Michaelmas Term
[2013] UKSC 64
On appeal from: [2012] EWCA Crim 280

JUDGMENT

R v Gul (Appellant)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Hope
Lord Mance
Lord Judge
Lord Kerr
Lord Reed

JUDGMENT GIVEN ON

23 October 2013

Heard on 25 and 26 June 2013

Appellant	*Respondent*
Tim Moloney QC Tatyana Eatwell (Instructed by Irvine Thanvi Natas)	Sean Larkin QC Prof Malcolm Shaw QC Duncan Atkinson (Instructed by CPS Appeals Unit)

LORD NEUBERGER AND LORD JUDGE (with whom Lady Hale, Lord Hope, Lord Mance, Lord Kerr and Lord Reed agree)

1. This is an appeal brought by Mohammed Gul against a decision of the Court of Appeal (Criminal Division) dismissing an appeal against his conviction for dissemination of terrorist publications contrary to section 2 of the Terrorism Act 2006 ("the 2006 Act"), for which he was sentenced to a term of five years' imprisonment (a sentence against which he also unsuccessfully appealed). The appeal raises the issue of the meaning of "terrorism" in section 1 of the Terrorism Act 2000 ("the 2000 Act").

The factual and procedural background

2. The appellant was born in Libya in February 1988, but he has lived much of his life in this country and he is a British citizen. In February 2009, as a result of executing a search warrant at his house, police officers found videos on his computer uploaded onto various websites, including the YouTube website. These videos included ones that showed (i) attacks by members of Al-Qaeda, the Taliban, and other proscribed groups on military targets in Chechnya, and on the Coalition forces in Iraq and in Afghanistan, (ii) the use of improvised explosive devices ("IEDs") against Coalition forces, (iii) excerpts from "martyrdom videos", and (iv) clips of attacks on civilians, including the 9/11 attack on New York. These videos were accompanied by commentaries praising the bravery, and martyrdom, of those carrying out the attacks, and encouraging others to emulate them.

3. The case for the prosecution was that each of these videos constituted "a terrorist publication" within section 2(3), which the appellant had "distribute[d] or circulate[d]" within section 2(2)(a), and consequently he had committed an offence by virtue of section 2(1), of the 2006 Act. The appellant's principal defence was that, although he did not agree with the targeting of and attacks on civilians, he believed that the use of force shown in the other videos was justified as it was being employed in self-defence by people resisting the invasion of their country.

4. At his first trial, the jury acquitted the appellant on four counts and was unable to agree on two other counts. A retrial in relation to those two counts (plus a further four counts added by the Crown by way of a voluntary bill) took place in front of HH Judge Paget QC with a jury at the Central Criminal Court. After the evidence, speeches and summing up, the jury retired to consider their verdict in the normal way on 22 February 2011. They then asked the judge for guidance on

certain questions relating to the meaning of terrorism, which, after hearing submissions from counsel, he answered.

5. One of the jury's questions was:

> "Re: definition of terrorism in [section 1 of the 2000 Act], would the use of force by Coalition forces be classed as terrorism?"

In relation to that question, the judge gave the following direction:

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

6. Later the same day, the jury asked a further question, which was in these terms:

> "Please confirm that within Iraq/Afghanistan now there are governments in place there cannot now be said to be 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?"

The judge answered this question, after hearing submissions from counsel, in these terms:

> "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."

7. The jury then proceeded to convict the appellant on five of the six counts. The count on which he was acquitted related to a video which contained footage concerning the Israeli-Palestinian conflict in Gaza. The judge directed the jury that, if Israel was involved in an incursion into Gaza which involved attacks on civilians, schools, hospitals and ambulances, and all that the appellant was encouraging was resistance to these attacks, the prosecution did not seek a conviction. The present appeal proceeded without considering whether, as a

matter of law, the stance adopted by the prosecution was correct, and we do not propose to address it further. The judge sentenced the appellant to five years' imprisonment, with appropriate allowance for time spent on remand.

8. The appellant sought to appeal against his conviction on a number of grounds, only one of which is relevant for present purposes. That ground, which was expressed in various ways during the course of his appeal, is ultimately embodied in the question which the Court of Appeal certified to be a point of general public importance, namely:

> "Does the definition of terrorism in section 1 of the Terrorism Act 2000 operate so as to include within its scope any or all military attacks by a non-state armed group against any or all state or inter-governmental organisation armed forces in the context of a non-international armed conflict?"

