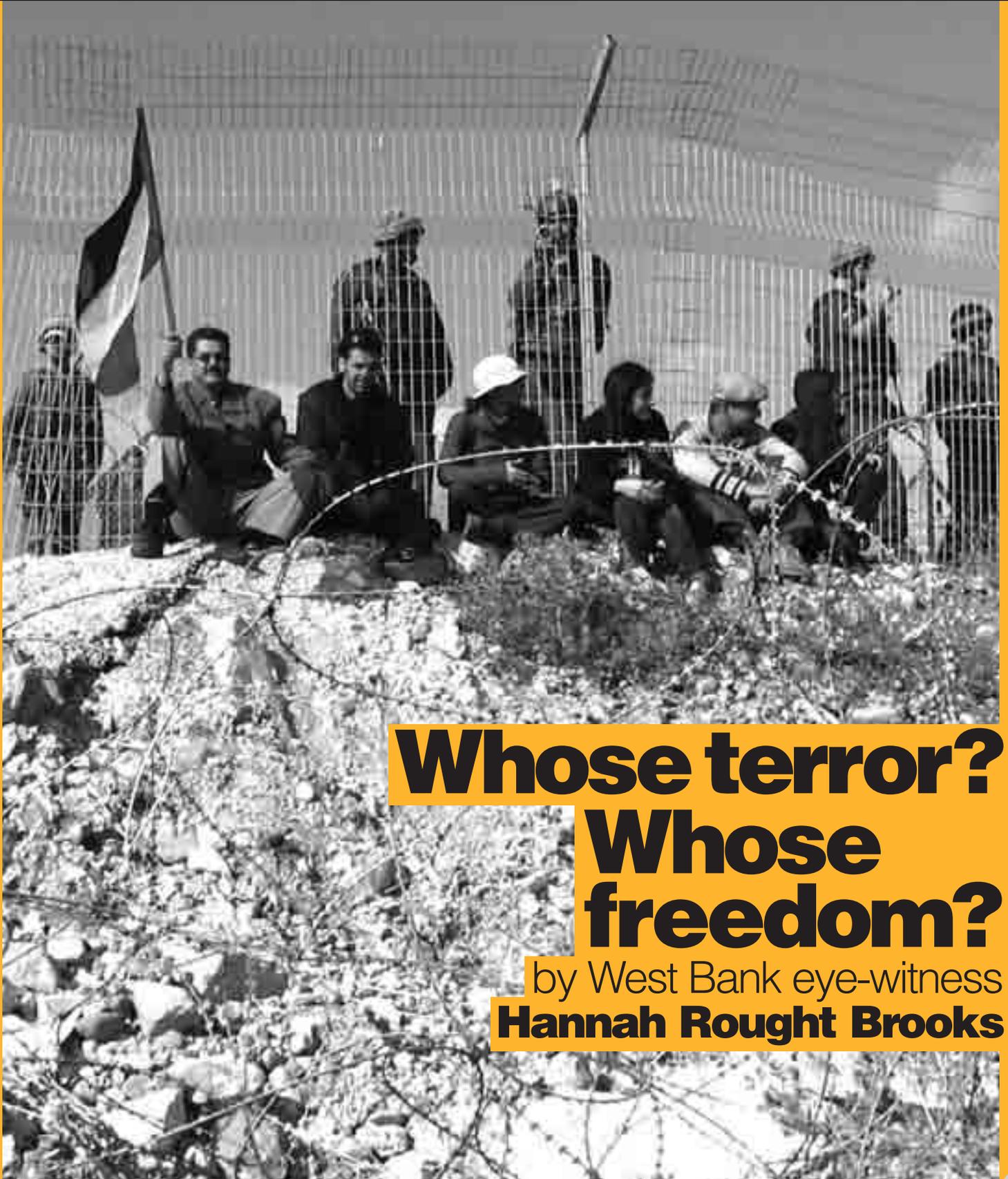


Socialist Lawyer

Magazine of the Haldane Society of Socialist Lawyers ■ Number 46 ● April 2007

£2.50



Whose terror? Whose freedom?

by West Bank eye-witness
Hannah Rought Brooks

Plus: **HUMAN RIGHTS AND 'TERRORISM'**
Keir Starmer QC

'TERRORISM': FLAG OF CONVENIENCE
Bill Bowring

MUSLIMS: ABSORPTION OR EXODUS?
Fahad Ansari

THE LEGAL STRUGGLES FOR WOMEN TODAY
Holly Pelham

LEGAL AID BATTLE
10-11

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The Haldane Society was founded in 1930. It provides a forum for the discussion and analysis of law and the legal system, both nationally and internationally, from a socialist perspective. It holds frequent public meetings and conducts educational programmes.

The Haldane Society is independent of any political party. Membership comprises lawyers, academics, students and legal workers as well as trade union and labour movement affiliates.

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Picture: Jess Hural / reportdigital.co.uk

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Printed by: **The Russell Press** *Cover picture:* **Hannah Rought-Brooks**

Many thanks to all our contributors and members who have helped with this issue

Standing up for public funding

Demonstrating outside Parliament on 19th March in defence of legal aid

As this issue went to press, legal aid practitioners are confronting the implementation of the first tranche of Legal Services Commission changes prompted by Lord Carter's report. It is a gloomy time for lawyers committed to publicly-funded litigation and an even gloomier one for all those potential clients who will be unable to find expert publicly funded legal advice and representation in the future. As always, the government accuses lawyers of trying to line their own pockets – pretty rich coming from a government stuffed with lawyers from commercial practice. How often have Blair, Falconer or Goldsmith accepted a publicly-funded legal aid brief?

We're sick of having to repeat that this is not about fat-cat lawyers but about welfare services being withdrawn from the poor and vulnerable in our society. Since the government can't answer that point, it resorts to avoiding debate or mud-slinging as Laura Janes' account of Vera Baird's appearance at the Young Legal Aid Lawyers' Question Time event makes clear. The next issue of *Socialist Lawyer* will focus on the expected and imminent implications of the changes in public funding.

This issue looks at terrorism and human rights, both domestically and internationally. New Labour described the introduction of the Human Rights Act in 1998 as "bringing rights home". However, as Keir Starmer QC illustrates so graphically, a government's genuine commitment to human rights is only really tested when it comes to difficult questions. A year after the implementation of the Human Rights Act 1998, the government failed the first test when it passed the Anti-Terrorism, Crime and Security Act 2001, allowing for indefinite detention, or internment, of non-nationals resident in the UK. Since then the government has faced a number of defeats in the Courts: indefinite detention and the use of torture evidence were ruled unlawful by the House of Lords and the system of control orders, and their punitive conditions, have been held to be incompatible with human rights. Notwithstanding these reverses, the government persists in breaching the rights protected under the Human Rights Act. Presently, foreign nationals, who have never been charged with any criminal offence in this country, are being deported or even returning voluntarily under pressure to countries where they are likely to face detention and/or torture. On the issue of balancing security with civil liberties and human rights, the government has failed woefully. Its response, yet again, has not been to re-consider its own practice but to attack the lawyers.

In Palestine, human rights lawyers are desperately needed. Hannah Rought Brooks, member of the Haldane Society executive, spent three months in the West Bank on behalf of the Bar Human Rights Committee. She describes daily and routine infringements of human rights: destruction of villages; military attacks on peaceful demonstrations; and checkpoints preventing freedom of movement. In the name of combating "terrorism" the Israeli army kills Palestinian civilians and lays waste to cars and buildings, only (as in the case Hannah describes) subsequently to release the suspected terrorists without charge. In addition, the Israeli government wilfully ignores UN resolutions and the International Court of Justice.

Lawyers in the Basque country are also familiar with repression of political parties, cultural associations and the media, all under the guise of combating "terrorism". Basque prisoner Inaki de Juana served 19 years. Shortly after his release, he was sentenced to another 12 years for the crime of publishing two comment pieces, said to be "terrorist threats". After a long hunger-strike, in which the World Medical Association, the European Association of Democratic Lawyers and the Council of Europe's Committee for the Prevention of Torture intervened,



Picture: Jess Hurd / reportdigital.co.uk

he has been repatriated to a hospital in the Basque country "for humanitarian reasons".

Moazzam Begg knows exactly what it is like to be suspected of being an international terrorist and to be held, with charge or trial, by a foreign power. He was held captive for over three years at Guantanamo Bay and will speak to the Haldane Society on Thursday 24th May about his experiences there and the men still imprisoned unlawfully. Sadat Sayeed, who will speak with Moazzam, updates us on the depressing failure of the US judiciary to acknowledge the constitutional rights of the Guantanamo captives.

It would be ridiculous to suggest that human rights abuses by governments will be overcome solely by lawyers or by litigation. But lawyers standing up for unpopular causes can make a difference, as the litigation in both Britain and, to a lesser extent, the US shows. Where do those lawyers who take the unpopular, but necessary, human rights challenges come from? What lies behind cases such as *A & others v Secretary of State for the Home Office* that challenged the detention and internment of foreign nationals without trial? In Britain, this and all the other test cases have been publicly-funded. Who knows what would have happened had there been no publicly-funded lawyers willing to represent so-called suspected terrorists? And, for every important human rights test case, there are thousands of cases that, in legal terms, might be considered mundane or straightforward, but involve the right to liberty, to freedom of expression and association, to respect for family, home, private life, and correspondence, and even the right to life itself. Hundreds of publicly-funded lawyers make sure that, day in and day out, those facing criminal charges, the loss of their homes, the loss of their children or other arbitrary treatment by the state get the chance to have their say in Court, and have their human rights considered. Without public funding, there will be more miscarriages of justice, more arbitrary treatment, less chance for the individual to put forward his or her case, and fewer test cases. It feels late in the day but we hope the government will reconsider.

The Haldane Society is sad to note the passing of two highly respected legal activists. Jack Gaster was the Society's Vice-President and lived a life fully engaged in political and legal struggles for justice. Gilly Mundy's untimely death has left a gap in the lives of everyone who knew him. His tireless campaigning work for the Newham Monitoring Project, the Lawrence Family Campaign and INQUEST will not be forgotten.

● **Liz Davies, chair, Haldane Society** lizdavies@riseup.net



Iñaki de Juana: Basque prisoner on hunger strike in Spain...

Spain uses “terrorism” to increase repression on the Basques

In the last years we have witnessed large-scale interference by Spanish justice in politics. Several groups, among them lawyers’ associations, have denounced the politicisation of the judicial system, and its corollary, the judicialisation (juridification) of political activity.

We can perceive clear political interventions in the administration of justice, which are designed to attack the independence and impartiality of the courts, as well as to put pressure on judges in those cases related to dissident or opposition groups, in particular the cases linked to the Basque issue. On the other hand, the law has interfered

in the political scene, in the democratic debate, and has been unlawfully used as a tool for the repression of political parties, associations, cultural groups or even media with an alternative point of view.

Of course, the new extensive interpretation of the meaning of “terrorism” all over the world, and the global impact of counter terrorist measures, have had a deep impact. In the case of the Basques it has meant the extension of the laws for secret arrest – which, as the UN Rapporteur Against Torture, Manfred Nowak, has recently declared, “allows torture”; new measures to restrict the most basic rights of political prisoners; the introduction of “reforms”

designed to cut back freedom of expression or association; and the reinterpretation of the criminal law to broaden the limits of the concept of “terrorism”. As others have said, this is not completely new, but it has generated a suffocating situation that affects more and more sectors of the society.

Just to provide an example of this, the president of the Basque autonomy, Juan José Ibarretxe, has been charged by the Spanish Courts with a crime of “disobedience” because he publicly met Arnaldo Otegi and other leaders of the outlawed party “Batasuna”. This is an example of the absurd conclusion of pushing the “renewed” laws to their limit.

However, in this article we would like to mention the concrete case of a Basque prisoner, Iñaki de Juana. This is a dramatic example of the “reformed” treatment of the large group of around 600 Basque political prisoners who are now dispersed in 48 Spanish and 31 French jails. To provide an example of the situation, just 11 prisoners are held in prisons located in the Basque country... this cannot be considered a coincidence.

On 8th November 2006, the Audiencia Nacional sentenced Iñaki de Juana to twelve years in prison for the crime of “issuing terrorist threats” in two comment articles which he published in the Basque daily, *Gara*. Mr de Juana had just finished serving a 19 year sentence and, in that context, the Justice Minister, Juan Fernando López Aguilar, stated that he would “do whatever is in our power to prevent these people

from being released” even by “building new charges” against the Basque prisoners.

It must be said that, as independent observers have stated, no “threats” whatsoever can be found in the comment articles. The persons mentioned in the articles never denounced or complained about them in the Courts.

In view of the sentence, de Juana began a second hunger strike – his first started on 7th August 2006 and lasted for 63 days – to demand that the decision against him be rescinded. He believes that this decision does not proceed from legal reasoning, but rather, from an attempt at political revenge against him, because of who he is, rather than because of any facts on which an accusation against him could be based.

Furthermore, the Audiencia Nacional decision to force-feed De Juana opened up a debate on this issue. The World Medical Association reiterated its view that “force-feeding people on hunger strike is unethical and cannot be justified”. Other medical experts back up this view. Nevertheless, as well as being force-fed against his will, de Juana was tied to his bed and was also drugged in order to aid the insertion of a nasal-gastric tube, all of which, according to de Juana’s lawyer, Alvaro Reizaba, means that de Juana was in a deplorable state.

The European Association of Democratic Lawyers issued a statement on this issue: “We express our concern because of the serious disproportion between the actions charged and the sentence [...]. This exceptional decision leads us to think that this

December

13: Five Law Lords unanimously uphold the right to protest and rule that police had acted unlawfully in detaining Iraq war protesters and forcibly turning them back. The protesters had been stopped from attending a rally at RAF Fairford in March 2003, hours before the

Gloucestershire base was used for bombing raids on Iraq. The Law Lords stated that freedom of expression was “an essential foundation of democratic society” and that the Human Rights Act had brought about a “constitutional shift” creating for the first time a right to protest.

14: A major criminal investigation into alleged corruption by the arms company BAE Systems and its executives is stopped when the Prime Minister claimed it would endanger Britain’s security if the inquiry was allowed to continue.

14: “Kiss and tell” celebrity exposés are delivered a blow when the Court of Appeal uphold a ruling by a High Court judge stopping publication of a book on the Canadian folk singer and songwriter Loreena McKennitt by her former friend and confidante Neima Ash.

15: Mark Gibson and his wife, Lezley, who gave thousands of chocolate bars laced with cannabis to multiple sclerosis patients for pain relief, are found guilty of conspiring to supply the drug. They claim to have helped more than 1,600 MS sufferers and are considering an appeal.

is the use of a “criminal law for the enemy” marked by persecution of individuals as a result of who they are, instead of the actions they may have committed”. That is also our opinion.

The Council of Europe’s CPT – its Committee for the Prevention of Torture – visited de Juana on 14th and 15th January 2007 and met representatives of various institutions, and of civil society. The importance of this Committee’s opinion on the delicate matter of force-feeding is not to be underestimated. Having said this, we must protest the fact that the Committee’s reports are only published if and when the Government decides to permit publication, and until then are confidential, according to the provisions of the European Convention for the Prevention of Torture. The reports are kept secret until that time. This is the case for the reports on the visits the CPT carried out in 2003 and 2005, the findings of which are still confidential.

Thus, important controversy has arisen around the decisions made by the Audiencia Nacional, and because of de Juana’s extremely delicate condition, as a result of his hunger strike. This controversy reached a high point when the British daily *The Times* on 5th February 2007 published an interview with the prisoner and some photographs of him when he reached 90 days on hunger strike. The photographs made a big impact on public opinion in Spain.

However, de Juana’s release has become a “matter of state”. The defence appealed to the Supreme Court, on the grounds



...and police attack marchers in support of him

that the articles by written him contained no incriminating elements to justify such a sentence and that the sentence was disproportionate. The Second Chamber of the Supreme Court, in a closed plenary session on 12th February 2007 decided to convict de Juana for a crime of “non terrorist threats”, linked with a crime of “enhancing terrorism”, which carries a reduced sentence of three years and seven months of imprisonment. Mr Reizaba met him after the decision and stated that “he has decided to maintain the hunger strike until he is released. He considers he has done nothing, he has not committed a crime and he must be in freedom. Meanwhile, he will not give up the fight”. On the other side of the political spectrum, the decision stirred up a violent political storm. Tens of thousands of protesters demonstrated in Madrid on 24th February 2007 against the Supreme Court’s decision to cut de Juana’s sentence. On the same

day thousands of protesters demonstrated in Bilbao asking for his release, and the Basque Autonomous police brutally attacked the peaceful marchers as the demonstration was “illegal”.

