Socialist Lawyer

Magazine of the Haldane Society of Socialist Lawyers ■ *Number* **37** ● October 2003 **£2.50**

Iraq: war and occupation

Rule of law or rule by power?

Phil Shiner asks: can there be accountability for an illegal war? **Louise Christian** on Guantanamo Bay **INQUEST** Interview **Paul Troop**: the Israeli wall

Public Meeting
19th November 7pm
Conway Hall
see p25

Haldane Society of Socialist Lawyers
25a Red Lion Square, Conway Hall,
London WC1R 4RL Tel: 020 7242 2897

The Haldane Society was founded in 1930. It is an organisation which provides a forum for the discussion and analysis of law and the legal system both nationally and internationally, from a socialist perspective. It is independent of any political party. Its membership consists of individuals who are lawyers, academics or students and legal workers, and it also has trade union and labour movement affiliates.

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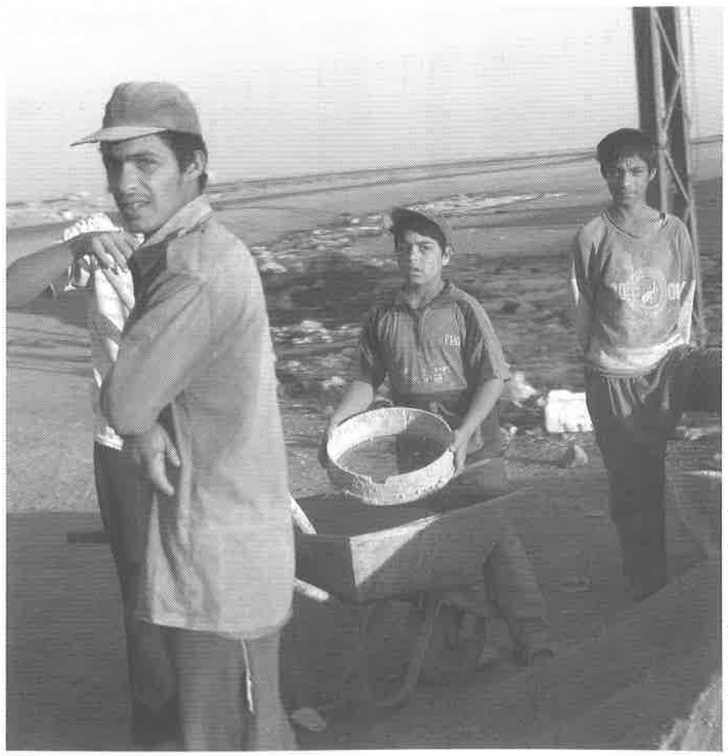
Number 37 *October 2003* ISBN No 09 54 3635



Picture: Jess Hurd / reportdigital.co.uk

Editorial team: **Catrin Lewis, Claire Bostock, Monika Pirani, Ashok Akanani, Rebekah Wilson, Dominic Teagle & Andy Eaton** *Production editor:* **Andy Smith**
Printed by **East End Offset, London E3** *Cover picture:* **Jess Hurd**

All change, but nothing changes

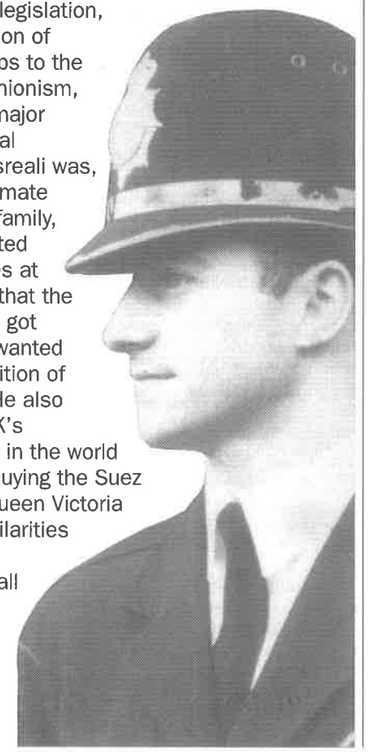
Can it really be that memories are so short? As we went to press, it seemed that a former Home Secretary with more than 'something of the night about him' was almost certain to be the new leader of the Conservatives. During his time as a member of Government, Michael Howard QC scared more than a few people. He made his name with his role in the ill-fated poll tax, oversaw a tranche of anti-union legislation and more, but it was his tenure as one of the most illiberal Home Secretaries of the 20th Century (and that's saying something) that has marked his political career so far. He also personally contributed to the victory of the Blair Rich Project in 1997. Who will ever forget Jeremy Paxman asking "Did you threaten to overrule him?" fourteen times during the run-up to the election?

Rather than merely celebrating the fact that the Tories are a spent force, it is worth considering how far to the right our whole mainstream political process has gone. Thomas Kielinger, writing about the deposing of Iain Duncan Smith in the German daily *Die Welt,* sums it up perfectly. He suggests that, "what counts is not ideology, but competence... That's where the Tories in the end drew the short straw because since 1994 Tony Blair and Gordon Brown have incorporated the lessons of the Thatcher revolution into the once socialist Labour party... The Tories became the victims of their own success – how could they oppose policies that came across like a facsimile of their own agenda."

Michael Howard's 'achievements' as Home Secretary are being increasingly overshadowed by those of David Blunkett, who is a true horror story. Who could have imagined that a Labour Government would oversee some of the biggest incursions into fundamental rights in the last 100 years? From attacks on the criminal justice system, through a systematic assault on asylum seekers, through to the criminalisation of whole sections of the community through vicious anti-terrorism legislation, it is just plain scary.

At the same time there are many important things that the Home Office has singularly failed to deal with. One such issue is racism in the police. Perhaps one of the most shocking things about the recent BBC programme on racism in the police force, *The Secret Policeman*, was how little shocked so many people were that there is such ingrained racism within the force. It showed some parts of the police looking like a recruiting ground for the BNP. The police force have been consistently criticised for the number of deaths in custody of black men and the programme disturbingly gave some indications about some of the attitudes that lie at the heart of many forces up and down the country. This comes at the same time as the final vindication of Superintendent Ali Dizaei after a campaign against him that can only be described as a witch-hunt. It is of real concern that there appears to be such ignorance on the question of diversity and anti-discrimination, even when a great deal of time and money is now spent on trying to address them. Is respect and dignity really that hard to understand?

Which brings us back to Michael Howard. If he were to take up residence at 10 Downing Street – highly unlikely as it is – he would become only the second Jewish Prime Minister, and it is worth considering the record of the first. Benjamin Disraeli was, like Howard, a Conservative, but unlike Howard oversaw a surprising number of relatively progressive pieces of legislation, including the legalisation of picketing, the first steps to the legalisation of trade unionism, the Factory Acts and major steps towards universal suffrage. However, Disreali was, in essence, a consummate politician, from a rich family, who implemented limited philanthropic measures at home, while ensuring that the monarchy and the rich got essentially what they wanted and retained their position of privilege and wealth. He also made sure that the UK's imperialist adventures in the world went forward apace, buying the Suez Canal and declaring Queen Victoria Empress of India. Similarities with our current Prime Minister are there for all to see. ■



Secret policeman: BBC reporter Mark Daly joined the force undercover

A right hash

The police hate the idea of youngsters being free to smoke cannabis.

Picture: Jess Hurd / reportdigital.co.uk

When David Blunkett announced that they were downgrading Cannabis from a Class B to Class C drug my initial reaction was one of surprise and pleasure. Here amongst the raft of attacks on civil liberties was finally a concession to an appeal from the left. Maybe the drug could have been legalised altogether but at least the police would no longer be able to arrest young black men for possession of the drug. Alan Travis of *The Guardian* wrote two years ago when the announcement was made, 'The police lose the power to arrest the 90,000 people a year who are currently charged with possession offences... Suspicion of cannabis possession will no longer be grounds for police stop and search, a Home Office spokesman said."

Since that announcement in October 2001 the government have delayed and put the proposal back for two years. Then they started to retract. A further announcement was made. Now there would only be a 'presumption' against arrest 'except where public order is at risk or where children are vulnerable'. It is laughable to imagine how the drug could cause a risk to public order and the announcement also failed to recognise that 40% of British schoolchildren have tried the drug.

The reason for the change is that the guidance for implementation of this new law (like everything else that this Home Secretary does) is led entirely by the Association of Chief Police Officers (ACPO). The Government in making this bill have not considered the public but only the police. Sir John Stevens, the Commissioner, welcomed the bill to free up time for his officers. ACPO also wanted to retain the power to arrest, and harass. The police hate the idea of youth being free to smoke and suggested it be an offence to blow smoke in an officers face. This has been extended under the new ACPO guidance and the police will be able to arrest for 'aggravating factors, such as smoking in public; for repeat offenders; and where there is a fear of public disorder. Juveniles will be dealt with under the Crime and Disorder Act 1998 and will be arrested and given a formal warning, which seems more discriminatory against juveniles.

The obvious conclusion from this guidance is that possession of a Class C drug must become an arrestable offence and so that provision is contained in the Criminal Justice Bill currently under debate. The upshot is that when considering the evidence for the reason to arrest our client, we shall still read in the officer's notebooks the hackneyed phrase 'I smelt Cannabis'.

This law will be worse than before as the public will believe it is legal and the police will retain more sophisticated discretion. We know that the rate of police stops against black people in comparison to white people is increasing. The McPherson Inquiry showed that stop and searches for drugs increased threefold between 1990 to 1997. This law will not stop the trend.

● **Matt Foot**

July

1 The European Court of Human Rights in Strasbourg rule that the UK breached Patrick Finucane's right to life, in failing to carry out an effective inquiry into allegations that the security services colluded in the Belfast solicitor's killing 14 years ago.

3 Of 1,500 public bodies that responded to a survey by the Commission for Racial Equality (CRE), a third have yet to implement new race equality obligations such as workforce representation, service user and employee satisfaction, with the NHS the worst offender.

15 In three separate consultation documents, Lord Falconer sets out a new judicial appointments system based on openness and transparency. It will be set up by an independent panel comprising the department's permanent secretary, a senior judge, a senior executive from outside the law and an independent assessor. Five members will be judges, five lawyers and five lay members.

Safety and justice?

In June this year the government released its much-heralded paper detailing its proposals to deal with domestic violence. It never ceases to surprise that in 2003 such an issue still has to be 'heralded" and requires a specific response. Even *The Sun* had to remind their readers that it's not okay to physically abuse those in your domestic situation, but followed up with a favourite pastime of the tabloids by naming and shaming. Offenҫes against the person (such as common assault, ABH and GBH) are a crime whoever they are committed against but, arguably, in cases of domestic violence those crimes are worse. They involve a fundamental breach of trust.

A crime of dishonesty involving a breach of trust immediately attracts a longer and harsher sentence. Not so with domestic violence so all credit to the government in recognising there has been a pitiful response from those with the authority to prevent domestic violence.

The government are right to tackle the issue head on – the alarming number of women killed by their partners testifies to that alone. However the proposals make for sad reading. The main thrust is that further criminalisation is the answer. Harsher sentences and more prosecutions. Alarmingly, the cost analysis at appendix D states that it will be cheaper to push more work the way of the criminal courts rather than work on improving access to civil courts, injunctions and enforcement of breaches of civil orders. Rather than helping victims of domestic violence this approach will only result in fewer victims seeking help.

Prison doesn't work. Working as a volunteer for a women's legal advice line, an alarming number of calls are from women who have called the police and then don't want to proceed with charges. This is not always because of fear. In the majority of cases it is due to economic and family considerations. Fathers who had been contributing financially would find themselves out of a job and then potentially unemployable with their convictions for violence. Most people just want the violence to stop. Judges must also be called to account for lower sentences when the victim involved is a partner or relative. But will prison or criminal convictions really act as a deterrent and prevent further domestic violence?

In New Zealand offenders are sentenced to domestic violence intervention programmes – if they complete them they don't have to go to prison. In Washington DC, perpetrators are able to enter a guilty plea, sentence is adjourned, if they then complete a similar anger management course the plea is withdrawn and so there is no conviction. The victim, current and future (no register of offenders is going to stop people from choosing who they go out with), is hopefully saved from similar behaviour in the future. There is not enough data to assess the impact of these programmes at the moment. But surely they are likely to be more effective than locking someone up and making them more angry and hopeless.

There are many reasons for not wanting to go to the police. They include previously negative experiences; "it's only a domestic affair we won't intervene", or racism. Sometimes clients are unsure of their immigration status and would not dream of going to the police. Others simply feel uncomfortable about 'grassing' on someone and potentially being seen to have caused their imprisonment.

In contrast, however, people have felt able to access the civil courts and obtain an injunction to prevent further abuse. The respondents to those applications often cease their behaviour, they are often embarrassed in a way that they aren't on being 'nicked by the police'.

Sadly enforcement of these orders is rather like a lottery and to really be effective the government needs to work on better enforcement mechanisms. Their sentencing powers should be widened to allow for attendance at domestic violence intervention programmes. Judges require clearer and more sensitive training about the issues surrounding domestic violence. Breaches of injunctions should be treated with the severity they require. Domestic violence can not be seen as a low priority.

Any new legislation will only be as good as those who enforce it. More effective enforcement of current measures coupled with wider and more sensitive sentencing powers in the courts is what is required. If the only option is harsher and longer terms of imprisonment the worry is that people who have previously had the courage to go to the courts for assistance to 'make it stop' will be utterly deterred.

● **Rebekah Wilson, volunteer at Rights of Women**

Travellers suffer more 'humbug'

Since they first arrived in Britain in the fifteenth and sixteenth centuries Gypsies and Travellers have faced persecution and discrimination. Obviously things have moved on somewhat since the time when to be a Gypsy in itself was a capital offence, but Travellers still find themselves in a position where, for example, young Johnny Delaney could be recently beaten to death in Ellesmere Port apparently merely for *being* a Traveller.

After the closure of commons and the progressive loss of or closing off of traditional stopping places, the government finally acted by introducing the Caravan Sites Act 1968 (via a private members' bill sponsored by Eric Lubbock, MP – now Lord Avebury and still at the

17 A football fan who used the word "Paki" in a terrace chant was banned from all Premiership and Nationwide League grounds for three years. The fan had been acquitted of racist chanting by a magistrate in January. But the CPS appealed and two High Court judges ordered the fan to be convicted and sent the case back to the Magistrates Court. He was also fined and ordered to pay costs.

18 Children's charities warn that Government proposals to tackle anti-social behaviour amount to a nationwide curfew of children under 16 that would breach human rights law. They argue the Anti-Social Behaviour Bill, which received its second reading in the House of Lords, would alienate young people from their community and make them the scapegoats for local disputes and unrest.

forefront of campaigns for Travellers) which made it a duty on local authorities to provide sites for Travellers. Despite the failure of many councils to comply with this duty, a basic network of sites was beginning to take shape when the then Conservative Government repealed the duty in the Criminal Justice and Public Order Act 1994. Their ostensible reasoning was that, from now on, Travellers should provide their own sites by buying land and obtaining planning permission. However, since 1994, it has remained enormously difficult for Travellers to get permission for a site. It is estimated that 80% of applications from Travellers are refused by the local planning authority as compared with 20% of refusals for settled people. The 1994 Act also strengthened police powers of eviction which had first been put in place in 1986. When police powers were first introduced, trespass was made a potentially criminal offence for the first time in the UK, thus began the process of defining the very way of life of Travellers as a 'problem'.

The 1994 Act powers (contained within sections 61 & 62 of the Act) allowed the police to move on Travellers from a specific piece of land if the landowner had taken reasonable steps beforehand to ask them to leave and one of three criteria were met (damage to land; or, threatening or abusive behaviour; or the presence of six or more vehicles). Since three caravans and three towing vehicles (for example) amounted to six vehicles, this criteria in itself is usually sufficient to cover most encampments.

The Travellers' Advice Team was set up in 1995 as a direct response to the disastrous effect of the 1994 Act on Travellers. On the one hand, those Travellers who could afford land found it extraordinarily difficult to get permission for their site. On the other hand, Travellers who had no authorised place were hounded from pillar to post by the use of the new eviction powers (section 77 was the relevant provision for local authorities). Our experience of the use of the police powers is regularly negative. The powers, when used 'correctly', are 'draconic' (not my words but those of Lord Justice Sedley). However we meet all the time with cases where the police appear to be using the powers unlawfully. For example by not ensuring that the landowner has given a proper (or any) notice to leave or by failing to have regard to the guidance on the use of the powers from the Association of Chief Police Officers, which states that welfare considerations must be taken into account. It may surprise you to know that we often end up strongly advising our clients to leave even when we think the law is not being properly applied by the police. This is because very short deadlines to leave are given by the police, ranging from "now" (in many cases) to two hours. We face almost impossible hurdles in attempting to obtain an injunction preventing the eviction within that timespan. Therefore, unless we can persuade the police to back down by means of negotiation, our clients are faced with the possibility of arrest and impoundment of their homes, unless they leave by the deadline. Out of hundreds of cases, I can only recall two where the Travellers stood their ground (and were duly arrested).

An attempt to have the police powers declared incompatible within the terms of the Human Rights Act 1998 in themselves was unsuccessful because, ultimately, the police must bring the matter before a magistrates' court to confirm the eviction. In my opinion, this is an entirely unrealistic decision that takes no account of the position on the ground. If you could get a court hearing to air your grievances but faced arrest and loss of your home before you could get there, what would you do?

In 1994 the then Labour opposition completely opposed the Tory proposals. Indeed Lord Irvine stated that the Tory proposals were 'humbug', hiding their real desire: to destroy their way of life. Despite being in power since 1997, Labour has continued the 'humbug'. Recently the government has professed the importance of making the link between unauthorised encampments and the provision of sites.

Now they have taken the first tentative step forward in that direction and potentially worsened an already catastrophic situation. Just to add injury to insult, the government have tacked on their new police eviction powers to the Anti-Social Behaviour Bill. At least this brings their philosophical position into the open – apparently being a nomad is *per se* anti-social.

Under the new proposals all the previous criteria are thrown out of the window and a new central criteria is introduced – if the police can direct you to an available pitch on a 'relevant' caravan site (run by a local authority or registered social landlord such as a housing association), then, unless you go there, you will be effectively banned from all land within the area of that local authority for the next three months. It will be an offence to stop on land in that local authority area for that period unless you go to the indicated caravan site.

How on earth will this work? Understandably local authorities usually have policies for the allocation of the much sought after vacancies on official sites. Are these policies to be overridden to the detriment of all those on the waiting list? How are the police going to know about vacancies?