9. The Court of Appeal (Sir John Thomas P, Silber and Kenneth Parker JJ) answered that question in the affirmative, and also rejected certain other grounds of appeal, as well as refusing to interfere with the sentence which the judge had imposed. Accordingly, the appellant's appeal was dismissed – [2012] EWCA Crim 280, [2012] 1 WLR 3432.

10. The appellant now appeals to this court contending that the answer to the certified question should be in the negative.

The Terrorism Acts 2000 and 2006

The 2000 Act

11. Section 1 of the 2000 Act is headed "Terrorism: Interpretation", and, as amended by the 2006 Act and the Counter-Terrorism Act 2008, it provides as follows:

> "(1) In this Act 'terrorism' means the use or threat of action where—
>
> (a) the action falls within subsection (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 subsection 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. … .
>
> (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, and
>
> (d) 'the government' means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.
>
> (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

12. Part II of the 2000 Act is concerned with "proscribed organisations" and Part III with "terrorist property". Part III creates certain offences, such as (in sections 15-18) terrorist fundraising, using money and money-laundering for terrorist purposes. It also imposes certain duties, such as a duty of disclosure in some circumstances, a duty not to tip off, and a duty to cooperate with the police and certain government agencies, such as the Serious Organised Crime Agency. It also granted certain powers to the police and such agencies, such as the right to detain, seize, and forfeit "terrorist cash". Parts IV and V of the 2000 Act are respectively concerned with "terrorist investigations" and "counter-terrorist powers". Part V confers powers to stop and search (sections 44-47), to search

individuals and premises (sections 42-43), and to arrest without warrant (section 41), and section 53 and Schedule 7 grant very wide powers to detain, interrogate, and confiscate in relation to people at ports and borders. Part VI of the 2000 Act is entitled "Miscellaneous", and it creates a number of offences related to terrorism – including weapons training in connection with terrorism (section 54), directing terrorist organisations (section 56), possession for terrorist purposes (section 57), collecting information for such purposes (section 58), and inciting terrorism abroad (section 59).

13. Included in Part VI are sections 62-64. Section 62(1) provides that:

> "If—
>
> (a) a person does anything outside the United Kingdom as an act of terrorism or for the purposes of terrorism, and
>
> (b) his action would have constituted the commission of one of the offences listed in subsection (2) if it had been done in the United Kingdom,
>
> he shall be guilty of the offence."

Subsection (2) states that the offences referred to in subsection (1) are offences under the Explosive Substances Act 1883, the Biological Weapons Act 1974, and the Chemical Weapons Act 1996.

14. Section 63 of the 2000 Act renders it an offence for a person to conduct an activity outside the UK which would be an offence under sections 15-18 if carried out in the UK. Section 64 makes amendments to the Extradition Act 1989.

15. Also in Part VI of the 2000 Act are sections 63A-63E, which were inserted by the Crime (International Co-operation) Act 2003 ("the 2003 Act"). Section 63A provides that a UK national or UK resident commits an offence if he carries out abroad any activity which, if carried out in the UK would be an offence under, inter alia, sections 54-59. Sections 63B-63D, in very summary terms, provide that a person commits an offence when he carries out abroad certain specified actions which, if carried out in the UK, would amount to terrorism.

16. Part VII of the 2000 Act is concerned with Northern Ireland. Part VIII is entitled "General", and it includes, in sections 114-116, certain police powers in connection with counter-terrorism, including the power to stop and search.

17. Also in Part VIII is section 117, which, according to subsection (1), applies to almost all offences created by the 2000 Act; those offences to which it does not apply have no relevance for present purposes. Subsections (2) and (2A) of section 117 (the latter subsection having been added by the 2006 Act) are in these terms:

> "(2) Proceedings for an offence to which this section applies—
>
> (a) shall not be instituted in England and Wales without the consent of the Director of Public Prosecutions, and
>
> (b) shall not be instituted in Northern Ireland without the consent of the Director of Public Prosecutions for Northern Ireland.
>
> (2A) But if it appears to the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland that an offence to which this section applies has been committed outside the United Kingdom or for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for the purposes of this section may be given only with the permission—
>
> (a) in the case of the Director of Public Prosecutions, of the Attorney General; and
>
> (b) in the case of the Director of Public Prosecutions for Northern Ireland, of the Advocate General for Northern Ireland".

The 2006 Act

18. The 2006 Act made some amendments to the 2000 Act, including the addition of "or an international governmental organisation" (an "IGO") into section 1(1)(b). Part 1 of the 2006 Act creates certain further offences in relation to terrorism; in particular, sections 1 and 2 respectively created the new offences of "Encouragement of terrorism" and "Dissemination of terrorist publications".