On 1st March 2007 de Juana was repatriated from Madrid to a hospital in the Basque Country, after 115 days on hunger strike. The Spanish Minister for International Affairs, Alfredo Perez Rubalcaba, decided “for legal and humanitarian reasons” to provide an “attenuated prison category” according to which, after recovering in hospital, de Juana will serve the rest of his sentence – one year remains – at home. The opposition parties are once again in uproar: they consider this as a “victory” for “the blackmail of the terrorists”. Actually, it is a defeat for the system of justice, which does not know how to adjudicate independently in a case which is overshadowed by politics.

● **Julen Arzuaga**, BEHATOKIA – Basque Observatory of Human Rights

‘Glorifying terrorism’?

P *Prison Writings: The Roots of Civilisation* by imprisoned Kurdish leader Abdullah Ocalan has just been published by Pluto Press (www.plutobooks.com). The book contains much of the material that Ocalan produced in his submission to the European Court of Human Rights. It has been published and distributed in Germany without difficulty. However, the planned launch of the book in the House of Commons (at an event organised by Elfyn Llywd, Plaid Cymru MP) was banned by the Serjeant-at-Arms who muttered deep threats about the book “glorifying terrorism”.

The book launch went ahead anyway, courtesy of the National Union of Journalists, who can recognise an attack on freedom of expression when they see one. The book has been praised by various leading academics as an important post-colonial history of the region and not been accused, by anyone, as glorifying terrorism.

Pluto Press commented: “This surely represents a grave breach of freedom of expression which members of the public, academics, academic unions, journalists, public interest, human rights and civil liberties organisations need to be concerned about. If this book and a public debate that surrounds it is said to ‘glorify terrorism’, we need to ask ourselves: What book, and which meeting, will next be subject to a similar ban?” ■

15: Tony Blair becomes first serving Prime Minister to be interviewed as part of a criminal investigation when Scotland Yard officers running the “cash for questions” inquiry question him at 10 Downing Street.

20: Home Secretary John Reid announces compulsory powers to fingerprint and photograph 70,000 foreigners a year who live in Britain. 150 screening centres around the world are to be set up so that biometric data, electronic fingerprints and photos, can be taken and stored from passengers coming to Britain from 169 countries outside Europe.

22: Fifteen specialist courts to tackle cases of domestic violence are to be set up by next April, bringing the total number to 64 across England and Wales. The courts use specially trained prosecutors, magistrates, legal advisers and police officers and provide independent advice for victims.

23: Plans to allow men who beat their partners or former partners to escape custody by pleading remorse have been dropped in guidance for judges on sentencing for domestic violence.

27: Prison officers in jails in England and Wales are to carry special “safety” knives to increase the chances of prisoners surviving suicide attempts. This move was recommended 17 times by Stephen Shaw, the prisons and probation ombudsman, during his first 18 months investigating deaths in custody.

Guantánamo: the gulag's still open

January 2007 saw the fifth anniversary of the use of the US Naval Base at Guantánamo Bay as the Bush administration's 'war on terror' gulag.

Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, took the opportunity in a radio interview to launch an attack on the integrity of the lawyers and law firms who are representing the detainees held at Guantánamo Bay. Mr. Stimson, a lawyer himself, stated: "Actually you know I think the news story that you're really going to start seeing in the next couple of weeks is this: As a result of a FOIA [Freedom of Information Act] request through a major news organization, somebody asked, 'Who are the lawyers around this country representing detainees down there,' and you know what, it's shocking." He then proceeded to reel off the names of a number of law firms, adding, "I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out." Asked who was paying the firms, Mr. Stimson hinted of dark doings. "It's

not clear, is it?" he said. "Some will maintain that they are doing it out of the goodness of their heart, that they're doing it pro bono, and I suspect they are; others are receiving monies from who knows where, and I'd be curious to have them explain that."

These comments clearly shine a light, not only on what the Bush administration thinks of the detainees, but also of those who represent them. For a senior member of the administration to argue that law firms are doing anything other than upholding the highest ethical traditions of the bar by taking on the most unpopular of defendants is nothing short of appalling. It is shocking that he would seemingly encourage the firms' corporate clients to pressure them to drop this work. Perhaps it is not surprising that this is the person the administration has chosen to oversee detainee policy at Guantánamo.

Remarkably, during the interview, Mr. Stimson called Guantánamo "certainly, probably, the most transparent and open location in the world".

Cully Stimson: is this the right man to oversee detainee policy at Guantánamo?



January also saw the release by the Pentagon of a draft manual for trying detainees at Guantánamo Bay to Congress. This comes off the back of the signing into law of the Military Commissions Act of 2006 (MCA).

Judges who sit on the military commissions will have wide latitude to decide what evidence may be presented. Notwithstanding the re-structuring of the tribunals, there remain grave concerns that there are not enough protections built into the trial process. Military lawyers representing detainees worry that statements from other detainees could be used to incriminate defendants with no way of knowing if the information was extracted under torture.

February saw the announcement by the US military that it had prepared fresh charges against three Guantánamo detainees: David Hicks of Australia, Salim Hamdan of Yemen, and Omar Khadr of Canada. The charges against David Hicks are providing material support for terrorism and attempted murder in violation of the law of war. Salim Hamdan is accused of acting as Osama bin Laden's driver in Afghanistan and of transporting weapons for al-Qaeda. Omar Khadr faces charges of murder and attempted murder in violation of the law of war, spying, conspiracy and providing material support for terrorism. The Pentagon announcement was welcomed by Australian Prime Minister John Howard, who had demanded that charges be filed against Mr Hicks by mid-February.



Six years on: Guantánamo still dispensing

On 27th March, David Hicks pleaded guilty to the charge of providing material support for terrorism. The attempted murder charges against him were dropped. Under a 'plea bargain deal' with the prosecution, he could only be sentenced to a maximum of seven years imprisonment with all but nine months of the sentence being suspended. Also, as part of the deal, Hicks withdrew claims he had been beaten by US forces after his capture in Afghanistan and that he had been sedated before learning of the charges against him. This aspect of the deal has been heavily criticised by US civil rights groups as an attempt to cover up the abuses which have taken place at Guantánamo Bay. Hicks' father however, insists that his son was maltreated and has stated that he intends to continue to "push that issue". Hicks will be transferred back to Australia to serve his nine month sentence.

In early March, hearings at the discredited Combatant Status Review Tribunal opened, to de-

January

3: A confidential inquiry by the Metropolitan Police into the death of Jason Fearon in London three years ago has resulted in a major overhaul of the Met's firearms strategy. The inquiry revealed that the murder would not have happened if a "proportionate" police response had been provided.

5: Judges are set to scrap their wigs after a consensus against the retention of wigs for civil cases has emerged from a review set up by the Lord Chief Justice Lord Phillips. He has described the judges' large wardrobe as "ridiculous" and prefers the European-style black robe.

12: The Assets Recovery Agency (ARA) is to be closed down. It was set up four years ago with a promise to seize £60 million a year in assets from organised crime. In 2004-2005 it seized £4.4m but cost nearly £20m to run.

16: German Government calls for the outlawing (across the EU) of denial of the Holocaust, the parading of Nazi symbols and racist speech.

16: The Home Office statistics that underpin one in five of its key policy areas are "not up to scratch" according to Sir David Normington, its Permanent Secretary, reporting to a Commons public accounts committee.

18: Government Ministers unveiled sweeping legislation to allow widespread data sharing between public and private sectors for the first time in the name of tackling fraud.



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termine the status of Khalid Sheikh Mohammed, the man accused by the Bush administration of masterminding the 9/11 attacks, and 13 others. All have spent years in secret CIA jails before being transferred to Guantánamo Bay. This is the first time they have faced a court.

These sham tribunals are held with no defence lawyers present, and with the panels of three military officials considering evidence obtained by torture. In the past, initial hearings have been open to outside observers, but the Pentagon decided that these cases were too sensitive to be reported freely. Edited transcripts of the proceedings will be released later after any information deemed to be classified is edited.

Two conflicting reports have emerged in the last few months in relation to abuse of detainees.

An investigation conducted by the US army, released in February, found “no evidence of mistreatment” at Guantánamo Bay. The

inquiry began last October after a Marine sergeant claimed that guards had bragged about how they had beaten detainees. Colonel Richard Bassett carried out 20 interviews with suspects and witnesses but did not bother to interview any of the detainees themselves, and concluded to recommend no action.

In sharp contrast, an internal report by the FBI catalogued a long list of abuses of prisoners. At least 26 employees of the agency said they witnessed inmates being mistreated and subjected to harsh interrogation. One reported seeing a man whose head was covered in duct tape, another saw detainees chained from hand to foot in the foetal position for up to 24 hours and saw a detainee being draped in an Israeli flag in a room with loud music and strobe lights.

In February the DC Circuit Court of Appeals ruled in the combined cases of *Al Odah v. USA & Boumediene v. Bush*, the first lawsuits challenging the MCA. The ruling states that the Guantánamo detainees have no constitutional right to *habeas corpus*, with the MCA eliminating the statutory right to challenge their detention in the courts.

DC District Court Judge Joyce Hens Green, who dissented, stated that “detainees possess the fundamental right to due process of law under the Fifth Amendment.” Reaching an entirely different conclusion, Judge Richard Leon dismissed the appeals, ruling that the detainees possess no constitutional rights to *habeas corpus*.

On 5th March, the Center for Constitutional Rights (CCR) along with co-counsel petitioned the US Supreme Court for a writ

of *certiorari*, asking it to review the decision of the DC Circuit Court of Appeals in *Al Odah* and *Boumediene*. The Supreme Court is being asked to grant review and hear the cases on an expedited basis in May. Regrettably, on 2nd April, the Supreme Court denied *certiorari*, with six judges denying the petition, and three in favour. It is not usual for the Supreme Court to give reasons for denial of *certiorari*, although in this case the three in favour stated their reasons for granting. Of the six who denied the petition, only two gave reasons. Justices Stevens and Kennedy said they were rejecting the petition only on procedural grounds, stating that alternative remedies had not yet been exhausted. This means simply more delay through protracted litigation. As of today, despite two Supreme Court rulings (*Rasul v. Bush* in 2004 and *Hamdan v. Rumsfeld* in 2006) affirming the detainees’ right to *habeas corpus* in the federal courts, nearly 400 detainees still remain imprisoned at Guantánamo Bay without charge or trial, never having had any meaningful chance to show that they deserve to be released.

In the light of the shifting balance of power on Capitol Hill, a number of principled members of Congress from both sides of the political divide are challenging the Bush administration’s flagrant disregard for human rights and the rule of law by proposing two new pieces of legislation. The Restoring the Constitution Act would restore many of the rights that the MCA stripped, including the right of non-citizen detainees to challenge their detention, a narrower defini-

tion of “unlawful enemy combatant”, and a restoration of the Geneva Convention protections. The Habeas Corpus Restoration Act would reinstate the right of non-citizen detainees to challenge their detention through the writ of *habeas corpus*.

Some good news! On 30th March, British resident Bisher al-Rawi was released from Guantánamo Bay. Mr al-Rawi, an Iraqi national who has lived in the UK for the last nineteen years, was seized in Gambia and taken to Afghanistan, before being taken to Guantánamo where he spent four and a half years, the last year in solitary confinement. The US authorities insisted on blindfolding and shackling Mr al-Rawi before handing him over. On arriving in Britain he was asked quick questions about his political views, before being released.

Back in the UK, Mr al-Rawi said it had been a horrific experience and talked of the “hopelessness” and “extreme isolation” of other British residents still held without charge or trial, some of whom he said “are now on hunger strike protesting against their extended solitary confinement”.

However, Mr al-Rawi’s Jordanian business partner Jamil el-Banna, also a British resident captured at the same time, remains at Guantánamo. The shadowy role which the British security services played in the capture of the two men has emerged. Both had been approached by MI5 to work for them, but were handed over to the CIA on the basis of faulty intelligence from the UK.

● **Sadat Sayeed** (Barrister at Garden Court Chambers)

20: Prime Minister’s political liaison officer, Ruth Turner, arrested in the “cash for peerages” inquiry, in connection with alleged offences under the Honours (Prevention of Abuses) Act 1925 and also on suspicion of perverting the course of justice.

22: Home Secretary John Reid proposes splitting Home Office into a Ministry for National Security and a separate Ministry for Justice. This follows an internal ‘capacity review’ of the ability of the security services to respond to the ‘terror’ threat.

27: The Borders Bill published by the Government, which will (in effect) turn the Immigration Service into a quasi-police force, with powers of arrest and detention for individual officers. Bill will make it compulsory for all non-European foreign nationals living in Britain to apply for bio-metric identity card.

31: Lord Levy arrested again on suspicion of perverting the course of justice (over his role in the “cash for questions/honours” affair). Tony Blair’s chief fundraiser and tennis partner is suspected of allegedly lying or withholding evidence from the police as part of a cover-up.

31: Anne Owers, Chief Inspector of Prisons, warns that overcrowded jail system in England and Wales is in a “serious crisis”. Sentencing statistics for 2005 showed that the total numbers imprisoned annually have risen from 79,500 in 1995 to 101,200 in 2005.

Jack Gaster

The solicitor, long-time Haldane Society activist, and one of our Vice-Presidents, Jack Gaster, died aged 99, on 12th March.

Jack was one of 13 children of Moses Gaster, Chief Rabbi of the Sephardic Jewish community in England but did not share his father's Zionist politics. He was an active left-winger for the whole of his life. His recorded memories of the 1926 General Strike, in which he denounces the involvement of university students, including his own brother, as "blacklegs" driving – or rather trying to drive – trains for the Government, have been published by the British Library sound archive.

He first joined the Independent Labour Party and was its representative in 1934 on the committee to welcome the Jarrow hunger marchers. In 1935, a section of the ILP including Gaster joined the Communist Party and that became his political home until its collapse in 1991.

From the 1930s, he was active in the struggle against fascism, organising against Mosley's blackshirts. He set up his own solicitors' firm in 1938, specialising in trade union and anti-fascist issues, and married a fellow-Communist, Marie Lynd (died 1990). He served in the war from 1941 (after the Nazi-Soviet pact had ended). In 1945 he acted as



Jack: vindicated

election agent for Communist candidates in the general election and in 1946 was elected as a Communist in Mile End to the London County Council. He and fellow Communist Councillor, Ted Bramley, provided the opposition to the ruling Labour Party, concentrating on housing, health and public transport issues.

In 1946, he helped to draft the Communist Party's submission to the Anglo-American Committee appointed by Clem Attlee to consider the future of Palestine. The submission called for an independent Palestine with Jews forming a national minority with full citizenship rights. "Given this basis, there will be no hesitation on the part of the Arabs, on the basis of agreement with the Jews as equal citizens of Palestine, to admit refugees from fascist persecution as freely as other free countries admit refugees to their shores."

The Committee did not agree and Gaster berated the British and US governments for their immigration controls on Jewish refugees.

Gaster achieved notoriety in 1952 when, representing the Haldane Society as part of an eight-member delegation from the

International Association of Democratic Lawyers, he visited North Korea to investigate claims that the United States had used germ warfare; while there he visited British troops in prisoner-of-war camps. He returned with what he called "the preliminary material for another Nuremberg" and published a 38-page dossier, *Korea... I Saw the Truth*, indicting Washington for germ warfare, executions without trial, burning alive, torture and organised destruction. The national media denounced him, and Tory MPs pressed for his prosecution for treason. It was only in later years that he was vindicated and it became acknowledged that germ warfare had been used by the US.

His firm, Gaster and Turner, represented London dockworkers in 1951, prosecuted for conspiracy charges around an industrial dispute. Until his retirement in 1990, his firm was the first port of call for trade unionists engaged in industrial disputes. Described as "a very sharp legal mind" he built a civil rights practice, acting for tenants, demonstrators, and serving as legal adviser to the Communist Party, various embassies, and international solidarity movements. Joe Slovo, the South African Communist leader, and Tariq Ali were among his clients.

He maintained an interest in the NHS, serving on a series of hospital management committees and helping to establish the pioneering Caversham Health Centre in north London, and was a prominent supporter of the freedom movements of the Portuguese colonies in Africa: Angola and Mozambique.