The second, and much more devastating question is, how will Travellers challenge the incorrect use of this sweeping power? What if, for example, there is not actually a pitch available or that pitches offered are totally unsuitable (e.g. by splitting up a family by directing them to different sites)? Given the very same short deadlines mentioned above the Travellers will face the same dilemma of risking arrest and loss of their vehicles in order to get as far as putting their case to a court. In our experience they will not do this. Alternatively, they face an effective ban from that local authority area for three months thus potentially destroying the often laborious work surrounding getting the children in local schools, getting linked in with local healthcare services etc.

Travellers, of all the ethnic minority communities in Britain, have the lowest life expectancy, the highest infant mortality rate and the worst educational performance. Now the Labour Government threaten to worsen an already disastrous situation… and provide no realistic legal redress for the victims. I think our clients might like to dig a big grave… and bury the Human Rights Act in it.

● **Chris Johnson, Community Law Partnership**

Demonstrators at September's arms fair – the police used anti-terrorist legislation to arrest, stop and search protesters.

Picture: Jess Hurd / reportdigital.co.uk

July

21 The National Union of Teachers announces a legal challenge to the government over rules which will allow faith schools to discriminate against gay teachers. The NUT seeks a judicial review of regulations implementing an EU directive which the union believes breaches European law and the human rights act.

29 The former MI5 officer David Shayler, loses an appeal against his conviction under the Official Secrets Act for passing classified information and documents to the press. He argued that his trial at the Old Bailey, where he defended himself, was unfair because the judge restricted his questioning of MI5 officers. He also had to disclose in advance questions he planned to ask witnesses in cross-examination.

August

5 An Indonesian army general is found guilty of crimes against humanity during the East Timor independence referendum in 1999 and jailed for three years , ending a series of court cases which rights groups had largely regarded as a whitewash. Major General Adam Damiri was regional commander at the time of the violence, and is the most senior general to be tried.

8 The government announces that it would the families of those killed by the Omagh bomb give them the remaining £800,000 they need to sue the five men they believe masterminded the atrocity.

8 TUC called for a legal maximum for workplace temperatures. Current legislation sets a minimum temperature below which no-one should have to work. But there is no equivalent for when it gets too hot.

Feltham inquiry

Five Law Lords have ruled that Home Secretary David Blunkett must set up an independent public inquiry into the death of Zahid Mubarek at the hands of a racist thug in their shared prison cell.

Blunkett had breached Zahid's right to life by refusing to order an inquiry. The decision comes after a lengthy legal battle by the Mubarek family. The 19-year-old, a first-time prisoner serving three months at Feltham young offender institution in west London, was fatally injured by skinhead Robert Stewart on 21st March 2000, the day he was to be released.

A prison officer had earlier warned colleagues that Stewart, also 19, who had a cross and "RIP" tattooed on his forehead and a Ku Klux Klan sign on his cell notice board, was a "very dangerous individual". After being placed in a cell with Mubarek, Stewart battered the teenager into a coma with a wooden table leg. He died of brain damage a week later.

After the attack Stewart drew a large swastika on his cell wall with the heel of his rubber shoe. Above it he wrote "Just killed me padmate", and below "RIP".

Stewart, who was later convicted of Mubarek's murder, had a long record of previous offences, many apparently racially motivated, and had been implicated in violence, damage to prison property, escape attempts, hostage holding and threats to other inmates and prison staff while in custody.

After his death Zahid's parents asked the Home Office to hold a public inquiry, but were refused. A High Court judge ruled that the refusal was a breach of the European Convention on Human Rights, which guarantees the right to life, but this decision was later overturned by three Court of Appeal judges, headed by Lord Woolf, the Lord Chief Justice.

The High Court's verdict was restored on 15th October when the Law Lords ruled unanimously that the State was under a duty not only to ensure a prisoner's right to life was protected, but also to investigate publicly the death of an inmate due to failures of the prison system.

The family's solicitor, Dan Rubinstein, said: "Just as the death of Stephen Lawrence proved a wake-up call for the police, we hope Zahid's death will prove to be a wake-up call for the Prison Service.

We hope for a radical re-examination of Prison Service policies and practices. We hope that the public inquiry will get the answers the family are still waiting for."

The prison's director general apologised to the dead youth's parents. An internal inquiry identified shortcomings at Feltham and made 26 recommendations for change. The Commission for Racial Equality held its own inquiry into the incident, largely in private, and made a finding of race discrimination against the Prison Service.

● **Ashok Akanani**

Human rights and embyros

Natalie Evans and Lorraine Hadley had undergone in vitro fertilization (IVF) treatment with their respective partners from whom each subsequently separated and with whom neither had any continuing relationship. In each case there remained in existence embryos created from the gametes of each claimant and her former partner. The former partners of the claimants had withdrawn their consent to the use of the embryos in IVF treatment. The consequences of this situation were devastating for both claimants but in particular for Natalie Evans who, as a young cancer victim, was unable to produce any further embryos.

The Human Fertilisation and Embryology Act 1990 (the Act) regulates certain forms of fertility treatment, including IVF, the storage of gametes, and the creation, storage and use of human embryos outside the body for treatment services or research. The two most important principles under the Act are: the welfare of any children born by treatment under its provisions; and the requirement of consent from those participating in the treatment under its provisions. Schedule 3 governs storage of and consent to the use of embryos. Under this, embryos must be destroyed unless both parties consent to their continued storage and use. Consent can be withdrawn at any time until "use."

This case was the first time the consent provisions under the Act had been subject to a full-blown HRA challenge. Relying on Articles 2, 8, 12 and 14 the claimants argued that Schedule 3 failed to accord the embryos a right to life, constituted an unnecessary interference with their respect for private and/or family life, failed to secure their right to found a family and permitted discrimination.

Relying on Article 2, the claimants argued that although an embryo is not a human life, it has a sufficiently "special" status to attract a "qualified" right to life. Two aspects of that limited, qualified right were: to continue in being whilst one or other of the gamete providers wished; and to be available for implantation if its mother wished. The Judge rejected this argument. Although there are no direct authorities on the point relating to embryos, there are authorities that state that a foetus, at whatever stage of its development, has no existence independent of its mother (Re F (in utero) [1988] Fam. 122 and Paton v UK (1980) 3 EHRR 408). The Judge concluded that if a foetus has no right to life an embryo could have no such right and that Article 2 was accordingly not engaged.

Under Article 8, the claimants maintained that the Act interfered with their right to privacy and family life. The Judge found that Article 8 was engaged as a result of the claimants having participated in the consensual process of IVF treatment, including the consensual creation and storage of the embryos. He also found that Schedule 3 of the Act, which permitted the claimants' former partners to refuse to allow them access to the embryos for the purpose of transfer into them, amounted to an interference with their Article 8 rights. However, the Judge ruled that the interference was necessary to protect the rights of all four gamete providers and proportionate. He states, at paragraph 249, "In my judgment, this is pre-eminently an area in which it is for Parliament to legislate, and in relation to which a generous margin of appreciation is appropriate. I am satisfied that a regime of treatment based on the twin pillars of consent and the interests of the unborn child is an entirely rational and appropriate foundation for the legislation, the more so when the Act itself is the product of a report of the quality of Warnock, followed by extensive consultation, a White Paper and careful Parliamentary scrutiny."

The Judge ruled that Article 12, the right to marry and found a family was not engaged; alternatively, for the same reasons given in relation to Article 8, that it was not breached.

As regards Article 14, the discrimination alleged was not addressed to any disproportionate enjoyment by men (as against women) of their rights and freedoms set out in the Convention. Using Article 14, the claimants set out to compare their position with that of "healthy" women who conceive naturally and who enjoy Convention rights which protect their embryos and themselves. The rights identified were those under Articles 3, 5, 8 and 12. The claimants argued that they suffered discrimination in that their position compared unfavourably with that of healthy women who were able to conceive naturally and therefore protect their own rights and those of their embryos. They stated that there are real differences between women who can conceive naturally and those who cannot; the withdrawal of consent in the former group, healthy women, post conception would be impossible whereas Parliament would allow withdrawal of consent in the latter group, IVF women. The women claimed that this could not be justified whatever the public policy arguments. The Judge did not agree with this contention and he found that there was no true analogy between the complaint and the chosen comparator. A woman who has fallen pregnant naturally is in a different position to an IVF patient awaiting embryo implantation, the Judge claimed, and that accordingly there was no breach of Article 14.

The Judge found that both Ms Evans and her former partner had embarked on the IVF treatment in good faith on the basis that their relationship would endure. However, it did not. In the changed circumstances of separation the Judge ruled "it would be quite inequitable not to allow either party to change their mind and withdraw consent to treatment."

Lorraine Hadley challenged the word "use" in Schedule 3 of the Act by trying to persuade the Court that it should not be given a literal interpretation. She claimed that the word was not restricted to the act of implanting the embryos but also included other aspects of the process, for instance, selection and examination, and as a result her partner was not in a position to withdraw his consent. The Judge found that the word "use" can only mean the implanting of the embryo into the female patient undergoing IVF.

As in many human tragedies involving disputes between individuals, in this case the tragedy being that the relationship between each women and her former partner had deteriorated to such a position that both men felt unable to accept the women's promises that if they were allowed to continue the IVF treatment and it proved to be successful, they would not seek support, emotional or financial, from them, the Courts are called upon to resolve the issues.

● **Claire Bostock**

27th September: 100,000 march through London against Bush and Blair's disastrous war and occupation in Iraq

Picture: Jess Hurd / reportdigital.co.uk

Lords help us

Things have come to a pretty pass when, under a Labour government, the fight against a new attack on trade union rights is left to a small Old Labour band in the House of Lords.

The attack stems from the government's victory over the Fire Brigades Union last winter. Instead of savouring its victory and leaving the matter there, the government insisted on proceeding with a fire services bill that pretends not to limit the firefighters' right to strike, but threatens precisely that.

The bill is a sloppy piece of work whose gaps have been consistently exposed by three trade union musketeers: Lord McCarthy, Baroness Turner and Lord Wedderburn. Government ministers in the Lords have been consistently irritated by the determined tactics of the musketeers, who insist on simple answers to simple questions and carry on asking those questions late into the night.

The latest contest, ignored by the parliamentary press lobby since it involves fundamental union liberties, was on Monday 6th October. Lord Wedderburn moved an amendment to ensure that the firefighters' right to strike should not be hampered by a distinction made in 1979 by the court of appeal. It distinguished between industrial action backed by a ballot that induces a breach of contract, where the union is protected from being sued, and industrial action backed by a ballot that induces a breach of statutory duty and is not so protected.

Since the bill creates new statutory duties for firefighters and fire authorities, surely it should protect industrial action supported by a ballot that induces a breach of statutory duty. The point is relatively simple and, for the union, crucial. Yet it seems beyond the intellectual capacity of ministers in the Lords, notably Lord Bassam.

Opposing the Wedderburn amendment, Bassam told their lordships: "This would single out the firefighters to be treated differently from other groups of workers, which in our view would be equally unfair". Lord Wedderburn pointed out that it was the bill that was treating firefighters differently, by imposing on their union an extra liability. Bassam's objection, he concluded, "is all claptrap which would not pass an entrance examination, let alone a first year paper". Bassam had no reply.

Either ministers do not understand what Wedderburn called "the simplest possible point", or, more probably, the government has plans to allow unions to be sued for public sector strikes. Either way, the three musketeers plan to divide the Lords on the bill's third reading. Labour peers need to be there to defend the most basic freedoms at least as energetically as the Labour and Liberal MPs who created the unions' immunities nearly a hundred years ago.

● **Paul Foot**

First published in *The Guardian*

August

25 Tommy Sheridan of the Scottish Socialist Party sent to jail for seven days after he refused to pay a fine imposed for his role in an anti-Trident demonstration at Faslane naval base, during a protest in February 2002 .

September

12 The Home Office announces that phone companies and internet service providers will be asked to stockpile customer records for up to 12 months so that they can be accessed by law enforcement and other public bodies,despite protests.

12 Demonstrators against the London arms fair were given permission for a full high court hearing into the legality of the police's use of anti-terrorist legislation to arrest and stop and search protesters. The application for judicial review was made by Liberty. At least two of the 144 people arrested were detained under the Terrorism Act 2000. David Blunkett and London mayor Ken Livingstone asked Scotland Yard to explain why public order acts were not used instead.

22 The Annual Report from the Disability Rights Commission (DRC) claims gaps in UK law are providing a "licence to discriminate" against disabled people and called for changes in the law to allow disabled people to challenge discrimination they faced on public transport and if they had certain medical conditions, including HIV and cancer.

29 Patricia Hewitt, industry secretary, promises new laws to make it legal to expel BNP activists from trade unions. The crackdown on race hate will be included in a new employment act, expected in the Queen's speech in November. She also promised to look again at whether the law should be changed to prevent employers from sacking striking workers, but refused to give a binding commitment.

News&Comment

Picture: Jess Hurd / reportdigital.co.uk

Twisted, spun and manipulated

Lord Hutton is now left with over a thousand pages of documents and 24 days of oral testimony to consider as he draws his final conclusions into the circumstances surrounding the death of Dr Kelly. At the heart of the inquiry lay two overriding questions. Firstly, to what extent was Andrew Gilligan's claim, supposedly based on conversations with Dr Kelly, that the Government actively intervened in the drafting of September dossier in order to 'sex it up', true. Secondly, who was responsible for the treatment of Dr Kelly after he made himself known as the probable source of Gilligan's stories and to what extent did this treatment lead him to take his own life.

Throughout the inquiry Downing Street stated that final responsibility for the content of the dossier lay with the joint intelligence committee (JIC) a position that was upheld by the committee's chair John Scarlett. Alastair Campbell told the inquiry that the government did no more than "setting out the facts on Iraq's WMD". Though Godric Smith, Blair's official spokesman, did concede that there was "interface between the intelligence professionals and the presentational professionals" as the dossier went through a number of drafts before its publication. Mr 'A', a civil servant with the Counter-Proliferation Arms Control Department, saw this relationship in slightly different terms when he told the inquiry that "there was a perception that the dossier had been round the houses several times... to try to find a form of words which would strengthen certain political objectives".

The inquiry heard a number of examples of how this search for 'a form of words' saw the dossier changed over a series of drafts in order to sharpen the case for war. Earlier drafts of the document had been entitled 'Iraq's programme for WMD'. The published dossier was called 'Iraq's Weapons of Mass Destruction', a significant shift in emphasis from a 'possible to actual' threat. Similarly an earlier draft's reference that Iraq's programme did not represent a real threat to London was dropped and detail that military bases in Cyprus were in range of Iraq missiles was added to heighten perceived danger to the UK.

Alistair Campbell personally made a number of interventions. The statement that dual use facilities were 'capable of' being used to produce WMDs was deemed to be too weak and 'capable of' was replaced with a more definite 'could'. Similarly, earlier draft assessments over the development of an Iraqi nuclear weapons programme, stated that Iraq were unlikely to be able to develop a nuclear weapon whilst sanctions remained in place and even upon lifting of sanctions the draft claimed, "we assess that Iraq would need at least five years to produce a weapon". Campbell, in a memo to John Scarlett about how the 'nuclear issue' was being handled, suggested that the wording of an earlier assessment of threat be used. In a further memo, Campbell suggested "in these circumstances, the JIC assessed in early 2002 that they could produce nuclear weapons in between one and two years". The final dossier said, "Iraq could produce a nuclear weapon in between one and two years".

One of the key changes in the dossier was made when Jonathan Powell, the prime minister's chief of staff, raised doubts to Campbell and Scarlett concerning the statement that "Saddam is prepared to use chemical and biological weapons if he believes his regime is under threat", so fundamentally undermining the government's justification for a pre-emptive attack. Powell communicated his concerns on 19th September and the paragraph was dropped before final publication five days later.

Central to the Government's dispute with the BBC was Gilligan's assertion on the *Today* programme that Downing Street had inserted the now infamous '45 minute' claim against the wishes of the intelligence services. The prime minister's foreword to the dossier clearly and unambiguously stated that WMD could "be ready to be used within 45 minutes of an order to use them". Geoff Hoon attempted to blame the press for the subsequent conclusion that Baghdad's ability to deploy chemical and biological weapons in 45 minutes applied to strategic weapons rather than battlefield ones. If this was the case then the government made little attempt to challenge this fundamental misunderstanding. Hoon limply argued that there was little point in attempting to change misconceptions, as the press never corrected things anyway!

If Hutton finds that ultimate responsibility for drafting the September dossier lay with the JIC and in light of what we now know about the non-existence of any WMDs in Iraq, there must be some serious concerns about the working practices and methodology of the security services. In the United States, the CIA, after a lengthy Senate investigation, is to be severely criticised by a report into the quality of intelligence gathered by the service on Iraq's weapons programme. No such scrutiny of the workings of the security services exists in this country. Nevertheless the inquiry has cast some rare light on their practices and post-Hutton they should not be allowed to scuttle back under their rocks.

If the government is likely to escape censure for its part in the drafting of the dossier it is unlikely to be so lucky in its subsequent treatment of Dr Kelly and indeed there was considerable disagreement within the government and between Downing Street and Whitehall over who was ultimately responsible.

The Government's reaction to Gilligan's stories was, to quote Downing Street spokesman Tom Kelly, to embark on "a game of chicken" with the BBC over his source. Alastair Campbell revealed, in extracts from his diary, that the initial reaction to Dr Kelly coming forward as the possible source "was to throw the book at him". Campbell related extensive correspondence with Geoff Hoon over how best to deal with Kelly, a version of events strongly at odds with the Defence Secretary's, who claimed that he was only marginally involved in the whole process.

Their initial instincts were tempered by Whitehall calls for restraint out of respect for the fact that Dr Kelly had volunteered himself as the possible source. Indeed Richard Hatfield, the Head of Personnel at the MoD, later told the inquiry that Kelly was not likely to face disciplinary action and was not in breach of the Official Secrets Act. Furthermore Kelly would be invaluable in the war of words with the BBC if he could be persuaded to distance himself from Gilligan's story. This did not stop some elements in Downing Street and Whitehall from smearing Dr Kelly as 'a show off', 'an eccentric' and 'a Walter Mitty character'.