19. Section 2 of the 2006 Act is in these terms:

> "(1) A person commits an offence if he engages in conduct falling within subsection (2) and, at the time he does so—

(a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;

…. or

(c) he is reckless as to whether his conduct has an effect mentioned in paragraph (a) ….

(2) For the purposes of this section a person engages in conduct falling within this subsection if he—

(a) distributes or circulates a terrorist publication;

….

(e) transmits the contents of such a publication electronically;

…..

(3) For the purposes of this section a publication is a terrorist publication, in relation to conduct falling within subsection (2), if matter contained in it is likely—

(a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism;

….

(4) For the purposes of this section matter that is likely to be understood by a person as indirectly encouraging the commission or preparation of acts of terrorism includes any matter which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts; ….

……

[Subsections (5), (6), (7) and (8) amplify the preceding subsections; subsections (9) and (10) identify certain defences].

(11) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;

…

(13) In this section—

….

'publication' means an article or record of any description that contains any of the following, or any combination of them—

(a) matter to be read;
(b) matter to be listened to;
(c) matter to be looked at or watched."

20. Part 2 of the 2006 Act contains certain "miscellaneous provisions", including the extension and modification of some of the powers granted by the 2000 Act, such as in relation to proscription, searches and investigations. Part 3 of the 2006 Act includes some supplementary provisions of which section 36 is significant for present purposes. That section is headed "Review of terrorism legislation", and it provides as follows:

"(1) The Secretary of State must appoint a person to review the operation of the provisions of the Terrorism Act 2000 and of Part 1 of this Act.

(2) That person may, from time to time, carry out a review of those provisions and, where he does so, must send a report on the outcome of his review to the Secretary of State … .

(3) …..

(4) That person must carry out and report on a review under this section at least once in every twelve month period … .

(5) On receiving a report under this section, the Secretary of State must lay a copy of it before Parliament.

…. ."

An outline of the issues

21. Although the appellant was convicted of offences contrary to section 2 of the 2006 Act, the issue which has to be addressed involves the interpretation of section 1 of the 2000 Act, and, in particular, the meaning of the word "terrorism". Terrorism is, of course, central to the offences in issue. In finding him guilty on the five counts, the jury must have been satisfied that the videos which the appellant uploaded satisfied the requirements of section 2(3)(a) of the 2006 Act. Thus, the jury must have concluded that the videos would have been understood by others to be encouraging or inducing them to commit, prepare or instigate "acts of terrorism", and that the appellant had intended, or had been reckless as to, that consequence.

22. The point which the Court of Appeal certified may be thought to be somewhat peripheral to the issues which confronted the jury. However the jury asked a question which gives rise to the point, and in this particular case it would be inappropriate to disregard it as irrelevant to the eventual verdict. If some or all of the activities shown in the uploaded videos, whose contents are briefly described in paras 2(i) to (iv) above, did not involve terrorism within the meaning of section 1 of the 2000 Act, it is possible that the appellant may have been acquitted on some or all of the five counts on which he was convicted.

23. The case for the prosecution is that the definition of terrorism in section 1 of the 2000 Act, and, in particular, in subsections (1) and (2), is very wide indeed, and that it would be wrong for any court to cut it down by implying some sort of restriction into the wide words used by the legislature. On that basis, the appellant was rightly convicted and the answer to the certified question must be "yes".

24. The case for the appellant, as it developed in oral argument, had three strands. The first is that the 2000 Act, like the 2006 Act, was intended, at least in part, to give effect to the UK's international treaty obligations, and the concept of terrorism in international law does not extend to military attacks by a non-state armed group against state, or inter-governmental organisation, armed forces in the context of a non-international armed conflict, and that this limitation should be implied into the definition in section 1 of the 2000 Act. The second, and closely connected, argument is that it would be wrong to read the 2000 or 2006 Acts as criminalising in this country an act abroad, unless that act would be regarded as criminal by international law norms. The third argument raised by the appellant is that, as a matter of domestic law and quite apart from international law

considerations, some qualifications must be read into the very wide words of section 1 of the 2000 Act.

25. Although it was advanced as an alternative argument to the contentions based on international law, we propose to start by addressing the appellant's case based on the relevant statutory provisions by reference to the familiar domestic principles, and then to consider whether that meaning conflicts with international law.

