Case No: 2011/01697/C5

Neutral Citation Number: [2012] EWCA Crim 280
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Paget QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2012

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE SILBER
and
MR JUSTICE KENNETH PARKER

- -

Between :

Regina	**Respondent**
- and -	
Mohammed Gul	**Appellant**

- -
- -

Mr Tim Moloney QC and **Ms Tatyana Eatwell** for the **Appellant**
Mr S Larkin QC, Professor Malcolm Shaw QC and **Miss B David** for the **Respondent**

Hearing dates: 8 and 9 November 2011

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Judgment

President of the Queen's Bench Division:

1. The appellant uploaded videos onto the internet which the Crown contended encouraged the commission of terrorism as defined in s.1 of the Terrorism Act 2000 (as amended). Included in the videos were scenes showing attacks on soldiers of the Coalition forces in Iraq and Afghanistan by insurgents. After retirement the jury asked questions, including a question as to whether such attacks were terrorism within the definition in s.1. The judge told them they were. The issue on this appeal is whether that answer was correct.

2. It is necessary first to describe briefly the material and then to explain how the issue arose after the retirement of the jury.

The facts

3. The appellant was born on 24 February 1988 in Libya. He is a British citizen and has lived much of his life in the United Kingdom. At the time of the trial he had enrolled as a law student at Queen Mary Westfield College and since the trial has graduated with a 2:1 in Law. In February 2009 police officers executed a search warrant at his house. Material was found on his computer consisting of videos uploaded onto the internet site of YouTube and other websites. He was charged with offences under the Terrorism Act.

4. In a first trial, he was acquitted on some counts and the jury disagreed on others. He was re-tried in early 2011 at the Central Criminal Court before HH Judge Paget QC and a jury. The indictment charged him with six counts of the dissemination of terrorist publications in 2008 and 2009 contrary to s.2 of the Terrorism Act 2006.

5. He was convicted on all counts save count 5. He was sentenced to five years imprisonment less time on remand. His application for leave to appeal was referred to the Full Court. There was essentially one ground which related to the way in which the judge had directed the jury in relation to the definition of terrorism. In respect of that ground we grant leave. Shortly prior to the hearing of the appeal he sought to amend his Notice of Appeal to add a further ground in respect of a jury irregularity. In respect of that ground we refuse leave to appeal for reasons we explain at paragraphs 61 and following.

The matters charged

6. The videos posted by the appellant on YouTube and other websites in relation to the five counts on which he was convicted showed attacks by Al Qaeda, the Taliban and other proscribed groups on military targets, including those in Chechnya and Coalition forces in Iraq and Afghanistan, the use of IEDs against Coalition forces, images of Osama Bin Laden, Al Zarqawi and others, excerpts from "martyrdom videos" and symbols associated with proscribed organisations. There were also shown the 9/11 attack on New York and clips of attacks on civilians. Attacks on police were also included. The videos were accompanied by *nasheeds*, praising, for example, the bravery of those carrying out the attacks and their martyrdom and encouraging such attacks.

7. It was the appellant's case in relation to those counts that he thought that force against the military was justified and that those who were fighting the Coalition forces were rightly resisting the invasion of their country. He did not agree with the targeting of civilians and attacks on civilians. He was therefore not encouraging terrorism, but self defence.

8. Although the appellant was acquitted on a count which related largely to Israel, Palestine and Gaza, it is necessary to mention that it included images of an Israeli helicopter and military vehicle being blown up. It is not necessary to refer to the other evidence in relation to this video or the appellant's explanation in relation to it.

The questions from the jury after retirement

9. After retirement, the jury late on 22 February 2011 formulated a number of questions. One raised issues as to whether encouraging a resident of Gaza to blow up the Israeli helicopter was an act of terrorism. The remaining questions were:

> "2. Is an explosives attack on Coalition forces in Iraq a terrorist attack or is there a distinction between terrorist attacks and self defence or "assistance" in such circumstances? Does it make a difference if the attack is on Iraqi police? Does it make a difference if the attack is by a proscribed group?
>
> 3. Are the answers to 2 the same for Afghanistan and Chechnya?
>
> 4. Re: definition of terrorism is the s.1 TA 2000, would the use of force by Coalition forces be classed as terrorism?"

10. The issues raised by these questions had not been dealt with in the evidence or the summing up. The judge heard submissions. He then told the jury that to answer the questions fully, further evidence would have been needed, but the time for evidence had passed. As to the first question, he told them it was not necessarily encouraging an act of terrorism to encourage a resident of Gaza to blow up an Israeli helicopter:

> "If Israel was taking part in an incursion, Operation Cast Lead, which involved attacks on civilians, schools, hospitals and ambulances, then resistance to that would be reasonable self defence. It is for that reason that the prosecution do not ask for guilty verdicts if that is all that was being encouraged."

11. After telling the jury that the answer to questions 2 and 3 depended on the circumstances, he told them that there was an argument that an explosives attack on Coalition forces was not a terrorist attack if there was a state of armed conflict between the Coalition forces and others, as what exempted soldiers on one side or the other from liability for terrorism was "combatant immunity" when they were fighting a war. More evidence would be needed to answer the question fully. As to attacks on the police, he pointed out that that would make a difference, as when the videos were uploaded in 2008-9, the police were not combatants either in Iraq or Afghanistan. In answering question 4, he said:

> "..the use of force by Coalition forces is not terrorism. They do enjoy combatant immunity, they are ordered there by our government and the American government, unless they commit crimes such as torture or war crimes. ..."