Jonathan Powell, the Downing Street director of communications, revealed that he was concerned that to know the source and not tell the Foreign Affairs Select Committee and so make it public, would smack of a cover up. There was also a general acceptance by all parties, including Kelly himself, that it was only a matter of time before his name entered the public domain. On the very last day of the inquiry Sir Kevin Tebbit, the permanent secretary to the MoD, told Hutton, in contradiction to Blair's own account, that far from being unaware of the naming strategy that exposed Dr Kelly name to the press, the Prime Minister chaired the key meeting where the strategy was finalised. The meeting approved a rather novel parlour game, in which lobby journalists were issued with a question and answer briefing paper giving out more details concerning Dr Kelly's identity. Those clever enough to guess correctly had the name confirmed.

The inquiry is unlikely to find that the Government wilfully mislead the British people over its reasons for war, but rather that it twisted, spun and manipulated the evidence that was available to suit its own ends. This would vindicate the central thrust of Andrew Gilligan's accusation that the September Dossier was to some extent 'sexed up' by Downing Street. It is likely however to suffer greater fallout from its treatment of Dr Kelly. James Dingemans QC, counsel for the inquiry, raised the possibility that the naming process was in fact unlawful and the Government was in breach of its duty of care to Dr Kelly. Furthermore, Dingemans raising the possibility that Dr Kelly's family could institute an action against the government for breach of his Article 8 rights.

Nevertheless the Government should survive Hutton's final report largely intact; Campbell has gone already and only Geoff Hoon's position is likely to be called into question. His version of events are at odds with Downing Street's and the Government is badly in need of a scape-goat. The length of his sabbatical will probably depend on the grace with which he falls on his sword.

The inquiry has been kind to Blair, it has distanced him from the initial anger that followed the announcement of Dr Kelly's death. He was going to show that he did not personally have blood on his hands even if it was going to take a full public inquiry to prove it. Post-Hutton calls for a proper judicial investigation into why we went to war with Iraq are now likely to go unheard. It was inevitable that Hutton would touch upon the Government's preparation and justification for war but equally much was left uncovered. Such an inquiry would not be as kind to Blair as he believes history is going to be.

● **Andy Eaton**

Lawyers or informers?

Family lawyers are now obliged to report their clients for any suspected tax irregularities to the National Criminal Intelligence Service (NCIS) under the Proceeds of Crime Act, which came into force earlier this year. The Act makes it a criminal offence if a person is involved in an arrangement that might facilitate "the acquisition, retention, use or control of criminal property... by any person".

Barristers and solicitors risk committing an offence under the new Act if they fail to make a report to NCIS if they suspect that assets disclosed by a client are the result of tax evasion or benefit fraud. Even if a client has been acquitted in criminal proceedings, a solicitor will still be required to report a client if he or she suspects that family assets may have an improper source. The NCIS will then be able to take civil proceedings, with a reduced burden of proof, and thereby secure the conviction they may have not been able to secure in criminal proceedings.

In a recent family case judgment, Dame Elisabeth Butler Sloss, President of the Family Division, ruled that solicitors were entitled to inform their client or their opponent that a report has been made. She also confirmed that the Act applied to all 'criminal property" whether this involves £10 pounds or one million pounds.

● **Monika Pirani**

October

2 A new law allowing for prosecution for crimes "motivated by sectarian hatred" announced by Northern Ireland secretary, Paul Murphy. The law should be in place by early next year.

13 A Law Society report urges the Government to act urgently to avert a growing crisis in the legal aid system, Nearly one in four offices doing family-law legal aid work dropped out of the scheme between January 2000 and June 2003.

13 Top civil servant at the Ministry of Defence, Sir Kevin Tebbit, tells the Hutton inquiry that the key policy decisions which led to the unmasking of David Kelly were taken at a Downing Street meeting chaired by Tony Blair.

16 Five law lords reject attempt to establish that a right exists under English law to sue for invasion of privacy. They upheld a Court of Appeal decision that a woman should receive no damages for a strip-search while visiting Armley prison.

17 The Government confirms that arms control laws would stop short of regulating the activities of British arms dealers operating abroad, despite a manifesto commitment to extend laws to cover arms dealers "wherever they are located".

17 The BNP sank to third place in a council bye-election in the Lancashire town of Lanehead, losing more than 40% of its vote. The Lib Dems were the winners.

20 Winston Silcott is released from prison after 18 years. His conviction for the murder of PC Blakelock at the Broadwater Farm riots in 1985 was quashed but he remained in jail for a murder, which he claims was self-defence.

24 Home Secretary David Blunkett announces that 15,000 asylum seekers' families, who have been waiting more than three years for a decision, are to be allowed to live and work in Britain.

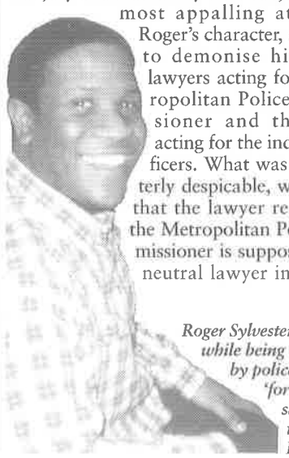
North Londoner Roger Sylvester died in police custody in 1999. This month an inquest jury unanimously returned an unlawful killing verdict. We spoke to the co-directors of campaigning group INQUEST, **Deborah Coles** and **Helen Shaw**

"IT WON'T BRING HIM BACK"

SL: Wasn't it a case of mixed emotions when the verdict came through?

Deborah: Yes. The family felt it was a vindication of what they'd thought all along, that Roger had died as a direct result of the excessive and unlawful force used against him by police officers. But, at the end of the day, nothing is going to bring him back, and it had played such an incredible emotional toll on them over the past four and a half years, that I think it was relief at the justness of the verdict, but also for the first time I think they'd started the grieving process.

They found out that other people, ordinary members of the public, had judged what those officers did to be unlawful. Apart from being a vindication of what they'd believed all along, that jury and that family were subjected to the most appalling attacks on Roger's character, an attempt to demonise him by the lawyers acting for the Metropolitan Police Commissioner and the lawyer acting for the individual officers. What was just so utterly despicable, was the fact that the lawyer representing the Metropolitan Police Commissioner is supposed to be a neutral lawyer in these circumstances, he was there to assist the court in finding out the truth about what happened. Ronnie Thwaites QC, during the course of that month, launched a vicious assault on Roger; Roger's character; Roger's family; he accused us all, lawyers as well as the supporters of the campaign, of having hidden political agendas. And what you had at that inquest was one legal team representing the family, confronted by two legal teams, one of whom was publicly funded by taxpayers' money, representing, in theory, the interests of Londoners in terms of what happened to an innocent man on the streets of London. But in fact, he was defending the actions of those officers. But despite all of that, the jury unanimously decided in two hours that he'd been unlawfully killed. My theory is that the same thing could happen tonight on the streets of London because the Metropolitan Police have taken no action in regard to the serious issues raised at the inquest about the dangerous use of restraint.



Roger Sylvester, who died while being restrained by police officers 'for his own safety' under the Mental Health Act

SL: Over the time that it's taken to even get an inquest in the first place, you must have felt the pain of the family.

Deborah: Yes. I think it's the first time I've got as close to a family, because four and a half years is a long time, and you build up a relationship with people. All the staff at INQUEST have been involved in attending marches, memorial services, and have built up a close relationship to the family. One of the emotions is just a sense of anger that the system allowed the family to have to endure that whole process for such a long time, but also, we said from the outset that had there been a proper, thorough police investigation, those officers would have been prosecuted for manslaughter. And now we're back to the same old situation, where we're having the police lawyers threatening to judicially review that inquest verdict, and we're calling upon the Crown Prosecution Service, in light of the evidence that was heard, to bring charges for manslaughter. But historically, it's very unlikely that that's going to happen.

Helen: The other thing I think is particularly disgraceful about what happened to the Sylvesters is that Roger died just around the time of the publication of the Stephen Lawrence inquiry report, and there was a lot said about how different it was going to be for families facing that kind of ordeal, and I remember us saying at the time, well, this is an opportunity for the authorities to demonstrate that difference. And, in fact, for the Sylvester family it's probably been one of the worst experiences that we've worked with a family on; rather than anything being better and different, it's actually been a real struggle.

Deborah: Also we have a Labour administration who wax lyrical about open justice, and access to justice, and, it is only because the family was a large extended family with significant resources in terms of not letting this case rest, that really ensured that Roger's death wasn't out of the public eye, and that all the Ministers in Government who needed to know about it were actually made to hear about it. But not all families have got those kind of resources, and it's taken a really serious emotional toll on members of the family.

SL: You mentioned the Labour government. What differences do you notice since they were elected in 1997?

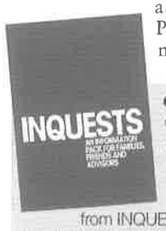
Helen: There have been changes, it would be wrong to say there haven't, but there haven't been enough. And one of the people who was quite instrumental in those changes was Gareth Williams (Lord Williams of Mostyn) who died recently. Particularly around pre-inquest disclosure of information to families; some movement on allowing limited means-tested funding at inquests; and obviously the fundamental review of the whole inquest system.

We had a strategy before Labour got into Government which was to make as much public fuss about the issue as possible, put it on as many people's agendas as possible, and we were quite successful at that. But, it's a long time since they were elected, and really not enough has been done. And I even think that, with this fundamental review of coroner services, it's going to make a difference in a generic sense to the inquest system, but, the cases that we've been most concerned about, that raise questions of the right to life, I don't think they've looked at that seriously enough.

I was talking to a woman the other day who had a similar view, which is that, although there have been policy changes arising out of her brother's death, it doesn't bring him back, she's still got no justice, and, I think, the new system isn't going to deliver justice, and that's still a big struggle for our organisation to try and put that back on the agenda.

Deborah: Having campaigned for years that there should be public funding given to bereaved people, particularly in deaths in custody cases, there was then limited means-tested funding made available, but the experience of our lawyers is that it's becoming increasingly difficult to get funding, and that the Legal Services Commission would do as much as they can to try and prevent access to public funding. In the case of the Sylvesters, because the family owned their own home in north London, it took them over the legal aid limits. We had to run a concerted parliamentary lobbying campaign, meeting up with all the key Ministers, and we were lucky to have the support of David Lammy [the local MP and junior minister] in actually pursuing this. But we had to run a concerted campaign to get them to grant exceptional funding in that particular case. But it didn't cover a lot of the important preparation work, and it's a problem that families are having all over the country. Home ownership takes you over the limits, and it also excludes anybody who's on a low income from any public funding. We've never said that families should be treated any differently from anybody else, but that there should be equality of arms. And we know that wherever an inquest is taking place into a death involving the State, unlimited public funding is available for the State to ensure that it has a team of lawyers to represent it, and that isn't the case for families.

Helen: The State has never publicly said how much that money is, how much is being spent, and I think that's something that we consider asking the Metropolitan Police Authority, to ask how much they've spent on the Sylvester case, and on other cases. I think people should know how much is being spent of their money that they pay in their council tax.



● This pack provides a comprehensive guide to all aspects of the inquest system and is excellent for lawyers needing accessible background information – from INQUEST, £10. Ring 020 7263 1111, email: inquest@inquest.org.uk or go to their website: www.inquest.org.uk

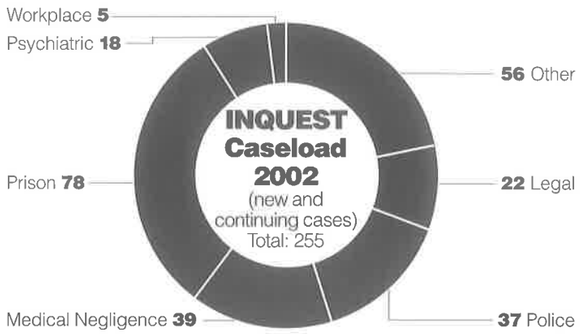
Deborah: None of these so-called reforms have come without concerted political campaigning, and it actually takes a lot of effort and strategic thinking. And the difficulty that an organisation like INQUEST has is that it is small, under-funded, but also has so many conflicting priorities, it's actually very difficult to do justice to the cases.

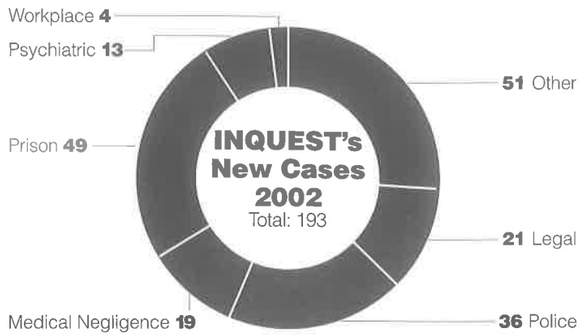
SL: The Princess Diana Memorial Fund fiasco hit you quite hard, didn't it?

Helen: Yes, our grant was suspended until recently, and one of the things that is always a problem for us is getting enough funding to even keep our six staff. That means we're having to desperately fundraise to keep the organisation going, and to meet our commitment to our staff.

Deborah: Some lawyers have been extremely important in supporting INQUEST's key objective, to maximise the opportunity for families to find out the truth about how their relative died. We've had a lot of lawyers – some of whom were involved in the setting up of the organisation – who have been extremely good at working in an area of law that has been very marginalised, and they haven't been paid. That's been extremely important – otherwise we couldn't have done what we've done. A lot of the early cases, where we got unlawful killing verdicts or where we had thorough inquests, have been through lawyers giving up weeks of their time for nothing, and quite senior lawyers. But now we're at a situation where lawyers *are* getting paid, particularly barristers. It's vital that lawyers join our ▶

Helen Shaw (left) and Deborah Coles at the INQUEST office in north London






Helen Shaw

"The level of scrutiny that's been applied to deaths of detained patients in psychiatric settings is far lower than that applied to deaths in prison and police custody. That's because INQUEST, as an organisation, has caused that level of scrutiny to be applied to deaths in custody"

lawyers' group, because we're dependent on that support for the ongoing service that we offer to families who aren't publicly funded.

Helen: We did a lot of work to persuade the Government to make that change around legal aid, so the people who are getting the money now should at least make a donation to us so we can keep going! You couldn't run this organisation without having a dedicated committed staff, because it is extremely stressful work. And it doesn't get the recognition it deserves, the pay's crap, the terms and conditions are crap, and we run on a shoestring.

SL: INQUEST was formed back in 1980, what *difference* do you think it's made?

Deborah: INQUEST's put the issue of contentious deaths, particularly deaths in custody, on the political agenda. Without INQUEST, I don't think that would have happened. It's also shown how families collectively can apply political pressure.

Helen: We've recently been sitting through an inquiry into the death of David 'Rocky' Bennett, who was restrained in a psychiatric institution. In the course of compiling our evidence and sitting through that inquiry, what became apparent is that the level of scrutiny that's been applied to deaths of detained patients in psychiatric settings is far lower than that applied to deaths in prison and police custody. That's because INQUEST, as an organisation, has caused that level of scrutiny to be applied to deaths in custody. That's the difference that INQUEST has made. But sometimes you think, *have* we made any difference? Because the deaths still happen. Apart from those 'Article 2' cases, I think the other difference that INQUEST has made has to do with the fact that to any bereaved family who are going to an inquest, the level of support and advice and information they get from the current system is absolutely appalling. Because we exist as an organisation called INQUEST, we deal with a lot of inquiries from people who are just bereaved people who've got to go to an inquest, and we've been able to help them by giving them information. We've now got our information pack for families. Doing stuff really that should be done by the State. But I think that has made a difference.

Deborah: The Bennett inquiry is a good example. What we were aware of during the course of that inquiry was the fact that we sit on an incredible amount of information that no other agency has. As far as we can, given the limited resources, we not only monitor all deaths in custody, but where we're involved with them, we'll do briefings and bring information together. And it was quite clear during the course of that inquiry that no other agency or Government body, had access to that information, so the inquiry team were looking to us to provide information, important information about how often restraint-related deaths happen and what recommendations we would make.

Helen: It's like sitting at the centre of a spider's web. Every time a death happens, if it gets referred to INQUEST, then we can compare it to previous deaths that have happened, and we can advise the family and advise the lawyers on the basis of all the previous experience. Like Deb said, there isn't another agency that does that, either in the voluntary sector or within the State.

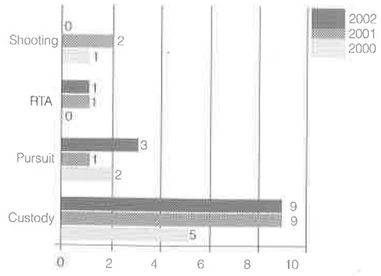
SL: Do you still find people who don't take you seriously?

Deborah: The media take us seriously because they know that if we put out a press release it's properly informed, it's accurate, and we are very clear in the kind of policy and wider issues arising from those cases. Sometimes it's to our disadvantage, because people think that we are huge.

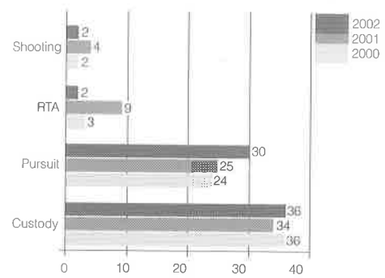
Helen: We get people saying, 'Can I speak to your press officer, can I speak to your PA, can I speak to...' At one point it was just Deb and me!

Deborah: I think people have tried to dismiss us as these crazy leftie women who work at INQUEST, and I think we've experienced gross sexism, not just by government but by other voluntary sector organisations. But I think we have *made* people take us seriously.

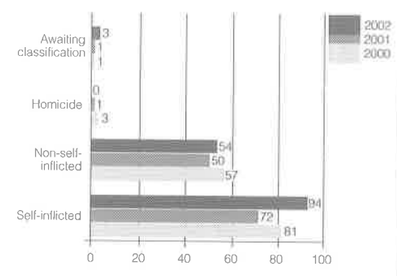
Deaths in Metropolitan Police Custody or otherwise 2000-2002



Deaths in Police Custody or otherwise 2000-2002 (all forces)



Deaths in Prison 2000-2002



On the one hand, the State will say they take organisations like INQUEST terribly seriously, they want our input, they want our expertise; however, what they never do is give us the resources in order to do our work more effectively. We've had to struggle with that whole idea of co-option in terms of when do we respond, and why the hell should we, as a voluntary sector organisation, have to respond without proper resources? A good example of that was the setting up of the Coroner's Review. Why was it that one of us wasn't on the Review Panel, given our expertise? And this constantly happens, being marginalised and patronised.

Helen: There's a double edge to the way that we've been treated as women working in an organisation like this, because we've been seeing on the one hand, 'aren't they wonderful?', holding the hands of poor distressed bereaved people, and pigeon-holed in that way; and then on the other hand, seen as another sexist stereotype of being loud-mouthed lefties who are just out to...

