture – and Britain doesn’t sanction torture... I would say if you look at the effect of Guantánamo Bay and other things like that, long term that has actually helped to radicalise people and make our country and our world less safe.’ Our reputation on torture prevention worldwide is boosted by showing how the UK achieves compliance with our legal obligations to prevent, prohibit and punish torture” – *Strategy for the Prevention of Torture*, above n. 10, pp.4-5.

<sup>73</sup> REDRESS statement: *REDRESS condemns decision to hand inquiry into Rendition and Torture to Parliamentary Committee*, 19 December 2013, available at <http://www.redress.org/downloads/redressgibsonreport-pressrelease19dec2013.pdf>. – “REDRESS today condemns the decision to hand the stalled official inquiry into rendition and torture to the Intelligence and Security Committee. ‘Today’s decision is an affront to justice and accountability for allegations which are as shocking today as they were when they first emerged’ said Carla Ferstman, Director of REDRESS. ‘The absence of any real reckoning and the continued passing of the buck should be an affront to any established democracy, not least the UK which has been steadfast in its rhetoric on its abhorrence of torture in any form’, she said. This is the latest in a long line of decisions backtracking on repeated promises made by government to hold an independent, judge-led inquiry with the power to investigate allegations of complicity in rendition and torture by members of the UK security services.”

## RECOMMENDATIONS

The Committee should:

- Consider whether best practice would be enhanced if consular assistance was made a legal right, and it should engage with the FCO on this possibility to begin a wider public debate;
- Carefully scrutinise all aspects of the revised Guidelines for consular officials, and call on the FCO to make them a public document;
- Critically assess and engage with the FCO on the circumstances where the revised Guidelines might not be applicable, that is, where the 'default position' would not be followed even where there was evidence of torture/mistreatment;
- Encourage the FCO to acknowledge the clear link between consular assistance and diplomatic protection, the importance of this link to torture survivors seeking reparations, and the need for HMG to espouse claims in practice;
- Call on the FCO to improve and develop not only the way it collects data and keeps records on matters relating to consular assistance, but to do so transparently and to actively seek feedback from what it calls its customers on how it has exercised such assistance in individual cases;
- Examine the concerns of civil society arising from HMG's December 2013 decision not to have an independent inquiry into the complicity allegations, and to challenge the FCO on whether this undermines the UK's capacity to improve consular assistance given how all aspects of the FCO's *Strategy*, including protection of British nationals abroad, are inter-related.

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