12. The jury then asked a further question at the end of that day:

> "Please confirm that within Iraq/Afghanistan now there are governments in place there cannot now be said to be in place a "conflict" and therefore no combatant exemption from what would otherwise be a terrorist attack, ie. IED on Coalition Forces. To simplify, would an IED attack (ignoring self defence) on Coalition Forces be a terrorist attack if carried out in 2008/9?"

13. After hearing further submissions, the judge answered the jury's question telling them that, although he had said on the day before he could not answer the question in a simple yes or no, in reality, he thought he could. After reminding them of the evidence that there were governments in place in Iraq and Afghanistan by 2008, he answered the question:

> "I have to apply the Terrorism Act and the definition of terrorism which is part of English law, and the answer is "yes, it would". But it is ultimately for you to say."

14. The issue on the appeal is whether these answers to the jury's questions were correct for, later that same day, the jury returned verdicts of guilty on five of the counts. Those counts included (as we have mentioned) footage of attacks on Coalition forces; count 5 where the appellant was acquitted contained, as we have stated, footage relating to the Israeli/Palestinian war in Gaza.

The definition of terrorism in the Act

15. S.1 of the 2000 Act (as amended) defines terrorism:

> "(1) In this Act "terrorism" means the use or threat of action where"
>
> (a) the action falls within sub-section (2),
>
> (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
>
> (2) Action falls within this sub-section if it
>
> (a) involves serious violence against a person

(b) involves serious damage to property

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within sub-section (2) which involves the use of firearms or explosives is terrorism whether or not sub-section (1)(b) is satisfied.

(4) In this section

(a) "action" includes action outside the United Kingdom

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom

(d) "the government" means the government of the United Kingdom, or a Part of the United Kingdom or of a country other than the United Kingdom."

16. The definition is comprehensive in its scope; on its face, acts by insurgents against the armed forces of a state anywhere in the world which seek to influence a government and are made for political purposes are terrorism. There is no exemption for those engaged in an armed insurrection and an armed struggle against a government.

The contentions of the appellant

(a) The way the appeal was first advanced

17. The initial contention advanced on the appeal was that combatant immunity extended to immunity for those participating in acts against the military in armed conflict. The effect of this was that individuals possessing that status were immune from domestic criminal law, provided that they did not commit crimes unrelated to the armed conflict and war crimes.

18. Whether there was such an armed conflict giving rise to combatant immunity was a question of fact for the jury. By directing the jury that attacks on the Coalition forces in Iraq and Afghanistan in 2008/9 were terrorism within the meaning of the 2000 Act, the judge had withdrawn from the jury a question of fact, namely whether these were armed conflicts which gave rise to combatant immunity so that IED attacks on the Coalition forces were not terrorist acts.

19. The judge had also misdirected the jury on the meaning of the 2000 Act as attacks on armed forces during a non international armed conflict were not terrorism:

i) The judge should have directed the jury in accordance with the decisions in *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292 and *Secretary of State for the Home Department v DD (Afghanistan)* [2010] EWCA Civ 1407. In those decisions it had been held that attacks by insurgents on the military were not terrorism. Accordingly the judge was wrong to have said that attacks on the Coalition forces in Iraq and Afghanistan were terrorism within the meaning of the 2000 Act.

ii) In the alternative, the definition in s.1 of the 2000 Act had to be read down in accordance with the principles of international law which did not include in the definition of terrorism attacks by insurgents on military forces in the course of a non international armed conflict.

(b) The certificate of the Foreign Secretary as to the nature of the conflicts in Afghanistan and Iraq

20. The initial response of the Crown was to indicate that it would seek leave to call evidence in relation to the position in Iraq and Afghanistan and to the status of the conflicts there as non international armed conflicts. In the event, the Crown served the Certificate of the Foreign Secretary dated 21 October 2011 in the following terms:

> "(1) Her Majesty's Government takes the view that the armed conflict in Iraq after 28 June 2004 involving UK armed forces as part of a United Nations Security Council-authorised multi-national force, then, from 1 January 2009, as specifically authorised by the Government of Iraq, constituted a non-international armed conflict between the Government of Iraq and various insurgent armed forces.
>
> (2) Her Majesty's Government takes the view that the armed conflict in Afghanistan involving UK armed forces as part of the United Nationals Security Council-authorised International Security Assistance Force since its establishment in December 2001 constitutes a non-international armed conflict between the Government of Afghanistan and various insurgent armed forces."

21. It was submitted by the Crown that the nature of the conflicts was a matter of high policy which was what is described in *Halsbury's Laws of England* (5th edition, vol 61 at paragraph 14-15) as "facts of state". Such matters are exclusively for the determination of the Executive branch of the state and not the Judicial branch.

22. The Certificate was accepted by the appellant as highly persuasive in a further written submission served before the hearing. Nonetheless the contention was formally maintained that the question of whether the conflict was an international armed conflict or a non international armed conflict was a question of fact for the jury. Reliance was placed on decisions of the United Nations International Criminal

Tribunal of Former Yugoslavia (including *Prosecutor v Krajisnik* (22 September 2000) and *Prosecutor v Tadic* (2 October 1995)). However, although the status of an armed conflict is ultimately a question of fact, no real attempt was made in the result to go behind what was conceded to be the highly persuasive certificate of the Foreign Secretary. It was our provisional view that the Certificate was conclusive but, in the light of the way in which the argument had developed, it was unnecessary for us to express a final view.

23. We therefore determine the issue on the basis that the conflicts in Afghanistan and Iraq were at the relevant time in 2008 and 2009, non international armed conflicts.