Deborah: Cause trouble!

Helen: A person told me they had spoken to someone in Government and when my name was mentioned they said, 'Oh that troublemaker.' We've got various examples of things like that. So we're on the one hand patronised and dismissed as 'hand-holders' and then, on the other hand, dismissed because people wrongly caricature us as being too extreme.

Deborah: I also think that it's something to do with the issues that we're dealing with, and one of the big issues that people cannot deal with is bereavement. When you're talking about State-sanctioned death, which a lot of these cases are, there are people who are quite afraid, not just of death itself, but the fact that what we are talking about is that police officers and prison officers have caused the death of members of the public. That is a difficult issue for people to engage in. And the problem is there are always these attempts to blame the dead for their own death. We ask the question, why is it that a disproportionate number of black men die following the use of force, and what you're dealing with here are very difficult questions about racism. And again it's another issue people don't really want to engage with. It took us years and years to get Government to acknowledge the fact that the figures that we kept putting out were actually correct. We monitor every death in custody and have done so since we were set up. We were reporting it to UK organisations, and international human rights organisations, we were saying, there is a disproportionate number here. We're not saying more black people than white people die; we're saying it's disproportionate in terms of when you look at the circumstances.

Helen: One thing that's important about how we've worked is where we've both come from politically and I think that has really informed our organisation. It's not politics with a big P in terms of political parties; it's more about our understanding of how the world works, and how it's played out in people's lives, how it affects policing, how you end up in prison.

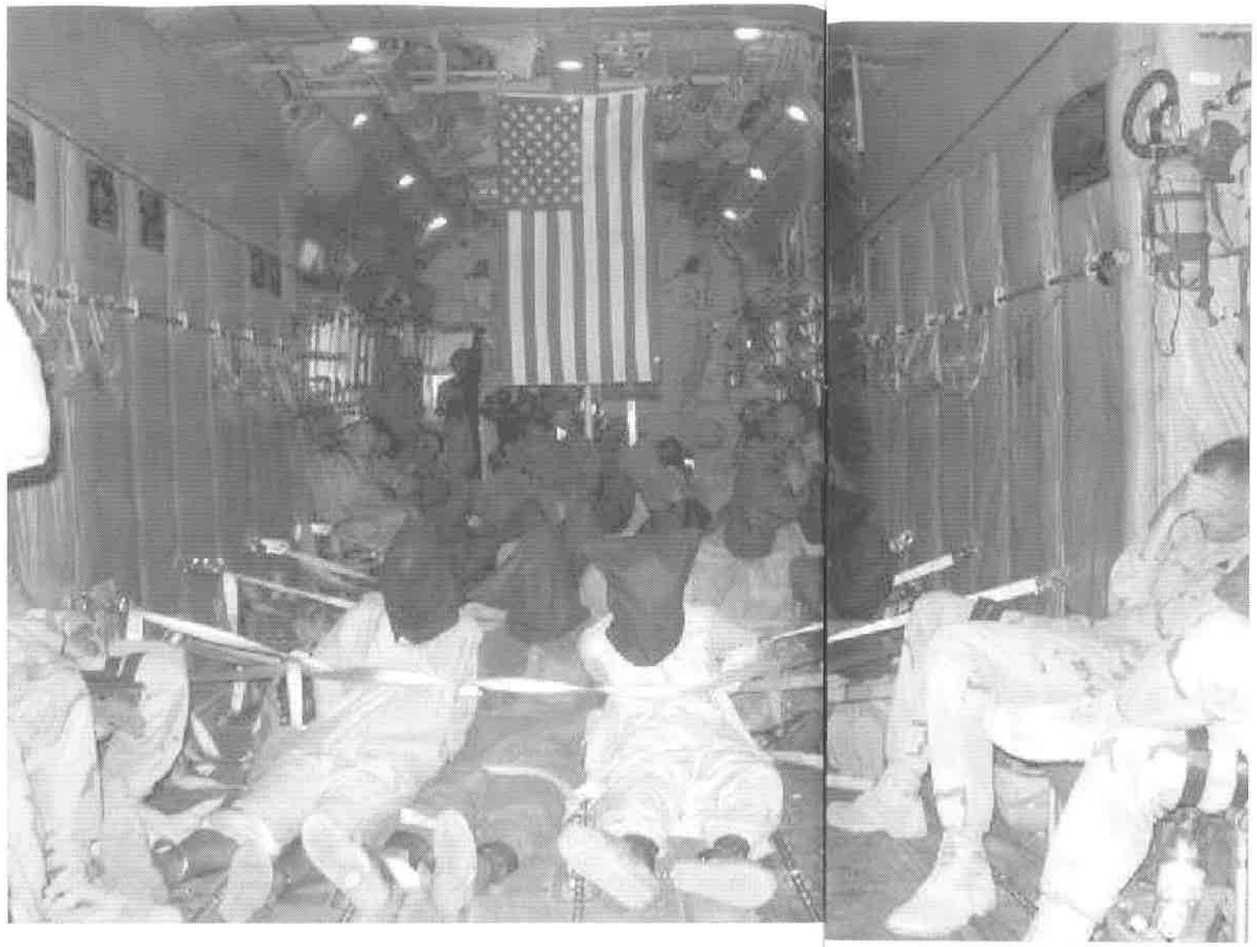
SL: If you had the power to put legislation into the Queen's Speech at the end of November, what would you propose?

Helen: That in any death in custody case, families have automatic non-means-tested public funding for their legal representation and preparation.

Deborah: I think a firmer commitment that where you have police or prison officers who use unlawful force, then they must be prosecuted. And, a change in the way in which 'Article 2' cases are investigated, both in terms of the police and prison investigation, but also the way in which they're dealt with at an inquest; we need a completely different system. We hope that our research project, funded by Nuffield, which is coming out in July of next year, is going to make a contribution to that. ■

"When you're talking about State-sanctioned death, which a lot of these cases are, people are afraid, not just of death itself, but the fact that police officers and prison officers have caused the death of members of the public. That is a difficult issue for people to engage in"


Deborah Coles



Twilight zone

Louise Christian on the plight of Guantanamo Bay detainees and the dilemma for lawyers representing them

The Attorney General Lord Goldsmith has now been engaged in negotiations with Pentagon officials for some three months over the fate of two British citizens, Feroz Abbasi and Moazzad Begg, detained in Guantanamo Bay and designated for trial by military commission. There have been at least six meetings but no announcement of what will happen.

In July, when the military commission trials were announced, there were expressions of outrage from across the political spectrum with wide cross-party support for an early day motion in parliament and with both the Bar Council and the Law Society uniting to condemn the proposed trials as unfair. An announcement by Goldsmith of "important concessions" – notably the removal of the death penalty as a possible sentence – failed to assuage the protests. Since then Goldsmith has said he will not provide "a running commentary" on the negotiations but it is not difficult to appreciate the impossibility of producing any solution involving a trial in Guantanamo Bay which could meet international law requirements for a fair trial. Goldsmith has said in correspondence that the option of bringing the British citizens back here for trial has not been ruled out, but it is thought that this option is opposed by David Blunkett. Goldsmith has admitted in correspondence that the Pentagon refuse to discuss with him the plight of four other British citizens also detained for well over a year *incommunicado* and without access to a court or a lawyer.

The sixty pages of rules for the military commissions are on the Pentagon website. They contravene the requirements of Article 14 of the International Covenant of Civil and Political Rights in almost every respect possible. The judges are military officers; the Chief defence lawyer is a military officer and the restrictions on civilian defence lawyers are so sweeping as to mean they cannot perform their duty. Bar Associations in the US have advised their members that it is unethical to accept such restrictions. They include agreeing to travel to Guantanamo for a trial and once there not being allowed to communicate with the outside world by phone or by email except with the consent of the "appointing authority" an Orwellian description for Mr Paul Wolfovitz.

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Meanwhile there are now at least three people being detained indefinitely without access to a lawyer as "enemy combatants" in the US. All of them were literally seized out of the custody of the Justice Department and removed from civilian prisons to military brigs by the Pentagon. Only one of the three, Yasser Hamdi, was detained in Afghanistan. The other two, Jose Padilla and Ali Saleh Kahlah al-Marri, were detained in the US accused of planning a "dirty bomb" (Padilla) and terrorist activities in Afghanistan (al-Marri). Padilla has been detained for some fourteen months without access to the outside world or to a lawyer despite the court ordering he should have such access (the Pentagon is appealing).

Submissions made on behalf of the Pentagon as to why he should be denied such access make interesting reading. In evidence from Admiral Jacoby, known as the Jacoby declaration it is said, "Padilla is unlikely to co-operate if he believes that an attorney will intercede in his detention. ...DIA (the Intelligence Department) is aware that Padilla is even more likely to resist interrogation than most detainees. Padilla has had extensive experience in the US criminal justice system and had access to counsel when he was being held as a material witness. These experiences have likely heightened his expectations that counsel will assist him in the interrogation process. Only after such time as Padilla has perceived that help is not on the way can the US reasonably expect to obtain all possible intelligence information from Padilla... Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break – probably irreparably – the sense of dependency and trust that the interrogators are attempting to create."

This blatant admission that the purpose of detention incommunicado without access to a lawyer is to extract confessions by psychological pressure ignores all the work done in this country and elsewhere by Professor Gisli Gudjonnsen, and others, about the extent to which such confessions may turn out to be unreliable or false when a suggestible detainee is attempting to please interrogators. Like the Guantanamo Bay detainees Padilla is to be denied all possibility of claiming innocence by a military headed by the President who likes to wear military uniform and sees nothing wrong in describing those held captive by the military as "bad men".

The ethical dilemma for lawyers is whether to participate at all in a trial at Guantanamo Bay. In a US court martial a soldier accused of offences has the right to choose his attorney and for that attorney to hear all the evidence, but this is not the case in the rules for Guantanamo Bay. The lack of remuneration and the ethical problems involved mean that few lawyers in the US have applied to be in the pool of civilian lawyers. There is not a single Muslim lawyer among them. Feroz Abbasi has written to his mother asking her to find him a Muslim lawyer. As the lawyers who she has asked to represent him, my firm would like to send Sadiq Khan to take instructions from him. But Goldsmith has admitted that the "concession" he announced that British lawyers could be "consultants" means nothing and that they will not be allowed to see the clients. As and when Goldsmith tells us what is to happen now, we will have to decide whether we can meaningfully participate at all.

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The US military is using torture against suspected terrorists in prisons around the world. And now, British intelligence officials have said that information obtained from victims will be used to prosecute terror suspects in secret British tribunals.

But evidence obtained during torture is notoriously unreliable and international law forbids its use in court. Campaigners say the secret British tribunals breach human rights. The director of the Medical Foundation for the Care of Victims of Torture, Malcolm Smart, said, 'Information obtained under torture is cheap and dirty information. If the intelligence services are cooperating in this way then they are in effect condoning, even encouraging, the torturers.'

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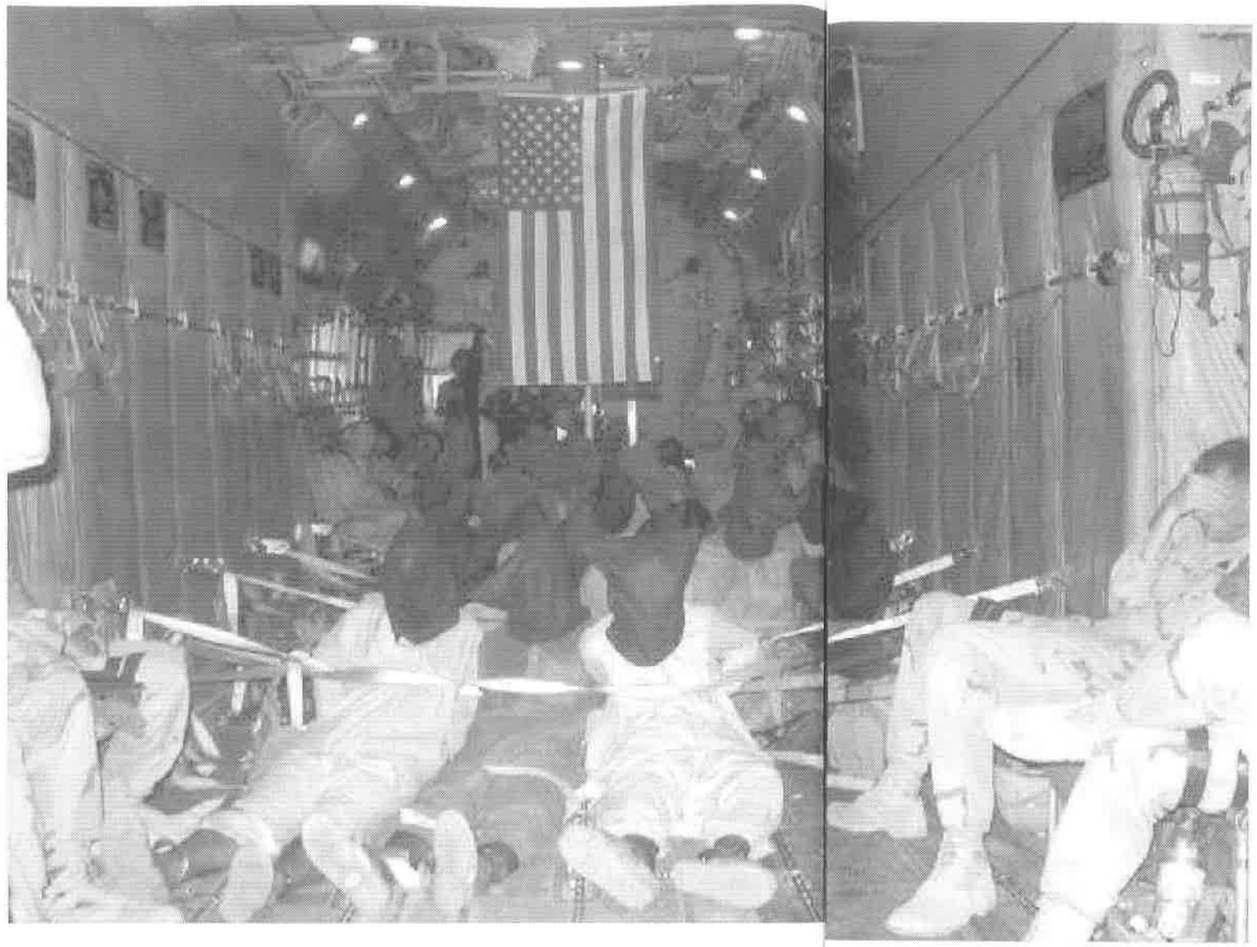
The US government has admitted that these physical techniques, as well as psychological torture, are used at Guantanamo Bay. Since the camp opened there have been 28 reported suicide attempts involving 18 prisoners. This is not surprising when detainees are held in wire mesh cages measuring 9ft by 8ft and each prisoner is allowed only one hour outside his cell each week. The wire cages overlook a newly constructed execution chamber and the US intends to seek the death penalty for those found guilty of certain terrorist offences in its special military commission, where the prisoners have no real prospect of a fair trial.

Is it possible that the government secretly approves of the US in its violation of human rights and international law at Bagram airbase and Guantanamo Bay? This suspicion will be even stronger now that MI5 has admitted it intends to use torture evidence in its case at the Special Immigration Appeals Commission.

● **Dominic Teagle**



Twilight zone

Louise Christian on the plight of Guantanamo Bay detainees and the dilemma for lawyers representing them

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● Dominic Teagle

The Attorney General Lord Goldsmith has now been engaged in negotiations with Pentagon officials for some three months over the fate of two British citizens, Feroz Abbasi and Moazzad Begg, detained in Guantanamo Bay and designated for trial by military commission. There have been at least six meetings but no announcement of what will happen.

In July, when the military commission trials were announced, there were expressions of outrage from across the political spectrum with wide cross-party support for an early day motion in parliament and with both the Bar Council and the Law Society uniting to condemn the proposed trials as unfair. An announcement by Goldsmith of "important concessions" – notably the removal of the death penalty as a possible sentence – failed to assuage the protests. Since then Goldsmith has said he will not provide "a running commentary" on the negotiations but it is not difficult to appreciate the impossibility of producing any solution involving a trial in Guantanamo Bay which could meet international law requirements for a fair trial. Goldsmith has said in correspondence that the option of bringing the British citizens back here for trial has not been ruled out, but it is thought that this option is opposed by David Blunkett. Goldsmith has admitted in correspondence that the Pentagon refuse to discuss with him the plight of four other British citizens also detained for well over a year *incommunicado* and without access to a court or a lawyer.

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CAN THERE BE ACCOUNTABILITY FOR AN ILLEGAL WAR?

A US military helicopter flies over Baghdad, Iraq, October 2003

by PHIL SHINER
Pictures by JESS HURD

The decision of any government to go to war is critically important, and the part played by the UK in the recent war in Iraq has raised profound concerns as to its basis in morality, common sense and legality. The public debate will continue as the Hutton report is released, and thereafter. Issues of international law, of profound importance and complexity, are highly significant to this ongoing debate.[1] It is possible to identify four critical areas:

● The right of states within international law to resort to force; ● The lawfulness of the use of force; ● The legality of the occupation; ● Human rights issues arising from the occupation

This article explores the efforts of a group of lawyers, peace activists and non-governmental organisations (NGOs) to make the UK government accountable for its actions in Iraq. It discusses the possibilities, in the tradition of cause lawyering, to expose abuses of power in the context of war, and explores the potential for and constraints on non-litigious means.

A forthcoming publication, *The Case for War*, will make available all the opinions, reports, articles, letters and judgments referred to below.[2]

This campaign of cause lawyering continues. It has to date four stages.

1. By comparison the doctrine of humanitarian intervention used to justify the NATO war in Kosovo, itself highly controversial amongst international lawyers, did not capture the same public attention.

2. For more details contact the author at phil_shiner@public interestlawyers.co.uk

STAGE 1: ACTION PRE R 1441 OF 8TH NOVEMBER 2002

The campaign began on 12th August 2002 when activists and lawyers met to discuss how to make the UK government accountable for the war it advocated. Case law on justiciability concerning defence or foreign policy made a judicial review of any decision to go to war unlikely.[3] Therefore, it was decided to use a peoples' law approach to ventilate the issues in public. A public inquiry was held in Gray's Inn on 11October 2002 with two teams of lawyers engaged to replicate the judicial review process. The NGO for illegality, Peacerights, instructed Rabinder Singh QC and an opinion was released focusing on whether the UK could use force in self-defence and whether existing Security Council Resolutions (SCRs) authorised force.