In the late 1980s, the Communist Party of Great Britain was riven by internal divisions. Gaster wrote an open letter to the General Secretary calling for "a spirit of conciliation and not confrontation". His words went unheeded and the Party collapsed in 1991. He described the Euro-Communists, whose right-wing trajectory helped to lay the foundations for New Labour, as "pseudo-popular democratic traitors". Although Gaster did not join the new Communist Party of Britain, he remained a strong supporter of the Party's newspaper, the *Morning Star*, and denounced New Labour until the end of his days.

After 1991, he joined Scargill's Socialist Labour Party, twice, leaving it twice, and in later years concentrated his political activities in the Camden Pensioners' Association and the Society for Co-operation in Russian and Soviet Studies (SCRSS).

Bill Bowring, fellow Haldane and SCRSS activist, recalls: "I went to his 90th birthday party at Hampstead Town Hall, which was attended by senior lawyers, including Lord Justice Stephen Sedley and Sir Geoffrey Goodman, as well as writers and politicians. Still active in his 90s, Jack began to help the pensioners' movement and would attend rallies in Trafalgar Square, catching the 24 bus near his home."

The Society was honoured to count Jack Gaster as one of our most loyal and active supporters, and elected him one of our Vice-Presidents, a position which he held until his death. We send our condolences to his children, grandchildren and great-grandchildren.

● Liz Davies

February

1: 10 Downing Street reveals that Prime Minister Tony Blair was interviewed for a second time by police over cash for honours, and told by police not to divulge either the fact of the interview or its details to anyone but his tightest circle.

2: Attacks on British Jews soared to record levels last year in the wake of Israel's war against Hizbullah in Lebanon, according to report by the Community Security Trust. There were 594 anti-semitic incidents in 2006 and more than a fifth took place during the war in July and August.

5: Big defeat for Government as House of Lords overwhelmingly votes to include deaths in prison and police cells as part of new corporate manslaughter measures.

7: Two 'terror' suspects freed without charge over alleged plot to abduct and behead a British Muslim soldier. The pair were never told why they were detained and never questioned about any terrorist activity or Islamic extremism!

8: Legal action is brought against JJB Sports by Which? under the Enterprise Act 2002 to try to recoup millions of pounds for thousands of football fans who were overcharged for England and Man United replica shirts. First case of its kind.

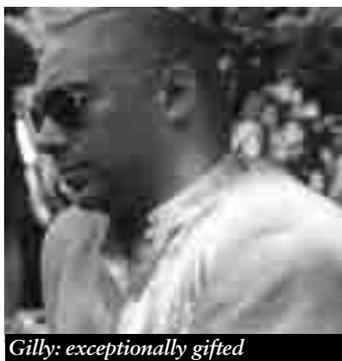
13: Serious Fraud Office launches investigation into allegations that UK-based firms paid bribes to Saddam Hussein's regime, including drugs giant GlaxoSmithKline.

Gilly Mundy

Campaigner and activist 'Gilly' Singh Mundy died suddenly on 17th March, aged just 36, after suffering a brain haemorrhage at his workplace. Hundreds of people attended his funeral in his home town of Leamington.

For the past nine years Gilly worked for the charity INQUEST, where he worked advising the families of people who had died in police custody. The organisation's co-director Deborah Coles spoke at his funeral. She said: "Gilly was an exceptionally talented case worker and contributed a lot to the fight against racism and injustice, supporting families all over the country. He very much took his inspiration from his father. I knew Gilly for nine years but only realised at his funeral what a close-knit community there was in Leamington and how much love there was for him and his family."

Gilly was a management committee member for the Newham Monitoring Project (NMP) and former caseworker for NMP between 1993 and 1997. During the inquiry in 1998 into Stephen Lawrence's murder, he also worked for the Lawrence Family Campaign, becoming very close to Stephen's father Neville. He then brought his campaigning zeal to



Gilly: exceptionally gifted

INQUEST. His unique way of patiently listening, guiding and providing strength to families, led them to describe Gilly as "a man of the people", combining his politics and belief in what was right and just with his compassion, humour and love for life.

His wife Debbie has asked for people who knew him to donate to the memorial fund that his family has set up for the causes that were so close to Gilly's heart. Cheques should be made to 'The Gilly Mundy Memorial Fund' and can be sent to the family via NMP at: The Harold Road Centre, 170 Harold Road, Upton Park, London E13 0SE. ■

Rail management should face criminal prosecution

The actions of a brave train driver, the robust build of the train and the restraining effect of trees meant the Cumbria rail crash at the end of February caused only one fatality and fewer seriously injured than could have been the case. That's little comfort to those injured, traumatised and bereaved; and there are now indications that it happened for the same reasons as previous train crashes: nuts and bolts on the points coming loose.

The solicitor for the bereaved of the Potters Bar crash in 2002, Louise Christian, said: "The management of Railtrack and Jarvis should face criminal prosecution for allowing safety to be put at risk. Now, because of the government's failure to honour its oft-repeated commitment to make the interests of victims paramount, there are more victims in Cumbria, and apparently for the same reason."

The Potters Bar families were treated disgracefully. They had to

go to court themselves without legal aid (twice refused) to prove who was responsible if they wanted to challenge compensation offers. After a delay of two years Network Rail and Jarvis formally accepted liability in court with considerable bad grace. Last year the families mounted an unsuccessful challenge in the courts to the government's refusal of a public inquiry. The first public examination of what went wrong in Potters Bar is now due to start this month in the form of an inquest before a High Court judge and a jury.

The aftermath of the Cumbria rail crash is uncomfortably familiar. After Potters Bar, Railtrack announced it was examining all the points on the network. Network Rail has now made the same announcement. There must be a full public inquiry and a commitment from the Government to implement its recommendations – even if it means spending substantial public money. ■

Turkish lawyer ends prison death-fast

Lawyer Behic Asci who began his death fast on Lawyers Day 5th April 2006 to protest about isolation in prison in Turkey (see *Socialist Lawyer* 45, December 2006), stopped on 22nd January, when a Circular was released by the Ministry of Justice accepting that groups of 10 prisoners can

come together for 10 hours a week without any condition.

There are still concerns about how long the government will uphold this circular, and whether they will increase the freedoms of the prisoners to 20 hours and more, to include use of enclosed spaces until the problem of no communal areas can be solved.

But for now, in honour of the 122 who have died and the hundreds more who are disabled for life through the death fasts, for the hundreds who are held on remand awaiting trial, and those who are convicted for standing for their beliefs, it is seen as a victory.

● Azam Zia

16: Coroner Andrew Walker agrees to US demand not to show in open court a video of British soldier Matty Hull being killed in a 'friendly-fire' incident by American troops. The cockpit recording shows US pilots in A10 tank-buster planes opening fire on the British convoy four years ago.

19: Another defeat for the Government in the House of Lords. This time over its plans to detain and treat people with mental health problems who have committed no offence. Peers' vote ensures that such treatment is permitted only if it is "likely" to help the patient.

23: Downing Street confirms it had asked the US to consider Britain as a possible launching pad for US missile interceptors as part of the Bush administration's 'son of Star Wars' anti-ballistic defence scheme. No comment on reports that Blair had raised it directly with Bush.

March

2: Home Office proposals mean that more than 3,000 child asylum seekers who arrive alone in Britain each year will be treated as adults if they refuse 'potentially harmful' dental x-ray checks to determine their age. This was criticised by the British Dental Association.

7: CCTV footage of police officers in Sheffield struggling with a 19-year-old woman is leaked to *The Guardian*. Toni Comer is held down by two police officers, hit six times, a foot appears to be put on her body, she is dragged away and the teenager's trousers fall round her ankles.

Legal aid: the fight is on

A week of action in late March saw a number of collective efforts across the country in an attempt to bring the crisis facing legal aid to the attention of Parliament and the public. On Monday 19th, hundreds of legal aid lawyers lobbied Parliament and joined a rally outside the House. Despite snow and sleet, representatives from all areas of legal aid joined together to call for the preservation of our legal aid system. The rally was addressed by prominent legal aid lawyers and human rights campaigners including Sir Geoffrey Bindman, Louise Christian and Shami Chakrabarti. Representatives from all major parties recognised the importance of publicly-funded work and pledged their commitment to legal aid.

The day highlighted a number of political and strategic issues. Reports from lobbying lawyers noted the lack of any detailed knowledge amongst MPs. Many MPs were shocked to learn what the proposals would mean for clients and how damaging these irreversible changes they will be if they are pushed through at break-neck speed. It's not so much that MPs do not care, but that they simply do not know. As changes in legal aid can be made without recourse to Parliament, the issue has simply not been brought to their attention.

So lobbying MPs may prove rewarding and effective: decreased access to an inade-

quately-funded profession will inevitably result in busier surgeries for MPs. Even if MPs are not swayed by the principle of access to justice itself, simple self-interest should make them sit up and pay attention.

MPs' support may well prove crucial in the long-run: the only way we can fight not only Carter, but any future ill-reasoned attack on legal aid, is to ensure that changes concerning legal aid are formally approved by Parliament. This would require an amendment to the Access to Justice Act 1999 itself.

Despite a significant turnout, the lobby received limited publicity in the mainstream press. The DCA wasted no time in branding the event as 'unprofessional', wrongly suggesting that clients had been left without representation while their lawyers were out on the streets. This comment has been met with outrage by the profession: not only is a significant pillar of the welfare state being eroded without our political representatives having an opportunity to vote on it, but it now seems that individuals of the profession exercising their democratic rights are being vilified.

Of course the DCA's comments are incorrect and unacceptable, but it only highlights that we must think carefully as to which tactics we employ: however inaccurate, lawyers have been branded as 'fat cats' for too long for the media or

public to show sympathy, even if it is our clients and not our pockets for which we are fighting. The complex reality of the situation cannot be encapsulated by an eye-catching headline, and as such remains relatively untouched by the press. We must fight this battle on our home ground and utilise our strengths: using the law to challenge the injustice these proposals will bring.

Despite the limited press coverage, the lobby was very encouraging, illustrating the strength of feeling in the profession. Firms, law centres, campaigning groups and not-for-profit organisations all attended, resulting in an inspiring and unprecedented unification of the profession.

The unified contract

The new unified contract has now been introduced for civil legal aid. The deadline for signing the contract was 30th March 2007. The unified contract permits the LSC to unilaterally vary the terms under which providers work. It is also the first stage in the introduction of fixed fees for civil legal help, which solicitors have unanimously condemned as a measure that will prevent them from delivering a service to the most needy clients.

Ninety-four percent of existing providers signed the new unified contract, but amidst an atmosphere of protest and reluctance. The Legal Aid Practitioners Group condemned the LSC's



Sally Middleton demands 'Justice' on the

"abuse of power" which saw the majority of legal aid solicitors sign the new unified contract with a heavy heart and criticised the LSC who as a "responsible public body" should not have asked their providers to sign a contract "that was so fundamentally flawed that a firm of commercial contract lawyers has said they would recommend that a client should not sign it." The remaining 6% of firms who did not sign simply stopped practicing legal aid. The unified contract has therefore had an immediate impact, with catastrophic results in some areas. We understand that since the unified contract was introduced, there is no legal aid housing provider in the Reading area.

Prior to the deadline for signing of the contract, the Law Society sent a letter before action to the LSC challenging the unilateral power to amend the contract. The deadline for the LSC to re-

March

9: British Airways drop their second appeal against pilot who won the right to work part-time to look after her young daughters. Jessica Stamer won an Employment Tribunal in 2005 for indirect sexual discrimination, and triumphed again when BA lost its appeal last year.

13: Home Office-commissioned report on the position of vulnerable women in the criminal justice system says that Ministers should set up a timetable within six months to close down women's prisons and replace them with a local network of small custodial units.

14: Ninety-five Labour MPs vote against plans to commence the £20 billion renewal of the Trident nuclear submarine system. Government forced to rely on Conservative support because of biggest rebellion on a domestic issue since 1997.

20: Lord Conrad Black's trial on racketeering charges opens in Chicago with the media mogul facing 17 charges of fraud, money laundering, tax evasion and obstruction of justice. "Burglars wear dark clothing and use crowbars", said the prosecutor, "these men wore suits and do it with memos and lies."

26: The Democratic Unionist Party's Ian Paisley and Sinn Féin's Gerry Adams sit side by side to announce they had reached agreement to share power from 8th May in a devolved Northern Ireland Government.

The importance of good manners

Since Young Legal Aid Lawyers began in 2005, we have attempted to respond to virtually every consultation on legal aid: We have been VERY BUSY and VERY DISAPPOINTED.

The Access to Justice Act allows the legal aid system to be changed without recourse to Parliament, despite the fact that access to justice is essential to the constitutional role of the law as a check and balance on the executive. Instead, these vitally important changes are being implemented following consultations.

2,372 responses were sent to the DCA and the LSC to inform the latest Government paper on the changes for legal aid, *The Way Ahead*. The paper notes that most respondents to the consultation expressed at least some opposition to fixed and graduated fees. Nevertheless the paper concludes that “the firm view of both the Government and LSC is that the principle of fixed and graduated fees is the right one.”

The 2,372 responses were analysed in *Legal Aid: A Sustainable Future – Analysis of Responses* published in November 2006 and referred to in a footnote in *The Way Ahead*. Careful consideration of the paper shows that there were well-reasoned and avid objections to fixed fees. Yet the only recompense we get is that the paper concludes that the LSC “welcome the interest, dedication and engagement that all stakeholders have shown throughout both the process of Lord Carter’s review and subsequent consultation and events.” The reality is best portrayed by the blanket statement in *The Way Ahead* that Government disagrees. It is simply not good enough.

The recent Green Peace Judicial Review has highlighted the problems with consultations that are not administered in a full, frank and meaningful way. The current process of consultation is insulting – many practitioners have painstakingly sought to engage with Government and the LSC throughout the process to virtually no end. We have devoted time and energy only to be ignored or accused as a profession

of succumbing to incentives to filibuster work for more money. The notion that legal aid should be a profitable business by virtue of the philosophy of swings and roundabouts is demeaning and offensive. As June Venters QC pointed out in a recent speech in defence of legal aid, she is “a legal aid solicitor – not the manager of a fair-ground”.

The Minister for legal aid has frequently sought to rebut the argument that the current consultation is inadequate by reference to her meetings with practitioners from all areas of legal aid work throughout the summer. Yet, it is the experience of many practitioners that these events have sometimes descended into a rather unruly and defensive battle with accusations of bad manners from both sides. Sadly, our recent Question Time event revealed little rapport between Government and legal aid practitioners.

After months of dedicated work from our membership, the event was almost entirely overshadowed when at the last minute it emerged that the Minister would only stay for the first half of the Question Time panel discussion – it was obviously crucial for her to be there to account for Government decisions. Yet, while the Minister did remain, she made it perfectly clear that the Government’s mind is made up and asked the audience to focus instead on the reality of the new arrangements.

While the event proved a heated and lively discussion on the question of the future for legal aid, it was the Minister’s early departure that captured the eye of the *Law Society Gazette* in the ‘obiter’ column under the title “An early exit”. Our host, Jon Snow, referred to “ministerial gremlins” that must have got into her diary. Yet our YLAL gremlins on the registration desk were surprised to see the Minister enjoying a glass of wine in the lobby as she waited for her car, while the Question Time continued without her.

On 1st April, the first tranche of Carter’s changes came into force alongside a growing sense of despair amongst the legal aid community. The insinuations that our

campaign and our criticisms have been motivated by greed are demoralising: we stand to lose a crucial pillar of the welfare state so that access to justice will be but a skeletal lip service operation. It is society that will lose – not lawyers. When we founded YLAL, part of the incentive was to provide a voice for the next generation, a vehicle through which to channel our representations and views. That promise was on the assumption that we would be listened to and that our views would be considered.

It is becoming increasingly hard to have any confidence that this Government is reciprocating our efforts on any level. The consultation process is beginning to feel like a sham and if the powers that be cannot engage on a meaningful or even polite level, the only resort is to up the ante: to demonstrate and fight back. Lawyers are trained in the art of reasoned argument to be adjudicated before a fair tribunal. Yet there appears to be no such opportunity in this debate and Government should not be surprised if the wilful refusal to listen and act results in direct action.

The first mass lobby of parliament was held on 19th March, where lawyers made a public show of our belief that access to justice is essential if we are to have any justice at all. Several MPs addressed the crowd, promising that if the issue ever came to the floor of the House we could rely on their vote. Sadly, the Government to date has shown so little respect for the views of the legislature that the changes have been implemented prior to the report of the Constitutional Committee on their impact. The Committee is due to report soon and it is hoped that the report will come up with some constructive recommendations and that this time the Government will have the good manners to listen.

