The Mark of Cain

The Crime of Terrorism in Times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in *R v. Mohammed Gul*

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Abstract

On 22 February 2012, the Court of Appeal of England and Wales was called on to interpret the definition of the crime of terrorism as contained in relevant United Kingdom (UK) legislation. When confronted with defence arguments grounded in international law, the Court denied that attacks by non-state armed groups against governmental armed forces in a non-international armed conflict may be exempted from being labelled as terrorist acts. The present article contests this assumption. The Court of Appeal could have interpreted UK legislation in light of the current international legal framework on the definition of the crime of terrorism in times of armed conflict. In particular, some international conventions on terrorism binding on the UK establish that all attacks committed in the context of an armed conflict, including non-international armed conflicts, continue to be governed by international humanitarian law (IHL). IHL provides a definition of the crime of terrorism in times of armed conflict and the Court should have interpreted the UK domestic legislation consistently with this definition. Such an approach is also supported by the idea that non-state actors should be encouraged to apply rules of IHL. Marking them as terrorists, even when they abide by the laws of war, constitutes instead a disincentive to comply with such laws.

1. Introduction

In *R v. Mohammed Gul*,[1] the Court of Appeal of England and Wales (Court of Appeal) was called on to deal with one of the most controversial topics in

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1 Court of Appeal of England and Wales (Criminal Division), *R v. Mohammed Gul,* Case No. 2011/01697/C5, [2012] EWCA Crim 280 ('*Gul* case').

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international criminal law: the identification of what constitutes a criminal act of terrorism. The crime of terrorism is defined in United Kingdom (UK) domestic law by the Terrorism Act of 2000 (Terrorism Act).[2] The objective elements of the offence include various acts of violence against persons or property, with particular focus on the use of firearms or explosives.[3] The *mens rea* requirement includes the purpose of influencing the will of a government or intimidating the public, or the purpose of furthering a political, religious, racial or ideological cause.[4] In the *Gul* case, the Court of Appeal had to decide whether violent attacks by non-state armed groups on state armed forces, perpetrated in the context of a non-international armed conflict, qualify as criminal acts of terrorism under the Terrorism Act.

The Court of Appeal's decision was delivered at a critical moment for the definition of the crime of terrorism, when the work of the United Nations (UN) Ad Hoc Committee, in charge of drafting a Comprehensive Convention on International Terrorism,[5] was temporarily suspended by the UN General

2 Section 1, United Kingdom (UK) Terrorism Act of 2000, available online at http://www.legislation.gov.uk/ukpga/2000/11/contents (visited 6 November 2012) ('2000 Terrorism Act'). For a concise but complete account of UK anti-terrorism legislation, see C. Walker, 'Clamping Down on Terrorism in the United Kingdom', 4 *Journal of International Criminal Justice* (*JICJ*) (2006) 1137.

3 Section 1, 2000 Terrorism Act: '(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'.

4 Section 1, 2000 Terrorism Act: '(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'.

5 The United Nations (UN) General Assembly established, by means of GA Res. 51/210, 17 December 1996, an ad hoc committee aimed at drafting international instruments useful in the fight against international terrorism. The Ad Hoc Committee successfully drafted the following instruments: International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly with GA Res. 52/164, 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly with GA Res. 54/109, 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the General Assembly with GA Res. 59/290, 13 April 2005. The Committee then started working on an all embracing convention on international terrorism. For an account of the main issues at stake and of the early developments in the Committee's debate, see M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: The Major Bones of Contention', 4 *JICJ* (2006) 1031. See also B. Saul, 'Attempts to Define Terrorism in International Law', 52 *Netherlands International Law Review* (2005) 57, at 76–82. With GA Res. 66/105, 9 December 2011, the General Assembly decided not to reconvene the Ad Hoc Committee until 2013. A list of other international instruments pertaining to the fight against terrorism is available online at www.un.org/terrorism (visited 6 November 2012). See also A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *JICJ* (2006) 933, at 936–937.

