SHAME ON YOU

‘Counter-terror’ Bill assault on civil liberties

WHAT WILL IT MEAN FOR INQUESTS? by Helen Shaw
PLUS: PEACE AND MULTI-CULTURALISM by Kader Asmal
TURKEY, THE KURDS AND HUMAN RIGHTS
DO CHILDREN IN CARE HAVE RIGHTS? and much more…
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April 2008  
ISSN 09 54 3635

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**Printed by:** The Russell Press  
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Many thanks to all our other contributors and members who have helped with this issue.
It’s not getting any better...

As Socialist Lawyer goes to press, we continue to face the possibility of the Government introducing 42 days detention without charge. The Counter-Terrorism Bill, awaiting its second reading in the House of Commons, contains not only 42 days, but also other seriously concerning proposals.

One of those is the proposal whereby the Home Secretary could require coroners to hold inquests in secret without a jury in cases of ‘national security’. Helen Shaw from INQUEST describes the long-running struggle of the Jean Charles de Menezes campaign for justice: his family’s right to know how and why he was killed, and to hold police officers responsible. It was not the inquest system that gave the de Menezes family justice. Instead, and most unusually, it was the decision of the Health and Safety Executive to prosecute, and the common sense of the jury, that provided some limited justice for the family. Flawed though it is, the inquest system provides for some accountability and, in many cases, the common sense of the jury can see past obfuscation by lawyers. Professional coroners, who owe their livelihood to the Home Office, are far less likely to be sceptical of the police, or of the implicit threat whenever the words ‘national security’ are mentioned. And those coroners who are not so easily intimidated, such as the coroner presiding over the deaths of British service personnel in Iraq, can be removed, and a specialist, more reliable coroner parachuted in for reasons of ‘national security’ at any point during the inquest (clause 65 of the Bill).

Part of the worrying underlying philosophy to the Counter-Terrorism Bill is an attack on the separation of powers. Perhaps that sounds like an esoteric lawyerish point. But let’s just consider the last point about coroners again: during the course of the inquest (a judicial hearing), the Government can remove the coroner and replace him or her with another coroner of the Government’s own choosing. Doesn’t that strike at the heart of the independence of the judiciary? And if coroners, why not other Judges?

The same assault occurs in the context of the debate over 42 days. The Government thinks it has learnt lessons from the defeat of 90 days. Not only has it reduced the period, but it reassures MPs that, if they pass the provision in principle, 42 days won’t actually be implemented unless and until there is a specific need to.

Don’t forget to look at the back page, as always. We’ve had a fantastic series of human rights lectures so far. An audience of 120 people listened to Imran Khan and Faisal Osman put the case against anti-terrorism laws. In a discussion on restrictions on the right to protest, the point was made forcefully that freedom of expression includes the freedom to say anything, provided that it’s not criminally unlawful. In March, we’ll be discussing the very familiar topic of keeping the right to public funding. In April, two long-standing Haldane supporters and regular contributors to this magazine, Phil Shiner and Bill Bowring, will be discussing the use of the Human Rights Act and extra-territorial jurisdiction. We’re particularly looking forward to hearing Bill describe the attempts to prosecute Donald Rumsfeld. The world would be a safer place if he succeeded. And we’re delighted that Gareth Peirce and Keir Starmer QC will look, in May, at the extent to which the Human Rights Act, whilst it must be defended, has its limitations for socialist and radical lawyers.

● Liz Davies, chair of the Haldane Society
Haldane cheer

December 2007 saw the Haldane Society’s most successful Christmas party to date. Held jointly with the Young Legal Aid Lawyers, over 100 revellers packed out Garden Court Chambers to hear rallying calls from Liz Davies, Louise Christian and Laura Janes before enjoying plenty of liberal spirit.

2007 was a challenging year for left-wing lawyers, with the Carter reforms ripped through the funding of cases for the most vulnerable in our society and constant legislative changes making most feel that the Government has abandoned any social justice agenda. Despite this, on the evening socialist lawyers from a range of backgrounds and levels of experience were able to form ideas and solidarity for the difficult times ahead. It was great to welcome so many law students and trainees: the next generation of radical lawyers.

It is important that the social justice debate stays alive amongst like-minded lawyers and the Haldane Society will be continuing with a progressive events programme to encourage this. 2008’s schedule include our respected and varied lecture programme (see the back page of this issue) as well as social events, and of course another Christmas party.

Many thanks to the Young Legal Aid Lawyers and to our hosts, Garden Court Chambers.

‘Counter Terrorism’ Bill will

In January, the Government published the long awaited Counter Terrorism Bill. As expected, the draft reinforces the trend beginning with the Terrorism Act 2000, whose broad definition of terrorism criminalised normal political activities, potentially on the basis of suspicion. Three more laws in 2001, 2005 and 2006 multiplied additional offences, for example by the introduction of the offence of glorification of terrorism.

The draft includes the power to detain ‘terror suspects’ without charge for up to 42 days, an arbitrary downward revision from the 36 days proposed during consultation. Notwithstanding the fact that we have the longest pre-charge detention in the developed world, of over 1,200 people arrested under anti-terrorism laws since 2000, less than 5 per cent have been convicted of ‘terrorism’ offences. Hence, most of those arrested are innocents who face severe harm to personal reputation, job prospects and family life.

Deceptively, 90 per cent of the draft bill extends police powers which aggravate injustices and extend the net even wider. Given that individuals are now being sent to jail even for possessing DVDs and downloading web pages rather than for possessing Semtex, this is all the more dangerous.

Suspects will be exposed to ‘post-charge’ questioning and silence could count against them. Judges could give longer sentences for ‘ordinary’ offences if they have a ‘terrorism connection’. Convicted ‘terrorists’ could have their property including bank balances, vehicles and houses, forfeited without considering the rights of their families. They could face a ban on foreign travel once released from jail and also face a lifetime of reporting requirements to the local police station whenever they stay away from home. The offence of not disclosing to the police any suspect terrorist activity encountered in the course of employment is extended to volunteer workers. It would be an offence to seek out or communicate information about the armed forces which could be useful to terrorism.

Most sinister is the extension of secret court procedures such as those practised by SIAC in the new regime of asset freezing and the power to conduct inquests in secret in the interest of national security could cover up the next extra-judicial killing such as that of Jean Charles de Menezes. A climate of fear has been politically created to justify special ‘anti-terror’ powers which are inherently unjust – and unnecessary to protect the public from violent threats. The criminal law would be adequate for this purpose. The answer to preventing any possible terrorist activity is effective intelligence rather than criminalising communities.

January

7: A survey by the Association of Lawyers for Children, whose members act for parents and children in care cases, finds that one-third of individual solicitors and 40 per cent of law firms plan to reduce their reliance on legal aid work. Solicitors are also threatening to pull out of legal aid criminal defence work as the Legal Services Commission, which runs legal aid, introduces new fee schemes.

8: The Justice Secretary, Jack Straw announces a ban on prison officers going on strike. The Prison Officers Association called it a betrayal of a Labour pledge in opposition to scrap a Conservative anti-union ban imposed in 1994 by Michael Howard as Home Secretary.

15: The introduction of compulsory identity cards for foreign nationals in Britain will take at least three years to complete. The first required to apply from the end of 2008 will be students and those married to British citizens or involved in civil partnerships or long-term relationships. From April 2009 the categories will be extended to business people, children of settled parents, those on work permits and visitors.

21: Hundreds of solicitors continue to boycott new legal aid contracts which were due to be signed by now. It could leave defendants charged with the most serious crimes, including complex fraud, terrorism and murder without proper representation. Barristers say most of the 2,300 chosen for panels to represent defendants in very high cost cases (VHCC) say they will not sign the contract, mainly because the rates are significantly lower than their current pay.
criminalise communities

Am I acting suspiciously?
Call: 0800 SHOOT-TO-KILL

A packed lecture theatre at the College of Law at the end of January heard Imran Khan, solicitor and long-standing Haldane member, and barrister Faisal Osman, answer the question ‘do we need anti-terrorism legislation?’ with a resounding ‘No’. Imran Khan described conditions at Paddington Green police station, where suspects can be currently detained for up to 28 days, and made a compelling case against the Government’s proposals to increase detention to 42 days. Khan and Osman argued that the aim of the criminal law should be to criminalise and punish behaviour, not ideology. The ideology that leads to criminal acts is irrelevant. It is the act itself that constitutes the crime. There are well-established criminal offences – conspiracy to cause explosions, murder, grievous bodily harm, nuisance, kidnap, blackmail, administering noxious substances, endangering the safety of aircraft – already in place and all can confer long prison sentences, including life imprisonment. Shortly after the talk, the case of the Bradford students, represented by Khan, who had been convicted of terrorist offences based on the websites they were viewing, were acquitted by the Court of Appeal.

The anti-terrorism legislation, including the increased stop and search powers available to the police, are used disproportionately. Of 1,166 people arrested under section 44 of the Terrorism Act 2000 between 11th September 2001 and 31st December 2006, only 221 had subsequently been charged with terrorism offences and only 40 convicted. Obviously Muslims, particularly young Muslims, were the principal targets. Section 38B of the Terrorism Act 2000, which criminalises a failure to disclose information which a person knows or believes might be of material assistance in preventing the commission by another person of an act of terrorism, targets Muslims in particular and is unheard of in any other area of criminal law, no matter how serious the offence. It leads not to people coming forward to help the police but to the opposite: the Muslim community, irrespective of the fact that an offender may or may not be present, is angry over the fact that it is under a burden to watch its own people. No other community, no matter what the charge and how serious that charge might be, is compelled to keep a watch over itself.

Liz Davies

Leaks and rendition

Derek Pasquill, the Foreign Office civil servant charged with leaking information to The Observer and New Statesman relating to the US practice of rendition, had the charges against him dropped at the Old Bailey on 9th January. The defence said the leaked documents dealt with issues such as ‘hearts and minds of Muslims’, ‘engaging with Islamists’, conversations between the Home Secretary and the Foreign Secretary, and ‘detainees’. Pasquill was arrested two years ago and only charged last September. The significance of the decision to drop the charges was acknowledged by the BBC which prioritised the outcome of the case as the lead story on Newsnight the same evening. The charges were dropped as it became apparent from internal Foreign Office papers that, far from harming British interests, Pasquill’s leaking of the documents had actually helped to provoke a constructive debate. Just over a month later on 21st February 2008 the Foreign Secretary, David Miliband, apologised to MPs after it emerged that two American ‘rendition flights’ of CIA detainees had landed on British soil in Diego Garcia. ‘In both cases a US plane with a single detainee on board refuelled at the US facilities at Diego Garcia’ said Miliband. This contradicted previous statements made by Tony Blair and Jack Straw.

Liz Davies

23: A part-time judge, forced to retire after reaching age 65, has won an unprecedented age discrimination claim against the Lord Chancellor, Jack Straw. A ruling from the London South Employment Tribunal Office on the case of Paul Hampton throws doubt on the Ministry’s ability to force retirement of recorders who turn 65.

24: Home Office figures show the fall in the annual crime rate is accelerating with a drop of 9 per cent recorded by the police in the year to September 2007. The British Crime survey shows a 4 per cent fall in crime over the same period. Police figures show a 17 per cent drop in robbery, a 16 per cent fall in serious violence and a 9 per cent reduction in sexual offences. But there was a 4 per cent rise in gun crime recorded by the police and a 21 per cent rise in drug offences.

25: Home Office consultation reveals that the legislation to extend the maximum limit on the detention of terror suspects to 42 days risks undermining the flow of information from the Muslim community to the police.

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22: The Information Tribunal orders the release of an early draft of the Government’s discredited Iraq weapons dossier. It was written by John Williams, head of the Foreign Office news department. His role was not disclosed to the Hutton inquiry into the circumstances surrounding the death of David Kelly, the Government weapons expert who questioned the way the dossier was drawn up.

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Haldane visit to Turkey warmly welcomed

Three members of the Haldane Society’s Executive Committee travelled to Turkey for five days from 4th to 8th February, to investigate whether Turkey is implementing its commitments on prison reform. Turkey now has obligations both under the European Convention for the Prevention of Torture (CPT), and under the Copenhagen Criteria; the conditions for its joining the EU.

Bill Bowring, Haldane’s International Secretary, Hannah Rought-Brooks and John Hobson were part of a delegation of human rights lawyers. We were joined by Ville Punto a human rights lawyer and member of the Democratic Lawyers of Finland (he will now attend ELDH meetings), and Bent Edresen, a human rights lawyer from Norway.

We met recently released detainees from F-type prisons and heard about the effects of ‘isolation treatment’; we also heard at first hand about the severe problems facing lawyers and family members visiting Abdullah Ocalan in Imrali Island Closed Prison. Practising lawyers and politicians told us their concerns over: the powers of the Heavy Penal Courts which have taken over the role of the abolished State Security Courts; delays and length of detention prior to trial; the continued use of powers to prosecute and imprison for ‘denigrating Turkishness’; and the use of politically motivated investigations against lawyers.

In Istanbul and Ankara we met leading representatives of Turkey’s political parties, from the AKP (the Islamist party now in power), CHP (the former ruling party, staunch secularists) and the Kurdish DTP. We received valuable information from non-governmental organisations – the Human Rights Association (IHD), the Human Rights Foundation of Turkey (TIHV), the Foundation for Society and Legal Studies (TOHAV), Turkish Medical Association (TTB) – and from former prisoners represented by the Associations for Solidarity with Prisoners and their Families (TUHAD-FED).

We were warmly welcomed in Istanbul and Ankara by the fighting lawyers of the Haldane’s sister organisation: the Contemporary Lawyers’ Association (CHD, the Turkish member organisation of ELDH) and their members in the Asrin Law Office (Ocalan’s lawyers). In contrast, we also met the Turkish and Istanbul Bar Associations. Unfortunately we were refused access to any F-type prison or to Imrali Island Closed Prison.

As a result of these meetings, we were gravely concerned that Turkey is falling short of its obligations, and that the positive progress made through reform under the Copenhagen Criteria has stalled.

The delegation will publish a detailed report documenting its findings.

Hannah Rought-Brooks and Bill Bowring

General reluctance

We have regularly reported on the rigorous attempts by Daniel Machover and Kate Maynard at solicitors Hicksman and Rose, to achieve justice for Palestinians affected by Israeli human rights abuses committed in Gaza and the West Bank. Amongst others, they act for Abdul Matar, the former inhabitant of one of 59 homes in a Palestinian refugee camp that were bulldozed by the Israelis in 2002 in retaliation for attacks on Israeli soldiers.

Another client is Ra-Ed Mattar, whose wife, three children and three other members of his family were killed, including his sister, when the Israelis dropped a huge bomb in a crowded part of Gaza. Along with killing Sheikh Salah Shehadeh, the bomb killed 14 others including nine children.

When the general with command responsibility, Major-General Almog, arrived in the UK on an El-Al flight in September 2005, a call from the Israeli embassy in London warned him that the police were waiting for him. The General and his wife refused to leave the plane and the warrant, which had been obtained as a result of the evidence Hickman and Rose had collected together with the Palestinian Centre for Human Rights, was never executed. The outcome of a complaint to the Independent Police Complaints Commission concerning this incident, was made public in February.

It is clear from the disclosed papers that the Anti-Terrorist

January

28: Figures released show that prisoners who are held in police cells as a result of jail overcrowding are costing the taxpayer £459 a night. Penal reform campaigners said that the revised estimates show that Operation Safeguard, the programme to relieve the pressure on the Prison Service, demonstrate that the taxpayer is being forced to pick up the tab for the Government’s failure to reform sentencing properly.

