*Terrorist or Armed Opposition Group Fighter? The Experience of UK Courts*

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Abstract:

The aim of this article is explore the case law of British courts relating to the actions of those who have committed acts which, in some circumstances, might be considered terrorism. It does this by identifying three different types of attacks and how British courts have responded to them. These are attacks against civilians, attacks against UN-mandated forces and attacks against the security or military forces of another State.

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Distinguishing between ‘terrorist’ and ‘freedom fighter’[[1]](#footnote-1) is a contentious issue in domestic and international law. Over the years British courts have found it necessary in criminal and immigration cases to establish where the boundary between the two lies. During the Nineteenth Century, a sympathetic approach appears to have been adopted with Lord Mustill noting ‘those who used violence to challenge despotic regimes often occupied the high moral ground, and were welcomed in foreign countries as true patriots and democrats.’ Times change, however, and those committing acts of violence now resort to ‘destructive and undiscriminating’ violence.[[2]](#footnote-2) As the spectre of international terrorism has grown, so too has the scrutiny given to those who have been involved abroad with armed opposition groups. It is in this context that British courts have been particularly active, developing a reasonable and robust approach to distinguishing between what might be termed a ‘legitimate’ armed opposition group fighter and a terrorist.

Thus, this article examines the experiences of British courts and tribunals in addressing the distinction between the two categories. The British definition of terrorism is, as will be seen, very broad inviting a degree of judicial interpretation. The resulting case law can be used to offer an insight into how a distinction between armed opposition group fighters and terrorists. The argument advanced in this article is that the interpretation of terrorism, and the exclusion of certain acts, by British courts and tribunals may be of assistance in sharpening the definition of terrorism in international law. The British approach has been chosen as a model because of its rich case law and because section 1 of the Terrorism Act 2000 (which contains the definition of terrorism) has arguably come to be exported into several other jurisdictions.[[3]](#footnote-3) And while this is not in itself declarative of international custom, it might be seen as marking a particular trend within international law and offering some insight into the how a common law jurisdiction has addressed this issue.

The article is structured into four main parts. The first, although it does not seek to rehearse much of the debate surrounding the definition of terrorism international or British law,[[4]](#footnote-4) provides a general overview of the relevant legal context, offering an appropriate foundation on which the remaining three parts might be based. It does not, however, address the issue of terrorism within the domestic context. Part Two considers the issue of armed attacks against civilians, acts which, as will be seen, have been acutely condemned by the British judiciary. The third focuses on military-style attacks against UN-mandated forces as it has been argued in certain cases these amount to legitimate attacks by armed opposition group fighters. British courts have so far failed to be persuaded these actions amount to anything other than terrorism. Part Four examines an issue which has troubled both domestic courts and the international community, namely attacks perpetrated by armed opposition group fighters against the military and security forces of a third state. Although, in international law, the status of these groups might perhaps be uncertain or ambiguous, British courts have been able and willing to consider whether or not armed opposition group fighters can be regarded as terrorists. It will be demonstrated throughout this piece lessons might be drawn from the British experience of demarcating the boundary between terrorist and armed opposition group fighter.

Part One – International and British Law Compared

When distinguishing between terrorists and armed opposition group fighters, British courts have often relied upon international law to help interpret domestic legal provisions. This has been particularly noticeable in judgments where the courts have addressed the issue of attacks against UN-mandated forces and against the military forces of a third state. The aim of Part One is to introduce both the international and domestic legal context and to identify some of the problems this article seeks to address.

In *R v* *Gul*, the UK Supreme Court[[5]](#footnote-5) noted the failure, despite sustained attempts, of international law to ‘identify a comprehensive definition of terrorism.’[[6]](#footnote-6) Despite the prominence of terrorism in international legal discourse, and the suggestion a definition exists in customary international law,[[7]](#footnote-7) it is curious no treaty exists to offer a comprehensive definition. As a result, this article takes as an arbitrary starting point the pronouncements of various organs of the United Nations, beginning with the UN Security Council. Resolution 1566 provides a description of certain acts which could constitute terrorism.[[8]](#footnote-8) It begins by framing terrorism as a criminal offence rather than a political act, thereby seeking to remove from the outset any perceptions of legitimacy. Terrorism is the commission of actions including killing, causing serious bodily injury or kidnapping intended to ‘provoke a state of terror in the general public or in a group of persons or particular persons’.[[9]](#footnote-9) The purpose being to compel a government or international organisation to do, or refrain from doing, a particular act. The Resolution also relies on the definitions of terrorism provided in ‘international conventions and protocols relating to terrorism’ but stops short of providing a concrete definition.[[10]](#footnote-10) Taken together with UN General Assembly Resolutions, these might ‘gradually harmonize national criminal laws, which may...constitute evidence of State practice and *opinio juris*’.[[11]](#footnote-11) The further harmonisation of domestic criminal law along with UN resolutions could move the international community slowly and unconsciously towards a unified definition of terrorism.

Although resolutions of the UN General Assembly are not formally binding sources of international law,[[12]](#footnote-12) they can be illustrative of, and evidence for, international custom.[[13]](#footnote-13) There are a number of UNGA Resolutions including the 1972 Resolution 3034 (XXVII) to counter international terrorism endangering life and jeopardising ‘fundamental freedoms’.[[14]](#footnote-14) It does however recognise the right of all peoples to self-determination and ‘upholds the legitimacy of their struggle...in particular the struggle of national liberation movements’.[[15]](#footnote-15) The inclusion of the latter point is of particular note for the purposes of this article because it potentially signals a difference between terrorists and those who participate in armed military-style attacks against government forces within the context of a national liberation movement. Resolution 48/122, meanwhile, condemned the violation of human rights by terrorist groups seeking to ‘[threaten] the territorial integrity and security of States’ in addition to ‘destabilizing legitimately constituted Governments’.[[16]](#footnote-16) Taken together these resolutions appear, at first glance to be contradictory. The first appears to support self-determination while the second condemns acts threatening a state’s territorial integrity. However, the inclusion of the term ‘legitimately constituted Governments’ suggests the possibility of some room for manoeuvre. In this case, the actions of armed groups opposing a dictatorial regime would not, in itself, constitute terrorism. An analysis closer to the argument advanced in this article would focus instead on the nature of the targets rather than the attackers’ motivations.

One possible reason for the lack of an accepted universal definition of terrorism lies in what are often political motivations underpinning terrorist acts. Higgins notes the term has become one ‘without legal significance’ and is instead a convenient shorthand for ‘widely disapproved of’ activities.[[17]](#footnote-17) Higgin’s viewpoint finds support elsewhere with Duffy noting the terms ‘terrorist’ and ‘terrorism’ are often used in a pejorative sense, carrying with them a degree of political stigmatisation.[[18]](#footnote-18) And the political nature of terrorism, it has been suggested, can often be used to justify the perpetration of indiscriminate violence.[[19]](#footnote-19) The politicisation of the term makes it almost impossible for a concrete legal definition in international law to be reached.[[20]](#footnote-20) The consequence of legal uncertainty, predominantly stemming from the opaque nature of the language involved permits States to make ‘unilateral interpretations geared towards their own interests’ at the expense of international law.[[21]](#footnote-21) International law appears to lose a degree of its universalism if States are able to place their own interpretations on it.

