Tortured Abroad:

The UK's Obligations to British Nationals and Residents

September 2012

20 YEARS REDRESS
Ending Torture, Seeking Justice for Survivors

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We are grateful for the support of the Joseph Rowntree Charitable Trust and the Trust For London. We would also like to thank Cage Prisoners, as well as our legal interns Ryan Vachon and Madeeha Dani for research support relating to this publication.

Contents

EXECUTIVE SUMMARY

Every year British nationals and residents are arrested, detained and imprisoned abroad.[1] Some of these individuals are ill-treated in detention. Others are ill-treated by state officials outside of formal places of detention. Ill-treatment can involve torture as defined and prohibited under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), or it can constitute other forms of mistreatment also prohibited under UNCAT. Ill-treatment may arise in a number of ways, for instance, during the investigation of a crime. Torture may be used to extract a confession or other evidence against the detainee or other persons; it may be used as punishment before or after a conviction and sentencing; prisoners can be ill-treated deliberately or through neglect. It may also arise in situations of abuse of power by state officials at places such as checkpoints, immigration centres, other public buildings, and on the street.

This Report examines the law, policy and practice of British consular assistance and diplomatic protection. It considers:

- the UK's obligations to British nationals abroad under UNCAT and other provisions;
- the policies and practice of the UK Government, in particular the Foreign and Commonwealth Office (FCO), in relation to British nationals, including those who are detained abroad;
- the position of dual nationals and residents with a status to live in the UK; [2]
- UK policy towards the state which is known or believed to have tortured a UK national;
- The extent to which the FCO will intervene while a national is in trouble abroad;
- The extent to which the FCO will help a national who has been tortured to seek justice from the state which is responsible for the ill-treatment (also known as espousal).

The focus of this Report is on consular assistance and diplomatic protection as two discrete areas of concern to British nationals. Increased flexibility regarding nationality rights affecting long term UK residents such as refugees, is also examined. Diplomatic protection involves interstate diplomatic interventions when a national suffers injury as a result of an internationally wrongful act committed (either directly or indirectly) by another State. Consular assistance concerns the assistance provided to nationals abroad by consular officers.[3] At a practical level, the need for consular assistance in cases of mistreatment (or fears of mistreatment) arises when the individual concerned is still abroad, usually but not always still in custody; diplomatic protection is more likely to become an issue when the individual has returned to the UK, though this is not always the case.

The policy of consular assistance has become clearer and better publicised in recent years, and yet still appears to be based entirely on the exercise of discretion. In this Report, REDRESS underscores that there is a need for consular assistance to become more responsive to the needs of the vulnerable individuals who are most reliant upon it. Britons should be entitled to expect a particular level of service that is reliable, predictable and dependable, and not one that is solely contingent on foreign policy considerations. This is all the more important when there are indications that the individuals concerned have been subjected to torture or other prohibited ill-treatment, or face a real risk of such treatment.

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[1] The Foreign and Commonwealth Office (FCO) has said: "As of 30 September [2011], we were aware of 2,572 British nationals detained in 87 countries overseas" - United Kingdom Foreign & Commonwealth Office *Human Rights and Democracy: The 2011Foreign & 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.

[2] REDRESS, *The Protection of UK Nationals Detained Abroad, 2005, A Discussion Paper Presented to the FCO,* available at http://www.redress.org/downloads/publications/DiplomaticProtectionFeb2005.pdf.

[3] John Dugard, *Diplomatic Protection*, Max Planck Encyclopaedia of International Law, 2010, para. 71.

And, at the same time, all States need to learn that the UK will always, to the fullest extent possible, take action to help its nationals and long term residents to obtain justice and reparation. This is where diplomatic protection must become more than a theoretical method of justice-seeking, as it is at present.

INTRODUCTION

When a British national or long term resident is arrested or detained abroad[4] it is both natural and lawful for them to seek help from their country.[5] The international law principles which govern this process have been developed and refined over many years, with some aspects codified in international treaties and others forming part of customary international law. While the scope of consular access has been clarified in decisions of international tribunals and domestic courts, in practice the way in which it has been exercised has been a matter of UK Government policy. Any UK national detained abroad is likely to feel more vulnerable than if they were in detention in Britain. And, it is those facing torture or other serious mistreatment who must be of most concern to UK authorities. The proper exercise of consular assistance can prevent or stop such abuse. However, the role of the UK Government should not end there. A person who has been tortured is entitled to reparation and there are clear ways in which the UK can facilitate justice-seeking procedures. These ways can involve both consular and diplomatic action. Consular assistance will aim mainly at preventing and halting abuse. If torture has been committed then the use of diplomatic means to achieve justice is legitimate – the UK can espouse its national's claim against the perpetrator state. This is known as diplomatic protection.

Similarly, when a British national has been subjected to ill-treatment by a state official outside a formal place of detention abroad, it is natural for them to turn to their consulate for assistance. The difficulties which all UK torture survivors who have been tortured abroad face in obtaining justice are huge. Very often a state that tortures does not have an effective legal system or the legal system is effectively closed to foreigners and it is only consular or diplomatic pressure which may lead to some form of reparation. Even where the survivor does have access to a regional or international tribunal and a favourable decision is obtained, it is often ignored, and again if the UK was to exercise diplomatic protection this would enhance prospects for reparation.

Consular assistance and diplomatic protection in response to torture and other mistreatment of British nationals abroad are not just routine consular and diplomatic functions. As highlighted in the Foreign and Commonwealth's recent strategy on the Prevention of Torture, the response to torture and other mistreatment of British nationals should be integral to the Government's anti-torture strategy.[6] The additional arsenal of consular and diplomatic action that the Government can take in relation to its own nationals should be deployed in order to take these cases further than would otherwise be possible. Such an approach would not only imply an adoption of best practices and improved standards in line with European efforts in this area, but would also constitute a positive

[4] These are the circumstances when abuse by state officials is most likely to take place. However, mistreatment can also take place outside of custody and still constitute torture - see pp. 21-22 below.

[5] For the purposes of this report, "British nationals" is used, while the rights and considerations pertaining to British nationals may also extend to long term or habitual residents. More progressive practice regarding stateless persons and refugees indicates that the appropriate state to protect such persons is the state of "lawful and habitual residence". A number of conventions on stateless persons and refugees have been adopted in this regard. Issues regarding nationality rights are discussed in section 3.2. below.

[6] Foreign and Commonwealth Office, *FCO Strategy for the Prevention of Torture 2011-2015,* Human Rights and Democracy Department, October 2011, available at http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-1664.pdf. The Strategy states at p. 4: "Torture prevention sits firmly within wider rule of law work being done to build fair legal systems, security and stability overseas. It also reinforces our Consular work to address the mistreatment of British detainees overseas." At p.9 the Strategy states: "HMG opposes torture in all contexts but we will focus our effort on countries [including those] where... we have other interests such as security, prosperity and British nationals in prison abroad."

and meaningful contribution to the eradication of torture, which the UK has instrumentally played a part in.

The UK government 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.[7]

It largely regards these as discretionary tools. Yet, as is argued in this Report, further consideration must be given to whether indeed there is discretion in the exercise of these tools, and if so, the extent of such discretion, taking into account a torture survivor's international law right to reparation, and the obligation on all states to ensure that such a right is made practical and effective. What rights does a UK torture survivor have in practice to obtain reparation when faced with an obdurate state which is avoiding its international obligations? If consular and/or diplomatic action will enhance the prospects of a UK torture survivor obtaining justice, should there not be certain obligations on the government to assist through these channels, rather than it being entirely a matter of discretion? And even if it can be said that a certain element of discretion is legitimate, should the policy relating to the exercise of this discretion not be clearer in cases of torture given its absolute prohibition at all times and under all circumstances? Issues such as these and others need to be examined as British nationals continue to face torture and other forms of ill-treatment abroad and continue to face huge obstacles in obtaining justice. While the UK Government has made progress in seeking to prevent torture abroad, more must be done to help British nationals who have been tortured abroad.

[7] 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/UKresponseGPText.pdf. However, the distinction between diplomatic protection and consular assistance is often blurred in practice.

1. CONSULAR ASSISTANCE OR CONSULAR PROTECTION?

1.1. International law

The right of a state to intervene in matters concerning its nationals abroad is a customary right and the subject of numerous treaties that have been codified in the 1963 Vienna Convention on Consular Relations (the Vienna Convention),[8] to which the UK is a party.[9] Amongst the consular functions described in the Vienna Convention, particular importance is given to consular assistance. Various articles describe consular functions relevant to imprisoned or detained nationals abroad. These 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.[10]

While the Vienna Convention refers to "protecting" the interests of its nationals as well as helping and assisting them, the UK Government eschews the use of "protection" and insists on "consular assistance."[11]

Consular rights of the sending State and the detained individual

The Vienna Convention sets out the rights of consuls to communicate with and assist detained foreign nationals. It also sets out the rights of detained or imprisoned nationals themselves. 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 detained individual to communicate with and access consular officers, and for communications addressed to the consular officer to be forwarded without delay.[12]

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

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[8] 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.

[9] Britain signed the VCCR on 27 March 1964 and ratified it on 9 May 1974. There are presently 173 state parties.

[10] Vienna Convention 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)

[11] The UK made this clear in its response to 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.ittig.cnr.it/Ricerca/ConsularAndDiplomaticProtection.pdf. At p. 521 it is stated: "From the perspective of the United Kingdom ...[c] onsular assistance is wrongfully referred to as 'consular protection.'" At p. 522 it is noted that the UK Government has said: "It is essential that unnecessary phrase such as 'consular protection'...should be avoided."

[12] Vienna Convention, Article 36 (1).

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.

Breaches of consular rights

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.[13] 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. For instance, where 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.[14]

Similarly, following the 1979 seizure of the American embassy in Tehran and the holding of hostages, the United States of America brought a case against Iran before the International Court of Justice (ICJ) submitting that the Vienna Convention compelled states to provide consular access and that a breach of this obligation constituted a grave violation of consular practice and human rights. The ICJ held that Iran had violated the Vienna Convention and other international obligations by failing to permit consular access to the hostages, and also ordered Iran to make reparations.[15]

International litigation of consular rights has also established that the Vienna Convention confers rights on individual nationals as well as on states.[16] Referring to the rights of nationals as expounded in the *LeGrand Case,* 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

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[13] 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. 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".

[14] Inter-American Court of Human Rights, Advisory Opinion OC -16/99 of October 1, 1999, requested by the 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. 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.

[15] *Case Concerning U.S .Diplomatic and Consular Staff in Teheran* (U.S. v Iran), 1980 ICJ Rep.3 (Judgement of May 24), 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.

[16] *LaGrand Case* (Germany v U.S.A.) ICJ (2001) (Judgement of 27 June), available at http://www.icj-cij.org/docket/files/104/7736.pdf. At para. 77 the Court said: "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.

> 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). The duty to exhaust local remedies does not apply to such a request.[17]

1.2. UK position regarding its obligations towards its own nationals

The Vienna Convention was partially incorporated into UK law by the Consular Relations Act 1968.[18] 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 in UK law.[19]

The UK Government regards consular assistance as "the provision of assistance by consular officials or diplomatic authorities to nationals in difficulty overseas".[20]

It also emphasises that consular assistance (or diplomatic protection) is not a legal right to which UK nationals are entitled:

> 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).[21]

The Government maintains that consular assistance is a matter of policy and is exercised on the basis of administrative discretion.[22]

1.3. EU attempts to establish improved standards on consular protection

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, should their own State not be represented in the relevant third country.[23] Article 23 of the Treaty on the TFEU states:[24]

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[17] *Ibid*., para. 40. 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.

[18] 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..."

[19] 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.

[20] 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/UKresponseGPText.pdf. The Government distinguishes between "consular *assistance*" and "consular *services*" and it is only the former which is relevant to this report, as consular services covers matters such as passport issuance, notarial services and visa applications.

[21] *Ibid*., para. 1.7.

[22] *Ibid*.

[23] Annemarieke Vermeer-Künzli, 'Where the law becomes irrelevant: Consular assistance and the European Union', International and Comparative Law Quarterly (ICLQ), Volume 60, October 2011, p. 965. The author refers to the1993 Treaty of Maastricht (subsequently known as the Treaty on European Union (TEU)) which created European citizenship.

[24] *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*

> 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. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.
>
> The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

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."[25] 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."[26] REDRESS submitted comments on the Green Paper in 2007,[27] including concerns voiced by UK nationals tortured abroad over the years, expressing failures by UK consular officials to properly assist them.[28]

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.[29] The resulting 700-page comparative study sets out the practice of EU Member States. As highlighted in CARE's analysis of the UK position, the UK considers the TFEU as "problematic"[30] and that the word "entitled" in article 23 does not create a right to consular assistance but only a right to non-discrimination. Supporting this view, one commentator suggests that there is evidence that the provision was intended as "a non-discrimination clause" implying that EU Member States must treat non-national EU citizens in the same way as they treat their nationals; "if their nationals have no entitlement to protection, then neither will non-national EU citizens."[31] The UK believes that article 23 simply obliges Member States to *consider* requests for consular assistance by unrepresented EU citizens on the same basis as requests by their own nationals, and that in this context "consideration" is the pivotal word.[32]

Furthermore, the UK position is that:

> [It] will not engage in publicity campaigns to inform EU citizens of Article 23(1) TFEU until its definition and meaning have been legally clarified. The language of 'consular and diplomatic

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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.

[25] *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.

[26] *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.

[27] 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.

[28] *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.

[29] 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.

[30] 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.

[31] Annemarieke Vermeer-Künzli, *supra* note 23, p. 969.

[32] CARE Project, p. 522.

protection' and 'entitlement' hold a stronger guarantee than is actually available to EU citizens and could create a potentially confusing state of affairs for EU citizens. [33]

While the CARE Project 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",[34] 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 protection."[35] Additionally, Denmark, Finland, Greece, Slovakia and Slovenia have legislation interpreted as having a right to consular protection.[36] 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.