Assembly. The main disagreement in the negotiations reportedly concerned the possible exclusion of every action carried out by so-called 'freedom fighters' in national liberation wars, a topic closely related — although not identical — to that dealt with in the *Gul* case.[6]

In addition, the Court of Appeal's ruling comes roughly one year after the groundbreaking decision by the Appeals Chamber of the Special Tribunal for Lebanon (STL).[7] This ruling asserted the existence in customary international law of a definition of the international crime of terrorism in times of peace.[8] The fact that the Court of Appeal of England and Wales — a domestic court dealing with an actual criminal case — made a reference to the STL ruling, and that it shared the STL position on the crime of terrorism in times of peace, shows the immediate impact of this decision.

The international community pays great attention to the definition of the crime of terrorism due to the increasing concern that terrorism raises at the national and international levels. Furthermore, when affirming that an individual has committed terrorist acts, a broad set of special consequences follow from both national and international legal instruments governing terrorism: from broader prosecutorial powers to the criminalization of preparatory acts,[9] from the provision of higher penalties to the restriction

6 A general exemption for acts of so-called 'freedom fighters' in national liberation wars would also include attacks on civilians, while the Court of Appeal in the *Gul* case only dealt with attacks on state armed forces. On the political rationale behind the negotiations of the various international legal tools on terrorism, see J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism', 19 *Leiden Journal of International Law (LJIL)* (2006) 69. The expression 'national liberation wars' refers to situations which, according to Art. 1(4), Additional Protocol I, are governed by the law of international armed conflicts. In this type of war insurgents, unlike non-international armed conflicts dealt with in the *Gul* case, would benefit from combatant immunity with regard to attacks against enemy combatants.

7 Special Tribunal for Lebanon (STL), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (STL-11-01/I/AC/R176*bis*), Appeals Chamber, 16 February 2011 ('STL, Interlocutory Decision').

8 *Ibid.*, § 85, holds that: 'This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.' The decision was issued in response to 15 legal questions asked by the Pre-Trial Judge to the Appeals Chamber. For a detailed account of the process that led to this decision, and, in general, as a useful reading guide to the decision, see M. Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?' 9 *JICJ* (2011) 1021. The decision of the STL has raised fertile legal debate. For some of the most interesting comments, see B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 *LJIL* (2011) 677; K. Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?' 24 *LJIL* (2011) 655; M. Gillett and M. Schuster, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism', 9 *JICJ* (2011) 989.

9 Cassese, *supra* note 5, at 956–957.

of defence activities,[10] not to mention increased tools of international cooperation.[11] Given this special legal regime, domestic courts — and especially domestic criminal courts — should exercise caution in assessing what constitutes an act of terrorism and what does not.

This article briefly presents the facts on which the Court of Appeal was called to decide. It then dwells on the stand taken by the Court of Appeal with regard to the UK domestic legislation and its relationship with the current international legal framework on terrorism. The author argues that the Court should have taken a different approach in its interpretation of the international crime of terrorism in armed conflict and that this ought to have influenced its interpretation of the Terrorism Act.

First, this article critically examines the methodology adopted by the Court of Appeal, its interpretation of the domestic notion of terrorism and its over reliance on the so-called *Lotus* principle. Secondly, it underlines how UK domestic legislation on terrorism has been created in order to comply with standards established by some international conventions on the same topic, most notably, the International Convention for the Suppression of Terrorist Bombings and the International Convention on Financing of Terrorism. Consequently, the Court of Appeal should have taken these conventions into account when deciding the case before it. It is argued that the international crime of terrorism in times of armed conflict is indeed defined in international humanitarian law (IHL), as reflected in these conventions, scholarly writings and some judgments. The issue has been, in particular, explored in the *Galić* case before both a trial chamber and the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). Domestic provisions criminalizing terrorism should therefore be read in accordance with this definition where the case concerns conduct undertaken during an armed conflict. Thirdly, this article argues that it would be appropriate, even at the domestic level, to use the terrorism label only to define those attacks during an armed conflict that actually constitute terrorism according to IHL. This could encourage armed non-state actors to abide by the laws of war, in order to avoid being marked as terrorist groups.