28: The first report by Sir Paul Kennedy, an Appeal Court judge who monitors communications intercepts, opposes the use of phone-tap evidence being used in court. A privy council inquiry on the issue is expected to report in time for the second reading of the Government’s latest counter-terrorism bill.

29: Prison officers across the country strike for 12 hours, the first national walkout in its 68-year history. The Prison Service was granted an injunction to force the officers back to work but many defied it.

30: Anne Owers, the Chief Inspector of Prisons warns that the Government’s ‘scramble to build new prisons’ threatens to move the UK towards a system of ‘large-scale penal containment’ which could mean worse as well as more jails. Owers argues that emergency measures to meet the overcrowding crisis, including the use of police cells, prison ship plans and the conversion of former army camps will do nothing to enhance safety or reduce reoffending.
Centre for Human Rights said: ‘Failure to respect the rule of law and to pursue those responsible for attacking civilians will undermine the respect for international law which we do badly need if we are to have peace in our region. Until such time we will be faced with the law of the jungle.’

The truth of this statement is being tragically borne out by events in Gaza. Israeli assaults on Gaza have reached new levels. On 27th February an air strike hit a street in the vicinity of Salam mosque in Jabalia killing five civilians, amongst whom there were four children aged between seven and 14, and injuring seven people, three of them critically. Three missiles targeted a central area of Gaza City, where the Palestinian Ministry of Interior, an UNRWA school and an 11-storey residential building are located. In the attack a five-month old child was killed, 22 apartments were rendered inhabitable and a clinic was severely damaged. On 28th February Israeli air forces attacked a street in Jabalia killing two children, aged 12 and 13.

The fact that some Israeli generals are now not travelling to the UK for fear of arrest shows that they fear being brought to justice, but it is only if such fears spread to other countries that Israeli policy makers will be forced to address the military measures which are at the heart of the war crimes allegations. If all states adopt the necessary measures, including searching for and prosecuting those responsible for grave breaches of the Geneva Conventions, then those who commit these war crimes will not escape justice forever.

Hannah Rought-Brooks

February

1: The High Court ruling is upheld that the parole board is not sufficiently independent of Government, which means that the right to a fair hearing for prisoners seeking release is violated. In a second judgment judges agreed that Jack Straw had acted unlawfully and was guilty of ‘systemic failure’ in his treatment of prisoners serving determinate sentences for public protection (IPP).

31: The Advocate General of the European Court of Justice decides in favour of Sharon Coleman, a legal secretary, who said she was forced to resign from a law firm as it would not accommodate her responsibilities to care for a disabled child. If the opinion is confirmed it will extend the law protecting people against discrimination on grounds of disability to carers.

1: The Home Office is to start the forcible removal of lone child asylum seekers. Unaccompanied children under 18 will be sent back to ‘safe environments’. The Refugee Council will oppose the new plans.

4: The Government is criticised over plans to hold inquests without juries which could limit hearings into the deaths of British soldiers and people shot by police. The plans are being tragically borne out by events in Gaza. Israeli assaults on Gaza have reached new levels. On 27th February an air strike hit a street in the vicinity of Salam mosque in Jabalia killing five civilians, amongst whom there were four children aged between seven and 14, and injuring seven people, three of them critically. Three missiles targeted a central area of Gaza City, where the Palestinian Ministry of Interior, an UNRWA school and an 11-storey residential building are located. In the attack a five-month old child was killed, 22 apartments were rendered inhabitable and a clinic was severely damaged. On 28th February Israeli air forces attacked a street in Jabalia killing two children, aged 12 and 13.

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Hannah Rought-Brooks

BAE leaned on Blair to halt corruption investigation

On the 14th and 15th of February 2008, Lord Justice Moses and Mr Justice Sullivan heard argument over the Serious Fraud Office’s (SFO) decision to terminate its investigation into alleged corruption by BAE Systems in recent arms deals with Saudi Arabia. The SFO inquiry into the Al Yamamah deal was stopped in December 2006 by the Government, Attorney General Lord Goldsmith said that it was threatening the UK’s national security.

Documents released during the course of the hearing revealed that BAE Systems wrote to the Attorney General on a ‘strictly private and confidential basis’ urging him to halt the investigation, on commercial and diplomatic grounds. The Court also heard that the investigation was stopped after Tony Blair, then Prime Minister, intervened following sustained lobbying by the Saudis and BAE, who wanted to preserve a lucrative arms contract. In a long, ‘exceptional’ letter to his Attorney General Lord Goldsmith, Blair said he was concerned, among other things, about this contract to sell Typhoon warplanes.

Lawyers for the Campaign Against the Arms Trade (CAAT) and the Corner House argued in the High Court that the decision to drop the investigation was illegal. First, it contravened the OECD Anti-bribery Convention, Governments signed up to the OECD treaty are forbidden from stopping investigations for commercial reasons. And second that the decision was taken in breach of the rule of law in that the Director of the SFO allowed threats to influence his decision. An additional argument that Tony Blair’s advice, taking into account commercial matters, amounted to a direction to discontinue the investigation which is an unlawful interference with the independence of prosecutors under UK and international law applied to both limbs of their argument.

The High Court heard unchallenged allegations that it was Prince Bandar, the alleged beneficiary of one billion pounds in secret payments from the arms giant BAE, who threatened to cut off intelligence on terrorists if the investigation into him and his family was not stopped. Investigators said they were given to understand there would be ‘another 7/7’ and the loss of ‘British lives on British streets’ if they carried on delving into the payments.

Lawyers on behalf of the Government argued that these threats were so ‘grave’ and put Britain’s security at such ‘imminent’ threat that the head of the SFO had no option but to shut down his investigation immediately.

The judgment is expected shortly on what is another shameful episode illustrating the capitulation of the Government to political pressure from Saudi Arabia and from the arms trade.

For more information: www.caat.org.uk
Housing Minister speaks, everyone else hits the roof

Caroline Flint MP, formerly at the Ministry for Work and Pensions, brought the DWP’s punitive approach with her when, less than two weeks into her new job as the Housing Minister, she hit the headlines by calling for new council tenancies to be conditional upon tenants signing a ‘commitment contract’. The long-term unemployed would have to promise to try to find work or their homes would be at risk.

She was greeted by hoots of protest from Labour MPs (Labour MP Austin Mitchell said ‘she must have flipped’), the National Housing Federation, Crisis, tenants’ groups, Child Poverty Action Group, the TUC and even the Tory Party.

The chief executive of Shelter, Adam Sampson, said Flint’s ideas would send Britain back to the Victorian era. ‘What is being proposed would destroy families and communities and add to the thousands who are already homeless.’

Flint’s proposals betray the New Labour philosophy of rights being conditional on responsibilities. In Flint’s view of the world, tenants ought to act responsibly by getting work. If they don’t, they don’t deserve to be tenants. She ignores the fact that councils have a legal obligation to house some of the homeless, particularly those with children. New Labour have refused to invest in council housing and this is yet another attack.

Flint may not be foolhardy enough to try and implement her ideas in full, but she may try to bring them in through the back door by changing housing benefit rules or definitions of intentional homelessness.

Cuba signs UN treaties

Following Fidel Castro’s resignation as president, Cuba has signed up to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The UN treaties were ratified by the Cuban Foreign Minister, Perez Roque, on 28th February – some 40 years after their initial ratification by the UN General Assembly. The Cuban Foreign Minister emphasised that this had been a sovereign decision taken by the Government of Cuba with no external pressure being placed on the island state by other countries. Perez Roque also outlined that scrutiny of Cuba by the UN Human Rights Council will be permitted from early 2009 as he requested that the ongoing US imposed trade embargo be lifted ‘without any conditions whatsoever’.

February

5: The Court of Appeal rules the police unlawfully detained a 16-year-old persistent offender for three hours at a Leeds police station while the CPS made up its mind on what offence to charge him with. Thousands of suspects could claim damages for false imprisonment if they were kept waiting in a police station pending a CPS decision.

6: Gordon Brown approves the use of evidence gathered by phone-tapping and other intercept evidence in criminal court cases. This follows an independent Privy Council review which urged changes to the law to allow intercept evidence to be used. Another review will establish how such evidence could be used in practice and ensure safeguards are put in place. Britain is one of the few western countries which does not admit such evidence in court.

11: A legal precedent is established that deliberate bugging of conversations with lawyers constitutes such an affront to the rule of law that trials should be halted and any convictions obtained overturned. The ruling, in the Court of Appeal in 2005, may mean that dozens of terrorist trials could be aborted if allegations by a whistleblower that lawyers’ visits with clients were routinely bugged at Woodhill prison are substantiated.

12: Five young Muslim men have their terrorism convictions quashed after judges concluded that reading Islamist material was not illegal unless there was ‘direct’ proof it was to be used to inspire violent extremism. The prosecution at their trial
tion, the Spanish judicial system is severely criticised, in Germany, the Netherlands).

This is why, over recent years, bilateral extradition agreements have been established with most countries in the Americas, and why, even within the European Union, they have managed to change the former extradition procedure to the European handover procedure, or European arrest warrant. This warrant sets down severe limits on a defendant's right to a defence. Despite the fact that it has been possible to slow down the process of handing over Basques to the Spanish State from Belgium and France, the truth is that the European arrest warrant has brought a fundamental change to international arrests by placing the responsibility (the obligation, almost) to hand over the defendant on the country where the arrest takes place, due to a mistaken concept of cooperation or reciprocity between states.

In any case, if the defence counsel's right to use all the legal instruments in its power is upheld at these European arrest warrant trials, repression can become a boomerang against the Spanish State. Even if the initial decision was to hand over the detainees, the verdict is a good example of the juggling efforts foreign courts have to carry out in order to grant the warrant. A notable case is that of the Sheffield Three who lost a final appeal in the High Court of London on 17th December 2007 against an original extradition order from the City of Westminster Magistrates' court. The appeal was based on the premise that the European arrest warrants were defective, and that the three suspected terrorists risk being subjected to inhuman and degrading treatment, including torture, if they are allowed to fall into the hands of the Spanish Guardia Civil. Their lawyers also argued that the information against one of the three had been obtained illegally from Arkaiz Agote Cillero, who is alleged to belong to the same terror cell, who was detained in March last year and who alleges that he was tortured by the Guardia Civil following his arrest. In our view, the European arrest warrant is simply a scandal, and the lack of legal basis so obvious that the prosecutor in charge of defending the interests of the State had no other option but to resort to the argument that there should be a measure of trust towards the human rights situation in another EU country.

Every time a Basque is arrested outside our country, apart from the arrests that take place in the two occupying countries – France and Spain, this becomes a source of internationalisation of the conflict. The lack of democracy in the Spanish State, its ludicrous legal and judicial system, all come into the picture. Furthermore, the fundamental issue of the denial of our people's democratic right to discuss and decide is clearly seen, as well as the use of brute force to deny the Basque Country its freedom.

Joséba Agudo Manzisidor and Edurne Irondo Garitagoitia, Basque Observatory of Human Rights

Defending the right to protest

On 27th February the second of the Haldane Society Human Rights Lecture Series took place. Haldane Executive member Camille Warren reports.

The lecture focused on the use of injunctions to quell campaigns against private companies, signalling a close collusion between the police and the companies and a growing use of criminal sanctions for violations of civil law and a disregard from some of the judiciary for fundamental rights. Stephanie Harrison, a barrister at Garden Court Chambers who represented protestors from the Smash EDO campaign, spoke about the balance between restrictions on protest to prevent criminal activity and the need to protect the rights of freedom of expression and association. This was considered recently by the House of Lords in the case of R (on the application of LaPorte) v Chief Constable of Gloucestershire [2006] UKHL 55. It arose out of anti-war protestors who were stopped by the police and forced to return to London on route to the American airbase at RAF Fairford on 22nd March 2003. The leading judgement of Lord Bingham made an important point about the right to protest: “It is the duty of member states to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully”. Not only must government not unduly interfere with the right to protest but it also has a duty to ensure that such protests can take place. The decision to stop the protestors was unlawful as not only was there no imminent breach of the peace but the police action was unreasonable and disproportionate.

Private companies initiated the use of injunctions based on the Protection of Harassment Act 1997 (PHA) against animal rights. It is a critical aspect of these injunctions that they rely heavily on the citing of criminal activity by a few protestors to justify the injunction but the injunctions act mainly to exclude legitimate protest. Protestors who are undeterred by the criminal law are unlikely to be deterred by the civil law. In particular the vivisection company Huntington Life Sciences (HLS), which was the target of a sustained campaign by the animal rights movement, used over 30 injunction proceedings to stop lawful protest by establishing exclusion zones around their buildings, preventing the making of noise at protests and the naming of persons in publications or by email. The protestors had no legal aid and so no representation. It is shameful that no judge in these injunction cases saw fit to raise questions of the arbitrary nature of these injunctions, their fairness or the impact they made on legitimate protest. It was not until an injunction was sought by EDO MBM, a subsidiary in Brighton of a US-based arms continued>
A report warns more than one in a hundred adult Americans are in prison, a higher rate of incarceration than at any time in US history, and that this is pushing the budgets of several states to breaking point.

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An official report states police officers knew they were covertly bugging conversations between a terror suspect, Babar Ahmed, and his MP, Sadiq Khan but were not breaking any rules when they did. The recording was not covered by the Wilson doctrine, which forbids the security services bugging MPs. Only bugging requiring the approval of the Home Secretary is covered by the doctrine, while the recording in Khan's case only needed to be authorised by a senior police officer.

Phil McLeish, who acted as legal advisor to the Climate Camp, spoke of the wider police tactics used to stifle protest. Fifteen years ago at the M11 link road protests the police took a back seat. In contrast nowadays the police see it as their role to micro-manage every stage of a protest, even small demonstrations that may involve no more than leafleting workers and there are far more police. Protestors are forced to demonstrate in designated zones that remove them from reaching both the people they are protesting against and the manufacturer who make weapons for use in Iraq and Israel, against the Smash EDO campaign that legal aid was granted. The judge in EDO Technology Ltd v Campaign to Smash EDO [2006] EWHC 598 made strong criticism of this method of bringing proceedings and finally discharged the injunction.

The most infamous and significant moment in the development of injunction law came with the proposed injunction by the operators of Heathrow airport against the climate camp protestors in 2007. In its original application form the injunction would have been taken out on behalf of Heathrow's suppliers, employees and passengers (including all passengers on the London Underground!) and sought to cover all members of the organisations composing the 'Airport Watch' coalition, which would have covered over five million people including members of the National Trust and the RSPB. Thankfully the judge in Heathrow Airport v Garman [2007] EWHC 1957 (QB) refused to grant the injunction in that form and said the PHA could not form the basis of an injunction to prevent legitimate protest. The Heathrow case should be a watermark for future cases on what courts will say constitutes harassment and prevent the use of injunctions to stifle legitimate protest.

In the Smash EDO case three of the seventeen respondents decided to represent themselves despite legal aid being awarded, to be able to make the wider political case for their actions. Laura Marcham, one of the Respondents, spoke of her experience as a litigant-in-person in the case as being empowering. The campaign against EDO mainly uses campaigning methods such as a weekly noise protest and publicity but there has also been direct action tactics used. Evidence first emerged of close collusion between the police and company in the bringing of the injunction when the terms of the injunction mirrored the charges on which protestors were being arrested for. Particular protestors named on the interim injunction were singled out for arrest by the police to justify their inclusion in the injunction, although most of these cases failed to result in convictions with the evidence being so weak. At trial the judge was very critical of EDO disclosing documents to the police but not to the respondents. With the discharge of the injunction the police have now moved on to using a recently discovered by-law to arrest protestors involved in the weekly noise protest and using conspiracy charges to arrest organisers.