1.4. UK guidance for nationals abroad: an exercise in limiting expectations?

A number of information leaflets and other documents available online provide information to the public, and give an indication as to what they might expect by way of support from the British government. These include:

- *"Support for British nationals abroad: A guide*". The Guide, first published in 2006, covers the full range of areas in which consular assistance can operate purportedly as a "single document" of UK policy.[37] The revised Guide was published in 2011[38] and contains 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."[39]

- *"In prison abroad"* published in 2011[40] and contains much the same information in the Guide's section "British nationals in detention or prison overseas", with various additional aspects, including advice to "Insist that the British Consulate be notified. **It is your right"**. [emphasis in the original].[41]

- *"Torture and mistreatment reporting guidance"*[42] published in March 2011 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." 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."[43]

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[33] *Ibid*., p. 553.
[34] *Ibid.,* p. 675.
[35] *Ibid*., p. 608.
[36] *Ibid.*
[37] 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."
[38] Available at t http://www.fco.gov.uk/resources/en/pdf/2855621/support-for-british-nationals-abroad.pdf.
[39] *Ibid*., p. 2, Note 1.
[40] Available at http://www.fco.gov.uk/resources/en/pdf/2855621/in-prison-abroad. There was an earlier version.
[41] *Ibid.,* p. 1.
[42] 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".
[43] *Ibid*., para. 10, part 1, 2 and 4.

- *"Allegations of torture mistreatment" guidelines*.[44] These internal guidelines set out in detail how UK consular officials should deal with allegations of torture or mistreatment of UK nationals, dual nationals or EU or Commonwealth nationals for whom the UK has accepted to provide consular assistance. The action to be taken includes "reporting immediately to Consular Directorate in London."[45] The reporting lines in London are set out, indicating that the Head of the Consular Assistance Group must ensure that all allegations are reported to the relevant Minister, usually in monthly updates, but in the most urgent and serious cases by specific submissions.[46] Action that can be taken in response to claims are set out as follows:

    - to bring the case to the attention of the relevant authority, with the individual's consent, demanding an end to the torture or mistreatment, and that the incident is investigated and the perpetrators brought to justice. Only the local or national authorities are in a position to take this action: it is not the role of consular officials to investigate allegations; to ask the British national if they would like the allegations to be taken up with the relevant authorities. It is to be made clear that the consular office is prepared to raise concerns vigorously, and should not set false expectations;

    - where a detainee asks for their complaint to be taken up, the next step "will generally be to make representations to the relevant authorities. There will be a strong presumption that allegations of torture or mistreatment should be raised vigorously with the appropriate authorities" unless there is "Ministerial authority... to adopt a different approach". No explanation is given on what such a different approach would be based;[47]

    - allegations can be raised formally through a *note verbale* expressing "concern at the allegations and request[ing] that a prompt, impartial investigation be undertaken" and normally the Note will also request that the UK is informed of the result;[48]

    - requests should always be followed up and concerns raised "if it appears that the process was not comprehensive or impartial";[49]

    - if the individual does not want allegations to be raised they should still be fully recorded and the person advised that the allegations can be taken up in future; in addition, on subsequent visits the consular official should continue to ask if the person wants any concerns to be raised.[50] Even without express consent the FCO may decide in exceptional circumstances to make case specific representations.[51]

The internal guidelines are comprehensive and if implemented in every case could constitute an important form of consular assistance. The provision that indicates that allegations can be taken up

[44] These internal guidelines are not published; they are reproduced as Annexure A to the current report.
[45] *Ibid.,* para. 50. The guidelines contain comments that: mistreatment which may not constitute torture may still be prohibited under international law as cruel, inhuman or degrading treatment or punishment; there may be signs of torture or mistreatment in addition to more obvious evidence, such as "rashes, weight gain, weight loss, alertness, rapid or particularly slow eye movements"; if there is concern that there may have been torture or mistreatment but the detainee doesn't raise this the official should "try to talk to them privately, and report your suspicions to Consular Directorate in London" as well as asking on subsequent visits whether the detainee wants representations to be made.
[46] *Ibid.,* para. 56.
[47] *Ibid.,* para. 60.
[48] *Ibid.,* para. 61.
[49] *Ibid.*, para. 62. The paragraph also states: "You should ask the Human Rights Adviser for guidance on what further action to take, who will provide advice in consultation with Post, Consular Directorate and the relevant geographical department. This can include making representations after the detainee has been released, if he is unwilling for concerns to be raised whilst he is detained. If you are asked by a former detainee to raise concerns over mistreatment or torture, either in your country, or in another country, you should seek advice from the Human Rights Adviser. This applies equally if the person has returned to the UK."
[50] *Ibid.*, para. 63. Paragraph 64 says that in certain circumstances general representations can be made in countries where there are general concerns about torture or mistreatment.
[51] *Ibid.,* para. 65.

in future, implies that when a detainee is safely back in the UK they can expect the UK Government to pursue the complaint with the detaining State. However, in practice, such diplomatic action is infrequent. There are also weaknesses in the guidelines and policy documents, in particular the lack of emphasis on the need to see a detainee in private. It is not unusual for persons to be unable to be communicate confidentially with the consular official concerned, despite the wording of Vienna Convention article 36 (1) (a) which refers to "free to communicate."[52]

Unlike with diplomatic protection where the UK Government has published Rules dealing with the UK's policy, there are no Rules on the application of UK policy on consular assistance. Nevertheless, it is worth noting that around the time that the current diplomatic protection Rules were published[53] the Parliamentary Under-Secretary issued a lengthy statement in Parliament in 1987, setting out the Government's then policy on consular assistance.[54] In the intervening 25 years, the policy on consular assistance has been considerably developed, particularly more recently, as set out in the documents under examination.

[52] *Supra*, p. 8.
[53] 1986.
[54] 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.

2. SYSTEMIC CONSULAR FAILURES TO PROTECT

2.1. Protecting terrorism suspects

The lack, and/or inadequacy, of consular assistance afforded to UK nationals and long-term residents suspected of terrorism, who were held in Guantanamo Bay and elsewhere continues to be of grave concern to REDRESS.

As early as 19 January 2002, within a week of detainees first arriving in Guantanamo Bay, the UK's security services and FCO officials had access to interview UK detainees.[55] Human rights organisations raised repeated concern about the UK Government's failure to make adequate representations to the US administration to safeguard the rights of the detained UK nationals and residents. In May 2002 the Foreign Secretary indicated that UK nationals had been "visited" by UK officials, including MI5 officers, and interviewed in relation to the UK's national security.[56] He had repeatedly raised with the US the circumstances in which UK nationals were being held and was satisfied that that they were being treated humanely. He also said the UK nationals had not complained of any ill-treatment, but some two years later, in June 2004, the UK Government admitted that a number of the detainees questioned by UK intelligence personnel in Guantanamo Bay had indeed complained about their treatment.[57]

The circumstances surrounding the lack of consular assistance emerged in a civil case brought against the UK Government by former detainees. It was revealed that former Prime Minister Blair, personally overruled the Foreign and Commonwealth Office's demand for consular access to British prisoners in Guantanamo Bay and elsewhere.[58] In 2008 it was revealed that the FCO was aware of five British citizens detained in Pakistan over the previous four years and admitted it had attempted to seek consular access to only two of these people. The FCO also declined to say how many had complained of mistreatment, saying: "We have a duty to respect the privacy of the individuals concerned."[59]

Admissions by David Miliband and others were made in Parliament in 2009 on how consular assistance was not properly handled by the Labour Government specifically in respect of some terrorist suspects who were allegedly tortured.[60] Some of the cases which have emerged are as follows:

- Martin Mubanga: A dual British-Zambian national arrested in Zambia on instruction of US agents, was detained without trial in Zambia in 2002. A press report of UK trial documents indicates that the Prime Minister's office prevented consular assistance from being provided.[61]

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[55] For example, Amnesty International, *United Kingdom - Human rights: a broken promise, 2006,* pp. 56-57, available at http://www.amnesty.org/en/library/asset/EUR45/004/2006/en/cc167867-d45b-11dd-8743-d305bea2b2c7/eur450042006en.pdf.
[56] *Ibid.*
[57] *Ibid.*
[58] BBC News: *'Foreign Office officials 'backed Guantanamo detentions' ,* 14 July 2010: "The court has also heard claims that former Prime Minister Tony Blair's office frustrated attempts by consular officials to help a detainee who was facing transfer to Guantanamo, the US detention facility in Cuba. In a hearing on Tuesday, the High Court heard that one document already disclosed to the men indicated that the Foreign Office had supported sending British suspects to Guantanamo" – available at http://www.bbc.co.uk/news/10622493.
[59] Ian Cobain, –*'MI5 accused of colluding in torture of terrorist suspects', The Guardian,* 29 April 2008, available at http://www.guardian.co.uk/world/2008/apr/29/humanrights.uksecurity1.
[60] See Hansard, 16 September 2009, Column 2235W, available at http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090916/text/90916w0011.htm.
[61] Sam Greenhill, *'Paper trail points to Blair: Former PM 'sanctioned the abuse of UK citizens' Mail Online*, 6 July 2010, available at http://www.dailymail.co.uk/news/article-1294868/TORTURE-INQUIRY-Former-PM-Tony-Blair-sanctioned-abuse-UK-citizens.html#ixzz20hjV6g3B.

- Zeeshan Siddiqui: A UK national arrested in Pakistan on 15 May 2005 on suspicion of involvement in terrorism; though his first interrogation took place in early July 2005 (days before the 7 July 2005 bombings in London), Siddiqui only gained consular access in mid-August.[62]

- Rangzieb Ahmed: A UK national arrested in Pakistan on 20 August 2006; the head of public affairs at the British High Commission in Islamabad told the BBC: "If he is a British national we will provide all possible assistance. But if he's a dual national our hands are tied."[63] The Joint Committee on Human Rights was told that Ahmed received no consular assistance in detention, and was seen by a consular official for the first time shortly before being put aboard a flight to the UK about two years later.[64]

- Tahir Shah: A UK national detained in Peshawar in July 2005, held for 16 days, who said he was hooded and shackled for long periods and deprived of sleep, and did not receive any consular assistance.[65]

- Azhar Khan: A UK national who told consular officials he had been tortured during a week in detention in Egypt in July 2008, after being detained on arrival in the country, by uniformed officials; the FCO said that it had received no complaints of mistreatment from British Nationals detained in Egypt, and only in 2009 admitted one individual had made allegations of mistreatment. [66]

  Moazzam Begg: A UK national seized in January 2002 by Pakistani intelligence and CIA officers in Islamabad, and sent to Kandahar, Bagram and then Guantánamo Bay; interrogated by UK security at Bagram airbase he had no access to any legal representation or consular access, even though there was a functioning British Embassy in Kabul.[67]

- Richard Belmar: A UK national detained in Pakistan in February 2002, and later rendered to Bagram airbase and then to Guantánamo Bay; evidence is said to be available to show how MI5 agents helped block attempts by officials from the British consulate in February 2002 from visiting him after the consulate had been alerted by his family in the UK.[68]

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[62] Human Rights Watch: *'Cruel Britannia'*, 2009, p. 26, available at http://www.hrw.org/sites/default/files/reports/uk1109webwcover_0.pdf. UK intelligence officers openly admitted to Siddiqui that they were there to question him, after which they would allow him access to UK consular officials – see Cage Prisoners, *Fabricating Terrorism III: British Complicity in Renditions and Torture*, 2011, p. 36 available at http://www.cageprisoners.com/our-work/reports/item/1063-fabricating-terrorism-iii-british-complicity-in-rendition-and-torture.

[63] Human Rights Watch: *'Cruel Britannia'*,2009, p. 33, available at http://www.hrw.org/sites/default/files/reports/uk1109webwcover_0.pdf. On 20 September 2007 it was reported that the FCO confirmed that though consular officials had been denied access to Ahmed by the Pakistani authorities, other officials from the High Commission in Islamabad were allowed to see him. The spokesperson failed to specify who these "other officials" were

[64] Joint Committee on Human Rights: "*Allegations of UK Complicity in Torture* ", 4 August 2009, p. 44, available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf. Helen Rawlins, head of the consular section in Islamabad, told a UK court that she took up the post in March 2007, and it was May 2008 before she learned of Ahmed's detention. Consular access was then denied.

[65] *Ibid.*, p. 109. He was effectively deported without any legal process, being put aboard a scheduled flight. He said that at Heathrow his British passport was returned to him by an official who did not identify himself. Shah said he assumed the official to have been from the Security Service.

[66] *Ibid.,* pp. 111-112. He returned to the UK the next day, flying into Heathrow, where two police officers took a statement from him. The FCO said that it had received no complaints of mistreatment from British nationals detained in Egypt but eventually in 2009 said one individual had made allegations of mistreatment following his return to the UK. It was said in a media report that the FCO "went through a series of twists and turns when asked about the allegations made by Azhar Khan, having already told parliament that no British nationals had been held in Egypt on suspicion of terrorist offences."

[67] Cage Prisoners *op. cit.*, pp. 33-34. In Guantanamo Bay "British Consular representatives and MI5 agents were indiscernible as they came together and questioned him together whilst he was kept in a tiny windowless cell… Instead of getting consular access he was told that he would stand trial at the kangaroo court-like Military Commission" – ibid.

[68] *Ibid.*, p. 27. The Pakistanis themselves were refusing to confirm whether or not he was in their custody and it was five months later before they gave any news to the consulate by which time he was already on his way to Guantánamo Bay.