The precise difference between terrorism and armed opposition group fighters can be said, in certain instances to be vague and further clarity between the two might be gained by focusing not on their motives but by their actions, and more particularly their targets.[[22]](#footnote-22) Cassese identified three different models for demarcating the boundary between ‘freedom fighters’ and terrorists in international law.[[23]](#footnote-23) The first, regarded by Cassese as a minority view, recognises the legitimacy of armed opposition group fighters engaged in an armed conflict for the purposes of self-determination. Attacks against civilians in this a context are not acts of terrorism. This approach would legitimise the targeting of civilians by reference to motive underpinning the act itself. Under the second, wars of national liberation are not covered by the international law of terrorism but regulated by international humanitarian law. Accordingly, attacks against civilians are classified as war crimes rather than terrorism. The third, and most widely supported view, is that attacks by freedom fighters in the context of an armed conflict (international or non-international) ‘if directed at military personnel and objectives in keeping with international humanitarian law...are lawful and may not be termed terrorism’. In this third instance, the targeting of civilians would remain terrorism.[[24]](#footnote-24)

The third position above finds historical support in the 1874 Brussels Project of an International Declaration Concerning the Laws and Customs of War, which recognised those who ‘spontaneously take up arms to resist the invading troops without having had time to organize themselves’ as belligerents ‘*if they respect the laws and customs of war* [emphasis added].’[[25]](#footnote-25) Thus, groups respecting international humanitarian law might not be considered terrorists. This point was also envisaged by the Draft Comprehensive Convention on Terrorism: ‘activities of armed forces during an armed conflict’ are not to be considered terrorism for the purposes of the Comprehensive Convention. The Draft adds these terms are to be understood ‘under international humanitarian law’. Crucially, for the present inquiry, this could mean armed opposition groups, providing they do not act unlawfully (for example by attacking civilian targets) would not be classified as terrorists.[[26]](#footnote-26)

Despite the probable emergence, as indicated by Cassese, of a customary definition of terrorism, the fact remains the international legal system continues to lack a codified and universal conception of terrorism. If domestic enforcement is going to be the primary means of combating terrorism, then the lack of an international definition is arguably not too problematic. However, it becomes an issue when ‘international jurisdiction over terrorism’ is sought or perhaps when cooperation between several countries becomes necessary.[[27]](#footnote-27) It also becomes tangentially an issue when domestic courts make reference to international law. Why a definition has become so hard to reach lies without the scope of this present inquiry but it is useful to revise, in brief, some of the reasons as to why this might be the case because it suggests an analytical gap for this article to consider.

Reflecting more widely on the interpretation of terrorism, Guillaume believes the word as an adjective, describes ‘any criminal activity involving the use of violence’ which is ‘likely to cause harm or threat to human life, in connection with an enterprise whose aim is to provoke terror.’ A concerted plan and the pursuit of an objective to cause terror among a country’s population must exist.[[28]](#footnote-28) This analysis broadly corresponds to the section 1 definition contained in the Terrorism Act 2000. The experience of the UK suggests a legal definition is possible, if only at a national level. This has helped to shape the approach of British courts in both terrorism cases and, more widely, in relation to immigration and asylum claims, as will be explained below. Section 1 2000 Act provides:

(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 **o**r 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.

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

Section 1 can therefore be divided into three elements: actions, targets and motive.[[29]](#footnote-29) ‘Actions’ include serious violence against a person or serious damage to property, endangering a person’s life and the creation of risk to the health or safety of the public, and the interference with or disruption of electronic systems.[[30]](#footnote-30) This category relates to the consequences, or harm, of the action. ‘Targets’ can be a government, international governmental organisation (for example, the UN), the public or a section of it.[[31]](#footnote-31) The ‘motives’ are the advancement of ‘political, religious, racial or ideological causes.’[[32]](#footnote-32) The use or threat of firearms or explosives amounts to terrorism whether or not it is designed to influence a government, international organisation or to intimidate the public.[[33]](#footnote-33) Arguably this final provision is very broad and could, if expansively applied by the courts, include any acts of armed conflict even if conducted in accordance with domestic or international law.

The broad categorisation of terrorism under section 1(3) drew comment in *R (on the application of Islamic Human Rights Council) v Civil Aviation Authority*.[[34]](#footnote-34) In this case the applicant sought to prevent arms shipments from the United States to Israel via British airports. An argument advanced by the applicant was that Israel’s actions amounted to terrorism and, by allowing the shipments, the British government was aiding and abetting terrorism.[[35]](#footnote-35) The Court recognised a very broad reading of section 1(3) could convert all lawful acts of war into acts of terrorism.[[36]](#footnote-36) These acts would more than likely involve the use of firearms or explosives and be committed with the intent to influence a government. The application was dismissed as ‘hopeless’ and ‘misconceived’. The inference from this being the definition contained in section 1 was never intended to apply to the case’s circumstances and thus a narrower reading of section 1(3) was required.[[37]](#footnote-37) The principle set down in this case being the judges are willing, and able, to restrict the scope of section 1. Lastly, concerns over the ‘excessive reach’ of section 1(3) were also raised by the then Independent Reviewer of Terrorism Legislation, David Anderson.[[38]](#footnote-38) This particular statutory provision would appear to afford the courts a huge measure of discretion, a point which might very well have been the intention of Parliament.

The other aspect of law crucial to understanding the approach of British courts and tribunals relates to immigration and asylum law. This has been used by British courts and tribunals particularly when processing claims by refugees who allegedly or admittedly took part in armed activities while abroad. This provides a fruitful source of cases relating to whether actions like these might or might not be regarded as terrorism. The principal source of law in this area stems from the Refugee Convention 1951. Its aim being ‘to assure refugees the widest possible exercise of [their] fundamental rights and freedoms’.[[39]](#footnote-39) Article 1 defines a refugee as an individual who is ‘outside the country of his nationality’ because of a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Protection is by no means universal. Article 1F excludes certain categories of individuals from the Refugee Convention’s protection. These categories include those for ‘whom there are serious reasons for considering’ they have committed crimes against peace, war crimes or crimes against humanity. In addition, and arguably more pertinent to this article’s focus, it also excludes those suspected of having committed ‘serious non-political offences’ or who are ‘guilty of acts contrary to the purposes and principles of the United Nations.’[[40]](#footnote-40) This exception has generated much discussion in British courts. Does someone who has attacked UN forces qualify as a refugee and is terrorism a war crime? These are issues considered in Parts Two, Three and Four.

The implementation of this in British law is found in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006which establish the minimum standards relevant to the granting of refugee status in the UK.[[41]](#footnote-41) This applies European Directive 2004/83/EC,[[42]](#footnote-42) the aim of which is the harmonisation of asylum policy within the European Union. The Regulations provide a person might be said to be fleeing persecution on the basis of race or membership of an ethnic group, on the grounds of religion including atheism, nationality, sexual orientation and political opinion.[[43]](#footnote-43) It however includes the exceptions found in Article 1F of the Refugee Convention meaning an individual seeking refuge in the UK might have their application refused if they have committed, for example, war crimes or acts of terrorism contrary to the purposes and principles of the UN.

Lastly, the Immigration, Asylum and Nationality Act 2006 specifically includes terrorism, as it is defined in section 1 of the Terrorism Act 2000, as an act contrary to the ‘purposes and principles of the United Nations’.[[44]](#footnote-44) In this way, those who have participated in terrorist outrages abroad cannot claim asylum because these actions fall within the exceptions contained within Article 1F. The British approach, though not declarative of international law, provides some evidence to suggest acts of terror might be regarded by the international community as being contrary to the purposes and principles of the UN. At the very least, these acts cannot be said to be committed in accordance with those purposes and principles.

The apparent lack of certainty at international law reflects the complexity and contentiousness of defining terrorism. Under British law the position is much clearer with courts and policy makers able to draw on the provisions of the Terrorism Act 2000. The other factor in this area is the effect of Article 1F of the Refugee Convention and its subsequent implementation into domestic law. As such, this article might be thought of as like a Venn diagram comprising of two distinct but nevertheless overlapping legal elements: the law relating to terrorism and the law relating to immigration and asylum. As will be seen, one has been used to interpret the other and *vice versa* creating a distinct body of case law founded on both areas of law.

Part Two – Attacks against Civilians

Direct and intentional attacks against civilians are perhaps the clearest category examined and as a result this section is the shortest section in this article. In certain instances, attempts might be made to justify attacks against civilians or civilian targets on the basis these acts are ideologically motivated. For example, in the interests of national liberation or freedom from an oppressive regime.[[45]](#footnote-45) As will be seen, these arguments have been roundly rejected by British courts and tribunals. This section begins by offering some consideration of the general protections afforded to civilians by the law of armed conflict and uses this to explain why civilians are generally protected.

The protection of civilians from terrorist attack mirrors the general protection granted to civilians and non-combatants by the law of armed conflict. The Geneva Conventions, their Additional Protocols, customary international law and international criminal law all prohibit the intentional targeting of civilians and non-combatants. The distinction between civilians and combatants is so fundamental it might be regarded as a *grundnorm* of the law of armed conflict.[[46]](#footnote-46) However, despite this general protection, it does not follow civilians are totally immune from the *effects* of an attack. The law of armed conflict recognises civilian casualties, though regrettable, can and do occur. In assessing the legality of these actions it is necessary to examine the proportionality and military necessity of the objective sought.[[47]](#footnote-47) Indiscriminate attacks directed against civilians during times of armed conflict amount to war crimes;[[48]](#footnote-48) the spreading of terror amongst a civilian population in times of armed conflict is likewise prohibited.[[49]](#footnote-49) Although these examples relate to the law of armed conflict, they do help to contextualise the position of civilians in international law and to demonstrate, even in times of armed conflict, they continue to enjoy considerable *legal* protection.