The appellant's argument based on domestic law

26. The definition of terrorism in section 1 of the 2000 Act is, at any rate on the face of it, very wide. That point was well made in *R v F* [2007] QB 960, paras 27-28:

> "What is striking about the language of section 1, read as a whole, is its breadth. It does not specify that the ambit of its protection is limited to countries abroad with governments of any particular type or possessed of what we, with our fortunate traditions, would regard as the desirable characteristics of representative government. There is no list or Schedule or statutory instrument which identifies the countries whose governments are included in section 1(4)(d) or excluded from the application of the 2000 Act. Finally, the legislation does not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as terrorism in a just cause. Such a concept is foreign to the 2000 Act. Terrorism is terrorism, whatever the motives of the perpetrators. …
>
> Terrorist action outside the United Kingdom which involves the use of firearms or explosives, resulting in danger to life or creating a serious risk to the health or safety to the public in that country, or involving (not producing) serious personal violence or damage to property, or designed seriously to interfere with an electronic system, 'is terrorism'…"

Following these observations, the Court of Appeal in this case underlined the "comprehensive" scope and "broad" nature of the definition of terrorism in the 2000 Act: [2012] EWCA Crim 280, [2012] 1 WLR 3432, paras 16 and 52.

27. The effect of section 1(1) of the 2000 Act is to identify terrorism as consisting of three components. The first is the "use or threat of action", inside or

outside the UK, where that action consists of, inter alia, "serious violence", "serious damage to property", or creating a serious risk to public safety or health – section 1(1)(a), (2) and (4). The second component is that the use or threat must be "designed to influence the government [of the UK or any other country] or an [IGO] or to intimidate the public" – section 1(1)(b) and (4). The third component is that the use or threat is "made for the purpose of advancing a political, religious, racial or ideological cause" – section 1(1)(c).

28. As a matter of ordinary language, the definition would seem to cover any violence or damage to property if it is carried out with a view to influencing a government or IGO in order to advance a very wide range of causes. Thus, it would appear to extend to military or quasi-military activity aimed at bringing down a foreign government, even where that activity is approved (officially or unofficially) by the UK government.

29. It is neither necessary nor appropriate to express any concluded view whether the definition of "terrorism" goes that far, although it is not entirely easy to see why, at least in the absence of international law considerations, it does not. For present purposes it is enough to proceed on the basis that, subject to these considerations, the definition of terrorism in section 1 in the 2000 Act is, at least if read in its natural sense, very far reaching indeed. Thus, on occasions, activities which might command a measure of public understanding, if not support, may fall within it: for example, activities by the victims of oppression abroad, which might command a measure of public understanding, and even support in this country, may well fall within it.

30. The Crown argues that, particularly given the purpose of the 2000 Act, "terrorism" cannot be narrowly defined, if one is to allow for the many disparate forms which terrorism may take, and the inevitable changes which will occur in international relations, in political regimes in other countries, and in the UK's foreign policy. Accordingly, runs the argument, a very wide definition was deliberately adopted, but, recognising the risks of criminalising activities which should not be prosecuted, the 2000 Act has, through section 117, precluded any prosecution without the consent of the Director of Public Prosecutions ("DPP") or, if the activities under consideration occurred abroad, the Attorney General.

31. It is clear that it is very hard to define "terrorism". Thus, Lord Lloyd of Berwick, who wrote an *Inquiry into the Legislation against Terrorism* (Cm 3420) which contained recommendations which were reflected in the 2000 Act, observed in a speech on the second reading of the Bill which later became that Act that "there are great difficulties in finding a satisfactory definition of "terrorism", and suspected that "none of us will succeed". That view has been cited with agreement in reports produced by the two successive Independent Reviewers of the

legislation appointed under section 36 of the 2006 Act, Lord Carlile of Berriew QC and Mr David Anderson QC.

32. In reports produced in 2006 and 2007 Lord Carlile concluded that the statutory definition of terrorism was "practical and effective" and advised that, save for small amendments, the definition should remain as originally drafted. More specifically, he observed that "the current definition in the Terrorism Act 2000 is consistent with international comparators and treaties, and is useful and broadly fit for purpose…". Lord Carlile also stated that "the discretion vested in the authorities to use or not to use the special laws is a real and significant element of protection against abuse of rights".

33. Mr Anderson published his first report in June 2012, in which he referred to the definition in section 1 in the 2000 Act as "complex" and "notable for its breadth". He pointed out that actions may amount to terrorism within the definition "even when they might otherwise constitute lawful hostilities under international humanitarian law (e.g. acts of violent rebellion against oppressive governments)". Mr Anderson recognised that the statutory definition left a "large discretion to prosecutors, mitigated only by the requirement [for] consent" under section 117 of the 2000 Act, together with other wide discretions. He went on to refer to the risk that "strong powers could be used for purposes other than the suppression of terrorism as it is generally understood". He also observed that there was a case for "shrinking the definition of terrorism", given that "[a]s presently drafted, the definition is so broad as to criminalise certain acts carried out overseas that constitute lawful hostilities under international humanitarian law".