The UK's right to self-defence

Any argument about the legality of force proceeds from the basis that the UN's purposes are essentially peaceful,[4] and that Article 2(4) of the UN Charter prohibits the use of force subject to two limited exceptions.[5] The first exception is the right to self-defence under Art. 51. At the time, the UK appeared to argue that the threat from Iraq to the UK through international terrorism, or from its WMD, or both, was so serious it justified a pre-emptive strike in self-defence. Alternatively, it was suggested that the threat to the US was such that the UK could invoke the right of collective self-defence. The legal opinion left no doubt that neither was justified. It emphasised that state practice "tends to suggest that the anticipatory use of force is not generally considered lawful, or only in situations of great emergency": a situation where an armed attack is launched or immediately threatened, and where there is an urgent necessity for defensive action against such attack, and no practicable alternative to action in self-defence. The opinion concluded the right to use force in anticipatory self-defence did not arise for the UK alone, or under collective self-defence with the US. There was no evidence to link Iraq to 'September 11' or Al-Qa'ida, and that the government's dossier released on 24th September 2002 did not meet the required conditions. Once the weakness of the case on self-defence had been exposed it was noteworthy that both the UK and US changed tack and began to argue for the second exception, a SC authorisation under the UN Charter, Chapter VII.[6]

The 11th October Inquiry

This inquiry was inspired by the approach to people's law, for long developed by the Permanent People's Tribunal.[7] The "judge", Professor Warbrick of Durham University, heard legal argument over a day hearing. The sponsoring group obtained key publicity when the Singh opinion was released, including coverage on TV and the *Today* programme. Professor Warbrick's adjudication[8] concluded that neither self-defence nor any existing SC authorisation permitted use of force. Mr Singh's arguments had foreshadowed the government's case, based on the Attorney General's statement of March 2003 that it was entitled to rely on the authorisation of R 678 from 1990, notwithstanding the ceasefire resolution of R 687. Professor Warbrick concluded: "the argument that the power in Resolution 678 both survives and is adequate to justify unilateral state action will not stand up to examination". This authorisation is to "the states cooperating with the government of Kuwait to take action effectively to restore the authority of the government of Kuwait... and to restore international peace and security in the area... but the coalition is no longer in existence.... The argument . . . fails to take into account the original reassertion of authority over the situation by the council in Resolution 687."

On 19th December 2002 BBC Radio 4's *Today* programme borrowed the idea and held its shadow hearing again mirroring a judicial review. The "judge", Professor Vaughn-Lowe, concluded that, notwithstanding R 1441, without an express authorisation from the UN SC it would be contrary to international law for the UK to use force.

Above: Iraqi women with their shopping in Baghdad; Right: One of millions of protestors in London in February

STAGE 2: PRE-EMPTIVE ACTION POST R 1441

Intense diplomatic negotiation preceded the adoption of R 1441. Amendments were made to ensure that if UNMOVIC or the IAEA[9] reported that Iraq failed to comply with its disarmament obligations it was for the SC to convene immediately in order to consider the situation. There would not have been unanimity if the UK and US ambassadors had not assured the world community, and the SC, that there were no "hidden triggers" or "automaticity" in the resolution.

However, Jack Straw made it clear to Parliament that, if required, military action would be taken if the SC vetoed a further resolution[10] and that "military action is bound to follow if Saddam Hussain does not co-operate fully with the terms of this resolution."[11] CND were one of many NGOs who had serious concerns about the UK intention to use force notwithstanding the terms of R 1441. A second opinion from Singh (and Charlotte Kilroy) was released, advising that the decision to use force based on R1441 would be in breach of international law, as a second SCR clearly authorising force was required. The opinion analysed the background to the adoption of the resolution as a guide to its interpretation and the system, in paragraphs 11 and 12, for Iraq's failure to comply to be reported to the SC who remained "seized of the matter."[12] It advised that the phrases "final opportunity" and "serious consequences" were only warnings to Iraq, not authorisations. It concluded: "It would be extraordinary if, having failed to obtain an express authorisation for the use of force, having incorporated minute changes to the final draft . . to exclude the possibility of "automaticity" and "hidden triggers" and to preserve the role of the Security Council and having publicly agreed . . that there was no such implied authorisation for force, the UK and US were to be able to use SC R 1441 as authority for the use of force without a further Security Council Resolution"[13]. When the Treasury Solicitor, acting for the Prime Minister, Foreign Secretary and Defence Secretary, responded to a letter before action on 26th November 2002 that it would not declare its understanding of what R 1441 permitted, proceedings were listed for 9th and 10th December 2002 on preliminary issues of justiciability, standing and delay.

The Issue of Costs: The first ever Pre-emptive Costs Order

CND are a private company limited by guarantee with limited funds. It had serious concerns about costs. As for its lawyers' fees, there was a very successful fundraising campaign led by Mark Thomas, the Channel 4 comedian, and some of the work was provided without charge. The concern was the government's costs if it lost. Thus, on 29th November a letter was written to the Treasury Solicitors offering to put £25,000 into an account on trust for the government's costs with an explanation as to why, in the public interest, this case should proceed with CND having certainty as to its liability. When the government refused the offer a hearing took place in the Divisional Court on 5th December 2002. CND obtained the first ever pre-emptive costs order since the court held the issues were of genuine public importance and it was right to give CND the certainty to pursue them. This success was covered in the national press.

The judgment of the Divisional Court

CND's lawyers did not seek to constrain the executive as to whether to take military action. In the light of recent cases on justiciability[14] this was excluded. Instead it was argued that the government had repeatedly confirmed it would be bound by international law and it had indicated that it would go to war without a second SCR. It was submitted that a pre-emtory norm of customary international law was at stake (the prohibition against force) and the Court could exercise its discretion to give an advisory opinion.

The Divisional Court[15] gave judgment on 17th December 2002. They gave permission to move for judicial review but dismissed the application. Simon Brown LJ held:

The Court has no jurisdiction to declare the true interpretation of an international instrument (R 1441) which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights or duties.

The Court would not determine an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence.

There was no demonstrably good reason for a making an advisory declaration.

The strategy to pursue this issue through judicial review involved careful weighing of the costs and benefits. It was seen as a very positive exercise by CND, despite the ultimate failure. The costs were limited and covered by a fundraising campaign. The issue of illegality gained much public attention, and within the specific context of R 1441, and there was extensive media coverage. CND raised its public profile making clear that it was concerned not just with nuclear weapons but also with the peaceful resolution of conflict between states. The pre-emptive costs order was another bonus, as was the studied approach of the ▶

3. See Laws LJ in R v Environment Agency ex p. Marchiori [2002] EuLr 225 at para 38: "..... It seems to me ...to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy."
4. Article 1 of the UN Charter sets out the UN purposes the first of which is "to maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace.... and to bring about by peaceful means.... adjustment or settlement of international disputes or situations which might lead to a breach of the peace."
5. Article 2(4) provides: "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nation.
6. There was a great deal of deliberately loose language in the run up to war with the public led to believe what was required was a UN mandate. Clearly a mandate can mean different things to different people (as we came to see over the debate about a second SC Resolution) and is not necessarily synonymous with an authorisation.
7. This was established in Rome in the 1970s inspired by Lelia Debasso. For more details: http://www.grisnet.it/filb/filbeng.html
8. 30th October 2002.
9. The UN Monitoring Verification and Inspection Commission and the International Atomic Energy Authority.
10. Official Report, Foreign Secretary's Department 7th November 2002, p246.
11. Foreign Secretary on Radio 4, 10th November 2002.
12. It noted that US and UK efforts to persuade the SC to adopt an earlier draft resolution containing an authorisation by the usual phrase "all necessary means" had failed.
13. para. 40
14. R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and another [2002] EWCA Civ.1598 concerns the human rights of internees at Guantanamo Bay.
15. Simon Brown, Maurice Kay, Richards LJJ

Divisional Court and the compliments paid to the "excellent submissions" of CND's lawyers. Although the approach of the court to issues of international law is a point of public importance justifying an appeal, a decision was made that CND had gone far enough. However a further strategy was already evolving.

STAGE 3: FURTHER PRE-EMPTIVE ACTION

War Crimes: Letters before action

During the wars in the Gulf, Kosovo and Afghanistan there were many incidents involving indiscriminate or disproportionate force. For example, the deliberate massacre of tens of thousands of Iraqi soldiers and civilians on the road to Basra[16], the destruction of homes, schools, shops and the Iraqi infrastructure, and the use of cluster bombs in all three conflicts. Acting on behalf of Mark Thomas, CND and 16 other NGOs lawyers served letters on Blair, Hoon and Straw on 22nd January 2003.[17]

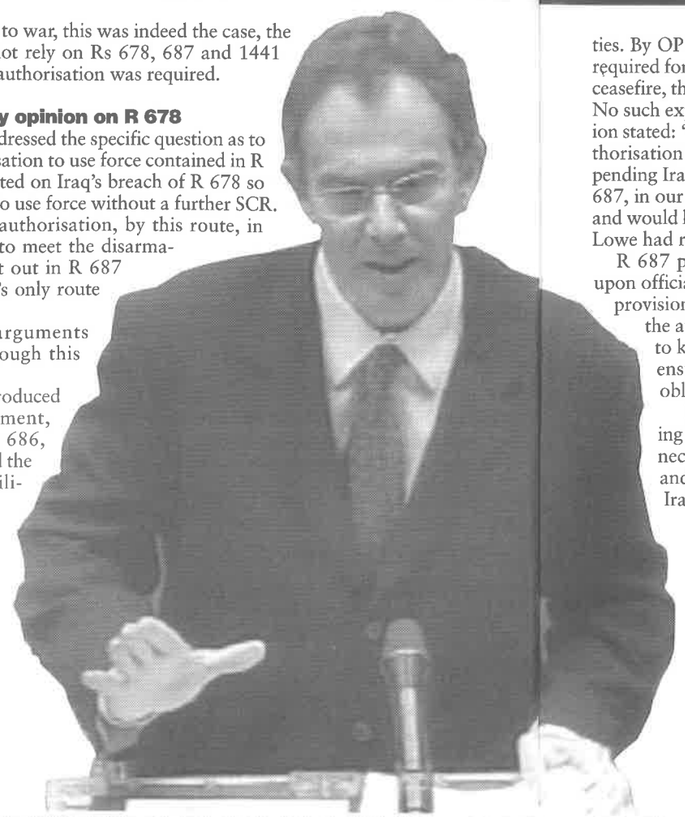
The letters documented the best evidence as to war crimes committed in the three previous conflicts. It set out the relevant provisions of international criminal and international humanitarian law, and the powers of the new ICC prosecutor under Article 15 of the Rome Statute to initiate an investigation of his own initiative. It gave notice that a coalition of NGOs in different countries would be collecting evidence as to war crimes. At the end of the war a tribunal consisting of leading international lawyers would sit to establish the legal principles for a hi-tech war. It would hear evidence from eyewitnesses and weapons experts to enable it to determine whether particular attacks were compliant with principles of discrimination, necessity and proportionality. If the panel concluded that evidence existed that war crimes had been committed it would report to the prosecutor who would be urged to use his Article 15 powers.

The Tribunal Hearing

Following the war, serious concerns arise as to war crimes especially in the context of the use of cluster bombs in urban areas. The Armed Forces minister has confirmed that the UK did deploy them, despite assurances that it would not. It is difficult to see how these necessarily indiscriminate weapons can satisfy key principles of necessity and proportionality. A panel of seven leading international lawyers have been assembled for a tribunal hearing on 8th and 9th November 2003 in London.[18]

The Government's Case for War

By mid-January the UK government had apparently decided on war, and that it would rely either on a second SC Resolution authorising force if it could get one or something lesser if it could not. A lesser option was thought by the team of lawyers to be a combination of SC Rs 678, 687 and 1441. Subsequently, this was indeed the basis of the Attorney General's statement of 17th March 2003.[19] His position was that SC R 678 was extant and could be revived by a material breach of R 678, which set out Iraq's disarmament obligations, plus a further material breach of R 1441 bearing in mind the warnings of "a final opportunity to comply with its disarmament obligations" and the serious consequences if it did not of operative paragraphs 3, 4 and 13 of R 1441. It is apparent that if the authorisation of force from R 678 was not capable of being revived, because it had been terminated, the government's arguments for legality fall away. The team now set about showing the public and the Commons that, in this critical build up to war, this was indeed the case, the government could not rely on Rs 678, 687 and 1441 and that a fresh SC authorisation was required.



The 23rd January opinion on R 678

The next opinion addressed the specific question as to whether the authorisation to use force contained in R 678 may be reactivated on Iraq's breach of R 678 so as to entitle the UK to use force without a further SCR. The revival of this authorisation, by this route, in order to force Iraq to meet the disarmament obligations set out in R 687 was, and is, the UK's only route to legality.

There are five arguments against legality through this route:

R 687, which introduced the ceasefire agreement, was preceded by R 686, which acknowledged the suspension of hostilities. By OP 4 it explicitly recognised that during the period required for Iraq to comply with the terms of the provisional ceasefire, the authorisation from R 678 would remain valid. No such explicit language is present in 687 and as the opinion stated: "If the Security Council had sought to use the authorisation to use force contained in resolution 678 alive pending Iraq's compliance with the provisions of resolution 687, in our view Resolution 686 demonstrates that it could and would have done so." Professors Warbrick and Vaughn-Lowe had reached similar conclusions.

R 687 provided for a formal cease-fire to be effective upon official notification by Iraq of "it's acceptance" of the provisions of R 687. Once it had accepted them, as it did, the authorisation of 678 ended. If the SC had wanted to keep it suspended like the sword of Damocles, to ensure Iraqi compliance with 687's disarmament obligations it could have done so. It did not.

R 678 authorised the "member states cooperating with the government of Kuwait... to use... all necessary means... to restore international peace and security in the area..." It is apparent that once Iraq had notified it's acceptance of the provisions of R 687, and the UN's observer unit deployed, the coalitions work was ended, and it ceased to be in existence. The authorisation of force ended with it.

By OP34 the SC resolved to remain actively seized of the matter. It is clear from that and the wording of R687 that any steps taken for the implementation of R 687 and to secure peace and security in the region were now once more a matter for the SC and not for the member states who had formed the coalition.

Bearing in mind the UN Charter's peaceful purposes and the prohibition against the use of force if is not for member states acting unilaterally to interpret SC resolutions so as to authorise force. It is plain from recent conflicts in Bosnia, Somalia, Rwanda, and the Gulf War that if the SC mean to authorise force it does so in clear terms using the phrase "all necessary means."

It is apparent that accountability for the war's illegality is still a possibility. Moreover, even the government's case for legality collapses in the absence of WMD.

Above: US Army armed patrol drive at speed through Baghdad; Left: Tony Blair narrowly winning support of MPs for war in Parliament

The 3rd March opinion on the Draft Resolution

The UK and US initially acknowledged that R 1441 was insufficient and a second SCR was required. However, the spin doctors had us believe that the key was whether this second resolution was passed, not what was in it, and in particular whether it specifically authorised force. As it turned out, the UK and US abandoned the attempt even to have a bland second resolution adopted. However on 24th February a draft resolution was released by the UK and US. The fourth in the series of six opinions focused on this draft. Essentially this draft said little. After a series of preambular paragraphs the two operative paragraphs stated that "Iraq has failed to take the final opportunity afforded to it in R 1441" and that the SC "decides to remain seized of the matter". The opinion noted that the phrase "all necessary means" or such like was absent, the preamble does not have operative effect, the warning of a final opportunity expressly envisages that a further decision will be taken by the SC as to what steps should be taken, and that accordingly "any attack by the US and the UK on Iraq in reliance on the Draft Resolution either alone or in conjunction with Resolution 1441 would be in breach of international law."

The Attorney General's Opinion and all that

By mid-March the question of legality had become key, especially as there was not to be political agreement amongst SC members for a second resolution, let alone one authorising force. The government's case for legality shifted away from requiring either a SC authorisation or a second resolution. The clamour increased that the government make public its legal advice. Peter Goldsmith, the Attorney General, is a commercial and not an international lawyer, and his statement to Parliament of 17th March 2003 was no more than a summary of advice received from elsewhere.[20]

The statement was not, in my view, a proper one for a law officer to make. He could not have been unaware of the arguments of Rabinder Singh QC, Professors Warbrick and Vaughn Lowe, and others, that R 686's wording gave a key understanding as to why R 687 did not suspend the authorisation of R 678 but terminated it. He ignored R 686's existence and the counter arguments. He had a duty not to misinform Parliament and the public. He broke it.

The team's last ditch efforts to prevent the inevitable included two briefing sessions to MPs in the House of Commons as to why the government's position was one of ▶

16. 26th & 27th February 1991

17. The event was recorded as part of the Channel 4 programme – "Mark Thomas ... Weapons Inspector" shown on 31st January.

18. These are Professors Chinkin, Tavernier, Schabas, Goodwin-Gill, Bowring, Grief and Baxi. Any readers wishing to attend the day long public session on Saturday 8th November should contact the author.

19. Note not an opinion as the one page written answer made no attempt to discuss other arguments than the one it asserted.

20. It is also worth noting that in a memorandum of 24th October 2002 to the Foreign Affairs Select Committee, Professor Christopher Greenwood QC, who is an eminent international lawyer often instructed by the government had concluded that it would be possible to render active the authorisation of R 678 which "would not necessarily require a Security Council Resolution. It could be done by means of a Presidential Statement (which would require a consensus from the council)." Even that possible route to legality was not available.

illegality, and a response to the Attorney General's statement, published in the Solicitor's Journal on 18th March 2003.

STAGE 4: ACTION POST-WAR

The central strategy is to make the government accountable for its actions. As far as war crimes go I have already described the tribunal to be held on 8th and 9th November 2002. There are three other themes to the continuing work to secure accountability for the decision to wage an illegal war, for the illegality of the occupation, and for violations of the human rights of Iraqi civilians.

