



## Report on the status of British residents held in Guantanamo Bay and the obligation on the UK government to provide them diplomatic support

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12<sup>th</sup> October 2005

### Introduction

The UK government, after successful diplomatic exertions, managed to secure the release of British citizens being held in Guantanamo Bay. The return of Feroz Abbasi, Richard Belmar, Moazzam Begg, Martin Mubanga, Asif Iqbal, Jamal Al Harith, Ruhul Ahmed, Shafiq Rasul and Tarek Dergoul prompted hopes on the part of many international organisations, that diplomatic protestations and campaigns on behalf of those held illegally could come to some fruition.

The legal penumbra that is Guantanamo Bay provides a difficult situation for Bisher al-Rawi, Jamil El-Banna, Shaker Aamer, Jamal Abdullah, Ahmed Errachidi, Benyamin Mohammed, Omar Deghayes and two others. They are all British residents in the United Kingdom who have lived their lives here peacefully for many years as refugees. After having escaped their home countries which tortured and abused them, they came to the UK in order to find protection and safety.

It would seem that the UK government is only willing to act on its obligations under international human rights law when the issue relates to its citizens alone. The government has made it clear that it will not support any person who does not have British citizenship. When Jack Straw was asked about the position of these refugees, he stated,

“We can represent British citizens...[but] we cannot represent those who choose not to seek British citizenship and make their own choices presumably because they want to maintain the citizenship of their birth.”

The nine men are now in a legal black hole as they have no one to make any representations on their behalf. Their countries of origin are the very places they fled in order to find security, while the country they fled to refuse to provide them with the protection that they deserve under the law of international human rights.

The following report aims to highlight to the government its duties and obligations under international refugee and humanitarian law to make representations on behalf of the nine British residents. If the government does not act, it will have condemned those men to the very fate that they came to the UK to escape from.

## The Rights of Refugees under International Law

When an asylum seeker first leaves their country of origin, they can be usually found in the country of 'first asylum', 'in transit' or 'receiving country'.<sup>1</sup> Regardless of their status in any of these three phases of refuge, the circumstances that led to their imposed escape would have to be based on a,

“...well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside the country of his habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.”<sup>2</sup>

It is clearly established that people who flee their country of origin in order to seek asylum, do so out of fear for their lives and humanity. The right of the refugee is further expanded upon through the adoption by the General Assembly of the Universal Declaration of Human Rights which provides in Article 14,

“Every one has the right to seek and to enjoy in other countries asylum from persecution”. “This right may not be invoked except in the case of persecution genuinely arising from non-political crimes or from acts contrary to the purpose of the United Nations.”

Despite the wording of Article 14, it was generally considered standard practice by all States that the *right* of asylum was considered to be right of the sovereign State to either grant asylum or refuse extradition. It was not considered to be a right for the asylum seeker in an unequivocal manner.<sup>3</sup> By the fifteenth session of the Commission on Human Rights, there emerged a paradigm shift as States began to recognise a greater right for an individual to be able to claim asylum,

“Divergent views on the nature of the right of asylum were stated. Some considered it a right of the individual and thought that some means of ensuring it should be found. It was argued that the right ‘to seek and enjoy’ asylum proclaimed in Article 14 of the Universal Declaration of Human Rights implied the right to ‘receive asylum’. Others did not agree with such an interpretation and emphasised that the right to grant asylum was a sovereign right of the State.”<sup>4</sup>

What is clear is that a number of States have indeed recognised the right of individuals to asylum and have specifically allowed for the non-extradition of political offenders. According to Oppenheim, although a number of States have recognised this right, through their constitutions, it is not something that can be considered as a ‘general principle’ of international law in relation to Article 38(1) of the UN Charter.<sup>5</sup> Although

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<sup>1</sup> Refer to ‘Declaration on Territorial Asylum’ adopted by the General Assembly of the UN on 14 December 1967 (Resolution 2312 (XXII) (Article 1)

<sup>2</sup> Article 1(A2) United Nations Convention Relating to the Status of Refugees, 28<sup>th</sup> July 1951

<sup>3</sup> Activities of the various organs of the United Nations in connection with the Right of Asylum- UN Doc E/CS.4/713, p.3

<sup>4</sup> Commission of Human Rights, Report of the 15<sup>th</sup> Session- UN Doc E/CS.4/789, p.9

<sup>5</sup> Oppenheim ‘International Law’ vol.1, p.677

there is no such specific rule that allows for such a principle of the unilateral right, when it comes to State practice in relation to the matter of admission, extradition and expulsion of refugees, customary international law has clearly established these factors as being among the “general principles of international law’ which the Statute of the International Court of Justice declares to be a source of International Law.”<sup>6</sup>

The UK has traditionally had a very strong background in the protection of refugees claiming political asylum. The Aliens Act of 1905 was the first piece of legislation put in place in order to limit the entry of aliens into the UK, however the important fact to note is that the law specifically exempted political and religious refugees from its main provisions. Further than this, an order that was made in 1906 allowed for any person coming from a disturbed country to have benefit of the doubt when claiming asylum. Thus it can be seen that the UK has always placed a very strong emphasis on the protection of political refugees in the interest of human rights. This approach was later heavily backed by the English courts who applied the rule to stop any deportation of refugees to countries which were sure to persecute and torture them. The Court of Criminal Appeal, in the case of Re Zansmer held, “The Court refrained from recommending expulsion on the ground that the defendant if sent back to Russia, would be punished for desertion.”<sup>7</sup>