- Mohammed Ezzoueck, Reza Asfarzadgen, Shahjahan Janjua and Hamza Chentouf: Four UK nationals who entered Kenya in January 2006 escaping the conflict in Somalia; trying to reach the British embassy the men made their way to Nairobi where they were detained by the Kenyan authorities and kept secretly in prisons without access to consular officials; however, they were interrogated by MI5 who knew that they were being kept in poor conditions and beyond any legal recourse, and who refused to help or grant them access to help in any way.[69]

These cases, which are not exhaustive, indicate 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.[70] While several British nationals and others with links to the UK have gone to court, and much has been revealed through the hearings, the cases were eventually settled, silencing certain issues and avoiding public scrutiny.[71] A full public inquiry therefore continues to be necessary.

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.[72] 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. To date the focus has been on the UK's active and passive failures to protect and prevent torture, rather than its responses to the treatment of UK nationals abroad. Even where there are no allegations of UK complicity (or if in due course after a proper inquiry it is found the allegations are unfounded) the violations *by the detaining states* need to be followed-up by the UK Government.

2.2. Protecting persons held in detention

REDRESS' concerns relating to UK consular assistance extend to all UK nationals detained abroad as well as British nationals who have suffered other violence, and in particular sexual violence, at the behest of foreign officials that amounts to torture. This latter aspect is examined separately below.[73] There are a number of common complaints that continue to feature, some of which were first highlighted in a document REDRESS sent to the FCO in 2005.[74] These matters had been brought to REDRESS' attention by torture survivors over numerous years; the FCO responded in a letter dated 5

[69] *Ibid.,* p. 48.

[70] The Detainee (Gibson) Inquiry was abandoned in January 2012 and its report is awaited later this year. A new inquiry will not begin until further police investigations into UK complicity in torture in Libya have been completed.

[71] See Justice Minister Kenneth Clarke's statement to Parliament, Hansard, 16 November 2010, column 752 *et seq*., available at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101116/debtext/101116-0001.htm.

[72] See the FCO's internal guidelines, Annexure A to the current Report, para. 62:*"You should always follow up the request for an investigation to ascertain the outcome. You should raise our concerns if it appears that the process was not comprehensive or impartial. You should ask the Human Rights Adviser for guidance on what further action to take, who will provide advice in consultation with Post, Consular Directorate and the relevant geographical department. This can include making representations after the detainee has been released, if he is unwilling for concerns to be raised whilst he is detained. If you are asked by a former detainee to raise concerns over mistreatment or torture, either in your country, or in another country, you should seek advice from the Human Rights Adviser. This applies equally if the person has returned to the UK."* It is thus clear that the present policy is that detainees who were tortured or ill-treated can look to the UK to follow-up with the detaining state even after a person is no longer there. In the circumstance it is reasonable to expect the present Government to call on the states concerned to investigate the allegations of abuse which *they* – the foreign states – are said to have perpetrated.

[73] At p. 21.

[74] REDRESS, *The Protection of UK Nationals Detained Abroad, 2005, A Discussion Paper Presented to the FCO,* available at http://www.redress.org/downloads/publications/DiplomaticProtectionFeb2005.pdf.

May 2005.[75] Subsequently, the FCO policy has developed and a number of the concerns then raised have been clarified; nevertheless, REDRESS still receives information from torture survivors which indicates not all concerns have been adequately addressed. We set out below issues which in our view remain of concern, as well as other matters which need to be dealt with to ensure better protection.

- ***The need for effective record keeping and vigorous complaints***

Officials often fail to inform victims "without delay" (or at all) of their right to have their consulate notified of their detention, and their right to communicate with their consulate, or to allow this communication to actually take place. Cases occur where days if not weeks or more pass before UK authorities are informed. Sometimes the information first reaches the consul through entirely unofficial sources such as the media, friends or family of the detainee. At times officials will block access despite the demands of UK consular officers. All such breaches of the Vienna Convention should lead the UK to make vigorous complaints. A torture victim is in the most vulnerable position imaginable, especially in the early stages of detention.

A recent example occurred in 2010 when a man was detained in a Middle East country and not seen by a consular official for some three weeks, although the fact of his detention was in the local media. During this period he was brutally tortured. Some States are notorious for torture, and in the past, UK consular officials have failed to undertake visits as soon as they possibly could. REDRESS welcomes new policies to visit within 24 hours of learning of the detention[76] and to maintain effective records of when a person was detained, when the consul learnt of this and how, when access was granted as well as whether the detainee was properly informed of their rights and so on.[77] The FCO said in its letter to REDRESS[78] that "We also take action to prevent non-notification in countries where this is of particular concern, for example through publicity campaigns in police stations and detention facilities to inform those with responsibility for initial arrest and detention about their obligations under international law." It is not known which states "are of particular concern" to the FCO in regard to non-notification or where and when the FCO has conducted such "publicity campaigns", but as mentioned above, cases of delay and/or non-notification do still occur.

Notably, the FCO does not mention in its Annual Report on Human Rights and Democracy country by country records relating to beaches of the Vienna Convention as well as its own responses (including time delays regarding access, whatever the cause),[79] an omission that should be rectified in future editions. The FCO should ensure that in every case any breaches are followed up, and in States where patterns of such breaches occur, vigorous diplomatic steps are taken for them to be halted. Relevant details and patterns should be properly recorded and made available for scrutiny.

- ***Ensuring access to a lawyer***

In view of the scant regard by foul-playing states to the right to prompt access to a lawyer, UK nationals often have to rely on consular officials to try to get legal representation. The UK policy of giving a detainee a list of local lawyers but otherwise having a completely hands-off approach has led to complaints. In one case a detainee facing a serious criminal charge was given a list of civil, not criminal lawyers. In another case a list of English-speaking lawyers was only given 11 months after

[75] Letter to REDRESS from Director, Consular Directorate, 5 May 2005, on file.
[76] Foreign and Commonwealth Office, *Support for British nationals abroad: A guide*, 2011, p.22, available at http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/files/kfile/consularfullguide,2.pdf.
[77] See FCO's internal guidelines, Annex A, para. 63.
[78] *Loc. cit.,* 5 May 2005.
[79] United Kingdom Foreign & Commonwealth Office *Human Rights and Democracy: The 2011Foreign & Commonwealth Office Report,* April 2012, available at http://centralcontent.fco.gov.uk/pdf/pdf1/hrd-report-2011.

arrest. Other torture survivors have complained of out-of-date lists, incorrect contact details, and wrong information on proficiency in English or expertise. Lists need to be accurate and to contain lawyers known to be appropriate and competent, and should be provided at the very earliest opportunity. In the recent Middle East case mentioned above the detainee had been offered a list of lawyers but didn't take it, because he thought he was about to be released, and because a guard and official were present he was unable to communicate properly with the consular officer. In fact he was tortured further and only released several months later.

In its letter to REDRESS[80] the FCO said: "Our Consular Guidance is clear on the subject of lawyers lists, both in relation to their content and their review...It is our aim that each list is reviewed annually..." It appears from this letter, therefore, that the policy now provides for consular officials to make sure that the lists provided[81] are up to standard. Nevertheless, the consulate should also be ready to ensure that the detainee actually is able to contact someone on the list - if access to a prison phone is denied, for example, which is another complaint which has been recorded. If there is any ongoing interference with access this too should be recorded and followed-up in every case. Where patterns of abuse emerge strenuous diplomatic protest must be made, including exposure in the FCO's Annual Report on Human Rights and Democracy.

- ***Raising of complaints at the right level***

UK consular officials have sometimes raised complaints of torture directly with those carrying out the abuse, instead of at a proper, higher level, resulting in more torture being inflicted. UK nationals say complaints were put forward by a consular official with insufficient authority and the complaint was therefore ignored, or by one who simply didn't understand what was required or who had no proper knowledge of the procedures involved. For complaints to be properly acted upon consular officials need to be determined and competent. While the current policy caters for these difficulties being properly recorded and pursued, scrutiny will need to continue in order to ensure effective progress.

- ***Ensuring sufficiently regular visits***

Some survivors have complained of consular officials not visiting them regularly and/or as often as they (the victims) have wished - one torture survivor complained of being "fobbed off" when he requested more visits because the consulate was understaffed. It is important that the UK's consular assistance policy is flexible enough to ensure sufficient visiting arrangements are in place when torture or ill-treatment has been raised, particularly in states where torture is known to be a serious problem. REDRESS is in receipt of recent complaints from a sentenced prisoner in an Asian country that his requests for more frequent visits have not been dealt with properly.

Some desperate torture survivors in detention resort to threatening to 'expose' the consular officials and to 'name names' when feeling their plight is not being taken seriously: one said that he threatened to talk to the media, telling 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. Things then improved, which appeared to demonstrate that lack of resources was not the problem.

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[80] *Loc.cit*., 5 May 2005.

[81] The provision of a list of lawyers is referred to in the FCO brochure *"Torture and mistreatment reporting guidance"*, March 2011, available at http://www.fco.gov.uk/resources/en/pdf/2855621/in-prison-abroad. The brochure states at pp.1-2: "We can provide lists of local lawyers and interpreters if you want, although we cannot pay for either ... Neither the Government nor the relevant British Embassy, High Commission or Consulate can make any guarantee in relation to the professional ability or character of any person or company on the list, nor can they be held responsible in any way for you relying on any advice you are given."

- ***Dealing with special needs in torture cases***

With regard to the particular attention required where torture is a real possibility, some survivors have said the consular officials were "out of their depth" - too used to dealing with "routine" issues of UK nationals in prison. Some victims have felt consular officials would sooner turn a blind eye or go through the motions of helping without wishing to 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. Examples given are where consular officials fail to attend on victims who have been hospitalised in detention as a direct result of the torture, or where previous medical ailments have been exacerbated as a result of the torture, necessitating hospitalisation.

In its letter to REDRESS[82] the FCO said "we do take official obstruction of medical examinations very seriously, and consular officials will include this in their representations to the authorities in cases where this is of concern...Where appropriate, we can...refer a prisoner's medical records to the FCO pro bono medical panel for their independent advice. The panel includes an expert on torture." REDRESS' concern here too, therefore, is that where patterns of abuse emerge in particular states strong protests must be made, and details provided in the FCO's Annual Report on Human Rights and Democracy.

- ***Insisting on private consultations with consular officials and/or lawyers***

The UK's policy does not sufficiently address deliberate obstruction of those trying to help, beginning with the denial or delaying of initial access to consular officials and/or lawyers. When access can no longer be prevented, then other difficulties are raised, such as hampering the conditions under which interviews are conducted. Often authorities will be present in the room[83] or find other ways of listening in, including using monitoring equipment. Those who carried out the torture may insist on being there to listen, and the victim will have been warned that if anything is mentioned about torture then more will be inflicted.

Consular officials should vigorously insist at the right hierarchical level to have private consultations, until a satisfactory result is achieved: it is a right under the Vienna Convention. Some torture survivors have said how consular officials appeared to accept the dictates of the torturers and other State officials in allowing communications to be monitored. In its letter to REDRESS[84] on this issue the FCO said "The degree of privacy afforded for legal and consular consultations is something about which we can make requests but not demands." In REDRESS' view this is an inadequate response reflecting an inadequate policy: the consular official should indeed demand an *effective* degree of privacy so the detainee can speak freely, and such demand should be persisted in until granted.

- ***Ensuring timely medical examinations***

A torture victim needs to be properly examined and treated by a competent and independent medical expert as soon as possible. This is a basic issue that both the consulate and lawyer should deal with. Such an examination can reveal and record evidence of the torture and go towards preventing further abuse as well as allowing an opportunity for treatment and relief of some of the immediate physical and psychological consequences. States which torture usually make it difficult, if not impossible, for such an examination to take place. Consular officials should do everything

[82] *Loc.cit*., 5 May 2005.
[83] See the recent incident referred to at p.19 *supra* under *Ensuring access to a lawyer.* In this case the detainee had been given fresh clothes with long sleeves to conceal marks of torture on his arms.
[84] *Loc.cit*., 5 May 2005.

possible to insist on access to a proper independent doctor. According to some torture survivors such commitment has not been forthcoming. Others have said consular officials made no effort to be present during medical examinations conducted by State doctors in prison, or didn't insist on seeing the results or talking to the doctors concerned, even when asked to do so, or when it was clearly in the best interests of the person to at least try.

In its letter to REDRESS[85] the FCO said: "Consular staff do not have any medical training so could not comment or advise if the check-up [by a state doctor in prison] was thorough and the analysis accurate." No doubt this is true, but it misses the point that if greater effort is made to monitor medical treatment then the detainee will have a better chance of being able to indicate to the consular official why he (the detainee) believes he needs further and proper medical attention.

- ***Maintaining contact and providing adequate feedback on action taken***

Some torture survivors have indicated a lack of feedback as to what steps were taken or attempted and what the State's response was, as well as further follow-up thereafter. One survivor said that the lack of feedback gave rise to the perception that the consular official was trying to 'cover-up' his incompetence. Another detainee said it was foolish to use a female consular official to try to resolve issues in a patriarchal country where women have little respect: her subsequent failure to achieve anything was then kept from the detainee who felt it was obvious why nothing had been achieved. In the circumstances, it would have been important to adequately address these perceptions, not least to demonstrate to the torture survivor concerned that the FCO is willing to engage – in a self-critical fashion if need be – throughout the process. Other issues raised, for which detainees required reports on progress have included: 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, and money issues.

2.3. Assisting British nationals who have been tortured or ill-treated outside formal places of detention

REDRESS is also aware of a number of cases where British nationals have been tortured or ill-treated by foreign state officials outside formal places of detention, but have not received appropriate support from consular staff they turned to for assistance. This has led victims of torture feeling doubly wronged: harmed both by the state responsible for the torture, and upset and angry at the failure of their own country to assist them.