We will continue to engage and respond to government proposals but, as Fred Astaire said, “the hardest job kids face today is learning good manners without seeing any.”

● **Laura Janes, Chair YLAL**
www.younglegalaidlawyers.org



demo outside Parliament on 19th March

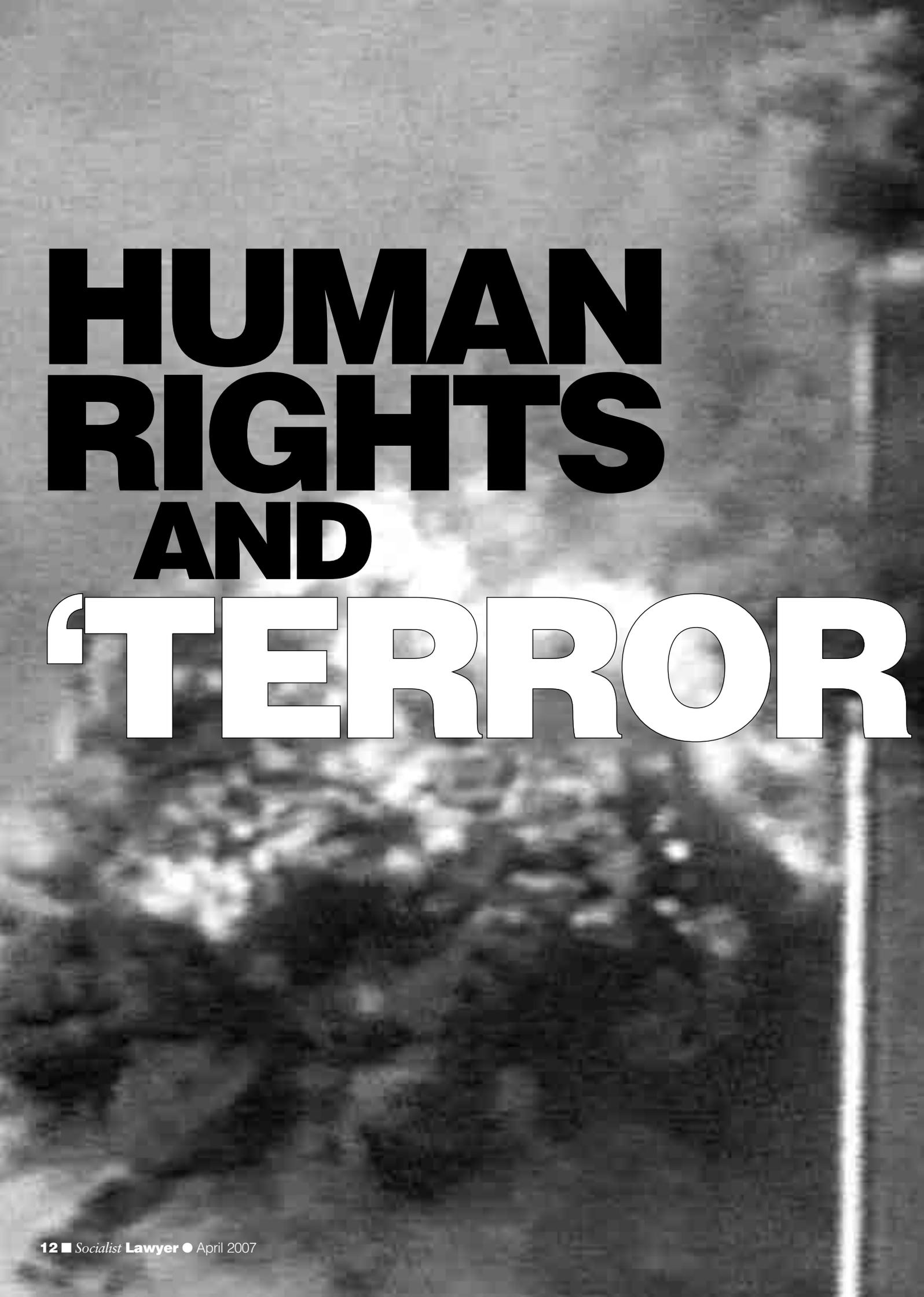
respond to the Law Society’s letter before claim was 5th April 2007. It is understood that the Law Society are now preparing to issue judicial review proceedings.

Legal Action?

However, even if successful, this will only challenge one aspect of the contract. Fortunately, the profession seems to be waking up to the fact that we have the expertise to fight the injustices of the changes to legal aid in the Courts. Several avenues of challenge are being considered. The way in which the changes to legal aid is being implemented gives rise serious legal questions, ranging from the validity of the consultation process, the effect of the changes on BME firms to the legality of the Access to Justice Act itself given its scope to allow such important changes to be made without recourse to Parliament.

● **Kat Craig**

28: New package of proposals from the Government on security, crime and justice include new ‘11-plus’ to assess the risk every child in Britain runs of turning to crime and DNA samples to be taken from any crime suspect who comes into contact with the police.



**HUMAN
RIGHTS
AND**

'TERROR



ISM' A RUGGED TERRAIN

by **Keir Starmer QC**

The Human Rights Act 1998 (HRA) came into force on the 2nd October 2000. It marked the beginning of a new era in the quest to develop and protect human rights in the UK. For centuries the idea had prevailed that UK political and legal institutions were perfectly suited to protecting human rights and required no fundamental change; while the UK had ratified all the major international and regional human rights instruments, none were really needed. The HRA challenged that old approach and represented a new beginning and a fundamental shift to a rights-based system of law. Part of a comprehensive programme of constitutional reform, the Home Secretary at the time described it as 'the first major Bill on human rights for more than 300 years'. Later he referred to it as 'a key component of our drive to modernise our society and refresh our democracy... to bring about a better balance between rights and responsibilities'. It was predicted that its impact on all areas of law and practice would be profound. ►

'History has dictated that there has been little opportunity for the fundamental principles underpinning the HRA to be tested in dispassionate cases'

Eleven months later, on the 11th September 2001, 19 terrorists hijacked four commercial planes. They flew two of them into the World Trade Centre, a third into the Pentagon and the fourth crashed when the passengers attempted to retake control. Shortly thereafter President Bush declared the 'War on Terror'. Prime Minister Blair lent all necessary support. And the rest is history. But that history has dictated that there has been little opportunity for the fundamental principles underpinning the HRA to be tested in dispassionate cases about the relationship between the common law and free speech, or other qualified rights under the European Convention on Human Rights (ECHR). Instead those fundamental principles have been tested in much more rugged terrain – the relationship between human rights and terrorism.

In the immediate aftermath of 9/11, the Government introduced what became Part 4 of the Anti-Terrorism, Crime and Security Act 2001. That Act provided for the indefinite detention of non-nationals who the Home Secretary 'suspected', but could not prove, were international terrorists. As is well-known it was condemned by the House of Lords in December 2004 in the 'Belmarsh detainees' case, *A & Others v Secretary of State for the Home Department*¹, as being incompatible with the European Convention on Human Rights. Given the battles that have now erupted over control orders and deportation, the successors to indefinite detention, it is worth reminding ourselves what the House of Lords thought was wrong with the 2001 Act.

There were three parts to its decision. First the Law Lords found that the 2001 Act did not rationally address the threat posed by Al-Qa'ida terrorists and their supporters because it did not address the threat presented by UK nationals. As the events of the 7th July 2005 in London underlined, that was timely advice for which the Government ought to have been grateful. Second the Law Lords were concerned that the 2001 Act, grounded as it was in immigration law rather than criminal law, permitted suspected terrorists to leave the UK on a voluntary basis and carry on their activities abroad. In one case the individual in question simply got the Eurostar to France. Third the Law Lords were concerned that the 2001 Act permitted the detention of individuals who sympathised with terrorist activity abroad but posed no threat to the UK. Against that background it can hardly be suggested that their Lordships were mischievously dismantling the Government's anti-terrorism strategy. They were simply pointing out that the Government's approach was discriminatory, irrational and, worst of all, ineffective.

What followed were control orders. These were introduced in the Prevention of Terrorism Act 2005. That Act allows either a Court or the Secretary of State to impose 'obligations' on individuals who the Secretary of State (again) 'suspects' but cannot prove have been involved in terrorist-related activity.

In the first case to go to court, *MB v Secretary of State for the Home Department*², the Government argued before Mr. Justice Sullivan that so long as the Court was satisfied that the Secretary of State reasonably suspected the individual in question of terrorist-related activity, it, the Court, should not test for itself whether his reasons were and continued to be well-founded. This was a deliberate attempt by the Government to have its legislation read in such a way as to prevent,



or at least limit, the courts testing the Secretary of State's evidence. Unsurprisingly, Mr Justice Sullivan ruled that it was unfair, and thus incompatible with the HRA, to impose a control order on an individual on the basis that the Secretary of State suspected him or her of terrorist-related activity and then to deny that person the opportunity of showing that the Secretary of State had, in fact, got it wrong.

Mr. Justice Sullivan bore the brunt of the backlash from the Government. He was accused by Ministers of misunderstanding the law and by the then ex-Minister, Charles Clarke, of failing to take responsibility for the battle against terrorism. As Lord Bingham pointed out in his lecture on the rule of law last year, the convention that Ministers, however critical of judges, do not publicly disparage them, "appears to have worn a little thin in recent times"³. What the Government has been less keen to acknowledge is that when the press coverage died down and the case went to the Court of Appeal, the Secretary of State did a complete U-turn and argued that the Court should test the Secretary of State's evidence, if necessary even by cross-examination of his witnesses, and decide for itself whether there is a reasonable suspicion that the individual in question is or has been engaged in terrorist-related activity: i.e. the very approach Mr Justice Sullivan had indicated fairness required. It seems that it was the Secretary of State who had misunderstood his own law and that it was the judges who were demanding a greater role in the battle against terrorism.

In the second control order case to go to court, *Secretary of State for the Home Department v JJ & Ors*⁴, the obligations

1. [2005] 2 AC 68.

2. [2006] EWHC 1000 (Admin).

3. The sixth Sir David Williams lecture, p.24.

4. [2006] EWHC 1623 (Admin).

A deliberate attempt was made by the Government to have its legislation read in such a way as to prevent, or at least limit, the courts testing the Secretary of State's evidence



Picture: Jess Hurd / reportdigital.co.uk

imposed by the Secretary of State were at issue. They required the individuals in question to move away from the area in which they had been living and to live in specially selected and security cleared accommodation. There they had to remain from 4.00 in the afternoon until 10.00 in the morning (18 hours) under curfew without stepping out as far as their yards, gardens or even communal corridors. They also had to wear electronic tags 24 hours a day and allow the police and/or monitoring company access to the premises at any time. There was also a rule that no visitors should be allowed onto the premises without Home Office approval (only to be given on production of the name, address and photo identity of the would-be visitor) and a rule that the individual subjected to the control order should not agree to meet anyone in the six hours that they were allowed off their premises, again unless they had Home Office approval to do so.

Whether those obligations were a good idea or a bad idea was not the issue before the court in the case of *Secretary of State for the Home Department v JJ & Ors*⁵. The issue was whether they amounted to a deprivation of liberty, as the individuals argued, or merely a restriction on movement, as the Secretary of State argued. That was a crucial distinction because when Parliament passed the Prevention of Terrorism Act 2005 it insisted that the Secretary of State should not have the power to make a control order that deprived an individual of his liberty. Only Courts could make such an order.

The inquiry by the Court therefore was simply to ascertain whether the Secretary of State had acted within the limits

'No government can deport an individual to another country if there is a real risk that he or she will be killed'

of the legislation that had been sponsored by his own Government. Both Mr Justice Sullivan and the Court of Appeal found that he had not. But that was not because of some obscure human rights provision that had somehow found its way into our law, but simply because, and somewhat fundamentally, the rule of law required the Secretary of State to obey his own legislation.

Since then the focus has moved to deportation. Under Article 2 (the right to life) and Article 3 (the prohibition on torture and ill-treatment) of the European Convention on Human Rights there is a rule that no government can deport an individual to another country if there is a real risk that he or she will be killed, tortured or subjected to inhuman treatment on his or her return. That rule was first articulated by the European Court of Human Rights in 1992 in a case called *Soering v UK*⁶. In that case the then Conservative Government wanted to extradite Mr. Soering to Virginia, where he would be at risk of the death penalty after many years on death row.

When quizzed by the European Court of Human Rights about its decision to deport Mr Soering to Virginia to face the death penalty, the UK Government's case was straightforward. It argued that whatever the authorities do in Virginia is none of our business. That notion had some currency in the 1930s when all eyes were on Germany, but it was famously rejected by the European Court on the basis that:

"It would hardly be compatible with the underlying values of the Convention, that common heritage of political traditions, ideals, freedom and the rule of law... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed."

For fourteen years that rule has been applied throughout Europe and hundreds of individuals have been spared death, torture and ill-treatment as a result.

That is, until the 26th February this year when the Special Immigration Appeals Commission gave judgment in the case of Abu Qatada. Abu Qatada is a Jordanian national. In 1993, after arriving in the UK, he sought asylum for himself, his wife and three children. In 1994 he was granted refugee status by the UK authorities. He was then interned under the now repealed Anti-terrorism, Crime and Security Act 2001. In March 2005 he was released from that internment, but a control order was immediately imposed on him. He was then rearrested in August 2005 and held under immigration powers pending deportation on national security grounds to Jordan.

From 2001 onwards, the Government had argued that Abu Qatada could not be returned to Jordan because he would be likely to face torture or other ill-treatment, not least because he faces trial before a military court on his return. But then, in 2005, the Government negotiated a Memorandum of Understanding (MoU) with Jordan, which purports to provide a framework for diplomatic assurances that his human rights would be respected if he were returned to Jordan. It is intended that the MoU will be monitored by a local NGO, the Adaleh Centre for Human Rights Studies, to ensure its "enforcement". It is said that, among other things, the Centre would be permitted access to Abu Qatada in detention.

5. [2006] EWCA Civ 1141, CA.

6. (1989) 11 EHRR 439.

'The Government's policy of reliance on diplomatic assurances against torture could well undermine well-established international obligations'

▶ However, the MoU is unenforceable under international law, under UK law and Jordanian law. Moreover, international independent monitoring bodies including the UN Special Rapporteur on Torture and the International Committee of the Red Cross, as well as detainees' lawyers, have all been denied prompt and private access to detainees held by the General Intelligence Department (GID), the security body with primary responsibility for detaining political and security suspects. Those limitations notwithstanding, the Special Immigration Appeals Commission ruled that it would be lawful, and no breach of Article 3 ECHR, for the Government now to deport Abu Qatada to Jordan. Unsurprisingly, that decision was subject to immediate appeal.

This flies in the face of the opinion of international human rights bodies and individuals worldwide. The UK Parliamentary Joint Committee on Human Rights published an assessment of the UK Government's compliance with the Convention against Torture in May 2006. After considering oral and written evidence from a wide range of witnesses, including Human Rights Watch, the Committee concluded: "... the Government's policy of reliance on diplomatic assurances against torture could well undermine well-established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country."

Louise Arbour, United Nations High Commissioner for Human Rights, has condemned what she calls the "dubious practice" of seeking diplomatic assurances: "diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement...". Manfred Nowak, UN Special Rapporteur on Torture, has also condemned the purported value of diplomatic assurances, and expressed a fear "that the plan of the United Kingdom to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture."

As Human Rights Watch have pointed out, the response of the then UK Home Secretary to the UN's most senior expert on torture was telling. Charles Clarke declared, in response to Nowak's criticisms, "The human rights of those people who were blown up on the tube in London on July 7 are, to be quite frank, more important than the human rights of the people who committed those acts... I wish the UN would look at human rights in the round rather than simply focusing all the time on the terrorist."

A different result was obtained in another important case between the Government and those that it suspects of terrorism: *A (torture) v Secretary of State*. The issue arose in connection with hearings of the Special Immigration Appeals Commission. In a ruling criticised by human rights NGOs around the world, the Court of Appeal ruled in August 2004 (by a 2-1 majority) that the Government was entitled to rely on evidence obtained under torture⁷. The Court of Appeal acknowledged that this could put the UK in conflict with international law. But the majority judgment considered that the Government was not precluded from relying on evidence "which had or might have been obtained through torture by agencies of other states." The only requirement was that the

7. [2004] EWCA Civ 1123, CA.