(c) The consequence of the absence of evidence at the trial

24. It was also contended by the Crown that the appellant should not be permitted to raise these issues. Indeed, as we have observed, there had been no argument on the issue until the jury had asked the questions which we have set out. In our judgment, this should not prevent the appellant raising the issue. First, there was in the result no dispute as to the facts; we proceed on the basis that the conflicts were non international armed conflicts. Second, the jury raised the issue of the meaning of terrorism in relation to attacks on the military forces of the Coalition in Iraq and Afghanistan. The judge gave them the answer we have set out. If the answer was wrong, then, given the verdict on count 5, that would raise a real doubt as to the safety of the convictions on the other counts.

25. We therefore turn to consider the issue on the definition of terrorism on the basis that the conflicts in Afghanistan and Iraq were non international armed conflicts and that the jury were considering the issue on a possible factual premise, namely that what was depicted in the videos were attacks by insurgents on the Coalition military forces and not civilians.

26. It is convenient to consider first the position under international law.

International Law: attacks on military personnel in non international armed conflict

(a) The appellant's contentions

27. The argument advanced by Mr Moloney QC at the hearing of the appeal under international law had two principal strands:

i) The definition of terrorism in international law had developed so that it excluded those engaged in an armed struggle against a government who attacked the armed forces of that government.

ii) That development was supported by the distinction made in international humanitarian law between attacks on the military and attacks on civilians by those engaged in all forms of armed conflict.

(b) Combatant immunity

28. It is convenient first to explain why the principle of combatant immunity ceased to be part of the appellant's case. As we have set out at paragraph 17 above, it was the initial contention of the appellant that the insurgents in Iraq and Afghanistan were

entitled to combatant immunity, that is to say the right to participate in armed hostilities without punishment provided they did not commit war crimes. The appellant had relied in part on the 1977 Additional Protocol I to the 1949 Geneva Conventions (relating to International Armed Conflict) which had the effect of treating as international armed conflicts armed conflicts in which "peoples are fighting against colonial occupation and alien occupation and racist regimes in the exercise of their right of self determination as enshrined in the UN Charter …" (Article 1.4). However because of the effect of the Foreign Secretary's Certificate in determining that the conflict was a non international armed conflict, the United Kingdom's express reservation limiting the application of Article 1.4 and the position of the regime in both Iraq and Afghanistan by 2008, it was clear that Additional Protocol I relating to international armed conflicts was not material to the appeal. In the light of the Foreign Secretary's Certificate and the other evidence to which we have referred at paragraph 20, the appellant's case proceeded in effect on the basis that the conflict was a non international armed conflict. It was contended by Mr Moloney QC that in non international armed conflicts no combatant immunity was accorded to the armed forces of the government or to armed insurgent groups. Their conduct was subject to municipal law and international humanitarian law did not apply.

29. The Crown accepted that insurgents in non international armed conflicts have no international legal status and no combatant immunity. Their position is governed by domestic law. States do not want to accord such status to insurgents and wish to be free to punish them under domestic law. There is therefore no explicit reference to combatant status in Additional Protocol II applicable to non international armed conflict; its focus was on the protection of civilians.

30. Nonetheless the Crown contended that the position of the armed forces of the state is different to that of insurgents and such forces enjoying combatant immunity. Whilst members of the armed forces of the UK are subject to domestic criminal law wherever they are deployed (see *Smith v Secretary of State for Defence* [2010] UKSC 29 and s.42 of the Armed Forces Act 2006), they are also entitled to combatant immunity in customary international law (as enshrined in Article 1 of the Hague Regulations annexed to the Hague Convention IV on the Laws and Customs of War on Land, 1907) which forms part of the common law. There are, it was submitted, a number of other principles which reinforce this conclusion. Mr Moloney QC in disputing this contention relied on various texts (including texts from the International Committee of the Red Cross (ICRC), the Manual on the Law of Non-International Armed Conflict published by the International Institute of Humanitarian Law in San Remo (2006) and Dr Emily Crawford's *The Treatment of Combatants under the Law of Armed Conflict*). He pointed out that the Hague Regulations did not contemplate non international armed conflict, as the first attempt to delineate this type of armed conflict was made in common Article 3 of the 1949 Geneva Conventions. The protection of the armed forces of the UK was a matter of UK policy; in Iraq and Afghanistan special agreements were necessary to protect the UK armed forces from the operation of domestic law.

31. It is not necessary for us to express a concluded view on whether the Crown's submissions were correct, as we were not concerned with the status of the forces of the Crown, but with the status of the insurgents. What was important was that it was

common ground that the criminal liability of the insurgents was a matter of domestic law. It is essential to bear this in mind when considering the relevance of international law to the definition under domestic law of terrorists.

(c) The development of the crime of terrorism in international law

32. It was common ground that international law has developed so that there is an international crime of terrorism at least in time of peace (or in other words when there is no armed conflict, either international or non international).

33. That development is given a very clear exposition in the judgment of the Appeals Chamber of the Special Tribunal for Lebanon: *Interlocutory Decision on the Applicable Law: Terrorism, Homicide, Conspiracy, Perpetration, Cumulative Charging* (16 February 2011). Amongst the fifteen questions of law the Appeals Chamber was asked to answer before an indictment before the pre-trial judge was confirmed were the questions whether the Tribunal should apply international law in defining terrorism and, if so, how that should be reconciled with Lebanese law. In concluding that the Tribunal should apply the domestic definition interpreted in the light of international conventional and customary law, the late Judge Cassese, an international judge of eminence, in giving the judgment of the Appeals Chamber examined in considerable detail state practice in relation to the definition of terrorism and of the international crime of terrorism (or the crime of international terrorism).