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February

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Paralegals in legal aid: a growing and unhealthy dependency?

The ‘Carter Model’ of highly efficient and profitable legal aid firms is based on a high ratio of unqualified fee earners to solicitors. In light of this growing dependency on paralegals as firms struggle to survive, the post-Carter world, combined with increasing anecdotal evidence from YLAL members about the unfair treatment of paralegals, YLAL surveyed its members in the autumn of 2007.

The results were shocking: the low levels of pay and the strong sense that many paralegals felt undervalued and exploited indicated a need for firm and urgent action. The survey revealed growing concerns about inadequate pay, uncertain career progression, lack of training and supervision, poor working conditions, and the implications of the pyramid model envisaged under the Carter review for profitable legal aid firms.

We found that the pay level for many paralegals was low compared to trainee solicitors, despite respondents undertaking similar or the same work. Forty-three per cent earned less than £17,000 and 13 per cent earned under £14,000 while 75 per cent of the former paralegals able to comment said that their salary was below the Law Society minimum for training contracts at the time. One respondent commented that: ‘In retrospect, the rate of pay was a bit abusive – I started on £7,500 a year and this went up to £9,500 after about 10 months’.

The survey also found that those who described their ethnicity as ‘Asian’ appeared to have noticeably lower pay than the sample as a whole. There was evidence that some paralegals were asked to work unpaid, in return for a chance of gaining a paid paralegal work or a training contract. If this continues, a career in legal aid will become the preserve of the wealthy. Both the profession and clients will suffer if diversity within the profession continues to be threatened.

Working conditions were regarded as worse for paralegals than for solicitors by 60 per cent of respondents. Lack of training was of particular concern to many of the respondents. Over 90 per cent carried a case load and seven per cent even conducted advocacy. However, just 10 per cent received detailed formal training. Fifty-eight per cent undertook paralegal work with a view to eventually qualifying as a lawyer. The LSC has consistently emphasised the central role of quality assurance in its raft of changes: a reliance on untrained and unsupported paralegals undermines this pledge. Yet at the same time, firms may feel they have little or no choice if they are to survive.

Our results indicate that, unless urgent action is taken, even more ‘would be’ young legal aid lawyers will seek employment in other fields. Under-trained paralegals working for overworked supervisors will not be able to supply the standard of legal services that clients deserve. The current level of exploitation is already limiting access to the legal profession, as students from under-privileged backgrounds struggle to service education related debts on paralegal salaries. In some cases, firms may be in breach of the Equal Pay Act 1970 or the Race Relations Act 1976.

Dedicated legal aid lawyers may be reluctant to blow the whistle on such firms because they are desperate to continue in the field. YLAL have drawn up a list of recommendations, including a proposed minimum salary for paralegals and referring the issue of exploitation of paralegals to the new Equality and Human Rights Commission. We hope the Law Society and the Legal Services Commission will take urgent action to ensure that the workforce upon whom the future of legal aid will depend is treated fairly. Paralegals would like to be consulted on issues that affect them and want firm intervention to protect them from exploitation and to ensure adequate training and fair treatment.

We hope the findings of our survey will assist the profession in ensuring that the raft of changes being rapidly imposed on our legal aid system do not result in the unrecognised and unchecked systematic exploitation of paralegals. As legal aid firms become more reliant on the use of paralegals to survive, it is important for the whole of the profession that their concerns are listened to. Our survey is available at: www.younglegalaidlawyers.org

Laura Janes

March

1. The case of an asylum seeker who was raped and tortured in Cameroon could have legal implications for others. Under current guidelines she should have been referred to the Medical Foundation for the Care of Victims of Torture to see if there was evidence to support her claims. Instead she was seen only by a nurse. Her application was rejected. However, following a judicial review she was released from detention and will now receive damages estimated at £16,000 for unlawful detention.

2. David Cameron proposes prisoners would pay a new form of reparation by handing over a proportion of any wages they earn in jail to victims of their crimes. Other proposals include increasing the prison capacity to 100,000 – 5,000 more than the Government has pledged.

3. A senior policeman responsible for raising standards in rape investigations states the police are contributing to the ‘appalling’ conviction rate in rape cases because officers too often fail to take alleged victims seriously enough and settle for mediocrity in their inquiries.

4. The use of restraint techniques involving deliberate physical pain in privately run child prisons should be abolished without delay states a report from MPs and peers. Parliament’s joint committee on human rights says that British law does not sanction the use of violence against children unless it is absolutely necessary.

5. The survey will assist the profession in ensuring that the raft of changes being rapidly imposed on our legal aid system do not result in the unrecognised and unchecked systematic exploitation of paralegals. As legal aid firms become more reliant on the use of paralegals to survive, it is important for the whole of the profession that their concerns are listened to.

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March
EUROPEAN CONVENTION ON HUMAN RIGHTS EXTRA TERRITORIAL ACTS IN IRAQ

by Kerim Yildiz, Executive Director of the Kurdish Human Rights Project (KHRP) and Josée Filion, Legal Researcher
In the latter half of 2007 and early 2008, more than 30 civilian-inhabited villages in Kurdistan, northern Iraq were destroyed by the Turkish cross-border military air raids, rendering over 600 families homeless and unable to return to their villages.

In the latter half of 2007 and early 2008, more than 30 civilian-inhabited villages in Kurdistan, northern Iraq (Kurdistan, Iraq) were destroyed by the Turkish cross-border military air raids, rendering over 600 families homeless and unable to return to their villages. The air strike, which reached 95 kilometres into Iraqi territory, destroyed and damaged schools, mosques, houses, tents, farmland and herds. A Turkish Human Rights Project (KHRP) fact-finding mission to the area revealed that the attack killed one woman, caused another to lose her leg and left several other civilians injured. The impact of military operations also extends to other, less immediately visible issues, such as the trauma caused to civilians, particularly children, and the destruction of traditional ways of life through the temporary or permanent displacement of village dwellers.

With the Turkish Parliament authorising the Turkish military to fight the Kurdistan Worker’s Party (PKK) in neighbouring Iraq, the Turkish Government has maintained that the attacks were within its right to self-defence, and that the attacks were restricted to isolated PKK bases. A statement by Recep Tayyip Erdogan, the Turkish Prime Minister, declaring the raids a ‘success’ and stating that his government is ‘determined to use all political and military means, both inside and outside Turkey against the PKK’, confirmed that the Turkish Government does not regard the deaths and injuries to civilians and damage to livelihood, farmland and property as contrary to its obligations under international law and human rights norms.

In Issa and Others v Turkey App 31821/96, the European Court of Human Rights (ECtHR or Court) considered the crucial question of extraterritorial jurisdiction: when does the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) apply to human rights abuses committed outside the territory of a State Party? This article deals with the nature and extent to which the ECHR is applicable to human rights violations perpetrated by armed forces of contracting states during military operations in the territory of a non-contracting state.

In April 1995, seven Kurdish shepherds were brutally killed by Turkish forces conducting a major cross-border operation against the PKK in Kurdistan, Iraq using artillery, F16 fighters and helicopters. After having been detained by the Turkish soldiers, their mutilated corpses demonstrated clear evidence of torture, with bullet wounds, and missing ears, tongues and genitals.

On the morning of 2nd April 1995, the shepherds and four of their relatives were taking their flocks to the hills near the Azadi village in Sarsang province, close to the Turkish border. They encountered Turkish soldiers who immediately abused and assaulted them, hitting them with their rifle butts, kicking them and slapping them on the face. The following day, the Turkish army withdrew from the area. Their bodies were found in an area close to where the seven shepherds had last been seen. According to the Turkish Government, their records did not show the presence of any Turkish soldiers in the hills surrounding the Azadi village, which is 10 kilometres south of the area where the Government alleged the operations took place.

The controversial issues of principle, law and fact in the Issa shepherds’ case, help to demonstrate why the interpretation and the practical application of the Convention’s extraterritorial reach outside the Council of Europe, is too important to ignore its implications.

The Issa and Others v Turkey hearing

Following the events, Kerim Yildiz travelled to the Azadi village to interview the widows of six of the shepherds and the mother of another, who asked the KHRP to assist them in their complaints to the ECtHR for the illegal detention, torture, execution of their relatives.

It was undisputed between the applicants and the Turkish Government that the Turkish armed forces carried out military operations in Kurdistan, Iraq over a six week period between 19th March and 16th April 1995. However, the fate of the applicants’ complaints depended on their ability to establish that, at the relevant time, the armed forces operated in the hills nearby the Azadi village where the killings took place. In other words, was the area effectively controlled by the Turkish armed forces, and consequently, within the ‘jurisdiction’ of Turkey for the purposes of article 1 of the ECHR? The Government claimed that ‘the perpetrators did not belong to the Turkish armed forces’ as ‘no Turkish soldiers had been present in the area indicated by the applicants’.

In response, the applicants argued that the victims were within the jurisdiction of the Turkish Government at the material time. This
The Turkish Government deployed in excess of 35,000 ground troops, backed by tanks, helicopters and F-16 fighter aircraft; given this degree of control, the Turkish Government had de facto authority over Kurdistan.

The law

The importance of the legal formulation and evidential standard for the applicability of the ‘extraterritorial jurisdiction’ cannot be underestimated if it is to afford this protection to civilians.

Under article 1 of the ECHR, states parties must answer for violations of the rights and freedoms committed against all persons within their jurisdiction. From the point of view of public international law, the jurisdictional competence of a state is primarily a territorial concept and refers to the state’s borders.

However, the ECHR jurisprudence limits this presumption by expanding the reach of states’ obligations under the Convention by way of interpretation. One such established basis for extraterritorial scope concerns states’ responsibility in respect of an area outside their national territories over which they exercise ‘effective overall control’. An important controversy lies in whether the victims of extraterritorial human rights violations located in non-contracting state territory can make use of the ECHR. The approach of the Court to applications brought against signatory states in respect of such extraterritorial actions is a developing jurisprudence.

In Loizidou v Turkey App 15318/89 the Court held that Turkey was responsible for the actions of its armed forces in Northern Cyprus. It noted that the concept of jurisdiction is not restricted to the national territory of the parties, but could also arise when a state exercises effective control of an area outside its national territory. While it did not define ‘effective overall control’, it considered several factors as the basis for its decision, including the number of personnel stationed throughout the territory, the presence of Turkish patrol and checkpoints on main lines of communication, and the existence of Turkish naval command and air forces.

Banković and Others v Belgium and 16 Other Nato States App 52207/99 concerned alleged breaches of the Convention by signatory states in respect of a Nato bombing campaign in former Yugoslavia, a non-party to the ECHR. The Grand Chamber held the case to be inadmissible since the states did not exercise effective control over former Yugoslavia. It went on to suggest that any extraterritorial liability of states under the Convention was limited to the territories of the Council of Europe. On this view the Grand Chamber stressed that the Convention operates in an ‘essentially regional context and notably in the legal space of the Contracting States’, which excluded former Yugoslavia. The decision was received with a high degree of criticism. If correct, this would limit the application of the ECHR to the European legal space and mean that a particular state action taken in the territory of a non-party State would take place in a ‘legal black hole’. This potential was exploited by the United Kingdom in relation to the application of the ECHR to its military activities in Iraq. In a case involving the torture and killing of Iraqis during the occupation, Al-Skeini v Secretary of State for Defence (Al-Skeini and Others) v Secretary of State for Defence [2007] UKHL 26, the House of Lords interpreted ‘effective control’ in light of the limiting principles in Banković.

The Court in Issa resolved any uncertainties surrounding the strictly regional character of the Convention by providing a more articulated interpretation of the issue of extraterritorial acts. The Court accepted that the Convention could have applied to Iraq – a territory clearly outside the European legal space – had Turkey been in effective control of Iraqi territory, which the Court found that it had not been in this instance.

This apparent conflict between the two cases can easily be reconciled. The Court’s use of the words ‘essentially’ and ‘notably’ in Banković qualifies the Court’s remarks that the Convention operates in a regional context and allows for the possibility of wider extraterritorial jurisdiction. The comments regarding ‘legal space’ were obiter dictum as they only came after the Court found the case inadmissible and held that the air strikes were not sufficient to satisfy the effective control criterion. Also, the Court considered the effective control test without mentioning former Yugoslavia’s status as a non-state party. The interpretation of ‘legal space’ by the Court in Issa recognises extraterritorial applicability by judging that territory under Turkey’s control would have fallen within the jurisdiction of Turkey, and not the jurisdiction of Iraq (a non-contracting state), had the operation of the Turkish armed forces in that area been established. This is a clear attempt by the Court to resolve any uncertainties surrounding ‘legal space’, by stating that it is not a bar to jurisdiction over extraterritorial acts. Rightfully,
The protection of individuals and the debate over extraterritorial acts in a non-contracting state's territory

The importance to victims of extraterritorial human rights violations of the practical application of ‘extraterritorial jurisdiction’ cannot be underestimated. Indeed, the ECHR was conscious of the vulnerability of these otherwise unprotected victims when it recognised that a state cannot insulate itself from the Convention’s scrutiny by operating beyond its borders.

As the case law stands in Issa, this protection is however undermined by the Court’s failure to provide sufficient guidance in two respects, namely the disproportionate and excessive standard of proof borne by applicants, and the limited scope of a fact-finding assessment and rulings.

While Issa extends the potential areas covered by the Convention in significant ways, the Court simultaneously set the highest evidentiary standard and in essence curtailed the expansion of the applicability of the Convention. In particular, the Court has made it difficult to successfully establish when a state exercises jurisdiction through its effective overall control while acting abroad. In order to prevail, an applicant must establish ‘beyond a reasonable doubt’ that a state exercised effective overall control over an area. Though this standard is not identical to its namesake in domestic jurisdictions, the Court defined the heightened standard of proof as one that ‘may follow from the coexistence of sufficiently strong, clear and corroborative inferences or of similar uncontroverted presumptions of fact’. This very high standard of proof poses difficulties for applicants – as it did for the applicants in Issa – who are often not able to marshal the amount of evidence necessary to meet the burden – particularly in covert operations where much of the available evidence is in the state’s control. Further, it comes close to imposing upon applicants the duty to prove beyond a reasonable doubt, the merits of their case as a condition precedent to establishing jurisdiction.

The Court claimed that the applicants in Issa failed to prove that Turkish troops conducted operations in the areas where the killings took place because they did not produce evidence to rebut the Government’s assertion that there was no record of troops being in the area at the time. The assertion remained unchallenged. The Court instead required detailed descriptions and independent testimony from the applicants, which went beyond what was considered in previous cases.

In this context, the test and burden imposed on applicants has the potential of rendering their protection illusory, unless defenceless civilians, who come under attack, have the presence of mind to collect forensic material, note the names of military commanders and their regiments and complete meticulous records concerning the lodging of their complaints.

Issa also raises questions concerning the nature of the Court’s fact-finding jurisdiction. Given the fundamental factual differences between the parties, particularly as to whether the perpetrators were members of the Turkish armed forces, the failure of the authorities to carry out any form of effective investigation into the allegations, and accordingly no findings of fact by any domestic courts, the Court should have acceded to the applicants’ request for a fact-finding hearing as the former Commission had done in Cyprus v Turkey App 23781/94. That the entire application turned on a factual assessment of whether Turkish troops were engaged in operations in Azadi village at the material time. KHRP believes that the Court should have conducted intensive factual examinations particularly into the Government’s untested claim that Azadi village was some 10km short of the operation zone.