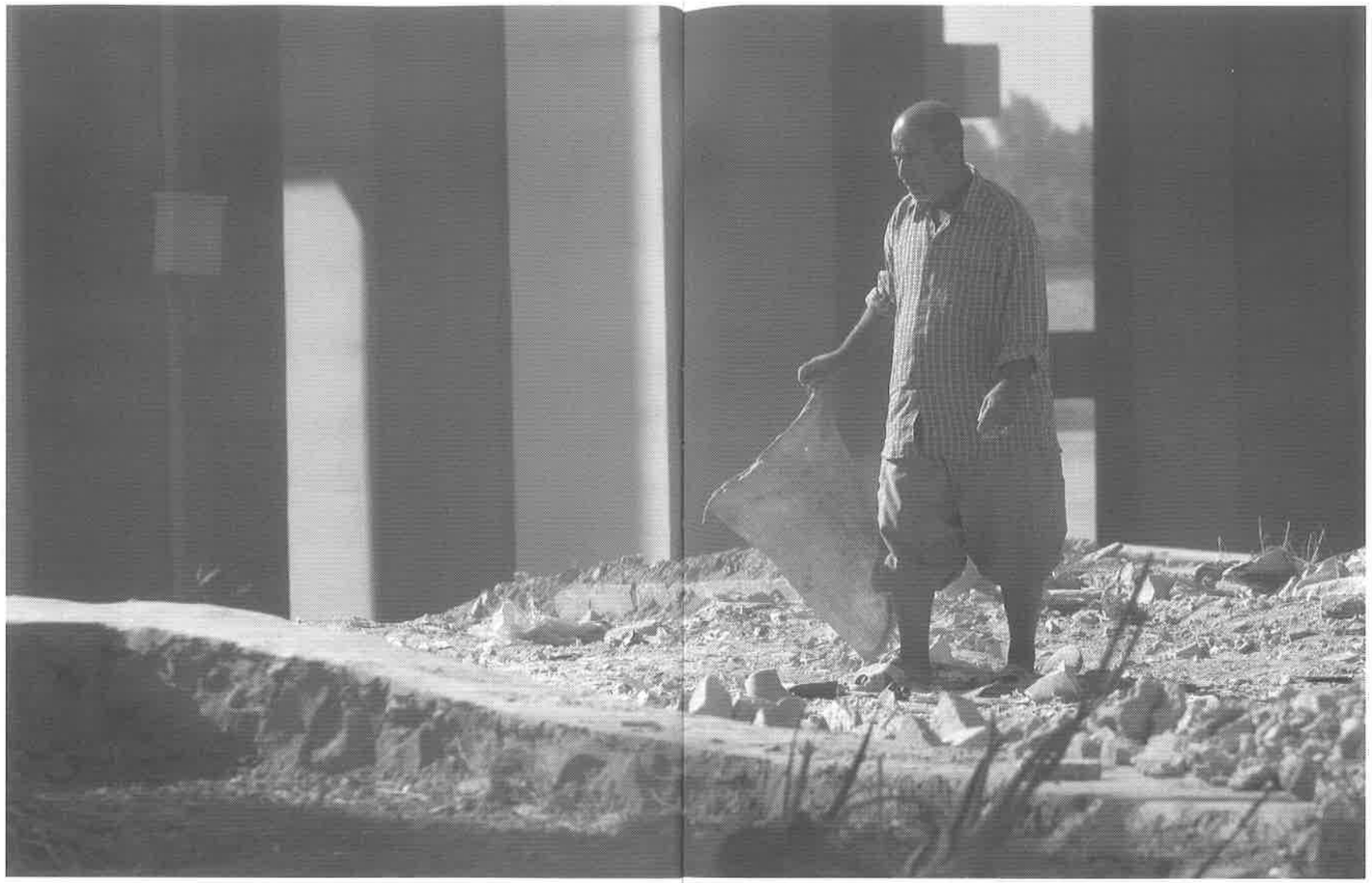
The missing WMD

Even if the government's analysis of the law were accepted the missing WMD blows a hole in its case for legality. The Attorney General's statement is posited on the proposition that the evidence before him as to Iraq's WMD was so compelling, the threat so serious, so imminent, that UNMOVIC could be given no more time despite having made excellent progress. The UK must go in now to ensure immediate compliance with R 687's disarmament obligations. His position is shown by his advice on the legality of occupation dated 26th March 2003 published in the *New Statesman* on 26th May. He reminds the Government that "military action pursuant to the authorisation in Resolution 678 (1990) must be limited to what is necessary to achieve the objectives of that Resolution, namely Iraqi disarmament and must be a proportionate response to that objective."[21]

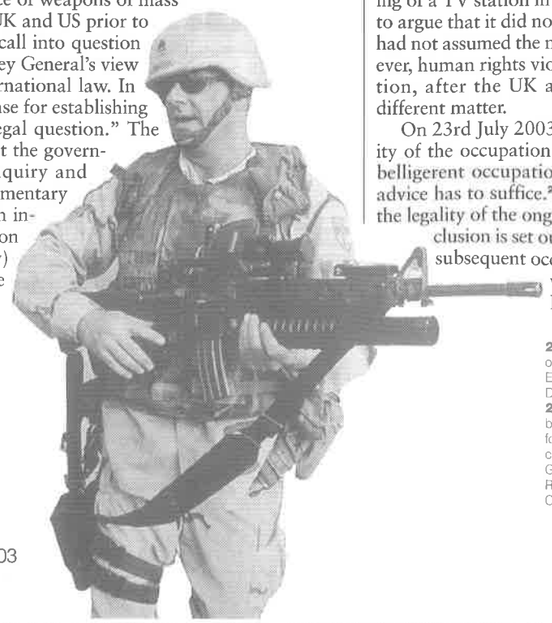
At best the government's case is that since retrospectively it is known that the threat of WMD was not apt to induce such a state of emergency that UNMOVIC's programme for disarmament must be overridden, and the SC not given a further opportunity to consider the matter, it can be seen that the war was illegal.[22] At worst, if there is the merest hint that the evidence as to seriousness and imminence was exaggerated (deliberately or otherwise) the government should resign. Thus, the issue of the evidence before the Attorney General when he gave his statement of 17th March 2003 as to the seriousness and imminence of the threat is critical. We do, of course have the reports of the Foreign Affairs Select Committee's inquiry, the Parliamentary Intelligence and Security Committee's inquiry and the Hutton inquiry. Nevertheless the combination of all of these is not sufficient to establish the strength of the evidence relied on as factual foundations for the government's case in law.

Calls for a judicial inquiry

On 6th June 2003, a fifth legal opinion was released and sent to the Treasury Solicitors. This advised "that the allegations made by former members of the cabinet in the recent past, that the evidence of the existence of weapons of mass destruction was exaggerated by the UK and US prior to the invasion of Iraq in March 2003 call into question the factual foundation for the Attorney General's view that the invasion was lawful in international law. In our view there is therefore a strong case for establishing a judicial inquiry to examine that legal question." The Treasury Solicitor's response was that the government saw no need for a judicial inquiry and relied on the two forthcoming Parliamentary inquiries. The addition of the Hutton inquiry, and the prospects of challenges on human rights violations (see below) mean that the team have put this issue on the shelf for the time being.



Baghdad scenes: Above: A man wonders through the rubble of a bombed building; Below: A US soldier patrolling the streets



The legality of the occupation

Accountability is sought for the thousands of apparently unnecessary casualties amongst civilians. One route is through the war crimes tribunal. Another would be if liability could be established for human rights violations during the war. Unfortunately, Strasbourg jurisprudence does not assist. The case of Bankovich,[23] arising from NATO's deliberate bombing of a TV station in Belgrade, enables the UK government to argue that it did not have jurisdiction during the war as it had not assumed the normal functions of government. However, human rights violations and the legality of the occupation, after the UK assumed jurisdiction, is an entirely different matter.

On 23rd July 2003, a lengthy sixth opinion on the legality of the occupation by the UK was released. The law of belligerent occupation is complex and a summary of the advice has to suffice.[24] Given the continuing importance of the legality of the ongoing occupation the whole of the conclusion is set out: "In our view while the invasion and subsequent occupation of Iraq by the US and the UK was unlawful at international law, Resolution 1483 has rendered the continuing occupation of Iraq by the US and the UK lawful, subject to the limits on the conduct of that occupation contained in international law. The responsibilities and obligations of the US and the UK remain limited by the Hague Regulations and Geneva Convention IV, and on a proper construction of Resolution 1483 the primary responsibility for nation-building, judicial reform and economic reconstruction rests with the Special Representative appointed in accordance with operative paragraph 8. While Resolution 1483 envisages that the US and the UK will be involved in those processes, in our view such involvement must remain administrative and logistical in order for it to comply with the US and the UK's obligations under international law, which are reaffirmed by Resolution 1483." It remains to be seen how this particular chapter develops.

Human Rights violations post-occupation

As a matter of law there is no reason why the UK government should not be held responsible for violations of human rights in the parts of Iraq for which it is responsible. For example, if civilians are killed or injured by cluster bombs used in urban areas and UK forces responsible for removing them promptly have not done so, or if medical operations have been cancelled because hospitals have not been adequately protected from looting. Violations of human rights in these, and other, circumstances may also involve breaches of provisions of GC IV.[25] Such violations might be challenged through judicial review and the HRA 1998. Contact has been made with a number of Iraqi civilians affected by violations for which the UK is responsible. A trip to Iraq has been arranged in October in order to take instructions.

CONCLUSIONS

The political implications of this illegal war have not finished sounding. What role international law has played in this struggle to make the government accountable, and within that the difference our campaign has made, is not for us to say, and certainly not at this stage. One would not wish to claim too much for the part of cause lawyering. Some might say our campaign has failed as we did not stop the war, or even win our legal challenge. But that is an unnecessarily restrictive appraisal of success. If we put the UK government under any extra pressure at all, so as to spare one casualty, one could argue it was worth every ounce of effort or penny spent. It would be difficult to dismiss the effects of our co-ordinated legal and political strategy in the light of the extensive opportunities we had to air the case for illegality in the court of public opinion. It is simply too early to say where this road leads. Will there be future evenness in accountability for aggressive war and war crimes, or will "victor's justice" prevail? Given this unilateral action that may be seen as a hammerblow to the role of the UN in furthering the peaceful resolution of conflicts can there be an equal and opposite reaction? What is needed is a strong UN, a reformed Security Council so that the five nuclear weapons states are not also the Permanent Members, and reforms in enforcement and other procedures so that, at least, there is an expedient method of obtaining an authoritative advisory opinion from the International Court of Justice. As for radical lawyering perhaps more might be achieved if we believe that we could make a (small) difference despite the forces against us. ■

● Phil Shiner, of Public Interest Lawyers, acted for CND, Peacerights, other NGOs and Mark Thomas in the various stages of this campaign.

21. It will be noted that "regime change" could not, according to this advice, be an end in itself.

22. Indeed it is noted that SC 1483, on the future administration of Iraq, did not endorse legality.

23. Bankovich and others, app.no. 52207/99, EctHR judgment, 12th December 2001.

24. International law on belligerent occupation is for the most part contained in the 1949 Geneva Convention Relative to Protection of Civilian Persons in Time of War (Geneva Convention IV), in particular Articles 27-34 and 47-78, and the annex to the 1907 Hague Convention IV Respecting the Law and Customs of War, on Land, (the Hague Regulations), Articles 42-56.

25. Part II of GC IV lays down a number of provisions that give general protection to the population including protection of the wounded, sick, infirm and pregnant women (Art. 16), the protection of civilian hospitals (Art. 18), and the special protection of children (Art. 25).

A trial of blunders

Rekha Kodikara asks if cosmetic fitting of sprinklers is enough to cover up incompetence

Yarl's Wood Immigration Detention Centre in Bedfordshire symbolised New Labour's determination to be tough on asylum seekers. It was Europe's largest immigration detention centre. The Centre opened in November, 2001 to 384 asylum seekers and had the capacity to detain 900. It was equipped with multi-faith prayer rooms, 10 classrooms, computers, books in several languages and a gymnasium – but no sprinklers.

On 14th February, 2002, half the detention centre was reduced to rubble. The £100 million centre was set ablaze by rioters. Group 4, who had operational control of the centre, announced that they were suing Bedfordshire Police for 97 million pounds under the Riot (Damages) Act 1886.

The bleak asylum centre was crucial to the government's policy of speeding up failed applications for asylum in the UK. The Home Secretary had a target of 2,500 deportations a month and Yarl's Wood was designated for such asylum seekers. However, at the time of the fire, only 46 detainees had notification of their removal dates. Many had been detained for several months.

The one million pound trial of detainees Henry Momodou, Naseem Moustaffa, Lucky Jacobs, Thomas Kalu, Agron Kasriotti, Abdul Kayode, Klodjan Gaba, George Tuka and Bihar Limani resulted in two convictions for violent disorder and one for affray. No one was convicted of arson and four of the defendants had the charges against them dismissed before or at half-time. This includes Naseem Moustaffa who pleaded guilty to affray. He received a three month sentence of imprisonment for throwing a plastic bottle at the police lines, but had already been remanded in custody for 16 months.

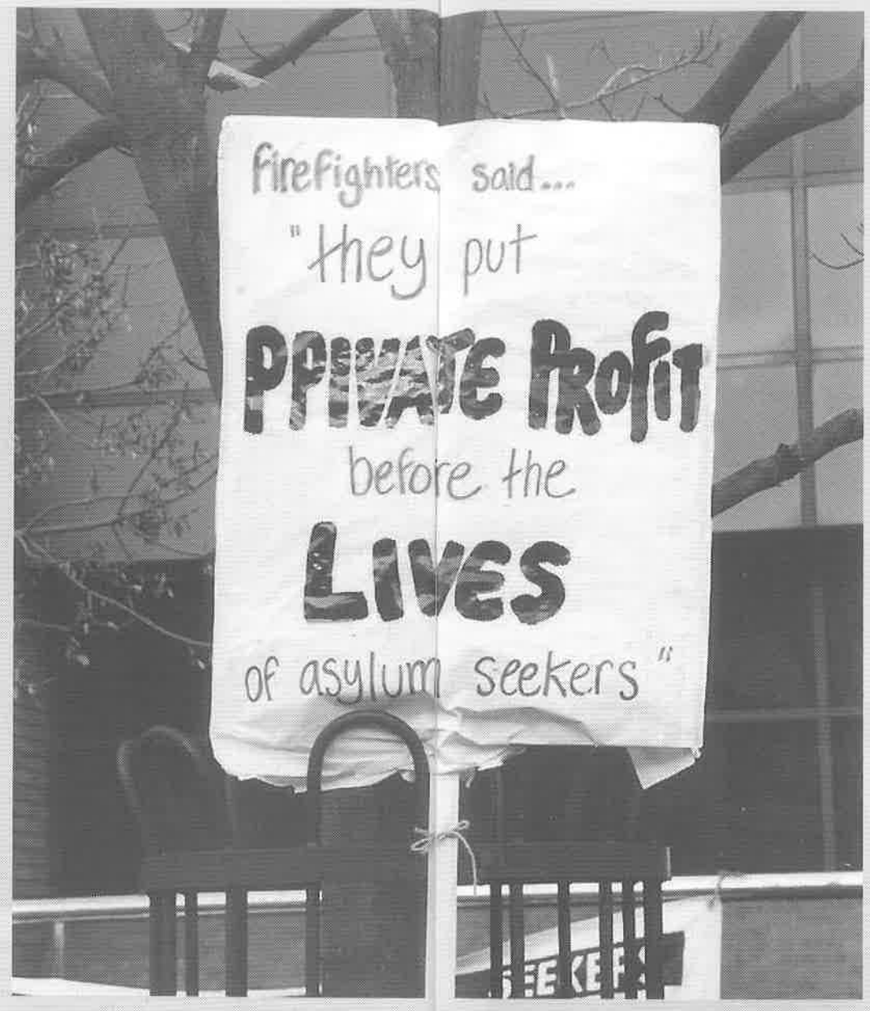
The trial judge, HHJ Roger Sanders, was not impressed with Group 4. He observed that there had been a "wholesale breach of the codes of conduct... They took it upon themselves to identify troublemakers on the night in ways which are in total breach of the rules... It's hard to justify the course of conduct".

Group 4 in their wisdom had taken matters into their own hands. The issue at the trial was identification. On the night of the fire, detainees were herded into the sports hall of the B wing. While in the sports hall, a number of Group 4 officers openly identified potential suspects of the disorder therefore giving rise to contamination of identification evidence. These detainees were immediately escorted by other Group 4 officers to the segregation wing. The officers later became witnesses in the trial on the issue of identification. The Shift Manager responsible for receiving information from Group 4 staff that identified potential suspects could not produce any notes of first descriptions given to him on the night. The only immediate record of alleged perpetrators came from an Inspector who had made a set of notes, written in a hurry, and which had been relayed to her by the Shift Manger.

The opportunities for contamination of ID evidence escalated in the days that followed. Immediately after the disorder, Group 4 hired a private company to conduct group counselling sessions, which inevitably meant that potential witnesses were placed together in the same sessions. Staff were also given access by management to photographs of detainees and similar photographs were shown to detainees. Bedfordshire Police were informed of this and they immediately advised Group 4 to cease investigating. To make matters worse, a local newspaper had photographed detainees who had been charged with arson and violent disorder outside Bedfordshire Magistrates. The article and the corresponding photographs were on display in the staff room at Yarl's Wood for at least two weeks.

Relations between Group 4 and Bedfordshire Police quickly deteriorated during the course of the investigation. Bedfordshire Police had to threaten Group 4 with a court order to obtain disclosure of Detention Custody Officers (DCOs) notebooks. All DCOs were issued with notebooks where they were expected to record events while on duty. A significant number had made a detailed record of the events of 14th February 2002. It later materialised that these notebooks were essential for cross-examination, particularly in the case of Thomas Kalu.

> "The trial judge said: 'it's hard to justify the course of conduct' [of Group 4]"



Furthermore, the manager for the Yarl's Wood Detention Centre had issued a notice to all members of staff at the Centre stating that they should obtain a copy of their statement to the police. The staff were advised that they were not required to sign their statement to the police without a copy being provided to them. They were further advised that they could discuss their statement with Group 4 management at the Centre. A legal representative for Group 4 was present during interviews between the police and Group 4 staff. The legal representative was there to represent the interests of Group 4. Bedfordshire Police interpreted the above as an interference with their investigation and reported Norton Rose, solicitors for Group 4, to the Law Society.

One month before the trial at Harrow Crown Court, Group 4 began conducting witness training sessions for potential witnesses. Bond Solon who were hired for this purpose designed a training package entitled "Butlins Detention Centre for Asylum Seekers". The Crown Prosecution Service was concerned that the substance of the witness training programme went beyond courtroom skills and advised Group 4 not to proceed with the training. The advice was ignored. Bond Solon were later described by leading counsel for the Crown as a "thoroughly disreputable organisation" and the training as "wholly inappropriate and improper in the context of a criminal trial". One of the witnesses received at least six hours of training – he should ask for his money back as the trial judge described his evidence as "simply awful".