Government had "neither procured nor connived at" the torture.

In December 2005, the House of Lords unanimously overturned the Court of Appeal decision⁸. As Lord Bingham noted: "The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention". Lord Bingham said he was "dismayed" at the British Government's apparent readiness to override "this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken".

These cases have all been concerned with preventative measures taken against suspected terrorists where the Government claims prosecutions are impossible. This distinction between preventative measures and criminal prosecution is crucial and goes to the heart of the fundamental basics of due process. If an individual is charged and prosecuted for a criminal offence, s/he is entitled to a fair trial. Although modifications to ordinary procedures are permitted to safeguard other interests, "the overall fairness of a criminal trial cannot be compromised"⁹. Reliance on closed material has never been accepted in criminal proceedings.

By contrast, if an individual is subjected to preventative measures, basic requirements of due process are jettisoned. The individual loses the right to know the case against him.

8. [2005] UKHL 71, HL.

9. (*Brown v Stott* [2003] 1 AC 681, per Lord Bingham).

Charles Clarke: "The human rights of those people who were blown up on the tube in London on July 7 are... more important than the human rights of the people who committed those acts..."



Picture: Jess Hurd / reportdigital.co.uk

He cannot give meaningful instructions to the only advocate who sees the secret information relied on by the Court. Preventative measures can be imposed on the basis of suspected, rather than proven, facts. There is little or no chance of an 'acquittal' and there is no fixed sentence.

Take the case of *MB v Secretary of State* as an example. A control order was imposed on MB on the basis of a statement made on behalf of the Secretary of State stating that he had "taken into account all the information before him, including the specific terrorism-related activity that he suspects MB was or is involved in". The material delivered to the court included an open statement and a closed statement. The open statement explained the object of the obligations imposed on MB. They were to prevent him from travelling to Iraq to fight against the coalition forces. It described how in March 2005, MB had been stopped from boarding a flight to Syria and, the next day, that he had been stopped from boarding a flight to Yemen. The explanations that he had given for his proposed travel had not been convincing. His passport had been confiscated. As the Court of Appeal observed in its judgment in this case: "This, of itself, fell far short of demonstrating an intention to join the terrorists fighting in Iraq... It is plain that the justification for the obligations imposed on MB lay in the closed material."

But that is material that MB has never seen and will never see. The Court of Appeal held that this was not unfair because a special advocate had been appointed on behalf of MB. While it is no doubt advantageous to have a special advocate rather than no advocate, that advantage is minimal since an individual in MB's position cannot give instructions

'The Government's measures could simply not have been [opposed] if the HRA had never been passed'

to his special advocate after that special advocate has seen the secret material: i.e. at the very point that it becomes vital to give instructions. That part of the Court of Appeal's ruling is on appeal to the House of Lords and will be heard later this year or early next year.

What then of the fight against terrorism abroad? In *R(Al-Skeini) v Secretary of State for the Defence*¹⁰, our courts had to consider the application of the HRA to an individual who died while in the custody of the British army in Iraq. Following the Court of Appeal decision in *R(B) v Secretary of State for Foreign and Commonwealth Affairs*¹¹, which held that Article 1 ECHR and the HRA extended to a number of asylum seekers who had escaped from detention in Australia and presented themselves to the British Consulate in Melbourne, the Administrative Court and the Court of Appeal in *Al-Skeini* held that the presumption of territoriality that applies to all legislation was rebutted in circumstances where the European Court of Human Rights has indicated that Article 1 ECHR applied to extend the territorial application of the ECHR. Unless that approach is overturned in the House of Lords later this year, there is now some prospect of an effective investigation into the circumstances in which a fit and healthy young man came to die of multiple wounds in the few days that he spent in the custody of UK soldiers.

A much more alarming approach, this time with far-reaching implications for international law, the scope of the protection afforded by the HRA and the principle of Parliamentary sovereignty and democratic accountability, followed in a case called *R(Al-Jedda) v Secretary of State for Defence*¹². In that case the claimant is a man with dual nationality (British and Iraqi) who has been detained in Iraq by the British army since October 2004. No proceedings have been brought against him, nor are any contemplated. He is being interned in Iraq and the Secretary of State accepts that is in breach of Article 5 ECHR.

Following *Al-Skeini*, the Administrative Court and the Court of Appeal held that the ECHR and the HRA extended to cover the claimant's detention. However, both Courts then accepted that under Article 103 of the UN Charter, obligations arising under the UN Charter prevail over any obligations under any other international agreement. That meant that a Security Council resolution requiring internment prevailed over Article 5 ECHR. If that lead is followed, derogation can be circumvented and the careful analysis of the House of Lords of the requirements of Article 15 ECHR in *A & Ors v Secretary of State for the Home Department* avoided altogether.

What these cases all show is that the protection offered by the HRA in an era of international terrorism has varied. In most cases, the HRA has prevailed, particularly in the House of Lords. But – and it's an important but – all of us have to recognise (including those who still argue that the HRA is a waste of time) that many of the arguments that have succeeded in limiting the reach of the Government's anti-terrorism measures could simply not have been run if the HRA had never been passed. ■

● Keir Starmer QC is a barrister at Doughty Street chambers specialising in human rights law. He was counsel for Amnesty and other NGOs in *A & Others v Secretary of State for the Home Department* and is counsel for MB and JJ.

10. [2005] 2 WLR 1401.
11. [2005] 2 WLR 618.
12. [2006] EWCA 1809.

ABSORPTION OR EXODUS: THE FUTURE LEGACY OF BRITISH ANTI-TERROR LAWS

In the name of 'counter-terrorism' Muslims in Britain are being persecuted, demonised and humiliated. **Fahad Ansari** asks why...

“We will kill every f***ing one of you Muslims”. One could be forgiven for believing this to be an excerpt from a BNP Party Political Broadcast. It is not. In fact, it is the horrifying taunt hurled by armed police officers with guns drawn at 34-year old London Underground worker ‘Abdul Rahman’ as he knelt before them cringing in fear for his life. Moments earlier, ‘Abdul Rahman’ had been pushed to the ground by three armed officers who subjected him to physical and verbal abuse, having intercepted him on his journey home from work. It was about half past four on a bright summer afternoon in full view of onlookers.

After thirty minutes of questioning, ‘Abdul Rahman’ was finally released and allowed to continue his journey home... to Bangladesh. One month after the incident, ‘Abdul Rahman’ had immigrated with his family to settle in the land of his parents. Despite the fact that he, his wife and three children were all born in Britain and had lived here their whole lives, this experience was enough for them to return “home” because, as he told me, “at least we are treated with some respect there.” In spite of his Britishness and his good citizenship, ‘Abdul Rahman’ did not receive the respect he deserved in Britain. For he was a Muslim; he was a terror suspect.

‘Abdul Rahman’ was not the first British Muslim to leave Britain to settle in the Muslim world in recent years. Nor will he be the last. Since the events of 11th September 2001, there has been a systematic persecution of Muslim communities throughout the world, leading to a growing exodus of Muslims from the West. Britain is no exception.

According to the latest statistics published

by the Home Office, over 1,166 terrorism arrests have been made since 9-11. Of these, only 211 have been charged with a terrorism-related offence with less than 3.5% of those arrested being convicted (these convictions include individuals prosecuted for wearing badges bearing the logo of proscribed organisations such as the UVF). This means that over 1,100 innocent people have been falsely accused of belonging to the most despised and loathed category of individuals in society today. These are not just hollow statistics but each arrest represents a harrowing tale of pain, anger, and humiliation. Pre-dawn raids, broken down doors, barking dogs, verbal taunts, physical abuse, fathers dragged away before their traumatized children, wives left abandoned, a media circus and an irremovable stigma are just some of the more hidden aspects of these statistics.

Some Muslims are even punished despite never having been charged with a single offence, being subject to life-restricting control orders, designed to make life so unbearable that internment appears attractive. Curfews, house arrest, electronic tagging and severe restrictions on the use of telephones and computers, have made these terror suspects prisoners in their own homes. That their children’s friends must

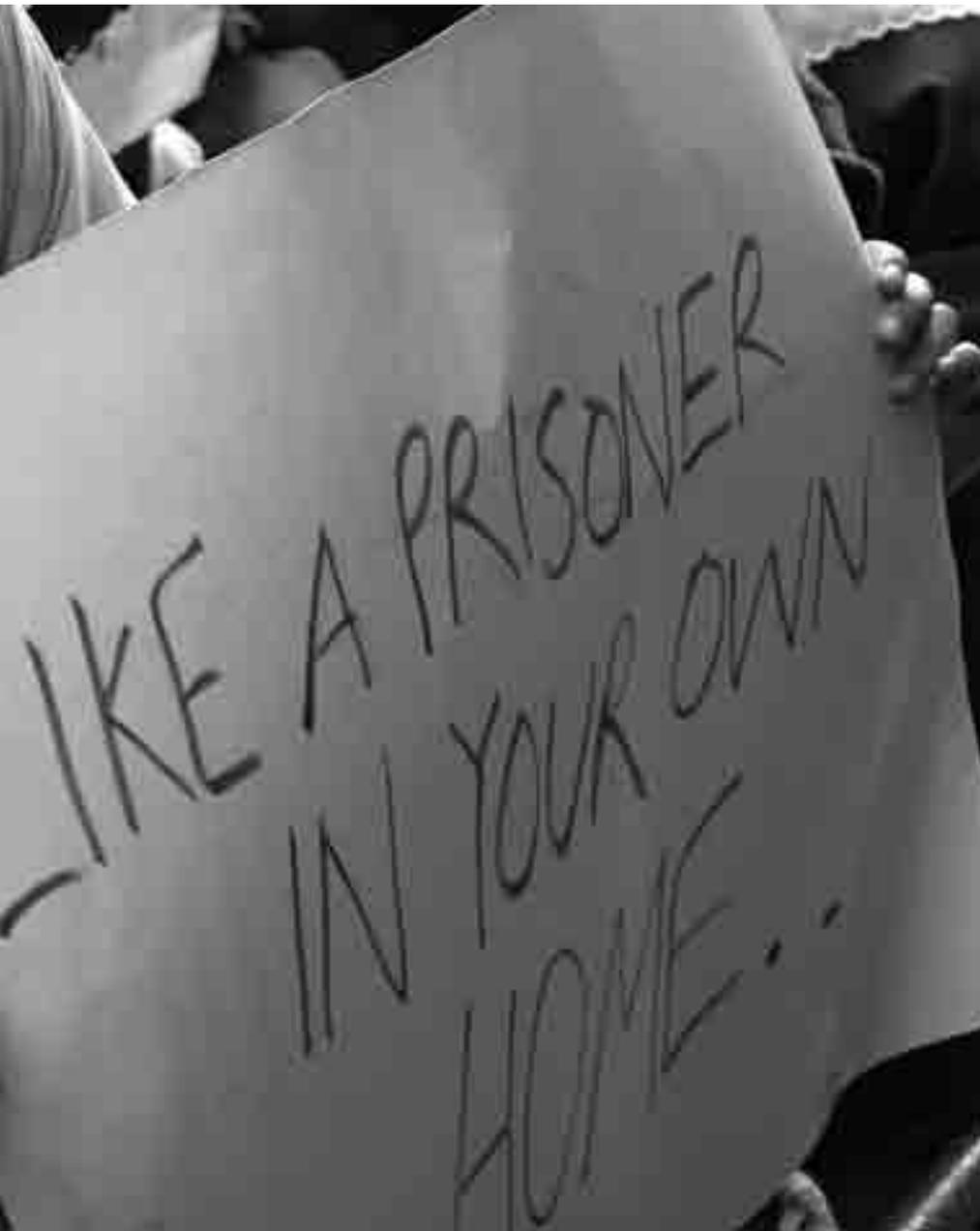
‘Muslims are arrested for actions such as tourist photography, the study of chemistry, frequent visits to the gym and paintballing’



apply to the Home Office to seek permission to visit them in their homes is indicative of the widespread and stigmatizing effects of these laws.

Further, the numerous arrests carried out against Muslims for innocuous actions such as tourist photography, the study of chemistry, frequent visits to the gym and paintballing, point at the inherent discrimination in the implementation of such laws. This has left Muslims confused and bewildered as to what recreational and educational activities they can engage in without falling under the scrutiny of the security services. Many Muslims no longer attend public demonstrations or engage in political lobbying for similar reasons. Others are even fearful of their choice of reading material on public transport in case it attracts the attention of passengers who may deem it “suspicious”. Essentially, British Muslims, despite not being physically incarcerated, have become prisoners of their fear.

Proponents of more draconian legislation and wider police powers often suggest that the grave nature of the threat we all face, including Muslims, necessitates such actions to be taken,



the idea being that erring on the side of caution is better than falling victim to another terrorist attack. There are many inherent flaws with such an argument.

Firstly, it contradicts the bedrock upon which our justice system is built. Fundamental principles such as the right to a fair trial and the presumption of innocence gave rise to Blackstone's ratio: "Better that ten guilty persons escape than that one innocent suffer." Unfortunately, we have now taken the road of authoritarian governments who prefer to err on the side of punishment lest any guilty man escape, irrespective of the impact upon the innocent masses.

Secondly, on a simple point of practicality and efficiency, it has been proven that this method of counter-terrorism has failed miserably. Heavy-handed fishing expeditions into a community of 1.6 million have only increased alienation, frustration and polarization. Casting the net so wide as to encompass all forms of political dissent has allowed those that may really threaten our safety to escape untouched. Rather than reduce the risk of terrorism, such

tactics have paradoxically made Britain a far more dangerous place to live in than before.

Finally, the implementation of these laws has effectively resulted in the terrorisation of a substantial sector of British society, the British Muslims. Whereas the majority of the population may believe these laws to be justifiable, this is only because it does not directly impact upon them. On the other hand, innocent Muslim victims of the anti-terror legislation are treated as terrorists irrespective of whether they have been convicted, charged or released.

Ultimately, they are ostracised and alienated from society. Their community, friendships and political associations become stigmatised as "suspected" terrorist networks. Their mere arrest undermines their reputations, livelihoods and freedom to travel. Moreover, police harassment and threats instil fear and terror among Muslims pressured into rooting out invisible extremists from their communities. Muslims across Britain, both practising and non-practising, feel that they are under constant surveillance. Many Muslims fear that rumours that they are involved in terrorism will be

passed around among international intelligence agencies, especially those in their countries of origin. This leads them to remain in constant fear for the safety of any family members who may still be at risk in such countries.

There is a feeling that every statement they utter will be manipulated and exploited to further raise the terror threat. People feel that they live in a state of siege, as populist prejudice is whipped up against them with the public being encouraged to fear foreigners, especially those from the Muslim world. In addition, there is an almost daily barrage of news items and articles in the mass media denigrating Muslims and Islamic beliefs and customs. Orchestrated attacks on the Qur'an, niqab, halal food, mosques, Muslim schools, Muslim parenting, Muslim lifestyles, Muslim police officers, and general Muslim practices have not only left British Muslims wondering about their future in the West but have also had a devastating impact upon relations with the wider society.

Just two years ago, a Home Affairs Select Committee report concluded that relations between British Muslims and the wider community had "deteriorated" since 9-11 and the resultant war on terror. In the same month, research presented at the annual conference of the British Psychological Society in Manchester revealed that children as young as thirteen were displaying signs of Islamophobia and were voicing their support for extreme far-right groups such as the British National Party. In the study of 1,500 students between the ages of 13 and 24, over 43% stated that their attitudes towards Muslims had got worse or much worse since the 9-11 attacks. A quarter said they had worsened still further following the invasion of Iraq. One can only speculate what effect the 7-7 bombings and the continuation of the war on terror has had on inter-community relations in the next generation.

This public demonisation and humiliation is leading a growing number of British Muslims to question what future they and their children have in the UK. With senior politicians from all political parties now singing the BNP tune, equating politically active Muslims with neo-Nazis, a growing feeling at the grassroots is emerging that Muslims are being offered a simple choice. Either stay silent and submissive and reform Islam to make it more palatable to Western norms (i.e. "integrate") or be hunted down and persecuted as extremists who "hate our way of life". History bears witness to the fact that such attempts to blame the victim for her persecution have had catastrophic results. In 1937, only a year after Mosley's blackshirts had clashed with Jews and other locals on Cable Street in east London and just months after Jews in Germany were banned from holding many professional occupations, Winston Churchill penned a paper 'How The Jews Can Combat Persecution', in which he expressed his belief that Jewish people were "partly responsible for the antagonism for which they suffer". The reason: their refusal "to be absorbed".