All refugees are ‘aliens’ and thus they are entitled to the rights and duties that come with that status. Refugees are entitled to the same standard which customary international law provides for all aliens, however in the case of the refugees there is one crucial element missing: the protection that is given to the alien by the diplomatic offices of his/her home State.<sup>8</sup> Essentially it is the nationality of the alien and the diplomatic protection that comes with it, that separates the refugee from any other alien, and because of that there is nothing to enforce the minimum standards of treatment of private and public international law. While the refugee retains the nationality of the country of origin, he/she remains in the state of a ‘de facto’ stateless people as there is no protection for them.<sup>9</sup>

While the refugees are in such a state, it is the Universal Declaration of Human Rights that comes to their aid through its affirmation of full political, economic and social rights for all persons, citizens and non-citizens alike. By providing such rights in broad terms, there follows an obligation on all States to ensure that any person under the protection of their sovereignty be given full access to such rights. The Declaration does however further provide for the right of refugees to seek and enjoy asylum, the right to freedom of movement, and the right to nationality.<sup>10</sup>

With only one or two articles which relate to citizens, the International Covenants on Human Rights apply to all persons regardless of their background for all those States which have acceded to the conventions. Although these rights are generally accepted upon ratification by the State to the Conventions, there are certain principles of customary international law that no State may escape liability from enforcing. The Convention against Torture and other Cruel, Unusual or Degrading Treatment or

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<sup>6</sup> AALC-UNHCR Workshop on ‘International Refugee and Humanitarian Law’ New Delhi 26<sup>th</sup> October 1991, p.46

<sup>7</sup> Ibid, p.47

<sup>8</sup> Weis 48 (1954) American Journal of International Law, p.199

<sup>9</sup> Supra 6, p.51

<sup>10</sup> Ibid, p.52

Punishment provides in more unequivocal terms the illegality of refoulment, especially to countries where there is a probable risk of torture.

The British government, failing to make representations on behalf of the British residents have destined them to refoulment back to their countries of origin. The UK has ratified both the European Convention on Human Rights and the UN Torture Convention and therefore cannot simply ignore its duty to ensure that those men are not sent back to their countries of origin. Bisher al-Rawi will be tortured in Iraq if he is returned, of that there is almost no doubt whatsoever, however he is only one of those nine who all face similar consequences. United Nations Security Council Resolution 1566 clearly states, "States must ensure that any measures taken to combat terrorism comply with all their obligations under international law." By refusing to make representations, the UK government has breached many of its obligations already.

The 1951 Convention on the Status of Refugees grants them the right against such treatment but further goes on to say that they should receive favourable treatment in areas such as: personal status, acquisition of property (Articles 13 and 14), access to courts (Article 16), education (Article 22), employment (Articles 17,18 and 19) and travel documents (Articles 27 and 28). For these stateless people, it is crucial that they are given some level of protection by the receiving State in order to guarantee their fundamental human rights.

In relation to the current discussion, the right to travel documents becomes particularly important. All of the nine British residents that were arrested and taken to Guantanamo Bay were travelling under the very documents that Articles 27 and 28 of the Refugee Convention grant as a right. Article 27 reads,

"The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

Article 28 on travel documents states,

"(1) The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

(2) Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article."

As refugees have no protection from their country of origin, they cannot use their national passport. It falls upon the receiving State to therefore provide the refugee with the relevant documentation that will allow for their travel. Since World War I there have been a line of agreements that have specifically allowed for the recognition of such documents in order to give them international enforceability. All States signatory to the

1951 Convention and many others officially recognise such a document allowing for the free travel of refugees inter-State.

As a recognised rule, travel documents are never issued for longer than two years, so refugees cannot remain outside of the receiving State for any period longer than that. The incarceration of the nine British residents has resulted in their having been away from the UK for over two years. The government has attempted to claim that this is in contravention of their right to travel, an argument which is weak and legally baseless. *Force majeure* could easily be claimed by any of the nine men as they had no option in their unwanted leave from the UK.

The line of legislation provides a strong norm of protection for the refugees, especially as they not only cannot claim protection from their State of origin, but more often than not, face the threat of death or torture by such a State. Therefore it is the duty of the receiving State under international law to provide protection to such stateless people, as the numerous international conventions require.

### Conclusion

International conventions and customary international go a very long way in establishing strong norms of international law binding States to act in the best interests of refugees from wherever their country of origin may be. The nine British residents that now sit in the cages of Guantanamo Bay are among those who have been legitimately found to have real cases for leaving their countries of origin and were therefore granted stay in the UK. Using their travel documentation granted to them by the British government, these men were all kidnapped while abroad, and now face certain torture and degrading treatment at the hands of the US military.

The British government has so far failed to uphold the international rule of law in protesting against the conditions that these men are being held. They are not merely foreigners to whom the government holds no responsibility. They are individuals, who after having faced oppression and injustice, fled to the UK in order to gain safety, and have indeed been granted it. The actions of the government are based solely on political considerations to simply ignore those people whom it does not wish to provide any protection. By holding to such a policy, they are in direct contravention of a line of international law to which they are bound.

Those nine men have no way to have representations made on their behalf. The minimum standard of humanity that the British could possibly give these men who have had a harder life than they deserve already, is to make protestations to the US over their status as protected individuals under international law. Their failure to do so, is a sore reflection of poor policy in relation to foreign nationals who face the very immediate threat of torture.

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