The deportation of potential defence witnesses was a failure of both Bedfordshire Police and the Home Office. Defendants such as Abdul Kayode and Lucky Jacobs had named in interview fellow detainees who could corroborate their whereabouts at the time of the disorder. It was too late – some of these witnesses were deported before the police could make inquiries. Another defendant, Thomas Kalu, was unable to name potential witnesses and needed access to photographs of detainees. This should not have prevented a balanced investigation as detainees were photographed on the night of the fire. Instead, Mr Kalu was given access to photographs several months after the incident only for his defence to discover that four out of the 23 detainees could be traced

Some of the defence teams had submitted that extensive prejudicial pre-trial publicity of asylum seekers prevented a fair trial for the defendants. Asylum seekers as a group had repeatedly received prejudicial media coverage – one example was *The Sun*'s campaign earlier in the year called "Asylum Madness". The media coverage cited by the defence was not specific to any one defendant but it was submitted that the defendants' status as asylum seekers were so integral to the matters being tried that some jurors would not be able to detach themselves from preconceived views against asylum seekers. The judge rejected this submission on the basis that it was unlikely that there would be many jurors who did not directly or indirectly have an immigrant background. After the jury retired to deliberate, a juror sent a note to the judge accusing two fellow jurors of bias and prejudice. The juror who sent the note was later discharged on grounds of ill health.

An acquitted asylum seeker is no less unpalatable for some of our newspapers. The *Daily Mail* found the not guilty verdicts for arson hard to swallow – on its front page it described the acquittals as "escaping charges of burning down". It even implied that the acquittals might have resulted from the conduct of Group 4. It quotes a source from Bedfordshire Police as saying, "Group 4 have behaved appallingly. If they had co-operated more, then maybe so many defendants wouldn't have walked free". Most inaccurately, the *Daily Mail* asserted that Nasseem Moustaffa was seen "smashing light fittings" and "brandishing a burning torch" – this evidence was considered unreliable and insufficient which led to the charges of arson and violent disorder being dismissed against him. It must have been some comfort to the *Daily Mail* to learn that Immigration Officials immediately detained the acquitted defendants and one of them, Klojdan Gaba was deported to Albania within days of his acquittal.

> "The *Daily Mail* found the not guilty verdicts for arson hard to swallow – it described them as 'escaping charges of burning down' "

Some of the defendants that the paper had accused of escaping convictions were also responsible for assisting Group 4 staff in escaping the fire. Lucky Jacobs and George Tuka led a Detention Custody Officer to safety . He was comforted by another defendant, Agron Kastriotti, whom the officer described as "a good man". Mark Curtis, a Detention Custody Officer who had suffered a terrifying ordeal while being trapped in an office was later comforted by Thomas Kalu and Lucky Jacobs. Bihar Limani, who was convicted of violent disorder, helped lead families to safety. The prosecution cynically described these efforts as "acts of mercy". Other detainees such as Fitz, a striking middle-aged Jamaican, had ensured the safety of Group 4 officers caught in a harrowing siege. He was deported before the trial. ▶

In contrast, the jury were told that Detention Custody Officers were ordered to "lock detainees in the burning building" and the order was obeyed. A former Detention Custody Officer, Darren Attwood, believed that the order was wrong and relayed his concerns during a counselling session. It materialised that Group 4 had been investigated for corporate manslaughter before the trial but several months of sifting through forensic evidence did not produce evidence of any fatalities.

In his closing speech, Nigel Rumfitt QC, for the Crown, labelled Group 4 as a "national laughing stock". He told the jury, "You may wonder whether any large commercial organisation could have made a bigger fool of itself even if it had been trying to do so". He accused the company of fouling up the initial stages of the investigation by showing photographs of suspects to potential witnesses, organising counselling and witness training sessions and for advising their staff not to co-operate with the police. Mr Rumfitt QC reminded the jury that Group 4 had lost control of the building within minutes of the disorder and had allowed the police control of the premises some five hours later. This damning description of Group 4 was a clear attempt by Bedfordshire Police to distance itself from the catalogue of blunders both during and after the disorder.

> "Campaigners are angry that the centre has re-opened before the completion of the inquiry"

Group 4 Falck A/S is the second largest security services provider in the world. According to its website (www.group4falck.com), it has operations in 85 countries, employs over 230,000 people and has a turnover of 3.2 billion pounds. It was founded by a Dane, Jorgen Philip Sorensen, who remains its largest shareholder. The company declares that, "Group 4 Falck works on the basis of a code of ethics governing such issues as human rights, racism and child labour". However, it considers "its most important social responsibility to be ensuring that the Company has a good and sound financial position and preserving the ability to generate growth and create jobs."

Whatever Group 4 believes to be its social and ethical responsibilities, they cannot correspond with the recent assertions made by former detainees of Yarl's Wood. Lucky Jacobs, Abdul Kayode, Henry Momoudou and others have claimed that they were denied food and water for at least three days whilst in segregation at Yarl's Wood. The detainees claim that they were placed in segregation for 17 days with little more than a blanket in February and were told for three days that there was no food as they had "burnt down the kitchen". Lucky Jacobs alleges that he was assaulted by Group 4 officers and is pursuing a civil action. The claims are being investigated by the Prisons Ombudsman, Stephen Shaw. Incidentally, the jury who visited the site during the trial, were told that the segregation wing was closed owing to refurbishments.

Yarl's Wood has now re-opened to detain women and families. The Government hopes that 400 asylum seekers will be kept at the Centre by 2005 as part of its policy to increase the removal rate of asylum seekers. Campaigners are angry that the Centre has re-opened before the completion of the inquiry and have accused the government of "disregarding human life". Group 4 have renewed their contract with the government and continue to operate the Centre.

The Centre is now fitted with sprinklers. But the evidence disclosed at the trial, the observations of the trial judge and the prosecution and the recent assertions by former detainees consistently depict incompetence, which cannot be fixed by a cosmetic fitting of sprinklers. Asylum seekers are entitled to equal protection from abuses of human rights and are one of the most vulnerable groups in society. It is simply wrong for some newspapers to question whether they have a right to sue an organisation that has allegedly abused their fundamental rights (see the *Daily Express,* 30th September 2003 and the *Daily Mail,* 30th September 2003). Judicial interference, Tony Blair, is essential in any democracy especially for those who become easy political fodder. ■

● Rekha Kodikara, Barrister and Junior Counsel to Thomas Kalu.

International condemnation of Colombian president's outburst

Organisations including the UN, the European Union and a whole host of international and Colombian human rights bodies have severely criticized president Alvaro Uribe Velez for his recent attacks on civil society groups.

Alfredo Castro, ANNCOL Colombia, reports:

"Following his outburst last week in which he described human rights groups and other NGOs as "terrorists" and "coward" president Alvaro Uribe Velez of Colombia has been condemned by the international community for putting lives in danger and not tolerating opposition.

The speech in which he made the remarks took place as eighty well-respected Colombian organisations issued a report criticising various elements of the President's national security policy. Uribe refused to name specific groups but claimed that those who were against him represented terrorist interests. Such accusations put the groups involved in grave danger of attack from right wing paramilitaries who see opponents of Uribe as guerrilla supporters.

While the United Nations said that the groups that Uribe attacked were "indelible requirements for the effective functioning of democracy, the construction of peace and the defence of human rights" and the European Union said that they were "preoccupied" by the possible "tragic consequences" of his remarks, perhaps the harshest criticisms came from the United States.

"Mr. Uribe's strident attack has placed the lives of all Colombian human rights defenders at risk. The Colombian government seems unable to comprehend that dissent is essential to democracy. The president's statements will only deepen international concern about his commitment to human rights. No one should expect Colombian democracy to emerge strengthened from Mr. Uribe's time in office," said Kimberly Staton, the Deputy Director of the Washington Office on Latin America.

> "In Colombia today, to be accused by someone in power of being a guerrilla fellow-traveller is tantamount to receiving a death sentence"

Neil Jeffery, the Executive Director of the US Office on Colombia added, "Democratic governments around the world recognize that a strong and independent civil society is fundamental for the protection of democracy, justice and the rule of law. President Uribe has shown today that he does not. Members of Congress will certainly take his comments into account the next time they consider providing Colombia with more military aid."

The Washington-based Center for International Policy, who have a long history of Colombia-related programs and projects made a statement saying, "In Colombia today, to be accused by someone in power of being a guerrilla fellow-traveller is tantamount to receiving a death sentence. Uribe applied his remarks to an entire sector of non-violent activists, scholars, opposition politicians and dissidents. He spoke of groups he sees as legitimate and those he sees as 'defenders of terrorism,' but failed to distinguish them clearly."

"For a country's president to make such a serious accusation – without presenting a shred of evidence or naming a single person or group under suspicion – is an act of pure cowardice. It makes the job of defending human rights in Colombia many times more difficult. Comments like these must stop now, and an apology is in order" the statement continued.

Lisa Haugaard, Executive Director of the Latin America Working Group added, "Mr. Uribe's diatribe against human rights groups in front of a military audience marks a dangerous turn of events. These vague accusations could give a green light to those who would attack legitimate opposition politicians, union activists, human rights defenders and community leaders in the name of fighting insurgency. The context of Mr. Uribe's comments is particularly disturbing given the documented ties that continue to exist between some sectors of the Colombian armed forces and paramilitary groups, who often target human rights defenders. Human rights defenders are valuable assets in any democracy, and among Colombia's most valuable and endangered resources. Mr. Uribe should work with them-not leave them undefended."

Amnesty International also severely criticised the comments with one Amnesty official telling ANNCOL that, "we are extremely concerned that killings of human rights defenders and others in civil society could now increase dramatically as a direct result of his speech. He said some disgraceful things that could lead to severe problems for some of the bravest people in Colombia."

In Colombia the Permanent Assembly of Civil Society for Peace, the country's foremost peace organisation, accused Uribe of being a "dangerous man" who made "wild accusations, backed by no evidence, but that put large numbers of lives at risk".

> "We are extremely concerned that killings of human rights defenders could now increase dramatically as a direct result of his speech" Amnesty

However, the Colombian government showed no signs of backing down last week with fresh comments from other senior figures producing further controversy.

Defence Minister Marta Lucia Ramirez said that she rejected the most recent report from the United Nations High Commission for Human Rights that blamed the majority of human rights violations in Colombia on the Colombian State.

"Actually the State is responsible for less than one per cent of the abuses whilst more than 99% are the work of terrorists" she claimed. Flying in the face of all evidence the Minister went on to blame leftwing rebels for nearly all violations and said that the US Department of State were wrong to say that the Colombian armed forces worked with paramilitary death squads – a fact agreed upon by not only the State Department but all international and Colombian human rights organisations too.

In a separate intervention the Commander of the Colombian Armed Forces, General Jorge Enrique Mora Rangel, accused the Intercongregational Commission for Peace and Justice, an internationally respected religious organisation, of working in league with leftwing FARC rebels and made similar accusations against displaced peasant communities that are currently trying to return to their land in the Cacarica River area of Choco department." ■

The Israeli government is building a wall in the West Bank. Its construction has raised strong and conflicting emotions within Israel, the occupied Palestinian territories and internationally. **Paul Troop** examines its legality under the Geneva Convention

ANOTHER BRICK IN THE WALL

Within Israel, the vast majority of Jewish Israelis support the building of a wall separating Israel and the Palestinians. In the July 2003 Peace Index Survey, 80% said that they were very or fairly supportive of the idea. This is not to say that Israelis are in agreement as to the way that the wall is being built. In this regard views diverge massively; parts of the Israeli left wing want the wall built along the "Green Line" that marks the boundary between Israel and land in the West Bank occupied by Israel since 1967, whereas Israeli settlers in the West Bank generally want the wall to be built as far into occupied land as possible.

No doubt the desire for a wall is as a result of three years of the Palestinian Intifada, the failure of the peace process and the fear generated by Palestinian militant activity against civilians by way of suicide bombings. It may also have been because of the apparent success of a similar wall built around Gaza in foiling suicide bombings in Israel.

Within the UK, at least initially, there also seemed to be support for the building of a wall. Among some sections this may have been because of a desire to delineate the boundaries of a future Palestinian state along the Green Line. This wish was shared by sections of the Israeli left wing and apparently a reason for the initial opposition to the wall by the current Israeli Prime Minister Arial Sharon. Perhaps also people in this country considered both sides to be equally blameworthy and saw the only solution as being to separate them.

The folk wisdom quoted in the 1915 Robert Frost poem "Mending Wall": "Good fences make good neighbours" is often quoted. However, like the wall, the poem is not as straightforward as it sounds. The character in Frost's poem in fact questions why a wall is necessary:

"Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offence."

What Will the Wall Amount to?

Throughout this article, the word "wall" is used. The Israeli Government does not use this term and prefer to refer to the wall as the "separation fence" . There are a variety of different names by which the wall is referred to. These include the "security fence," "separation barrier," "concrete fence," and "apartheid wall" depending on the point of view of the user. Many official Israeli Government words and phrases have unofficial counterparts. Examples include: "Israeli Defence Force" / "Israeli Occupation Force;" "Judea and Samaria" / "West Bank;" "Targeted Prevention" / "Assassination."

I have used the term "wall" as I consider it to be the most accurate description of the structure currently being built. Although not complete at present, there are clear indications of what the final form of the structure will be. It is likely to be a concrete structure with a maximum height of eight metres. There will also be electrified fencing, trenches up to four metres deep, a trace path, a two lane road for patrol vehicles, electronic sensors, thermal imaging and video cameras, fortified guard towers and razor wire. There are likely to be "no-go" areas of various widths either side of the structure, possibly of up to several hundred metres. This does not reflect the normal use of the word "fence" and as I shall explain in this article, the effect of the wall will not be to "separate" Israelis and Palestinians.

Legality under International Law

It has been contended that the building of the wall in this way is contrary to International Law. Both the recent UN General Assembly Resolution A/RES/58/3 on the wall and the UN Security Council draft resolution S/2003/980 (vetoed by the USA) state that the wall is "contrary to relevant provisions of international law," though they do not state which ones.

The Israeli government argues that the requisition of property in the Occupied Territories is legal according to Article 23(g) of the 1907 Hague Regulations which states: "Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden… (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war…"

However, Article 46 of the same Hague Regulations states that private property must be respected and cannot be confiscated and Article 55 states that an occupier is regarded only as an administrator and user of real property and agricultural land in the occupied territory and therefore must safeguard such properties.

Most relevant is the Fourth Geneva Convention of 1949, which governs the treatment of civilians. The Israeli Government is signatory to the Convention, but denies that the Fourth Geneva Convention applies to the Occupied Palestinian Territories. Against this, the Committee of Contracting States of the Fourth Geneva Convention disagrees and states that Israel remains the occupying power and therefore must comply with the Convention and other rules relating to occupation .

Article 53 of the Fourth Geneva Convention relates to property appropriation and reads: "Article 53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

The Fourth Geneva Convention also provides that appropriation of property can amount to a "grave breach" and therefore a war crime: "Article 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention… extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Under the preceding article of the Geneva Convention, Article 146, the parties signatory to the Convention agree to enact penal sanctions and to search and bring to trial before their own courts persons alleged to have committed grave breaches of the Convention, regardless of their nationality. In this country, the obligation is enshrined in the Geneva Conventions Act of 1957.

Other commentators have pointed out various other breaches of international instruments that Israel is breaching because of the wall. BTselem, the Israeli Information Centre for Human Rights in the Occupied Territories has submitted that the wall is an infringement of the right to freedom of movement, the right to work and to an adequate standard of living and the right to property. Additionally, the Oslo Peace Accords signed in 1995 forbid a party from changing the status of the West Bank under the agreement .

Is "separation" possible?

You could be forgiven for thinking that separating Israelis and Palestinians would be easy. The West Bank lies to the East of Israel. The River Jordan and the Dead Sea form the Eastern border of the West Bank with Jordan. The border of the West Bank with Israel runs for about 350 kilometres in a rough curve that runs near Haifa in the North, Tel Aviv to the West and the Negev desert to the South. For a variety of reasons, attempting to build a dividing wall would not be easy. The wall in Robert Frost's poem divides an apple orchard from pine trees. The populations of the West Bank and Israel are not so neatly divided.

The first obstacle is the Israeli settlements. Travelling through the West Bank, seeing settlements is as common as seeing Palestinian towns. In contrast to Palestinian towns that have grown randomly and untidily in the valleys, settlements are normally located on the tops of hills, regular white boxes of houses with red tiled roofs arranged in rows and surrounded by massive security. Though population transfer into occupied land is illegal, contrary to Article 49 of the Fourth Geneva Convention, the Israeli Government has planned, supported and funded this settlement of Israelis in the West Bank. There are now 400,000 Israelis living among the Palestinian population. Settlements are often deliberately placed in immediate proximity to Palestinian Towns and villages and in the case of Hebron, a Palestinian Town, a settlement is located in the very heart of the city. It is therefore impossible to divide Palestinians from Israelis unless the settlements are dismantled, a step to which the current Israeli Government is vehemently opposed. Nor should it be forgotten that Palestinians who remained in Israel when the state was created amount to around 20% of the population and the proportion is steadily increasing.

The current government's refusal to consider dismantling the settlements creates further difficulties in any attempt to "separate" the two peoples. Settlers are citizens of Israel and are entitled to unrestricted access to and from the West Bank. In addition, citizens of Israel, including both Jewish and Palestinian citizens, together with visitors to Israel holding a visa are also entitled to unrestricted access to the West Bank, though Israeli citizens are forbidden to enter Area "A," which is nominally under Palestinian control. This necessitates a porous border with numerous security checkpoints to check identity cards and search people and vehicles.

Will a wall prevent suicide bombings?

The Fourth Geneva Convention requires property appropriation to be "necessary" in order to be legal. Doubts have been expressed as to whether the wall will be effective, bringing doubt on whether it is "necessary".