With almost identical comments being made openly about British Muslims today, many, such as Abdul Rahman, have chosen to flee this persecution and return "home". ■

● Fahad Ansari is a researcher at the Islamic Human Rights Commission

The United Nations, the European Union and the Court of Appeal all say: No procedural human rights guarantees for 'terrorist' suspects. **Bill Bowring** argues this is serious.

'TERRORIST': FLAG OF CONVENIENCE?

This article argues that the response of international organisations to the attacks on the United States now poses a shockingly serious threat to some fundamental human rights, especially procedural guarantees. These attacks were firstly the bombing on 7th August 1998 of the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, leaving 258 people dead and more than 5,000 injured; and secondly, the notorious "9/11" on 11th September 2001 in New York and Washington.

Both these events have been characterised as "terrorist attacks", and the use of the word "terrorist" is at the root of most of the current problems. In a lecture delivered in 2004, the South African Professor John Dugard, now the UN's Special Rapporteur on the Palestinian Occupied Territories, said the following²:

"The Security Council of the United Nations, guided by the major powers (or power?) has shown little interest in... a search for a definition that takes account of the causes of terrorism and condemns both non-State terrorist and State terrorists even handedly.

Terrorism for the Security Council is what obscenity was for the American judge who remarked that he knew obscenity when he saw it! The danger of this approach is that it gives each State a wide discretion to define terrorism for itself, as it sees fit. It encourages States to define terrorism widely, to settle political scores by treating their political opponents as terrorists. It is a licence for oppression."

The UN Security Council

The UN Security Council's response to both attacks was draconian. Acting under Chapter VII of the UN Charter, which gives it mandatory powers, the Security Council in UNSC Resolution 1267(1999) of 15 October 1999 ordered states to:

"freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban... as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available... except as may be authorised by the Committee on a case-by-case basis on the ground of humanitarian need."

Within days of "9/11" the UNSC adopted Resolution 1373 (Terrorism) of 28th September 2001 which continues to be the focus of action by governments around the world against Al-Qa'ida financing. Resolution 1373 makes the connection between terrorism and organised crime, drug trafficking, arms trafficking and the illegal movement of weapons of mass destruction. The Resolution orders member states to:



1. I wish to acknowledge great assistance from Ben Hayes of Statewatch and Julien Arzuaga of Behatokia, Basque Observatory of Human Rights. All errors are my own.

2. The Rhodes University Centenary Lecture at <http://www.ru.ac.za/centenary/lectures/johndugardlecture.doc>.

“Terrorism for the Security Council is what obscenity was for the American judge who remarked that he knew obscenity when he saw it!”



- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; ...

Did the Security Council act lawfully in adopting this Resolution? A number of international lawyers³ have warned that the Security Council, by laying down a series of general and abstract rules binding on all UN member states, purported to legislate unlawfully, *ultra vires* the UN Charter. Resolution 1373 differed from all previous Security Council decisions in Chapter VII, in that “the threat to the peace is identified not in any specific situation but rather a form of behaviour, ‘terrorist acts’. Indeed, it is a form of behaviour that the resolution leaves undefined.”⁴

Nevertheless, the Security Council has established a “Sanctions Committee” of all its members which has drawn up “terrorist lists” of organisations and individuals who are to be subjected to “asset freezing”.

The EU's response

The EU has in each case acted swiftly to put in place mandatory requirements to enforce the Security Council's measures. Thus, it has adopted “Common Positions” under Article 15 of the Treaty establishing the European Union. If the Common Position calls for Community action implementing some or all of the restrictive measures, the Commission will present a proposal for a Council Regulation to Council in accordance with Articles 60 and 301 of the Treaty establishing the European Community. It should be recalled that it is the member states acting in the Council that are ultimately responsible for deciding who is included in the EU “terrorist list”, acting under the EU's Common Foreign and Security Policy. This is of course the context of unjust and arbitrary decision-making.

It is no surprise that Al-Qa'ida is on the list, as is the PKK – although the PKK has recently had a small success in its legal fight for removal from the list. But a number of individuals also find themselves there.

Three questions arise. How did they get onto the list? What effects will it have on them? And how can they possibly get themselves removed? From the point of view of human rights and fundamental freedoms, the assessment by the international and national authorities of the need for an

3. Olivier, Clémentine (2004) “Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under

International Human Rights Law? (Revisiting Security Council Resolution 1373)” v.73 *Nordic Journal of International Law* pp.399-419, p.419; Happold, Matthew (2003) “Security

Council Resolution 1373 and the Constitution of the United Nations” 16 *Leiden Journal of International Law* pp.593-610.

4. Happold, *ibid*, p.598.

'More recent developments are more disturbing still'

interference with a property right must be subject to procedural guarantees: there must be an avenue of appeal from the decision of a national authority to interfere with that right.

Ben Hayes and Tony Bunyan of 'Statewatch' have created a splendid web resource, containing details on all the cases under consideration.⁵

The case of Professor Sison

One case is being taken on by a Haldane colleague, the Belgian advocate Jan Fermon. This is a case of inclusion in the list, and asset-freezing, with respect to an individual, Jose Maria Sison, Founding Chairman of the Communist Party of the Philippines and currently Chief Political Consultant of the National Democratic Front of the Philippines, who has since 1987 resided in the Netherlands where he is seeking asylum as a political refugee. He has been placed on "terrorist lists" by the United States, by the Netherlands Government, and finally by the European Union. On 6th February 2003 he applied to the Court of First Instance (CFI) of the ECJ for his removal. His application noted the following effects on him:

"Such a provision involves the loss of free disposition and a total dispossession of all the financial assets of the applicant. He can no longer make the least use of the entirety of his assets.

Excluding the applicant from all bank and financial services deprives him from the possibility to obtain effective compensation for the violation of his basic human rights by the Marcos-regime as granted to him by a US court, as well as from the possibility to benefit from an income from lectures and publishing books and articles and from possible regular employment as a teacher.

The freezing of Prof Sison's joint bank account with his wife and the termination of social benefits from the Dutch state agencies deprive him of basic necessities and violate his basic human right to life. The termination of said benefits should never be done for an undefined period of time under the pretext of anti-terrorism.

The practical consequences of the decision are extremely harsh and cannot be justified by the avowed objectives of the Regulation to combat the financing of terrorism."

On 26th April 2005, the CFI rejected his applications. And on 1st February 2007 the First Chamber of the ECJ dismissed his appeal.

The case of the Basque youth movement

Another case went – without success – to both the CFI, in June 2004, and the European Court of Human Rights, in May 2002. This was the case of *SEGI*, a Basque youth movement, which requested the CFI award damages for its allegedly illegitimate inclusion in the list annexed to Common Position 2001/931/CFSP, noted above, which implemented UNSC Resolution 1373 (2001).⁶ Christine Eckes has commented:

"The CFI... did not satisfy the fundamental principles upon which the Union is built and which the Courts have upheld in the past. This is deplorable. It not only infringes fundamental rights in the individual case, but it also harms the objective of promoting fundamental rights as such. Additionally, the doubtful factual basis on which the European blacklists are drawn up and the fact that the ECtHR did not show itself ready to grant protection of last resort, render the situation even more alarming."⁷



UN resolutions trump fundamental human rights

Recent developments are more disturbing still. The first two cases on "acts adopted in the fight against terrorism", *Ahmed Ali Yusuf and Al Barakaat International Foundation*, and *Yassin Abdullah Kadi*, both against *Council of the European Union and Commission of the European Communities*, have had a direct effect on UK courts. These were decided on 21st September 2005 by the CFI. The judgments established a "rule of paramountcy": according to international law, the obligations of Member States of the UN under the Charter of the UN prevail over any other obligation, including their obligations under the ECHR and under the EC Treaty. This is the result of the alleged operation of Article 103 of the UN Charter, which provides:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The CFI drew a clear distinction between *jus cogens* rights, for example the right not to be tortured or subjected to inhuman or degrading treatment, and other human rights, for example procedural rights, or other fundamental rights.

Lord Justice Brooke, in the Court of Appeal has summarised the effect of these decisions in a way which makes it quite clear how dangerous they are, especially when applied in domestic courts:

"... the court held (at paras 213-226) that the obligations of the members of the European Union to enforce sanctions required by a Chapter VII UN Security Council resolution prevailed over fundamental rights as protected by the Community legal order or by the principles of that legal order. The court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution other than to check, indirectly, whether it infringed *ius cogens*, 'understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible... [restricted to] aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination'."

This was in the Court of Appeal's decision of 29th March 2006, in *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence*⁸ – the case of a British and Iraqi citizen detained indefinitely by British forces, on the decision of a certain Major General Rollo, without charge or trial, in Southern Iraq. The Court of Appeal followed the CFI in holding that a UN Security Council Resolution, in this case UNSCR 1546 (2004) of 8th June 2004, purporting both to end the occupation and to permit internment, trumps all human rights except *jus cogens*. The Court concluded:

"There is inevitably a conflict between a power to intern for imperative reasons of security during the course of an emergency, and a right to due process by a court in more settled times. In my judgment, Article 103 does give UNSCR 1546 (2004) precedence, in so far as there is a conflict... It has not been suggested that either of the major-generals who were concerned with the review decisions (see para 10 above) could be faulted in their approach..."

This also overrides the whole of the jurisprudence of the European Court of Human Rights on procedural guarantees

5. Statewatch 'Terrorist' Lists: Monitoring proscription, designation and asset-freezing www.statewatch.org/terrorists/listslatest.html

6. See Eckes, Christine (2006) "How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of Segi" v.17 n.1 *Kings College Law Journal* pp.144-154

7. Eckes, *ibid*, p.154.

8. C1/2005/2251, [2006] EWCA Civ 327 – now on its way to the House of Lords

“The wider public remain blissfully unaware of these frightening developments”

where property rights are concerned. There is no doubt that “freezing orders” affect the property rights, and thus the civil rights, of the blacklisted organisations or individuals concerned. The Strasbourg cases show clearly that they must be able to challenge such orders in proper courts, in full and fair judicial proceedings in which the relevant matters can be argued in substance. Specifically, the courts must be regular courts, and the judges regular, independent and impartial judges; and the procedure must ensure “equality of arms” to the parties.

All of this has now been taken away.

The EU’s measures were challenged most recently in the cases of *Faraj Hassan v Council of the EU and the EC*⁹ and *Chafiq Ayadi v Council of the EU*¹⁰, heard by the Court of First Instance on 12th July 2006. Mr Ayadi is a Tunisian national resident in Dublin while Mr Hassan is a Libyan national held in Brixton Prison pending extradition to Italy. Both challenged their inclusion on the UN “terrorist list” (of supporters of Al-Qa’ida or the Taliban), which is incorporated into EU law under Council Regulations. Both cases were dismissed – taking the number of unsuccessful challenges to proscription at the CFI to eight – though an interesting spin was put on the rights of the individuals concerned to compel their governments to raise questions in the Security Council. This so-called “diplomatic remedy” is currently the only chance of de-listing on offer to affected individuals. Mr Ayadi had been in custody in the UK since 16th May 2002.

The wider public remain blissfully unaware of these frightening developments. There is no need to deny that very serious crimes, including the murder of thousands of civilians, have been planned and committed in recent years, and that their perpetrators should be brought to trial for the most serious offences known to criminal law – murder and conspiracy to murder.

However, the people and organisations placed on “terrorist lists” have never been suspected or accused of such crimes. Professor Christian Tomuschat, one of the leading scholars of human rights, has commented:

“In the long run, such a denial of legal remedies is untenable. To be sure, no one wishes to protect Al-Qaeda or the Taliban. But the freezing of assets is directed against persons alleged to have close ties to these two organisations. Everyone must be free to show that he/she has been unjustifiably placed under suspicion and that therefore the freezing of his/her assets has no valid foundation.”¹¹

The PMOI case

There has recently been a positive – though limited – development. On 12th December 2006 the CFI ruled in favour of an appeal by the People’s Mujahedeen of Iran (PMOI) against asset-freezing as a result of their inclusion in the EU “terrorist list”. The Court’s ruling represents the first successful legal challenge, but leaves undisturbed the EU legislation on “terrorist lists”. The ruling was limited to the decision to freeze the PMOI’s assets, rather than the broader issue of its designation as “terrorist”. The Court made a further distinction between organisations proscribed by the EU member states, and organisations proscribed the UN Security Council. Further challenges are on the way.

It is significant that PMOI was originally listed as a ter-



rorist organisation by the UK under the Terrorism Act 2000. Accordingly, the UK supported the European Council in opposing PMOI’s appeal. The CFI’s judgment contains an extraordinary rebuke to the Council and the UK.

“170 ... it is not possible simply to accept the United Kingdom’s position at face value. At the hearing, moreover, the applicant reiterated its position that it did not know which competent authority had adopted the national decision in respect of it, nor on the basis of what material and specific information that decision had been taken.

171 Furthermore, at the hearing, in response to the questions put by the Court, the Council and the United Kingdom were not even able to give a coherent answer to the question of what was the national decision on the basis of which the contested decision was adopted. According to the Council, it was only the Home Secretary’s decision, as confirmed by the POAC (see paragraph 169 above). According to the United Kingdom, the contested decision is based not only on that decision, but also on other national decisions, not otherwise specified, adopted by competent authorities in other Member States. (My emphasis, BB)”

As a result of this decision an organisation or individual placed on the “terrorist list” according to EU legislation (but not where listing is the result of a UN decision) may argue that it is entitled to a “statement of reasons”, although it is not clear that this applies to inclusion in the list, or simply liability to asset freezing. Moreover, there should be entitlement to a hearing before a court that is competent to review the lawfulness of the decision for inclusion in the “terrorist list”.

In its statement made on the day of the ruling, the Council gave the following rather vague assurance:

“The Council intends to provide a statement of reasons to each person and entity subject to the asset freeze, wherever that is feasible, and to establish a clearer and more transparent procedure for allowing listed persons and entities to request that their case be re-considered.”

It remains very unclear how exactly this promise will be put into effect.

And in any event the EU has – outrageously – kept the PMOI on the “terrorist list”.

In its latest decision, on 27th February 2007, the Grand Chamber of the ECJ dismissed, with costs, the appeal of the Basque human rights organisation “Gestoras Pro Amnistia” and SEGI against the dismissal by the CFO of its claim for damages suffered as a result of inclusion in the “terrorist list”. Once again the UK intervened, with Spain, on behalf of the Council – the only other EU state to do so.¹³

Conclusion

On 21st December 2006 the EU added two groups and nine individuals to its “terrorist list”, which now contains a total of 50 groups and 54 individuals. Despite the positive outcome of the PMOI case, and the decision, on 18th January 2007¹⁴, to allow the PKK to continue with its claim to be removed from the list, the operation of EU (and UK) anti-terror legislation represents a severe threat to fundamental human rights. Especially, the procedural guarantees without which the worst violations can go unchallenged. ■

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9. Case T-49/04

11. Tomuschat, Christian (2003) *Human Rights: Between Idealism and Realism* (Oxford: OUP), p.90

10. Case T-253/02

12. Case T-228/02, <http://www.statewatch.org/terrorlists/docs/CFI-PMOI-judgment.pdf>

13. Case C-354/04 P, <http://www.statewatch.org/news/2007/mar/ecj-feb.pdf>

14. Case C-229/05 P

Some 362km of the proposed 703km Separation Wall has now been completed. It is made up of eight-metre-high concrete walls, ditches, trenches, wire fences, patrol roads and barbed wire. The Wall does not follow the 1949 armistice line; only 20% follows this “Green Line”. The rest veers well into the West Bank with 525km of the total length of the projected barrier in the West Bank. These figures come from the United Nations Office for the Co-ordination of Humanitarian Affairs in the Occupied Palestinian Territories (OCHA–OPT). The figures continue: 10.1% of the West Bank and East Jerusalem land will lie between the Wall and the Green Line; a total of 60,500 Palestinians in 42 villages will reside in these areas, effectively cut off from their communities and commercial centres and unable to enter Israel; 12 villages with 31,400 Palestinians will be completely encircled by the wall; and 124,300 more people will be living on the east side of the wall but surrounded by the wall on three sides and controlled on the fourth by an associated physical structure.

