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# Consular Assistance and Trial Attendance:

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A Comparative Examination of the American, Australian,  
British, Dutch and German Ministries of Foreign Affairs

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of Foreign Affairs

**Katerina Mantouvalou**

The research described in this report was conducted by  
Fair Trials International and funded by the **Nuffield Foundation**.



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# Foreword

Our work at Fair Trials International, defending the rights of people facing charges abroad, leaves us in no doubt that consular assistance is a vital public service. For those arrested outside their own country, detained hundreds of miles from home, unable to speak the local language, ignorant of the local legal system and with no idea of who to turn to for help, consular assistance provides a lifeline.

It is, however, a public service which has been subject to almost no detailed examination whether by academic institutions, bodies like FTI or even Ministries of Foreign Affairs themselves. With the generous support of the Nuffield Foundation, the constructive engagement of five participating Ministries and the skill and dedication of FTI's Researcher (Dr Katerina Mantouvalou), this FTI project has begun the process of filling these gaps in knowledge and understanding.

It is not possible in a short Foreword to do justice to the wealth of information and analysis in this report, but three things stand out. First, the amount countries can learn from each other about how to deal with the challenges in defining and communicating the scope of consular assistance and delivering effective assistance in often difficult contexts and with limited resources. Second, the need for Ministries to be more systematic about collecting and analysing data on the assistance they provide and, where possible, its impact. Finally, the need to ensure consular officials on the ground are given the training they need to understand and perform their important role.

This research is only a starting point, examining in detail just one aspect of the consular assistance provided to defendants - trial attendance. I hope Ministries of Foreign Affairs will use this study as a tool to review their existing policies and practices on trial attendance and that it will also provide a launch pad for the examination of other equally important aspects of consular assistance.

## **Jago Russell**

Chief Executive, Fair Trials International

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# Contents

Executive summary	vi
Acknowledgements	ix
Table of charts	x
Table of tables	xi
<b>Chapter 1: Introduction</b>	<b>1</b>
<b>Chapter 2: Methodology</b>	<b>3</b>
2.1 Main methodological components of the project	3
2.2 Official policy methodology	3
2.3 Consulate survey methodology	4
2.4 Case study methodology	5
<b>Chapter 3: Comparing the policies of the five Ministries</b>	<b>7</b>
3.1 The Australian Department of Foreign Affairs and Trade	8
3.1.1 Consular assistance to Australian defendants overseas: an overview	8
3.1.2 Trial attendance	9
3.2 The British Foreign and Commonwealth Office	11
3.2.1 Consular assistance to British defendants overseas: an overview	11
3.2.2 Trial attendance	13
3.3 The Dutch Ministry of Foreign Affairs	15
3.3.1 Consular assistance to Dutch defendants overseas: an overview	15
3.3.2 Trial attendance	17
3.4 The German Federal Foreign Office	18
3.4.1 Consular assistance to German defendants overseas: an overview	18
3.4.2 Trial attendance	19
3.5 The US Department of State Overseas Citizens Service	21
3.5.1 Consular assistance to American defendants overseas: an overview	21
3.5.2 Trial attendance	23
3.6 Conclusion	25
<b>Chapter 4: From policy to practice</b>	<b>27</b>
4.1 The facts on the ground	27
4.1.1 The prevalence of trial attendance	27
4.2 The decision-making process	30
4.2.1 Overarching factors affecting trial attendance	30
4.2.2 Case by case factors affecting trial attendance	37
4.3 The role of consular officials at a trial	39

4.4	Reporting and management of information	40
	4.4.1 The practices of reporting	40
	4.4.2 The uses of reporting	42
4.5.	Training and guidance	43
	4.5.1 The provision of guidelines and support	43
4.6	Conclusion	46
<b>Chapter 5: The case of Istanbul</b>		<b>47</b>
5.1	Facts relating to detainees and trial attendance	47
5.2	Local policy of the consulates	50
5.3	Causes of concern in each consulate's region of responsibility	51
	5.3.1 The consulates' point of view	52
	5.3.2 The defence lawyers' point of view	53
5.4	The role of consular officials at trial	56
5.5	The perceived advantages and disadvantages of trial attendance	58
5.6	Reporting and management of information	61
5.7	Training and guidance	61
5.8	Conclusion	62
<b>Chapter 6: Conclusions and recommendations</b>		<b>63</b>
<b>Annex</b>		<b>67</b>
	Literature review	67
<b>Appendices</b>		<b>73</b>
	Appendix 1: Comparative tables of the policies of the five Ministries	73
	Appendix 2: Ministry survey questionnaire	80
	Appendix 3: Consulate survey questionnaire	96
<b>References</b>		<b>109</b>

# Executive summary

## Background

Over the last seventeen years Fair Trials International has helped hundreds of people facing criminal charges outside their own country to defend their right to fair trial. We have long recognised the important role of consular assistance in defending our clients' interests but were struck by the absence of in-depth analysis of the forms of consular assistance provided to those facing trial overseas and the specific subject of consular attendance at trial. With funding from the Nuffield Foundation, we have been able to begin the process of filling this gap in knowledge and understanding of this important public service.

## Purpose and scope

The main purpose of the project was to compare the policies and practices of the American, Australian, British, Dutch and German Ministries of Foreign Affairs on consular assistance provided to those facing trial overseas and the subject of consular attendance at trial. A secondary objective was to examine the advantages and disadvantages of trial attendance, including the relationship between trial attendance and the observance of fair trial rights. The study of policies and practices provided us with a wealth of factual information, which is analysed in the full report. On the secondary objective we were not able to collect empirical data because they were not available in any of the participating Ministries. Therefore, we relied on the perceptions of Ministry and consular officials and defence lawyers. Nevertheless, clear indications emerged of the potential benefits and costs of consular attendance at trial.

To collect material, we conducted in-depth interviews with the five Ministries of Foreign Affairs and identified the main elements of their policies on consular assistance provided to those facing trial overseas and consular attendance at trial. 38 consular posts of four Ministries were then surveyed in order to assess how the different policies translated into practice (Australia was not able to participate in the survey as it did not have the resources to do so). Finally, consular officials of the four Ministries and defence lawyers were interviewed in Istanbul, allowing us to compare the policies and practices of the four Ministries in a single country.

## Key findings

*Consular assistance and trial attendance:* Consular assistance is a legally protected right only in Germany; in other participating countries it is a government policy. All of the participating Ministries provide various forms of consular assistance to their nationals facing criminal charges abroad including prison visits, lists of defence lawyers and interpreters, and trial attendance.

*General approach:* The five participating Ministries of Foreign Affairs adopted a range of approaches to consular attendance at trial. Australia's policy is to attend trials where possible and/or where they are logistically able to, within constraints including staff resources, the requests of the client, the location and the severity of the case. The United Kingdom, the Netherlands and Germany, by contrast, decide on a case by case basis and attend the trials of their nationals only exceptionally. The United States has a policy of compulsory trial attendance

in certain prescribed circumstances, including where there are indications of discrimination. Despite this, trial attendance by the US consulates remained exceptional and US consulates did not report higher levels of trial attendance in practice than British, Dutch or German consulates.

*Comparing policy and practice:* The study enabled us to compare the policies and practices of Ministries of Foreign Affairs and to analyse how the policies of participating countries translate into practice. In particular we found differences in the following four areas:

- ▶ **Deciding whether to attend trial:** The vulnerability of the defendant and severity of charges or sentence were cited as key considerations by Ministries of Foreign Affairs when deciding whether to attend trials. The consular survey demonstrated that, as well as the vulnerability of the defendant, in practice consular officials consider concerns about an individual trial and the level of political interest in a case to be significant factors in deciding whether to attend an individual trial (p.38).
- ▶ **Role of consular officials at trial:** All participating Ministries considered the role of consular officials at trial to include ensuring the welfare of the defendant and demonstrating the government's interest in the proceedings. Australia, the United States and Germany also considered their officials to have an active role as 'observers' to ensure compliance with internationally recognised fair trial rights. By contrast, the United Kingdom maintained a distinction between 'observing/monitoring' and passive 'attendance', stating that officials do not attend to assess the fairness of proceedings. The consulate survey and interviews in Istanbul suggested that, in practice, there is no clear distinction between the role of ensuring welfare and assessing the fairness of proceedings.
- ▶ **Data collection and analysis:** Ministries do not collect data centrally on the numbers of trials held and attended. At consulate level there was greater knowledge of the small number of trials attended by consular officials but little knowledge of the total number of trials held. Even though consular officials usually report to the Ministry on the trials attended, these reports do not have a standardised format and are not systematically analysed. The only exception to this is Australia which has developed a standardised reporting format. However, the collated data is not systematically analysed to identify patterns which could help design future policy in this area.
- ▶ **Training:** Ministries explained that consular officials receive training before or after taking a post, including on consular assistance and trial attendance. The consular survey and interviews with consulates in Istanbul, however, revealed that: just under half of the consular posts were not aware of their Ministry's official policy on trial attendance (p. 31); a sizeable minority of consular officials believed there is insufficient training for consular officials and suggested more region-specific training (p. 44); training was not generally provided on fair trial rights in any of the Ministries, including Australia where trial attendance is the norm, even though, in practice, the role of consular officials requires this knowledge.

*Advantages and disadvantages of trial attendance:* The most important perceived benefit of trial attendance was ensuring defendants' emotional welfare, recognised by almost all of the 38 consulates surveyed. Ensuring the physical welfare of defendants was also considered to be an important benefit of trial attendance. A link between trial attendance and the fairness of proceedings was less clear although a few of the consulates surveyed considered trial attendance could influence the conduct of the defence lawyer or the fairness of the overall trial (p.33). German and US consulates were most likely to respond that there is a link between trial attendance and the observance of fair trial rights. The defence lawyers interviewed in Istanbul also felt trial attendance could ensure proceedings were not delayed and make the judiciary more likely to comply with domestic and international fair trial standards. The main disadvantage of consular attendance at trial was the fact that it was resource-intensive and time-consuming. Other potential disadvantages identified by a small number of the consulates surveyed included a negative impact on diplomatic relations and, in some cases, even on the trial process itself.

## Key recommendations

*List of defence lawyers:* FTI's review of the lists that local consulates provide to defendants in Istanbul highlighted that they include only a very small number of criminal lawyers. We recommend that lists of lawyers be reviewed annually and that consulates exchange information on lawyers with non-governmental organisations.

*Trial attendance:* The US experience demonstrates that a policy of mandatory attendance in certain circumstances does not necessarily put extra pressure on resources. Clearly, the extent of pressure on resource will depend on how many situations require mandatory trial attendance. We recommend that other participating Ministries review their current policy in light of this. There may be other valid reasons for a case by case approach but pressure on resources may not be a relevant factor. We further recommend that participating Ministries review their official policy in light of the following: the perceived advantages and disadvantages of consular attendance; the factors which are, in practice, taken into consideration by consular officials when deciding whether to attend trials; the challenges consular officials face when attending trials; and the role which, in practice, consular officials play when attending trials, especially in relation to fair trial rights.

*Data collection and analysis:* We recommend the more systematic collection of data both on trials attended and not attended. Data could be divided into information about the defendant and information about the trial. The former should include details about the age, gender and nature of charges, and the latter should include details about the presence of a defence lawyer and interpreter (if necessary), translation of key documents, length of trial, verdict and sentence. Trial attendance reports should also be standardised. In addition to the above, consular officials should report on the perceived impact their presence had on the emotional welfare of defendants, judges' behaviour and reasoning, trial procedure/length, and quality of interpretation. Data on trials held and reports on trials attended should be systematically analysed to detect patterns. A one year trial period is recommended to all Ministries to identify the costs and benefits of their practices.

*Training:* We recommend that training is broadened to address the actual challenges consular officials face and the role they perform when attending trials, in particular with respect to fair trial rights. Consular officials also need to be better informed on the policy of their Ministries. Regional conferences (currently organised by the British and Dutch Ministries) and training on human rights reporting could prove useful.

*Further research:* This project identified a number of areas in which further research would be valuable, including:

- ▶ Research to identify the costs and benefits of the German model of creating a 'legal' right to consular assistance (the only country participating in this study in which consular assistance is a legally protected right).
- ▶ This project focused on consular attendance at trial but further in-depth research would be valuable into different aspects of consular assistance, including to identify examples of good practice. For instance, the UK and the US have partnerships with external organisations which assist defendants with the legal or welfare aspects of the trial and any subsequent sentence.
- ▶ Finally, we propose that in two years time research is undertaken to examine whether there have been any changes in data collection and analysis and in the training provided by participating Ministries of Foreign Affairs.

# Acknowledgements

The author would like to acknowledge the support and critical contributions of all the experts who participated at the interviews in the American, Australian, British, Dutch and German Ministries of Foreign Affairs. Special thanks are also owed to consular officials from the five Ministries who responded to the survey, and to consular members of staff and defence lawyers who participated in the case study in Istanbul.

We would also like to thank the members of the Advisory Group for their constructive approach and useful feedback:

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Finally, we would like to thank the Nuffield Foundation for its generous financial support for this project.

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# Table of charts

Chart 1	Reasons for recent trial attendance	29
Chart 2	Role of support in the context of overall consulate workload	30
Chart 3	Existence of a policy on trial attendance within the consulate	31
Chart 4	Causes of concern with local trial procedures	32
Chart 5	Benefits of trial attendance	33
Chart 6	Importance of trial attendance to the defendant	34
Chart 7	Drawbacks of trial attendance	35
Chart 8	Factors affecting individual trial attendance	38
Chart 9	Remit of consular attendees	39
Chart 10	Parts of trials typically attended	40
Chart 11	Content of training and support	43
Chart 12	Form of support received	44
Chart 13	Sufficiency of training received	44
Chart 14	Confidence when attending trials	45
Chart 15	Desired sources of support for consular officials	45

# Table of tables

Table 1	Numbers of trials held and cases where support provided – range across consulates in the past twelve months	28
Table 2	Reasons for trial attendance over the previous twelve months	29
Table 3	Articulation of policies by Ministries and consulates	32
Table 4	Perceived benefits of trial attendance for defendants	34
Table 5	Examples of positive and negative impact of trial attendance	36
Table 6	Process for deciding whether to attend trial in a typical case	39
Table 7	Reporting on trial attendance	41
Table 8	How information contained in the reports is used	42
Table 9	Is information from trials of nationals in the region collected in any database or other form of management system?	42
Table 10	List of defence lawyers practising criminal law	48
Table 11	Cases where trials attended during previous twelve months	49
Table 12	Trials held where consular support provided – range across Istanbul consulates in the past twelve months	50
Table 13	Policies on trial attendance	51
Table 14	Consular assistance and trial attendance: policy by Ministry	73
Table 15	Decision-making process on trial attendance: principles, criteria and structure	75
Table 16	Reporting on trial attendance	76
Table 17	Training and other forms of support for consular officials	78



# Introduction

Fair Trials International works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own. In the last few years the organisation has received an increasing number of requests from non-national defendants for assistance in having consular officials attending their trials. This request is often made on the assumption that non-national defendants receive a fairer trial if there is a representative from the consulate of his/her origin attending the trial. With funding from the Nuffield Foundation FTI has conducted research on requests for consular assistance. This project examines, first, the policies and practices of different Ministries on consular assistance and trial attendance; and, second, what effect consular trial attendance has on the fair trial rights of foreign defendants.

The 1963 Vienna Convention on Consular Relations (the Convention or VCCR) forms the legal basis for providing consular assistance to detainees. The Convention requires host states to inform detained persons, without delay, of their right to contact the consular authorities of their home state. These contact rights include communication with and access to a local consular official, delivery of written communications and visits.

More recently, decisions of international courts have provided a further element to the interpretation of the VCCR provisions: not only do host countries have a duty to notify non-nationals of their right to contact the consular authorities of their home state; individuals also have a right to receive consular assistance from the state of their origin if they wish. In an advisory opinion provided by the Inter-American Court of Human Rights to the United Mexican States on October 1, 1999, the Court held that article 36 of the VCCR confers rights upon detained foreign nationals including the right to information on consular assistance. The Court also held that these rights place corresponding obligations on the receiving State.<sup>1</sup> Similarly, the International Court of Justice (ICJ), in the cases of *LaGrand* (Germany v United States of America)<sup>2</sup> and *Avena and Other Mexican Nationals* (Mexico v. United States of America)<sup>3</sup> held that article 36 confers on individuals the right to contact their consulate and receive consular assistance:

*[B]y not informing [the arrested persons] without delay following their arrest of their rights under article 36, paragraph 1(b) and paragraph (3)... the United States breached its obligations [to render assistance] to Federal Republic of Germany and to the LaGrand brothers.'*

Even though international law provides general guidelines on consular assistance, it does not give detailed instructions on the forms of assistance that should be offered to detainees. And domestic policy on this issue varies. States provide different forms of assistance to their national defendants and trial attendance is only one (and not the most common) form of consular assistance. Consular attendance at trials predates the VCCR; in 1921 the Italian Consul to the United States attended the trial of Sacco and Vanzetti, two Italian citizens residing in the United States.<sup>4</sup> However, limited research has been conducted on states attending the trials of their nationals, and the potential advantages and disadvantages of this form of assistance.

1 Gar Pardy, 'Consular and Diplomatic Protection in an Age of Terrorism: Filling the Gaps', in *The Human Rights of Antiterrorism*, ed. by Craig Forcese and Nicole LaViolette (Toronto: Irwin Law, 2008).

2 *LaGrand* (Germany v United States of America) [2001] I.C.J. Rep. 466

3 *Avena and Other Mexican Nationals* (Mexico v. United States of America) [2004] I.C.J. Rep. 12.

4 David Weissbrodt, 'International Trial Observers', *Stanford Journal of International Law*, 18 (1982), 27-121 (p. 28).

## 2 Consular Assistance and Trial Attendance

This project seeks to fill this gap and explore state policies on consular assistance and trial attendance. The main research questions are as follows:

- ▶ What are the main forms of consular assistance provided to non-national defendants?
- ▶ Who is eligible to receive consular assistance from the participating Ministries?
- ▶ What is the legal basis for providing consular assistance?
- ▶ What is the role of consular officials at trial?
- ▶ Do consular officials report on the number of trials attended? If so, is there a standardised reporting format?
- ▶ What training do consular officials receive on consular assistance and trial attendance?
- ▶ What are the potential advantages and disadvantages of consular attendance at trial?

To respond to these questions FTI secured the participation of five Ministries of Foreign Affairs in the study: the Australian Department of Foreign Affairs and Trade, the British Foreign and Commonwealth Office, the Dutch Ministry of Foreign Affairs, the German Federal Foreign Office, and the US Department of State Overseas Citizens Service, and reviewed their policies in this area. To collect data for the study we used the following methodology:

- ▶ We reviewed the current literature on trial monitoring and trial attendance and their impact on judicial process and fair trial rights of non-national defendants;
- ▶ We surveyed five Ministries of Foreign Affairs and reviewed their written policies;
- ▶ We conducted in-depth interviews with officials from five Ministries of Foreign Affairs;
- ▶ We surveyed 38 consular posts from the four Ministries of Foreign Affairs remaining after Australia chose to opt out of the project at this stage; and
- ▶ We conducted in depth interviews with nine defence lawyers and consular officials from the remaining four Ministries in Istanbul.

### Structure of the report

Chapter 2 explains the methodology of the project. Chapter 3 reviews the policy of the five Ministries on consular assistance and trial attendance. Chapter 4 presents consular survey findings, and explores how the policies of the central Ministries translate into practice. Chapter 5 takes Istanbul as a test case, and examines the policies of the four Ministries in an area where we assumed that consular officials have similar concerns. Finally, Chapter 6 presents the conclusions of this study and makes recommendations in this area.

# Methodology

## 2.1 Main methodological components of the project

The project consists of the following methodological components:

- ▶ A review of current literature on trial monitoring, trial attendance and its impact on judicial process and fair trial rights of non-national defendants;
- ▶ A review of current legislation and research/academic literature on consular assistance;
- ▶ Survey of five Ministries of Foreign Affairs;
- ▶ In-depth interviews with five Ministries of Foreign Affairs;
- ▶ Survey of 38 consular posts from the four Ministries of Foreign Affairs (Australia opted out at this part of the project);
- ▶ In-depth interviews with nine defence lawyers in Istanbul; and
- ▶ In-depth interviews with consular officials from the four Ministries in Istanbul.

To ensure the quality and objectivity of the research, FTI has appointed an independent Advisory Group to provide external scrutiny and specialist advice throughout the project.<sup>5</sup>

## 2.2 Official policy methodology

Between September 2007 and February 2008 FTI secured the participation of five Ministries of Foreign Affairs (Australia, Germany, the Netherlands, the United Kingdom and the USA) in the research project, and developed a web-based survey for use with the Ministries of Foreign Affairs.

The survey asked a range of questions about Ministries' official policies in the following areas:

- ▶ The legal basis for delivering consular assistance;
- ▶ The eligibility criteria for receiving consular assistance;
- ▶ The forms of assistance provided to detainees;
- ▶ The centrally collected data on consular assistance and trial attendance;
- ▶ Cases where trials are attended by consular officials; and
- ▶ The training or support available to consular officials who attend trials.

The participating Ministries of Foreign Affairs completed the survey between February and April 2008.

Survey findings were assessed, and then FTI conducted interviews with the participating Ministries. In-depth interviews covered the same thematic areas as the survey questionnaires, and provided a better understanding of the different policies adopted by Ministries on consular assistance and trial attendance. Interviews were carried out face-to-face, with the exception of the interview with the Australian Ministry which was carried out over the telephone.

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<sup>5</sup> For details about the Advisory Group Members see Acknowledgements.

In-depth interviews were conducted between April and June 2008.

## 2.3 Consulate survey methodology

At the second stage of the project, FTI researched the experiences of consular officials regarding consular assistance and trial attendance of foreign nationals. This was a fundamental element of the project since consular officials are the ones who have direct experience of implementing the policies set by their Ministries, and it was crucial to understand how central policy is translated into practical action.

A sample was drawn up of consular posts for each Ministry, chosen by the Ministry to represent ‘a good selection of posts in countries with a relatively high number of prisoners who are nationals of the relevant consulate, and where consular staff are more likely to deal with difficult detention cases.’

*Despite being involved in the initial stages of the research project, Australia’s Department of Foreign Affairs and Trade were unable to continue to participate in the consulate survey and subsequent stages of the project, due to resource constraints.*

E-mail invitations and links to the online survey were sent out to 42 consulates – the Netherlands and UK both supplied a total of 11 consulates in order to include Istanbul consulates, key to later stages of the research.

A total of 38 consulates completed the online survey, an outstanding response rate of 90.5%. Responses received were as follows:

Ministry	Responses received
German Federal Foreign Office	8
Netherlands Ministry of Foreign Affairs	11
UK Foreign and Commonwealth Office	11
US Department of State	8
Total	38

The survey asked a range of questions about posts’ experience of:

- ▶ Making decisions about whether to attend trials;
- ▶ Attending trials;
- ▶ Reporting on attendance at trial; and
- ▶ The value and/or risks of attendance at trial.

The main fieldwork took place between 23 February and 20 March 2009, with one consulate responding later on June 23 2009.

*Data in this report is unweighted. Because of the small sample size, results have been reported as raw figures (i.e. number of consulates, rather than %s), and the data in the charts are presented on the basis of raw figures.*

## 2.4 Case study methodology

As the final stage of the project, FTI conducted a field visit in Istanbul. FTI selected Istanbul as a case study because all participating Ministries have a consulate there and, being a popular tourist destination, each consulate would be experienced at assisting their nationals there. We made the assumption that they would also have similar concerns about the treatment of foreign national defendants and this could form a basis for comparison of their policies. The aim of this visit was twofold: first, to capture the experience of consular officials on trial attendance and, second, to explore the potential advantages and disadvantages of trial attendance.

In Istanbul FTI conducted semi-structured interviews with consular officials of the four Ministries. These covered the same themes as the survey, and gave us an insight into their experiences of attending trials. The main topics that were discussed are as follows:

- ▶ The local policy of the consulate on trial attendance;
- ▶ How decisions are made about whether to attend trials;
- ▶ Causes of concern in their region of responsibility;
- ▶ The role of consulate authorities in trial attendance;
- ▶ The value and/or the risks of trial attendance; and
- ▶ The training consular officers receive on trial attendance.

Consular officials' experience of trial attendance was complemented by nine interviews with defence lawyers in Istanbul. Interviews with a number of defence lawyers were included to provide a different perspective on consular trial attendance, and indicate their perceptions as to the impact of consular attendance at trial. In the interviews with defence lawyers we covered the practices of the participant Ministries and the value of consular presence in court.

To collect our sample of defence lawyers we used the lists of local defence lawyers that the four participating consulates in Istanbul provide to their citizens who are detained in Turkey.<sup>6</sup> From these lists provided by the consulates we approached individuals to take part in the research on the basis that they:

- ▶ Practise criminal law; and
- ▶ Have some experience of defending foreign nationals.

The intention was to interview lawyers and to ask them about their experience of representing nationals of the consulate whose list they appeared on. However, it soon became clear that appearing on a consulate's list was no indication of regular work defending that country's citizens. As a result interviews explored their perceptions of any consulates they had experience of, not necessarily those on whose list they appeared.

In addition, there were several firms on the list who told us they do not in fact practise criminal law. In most of these cases they were commercial lawyers. Although in some cases commercial law firms did mention that occasionally they took on criminal work for individuals (for instance where a commercial client required it), in many cases they did not.<sup>7</sup> It should be noted, though, that the lists are provided by the consulates for use by businesses as well as citizens, and so the presence of commercial lawyers is not implied as a criticism.

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6 As will be discussed more extensively in the next chapters, the participating Ministries make available a list of local defence lawyers who speak the relevant second language (e.g. German) for their citizens to use if needed. These are not presented as recommended lawyers, but merely as useful information, with attendant caveats.

7 For details see Chapter 5.

## 6 Consular Assistance and Trial Attendance

In total we were able to conduct nine interviews (and not fifteen which was our original goal). Interviews were carried out over the telephone, in English, with the exception of two interviews that were carried out face-to-face in Turkish by Eksen Research of Istanbul. The two lawyers in question were listed on the German consulate's list but only spoke Turkish and German.

Respondents were not offered a financial incentive to take part, but were promised a copy of the final report after it was published.

The survey asked a range of questions about the lawyer's experience of:

- ▶ The Turkish criminal justice system;
- ▶ Consulates' attendance at trials; and
- ▶ Any perceived impact on fair trial standards.

Fieldwork took place between 14 April and 6 June 2009.

There were enough common, consistent themes within the interviews for us to be confident that the findings are a reliable assessment of the defence lawyers' opinions, although they cannot provide a comprehensive or conclusive assessment of the policies of any individual consulate.

# Comparing the policies of the five Ministries

In this chapter we explore the policies of the five Ministries on consular assistance and trial attendance. Interview findings are presented here by country and are subdivided into general forms of assistance for non-national defendants and trial attendance.

For direct comparisons of the policies of the five Ministries, see Tables in Appendix 1.

Research findings suggest that:

- ▶ Consular assistance is a legally protected right only in Germany; in Australia, the Netherlands, the UK and the US it is a government policy.
- ▶ Participating Ministries provide similar forms of consular assistance to their nationals. These include a minimum number of prison visits, a list of lawyers and interpreters, information about the local legal system and, often, some form of financial assistance.
- ▶ Trial attendance in every case is encouraged only by Australia; the other four Ministries decide on a case by case basis, and attend trials rarely.
- ▶ Australia has signed an agreement with Canada to increase its capacity to provide consular services, including the ability to attend trials in locations where they would not otherwise have residential accreditation.
- ▶ The US is the only country which makes trial attendance mandatory in certain circumstances.
- ▶ Germany has the most decentralised system of decision-making on trial attendance; the UK and the US have the most centralised ones; final decisions on trial attendance often rest in the central Ministries.
- ▶ According to the Ministries, when consular officials attend a trial they usually do so in order to demonstrate the interest of the government in the trial and support the morale of the defendant. Consular officials make an assessment of the fairness of the trial only in the case of Australia. However, even then, the consular officer does not make a detailed legal analysis of the fairness of the trial; he/she only observes whether due process is accorded (e.g. presence of lawyer and interpreter if necessary) and is also alert to any evident 'unfairness' based on the individual officer's instincts, experience and the advice of the defendant's lawyer. In even fewer cases would they try to influence the conduct of the defence lawyer (policy followed by the German Ministry of Foreign Affairs in death penalty cases).
- ▶ Although consular officials must always report on trials attended, these reports have a standardised format only in Australia. These reports are not systematically analysed in order to identify patterns in any of the participating Ministries.
- ▶ Consular officials receive training (before or after taking a post) both on consular assistance and trial attendance. However, training on the latter subject usually focuses on the role of consular officials at trial rather than on fair trials rights. Surprisingly, this is also the case in Australia where trial attendance was found to be the norm.

## 3.1 The Australian Department of Foreign Affairs and Trade

### 3.1.1 Consular assistance to Australian defendants overseas: an overview

#### *Basis of protection*

In Australia consular assistance is a policy commitment of the government to its citizens.<sup>8</sup> The Consular Charter forms the basis of consular assistance provided to Australian nationals overseas.<sup>9</sup> It was produced in order to inform the public about the role of consular services and sets out the standards of service they can expect to receive. According to the Foreign Ministry's handbook the Charter 'signifies the department's commitment to providing effective, prompt and courteous consular services to all Australians requiring them... and outlines clients' rights and responsibilities'. The Charter does not have a legislative basis; it presents the 'vision of what the department works to'. As a policy document, the Charter aims to make clear what the Department can and cannot do to assist Australians overseas.

The Vienna Convention on Consular Relations, to which Australia is a signatory, recognises the right of Australia to offer consular protection to Australians overseas.

#### *Eligibility*

All Australian nationals are eligible to receive consular assistance abroad, including dual nationals in third countries. In some cases dual nationals are also eligible to receive consular assistance in their second country of nationality.

The Ministry also tries to provide consular assistance to Australian dual nationals in countries that do not recognise the right of Australia to perform consular functions and assist dual nationals. In those cases, the Australian Department of Foreign Affairs and Trade (DFAT) notes that they 'are still providing consular service', in the sense that they may be dealing with next of kin and the authorities, that they would be 'certainly seeking' consular access to enforce their rights to see the particular citizen and the rights of the citizen to see consular officials if they so chose. If consular officials cannot see the prisoner because of the circumstances in a country, they would still be providing a level of consular service within the parameters of that particular case. In those cases the services would be limited 'not due to any intention to give them less of a service, but due to local circumstances in certain countries'.