The positive implications of the Issa judgment can however easily be imagined. Simply by perusing the recent newspaper articles and press statements made by Turkish officials with regard to their fight against ‘outlawed PKK terrorists’, one can develop a potential factual basis for Turkey’s effective overall control over areas in Iraq. If such facts are proven, as well as collecting evidence provided by the victims of the human rights violations, that would mean that the victims would have a remedy before the ECHR.

If Turkey wins the battle over the applicability of the ECHR to extraterritorial acts in the non-contracting state of Iraq, this lacuna in human rights protection will exacerbate the already predominant impunity of armed forces to the detriment of innocent civilians.

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that the territorial locus at issue does not fall within the overall territory of the Council of Europe, does not preclude the Convention from applying.

If this was not the case, there would be a severe limitation as far as the Convention is concerned, since some of the key sites of extraterritorial action by contracting states – most notably the United Kingdom’s military presence in Iraq and Afghanistan, and Turkey’s military operations within Iraqi borders against the PKK – would fall outside of the ‘legal space’ of the Convention. Under such an interpretation of extraterritorial jurisdiction, Iraqi citizens would have no remedy for interpretation of extraterritorial jurisdiction, against the PKK – would fall outside of the military operations within Iraqi borders presence in Iraq and Afghanistan, and Turkey’s most notably the United Kingdom’s military traterritorial action by contracting states – concerned, since some of the key sites of ex-severe limitation as far as the Convention is within the overall territory of the Council of that the territorial locus at issue does not fall other rules of international law that may be applicable to extraterritorial state activities, such as international humanitarian law applicable in the event of an armed conflict, or customary international law. However, the unique nature of the ECHR is the fact that it includes an implementation mechanism by means of which victims can hold a state accountable for violations that it commits – or can they?
I am going to address the question: why is the rule of law including crucially human rights law, so important in the world we face post 9/11? I make the point that in the UK on issues of fundamental constitutional importance it is the Human Rights Act (HRA) that makes all the difference.

The world changed significantly on 9/11. Pursuant to the so-called “war on terror” there have been extra-territorial adventures by coalition forces, including the UK and the US, in Afghanistan and Iraq and a new phenomenon whereby the Security Council now acts as a global legislator, and has done so in many instances. The UK and US have ignored international law when they had to – the invasion of Iraq itself – and manipulated it to their own ends through the Security Council if this was possible. At the heart of the US and UK project there is a desire to avoid accountability for what they want to do. Thus, Guantánamo Bay and extraordinary renditions are part of the same struggle to avoid accountability through jurisdiction as was the recent domestic dispute as to whether the European Convention on Human Rights and the Human Rights Act applied whilst the UK occupied South East Iraq. The US redefined torture so that in Guantánamo Bay and its secret camps around the world US agents can engage in interrogation techniques, which falling short of the pain from seriously bodily injury do not, they say, constitute torture. At the same time the UK Government both use many of the same techniques (certainly in Iraq) whilst denying that either the ECHR or the HRA applied anywhere in UK detention facilities in Iraq. Thus there must be an independent inquiry into the death of Baha Mousa which in practical terms involves looking at the whole of the UK’s detention policy. That is the first good news. Returning to attributability if the actions of UK soldiers as part of the multinational force in Iraq are attributable to the UN, then that type of independent inquiry following Al Skeini can never happen. But the second good news is that in December 2007 the House of Lords held in Al-Jedda that the actions of UK soldiers in Iraq were attributable to the UK. This has vitally important consequences for accountability not just in Iraq but also in Afghanistan where, at least, the UK and Canada are arguing that the actions of individual states in detention cases are attributable to the UN.

The third part of the jigsaw on accountability is the vexed question as to what standards apply when coalition forces occupy Iraq or go into Afghanistan or elsewhere. In Iraq the UK made two literally fatal errors. First, it decided that minimum humanitarian standards from Geneva Conventions III and IV applied, not the higher standards of human rights law including the ECHR and the UN Convention against Torture. Second, unbelievably, it decided that the Heath Government’s 1972 ban on the five techniques used in Northern Ireland at the time (hooding, stressing, sleep deprevation, food and water deprivation and noise) only applied to the UK and Northern Ireland. As a consequence all Battle Groups were hooding and stressing and the alarm bells that should have rung, which would have stopped this, did not. As a consequence of the UK’s detention policy applying only lower standards many Iraqis were killed and tortured in UK detention facilities. Thus, the question as to whether human rights law is displaced by the lex specialis of international humanitarian law is of critical importance. This third point will be decided shortly by a Divisional Court in Al-Sweady where the facts include the evidence released two weeks ago that suggests UK forces executed up to 20 Iraqis in custody in May 2004, tortured a further nine, and subjected some of the 20 to horrific mutilations before final dispatch.

So: Al Skeini (jurisdiction); Al-Jedda (attributability); and Al-Sweady (which body of laws apply). All UK human rights cases turning on the fulcrum of judicial review. All of huge constitutional importance. All challenging the might of the US and UK who wish to do what they will with impunity in this new international legal order. If UK forces have acted in the way alleged it is the HRA post October 2000 that is all that prevents them now escaping accountability. All of these cases and others on accountability – including the House of Lords case of Rose Gentle on the question of the legality of the war – are Public Interest Lawyers’ cases. They are a potent contemporary symbol both of the importance of our judicial review system that serves to enforce the rule of law and also the strength of our democracy. These four cases are publicly funded – albeit after huge struggles with the Legal Services Commission that continue to constitute a threat to the work – and there is no other democracy where a state funds lawyers like me to take on that same state in matters of such importance. I hope that our democracy continues to allow such legal challenges.

Phil Shiner, of Public Interest Lawyers, is a solicitor for victims of war and occupation in Iraq, including the families of Baha Mousa, Al Skeini and Gordon Gentle.

**IRAQ, JUSTICE AND LEGAL ETHICS**

Phil Shiner gave a speech to a Law Society Seminar at Cambridge in March, entitled ‘Justice and the rule of law’. Here is an extract.

“There must now be an independent inquiry into the death of Baha Mousa which... involves looking at the whole of the UK’s detention policy.”
There has been an increased recognition of the importance of the rights of children and young people. But is that true for children in care? It seems, Hannah Rought-Brooks argues, that few young people in care are able to challenge failures by their ‘corporate parent’ to promote their welfare.

WHO CARES ABOUT CHILDREN’S RIGHTS?
Children in care are a highly vulnerable group: marginalised, often forgotten and voiceless. Care proceedings in the family courts can hold up a microscope to local authority care plans and the difficult decisions about what is in a child’s best interests. The aim is to ensure proper scrutiny of any proposal to remove a child from their home, examine if there are better alternative placements, and what therapy might be required. The spotlight is firmly on the local authority. However, once that process is over, and the spotlight is switched off, what then happens to the children who find themselves within the care system – do they live happily ever after?

Children who have been placed in care have often been removed from violent, abusive or neglectful homes. Others have been taken from parents who are simply unable to look after them because of mental illness or other problems. They are often traumatised, troubled and vulnerable and need to be placed somewhere they can feel secure and where they will be supported and listened to. Yet sadly, this is often very far from the reality, which often involves frequent placement moves, being split up from siblings, placements miles from birth family members and inappropriate, abusive and neglectful placements.

Can the law help?
Over recent years there has been increased recognition of the importance of the rights of children and young people and the need for children to be listened to and given a voice in decision making processes. The Convention on the Rights of the Child, which the UK has signed up to, sets down this recognition in article 12 which provides for the right of the child to express their views freely and for those views to be given due weight. The Children Act 1989 provides very clear duties to local authorities for children in their care. Local authorities must not only provide accommodation but must safeguard and promote their welfare and make appropriate services available to the children.

But after a care order has been made the reality is that many children’s best interests and welfare are not promoted. However, very few young people are able to challenge failures by their ‘corporate parent’ to promote their welfare.

I recently represented a group of four siblings, through their aunt acting as their litigation friend. They had been removed from the care of their mother, a heroin addict and had been placed with foster carers, where over a number of years they had been subject to both physical and emotional abuse. This was subject to an investigation and a report which strongly criticised the local authority for, amongst other things, not moving the children sooner. They were placed with their aunt on an emergency basis but unfortunately she had very little space as she had two children of her own. The aunt wanted the local authority to do something about the lack of living space, as she was prepared to have all four children stay with her permanently and the children desperately wanted to stay with her. Over the course of 18 months nothing was done by the local authority to improve the situation and inevitably the placement broke down. The children have now been split up: the oldest in a leaving care flat, two in separate children’s homes, and another in a foster placement. It goes without saying that the cost of enlarging the aunt’s accommodation pales against the enormous costs of accommodating these four children separately.

A claim on behalf of the children was brought, first to try and get the local authority to resolve the accommodation situation and secondly for Human Rights Act damages for the children under article 8 for a breach of their right to family life. The local authority concerned has now made an offer for fairly considerable damages to the children and accept they may have been slow in resolving the accommodation issue and therefore contributed to the breakdown of the placement.

Is money the answer?
The money is certainly welcome for these children who have been badly let down by the care system and by their corporate parent but it is not what the children wanted. These children wanted to stay with their aunt and they wanted to stay together. The solution, for other children in similar situations, must surely lie in prevention – better accountability of local authorities’ implementation of care plans and greater and easier access to advice and assistance for children and young people to enable them to challenge the local authorities, whether because of bad decisions or simple inertia.

The role of the Independent Reviewing Officer (IRO) could be crucial. The appointment of an IRO is now a legal requirement under section 118 of the Adoption and Children Act 2002, with the government issuing the Review of Children’s Cases (Amendment) (England) Regulations 2004 along with statutory guidance in September 2004. The regulations were published to address the problem identified by the House of Lords in Re: S and Re: W [2002] 1 FLR 815, which ruled out a role for the court in monitoring a local authority’s actions after the making of a care order, but identified a potential lacuna where young children who had no adult to intervene on their behalf and, consequently, no means of initiating proceedings when care plans were not properly implemented.

The IRO’s role is to chair looked after children’s reviews, to monitor the performance of the local authority’s functions and
“It is perhaps not surprising that in a study on child well-being, the United Kingdom was ranked twenty first out of 21 developed countries.”

Caerphilly CBC [2005] EWHC 586 concerned a 16 year old boy who had served a custodial sentence in a young offenders institution and was entitled to the leaving care provisions, and should have been provided with accommodation under section 20 of the Children Act. In judicial review proceedings brought on behalf of J, the Judge held that not only was he entitled to the accommodation and to a pathway plan, but that the plan had to be very specific and should state the child’s needs and what was to be done about them, by whom and when, and that it was important that the personal adviser was acting in the role of adviser to the child and not in some conflicting role. In R (S) v Sutton LBC [2007] EWCA 790, a teenage girl who was released from a period of detention was provided with accommodation under the local authority’s obligations under part 7 of the Housing Act 1996. The Court of Appeal upheld her claim that the local authority owed her a duty under section 20 of the Children Act and had illegally sought to ‘side step’ its duties by having her declare herself homeless.

The House of Lords in R(M) v Hammersmith & Fulham [2008] UKHL 14 considered the questions of when and why a housing authority should refer cases concerning children and young people to social services for assessment. Lady Hale emphasised that once a section 20 duty has been established, local authorities cannot side-step their additional obligations under section 20 by arguing they are acting under other legislative provisions and made this comment on the importance of the distinction: “there is all the difference in the world between the services which an eligible, relevant or former relevant child can expect from her local housing authority, to make up for the lack of proper parental support and guidance within the family, and the sort of help which a young homeless person, even if in priority need, can expect from her local children’s services authority.”

Bearing this in mind it is perhaps not surprising that in a study on child well-being, the United Kingdom was ranked twenty first out of 21 developed countries. If the UK is to improve on this standing it would do well to ensure that the local authority makes good these failings, which could be in respect of the suitability or location of the accommodation, and assisting her with education, training and employment. Once a ‘relevant child’ reaches 18 (or a child ceases to be looked after at that age), the local authority still owes duties to advise and to provide various forms of assistance, especially with employment, education and training. The Leaving Care Regulations 2001 also provide that a local authority must take reasonable steps to keep in touch with her, appoint a personal adviser, assess her needs and prepare a pathway plan if she does not already have these. Local authority guidance advise housing and social services that there should be a framework for the joint assessment of 16 and 17 year olds. These are positive developments, especially with the sort of help which a young homeless person, even if in priority need, can expect from her local housing authority.

Leaving Care

Another issue of concern is how children are treated as they leave the care system. If an ‘eligible child’ ceases to be looked after by a local authority, but is still aged sixteen or seventeen, she becomes a ‘relevant child’. There is a specific duty to support her, by providing her with or maintaining her in suitable accommodation, and assisting her with education, training and employment. Once a ‘relevant child’ reaches 18 (or a child ceases to be looked after at that age), the local authority still owes duties to advise and to provide various forms of assistance, especially with employment, education and training. The Leaving Care Regulations 2001 also provide that a local authority must take reasonable steps to keep in touch with her, appoint a personal adviser, assess her needs and prepare a pathway plan if she does not already have these. Local authority guidance advises housing and social services that there should be a framework for the joint assessment of 16 and 17 year olds. These are positive developments, especially with the sort of help which a young homeless person, even if in priority need, can expect from her local housing authority.

Bearing all this in mind it is perhaps not surprising that in a study on child well-being, the United Kingdom was ranked twenty first out of 21 developed countries. If the UK is to improve on this standing it would do well to start with improving the lives of its most vulnerable children.
When we talk or write about conflicts in today’s world, the word identity frequently occurs. Be it à propos of former Yugoslavia, Canada, Ireland, Britain after 7th July 2005, the Netherlands, Belgium… identity seems to provide a simple explanation of those conflicts: people are assumed to belong to a solid, immutable group which responds as one if threatened or ill-treated. Identity implies uniqueness and sameness.

Nothing could be further from the truth.

What attracted me to the political settlement based on the Good Friday Agreement was the recognition that many citizens here have multiple loyalties, based on identities that may differ from each other, and even be contradictory.

This contrasts with jurisdictions where good sense has been replaced by demands for the recognition of the alleged core values of a society to which everyone, especially immigrants, must subscribe, in order to build a single identity.

In South Africa, under apartheid, the core value system of separation based on race destroyed any chance of the majority feeling a sense of belonging.

So, in order to ensure that separateness was replaced by unity, we, the lawyers in the African National Congress, drafted Constitutional Guidelines for a Democratic South Africa in 1988, proposing that:

‘It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.’

We soon realised though that a single national identity could not be imposed by diktat and that civil war could result if such a concept had to be ‘binding on all South Africans’. So we replaced the bogus nationalities created by apartheid with a single citizenship for all South Africans, a revolutionary step which we hoped would provide a basis for a durable peace and an understanding of our common humanity.

We hoped that the core values of our constitution – liberty, equality, justice and dignity, which do not belong to any one culture, would provide what Fintan O’Toole has called ‘a map of integration, setting out the relationship between rights and duties in a way open to everyone’. I think we have succeeded in this aim.

In South Africa – a country which for so long denied the humanity of most of its people – we have sought to construct the very antithesis of apartheid: a politics of humanity. We have done so by infusing our constitutionalism with a cosmopolitan, multicultural ethic. This ethic can best prompt reform at an international level as well, so hopefully securing, at both domestic and global level, a durable peace.

We have attempted to secure this politics not by denying our differences: the Constitution guarantees rights which best protect our freedom to be individuals, unlike any other, but also guarantees the rights we enjoy only in and through our communities – that protect our enjoyment of the society of those like ourselves. We thus continue the tradition of the Freedom Charter which, in the midst of the madness of apartheid, declared that all South Africans had the right to their own languages and to develop their own cultures and customs.