34. The Appeals Chamber concluded that customary international law recognised such a crime committed in peace. At paragraph 107 of the judgment, Judge Cassese expressed the view of the Appeals Chamber:

> "that, while the customary rule of an international crime of terrorism that has evolved so far only extends to terrorist acts *in times of peace*, a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging. As the ICTY and the SCSL have found, acts of terrorism can constitute war crimes, but States have disagreed over whether a distinct crime of terrorism should apply during armed conflict. Indeed, both within the drafting committee of the Comprehensive Convention on Terrorism and in reservations to the UN Convention for the Suppression of the Financing of Terrorism, some members of the Islamic Conference have expressed strong disagreement with the notion of considering as terrorist those acts of "freedom fighters" in time of armed conflict (including belligerent occupation and internal armed conflict) which are directed against innocent civilians. They have insisted both on the need to safeguard the right of peoples to self-determination and on the necessity to also punish "State terrorism"."

35. There is, we think, no doubt that international law has developed so that the crime of terrorism is recognised in situations where there is no armed conflict. However the law has not developed so that it could be said there is sufficient certainty that such a crime could be defined as applicable during a state of armed conflict.

36. The Appeals Chamber observed at paragraph 108 that 173 states had ratified the International Convention for the Suppression of the Financing of Terrorism (to which we refer in more detail at paragraph 42.i)) without making a reservation; the definition refers to armed conflict without the freedom fighters exception. Even those states that were parties to a convention with a freedom fighters exception had ratified it, accepting it was a crime to attack civilians in the course of armed conflict. It could therefore be concluded that:

> "… an overwhelming majority of States currently takes the view that acts of terrorism may be repressed even in time of armed conflicts to the extent that such acts target civilians who do not take an active part in armed hostilities; these acts, in addition, could also be classified as war crimes (whereas the same acts, if they are directed against combatants or civilians participating in hostilities, may *not* be defined as either terrorist acts or war crimes, unless the requisite conditions for war crimes were met)."

However customary law has not yet developed so as to make such attacks on civilians in times of armed conflict the international crime of terrorism. It is incipient.

(d) State practice on the definition of terrorism

37. Although international law has developed that far in relation to what constitutes the international crime of terrorism (and does not yet make it an international crime to commit an act of terrorism against civilians in the course of armed conflict), we are concerned with a different question. The issue for us is whether, under international law, the definition of terrorism under customary international law has developed so that an attack by insurgents on military forces of a government is not terrorism. Although the discussion as to what amounts to the crime of terrorism under international law assists in the resolution of the issue, the question is a different one. It must be resolved by ascertaining the definition of terrorism in international law.

38. Although there is some debate as to whether there is any definition of terrorism in customary international law, it is desirable to confine the examination of state practice, evidenced by international conventions and national legislation, to the question on whether attacks on the military forces of a government by some types of insurgents engaged in an armed struggle against that government (particularly those engaged in wars of liberation or self determination (conveniently referred to as "freedom fighters")) are acts of terrorism.

39. Some of that practice is referred to in the judgment of the Appeals Chamber including the Arab Convention for the Suppression of Terrorism, 1998 (paragraphs 63-70), UN General Assembly Resolutions and UN Conventions (paragraphs 88-89), national legislation (paragraphs 93-8) and decisions of national courts (paragraphs 99-100). It is helpful to refer to examples relied on by Mr Moloney QC as demonstrating that there was state practice that excluded attacks on the military by insurgents from the definition of terrorism:

i) The Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1999-1420H) defines terrorism:

> "Terrorism means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States."

It contains in Article 2A an exemption in respect of certain armed struggles:

> "Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."

ii) The Convention on the Prevention and Combating of Terrorism made by the Member States of the Organization of African Unity (1999) defines Terrorist act in the following terms:

> "(a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>
> (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
>
> (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
>
> (iii) create general insurrection in a State.
>
> (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to(iii)."

It contains also an exemption in relation to "struggles" for self-determination:

> "Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts."

iii) The Canadian Criminal Code defines terrorist activity as acts under various international conventions and acts committed:

> "(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
>
> (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and …"

After referring to the intention, it continues:

> "… and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission, but, for greater certainty, **does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict**, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law (emphasis added)."

In *R v Khawaja* [2010] ONCA 862, the Court of Appeal for Ontario referred at paragraph 159 to the armed conflict exception as being concerned with armed conflict in the context of the rules of war established by international law. It was designed to exclude activities sanctioned by international law from the reach of terrorist activity as defined in the Criminal Code.

iv) The Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 of South Africa recognises in its recital that acts committed under international law:

> "… during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces as being excluded from terrorist activities."

The definition of Terrorist Act contains an exclusion which reflects that recital.

40. However, the practice of other states does not contain such an exception. Apart from the 2000 Act in the UK, we were referred to:

i) The Australian Criminal Code Act 1995 where the definition of terrorist act refers to the act being done:

> "… with the intention of:
>
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
>
> (ii) intimidating the public or a section of the public."

ii) The manual on the Law of Non-International Armed Conflict published by the International Institute of Humanitarian Law in San Remo (2006) in which a clause at paragraph 2.3.2 (on the rule against killing or wounding fighters in an armed conflict) points out that non-international armed conflicts are radically different from international armed conflicts:

> "One of the hallmarks of international armed conflict is that lawful combatants who are *hors de combat* are entitled to prisoner of war status. This is not the rule in non-international armed conflicts and, as a result, captured personnel of armed groups may be put on trial for treason or other crimes, and heavily punished. It should be understood, however, that trial and punishment must be based on due process of law. It is strictly prohibited to summarily execute captured personnel."

iii) *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) where the Divisional Court made clear at paragraph 18 of the judgment that insurgents could be prosecuted by the Afghan Government for terrorism. Accordingly where captured insurgents were believed to have committed offences against Afghan law there were sound reasons for their transfer into the custody of the Afghan authorities for the purpose of questioning and prosecution.