Permanent Australian residents are also eligible to receive consular assistance 'as if they were Australian citizens'. The only exception is that permanent residents cannot receive financial assistance.

Australia has also reached a formal agreement with Canada to provide consular assistance to Canadian citizens in countries where Canada is not represented and vice versa. In those countries Australia provides services (including in arrest cases) to Canadians who are in their jurisdiction. This agreement was reached on the basis that the two countries provide a comparable level of services to their nationals who are detained overseas and they have consular posts in different parts of the world. If in a specific case Canada provided a form of assistance to individuals that Australia did not, the Ministry would expect Canada to respect the Australian rules.

#### *Forms of assistance*

##### **Prison visits**

According to the DFAT, when consular officers are informed of the arrest of an Australian citizen they should attempt to visit the person at the earliest possible opportunity. In this initial visit the consular officer makes

8 Unless stated otherwise, data presented in this chapter derive from interviews with the five participating Ministries.

9 Department of Foreign Affairs and Trade 'Consular Services Charter', June 2008, <[http://www.smartraveller.gov.au/consular\\_charter/service\\_charter.pdf](http://www.smartraveller.gov.au/consular_charter/service_charter.pdf)> [accessed 01/08/09]

an assessment of the needs of the individual and determines how often he/she should visit the detainee. The DFAT does not set a minimum number of prison visits each year. It recognises that in some cases frequent visits might be difficult because Australia's consular representation is relatively thin around the world, and does not cooperate with partner or prison organisations on prison visits.<sup>10</sup>

### **Legal assistance**

Consular officials provide a list of lawyers to defendants to consult if they wish, but not a list of interpreters. According to the DFAT these lawyers are not recommended, as such; they are merely lawyers attached to a bar association in a particular country who are English-speaking and practise law. The lists are taken from the local phone directory or relevant Bar Association list. They are updated at least once a year by the embassies. Unlike the other participating Ministries, the DFAT or the embassies do not investigate complaints about the lawyers. The reason is because they believe that it would be 'improper' for them to make a judgment based on a person's complaints. The DFAT considers that they should 'allow the ethics of a particular association to determine whether it is appropriate for that person to continue and whilst they are making that judgment it is not appropriate for [the DFAT] to second guess. [The DFAT] would equally get complaints from these associations about the judgments [it is] making'.

### **Financial assistance**

The DFAT has also approved a Prisoner Loan Scheme in 22 countries to provide financial support to detainees to cover basic welfare needs. In those countries local consulates are responsible for putting up a case for the requirement of a prisoner loan. Even though the amount of money is not particularly large, it is acknowledged that in some places 'it can actually make a big difference'. The aim of the Prisoner Loan Scheme is to enable prisoners to access funds in order to make them equivalent to those local prisoners.

## **3.2.1 Trial attendance**

### *The criteria of attendance and the structure of decision-making*

Australia is the only country participating in the study which states that 'consular officials should normally try to be present in court when an Australian citizen is charged with a criminal offence' and that trial attendance is a common practice.<sup>11</sup>

According to the researcher, the principle that guides the DFAT policy on trial attendance is 'uniformity'. As stated in the Ministry's handbook consular officials are 'supposed to attend trials unless there are overriding reasons why that is either not practical or not necessary'. The Ministry recognises, though, that those who attend trials might not be able to attend all the sessions of a trial. It also acknowledges that resourcing does play a part in attendance at trials. The geographic location of the trial was presented as a factor that can affect the ability of consular staff to attend trials or do visits.

Decisions about trial attendance are made by local consular posts with some input from the central consular office. The local posts are expected to make decisions based on guidelines in the DFAT handbook given the resources available, the severity of the sentence and the geographic location of the trial.

### *The purpose of attending trials and the role of consular officials at trial*

Consular officials who attend trials, in addition to demonstrating the Australian Government's interest, look out for issues of due process. Australia does not generally make a legal assessment of the fairness of the trial; this is a responsibility of the defendant's lawyer. The focus of consular officials with respect to prisoners is 'their

10 As will be shown later on, this is a practice followed by the US State Department to facilitate prison visits in remote areas.

11 In the public guide of the DFAT 'Arrested and Jailed Overseas' it is stated that consular officials can 'monitor [the] court trials, and in some circumstances, attend as an observer'. <[http://www.smartraveller.gov.au/tips/jailed\\_overseas.pdf](http://www.smartraveller.gov.au/tips/jailed_overseas.pdf)>, p. 1 [accessed 01/08/09]

physical and mental wellbeing' rather than the quality of their legal defence'. Consular officials need to observe this delicate balance between promoting the welfare of citizens and being responsible for their legal defence. Australian consular officials do not assess the quality of a client's legal defence.

The DFAT has a policy of attending trials and in its handbooks gives instructions on matters consular officials need to observe when attending trials.

Before a particular session of a trial, consular officials can sit in on discussions between the lawyer and the detainee if he/she consents. In these discussions consular officials should reassure themselves that certain things are in place, such as translations of documents in non-English speaking countries. If consular officials do not meet with the lawyer and the client before the trial they will take the opportunity to discuss matters with them during adjournments. During adjournments consular officials will ask the detainee if he/she is actually satisfied with the direction things are taking and if they have any questions. This is considered to be important because sometimes state-appointed lawyers might not be committed to the case and they might not provide a good quality of legal defence.

According to the DFAT if the client informs consular officials that there is a particular problem with the conduct of a defence lawyer, if for instance the lawyer appears to be completely unprepared, consular officials would not advise the lawyer how they should actually proceed. Clients are responsible for their own legal representation and the quality of that representation. Consular officers cannot make a decision about the quality of legal representation themselves; their advice is based on comments that the client makes.

The DFAT handbook also provides consular officials who attend trials with a checklist to help them assess whether the trial is fair. This checklist instructs consular officials to ensure that a detainee is legally represented and has access to an interpreter. It also states that the main elements of a fair trial are as follows:

- ▶ The accused must be aware of the specific charges;
- ▶ The accused must be given adequate time to prepare a case and be afforded the opportunity of summoning witnesses in defence;
- ▶ The accused must be given the opportunity to know the substance and source of any evidence and be given the opportunity of probing the evidence by cross examination;
- ▶ The accused must be afforded the right of being defended by a lawyer of the accused's choice;
- ▶ The trial should be held before an impartial tribunal;
- ▶ An Australian representative should be able to attend the judicial proceedings; and
- ▶ The accused must be able to understand the proceedings and have access to an interpreter if necessary.

The DFAT also mentioned secondary reasons why consular officials might attend trials: if there is significant media interest, if family members express a particular concern, or even for purposes of training consular officials. However, the main reasons why consular officials attend trials are to ensure the fairness of the trial, and to demonstrate the interest of the government in the case.

### *Reporting and monitoring*

Consular officials are required to report back to the Ministry their impressions of the trial. Australia is the only country participating in the study which has developed a standardised reporting format to ensure that certain important information is always collected. This reporting template forms part of their internal guidelines and includes a series of 'prompts' to advise consular officials on the information that should be included in the report. This includes noting the exact charges, the verdict, the sentence passed and whether this is equivalent to local sentencing practice, and whether an appeal is possible. These reports are distributed to people in the consular division, and other relevant posts in the Ministry. They are not shared with the client. Information from certain sections of the report is used to update other individuals, including the next of kin (with the client's

consent). The consular official will give the option to the detainee of actually deleting passages from the copy that the next of kin will see.

Information collated in these reports is not systematically analysed to identify patterns and design future policy in this area. Even though Australia collects data on trials attended by consular officials, information is only occasionally gathered about trials held but not attended.

### *Training and guidance*

Despite the relatively high importance the DFAT attached to trial attendance there is no specific training on this issue. Consular officers receive extensive pre-posting consular training but there is no element of training that deals with people who are on trial or the fair trials aspect. In this regard, consular officials receive assistance from information in the consular handbook and other training material.

They also receive country-specific briefings which could inform consular officials about particular legal issues such as the death penalty or a particularly harsh judicial system.

While employed at a local consular post, consular officials receive support on trial attendance primarily from two sources: first, they cooperate with local members of staff who have long experience in the judicial system. Second, they receive support in a consular case from desk officers in Canberra on a 24 hour basis. The Consular Operations Branch in Canberra is divided into two sections and each one is responsible for a different part of the world. "A section" looks after the countries of the wider Asian region and "B section" looks after cases in the rest of the world. The two sections have a series of case managers who oversee all consular cases that arise in their relevant countries.

## **3.2 The British Foreign and Commonwealth Office**

### **3.2.1 Consular assistance to British defendants overseas: an overview**

#### *Basis of protection*

As in the case of Australia, British consular assistance is provided as a matter of government policy; it is not a legally protected right of British nationals detained overseas. The Government has published *Support for British Nationals Abroad: A Guide*,<sup>12</sup> a document that constitutes the 'published commitment of the FCO to the type of assistance that they can provide to British nationals abroad'. If individuals believe that they are not receiving the type of assistance set out in the guide they can report it under the Ministry's complaints procedure. Alternatively they can make a complaint to the Parliamentary Ombudsman, that deals with complaints of maltreatment by the administration.

The Vienna Convention on Consular Relations and bilateral consular conventions provide the legal framework for consular work overseas.

#### *Eligibility*

Consular assistance is provided to all British nationals abroad. Full support is also offered to dual nationals who are travelling in a third country on a British passport. If someone travels on his/her other passport and the country of the other nationality has a consulate, the FCO would expect that consulate to offer assistance. If this country has no consulate, however, then the FCO would consider on a case by case basis whether it would provide assistance to the individual. In this case the embassy of the country in a neighbouring state would

12 Foreign and Commonwealth Office, 'Support for British Nationals Abroad: A Guide', 2009, <<http://www.fco.gov.uk/resources/en/pdf/2855621/english>> [accessed 02/08/09].

also be consulted to agree on how the British consulate will help. It is worth mentioning that Britain is the only country participating in this study which looks at the passport a dual national travelled on to decide whether this person is eligible to receive consular assistance.

According to the FCO, they would not normally offer support to dual nationals when they are in the country of their second nationality. However, the FCO makes an exception and provides assistance to dual nationals in their second countries in humanitarian circumstances such as cases of forced marriages, death penalty and torture. In the case of war or natural disaster the FCO also provides assistance to family members of nationals along with the individuals themselves.

The UK has bilateral Consular Conventions with around 40 countries under which they should be notified automatically when one of their nationals is detained.

Finally, European Union and Commonwealth nationals whose country does not have a local mission are eligible to receive consular assistance from the FCO. In those cases individuals receive the same type of assistance that would be provided to British citizens in a similar situation.

Permanent residents, who are non-nationals, are not eligible to receive consular assistance even if they legally reside in the UK.

#### *Forms of assistance to British defendants abroad*

According to the FCO's 'Guide for British Nationals Abroad', individuals who are eligible to receive assistance receive the following forms of assistance:

#### **Prison visits**

Consular officials aim to contact detainees within 24 hours of being told about an individual's arrest or detention. Frequency of visits while a detainee awaits trial will depend on the assessed need for support. If someone is in prison in an EU country, or in Iceland, Liechtenstein, Canada, the USA, Australia or New Zealand consular staff aim to visit them once after sentencing and then after that only if there is a real need. In other countries the FCO aims to visit detainees at least once a year.

#### **Prisoner's information pack**

On the first visit detainees get the 'prisoner's information pack', one of which is produced for each post that the FCO has around the world. Within the prisoner's pack individuals will find basic information about the local legal system and the local prison system. This is prepared by consular staff in every post in conjunction with the embassy and the local legal adviser who will ensure that information provided in the pack accurately describes the local system. Detainees are also given a list of lawyers and a list of interpreters they could use. Like all other Ministries participating in the study the FCO underlined that these are not FCO-recommended lawyers or interpreters. However, if posts get negative feedback they might remove a name from the list. Similarly if they are informed that someone is particularly helpful they might add the name of this person to the list. Local posts review the lists of lawyers and interpreters once a year.

#### **Detainees' welfare provisions**

The FCO also helps family members and friends to send money and goods to detainees. The FCO does not charge the relatives for transfers of funds up to £200 per month. For transfers that exceed this limit there is a fee to pay. The FCO does not provide financial assistance to detainees either in the form of loans (as in Australia) or of a monthly 'allowance' (as in the Netherlands). However, it works with partner organisations which provide assistance to detainees on welfare issues.

Prisoners Abroad is a UK Charity which is partly funded by the FCO and provides assistance to British prisoners. It does not help individuals with the legal aspect of their case; it assists them with the welfare side of detention. Prisoners Abroad give a small amount of money to British detainees who do not have any other source of income; this amount is usually between £60 and £100 per quarter. This charity also has resettlement programmes for British prisoners once back in the UK and does letter-writing for overseas prisoners.

### **Legal assistance**

The FCO would never pay for the defence lawyer of an individual. Unlike Germany which might pay for the defence of an individual in a death penalty case, the FCO partly funds Reprieve, a charity which specialises in death penalty cases. This funding is not to cover the legal defence of individuals in their trials. It is used to help defence teams in death penalty cases with research and background work. This money is allocated annually and is not earmarked for particular cases. To assist in cases where there are human rights concerns the FCO maintains a panel of pro bono lawyers who can advise local lawyers on international issues. Also, in a limited number of cases, the UK submits "amicus" briefs to foreign courts on issues of international law in cases involving British nationals.

### **Pursuing complaints**

With the individual's permission, consular officials can also pursue complaints about ill treatment with the prison authorities, intervening when detainees are not treated in line with internationally accepted standards if it is considered appropriate in the circumstances.

## **3.2.2 Trial attendance**

### *Criteria of attendance and structure of decision-making*

Unlike the case of Australia where trial attendance is the default position, the official policy of the FCO is that British consular officials 'rarely attend trials'. Similarly to Germany and the Netherlands, the UK policy on trial attendance is that 'attendance is an exceptional activity that must be justified'.

The key principle that guides the FCO's policy on trial attendance is to offer support and take an interest in the welfare of the prisoner. Within this, importance is also attached to *consistency* of approach within the parameters of FCO public statements and internal guidance, with the aim of ensuring that the public understand what help they can expect from consular staff. In the interview with the FCO, consistency was not defined as 'doing the same thing everywhere'. It was interpreted as 'providing a consistent level of service in similar conditions'. To ensure that a consistent level of service is provided, depending on the conditions around the world, the FCO holds 'best practice conferences' so that individuals can discuss the levels of service provided across the board and identify inconsistencies. These conferences do not only address the issue of consistency around problems of 'under-servicing', they also look at the issue of 'over-servicing' (providing services which are over and above what the FCO public guidelines say that it can do). If the FCO identifies an over-serviced area then it introduces an 'exit strategy' in order to bring people out of that level of servicing over a period of time, trying to explain to all of the people involved why this needs to be changed.

Following the above definition of consistency, the FCO suggests that consular officials should not attend trials unless in exceptional circumstances. There are no publicly available guidelines on the circumstances where trials should be attended. However, consular officials can receive internal advice on these issues. Various criteria are used to decide which trials to attend. In a small number of cases a consular official might attend a trial simply because he/she did not have the chance to see the defendant earlier and he/she attends the trial to talk or pass messages to the defendant. In other cases the FCO might consider it necessary to attend the trial of vulnerable individuals such as minors or elderly defendants or defendants with a mental health problem. In those cases the FCO might be concerned about their welfare and how it might be affected by the court proceedings. A third situation when trial attendance might be encouraged is in a death penalty case. In these

cases consular officials would not attend every part of the trial, but would try to go to some sessions in order to provide moral support to the individual and reinforce the government's message on this particular issue, which is that it 'opposes the death penalty and wants to make that known to people'. Finally, if there have been allegations of human rights violations, the FCO 'will also consider attending but this does not mean that there will always be a representative'.

None of the above situations is described by the FCO as making trial attendance 'mandatory'. As will be discussed more extensively later, only the US identifies certain occasions where trial attendance is 'mandatory'. The FCO pointed out that local posts might have other priorities (such as other responsibilities to be fulfilled) which might also affect decisions about trial attendance. Therefore, each case will be decided individually; there is not a checklist or a hierarchy of factors which affect decision-making on trial attendance. In Britain, decisions on whether to attend a trial are jointly taken by the FCO and the local posts. However, the FCO has the final say on whether a trial should be attended.

#### *The purpose of attendance and the role of consular officials at trial*

The purpose of trial attendance varies: in some cases the FCO attends in order to demonstrate the interest of the British government in an individual case (e.g. death penalty cases). In other cases consular officials would attend a trial to provide moral support to the defendant (e.g. vulnerable defendants). In others, consular officials might attend a trial because they were concerned about a specific aspect of a case.

According to the FCO, consular officials do not 'monitor' or 'observe' trials, they merely 'attend' them. Consular officials who attend trials do not offer a critique or a legal view on the case. This distinction is considered to be compatible with the more general role that the FCO aspires for consular officials to have when they deal with detainees, which is to protect their welfare. The FCO draws a distinction between the legal and the welfare aspect of a trial, and the US makes a similar distinction (see below).

If, however, consular officials consider that a process does not follow local or international standards (e.g. if defendants are meant to have an interpreter but they do not) they would consider intervening. In such cases, intervention will only occur where it is considered by the FCO to be legitimate. Thus it differs from interference, which the FCO is against, as an unjustified attempt to secure a person's preferential treatment on the grounds of his/her nationality.

According to the FCO 'whether our involvement is considered interference or intervention depends on the grounds on which it's justified, the objective that is being pursued and the manner in which it's done'.

#### *Reporting and information management*

Consular officials attending a trial are expected to report back their impressions and observations on a range of issues. Nevertheless, contrary to Australia the exact nature of the report depends on the circumstances of the case and the justification for attending the trial. For instance, a consular official attending to provide moral support to a vulnerable defendant might report mainly on the defendant's wellbeing and state of mind, whereas a consular official attending because of concerns about the trial process might be required to report back on a wider range of issues, such as whether interpretation was provided.

Unless the detainee requests it, reports are not usually shared with family members or the defence lawyer because of restrictions under the Data Protection Act.

The FCO also collects data on the number of individuals detained abroad and breaks down these data country by country. Consular officials also report on the gender, age, and the nature of charges in respect of detainees abroad. Whenever they work on an assistance case they report on these issues. This information is kept in an internal consular system known as Compass. The purpose of this is not to collect data about individuals *per se*.

The reason for reporting is that people who work on a case from London and from the local consulate need to be informed about the latest developments on individual cases. Because the FCO does not collect data on trials not attended by consular officials such data cannot be used to shape future policy on trial attendance.

### *Training*

Like the other Ministries participating in this study, consular officials are trained both before and after taking up a post. Staff are trained on a three week modular course before they take up a position overseas, which will cover the whole range of consular assistance. Within that, there is a section on prisoners and fair trials, mainly highlighting the key areas for staff to be concerned about. Another form of training provided within the Directorate in London is on specific issues that the FCO thinks are of interest. Speakers from external partner organisations such as Prisoners Abroad sometimes attend, as well as internal experts.

When members of staff arrive at a local post they sometimes receive training on consular assistance/fair trial issues. Consular sections running the training will take sections of the Consular Guidance and hold a discussion session on them, so staff can learn from those particular parts. External speakers are also invited, to hear about local courts and judicial systems. This is considered good practice because it makes use of local resources and helps familiarise members of staff with the local legal system. As will be discussed in the course of this report, the participating Ministries do not use local resources extensively.

Another source of information on these issues is conferences. Even though conferences cannot strictly be considered as training, they offer opportunities to discuss issues of concern and effective responses to them. Every region has a regional conference once a year.

Finally, a key form of support to consular officials is provided by the human rights adviser in the Consulate Directorate in London, who is employed in partnership with the NGO Prisoners Abroad. If consular officials have concerns about the fairness of trials, they should contact the human rights adviser, report back to them and seek their advice.

## **3.3 The Dutch Ministry of Foreign Affairs**

### **3.3.1 Consular assistance to Dutch defendants overseas: an overview**

#### *Basis of protection*

Similarly to Australia and the United Kingdom, consular assistance is provided as a matter of government policy: it is not a legally protected right of Dutch nationals detained abroad. Internal guidelines provide general indications to consular officials on the type of assistance they could provide to national defendants. A team of 25 experts within the Ministry interprets these principles on a case by case basis. This group of experts only deals with Dutch citizens abroad in distress. The combination of 'general guidelines' with 'expert opinion' is considered a preferable approach in the Netherlands. This differs from the detailed internal guidelines that are offered in the UK, Australia and Germany and from the detailed publicly available guidelines offered in the US.

According to the Dutch Ministry of Foreign Affairs, this approach gives more flexibility to the Ministry to provide as much help as possible; they have 'more room to manoeuvre and deliver assistance'.

The Netherlands also considers the VCCR and other bilateral consular conventions to provide the legal framework for consular work overseas.

*Eligibility*

All Dutch nationals are eligible to receive consular assistance. Dual nationals in third countries are also eligible to receive consular assistance irrespective of the passport they travelled on. In such cases, consular officials discuss the issue with the embassy of the other nationality and the defendant, and jointly decide which embassy is better adapted to assist.

Dual nationals arrested in a second country of citizenship are not protected by the VCCR. The availability of assistance in such cases will depend on the degree of cooperation of that second country.

Like Australia, which has bilateral agreements with other countries, the Netherlands has reached a similar bilateral agreement with Moroccan/Dutch nationals. In the case of other countries, no such bilateral agreements have been reached.

Residents and family members of Dutch nationals are also eligible to receive consular assistance. Finally, EU nationals are also eligible to receive consular assistance from a Dutch consulate or embassy if their country of origin is not represented.

*Forms of consular assistance to Dutch detainees abroad***Prison visits**

According to the Ministry's guidelines, consular officials should visit detainees within 24 hours of being informed of their detention and make an initial assessment of the case and the type of assistance they might require. Thereafter, consular officials visit detainees at least twice per year. However, there are regions in which they visit them once per month. This depends primarily on prison conditions. Consular officials are under considerable pressure sometimes and need to handle conflicting demands. For this reason the Ministry works with volunteers who also pay visits to detainees, a policy which is also followed by the US.

**Welfare issues**

The Netherlands is the only country participating in this study which provides direct financial aid to all the detainees outside the EU. Every month they receive 30 Euros as a benefit. This is a flat standard rate. There are no variations on the amount that they receive depending on the prison conditions or the cost of living in an individual country. According to the Ministry of Foreign Affairs this would be impossible because each detention centre has its own set of problems and has its own level of "costs".

Detainees in EU countries do not receive financial assistance because prison conditions are considered in general to be better than in Africa, Latin America or Asia. Financial assistance is provided to detainees in United States, Canada and Australia, even though prison conditions are relatively good, because of the telephone costs and difficulty of receiving family visits.

**Legal assistance**

Like all other Ministries participating in the study, the Dutch Ministry provides detainees with a list of defence lawyers. Even though the Ministry does not require local consulates to revise the list at a specific point every year, it is assumed that these lists are up to date. These are not recommended lawyers; they just provide a 'head start' for detainees who are looking for a defence lawyer.

A second form of assistance unique to the Dutch is the 'confidential lawyer'. If consular officials are particularly concerned about the fairness of an individual trial they report it to the Ministry and Ministry officials then decide whether they should hire a 'confidential lawyer'. This lawyer provides an external assessment of the case and delivers an opinion about the legal proceedings, not about whether the defendant is guilty or not guilty. Confidential lawyers are paid by the government. This lawyer conducts research: the research document goes to the embassy, addressed to the consular official responsible. The aim of this external advisory report

is to assist the consular official and Ministry staff in analysing the problem. When they feel that there is an issue they need to address they make a policy decision to do so. This confidential lawyer never appears as an advocate in court, never discusses the case with the judge, and his report is not be shared with anyone outside the Ministry. Confidential lawyers are hired approximately five to eight times a year, when defence lawyers raise concerns about the fairness of the trial or in a death penalty case.

### 3.3.2 Trial attendance

#### *Criteria of attendance and structure of decision-making*

Similarly to the UK, in the Netherlands trial attendance is seen as an exceptional step and must be justified. The guiding principle for the Dutch Ministry of Foreign Affairs is flexibility. Consular officials have enough autonomy to decide how to provide as much assistance as possible to detainees including whether they will attend a trial. According to the Ministry this flexibility allows consular officials to provide more assistance on certain occasions.

Unlike the UK, though, the Dutch Ministry does not provide detailed internal guidelines. Decisions about trial attendance are made on a case by case basis. The Dutch Ministry has not established specific criteria according to which trial attendance would be encouraged or required. Consular officials use their intuition and knowledge to assess whether they should attend an individual trial. Within Europe consular officials only attend trials in exceptional circumstances. Outside Europe consular officials attend trials more often.

Decisions about trial attendance are made jointly by the Ministry and the local posts; final decisions often rest with staff at the post. The Netherlands does not follow a structured approach to decision-making since there are no clearly defined conditions on which trials are attended. A number of factors are taken into consideration: media interest, severity of the sentence, the personal involvement/interest of an ambassador in an individual sentence; pressures from family members. If consular officials decide to attend an individual case, they report this to the Ministry. If they are particularly concerned about the fairness of a trial they seek assistance on how to deal with this issue from the Ministry. Finally, in exceptional circumstances the Ministry might have the final say on trial attendance.

#### *Consular officials at trial: purpose and role*

Consular officials might attend trials for several reasons: to ensure the fair treatment of the defendant, morally support him/her, inform the press and demonstrate that they provide good services (the media in the Netherlands and the Dutch Parliament both consider attending trial to be proof of good consular care). Trial attendance also makes authorities in the country of trial aware of the importance of the case to the Dutch government. Similarly to the UK, this might happen in death penalty cases.

The role of consular officials at trials is 'observing, recording and reporting back any concerns'. The aim of attendance is not to influence the sentence itself but to contribute to the fair treatment of the Dutch defendant to demonstrate the interest of the government to the local authorities.

Consular officials who attend trials look out for issues of due process and fair trial. The consular official checks that 'all the pros and cons are equally discussed and that the person's lawyer gets a fair chance of expressing himself or herself'. Consular officials are not legal experts themselves but they are in close contact with the defence lawyer. They have long experience of attending trials and they will usually sense if something is going wrong. On such occasions they contact defence lawyers to discuss the matter.

If consular officials believe that the treatment of detainees falls below internationally accepted standards they first discuss it with the defendant's lawyer. If their concerns are confirmed they might complain to the authorities, both to the judicial authorities and to the directors of prisons. Complaints are sometimes made on a bilateral level: on other occasions they are raised at EU level. In the experience of the Ministry of Foreign Affairs cooperation of EU states on these issues can give them 'a bit more power'.

### *Training*

Consular officials receive training in many different forms. There is training available on the internet. This offers the basic knowledge necessary. Then the Ministry organises meetings with people from the embassies approximately twelve times per year and organises three large conferences where embassies meet each other in a capital city that hosts the event. Once a year there is also a conference in the Hague. At this event people from the Ministry try to see as many consular officials as possible and discuss with them issues of common concern.

Consular officials also receive training when they arrive at the post. This training is not compulsory but it is strongly recommended, and introduces consular officials to their new duties. Finally, a significant source of assistance is provided by the group of experts at the Ministry.

## **3.4 The German Federal Foreign Office**

### **3.4.1. Consular assistance to German defendants overseas: an overview**

#### *Basis of protection*

Germany is the only country participating in this study in which consular assistance is a legally protected right. The 'Law on Consular Officers, their Functions and Powers' (Consular Law) of 11 September 1974 constitutes the legal basis for consular assistance provided to German nationals abroad. Article 7 of the Law contains a specific provision relevant to detainees. According to this provision, 'consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons'. This article guarantees the right of German nationals to receive "assistance on demand"; the level of assistance depends on the individual circumstances and needs of the case; primarily it provides them with assistance in finding a lawyer and some information about the local legal system. In other cases it can also provide detainees with "social assistance". This, however, depends on the region within Germany that the individual is from and is normally resident. Social funding is provided by the region, and regional law governs individual decisions about the type of social assistance offered.

If individuals do not receive the assistance guaranteed by law they can challenge it in court and claim damages.

The VCCR is recognised as the international legal instrument which guarantees the right of the Federal Republic of Germany that on request of a person detained abroad, the consular post of Germany should be informed. Also, 'there are several agreements with other states whereby an official notification of the consular post has to take place irrespective of the will of the person concerned'.

#### *Eligibility for assistance*

The GFFO provides consular assistance to all German nationals who are detained, imprisoned or on trial abroad. It makes no difference to the position of the GFFO whether a dual national is detained in a second or third country, or which passport he/she travelled on. In the view of the FFO, that individual is a German in need of assistance, and that is the only factor that should matter. The assistance that can be provided may be limited

by the second country's legal rules, but will not be limited by the GFFO's own policy. A growing number of countries are allowing the provision of consular assistance to their own (dual) nationals. This position reflects the general principle of provision, which is that it is needs-based.

German residents and family members of nationals/residents may also be assisted on a case by case basis where there is 'a close relationship with Germany'. The closer the ties with Germany, the more likely the GFFO is to assist. The interviewee gave an example of a Turkish national resident in Germany who was arrested and sent to Guantanamo Bay. Turkey was not providing assistance so Germany stepped in. Cases like this are not a matter of legal obligation, but of domestic politics and the general values and principles of the consular service. When an individual's home country is not providing necessary and appropriate assistance, and where there are ties with Germany, Germany will consider providing assistance, on a case by case basis. This also applies to refugees and asylum seekers. Finally, under EU legislation, the GFFO provides consular assistance to any EU national in a country where their nationality is not represented.

#### *Entitlements of German defendants abroad*

The form of assistance provided to German defendants varies according to the nature of the charges and the local circumstances.

German detainees are entitled to at least one prison visit a year. However, the frequency depends on local circumstances. Consular officials also provide defendants with information leaflets on how the local legal system works, and how they can receive legal aid. This information on the local legal system is provided to the embassy by local lawyers who co-operate with the embassy. The embassy holds lists of lawyers 'known to the embassy' and who have some relation to Germany (e.g. may speak German or have dealt with German clients before). They are not recommended lawyers. If complaints were received about a lawyer on the list, the embassy would look into the individual case. The embassy will not normally pay for a lawyer or interpreter. However, in special cases this may happen – for instance if the local system does not provide one and serious charges are involved the embassy may pay for or provide an interpreter. The embassy would also make diplomatic representations to ask the local country to provide a lawyer or interpreter.