This determination to celebrate rather than abolish difference, may seem counter-intuitive. It is not long since we emerged from a past in which our differences were our defining feature; the basis on which the State determined the rights,
Multiculturalism is also necessary because a society in which each is able to demonstrate his or her difference and diversity equally is a society much more likely to encourage its members to see beyond signifiers of religion, race and ethnicity as the sole markers of identity.

Multiculturalism is also necessary because a society in which each is able to demonstrate his or her difference and diversity equally is a society much more likely to encourage its members to see beyond signifiers of religion, race and ethnicity as the sole markers of identity. In the words of Judge Albie Sachs of our Constitutional Court, a constitution and its human rights provisions must ensure the right to be the same – equality of rights – and the right to be different.

The type of multiculturalism we seek to promote could be called a cosmopolitan multiculturalism. Cosmopolitans think that there are many values worth living by and that you cannot live by them all. So we hope and expect that different people will embody different values, but in an important caveat noted by Kwame Anthony Appiah in Cosmopolitanism: ethics in a world of strangers, they have to be values worth living by, because there 'simply is no decent way to sustain those communities of difference that will not survive without the free allegiance of their members'.

South Africa's constitutional embrace of multiculturalism is demonstrated by the large number of provisions guaranteeing individuals' rights to belief, language, culture, as well as the rights of communities – whether cultural, religious or linguistic – to practise those activities which evidence their community.

Similar provisions can be found in many constitutions the world over as well as in countless international instruments. A more distinguishing feature of South Africa's multicultural constitutionalism is a critical attitude or ethos that at the best of times guides the branches of government in reconciling rights within our society. It is a critical approach that unambiguously seeks to shape a shared future.

South Africa's Constitution has been called a 'transitional constitution' – one which is both backward- and forward-looking. It is backward-looking in that what counts as justice, as going forward, is determined and informed by our knowledge of the terrible injustices of the past. But it is not equally poised between the future and the past. It looks back only to repudiate the illiberal past. And a repudiation of the past requires us to marshal reasons in the present day for rejecting the values and practices of the apartheid past.

We especially want to reclaim and restore histories that have been all but obliterated – histories of marginalised peoples and societies. In the articulation of our constitutional project we must make our decisions by reference to South Africans' shared future and what we want that to look like, and how that involves departure from our past.

This mode of reasoning – an articulation of the society we are reaching for – strikingly resembles what has been called a 'culture of justification', a culture South African human rights lawyers hope will be firmly instantiated by a bill of rights. We look to our Bill of Rights not only for its explicit content, but also to enrich laws by fostering justification-thinking. It was the poverty of law, in the shape of pervasive authority-thinking that made apartheid possible. Our Bill of Rights aims to restore discipline to a system grown slothful about justification.

The Divisiveness of 'National Identity'

Were it to be otherwise, if our past, and not the future, were our lodestar, then I fear we would venture too close to divisive, contemporary political projects, as seen in Britain today with the espousal of 'British values' – what Prime Minister Gordon Brown has called 'a clear shared vision of national identity'. This imagining of Britain, based on a purported rediscovery (or reinvention) of its past brings with it the alienation of many immigrants and communities. This is not the Britain which claimed to hold dear the values of liberty, tolerance and social justice. These immigrants, by virtue of their multiple identities and sometimes conflicting allegiances, must necessarily contest such a 'clear, shared vision of national identity'.

In Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality project and Others v Minister of Home Affairs and Others, CCT 60/04; CCT 10/05, involving the right of same-sex couples to marry, our Constitutional Court showed itself acutely conscious of the need to formulate a jurisprudence that speaks to a shared future, one that rejects what was unconscionable in our past. Justice Sachs noted: ‘Our Constitution represents a radical rupture with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough. In the memorable words of Mahomed J: “In
PEACE
MULTICULTURALISM
AND DEVELOPMENT

some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and ringing rejection of, that part of the past that is disgracefully racist, authoritarian, insular and repressive and a vigorous identification with and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

In South Africa our constitutional justification must be unequivocally aspirational, future-bound, preserving from the past only that which is justifiable. And while this style of reasoning, of justification, may seem especially suited to South Africa, I would suggest that it is fitting for much of the world as well.

In our public life and discourse, in our laws and jurisprudence, we need to encourage a culture of justification that seeks to shape a shared future based on a very critical examination of our past. This culture of reasoning/justification is much less likely to alienate peoples whose cultures/societies are not well represented in our past – at least our ‘official’ past. And people who make their homes in South Africa today, without any representation in our past, are much more likely to find a place, a sense not just of being, but of well-being, in South Africa, as they too participate, as full members, in articulating a vision of a shared future.

I have saluted the political arrangements in the North of Ireland which have brought peace to a deeply divided society. This ‘consocial’ form of political settlement allows for weight to be given in the structures of government to ethnic, or in this case, community, representation. In other words, administration is by consensus, not majority rule. In the same spirit, it has been suggested in the Good Friday Agreement and elsewhere that a bill of rights for Northern Ireland should be enacted: binding human rights rules would encourage development towards a shared future based on what must not be seen as simply restraints on the government but as instruments of empowerment of citizens.

A bill of rights would be part of a healing experience and an instrument to deal with the pathologies of society which may exclude fellow citizens because of their race, gender, religion, sexual orientation, disability or lifestyle, as in the case of travelling people.

The twentieth century can be described as the period in which the nation-state system reached its apogee; it will also be remembered for the terrible barbarity of totalitarianism and war. But it is not just the excesses of nationalism that compel a more cosmopolitan commitment. This commitment is also compelled because democracy at a national level is weakened when, due to the erosion of the State’s autonomy, its capacity to respond to democratic demands is undermined.

African nation-states are also used for allocating benefits and resources.

Identity politics provides: ‘a new populist form of communitarian ideology, a way to maintain or capture power, that uses the language and forms of an earlier period. Undoubtedly, these ideologies make use of pre-existing cleavages and the legacies of past wars. It is also the case that the appeal to tradition and the nostalgia for some mythical or semi-mythical history gains strength in the social upheavals associated with the opening up to global pressures.’

Right now Kenya is in turmoil. It may not be a Rwanda, but the fact that one of Africa’s most stable countries should now be the site of so much violence and displacement, animated supposedly by ethnic divisions mirroring political affiliations, speaks to the enormous and destructive power of identity mobilisation. Such political or ethnic affiliations, as we know from other countries, are also used for allocating benefits and resources.

The appeal of narrow identity politics is not confined to post-colonial states or post-communist states. It is also apparent among the most established Western democracies, as in contemporary Belgium where strong antipathy exists between the richer Flemish north and the poorer French-speaking Walloon region.

A sense of identity founded on a nationality that is itself predicated, not on immutable ideals, but on a sense of shared future, will go some way to undermining the allure of narrow, identity politics. Realistically, this emphasis on individual rights and a sense of shared future cannot hope to counter the appeal of divisive identity politics where such politics holds out the prospect of real advancement and where multiculturalism simply becomes a cover for unequal social and economic relations.

This re-conceptualisation is also needed at the international level if we are to bring about the reforms needed to secure durable peace.

This age of globalisation creates another reason to emphasise nationhood – albeit not a nationhood based on exclusive, immutable features. While the process of globalisation affords some positive goods, it has also brought about tremendous political and economic instability and rupture. In the face of such uncertainty, identity politics in the narrowest sense, predicated on certain immutable features and ideals, assumes a particular potency. Identities are constructed and emphasised for the purposes of political mobilisation. They offer a new sense of security in a context where the political and economic certainties of previous decades have vanished.

As Mary Kaldor notes in Cosmopolitanism and Organised Violence, identity politics provides: ‘a new populist form of communitarian ideology, a way to maintain or capture power, that uses the language and forms of an earlier period. Undoubtedly, these ideologies make use of pre-existing cleavages and the legacies of past wars. It is also the case that the appeal to tradition and the nostalgia for some mythical or semi-mythical history gains strength in the social upheavals associated with the opening up to global pressures.’

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Again Belgium today is instructive – much of the Walloon/Flanders tension is rooted in uneven development. In securing equitable development within multicultural societies, we have to move beyond a narrow distributionist account of development towards an assessment of the extent to which people’s ability to make reasoned choices is positively supported by the social opportunities of education, employment and participation in civil society.

This is what real ‘development’ is about, harnessing people’s energies for the common good or, as the preamble to the South African Constitution puts it, to ‘[…] improve the quality of life of all citizens and free the potential of each person’.

National identity, even conceptualised in its most cosmopolitan, multicultural ideal, brings with it certain forms of exclusivity – an exclusion of those who cannot or may not make their homes within the nation-state. This requires further exploration. Kant, in his formulation of a cosmopolitan ethic, argued that the enactment of cosmopolitan laws (i.e. laws guaranteeing the right to hospitality), would ensure the security of strangers when they set foot in a foreign land. This would address the rights-gap wrought by statelessness. In this formulation Kant makes plain that rights attach to individuals qua individuals and such rights are to be realised irrespective of where the person finds him or herself.

**Multiculturalism and cosmopolitanism must inform a more equitable international order**

Globalisation, for better or worse, is an unstoppable process. At its best it promotes democratisation, exerting pressure on previously insulated regimes to introduce political reform as a precondition for economic reform, to reduce corruption, increase respect for human rights and introduce/enhance democratic institutions.

At its worst it locks states, particularly weaker states, into entrenched patterns of inequality and uneven development. It promotes the erosion, and often complete negation, of state autonomy leaving the state unable to respond to democratic demands. It offers incentives for supranational, more exclusive affiliations, which lay claim to what were previously the monopolies of the state – i.e. force and taxation. As Mary Kaldor notes, it is this ‘lack of authority of the state, the weakness of representation, the loss of confidence that the state is able or willing to respond to public concerns, the inability and/or unwillingness to regulate the privatisation and internationalisation of violence that gives rise to violence’. As a space of mixing and merging, diaspora disproves any apartheid-like attempt to carve up the world into separate and distinct peoples, cultures, or civilisations. Samuel Huntington, in his notorious volume, *The Clash of Civilizations*, developed a ‘simple map’ of the world. He fixes civilisations in place; allows for no movement; recognises no exchanges. We would have forgotten all about his map by now if it had not been found useful by strategic planners in Washington, DC. Huntington’s map violates our understanding of a non-racial world; his is a world of us against them.

First, in Huntington’s account, all civilisations are racialised, regarded as natural organisms, with roots and branches, which are unified by allegiances among ‘kin countries’.

Second, civilisations are reified, treated like things, like machines, or even worse, like the machinery of war. ‘In a world where culture counts’, Huntington writes, ‘the platoons of Civilizations are the armies of Civilizations’. As a space of mixing and merging, diaspora disproves any apartheid-like attempt to carve up the world into separate and distinct peoples, cultures, or civilisations. Samuel Huntington, in his notorious volume, *The Clash of Civilizations*, developed a ‘simple map’ of the world. He fixes civilisations in place; allows for no movement; recognises no exchanges. We would have forgotten all about his map by now if it had not been found useful by strategic planners in Washington, DC. Huntington’s map violates our understanding of a non-racial world; his is a world of us against them.

Third, citizenship, with its political rights and responsibilities, is depicted as a unique feature of the West. While societies of the West engage in politics, the rest are supposedly seduced by appeals of cultural identity. ‘Politicians in non-Western societies do not win elections by demonstrating how Western they are’, Huntington asserts. ‘Electoral competition instead stimulates them to fashion what they believe will be the most popular appeals, and those are usually ethnic.’
nationalist, and religious in character.’ Recent elections in Denmark and the Netherlands belie this superior attitude and raising of the spectre of immigration in the US, Britain and many other countries. Studies show that ethnic chauvinism is not the prerogative of the Third World.

Finally, considering national sovereignty, Huntington claims that a state’s ‘cultural identity’, preferably of the Protestant kind, entirely determines its role in world politics. For those who assume the cultural superiority of the West, he provides a rationalisation for intervening in the sovereignty of other nations.

The recent high-powered report: Civil Paths to Peace: report of the Commonwealth Commission on respect and understanding, prepared for the 2007 Commonwealth Heads of Government Conference, provides a sharp riposte to those who blithely talk of the new wars of religion. It highlights the urgent need to address the ‘many root causes of conflict’ and draws attention to the post-9/11 debate that ‘culture is neither the defining nor the only fault line over which people conflict’.

While cultural differences can contribute to violence ‘they are not the only causal factors, nor are they immutable or irresistible’. The report explores the various ways through which violence is generalised and sometimes ‘wilfully nurtured’. It raises questions about the role of poverty and inequality in promoting hatred and violence. These questions require sophisticated analysis and the report draws attention to what it calls ‘manifest inequality’ and its relationship to the psychological dimensions of humiliation.

It makes devastating reading, and should be compulsory for prime ministers, presidents and their advisers who often display a total lack of understanding of the reaction of their citizens whose culture and religion are demonised and marginalised. It is understandable if not acceptable that the resulting alienation of these citizens leads them to take up violence.

By contrast, The Economist’s gung-ho approach to British homeland security is typified by columnist Bagehot, writing on the 15th December 2007 that:

‘[The Prime Minister] sensibly compares the Islamist threat Britain now faces to the cold war, describing it as a generational struggle that must be waged in classrooms, libraries and prisons, as well as with bullets.’

Such war-talk, which the writer refers to as a ‘grown-up reaction’, with all its implied abuse of human rights, will simply strengthen the hands of those intent on violence. We cannot afford to reduce our own battles to be reduced to such cruel simplifications, or to be imprisoned within the confines of Huntington’s map. Our multiple identities must be encouraged to flourish, not forced into the mould of some racialised or other stereotypical identity. Africans, for example, cannot be contained within the racist categories that were designed to dehumanise them. None of us has a fixed and frozen cultural identity, because we live in a complex and changing process of cultural creativity. The people of the diaspora cannot be put in some kind of rigid box, because the world around them is constantly being created and recreated by people who experience themselves as displaced.

The Joseph Rowntree Charitable Trust’s recent report Power to the People, draws an alarming picture of what it describes as the ‘disengagement’ from politics by people in Britain who are neither apathetic nor lacking interest. It is the absence of democratic processes and the absence of opportunities for engaging with the process which is responsible. The empirical evidence illustrates the desire of people to have a greater say over policies and decisions that affect their lives. The study shows a clear need to ensure that parties and the electoral process reflect the diversity and complexity of people’s lives. Democracy needs debate and the articulation of difference.

Also, the administration of justice today shows a greater tendency to hold to account those in authority who resort to violence for personal political reasons. Robert Fine, in Cosmopolitanism and Human Rights, writes:

‘Cosmopolitans find reason for hope today in the establishment of albeit imperfect institutions to prosecute and punish heads of state and officials who commit atrocities against those they have in their power. It finds hope in the proliferation of human rights conventions and legislation against crimes against humanity and genocide. It finds hope in the use of military force not for raison d’état but to stop genocide and crimes against humanity taking place in far-off places. […] It finds hope in the cosmopolitan intellectual currents now traversing the disciplines of the social sciences, which confront the vast contradictions inherent in the rights of man without resorting to cynicism on the one hand or naïve wishfulfillment on the other.’

Today in Africa the former head of one state, Charles Taylor of Liberia, is prosecuted by an international tribunal for his alleged complicity in the gross violations of humanitarian law in a neighbouring state, Sierra Leone. The head of the African Union, John Kufor, and former UN Secretary General Kofi Annan recently travelled to Kenya in a bid to mediate and quell tensions arising from the recent elections, marred by widespread irregularity and killings. The new Southern Africa Development Community (SADC) Tribunal, headquartered in Namibia, in its very first judgment, has ordered that a Zimbabwean farmer be granted interim relief.