I returned to the West Bank in November 2006, working there until the end of January this year. The last time I was there, 2004, I was observing and monitoring human rights violations as part of a programme called the Ecumenical Accompaniment Programme in Palestine and Israel (EAPPI). This time I was there with the Bar Human Rights Committee as part of a project providing training programmes in human rights and international law with the Palestinian Bar Association and the Palestinian Independent Commission for Citizens Rights. What I intend to write about here is not the theory of human rights but my

observations of the violations of those rights and the ways in which Israeli occupation consistently violates international human rights and international humanitarian law in the West Bank. Gaza, I would love to be able to write about but sadly the situation there is so grave that I was unable to visit and would only be able to write from a theoretical standpoint which you can read elsewhere.

I started by giving some figures concerning the wall and although these are shocking enough in that form it is, I think, only by visiting the communities affected or reading individual stories that the true impact can be understood. I wrote about Bil’in in the December 2006 issue of the *Socialist Lawyer* – I hadn’t been there but had read about the situation there and the ongoing protests. I have now been there, twice I went to the weekly Friday demonstration against the wall which is taking half of the land belonging to the villagers.

You can see the road and the settlement clearly from the village – the brand new road stretches around the hillside to link the settlements in the north of the West Bank to each other and up with Israel. It stretches through beautifully cultivated Bil’in farm land which had formerly been full of olive trees. So I could see for myself what I had read in the reports – that the purpose of the barrier cannot be security here – it is to annex the land for the building of a road and the extension of the settlement.

The number of demonstrators is small: no more than 30-40 and a mix of Palestinian villagers, Israeli and international activists and a contingent of press and photographers (although there were hundreds for the second anniversary). Things are looking rather bleak for the villagers of Bil’in. There is a large fence that separates the villagers from their land and

in front of the fence there is then a large roll of barbed wire to prevent anyone from reaching the fence. The Palestinians have no access to their land at all. During the protests the soldiers come out in force to ensure that nobody tries to get across the barbed wire and then over the fence. The first time I was there, the soldiers threw smoke flares and fired rubber bullets at the wholly peaceful protest – nobody had even attempted to get through the fence or done anything to provoke such a reaction. On 23rd February, some 400 demonstrators turned out to mark two years of non-violent struggle against the construction of the Wall. The protesters faced violent force from the Israeli military, who used tear gas and stun grenades, a water cannon and live ammunition against the Palestinian, Israeli and foreign peace activists. Several Israeli and Palestinian demonstrators were arrested.

In contrast to the Palestinians’ inability to access their own land, the soldiers freely cross the fence onto the Bil’in villagers’ land and into the village itself. Then the scene is reminiscent of the scenes from the first intifada with young boys throwing stones at the soldiers and the soldiers firing bullets back at the boys.

On 25th February 2007, the Orwellian named Supreme Planning Council for Settlements in the West Bank, legalised the continued construction of the settlement on the lands belonging to Bil’in which will consist of a further 42 units with 1500 apartments.

In another village, Umm Salamone (near Bethlehem), the process is just beginning. On 26 December the bulldozers had rolled in and uprooted around thirty almond trees in a couple of hours. The farmers had rushed to the field to try and stop them but really what could they do in the face of armed soldiers,

ISRAELI WALL DEMOLI

West Bank eye-witness **Hannah Rought-Brooks** goes back to Israel to see the effect of the Separation Wall on local communities



jeeps and bulldozers? When I visited a couple of weeks later, in early January, the devastation was plain to see – I could see the straight path through that the bulldozers had cleared across the land. Abu Ali, the owner of the land, seemed incomprehending of how this could be happening when everyone knew that his family had owned the land for generations.

Umm Salamone is some 10km away from the Green Line, but is close to a big block of illegal settlements called Gush Etzion which the proposed route of the wall will go around, and in the process take large swathes of land belonging to the villagers of Umm Salamone.

On 15th January the bulldozers and the soldiers were back and this time the land was declared a closed military zone. Over one hundred trees were uprooted with the villagers powerless to stop the soldiers: those who tried to put up some resistance were pushed aside. Then all the people from the village ran to the area closed by the army, lined up facing southwest with the local Imam in front of them and started praying. The soldiers faced with this unusual response were at a loss and let them be. The villagers and their committee has now decided that this will be a regular event – a non violent popular action of resistance against the building of the wall and the confiscation of their land.

I wasn't able to get to the bottom of what stage legal proceedings have reached for the villagers of Umm Salamone. However, I was told they had a lawyer although they hadn't had any success as yet. It is difficult to imagine how frustrating this work must be for the lawyers involved: you have international law on your side together with all the usual tools – land deeds and proof of ownership and yet in many cases this seems to count for nothing.

I need hardly remind you of the advisory opinion the International Court of Justice (ICJ) on 9 July 2004 that found that the Barrier constructed in the West Bank is illegal under international humanitarian and human rights law. The Court also found: Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. The Court also concluded that Israel has an obligation to make reparation for the damage caused and that Israel is under a responsibility to return the land, orchards, olive groves and other immovable property, seized for purposes of construction of the Barrier in the OPT.

Jayyous, in the north of the West Bank, is a Palestinian community traditionally dependent on agriculture for their livelihood. The barrier now separates the village of Jayyous from about 70% of their agricultural land. The 900 hectares of land trapped behind the barrier produce almost 90 percent of the agricultural income earned by the village. The only access available to residents is by one or other of two gates, controlled by armed guards and only opened at times determined by Israel. The only residents able to pass through the gates are those who can prove that they own a parcel of land and, in addition, have been given security clearance by Israel. Neither are easy to obtain and many young people do not have access to their families land.

According to Jayyous' mayor Fayeze Salim, the land that has been separated from the village contains 15,000 olive trees, nearly 50,000

citrus trees, and 120 greenhouses. Six of the seven wells that supply water to the agricultural land lie behind the barrier. The Mayor suggests that nearly all of the families (487 out of 550) in the village are directly affected by the construction of the barrier, with an associated loss of income.

The reports from human rights observers in the area have repeatedly stressed the difficulties for farmers, first in obtaining permits to access their land and then in gaining access on a daily basis due to the unpredictability of the gate opening times. They describe farmers having to wait to access their land early in the morning or in the midday sun, or the gates simply not being opened at all. In 2005 the local municipality has a list of 156 Jayyous residents who have been unable to obtain permission from the Israeli authorities to pass through the gates in the fence. Some ten or more families have no access to the land that they own between the fence and the Green Line, because no-one has a permit to pass the gates. This situation has deteriorated since the election of the Hamas Government and the refusal of Israeli officials to communicate with the Palestinian Authority.

I should mention some 'successes' by the legal community, although they are limited. On 14th December 2006, the High Court of Justice ruled in favour of a petition submitted by the Association for Civil Rights in Israel (ACRI), and two other petitions on the same issue, against the continued construction of the concrete wall in the southern Hebron Hills which is being built in addition to the separation barrier in that area, and which isolates over 80,000 dunams of land and 21 Palestinian communities from the rest of the West Bank.

SHES HUMAN RIGHTS



► The High Court of Justice ordered the State to dismantle the almost-completed concrete wall which stretches 41 km along Route 317 within the next six months. However, the ruling grants the IDF permission to construct an alternative barrier in the area which will allow pedestrians and flocks of animals to move around freely.

In the ruling, the Court states that the concrete wall severely and disproportionately impacts the lives of thousands of Palestinian residents who live south of the wall or whose lands are situated south of the wall. The wall restricts the movement of pedestrians, renders it impossible for people with disabilities, the elderly, and women with young children to enjoy freedom of movement, and prevents the passage of flocks of sheep and goat to lands in which they can graze. The ruling further states that, by restricting the movement of the local Palestinian residents, the wall denies them access to essential services and damages their livelihoods. The ruling emphasizes that the construction of the low wall violates the rights to ownership, freedom of movement, education, health, family life, and dignity. The wall effectively isolates a large area of land and cuts it off from the rest of the West Bank. In light of the disproportionate harm and violation of the rights of the local Palestinian residents caused by the concrete wall, the High Court of Justice ordered the State to dismantle it within the next six months.

More often, they are failures. ACRI were recorded as being “astounded and disappointed” by the December 2006 ruling issued by the High Court, which defined the imprisonment of thousands of people behind a

nine-metre concrete barrier in the Palestinian neighbourhood of A-Ram, as “proportionate”. The High Court of Justice rejected the petition that was submitted by ACRI in June 2004, against the section of the Separation Barrier that was constructed in the neighbourhood of A-Ram in northern Jerusalem. They challenged the construction of the Barrier around A-Ram, which surrounds the area on its western and southern sides, and cuts some 58,000 residents off from East Jerusalem and from a number of adjacent areas. Currently, the community residents, and all those wishing to enter Jerusalem from the area of Ramallah and A-Ram or vice versa are forced to wait for long periods of time at the Kalandia checkpoint, the only checkpoint in north Jerusalem, which results in a severe disruption of their daily lives. Those affected include: individuals with permanent Israeli residency status; people holding permits that enable them to visit the area; and even Israeli citizens. Many of the residents require daily access to and from the city in order to reach their places of work and their health and education services.

The construction of the Barrier around the neighbourhood of A-Ram, in effect, imposed an arbitrary border within a contiguous urban area; undermining all aspects of the residents' lives, most of whom have permanent Israeli residency status. A-Ram – a major economic centre in the West Bank – links the northern and southern sections of the West Bank, and connects both to Jerusalem.

Israeli Incursions

In case you were thinking that the occupation in the West Bank is confined to building projects I should also mention the Israeli army presence and the regular operations it conducts in the towns and cities in the West Bank.

I was in Ramallah when the Israelis conducted a “routine operation” (Israeli Prime Minister Olmert's words) to arrest a suspected Palestinian terrorist on 4th January 2007. It took place in broad daylight and in full view of the Al-Jazeera cameras who have their offices in one of the blocks in the centre of Ramallah – the al-Manara. As you would expect the centre of town was full of people, families and children going about their normal business; working, shopping, meeting friends. Without any warning around

20 jeeps, armoured personnel carriers and bulldozers rolled in and proceeded to smash up the market stalls and destroy the cars getting in their way (all shown live on Al-Jazeera). From where we were standing and sheltering inside a shop (maybe 50 metres from the al-Manara), we could hear the guns firing and the gun fight that developed, and see the smoke as some of the surrounding buildings were damaged and the debris started flying everywhere. People were running away and all the shops immediately put down their shutters to protect the people inside who had got caught up in it all.

This was my observation of what happened – Al Haq, a Ramallah-based human rights organisation, conducted a full investigation and gave this summary of the facts:

“At approximately 3:00 pm on 4 January 2007, an Israeli military undercover unit, consisting of at least four members, entered the al-Makateb building on al-Hisba Street, adjacent to the large open-air fruit and vegetable market in Ramallah city centre... In total, approximately 25 armoured jeeps arrived from three different directions, three military bulldozers were deployed, destroying cars and damaging buildings on the streets surrounding al-Manara square. Apache helicopters fired large-calibre bullets and tear gas from above. Some Palestinians returned fire at the ground troops from side-streets while youths threw stones at the Israeli soldiers and vehicles. The incursion and intensive shooting lasted almost two hours before the Israeli military withdrew, having killed four unarmed Palestinian civilians, one of whom was a child killed by a bullet to the head. The civilians killed were all shot on main roads in full daylight and were: Yousef ‘Abd-al-Qader’ Adour, 22; Khalil Mustafa al-Bayrouti, 31; ‘Ala’ Fawwaz Humran, 16; and Jamal Jamil Jwailes, 29. A further 28 Palestinians were wounded by live ammunition and two more were hit by rubber bullets. The Israeli army captured four Palestinians whom they claimed had been wanted, but who were subsequently released. The damage caused to civilian property is estimated by the Palestinian National Authority at US\$ 5 million.”

The paper concluded that “To describe the incursion as a ‘routine’ arrest operation, as Israeli officials did in the aftermath, is to recklessly overlook the obvious danger it created for the civilian population of Ramallah, which is protected under international humanitarian law. The operation was carried out in complete disregard of Israel's legal obligations regarding public order and safety, and resulted in numerous serious violations of international



humanitarian law by the Israeli occupying forces pertaining to the use of force against protected persons and property.” And further that “International humanitarian law exerts further constraint on the use of force through the principle of military necessity, which complements the doctrines of distinction and proportionality. The principle holds that military actions, even where distinction and proportionality are respected, must contribute towards a concrete and identifiable military objective pertaining to the overcoming of enemy forces. Otherwise, such actions are not legitimate. Firing randomly into crowds of hundreds of civilians and bulldozing civilian property, for a significant period of time after the arrest operation had failed and the undercover unit had already been rescued, was not of any strategic military value to the Israeli forces. Israel thus has no grounds to invoke military necessity in defence of the incursion in Ramallah.

The Israeli actions which stemmed from a failure to respect these and other core principles of international humanitarian law led to the commission of a number of war crimes; namely wilful killing, destruction of property and perfidy, for which the agents who orchestrated and participated in the incursion are criminally responsible under customary international law.”

I include this much information from the position paper as it provides an excellent analysis of the actions of the Israeli army in the context of international human rights and humanitarian law which is rarely available. What Al Haq were also able to do was identify the Israeli army officer responsible for the actions, one of whom who later admitted that it was “an error of judgement”. You can find the full Al Haq position paper on this event on their website: www.alhaq.org.

The people of Nablus are subject to this sort of “routine operation” on a regular, almost daily basis. There are however no TV cameras present and few human rights organisations to record the destruction, death and injury that inevitably ensue. As a consequence of the incursions, the city becomes a ghost town at night, with most of the shops shutting up as soon as it gets dark (around 4pm to 4.30pm in the winter) and the majority of people then not leaving their homes until the morning. I was staying in Nablus for a few days to conduct one of the Bar Human Rights Committee training programmes with a group of Nablus lawyers and was unfortunate enough to be present during one of these so called “routine operations”. I was woken in the very early hours of the morning by the sound of heavy artillery fire that sounded like it was coming from just outside my hotel window, and which then went on for the rest of the night. On going to have breakfast, I talked to the receptionist who told me that one Palestinian had been killed and one seriously injured. He told me that this was just normal – it happened all the time. This incident, unlike the Ramallah incursion, does not appear in any position papers and will simply go down as another death in the weekly OCHA figures. This is the reality of life under occupation and the terror that many Palestinians have to endure on a nightly basis.

‘Given the failure by the Israelis to investigate and prosecute war crimes committed by their officers and politicians, it is vital that the UK fulfills its obligations under the Geneva Convention’

Freedom of Movement

Checkpoints and closure is part of daily life in the Occupied Territories. They can be the permanent structures with turnstiles and airport style bag checks like the ones set up at Qalandiya and at Huwarra (which is the location of the main checkpoint between Nablus and the south of the West Bank), or temporary “flying” checkpoints staffed by soldiers that can appear over night on a busy road. Sometimes there are simply piles of rubble or mounds of earth that can prevent cars and buses from using roads. These mechanisms impact on the daily lives of Palestinians in almost every way. They prevent or delay them getting to work, to school or university, they prevent the free movement of goods and produce, and delay ambulances and medicine getting through to hospitals or patients. It is clear from the observations of human rights organisations that security alone cannot explain the checkpoints, given the random and unpredictable nature of them, and given that most are situated between Palestinian towns rather than between Palestinian and Israeli towns. You can see these observations in the reports by Machsomwatch, the Israeli women’s organisation who organise to observe and report on the checkpoints and the reports of international organisations such as EAPPI, CPT and OCHA mentioned previously.

One of the observers from the EAPPI programme I was part of, made this observation when she was at the Huwarra checkpoint: “On my first checkpoint watch after my return the soldiers are letting no males between 15 and 40 out of the city even if they have permits. There is a crowd of very angry students who have exams that day in Nablus. The soldier isn’t budging. Orders are orders. The students phone others to say only the girls need bother trying to cross. Some things are farcical. A university lecturer who is 39 pleads a special case as he is supervising the exams. The soldier wants to help him and phones his commander. But no. No one under 40. ‘Looks like I’ll have to come back next year’ he says as he passes us.”

This rule was still in place when we crossed through Huwarra into Nablus, although it had changed slightly to prohibit all males between 16 and 35 travelling through the checkpoint. At the training in Nablus, Saad Abdel Haq, the field officer from OCHA, told us that ACRI were hoping to bring a case on this issue.