Similarly to the UK and the Netherlands, Germany mentioned that death penalty cases are treated slightly differently and may attract an increased level of assistance. Germany, though, is the only country participating in the study that explicitly stated that the GFFO might pay for defence lawyers in death penalty cases. This is a political decision (as a result of constitutional requirements), and taken on a case by case basis.

Food and basic necessities for detainees are provided by "social assistance" on a 'needs assessment' basis – this generally means that if the prison does not provide these things, and the detainee cannot get them by any other means (e.g. family, local NGO) the social assistance authority in Germany will provide them.

### **3.4.2 Trial attendance**

#### *Criteria of attendance and structure of decision-making*

Like the other European participants in the study, the GFFO stated that trial attendance is exceptional and must be justified. A fundamental principle underpinning the provision of assistance is the 'non-judgmental ethos'. Trial attendance is not based on an assessment of guilt or innocence, and is provided independently of individuals' perceived responsibility for their actions. Rather, the provision of assistance is based on individual need – a needs-based assessment, including considerations of whether there are other means or sources of help and support.

Decisions to attend a trial are taken on the basis of the charges involved. When local consulates decide whether they would attend a trial or not, they take into account the severity of the sentence, the type of trial, the geographic location of the trial and other conflicting demands. Consular officials are more likely to attend trials for 'political' charges rather than in criminal cases. The GFFO always aims to send an observer when there is a reasonable basis to believe that minimum standards are not met in the local system, or in the specific case of the defendant (because of the defendant's race, or the type of charges etc). Capital punishment trials are also likely to be attended. In some cases trial attendance might be limited for practical reasons. In some cases it is 'impossible to attend', e.g. where legal rules prohibit this (including cases involving minors where the courtroom is closed), or where geographic difficulties make it impossible to send an observer.

The work of the GFFO and the consular network is decentralised. Local posts have primary responsibility for their own work. However, there are official guidelines regarding the provision of assistance to detainees. These include identifying situations in which local posts should report to or seek advice from the central office. This 13-page document is for internal use only and is not releasable.

There is also additional support for decision-making once officers are in post. The central GFFO can assist with specific decisions. For instance, they might decide that it is necessary to attend a particular trial even if the local post does not. This decision might be taken on the grounds of public interest within Germany, or because there are reasonable grounds for concern regarding the treatment of the prisoner or the trial process.

The GFFO will know about these cases because local posts have to report cases to the central office in certain circumstances, e.g. capital punishment cases or cases that may potentially involve other human rights violations; cases involving several people (e.g. involving political demonstrations); cases with a political dimension (e.g. involving a teacher or journalist); cases that have attracted significant media attention; cases where Article 36 VCCR was violated because the consulate was not informed of the detention; or cases where there has been violation of the minimum standards for the treatment of prisoners. Outside the EU, these requirements mean that around 80-90% of cases are reported to the central GFFO. Within Europe, the figure is only 1-2%.

#### *Consular officials at trial: purpose and role*

The purpose of trial attendance varies. In some cases German consular officials might attend trials to gain first-hand information about the case. In other cases they observe the process and fairness of the trial. Even though consular training involves more than just basic legal training, consular officers are not qualified lawyers. They know how the legal system and court process works in Germany, and the role of the courts according to the rule of law. Taking these into consideration consular officials try to ensure that German nationals receive this standard of treatment, even if locals do not.

Consular officials also provide moral support to the detainee. Their presence means that judges are less likely to violate due process standards, and therefore helps to ensure that standards are met. The intention is not to influence the trial, but to ensure that standards are followed. Consular observers note and record concerns, and take up concerns with the local authorities. However, intervention is often a more general discussion on systems and common problems, rather than involving case-specific issues. The consulate has to assure local authorities that they are not there to defend the defendant, but to ensure his rights are protected.

The officials' role is that of an observer: they are not there to intervene. That is the role of the defence lawyer. Close working relationships with the defence lawyer are necessary, because for instance, the consular observer will need to know if the defence lawyer has requested an interpreter for the client. Their role is not to identify legal errors, or to be part of the defence team, or to prove the court is not independent. Their role is purely to observe, and to identify if concerns should be taken up with the local authorities.

*Reporting process and management of information*

Reports of trial attendance are always prepared. Reporting is done in a general way, to give a description of how the court session(s) went, and to identify any specific concerns. A report would also advise on a decision about whether to intervene. The report is written for the consular post. It is an internal document and is not made public. The consulate may discuss specific concerns with the lawyer, to see if the lawyer has similar concerns.

There is some analysis of reports at a regional level, and common issues are flagged centrally.

Local posts collect data about the number of cases awaiting trial, or where a sentence is being served or a person is in immigration detention. The type of information requested in the survey is collected only by local posts, not held centrally. The consular network is decentralised so there is no central overview of the information collected and no statistical function on the IT system: this is for data protection reasons. The information is used to make an assessment of the needs of the individual detainee (e.g. considerations of age and gender). It is also used to assess whether additional assistance is required because of the nature of the case (e.g. death penalty cases where there is a political commitment and a constitutional requirement to provide further assistance). The GFFO also seeks to obtain ongoing information about the case from the individual's lawyer. Some analysis of the information is conducted to identify trends/patterns, for use in constructing targeted public information.

*Training*

During the 3 years of comprehensive training at the diplomatic school of the GFFO all consular officers are also trained in consular work amongst other kind of legal training. The consular work training includes theoretical as well as practical education. Especially during a 9 months on-the-job training the future consular officers gain experience in the daily consular work at a German consulate or embassy. The GFFO recruits school leavers and provides a 'university-like' training lasting three years through its diplomatic school.

Consular officials also receive ongoing training (every two to three years). Additional training is provided in advance of taking up each consular post. A group of officials taking up new posts around the world receive two weeks of general legal training. The new consular officer will also get a briefing from the central GFFO on these issues.

## 3.5 The US Department of State Overseas Citizens Service

### 3.5.1 Consular assistance to American defendants overseas: an overview

*Basis of protection*

Like Australia, the Netherlands and the United Kingdom, US consular assistance is a policy provision and not a legally protected right of American citizens abroad. The US State Department has issued detailed, publicly available manuals which manage people's expectations and inform consular officials about their various responsibilities towards citizens.<sup>13</sup> The Foreign Affairs Manual 'is a guideline and not a particular set of obligations that is owed to a United States citizen'. They are not regulations that have the force of law. The State Department sets out for consular officers what they are expected to do in a normal case depending on the circumstances.

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<sup>13</sup> As indicated in previous parts of this chapter all participating countries have issued public information on consular assistance provided to their nationals. However, the US is the only country which provides detailed information of the specific criteria that are used to determine the type of assistance offered in individual cases.

The VCCR forms the principal legal basis for consular officials to provide assistance to American nationals abroad. If a person is arrested there is an obligation to inform that person that he or she is entitled to have their consulate or embassy notified of their arrest. The US also has bilateral agreements with some countries which make this notification mandatory, even if a detainee does not wish to contact the embassy and receive consular assistance. On those occasions countries have an obligation to inform the nearest embassy or consulate of the arrest.

### *Eligibility*

All American citizens are eligible to receive consular assistance; dual nationals who travel to a third country also receive consular assistance irrespective of the passport that they travelled on. As mentioned earlier only the UK Foreign Office makes such a distinction.

According to the US Department of State Overseas Citizens Service (DSOCS) the passport that someone has travelled on matters only when they are in the country of their other nationality. In such cases the State Department does not tell consular officials "there is a diminution of your responsibility toward American citizens". It does acknowledge, though, that the country of the other nationality may not permit consular officials to render the assistance that the DSOCS considers that they are willing and able to offer. The State Department will raise the question with the other country of consular assistance and then wait for their response.

US permanent residents are also eligible to receive consular assistance in some cases.

### *Forms of assistance*

#### **Prison visits**

The State Department has a requirement that consular officials either visit or, at least, contact the person, preferably within 24 hours of the notification, because in their experience that is the most distressing point in a prisoner's incarceration.

For individuals detained a long distance from the consulate or the embassy there are American citizens who act as 'wardens' and who visit detainees held in remote places, maintain contact with them and deliver documents and correspondence to them. These people are not employees of the embassy, they are private citizens who work in some other enterprise or are retired.

There are three main criteria which determine the frequency of visits to a defendant: first, the vulnerability of the defendant; second, the prison conditions, and third, the safety of the consular official. Consular officials make an assessment on their first visit of the prisoner's physical and mental health and decide how often they need to visit him/her. The State Department sets a minimum of at least one visit every six months but frequency can vary.

#### **Legal assistance**

Like all other Ministries participating in this study, the State Department provides detainees with a list of lawyers and a list of interpreters. The task of developing and maintaining the lists is assigned to each embassy or consulate. These are not recommended professionals, but embassies and local consulates make an attempt to scrutinise the list and would consider removing names from the list if there were substantiated concerns about the individuals. The US State Department is the only Ministry to acknowledge that 'when someone remains on the list that is an indirect endorsement'. Developing the list of interpreters is a less formal procedure and on some occasions they reach informal arrangements with universities.

### **Welfare needs**

Medical and dietary assistance is provided in some cases. If someone suffers from a health problem and cannot receive medication in the country of detention, the US State Department will try to provide it for free. In places where they cannot provide medication the State Department will lend them money to buy it. Before providing financial assistance they will ask for assistance from the defendants' relatives.

In recent years, there have been a lot more programmes in different countries and aided by certain international charities through which the State Department was able to obtain certain types of medication for free. International charities provide the medication to the State Department and consular officials give it to the detainees.

### **Pursuing complaints**

Another aspect of assistance provided by the State department is pursuing complaints about ill treatment. If there is evidence of ill treatment they would always ask the detainee whether or not to raise the issue, but they do not necessarily abide by the detainee's request, for example not to report something, especially if it is a serious abuse.

## **3.5.2 Trial attendance**

### *Criteria of attendance*

The publicly available manuals state that consular officials sometimes attend trials. The US is the only country which defines the circumstances in which trial attendance is 'mandatory'. Despite this publicized commitment to attend trials on these occasions, the US State Department noted that trial attendance remains an exception. The principle that guides trial attendance in the US is transparency. As mentioned earlier the US State Department publishes manuals which indicate that in some cases consular officials may attend trials. It further states that there are specific circumstances under which attendance at trials is 'mandatory'.

According to the Foreign Affairs Manual consular attendance is mandatory if there are indications of discrimination against the US citizen or national on the basis of US nationality, race, religion or ethnicity either in procedure or in sentence, and provides indications of when this might happen. Despite having specific criteria for trial attendance, the US State Department described trial attendance to be 'a fairly exceptional' practice.

The manual provides examples of ten occasions which would require consular officials to attend trials.<sup>14</sup> However, these are indicative and not exhaustive.

1. Past history of discriminatory treatment of other US citizen or national prisoners;
2. Treating a US citizen or national prisoner of one race, religious or ethnic background differently than a US citizen or national prisoner of another racial, religious or ethnic background;
3. Refusal to provide the US citizen or national with translation facilities when proceedings are in a language the prisoner does not understand;
4. Slanted pre-trial publicity, particularly where the press is government-controlled, or it is clear the host government is 'leaking' the information;
5. Proposed sentences or fines that clearly exceed those normally accorded local nationals or third country nationals convicted of similar crimes;
6. The charges are political in nature, or the trial is expected to have political overtones;
7. The charges and/or the trial are a pertinent factor in the bilateral relationship with the host government;

<sup>14</sup> US Department of State, 'Foreign Affairs Manual', vol. 7, October 2004, p. 2 <<http://www.state.gov/documents/organization/86608.pdf>> [last accessed 03/08/09]

8. The prisoner or his family has specifically requested your presence at the trial, and it is reasonably feasible for you to do so; and
9. You are instructed to do so by the Department.

### *Structure of decision-making*

Usually decisions about whether to attend a trial or not are taken through a combination of local and central decision-making. Usually the local posts identify cases of greater interest and then consult the State Department as to whether they should attend trial or not. Similarly to the UK, the final decision about trial attendance rests with the State Department because on some occasions it is difficult for local posts to assess how important something might be.

### *Consular officials at trial: purpose and role*

When consular officials attend trials, the factor they observe most is 'fairness' or the absence of fairness. When consular officers attend trial the focus with respect to prisoners is 'their physical and mental wellbeing' rather than the quality of their legal defence'. Consular officials need to observe this delicate balance between promoting the welfare of citizens and being responsible for their legal defence.

When attending the trial they can also observe the quality of interpretation their nationals receive. Another purpose of attendance is to gain first-hand information about an individual trial. Consular officials also observe whether nationals are treated fairly according to international standards, not necessarily national standards.

### *Reporting of trial attendance and management information*

Local posts are expected to report on every trial that they attend. The US State Department holds in their case management system a profile of the individual defendant which can be accessed from Washington and at the local post. So if someone in Washington is interacting with the family the consular official would be aware of that.

In certain cases, the USA's central office will provide a reporting table to the consular post, requesting observations to be made on specific questions or issues of concern.

As in all other countries participating in the study, reports on trial attendance are internal documents used to advise the consulate and MFA of any concerns with the trial process, and where appropriate to identify or request advice on any further action by the consulate that might be necessary. Reports are sent to a distribution list of caseworkers and specialist advisers at the local post, regional posts and central office. Reports are not normally shared with the detainee or his legal team, a practice that was only found in the Netherlands and in Australia.

The US was the only country participating in the report that was not only able to report on the number of American citizens detained but also on the number awaiting trial. These figures were then broken down to those awaiting trial and those in prison. However, even this information is no longer routinely collected. Germany also mentioned that these data are collected by local posts but not held centrally.

### *Training and other forms of assistance*

While new consular officers do not spend extensive time at the State Department headquarters before taking up their assignments abroad, they do, take a 31 day consular training course at the National Foreign Affairs Training Center in Washington. One week of the course deals exclusively with arrests, imprisonment, trials and other matters which may affect American citizens who find themselves subject to such conditions. The US Department of State provides extensive training to all consular officers in all aspects of consular responsibility and assistance before they are deployed in the field. The training process contains materials related to arrests, imprisonment and attendance at trials.

More support is given to consular officers by more experienced members of staff when they arrive at a local post.

Consular officers can also receive additional help from the Central Office in Washington. In high profile cases the analysis will take place in Washington but placed in the context of the country's legal system.

### 3.6 Conclusion

#### *Basis of protection*

Consular assistance is a legally protected right only in Germany; in Australia, the Netherlands, the UK and the US it is a government policy.

#### *Eligibility*

Eligibility criteria to receive assistance vary across Ministries: citizens are always eligible for assistance; residents are sometimes eligible in the cases of Australia, Germany and the US but never in the case of the UK. The UK is the only participating country which only provides consular assistance to dual nationals in third countries when they travel on their British passport. The rest of the Ministries provide assistance to dual nationals irrespective of the passport they travel on.

In compliance with EU legislation Germany, Netherlands and Britain also provide consular assistance to EU nationals if their country of origin is not represented in a particular location. In these cases EU nationals receive the same services as nationals of the Ministry providing assistance. Australia has signed a similar agreement with Canada to assist Canadian nationals in countries where Canada is not represented and vice versa. However, in this case the represented consulate provides the form of assistance that would be provided by the Ministry of the individual's origin.

#### *Consular assistance*

The five participating Ministries provide similar forms of consular assistance to their nationals.

Trial attendance is encouraged only in Australia; the other four Ministries decide on a case by case basis.

#### *Decision-making on trial attendance*

The principles that guide decision-making differ across Ministry. Even though the following descriptions are not exclusive, what struck the researcher is that Australia placed more emphasis on uniformity, Germany on a non-judgemental ethos, Netherlands on flexibility, the UK on consistency, and the US on transparency.

The US is the only country which makes trial attendance mandatory in certain circumstances.

Germany has the most decentralised system of decision-making on trial attendance; the UK and the US have the most centralised ones; final decisions on trial attendance often rest in the central Ministries.

#### *Role of consular officials at trial*

All participating Ministries considered the role of consular officials at trial to include ensuring the welfare of the defendant and demonstrating the government's interest in the proceedings. Australia, the United States and Germany also considered their officials to have an active role as "observers" to ensure compliance with internationally recognised fair trial rights. By contrast, the United Kingdom maintained a distinction between "observing/monitoring" and passive "attendance", stating that officials do not attend to assess the fairness of proceedings.

### *Reporting*

Even though consular officials usually report on the trials attended, these reports have a standardised format only in Australia. In addition, even though the way that reporting is carried out varied among Ministries, the purpose of reporting was common to all Ministries of Foreign Affairs. The purpose of a report is: first, to provide a record of the consular official's impressions and observations at the trial; second, to report the consular official's impressions and observations; and, third, to advise the consulate and Ministry whether any further action is necessary.

### *Training*

Consular officials receive training before or after taking a post both on consular assistance and trial attendance. However, training on the latter subject usually focuses on the role of consular officials at trial rather than on fair trial rights. Surprisingly, this is also the case in Australia where ensuring the fairness of the trial is considered to be a key responsibility of consular officials.

# From policy to practice<sup>15</sup>

The aim of this chapter is to explore how central policy on consular assistance and trial attendance is translated into practical action. To investigate this issue we asked 38 consular posts of the four Ministries (8 German, 11 Dutch, 11 British, 8 US) to respond to a questionnaire about their experience in this field.

In this chapter we will report findings of the survey in the following order:

- ▶ First, we will provide factual information about consular assistance in general and trial attendance more specifically;
- ▶ Second, we will present the factors that affect decision-making in trial attendance;
- ▶ Third, we will discuss survey findings about the role of consular officials in trial attendance;
- ▶ Fourth, we will explore reporting and management information on trial attendance; and
- ▶ Finally, we will report survey findings on training and guidance consular officials receive on trial attendance.

Despite being involved in the initial stages of the research project, Australia's Department of Foreign Affairs and Trade decided not to be involved in the consulate survey and the field visit in Istanbul, and opted out of the research at this stage.

## 4.1 The facts on the ground

### 4.1.1 The prevalence of trial attendance

We asked consulates for data in three areas: the number of detainees to whom general assistance is provided, the number of trials of nationals held and the number of trials attended. As was found to be the case with the Ministry of Foreign Affairs interviews, consular trial attendance is very much seen to be the exception rather than the rule.

Providing general assistance to detainees is common – many consulates provide assistance to the equivalent of more than one detainee a week.<sup>16</sup> However, while trials of nationals are also common place, actual attendance is a rarity. In fact, 15 of the 37 consulates did not attend a trial in the past twelve months, a further nine only attended one trial, seven consulates attended between 1 and 5 trials, and only four of them attended between 6 and 10 trials in the past twelve months.<sup>17</sup> Only three of the consulates which participated in the study attended all the trials that were held in the region of their responsibility. These were in regions in which only a small number of trials (between 1 and 6) were held in the past twelve months.

<sup>15</sup> I would like to thank Alan Terry from Vanilla Research for his valuable contribution to this part of the report.

<sup>16</sup> For the purpose of this comparison, the UK sample is ten instead of eleven consulates because one consulate did not provide a numerical answer to the question of how many trials were attended in the past twelve months. Their answer was that 'By FCO/Consular Direction we do not attend trials. However, for major cases such as those that may attract a death or life or long determinate sentences we often attend the reading of the judgement/sentencing hearing'.

<sup>17</sup> Two consulates did not know how many trials were attended by consular officials in the past twelve months.

Across all the consulates surveyed, calculations suggest they attended on average around 1 in 20 trials of nationals. Importantly, this figure varied greatly by consulate network. It is crucial to note here that figures cannot be compared strictly across Ministries: the base sizes for comparison are small, each Ministry provided a different list of consulates, and of course each detainee and trial is different. The figures below, however, do suggest that on the ground different consulates follow different practices.

**Table 1:** Numbers of trials held and cases where support provided – range across consulates in the past twelve months

	<b>Germany</b>		<b>Netherlands</b>		<b>UK</b>		<b>US</b>	
	<b>(8 consulates)</b>		<b>(11 consulates)</b>		<b>(10 consulates)</b>		<b>(8 consulates)</b>	
	<b>Median (SD)</b>	<b>Range</b>	<b>Median (SD)</b>	<b>Range</b>	<b>Median (SD)</b>	<b>Range</b>	<b>Median (SD)</b>	<b>Range</b>
Detainees provided general support	20 (29.7)	7-100	50 (63)	20-200	41 (35.3)	15-110	47.5 (60.2)	3-150
Trials of nationals held	6 (17.2)	0-50	9 (51.3)	1-120	30 (18.5)	6-50	10 (34.9)	1-80
Trials attended	2 (2.8)	1-8	1 (2.3)	0-6	0 (0.7)	0-2	1 (2.1)	0-5
<b>Number of consulates</b>								
Consulates attending at least 1 trial	7		6		2		5	
N: 37								

N= Number of participants

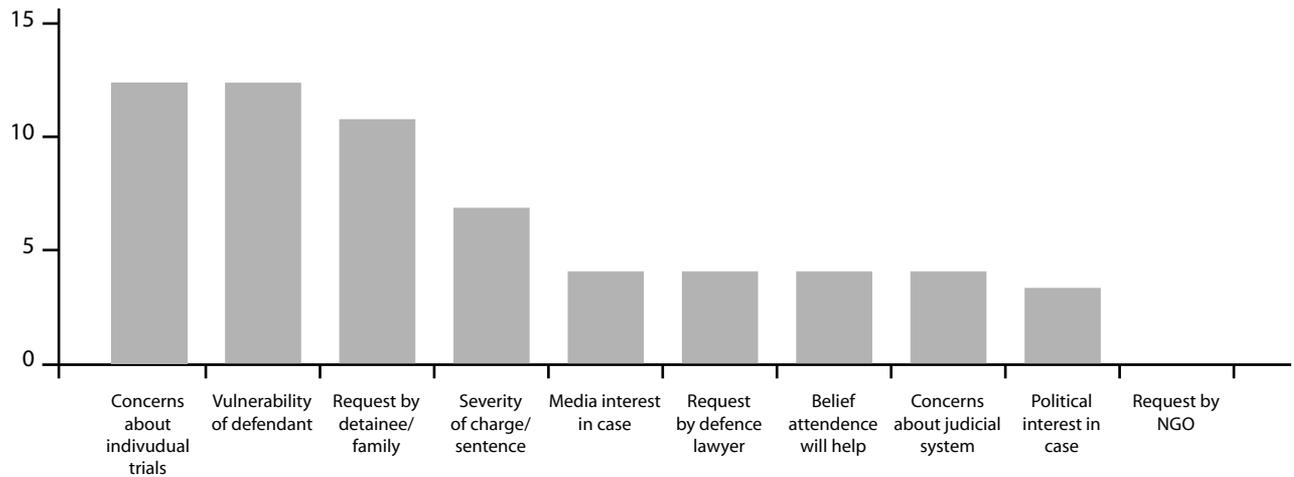
Table 1 characterises German consulates as the most likely, in practice, to attend a trial of a national, and British consulates as the least. In the past twelve months the number of detainees for whom German consulates provided support, ranged from 7 to 100; the number of trials of German nationals held ranged from 0 to 50 and the number of trials attended was between 1 and 8. At the same time the number of detainees that British consulates provided general support for ranged from 15 to 100; the number of trials of British nationals held ranged from 6 to 50; and finally, the number of trials attended ranged from 0 to 2.

Even though Table 1 shows that British and German consulates provided assistance to a similar number of detainees, and that a similar number of trials of their nationals were held, the British consulate attended fewer trials. However as Table 2 shows, the German sample included a greater number of countries where fair trial standards might be considered more of a concern, but not to the extent that this would account for the whole difference. US consulates did not appear to attend a larger number of trials than the other consulates despite the more transparent and systematic US State Department approach of 'attendance as an activity that is encouraged within defined conditions'. There are two reasons why this might happen: either US consulates that participated in the study did not have obvious cause of concern in the region of their responsibility, or they were not entirely aware of the policy of the State Department (see also section 4.2.1).

One important issue raised in the earlier Ministry interviews was an apparent paucity of centrally-held data on the number of trials held and attended. While the survey suggests that this is the case locally in terms of trials held (9 of the 38 did not know the number, a further 15 could only give a 'best estimate'), in terms of trials attended there is a greater level of awareness (only 2 did not know how many). The extent to which this individual knowledge is translated into wider institutional information will be detailed later in this report.

The specific reasons given for recent trial attendance varied, and were both reactive (e.g. requests from family) and proactive (e.g. concerns about the individual trial).

**Chart 1:** Reasons for recent trial attendance



**Q** For which of the following reasons has the consulate actually attended a trial within the last twelve months?  
Base: all (38)

If we break this data down by country, we see that the German sample included the greatest number of countries where fair trial standards were considered more of a concern (Table 2). 5 out of the 8 German consulates reported that within the last twelve months they actually attended a trial because they had specific worries about the individual trial. Also 5 out of the 8 German consulates reported that they attended a trial because they had concerns about the vulnerability of the defendant. The UK sample included the smallest number of countries where fair trial issues were considered to be a concern. Responding to the same questions only 2 out of 11 British consulates actually attended a trial because they were concerned about either the individual trial or the vulnerability of the defendant.

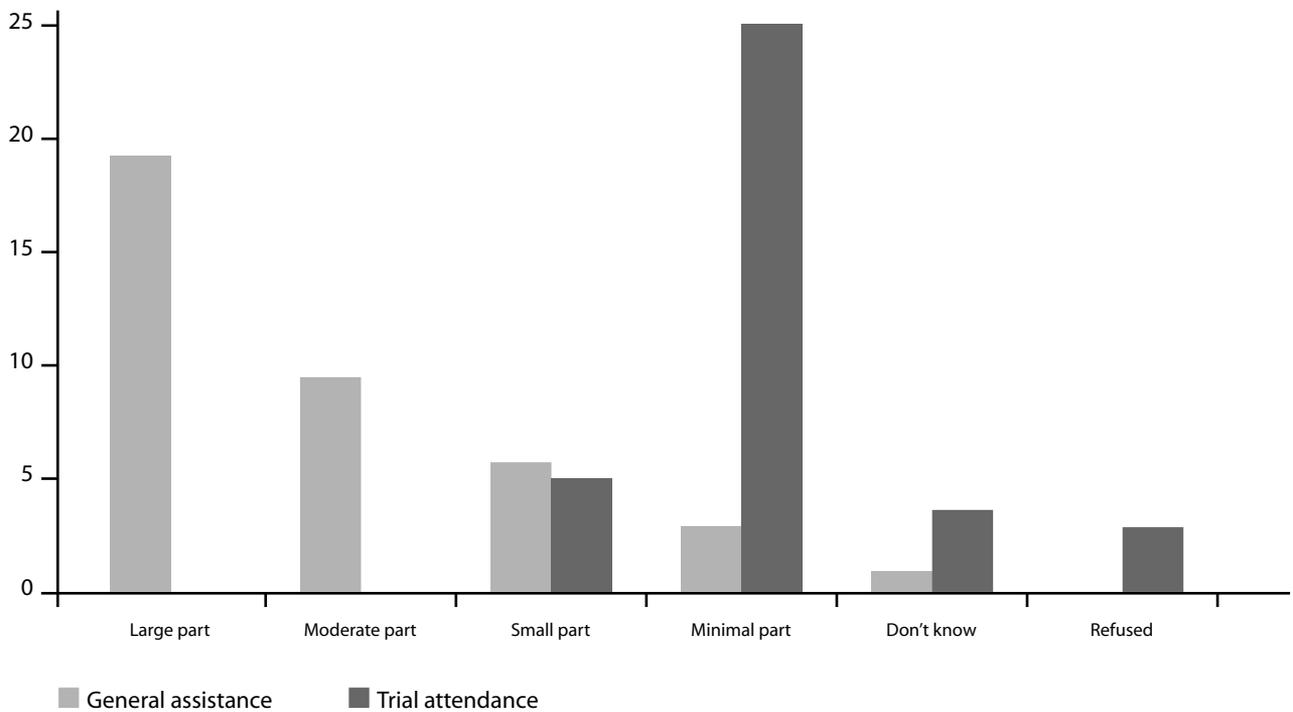
**Table 2:** Reasons for trial attendance over the previous twelve months

	Specific concerns about the individual trial	Vulnerability of the defendant
	Number of consulates	
Germany (8 consulates)	5	5
Netherlands (11 consulates)	3	4
United Kingdom (11 consulates)	2	2
United States (8 consulates)	3	2
N: 38		

N=Number of participants

We also asked consular officials to tell us how large a part of the overall workload of this consulate trial attendance and consular assistance play. As indicated in Chart 2, while more general consular assistance for detainees (such as contact with relatives or helping them find an interpreter) is recognised by most consulates as a large or moderate part of their overall workload, trial attendance is seen by the sizeable majority as constituting a minimal part. 27 of the 38 respondents reported that general assistance played either a large or a moderate part of their workload. 31 of the 38 respondents said that trial attendance played either a small or minimal part of their work.