All these signify a recognition that the concept of state sovereignty is and must be porous. It may only be claimed by a state to the extent it secures the protection of rights-holders within the state. That said, to the extent that the nation-state is democratically representative of its population and reflective of its democratic aspirations, it must be accorded equality with all other states as the vehicle by which such people and claims are advanced at global level.

There is still much to be done: how best to secure fairer, more democratic representation within international authorities and institutions? In particular, how to secure fairer representation within global financial institutions so that globalisation does not just become a watchword for the inequitable development and enrichment of some states at the expense of others? How can we secure a means of enforcing states’ obligations to their inhabitants without allowing such means to become a pretext for selective and/or opportunistic interventions by larger, more powerful states?

How, in other words, to avoid the hegemonic unilateralism pursued by the US in respect of Iraq, by which the US Government believes itself entitled to disregard both international law and the opinions of the international community in pursuing its own strategic interests and in imposing its own values.

These must be the intellectual projects of our age – peace, justice and development within and beyond states. They constitute an exciting challenge. In this journey, we may take for guidance the torch of Antigone whose free spirit shines down the ages and lights the way forward. As she said: ‘I was born for love, not for hatred’. In our troubled world this may appear a romantic vision, yet the world desperately needs this vision, so we can experience the boundless march of humanity for peace; so that the saying of Sophocles will come true – that the universe has many miracles, but the finest of all is humanity.

Kader Asmal was a Minister in the governments of Nelson Mandela and Thabo Mbeki. He retired as a Member of the National Assembly, Parliament of South Africa in February 2008. He is a Vice-President of the Haldane Society.
In his novel, *Diary of a Country Prosecutor*, the great Egyptian dramatist and lawyer Tawfiq al-Hakim reflects bleakly on the moral rot at the heart of his country's electoral system. The chief of police reveals in conversation with the novel's narrator his methods for managing the democratic process: 'Complete freedom. I let people vote as they like – right up to the end of the elections. Then I simply take the ballot box and throw it in the river and replace it with the box which we prepare ourselves.'

Al-Hakim's novel was written in the 1930s and was based on his own experiences of working as a prosecutor in a small country town. If his narrator could see Egypt today, he would not be surprised to learn that many officials still regard the electoral system with contempt. He would be heartened, however, to see that popular movements have grown up to defend the integrity of Egypt's elections. Still more welcome to him would be the part played by judges in these movements, with campaigns for judicial independence sparking waves of protest, repression and further protest.

In January 2008 the issue was taken up by the US, with Congress voting that a portion of Egypt's massive aid package is conditional on judicial reform. There was some irony of course in this decision given that it is American money which finances the repressive apparatus of the Egyptian state, with $1.3 billion of military aid a year.

Pressure for judicial independence has become an important factor in the crisis faced by the Egyptian regime as it attempts to manage the succession to the ageing President. The alienation of large parts of the judiciary is only one symptom of a deeper malaise, with Mubarak facing broader opposition than he has ever known.

The political system in Egypt maintains a democratic façade. There are regular elections, on a five year cycle. The last elections were in 2005, the next will be in 2010. Presidential elections take place in September and elections to the Egyptian People's Assembly two months later.

**EGYPT: WHEN JUDGES REBEL**

Anne Alexander and David Renton examine the political pressure facing the Egyptian regime as it attempts to manage the succession to the ageing President.
There are several legal opposition parties and some independent newspapers. Behind the scenes however, Mubarak’s power as President overshadows the state and his political machine, the ruling National Democratic Party (NDP), dominates parliament, the military, and large parts of the public sector.

Before 2005, the President was elected by a plebiscite, as any nominee securing two thirds of the votes in the previous elections to the People’s Assembly would be the sole candidate. As the NDP has long controlled at least two thirds of parliamentary seats, Mubarak’s victory has been a foregone conclusion.

An amendment to the constitution meant that the 2005 presidential elections were contested by several candidates, but with the resources of the state firmly behind the Mubarak campaign, his opponents fared badly.

By contrast to the lavish funds available to the NDP, opposition parties have to clear numerous hurdles before being allowed to operate legally, and even when they do, frequently face repression and harassment by the authorities.

The media is subject to similar scrutiny. Since the assassination of President Anwar Sadat by Islamist gunmen in 1981, the Egyptian state has been governed continuously by emergency laws. These allow the authorities to bring civilians to trial in military courts and ban public gatherings.

The source of recent confrontations between reform-minded judges and the state has been the judiciary’s role in supervising legislative and presidential elections. This function is of recent origin.

The Egyptian constitution calls for full judicial supervision of polling. In the 1990 and 1995 legislative elections however, it was civil servants who oversaw voting in smaller polling stations. These two elections coincided with the tightening of the NDP’s grip on parliament. The proportion of seats held by NDP members rose from 68 per cent in 1985 to 94 per cent in 1995.

The trend towards a one-party parliament in turn prompted a campaign by the opposition parties calling for full judicial supervision of elections. In July 2000, this campaign appeared to have won a significant victory when the Supreme Constitutional Court ruled that the election procedures used in the 1990 and 1993 elections were unconstitutional. Following this ruling, the elections held in November of the same year were organised in three stages to allow judges to observe the entire process.

The ruling party found other ways to ensure a comfortable victory for its candidates. In many constituencies the police intervened to prevent potential voters for non-NDP candidates from even reaching the polling stations.

Similar tactics by the Interior Ministry in the 2005 legislative elections increased tensions between the state and the Judges’ Club, a semi-independent professional body representing Egypt’s judges.

Months before the poll, a thousand-strong meeting of judges at the Alexandria branch of the club threatened to refuse to supervise the elections at all unless the government met their demands for judicial reform.

Judges did oversee the voting, but an investigation by two vice presidents of the Court of Cassation, Mahmoud Mekki and Hisham Bastawisi revealed massive fraud and intimidation by the authorities on behalf of the ruling party. Not only did opposition candidates, activists and voters suffer, but in several areas, policemen arrested or beat the judges who were supposed to be overseeing the count.

Rather than acting on the report, the government struck back at its authors. In May 2006, Mekki and Bastawisi were hauled before a disciplinary panel on charges of ‘insulting the judiciary’, and threatened with dismissal, triggering dramatic protests by members of the Judges’ Club and their supporters.

Thousands of riot police gathered in the street outside the Cairo branch of the club, beating and arresting protesters who gathered to show their support for the judges as they rallied inside. Hundreds more opposition activists were arrested over the following weeks, mainly members of the outlawed Muslim Brotherhood.

The authorities drew back, however, from direct confrontation with the judges. Mekki was exonerated by the disciplinary panel, while Bastawisi escaped with a reprimand. Since then, the conflict has continued to simmer, without breaking into the kind of protests which grabbed the international head-
lines in May 2006.

For obvious reasons, Egyptian judges are reluctant revolutionaries, and no doubt many hope to achieve reform through dialogue, rather than confrontation. So far however the regime has shown little sign of compromise. In June 2006, parliament passed the Judicial Authority Law, making only minor concessions to those who argued that the legislation increases the executive’s control over the judiciary.

Then, constitutional amendments approved in a referendum in March 2007, replaced judicial oversight of legislative elections with the much vaguer formula of a supreme supervisory committee.

Judges in Alexandria raised black flags over the judges’ club building, urging a no vote or a boycott of the referendum. In the plebiscite, the government claimed a 75.9 percent yes vote on a 27.1 percent turnout. While it probably is true that a majority of voters did vote in favour, critics suggested that the turnout had been below 10 percent.

The same referendum endorsed an outright ban on political activity based on religion. This was a further blow against the Muslim Brotherhood. It also gave the President wide powers to continue using military courts against civilians, under the banner of ‘anti-terrorism’.

Yet, despite acquiring a new armoury of repressive legislation, the Mubarak regime remains under internal pressure on several fronts. Firstly, the President confronts the problem of his own mortality. His son, Gamal, has recently taken on a leading role in the NDP, and is apparently being prepared for power, but the transition is not guaranteed to be smooth.

Gamal Mubarak and his technocrat allies, who are committed to neoliberal economic reforms, are not popular. They face opposition from other sections of the NDP, who fear that the further dismantling of the Nasserist welfare state could trigger uncontrollable protests.

On the other hand, a tightly managed process of political reform, for which Gamal Mubarak could take credit, might allow the regime to reinvigorate itself.

US pressure on the regime to introduce at least cosmetic reforms has had some effect. Hisham Kassem, of the new independent paper Al-Masry al-Yawm, argues that the independent press gained an opportunity to establish itself as a serious force in the Egyptian media, as a result of US pressure on the Mubarak regime to embrace Bush’s initiatives after 9/11 promoting democracy in the Middle East.

By the time Mubarak moved against some of his most outspoken critics in the media in September 2007, new independent newspapers accounted for a quarter of overall newspaper circulation, up from three per cent four years ago.

Kassem noted bitterly however, that US support evaporated at the very moment independent journalists needed it most. Likewise US calls for free and fair elections in 2005, faded away after the Muslim Brotherhood dramatically increased its representation in parliament.

Intermittent US statements about the need for democracy can hardly be said to count as severe pressure on the regime. And while George Bush’s credentials as a democrat are questionable, the commitment of his administration to continue providing military aid to Egypt is not.

During the Bush presidency, Egypt has continued to receive more military aid from the US than any other recipient in the world save Israel. The size of the grants to Egypt is all the more remarkable given that the country has been continuously at peace with all its neighbours since the mid-1970s. In fact, the only significant role played by the Egyptian army has been to act as a domestic prop for the regime, which it does by repressing armed Islamist militants or quelling social unrest.

Popular pressure for change meanwhile, is a more significant factor than in the past. Huge street demonstrations over the US-led invasion of Iraq in 2003 were followed by the development of a protest campaign targeting both Mubaraks; father and son.

Under the slogan ‘Kefaya’ (Enough!), intellectuals, students and members of Egypt’s vocal professional associations, organised demonstrations and meetings during 2004-5 calling for an end to Mubarak’s rule, constitutional reform and political liberalisation.

These public campaigns ebbed away in 2007, but were replaced by a wave of workers’ militancy, including widespread strikes. Although the strike wave is largely fuelled by economic grievances, the alienation of workers from the state-run trade unions is another problem for the regime, as it is on these institutions that NDP party bosses rely to mobilise a semblance of popular support during elections.

The linked demands for free elections, judicial independence and judicial scrutiny, continue to gnaw away at the legitimacy of the regime. The struggle for democratic rights is not the only source of the regime’s weakness. It is however, an important part of a growing protest coalition.

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In June of last year Nepal should have held its first democratic elections following the King’s removal from power in 2006. The elections will be the first since a 10-year insurgency ended in November 2006 with a peace accord between the Government and the rebel Communist Party of Nepal (Maoist) (“CPN(M)”). After two postponements to date the elections are now scheduled for the 10th April 2008, but whether free and fair elections can take place on that date is now in some doubt. With a lack of public security raising tensions in the Terai region of Nepal and ongoing fuel shortages, the only certainty is the level of uncertainty facing the people of Nepal at this crucial time.

It was on the 21st November 2006 that a comprehensive peace agreement was concluded between the government of Nepal (the political parties) and the Maoists (CPN(M)). For 19 days from the beginning of April 2007, the country saw increasingly large demonstrations. The demonstrations which greeted TV screens throughout the world then, were referred to in Nepal as the peoples movement ‘Jana Andolan II’. The demonstrators called for the removal of the authoritarian King. In response, the Royal Government killed 18 protestors and injured many more in their quest to stop the Jana Andolan. Eventually the King was forced to step aside and the peace agreement was signed. It carried the hopes and ambitions for democracy and for change in a country ridden by poverty and discrimination.

As part of the agreement the parties all invited international assistance; all sides wanted a UN presence in the country. The UN deployed in the form of a political not peacekeeping mission, (United Nations Mission in Nepal, “UNMIN”) and Nepal expected. But almost two years on from those demonstrations what has happened to a movement for democracy that showed so much promise for the future? And why have relations soured toward the UN, a mission that was initially so welcomed?

The Comprehensive Peace Agreement, far reaching, ambitious and full of hope relegated the Nepal Army to barracks and the Peoples Army to cantonment sites. The Nepal Army would stay in pre agreed barracks sites, they would not be allowed out with arms and would be monitored by UNMIN military observers. In return the People’s Army agreed to go to sites specifically built to house their army: cantonment sites. They agreed to remain there, with their arms contained and observed by UNMIN military observers. With both armies of the civil war effectively grounded it was hoped this would help preserve the peace and prevent a return to hostilities. There have been allegations of breaches on both sides of this agreement. Allegations that the Nepal Army has left the barracks with arms and allegations that the Maoists filled their cantonment sites with volunteers who had not been involved in the people’s war at all, are just some of the alleged breaches to date.

The agreement called for a commitment to ending discrimination based on class, ethnicity, language, gender, culture, religion and region. It promised to address the problems of women, Dalit, indigenous people, ethnic people (janjatis), Terai communities (Madhe-
Discrimination permeates throughout Nepalese society. As democracy has begun to take hold demonstration after demonstration has been held by different marginalised groups. At the moment it is the people who mostly live in the Terai districts of Nepal who are protesting on a daily basis. And it is their plight and refusal to date to take part in the elections in April which is currently fuelling concerns about the election date in April. The peace agreement made a request to the international community including all friendly countries and the United Nations to extend support to Nepal in the campaign to establish a full fledged democracy and a lasting peace. This lead to the establishment of the United Nations Mission in Nepal ‘UNMIN’.

UNMIN faces many challenges in meeting the demands of supporting the peace process in a post-conflict country. And it is a very easy body for people to criticise. But what is true is that in a country so riddled with discrimination it at least should ensure that it has good employment practices and seeks to promote diversity within its own workforce. For example national staff should be valued in pay terms as much as international staff. The marginalised in society should not be found mostly in the ranks of driver and cleaners for the mission. Perhaps, if they could be found and that may be difficult, a female driver or two could be employed. It is the national staff who will ensure that the mission succeeds on some level and rather than being paid less perhaps they should be paid more. This might then help with the sometimes inevitable disconnect between the local people and an international mission.

It is not only the increasing criticism of UNMIN that is causing concern over sustaining the peace agreement. In February 2007 the registration of Maoist weapons was yet to be completed, the total number registered stood at 3,428 and the Nepalese army said more were in their possession. More than 30,000 combatants were registered at the cantonment sites. There were accusations that these were children in school and not previously in the Peoples Liberation Army. There were concerns that with such horrible conditions in the cantonment sites many were just leaving to go home or away to find work, usually abroad.

Other crucial questions concerned whether the Maoists would remain part of the peace process at all. By November of last year the Maoists had resigned from their government posts, protesting that the elections could only take place when the country had been declared a republic and the threat of the King resuming power addressed. That issue was resolved and the Maoists returned to their posts in December 2007 after lawmakers agreed to amend the interim constitution to declare Nepal a republic and the threat of the King resuming power addressed. That issue was resolved and the Maoists returned to their posts in December 2007 after lawmakers agreed to amend the interim constitution to declare Nepal a republic. But elections held in conditions where so many of the people are disenfranchised will only serve to undermine the peace process.

But the Maoists continue to face problems when the public security situation is so tenuous. The future for Nepal is uncertain and the peace process at a critical stage. There are no elections held in conditions where so many of the population are disenfranchised and the public security situation is so tenuous will equally serve to undermine the peace process.