Terrorist attacks against civilians abroad have been considered by British courts and tribunals. For example, in the case of *T v Secretary of State for the Home Department*, an illegal immigrant resisted deportation to Algeria.[[50]](#footnote-50) T had been a member of a group called FIS (*Front Islamique du Salut* – The Islamic Salvation Front). As part of his involvement with this group he had been responsible for planting and detonating a bomb at an Algerian airport, killing ten people. There was discussion in the judgment as to whether T’s actions amounted to a political or non-political offence. If the former, then the Article 1F exclusion would not apply. Lord Slynn dismissed this, noting ‘killing innocent citizens was “totally beyond the pale” and outside the protection afforded by the [Refugee] Convention.’[[51]](#footnote-51) As a consequence, sanctuary should not be afforded to individuals who have committed acts like these.[[52]](#footnote-52) This approach mirrors the general protection encountered in the law of armed conflict preventing the deliberate targeting of civilians and civilian objects.

*T* was not without precedent and the judgment has its roots in the decision of the 1894 case of *Re Meunier*.[[53]](#footnote-53) A French anarchist was allegedly responsible for two explosions in Paris, one targeted a civilian café and the other a military barracks. After the attacks, Meunier fled to Britain and his extradition sought by the French government. Resisting this, he argued the attacks were political offences to which immunity from extradition attached. However, because the acts of the anarchists were directed ‘mainly’ against private citizens and not elements of the French State, they were non-political offences and Meunier could be extradited.[[54]](#footnote-54) Unlike Meunier who was seeking to destroy government, T sought to replace one government with another. The House of Lords recognised this gave T’s action a political dimension but one which did not excuse the use of indiscriminate violence against civilians.[[55]](#footnote-55) Here, it was recognised the motivation underpinning an attack could never be used to justify the targeting of civilians.

British courts have found the decisions of US courts particularly helpful, and help to paint a more complete picture.[[56]](#footnote-56) For instance, the US case of *Eain v Wilkes* involved the extradition of a PLO member to Israel.[[57]](#footnote-57) The nature of the attack, bombing a crowded marketplace, did not fall within the political exception even, as in *T*, though the Court accepted a political motivation could exist due to the nature of the conflict between Israel and the Palestinians. The reasoning for this was because the nature of the violence used was indiscriminate and targeted civilians. Support can also be found in *Mahmoud Abed Atta*, a case which again involved the extradition of an individual for the bombing of a civilian target, in this instance a bus carrying civilians.[[58]](#footnote-58) The judge recognised, though the attack was underpinned by political motives, it was nonetheless not a political crime due to the indiscriminate nature of the violence and the resulting targeting of civilians. Thus, while a group might be motivated by politics, it is the target and consequences of a group’s actions which render an individual subject to the Article 1F exceptions.

British courts have considered attacks against civilians to be terrorism from at least the case of *Re Meunier* in 1894. More contemporary events have not changed judicial opinion as seen in *T v Secretary of State for the Home Department*. This position finds considerable support in international law,[[59]](#footnote-59) notably that which relates the law of armed conflict. There is also a link to general pronouncements on terrorism in public international law such as from the UN Security Council and General Assembly. To this extent, the British approach adds little additional illumination, but much support, to this particular area. As will be seen, attacks against UN-mandated forces and against another State’s military or security forces enjoy less legal certainty.

Part Three – The British Response to Attacks against UN-Mandated Forces

The commission of attacks by paramilitary organisations against UN-mandated forces has become a concern following the September 11th attacks and the subsequent military intervention in Afghanistan and Iraq. They have been perpetrated by various factions ranging from the Taliban to Al-Qaeda to more localised, quasi-military groups. These attacks have resulted in substantial loss of life to both military personnel serving with UN-mandated forces and also to civilians.[[60]](#footnote-60) The presence of international military forces in the form of the International Stabilisation and Assistance Force (ISAF) has been authorised by the UN Security Council.[[61]](#footnote-61) Following the invasion of Iraq in 2003 and the replacement of the Coalition Provisional Authority with a newly formed Iraqi government, the UN Security Council authorised the presence of coalition forces in Iraq in the form of the Multi-National Force – Iraq (MNF-I).[[62]](#footnote-62)

To justify their actions, attackers might claim they were acting as ‘freedom fighters’ against an invading military force, raising the question as to whether the attacks might be considered legitimate.[[63]](#footnote-63) British courts have, as will be seen, been involved in answering this very question in relation to immigration claims and criminal prosecutions. One key issue for the former was whether the attacks constituted terrorism and, if so, whether they amounted to acts contrary to the purposes and principles of the UN. The purpose of this section is to examine how British courts have addressed the status of individuals suspected of participating in attacks against UN-mandated military forces. It provides an overview as to how British law in this area might be used to clarify and further define the position of this type of combatant in international law.

An attack against UN-mandated forces would at first glance appear contrary to the purposes and principles of the United Nations. These forces are deployed in furtherance of the UN’s purposes and principles making it difficult to argue attacks have any legitimacy. The first point of analysis for British courts has been to establish what is meant by the term ‘purposes and principles of the United Nations.’ To do this they have turned to the UN Charter.[[64]](#footnote-64) The Charter might be seen as a governing document or constitution,[[65]](#footnote-65) containing within it several statements relating to its purpose and its principles. Article 1 of the Charter sets out the organisation’s purposes, notably the maintenance of international peace and security, ‘the suppression of acts of aggression or other breaches of the peace’ and the promotion of human rights. Article 2 contains the UN’s principles, including the sovereign equality of its Members, the requirement of Members to fulfil in good faith their obligations under the Charter and the duty to assist the UN in its operations. Taken together, these make no explicit reference to terrorism but they do point to a desire for peace, security and respect for human rights, principles violated by acts of terror. Extending ‘acts contrary to the purposes and principles of the UN’ to include acts of terrorism is difficult because, as seen in Part One, the latter lacks definition in international law. Despite this, the UN Security Council and UN General Assembly have both drawn links between the two. For example, one UN General Assembly Resolution, accepted unanimously by all UN Member States, reads ‘Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations’.[[66]](#footnote-66)

This distinction is important because under Article 1F of the Refugee Convention, those committing acts contrary to the purposes and principles of the UN will be excluded from protection. If terrorism can be shown to be contrary to the purposes and principles of the UN, as it likely can be, then those committing attacks against UN-mandated forces are likely to be excluded from Article 1F’s protection. British courts are here assisted by the Immigration, Asylum and Nationality Act 2006, section 54(1). This specifically states terrorism is an act ‘contrary to the purposes and principles of the United Nations’, with terrorism being defined as found in the Terrorism Act 2000, section 1. Thus, the inclusion of this provision has now simplified matters for British judges: if an act is terrorism by domestic standards then it can be regarded as contrary to the purposes and principles of the UN. Prior to this Act, courts found it necessary to examine what was meant by the UN’s ‘purposes and principles’ in order to determine whether or not an individual’s actions might be deemed to have triggered the Article 1F exception. This has helped to give a little more colour to the definition and is likely to be of use in international law which lacks the concreteness of section 54(1).