2. The Facts

The defendant was not accused of having perpetrated an act of terrorism. Mohammed Gul, a law student residing in London, was indicted on counts of dissemination of terrorist publications, a criminal offence in the UK, according to Section 2 of the UK Terrorism Act of 2006.[12] In particular, he uploaded a

10 T. Weigend, 'The Universal Terrorist: The International Community Grappling with a Definition', 4 *JICJ* (2006) 912, at 913.

11 See e.g. Art. 19, International Convention for the Suppression of Terrorist Bombings.

12 Section 2(3), UK Terrorism Act of 2006, available online at http://www.legislation.gov.uk/ukpga/2006/11/contents (visited 6 November 2012).

broad range of videos to the internet, including recordings of attacks against coalition forces in Iraq and Afghanistan, attacks against Israeli soldiers, attacks in Chechnya and images of leaders of Al Qaeda. These videos were often accompanied by songs and prayers in favour of the perpetrators of these acts and encouraging other people to follow their example.

The crime of dissemination of a terrorist publication requires that the publication indeed concerns a terrorist act. Consequently, in the criminal proceedings against Gul, it was necessary to assess whether the videos posted by the defendant showed actual terrorist attacks. The first instance proceedings were held in front of a jury. The jury, in charge of the decision on the culpability of the defendant, asked the judge for some clarifications on the interpretation of the crime of terrorism as defined under UK legislation. The jury asked whether attacks carried out by non-state armed groups against state armed forces in the context of an armed conflict (including attacks on coalition forces in Iraq and Afghanistan) could actually be considered as terrorist acts. While conceding that attacks carried out against state forces in international armed conflicts — including those against Israeli forces in Gaza — do not constitute terrorist acts per se, the judge reached the opposite conclusion about attacks perpetrated during non-international armed conflicts. The jury convicted Gul and sentenced him to five years imprisonment. Gul appealed the judge's instructions to the jury.

3. The Reasoning of the Court of Appeal

Gul argued that reference to UK legislation alone was not sufficient to solve the issues at stake, given that UK domestic law should be interpreted in accordance with applicable rules of international law. The definition of the crime of terrorism in armed conflict developed under international law excludes attacks carried out by non-state parties to an armed conflict against governmental armed forces, when they abide by certain principles of the law of armed conflict. Applicable rules of IHL consistently distinguish between attacks carried out against enemy combatants and attacks perpetrated against the civilian population and civilian objects.[13]

The Court of Appeal rejected this contention made by the defence. The Court's reasoning postulated that the attacks in the videos posted on the internet by Gul took place in the context of non-international armed conflicts. According to the law applicable to such conflicts, the Court observed, insurgents and members of non-state armed groups are not shielded by any combatant immunity: their behaviour always remains subject to domestic criminal law.[14]

13 The arguments of the defence are briefly summed up in *Gul* case, § 27.

14 *Ibid.*, §§ 28–31. However, the Court left open the question whether instead members of regular armed forces of a state continue to be protected by combatant immunity even in non-international armed conflicts.

The Court of Appeal added that customary international law has so far evolved to also include an international crime of terrorism in times of peace, in line with the STL Appeals Chamber decision of 16 February 2011.[15] However, the Court continued, a discrete crime of terrorism in times of war has not yet crystallized in customary international law. The jurisprudence of the ICTY,[16] and of the Special Court for Sierra Leone (SCSL),[17] has classified acts of terrorism during armed conflicts as a mere sub-category of war crimes.[18]

Thirdly, the Court pointed out that the definition of terrorism available in international law does not contain any general exceptions for attacks carried out by so-called 'freedom fighters', namely, those armed non-state actors fighting a war of national liberation. More importantly, the definition of terrorism accepted by states in their domestic practice does not provide specific exceptions for attacks perpetrated against state military forces, therefore, confirming that no customary international rule exists on the matter. The evidence of state practice and the scholarly writings tendered by the defence, according to the Court, do not alter this conclusion.[19]