41. Before considering this evidence it is necessary to set out Mr Moloney QC's further submissions under the second strand of his argument to which we referred at paragraph 27.ii) above.

(e) The nature of terrorism is violence directed at civilians

42. Mr Moloney QC first relied on the definitions of terrorism in international conventions which were directed at attacks aimed at civilians:

i) In the International Convention for the Suppression of the Financing of Terrorism, 1999, Article 2 sets out the activities of which the financing is prohibited as not only offences within the annexed list of treaties but also:

> "Any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, where the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act."

ii) Although the 2011 resolution of the General Assembly of the United Nations entitled "*Measures to eliminate international terrorism"* (65/34) does not contain a definition of terrorism, it could be seen from paragraph 4 that its focus is directed at:

> "acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes"

as nothing can be invoked to justify such acts.

iii) In *the Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory (*ICJ Rep 2004), Judge Kooijmans in his separate opinion in examining the justification put forward by Israel for building the wall referred to terrorism in the following terms:

> "Deliberate and indiscriminate attacks against civilians with the intention to kill are the core elements of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them."

43. Although it is clear the emphasis in these materials is on attacks on civilians, that is hardly surprising as there is almost universal condemnation of such attacks, notwithstanding the view of some states that even these acts fall within the freedom fighters' exception. However, although it is clear that in all forms of armed conflict civilians should not be attacked, that does not amount to state practice or *opinio juris* that those who attack military personnel in non international armed conflict cannot be designated as terrorists.

(f) The laws of armed conflict (international humanitarian law) draw a distinction between attacks on civilians and attacks on the military

44. Mr Moloney QC's next argument was that there was a clear distinction in the laws relating to armed conflict (international humanitarian law) between attacks on civilians and attacks on military forces, whether the conflict be international armed conflict or non international armed conflict. He referred principally to the following:

i) In the International Committee of the Red Cross (ICRC) publication *Customary International Humanitarian Law*, which has formulated the applicable rules, Rule 1 states:

> "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians"

ii) Civilians are defined in that text as those who are not members of the armed forces. It is, we think, hardly surprising that the commentary states that this is applicable to both international and non international armed conflict and that no contrary practice could be found. The same applies to the prohibition in Rule 2 of acts or threats of violence the primary purpose of which is to spread terror among the civilian population. The same applies to Rules 11 and 12 which prohibit indiscriminate attacks which are of a nature that do not distinguish between the civilian and military.

iii) The UK Joint Service Manual of the Law of Armed Conflict, 2004 edition, reflects this statement of customary international law.

iv) Article 51 of the 1977 Additional Protocol I to the Geneva Conventions (relating to international armed conflict) and Article 13 of Additional Protocol II (relating to non international armed conflict) each provide:

> (2) The civilian population as such, as well as individual citizens shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> (3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

45. Whilst that clear distinction is not controversial, it was the basis for his contention that there were good reasons why attacks on the military, as distinct from civilians, in the course of such conflicts should not be designated as terrorism. He relied upon:

i) The ICRC's view that there is little to be said for calling attacks on civilians in non international armed conflict "terrorism", as such attacks were crimes under international humanitarian law. It observed in a statement made in October 2010:

> "A crucial difference between International Humanitarian Law and the legal regime governing terrorism is that International Humanitarian Law is based on a premise that certain acts of violence in war – against military objectives and personnel – are not prohibited. An act of "terrorism", however, is by definition prohibited and criminal. The two regimes should not be blurred given the different logic and rules that apply. This is particularly important in situations of non international armed conflict, where a "terrorist" designation may act as an additional disincentive for organised armed groups to respect international humanitarian law (they are already subject to criminal prosecution under domestic law)."

ii) The view of Judge Cassese expressed in an article *The multifaceted notion of terrorism in international law* (2006), 4 Journal of International Criminal Justice 933-958. That view was that the acceptance by a large number of states by their ratification of the Convention on the Suppression of the Financing of Terrorism (which contained the definition we have set out at paragraph 42.i) above) showed there was a middle of the road position between those states which contended that any act committed by a freedom fighter was not terrorism and states which contended that such acts, whilst not terrorism, were governed by international humanitarian law. That middle of the road position was that attacks by "freedom fighters" and other combatants in armed conflicts, if directed at military personnel and objectives in keeping with international humanitarian law, were lawful and should not be termed terrorism, whereas attacks on civilians intended to terrorise civilians were terrorism and not war crimes.

iii) A somewhat similar view as to the need for such a distinction was expressed by Professor Sassoli in *Terrorism and War (*2006) 4 Journal of International Criminal Justice 959-981. He accepted that, as in non international armed conflict no combatant status existed, international humanitarian law would not prevent a state for trying a rebel who attacked military objectives for terrorism. However, labelling such a person a terrorist ran counter to the need to reward such persons for respecting international humanitarian law in non international armed conflicts. If they were not labelled "terrorists" they would be more likely to act in accordance with that law.

46. We would observe that although the objectives set out in the papers referred to in the preceding paragraphs may be reasons for not designating insurgents who attack the military forces of a government as "terrorists", it is clear that neither the papers nor the evidence contained in them are evidence of state practice to the effect contended for the reasons we give in the next paragraph.

(g) Conclusion on whether there is a rule of customary international law

47. From these materials, we conclude that, although international law may well develop through state practice or *opinio juris* a rule restricting the scope of terrorism so that it excludes some types of insurgents attacking the armed forces of government from the

definition of terrorism, the necessary widespread and general state practice or the necessary *opinio juris* to that effect has not yet been established.