As an example of such a case, REDRESS has recently supported a complaint lodged by a UK woman who was raped by a military officer at a checkpoint abroad, acts which amount to torture. She believes that not only did she did not receive proper support from the consulate in the country concerned, despite persistent attempts to receive assistance, the acts of the consulate in fact put her in further danger and risk of traumatisation. The complaint has led the Parliamentary Ombudsman to undertake an investigation into the FCO's conduct in this case.[86]

[85] *Loc.cit.,* 5 May 2005.
[86] See J. Shenker, *Foreign Office admits failings in case of Briton allegedly raped in Egypt,* Guardian, 17 November 2011, available at http://www.guardian.co.uk/world/2011/nov/17/foreign-office-admits-mistakes-alleged-rape-egypt.

In addition to some of the points raised in the previous section, a number of further issues were highlighted by this case.

- ***Recognising acts committed outside places of detention as torture or ill-treatment***

There is a traditional understanding of torture as occurring in places of detention during interrogation. While this is one way in which torture occurs, the definition of torture and ill-treatment goes far beyond this situation. It is well-established that torture can occur in any place where a state official intentionally inflicts (or is complicit in the infliction of) severe pain and suffering, whether physical or mental, on a person for a prohibited purpose. The rape of a person by a state official at a checkpoint, for example, will almost certainly be held to amount to torture.[87]

However this is not explicitly recognised in the Torture and Mistreatment Reporting Guidance for consular staff,[88] and as a result this is not a link that appears to have been made by staff responding to calls by distressed British nationals. This means that the appropriate responses have not been put into place. As a result of the case referred to above the FCO has committed to changing its guidance to reflect this position; improved training of staff is also required to ensure that allegations which may amount to torture can be recognised, regardless of the place in which it occurred.

- ***Supporting the making of complaints and accessing local remedies***

Crimes committed by state officials are likely to raise particular issues if the victim wishes to make a complaint (as is their right under Article 13 of the Convention Against Torture). In the case of an attack by a military or police officer the victim may be in further danger if she reports the crime to the police or the military, as there may be incentives for the crime to be covered up or the victim to be intimidated to withdraw the complaint. The victim may also be in danger of significant re-traumatisation by the process of making the complaint if it is handled badly by local authorities. In the case referred to above the victim was advised to report the crime to the local police, resulting in her being held against her will by the military, less than 24 hours after the initial rape.

If the victim wishes to make a criminal or other complaint he or she should therefore be provided with all possible assistance by the consulate, including in all cases being told at the outset that a consular officer can accompany them when they make the complaint.[89] This may need to be done immediately (particularly because medical evidence is likely to be an issue), including outside of office hours.

If the victim does decide to report the crime, it is important to explain the benefits of appointing a lawyer to protect the victim's interests in any subsequent criminal proceedings. Particularly where the military or police are involved in a crime it may be very difficult for the victim to get any information about the status of the proceedings; such proceedings may be held using different and often secretive procedures, including in military courts. If the victim is not aware of the status of proceedings he or she may lose the chance to participate in those proceedings and to claim damages (if available).

Some countries have specific mechanisms for reporting torture and other human rights violations to the authorities which may be easier for the victim to use and may result in the payment of compensation without formal criminal proceedings. Each post should have information as to

[87] See, for example, *V.L. v. Switzerland*, CAT/C/37/D/262/2005, UN Committee Against Torture (CAT), 20 November 2006, para. 8.10, available at http://www.unhcr.org/refworld/docid/47975afd21.html.

[88] FCO, *Torture and Mistreatment Reporting Guidance,* March 2011, available at http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/torture-mistreatment-reporting-guidance.

[89] In cases of sexual assault this is already provided for in the guidance to consular officials (received under a Freedom of Information Act request), but in REDRESS' experience is not always followed.

whether such mechanisms exist, and if so, the victim should be made aware of them and given details of lawyers or specialised NGOs who can assist.

- ***Following up on the progress of any investigation and prosecution***

In cases of torture outside formal places of detention it is important to recognise the state's responsibilities to investigate, prosecute, punish, and provide reparation to the victim. The guidance on torture and mistreatment specifies particular reporting and recording requirements. The guidance also requires consular officers to bring the case to the attention of the relevant authority, with the individual's consent, demanding that the incident is investigated and the perpetrators brought to justice. This guidance should be followed in all cases of alleged torture and mistreatment, not just that which takes place in prisons.

2.4. Consular assistance: still need for improvement

The annual FCO Human Rights and Democracy Report section on protecting the rights of UK nationals overseas has become more comprehensive, a welcome development consistent with the other FCO policy documents which have been referred to above. The latest report published in April 2012[90] reflects these current policy sources, stating, for example:

> Supporting British nationals in difficulty around the world sits at the heart of FCO activity… An integral part of the support provided by our global network of consular staff is promoting and protecting the human rights of British nationals overseas. We provide advice and support to British nationals...in detention who allege mistreatment...and we will press governments, police and prison authorities to respect individual human rights...and, with the permission of the British nationals involved, investigate allegations of abuse.[91]

The report also highlights the FCO Strategy for the Prevention of Torture 2011–2015,[92] published in October 2011. The Strategy explicitly states that torture prevention "reinforces our Consular work to address the mistreatment of British detainees overseas"[93] and that while "HMG opposes torture in all contexts [...] we will focus our effort on countries [including those]...where we have other interests such as security, prosperity and British nationals in prison abroad."[94]

It is to be hoped that the UK's clearer and more comprehensive policy of consular assistance in torture cases or those where there is a serious threat of mistreatment which has been publicised in the last few years will lead to better protection for, and prevention of abuse to, UK nationals. The UK Government needs to make clear to *every* State in the world that the torture and ill-treatment of UK nationals and others with a substantive link to the UK will not be tolerated. This requires not only having a clear and comprehensive policy which is put into practice, but also requires an ongoing and intensive diplomatic discussion – a campaign in fact – especially with States where there are frequent problems.

It is clear that the UK must be careful not to act in ways in which the detainee does not want and/or which will be counter-productive in any individual case. To obviate this requires the UK making it a cornerstone of its foreign policy that ill-treatment of its nationals is unacceptable. Every State needs

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[90] United Kingdom Foreign & Commonwealth Office *Human Rights and Democracy: The 2011 Foreign & Commonwealth Office Report,* April 2011, available at http://centralcontent.fco.gov.uk/pdf/pdf1/hrd-report-2011.
[91] *Ibid.,* pp. 120 -122.
[92] Available at http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-1664.pdf.
[93] *Op. cit.,* p. 4.
[94] *Ibid.,* p. 9.

to be regularly informed that the UK will always follow-up allegations until such time as they are fully resolved. It is not sufficient for the UK to focus primarily on consular assistance without equally making clear that it will take effective diplomatic action where appropriate. Moreover, UK policy documents and officials should emphasise throughout that these measures are part of a coherent policy and practice to protect UK nationals from torture suffered abroad.

Diplomatic protection is examined in the next section, but sight must not be lost of the fact that diplomatic action cannot always be separated from consular assistance when it comes to reparation, although they are different processes. When UK nationals have been tortured or are at risk of torture, consular assistance and diplomatic representations should be clear and unequivocal. One of the links between consular assistance and diplomatic protection is that if consular assistance is properly afforded in a torture case then there will very likely already be a record of which the UK is aware of what ill-treatment has taken place – the consular officials will have been involved in the issues from the start. This should facilitate the exercise of diplomatic protection at a later stage. So although consular assistance is primarily preventative and protective in individual cases, it is also more than that, as it can and should also lay the ground for reparation. Where UK nations have been tortured, the UK should do whatever it can to help the survivor obtain reparations. This must be done regularly and consistently as part of the UK's torture prevention strategy. Not only would this facilitate justice being obtained for such victims, but it would have a preventative impact for British nationals, other foreigners detained abroad as well as other detainees.

The world-wide campaign against torture needs to make use of the opportunity afforded by consular assistance to directly influence the way States which torture behave. Taking effective and consistent action is more than protecting UK nationals: it is a means of exposing and indeed sanctioning States that need to address the illegal practices for which they are responsible.

3. A RIGHT TO DIPLOMATIC PROTECTION IN TORTURE CASES?

3.1. International law

The traditional view of diplomatic protection is well described by the International Law Commission's (ILC) 2006 *Draft Articles on Diplomatic Protection:*[95]

> [D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[96]

Diplomatic protection is a product of customary international law, and, as an evolving international law concept, it must be considered in line with developments in international human rights protection. The International Court of Justice (ICJ) in the 2007 in the *Diallo* case explained as follows:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, […] diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[97]

3.1.1. Towards a victim-centred approach to diplomatic protection

It is accepted that States exercise diplomatic protection in their own right *or* that of their nationals - or both.[98] In this respect, in his *First Report on Diplomatic Protection*[99] the Special Rapporteur of the ILC pointed out that a number of States recognise the individual's right to receive diplomatic protection for injuries suffered abroad.[100] As such, the State must as a minimum involve the survivor in the procedure in some way, for example, the State should not bring an international claim against the will of the injured national, and if a national declines diplomatic protection he or she is not infringing the State's right but acting within his or her own right. [101]

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[95] Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

[96] *Ibid.,* p. 23.

[97] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections,* Judgment of 24 May 2007, para. 39, available at http://www.icj-cij.org/docket/files/103/13856.pdf.

[98] Article 1 emphasises that diplomatic protection is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act... [It] deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts... As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law; Draft Articles, *op. cit.,* p. 26.

[99] First Report on Diplomatic Protection, by Mr. John E. Dugard, Special Rapporteur, ILC, 52nd session, 7 March 2000, A/CN.4/506, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_506.pdf.

[100] *Ibid.,* para. 80.

[101] Article 2 of the Draft Articles states: "A State has the right to exercise diplomatic protection in accordance with the present draft articles." The Commentary points out that while it is the State that initiates and exercises diplomatic protection and is the entity in which the right vests, this article is without prejudice to whose rights the State seeks to assert - its own right or the rights of the injured national on whose behalf it acts – loc.cit. p. 28. In earlier drafts it was proposed that the state would have a duty to exercise diplomatic protection in cases where a jus cogens norm had been violated, such as the prohibition against torture, and with certain restrictions, but this was dropped as "there was need for more State practice and, particularly, more *opinio juris* before it could be considered" - see Report of the

In addition, the International Court of Justice has considered that States are under the obligation to make appropriate reparation, in the form of compensation for human rights violations, which is generally intended for the benefit of the individual victim.[102] As explained in a significant separate declaration by Judge Greenwood, who was part of the 15-1 bench awarding compensation, in the ICJ Diallo case:

> Although Guinea has brought this case in the exercise of its right of diplomatic protection, the case is in substance about the human rights of Mr. Diallo. The damages which the Court has ordered the DRC to pay to Guinea are calculated by reference to the loss suffered by Mr. Diallo and are intended for his benefit, not that of the State...[T]he DRC committed serious violations of Mr. Diallo's human rights. He was unlawfully and arbitrarily detained and expelled from the country in which he had long been resident without any semblance of due process and without being given the opportunity to wind up his affairs before he was forced out of the country. In accordance with long-established legal principle, there can thus be no doubt that the DRC must compensate for the loss and damage which those unlawful acts caused Mr. Diallo.[103]

Many States have gone a step further, and have enacted obligations to consider requests for diplomatic protection as a matter of their citizens' constitutional rights. 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 such a 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. In this regard, the South African Constitutional Court found that in exercising its discretion to exercise diplomatic protection there was a duty to:

> [P]roperly consider the request for diplomatic protection. The government must carefully apply its mind to the request and respond rationally to it. This would require, amongst other things, the government to follow a fair procedure in processing the request and it may be required to furnish reasons for its decisions. The request for diplomatic protection cannot be arbitrarily refused. [104]

Nationality requirements have become more flexible in order to ensure the protection of individual rights.[105] For instance:

International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Fifty-fifth session, Supplement No.10, Document A/55/10, para. 456, available at http://untreaty.un.org/ilc/reports/english/a_55_10.pdf. The restrictions proposed were: 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. The Special Rapporteur had made the proposal as an exercise in progressive development.

[102] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Reports, 19 June 2012, available at http://www.icj-cij.org/docket/files/103/17044.pdf. This (last) judgement in the case dealt with the quantum of damages, para. 4.

[103] *Declaration of Judge Greenwood,* para.1, available at http://www.icj-cij.org/docket/files/103/17050.pdf. The merits were decided in the earlier judgement *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo*), ICJ Reports 30 November 2010, available at http://www.icj-cij.org/docket/files/103/16244.pdf.

[104] *Kaunda and Others v President of the Republic of South Africa and Others* [2004] ZACC 5, p. 92, available at http://www.saflii.org/za/cases/ZACC/2004/5.html,

[105] Draft Article 3: "Protection by the State of nationality: 1.The State entitled to exercise diplomatic protection is the State of nationality. 2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8."The traditional general rule in its pure form was stated in the *Panevezys-Saludutiskis Case* (Estonia v Lithuania (1939) PCIJ Reports, Series A/B, No. 76) in the following terms: "… In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This rule is necessarily limited to intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up the claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of

- In a move away from the principle elaborated in the ICJ *Nottebohm case,*[106] Article 4 of the ILC Draft Articles[107] provides that it "does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality."[108] The effective link requirement would unduly exclude millions of persons from the benefit of diplomatic protection.[109]

- There is also increased flexibility regarding the continuous nationality of a natural person.110 While it has been retained, Paragraph 2 of the Draft Article contains a more flexible approach, and provides that a State may exercise diplomatic protection in respect of a per*son who wa*s a national at the date of the official presentation of the claim but not at the time of the injury, provided certain conditions are met.

- While some domestic legal systems prohibit their nationals from acquiring dual or multiple nationality,[111] draft Article 6 recognises that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which the person is not a national.[112]

- As regards claims against a State of nationality where a person with multiple nationality is concerned, draft Article 7[113] indicates support for the possibility of the State of predominant nationality bringing proceedings against another State of nationality.[114] This position also

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some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse."

[106] *Liechtenstein v Guatemala*, ICJ Reports 1955. The ILC view was that there were certain factors that served to limit *Nottebohm* to the facts of the case, such as the extremely tenuous links between the applicant State and the individual compared to the close ties between the individual and the respondent State.