34. In his recent second report, published in July 2013, Mr Anderson again referred to the definition, describing it as "remarkably broad – absurdly so in some cases", and went on discuss the issue very instructively. He pointed out that the consequence of the very broad definition was "to grant unusually wide discretions to all those concerned with the application of the counter-terrorism law, from Ministers exercising their power to impose executive orders to police officers deciding whom to arrest or to stop at a port and prosecutors deciding whom to charge", but went on to say that "that the wide discretions appear for the most part to be responsibly exercised". He also expressed the view that any amendment to the definition would involve a "root-and-branch review of the entire edifice of anti-terrorism law, based on a clear-headed assessment of why and to what extent it is operationally necessary to supplement established criminal laws and procedures", a review which he said that he would "welcome". He also made the point that "if special legal rules are to be devised in relation to it, they should be limited in their application, and justified on the basis of operational necessity."

35. We turn to the consent requirement created by section 117 of the 2000 Act. In the general way the decision whether to initiate the prosecution of any crime, whether created by statute or common law, is subject to the well known prosecutorial discretion. Where the consent of the DPP or the Attorney General is required, their respective responsibilities are exercised for the unexceptionable purpose of ensuring that a prosecution should not be instigated nor proceed if this would not be in the public interest. However, the prosecutorial discretion was never intended, and as far as we can ascertain, it has never been suggested that it was ever intended, to assist in the interpretation of legislation which involves the creation of a criminal offence or offences. Either specific activities carried out with a particular intention or with a particular state of mind are criminal or they are not.

36. The Crown's reliance on prosecutorial discretion is intrinsically unattractive, as it amounts to saying that the legislature, whose primary duty is to make the law, and to do so in public, has in effect delegated to an appointee of the executive, albeit a respected and independent lawyer, the decision whether an activity should be treated as criminal for the purposes of prosecution. Such a statutory device, unless deployed very rarely indeed and only when there is no alternative, risks undermining the rule of law. It involves Parliament abdicating a significant part of its legislative function to an unelected DPP, or to the Attorney General, who, though he is accountable to Parliament, does not make open, democratically accountable decisions in the same way as Parliament. Further, such a device leaves citizens unclear as to whether or not their actions or projected actions are liable to be treated by the prosecution authorities as effectively innocent or criminal - in this case seriously criminal.

37. Given that the consent requirement in section 117 is focused on the decision whether to consent to a prosecution, this approach to the construction of the 2000 Act has two further undesirable consequences. First, the lawfulness of executive acts such as detention, search, interrogation and arrest could be questioned only very rarely indeed in relation to any actual or suspected involvement in actual or projected acts involving "terrorism", in circumstances where there would be no conceivable prospect of such involvement being prosecuted. Secondly, the fact that an actual or projected activity technically involves "terrorism" means that, as a matter of law, that activity will be criminal under the provisions of the 2000 and 2006 Acts, long before, and indeed quite irrespective of whether, any question of prosecution arises.

38. We return to the language used in section 1 of the 2000 Act. Despite the undesirable consequences of the combination of the very wide definition of "terrorism" and the provisions of section 117, it is difficult to see how the natural, very wide, meaning of the definition can properly be cut down by this Court. For the reasons given by Lord Lloyd, Lord Carlile and Mr Anderson, the definition of "terrorism" was indeed intended to be very wide. Unless it is established that the

natural meaning of the legislation conflicts with the European Convention on Human Rights (which is not suggested) or any other international obligation of the United Kingdom (which we consider in the next section of this judgment), our function is to interpret the meaning of the definition in its statutory, legal and practical context. We agree with the wide interpretation favoured by the prosecution: it accords with the natural meaning of the words used in section 1(1)(b) of the 2000 Act, and, while it gives the words a concerningly wide meaning, there are good reasons for it.