**Chart 2:** Role of support in the context of overall consulate workload

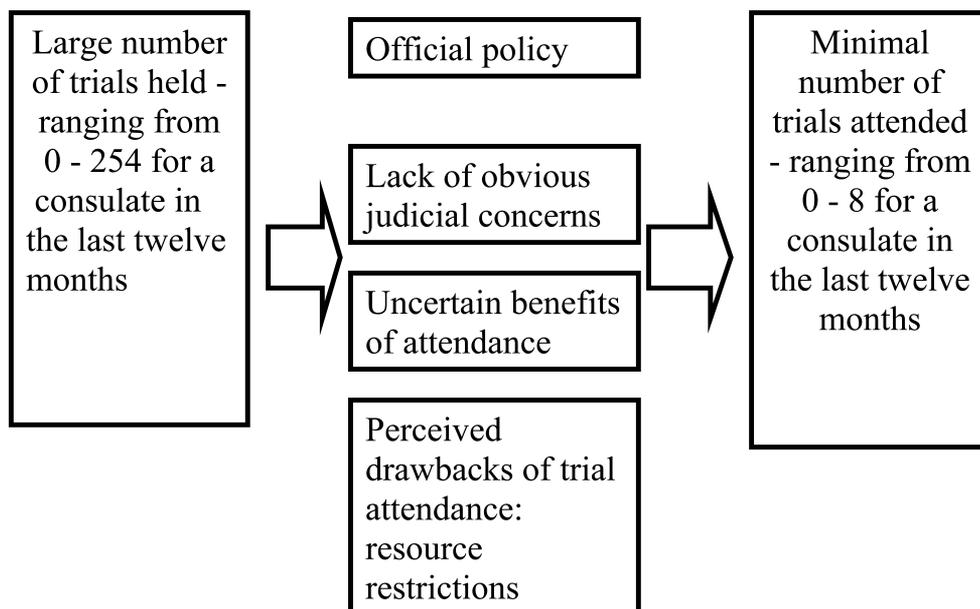


**Q** Can you tell me how large a part of the overall workload of this consulate each of the following elements plays – attending trials, and more general assistance such as contact with relatives or helping them find an interpreter? Base: all (38)

## 4.2 The decision-making process

### 4.2.1 Overarching factors affecting trial attendance

The figures from the survey show that trial attendance is very much the exception rather than the rule, and for many consulates is something they might do rather than something they actually *have done*. There would seem to be four main factors ‘filtering’ the numerous instances of trials into the few instances of attendance:



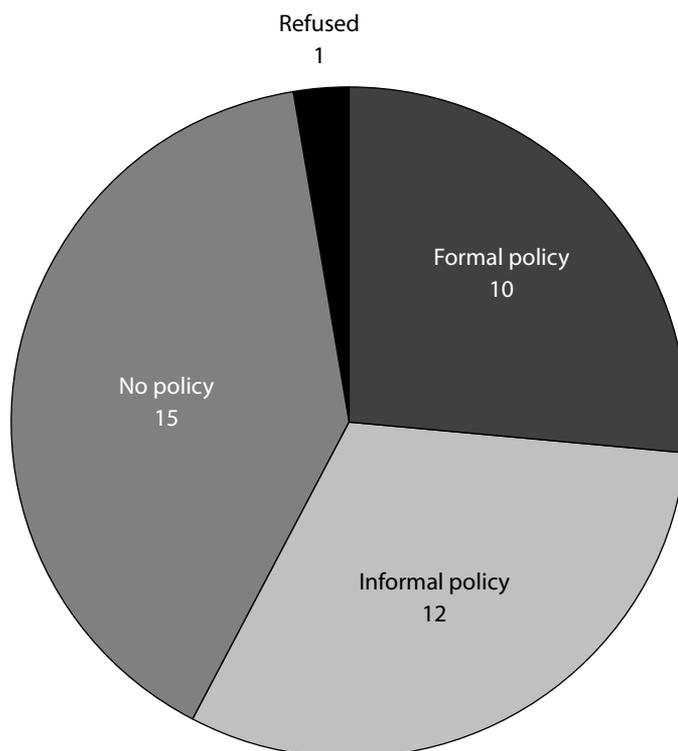
N: 38 consulates; N=Number of participants

### Official policy

The earlier interviews with the sponsoring Ministries of Foreign Affairs showed that for each of the UK, US, Germany and the Netherlands, the policy was that trial attendance should only happen in exceptional circumstances. The difference was that in the UK, Germany and the Netherlands it was decided on a case by case basis, whereas the US talked of a more structured and transparent approach, with attendance being compulsory in defined circumstances and encouraged in others.

These 'head office' policies though would not seem to be consistently translated through the consulate network.

**Chart 3:** Existence of a policy on trial attendance within the consulate



**Q** Can you tell me whether this consulate has a policy on attending trials? Base: all (38)

15 of the 38 said they did not have a policy for trial attendance, and even among the US consulates 3 of the 8 responding said that they did not have a policy (in comparison to the State Department's suggestion of guidelines being consistent and publicly available). A US consulate even stated that:

*I personally would hate to see guidelines on when to attend trials become too codified or inflexible. Country conditions and individual prisoner situations are so unique that the decision to attend a trial should be left to experts in each country and not dictated by outsiders. That said, every consular officer should be trained in the intricacies of that country's judicial processes, procedures, evidentiary processing, etc.*

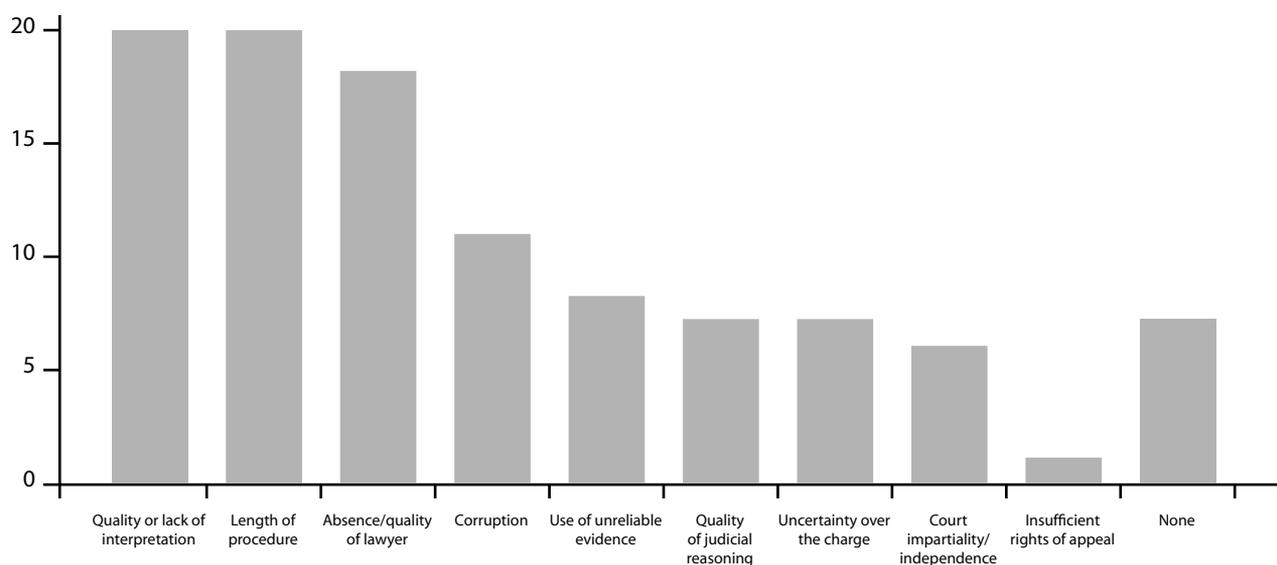
**Table 3:** Articulation of policies by Ministries and consulates

	Ministry's policy	Consulate's policy	Consular staff articulation of policy
Germany	Case by case, should be exceptional	Mixed: formal, informal and no policy	It varies from those who do have a local policy of attending (when appropriate) to those who have a local policy of not attending
Netherlands	Case by case, should be exceptional	Most do not have a policy	Those that do have a local policy attend if there are concerns about the local judicial system, otherwise not
UK	Case by case, should be exceptional	Most have a policy	Consulates do not attend trials, except in the case of minors, or in very exceptional circumstances
US	Guidelines transparent and available to all; mandatory attendance under certain circumstances	Mixed: some are not aware of a policy	Mandatory under specific circumstances (e.g. discrimination against US citizen, or when process has stalled). In other cases they may 'try' to attend

With the adoption of policies being seen to vary by consulate and country, the origin of policies is also seen to vary. While in most cases UK consulates adopt a policy handed down from the Foreign and Commonwealth Office (6 of the 8 with a policy say it was decided by the FCO), the situation is more mixed elsewhere, with some deciding the policy within the consulate, some receiving it from the Ministry and some deciding it jointly.

#### *Lack of obvious judicial concerns*

It is worth considering whether the consulates we spoke to actually felt fair trial rights were a problem in the region they were responsible for, and therefore whether there was a link between judicial concerns and trial attendance. A majority did have causes for concern, most commonly around the length of procedures, interpretation, or the legal assistance provided to defendants.

**Chart 4:** Causes of concern with local trial procedures

**Q** In your experience, and thinking about the region for which your consulate is responsible, which of the following do you personally feel are ever causes of concern, in terms of the fairness of the trial process faced by foreign defendants? Base: all (38)

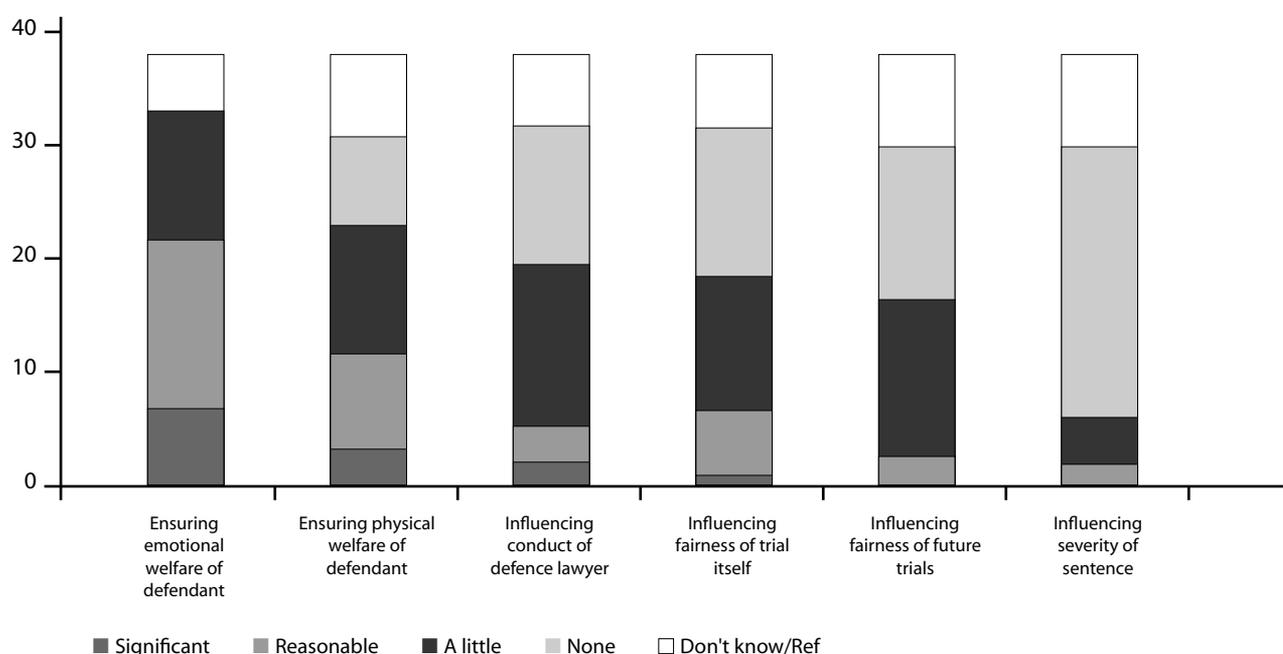
Other concerns are common, including one comment that western companies and individuals can be targeted for prosecution in the hope that a bribe will be paid to drop the charges. However, a minority of seven consulates did not have any concerns about the local judicial processes which is another reason why for some, consulate attendance is a low priority.

If we break the data down by country we see that 5 out of 8 German consulates had concerns about corruption in the judicial system, and 4 out of 8 had concerns about the use of unreliable evidence in the trial. Interestingly, none of the British consulates that participated in the study had concerns about any of the two issues, an element that might contribute to the lower attendance rates of British consulates at trials.

*Uncertain benefits of trial attendance*

The research suggests that the consulates agree that trial attendance has some benefits, but disagree over what these benefits are, and how significant they are.

**Chart 5: Benefits of trial attendance**



**Q** For each of the following possible benefits, can you tell us how much of a benefit to the detainee, in your experience, you think consular trial attendance actually provides? Base: all (38)

As can be seen above, there is a consensus that such support is of at least moderate benefit to the detainee’s emotional welfare, and in many cases their physical welfare. Furthermore, the majority of consulates across the board feel that there are no benefits at all in terms of influencing the sentence itself.

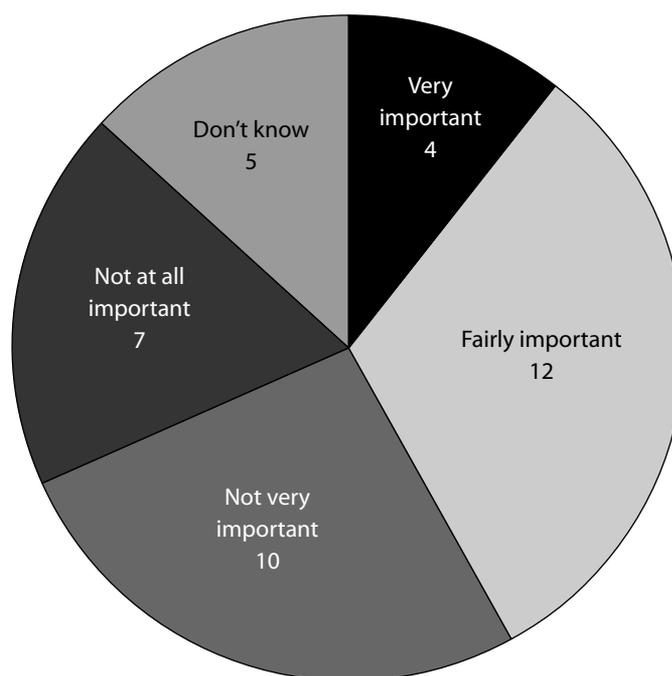
However, this is not the case in terms of influencing the fairness of the trial itself or the conduct of the defence lawyer. As Table 4 demonstrates, German and US consulates feel there is at least some benefit in terms of both the fairness of the trial and the conduct of the defence lawyer (more so than in the UK and Netherlands consulates within the sample), but most often this is just ‘a little’ rather than anything more substantial.

**Table 4:** Perceived benefits of trial attendance for defendants

	Influencing conduct of defence lawyer			Influencing fairness of individual trial itself		
	'A little,' 'significant' or 'reasonable benefit'	'No benefit at all'	Refuse/ Don't know	'A little,' 'significant' or 'reasonable benefit'	'No benefit at all'	Refused/ Don't know
	<b>Number of consulates</b>					
Germany (8 consulates)	8	0	0	7	1	0
Netherlands (11 consulates)	4	5	2	3	7	1
United Kingdom (11 consulates)	2	8	1	3	6	2
United States (8 consulates)	5	1	2	5	1	2
N: 38						

N=Number of participants

This somewhat muted enthusiasm for the existence of any benefits of trial attendance is loosened a little though when consulates consider the detainee's perspective, as Chart 6 demonstrates.

**Chart 6:** Importance of trial attendance to the defendant

**Q** How important to the detainee do you personally think trial attendance is, in comparison to other support you may provide, such as access to a list of defence lawyers, personal visits while in detention, liaison with relatives? Base: all (38)

These figures show a balance of opinion as to the benefits – 16 of the consulates seeing consular attendance as fairly or very important to the detainee. In contrast with 17 who do not see it as important in the context of the wider support they provide, such as access to a list of defence lawyers or personal visits.

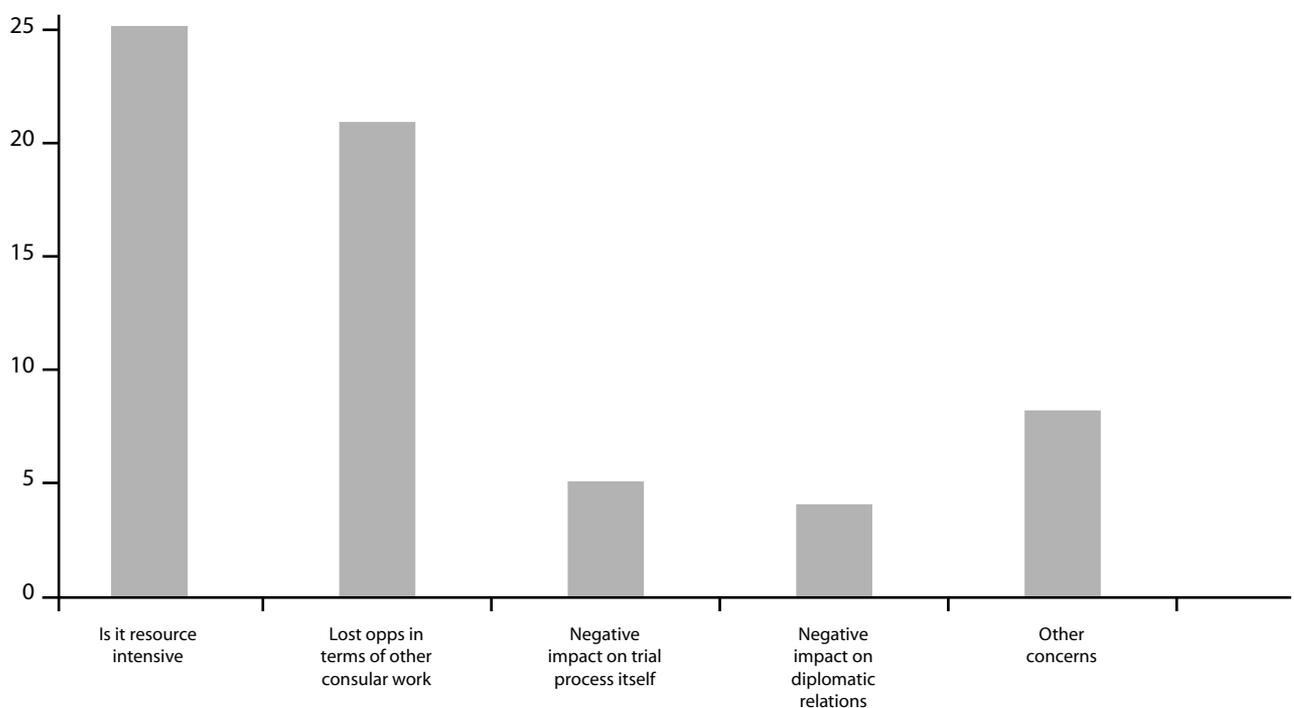
#### *Perceived drawbacks of trial attendance: resource restrictions*

In comparison, there is a more established sense of the negative impacts of trial attendance – namely the demands it makes on officials' time.

*The decision is basically left up to us. Because we are so short staffed, we do not have the time or resources to be able to attend. Anonymous*

*General trial attendance would be impossible for resourcing reasons alone. To liaise with the local lawyers is a far better use of consular manpower. Anonymous*

**Chart 7:** Drawbacks of trial attendance



**Q** Which of the following do you see as actual drawbacks of attending trials? Base: all (38)

Across all four Ministries there is the perception that trial attendance means lost opportunities in terms of other consular business (21 out of the 38 consulates reported it), compounded in their minds by the sense that it is a resource intensive exercise (25 out of the 38 consulates). Albeit only a handful of consulates saw a recognised poor reaction, either diplomatically (4 out of the 28) or judicially (5 out of the 38), to such 'interference', there were other downsides mentioned including:

- ▶ Families becoming overly dependant on the consular support and regarding them as part of the legal team;
- ▶ The fact that sometimes defendants wish to 'buy their way out of trouble' through bribes, and see consular involvement as hampering that option; and
- ▶ That involvement can be construed as 'taking the defendant's side', when a consulate is supposed to remain neutral regarding their guilt.

*Is there evidence either way?*

The picture painted by the survey - of many consulates unconvinced of the benefits trial attendance can have on ensuring fair trials, and conscious of the drawbacks - is developed further when consular officials were asked for specific examples of the impact trial attendance can have.

The survey asked for a brief overview of a recent case where consular officials felt that their attendance at a trial was extremely useful, and one where it was a waste of time. In most cases no examples were offered, as the consulate had not actually attended any trials recently, or were reluctant to share details. Some positive examples are given, though, but there are almost as many examples of the perceived downside of trial attendance, in the form of wasted time.

**Table 5:** Examples of positive and negative impact of trial attendance

Nationality of consulate	Examples of positive impact
Germany	A German with a Masters degree was held in prison with murderers and drug dealers because he stayed too long in the country without a permit and then falsified a document. Because of our participation and intervention the judge set him free.
UK	We have one case where we're concerned about the physical, mental and emotional welfare of an elderly defendant. In addition the defendant's English is particularly poor. We have attended the hearings to make sure the defendant fully understands what is taking place, that she has a good interpreter, and that the lawyer is genuinely defending her. Because of the difficulties in communicating it has been vital that we can clarify situations to our Ministry, the lawyer, the family and the defendant herself.
US	We recently attended hearings in a case where the minor citizen defendant was a ward of the civil court; belief was that attendance resulted in increased vigilance on the part of youth authorities in attending to his other needs. Communication on subsequent court and parole decisions was also conveyed in a more timely manner.
US	A case was moving along at a snail's pace, with the judge and various attorneys often not showing up for scheduled hearings. Witnesses failed to appear repeatedly, yet the judge kept giving them another chance. The embassy signalled that it would be attending the next hearing and did so. Suddenly trial dates became regular, attendance reliable and the case began moving again.
Anonymous	No consular attendance has been extremely useful. Most of the times we are there because of some moral support to the detainee or their relatives.

Nationality of consulate	Examples of negative impact
Germany	We participated at a trial of a drug-related case but as the judge had forgotten to get a translator the whole trial had to be delayed to an another day a month later when I could not attend.
Anonymous	The problem in this country is that the defendants often go to court several times before the trial really starts; each time, the judge resets the date of trial. Therefore, it is very difficult to know when our presence could be useful.
Anonymous	It is regularly a waste of time if you go to court at the fixed date and the trial is delayed and delayed and delayed, so that finally you have to leave without having attended the trial.
Anonymous	In a still pending case there have already been 9 court sessions with the appearance of the defendant. Postponements were justified with the absence of witnesses or the lack of necessary papers (which means bad organisation - some additional papers had to be ordered from another court and afterwards translated, which could have been done at the beginning of the trial).

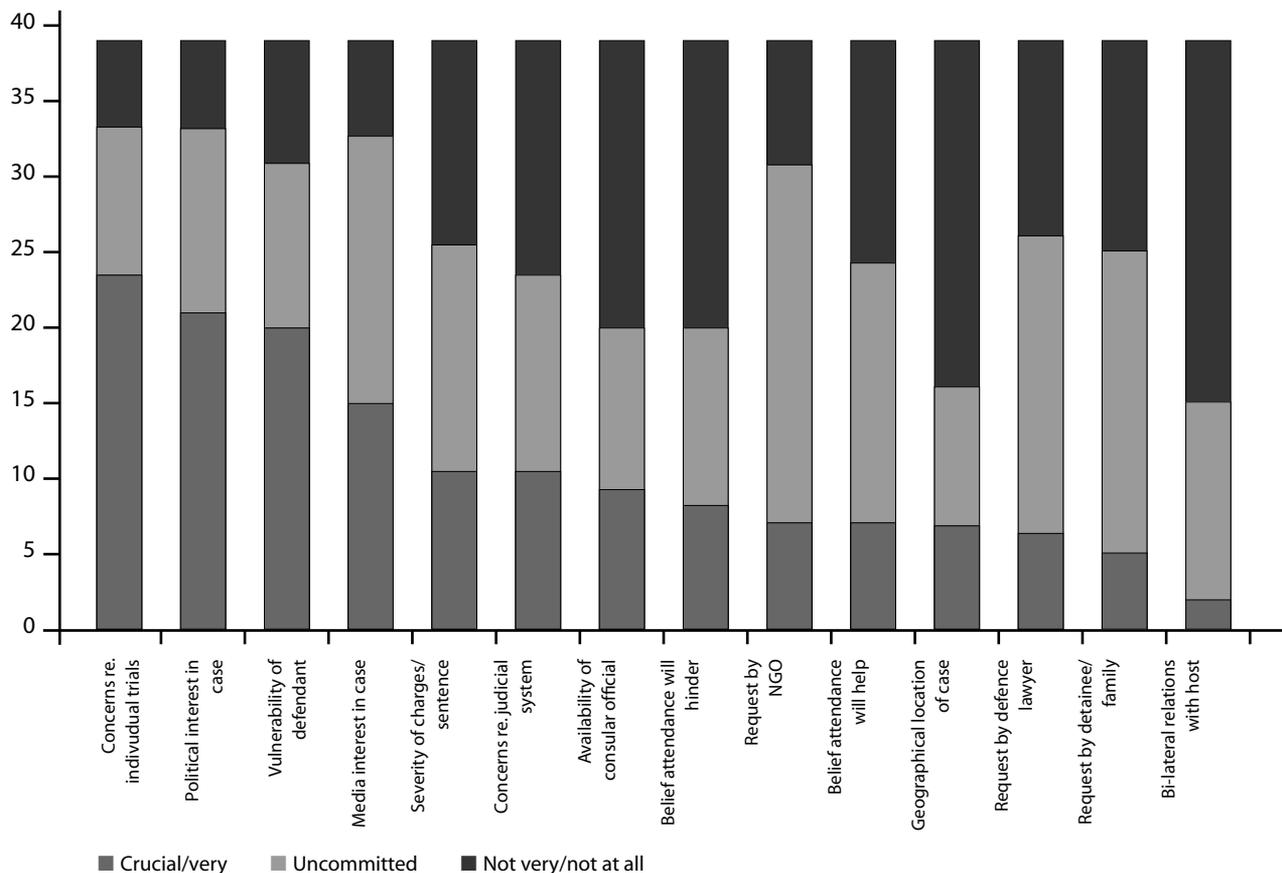
The positive examples that were provided by individual consulates indicate that trial attendance could benefit trials in different areas: the first example draws our attention to the potential benefit trial attendance has to the outcome of the trial. Examples two, three and four point out that trial attendance could possibly contribute to the procedural fairness of the trial itself. Especially in the cases of vulnerable defendants, such as the elderly and minors, trial attendance could contribute to the better understanding of the procedures by the defendant, and could also make the authorities more vigilant about the needs of the vulnerable defendant. Finally, example five underlines the benefits of trial attendance to the emotional welfare of the defendant and his/her family.

These cases could not be generalised though. Consular officials provided a number of examples which demonstrated that trial attendance had neither a positive nor a negative impact on the trial itself. Trials attended by consular officials were adjourned several times because of insufficient organisation. In these examples, the main drawback of trial attendance was that it was a lost opportunity in terms of other consular work.

#### 4.2.2 Case by case factors affecting trial attendance

After the overarching factors affecting trial attendance (namely official policy; lack of obvious concerns about the local judicial process; uncertainty over the benefits and perceived downsides of consular attendance at trials), whether to attend a trial or not will be taken on a trial by trial basis. A number of factors are seen to feed into this, as can be seen in the chart below.

Chart 8: Factors affecting individual trial attendance



**Q** For each of the following factors, can you tell me how important you personally feel each is in the decision whether or not to attend an individual trial? Base: all (38). Uncommitted = fairly important, don't know or refused

Four main influences emerge – concerns about the individual trial, political interest in the case, the vulnerability of the defendant and media interest in the case. Other factors are seen to be less important, or in the case of concerns about the local judicial process, have more people downplaying its importance than highlighting it.

When asked spontaneously which factors they take into consideration, many of the above feature, but there is also acknowledgement of more prosaic factors such as work pressures or the worry about setting precedents.

*Staffing, time and budgetary constraints also factor into the decision. US consulate*

*Very often the consulate does not even know the date and hour of a trial, especially when there is no private Lawyer. German consulate*

The relationship between the number of trials and the available resources usually works against trial attendance, but one consulate explained that they can actually attend trials as the rule rather than the exception because of the relatively low number of detainees.

*Due to the low number of American citizen detainees, the consulate generally attends all proceedings or conducts an arrest visit (in the event of a charge that is eventually dropped or does not go to trial) for each case. US consulate*

The decisions on whether to attend or not are usually made by the Head of the consulate, although in a minority of cases the individual consular official (especially in Germany) or the central Ministry is also involved.

**Table 6:** Process for deciding whether to attend a trial in a typical case

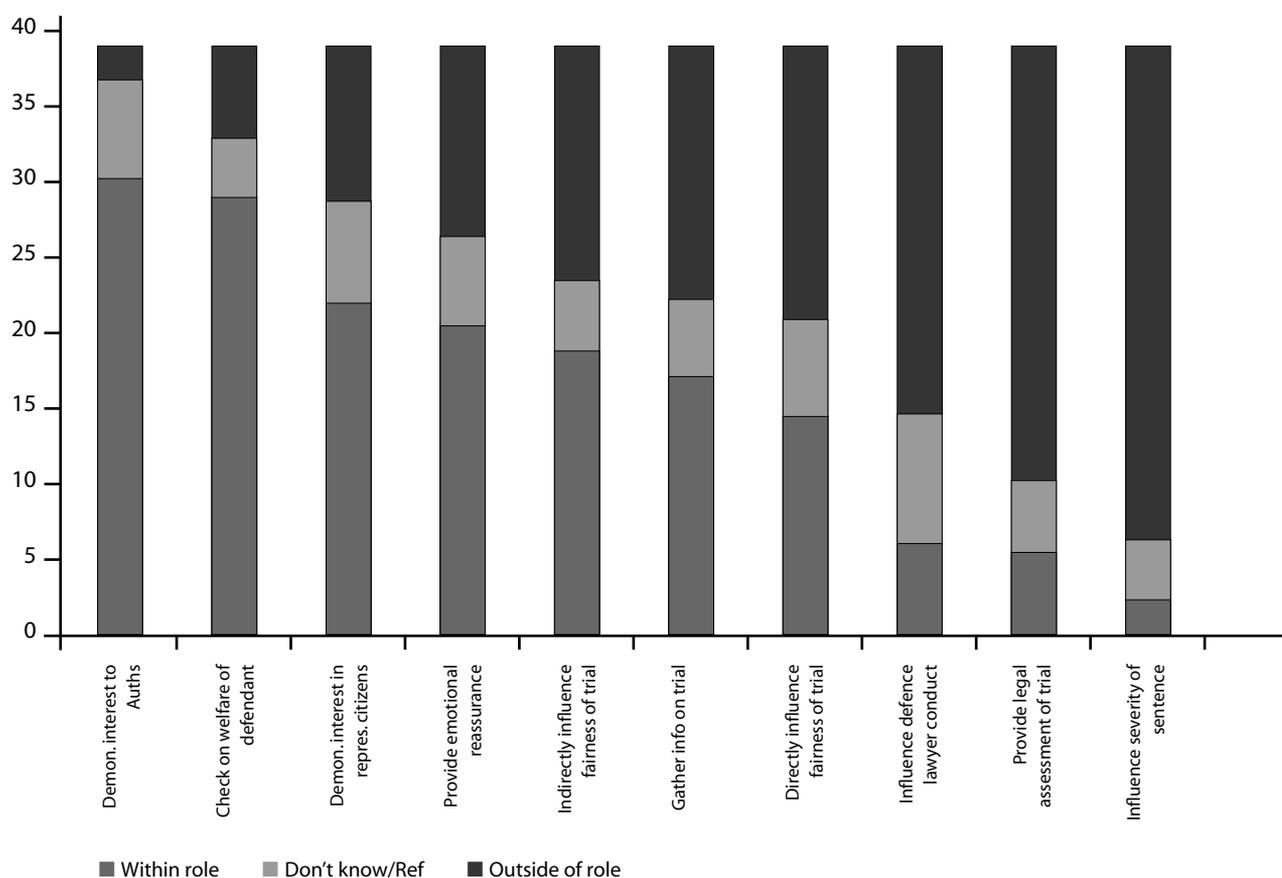
Decision made by:	Number of consulates
Head of the consulate	29
Individual consular official	14
Central Ministry	11
Refused	2
N: 38	

N= Number of participants

### 4.3 The role of consular officials at a trial

The survey findings would suggest that when consulates do attend trials, they see their role more as passively observing rather than actively monitoring (as in the established concept of NGOs monitoring fair trial adherence).