(h) The consequences of the present position under international law

48. It has been a rule of international law that what is not prohibited is permitted; this was made clear in the judgment of the Permanent Court of International Justice in *the SS Lotus* (1927, Series A – 10) where the court said:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

49. It seems to us, therefore, that there is nothing in international law which would exempt those engaged in attacks on the military during the course of an insurgency from the definition of terrorism. Moreover it is important to note state practice as evidenced by Resolution 1988 of 2011, the Security Council on 17 June 2011. That resolution re-affirmed its view of the position in Afghanistan:

> "*Reaffirming* that the situation in Afghanistan still constitutes a threat to international peace and security, and *expressing* its strong concern about the security situation in Afghanistan, in particular the ongoing violent and terrorist activities by the Taliban, Al-Qaida, illegal armed groups, criminals and those involved in the narcotics trade, and the strong links between terrorism activities and illicit drugs, resulting in threats to the local population, including children, national security forces and international military and civilian personnel."

The position in domestic law

50. In our view therefore there is no rule of international law which requires this court to read down s.1 of the 2000 Act. We turn therefore to the domestic authorities.

(a) The decision in R v F

51. The definition in s.1 was considered by this court in *R v F* [2007] QB 960. F was charged with being in possession of information likely to be useful to a person committing an act of terrorism. He contended that the activities were not terrorism as they were targeted at removing the government of Libya when that government was Colonel Gaddafi. The argument developed by Mr Geoffrey Robertson QC was that Article 21 of the Universal Declaration of Human Rights and Article 52 of the International Covenant on Civil and Political Rights recognised the right of participation in government through freely chosen representatives. Governments

which were not representative were therefore not governments within the meaning of the 2000 Act. The actions of F could not amount to the offence charged. The then President, Sir Igor Judge, in giving the judgment of the court after referring to the right to rebel observed at paragraph 8

> "That said, we were also told that protection is provided in international law for a number of categories of "freedom fighters", by making it clear that if they avoid "war crimes", they may be treated as legitimate combatants. If so, violence in a justified cause cannot be said to be the exclusive prerogative of governments."

He held that, given the broad terms of the Act, all governments were within its scope; there was no exemption from criminal liability for terrorist activities which were motivated or said to be morally justified by the alleged nobility of the terrorist cause. He concluded at paragraph 16:

> "Terrorism therefore extends to terrorist activities here and abroad, and terrorist actions against foreign governments fall within its ambit. The extension of terrorism offences to include terrorist activities abroad is a constant theme of the legislation, no doubt reflective of the international nature of terrorism, and perhaps also, of the need to avoid the United Kingdom becoming or appearing to be a safe haven for terrorists of any nationality, whether ultimately intent on pursuing their objectives in this country, or abroad, or in their own native countries. On the face of it, governments of countries other than the United Kingdom are to be protected from terrorist activities organised and planned here."

52. Although the issue raised in this appeal did not arise, the decision emphasises the broad definition of terrorism in the 2000 Act.

(b) Consideration in the asylum cases

53. In three asylum cases, an issue arose as to whether a person to whom asylum has been refused has been guilty of acts contrary to the purposes and principles of the United Nations within the meaning of Article IF(c) of the Asylum Convention; in considering this issue, the courts also considered whether these could be described as terrorists.

54. In the first of the cases, *KJ(Sri Lanka) v SSHD* [2009] EWCA Civ 292, KJ was found to be a member of the LTTE who had been engaged in reconnaissance and had been involved in 5 battles with the Sri Lankan Army. The SSHD contended that the LTTE was engaged in acts of terrorism and therefore its activities were contrary to the purposes and principles of the United Nations. That contention was upheld by the Tribunal. On appeal, the Court of Appeal considered first what were acts contrary to the purposes and principles of the United Nations. Stanley Burnton LJ giving the only substantial judgment answered that question at paragraph 34:

> "... It is clear that acts of terrorism – in particular the deliberate killing or injuring of civilians in pursuit of political objects –

> are such acts. The Tribunal in their decision under appeal stated that acts contrary to the purposes and principles of the United Nations are not to be equated with acts of terrorism. It is unnecessary for me to debate this issue, because Mr Johnson did not suggest that acts of a military nature committed by an independence movement (such as the LTTE) against the military forces of the government are themselves acts contrary to the purposes and principles of the United Nations. I do not think that they are. Moreover, the Tribunal in its determination under appeal seems to have accepted that an armed campaign against the government would not constitute acts contrary to the purposes and principles of the United Nations. For present purposes it is necessary to distinguish between terrorism and such acts."

He held that as KJ was a foot soldier and had not participated in attacks on civilians and only against the military, he had not participated in acts contrary to the purposes and principles of the United Nations.

55. In *SS v SSHD* (SC/56/2009), (30 July 2010) the Special Immigration Appeal Commission had to consider whether SS, a Libyan national, should be deported on the grounds that his presence in the UK was a threat to national security and was not entitled to asylum as he was an active member of the Libyan Islamic Fighting Group (LIFG). The Commission found he was a member of the LIFG; the issue then arose as to whether he was entitled to the protection of Article IF(c). In the course of concluding that he was not, Mitting J, in giving the judgment of the Commission, stated at paragraphs 15 and 16, after referring to the differences between Article 1.3 of the definition of terrorist act adopted by the European Council on 27 December 2001 in a statement setting out their common position (2001/931/CFSP) and s.1 of the 2000 Act,:

> "15. The common ground between the two instruments is far greater than the differences. The fundamental definition of terrorism in both is the use or threat of action designed to influence a government or to intimidate a population by serious acts of violence and some acts of economic disruption.
>
> 16. We have not been referred to and are not aware of any widely accepted international definition of terrorism which differs in any essential respect from that summarised above. There is clearly room for debate about the inclusion of serious disruption to the economic infrastructure of a country not caused by violence in the definition and an implied exclusion of lawful acts of war, possibly including civil war. (cf. *KJ (Sri Lanka) v SSHD*, below). But we doubt that any international organisation or reputable commentator would disagree with a definition of terrorism which had at its heart the use or threat of serious or life threatening violence against the person and/or serious violence against property, including economic infrastructure, with the aim of intimidating a population or

> influencing a government, except when carried out as a lawful act of war."