The situation does not look promising for April elections following the recent violence in the Terai. Political parties recently submitted lists of candidates to be chosen under a proportional representation system for April’s elections. They included the CPN (M) group, which gave up its armed struggle under the peace accord and became a political party. But the parties representing Madhesi interests boycotted the process and are threatening to not take part in the elections.

A further postponement of the elections will only serve to undermine the peace process but elections held in conditions where so many of the population are disenfranchised and the public security situation is so tenuous will equally serve to undermine the peace process.

The future for Nepal is uncertain and the peace process at a critical stage. There are no easy answers but the attention of the international community must remain focused.
Haldane’s sister organisation in the US, the National Lawyers Guild, sent a delegation of lawyers and law students to Pakistan in early January, after the killing of Benazir Bhutto and before the elections. Their report calls for the immediate restoration of the independent judiciary. Noting the US support for military dictatorship in Pakistan, it called upon the US Government to promote the restoration of all the deposed judges, for an independent media and for free, fair and transparent elections.

The delegation met with more than 50 jurists, lawyers, political party representatives, government representatives, and civil society activists. The Government refused to respond to their requests to speak to detained Chief Justice Iftikar Mohammad Chaudhry and President of the Supreme Court Bar Association, Aitzaz Ahsan. Lawyers have been at the forefront of defending the rule of law in Pakistan since Musharraf suspended Chief Justice Chaudhry in March 2007. Although he was reinstated by the Supreme Court in July 2007, on 3rd November 2007 Musharraf declared an emergency, suspended the constitution and detained hundreds of lawyers, journalists, and political and civil society activists.

The National Lawyers Guild reports that Musharraf’s Provisional Constitutional Order, which purported to suspend fundamental rights under the constitution, is unconstitutional, as is his Oath of Offices (Judges) Order, with the powers to remove sitting judges. The Supreme Court, meeting in an extraordinary session on the afternoon of 3rd November 2007, issued an order restraining the Government ‘from administering a fresh oath’ to any judges of the superior judiciary, directed all judges to refuse to take any new oath of office, and stated that any appointment of new judges ‘shall be unlawful and without jurisdiction’. A majority of the superior judiciary did, indeed, refuse to take the new oath. They were summarily and unlawfully removed from office by Musharraf. Chief Justice Chaudhry remains under house arrest.

Despite that, Musharraf promulgated two constitutional amendments, relying upon his unconstitutional Provisional Constitutional Order, giving him and the Government immunity from any judicial review.

The National Lawyers Guild describe Musharraf’s action in November as ‘nothing less than a coup d'état.’ The proclamation of emergency was no such thing and ‘was, in fact, a declaration of martial law’.

The Guild notes that Pakistan’s various constitutions have been suspended by military generals on numerous occasions over Pakistan’s sixty year history. The usual pattern is that a general suspends the constitution and orders all judges to take a new oath to uphold the military’s orders, rather than Pakistan’s constitution. In prior coups, some judges have co-operated, others have resigned rather than violate their oath to uphold the constitution. However, this coup is different in that its plain purpose was to remove the sitting judiciary.

Historically, the judiciary in Pakistan has been aligned with the military-political establishment. However, events over the last year...
have shown a judiciary beginning to check executive aggrandizements. Lawyers cite four legal issues as flash points. The Supreme Court had reviewed a government privatisation project (of the state-owned Steel Mill) which would have resulted in the sale of state assets at grossly undervalued rates to an international consortium that included army generals, and found the sale unlawful because its process was opaque and it failed numerous statutory requirements.

There were a series of ‘missing persons’ cases, some filed by the Human Rights Commission of Pakistan and some by Chief Justice Chaudhry on his own motion, which resulted in exposing some of the practices of the intelligence agencies of detaining and disappearing both legitimate and questionable terrorist suspects. The Supreme Court demanded that the detainees be physically produced in court and that the state should provide documentary explanations of their alleged links to terrorist activities and cite the legal basis for their detention. Very few documents were ever produced and eventually some of the detainees were released by the Supreme Court. Even though these were only the detainees whom even the intelligence agencies had agreed posed no threat, the decisions imposed a check on the executive in its ‘war on terror’ activities, vindicated the right of due process and revitalized habeas corpus. Many of the alleged ‘terrorists’ had been handed over to the US agencies for interrogation, as indeed happened to British citizen Moazzam Begg who spent four long years in Bagram and Guantánamo Bay.

In the third case, the Supreme Court reinstated the Chief Justice following his suspension by Musharraf in March 2007. The case against the Chief Justice (accused falsely of corruption) outraged and emboldened lawyers and is credited with the birth of the lawyers’ movement. The images of vast numbers of lawyers marching in support of the Chief Justice have now become familiar. Emboldened by popular support for the Chief Justice (famously, it took him over 24 hours to drive from Islamabad to Lahore, normally a short drive, because of the crowds greeting him on his way), the Supreme Court reinstated him in July 2007 and demonstrated the court’s potential to uphold constitutional processes in the face of political pressure.

Just prior to the coup, the Supreme Court had considered a series of petitions challenging Musharraf’s eligibility to stand for re-election as President. It had ordered the chief election commissioner to withhold notification of the planning presidential election results until the cases had been determined. No decision was ever handed down, because Musharraf intervened on 3rd November 2007. The National Lawyers Guild heard that the Chief Justice had refused to proceed with the cases, some filed by the Human Rights Commission, others by the various elites who had taken action to prevent Musharraf from standing. Reinstatement is vital. Otherwise the Chief Justice has the capacity to give orders in the name of the Supreme Court that override the body’s decisions.　

These four court cases had set the stage for the 3rd November coup and the resulting removal of more than sixty sitting judges, including over two-thirds of the Supreme Court. Lawyers speaking to the delegation praised the deposed judges as experienced and highly qualified, whose only ‘sin’ was genuine independence. Their replacements are condemned as inexperienced, unqualified and completely beholden to President Musharraf. Lawyers warn that the failure to reinstate the deposed judges will permanently and irreparably damage the institution of the judiciary, stripping it of any hope of independence or credibility. One lawyer said ‘judges used to be elevated, now they are recruited’. At the time of the visit in early January, lawyers had maintained a boycott of the courts for two months, although there were concerns that it could not last indefinitely.

Pakistan’s media is not free or independent, and that is particularly so in the Urdu language press. The English language media, read by the elite, has traditionally been comparatively freer, although always threatened and subject to repressive legislation. The Urdu press faces government restrictions on, or threats to restrict, licensing, the banning of certain personalities from appearing altogether, the withdrawal of advertising revenue and direct and indirect threats of personal harm. GEO, Pakistan’s most popular television network, was forced off the air entirely following the coup and now broadcasts by satellite from the UAE (although the Pakistani Government put pressure on the UAE to prohibit this). Other channels have been removed from the air. The concentration of restrictions in the Urdu media, whilst both the English language media in Pakistan and the international press enjoy comparatively greater freedom, conveys the appearance of an independent press to the outside world, whilst severely constraining press freedom. The upshot is that the Government benefited at the expense of an effective media blackout around the coup.

At the time of writing, Pakistan’s elections have taken place. Despite the very real concerns that they were not fully free, fair or transparent, the electorate have rejected Musharraf’s party and supported the opposition – the PPP and the Muslim League – who call for an end to emergency rule and the restoration of democracy. Pakistan high politics are concentrated in the hands of the elite (as Bhutto’s will treating the leadership of the PPP as family property demonstrated), and the various elites will jockey for power. The new Prime Minister, Yousaf Raza Gilani from the PPP, has freed the Judges and promises to reinstate them. Reinstatement is vital. Otherwise the Supreme Court will remain staffed by judges who were prepared to countenance Musharraf’s unconstitutional actions.

The full report from the National Lawyers Guild is available on the Haldane Society website: www.haldane.org

Liz Davies is a barrister at Garden Court Chambers and chair of the Haldane Society

“One lawyer said ‘judges used to be elevated, now they are recruited’.”

Socialist Lawyer ● April 2008 ● 31
The Labour Party has long claimed the legal aid system as one of its protected post-war legacies. So it is extraordinary that nearly 60 years later, it is intent on dismantling it. Not only is it a betrayal of noble ideals but also of the most vulnerable people in society. In a world of market forces, justice has become a luxury that those who most need it are least able to access.

Primarily, these are women. Women account for over 60 per cent of all legal aid applications and in the area of family law the figure is even higher. Their applications often meet with little success.

As a barrister advising on Rights of Women's busy legal advice line I am keenly aware of the impact of failed applications. Our continuously ringing phones and the sheer volume of calls reflect an overwhelming unmet demand by women for legal advice. Last year we received almost 90,000 attempted calls. Of these we were able to advise 1,710 women.

Hundreds of column inches have already been devoted to the plight of legal aid and how the introduction of fixed fees has accelerated the exodus of solicitors from legal aid franchises. We are told by Resolution, for example, that support for BMER women.

The number of agency workers in the UK has doubled in the past four years. One in four of all agency workers in the EU are now employed in Britain. Under such schemes, the employer pays an agency a commission to recruit employees, who face particular problems in accessing legal advice. To this end we monitored not only calls to the advice line but also carried out a survey of 350 organisations in London that support BMER women.

While the full research report will be launched later this year, the initial findings demonstrate that some of the most vulnerable sectors of society are being prevented from accessing justice.

Of the women we questioned, 58 per cent who applied for legal aid were deemed ineligible. Only 2 per cent of applications were rejected on the basis of merit; the vast majority – 82 per cent – were refused on the basis of income and capital. 88 per cent of these respondents said that the impact of not receiving legal aid was either significant or very significant.

These figures reflect Rights of Women’s wider concerns about the negative impact of the income and capital limits set by the Legal Services Commission as well as the financial burden that the statutory charge places on those least able to pay it. We are also opposed to the recent developments which incentivise agreement-seeking between the parties because it can give rise to conflicts of interest – women who call our advice line frequently report the significant pressure they are put under by their own solicitors to reach agreements.

The extension of the domestic violence waiver is of course a positive development. Vera Baird’s announcement last March that financial eligibility for legal aid for domestic violence victims will be improved [...] with both income and capital limits [...] waived on a discretionary basis’ is certainly to be applauded in principal. However, our experience from the women who call the advice line indicates that this discretion is rarely exercised.

So what happens to those women who do not receive legal aid? The choice is stark. They must either forget their claim or represent themselves in court. While just over 40 per cent said that they were deterred from taking

**by Holly Pelham**

These are sobering statistics, but what is the effect on the women themselves who need urgent legal advice? As a national organisation providing free confidential legal advice to women, we hear directly about women’s personal experiences of accessing justice and the barriers they face in doing so.

In 2007 we undertook a national research project to investigate these issues. In line with our belief in the importance of voicing the concerns of diverse groups of women, we focused on BMER women (Black, Minority Ethnic and Refugee women and women seeking asylum) who face particular problems in accessing legal advice. To this end we monitored not only calls to the advice line but also carried out a survey of 350 organisations in London that support BMER women.

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**by David Renton**

Many of the recent migrants to the UK work as agency workers. In a typical case, a group of agency workers were recruited in Poland by an agency who proceeded to dismiss the workers as soon as they joined a trade union. Transport and accommodation were provided at a cost and in circumstances where the workers were not in a position to refuse them.

For some workers, the increase in agency contracts has enabled a return to something like the conditions before the UK’s first modern employment protection, the Truck Acts, which were designed to prevent the abuse of employers requiring workers to trade as consumers with the employer’s agents on unfavourable terms.

It would be wrong however to suggest that all agency workers are living on the margins. At one end, the market comprises the niche employment of specialist consultants, accountants, and IT experts. Some agency workers are paid in excess of £50,000 per year. Larger numbers of agency workers work in the least glamorous sectors of the economy: agriculture; construction; and factory work. Between these two extremes, there is a large middle ground of agency workers, indistinguishable from the majority of their work colleagues except that they have less rights in law.

The case before the Court of Appeal concerned a housing officer Merana James. Her contract with the agency described her as ‘a temporary agency worker’. But at the time of her dismissal she had been working for Greenwich Council for eight years altogether and more than three years continuously.

The Council supervised Ms James’ work, provided materials for her, and organised the procedures which she followed each day. She wore a staff badge bearing the council logo. When she was absent from work without giving reasons, it was the council that took the decision – in effect – to dismiss her.

However in Ms James’s contractual documents she was not an employee. There was nothing, the Court held, requiring it to look behind the documents.

At the end of its judgment, the Court of Appeal insisted that its decision was the only possible finding open to it. The rights of employees are protected by statute. The overwhelming majority of agency workers are engaged on contracts which give them a subordinate status. In a common law tradition in which the terms of written agreements are treated with deference, there is nothing for the courts but to accept the terms under which the parties reach an agreement. Where the contracts are sham, or where it is necessary to
legal proceedings altogether, a little over 50 per cent of ineligible women said that they had gone on to represent themselves. These are mainly the women who call us. Women who have given up on the system and whose only source of legal support is the free legal advice they receive from the qualified solicitors and barristers that work on our advice line.

The Government is letting women down. In denying women access to legal advice it denies them knowledge about their fundamental rights. At Rights of Women, despite being overstretched and under-resourced, we have done our best to fill the gap. We wrote our Domestic Violence DIY Injunction Handbook to demystify the law – a step-by-step guide to getting an injunction without the assistance of a solicitor. In the last two and a half years we have sold 1,500 copies. Our latest publication Pathways to Justice: BMER women, violence and the law was written in response to a survey in which 95 per cent of respondents told us they needed a book on the law, legal rights and procedures relevant to BMER women.

We are committed to making the law accessible to women, to informing women about their legal rights and to giving a voice to the most vulnerable and marginalised sectors of society. This is not an easy battle, but it is one we believe worth fighting.
Counter-Terrorism Bill 2008 Part 6 – Inquests and inquiries

Clause 64 […]

‘BA Certificate requiring inquest to be held without a jury

(1) The Secretary of State may certify in relation to an inquest that, in the opinion of the Secretary of State, the inquest will involve the consideration of material that should not be made public –
(a) in the interests of national security,
(b) in the interests of the relationship between the United Kingdom and another country, or
(c) otherwise in the public interest.

[…]

(3) Where a certificate has effect in relation to an inquest, the inquest must be held or (as the case may be) continued without a jury, so that –
(a) if a jury has not been summoned, the coroner must not summon a jury, and
(b) if a jury has been summoned, the coroner must discharge the jury[,]’

When the Counter Terrorism Bill was published on 24th January 2008 there had been no indication that among its controversial proposals would be clauses seeking to amend the Coroner’s Act 1988 to give the Secretary of State extraordinary powers to issue certificates at any case in which the Secretary of State believes that material will be revealed contrary to the public interest. INQUEST has been in regular and ongoing dialogue with successive ministers in the Ministry of Justice and its predecessors about reform of the inquest system over many years.

Our recent frustration had been about the failure in November 2007 to include a coroner reform bill in the current legislative programme. No indication had been given that such draconian proposals were about to be made and on the morning the Bill was published we received an email announcement from the Ministry of Justice. We immediately wrote to Bridget Prentice MP, Parliamentary Under Secretary of State responsible for coroners, to express our extreme concern that this measure has been introduced without any consultation. This is despite the organisation and members of its Lawyers Group being in regular and ongoing dialogue with ministers and officials about the operation of the inquest system and other proposed reforms.

The proposed amendments would enable some inquests to be conducted at least partly in private, with government vetted coroners and government vetted counsel overseeing the ‘sensitive material’. Bereaved families and their legal representatives, as well as the public at large and the media, would be excluded from the process.