**Chart 9:** Remit of consular attendees



**Q** For each of the following areas, can you say whether the consulate feels it is within the role of a consular officer attending a trial, or outside of their role? Base: all (38)

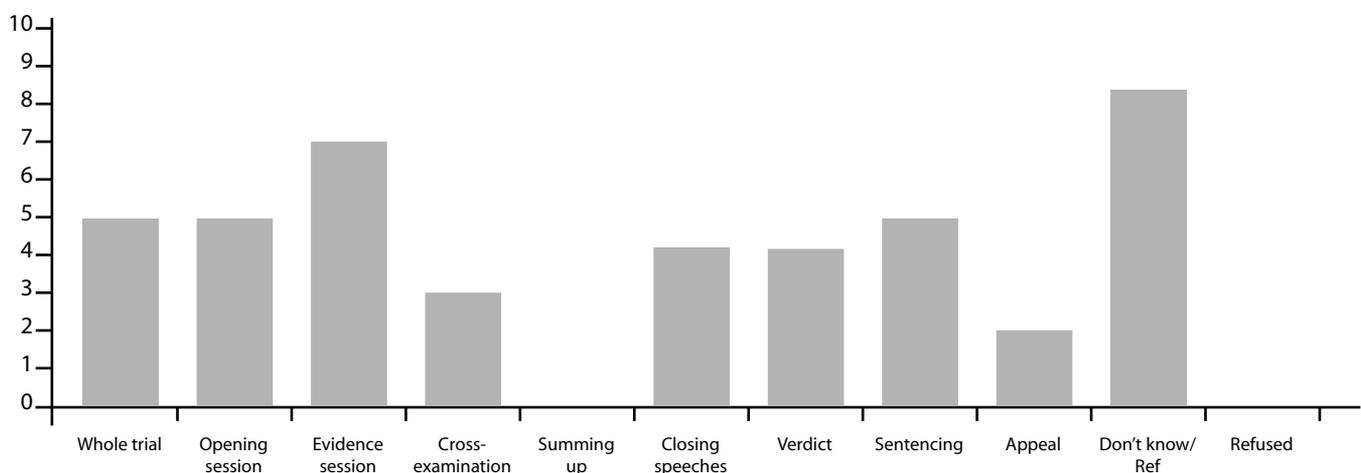
Demonstrating interest (both to citizens and to the local authorities) and ensuring the welfare of the defendant rate highest in terms of being within their remit. Indirectly influencing the fairness of the trial is some way down the list, with direct influence even further so.

Interestingly, those consulates who see influence falling within their remit (mainly indirect but also, to a lesser extent, direct) are predominantly from two countries' consulates – the US and Germany. In the former instance this would seem to fit with their more formalised, transparent policy of 'mandatory' trial attendance in certain circumstances, and in the latter would fit with the apparent (albeit less formalised) practice of more common trial attendance.

Lastly, it is worth noting that only a small minority of respondents (5 - solely from US or German consulates) saw it as within their role to provide an informed legal assessment of the trial.

It was also seen that there were varying practices around which elements of a trial to attend – as might be expected given the different combinations of consulate and host judicial system in the survey. Presumably because of the demands on consular resources relatively few attend the whole trial, with the evidence session the more common focus, but only marginally so.

**Chart 10:** Parts of trials typically attended



**Q** Can you tell me how large a part of the overall workload of this consulate each of the following elements plays – attending trials, and more general assistance such as contact with relatives or helping them find an interpreter? Base: all (38)

## 4.4 Reporting and management of information

### 4.4.1 The practices of reporting

We wanted to explore the extent to which consulates learn from the experience of trial attendance, and whether or not information is fed back into planning and improving the services they offer.

These are certainly the foundations for making use of information, since a majority of consulates either always or usually follow-up with a report on the trial, a practice consistent across countries.

**Table 7:** Reporting on trial attendance

How often reports on trial attendance are made:	Total number of consulates
Always	20
Usually	4
Sometimes	4
Never	4
Refused	6
N:	38

N: Number of participants

These reports are then almost always shared with senior managers within the consulate (23 of the 28 who make reports) and the central Ministry (26 of the 28), but seldom with the detainee or their families (6 of the 28).

The content of the reports though do appear to differ by country and by consulate. Although many consulates did not share what sort of information formed the basis of a report, those that did varied between a 'facts only' approach and a more subjective 'fair trial' assessment.

*We observe if international minimum defence standards such as presence of a defence lawyer and interpreter are guaranteed. German consulate*

*In the report information is provided concerning the compliance with the defendant's rights, especially representation by an attorney and sufficient translation. Anonymous*

*It depends, but no legal assessment of course. UK consulate*

*Presence of lawyer and interpreter. Standard of legal support. Standard of interpreting. Conditions in court. Welfare of individual standing trial. UK consulate*

*Nature of the hearing attended. Brief summation of the proceedings. Any concerns regarding key players and fairness of process. US consulate*

*Information pertinent to interim hearings; delayed or cancelled hearings; judgment or determination; if acquitted; if convicted. US consulate*

#### 4.4.2 The uses of reporting

This information is, in most cases, fed back to the consulate to help plan services.

**Table 8:**

How information contained in the reports is used:	Number of consulates
The information in the reports is formally reviewed or collected and used to help plan the services the consulate provides and the actions it takes	16
The information in the reports is formally reviewed or collected but is not used to help plan the services the consulate provides and the actions it takes	6
The information is not formally reviewed or collected	0
Don't know	4
Refused	2
N: 28	

N= Number of participants

However, it was found that while the information from the small number of trials attended is formally collected, that is not as often the case with the wider issue of trials of nationals in general. Practices vary across consulates, but also across consulate networks.

**Table 9:**

Is information from trials of nationals in the region collected in any database or other form of management information?	Number of consulates
Yes	12
No – although there are a lot of such trials	9
No – there are not enough trials to justify it	7
Don't know	4
Refused	6
N: 38	

N= Number of participants

Indeed, within the Dutch consulate network we saw both extremes, with some saying they did not keep a database even though there were sufficient numbers of trials, while another described a very active use of the information:

*Every visit of a consulate (trial or prison visit) is registered in specific software, so information can be shared between consulate and Ministry and vice versa. Dutch consulate*

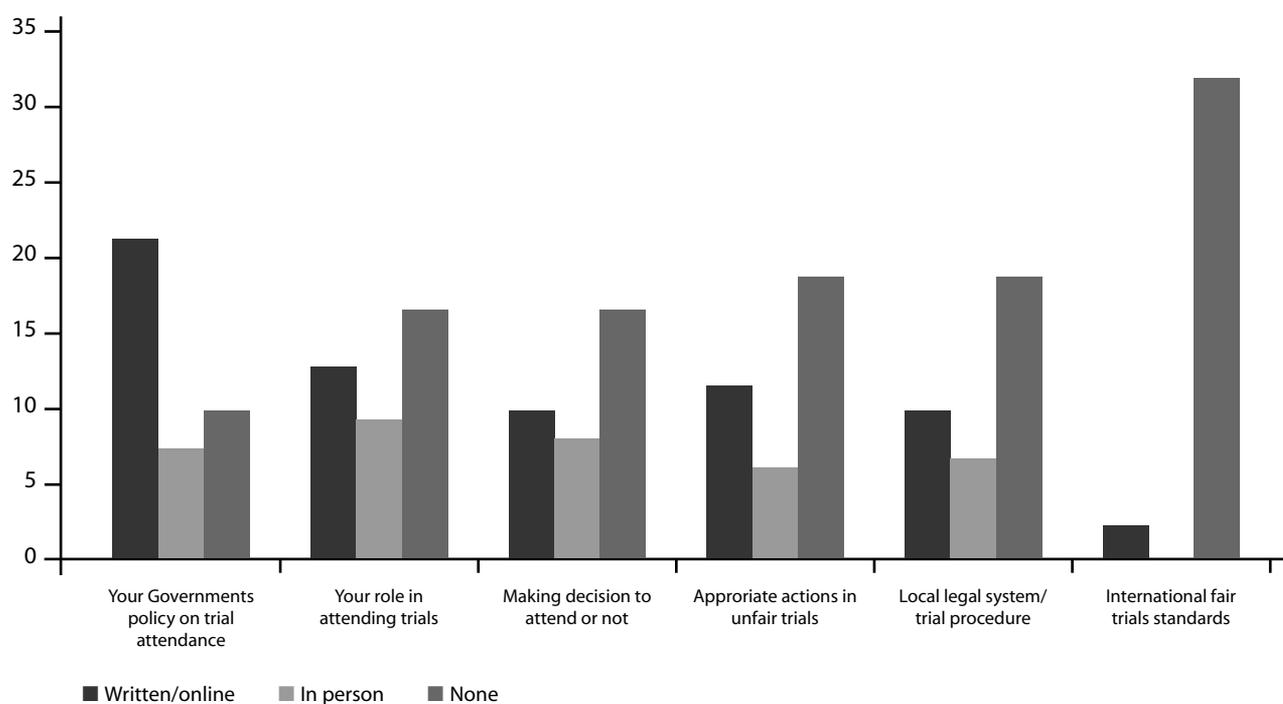
## 4.5 Training and guidance

### 4.5.1 The provision of guidelines and support

The findings around the training and guidance that is given to consulates largely reflects the findings elsewhere in the report – training and support is provided, but not consistently, and focuses on individuals' core consulate role rather than a wider briefing on fair trial standards. A majority (across each consulate network) are aware of official guidelines around trial attendance, but these are always in the form of central Ministry guidelines – none were aware of any external guidelines from NGOs.

The content of wider training and information understandably reflects their origins. As the chart below shows they focus on the Ministry's policy and the individual's role, with far fewer covering issues such as appropriate actions in unfair trials and almost none covering international fair trial standards (just two mentions, both from British consulates).

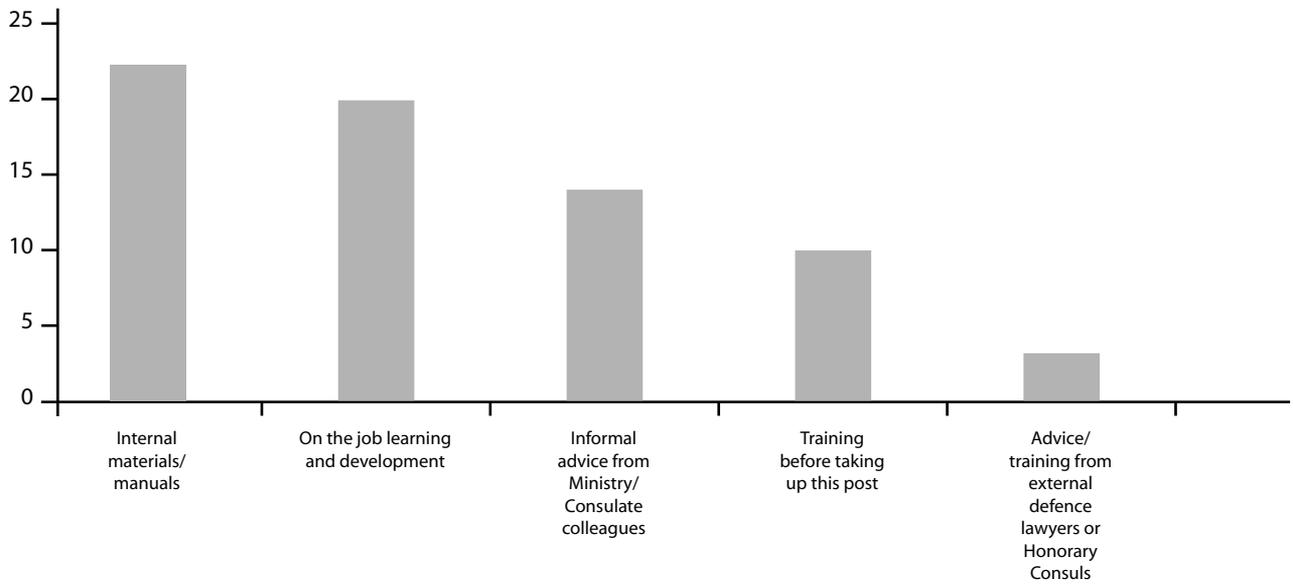
**Chart 11:** Content of training and support



**Q** Have you received training or support, either in person or written/online, in any of the following areas? Base: all (38)

The form of the support is a mix of formal and informal, but primarily comes from within the Ministry and consulate network, rather than from external organisations.

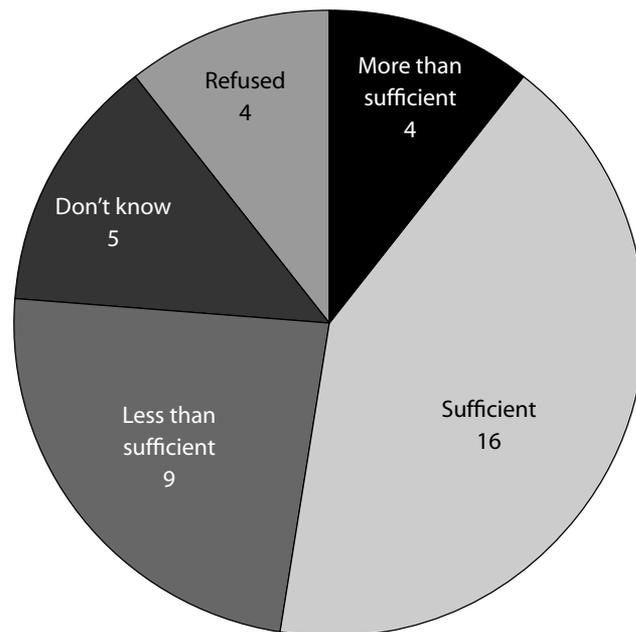
**Chart 12:** Form of support received



**Q** Which form did that support take? Base: all receiving some form of training or support (28)

For many, the training and support provided is felt to be sufficient, but there is also a sizeable minority who feel it is less than sufficient. There is a suggestion though that this may be more a function of the demands on those individuals than the quality of the materials/advice provided. Of the 9 who responded 'insufficient', 6 were from US or German consulates, the networks who perform a greater role in terms of attendance.

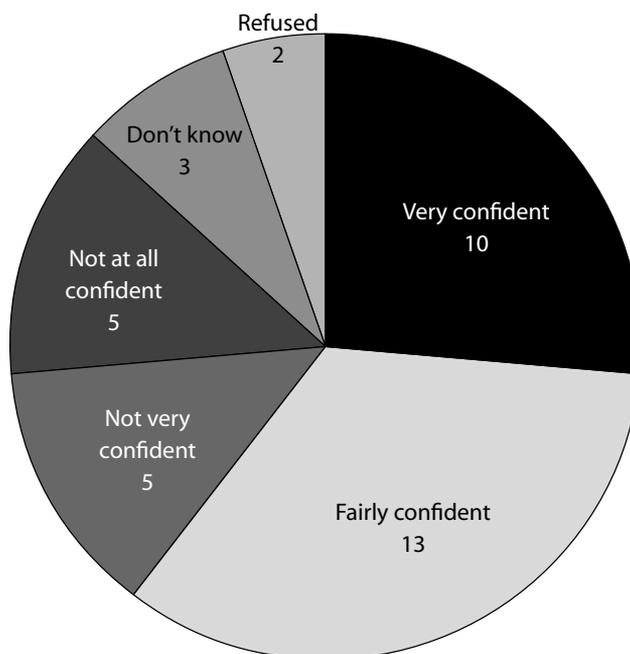
**Chart 13:** Sufficiency of training received



**Q** Thinking about the skills and knowledge that you feel you need when attending trials, how sufficient would you rate the training and support you have received, if any? Base: all (38)

A similar picture is found when asked about how confident they felt about attending trials – on the whole most felt confident (though ‘fairly’ rather than ‘very’), while a minority expressed doubts.

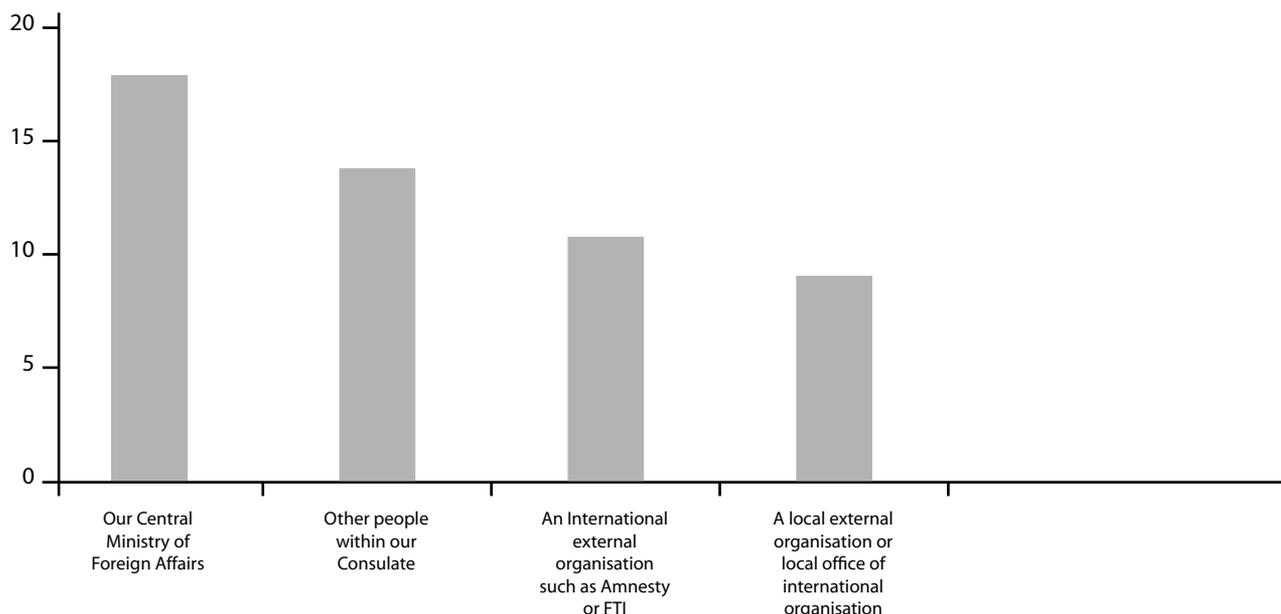
**Chart 14:** Confidence when attending trials



**Q** In general, how confident do you personally feel about consular attendance at trials – for instance knowing whether to attend a trial or not, what impact your attendance might have and what role you should or should not take while attending? Base: all (38)

Respondents’ own Ministries and consulate networks are seen as best-placed to improve preparedness. There is support for help from external NGOs, but on the whole these are seen as secondary.

**Chart 15:** Desired sources of support for consular officials



**Q** Which, if any, of the following do you think would be a useful source of help and support in terms of developing the skills and knowledge required for consular attendance at trials? Base: all fairly/not very/not at all confident about attending trials (23)

There are few, if any, concerns expressed about the intentions of international NGOs such as FTI – those that did not select them as a useful partner usually attributed it to the fact that they feel local expertise and knowledge of the local judicial system is what would be most helpful to them.

This sentiment is borne out when asked in general what training or information they would find useful to equip them to effectively attend trials. Some consulates allude to a grounding in fair trial rights in general. They mention that they would like to have specific instructions on when to act and what constitutes a legitimate form of intervention by consular officials:

For instance a Dutch consulate mentioned that they would like *'to learn what role I can take; what I can or cannot do while attending a trial; what I can or cannot do before a trial starts (talking to lawyers etc)'*.

A British consulate stated that *'it would be more useful to have quick and easy access to a source of expertise such as Fair Trials International, rather than try and become experts ourselves'*.

A third (anonymous) consulate also reported that it would be useful to receive training on *'trial procedure. Knowing when and how to object to unfair or improper proceedings/practices'*.

Others, though, pointed out that training should focus on raising their understanding of 'local particularities'. For instance a respondent was sceptical about receiving generic training on trial attendance *'as cases differ and local circumstances differ from posting to posting - learning by doing is best'* (Anonymous).

In the next chapters we will examine whether it is necessary to strike a new balance between receiving generic training and providing more clear instructions about the role of consular officials at trials.

## **4.6 Conclusion**

Research findings of this survey suggested that:

- ▶ Across consulates of the four Ministries the pattern was that trial attendance was the exception rather than the rule.
- ▶ UK consulates that participated in the study appeared to be the least likely to attend trials and German consulates the most likely ones.
- ▶ The US State Department approach of 'attendance as an activity that is encouraged within defined conditions' did not translate into an increasing number of trials attended by American consulates.
- ▶ Across consulates there are four overarching factors 'filtering' the numerous instances of trials into the few instances of attendance: official policy, lack of obvious judicial concerns, uncertain benefits of attendance and perceived drawbacks (especially resource restrictions).
- ▶ Across Ministries it was found that consulates formally collect information about the small number of trials attended. However, that is not often the case with the wider issue of trials of nationals in general.
- ▶ Training and support is provided, but not consistently, and focuses on individuals' core consulate role rather than a wider briefing on fair trial standards.
- ▶ The training and support provided was felt to be sufficient, but there was also a sizeable minority who felt it was less than sufficient. These were primarily from the US and German consulates, the two networks who see a wider role in terms of attendance.

# The case of Istanbul

As explained in Chapter 2, FTI selected Istanbul as a case study because all participating Ministries have a consulate there and, being a popular tourist destination, each consulate would be experienced at assisting their nationals there. We made the assumption that they would also have similar concerns about the treatment of foreign national defendants, and this could form the basis for comparison of their policies. Semi-structured interviews with consular officials in Istanbul covered the same themes as the consulate survey and gave us an insight into their experiences of attending trials. The views of consular officials on trial attendance were complemented by nine interviews with defence lawyers in Istanbul. Interviews with defence lawyers were included to provide a different perspective on consular trial attendance and indicate their understanding of the potential advantages and disadvantages of consular attendance at trial.

In this chapter, first, some facts about forms of assistance provided to detainees and trials attended by each of the consulates will be presented. Second, the local policy of the consulates in trial attendance will be examined. Third, the main concerns of consular officials in Turkey will be explored. Finally, the perceived advantages and disadvantages of trial attendance will be investigated.

## 5.1 Facts relating to detainees and trial attendance

### Consular assistance to non-national defendants

As noted in Chapter 4, all four participating consulates in the study have an established 'prisoner pack' that they offer to their nationals who are detained abroad. This includes information about the minimum number of prison visits and a list of local lawyers and interpreters. Some information about the local judicial system, provision of clothing (if necessary) and in some cases financial assistance is also included in the 'prisoner pack'.

#### *Prison visits in Istanbul*

Consular officials in Istanbul visit detainees more frequently than required by the Ministries of Foreign Affairs. The British consulate mentioned that they always try to have a prison visit prior to the first hearing, and thereafter they visit detainees regularly. The Dutch consulate noted that the minimum number of visits is twice a year. However, in Istanbul prison visits are more frequent, approximately four to five times a year, because foreign prisoners are held primarily in two prisons only, making it easier for consular officials to visit them. The German consulate stated that they try to visit detainees four times a year. The American consulate paid the most frequent prison visits. Before the trial consular officials visit the defendant once a month; after conviction they visit them once every 90 days. As is demonstrated by Table 12 (p.50), the American consulate had the lowest number of prisoners in Turkey, and this could make frequent prison visits easier.

#### *Legal assistance*

None of the participating consulates stated that they would pay for a defence lawyer. In Turkey if defendants cannot afford to hire a private lawyer the state appoints a public defence lawyer to represent them in court.

However, all four participating consulates consider that it is within their responsibility to provide defendants with a list of defence lawyers they could consult. These were not 'recommended' lawyers in Istanbul, and the consulates do not make an assessment of the lawyer's competence. The main criteria used to compile and revise these lists are:

- ▶ The language skills of the lawyer;
- ▶ The familiarity of the lawyer with the legal system of the country of the defendants' origin;<sup>18</sup> and
- ▶ The area of expertise of defence lawyers (e.g. commercial or criminal law).

As indicated in Chapter 2, in order to select the sample of defence lawyers who participated in the study we used the list of lawyers provided by the consulates and this gave us the opportunity to assess these lists. Using the lists, we approached individuals to take part in the research on the basis that they practice criminal law and defend foreign nationals at least occasionally. It quickly became apparent, though, that for an individual citizen seeking a criminal defence lawyer, the various consulate lists varied in terms of support. The main reason behind this was that a large number of listed firms claimed that they do not practice criminal law. In most cases they were commercial lawyers. Although in some cases commercial law firms did state that occasionally they took on criminal work for individuals (for instance where a commercial client required it), in many cases they did not.

**Table 10:** List of defence lawyers practising criminal law

Consulate	Number of firms on list	No. of firms listed as potentially practising criminal law	No. of firms consequently communicating they do not practice criminal law <sup>19</sup>	No. of firms left practising or potentially practising criminal law
Australian	11	1	0	1
British	10	5	0	6 <sup>20</sup>
Dutch	12	12 <sup>21</sup>	7	5
German	27	10	7	4 <sup>22</sup>
US	17	16 <sup>23</sup>	7	9
Total				18 <sup>24</sup>

Whilst this pattern had implications for the research (in that we were unable to meet our original target of fifteen interviews), it also has larger implications for any citizens looking to the consulates for help finding in a criminal defence lawyer.

18 This would allow lawyers to explain the similarities and/or differences between the Turkish legal system and the legal system of the defendant's country of origin.

19 In some cases we have excluded firms that we did not make contact with but whose websites only listed areas of commercial rather than criminal practice. We have also excluded a few lawyers who have not had any criminal cases for a number of years and felt they were no longer familiar with the system.

20 Includes one firm that was not listed as practising criminal law, but said they do take on occasional cases.

21 No guidance is given in the Netherlands' list as to particular practice areas.

22 Includes one firm that was not listed as practising criminal law, but said they do take on occasional cases.

23 On the US list most firms are described as having 'experience in a wide range of legal areas' which we have taken to potentially include criminal defence work.

24 Figure does not add to the sum of the individual lists as many firms appear on more than one list.

*List of interpreters*

All the participating consulates also provide a list of interpreters to their nationals. However, as will be discussed later on, the quality of interpretation is a concern for most of the consulates. The only consulate which stated that it did not experience problems with court interpreters was the Dutch consulate. Consular officials encouraged some bilingual Dutch-Turkish speakers to register with the courts, and these interpreters are contacted every time a Dutch person is detained.

*Financial assistance*

The Dutch consulate is also the only consulate which provides financial assistance to detainees. Dutch detainees receive a monthly allowance of 30 Euros to cover their basic needs. The other three consulates facilitate communication and logistics between the detainees and their family members or others who may provide them with financial assistance.

In cases where the prisoner has no other private means of financial assistance, the US consulate can also provide a loan to cover the cost of vital dietary and medical needs. In cases when prison officials provide little or no food, a loan could be provided to pay for the provision of a full diet. Loan assistance could also be provided for emergency medical treatment or for required medications or vaccinations that would not be provided by prison authorities. These loans must be paid back upon return to the United States.<sup>25</sup> Further to the above loan programs, dietary supplements may be provided to prisoners on a non-reimbursable basis if prison food is insufficient to maintain an acceptable level of health, and supplements are not available through the prisoner's private resources.

**Trial attendance in Istanbul**

The survey of consular officials showed that while around the world consular attendance at trials is relatively rare (figures suggest around one in twenty trials are attended), the consulates in Istanbul were seen to attend trials on a more regular basis (approximately one in three trials).

**Table 11:** Cases where trials attended during previous twelve months

	<b>Total consulate survey sample (=37) Range</b>	<b>Istanbul consulates (=4) Range</b>
Trials of nationals held in the past twelve months	0 – 120	0 – 19
Trials attended in the past twelve months	0 – 8	0 – 6
Approximate proportion of trials attended	1 in 20	1 in 3
As the ranges show there is much variation in the experiences of different consulates. As a result the approximations are made for illustrative purposes rather than as a definitive statement of fact.		

If we break down these figures by Ministry, we see that the British consulate in Istanbul attended two in six trials of British nationals, the Dutch consulate attended six out of six trials, and the German consulate attended approximately one in six trials. No trials were held of American nationals in Istanbul in the last twelve months. The three consulates in Istanbul were more likely to attend trials than their counterparts in other parts of the world. The most significant difference from the findings of the survey of consulates is that both the Dutch and the American consulate in Istanbul have an 'all trial attendance policy' as will be discussed below.

<sup>25</sup> After the sentence is served, at the time of release and deportation from Turkey, the loan recipient would be issued a passport that is valid only for their travel back to the United States. They would not be eligible to receive a new passport until the loan is repaid.

**Table 12:** Trials held where consular support provided – range across Istanbul consulates in the past twelve months

	British consulate	Dutch consulate	German consulate	US consulate
Detainees provided general support	18	25	23	3
Trials of nationals held	6	6	19	0
Trials attended	2	6	3	0

These findings are supported by our interviews with defence lawyers. Although qualitative in nature, the experience of defence lawyers suggested that it is fairly common to have a consulate representative attending trials in Istanbul.

## 5.2 Local policy of the consulates

In Istanbul we asked consular officials to describe the policy of their consulate at trial attendance.