[107] Draft Article 4: "For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State**,** by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law."

[108] Commentary, p. 33.

[109] *Ibid.:* "[I]f the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection."

[110] Draft Article 5: "Continuous nationality of a natural person: 1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates. 2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law. 3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality. 4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim."

[111] The UK has no such prohibition. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws recognises the institution: "… [A] person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses"- Article 3, 179 LNTS, p.89.

[112] Draft Article 6: "1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national. 2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national." The Commentary noted (page 43) that while the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different for a or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect of that claim Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is impossible to codify rules governing varied situations of this kind, and they should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

[113] Draft Article 7: "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 date of injury and at the date of the official presentation of the claim."

[114] See for example the case of *Carnevaro* (Italy v Peru), Permanent Court of Arbitration (1912), 11 RIAA 397. The Iran-United States Claims Tribunal has also applied the principle of dominant and effective nationality in a number of cases - See *Esphahanian v Bank Tejarat* (1983) 2 Iran-US CTR 157; also, the United Nations Compensation Commission established to provide for damages caused by the Iraqi invasion

accords with developments in international human rights law which afford legal protection to individuals even against a State of which they are nationals.

- More progressive practice regarding stateless persons and refugees indicates that the appropriate state to protect such persons is the state of "lawful and habitual residence". A number of conventions on stateless persons[115] and refugees116 have been adopted in this respect, and the ILC Draft Article 8 deals with the diplomatic protection of stateless persons and refugees,[117] although it does not define stateless persons.[118] In deciding on the requirement of lawful and habitual residence the ILC followed the 1997 European Convention on Nationality, which sets a high threshold.[119]

- Diplomatic protection for refugees by the State of residence is particularly important as they are "unable or unwilling to avail [themselves] of the protection of [the State of nationality]"[120] and, if they do, run the risk of losing refugee status in the State of residence. It should be noted that the term "refugee" is not limited to refugees as defined in the 1951 Convention, and allows a State to extend diplomatic protection to any person that it considers and treats as a refugee. This is particularly important for refugees in States not party to existing or regional instruments. Paragraph 3 of the ILC Draft Articles provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee.[121]

- The UK Court of Appeal decision in *Al Rawi*[122] is at odds with the progressive developments giving protection to persons with lawful and habitual residence. In this case men held at Guantanamo Bay who were not UK nationals but who had refugee or long-term residency rights in the UK, asked the Court to order the UK Government to make a formal request to the USA for their release. This was refused despite it having been argued on behalf of the United Nations High Commissioner for Refugees (UNHCR), which made reference to ILC Draft Article 8 as well as Article 16 of the Refugee Convention, "challeng[ing] the correctness of the rule of international law...that a State only enjoys a right – recognised and enjoyed by every State – to afford diplomatic protection for its own nationals by means of a State to State claim."[123] The Court decided the UK did not have standing to exercise diplomatic protection, rejecting several arguments to the contrary.[124]

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and occupation of Kuwait – see United Nations document S/AC.26/19991/Rev.1, para.11 . The condition applied by the Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.

[115] Such as the Convention on the Reduction of Statelessness (1961), 989 UNTS, p. 175.

[116] Such as the Convention on the Status of Refugees (1961), 189 UNTS, p. 150.

[117] Such definition is to be found in the 1954 Convention Relating to the Status of Stateless Persons - 360 UNTS, p.117, which in article 1 defines a stateless person "as a person who is not considered as a national by any State under the operation of its law."

[118] Draft Article 8: "1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State. 2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State. 3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee." The ILC Draft Article does not provide a definition of 'Stateless'.

[119] ETS, No. 66, article 6 (4) (g). See also the 1960 Harvard Draft Convention on the International Responsibility for Injuries to Aliens, which includes for the purposes of protection a "stateless person having his habitual residence in that State" (article 21(3) (c). The ILC felt this high threshold was justified in the case of an exceptional measure introduced *de lege ferenda.*

[120] Article 1 (A) (2) of the Convention Relating to the Status of Refugees, 189 UNTS, p. 137.

[121] Commentary, *op. cit*., p. 51.

[122] *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.

[123] *Ibid.,* para. 115.

[124] The Court's reasons cover paras. 115-130. They include finding Article 8 "is something of a distraction" (para 120) and that to adjudicate on the applicability of the Refugee Convention would require the Court "arriving at conclusions of American federal law relating to the construction of the DTA [the USA Detainee Treatment Act 2005] and claims of *habeas corpus*. We are in no position to embark upon such an exercise."(para129) The Court also rejected the argument on behalf of the men that to refuse to even consider exercising diplomatic protection was discriminatory, following the *Abbasi* case, and/or that the men had any such legitimate expectation: "[T]he only legitimate expectation...contemplated [in *Abbasi*] is that the [UK Government] would *consider* a British national's request that representations be made on his behalf. There is no basis for accepting a like expectation enjoyed by non-British nationals."(para. 89). The *Abbasi* case is referred to more below at pp. 32-33.

- *Al Rawi* was appealed to the House of Lords (as it then was), and REDRESS and a group of other NGOs were granted leave to make a third party intervention. However, before the appeal was heard the FCO sought the release and return of the detainees, who subsequently withdrew their appeal.[125]

3.1.2. Reasonable flexibility in relation to exhausting local remedies

The exercise of diplomatic protection, in the form of an international claim brought by a State generally requires that the injured person first exhausts "all local remedies".[126] However, this rule is subject to a range of exceptions which are dealt with in the ILC Draft Article 15.[127] These include the following:

- "Futility" or "ineffectiveness". The question whether local remedies do or do not offer the reasonable possibility of effective redress has to be decided by the competent international tribunal. The decision on this matter must be made on the assumption that the claim has merit.[128]
- "Undue delay". The exhaustion of local remedies may be dispensed with when the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented. The ILC acknowledged the difficulty in giving an objective meaning to "undue delay" or prescribing a fixed time limit within which local remedies should be implemented.[129]

- Unreasonable to accept compliance. It is considered unreasonable to expect compliance, for instance, where a State prevents an injured alien from gaining factual access to its tribunals, or where criminal conspiracies obstruct the bringing of local proceedings or where the cost is prohibitive.[130]

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[125] It would have been argued that the fact that the UK Government was willing and able to make representations to foreign governments concerning detention is capable of being transformed into an *obligation* in the context of torture; this obligation would not necessarily arise in every case of torture but would do so where there is every likelihood that such intervention would in fact protect a specific individual from the infliction or continuation of torture, inhuman or degrading treatment - see the application to intervene *NGO Petition for Leave to Intervene before the House of Lords (July 2007)*, available at http://www.redress.org/downloads/casework/AlRawiHLPetition30July07.pdf.

[126] Draft Article 14 seeks to codify the customary international rule requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. The ICJ in the *Interhandel* case called this "a well-established rule of customary international law", Switzerland v USA, 1959 ICJ Reports 27. In the *Elettronica Sicula (ELSI)* case it was referred to as "an important principle of international law", 1989 ICJ Reports 42, para.50. In the *Ambatielos Arbitration* (Greece v UK (1956) 12 RIAA 83) the tribunal put it as follows: "The rule requires that 'local remedies' shall have been exhausted before an international action can be brought. These 'local remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane…" In the case of *Nielson v Denmark* the European Commission of Human Rights expressly ruled that the extraordinary remedy in the case before it- recourse to the Danish Special Court of Revision – had to be exhausted to satisfy the rule: "The crucial point is not the ordinary or extraordinary character of the legal remedy but whether it gives the possibility of an effective and sufficient means of redress." - Application no.343/57 (1958-59), 2 YBECHR 413 at 436.

[127] Draft Article 15: "Local remedies do not need to be exhausted where: (*a*) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible; *(c)* There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; *(d)* The injured person is manifestly precluded from pursuing local remedies; or *(e)* The State alleged to be responsible has waived the requirement that local remedies be exhausted."

[128] Commentary *op.cit.,* p. 77. This also accords what judicial decisions that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well established line of precedence adverse to the alien; the local courts do not have the competence to grant an appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection.

[129] *El Oro Mining and Railway Company (Limited)* (*Great Britain v. United Mexican States*), decision No. 55 of 18 June 1931, UNRIAA, vol. V, p. 191 at p. 198: "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render a judgment. This will depend upon several circumstances, foremost among them upon the volume of the work involved by a thorough examination of the case, in other words upon the magnitude of the latter."

[130] *Ibid.,* p. 83.

- Waivers. Waivers can take many different forms and can be expressed or implied.[131] Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Waiver of local remedies will not be readily implied, but no general rule can be laid down as to when an intention to waive local remedies may be implied. [132]

- Special Circumstances. There is a general acceptance, particularly in the context of the European Court of Human Rights, that there is no obligation to have recourse to remedies that are inadequate or ineffective.[133] There is a "generally recognised rule of international law"[134] that absolves an applicant from the obligation to exhaust domestic remedies where there are "special circumstances."[135] The European Court of Human Rights has also said in another case involving torture, that:

> Where […] there is a practice of non-observance of certain Convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate. Thus, if there was an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative enquiries would either not be instituted, or, if they were, would be likely to be half-hearted and incomplete…[136]

3.2. UK domestic law and policy: discretion still applies

Like consular assistance, the UK does not regard diplomatic protection as a legal right to which UK nationals are entitled:

> The United Kingdom provides diplomatic protection (and diplomatic representation) as a matter of published policy and not on the basis of a legal right to such protection.[137]

Unlike certain other States where diplomatic protection is guaranteed as a constitutional right, the UK has not incorporated the doctrine into domestic legislation, and its current "Rules applying to international claims" (the Rules) are said to be "based on general principles of customary international law".[138] A leading decision relating to diplomatic protection is the 2002 Court of Appeal

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[131] Draft Article 15(e) provides for waivers of the rule on exhaustion of local remedies. *Government of Costa Rica* case (In the matter of Viviana Gallardo *et al*.) of 13 November 1981, Inter-American Court of Human Rights, ILR, vol. 67, p. 578 at p. 587, para. 26: "In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waiveable, even tacitly."

[132] Commentary, p. 85.

[133] *Akdivar and others v Turkey (*1996*),* ECtHR Reports 1996-IV.

[134] *Van Oosterwijck v Belgium* (1980) 40 ECtHR (Series A).

[135] These include: an administrative practice which consists of a repetition of acts incompatible with the Convention, and where official tolerance by the State authorities have been shown to exist and are of such a nature as to make proceedings futile or ineffective - ECtHR Reports 1996-IV; national authorities remaining totally passive in the face of serious allegations of misconduct or the infliction of harm by State agents, for example, where they have failed to undertake investigations or offer assistance - *Aksoy v. Turkey* (1996) ECtHR Reports 1996-VI. In the case of *Cyprus v Turkey* ECtHR Reports 1996-IV the respondent government complained that the alleged victim had made no use of the possibility of obtaining a domestic remedy from the Turkish courts. The Commission considered that any remedy before Turkish courts could not be regarded, in respect of complaints concerning the violation of human rights of Greek Cypriots in Cyprus, as both "practicable and normally functioning in such cases."

[136] *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* Nos. 9940-9944/82, 35 DR 143 at 162 (1983). See also the earlier case of *Greece v UK* No. 299/57, 2YB 186 at 192 (1957) in which the Commission held that it was necessary to pursue domestic remedies to the highest court in torture cases where the identity of the torturer is known or revealed, but that where the identity was withheld then domestic remedies would be ineffective.

[137] CARE Project, *Consular and Diplomatic Protection Legal framework in the EU Member States,* December 2010, p. 525, available at http://www.ittig.cnr.it/Ricerca/ConsularAndDiplomaticProtection.pdf.

[138] *Diplomatic protection: Comments and observations received from Governments*, A/CN.4/561/Add.1, 3 April 2006, Annex pp. 14 -16, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_561_add1.pdf. The Rules are attached as Annexure B to the current report.

case of *Abbasi.*[139] Mr Abbasi, one of the nine British nationals held in Guantanamo Bay, was seeking by judicial review, to compel the Foreign Office to make representations on his behalf to the United States Government for his release, for him to be brought before a proper court, to take other appropriate action or to give an explanation as to why this has not been done.[140] The Court of Appeal considered the Special Rapporteur's work on a draft article imposing a *duty* on States to exercise diplomatic protection when nationals have suffered a breach of a *jus cogens* norm, but noted his point that many states did not accept that such a right either exists in international law or can be introduced at this stage on the basis of "progressive development".[141]

3.2.1. The doctrine of legitimate expectation

UK courts have recognised that consular assistance and diplomatic protection operate under the doctrine of "legitimate expectation." This doctrine was set out in the landmark 1984 House of Lords ruling in *Council of Civil Services Unions and others v Minister for the Civil Service.* In this case it was held that:

> [E]ven where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law.[142]

Nonetheless, according to several leading judgments in the House of Lords and Court of Appeal, UK nationals' expectations would appear to be relatively limited. A UK national abroad only has the right to expect the FCO to *consider* exercising consular assistance even where torture is alleged,[143] and the content of such assistance would be a matter of published policy.