INQUEST is particularly alarmed that the proposals are contained in proposed counter-terrorism legislation as this implies that there have been real issues that have arisen in relation to inquests that have involved questions of ‘counter-terrorism’. We are at a loss to identify any such circumstances. The proposals contained in clauses 64-67 of the Bill arose from legal challenges brought on behalf of the family of Azelle Rodney over the admissibility of intelligence evidence. Azelle Rodney died in April 2005 after a police operation in North London – the circumstances surrounding his shooting had nothing to do with counter-terrorism. Azelle was shot seven times after the car he was in was ordered to stop in a ‘hard stop’ after being under police surveillance for over three hours in Edgware, North London. Two men were later convicted for firearms offences. After his death, the Independent Police Complaints Commission (IPCC) conducted an investigation and a file was passed to the Crown Prosecution Service (CPS). In July 2006 the CPS announced that there was ‘insufficient evidence to disclose a realistic prospect of conviction against any officer for any offence in relation to the fatal shooting’. After the CPS decision the family was told by the coroner that the full inquest could not be held because large portions of the police officers’ statements had been crossed out under the Regulation of Investigatory Powers Act (RIPA) 2000, which covers information obtained from covert surveillance devices such as telephone taps or bugs. Lawyers acting for the family of Azelle Rodney threatened to take the Government to court to show that RIPA was in breach of the Human Rights Act 1998. His family have already been told that their case will be subject to the new measures despite them currently being proposals in a Bill that has not even had its second reading in Parliament.

Daniel Machover, solicitor for Susan Alexander, Azelle Rodney’s mother commented that, ‘These proposals mean that ministers and those responsible for intelligence gathering will never be held properly to account for the validity of their tactics. It is a fiasco, bearing no resemblance to a fair system of justice. Presented with the problem of what to do with sensitive material that is relevant to the circumstances of how and why a person was killed by a state agent, the Government proposes to remove the vital democratic account-
able layer of a jury and hide away from the bereaved family crucial evidence about the death. My client, Susan Alexander, is distressed that having expected a new law which would finally enable her to see and question the key evidence that led to the police shooting of her son, she will end up being worse off than before.’

Concern about the proposals has already been expressed by JUSTICE and the Law Society and by parliamentarians, including the chairs of the parliamentary Joint Committee on Human Rights and the Justice Committee. The JCHR expressed concern that the proposals could compromise the independence of controversial inquests into the deaths of terrorism suspects in police operations or the deaths of service personnel in Iraq. They branded the inquest plans as ‘astonishing’ especially as they were introduced at a late stage with no time for consultation or pre-legislative scrutiny.

Chair of the Committee, Andrew Dismore MP, said: ‘We are seriously alarmed at the prospect that under these provisions inquests into deaths occurring in circumstances like that of Jean Charles de Menezes, or British servicemen killed by US forces in Iraq, could be held by a coroner appointed by the Secretary of State sitting without a jury. Inquests must be, and be seen to be, totally independent, and in public to secure accountability, with involvement of the next of kin to protect their legitimate interests.

When someone dies in distressing, high profile circumstances their family need to see and feel that justice is being done, and where state authorities are involved there is a national interest in accountability as well.’

INQUEST has serious concerns about these far reaching proposals which have been introduced without consultation and have wide reaching consequences. The public will find it difficult to have confidence that these coroner-only inquests, with key evidence being suppressed, can investigate contentious deaths involving state agents independently.

This is the most extreme example of a process of closing down and rolling back the little progress that has been made towards achieving meaningful change in relation to deaths in custody and the inquest system. The number of custodial deaths remains far too high and many cases reveal a horrendous catalogue of failings in the treatment and care of vulnerable people in custody or who are otherwise dependent on others for their care. They raise questions about excessive and inappropriate use of custody for some of the most vulnerable people in society; they also highlight failures to fulfil the state’s duty to protect life. Inquests repeatedly identify the failure to implement existing guidelines on the care of ‘at risk’ detainees.

The hard fought for direction of travel in relation to inquests and investigations into contentious deaths in custody or involving agents of the state has been towards greater openness and accountability. But how much difference has really been made and what are the other challenges we are facing this year?

Following many years of campaigning by bereaved families, lawyers, complainants, police monitoring groups and human rights organisations the discredited Police Complaints Authority was replaced in 2004 with the Independent Police Complaints Commission. The new body was welcomed and everyone involved, whilst retaining a healthy scepticism, hoped that it would make a real difference to the independence and transparency of the investigation of complaints against the police.

Already damaged by the fiasco surrounding the investigations into the circumstances surrounding the death of Jean Charles de Menezes the Commission was dealt another blow in February 2008 with the high profile public resignation of the Police Actions Lawyers Group from its advisory board. Practitioners from PALG cited examples over the years, where members ‘have found themselves inundated with an endless flow of cases where the IPCC has failed to properly handle complaints about police misconduct, ranging from racism, violence and fabrication of evidence, to corruption and even deaths in police custody’. PALG representative Tony Murphy of Bhatt Murphy solicitors commented: ‘It is a source of great disappointment and frustration that the IPCC is failing to deliver...
anything like the rigorous, independent and
inspiring police complaints system that this coun-
try has so long deserved. Instead it has instituted
and overseen a chaotic system that has allowed
complainants’ confidence to be eroded to a new
low, by failing to properly analyse or gather ev-
idence, and by unquestioningly accepting the
word of police authorities. Every effort has been
made to raise these concerns with the IPCC over
these years to no avail.’

Their stance was supported by the Jean
Charles de Menezes Campaign which ex-
plained their experience with the IPCC has
been ‘characterised by delay, ineffectiveness,
poor decision-making and a tendency for the
IPCC to bow down to police pressure’. Their
experience mirrored that of many others. The
family and their legal representative had par-
ticipated ‘for more than two years of meetings
[...] for the IPCC’s deliberations to end with
the feeblest of conclusions’. A spokeswomen
commented on behalf of the campaign that the
IPCC’s ‘reports have read like a long-winded
apology for the failure of those involved and they have failed to
recommend criminal prosecutions or even dis-
ciplinary action for any of the officers involved
in the botched anti-terrorism operation that
ended with an innocent man being shot seven
times in the head’. She added that: ‘in the af-
ftermath of the shooting, it was claimed by Nick
Hardwick, chairman of the IPCC, that the
Metropolitan Police would be the litmus test of
the IPCC as a new body to investigate police com-
plaints. However, the IPCC has done little to
address public disquiet about the death of an
innocent young man or dispel widespread scep-
ticism about the investigation. It seems to many
that Hardwick’s organisation is just as capable
of carrying out a whitewash as its predecessor,
the discredited Police Complaints Authority.’

INQUEST shares these concerns and has
seen a pattern of decision making in cases that
has further dented confidence in the process.
The IPCC was established in the wake of wide-
spread public distrust of its predecessor, the
Police Complaints Authority, and with a com-
mitment to openness and transparency. But it
appears that they still have limited under-
standing of the family and public perception
of their processes.

What often goes unmentioned is the high
price paid by bereaved families in remaining
involved in the lengthy, complicated investiga-
tion and inquest process following deaths in all
forms of detention or involving state agents.
INQUEST deals on a daily basis with some of
the most horrendous conse-
quences of detention in prison, in
police custody or in psychiatric
detention. Families show incred-
ible courage, diligence and persistence to
ensure that the disturbing issues surrounding
their relatives’ deaths are exposed to
scrutiny. Without their participation in the
process it is doubtful that many issues of
concern surrounding contentious deaths
would be explored.

But there are huge obstacles in the
way of families effectively participating
in these inquests as required by article 2 of
the Human Rights Act 1998, not least the
continued problems with access to public
funding for legal representation. In 2007
the Government rejected outright a recom-

INQUEST has proposed a properly resourced independent overarching standing commission on custodial deaths with statutory powers to address the complexity and breadth of issues that arise. We are currently working on the proposal in more detail. The idea has sparked interest and support from a wide range of policy makers and practitioners. In the concluding remarks of the report of the Zahid Mubarek Inquiry, Mr Justice Keith commented: “The death of Zahid Mubarek was just one of the many deaths in custody which occur every year [...] there are lessons to be learned from every death in prison. That is why bodies such as INQUEST, which provides legal advice and support to the friends and families of those who die in custody, have been pressing for a standing commission on deaths in custody.” During the parliamentary Joint Committee on Human Rights Inquiry into deaths in custody (2003-2004), the then chair Baroness Jean Corston, also expressed interest in exploring the proposal further. Their principal conclusion was that there was a need for “a central forum to address the significant problem of deaths in custody” and that a permanent ‘cross-departmental expert task force on deaths in custody’ should be established.

A standing commission on custodial deaths could:
- bring together the experiences from the separate investigation and inspection bodies where shared features of the deaths go beyond the remit of specific government departments, state and custodial agencies;
- identify key issues and problems and monitor the outcomes and progress of investigation and inquest findings;
- look at serious incidents of self-harm or near deaths in custody where there is a need to review and identify action to be taken to prevent similar incidents;
- develop policy and research, disseminate findings where appropriate and encourage collaborative working with best practice established in one institution being promoted in the other institutions;
- act as a check and balance on the investigation process; to reduce the number of custodial deaths; to improve the treatment and care of those within the institutions where the deaths occur; and to the treatment of bereaved people, there has never been a greater need for our service but at the same time never greater pressure on our limited resources. Sadly despite our high profile and our ability to influence, this is not matched by an ability to attract funds and your support is of vital importance to the organisation. We would urge everyone who supports our work to find a way to demonstrate that support by: becoming a regular financial supporter of INQUEST; making a donation; joining the INQUEST Lawyers Group; taking out a subscription to our journal Inquest Law; or all four.

Helen Shaw is a Co-Director of INQUEST. See: www.inquest.org.uk

In 2007 INQUEST published Unlocking the Truth: families’ experiences of investigation of deaths in custody, that gives voice to bereaved families in their own words and argues that the current investigation and inquest system is still insufficiently resourced and is failing to perform its preventative function to reduce deaths in custody. It makes 80 recommendations for changes to improve accountability and learn from the experience of bereaved families.

In April 2008 INQUEST published another report, Dying on the Inside – examining women’s deaths in prison, which adds to the body of work that gives voice to bereaved families and argues for fundamental reform of the criminal justice system in relation to the treatment of women.

Both books (and other publications) are available from INQUEST, see www.inquest.org.uk for more details.
A testament to the power of song...

A Proper State
Leon Rosselson (CD)
www.leonrosselson.co.uk/records.html

Until two Court of Appeal rulings in the week before Leon Rosselson released his latest CD, A Proper State, possessing it might have led to prosecution under the Terrorism Act. On Armistice Day last year, he stood in the lashing rain outside the Trident base at Faslane, near Glasgow, with a small group of protestors against the obscenity of our nuclear ‘deterrent’. ‘It was the singing that kept our spirits up,’ he says, ‘The power of song’. And in Faslane 365 (celebrating the year-long non-violent blockade of the base) he exposes the insane paradox of deterrence (see lyrics above).

In these paranoid times, it isn’t hard to imagine some gung-ho prosecutor deciding this was an incitement to RPG-toting terrorists everywhere. Fortunately, the Court of Appeal in R v K (The Times 18 February 2008), has at last laid down that the prosecutor must now prove criminal intent, not just possession, before a person can be convicted for possessing ‘a document or record likely to be of use to a person committing or preparing an act of terrorism’. Leon has never been afraid of controversy. I remember having dinner with him and his wife Rina 30 years ago when, at the end of the meal, he got up from the table and went to the piano, saying: ‘I’m writing this song, do you think I can get away with it?’. Stand up for Judas was a delicious shock at the time and, together with The World Turned Upside Down, has become a favourite with his polit-folk audiences worldwide.

The songs on A Proper State, like those throughout his half-century of singing and writing, obstinately defy category. Conversation on a Mobile is a wry commentary on our increased means of communicating and our decreasing powers to communicate. Barney’s Epic Homer – no, nothing to do with purple dinosaurs but a joyous paean to anarcho-misfits everywhere – is back again, paired with Barney’s Got a Job Now, which sees our hero rise again to turn the world of superstore consumerism upside down.

The title track of A Proper State excoriates in classic Rosselson style the bread and circus world of celebrity-obsession, fashion-fetishism and the ‘heart-shaped emptiness’ of liposuction and botoxification. In similar vein, See Life’s Road Before You revisits themes on the soullessness of the ambitions we are taught to think of as proper in this proper state.

Leon’s sardonic pre-postscript to his own life, When They Ask Me [if I want to be buried or cremated], casts a lyrical-satirical eye on death, whose complete antithesis, Like Love, is one of the sweetest simile-sequences imaginable for that indefinable, yet often over-defined, human condition.

The Third Intifada is appropriately subtitled: ‘A prediction. Although in one way or another, it has already happened, many times over’. A crowd of unarmed protestors “walked to the Wall in their thousands” demanding justice and freedom: ‘Said the General, You’ve had your last warning. This is our land, they said. The soldiers’ hands gripped their rifles The gunships buzzed overhead They said, Do you think you can kill us all? The General said, Why not? A woman screamed out to the heavens When they fired the first shot. The Minister of Propaganda Alerted the BBC Terrorists tried to breach the fence And attack our troops, said she. A hostile mob assembled Where civilians aren’t allowed And gangs of armed militants Hid themselves in the crowd Of course, any civilian casualties Are a matter of great regret But we have the right to defend ourselves When our soldiers are under threat.’

The Ghost of Georges Brassens is a tribute in the form of a conversation between Leon and his hero. It celebrates not only the great man himself but a society where song is valued for its unique contribution to culture.

As the liner notes point out: ‘Over here, on the other hand, it is valued mainly for its salability (he says bitterly)’. Rosselson wrote the final track, The Power of Song, for the Sheffield Socialist Choir’s 20th anniversary. It underscores the timeless power of song and the timeless nature of the struggle for justice and humanity, coupling a capella plainchant with polyphonic warmth as the words take us from Mother Jones’s use of the power of song to free jailed miners’ wives at the beginning of the last century, to the freedom songs of Soweto and on to the Greenham Common women in 1982. ‘They had nothing but their voices but their voices made them strong / Turned despair into defiance and defiance into song.’

Myself, I would have called the CD The Power of Song but then, perhaps Leon didn’t want to steal the title from Jim Brown’s film about Pete Seeger. For me, Leon Rosselson has always been our very own Pete Seeger – and then some. If you have difficulty, as I did, in finding it in mainstream stores, A Proper State and other Rosselson Songs can be purchased direct from http://www.leonrosselson.co.uk/records.html, where you can also find details of upcoming gigs. I hope to see you there.

Richard Harvey

Leon Rosselson at Faslane
If you would like to join or renew your membership of the Haldane Society, which includes subscription to *Socialist Lawyer* for a year, please fill out the form below and forward with the appropriate membership fee.

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Haldane Society of Socialist Lawyers
Human Rights Lectures 2008

Wednesday 23rd April 2008:
Universal jurisdiction: holding war criminals to account
- Phil Shiner, Public Interest Lawyers, solicitor for victims of war and occupation in Iraq, including the Baha Mousa, Al Skeini and Gordon Gentle families
- Bill Bowring, Professor of International Law

Wednesday 28th May 2008:
Human Rights Act: limitation or liberation?
- Gareth Peirce, solicitor
- Keir Starmer QC

Venue: Room SG01, College of Law, 14 Store St, London WC2 (nearest tube Goodge Street)
6.30pm – 8.30pm
Entrance £10 for legal practitioners, free to students, trainees, unemployed, etc. CPD points available.

Further information: www.haldane.org