### *The British consulate*

The British consulate stated that their official policy is only to attend in exceptional circumstances. Consular officials mentioned that this is the FCO's official policy which is also implemented in the region. According to the consulate in Istanbul officials do not have a checklist or pre-defined criteria to help them decide which trials to attend. However, in practice sometimes British consular officials attend trials in the following situations. First, if there is increased media interest in a particular case. Consular officials usually attend high profile media cases because they want to give information to the family in the UK about the trial before it is published in the newspapers or online. Second, British consular officials might attend trials when they consider that the defendants are in a vulnerable position because of their age (whether young or elderly) or their mental state. Finally, consular officials sometimes attend the trials of naturalised British citizens who do not have good command of English. In these cases it can be difficult for the interpreter to understand what the defendant says, and consular officials could attend in order to ensure adequate interpretation is provided.

### *The Dutch consulate*

Surprisingly, the Dutch consulate in Istanbul mentioned that they have an 'all trial attendance policy'. This was a local policy that the central Ministry in the Netherlands supports. The Dutch consulate tries to attend all trials and all stages of trials of Dutch nationals in the region of the consulate's responsibility. Consular officials acknowledge that in some cases they might not be able to attend a trial if they are not informed promptly or if there is a shortage of personnel in the consulate (e.g. during the summer holiday). However, this has never been the case in the last two years. There was always 'at least one representative of the consulate at every stage of the trial'.

### *The German consulate*

Similar to the British, the German consulate in Istanbul has a policy of 'trial attendance as an exceptional activity that must be justified on a case by case basis'. This was also the policy of the German Federal Foreign Office. However, in Germany's case final decisions about attending a trial are taken by the local consulate in Istanbul not by the central Ministry, as is the case for the UK. The German consulate uses similar criteria to the British to decide which trials to attend. However, the German consulate also offered another dimension to the problem: non-nationals might not understand the local judicial system even if they speak Turkish. In their experience even German citizens of Turkish origin who speak the language might face difficulties when adapting to the situation. Non-nationals are not familiar with the way the judicial system works and occasionally the authorities might try to intimidate them because of their 'differences'.

### The US consulate

The American consulate in Istanbul makes every attempt to attend all trials. Similarly the Dutch consulate has a locally created policy to attend trials.

A comparison is made below (Table 13) between the official policies of each Ministry, the local policy of the consulates in Istanbul and the experience described by our sample of defence lawyers.

**Table 13:** Policies on trial attendance

Country	Ministry's global policy on trial attendance <sup>26</sup>	Local policy of Istanbul consulate	Relevant experience of individual defence lawyers
Australia	Attend trials 'most of the time'	n/a	n/a
Germany	Exceptional activity that must be justified on a case by case basis	Try to attend trials whenever necessary	One said his experience is that German officials regularly attend. Another said his experience is that they tend not to attend
Netherlands	Exceptional activity that must be justified on a case by case basis	All trial attendance policy	Lawyers relayed some experience either way
UK	Exceptional activity that must be justified on a case by case basis	Exceptional activity that must be justified on a case by case basis; work closely with defence lawyers instead	Lawyers relayed some experience either way
US	Attendance compulsory in certain circumstances, encouraged in others	All trial attendance policy	One said his experience is that US officials often attend

So far fieldwork findings suggest that consular officials of the four Ministries visit defendants in prison and attend their trials more frequently than required by the central Ministry or practised by other consulates around the world. In the next three sections we will try to interpret these findings by looking at the causes of concern in the region of their responsibility, the role of consular officials at trial and the perceived advantages and disadvantages of trial attendance.

### 5.3 Causes of concern in each consulate's region of responsibility

It is worth considering whether the consulates in Istanbul actually felt fair trial rights were a problem in the region they were responsible for, and therefore whether there was a link between judicial concerns and trial attendance. Most consulates in Istanbul mentioned that they did not have serious concerns in Istanbul, and that they did not have evidence that foreign nationals were discriminated against. Moreover, they mentioned that prison conditions in Istanbul were fairly good. Their concerns were most commonly around the length of procedures and the quality of interpretation.

<sup>26</sup> As outlined in the initial interviews with Ministries of Foreign Affairs

### 5.3.1 The consulates' point of view

#### *The British consulate*

The British consulate in Istanbul mentioned that they do not have significant concerns in Istanbul. Accordingly, consular officials do not think it necessary to attend trials in Istanbul. The main problems of the Turkish judicial system are related to the quality of interpretation, the length of the trial, and the fact that the prosecutor often makes a very quick decision on the likelihood of a guilty or not guilty finding. If the defendant is a foreigner, the prosecutor makes a very quick decision on the likely finding. He will therefore either release the defendant immediately, or rule for him/her to be held pending trial. He won't grant bail. The first two problems were also mentioned in the interviews with consular officers from the other three countries and defence lawyers. The last problem was only mentioned by the UK.

#### *The Dutch consulate*

The Dutch consulate had a similarly positive opinion about the judicial system: there seemed no difference in the treatment between Dutch and Turkish defendants and prisoners in Turkey. In some cases consular officials had attended trials of both Dutch and Turkish defendants in the same case. In those cases, consular officials noticed that the treatment of Dutch and Turkish defendants seemed to be consistent: all defendants received the same treatment and were all detained for the same amount of time.

Officials at the Dutch consulate felt that the only problem with the Turkish system is the length of trials but this is a problem that both nationals and non-nationals face. The Dutch consulate was the only consulate that did not have problems with the quality of interpretation in Turkey. Dutch consular officials felt that in the past these problems had existed; in some cases an English speaking interpreter was provided to assist a Dutch speaking defendant. However, over the last two years the consulate had encouraged interpreters to register with the courts. These interpreters are contacted when there is a Dutch speaking person on trial. Interestingly, consular officials do not know if defendants receive a translation of the charges in Dutch.

#### *The German consulate*

The German consulate was the only one that was concerned about procedural guarantees and gave examples of cases when procedural safeguards to ensure a fair trial were not respected.

For instance, German consular officials related the case of a defendant who could not speak Turkish, had no defence lawyer in court, no interpreter, and had not received a copy of the charges against him. Consular officials were informed about this case quite late and they brought the inadequacies to the judge's attention. Following their intervention the trial was adjourned for a later date. This has happened several times. This person has been in pre-trial detention for almost two years because every time someone/something has been missing (defence lawyer, interpreter etc). The last hearing that they attended seemed to be well organised. However, the defence lawyer realised that no translated copy of charges was provided. The court asked the defendant if he would accept an oral summary of the accusation but he did not accept it. This shows that sometimes the minimum procedural safeguards against unfair trials are not respected during trials in Turkey, non-national defendants can therefore be in pre-trial detention for a long period. Even though consular officers are aware that this period is finally deducted from the sentence, they still believe that this uncertainty causes a lot of anxiety to the defendants.

Another case mentioned by German officials concerned a person who suffered from a mental illness and required treatment. When this person was arrested this treatment was interrupted. The authorities ignored some of the signs that suggested the person suffered from a mental illness, but consular officials became increasingly concerned that the health of this person was deteriorating and they wanted to intervene. They managed to get medical reports from Germany which demonstrated that this person needed medication for a mental illness and they provided an official translation of these documents. The Turkish authorities felt that

the relevant person was just faking the illness. It finally took consular officials approximately eight months to convince the authorities that this person needed specialised medical treatment.

The third case concerned a defendant who asked for consular assistance but the authorities did not inform the German consulate about his arrest. Consular officers are aware that on some occasions they are not informed about arrests in a timely way. In another case, once German consular officials were informed that a German national was arrested, they visited him in prison and immediately realised that he did not speak German at all. They provided the defendant with clothing and some assistance which is provided to all German defendants even though there was no other evidence/documentation that this person is German apart from what the authorities said. A Persian interpreter was consulted at a later date and it became clear that the defendant was from Afghanistan and had nothing to do with Germany. According to the German consulate this story demonstrates that the authorities do not always take their responsibility to inform individuals of their right to consular assistance seriously.

The above incidents were not presented as intentional efforts to discriminate against non-national defendants, the German authorities felt that these incidents demonstrate that Turkish authorities 'are simply not aware of the extent and the seriousness of the problem. They believe that if someone is guilty it does not really matter if he gets a fair trial or not'.

#### *The US consulate*

Similar to the British, American consular staff noted that 'one problem that non-national defendants faced is a lack of Turkish-language abilities and inadequate interpretation'. For this reason when consular officers compile lists of defence lawyers they indicate which lawyers speak English and can also act as interpreters. They also mentioned that initial consular notification can be slow because Turkish authorities notify the consulate by mail. This can result in notifications delayed by as much as several weeks.

In their experience there is no problem with pre-trial detention; American prisoners are not subject to lengthier pre-trial detention than their local counterparts. In some cases non-nationals are excluded from amnesty laws but this is the only circumstance in which differential treatment between national and non-national defendants has been noticed. Prison conditions in Turkey are quite good and American prisoners have not had any particular concerns with their personal safety in prison.

The positive image of the Turkish judicial system and prisons was complemented by a comment that 'anecdotal evidence suggests that non-nationals may benefit from positive discrimination during sentencing. They may receive shorter sentences than nationals who have committed a similar offence'.

### **5.3.2 The defence lawyers' point of view**

#### *Advantages and disadvantages of the Turkish system*

Most of the lawyers we spoke to criticised the system, but they were also careful to point out that the system had improved in recent years and was not as bad as the system in some other countries.

The following comments were made by the lawyers:

*Although Turkey is said to get closer to EU standards in terms of law, we still have lots of problems.*

*Sometimes someone will complain about the legal system and some people will be happy, it depends on which bit you experience.*

The overall impression conveyed by the lawyers was that the system has 'reasonable' aspirations, but that the delivery of these aspirations is not always successful.

This sentiment is epitomised by the following comment:

*The (Criminal Procedure) Code is very European, but the way it is executed is very Turkish.*

*A judge with no jury is seen as a strength, but also a weakness*

The composition of Turkish tribunals was a common theme in many of the comments made by the interviewees on the strengths and weaknesses of the Turkish system. In Turkey one judge (or three judges for more serious offences) sits without a jury to hear criminal cases. Some interviewees felt this contributed to the power and independence of the judges, and one lawyer felt that this independence and power may explain why judges are difficult to bribe.

On the other hand, the obvious disadvantage of a single-judge tribunal is that occasionally judges fail to give due regard to all the evidence, exhibit carelessness and apply legal rules inconsistently and arbitrarily on a whim. Some of the interviewees expressed concern about the possibility of arbitrariness. One stated:

*When I was in Western Europe I didn't care what the judge was thinking - I had a client, I had law, I had a defence. Even if I knew that the judge didn't like me I didn't care. I think often in Turkey the lawyer knows for some reason that the judge will not grant him some rights, even if it is explicitly in the law.*

Concerns were expressed about the inconsistency with which judges apply the rules for the admissibility of evidence. Some lawyers stated that sometimes evidence is not given its due weight and complaints were also made about the fact that some judges do consider evidence which is subsequently ruled inadmissible.

The lawyers who were interviewed felt that inconsistencies could be found in the reasoning behind decisions as well and that verdicts and sentences varied arbitrarily without discernible justifications.

*Defence lawyers, like consular officials, focussed their criticism on the long delays in the court system*

By far the most prominent concern about the Turkish system was the unreasonable amount of time it takes for cases to be resolved. Many lawyers complained that it takes years for even the most minor criminal cases to be resolved and sometimes the resolution of cases concerning serious crimes takes over five years.

One lawyer stated:

*It is not possible to resolve even a very small case in less than 3 or 4 years.*

Defence lawyers were frustrated by the delays, but they felt that delays in the court system have also had concrete implications, in particular they felt the delays contributed to:

- ▶ Unreasonably longer periods of pre-detention for defendants;
- ▶ Cases being barred by the statute of limitations; and
- ▶ Obstacles for judges to effectively evaluate evidence as sometimes the evidence being relied on in a decision could have been adduced many months or even years before the decision is made.

These delays were mainly attributable to a lack of court capacity, with bottlenecks more pronounced for more serious crimes in the more populated districts. Some judges heard 20-25 cases a day and it would appear that the practice was to set aside a brief amount of time for many cases (which led to them being perpetually adjourned) rather than to allocate a sufficient amount of time to a few cases.

One lawyer stated:

*If the Ministry of Justice budget became bigger, the number of judges would increase and the judgment process would become faster.*

This criticism is not uniquely applicable to the Turkish system and is common to other justice systems as well. These concerns were also mirrored in the consulate survey and consular officials complained that trial attendance could be overly time consuming due to the number of cancelled or delayed hearings, often with little notice.

#### *Other concerns expressed by the lawyers*

Other criticisms did emerge during the course of the interviews, but these were expressed by a minority of interviewees. The following additional concerns were raised:

- ▶ Evidence is held to be admissible in an arbitrary fashion. Some lawyers felt that the admissibility of evidence is not determined by law and is subject to the caprice of the presiding judge.
- ▶ Access to evidence is sometimes limited. Judges were perceived as being too eager to use confidentiality orders to prevent defence lawyers from having access to evidence.
- ▶ Detention conditions were not ideal. Prisons were described as overcrowded, and the treatment of prisoners at the hands of the Police was also criticised by some. One lawyer stated: *'the police in Turkey is not your friend'*.
- ▶ Independence of the judiciary from the State – while for some, judges were seen to be quite independent-minded, others commented that some decisions are made for political rather than objective reasons, either on religious or party political grounds.
- ▶ Contrary to the reports of consular officials, the quality of interpretation was not commonly felt to be an underlying weakness of the system for defence lawyers, at least in Istanbul's courts. However, we did hear comments that sometimes, when relevant court hearings coincide, appropriate interpreters can be in short supply, and that the required translation of official documents can contribute to delays.
- ▶ here is a reasonable system for appeals, but some of those we spoke to were of the view that appeals are sometimes rushed through court without adequate consideration, and are 'processed' rather than heard.
- ▶ One final criticism was raised against the practice in some cases to immediately deport foreign nationals accused of criminal charges and subsequently bar them from re-entry. This practice makes it impossible for some defendants to attend trial to defend themselves.

The general impression was that most other fair trial rights were upheld reasonably well. Interestingly, in terms of defence lawyers, the consensus was that the quality of defence lawyers might be inconsistent, but that this is the case throughout the world.

*Well, you have the good defence lawyers and bad ones, all around the world this happens.*

This broad list of concerns only partly overlaps those raised by consulates in Istanbul or globally in the corresponding survey. The consulates' list of complaints in the survey was dominated by worries about the quality of interpretation, the length of legal procedures and the quality of defence lawyers, followed closely by corruption. Unease around the quality of judicial reasoning – highlighted by the Turkish defence lawyers – was a much lower priority.

*Appreciation of internationally accepted fair trial standards is informal*

It is worth commenting that from all the lawyers we spoke to, only one claimed to have had formal training in international fair trial standards. Two more highlighted that they had trained in, or had experience of, the UK or German legal systems and so gained an appreciation of fair trial rights. One lawyer went so far as to highlight and explain what he felt was a wider weakness in the system.

*To my knowledge only one law school in Turkey, Bilkent University, actually trains lawyers in human rights, so the lawyers who go to court don't know about human rights.*

Comments like this are similar to the ones the German consulate made about the procedural guarantees and fairness of trials in Turkey.

## **5.4 The role of consular officials at trial**

### **Ensuring the fairness of the trial**

In Istanbul we asked consular officials to describe their role at trial. Interviews with American, British and German consular officials showed that the primary role of trial attendance is to ensure that internationally accepted fair trial rights are respected. On the contrary, earlier survey findings (section 4.3) suggested that consular officials attend trials primarily to demonstrate an interest (both to citizens and to the local authorities) and ensure the welfare of the defendant.

According to the British, German and the US consulate in Istanbul when consular officials attend trials their primary role is to ensure the procedural fairness of the trial and not to act as part of the defence team or to influence the outcome of the trial. Consular officials check if international procedural guarantees are respected and try to 'balance out' potential disadvantages suffered by foreign defendants.

*The British consulate*

The fairness of the trial was a priority for the British consulate. Nevertheless, consular officials follow a different path to monitor the development of a case. Instead of attending trials consular officials regularly contact defence lawyers. Before the first hearing they check that the state has provided relevant assistance, namely that there is a lawyer and an interpreter. Thereafter, in the initial stages they follow all the cases though the lawyers not via the court itself. If they notice that a case suddenly keeps getting adjourned for no apparent reason, or if they cannot get hold of the lawyer on the phone for long or if an interpreter has not turned up twice previously the British consulate reviews its policy on trial attendance and a member of staff will attend a hearing. However, on all other occasions they keep in regular contact with defence lawyers.

British consular officials also often contact prosecutors to get information from files for lawyers in the UK, if they want to know what is happening in a case. So prosecutors are key contacts for British consular officials.

*The Dutch consulate*

The Dutch consulate is the only one which said it did not get involved in the legal part of the case. This is true to the extent that they are not aware whether the charges are translated for the accused. Dutch officials consider it the responsibility of the defence lawyer to ensure that the necessary documents are translated.

*The German consulate*

According to the German consulate, consular officials check if the defendant has knowledge of the accusations against him, a clear understanding of the charges, an interpreter in court and a defence lawyer. If German consular officials notice that there are irregularities they inform the authorities. However, they try to be very careful not to give the wrong impression that they want to influence the outcome of the trial when they deal with them. German consular officials raised one case at a diplomatic level. However, the response that they received was that the judicial system is independent and that it is not possible to intervene.

*The US consulate*

American consular officers try to ensure that American defendants are not discriminated against because of their nationality. They attend trials and pay prison visits to observe procedures, to ensure that international law guarantees are respected and to facilitate communication if the defendant cannot understand the language.

They also spend significant amounts of time maintaining contact with the Turkish authorities. Consular officers monitor the development of trials by contacting prosecutors and/or public or private defence attorneys. This communication is not intended to affect the outcome of the trial, but only to obtain status updates. US consular officers are not empowered to provide legal services or act as legal representatives to arrested American citizens.

**Demonstrating the interest of the government in the trial**

The British, German and US consulates also mentioned that they attend trials to represent the interests of their government in the trial. However, the Dutch consulate explicitly stated that they 'do not attend trials for this reason'. When Dutch officials attend trials they do not introduce themselves to the judges and they do not attend in an official capacity. On the other hand, American officials said that the first time they attend a trial they introduce themselves to the court clerk, and they believe that the clerk passes this information to the judge.

**Providing moral support to the defendant**

The Dutch consulate underlined that, apart from making sure the defendant receives a fair trial, the main purpose of trial attendance is to provide moral support to the defendant, and to check on their mental and physical state. Checking on the welfare of vulnerable defendants is also considered to be within the role of the other three consulates. For instance, the American consulate mentioned that 'trial attendance provides emotional support to the defendant and consular officers attend trials because they believe that their presence reassures defendants'. However, American officials considered that they have a broader role when they attend trials. The only consulate that did not consider that providing moral support to the defendant was within their role was the British consulate.

## 5.5 The perceived advantages and disadvantages of trial attendance

American and German consular officials in Istanbul noted that trial attendance can benefit the fairness of the trial, the defendants' emotional welfare, the conduct of the defence lawyer, and even the severity of the sentence. With the exception of the British consulate in Istanbul, consular officials did not mention any significant disadvantages of this practice. These findings come in contrast to survey findings which suggested that consular officials across the 38 consulates felt trial attendance only marginally impacted the fairness of the trial and had no beneficial impact at all in terms of influencing the sentence itself.

### *The British consulate*

The British consulate believed that trial attendance has fewer benefits than the ones mentioned by other consulates. In their experience trial attendance might slightly influence the performance of the lawyer. As far as interpretation is concerned, British consular officials felt the presence of consular officials does not make a difference. Even if the quality of interpretation is low, consular officials can only intervene in exceptional circumstances. On all other occasions they could ask the defendant or the lawyer about the quality of interpretation. If either of them perceived a problem, consular officials would get the transcripts and look at them. The British consulate considered this approach as effective as attending the trial because they felt that either way *'all [they] can do is [to] write a letter afterwards or speak to the prosecutor afterwards and [they] could do that whether [they] had been there or not as long as someone informs [them]'*.

### *The Dutch consulate*

The Dutch consulate noted that their presence at trials does not have either a positive or a negative impact in the trial. They attend trials to ensure the Dutch defendant receives a fair trial and to provide moral support to the defendant.

### *The German consulate*

According to the German consulates trial attendance provides emotional support to the defendant and can have a positive impact on the procedural aspects of the trial.

### *The US consulate*

The staff at the American consulate shared some anecdotal evidence that non-nationals might benefit from positive discrimination during sentencing and that they might receive shorter sentences than nationals who have committed a similar offence. Consular staff gave different explanations why this might happen. It could be that local authorities probably do not want to keep foreigners imprisoned for long, in part because of the possibility of negative publicity. Another explanation was that American citizens are more cooperative, better educated, and better behaved than other detainees and do not tend to provoke or pick fights with other prisoners and they generally respect the prison officers. Finally, the presence of the American consular personnel could also be beneficial.

The Dutch, German and US consulates did not mention any downsides of trial attendance and have never had a negative experience. Even though they all acknowledged that it could be time consuming and resource intensive, they considered it to be part of their responsibilities. They prioritise consular work and attending trials is considered to be a high priority.

The only consulate that mentioned that trial attendance can have downsides was the British consulate. For them defendants could have false expectations when consular officials attended trials. They might get frustrated when the quality of interpreting is not very good and consular staff do not intervene. Equally they might think that consular staff are there because they have some influence or that they could help them get an acquittal or secure a release. Nevertheless, consular officials are clear that this is not their role; they are neither interpreters nor lawyers.

The British consulate also mentioned that judges might be offended if they see consular officials attending trials. They might think that foreigners do not trust the judicial system or that they wanted to make a point about human rights violations in Turkey and directly affect Turkey's accession to the EU. In this regard, the presence of consular officials could sometimes backfire and make judges more defensive and aggressive.

Finally, when consular officials were involved in a case and the defendant is still found guilty and given a severe sentence, then the defendant might blame consular staff for not doing anything to help them and allege that the judge is wrong. On such occasions the relationship consular officials have with the defendant would be jeopardised and consular officials would find it difficult to look after the defendant for the duration of the sentence.

These are all important objections that were raised by British consular officials. We tried to investigate these objections during the interviews with consular officials from the other three consulates who attend trials more regularly. These drawbacks of trial attendance were discussed with consular officials from the German, American and Dutch consulates and even though none of them shared such a negative view about the implications of trial attendance, they acknowledged that they needed to be careful in order to fulfill their responsibilities.

### **The defence lawyers' point of view**

#### *Lawyers believe trial attendance by consular staff is beneficial*

Interviews with representatives from the Ministries of Foreign Affairs showed that they viewed trial attendance as potentially beneficial in the following ways:

- ▶ It makes local authorities aware of the fact that the defendant's government is interested in the case;
- ▶ It brings additional attention to the case; and
- ▶ It reminds local authorities of their obligations under domestic and international law.

All of the above can result in more care being exercised in the case.

However the interviewees acknowledged that there was no concrete evidence to back the existence of these benefits. It is clear that the majority of the lawyers we spoke to believe that attendance at trials by consular officials has a positive impact on ensuring fair trial rights are protected. However, this is also based only on perceptions, and in a couple of cases supposition, rather than actual evidence. The following comments were made:

*When the judges are under pressure, they do their job more carefully and tidily.*

*The judge is more careful with his wording, his behaviour and with the court process.*

*If it is involving a foreigner, in that case the consular presence puts a pressure on the judge ... to finalise it in a better (quicker) way for the suspect.*

The responses actually reflect the main concerns expressed about the Turkish justice system as a whole, namely that trials take too long to process and that judges do not always pay adequate attention to the entire body of evidence. The interviewees believed that attendance by consular officials puts pressure on judges to be more efficient with their use of time and to be more attentive when court is in session.

Some lawyers felt that the impact of trial attendance by consular officials depends on the role the official takes. One lawyer pointed out that in crowded courthouses where a number of cases are heard one after another, the judge is unlikely to even know an official is present (therefore making it more difficult for attendance to influence judicial behaviour).

It should be noted that there were some respondents who felt that attendance by consular officials at trials had no impact on proceedings.

In addition to the perceived benefits as regards the fairness and speed of proceedings, the positive impact of trial attendance by consular officials on the morale of defendants was also raised by the respondents. They stated that attendance at trials by consular officials provided emotional support to defendants and made the defendant less likely to feel 'alone'. This belief was commonly expressed in the consulate survey, although as the focus of this study is the effect of attendance by consular officials on the fairness of trials, the emotional impact of attendance was not investigated further.

### **The negative impact of attendance at trials**

Despite a belief that attendance can usually have a beneficial impact, there was an acknowledgement that judges can take exception to a perceived 'interference' in their court.

The impact of trial attendance by consular officials is too complex to precisely determine. Many of the lawyers we spoke to agreed that the effects are far from clear. To some extent it was felt that as judges value their independence they could potentially resent 'foreign' involvement, others felt that with Turkey keen to join the EU there was a desire to impress on Western observers that the Turkish justice system respects human rights, which would support the assertion that consular attendance has a positive impact on the fairness of proceedings.

The common conclusion was that trial attendance does reap benefits and occasionally leads to subtle intervention or 'soft' diplomacy behind the scenes to respond to irregularities in trial proceedings. However the Ministries interviewed as part of this research project all agreed that any attempts to correct irregularities should stop short of explicit pressure on the judge.

### **Should attendance at trials be discouraged or promoted?**

A majority of lawyers felt that there should be more consulate attendance than is currently the case, and indeed those who felt it should remain the same were often experiencing higher levels of attendance in the first place. One lawyer observed:

*In Turkey it is always the party that pushes who gets heard, so when the consulate pushes or your lawyer is willing to push then things might happen. It is the party that is silent that gets pushed aside.*

These views do not indicate that attendance by consular officials should be the rule rather than the exception. Comments focused around an acknowledgement that some trials were more serious than others, and some cases less clear-cut than others. However, the interviewees' concerns about the Turkish criminal justice system and the general consensus that attendance by consular officials has a positive impact on trial proceedings, suggests that consular attendance should not just be reserved for exceptional circumstances.

We leave the last words to one of the lawyers who we interviewed:

*It's impossible to prove whether it has an impact - which judge would say they're more careful when the consulate is involved? But you know that if journalists are involved the judges are more afraid of public opinion - the same will apply in the case of the consulate.*

## 5.6 Reporting and management of information

Reporting and management of information appeared to be more systematic in Istanbul than in other consulates which participated in this study (see Chapter 4, section 4.4). All consulates in Istanbul follow with a report on the trial attended. These reports do not have a standardised form, and information collated in these reports varies. Dutch consular officials report on 'general procedures in court, the next trial, and the emotional state of the defendant'. British consular officials report on 'the presence of lawyer and interpreter, the standard of legal support, the standard of interpretation, the conditions in court and welfare of individual standing trial'. American consular officials report on 'doings, outcome, and any noteworthy impressions'. Finally, German officials note 'if international minimum defence standards such as presence of a defence lawyer and interpreter are guaranteed. [They] also observe if international minimum defence standards such as presence of a defence lawyer and interpreter are guaranteed'.

Typically the reports are shared with senior managers within the consulate and the central Ministry of Foreign Affairs. The German consulate mentioned that reports are also shared with the embassy. The British consulate also pointed out that sometimes reports are shared with the detainee, their family or their defence team. The Dutch consulate pointed out that consular officials report back to the Ministry and the Ministry reports to one family member. The Ministry makes sure that one contact person is informed about everything that has happened.

With the exception of the Dutch consulate, information contained in the reports is formally reviewed or collected and used to help plan the services the consulate provides and the actions it takes. Finally, all participating consulates in Istanbul collect information from trials of nationals in the region covered by their consulate in a database that produces numbers, measures or quantifiable information about such trials.

## 5.7 Training and guidance

The German consulate was the only one which stated that consular officials receive support in person about their role in attending trials, the appropriate actions that need to be taken in the case of unfair trial and how to make the decision whether to attend an individual trial or not. The other three consulates underlined that they receive training in consular assistance in general, but not about trial attendance in particular. American, British and Dutch consular officials receive support in trial attendance by local members of staff who have experience in trial attendance and by the central Ministries. Interestingly, even though German consular officials were the only ones who received some training in trial attendance, they were also the only ones who believed that more training on the legal system of the host countries would be beneficial in terms of equipping consular officers to effectively attend trials.

## 5.8 Conclusion

In summary, research findings in Istanbul can seem somewhat contradictory: despite the fact that all interviewees stated they do not have major concerns about the fairness of the trials held in the city, trial attendance is more common in the city than in other parts of the world.

At first glance this is incompatible with the official policy of the four Ministries which suggests that trial attendance is rarely practiced unless there are particular causes of concern for the treatment of their nationals. Further scrutiny reveals that it is compatible with the role of consulate officials at trial to ensure the fairness of the trial, provide moral support to the defendant, and check on his/her welfare.

The UK consular officials attended the least trials. However, it appears they apply a proactive approach to assess the treatment of British defendants in the Turkish criminal justice system. The British consular officials are in close contact with defence lawyers and public prosecutors, and they have developed an alternative –allegedly equally effective– way of assessing the fairness of the trials.

Both German and US consular officials consider that trial attendance can provide moral support to the defendant, and can contribute to the procedural fairness of the trial. This was also confirmed in the interviews with defence lawyers. The US consulate also suggested that there is anecdotal evidence that trial attendance can also have a positive impact on the outcome of the trial.

The British and the Dutch consulates were more sceptical about the potential advantages of trial attendance. Even though the Dutch consulate in Istanbul has an ‘all trial attendance’ policy, they believe that this provides moral support to the defendants and does not have a positive or negative impact on the trial itself.

The British consulate outlined some potential disadvantages of trial attendance. These were related to the trial itself and the relationship between consular officials and the defendants. These concerns were not confirmed by any other participating consulate which attends trials more regularly.

Reporting was more systematic in Istanbul than it appeared to be both in the Ministry interviews and in the survey responses.

Finally, the British and American consulates appeared to make good use of local resources (e.g. lawyers and public prosecutors) in order to gain a better understanding of the local judicial system.

# Conclusions and recommendations

To summarise, the aim of this project was to explore the policies of the American, Australian, British, Dutch and German Ministries of Foreign Affairs on consular assistance provided to non-national defendants. First, it investigated the types of assistance provided to non-national defendants/detainees/prisoners. Second, it examined if the participating Ministries attend the trials of their nationals abroad, and if so, on what occasions and what role consular officials have during trial. Finally, it explored if there is a relationship between trial attendance and the protection of fair trial rights.