56. In the appeal against this decision, Carnwath LJ giving the only substantial judgment after observing that Lord Brown had in *R (JS) (Sri Lanka) v SSHD* [2010] UKSC 15 referred at paragraph 24 to Stanley Burnton LJ's judgment without dissent and drawing attention to the decision in *DD* (to which we refer at paragraph 57 below), concluded at paragraph 37 of [2011] EWCA Civ 1547:

> "It seems clear therefore that the panel went too far in holding that *KJ(Sri Lanka)* could not be relied on to support a distinction between different categories of violence for political ends."

On the facts of that case, it made no difference as the "military action" exception to the definition of terrorism could not extend to acts of every kind against governments such as those directed against police or government officials.

57. In *SSHD v D* [2010] EWCA Civ 1407, DD was a fighter with various insurgent groups in Afghanistan against both Afghan government forces and the Coalition forces present in Afghanistan pursuant to UN resolutions. His claim to asylum was disputed on the ground that he had been engaged in terrorism against members of the Coalition forces and therefore in acts contrary to the purposes and principles of the United Nations. In giving the only substantial judgment, Pill LJ considered that the court in *F* did not have to consider whether armed insurrection was terrorism; there was nothing in the judgment to cast doubt on the distinction made in *KJ* that participation in military actions against the government was not terrorism. He concluded:

> 55. *KJ* appears to be authority for the proposition that military action directed against the armed forces of the government does not as such constitute terrorism or acts contrary to the purposes and principles of the United Nations. SIAC in *SS* stated that these observations were made *per incuriam*. I am not prepared, in the absence of argument beyond that addressed to this court to hold that the observations were *per incuriam* and it does not appear to me that they were, though the circumstances in which acts of violence against a government are acts of terrorism is a difficult question. Serious violence against members of government forces would normally be designed to influence the government and be used for the purpose of advancing a political religious or ideological cause, within the meaning of those words in s1 of the 2000 Act. On the other hand, it is difficult to hold that every act of violence in a civil war, the aim of which will usually be to overthrow a legitimate government, is an act of terrorism within the 2000 Act.

58. He went on to hold that the only findings were findings of acts against government forces and following *KJ* acts of terrorism had not been committed on the findings

made. However, remitting the matter to the Tribunal, he made clear fighting UN mandated forces was action contrary to the purposes and principles of the UN.

(c) Our conclusion

59. The decision in *KJ* was not made with the benefit of detailed argument; nor, as Pill LJ made clear, was detailed argument addressed to the court in *DD*. Moreover in neither case was the court applying the terms of s.1 of the 2000 Act. In this case, we have had the benefit of the detailed argument on international law which we have set out above. We are greatly indebted to all counsel for the clarity of those arguments and for the immense industry and learning they displayed.

60. The definition in s.1 is clear. Those who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act.

The issue in relation to the jury

(i) The submissions

61. Mr Moloney QC shortly before the hearing of the appeal sought to add a further ground of appeal to the effect that an irregularity occurred during the course of the trial of the appellant because extraneous material capable of striking at the fairness of the trial was discovered by one member of the jury from the internet. This was then supplied to others, but neither the appellant's legal team nor the judge knew of this.

62. The basis of the proposed amended ground of appeal was that on 13 September 2011, a non-practising barrister called to the Bar in 2011 provided a written statement. In it, he explained he had undertaken a mini pupillage in the chambers of Mr Moloney QC. He had shadowed Mr Moloney QC and his junior for a few days during the trial of the appellant. He said that during the course of a meeting in a pub with some friends, a lady, whose identity he did not know but who was a member of that group, explained that she had been a member of the jury which had tried the appellant in February 2011. The lady, according to the non-practising barrister, said that another member of the jury (whose identity he also did not know) had used Google to carry out a search of the appellant's name on the internet. The member of the jury had discovered that there had been a prior trial of the appellant in which the jury had been unable to return a verdict. The lady then said that this information had then been relayed to other members of the jury, but it was not clear whether this disclosure had been made to all other members of the jury or merely to some of them.

63. On the basis of this statement, Mr Moloney QC contended that the extraneous material had clearly been introduced to the jury. As the appellant did not know of it, he did not have an opportunity to comment on it. As the trial judge did not know of it, he was unable to give any warning to the jury in relation to it. In consequence he submitted that these omissions struck at the fairness of the trial and so the appellant's conviction should be quashed.

64. Mr Larkin QC answered by contending there was nothing in the statement made by the non-practising barrister which could have been in any way prejudicial to the appellant. Indeed it was not suggested that the material on the internet had shown that the appellant had been guilty of any counts in the first trial or constituted in any way evidence which was unfavourable to the appellant. Mr Larkin QC relied on the fact that the evidence adduced in the first trial (including the charges on which the appellant had been acquitted) was also adduced in the course of the retrial on the basis that it was evidence of the appellant's mindset.