Finally, the Court relied on the *Lotus* case decided by the Permanent Court of International Justice for the proposition that, whenever international law restricts states' sovereign will, it should do so in a precise manner; otherwise, anything not expressly prohibited for states under international law is presumed to be allowed.[20] Given the lack of explicit prohibitions against labelling as terrorist any attack by non-state armed groups on state armed forces in non-international armed conflicts, the Terrorism Act is consistent with international law. There is, therefore, no reason for the Court not to apply it, or to interpret its provisions in a way different from its ordinary meaning.[21]

Based on all of these arguments, the Court of Appeal dismissed the appeal, and confirmed the conviction of Gul pursuant to Section 2(3) of the UK Terrorism Act of 2006. While the Court of Appeal's reading of the Act appears reasonable — although it leads to a harsh sentence for uploading videos to the internet — legal reasoning and policy considerations suggest a different interpretation of the Terrorism Act, which would have lead to a different conclusion.

15 See STL, Interlocutory Decision.

16 ICTY, Judgment, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, §§ 91–137 ('*Galić* Judgment'); Judgment, *Galić* (IT-98-29-A), Appeals Chamber, 30 November 2006, §§ 79–109.

17 SCSL, Judgment, *Brima and others* (SCSL-2004-16-T), Trial Chamber, 20 June 2007, §§ 660–671 ('SCSL, *Brima and others*'). See also Judgment, *Brima and others* (SCSL-2004-16-A), Appeals Chamber, 3 March 2008.

18 *Gul* case, §§ 32–36.

19 *Ibid.*, §§ 37–41.

20 *S.S. Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10., § 44 ('*Lotus* case').

21 *Gul* case, §§ 47–49. As an additional argument, which, however, is not relevant for this article, the Court of Appeal asserted that the application of Section 1, Terrorism Act, by UK courts in immigration matters has consistently included attacks by non-state entities against state armed forces. On the point see *Gul* case, §§ 51–60.

4. The Methodology of the Court of Appeal

Gul contended that attacks by non-state armed groups on state armed forces in the context of an armed conflict do not constitute acts of terrorism under IHL. By interpreting the Terrorism Act consistently with rules of international law binding on the UK, the Court of Appeal could have found that he had not disseminated terrorist publications and this would have lead to his acquittal. The relationship between the domestic criminalization of the crime of terrorism and the international regulation of the same criminal offence has been examined by various national courts.

The *Bouyahia Maher Ben Abdelaziz* case decided by the Italian Supreme Court — *Corte di cassazione* —[22] affirmed that the provision creating the crime of terrorism under Article 270 *sexies* of the Italian Penal Code has to be interpreted in accordance with the relevant rules of international law binding on Italy. According to the Court, since applicable international legal instruments on terrorism do not cover attacks carried out against combatants in the context of an armed conflict, one should look to IHL when dealing with them.[23] Interpreting the domestic legislation in light of applicable international rules, the Court sought to make coherent the whole system of the repression of terrorism.[24]

A similar opinion was expressed by the US Court of Appeals for the District of Columbia in the *Yunis* case,[25] where the Court recognized the decisive impact of international law where domestic legislation leaves room to interpretation.[26] Such a systematic interpretation was indeed adopted in the same judgment when trying to understand whether the Lebanese Amal armed group was to be considered a military organization. With regard to this legal question, IHL was heavily relied on in order to interpret, and fill in the gaps of, US legislation.[27]

In the *Gul* case, the Court of Appeal of England and Wales takes an ambiguous position. The Court seemed to imply that, had it been dealing with a case

22 Italian Supreme Court (*Corte di cassazione*), *Bouyahia Maher Ben Abdelaziz et al.*, Judgment No. 1072 of 17 January 2007, in A. Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011) 305 ('Italian Supreme Court, *Bouyahia Maher Ben Abdelaziz*').

23 *Ibid.*, § 2.2.

24 L. Aleni, 'Distinguishing Terrorism from Wars of National Liberation in the Light of International Law', 6 *JICJ* (2008) 525, at 537.