Palestinians who use the checkpoint at Gilo, the Bethlehem checkpoint, while not facing the same restrictions as those at Huwarra encounter different problems. Opening at 5.30am, there are usually as many as 3,000 people waiting to travel through the checkpoint to their jobs, schools, universities or simply to visit family. The pictures alongside give you a flavour of the numbers of people and the powerlessness they must feel. I have many stories from these checkpoints, none of them favourable and some of them frightening, all only giving me a small insight into what life is like for Palestinian civilians on a daily basis.

Conclusion

What is positive amongst the desperation here is the determination and commitment of lawyers and campaigners in both Israel, Palestine and overseas. Organisations in Israel such as ACRI and the Public Committee against Torture in Israel, and individual lawyers like Michael Sfard, the lawyer for the Bil’in villagers and many other affected communities, are committed to holding their government to account. In Palestine there are human rights organisations like Al Haq, the Palestinian Centre for Human Rights, Adameer and the Palestinian Prisoners Society where dedicated lawyers work in sometimes impossible situations to document and represent the victims of human rights violations.

Given the failure by the Israelis to investigate and prosecute war crimes committed by their officers and politicians, it is vital that the UK fulfills its obligations under the Geneva Convention to “search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own Courts.” Daniel Machover and Kate Maynard at Hickman and Rose, are an example of where UK lawyers have been able to successfully co-operate with Palestinian lawyers in an attempt to prosecute Israeli commanders in international courts for war crimes using the principle of universal jurisdiction. It was reassuring to note that in answer to a question in the House of Commons as to whether the Foreign Secretary had “given assurances to the Israeli Government that members of the Israeli Defence Force will not be subject to arrest in the UK” the Government responded by saying “My right hon. Friend the Foreign Secretary has given no such assurances.” However Mr McNulty for the Government did confirm that they had been reviewing the “legal and practical issues raised by the issue of arrest warrants in international cases.”

It is our responsibility as socialists and socially responsible lawyers, to support these lawyers and activists in their work and to support the efforts of lawyers in this country to bring to justice those responsible for war crimes committed in Palestine and ensure that any such attempts by the Government to change the law are vigorously resisted. ■

● Hannah Roughts-Brooks is a barrister at Tooks Court Chambers and a member of the Haldane Society Executive. She has recently returned from the West Bank, working with the Bar Human Rights Committee

IT'S CONTROL AND ACCESS WE NEED

With a new law on domestic violence soon to come into force, **Holly Pelham** looks at the legal struggles still facing women today

Over thirty years ago when the Women's Liberation Movement was in its infancy, the focus of attention was on sex discrimination, equal pay and free contraception for all.

These issues were championed throughout the 1970s, 1980s and 1990s and by the turn of the century, there was a plethora of new legislation in force. But there the law has its limitations and it is disappointing that there is still no equality in reality. The reality in terms of equality and discrimination still has some way to go.

On the one hand some of the battles have been won, on the other new debates have emerged with new causes to fight. But one – the most widespread, most iniquitous of all continues, that of domestic violence. It doesn't matter which source you use, the statistics are equally appalling: one in four women experience domestic violence. Some say one in three. Worse still, 64% of those women who experience domestic violence don't even recognise it as a crime.

It hasn't of course helped that our legislators have avoided all sensible requests to define the term in law. It's not entirely clear why. Australia and New Zealand have perfectly straightforward, user-friendly definitions of domestic violence. It makes it a lot easier when, as in New Zealand's Domestic Violence Act 1995, it's there in black and white – domestic violence includes physical abuse, sexual abuse and psychological abuse including intimidation, harassment, damage to property and threats of the above. But such clarity still seems to make our courts uncomfortable.

Or perhaps it's actually about something else: a reluctance to legislate on what happens within the home in intimate relationships. After all, it wasn't until as recently as 1991, after years of vigorous campaigning by women's groups, that marital rape finally became a crime.

It's salutary to remember how far we've

come from the words of Sir Mathew Hale who ruled in 1736 that husbands could not be found guilty of raping their wives because:

By their mutual matrimonial consent and contract the wife has given up herself in this kind unto her husband, which she cannot retract.

And so, after more than 250 years, women were at last no longer classed as chattels and the anomaly in our criminal law was finally corrected.

That was the 1990s. How, in more recently times, has the law protected women from domestic violence? Poorly. Where there are laws to protect women – such as non-molestation orders – they are often cautiously and erratically enforced. Perpetrators do not take them seriously. They don't need to. They know, even for a repeat offence, that they are unlikely to be sent to prison. They may be looking at a fine, or possibly a suspended sentence. But it is rare to find a judge who will punish an offender more seriously than that.

Clearly, the value of a non-molestation order is entirely dependent on the effectiveness of the enforcement. Without effective enforcement, such protection is meaningless, leaving the abuser to breach with impunity.

Now, finally, the government has decided to criminalise breach of a non-molestation order when the Domestic Violence Crime and Victims Act 2004 comes into force on 1st July 2007. Under s.1 of the Act breach of a non-molestation order will be punishable by up to five years in prison.

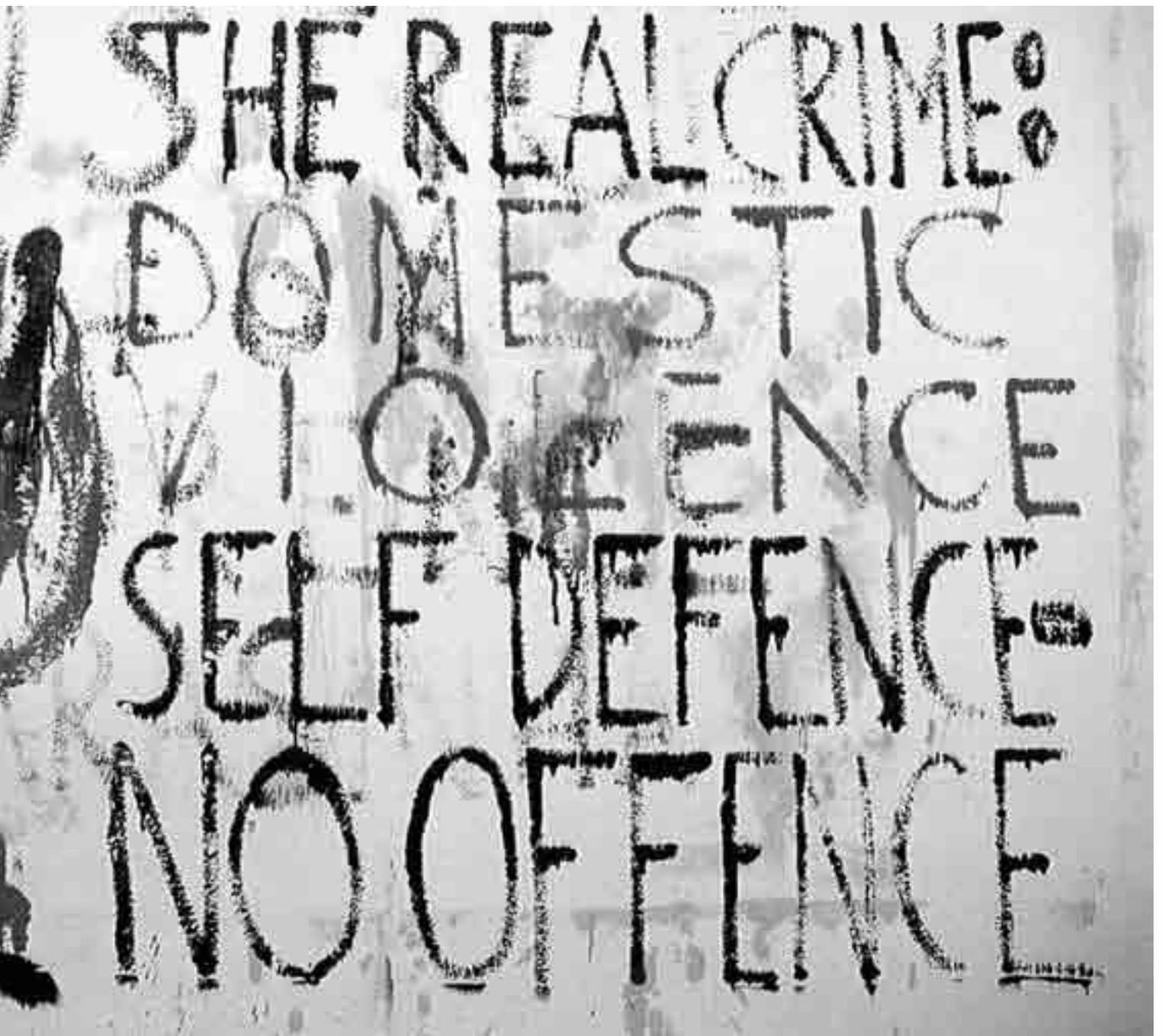
'With access to justice being reduced across the board, it is the most vulnerable groups who are hardest hit'



The fact that domestic violence is being taken seriously is to be commended. But what are the implications for women? And is this the best option?

We know from women who call our legal advice line that the vast majority are reluctant to criminalise their partners. They want protection, not arrest and prosecution. They are alert to the potential consequences of inflaming the situation and fear the very real risk that they may lose their partner, their home and their financial stability.

At Rights of Women we are particularly concerned by the loss of control that criminal proceedings will mean for women. To illustrate, at the moment if a non-molestation order is breached, the woman can choose whether she wishes to take enforcement proceedings against her abuser in a county court or not. It's up to her. At any point she can withdraw. She remains in control throughout. However, with the new changes, once a non-molestation order



has been breached and has been reported to the police, the matter is taken out of her hands. She cannot discontinue enforcement proceedings. Consequently she may be forced to give evidence against her abuser and against her will.

It is still early days, but we have concerns about the prospect of automatic criminalisation. We would have preferred stronger enforcement measures in the county court, with women retaining control over the decision to take enforcement proceedings and the court process that ensues.

Ultimately, though, laws mean nothing if women can't access them. With access to justice being reduced across the board, it is the most vulnerable groups who are hardest hit. In particular this means women, often the primary carers, who are dependent financially on their partners.

As legal aid diminishes, the demand for other sources of free legal advice has vastly increased. Last year Rights of Women received

approximately 75,000 attempted calls by women wanting free legal advice. This was a 25% increase in the number of calls we received the year before. Of these we advised 1,500 women. Demand vastly exceeds our capacity to supply.

The need for greater access is all the more urgent given that many callers have been through years of domestic abuse before reaching the stage where they are able to seek legal advice. Many of the women we advise tell us that they do not know where else to turn. They fall in the ever widening gap between the prohibitive cost of a solicitor and the legal aid threshold.

There is also another worrying trend. While we are unable to compile statistics for reasons of confidentiality, we know from our callers that a disproportionate number of abusers are in fact police officers. This is a source of obvious concern to us, because it means that for these women reporting the matter to the police

may not be an option. This immediately disqualifies them from legal aid. If they can't afford a solicitor (and the vast majority of our callers are in this category) then they will only be able to get a court order if they represent themselves through the daunting process of court proceedings.

There is clearly an urgent need not just to improve the substance of the law as it protects women but also to address the issue of access. At Rights of Women we believe that knowledge is power and that providing free legal advice to women is a vital form of empowerment. ■

● Holly Pelham is Legal Officer at Rights of Women which operates two free legal advice lines for women staffed by trained barristers and solicitors. If you are interested in becoming a member of Rights of Women or in being a volunteer on their advice line please contact Ranjit Kaur, Director on 020 251 6576

A much-needed case for the defence



ASBOs: a practitioner's guide to defending anti-social behaviour orders
Maya Sikand
£45, LAG

The most recent figures on anti-social behaviour orders (asbos) saw a rise in successful asbo applications from 99 percent to 99.9 percent. Put another way, that means just one in a thousand asbo applications are refused by the Court. In that context it seems like an act of self-flagellation to write a guide on defending asbos.

The only other guide in existence is published by Jordan's and is imaginatively titled 'asbos'. It is the antithesis of Sikand's book, and should have been called 'How easy it is for careerist lawyers to obtain asbos'. Jordan's guide cites the advantages of asbos which include that they can last indefinitely and that they can apply to anyone aged 10 and over. So a book for the defence was much needed.

The moral case against asbos is becoming increasingly clear. Asbo powers started out as intended for serious neighbourhood disputes but are now a catch-all for any scapegoat – youth, the elderly, beggars, prostitutes, addicts, demonstrators, travellers, people with mental health problems – who will be next? In 1998, to help see the passage of the Bill through the Commons, Alan Michael said it would be 'exceptional' to use asbos against young

people. In 2007 we find that nearly half of the 10,000 asbos have been imposed against young people. Nearly half of asbos are breached and five to 10 children every week are going into custody for breach of asbos.

These depressing statistics make it even more important for criminal defence lawyers to resist what they can in this draconian process. Sikand's work gives us the tools and the hope to do that. There has been some success for defence solicitors in the following areas: negotiating reduced conditions or alternatives to asbos prior to Court; resisting and defeating some conditions within asbos at Court; and on appeal, limiting excessive asbo applications and conditions.

For practitioners this guide plays the conventional role of assistance in working out the specifics of dealing with an asbo application. The legislation is cumbersome and there have been several acts within the Blair Administration which have made important changes to the law. The book separates out the two types of asbo application, the standalone and post-conviction asbo. It is set out in a very user-friendly way, a style developed so well by LAG.

This is much more than a conventional guide as it also gives a lot of creative thought to how to challenge the massive ambit of asbos which in theory can ban anything, anywhere, for the rest of time. Practitioners will find very useful the section on terms and duration of asbos, which not only emphasises the concept of 'proportionality' but also gives a thorough account of what has

been happening at the Court of Appeal, with particular regard to unacceptable banning conditions.

Seven years after asbos were introduced there are a growing number of independent reports highlighting the problems with asbos, which have been backed up by unexpected dissenting voices. More recently these included Rod Morgan the head of the Youth Justice Board who has since resigned out of protest against Government policy and Martin Narey who was head of the Prison Service and now works at Barnardo's. The Government continues to ignore any criticism and trumpet the asbo 'success'. It is clear that over the next few years lawyers will need to bring criticism from outside the court into the courtroom, to try and stem the tide of the irresponsible and frightening use of asbos. This book is essential armoury in that battle.

● **Matt Foot** (Co-ordinator, Asbo Concern, Criminal Defence Solicitor, Birnberg Peirce & Partners Solicitors)



Ramparts of Resistance – why workers lost their power and how to get it back
Sheila Cohen
£16.99. Pluto Press

For anyone interested in trying to make sense of the last forty years of labour relations, from the viewpoint of the trade union or workplace activist, *Ramparts of Resistance* by Sheila Cohen is an excellent place to begin. In meticulous detail, she has catalogued disputes and campaigns, with all the messy negotiating histories, rare moments of triumph, and sometimes tragic consequences. By writing across both time and across continents, and by providing details of a range of industrial disputes, she provides a valuable snapshot of a key

period of industrial history.

She writes with undeniable passion, and her narrative is both engaging, highly informative and, by turns uplifting and disheartening. The back story, as we all know, is that the workers did not and still do not, always win. Whilst the changes to laws, the occupations of industrial plants and the physical organisation of thousands of workers have had many clear positive results the author notes that for many other workers engaged in industrial disputes, the powerful change to their consciousness is of little use or importance to them, as they face the destruction of their industries and workplaces, and the consequent loss of livelihood and often community.

Whether she achieves her stated objective, of "reversing the focus of debate on rebuilding the labour movement" with her suggestion of "putting the workplace based rank and file organisation and resistance at the head of the strategic discussion", will depend on whether those who read the book accept the analysis of history which she offers (and the criticisms which she makes of that history) and agree with her that the way forward is to build a bridge between radical intellectuals and workplace activists in order to build a class conscious leadership within the working class.

For those already convinced that this is the way forward, the analysis will be useful ammunition in debates about history and the lessons to be learned from it. For the rest, this is a fascinating and meticulously researched history, from a refreshingly different perspective. For this reason alone it deserves a space on the bookshelves of both radical intellectuals and workplace activists, as well as those who are neither, but aspire to be both.

● **Catherine Rayner** (Barrister, Toombs Chambers)

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barrister, Matrix Chambers,
and Director of Centre for the
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**2007/Number 5
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Moazzam Begg, captured in
Pakistan and imprisoned by the
US government on Guantanamo
for over three years, author
Enemy Combatant, an account of
his experiences at Guantanamo
Sadat Sayeed, barrister,
Garden Court Chambers,
Visiting Fellow at the Center for
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