Thus, based on *Abbasi*, and confirmed in *Al Rawi,*[144] while the Government is not obliged to exercise diplomatic protection there remains scope for judicial review of any refusal to do so. 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. [145]

Following the *Abbasi* decision, the FCO continued to visit the UK detainees and also began to make representations to the US Government that they either face a fair trial or be sent back to the UK.[146] However, these interventions were *not* based on any recognition of the right of citizens to

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[139] *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.
[140] *Ibid.*, para. 1.
[141] Para. 41. The Court also found (at paras. 41-79) that neither the European Convention on Human Rights nor the Human Rights Act imposed such an obligation; Strasbourg cases examined included *Al Adsani v UK* (2002) 34 EHRR 11 *(*Application no. 35763/97), *Soering* [1989] 11 EHRR 439 (Application no.14308/88), *Bankovic and Others v Belgium and Others* 11 BHRC 435 (App. No. 52207/99) and *Bertrand Russell Peace Foundation v United Kingdom* (Commission decision 2 May 1978.) It thus concluded (para 79) that neither treaties, legislation nor case law "afford[ed] any support to the contention that the Foreign Secretary owes Mr Abbasi a duty to exercise diplomacy on his behalf."
[142] *Council of Civil Service Unions v Minister for the Civil Service*, 1984 [House of Lords] 374 at p. 401, available at http://www.careproject.eu/database/upload/UKcase001/UKcase001Text.pdf.
[143] The CARE national report (*op.cit.*) states at p. 532: "The United Kingdom is very rarely challenged legally for its consular services."
[144] *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.
[145] *Abbasi* at para. 100.
[146] See, for example, Foreign and Commonwealth Office, 'Statement on the British Nationals Detained in Guantanamo Bay' (10 March 2003); Foreign and Commonwealth Office, 'Statement on British Guantanamo Bay Detainees' (20 May 2003).

diplomatic protection. It has been said that the *Abbasi* decision makes it difficult for the Government to now 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.[147]

While *Abbasi* concerned a UK national detained at Guantanamo Bay, *Al Rawi* involved a number of UK residents detained there giving rise to efforts to persuade the UK Government to also intervene on their behalf.[148] However, unlike the approach the UK Government had eventually taken in calling for the fair trial or release of its nationals, in respect of these non-nationals its representations were more limited:

> [O]n 27 April 2005, [the Foreign Office Minister responsible] met senior officials from the United States Embassy in order to pass on the concerns of the detainee claimants' families and lawyers. Although she made no specific request for their return, she expressed concern about the reasons for their detention, the fact that they had not been charged, and the families' anxiety that they might be returned to countries where they might face torture. She raised the allegations of mistreatment – and torture – which had been put to her at the meetings and asked for assurances as to the conditions in which the detainee claimants were being held. The matter was followed up by British officials in Washington but there has been no formal response to the representations that were made.[149]

Mr Al-Rawi and two other detainees and their families sought a judicial review of the UK's refusal to formally intervene on their behalf, arguing that:

> [T]he Foreign Secretary is under a duty to make a formal and unequivocal request of the United States for the release and return of the detainee claimants to this country; and/or… that the Foreign Secretary is under a duty to make the same representations to the United States of America in respect of the detainee claimants as have been made in respect of British citizens detained at ...Guantanamo... [150]

In arguing that the exercise of diplomatic protection was not possible for non-nationals, the UK set out the traditional international law view as to why it could not intervene with the US more strenuously – the lack of a recognised right to do so.[151] Before the case was heard in the Court of Appeal the UK Government had in fact formally requested Mr Al Rawi's release, explaining that this was on the basis of "some reasonable prospect of success, and without causing [...] significant

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

[148] Six such persons were: Shaker Aamer (a Saudi national and long-term UK resident); Jamil El Banna (a Jordanian national with indefinite leave to remain in the UK and refugee status); Omar Deghayes (a Libyan national with indefinite leave to remain in the UK and refugee status); Binyam Mohamed (an Ethiopian national with leave to remain in the UK while his application for political asylum was being processed); Bisher Al-Rawi (an Iraqi national who fled Iraq to the UK with his family in 1983; though his family members became UK citizens he retained his Iraqi nationality as the family felt this might help them in recovering property appropriated in Iraq); Abdennour Sameur (an Algerian national with indefinite leave to remain in the UK as a refugee). The traditional rule in international law is that diplomatic protection is only exercisable on behalf of nationals, which was the position taken in respect of these non-nationals: the UK had no right in international law to exercise diplomatic protection on behalf of such persons, it argued. Later, and after the nine nationals had been returned, the UK Government said it could and was making representations in respect of the non-nationals with refugee or long-term residency status in the UK, but only on what it termed humanitarian grounds.

[149] *Al Rawi and Others v Secretary of State for Foreign Affairs and Another* [2006] EWHC 458 (Admin) para. 22. Initially, the UK Government had declined to make any representations at all. Thus in September 2002 Baroness Symons wrote to the family of Mr Deghayes saying that, '"[h]is detention and welfare are matters for the United States and Libya. I can only advise that you contact the Embassies of the United States and Libya in London and seek information from them."' In January 2003 in relation to Mr. Al Rawi, she wrote that '"[i]f he was travelling on Iraqi documentation, then clearly it is the role of the Iraqi authorities to provide assistance either directly or through a country which they have indicated they wish to represent their interest"' - *ibid.,* para. 19. Under traditional international law, the ability of a state to exercise diplomatic protection was premised on the 'nationality of the claimant state attaching to the individual or corporation' - I. Brownlie, Principles of Public International Law, Sixth Edition (Oxford University Press, 2003) at 389.

[150] *Al Rawi and Others v Secretary of State for Foreign Affairs and Another* [2006] EWHC 458 (Admin), para. 30. The detainees alleged that they had been tortured and ill-treated.; the Court of Appeal proceeded on the premise that they had been subjected at least to inhuman and degrading treatment – para. 3.

[151] *Ibid*., para. 28-29.

counterproductive effects more generally […] the matters referred to do not give rise to a legal obligation on [the UK] to make any request at all."[152]

The Court of Appeal found that the refusal to make representations' on behalf of the other detainees did not constitute a violation of the rights of their family members under the ECHR;[153] that not making the same representations for non-nationals as had been made for nationals did not constitute unlawful discrimination under the Race Relations Act;[154] that there had been no breach of legitimate expectations;[155] that the UK's position on state to state claims in international law and the primacy of nationality was not mistaken. In particular, it considered that Article 8 of the Draft Articles on Diplomatic Protection, which recognised that the state in which a non-national was habitually and lawfully resident could exercise diplomatic protection, did not constitute customary international law and therefore the UK did not have standing to make formal representations on behalf of the non-nationals.[156]

The Court was also especially concerned with the efficacy and practicality of the called-for interventions, perhaps even more than any legal basis, and did not accept the argument that the Government's judgement in this regard was flawed; thus in regard to the Draft Articles on Diplomatic Protection as well as arguments under Article 16 of the Refugee Convention, the Court said:

> [They] do not in truth engage the core of the case: the [UK Government's] judgment that any formal representations to the US authorities on behalf of the detainee claimants would be ineffective and counterproductive. [157]

The case was appealed to the House of Lords, but shortly before it was due to be heard the Government decided to request the release and return of the two remaining appellants as well as the other UK residents still held, and thus the appeal was withdrawn. The UK was still not prepared to raise the same issues as it had eventually done on behalf of the UK nationals, such as trial by military commission, and instead characterised its intervention on a different basis altogether:

> [The UK Government] decided to seek the release of the five in light of work by the US government to reduce the number of those detained at Guantanamo and our wish to offer practical and concrete support to those efforts. In reaching this decision we gave full consideration to the need to maintain national security and the Government's overriding responsibilities in this regard. [158]

3.2.2. Diplomatic representations also a matter of discretion

In *Al-Adsani* where the applicant was a dual UK-Kuwaiti national and his complaint of having been tortured was against Kuwait, his other State of nationality, the applicant submitted that he "had attempted to make use of diplomatic channels, but the [UK] Government refused to assist him…"[159] Interestingly, in that case the UK Government submitted that "there were other [i.e. other than

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[152] *Ibid*., para. 38.
[153] *Ibid*., para. 91 *et seq.*
[154] *Ibid*., para. 65 *et seq.*
[155] *Ibid.*, para. 88 *et seq*.
[156] *Ibid.*, para. 115 *et seq.*
[157] *Ibid*., para. 120,122.
[158] Foreign and Commonwealth Office, 'David Miliband: Written Ministerial Statement on Guantanamo Bay: Return of UK Residents' (13 Dec. 2007).
[159] *Al-Adsani v. The United Kingdom*, Application no. 35763/97, (2002) 34 EHRR 11, para. 51, available at http://www.unhcr.org/refworld/country,,ECHR,,KWT,4562d8cf2,3fe6c7b54,0.html.

litigation] traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim."[160]

It is not known why the UK did not take up the claim formally 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 Articles,[161] but it also appears that Kuwait did not treat the applicant as a UK national. Contrary to the argument made in the UK's submission to the European Court of Human Rights mentioned in the previous paragraph, therefore, effectively no diplomatic representation and protection was available.

3.2.3. The UK Rules applying to international claims

The key UK policy document is the current "Rules applying to international claims" (the Rules) which is said to be "based on general principles of customary international law."[162] There is a distinction between "*formal claims*" and "*informal representations*."[163] The policy on informal representation is reflected in the following Ministerial Statement as follows:

> [The UK Government] consider[s] 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. [164]

In a second Ministerial Statement, the UK government has indicated that it would consider making direct representations to third governments on behalf of British citizens where it believes that they were in breach of their international obligations. [165] Where it would consider doing so, the Rules on international claims would apply as "a considered statement of Government's policy."[166] In this regard, the UK Rules differ in nearly every respect from the positions codified into the ILC Draft Articles. An outline of the differences is as follows:

- Nationality: Rule I expresses a narrower approach than the ILC Draft Articles; it states that HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury. As has been shown this aspect of continuous nationality is dealt with in Draft Article 5 (1) which retains the traditional approach expressed in Rule I. However, Draft Article 5

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[160] *Ibid*., para. 50.
[161] See below pp. 36-37.
[162] *Diplomatic protection: Comments and observations received from Governments*, A/CN.4/561/Add.1, 3 April 2006, Annex pp. 14 -16, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_561_add1.pdf. The Rules are attached as Annexure B to the current report. In *Abbasi* (*op.cit*.) the Court of appeal said at paras. 88-89: "The practice of the United Kingdom Government in respect of diplomatic protection was explained in 1999, in comments presented to the United Nations General Assembly, as part of the discussion of a report of the International Law Commission (reproduced in British Yearbook of International Law 1999 at p.526). Under the heading "Diplomatic protection: United Kingdom Practice", the paper notes that this is a matter "falling within the prerogative of the Crown" and that "there is no general legislation or case law governing this area in domestic law". It distinguishes between "formal claims" and "informal representations". In relation to formal claims, "a considered statement of the Government's policy" is contained in "rules" issued by the Foreign Office, based on "general principles of customary international law". It is said, citing *Mutasa v Attorney General* [1980] 1 QB 114 that the rules are "a statement of general policy and have no direct effect in domestic law".
[163] The Rules state: "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" – see Annex B under '"Basis of the rules."
[164] *Abbasi,* para. 90 where the Court of appeal referred to the statements thus: "In relation to informal representations, the 1999 British Year Book of International Law records two further Ministerial statements of policy. The first refers to a "review of our policy" on making such representations about convictions and sentencing of British prisoners abroad."
[165] *Abbasi*, para. 91, where the Court of Appeal said: "This review was further explained in a Parliamentary Answer on 16th December 1999 by Baroness Scotland."
[166] *Abbas,i* para. 89.

(2) and (3) also contain a more flexible approach, and provide that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury, provided certain conditions are met, namely:

> 2. A State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law. 3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

- Dual nationality. Another example of the UK's *narrower* approach concerns dual nationality. Draft Article 7 adopts the "predominant State" approach in respect of multiple/dual nationals, whereby only a State that is predominant at the time of injury and claim can make a claim against a second state of nationality. The UK position on the other hand is expressed in Rule III as follows:

> 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.

- Exhaustion of local remedies. The Rules and Comment show that local remedies need not be exhausted where: i) there aren't any remedies available (Rule VII); (ii) a local appeal would be clearly ineffective (Comment); (iii) there is no local justice to exhaust (Comment); and that (iv) there has been prejudice or obstruction amounting to a denial of justice (Rule VIII).

However, with respect to exhausting local remedies, there are substantial differences with the five exceptions listed in Draft Article 15.[167] The ILC's "futility" or "ineffectiveness" approach is wider than the principle contained in the Comment's wording, which states "if it is *clearly established* that in the circumstances of the case an appeal to a higher municipal tribunal would have had *no effect.*" [emphasis added]. Furthermore, the issue of undue delay is not dealt with as specifically, although "obstruction" in Rule VIII could doubtless lead to "undue delay." On the contrary, the reference in Rule IX to delay, refers to HMG not taking 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.

At both the international law level and at the UK domestic law level the principle is that the State of nationality (the UK) has discretion as to whether or not to take up a national's claim. This discretion apparently arises even in the case of an alleged breach of a *jus cogens* norm, such as the prohibition against torture, just as in the case of any other international wrong allegedly committed against a UK national by the other State. What Rule IX indicates is that the UK takes into account the time between the occurrence of the alleged injury and when it is 'presented' to the UK Government when

[167] Draft Article 15: "Local remedies do not need to be exhausted where: (*a*) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible; *(c)* There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; *(d)* The injured person is manifestly precluded from pursuing local remedies; or *(e)* The State alleged to be responsible has waived the requirement that local remedies be exhausted."

deciding whether or not to exercise its discretion in favour of the national. It has also been noted that the UK regards the Rules as an expression of customary international law, and yet this element of the 'discretion principle' is *not* part of customary international law, at least not insofar as the ILC Draft Rules are concerned.

- Where it is unreasonable to expect compliance, waivers and special circumstances.

The UK Rules do not cover these international law principles as drawn by the ILC.

In summary, on the question of the exhaustion of local remedies, the Rules – without adequate explanation - appear to be *considerably narrower and stricter* than the principles laid down in the Draft Articles, and thus make it even more difficult for a UK national to persuade the Government to espouse a claim than might otherwise be so.

3.3. Diplomatic protection: non-existent UK practice in torture cases

From the detailed examination above it is clear that if the FCO wishes to exercise its discretion to espouse a UK national's claim in a torture case it can do so. However, in recent years and through a series of Parliamentary Questions (PQs) and Freedom of Information Act (FOIA) requests that REDRESS has made, it is equally clear that it has never done so.