25 United States (US) Court of Appeals, District of Columbia Circuit, *Fawaz Yunis*, Judgment of 29 January 1991, in Cassese et al., *supra* note 22, at 294.

26 *Ibid.*, at 297: 'Courts will not blind themselves to potential violations of international law where legislative intent is ambiguous.'

27 *Ibid.*, at 299–300. See also Lebanon Judicial Council, *In re Dany Chamoun et al.*, Judgment No. 5/1995 of 24 June 1995, in Cassese et al., *supra* note 22, at 288. There the defendant argued that the provision on terrorist acts of the Lebanese Criminal Code ought not to be applied when dealing with a killing committed against an enemy during an armed conflict. The Judicial Council interestingly did not reject the contention in point of law, but in point of fact. The victim Dany Chamoun was considered not to be a combatant and his assassination not to be related to a military necessity.

of terrorist acts in times of peace, it would have interpreted UK domestic legislation in light of the definition of the crime of terrorism in times of peace provided by customary international law. However, the Court did not take the same approach with regards to the crime of terrorism in times of armed conflict. It appears that the Court of Appeal misinterpreted the case law of STL Appeals Chamber. Given that a definition of a discrete international crime of terrorism in times of armed conflict had not yet crystallized in customary international law,[28] the Court of Appeal inferred that no rule of international law prohibited states from labelling any attacks on governmental armed forces during armed conflicts as terrorist.[29] The judges did not give appropriate consideration to the fact that IHL already contains numerous norms prohibiting the commission of acts of terrorism in times of war.[30]

In one of its arguments, the Court of Appeal referred to the *Lotus* principle.[31] The principle has been traditionally interpreted as affirming that restrictions on states' freedom of will cannot be presumed, in the absence of clearly formulated rules containing prohibitions. The Court of Appeal clearly intended to justify the freedom of the UK — as long as it could not find express prohibitions established in international law — to decide what constitutes the criminal offence of terrorism under UK domestic law.

If interpreted uncritically, the *Lotus* principle appears to encourage states to disregard international standards when defining the crime of terrorism. However, one should remember that since 1927, when the *Lotus* decision was delivered, the states' *domain reservé* has been significantly reduced. Thanks to the emergence of human rights law and international criminal law, and to the progressive development of IHL (particularly the law of non-international armed conflicts), international obligations now arise from the interplay of a greater number of provisions. Not all of these obligations constitute express prohibitions. Nonetheless, sometimes they establish definitions and standards also restricting the freedom of states.[32]

It is submitted that this is true of the current international legal framework on terrorism. If the Court of Appeal had analysed the framework in its entirety,

28 STL, Interlocutory Decision, §§ 107–109.

29 *Gul* case, § 47.

30 S. Jodoin, 'Terrorism as a War Crime', 7 *International Criminal Law Review* (2007) 77, at 79–86.

31 *Lotus* case, § 44, the Court held that: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.'

32 Overreliance on the *Lotus* principle has also been criticized by such eminent jurists as Bruno Simma. Judge Simma argued, in particular, that the principle mirrors a consensualistic vision of international law, anachronistic 'in a contemporary international legal order which is strongly influenced by ideas of public law'. See Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* International Court of Justice, Advisory Opinion of 22 July 2010, available online at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4 (visited 6 November 2012).

the Court would have found that the customary law of non-international armed conflict does envisage a specific offence of terrorism, as elaborated below. Thus the UK, even under the *Lotus* rule, is not free to define the concept as it wishes in relation to violent acts committed against armed forces in an armed conflict.

5. An Alternative Interpretation Based on Relevant Rules of International Law

A. Exemption Clauses in Some International Conventions on Terrorism

Gul's defence cited a number of international instruments on terrorism containing an exemption clause for attacks carried out by non-state armed groups during armed conflicts.[33] Notwithstanding the fact that the Court of Appeal rejected it — adducing evidence of contrary state practice from the past —[34] the argument of the appellant was worthy of greater consideration. It is beyond the scope of this article to conduct a thorough review of state practice on the point. It is nevertheless possible to look at the three international conventions on terrorism drafted by the UN Ad Hoc Committee,[35] all of which are binding on the UK, as an indicator of the current trend in international law.