39. We are reinforced in this view by the further consideration that the wide definition of terrorism was not ignored by Parliament when the 2000 Act was being debated. It was discussed by the Home Secretary who also, in answer to a question, mentioned the filter of section 117 (see Hansard (HC Deb) 14 December 1999, cols 159, 163). This is not a case in which it is appropriate to refer to what was said in Parliament as an aid to statutory interpretation, but it provides some comfort for the Crown's argument. Of rather more legitimate relevance is the fact that Parliament was content to leave the definition of "terrorism" effectively unchanged, when considering amendments or extensions to the 2000 Act, well after the 2007 report of Lord Carlile, which so clearly (and approvingly) drew attention to the width of the definition of terrorism - see eg the Crime and Security Act 2010, the Terrorist Asset-Freezing etc Act 2010 and the Terrorism Prevention and Investigation Measures Act 2011.

40. In reaching our conclusion, we do not attach any weight to the provisions of section 117 of the 2000 Act as an aid to construction. It may well be that any concern which Parliament had about the width of the definition of terrorism in section 1(1) was mitigated by the existence of the statutory prosecutorial discretion, but, for the reasons given in paras 35 and 37 above, we do not regard it as an appropriate reason for giving "terrorism" a wide meaning.

41. Accordingly, we conclude that, unless the appellant's argument based on international law dictates a different conclusion, the definition of terrorism as in section 1 of the 2000 Act is indeed as wide as it appears to be. This would result in the certified question being answered "yes".

The appellant's argument based on international law

Introductory

42. If the attacks on Coalition forces in Afghanistan and Iraq, and on military targets in Chechnya, shown on the seized videos would otherwise amount to

terrorism as defined in section 1 of the 2000 Act, the appellant contends that this would be contrary to, or inconsistent with, the norms of international law.

43. The appellant has two arguments in this connection. The first is that some provisions of the 2000 and 2006 Acts were enacted to give effect to the UK's international obligations arising under treaties concerned with the suppression of terrorism, and that "terrorism" should accordingly be given a meaning in those statutes which accords with the international law norm, and at any rate with the definition in the relevant international document to which effect is intended to be given. The second argument is that, as the 2000 and 2006 Acts criminalise certain "terrorist" actions committed outside the UK, the meaning of "terrorism" in those statutes should not be wider than what is accepted as an international norm.

No international consensus as to terrorism

44. These two arguments each face more than one insuperable obstacle. The common obstacle they both face is that there is no accepted norm in international law as to what constitutes terrorism. As this court observed in a judgment given by Lady Hale and Lord Dyson in *Al-Sirri v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)* [2013] 1 AC 745, para 37, "there is as yet no internationally agreed definition of terrorism" and "no comprehensive international Convention binding Member States to take action against it". Indeed, the reasoning in that case proceeded on the basis that the definition of terrorism in the 2000 Act was significantly wider than in article 1F(c) of the 1951 Convention relating to the Status of Refugees ("the Geneva Convention") – see para 36.

45. The appellant seeks to meet this point through the contention that, whereas there is no international agreement as to the meaning of terrorism, there is a general understanding that it does not extend to the acts of insurgents or "freedom fighters" in non-international armed conflicts. The short answer to this point is that, while there is significant support for such an idea, any such support falls far short of amounting to a general understanding which could be properly invoked as an aid to statutory interpretation. As the Court of Appeal said in para 35, while international law "has developed so that the crime of terrorism is recognised in situations where there is no armed conflict", it "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". Accordingly, as it went on to conclude in para 50, "there is no rule of international law which requires this court to read down section 1 of the 2000 Act".

46. The United Nations has attempted to identify a comprehensive definition of terrorism, but has so far failed. Indeed, it appears that one of the difficulties has been achieving agreement as to the very point at issue in this appeal. In 2007, the *ad hoc* committee established by General Assembly resolution 51/210 of 17 December 1996 suggested that it be agreed that "the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention". However no consensus has been achieved, because various states' delegations were concerned about "(a) the right of peoples to self-determination under international law; (b) the activities of armed forces in armed conflict; and (c) the activities of military forces of a State in peacetime, also taking into account related concerns about State terrorism" - to quote from the committee's 2011 report. In early 2012, the General Assembly established a working group to "finalise" the drafting of a comprehensive international convention on terrorism, but, by the end of that year, the chair of the group reported that there were still disagreements, including as to the precise distinction between terrorism and "legitimate struggle of peoples fighting in the exercise of their right to self-determination".

47. It is true that there are UN Conventions and Council of Europe Conventions concerned with counter-terrorism, which define terrorism as excluding "activities of armed forces during an armed conflict", but there is room for argument as to their precise effect, and, more importantly, it is quite impossible to suggest that there is a plain or consistent approach in UN Conventions on this issue.