The definition of the UN’s ‘purposes and principles’ arose in *Secretary of State for the Home Department v DD (Afghanistan)*.[[67]](#footnote-67) DD was an Afghan national seeking asylum in the UK on the basis his life would be in danger if he were to be returned to Afghanistan. While in Afghanistan he had been involved with three Afghan terrorist and paramilitary organisations including the Taliban. Through these organisations he had participated in attacks against ISAF. The Court’s task was to resolve whether attacks like these were contrary to the purposes and principles of the United Nations. DD’s argument was he had been defending his homeland against ISAF and as a result his actions were neither contrary to the UN’s purposes and principles nor did they constitute terrorism. The Court of Appeal disagreed noting the use of military force in Afghanistan was authorised by the UN in order to stabilise the country and to ensure the protection of UN agencies engaged in reconstruction work.[[68]](#footnote-68) The use of force by ISAF was, according to Pill LJ, ‘conducted on behalf of the entire international community.’ Accordingly, ‘fighting against UN mandated forces would appear to be a clear example of action contrary to purposes and principles of the United Nations’. However, he stopped short of saying all violence against UN personnel would automatically be contrary to the purposes and principles of the UN: ‘Situations will differ and require specific analysis.’[[69]](#footnote-69) In framing the judgment like this, the Court was careful to exclude certain acts of violence, like robbery or kidnapping of UN forces, from Article 1F. Instead, only violence which is a result of *direct military* action would cross the Article 1F threshold.[[70]](#footnote-70)

When the case reached the Supreme Court, it was argued on DD’s behalf only attacks made directly against UNAMA (UN Assistance Mission to Afghanistan) would be considered contrary to the purposes and principles of the United Nations. UNAMA was a non-combatant peacekeeping force and protected by international law, ISAF was neither.[[71]](#footnote-71) The Court failed to be persuaded by this line of argument: the maintenance of international peace and security is a primary purpose of the United Nations and ISAF’s role was to maintain international peace and security by assisting in the stabilisation of Afghanistan.[[72]](#footnote-72) DD’s actions against ISAF demonstrated he was ‘seeking to frustrate’ the maintenance of international peace and security.[[73]](#footnote-73) Therefore, the use of military force against UN-mandated forces, even those engaged in military operations, may amount to an act contrary to the purposes and principles of the United Nations.

The issue was first considered in *KK v Secretary of State for the Home Department*[[74]](#footnote-74)where the Immigration Appeals Tribunal (IAT) examined the status of a Turkish national with a history of involvement with a proscribed terrorist organisation, the Kurdistan Workers’ Party (PKK). To further its commitment to an independent Kurdistan, the PKK undertook guerrilla operations against Turkish security and military forces. The IAT took into account several UN sources including the Charter, Security Council resolutions and resolutions of the UN General Assembly. Together these might be regarded as representing the collective view of the UN or at least indicative of a general approach to the issue. The IAT recognised ‘acts contrary to the purposes and principles of the United Nations’ was a wider concept embracing acts other than terrorism.[[75]](#footnote-75)

The issue of armed attacks targeting forces operating under an UN mandate was given further consideration in the case of *R v Gul* albeit in a slightly different context.[[76]](#footnote-76) Gul was prosecuted and convicted in the first instance for the dissemination of terrorist material contrary to section 2 Terrorism Act 2006.[[77]](#footnote-77) The material included videos depicting attacks made by insurgents against Coalition forces in Iraq and Afghanistan operating under the auspices of a UN mandate.[[78]](#footnote-78) Gul’s defence at trial had been the videos were not terrorist in nature because they depicted the actions of ‘freedom fighters’ facing an oppressive foreign force. As a result, it was argued the actions could not be described as terrorist and therefore he could not be guilty of disseminating terrorist material. This argument was then used to buttress his case before the Court of Appeal but was rejected with the judgment concluding ‘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 [Terrorism] Act [2000] are terrorists.’[[79]](#footnote-79) This position seemingly confirms the idea attacks against UN-mandated forces amount to terrorism.

Gul’s appeal to the Supreme Court focused on the argument his actions could not amount to disseminating terrorist material because the acts depicted in the material were not in themselves terrorist. The certified question posed to the Supreme Court was:

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?[[80]](#footnote-80)

An affirmative answer to this question would mean any attack by insurgents against the military forces of any State would amount to terrorism. Lords Neuberger and Judge, delivering the Court’s judgment, recognised the breadth of section 1 and ‘military or quasi-military activity aimed at bringing down a foreign government, even where the activity is approved (officially or unofficially) by the UK government.’[[81]](#footnote-81) The Supreme Court concluded it was not for the courts to ‘cut down’ the very broad definition of terrorism contained in section 1, and rejected Gul’s appeal.

The *Gul* judgment presents a number of challenges particularly because the Supreme Court cited, *obiter*, a suggestion by the then Independent Reviewer of Terrorism Legislation that the definition of terrorism should not apply to acts which would be regulated by the law of armed conflict.[[82]](#footnote-82) Under this approach those participating in such armed attacks might avoid falling within the scope of section 1 of the Terrorism Act 2000 and also fail to trigger the Article 1F exceptions. The acceptance of this perspective would accommodate the position taken in *SS (Libya)* and *KJ (Sri Lanka)*, discussed in more detail in Part Four. In *SS (Libya)* the Court of Appeal recognised the judiciary is able to distinguish between acts of terrorism and ‘military action against a government’ by armed opposition groups.[[83]](#footnote-83) Meanwhile in *KJ (Sri Lanka)*, Burnton LJ differentiated between terrorist acts targeting civilians and the targeting of a State’s armed forces.[[84]](#footnote-84) Finally, in *DD (Afghanistan)* it was noted by Pill LJ ‘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’.[[85]](#footnote-85) Together these judgments seem to confirm, at least in British law, the third approach to defining terrorism in international law as outlined by Cassese.[[86]](#footnote-86)

The approach taken by the Supreme Court in *Gul* points to a degree of tension in the case law relating to armed activities committed abroad. However, it would appear the two positions might be distinguishable on the facts, and specifically the targets of the attacks are brought into focus. *Gul* concerned the dissemination of material depicting attacks against UN-mandated forces in Iraq and Afghanistan. There was no suggestion Gul had committed these attacks, the criminal offence in question was purely dissemination. However, the targets were ISAF forces operating under an existing UN mandate, and justified the Supreme Court’s decision to classify Gul’s actions as disseminating terrorist material.[[87]](#footnote-87)

Military-style attacks by armed groups against UN-mandated forces appear to amount to acts ‘contrary to the purposes and principles of the UN’. Whether, in international law, they amount to terrorism is less clear, in part because of the lack of an accepted definition of terrorism. As a result, British courts and immigration tribunals have had to rely on domestic legislation to interpret international law. The definition provided in section 1 of the Terrorism Act 2000 in conjunction with the clarification that terrorism amounts to an act ‘contrary to the purposes and principles of the UN’ in section 54 of the Immigration, Nationality and Asylum Act 2006 have proven to be invaluable. In turn, the experience of the British judiciary might be of assistance in international law so that such attacks can at least be classified as contrary to the purposes and principles of the UN, even if the international community as a whole is reluctant to classify them as terrorism.

Part Four –Attacks by Armed Opposition Group against a State’s Military or Security Forces

The romantic image of guerrillas fighting for their people’s freedom is a powerful and enduring notion. The existence of armed opposition groups are an essential *sine qua* *non* of non-international armed conflicts. Guerrilla warfare is often, though not always, aimed at overthrowing an established regime or government of a State.[[88]](#footnote-88) These armed conflicts are frequently bloody and counter-insurgency tends to be costly in terms of finance, resources and time. [[89]](#footnote-89) Part Four focuses on how British courts have addressed the issue of individuals who have fought abroad against the military or security forces of another state. It will be seen that in several instances, such individuals have received a sympathetic response from the British judiciary. Despite this outcome in domestic law, it is highly unlikely that international law will settle on a precise distinction between the terrorist and a ‘legitimate’ armed opposition group fighter. Nevertheless, the British experience remains relevant to public international law because it helps to add further understanding to the distinction between the two.

In domestic law, these individuals are often regarded by their home state to be terrorists or common criminals, despite the ‘nagging concern’ the label does not adequately reflect this status.[[90]](#footnote-90) As a result they may be prosecuted under domestic law for their activities.[[91]](#footnote-91) British courts appear, consciously or unconsciously, to take cognisance of the difficulties posed by these individuals who have fought abroad against a foreign government. As will be seen, individuals who have participated in attacks have been afforded a certain degree of sympathy from British courts and tribunals, perhaps reflecting more widespread understanding of the position in which these individuals have found themselves.

In international law the picture is not very clear. The UN General Assembly has long-recognised the actions of national liberation movements and those seeking to achieve their self-determination might not be considered terrorists.[[92]](#footnote-92) In part, whether an individual might be classified as a legitimate combatant or terrorist depends on the group’s targets. Cassese notes the most widely supported view is when an armed opposition group launches attacks in the context of an armed conflict (whether international or non-international), and ‘if directed at military personnel and objectives in keeping with international humanitarian law’, then the attacks are ‘lawful and may not be termed terrorism’.[[93]](#footnote-93) The above position appears to conflict with the position of armed opposition fighters under the law of armed conflict. Common Article 3 of the Geneva Conventions 1949 requires the humane treatment of ‘persons taking no active part in the hostilities’ including captured fighters[[94]](#footnote-94) and those rendered *hors de combat*.