The study has generated a number of important findings about the policies and practices of the participating Ministries on consular assistance and trial attendance which we summarise below. It has also identified numerous areas in which further research is needed. Fair Trials International's long experience of assisting people facing criminal charges in another country leaves us in no doubt about the importance of the role played by consular assistance. We hope this study will provide a springboard for further research into this vital public service and inform systematic review by Ministries of Foreign Affairs of their policies and practices regarding consular attendance at trial.

## Conclusions and recommendations:

### 1. Basis of protection

This project examined the standards of consular services that are provided by participating countries. All Ministries acknowledged that the 1963 Vienna Convention on Consular Assistance outlines the rights and responsibilities of governments to protect their citizens. They also pointed out that they have developed a more specific basis regarding the consular services they provide. From countries participating in the study, Germany was the only one in which consular assistance is a legally protected right; consular officials have a statutory duty to protect their citizens abroad. In Australia, the Netherlands, the UK and the US it is a government policy, and consular assistance is based on public statements, manuals and internal guidelines. We recommend that further research needs to be conducted to identify the costs and benefits of the German model of creating a 'legal' right to consular assistance.

### 2. Forms of assistance

We asked participating Ministries to inform us about the forms of assistance they provide to their nationals who are on trial abroad. We found that the five Ministries of Foreign Affairs provide similar forms of consular assistance to their nationals (e.g. minimum number of prison visits, lists of lawyers and interpreters, and trial attendance). We also identified some differences in terms of partnerships with external organisations and provisions of *pro bono* legal assistance. It was clear that further in-depth research into different aspects of consular assistance would be of value and will help to identify examples of good practices.

### 3. Lists of lawyers

All of the participating Ministries provide their citizens with lists of lawyers. Our review of the lists that local consulates provide to defendants in Istanbul highlighted the fact that they include only a very small number of criminal lawyers.

- ▶ We recommend a more consistent and rigorous approach to providing lists of lawyers for nationals, ensuring there is a minimum number of criminal and commercial lawyers. We also suggest that the lists of lawyers should be reviewed annually. Local consulates could also benefit from exchange of information in this area including with non-governmental organisations.

### 4. Trial attendance

We asked participating Ministries about their official policy on trial attendance. Research suggested that trial attendance in all cases is encouraged only in Australia; the other four Ministries decide on a case by case basis, and attend trials rarely. Further research needs to be conducted to examine how the policy of the Australian Ministry translates into practice. On this occasion, it was not possible to test Australia's policy because they were unable to continue to participate in the consulate survey and the later stages of this study due to resource constraints.

We also found that the US is the only country which makes trial attendance mandatory in certain circumstances. In the interviews with the State Department and in the consulate survey we explored whether this measure increases the number of trials attended by US consular officials. We found that American consular officials do not attend more trials than officials of the other three Ministries who always decide on a case by case basis.

- ▶ The US experience demonstrates that a policy of mandatory attendance in certain circumstances does not necessarily put extra pressure on resources, depending on how tightly the circumstances are defined. We recommend that other participating Ministries review their current policy in light of this. There may be other valid reasons for a case by case approach but pressure on resources may not be relevant. We further recommend that participating Ministries review their official policy in light of the following: the perceived advantages and disadvantages of consular attendance; the factors which are, in practice, taken into consideration by consular officials when deciding whether to attend trials; the challenges consular officials face when attending trials; and the role which, in practice, consular officials play when attending trials, especially in relation to fair trial rights.

### 5. Structure of decision-making

We explored the structure of decision-making on trial attendance. We found Germany to have the most decentralised system of decision-making on trial attendance; the UK and the US have the most centralised ones; the final decision on trial attendance often rests with the central Ministries. Further research may provide insight in the effectiveness of these approaches.

## 6. Role of consular officials at trial

We asked Ministry officials about the role of consular officials who attend trials. All participating Ministries considered the role of consular officials at trial to include ensuring the welfare of the defendant and demonstrating the government's interest in the proceedings. Australia, the United States and Germany also considered their officials to have an active role as 'observers' to ensure compliance with internationally recognised fair trial rights. By contrast, the United Kingdom maintained a distinction between 'observing/monitoring' and passive 'attendance', stating that officials do not attend to assess the fairness of proceedings. The consulate survey and interviews in Istanbul, suggested that, in practice, there is no clear distinction between the role of ensuring welfare and assessing the fairness of proceedings.

## 7. Advantages and disadvantages of trial attendance

Initially one of the aims of the project was to examine the impact of trial attendance on the fairness of the trials. However, interviews with consular officials and defence lawyers in Istanbul allowed us to consider the potential advantages and disadvantages of this practice. The most important perceived benefit of trial attendance was ensuring the emotional welfare of defendants, recognised by almost all of the 38 consulates surveyed. Ensuring the physical welfare of defendants was also considered to be an important benefit of trial attendance. A link between trial attendance and the fairness of proceedings was less clear although a few of the consulates surveyed believed trial attendance could influence the conduct of the defence lawyer or the fairness of the overall trial (p.33). German and US consulates responded that there is a link between trial attendance and the observance of fair trial rights. The defence lawyers interviewed in Istanbul also felt trial attendance could ensure proceedings were not delayed and made the judiciary more likely to comply with domestic and international fair trial standards. The main disadvantage of consular attendance at trial was the fact that it was resource-intensive and time-consuming. Other potential disadvantages identified by a small number of the consulates surveyed included a negative impact on diplomatic relations and, in some cases, even on the trial process itself.

## 8. Data collection and analysis

We asked Ministries and local consulates whether they collect data on the number of trials of their nationals that are held overseas and about trials that are attended by consular officials. Ministries do not centrally collect data on the number of trials held and attended. At the local consulate level there was greater knowledge of the small number of trials attended by consular officials but little knowledge of the total number of trials held. Even though consular officials usually report to the Ministry on the trials attended, these reports do not have a standardised format and are not systematically analysed. The only exception to this is Australia which has developed a standardised reporting format. However, even in Australia's case collated data is not systematically analysed to identify patterns which could help design future policy in this area.

- ▶ We recommend a more systematic collection of data both on trials attended and not attended. Data could be divided into information about the defendant and the trial. The former should include information about the age, gender and nature of charges, and the latter should include details about the presence of a defence lawyer and interpreter (if necessary), translation of key documents, length of trial, verdict and sentence. Trial attendance reports should also be standardised. In addition to the above, consular officials should report on the perceived impact their presence had on the emotional welfare of defendants, judges' behaviour and reasoning, trial procedure/length and quality of interpretation. Data on trials held and reports on trials attended should be systematically analysed to detect patterns. A one year trial period is recommended to all Ministries to identify the costs and benefits of their policies and practice.

## 9. Training

Finally, we asked about the training consular officials receive on consular assistance and trial attendance. Ministries explained that consular officials receive training before or after taking a post, including on consular assistance and trial attendance. However, the consular survey and interviews with consulates in Istanbul highlighted that: just under half of the consular posts were not aware of their Ministry's official policy on trial attendance (p. 31); a sizeable minority of consular officials believed there is insufficient training for consular officials and suggested more region-specific training (p. 44); and although training was not generally provided on fair trial rights in any of the Ministries, including Australia where trial attendance is the norm, in practice, the role of consular officials requires an understanding of fair trial rights.

- ▶ We recommend that training is broadened to address the actual challenges consular officials face and the role they perform when attending trial, in particular with respect to fair trial rights. Consular officials also need to be better informed on the policy of their Ministries. Regional conferences (currently organised by the British and Dutch Ministries) and training on human rights reporting could prove useful.
- ▶ We propose that in two years time research is undertaken to examine whether there have been any changes in data collection and analysis and in training provided by participating Ministries of Foreign Affairs.

# Literature review

## 1. Legal framework

Consular assistance has been provided to aliens since the early 20th century. Prior to the creation of the post-War human rights framework, there were few procedures that would allow individuals to challenge their treatment by their state of citizenship. If, however, their rights were violated abroad, their state of citizenship could intervene to protect their interests or put forward claims for reparation for inadequate treatment. Diplomatic protection or intervention was based on the assumption that a wrong to a national constituted a wrong to the state itself. When two states were involved, they would use diplomacy, arbitration and law to handle the issue.<sup>27</sup>

According to a United Nations report, in the early 20th century consular assistance was treated with suspicion by developing nations primarily for two reasons. Firstly, only nationals of powerful states could enjoy this type of protection because it was only those states that were willing to intervene and ensure that their nationals were treated 'in accordance with the ordinary standards of civilisation set by Western States'. Secondly, diplomatic protection of aliens was abused by more powerful states to justify acts of aggression.<sup>28</sup>

The way consular assistance was provided and perceived shifted significantly in 1960s. In 1963 the Vienna Convention on Consular Relations (the Vienna Convention) was negotiated under the auspices of the United Nations International Law Commission in Vienna. The Convention codified existing customary law and bilateral agreements and incorporated new rules originating from conventional sources.<sup>29</sup> The Vienna Convention is the 'most important instrument on consular relations'<sup>30</sup> and today has approximately 170 signatories.<sup>31</sup>

Traditionally, diplomatic protection, guaranteed by the Vienna Convention, was understood as a sole and discretionary right of an injured alien's state of nationality to assert against a foreign state. If the state felt that the claim of an injured national was unfounded, or decided that to espouse the claim would be contrary to its broader foreign policy considerations, it was not obliged to justify its actions or inaction to its national. Similarly if the state of nationality did bring the claim, it always had full discretion to settle the case in any way it considered appropriate.

According to more recent interpretations, the right to consular assistance which is guaranteed by the Vienna Convention is an individual right to enjoy protection while in a foreign state.<sup>32</sup> Stephen Tim has, for example,

27 Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984)

28 John R. Dugard, 'First Report on Diplomatic Protection', (Geneva: International Law Commission, United Nations 2000), A/CN.4/506, p. 5.

29 Victor M. Uribe, 'Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice', *Houston Journal of International Law*, 19 (1996-1997), 375-425 (p. 385).

30 *Ibid*, p. 384.

31 Mark Warren, 'Consular Resources and Litigation Strategies', in *Cultural Issues in Criminal Defence* ed. by Linda Friedman Ramirez (New York: Juris Publishing, 2007), chapter 1.

32 Uribe, 'Consuls at Work', p. 390; Brittany P. Whitesell, 'Diamond in the Rough: Mining Article 36(1) (B) of the Vienna Convention on Consular Relations for an Individual Right to due Process', *Duke Law Journal*, 54 (2004), 587-619.

discussed the *LaGrand Case*, a landmark decision by the International Court of Justice.<sup>33</sup> In this case the Court decided that the Vienna Convention confers rights not only on State Parties but also on individuals. The Court also suggested that the right to consular assistance should not only be narrowly interpreted as a right to consular communication, notification and access, but that it should also serve broader purposes, such as allowing a detained person's state of nationality to provide thorough legal assistance in domestic criminal proceedings. Similarly to the *LaGrand Case*,<sup>34</sup> in the *Avena and Other Mexican Nationals Case* the International Court of Justice held that Article 36 of the Vienna Convention confers on individuals the right to contact their consulate and receive consular assistance.<sup>35</sup> The latter Court decision is discussed in a number of articles, including Sarah Ray's, 'Domesticating International Obligations'.<sup>36</sup> With the existing large body of international human rights law, which recognises the rights of individuals to seek and enforce their rights before national and international jurisdictions, the question arises as to whether the action of the state of nationality to bring an international claim in order to protect its national is an enforcement of its own right or the right of its nationals.

A number of studies explore the adequacy of the international legal protection of the right to consular assistance. For instance, in *Consular and Diplomatic Protection at the Age of Terrorism*, Gar Pardy discusses the steps that need to be taken in order to fill in the gaps that were left by the Vienna Convention.<sup>37</sup> He argues that there is an absence of appropriate international legal enforcement mechanisms to assist states in providing consular protection. He points out that there is a need for an additional international instrument, and also that it may be appropriate to negotiate a new convention or optional protocol to the Vienna Convention that would deal exclusively with consular protection issues and compliment the Convention.

## 2. Empirical literature examining state policies on consular assistance and trial attendance

Taking into consideration the different interpretations of the existing legal framework, and concerns voiced about its ability to address adequately the vulnerabilities of non-national defendants, one would expect that the literature on state policies in this area would be substantial. However, the basis for providing consular assistance in different countries, the forms of assistance provided to foreign nationals and the advantages and disadvantages of state practices have attracted very little attention so far.

In the limited research, a distinction has been drawn between states which consider that 'consular representatives have a duty to provide consular protection to their nationals' and states which believe that consular assistance 'is a matter of strict discretion of the state of nationality'.<sup>38</sup> Victor Uribe places countries like France, Mexico, the United Kingdom, the United States, Hungary and Brazil in the former category, and Canada and the Netherlands in the latter. In the course of this report we examine whether this distinction is valid and whether there are substantial differences in the policies and practices of some of the countries mentioned by Uribe in his work.

33 Tim Stephens, 'The LaGrand Case (Federal Republic of Germany v United States of America): The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose?', *Melbourne Journal of International Law*, 3 (2002), 143-164.

34 *LaGrand (Germany v United States of America)* [2001] I.C.J. Rep. 466

35 *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] I.C.J. Rep. 12.

36 Sarah, M. Ray, 'Domesticating International Obligations: How to Ensure US Compliance with the Vienna Convention on Consular Assistance', *California Law Review*, 91:6 (2003), 1729-1771.

37 Gar Pardy, 'Consular and Diplomatic Protection in an Age of Terrorism Filling the Gaps', in *The Human Rights of Antiterrorism*, ed. by Craig Forcese and Nicole LaViolette (Toronto: Irwin Law, 2008).

38 Uribe, 'Consuls at Work', pp. 379-381.

In 2005 RAND Europe conducted an International Review of Consular Services. This is the most comprehensive comparative review of state policies in this area.<sup>39</sup> This study analyses interview data and policy documents of six Ministries of Foreign Affairs (Australia, France, Germany, Netherlands, Sweden and the United States) in a number of areas. This study does not just examine the protection of distressed nationals; it takes a broader view and compares state policies in consular assistance in general.

Other studies look at just one country and explore the forms of assistance provided to its nationals abroad. A report published by Redress, a UK-based NGO, examines the challenges faced by British survivors of torture when seeking the intervention of the British Government before, during or after having been tortured abroad.<sup>40</sup> This report draws on the experiences of British nationals who have been tortured in different countries and at different times. Individual stories go back as far as twenty years, and illustrate the claim that, on some occasions, diplomatic or consular protection was not adequately provided to survivors of torture. Luke T. Lee's *Consular Law and Practice* (published in 1991) in one chapter presents the types of assistance the United States provides to arrested American citizens abroad.<sup>41</sup> Michael Fliehm's 'Reciprocity Unmasked' focuses on the case of Mexico, a country which provides significant legal, emotional and financial support to its citizens facing capital sentences, and has successfully intervened in numerous cases of Mexican nationals in the US.<sup>42</sup> Taking the variation of state policies into consideration, it is necessary to explore the potential advantages and disadvantages of different policies and practices in this area.

### 3. Empirical literature on potential benefits of trial attendance

More research has been conducted on the practice of trial attendance. David Weissbrodt has, for example, undertaken a comprehensive examination of the practice of trial attendance. In his article *International Trial Observers*, he provides a detailed account of the practice of observing political trials of foreign persons.<sup>43</sup> Weissbrodt not only examines trial observation by governments but also by non-governmental organisations. In his study he argues that trial monitoring helps ensure the integrity and fairness of the judicial process and can protect the accused from abuse or discrimination throughout the judicial process. He identified the reactions of local lawyers as a key source of information on the impact of trial observers and argues that it can give us a clear idea of the potential advantages of the practice.

Mark Warren's 'The role of the Consulate in Criminal Defence' also underlines potential advantages of consular trial attendance.<sup>44</sup> Warren claims that prompt consular contact can ensure that legal rights are explained in culturally-relevant terms to defendants, and that certain linguistic and conceptual barriers can be overcome. Warren further notes that a consular presence in the courtroom provides moral support to the defendant and can have a positive impact in the fairness and outcome of the trial.

Intergovernmental and non-governmental organisations have a long history of sending trial monitors to cover trials, particularly politically charged trials, and reporting on these issues. More recently, trial monitoring programmes have been introduced within a broader context. Longer-term and wider-ranging programmes address issues such as transitional justice, judicial capacity building, or discrimination against particular groups in society. For example, the Office for Democratic Institutions and Human Rights (part of the Organisation for

39 Mirjam van het Loo (et al), 'International Review of Consular Services', (Leiden: Rand Europe, 2005).

40 Redress, 'The Protection of British Nationals Detained Abroad: A Discussion Paper Concerning Consular and Diplomatic Protection', London: February 2005.

41 Lee T. Luke, *Consular Law and Practice* (Oxford: Oxford University Press, 1991), pp. 163-173.

42 Michael Fliehm, 'Reciprocity Unmasked: The Role of the Mexican Government in Defence of its Foreign Nationals in United States Death Penalty Cases', *Arizona Journal of International and Comparative Law*, 20:2 (2003), 359-407.

43 David Weissbrodt, 'International Trial Observers', *Stanford Journal of International Law*, 18 (1982), 27-121.

44 Warren, 'Consular Resources and Litigation Strategies'.

Security and Co-operation in Europe) sees trial monitoring as fundamentally important, stating that 'in order to enhance implementation of human rights and the rule of law, OSCE participating States have committed themselves to open their trials to international observers.'<sup>45</sup> The former Secretary General of the United Nations has also noted the importance of trial monitoring in the context of transitional justice.<sup>46</sup> The existence of such programmes could be interpreted as a testament to the vital impact that trial monitoring can have on access to justice.

Trial monitoring and reporting has been discussed as serving four different purposes. First, they assess the fairness of trials and make recommendations for reform in this area. Second, they give publicity to individual trials and serve the campaigning and lobbying purposes of the observing organisation. Third, they ensure – if possible – the fairness of the trial. Finally, they identify best practice.

Regarding the first goal of trial monitoring, the assessment of the fairness of trials, a joint report written by Amnesty International and the Judicial System Monitoring Programme (JSMP) discusses the outcomes of trial monitoring in Indonesia and Timor-Leste.<sup>47</sup> In this case, trial monitoring followed the extreme violence that took place during the period surrounding the vote for independence of August 1999 in the Democratic Republic of Timor-Leste. Trial monitoring allowed the authors to identify the failure to conduct trials which comply with international human rights standards, and raise concerns about specific cases. Reporting on the trial provided them with the opportunity to make recommendations for the reform of legal procedures under which gross violations of human rights are investigated and brought to trial in Indonesia.

A second goal of trial monitoring is to give publicity to individual trials and serve the campaigning and lobbying purposes of the observing organisation. Another report by Amnesty International examines five cases which demonstrate the failure of Turkish authorities to investigate grave human rights violations and resulting impunity.<sup>48</sup> Monitoring these cases, the authors argue that 'there is still no independent body in Turkey which can impartially and effectively investigate human rights violations by state agents, in accordance with international human rights standards. The criminal justice system is not only overburdened but also appears more interested in protecting the state and its officials than individual citizens.'<sup>49</sup> Reporting allowed trial monitors to call on the Turkish authorities to ensure 'the prompt, independent, impartial and thorough investigations of allegations of human rights violations', to address flawed trial proceedings and to improve medical reporting and forensics. It also calls for legal reforms, further training of public officials and improved centralised data collection.<sup>50</sup>

A third purpose is to ensure – if possible – the fairness of the trials. This is often the goal of trial monitors of intergovernmental organisations. According to a report of the Organisation for Security and Co-operation in Europe, 'a major human rights task of the OSCE-KVM while deployed in Kosovo was the monitoring of trials.'<sup>51</sup> Their report documents, amongst other things, the violation of the right to a fair trial in Kosovo. It also expresses the idea that the presence of trial monitors 'most probably had a positive impact on some individual cases and on the overall conduct of the trials. However, a large number of accused persons were convicted

45 OSCE, 'Report from the Trial Monitoring Project in Azerbaijan 2003-2004', (Baku: OSCE, 2004), p.6 <[http://www.osce.org/publications/odihr/2005/04/13762\\_209\\_en.pdf](http://www.osce.org/publications/odihr/2005/04/13762_209_en.pdf)> [accessed 08/09/09]

46 Kofi Annan, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General', (United Nations, Security Council: August 2004) S/2004/616, par. 12.

47 Amnesty International and Judicial System Monitoring Programme, 'Indonesia and Timor-Leste. Justice for Timor-Leste: The Way Forward', (Amnesty International, 2004) ASA 21/006/2004. See also, Amnesty International, 'Turkey, *Justice Delayed and Denied: The Persistence of Protracted and Unfair Trials for those Charged under Anti-Terrorism Legislation*', (Amnesty International, 2006) EUR 44/013/2006.

48 Amnesty International, 'Turkey: The Entrenched culture of impunity must end', (Amnesty International, 2007) EUR 44/008/2007.

49 Ibid, p. 4.

50 Ibid, pp.31-33.

in circumstances where the proceedings cannot be considered to have been fair according to international standards.<sup>52</sup> Richard Rogers also confirms the positive impact of trial monitoring in this case.<sup>53</sup> He notes that local defence lawyers regularly informed trial monitors that judges were noticeably more careful to respect the rights of accused persons when trial monitors of the Legal System Monitoring Section were present, and that judges and other parties performed their duties more carefully when they were aware of being assessed.

A final purpose of trial monitoring and reporting by non-governmental and intergovernmental organisations is to identify best practice. This was the case with the Judicial System Monitoring Programme (JSMP).<sup>54</sup> According to the authors, the aim of court monitoring, legal analysis and reporting was 'to contribute to the ongoing evaluation and building of the justice system in East Timor.' This report assesses the *Lolotoe* case from a human rights law perspective, and provides an assessment of its compliance with international fair trial standards. The case was heard by the Special Panels for Serious Crimes which were established by the United Nations Transitional Authority in East Timor in June 2000, as a response to the extreme violence that occurred in East Timor under and immediately following Indonesian occupation. The report draws some comparisons with an earlier case heard by the Special Panels, that of *Los Palos*, in which the JSMP identified several areas of concern in relation to compliance with international standards. The JSMP uses this case as a comparison point to determine whether issues identified in *Los Palos* had been addressed or continued to persist. JSMP found that '*Lolotoe* demonstrates much needed improvement in the overall standard of trials before the Special Panels. Since the *Los Palos* case, legal representation and legal arguments have overall been of a higher standard, interpretation problems minimized, and the court appears to have operated in a more orderly and professional manner. There remain, nevertheless, areas of concern that need to be addressed.'<sup>55</sup> The authors of the report conclude that 'as other trials come before the Special Panels and are appealed, it is hoped that the lessons learnt from *Lolotoe* will continue to influence the court's practice.'<sup>56</sup>

*Training and Guidance:* Rough guidelines exist for selecting trials for monitoring.<sup>57</sup> These usually describe the basic concepts applicable to trial observation and issues to consider before, during and after the observation of the trial such as briefings, travel arrangements, meetings, attendance in the courtroom, debriefings, reporting and follow up. Nevertheless, these are more suited to non-governmental and intergovernmental organisations, which may have different purposes in selecting trials for monitoring, often choosing more strategically or politically important cases for campaigning. Foreign Ministries, by contrast, have an interest in the welfare of their nationals detained abroad and the guidelines produced for non-governmental and intergovernmental organisations, therefore, might not be directly relevant. An exception to this is the 'Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA.'<sup>58</sup> This document provides a useful introductory guide to the criminal justice system in the United States for consular officers.

This short review of the existing literature on the topic demonstrates that, despite significant variations in policy and practice on consular trial attendance throughout the world, there is little research on the specific impact of consular attendance of trials. Trial monitoring reports by non-governmental and intergovernmental

51 OSCE-Office for Democratic Institutions and Human Rights, 'Kosovo/Kosova, As Seen, As Told', (OSCE: Warsaw, 1999) chapter 10.

52 Ibid, pp. 130-131.

53 Richard J. Rogers, 'The Importance of Monitoring the Trials at the Extraordinary Chambers', in Open Society Justice Initiative, *The Extraordinary Chambers*, (Open Society Justice Initiative, 2006) pp. 130-138 (p. 133).

54 Judicial System Monitoring Programme (JSMP), 'The Lolotoe Case: A Small Step Forward', (JSMP: Dili, East Timor, 2004).

55 Ibid, p. 33.

56 Ibid, p. 34.

57 See, for example, Office of the High Commissioner for Human Rights, 'Trial Observation and Monitoring the Administration of Justice' in Training Manual on Human Rights Monitoring, (New York and Geneva: United Nations, 2001), ch. 13; International Commission of Jurists, 'Trial Observation Manual', (International Commission of Jurists: Geneva, 2002).

58 Anne James and Joanne Cecil, 'Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA', (Durham: The International Justice Project, 2005) with research prepared by Mark Warren.

organisations clearly show that this practice can have certain advantages. However, a number of questions remain unanswered: Can consular officials who attend trials play the same role as trial monitors of these organisations? How do Foreign Ministries and consular officials themselves understand their role when they attend trials? How do they select trials to attend? What are the advantages and disadvantages of consular trial attendance? These are some of the questions that we seek to address in this study to open the debate in this largely unexplored and important public service.

# Comparative tables of the policies of the five Ministries

**Table 14:** Consular assistance and trial attendance: policy by Ministry

	<b>Basis of protection</b>	<b>Provisions / Entitlements (depending on the basis of protection)</b>		<b>Eligibility</b>
		<b>Consular assistance</b>	<b>Trial attendance</b>	
Australia	Policy	<p>First prison visit: as soon as possible after notification</p> <p>No minimum number of prison visits thereafter; decided on a case by case basis</p> <p>List of local lawyers (updated annually by Embassies; individual complaints are not investigated)</p> <p>Contact next of kin and inform them of the arrest</p> <p>Establishing Prisoner Loan Scheme in countries where prisoners are responsible for their own basic welfare and medical needs (residents are not eligible for this type of assistance)</p> <p>In some cases, make a prison transfer arrangements</p>	Attendance as a common practice	<p>All Australian nationals (including dual nationals in third countries) Residents</p> <p>Dual nationals in second country if there is bilateral agreement</p> <p>Canadian citizens in countries where Canada is not represented and Australia is (reciprocal agreement with Canada)</p>
Germany	Domestic legislation	<p>First prison visit: usually within 24 hours from notification</p> <p>Minimum number of prison visits: two per year</p> <p>List of local lawyers and interpreters</p> <p>Information about the local legal system</p> <p>Financial assistance for basic welfare and medical needs to destitute defendants/prisoners</p>	Attendance as an exceptional activity that must be justified	<p>All German nationals and dual nationals in third countries</p> <p>Residents, family members of nationals, sometimes dual nationals in second countries</p> <p>EU nationals in countries where their embassy is not represented</p>

Netherlands	Policy	<p>First prison visit: as soon as possible after notification</p> <p>Minimum number of prison visits: twice per year</p> <p>List of local lawyers and interpreters</p> <p>Financial support of 30 euros per month for every detainee outside Europe for basic welfare and medical needs</p>	<p>Attendance as an exceptional activity that must be justified</p> <p>Rare within Europe</p> <p>Encouraged outside Europe</p>	<p>Dutch nationals (including dual nationals in third countries)</p> <p>Dual nationals in second country if agreement is reached with the government</p> <p>EU nationals in countries where their embassy is not represented</p>
United Kingdom	Policy (Public statements and internal guidelines)	<p>First prison visit: contact as soon as possible after notification, visit if requested</p> <p>Minimum number of prison visits: no set limit</p> <p>List of local lawyers and interpreters /pro bono lawyers in human rights cases/NGO support in death penalty cases</p> <p>FCO partly funds British NGOs that support detainees in basic welfare and medical needs</p>	<p>Attendance as an exceptional activity that must be justified</p>	<p>British nationals</p> <p>Dual nationals in third countries (when travelling on a British passport)</p> <p>Dual nationals in second countries if there are certain humanitarian or human rights concerns</p> <p>EU nationals in countries where their embassy is not represented</p>
United States	Policy (Publicly available guidelines)	<p>First prison visit: usually within 24 hours of notification</p> <p>Collaboration with American citizens ('wardens') who may deliver documents to detainees in remote areas</p> <p>Prison visits once every six months minimum standard, early stages more frequent, exceptions apply</p> <p>List of lawyers and interpreters</p> <p>Emergency financial assistance for medical and dietary purposes</p> <p>Establish links with international charities through which detainees can obtain certain types of medication for free</p>	<p>Attendance as an activity that is encouraged on certain, defined conditions</p>	<p>All American citizens</p> <p>Dual nationals in third countries irrespective of the passport they travel on</p> <p>Dual nationals in second country of nationality: sometimes</p> <p>Family members of citizens: sometimes</p> <p>Residents: sometimes</p>

**Table 15:** Decision-making process on trial attendance: principles, criteria and structure

	<b>Principle</b>	<b>Criteria of attendance</b>	<b>Structure of decision-making</b>
Australia	Uniformity	Attendance as a default position unless there are overriding reasons why it is not practical or necessary (e.g. resourcing, distance)	Decision made by local post with some input from central office
Germany	Non-judgmental ethos	Decided on a case by case basis No predetermined criteria	Decentralised system; authority rests with local posts
Netherlands	Flexibility	Decided on a case by case basis No predetermined criteria	Decision made by local post with some input from central office
United Kingdom	Consistency	Decided on a case by case basis No predetermined criteria	Decision made centrally with some input from local posts
United States	Transparency and Publicity	Decided on a case by case basis Specific and publicly available criteria under which attendance is compulsory Safety of defendant and consular official are taken into consideration	Decision made centrally with some input from local posts

**Table 16:** Reporting on trial attendance

	Report	Reporting table	People with whom the report is shared	Data <sup>59</sup>	
				'Available' data	'Missing' data
Australia	Always	Standardised reporting format	Ministry  Senior officials in the consulate  Next of kin (if the detainee consents)	Total number of nationals detained abroad (of which nationals awaiting trial, serving a sentence, in immigration detention)  Number of defendants who received consular assistance	Number of trials held  Number of trials attended  Data about age, gender, nature of charges and whether the defendant speaks the local language
Germany	Always	No standardised report	Ministry  Senior officials in the consulate	Total number of nationals detained abroad  Number of defendants who received consular assistance  Data about age, gender, nature of charges	Number of trials held  Number of trials attended  Data on whether the defendant speaks the local language  Data on defendants awaiting trial, serving a sentence, in immigration detention

<sup>59</sup> During the survey FTI asked participating Ministries to provide information about a number of issues which were considered necessary in order to make an assessment of the relationship between consular attendance at trial and fair trial rights. Any reference to 'available' and 'missing' data in this section refers to those data that we requested. Ministries might be routinely collecting other data which we did not request about consular assistance at trial.