3.3.1. No espousal of cases in spite of numerous claims made by nationals

In 2008 Parliamentary Questions (PQs) were first put to the Secretary of State for Foreign and Commonwealth Affairs, seeking information on the number of espousal requests made in torture cases and the number espoused since 8 December 1988 being the date when the UK ratified UNCAT.[168] From the reply it emerged: [169]

- Records were not collated prior to April 2005;
- From 1 April 2005 statistics were collated in cases where the British national involved gave permission for concerns to be raised with the detaining authorities over allegations of mistreatment;
- The figures were: April to December 2005: 39 allegations; January to December 2006: 69 allegations; January to December 2007: 75 allegations;
- Collated data are not broken down into specific details of the alleged mistreatment, nor is there collated data on how many British nationals asked the Government to formally espouse claims for torture;
- Data is not collated centrally on claims formally espoused for torture, and no such legal claims were espoused in recent years;

[168] Hansard 17 July 2008, columns 680W-681W, available at http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080717/text/80717w0038.htm. The precise formulation was as follows: "How many British nationals have asked the Government to espouse their claims for damages following allegations of torture by officials or agents of foreign governments, or have requested the Government to intervene on their behalf in these matters, since 8 December 1988; How many claims by British citizens of torture abroad have been espoused by the Government since December 1988; and what the criteria are for determining whether to espouse such a claim."

[169] *Ibid.* The answer began: "The UK is opposed to torture and is one of the most active countries in the world in the fight to eradicate it. We provide consular assistance to British nationals detained abroad, which includes taking an interest in their welfare. We take allegations of mistreatment—including torture—very seriously and, with the permission of the individual concerned, can take up such allegations with the relevant authorities in the host state." It was also said that to collate this information "would therefore incur a disproportionate cost."

- Any request to formally espouse a legal claim of torture would be considered on a case by case basis.

These revelations that from April 2005 to December 2007 183 allegations of mistreatment had been raised, but there was no collated record of the number of requests for espousal, led to further PQs asking what steps the UK takes towards foreign governments alleged to have severely mistreated British citizens, including through torture.[170] The reply was that the Government response was "determined by the circumstances of the case."[171] Asked about compensation paid in torture cases[172] it emerged that the Government was "not aware of any compensation received".[173] In practice, therefore, it is clear that the FCO does not treat espousal with any kind of priority, certainly as far as the tracking of data in torture cases is concerned, and/or in monitoring the exercise of diplomatic protection.

REDRESS attempted, through a Freedom of Information Act (FOIA) Request later in 2008,[174] to obtain more precise details including how many UK nationals have asked the UK to espouse their claims for torture since 8 December 1988 and the factors relevant to the Government's decision to espouse, without success.[175] Further PQs were also asked in 2009 concerning the estimated costs of centrally collating statistics relating to the allegations of ill treatment or torture made by British nationals – the Government replied that it had no estimate as it would require searching through thousands of files on individual cases.[176] Next, the Secretary of State for Foreign and Commonwealth Affairs was asked:

> [W]hat factors his Department takes into account when making decisions on requests formally to espouse a legal claim of torture. [177]

The reply was as follows:

> Where the Government consider that another Government is responsible under international law for an injury to a UK national, it may in certain circumstances take over and formally espouse a claim against that Government. Before that stage is reached the claimants should have made all possible effort to secure settlement of the claim through local or other legal remedies, if such remedies exist. Any individual request would be

[170] Hansard 22 July 2008,column 1118W, available at http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080722/text/80722w0029.htm
[171] *Ibid*.
[172] *Ibid*. The PQ was: "[F]rom which foreign governments the Government has received compensation following allegations of torture of British citizens since 8 December 1988; how much was paid in these cases; and how long the process took in each case."
[173] *Ibid.* It also said:" The Foreign and Commonwealth Office does not keep records of payments centrally. Providing a more detailed response would incur a disproportionate cost."
[174] The questions put to the FCO on 29 August 2008 were: "Q1: How many British nationals have asked the Government to espouse their claims for damages following allegations of torture by officials or agents of foreign governments, or have requested the Government to intervene on their behalf in these matters, since 8th December 1988? Q2A: How many claims by British citizens of torture abroad have been espoused by the Government since December 1988? Q2B: What factors are relevant to the Government's decision whether to espouse such a claim? Q3A: From which foreign governments has the Government received compensation following allegations of torture of British citizens since 8th December 1988? Q3B: How much was paid in these cases? Q3C: How long did the process take in each case?"
[175] The reply, received on 9 September 2008, was to refer REDRESS to the answers already given to the PQs above. REDRESS did not regard this as a satisfactory response and after further questions and answers, and an internal FCO review, REDRESS referred the matter to the Information Commissioner's Office (ICO) in January 2009.
[176] Hansard, 11 February 2009, column 1997W: "*Sir Malcolm Rifkind:* To ask the Secretary of State for Foreign and Commonwealth Affairs with reference to the answer of 17 July 2008, Official Report, columns 680-81W, on British nationality: torture, what estimate he has made of the costs involved in the central collation of statistics relating to the allegations of ill treatment or torture made by British nationals. *Gillian Merron*: The Foreign and Commonwealth Office (FCO) has only collected statistics, relating to the allegations of ill treatment or torture made by British nationals, since 1 April 2005. The FCO has no estimate of the costs involved in collating this information pre-April 2005, as it would require searching through thousands of files on individual cases. To provide this would incur a disproportionate cost."
[177] Hansard, 2 March 2009, column 1251W.

considered on a case by case basis. On receipt of such a request, the Government would consider what factors may be relevant at that time. [178]

This revealed nothing that was not known already.[179] After the intervention of the Information Commissioners Office in regard to REDRESS' FOIA request,[180] REDRESS met with the FCO[181] and was told:

- Case notes on the FCO computer system cannot be easily searched for information on mistreatment and espousal - it would require going through individual case files;
- Overseas posts have sent figures on the number of detainees and number of times FCO raised concerns about mistreatment since 2005 (183 cases), but no figures on espousal are available;

Also anecdotally, it was thought the FCO had not espoused any torture claims since 2005:

- Before 2005, no centralised records were kept;
- It might be possible to search by a name but no figures were available;
- There was no clear criteria as the official had not seen many cases;
- Exhaustion of domestic remedies and then on a case-by-case basis was as detailed an answer as possible;
- REDRESS might limit its request for more information to within these 183 cases, but each case might have hundreds of case notes; anecdotally, it was thought there had been one request for espousal that was not taken up.

Accordingly, and on the basis of the last point, REDRESS sought further information from the FCO[182] who replied as follows: [183]

- The FCO does not hold centrally the data relating to the number of British nationals requesting espousal or the number of cases espoused;
- Databases are not searchable in a way that allows extraction of data on the number of times the UK has been asked to espouse a claim of torture since 2005;
- Anecdotal memory is that there may have been one espousal request since 2005;
- To the best of recollection, since 2005 no claims of torture have been espoused;
- Overall figures for the number of cases where the UK raised concerns over mistreatment are recorded but not crossed referenced to specific cases;

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[178] *Ibid*.

[179] A final 2009 PQ concerned whether the FCO considered collating its records prior to April 2005 as well as breaking down data into specific details of mistreatment, but this was rejected on the basis of costs as well not adding meaningful value: see Hansard 9 March 2009, column 53W:"*Sir Malcolm Rifkind:* To ask the Secretary of State for Foreign and Commonwealth Affairs with reference to the answer of 17 July 2008, Official Report, columns 682-23W, on British nationality: torture, what consideration his Department has given to breaking down collated data into specific details of alleged mistreatment; and what consideration his Department has given to collating records prior to April 2005.*Gillian Merron:* The Foreign and Commonwealth Office have considered keeping statistics for different types of mistreatment. However in view of the wide range of allegations and the difficulties in classifying individual incidents it was concluded that this exercise would not add meaningful value to the records already held. Given that no records were collated prior to 1 April 2005 examining the large number of individual case files to collate records would incur a disproportionate cost."

[180] REDRESS engaged in correspondence with the ICO about the scope of the Commissioner's investigation. The ICO published its Decision Notice on 12 January 2010, the essence of which was that the FCO had not offered REDRESS reasonable advice; the FCO was therefore required to give assistance about what it could provide within the costs limit in the case.

[181] On 17 February 2010.

[182] On 22 April 2010. REDRESS asked the following: how many British nationals have requested the British government to espouse a claim of torture since 2005 to the best of your recollection; how many claims of torture has the British government espoused since 2005 to the best of your recollection; how many of these 183 cases where allegations were raised involved requests by British Nationals to the British Government to espouse a claim of torture. In how many of these 183 cases where allegations were raised did the British Government espouse a claim of torture?

[183] 21 May 2010.

- Countries to which these refer can be identified, but the only way to extract case specific information would be to examine the case files for all prisoner cases in each country, which can run to hundreds and can take matters beyond the cost limits;
- If asked how many times the FCO were asked to espouse a torture claim in a particular country in a particular year – depending on the overall number of prisoner cases in that country in that year – it may be able to search all these files, but there was no guarantee that a search would yield any useful information.

REDRESS thus asked for details of the states to which the 183 cases and any further cases related[184] and the FCO[185] supplied spreadsheets of the number of detained British nationals for whom it has raised allegations of mistreatment for the calendar years 2005, 2006 and 2007.[186] From 2005 to March 2010 there were 295 cases where concerns of mistreatment arose which the FCO recorded in specific states, plus another 13 cases where details of the states are not held, making 308 cases altogether.[187] Details showing the 295 cases broken down by state of detention are available in Annex C.

3.3.2. Diplomatic protection: need for UK Government to make positive changes

A considerable number of allegations are made each year, with an average of more than 50 for each of the six years, or about four a month, in 67 different states altogether[188] REDRESS' attempts to understand how the UK is using diplomatic protection in cases of torture or other cases of serious mistreatment abroad, has uncovered serious concerns. These concerns are not only the frequency with which British nationals abroad make allegations of abuse, but how they are recorded and analysed and most importantly what the UK's response is in each individual case. Diplomatic protection appears to be a form of justice-seeking available to torture survivors in theory only. There has been no formal espousal during the years under examination, and there is no indication that any claims were espoused previously either.

Furthermore, as has been shown it proved difficult to obtain useful information and what has emerged took several years to be revealed. Even though the FCO appears to be trying to keep more relevant data it is still not apparent whether any systematic effort is now being made to track cases where espousal has been requested. The FCO's policy is that it can also consider making informal diplomatic representations. These are not the same as consular assistance attempts to help those in or out of detention who have alleged abuse, although there can be overlap. However, as a form of 'informal diplomatic protection' for want of a better phrase, the FCO has not revealed data of what it has done by way of informal diplomatic representations in any of the over 300 cases for which it has some records during 2005-2010. It seems that it is difficult to access such data.[189]

The Government needs to re-visit its position in relation to both consular assistance and diplomatic protection from a human rights point of view, which is integral to its commitments to promote

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[184] On 17 June 2010 REDRESS asked: "Q1: You state that you can identify the countries to which the 183 cases relate. Please provide this information (i.e. for each year, the number of cases per country).Q2: The figure of 183 cases relates to the period April 2005 to December 2007. Please provide the equivalent statistics for January to December 2008, January to December 2009, and any statistics you can provide at this stage for the current year. In addition, please identify the countries to which these more recent cases relate (again, for each year, the number of cases per country)."

[185] On 21 May 2010.

[186] From 2008, the information was collected from posts overseas on a half-yearly basis and does not fall within the calendar year. The spreadsheet for 2008 therefore includes data on all cases recorded from April 2008 to March 2010 inclusive, totally another 112 cases.

[187] The FCO also told REDRESS: "We can confirm that in the period 1 January – 31 March 2008 we have recorded that 13 allegations were made. However, we no longer hold information about the countries in which these were made".

[188] See Annex C.

[189] The information would be contained in each individual file, not necessarily easily identified, as each detainee's file (i.e. whether or not a mistreatment concern is recorded) would have to be examined – and there are thousands of UK nationals who have been detained, arrested or imprisoned.

human rights and democracy as a matter of foreign policy. Furthermore, the relatively novel Torture Prevention Strategy[190] provides an excellent opportunity to revise and clarify UK commitments towards British nationals and residents alleging torture abroad. Diplomatic protection can be used as a double-edged tool to seek remedies and reparation for individual victims on the one hand and ensure compliance with international standards, as a part of the FCO's Torture Prevention Strategy on the other.

Important in this regard is the approach of the European Court of Human Rights (ECtHR) to remedies against violating States and to the responsibility of States to ensure the human rights of all persons subject to its jurisdiction. Its judgments are said to be "having an obvious impact on the traditional law of diplomatic protection."[191] An illustration is the application presented by Denmark against Turkey "on behalf" of a Danish national, which included both elements of diplomatic protection (infringements by a foreign State of the rights of one of its nationals) and elements more characteristic of human rights monitoring.[192] Denmark requested the ECtHR to examine both the treatment of its citizen and whether the interrogation methods on him were widespread in Turkey. The recent approach of the ICJ in the *Diallo* case[193] including such comments as "[a]lthough Guinea has brought this case in the exercise of its right of diplomatic protection, the case is in substance about the human rights of Mr. Diallo" is consistent with these developments in the ECtHR, and are welcomed. They form part of a broader trend in international human rights law that recognises the right if not responsibility of states to ensure the effective protection of human rights worldwide.

In conclusion, there is an urgent need for a re-appraisal of both consular assistance and diplomatic protection policies in torture cases and other instances of serious ill-treatment, if the human rights of British nationals abroad are to be more strongly safeguarded, which REDRESS believes they should be. This process should lead to changes in UK law, practice and policy so that when abuse does occur the survivors will have a far better prospect than they do now of obtaining the reparations to which they are entitled. In this way the UK can make a further vital contribution towards the struggle against the scourge of torture.