Returning to the domestic context, the principal difficulty under British law facing individuals who have participated in armed attacks against another State’s military or security forces is the wide nature of section 1 of the Terrorism Act 2000. This has the potential to draw these individuals into its ambit, even if they have been motivated by the desire to resist, by force of arms, a tyrannical government. Consequently, acts committed against governments without the ‘desirable characteristics of representative government’[[95]](#footnote-95) can amount to terrorism even if they are committed with an apparently just cause. The Court of Appeal in *R v F* held it made no difference under the Terrorism Act 2000 if acts targeting dictatorial regimes were committed with noble purpose: ‘Such a concept is foreign to the 2000 Act. Terrorism is terrorism, whatever the motives of the perpetrators’.[[96]](#footnote-96) However, the Courts have frequently drawn a line around the activities of certain individuals involved in fighting the forces of a foreign government, following the position at international law outlined by Cassese.

A number of instances of individuals fighting another State’s military or security forces have arisen in British courts. The first case considered is *Gurung* concerning the actions of the applicant, a member of the Maoist Communist Party of Nepal (CPN). The CPN is a proscribed terrorist organisation under British law, meaning membership and other activities of support are criminal offences.[[97]](#footnote-97) The CPN had been involved in a guerrilla campaign against the government during the Nepalese Civil War (1996-2006). His application for asylum was refused in the first instance because he had been a member of a proscribed terrorist organisation and had by this fact alone been involved in ‘terrorist activities’. This was justified by reference to an exclusion under the Article 1F criteria.[[98]](#footnote-98) On appeal, the IAT examined the applicant’s circumstances and more generally the status of armed opposition groups. The initial decision was described as ‘jumbled and incomplete’; membership of a proscribed organisation did not necessarily result in an individual being sufficiently complicit in its activities to justify invocation of Article 1F.[[99]](#footnote-99)

To support its analysis the IAT devised an axis with two hypothetical organisations at either end. One was a political organisation embracing democracy and safeguards for human rights acting in opposition to a dictatorial regime. To further its cause it created an armed military wing to attack government forces. Apparently following the position outlined by Cassese, above, the IAT noted an applicant’s involvement in an organisation would not in itself give rise to an exclusion under Article 1F unless its ‘armed actions...[were] not proportionate acts’ like, for instance, attacks against civilians. An individual joining such a group might be able to argue they joined with the best possible motives in support of the group’s political aims.[[100]](#footnote-100) At the other end of the axis was a group committed to perpetrating terrorist attacks and ultimately establishing a dictatorship. The IAT held it would be difficult for an individual to demonstrate they were not complicit in the acts of the organisation.[[101]](#footnote-101) Under the *Gurung* formulation, the closer an organisation is to the first group the less likely it will be for its members to trigger Article 1F.

*Gurung* was reconsidered by the Supreme Court in *JS (Sri Lanka) v Secretary of State for the Home Department*.[[102]](#footnote-102) JS had risen rapidly through the LTTE ranks, becoming a platoon commander in the intelligence division by the age of 17. He fled Sri Lanka and sought asylum in the UK, again fearing persecution if he were to be returned. As in *Gurung* and *KJ (Sri Lanka)* his application for asylum was refused because as an officer in the LTTE he was deemed responsible for crimes against humanity and war crimes committed more widely by the LTTE. The Supreme Court was unconvinced by this argument, noting there was nothing to suggest JS had himself been involved in these acts and had instead been involved in military attacks against the Sri Lankan military. As a result, his actions would fall outside the scope of Article 1F.

The Supreme Court did, however, attempt to address the apparent romanticism attached to armed opposition group fighters suggested by the Court of Appeal in *Gurung*. The Supreme Court described this as being ‘unhelpful’ because of the large number of variables associated with each individual case. In particular, it seems the Supreme Court thought the IAT had overstated the position of armed opposition groups with democratic sympathies. The inference from the *Gurung* formulation appeared to the Court to be advancing the argument armed opposition groups with democratic sympathies could nevertheless engage in war crimes, crimes against humanity or other acts contrary to the purposes and principles of the UN and for its members to avoid triggering Article 1F. This view would permit individuals to hide behind their motives rather than be held to account for their actions. However, the Courts have been keen to avoid this situation and have resisted the introduction of a subjective viewpoint into this area of law. Lord Brown noted ‘War crimes are war crimes however benevolent and estimable may be the long-term aims of those concerned.’[[103]](#footnote-103) Thus the activities and beliefs of the group were secondary to the actions of the individual and would not absolve an armed opposition group fighter from the commission of war crimes.

The favoured approach of Lord Brown, therefore was to consider each individual on his or her own merits. In assessing these types of cases, seven ‘determining factors’ may be used. The first of these concerns the nature and size of the organisation, and secondly if the organisation is proscribed and by whom. Membership of an organisation which is widely proscribed around the world could be more significant when assessing an individual’s liability. The third and fourth points relate to how the individual came to be recruited (was his or her membership voluntary?) and the length of time he or she spent with the organisation. The longer an individual spends with an organisation the stronger the inference should be they agreed with its aims and objectives. Fifth his or her role within the organisation, including rank and influence. The final elements relate to what the individual knew about the organisation’s war crimes and his or her personal involvement particularly with the commission of war crimes.[[104]](#footnote-104) The overriding issue is exclusion under Article 1F should be based on an individual’s conduct within the organisation concerned, avoiding guilt by association.

The next two cases concern individuals who, as members of the proscribed LTTE (Tamil Tigers), participated in armed attacks against Sri Lankan security and military forces. Both claimed asylum in the UK on the ground they would face persecution if returned to Sri Lanka. In *KJ (Sri Lanka) v Secretary of State for the Home Department* the applicant had voluntarily joined the LTTE in 1980 and was part of a reconnaissance unit tasked with surveying Sri Lankan military targets for future attacks. He had also directly participated in attacks but claimed only the military was targeted and in areas free from civilians.[[105]](#footnote-105) Echoing the logic displayed in *Gurung*, the Home Secretary argued, because he had been a member of a proscribed terrorist organisation, KJ should be deported because his activities fell squarely within the Article 1F exception. At the Court of the Appeal, Burnton LJ noted ‘the deliberate killing or injuring of civilians in pursuit of political objects’ could be classified as running contrary to the purposes and principles of the UN and thus could trigger Article 1F. However, he continued, ‘an armed campaign against the government would not constitute acts contrary to the purposes and principles of the UN.’[[106]](#footnote-106) Distinguishing between the two would be a crucial task. In instances where an organisation uses only terrorist actions to achieve its goals ‘there will almost certainly’ be serious reasons for considering the actions are contrary to the purposes and principles of the UN.[[107]](#footnote-107)

The focus on the individual rather than the organisation also permits a more proportionate response to groups, like the LTTE, who commit both military operations against a State’s military and security forces, in addition to terrorist acts targeting civilians. Membership of a proscribed group is thus a criminal offence punishable by up to ten years’ imprisonment.[[108]](#footnote-108) However, groups like the LTTE are relatively large organisations, comprised of various wings and units. Burnton LJ noted this, adding it would be possible for an individual to join the military wing with the intention of attacking government forces without necessarily being sympathetic to the commission of terrorist acts against civilians. In a situation like this it could be concluded an individual had not committed acts contrary to the purposes and principles of the UN.[[109]](#footnote-109) The Court of Appeal’s position is strengthened by a judgment from the Court of Justice of the European Union (CJEU) where it was noted terrorist acts are ‘characterised by their violence towards *civilian populations* [emphasis added]’.[[110]](#footnote-110) This suggests a marked reluctance to characterise all acts of armed violence, including those targeting military or security forces, as terrorism. Further support may be found in a further CJEU case in which the LTTE actions were described as those of a national liberation movement fighting the Sri Lankan government.[[111]](#footnote-111) Here, it was noted the ‘perpetration of terrorist acts by participants in an armed conflict is expressly covered and condemned by international humanitarian law’.[[112]](#footnote-112) Thus, armed opposition fighters could commit terrorist actions but by implication not all acts committed by these individuals would automatically constitute terrorism.[[113]](#footnote-113)