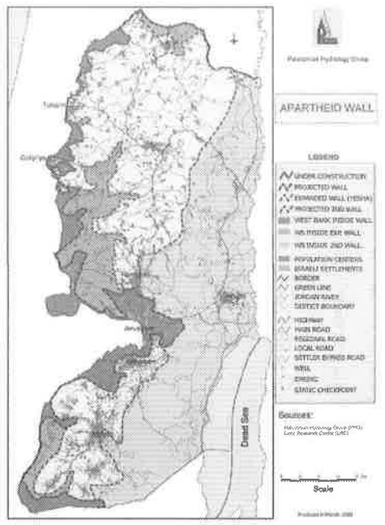
The Wall is commonly thought to be a way of preventing suicide bombers from the West Bank from reaching Israel. The basis for this is apparent success of a similar wall that surrounds Gaza. Since the effective closure of Gaza to Palestinian movement, the vast majority of suicide bombers have come from the West Bank. The Israeli Ministry of Defence has stated: "The security fence that exists along the Gaza Strip has proven its defensive robustness and the vast majority of infiltration attempts through it, were discovered and thwarted."

However, an official Israeli Government report has cast doubt on the application of this assumption to the wall in the West Bank. The Israel State Comptroller is an independent audit body that reports to the Israeli Parliament, the Knesset. In July 2002 the State Comptroller produced a report on the seam area that stated: "[Israel Defence Force] documents indicate that most of the suicide terrorists and the car bombs crossed the seam area into Israel through the checkpoints, where they underwent faulty and even shoddy checks."

The suicide bomber that killed 19 people in a Haifa restaurant on 4th October 2003 apparently travelled from Jenin in the North of the West Bank and through the completed section of the wall with little difficulty.

Sources in the Government have also expressed doubts about the wall. In an interview published 30th August 2003, Israel Defence Force Chief of Staff Moshe Ya'alon said: "I don't think the fence will solve all the problems. If I were given that money, I would invest it elsewhere." Even Ariel Sharon, speaking of the wall in April 2002, was quoted as saying: "The idea is populist and intended to serve political objectives."

There are also massive differences between Gaza and the West Bank. The apparent success of the wall in Gaza has been as a result of the almost hermetic sealing of Gaza to Palestinians. When I lived in East Jerusalem, myself and my colleagues would sometimes buy lunch from a Palestinian from Gaza who sold food cooked by his wife from the back of a battered old car. He was outside Gaza when the borders were effectively sealed and had been unable to ▶



return for years. The West Bank wall could only be as effective as the one in Gaza if the gates in it were closed to Palestinians, something that the Israeli Government is claiming that they have no intention to do.

Doubts about the efficacy of the wall, together with knowledge of the cost amounting to a sum in the region of £1,000 million have led some to speculate that there are other reasons for the Sharon Government's decision other than security concerns or mere submission to popular pressure. Palestinian, Israeli and international commentators have suggested that the wall is an attempt by Sharon to appropriate further Palestinian land and to delineate the borders of a future Palestinian state far smaller than one that would encompass the entire West Bank. There is force in this suggestion.

Permanence

Israel considers the wall to be temporary. The significant cost and extent of the construction alone have led some to question what the Israeli Government considers to be "temporary".

The government points to the fact that the land in question has been requisitioned by military order only until 31st December 2005. However, nothing prevents the orders themselves from being renewed without limitation in the future. It would seem difficult for the Israeli Government to justify the enormous cost of the wall if it were to be dismantled in 2005 or shortly thereafter. The construction methods suggest the wall could stand for a long time.

Historical precedent does not inspire confidence in the government's claims. A similar procedure was used by Israel to take control of Palestinian land for a "temporary" period to establish settlements. These settlements have not been returned and it is clear that the intention of Israel was to permanently appropriate the land. It is likely that despite the government's statements, the land taken to build the wall will be effectively appropriated.

The Route of the Wall

The Wall at present is not complete. Nor is it clear where the final route will run, as previously the Israeli Government has refused to release a final plan and changes to the route are taking place daily. However, parts of the route can be determined from the land-seizure orders given to Palestinians, maps submitted to the High Court of Justice and physical observations of the current construction.

Deviations from the "Green line"

The first point to note is that although the Israeli government is building the wall, not a single part of it is being built on Israeli land. The parts of the wall that have so far been constructed do not follow the Green line. In some places, the wall deviates from the Green line by as much as six kilometres into the West Bank. In response to the question why this is so, the Israeli Ministry of Defence states: "The Security Fence is a defensive measure that is being built in order to eliminate terrorist attacks on Israeli citizens. As such military and operational considerations dictate its route and not political considerations."

What the Israeli Government appears to mean by this was revealed in submissions to the High Court in proceedings relating to the wall. One element of the wall is a "trace path," designed to show footprints. The Israeli Government position was that the wall was required to be inside the Green Line in order to enable the military to track down anyone who had succeeded in crossing the wall before they were able to enter Israel. This does not explain why in some places the wall is near to the Green line but in other places it is a long distance away. Nor does it explain why Israel is apparently unconcerned by the Palestinians living in the seam area between the wall and the Green line, unless the government is intending to remove these Palestinians to other areas inside the wall. This raises questions as to whether the appropriation is justified by military necessity. Many people point out that the wall could easily have been built on Israeli soil.

There have been recent indications that the Israeli cabinet will approve the route of the wall to ensure that the Israeli settlement of Ariel will be on the Israeli side of the wall . Ariel is a large settlement located in the very heart of the West Bank. Building the wall in this way would necessitate a long "finger" into the West Bank, dividing the land still further.

All of the construction work so far has been on Palestinian land. Due to the width of the wall, in some places up to 100 metres wide, a significant amount of Palestinian land has been requisitioned for its construction.

Along the "seam area" (the strip of land along the Green Line), there are both Israeli settlements and Palestinian towns. The route of the wall so far seems designed as far as possible to ensure that Israeli settlements in the West Bank are on the Western, Israel side of the wall and that Palestinian towns are on the Eastern side of the wall. The result is a wall much longer that the Green Line, that loops back and forth and results in a significant amount of Palestinian land being on the Israeli side of the wall. It has also led to Palestinian towns being made into "enclaves," surrounded on all sides by the wall and with only restricted access from the West Bank.

Palestinians have had no influence on the route of the wall. Orders for requisition of land become valid the date signed, even if not delivered to the owner, and may be issued retroactively after the seizure has taken place. Appeals against the orders must be lodged within a week to the Legal Advisor to the Military Commander for review by the Israeli Military Appeals Committee. It is believed that every one of the hundreds of appeals against requisition have been rejected; though in some cases the amount of land requisitioned has been reduced. It is also possible to appeal further to the Israeli High Court, but all such appeals have so far been unsuccessful. Compensation is offered, but it is considered to be below the actual value and Palestinians are reluctant to accept it for fear of legitimising the appropriation of their land.

Enclaves

The looping route of the wall within the West Bank to ensure that Israeli settlements are on the Israeli side of the wall has led to the creation of several enclaves on both sides of the wall. The clearest example of this is the Palestinian town of Qalqiliya, which has 41,000 residents. The wall surrounds the town, with only one entry and exit point to the West Bank. The town will be severed from farmland and wells. Access to both the town and the land the other side of the wall will be dependent on permission being granted by the Israeli Military. This month, the Palestinian Centre for Human Rights reported that on 5th October 2003 a number of farmers from Jayous, near Qalqiliya crossed from the West Bank side of the wall through to the Israeli side of the wall with their families in order to gather their crops. When they tried to return that day, the soldiers prevented them gaining access to their village. Eventually the women and children were allowed to cross, but around 70 male farmers were forced to stay outside the wall by their land for at least nine days.

In order to comply with the requirements of the Fourth Geneva Convention, the appropriation of land must be justified by military necessity. It is highly unlikely that protecting settlements, which are themselves illegal contrary to the Geneva Conventions, would be justified by military necessity.

The "Seam Zone"

A large question has been raised about what will happen to the Palestinian land in the "Seam Zone", the strip of land between the Green Line and the wall. On 2nd October this year, the Commander of the Israeli Military in the West Bank by military order declared the Seam Zone a "closed area". This means that "no person will enter the seam zone or stay in it" and that "a person that stays in the seam zone is obliged to exit it immediately."

Different requirements apply to Israelis and Palestinians. All Israelis are exempt from the requirements and can enter and leave as they please. This also includes anyone entitled to immigrate to Israel under the Law of Return 7510-1950. By contrast, all Palestinians will be required to obtain permits from the military commander to enter and remain in the seam zone. This includes current permanent residents of the Seam Zone.

The requirement to obtain a permit causes grave concern to Palestinians. The Israeli government has required Palestinians to obtain similar permits in the past. The manner in which these permits have been granted and refused has previously been based on arbitrary criteria. Reasons for refusal have not been given. BTselem has reported that in the past, Israel has taken advantage of the requirement that Palestinians obtain entry permits or permits to go abroad by making them conditional on collaboration with the Israeli Intelligence Service, the General Security Service .

Even with a valid permit or permission to travel, the system of checkpoints provides no guarantee of free movement. For long periods of time all movement within the occupied territories can be suspended for long periods, as happens during Jewish holidays and elections. In some circumstances, men between specific ages are forbidden to enter certain areas. In February this year I was forced to travel by a Palestinian "service" from Tulkarem to Ramallah after my Arab-Israeli taxi driver refused to leave Jerusalem to pick me up in the snow. What would have been a journey of less than an hour using Israeli roads took almost five hours using Palestinian roads. Because of these restrictions, the only men allowed to travel in the service through the numerous checkpoints were the driver, a doctor and myself.

Maltreatment of Palestinians at Israeli Military checkpoints is extensively documented. My own experience of checkpoints was not favourable. Often checkpoints would only be open during the day, with long queues of people on foot waiting for hours. Crossing with a vehicle was often almost impossible. Checkpoints are often closed at short notice. In Ramallah I had to stay overnight with a television cameraman overnight while Israeli Tanks patrolled outside after the exit checkpoint was closed.

The net effect of the different laws and military orders applied to Palestinians by the Israeli bureaucracy is likely to lead to Palestinians losing land in the Seam Zone. This is because of the Israeli Government's use of an Ottoman Land Law of 1858. Israeli uses this law to declare unregistered land that has not been cultivated for a period of three years to be declared "State Land". The Israel Lands Administration has never made public the amount of land registered as State Land, but it is believed to comprise around 40% of the West Bank. The majority of Palestinian land in the Seam Zone is unregistered and the Israeli Government ceased carrying out surveys shortly after 1967 whilst continuing to allow State Land to be registered.

Palestinians in the Seam Zone are also being discouraged from remaining there by the current Israeli policy of demolitions. Recent months have seen a large increase in demolitions of what Israel considers to be "illegal" structures and it has a policy of refusing to issue Palestinians building permits outside the built up areas of towns and villages. Between 1996 and 1999, only 79 such permits were granted in Area C. Hundreds of demolition orders have recently been issued. All these factors are likely to lead to the effective "expropriation" of Palestinian land.

Another Wall to the East?

There has been speculation for some time that another wall may be built somewhere along the other side of the West Bank, to the East between the Palestinians and Jordan. Depending on the route, it may have the effect of closing Palestinian areas into unconnected enclaves. Israel mostly classes the East of the West Bank as a military zone. On the road to the Dead Sea in some areas I saw numerous red signs in Arabic, Hebrew and English warning that anyone would be liable to be shot if found near the Dead Sea between sunset and sunrise. Also visible are the nearby Israeli settlements, marked by lots of white and blue Israeli flags.

An indication that a second wall is being planned was recently given by a leak from an anonymous source in the Israeli Government.

The United Nations

UN Security Council draft resolution S/2003/980, introduced by Syria, was subject to a vote on 14th October 2003. Relevant parts of the draft resolution read as follows: "... *Reiterating* its call upon Israel, the occupying Power, to fully and effectively respect the Fourth Geneva Convention of 1949... *Reiterating* its opposition to settlement activities in the Occupied Territories and to any activities involving the confiscation of land, disruption of the livelihood of protected persons and the de facto annexation of land... 1. Decides that the construction by Israel, the occupying Power, of a wall in the Occupied Territories departing from the armistice line of 1949 is illegal under relevant provisions of international law and must be ceased and reversed..."

The USA exercised its veto stating that the resolution was "one sided" and "did not further the goals of peace and security in the region." The UK abstained on the resolution.

Subsequently, the UN General Assembly Resolution 2003 A/RES/58/3, calling on Israel to cease and reverse construction of the wall was passed by 144 votes in favour, 12 abstentions and four votes against. However, General Assembly resolutions have no legal effect.

Summary

It seems likely that the wall in the West Bank is contrary to the Fourth Geneva Convention as it amounts to extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In legal terms, there is very little that can be done to require Israel to cease construction of the wall in the way that it is doing so. The USA almost invariably exercises its veto over Security Council Resolutions relating to Israel. The only theoretical legal avenue might be for States to fulfil their obligation under the Fourth Geneva Convention to search for and bring to trial individuals alleged to have committed grave breaches of the Geneva Convention. There are difficulties in undertaking this too, not least diplomatic immunity following the case of *Congo v Belgium* in the International Court of Justice and political unwillingness at the domestic level. ■

● Paul Troop is a barrister at Tooks Court Chambers and previously International Lawyer and War Crimes Investigator, Law, the Palestinian Society for the Protection of Human Rights and the Environment

Berlin Wall 96 miles long (155km) Average height 11.8 ft (3.6m)

Israel Wall To be at least 403 miles long (650km) Maximum height 25 ft (8m)

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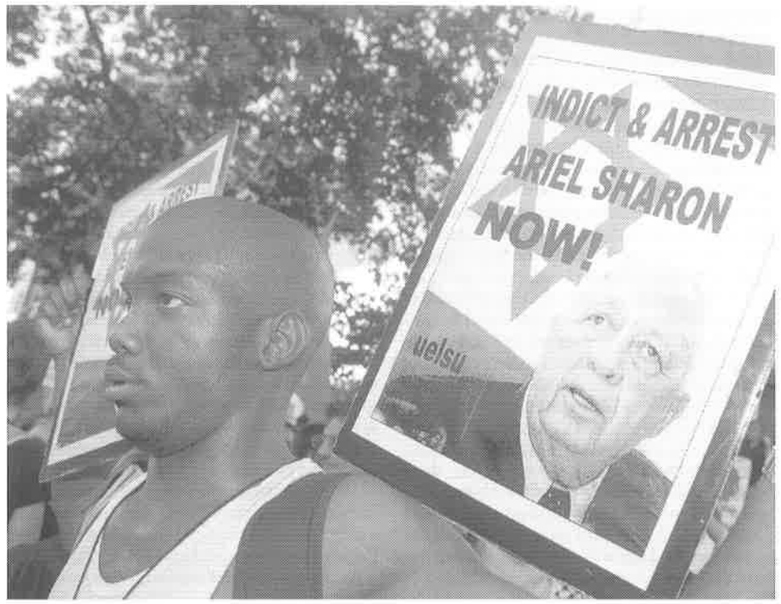

Picture: Jess Hurd / reportdigital.co.uk

Merrilyn Onisko from the US National Lawyers Guild reports on the recent experiences of their Middle East Legal Assistance Brigades

The first delegation of the U.S. NLG's Legal Assistance Brigades to Israel and Palestine was a great success. The Middle East Subcommittee arranged for a group of Guild lawyers and law students (and recent graduates like me) to work with Israeli and Palestinian NGOs on such important issues as detainees, prisoners, and torture, as well as collaborating with the Free Marwan Barghouti Campaign. I was there for nearly three weeks and from the moment I arrived, there was endless work for me to do.

On my first day, I met a woman lawyer from the Prisoner's Club – a large network of law offices across the West Bank devoted solely to providing legal assistance to Palestinians who are either in prison or being held in administrative detention. Administrative detention, usually described as preventative detention or internment, entails the imprisonment of individuals, without charge or trial, initially for a period of six months but renewable indefinitely. This policy originated during the British Mandate of Palestine but has continued in various forms since 7th June 1967, when Israel began its illegal occupation of the West Bank and Gaza Strip.

Because of the widespread nature of administrative detention (it is difficult to meet one Palestinian who has not been in jail or detention or had a family member incarcerated), groups working on this issue are vital to the Palestinian society.

Along with the Prisoner's Club, there are eleven other groups in Palestine devoted solely to this issue, including the Mandela Institute, Addameer, and others in Israel including the Public Committee Against Torture in Israel (PCATI). The Guild Brigades worked with many of these groups on a daily basis on whatever issues they needed help with at the time. For example, Michael Shahin, a law student from California is currently assisting Addameer attorneys in administrative detention cases. I worked at Mandela Institute and updated their report on Administrative Detention for their website. The final section on International Law required updating since their previous report in 1998. One of the most important parts of the update is a legal strategy that came out of this Guild project: the idea of claiming POW status for Palestinian prisoners and detainees. Audrey Bomse, a Guild member who has been working in East Jerusalem for the past two years, has written an extensive article on the legality and legitimacy of Palestinian resistance to the Israeli occupation, and argues convincingly for a movement within the Palestinian community to claim POW status upon arrest. This status would allow Palestinian prisoners and detainees considerably more rights than they are now allowed (which is virtually nil), and also serve to legitimise the claim of Palestinian self-determination via armed struggle to the international community.

We were also able to attend one of the community outreach events hosted by Addameer at Dheiheishe refugee camp in Bethlehem. Although it was conducted in Arabic, we were able to pick up a definite message from the community – that they feel angry and helpless in the face of their sons and daughters being victims of mass arbitrary arrests without any form of due process and no real recourse to challenge it. The good news is that these groups are beginning to make good progress educating the community about their rights and what they should and should not do if they are arrested. (At present, 95% of criminal convictions are based on confessions.) These efforts are especially hopeful considering a brand new procedure agreed to by the Israeli State Attorney's Office – in the course of litigation challenging the human rights violations of detainees – to distribute to all detainees under interrogation, a document (written in Arabic) detailing their rights. This includes the right not to incriminate oneself.

Finally, we developed a strong relationship with the Campaign to Free Marwan Barghouthi. The Guild, along with other groups from around the world, are working together to promote awareness of the campaign for Marwan and all political prisoners. I hope to take this campaign back to the States and with the help of the Guild community, apply some real pressure on the Israeli government to end the illegal and immoral policy of detaining and imprisoning political prisoners – especially those abducted from the Occupied Territories in clear violation of the Oslo Accords.

The Legal Assistance Brigades has been an extremely rewarding experience, and I think we have made some encouraging contacts in Palestine and Israel that will be long-lasting and fruitful for all of us. The Guild is affiliated with the International Association of Democratic Lawyers, which has agreed to co-sponsor the work in Palestine. We are hoping to expand participation in the Legal Assistance Brigades to lawyers and law students from other countries. Anyone interested in getting involved with the Brigades in Palestine, or doing legal research and writing from home, please contact me at monisko@yahoo.com. Join us in our campaign to 'Bring the Intifada into the Courtroom.' ■

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