(ii) The nature of the material

65. We agree with Mr Larkin QC that there was no evidence that there was anything that was said or done by a juror as a result of looking at the internet, which would or could have led the jury to do anything other than to follow the directions of law given by the judge and to arrive at verdicts based on the evidence.

66. The riposte of Mr Moloney QC was that he had carried out a Google search on the appellant in order to ascertain what material *might* have been available to a member of the jury who had carried out such a search on the appellant during the trial. He produced three articles. None of them contained material which was not adduced during the trial or which would have been inadmissible at the appellant's trial. More importantly, there was no evidence that any member of the jury read any of these three articles. Nevertheless Mr Moloney QC submitted that the matter should be further investigated through the Criminal Cases Review Commission. The trial judge gave the conventional warning at the outset of the case telling the jury not to carry out any investigations.

(iii) No need for an enquiry by the CCRC

67. In our view, no such enquiry was necessary. The approach to any post-trial allegations of jury misconduct is set out in *R v Thompson and Others* [2011] 2 All ER 833; [2010] EWCA Crim 1623. In giving guidance, the Lord Chief Justice stated that :-

> "2. Much more difficult problems arise when after the verdict has been returned, attention is drawn to alleged irregularities. ... Responsibility for investigating any irregularity must be assumed by this court. In performing its responsibilities, it is bound to apply the principle that the deliberations of the jury are confidential. Except with the authority of the trial judge during the trial, or this court after the verdict, inquiries into jury deliberations are "forbidden territory" (per Gage LJ in R v Adams [2007] 1 Cr App R 449). If any complaint about jury deliberations is received by the trial court after verdict it is immediately referred to this court and whether the complaint has been received from the court of trial or by this court directly, the practice is to examine each case to see whether or not, **exceptionally**, further inquiries ought to be made, and if so, to invite the assistance of the Criminal Cases Review Commission to conduct the necessary inquiry." (emphasis added)

68. Inquiries into the jury's discussions of necessity must trespass into "*forbidden territory*" and therefore should only be undertaken, in the Lord Chief Justice's words, "*exceptionally*". The court will not investigate a case or request the Criminal Cases Review Commission to do so where a juror has discovered information on the internet which might have been disclosed to other members of the jury but where the information -

> "29…does not suggest that that the juror or anything he or she said to the other members of the jury, led them in dereliction of their duty, do anything other than follow the directions given by the judge, as supplemented by him in answer to the numerous notes in which the jury sought further directions".

69. The Court applied this approach in setting this threshold for appellate intervention in the case of *Thompson* in which it was explained that:

> "24. One juror "pulled five pages of questions" due to homework he had completed on the internet, relating to the case and legal terminology, completely disregarding "the judge's instructions that they should not do this". Indeed, although we cannot be sure whether it was written in consequence of reference to the internet or not, it is correct that the second jury note, sent early on 15th October, sought detailed further directions on the law. On the last morning the jury decided to change the chair, and the juror reacted in an "appalling and aggressive manner."

70. The conclusion of this court on that point was that:-

> "29. The use of the internet … constituted an irregularity. Assuming that the allegation is correct, the juror had disregarded unequivocal instructions by the judge. The letter does not suggest that the juror, or anything he or she said to the other members of the jury, led them, in dereliction of their duty [2], do other than follow the directions in law given by the judge, as supplemented by him in answer to the numerous notes in which the jury sought further directions".

71. The court was there adopting the same threshold for determining whether to conduct further investigations such as the one to which we referred in paragraph 68 above. Indeed the Court proceeded to rule out the need for referring the matter to the Criminal Case Review Commission when it concluded that:-

> "30. … satisfied that notwithstanding the irregularity drawn to our attention, no further investigation of the misuse of the Internet is required. The jury verdict is not unsafe."

72. Assuming that the statement made by the non-practising barrister contained an account of what in fact happened, it is clear that there is nothing to show that any internet searches by the juror had led to anything prejudicial about the appellant being discovered. Moreover the only information discovered was that there had been a

previous trial of the appellant at which the jury was unable to agree on a verdict. In any event, as we have explained, the evidence adduced in the first trial (including the charges on which the appellant had been acquitted) was also adduced in the course of the retrial on the basis that it was evidence of the appellant's mindset.

73. The mere fact that a juror has carried out research on the internet which is wrongful is in itself insufficient. In this case (as was the case in *Benjamin Thomas,* one of the other appellants in *Thompson*) there was no evidence that anything prejudicial had been discovered. We have no doubt in concluding that this was therefore not a case where in the words of the Lord Chief Justice in *Thompson*:-

> *"29…the juror* [who carried out the search on the Internet] *or anything he or she said to the other members of the jury, led them in dereliction of their duty, do anything other than follow the directions given by the judge, as supplemented by him in answer to the numerous notes in which the jury sought further directions"*.

Any irregularity in the trial of this appellant could not have affected the fairness of the proceedings or the safety of the conviction. We therefore further refuse leave to appeal on this issue.

Sentence

74. The appellant also seeks leave to appeal against sentence. We accept that he was a man who, save for a caution, was of good character. As we have mentioned, he was studying for a degree and has now obtained a 2.1 degree. The consequences of his conviction are extremely serious for his future.

75. Although we accept that the sentence passed was at the upper end of the range of sentences it would have been appropriate to have passed for offences of this kind, we cannot say that the sentences were manifestly excessive. The videos were in part glorifying and encouraging attacks on the forces of Her Majesty then serving in Iraq and Afghanistan. The seriousness of such conduct has to be marked by significant sentences of imprisonment despite the youth of the appellant and the serious consequences this conviction will have for the rest of his life.