[190] FCO Strategy for the Prevention of Torture 2011–2015, published in October 2011, see discussion under section 2.4 *supra*.
[191] "The Implications of the European Convention on the Development of Public International Law" – Report prepared by Theodor Meron, CAHDI (2000) section 9, available at https://wcd.coe.int/ViewDoc.jsp?id=348429&Site=CM.
[192] *Ibid*. See also *Denmark v Turkey* (preliminary Objections) ECtHR (First Section), Appl. No 34382/97, decision as to admissibility of 8 June 1999.
[193] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Report, 19 June 2012 Judgment, available at http://www.icj-cij.org/docket/files/103/17044.pdf. - see *supra* p. 26-27.

4. RECOMMENDATIONS

The UK Government should:

1. Make the exercise of effective consular assistance and diplomatic protection for UK nationals at risk of, or having suffered torture abroad an integral part of its international torture prevention policy;

2. State unequivocally that the principle of effective protection and support of UK nationals is paramount and that there should be no exception to taking vigorous and clearly documented action on behalf of UK nationals who face or have suffered torture;

3. Re-visit, revise, clarify, re-evaluate and thoroughly up-date its policy **on consular assistance**, and in the process take into account, inter alia, the following:

    - The progressive development of international human rights law
    - The distinction between consular assistance, diplomatic protection and diplomatic representation (formal and informal)
    - All applicable policy statements and domestic jurisprudence
    - Developments within the European Union seeking a unified approach to consular assistance
    - The importance of the absolute prohibition against torture, and consequently the importance of consular assistance as a way of protecting British nationals and other applicable persons abroad;

4. Initiate a wide public consultation as part of the above process;

5. Ensure that the above process is aimed at achieving an accessible, clear, consistent, coherent and well-publicised policy in respect of all aspects of the exercise of consular assistance in cases of torture and other prohibited ill-treatment;

6. Consider introducing legislation governing the exercise of consular assistance in cases of torture and other prohibited ill-treatment, to enhance the rights of British nationals and other applicable persons;

7. Re-visit, revise, clarify, re-evaluate and thoroughly up-date its policy on **diplomatic protection** including the 'Rules applying to international claims' (the Rules), and in the process take into account, inter alia, the following:

    - The 2006 International Law Commission Draft Articles on Diplomatic Protection
    - The development of international human rights law since the Rules were published
    - The distinction between diplomatic protection, diplomatic representation (formal and informal) and consular assistance
    - All applicable policy statements and domestic jurisprudence
    - Developments within the European Union seeking a unified approach to diplomatic protection
    - The importance of the right to reparation and the right to a remedy for victims of torture and related international crimes, and consequently the importance of diplomatic protection as a way of achieving these rights for UK nationals and other applicable persons

8. Initiate a wide public consultation as part of the above process;

9. Ensure that the above process is aimed at achieving an accessible, clear, consistent, coherent and well-publicised policy in respect of all aspects of the exercise of diplomatic protection (espousal) in cases of torture and related international crimes;

10. Consider introducing legislation governing the exercise of diplomatic protection in cases of torture and related international crimes, or the threat thereof, to enhance the rights of British nationals and other applicable persons;

11. Ensure that the practice of exercising diplomatic protection (espousal) becomes a real and not merely a theoretical means of torture survivors to obtain justice and reparation.

ANNEX A: United Kingdom of Great Britain and Northern Ireland Internal Consular Guidelines: "Allegations of torture mistreatment guidelines"

[Discussed in Section 1.3 above; emphasis in the original]

49. An offence under UK law, torture is defined as a public official intentionally inflicting severe mental or physical pain or suffering in the performance or purported performance of his duties. The British Government is opposed to torture in all circumstances.

50. Treatment which does not amount to torture may still constitute cruel, inhuman or degrading treatment or punishment, which is prohibited under international law. For example, this could include beatings, food or drink deprivation, subjection to noise or long-term solitary or sensory confinement. Whether ill treatment is of the severity and nature to constitute cruel, inhuman or degrading treatment or punishment depends on all the circumstances of the case. Individual instances of mistreatment that might in isolation constitute CIDT could amount to torture in circumstances in which e.g. they are prolonged, or coincide with other measures. **You need to take action on any allegation that a British national has been subject to torture or mistreatment, including dual nationals, including reporting the allegation immediately to Consular Directorate in London.** Further guidance is set out below.

51. Signs that someone is being tortured or mistreated may include rashes, weight gain, weight loss, alertness, rapid or particularly slow eye movements in addition to more obvious evidence. If you are concerned that a detainee has been tortured or mistreated, but they do not raise concerns with you, try to talk to them privately, and report your suspicions to Consular Directorate in London. You should continue on subsequent visits to ask them if they are being tortured or mistreated and whether they would like us to make representations accordingly. If they make no complaint but you are still concerned ask the HRA for advice.

Reporting cases of alleged or suspected torture or mistreatment

52. **You should report to the Human Rights Adviser** in Assistance Policy and Prisoner Section in London **all cases** where allegations of torture or mistreatment are brought to your attention, either by the detainee themselves or by someone else, **copying to your Head of Mission, the Head of Consular Assistance Group, your Post's political section and your CCT desk officer.** This includes cases which you have been informed about via any sources other than the prisoner, including family members or representatives or reports from other agencies. In the case of highly classified information, you should consult the originator of the report, ensure that it is copied to the Head of Consular Assistance Group by the originating organisation, and let him/her know that the report has been sent. For the avoidance of doubt the same reporting procedures apply in the case EU or Commonwealth nationals for whom we have accepted to provide consular assistance.

53. Your report should include as much relevant information and as specific details as possible, including:

Detainee's full name, date of birth and passport number (if available); Name of alleged perpetrator; Prison/ detention facility
Reason for detention; Allegations made and date; Your observations of the alleged victim's physical/mental condition;
How the alleged incident was reported to you (i.e. the name of the person or source if this was not the detainee);
Whether we have permission from the detainee to raise these with the authorities of the state concerned or with other people

54. As well as reporting the above, Post should take the following actions locally:

Ensure detainee is aware of any local complaints procedure and has access to local lawyer if necessary;
Ensure the detainee has access to medical treatment if necessary.

55. Please complete the prisoner mistreatment allegation proforma and send to key contacts in London (by email) **within 24 hours** of receiving the allegation. The grid should also be attached to Compass (as long as all information is unclassified). (CCT should use the information in the grid to fill in the mistreatment table.)

56. The Head of Consular Assistance Group will ensure that all allegations of torture or mistreatment are reported to the relevant Minister, usually in monthly updates, but in the most urgent and serious cases by specific submissions. The allegations are collated in CCT by the section clerk for section four. CCT should ensure that (s)he is informed when a new allegation is made.

57. Posts should also keep a record of cases where allegations of torture or mistreatment have been made, and forward this to Consular Directorate as part of the Half Yearly Detainee Return. This record should include the individual's name, the COMPASS reference number, a brief description of the allegation including relevant dates, and confirmation whether action has been taken or not. A standard spreadsheet is available. As the full details of the case will be on Compass, there is no need to provide more information. When forwarding this information to Consular Directorate as part of the Half Yearly

Detainee Return, Posts should only send the part of the spreadsheet containing new cases since the previous Half Yearly Detainee Return. This may mean that some individuals re-occur on multiple lines of the spreadsheet if they make new allegations of torture or mistreatment.

Action for consular officers

58. The main action we can take in response to claims of torture or mistreatment is to bring the case to the attention of the relevant authority, with the individual's consent, demanding an end to the torture or mistreatment, and that the incident is investigated and the perpetrators brought to justice. Only the local or national authorities are in a position to take this action: it is not the role of consular officials to investigate allegations.

59. If a British national including dual nationals, or someone on their behalf, makes an allegation that they have been tortured or mistreated, a consular officer should visit them as soon as possible. If, on request, a visit by a consular officer is denied by the local authorities, the consular officer should inform London as soon as possible. Post and London can discuss options for raising with the authorities so that Post can push for consular access and secure a visit as soon as possible. They should get as much detail as possible about the allegations, including dates, times, places, the details of the torture or mistreatment and the names of any officials involved. The British national should be asked if they would like us to take the allegations up with the relevant authorities. You should make clear simply that we are prepared to raise concerns vigorously, and **not** set false expectations as to what this might achieve. Without direct consent of the detained British national, you should take no case specific action with the authorities. Prisoners may choose not to have allegations of torture or mistreatment raised with the authorities, as they may believe that it could exacerbate the situation. Posts should still report these allegations to London.

60. If a British national asks you to take up their complaints, you should consult the Human Rights Adviser urgently on next steps, which will generally be to make representations to the relevant authorities. There will be a strong presumption that allegations of torture or mistreatment should be raised vigorously with the appropriate authorities, with the consent of the individual concerned. Ministerial authority is needed to adopt a different approach.

61. We can raise allegations with the authorities in a number of ways. One option is to do so formally through a Note Verbale. The Note should not imply that we are offering any view as to the substance of the allegations but should express concern at the allegations and request that a prompt, impartial investigation be undertaken. The Note will also normally request that HMG is informed of the result of any investigation undertaken. The Human Rights Adviser will be able to let you have an example of a Note Verbale to bring a case to the attention of the local authorities.

62. You should always follow up the request for an investigation to ascertain the outcome. You should raise our concerns if it appears that the process was not comprehensive or impartial. You should ask the Human Rights Adviser for guidance on what further action to take, who will provide advice in consultation with Post, Consular Directorate and the relevant geographical department. This can include making representations after the detainee has been released, if he is unwilling for concerns to be raised whilst he is detained. If you are asked by a former detainee to raise concerns over mistreatment or torture, either in your country, or in another country, you should seek advice from the Human Rights Adviser. This applies equally if the person has returned to the UK.

63. If the British national does not want us to raise the allegation of torture or mistreatment with the authorities, you should nevertheless take action as follows. You should record the allegation in as much detail as possible as set out above, advise the British national that we can take the allegations up in the future with the authorities concerned, and pass details to the Human Rights Adviser. Where the consular officer has concerns that a British national may be being tortured or mistreated while in detention, the consular officer should continue to ask them on subsequent visits whether they wish us to raise any concerns.

64. Where a British national does not want allegations of torture or mistreatment raised with the country concerned, but there are general concerns over the treatment of prisoners in that country, or you are aware of similar complaints e.g. from EU partners, you should seek the Human Rights Adviser's advice on whether it would be appropriate (and safe for the British national concerned) for us to make general representations, either alone, or via others such as the EU Presidency. If it is agreed such general representations would be useful and safe, the British national should be asked whether they agree to such action before any lobbying is undertaken. These representations may in some cases form part of the wider political dialogue with your host Government.

65. Notwithstanding the FCO may decide to make case specific representations without express consent where there are exceptional circumstances that justify doing so. An example of this may be where the individual is mentally incapable of giving informed consent. Such cases should be determined on a case by case basis, taking the best interests of the individual into account. Again, the Human Rights Adviser should be consulted in all such cases.

ANNEX B:

United Kingdom of Great Britain and Northern Ireland Rules applying to international claims

1. Basis of the rules

The UK's rules and the comments have appeared in a number of published works, e.g. the International and Comparative Law Quarterly, Volume 37 (1988) 1006-8. These rules are based on general principles of customary 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.

The rules do not deal with the more complex question of what conduct on the part of a State amounts to a breach of international law for which it is responsible. This is covered more fully in Chapter 4.

2. Rules regarding nationality of claimant

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:

(a) All British nationals who fall into one of the following categories under the British Nationality Act 1981 (or one of the corresponding categories under earlier legislation):

(i) British citizens
(ii) British Dependent Territories citizens
(iii) British Nationals (Overseas)
(iv) British Overseas citizens
(v) British subjects under Part IV of the Act
(vi) British protected persons

(b) Companies incorporated under the law of the United Kingdom or of 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/her 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.

3. 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.

4. 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/her national status.

ANNEX C: UK Nationals in Foreign Prisons: Number of Cases where Concerns of Mistreatment were raised and recorded by the Foreign and Commonwealth Office

Country name	2005	2006	2007	April 2008-March 2010	TOTAL
Angola				1	
Australia	2	1		5	
Austria			2		
Bahrain		1			
Bangladesh				1	
Botswana	1				
Brazil	1	5	2	4	
British Virgin Islands		1			
Canada	1	3	2	1	
China		2		6	
Congo (Dem Repub of)				1	
Costa Rica				1	
Cyprus				12	
Czech Republic	1		1		
Denmark	1				
Ecuador		1	1		
Egypt	3			3	
France	2		1		
Germany			3		
Ghana			2		
Gran Cayman		1			
Hungary		1		1	
India	1	2	2	2	
Iraq	1	2			
Israel	1	1			
Italy		1		1	
Japan	1		18	4	
Kazakhstan		1			
Kenya				2	
Korea (South)			1		
Kuwait		4	2	1	
Laos	1	2			
Latvia			1		
Lebanon				1	
Lithuania			1		
Malaysia				1	
Malta		2			
Mauritius				1	
Mexico		2			

Mongolia	1				
Namibia				1	
Nepal			1	1	
Nigeria				1	
Pakistan	1		2	9	
Peru		3	1	9	
Poland				2	
Portugal		2			
Qatar			1		
Romania	1		3	1	
Saudi Arabia		1		2	
Serbia & Montenegro		1		1	
Sierra Leone				1	
Singapore			2		
Slovakia		1			
South Africa	2	1	1	2	
Spain	8	7	5	16	
Syria		1			
Taiwan			1	1	
Thailand		4	1	2	
Trinidad & Tobago		1	1	1	
Tunisia				1	
Turkey		1			
UAE		5	1	3	
USA	9	6	14	8	
Venezuela		2			
Zimbabwe			2	1	
TOTAL	**39**	**69**	**75**	**112**	**295**