Netherlands	Always in exceptional cases hire a 'confidential lawyer' to provide extra report on a case	No standardised report	Ministry  Senior officials in the consulate  Detainee and next of kin (certain sections)	Total number of nationals detained abroad (of which nationals awaiting trial, serving a sentence, in immigration detention)  Number of defendants who received consular assistance  Data about age, gender, nature of charges	Number of trials held  Number of trials attended  Data on whether the defendant speaks the local language
United Kingdom	Always	No standardised report	Ministry  Senior officials in the consulate	Total number of nationals detained abroad  Number of defendants who received consular assistance  Data about age, gender, nature of charges	Number of trials held  Number of trials attended  Data on whether the defendant speaks the local language  Data on defendants awaiting trial, serving a sentence, in immigration detention
United States	Always	Standardised reporting format	Ministry  Senior officials in the consulate	Total number of nationals detained abroad (of which nationals awaiting trial, serving a sentence, in immigration detention)  Number of defendants who received consular assistance  Data about age, gender, nature of charges	Number of trials held  Number of trials attended  Data on whether the defendant speaks the local language

**Table 17:** Training and other forms of support for consular officials

	Before taking the post		After taking the post		Other forms of support
	Consular assistance	Trial attendance	Consular assistance	Trial attendance	
Australia	Generic training on consular assistance  Country specific training on certain elements of the judicial system (e.g. death penalty)	No training provided	Regional training by experienced members of staff	Regional training by experienced members of staff  Interaction with experienced members of staff at the local post	Desk officers at central office: regional experts (24 hours service)
Germany	Three-year training	General legal training	Additional training by the Ministry every two to three years  Two week training before taking up a post (not country specific)  Regional training by experienced members of staff	Training on human rights and treatment of prisoners	Desk officers at central office
Netherlands	Online support	No training provided	Regional training by experienced members of staff  Regular regional conferences	Regional training by experienced members of staff  Interaction with experienced members of staff at the local post	Desk officers at central office: regional experts and human rights advisers

United Kingdom	Three week course on consular assistance (including prisoners and fair trials)	Fair trials training is part of the consular assistance course	Regional training by experienced members of staff	Subject-specific training with external speakers (e.g. Prisoners Abroad)  Consular sections overseas analyse Ministry guidance with external speakers	Desk officers at central office  Regional experts and human rights advisers  'Consistency toolkit'
United States	31day consular course (one of the weeks is spent on assisting Americans abroad)  Advanced consular course (can take up to twelve years to complete)	Training provided to all consular officers	Regional training by experienced members of staff	Regional training by experienced members of staff  Interaction with experienced members of staff at the local post	Desk officers at central office  Regional experts and human rights advisers

# Ministry survey questionnaire

## 1. Fair Trials International Questionnaire

This questionnaire collects information on the consular assistance that you provide to detainees overseas, and explores your policies and practices regarding trial observation. By detainees we mean anyone who is being held in police custody, anyone who is being held in detention awaiting a trial or appeal, anyone who is serving a prison sentence, or anyone who is being detained by the immigration authorities.

The questionnaire begins by asking for some background information about the structure and funding of your consular network and the size of the population served. It then asks about the types of consular assistance provided to detainees, and finally asks a series of questions about trial observation by consular representatives.

If you are unable to answer any of the questions it would be helpful if you can state whether this is because:

- 1) the information is not collected; or
- 2) the information is not held centrally; or
- 2) the information cannot be released.

You do not need to complete the survey in one go - it is possible to answer some questions and return to answer others at a later date. In order to save your responses you must make sure you click the 'Next' link at the bottom of the page or the 'Done' link at the end of the survey. You can access the saved questionnaire from any computer by using the link in the email invitation.

Thank you for your participation in this research. If you have any queries about any aspect of the questionnaire please contact Amanda Cumberland at Fair Trials International on +44 (0)20 7762 6400 or at [amanda.cumberland@fairtrials.net](mailto:amanda.cumberland@fairtrials.net).

### 1. Please provide the following personal details:

Name	<input type="text"/>
Position	<input type="text"/>
Organisation	<input type="text"/>
Email address	<input type="text"/>
Telephone Number (including international dialling code)	<input type="text"/>

## 2. The Consular Network

### 1. Which government department has responsibility for delivering consular services?

### 2. What is the legal basis for delivering consular services? (Please tick all that apply)

- Vienna Convention on Consular Relations
- Domestic legislation
- Constitution
- Consular Charter
- Service standards or targets
- Internal guidelines or manuals
- Other (please specify)

### 3. How do people in need of assistance find out about and access consular services?

### 3. Funding

#### 1. How are consular services funded? (Please tick all that apply)

- Central government funding
- Consular premium on passports
- Fees charged for services
- Other (please specify)

#### 2. What was the total annual budget for delivery of all consular services for each of the last three financial years?

2005-2006	<input type="text"/>
2006-2007	<input type="text"/>
2007-2008	<input type="text"/>

#### 3. Out of the total annual budget, how much was allocated to delivery of consular assistance?

2005-2006	<input type="text"/>
2007-2007	<input type="text"/>
2007-2008	<input type="text"/>

#### 4. Out of the total annual budget available for consular assistance, how much was allocated to delivery of consular assistance to detainees?

2005-2006	<input type="text"/>
2006-2007	<input type="text"/>
2007-2008	<input type="text"/>

## 4. Population Served by the Consular Network

### 1. What is the size of the population served by the consular network?

Total number of passport holders

Total number of overseas trips made each year by all passport holders

Total number of nationals living abroad

### 2. Who is eligible to receive services?

	Yes	Sometimes	No
Citizens	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Residents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dual nationals	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dual nationals (in a third country only)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Family members of citizens	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Family members of residents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other (please specify)

### 3. How many assistance cases were dealt with by the consular network in each of the last three years?

2005-2006

2006-2007

2007-2008

### 4. Of these, how many involved provision of consular assistance to detainees?

2005-2006

2006-2007

2007-2008

## 5. Overseas Prisoner Population

### 1. What is the total number of nationals currently detained overseas?

### 2. Do you routinely collect any of the following information about detainees?

	Yes	No	Sometimes
Age	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Gender	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Nature of charges (e.g. drugs charges, sex offences)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Nature or length of sentence (e.g. death penalty case)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Whether the defendant speaks the local language	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other (please specify)

### 3. In particular, how many of the total number of detainees are:

Awaiting trial	<input type="text"/>
Serving a sentence	<input type="text"/>
In immigration detention	<input type="text"/>
Other (please specify)	<input type="text"/>

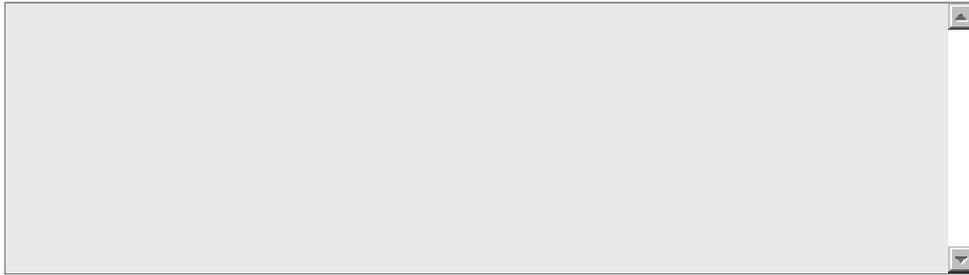
## 6. Assistance to Detainees

### 1. What forms of assistance are provided to detainees? (Please tick all that apply)

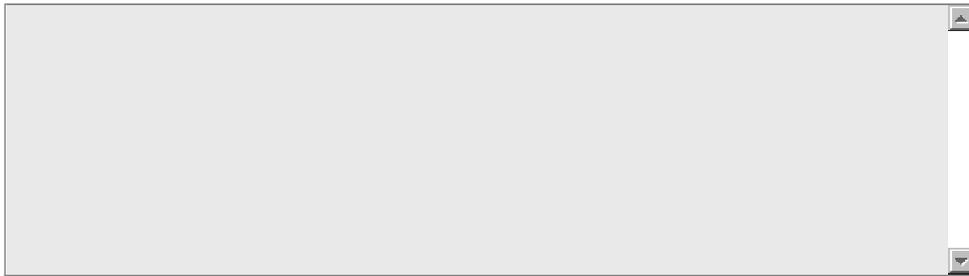
	Always	Most of the time	Sometimes	In exceptional cases	Never
Visiting the detainee in prison	<input type="checkbox"/>				
Providing information about the local legal system	<input type="checkbox"/>				
Providing information about the local prison system	<input type="checkbox"/>				
Helping detainees to find a lawyer	<input type="checkbox"/>				
Providing or paying for a lawyer	<input type="checkbox"/>				
Helping detainees to find an interpreter	<input type="checkbox"/>				
Providing or paying for an interpreter	<input type="checkbox"/>				
Contacting friends and family of detainees	<input type="checkbox"/>				
Assisting friends and family in sending money or goods to detainees	<input type="checkbox"/>				
Providing food and other basic necessities	<input type="checkbox"/>				
Providing financial assistance to purchase basic necessities	<input type="checkbox"/>				
Pursuing complaints about ill-treatment with the prison authorities	<input type="checkbox"/>				
Intervening when detainees are not treated in line with internationally accepted standards	<input type="checkbox"/>				
Intervening when fair trial rights are violated	<input type="checkbox"/>				
Attending the trial	<input type="checkbox"/>				

Other (please specify)

**2. Is there any planned variation in the type or level of assistance offered to detainees across the consular network (e.g. regional variation in frequency of prison visiting)? If so, please provide details.**

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**3. Is there any unplanned variation in the type or level of assistance provided to detainees across the consular network (e.g. under or over-servicing)? If so, please provide details.**

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## 7. Overseas Trials

This section asks about the frequency of consular attendance at overseas trials. By trials we mean criminal trials only, not civil trials or other court hearings.

### 1. How many trials of nationals took place overseas in the last year?

### 2. Do you send consular observers to overseas trials?

- Always
- Most of the time
- Sometimes
- In exceptional circumstances
- Never

## 8. Overseas Trials (2)

You indicated that you never send consular observers to trials. This section explores the reasons for this policy and your views on the importance of attending trials compared with other forms of assistance to detainees.

### 1. You indicated that you never send consular observers to trials. Why is this?

(Please tick all that apply)

- Consular officers are not trained for trial monitoring
- Providing other services to detainees is more important
- Competing demands on staff time
- Attending trials has no discernable benefits for the defendant
- Lack of resources
- Attending trials has negative consequences for the defendant
- Other (please specify)

### 2. Do you intend to provide this service to detainees in the future?

- Yes
- No

### 3. In your opinion, how important is consular attendance at trials in protecting the fair trial rights of defendants?

- Very important
- Fairly important
- Neither important nor unimportant
- Fairly unimportant
- Very unimportant

### 4. What other forms of assistance do you use to help protect the rights of those facing trial in a foreign country?

## 9. Attendance at Trials

**1. How many overseas trials were attended by a consular observer in the last year?**

**2. When a consular observer attends a trial, which sessions are usually observed?**

- Opening session
- Evidence sessions
- Cross-examination of witnesses
- Summing up by judge
- Closing speeches by prosecution and defence
- Verdict
- Sentencing
- The whole trial
- Other (please specify)

**3. When a consular representative observes a trial, what, on average, is the total staff time (in hours) that is spent attending the trial?**

**4. How would you describe the role of the consular observer and the purpose of attending a trial?**

**5. Is any specific training or support available to consular officers who undertake trial observation?**

- Yes
- No

## 10. Decision-Making

### 1. Is the decision whether or not to observe a trial made:

- Locally
- Centrally
- Other (please specify)

### 2. Who normally makes the decision whether or not to attend a trial?

### 3. How important are the following factors in influencing the decision whether to attend an individual trial?

	Very important	Fairly important	Neither important nor unimportant	Fairly unimportant	Very unimportant
General concerns about the local judicial system	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Specific concerns about the individual trial	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Vulnerability of the defendant	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Severity of the charges	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Severity of the potential sentence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
High-profile nature of the case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Media interest in the case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Availability of a consular observer who can attend	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Geographical location of the trial and ease of access	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ability of consular attendance to have a beneficial impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Potential of consular attendance to have a negative impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bi-lateral relations with the country in which the trial is taking place	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Attendance is requested by the defendant or family member	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Attendance is requested by the defence lawyer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Attendance is requested by an NGO	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Other (please specify)

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## 11. Reporting

### 1. Would a consular observer usually prepare a record or report of the trial?

- Always
- Most of the time
- Sometimes
- In exceptional cases
- Never

## 12. Impact of Trial Monitoring

**1. In your experience what, if any, are the benefits of consular attendance at trials to the defendant?**

**2. In your experience what, if any, are the benefits of consular attendance at trials to the consular post?**

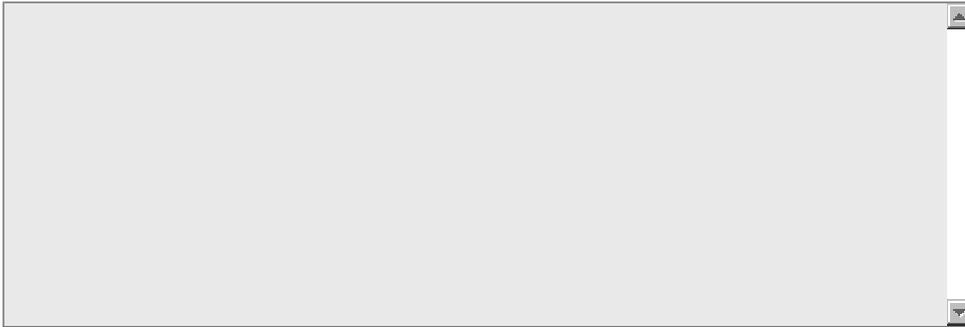
**3. In your experience what, if any, are the risks of consular attendance at trials to the defendant?**

**4. In your experience what, if any, are the risks of consular attendance at trials to the consular post?**

**5. In your opinion, how important is consular attendance at trials in protecting the fair trial rights of defendants?**

- Very important
- Fairly important
- Neither important nor unimportant
- Fairly unimportant
- Very unimportant

**6. What other forms of assistance do you use to help protect the rights of those facing trial in a foreign country?**



### 13. Thank you!

Thank you for taking part. You have now completed the questionnaire.

Fair Trials International will contact you shortly to arrange an interview date, and to provide a list of interview questions.

**1. If you would like to make any other comments about the issues raised in this survey, please provide them here.**



# Fair Trials International

## Consulate Survey

2 Feb 2009



### Introduction

Thank you for agreeing to take part in this survey. We very much appreciate your time, as does your Ministry for Foreign Affairs. We are very keen for you to answer these questions openly and honestly, and can assure you that any comments or views you share will be treated confidentially, and will not be attributed to you individually or to your individual consulate. Furthermore, at the end of the questionnaire you will have the option to choose whether any comments can be attributed to the “home country” of your consulate, e.g. “one of the ten UK consulates commented...”), or should remain non-attributable and confidential. As we have mentioned, the survey is being run by Vanilla Research and Fair Trials International, and hosted securely by Research Now. The findings will only be published in aggregate form. The questionnaire should only take around 15 minutes to complete.

Throughout the questionnaire, where you are unable to provide information, we would be keen to know whether the information exists but you are unwilling to provide it (please answer ‘Refused’), or whether the information does not exist (please answer ‘Don’t know’).

### Background information

This questionnaire collects information on the consular assistance that is provided to detainees in your country or area of responsibility, and explores your policies and practices regarding attendance at hearings related to criminal matters – primarily trials and appeals, but also including other instances such as bail hearings. By detainees we mean anyone who is being held in police custody, anyone who is being detained awaiting trial or appeal, anyone who is serving a prison sentence, or anyone who is being detained by the immigration authorities.

For simplicity, throughout the questionnaire we will use the word ‘trials’, although we would like you to think about all hearings related to criminal matters, including for instance appeals or bail hearings.

**ASK ALL**

**Q1a** Firstly, can you tell us approximately how many detainees this consulate has provided some form of assistance to in the past 12 months? If you aren't sure, we would really like your best estimate.

.....

Don't know .....

Refused.....

**ASK IF NUMERICAL ANSWER GIVEN AT Q1a**

**Q1b** And is this an 'informed exact or approximate answer', or a 'best estimate'?

Informed exact/approximate answer.....

Best estimate .....

**ASK ALL**

**Q2a** And can you tell us approximately how many trials of UK/US/German/ Australian/Netherlands nationals (AS APPROPRIATE) were held in the region covered by your consulate in the past 12 months? If you aren't sure, we would really like your best estimate. For the purposes of this question please treat a bail hearing followed by a trial followed by an appeal as 1 'trial'.

.....

Don't know .....

Refused.....

**ASK IF NUMERICAL ANSWER GIVEN AT Q2a**

**Q2b** And is this an 'informed exact or approximate answer', or a 'best estimate'?

Informed exact/approximate answer.....

Best estimate .....

**ASK ALL**

**Q3a** Approximately how many trials of UK/US/German/ Australian/Netherlands nationals (AS APPROPRIATE) did consular officials attend in some part in the past 12 months? If you aren't sure, we would really like your best estimate. For the purposes of this question please treat a bail hearing followed by a trial followed by an appeal as 1 'trial'.

.....

Don't know .....

Refused.....

**ASK IF NUMERICAL ANSWER GIVEN AT Q3a**

**Q3b** And is this an 'informed exact or approximate answer', or a 'best estimate'?

Informed exact/approximate answer.....  
Best estimate .....

**ASK ALL**

**Q4a** How is responsibility for attending trials shared amongst staff in your consulate? SC

One member of staff has primary responsibility.....  
Responsibility is shared amongst a number of staff.....  
Every member of staff attends trials .....

Don't know .....

**ASK Q4b IF RESPONSIBILITY IS SHARED AT Q4a**

**Q4b** And how many staff share responsibility for attending trials?

.....

Don't know.....

Refused.....

**ASK ALL**

**Q5** Thinking about the consular official who most often attends trials, approximately what percentage of the time they spend on consular work is taken up by attending trials?

% .....

Don't know.....

Refused.....

**Q6** And, thinking about the consular official who most often provides more general assistance to detainees (such as contact with relatives or helping them find an interpreter), approximately what percentage of the time they spend on consular work is taken up providing such assistance?

% .....

Don't know.....

Refused.....

**Q7** Lastly, for this section, can you tell me how large a part of the overall workload of this consulate each of the following elements plays – attending trials, and more general assistance such as contact with relatives or helping them find an interpreter? SC

	Trial attendance	More general assistance
It plays a large part of the overall consulate’s workload.....		
It plays a moderate part of the overall workload .....		
It plays a small part of the overall workload .....		
It plays a minimal part of the overall workload .....		
Don’t know .....		
Refused.....		

**THE DECISION-MAKING PROCESS**

**Q8** Can you tell me whether this consulate has a policy on attending trials? SC

Yes, we have a formal policy.....
Yes, we have an informal policy .....
No, we do not have a policy .....
Don’t know .....
Refused.....

**ASK Qs 9-10 IF FORMAL OR INFORMAL POLICY IN PLACE AT Q8**

**Q9** And can you tell me who decided what the policy should be – was it decided within the consulate, or by the central Ministry of Foreign Affairs? SC

Decided within consulate.....
Decided by central Ministry of Foreign Affairs.....
Decided jointly.....
Don’t know .....
Refused.....

**Q10** Can you describe the principles of that policy please?

WRITE IN .....
Refused.....

**ASK ALL**

**Q11** In a typical case, who makes the decision whether or not someone from the consulate should attend an individual trial? Please tick all that influence the decision.

The individual consular official dealing with the case .....
The head of the consulate or other senior official .....
The central Ministry for Foreign Affairs.....
Refused.....

Q12 How does the consulate usually decide whether or not to attend an individual trial – what sorts of factors do you take into account?

WRITE IN .....  
Refused.....

Q13 For each of the following factors, can you tell me how important you personally feel each is in the decision whether or not to attend an individual trial? SC ROTATE START

Not at all    Not very    Fairly    Very    Crucial    DK Ref  
Important    important    important    important

- General concerns about the local judicial system.....
- Specific concerns about the individual trial .....
- Vulnerability of the defendant.....
- Severity of the charge or potential sentence.....
- Media interest in the case.....
- Political interest in a case.....
- Availability of a consular official who can attend.....
- Geographical location of the case/ease of getting there.....
- Belief that attendance will have a beneficial impact .....
- Belief that attendance will have a negative impact .....
- Bi-lateral relations with the country in which the trial will take place.....
- A request by the detainee/family/friends for consular attendance.....
- A request by the defence lawyer for consular attendance .....
- A request by a Non-Governmental Organisation (such as Fair Trials International or Amnesty International) for consular attendance .....

DON'T ROTATE:  
Other (WRITE IN) .....

**Q14** How important to the detainee do you personally think trial attendance is, in comparison to other support you may provide, such as access to a list of defence lawyers, personal visits while in detention, liaison with relatives? SC

- Very important.....
- Fairly important.....
- Not very important.....
- Not at all important.....
- Don't know .....

**THE ROLE IN ATTENDING TRIALS**

**Q15** When someone from the consulate attends a trial, which sessions do they typically attend? Please tick all that apply.

- The whole trial .....
- Opening session.....
- Evidence session .....
- Cross-examination of witnesses.....
- Summing-up by Judge .....
- Closing speeches by prosecution and defence .....
- Verdict.....
- Sentencing .....
- Appeal (where applicable) .....
- Other (WRITE IN) .....
- Don't know .....

**Q16** For each of the following areas, can you say whether the consulate feels it is within the role of a consular officer attending a trial, or outside of their role? SC ROTATE START

Within their role	Outside of their role	Don't know	Refused
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- Check on the welfare of the defendant .....
- Provide emotional reassurance to the defendant .....
- Gather information on the trial.....
- Provide an informed legal assessment of the trial.....
- Influence the severity of a sentence .....
- Demonstrate the consulate's interest in representing citizens .....
- Demonstrate to the local authorities the consulate's interest in the case .....
- If necessary, indirectly influence the fairness of the trial (e.g. by your presence) .....
- If necessary, directly influence the fairness of the trial (e.g. raising concerns with the authorities) .....
- If necessary, influence the conduct of the defence lawyer.....

Q17 For which of the following reasons has the consulate actually attended a trial within the last 12 months? Please tick all that apply.

- General concerns about the local judicial system .....
- Specific concerns about the individual trial.....
- Vulnerability of the defendant.....
- Severity of the charge or potential sentence .....
- Media interest in the case.....
- Political interest in the case.....
- Belief that attendance will have a beneficial impact .....
- A request by the detainee/family/friends for consular attendance .....
- A request by the defence lawyer for consular attendance .....
- A request by a Non-Governmental Organisation for consular attendance .....
- Other (WRITE IN) .....
- Refused.....

Q18 When attending a trial, how often does the consular official follow-up with a report on the trial? SC

- Always.....
- Usually.....
- Sometimes .....
- Never.....
- Refused.....

**ASK Qs 19-21 IF ALWAYS/USUALLY/SOMETIMES AT Q18**

Q19 And what sort of information is included in the report?

- WRITE IN .....
- Don't know.....
- Refused.....

Q20 Typically, who is the report shared with? Please tick all that apply.

- Senior managers within the consulate .....
- Our central Ministry for Foreign Affairs.....
- The detainee or their family or defence team .....
- Other (WRITE IN) .....
- Don't know.....
- Refused.....

**Q21** And which of the following best describes what is done with the information contained in the reports?  
SC

- The information in the reports is formally reviewed or collected and used to help plan the services the consulate provides and the actions it takes .....
- The information in the reports is formally reviewed or collected but is not used to help plan the services the consulate provides and the actions it takes .....
- The information is not formally reviewed or collected .....
- Don't know .....
- Refused.....

**ASK Q22 IF 'NOT FORMALLY REVIEWED/COLLATED' AT Q21**

**Q22** Can you tell us why the consulate chooses not to review or collate the information?

- WRITE IN .....
- Don't know .....
- Refused.....

**ASK ALL**

**Q23** Does your consulate collect information from trials of nationals in the region covered by your consulate in any database or other form of management information, that produces numbers, measures or quantifiable information about such trials? SC

- Yes .....
- No – although there are a lot of such trials .....
- No – there are not enough trials to justify it .....
- Don't know .....
- Refused.....

## FAIR TRIALS

### ASK ALL

**Q24** In your experience, and thinking about the region for which your consulate is responsible, which of the following do you personally feel are ever causes of concern in terms of the fairness of the trial process faced by foreign defendants? Please tick all that apply.

- Quality of, or lack of, interpretation .....
- Absence or quality of legal assistance/defence lawyers .....
- Length of procedure.....
- Lack of impartiality and independence of the court .....
- Quality of judicial/judges' reasoning .....
- Corruption.....
- Uncertainty over the charges brought against the defendant .....
- Use of unreliable evidence .....
- Insufficient rights of appeal .....
- Other (WRITE IN) .....
- None .....
- Don't know.....
- Refused.....

**Q25** Given an instance such as those outlined in the previous question, do you think Consular intervention in trial proceedings is ever appropriate? SC

- Yes .....
- No .....
- Don't know.....
- Refused.....

### ASK Q26 IF YES AT Q25

**Q26** And in the case of your consulate, what form might that intervention take?

- WRITE IN .....
- Refused.....

## IMPACTS AND BENEFITS

### ASK ALL

We would now like you to think about the *actual* impacts that trial attendance can have.

**Q27** For each of the following possible benefits, can you tell us how much of a benefit to the detainee, in your experience, you think consular trial attendance actually provides? SC

	No benefit at all	A little benefit	Reasonable benefit	Significant benefit	DK Ref
Ensuring the physical welfare of the defendant .....					
The emotional welfare of the defendant .....					
Influencing the severity of a sentence .....					
Influencing the fairness of the individual trial itself.....					
Influencing the conduct of the defence lawyer.....					
Influencing fairness of future trials.....					
Any other benefits? PLEASE SPECIFY .....					

**Q28** And which of the following do you see as actual drawbacks of attending trials? Please tick all that apply.

- Lost opportunities in terms of doing other Consular work.....
- It is resource intensive.....
- Negative impact on diplomatic relations with the host country .....
- Negative impact on the trial process itself .....
- Any other drawbacks? PLEASE SPECIFY.....
- Don't know .....
- Refused.....

**Q29** Could you give us a brief overview of a recent case where you felt consular attendance at a trial was extremely useful? Please do not include any personal details of the detainee, your staff, court officials etc. We are obviously interested in specific examples, but of course would not include any specific details in our analysis or report.

WRITE IN .....

Refused.....

**Q30** And could you give us a brief overview of a recent case where you felt consular attendance at a trial was a waste of time? Please do not include any personal details of the detainee, your staff, court officials etc. We are obviously interested in specific examples, but of course would not include any specific details in our analysis or report.

WRITE IN .....

Refused.....



**IF ANY TICKED AT Q34**

**Q35** And which form did that support take? Please tick all that apply.

- Training before taking up this post.....
- On the job learning/development .....
- Internal materials/manuals .....
- Informal advice from consulate/Ministry colleagues .....
- Advice/training from external defence lawyers or honorary Consuls.....
- Other (PLEASE SPECIFY) .....
- Refused.....

**ASK ALL**

**Q36** Thinking about the skills and knowledge that you feel you need when attending trials, how sufficient would you rate the training and support you have received, if any? SC

- More than sufficient.....
- Sufficient .....
- Less than sufficient.....
- Don't know .....
- Refused.....

**Q37** In general, how confident do you personally feel about consular attendance at trials – for instance knowing whether to attend a trial or not, what impact your attendance might have, what role you should or should not take while attending? SC

- Very confident.....
- Fairly confident .....
- Not very confident.....
- Not at all confident.....
- Don't know .....
- Refused.....

**ASK IF FAIRLY/NOT VERY/NOT AT ALL CONFIDENT AT Q37**

**Q38** Which, if any, of the following do you think would be a useful source of help and support in terms of developing the skills and knowledge required for consular attendance at trials? Please tick all that apply

- Other people within our consulate .....
- Our central Ministry of Foreign Affairs .....
- An international external organisation such as Fair Trials International or Amnesty International
- A local external organisation (or the local office of an international external organisation)
- Other PLEASE SPECIFY .....
- None of the above.....
- Don't know .....
- Refused.....

**ASK Q39 FOR EACH OF THE FIRST FOUR OPTIONS NOT SELECTED AT Q38**

**Q39** Can you tell us why you do not feel (INSERT OPTION FROM Q36) would be a useful source of help and support?

WRITE IN .....  
Refused .....

**ASK ALL**

**Q40** In which areas, if any, do you feel further training or information would be beneficial in terms of equipping you to effectively attend trials?

WRITE IN .....  
Refused .....

**Q41** Finally, is there anything else you feel it would be useful for us to know in terms of your consulate’s approach to attending trials?

WRITE IN .....  
Nothing else.....

**Q42** As explained at the start of the questionnaire, none of your comments or views will be attributed to you individually or to your consulate. However, we would, where possible, like to include certain interesting comments and identify the ‘home country’ of the respective consulate (though not the consulate itself). Would you be willing for your comments to be identified as, for instance, ‘one of the 10 or so UK/US/German/ Australian/Netherlands consulates (AS APPROPRIATE)’, or would you prefer for your comments to remain completely anonymous?..... SC

Yes, I am happy for any comments to be identified as ‘one of the UK/US/German/ Australian/ Netherlands (AS APPROPRIATE) consulates’..... 1  
No, I wish for any comments to remain completely unattributed ..... 2

**ASK ALL**

Thank you very much for completing the survey. We will analyse the responses of all the consulates and the findings will be incorporated into our final report, which will be published and shared with your respective Ministries in July of this year.

**ATTACHED FROM SAMPLE - NO NEED TO PROGRAM**

**COUNTRY**

Australia..... 1  
Germany.....2  
Netherlands .....3  
United Kingdom.....4  
USA.....5

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## **Our Mission**

To work for fair trials based on international standards of justice and defend the rights of those facing charges in a country other than their own

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