48. Thus, the Crown asserts that the UN has adopted fourteen counter-terrorism treaties to date[1], and of these fourteen treaties (i) seven state that "the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed

---

[1] 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; 1979 International Convention against the Taking of Hostages; 1980 Convention on the Physical Protection of Nuclear Material; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation; http://www.un.org/terrorism/instruments.shtml

by this Convention", (ii) of the seven which have no such statement, six provide that the treaty "does not exclude any criminal jurisdiction exercised in accordance with national law", and (iii) of the seven which include such a statement, at least five contain a provision substantially to the like effect. The appellant contends that the absence of an armed conflict exclusion from a treaty does not mean that that treaty applies in relation to an action at a time of armed conflict. However, it is not normally appropriate to imply a term into an international treaty, and, in any event, the absence of any such express exclusion is scarcely consistent with the contention that there is an internationally accepted norm such as the appellant suggests.

49. Further, as this court pointed out in *Al-Sirri*, para 68, "an attack on [the International Security Assistance Force in Afghanistan] is in principle capable of being an act contrary to the purposes and principles of the United Nations", and such an attack therefore can constitute "terrorism" – see para 3 of the same judgment. Consistently with this, there have been UN resolutions referring to the activities of Al-Qaida and the Taliban as "terrorism", notwithstanding allegations that their actions involved insurgents attacking forces of states and IGOs in non-international armed conflict (eg UN Security Council resolutions 2041, 2069 and 2082 of 2012, and Council Decision 2011/486/CFSP of 1 August 2011).

50. In addition, in international humanitarian law, it appears that insurgents in non-international armed conflicts do not enjoy combatant immunity. Crawford in *the Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010), pp 78-79, says that "international law does not immunize" "participation in non-international armed conflict", and that there is "nothing in the customary international law that replicates … combatant immunity for persons who participate in non-international armed conflicts", a view supported by Sivakumaran in *The Law of Non-International Armed Conflicts* (2012), p 515.

51. As for domestic legislation across the world, the Crown states in its argument, without challenge, that of a survey of 42 states it has identified with legislation which defines terrorism, (i) 28 do not exclude armed attacks, (ii) four explicitly include armed attacks, and (iii) seven explicitly exclude armed attacks (which includes the United States, although its position might be said to be ambivalent, as some of the relevant legislation is widely drawn without the exclusion). It is true that none of these legislative provisions explicitly refer to armed attacks during a time of armed conflict, but we would refer back to the point made at the end of para 48 above.

Other problems faced by the appellant's case

52. It appears clear that sections 62-64 of the 2000 Act give effect to the UK's obligations under the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of the Financing of Terrorism 1999. It is also fair to say that these two Conventions, particularly the latter, appear to have been drafted so as to exclude insurgent attacks on military forces in non-international armed conflicts from their respective ambits. However, the notion that the meaning of "terrorism" in section 1 of the 2000 Act should be read down, because some of the activities which were rendered offences by that Act were criminalised as a result of the UK's obligations under the two Conventions, runs into two difficulties.

53. First, there is no rule that the UK government cannot go further than is required by an international treaty when it comes to legislating – the exercise is often known as "gold-plating". It is not as if there is anything in either the 1997 or the 1999 Convention which excludes a signatory state going further than the requirements of the Convention, or anything in the 2000 Act which suggests that Parliament intended to go no further. That is not to say that gold-plating is never objectionable, but no argument was advanced on this appeal to suggest that there was any reason why it was objectionable in this case (save that considered and rejected in paras 44-51 above).

54. Secondly, quite apart from this, if the wide definition of "terrorism" in section 1 of the 2000 Act has to be read down for the purposes of sections 62-64, there is no reason to read it down when it comes to any other provision of the Act – or of the 2006 Act. In *Al-Sirri*, para 36, this court appears to have approved, indeed to have relied on, the proposition that, if application of the wide definition of "terrorism" in section 1 of the 2000 Act led to another provision of the Act conflicting with the UK's obligations under the Geneva Convention, then the definition should be read down when applied to the provision in question, and not generally throughout the Act. To conclude otherwise would be a classic case of letting the tail wag the dog.

55. The 2006 Act takes the appellant's argument no further. It is true that some of its provisions give effect to the UK's obligations under the Council of Europe Convention on the Prevention of Terrorism 2005 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005. However, section 2 of the 2006 Act was not enacted to give effect to any international Convention, and, even if it had been and had gone further than the Convention concerned required, there is no reason why Parliament should not have gold-plated the legislation, as already explained.