The relationship between terrorism and attacks by armed opposition group fighters was given further consideration in *SS (Libya)*.[[114]](#footnote-114) This case concerned a Libyan national with links to Libyan Islamic Fighting Group (LIFG), an anti-Gaddafi group with alleged links to Al-Qaeda.[[115]](#footnote-115) Amongst their activities they have attacked the Libyan government and attempted to assassinate Colonel Gaddafi.[[116]](#footnote-116) His application for asylum was rejected and his appeal heard by the Special Immigration Appeals Commission (SIAC). It was argued on behalf of SS his position was analogous to KJ in that he had merely been a member of an armed opposition group rather than a terrorist organisation. Article 1F would not be engaged. This argument was rejected by SIAC which held the *KJ (Sri Lanka)* judgment by the Court of Appeal to be *per incuriam* because it had not taken into account the definition of terrorism contained in section 1 of the Terrorism Act 2000. Accordingly, SIAC found the actions of the LTTE using firearms and explosives amounted to terrorist acts in accordance with section 1(3). As a result, and recalling terrorism can amount to an act contrary to the purposes and principles of the UN,[[117]](#footnote-117) the LTTE had committed acts of terror and thus Article 1F should have been engaged. At this stage, SIAC appears to have adopted the position criticised by Ouseley J who earlier noted almost all acts of armed conflict could, if a strictly literal approach were taken, fall within the parameters of the Terrorism Act 2000.[[118]](#footnote-118)

The decision of SIAC was rejected by the Court of Appeal. Carnwath LJ first addressed the assertion by SIAC that the decision in *KJ (Sri Lanka)* was *per incuriam* noting ‘It is a strong thing for an inferior tribunal, like SIAC, to decide to disregard as *per incuriam* a recent, fully considered, judgment of the Court of Appeal.’[[119]](#footnote-119) *Per incuriam* means the judgment was reached by means of a ‘manifest slip or error’[[120]](#footnote-120) like ignoring statute or previously established case law. Furthermore, judicial distinction could be drawn between acts of terrorism and ‘military action against a government’ by armed opposition groups.[[121]](#footnote-121) Here the judgment has echoes of Pill LJ in *DD (Afghanistan)* who held ‘it is difficult to hold 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 [Terrorism Act 2000]’.[[122]](#footnote-122) Again, this position accords with that set down by Ouseley J in *R (On the application of Islamic Human Rights Council) v Civil Aviation Authority*.[[123]](#footnote-123) The judgment in *KJ (Sri Lanka)* and the other cases mentioned therefore suggests judges have both recognised the scope of section 1 and that it can properly be restricted if the interests of justice so demand.

A further factor potentially guiding judges, albeit unknowingly perhaps, is the tradition in British politics of seeking to protect those who have committed political offences abroad which, as will be briefly outlined, could include armed attacks against another state’s military and security forces. This line appears to have been developed in the mid-Nineteenth Century as evidenced by several debates in the House of Commons. Britain was regarded as a haven for refugees fleeing their ‘own land for the vigorous assertion of liberty’ having committed political offences abroad.[[124]](#footnote-124) Political offences might be said to include offences committed during the course of ‘any civil war, insurrection, or political movement’ although not instances of assassinations committed for political purposes.[[125]](#footnote-125) Assassinations like this were regarded as going ‘against the universal morality of all nations’ and were distinguishable from political offences which were committed against governments more broadly stated.[[126]](#footnote-126) The latter action targeting governments were aimed at overthrowing a government or altering the system of law, in short revolutionary actions rather than political murder.[[127]](#footnote-127)

The approach taken by MPs might in itself be founded upon a more abstract notion of a right to rebel in the face of a tyrannical or autocratic regime. John Locke believed individuals instituted government to protect their rights. If these rights were violated following a ‘long-train of abuses’, then the use of violence could be justified to protect their rights and restore their ‘original liberty’.[[128]](#footnote-128) Developing Locke’s work, Tony Honoré has noted the right to rebel encapsulates a broad spectrum of political violence caused by exploitation or during a struggle for self-determination.[[129]](#footnote-129) Honoré here echoes a debate, again in the House of Commons, concerning acts committed in Ireland to further the cause of Irish nationalism. Violence may ‘accompany the fight of the weak with the strong’ but, crucially, only where the weaker party has ‘no Constitutional means of making its voice heard.’[[130]](#footnote-130) The effect of this was to draw a sharp distinction between activities which had no, or at best marginal, impact on Britain and acts, like those in Ireland, having a profound impact on domestic politics and public order.[[131]](#footnote-131) From this it appears, according to Honoré, a right to rebellion exists only where primary rights are violated by an oppressive government and where the victims’ only remedy is to take up arms.[[132]](#footnote-132)

The British experience regarding the actions of armed opposition group fighters offers some insight into how their status might be addressed in public international law. It seems apparent there is little appetite to classify as terrorism *all* attacks by armed opposition group fighters against *all* governments. The British approach centres on the individual’s actions rather than those of the group. Thus it is not sufficient to say simply that a particular individual was a member of a proscribed terrorist organisation. Of course, membership of groups such as ISIL and Al-Qaeda which are largely defined by their terrorist activities will heavily suggest an individual identified with and perpetrated acts of terrorism conducted in the group’s name. The British experience has been invaluable in that it has helped to clarify which acts, for the purposes of British law, will not usually fall within the purview of the Terrorism Act 2000. Furthermore, because of the suggestion that the British definition of terrorism has been used, or has influenced the law in, other jurisdictions,[[133]](#footnote-133) the possibility remains of its having some impact on shaping the approach of international law in this area.

Concluding Remarks

This article has covered three separate but connected issues of how British law has addressed attacks by civilians, UN-mandated forces and the military or security services of another state. It has been shown that, primarily due to the lack of an accepted definition of terrorism in public international law, the international legal system does not currently have the ability to address these issues. By contrast, British law has developed a discrete body of case law blending the law relating to terrorism and immigration. From this it has emerged that the British approach is surprisingly close to the position argued by Cassese to be the dominant, but crucially not exclusive view, in international law.

In British law, attacks against civilians amount to terrorism regardless of the underpinning motives. Likewise most, though not all,[[134]](#footnote-134) attacks against UN-mandated forces are contrary to the ‘purposes and principles’ of the UN and, as a result, can be regarded as terrorism. In respect of the third category, armed opposition group fighters targeting the military or security forces of another state might not be classified as terrorists provided they adhere to the law of armed conflict and refrain from targeting civilians. To this end the general approach of British courts adds support to the idea advanced by Klabbers that ‘violence can be used for the noblest of purposes’[[135]](#footnote-135) as has been elsewhere suggested.

It is obviously neither realistic nor appropriate to suggest that one State’s experience in a particular area is declarative of the position in public international law. This would fly in the face of the often consensual nature of the international legal system. However, what such an experience can do is highlight one particular solution to a given problem in the hope this might go on to stimulate and inform wider discussion. In the case of this article it has been to examine British case law and offer some suggestions for future reflection on the dividing line between terrorists and armed opposition group fighters. The approach of British courts might be of assistance in further understanding where the dividing line in international might be drawn.