56. The appellant's reliance on the fact that there are provisions of the 2000 and 2006 Acts which criminalise various activities as terrorist offences even if committed abroad, runs into similar problems. Even if it were the case that, because of the need to take into account the UK's international law obligations, the wide definition of terrorism had to be read down when it comes to construing those provisions, that would be of no assistance to a defendant such as the appellant, who is a UK citizen being prosecuted for offences allegedly committed in this country. There is no reason to read down the wide definition of terrorism in a case such as this. The present case does not involve a defendant who has committed acts, which are said to be offences, abroad: the activities said to be offences were committed in the UK – and by a UK citizen.

57. That renders it unnecessary for us to consider whether, as there is no internationally agreed definition of "terrorism", the Court of Appeal was right to decide that there is no reason why Parliament cannot criminalise acts of "terrorism", as defined in section 1 of the 2000 Act, committed outside the UK. In reaching that decision, the Court of Appeal relied on the Permanent Court of International Justice's statement in *The SS Lotus* 1927, PCIJ, Series A, No 10, para 48 that "[r]estrictions upon the independence of states cannot …be presumed" given that the "rules of law binding upon states … 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 [states] or with a view to the achievement of common aims". Whilst various assumptions on which that decision was based have been modified or superseded by subsequent developments in international law, "the *Lotus* principle [is] that states have the right to do whatever is not prohibited by international law", as is stated in the Max Planck *Encyclopaedia of Public International Law*, in its discussion of the case.

58. The appellant contends that the mere fact that certain actions can be characterised as terrorism without offending international law does not mean that those actions can be criminalised by one state if they are carried out in another state. The appellant cites, for example, Brownlie's *Principles of Public International Law* (8th ed 2012), p 458, which says "if a state wishes to project its prescriptive jurisdiction extra-territorially, it must find a recognised basis in international law for doing so". That raises a point of some importance and some difficulty, and it might be said to represent a shift in focus in international law. Given that we do not have to decide the issue, we should not do so in this appeal: it should await another case.

Conclusion

59. We would accordingly answer the certified question "yes", and consequently we would dismiss this appeal.

60. Before ending this judgment, we would make two further points of a general nature about the 2000 and 2006 Acts.

61. First, we revert to the concern about the width of the definition of "terrorism", as discussed in paras 28-29 and 33-37 above. In his first report, Mr Anderson QC made the point that "the current law allows members of any nationalist or separatist group to be turned into terrorists by virtue of their participation in a lawful armed conflict, however great the provocation and however odious the regime which they have attacked". He went on to say that "other definitions of terrorism choose to exclude activities sanctioned by international law from the reach of terrorist activity", citing the Canadian and South African Criminal Codes as examples. In his second report, Mr Anderson mentioned the "potential application of the Terrorism Acts even to UK forces engaged in conflicts overseas", and referred to the fact that a recent Australian report "recommend[ed] that Australian law be changed so as to provide that the relevant parts of the Criminal Code, as in Canada, do not apply to acts committed by parties regulated by the law of armed conflict."

62. While acknowledging that the issue is ultimately one for Parliament, we should record our view that the concerns and suggestions about the width of the statutory definition of terrorism which Mr Anderson has identified in his two reports merit serious consideration. Any legislative narrowing of the definition of "terrorism", with its concomitant reduction in the need for the exercise of discretion under section 117 of the 2000 Act, is to be welcomed, provided that it is consistent with the public protection to which the legislation is directed.

63. The second general point is that the wide definition of "terrorism" does not only give rise to concerns in relation to the very broad prosecutorial discretion bestowed by the 2000 and 2006 Acts, as discussed in paras 36-37 above. The two Acts also grant substantial intrusive powers to the police and to immigration officers, including stop and search, which depend upon what appears to be a very broad discretion on their part. While the need to bestow wide, even intrusive, powers on the police and other officers in connection with terrorism is understandable, the fact that the powers are so unrestricted and the definition of "terrorism" is so wide means that such powers are probably of even more concern than the prosecutorial powers to which the Acts give rise.

64. Thus, under Schedule 7 to the 2000 Act, the power to stop, question and detain in port and at borders is left to the examining officer. The power is not subject to any controls. Indeed, the officer is not even required to have grounds for suspecting that the person concerned falls within section 40(1) of the 2000 Act (ie that he has "committed an offence", or he "is or has been concerned in the commission, preparation or instigation of acts of terrorism"), or even that any

offence has been or may be committed, before commencing an examination to see whether the person falls within that subsection. On this appeal, we are not, of course, directly concerned with that issue in this case. But detention of the kind provided for in the Schedule represents the possibility of serious invasions of personal liberty.