1. This article uses ‘armed opposition group fighter’ in preference to ‘freedom fighter’. [↑](#footnote-ref-1)
2. *T v Secretary of State for the Home Department* [1996] AC 742, 752-753. [↑](#footnote-ref-2)
3. Jessie Blackbourn, Fergal F Davis and Natasha C Taylor, ‘Academic Consensus and Legislative Definitions of Terrorism: Applying Schmid and Jongman’ (2012) 34 Statute Law Review 239, 257. A similar point is also made in Kent Roach ‘The post-9/11 Migration of Britain’s Terrorism Act 2000’ in Sujit Choudhry (ed) The Migration of Constitutional Ideas (CUP 2006) 374. [↑](#footnote-ref-3)
4. British law is used here as convenient shorthand because much of the relevant law discussed in this article relates to the United Kingdom as a whole rather than the three separate jurisdictions of England and Wales, Scotland and Northern Ireland. [↑](#footnote-ref-4)
5. References to the ‘Supreme Court’ are, unless otherwise indicated, references to the UK Supreme Court. [↑](#footnote-ref-5)
6. [2013] UKSC 64 [46]. [↑](#footnote-ref-6)
7. Antonio Cassese ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 Journal of International Criminal Justice 933, 935. [↑](#footnote-ref-7)
8. UNSC Res 1566 (UNSC S/Res/1566). [↑](#footnote-ref-8)
9. ibid Operative para 3. [↑](#footnote-ref-9)
10. Ian Johnstone, ‘Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit’ (2008) 102 American Journal of International Law 275, 297. Cf Andrea Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion’ (2007) 17 European Journal of International Law 881, 890. [↑](#footnote-ref-10)
11. Ben Saul, ‘Definition of “Terrorism” in the UN Security Council: 1985-2004’ (2005) 4 Chinese Journal of International Law 141, 166. [↑](#footnote-ref-11)
12. James Crawford, Brownlie’s Principles of Public International Law (OUP 2012) 42. [↑](#footnote-ref-12)
13. Marko Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’ (2005) 16 European Journal of International Law 879, 896; See also *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits)[1986] ICJ Rep 14 at 44,para.195. [↑](#footnote-ref-13)
14. UNGA Res 3034 (XXVII) UN DOC A/RES/3034, 18 December 1972, Preamble and Operative para 1. [↑](#footnote-ref-14)
15. ibid para 3. [↑](#footnote-ref-15)
16. UNGA Res 48/122 UN DOC A/RES/48/122, 14 February 1994, Operative para 1. [↑](#footnote-ref-16)
17. Rosalyn Higgins, ‘The General International Law of Terrorism’ in Rosalyn Higgins and Maurice Flory (eds) International Law and Terrorism (Routledge 1997) 28. [↑](#footnote-ref-17)
18. Helen Duffy, The ‘War on Terror’ and the Framework of International Law (CUP 2005) 18. [↑](#footnote-ref-18)
19. Jan Klabbers, Rebel with a Cause? Terrorists and Humanitarian Law’ (2003) 14 European Journal of International Law 299, 302. [↑](#footnote-ref-19)
20. Ben Saul, Defining Terrorism in International Law (OUP 2006) 16. [↑](#footnote-ref-20)
21. Gilbert Guillaume, ‘Terrorism and International Law’ (2004) 53 ICLQ 537, 540. [↑](#footnote-ref-21)
22. Antonio Cassese ‘The Multifaceted Criminal Notion of Terrorism in International Law’ (2006) 4 Journal of International Criminal Justice 933, 935. [↑](#footnote-ref-22)
23. Antonio Cassese, International Criminal Law (OUP 2008) 162-163. [↑](#footnote-ref-23)
24. ibid 163. [↑](#footnote-ref-24)
25. Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, Article 10. Available at: <https://www.icrc.org/ihl/INTRO/135> (Last accessed: 21 August 2017). [↑](#footnote-ref-25)
26. UN General Assembly, ‘Report of the Ad Hoc Committee established by General Assembly resolution

    51/210 of 17 December 1996’ Eleventh Session 5, 6, 7 February 2007 UN Doc A/62/37. [↑](#footnote-ref-26)
27. Thomas Weigend ‘The Universal Terrorist: The International Community Grappling with a Definition’ (2006) 4 Journal of International Criminal Justice 912, 914. [↑](#footnote-ref-27)
28. Gilbert Guillaume, ‘Terrorism and International Law’ (2004) 53 ICLQ 537, 540. [↑](#footnote-ref-28)
29. See the report by the Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2012*, July 2013, 4.2, available at <https://terrorismlegislationreviewer.independent.gov.uk/the-terrorism-acts-in-2012/> (Accessed: 21 August 2017). [↑](#footnote-ref-29)
30. Terrorism Act 2000, s.1(2)(a)-(c). [↑](#footnote-ref-30)
31. ibid, s 1(c)(b). [↑](#footnote-ref-31)
32. ibid, s 1(1)(c). [↑](#footnote-ref-32)
33. ibid, s 1(3). [↑](#footnote-ref-33)
34. [2006] EWHC 2465 (Admin). [↑](#footnote-ref-34)
35. ibid [2] [↑](#footnote-ref-35)
36. ibid [43-44]. [↑](#footnote-ref-36)
37. ibid [44] and [46]. [↑](#footnote-ref-37)
38. Report of the Independent Reviewer of Terrorism Legislation, ‘The Terrorism Acts in 2013’ July 2014, 10.54, available at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf> (Accessed 21 August 2017). [↑](#footnote-ref-38)
39. The Refugee Convention, Preamble. [↑](#footnote-ref-39)
40. ibid art 1F(a-c). [↑](#footnote-ref-40)
41. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525. [↑](#footnote-ref-41)
42. Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12. [↑](#footnote-ref-42)
43. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525, reg 6. [↑](#footnote-ref-43)
44. Immigration, Asylum and Nationality Act 2006, s 54. [↑](#footnote-ref-44)
45. Antonio Cassese, International Criminal Law (OUP 2008) 162-163. [↑](#footnote-ref-45)
46. David Kretzmer, ‘Civilian Immunity in War: Legal Aspects’ in Igor Primoratz (ed) Civilian Immunity in War (OUP 2007) 84. [↑](#footnote-ref-46)
47. For example, Article 8 of the ICC Statute governing war crimes makes ‘intentionally directing attacks against the civilian population’ an offence. This would exclude attacks in which civilians are unintentionally killed. Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002. [↑](#footnote-ref-47)
48. *Prosecutor v Kupreškić* (Case No. IT-95-16-T) ICTY Trial Chamber Judgment, 14 January 2000, § 524. [↑](#footnote-ref-48)
49. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (‘Additional Protocol II’) 8 June 1977, 1125 UNTS 609, art 13(2). [↑](#footnote-ref-49)
50. [1996] AC 742. [↑](#footnote-ref-50)
51. [1996] AC 742, 776. [↑](#footnote-ref-51)
52. ibid 755. [↑](#footnote-ref-52)
53. [1894] 2 QB 415. [↑](#footnote-ref-53)
54. ibid 419. [↑](#footnote-ref-54)
55. *T v Secretary of State for the Home Department* [1996] AC 742, 787. [↑](#footnote-ref-55)
56. For example, as in *T v Secretary of State for the Home Department* [1996] AC 742. [↑](#footnote-ref-56)
57. (1981) 641 Federal Reports Second Series 504. [↑](#footnote-ref-57)
58. *Mahmoud Abed Atta v Wigen* (1990) 910 F 2d 1063. [↑](#footnote-ref-58)
59. One counter, albeit minority, view was highlighted by Cassese wherein armed opposition group fighters engaged in a struggle for self-determination may legitimately attack civilians. Antonio Cassese, International Criminal Law (OUP 2008) 162-163. [↑](#footnote-ref-59)
60. See for example a report by the US Congressional Research Service on deaths up until April 2011 ‘Afghanistan Casualties: Military Forces and Civilians’ Available at <http://www.dtic.mil/docs/citations/ADA543297> (Last accessed 21 August 2017) [↑](#footnote-ref-60)
61. UN Security Council Resolution 1386, 20 December 2001, UN Doc S/RES/1386. [↑](#footnote-ref-61)
62. UN Security Council Resolution 1546, 8 June 2004, UN Doc S/RES/1546. Initial authorisation for a multinational force had been given in UN Security Council Resolution 1511, 16 October 2003, UN Doc S/RES/1511 [↑](#footnote-ref-62)
63. As was the case in *Secretary of State for the Home Department v DD (Afghanistan)* [2010] EWCA Civ 1407. [↑](#footnote-ref-63)
64. For example, *KK v Secretary of State for the Home Department* [2004] UKIAT 101, [2005] INLR 124, [21]. [↑](#footnote-ref-64)
65. See for example Bardo Fassbender, The UN Charter as the Constitution of the International Community (BRILL 2009). For an overview of the issues involved see Michael W Doyle, ‘Dialectics of a global constitution: The struggle over the UN Charter’ (2012) 18 European Journal of International Relations 601. [↑](#footnote-ref-65)
66. UN General Assembly Resolution 49/60, 9 December 1994, UN Doc A/RES/49/60. [↑](#footnote-ref-66)
67. [2010] EWCA Civ 1407. [↑](#footnote-ref-67)
68. ISAF was authorised by UN Security Council Resolution 1386, 20 December 2001, UN Doc S/RES/1386. [↑](#footnote-ref-68)
69. [2010] EWCA Civ 1407 [65]. [↑](#footnote-ref-69)
70. Likewise, in *Pushpanathan*, the Supreme Court of Canada held drug dealing was not an act contrary to the purposes and principles of the UN even though the UN had condemned such acts. *Pushpanathan v Canada* [1998] 1 SCR 982. [↑](#footnote-ref-70)
71. *Al-Sirri & DD v Secretary of State for the Home Department* [2012] UKSC 54, [2013] AC 745 [60]. [↑](#footnote-ref-71)
72. ibid [63]. [↑](#footnote-ref-72)
73. ibid [68]. [↑](#footnote-ref-73)
74. [2004] UKIAT 101, [2004] Imm AR 284. [↑](#footnote-ref-74)
75. ibid [75]. [↑](#footnote-ref-75)
76. [2013] UKSC 64, [2014] AC 460. [↑](#footnote-ref-76)
77. This section makes it an offence, inter alia, to disseminate such material if the accused ‘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’. Terrorism Act 2006, s 2(1)(a). [↑](#footnote-ref-77)
78. UN Security Council Resolution 1546, 8 June 2004, UN Doc S/RES/1546. Initial authorisation for a multinational force had been given in UN Security Council Resolution 1511, 16 October 2003, UN Doc S/RES/1511 [↑](#footnote-ref-78)
79. *R v Gul* [2012] EWCA Crim 280, [2012] 1 WLR 3432 [60]. [↑](#footnote-ref-79)
80. *R v Gul* [2013] UKSC 64 [2014] AC 460 [8]. [↑](#footnote-ref-80)
81. ibid [28]. [↑](#footnote-ref-81)
82. ibid [61]. [↑](#footnote-ref-82)
83. [2011] EWCA Civ 1547 [41]. [↑](#footnote-ref-83)
84. [2009] EWCA Civ 292, [2009] Imm AR 674 [34]. [↑](#footnote-ref-84)
85. *DD (Afghanistan) v Secretary of State for the Home Department* [2010] EWCA Civ 1407 [55]. [↑](#footnote-ref-85)
86. Antonio Cassese, International Criminal Law (OUP 2008) 162-163. [↑](#footnote-ref-86)
87. UN Security Council Resolution 1386, 20 December 2001, UN Doc S/RES/1386. [↑](#footnote-ref-87)
88. Steven Haines, ‘The Nature of War and the Character of Contemporary Armed Conflict’ in Elizabeth Wilmshurst (ed) International Law and the Classification of Conflicts (OUP 2012) 21-2. [↑](#footnote-ref-88)
89. David Galula, Counterinsurgency Warfare*:* Theory and Practice (Praeger 1964) 10-11. [↑](#footnote-ref-89)
90. Jan Klabbers, Rebel with a Cause? Terrorists and Humanitarian Law’ 14 European Journal of International Law 299, 302. [↑](#footnote-ref-90)
91. Peter Rowe, ‘Freedom fighters and rebels: the rules of civil war’ (2002) 95 Journal of the Royal Society of Medicine 3. [↑](#footnote-ref-91)
92. See for example UNGA Res 3034 (XXVII) UN DOC A/RES/3034, 18 December 1972; UNGA Res 48/122 UN DOC A/RES/48/122, 14 February 1994. [↑](#footnote-ref-92)
93. Antonio Cassese, International Criminal Law (OUP 2008) 162-163. [↑](#footnote-ref-93)
94. Note this is different to the term ‘prisoner of war’ status which is only applicable in international armed conflicts. See Dieter Fleck, ‘The Law of Non-international Armed Conflicts’ in Dieter Fleck (ed) The Handbook of International Humanitarian Law (OUP 2008) 626. [↑](#footnote-ref-94)
95. *R v F* [2007] EWCA Crim 243 [27]. [↑](#footnote-ref-95)
96. *R v F* [2007] EWCA Crim 243 [27]. [↑](#footnote-ref-96)
97. Terrorism Act 2000, s 3 proscribes certain terrorist organisations. Sections 11-13 make membership, support or wearing the uniform of a proscribed organisation criminal offences. [↑](#footnote-ref-97)
98. *Gurung v Secretary of State for the Home Department* [2002] UKAIT 4870, [2003] Imm AR 115 [126]. [↑](#footnote-ref-98)
99. ibid [6]. [↑](#footnote-ref-99)
100. ibid [112]. [↑](#footnote-ref-100)
101. ibid [113]. [↑](#footnote-ref-101)
102. [2010] UKSC 15, [2011] 1 AC184. [↑](#footnote-ref-102)
103. [2010] UKSC 15, [2011] 1 AC184 [32]. [↑](#footnote-ref-103)
104. Although the judgment makes reference only to ‘war crimes’ this could arguably be extended to include crimes against humanity included in Article 1F(a) of the Refugee Convention. [↑](#footnote-ref-104)
105. [2009] EWCA Civ 292, [2009] Imm AR 674. [↑](#footnote-ref-105)
106. ibid [34]. [↑](#footnote-ref-106)
107. [2009] EWCA Civ 292, [2009] Imm AR 674 [37]. [↑](#footnote-ref-107)
108. Terrorism Act 2000, s 11. [↑](#footnote-ref-108)
109. *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292, [2009] Imm AR 674 [40]. [↑](#footnote-ref-109)
110. Cases C-57/09 & C-101/09 *B & D v Germany* [2010] Judgment of the Grand Chamber, 9November 2010, [81]. [↑](#footnote-ref-110)
111. Cases T-208/11 and T-508/11 *LTTE v Council* [2014] Judgment of the General Court, 16 October 2014, § 43. [↑](#footnote-ref-111)
112. ibid § 62. [↑](#footnote-ref-112)
113. ibid § 68. [↑](#footnote-ref-113)
114. [2011] EWCA Civ 1547. [↑](#footnote-ref-114)
115. *Secretary of State for the Home Department v AR and Others* [2008] EWHC 2789 (Admin) [8]. The Court held LIFG posed a risk to the national security of the United Kingdom: [13(viii)]. [↑](#footnote-ref-115)
116. [2011] EWCA Civ 1547 [59]; see also [11] further outlining the activities of LIFG. [↑](#footnote-ref-116)
117. Immigration, Asylum and Nationality Act 2006, s 54. [↑](#footnote-ref-117)
118. Similar to the point made by Ouseley J in *R (on the application of Islamic Human Rights Council) v Civil Aviation Authority* [2006] EWHC 2465 (Admin) [43-44]. [↑](#footnote-ref-118)
119. [2011] EWCA Civ 1547 [28]. [↑](#footnote-ref-119)
120. *Morelle Ltd v Wakeling* [1955] 2 QB 380 [399]. [↑](#footnote-ref-120)
121. [2011] EWCA Civ 1547 [41]. [↑](#footnote-ref-121)
122. *DD (Afghanistan) v Secretary of State for the Home Department* [2010] EWCA Civ 1407 [55]. [↑](#footnote-ref-122)
123. [2006] EWHC 2465 (Admin) [43-44] [↑](#footnote-ref-123)
124. Philip Howard MP, HC Deb 12 April 1848, vol 98, col 231. [↑](#footnote-ref-124)
125. JS Mill MP, HC Deb 6 August 1866, vol 184, col 2115. [↑](#footnote-ref-125)
126. Charles Neate MP, HC Deb 6 August 1866, vol 184, col 2113. [↑](#footnote-ref-126)
127. The Attorney General, HC Deb 6 August 1866, vol 184, col 2121. [↑](#footnote-ref-127)
128. John Locke, Two Treatises of Government (Peter Laslett ed, CUP 1988) 421. [↑](#footnote-ref-128)
129. Tony Honoré, ‘The Right to Rebel’ (1988) 8 Oxford Journal of Legal Studies 34, 36. [↑](#footnote-ref-129)
130. Sir William Marriott, HC Deb 13 March 1889, vol 333, cols 1577-78. [↑](#footnote-ref-130)
131. In similar fashion, the British government refused to recognise the existence of an armed conflict during The Troubles in Northern Ireland. See Theodor Meron. ‘The Humanization of Humanitarian Law’ (2000) 94 American Journal of International Law 239, 272. [↑](#footnote-ref-131)
132. Tony Honoré, ‘The Right to Rebel’ (1988) 8 Oxford Journal of Legal Studies 34, 38. [↑](#footnote-ref-132)
133. Jessie Blackbourn, Fergal F Davis and Natasha C Taylor, ‘Academic Consensus and Legislative Definitions of Terrorism: Applying Schmid and Jongman’ (2012) 34 Statute Law Review 239, 257. [↑](#footnote-ref-133)
134. [↑](#footnote-ref-134)
135. Jan Klabbers, Rebel with a Cause? Terrorists and Humanitarian Law’ 14 European Journal of International Law 299, 307. [↑](#footnote-ref-135)