Article 19 of the 1997 International Convention for the Suppression of Terrorist Bombings (1997 Convention),[36] and Article 4 of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (2005 Convention),[37] present identical wording. In both cases, the first paragraph constitutes a sort of without prejudice clause, aimed at preserving

33 *Gul* case, § 39.

34 *Ibid.*, §§ 40–41.

35 International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Acts of Nuclear Terrorism, for full reference, see *supra* note 5 .

36 Art. 19, International Convention for the Suppression of Terrorist Bombings states: '(1). Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law. (2). 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, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.'

37 Art. 4(1)-(2), International Convention for the Suppression of Acts of Nuclear Terrorism holds: '(1). Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law. (2). 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, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.'

compliance with other obligations established by international law, especially by IHL. The second paragraph instead expressly excludes the applicability of these conventions to the activities of armed forces already regulated by IHL. The expression 'armed forces' here clearly refers to members of both governmental forces and non-state armed groups. This is highlighted by the use — in the same provision — of the different expression 'military forces of a State' when referring to governmental agents. This interpretation is consistent with Article 43(1) of Additional Protocol I and with the commentary given by the International Committee of the Red Cross (ICRC) on this Article.[38] One should henceforth infer that, since hostile acts in armed conflicts are always covered by IHL, the same hostile acts cannot fall under the definition of terrorism as enshrined in the 1997 Convention and as recalled by the 2005 Convention.

The 1999 International Convention for the Suppression of the Financing of Terrorism (1999 Convention) literally repeats the provision of Article 19(1) of the 1997 Convention and Article 4(2) of the 2005 Convention, without, however, reproducing the related second paragraphs.[39] Article 21 of the 1999 Convention indeed affirms that nothing in the Convention itself 'shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions'.[40] An Italian judge recently relied on this provision to conclude that attacks against armed forces during a non-international armed conflict cannot be labelled as acts of terrorism.[41] Indeed, according to Article 21, the entire 1999 Convention must be read in accordance with the rules of IHL. Whenever IHL is applicable, the definition of terrorism enshrined in the 1999 Convention must then be consistent with the definition of acts of terrorism in IHL, which is discussed below.

In addition, Article 2(1)(a) of the 1999 Convention is already compatible with Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, the provisions currently defining acts of terrorism according to IHL.[42] Indeed, Article 2(1)(a) of the 1999 Convention traces a line between attacks

38 Art. 43, Additional Protocol I reads: 'The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, "inter alia", shall enforce compliance with the rules of international law applicable in armed conflict.' See International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff Publishers, 1987), at 505.

39 International Convention for the Suppression of the Financing of Terrorism.

40 Art. 21, International Convention for the Suppression of the Financing of Terrorism.

41 Tribunale di Napoli — Ufficio G.i.p., *T.J. (alias Kumar) et al.*, Judgment of 23 June 2011, per Judge Guardiano. See A. Valsecchi, 'Sulla definizione di terrorismo in tempo di guerra', *Diritto Penale Contemporaneo — Rivista Trimestrale* (2012) 184. The case concerned the qualification as terrorist acts of actions undertaken by the Liberation Tigers of Tamil Eelam, a non-state armed group operating in Sri Lanka.

42 See Section 5B.

directed against unlawful targets — civilians and persons who do not take part in the hostilities — and the remaining attacks — that is, those directed against persons directly participating in the hostilities. Only the former can be punished as terrorist acts according to the law of armed conflict.[43]

From the combined reading of these provisions, it is possible to deduce a conclusion: attacks by non-state organized armed groups on governmental armed forces in armed conflicts are not covered by the definition of terrorist acts as endorsed by these three UN conventions. One commentator recalls that the Terrorism Act was aimed at giving effect in the UK to international obligations on terrorism.[44] The Act should be then interpreted in accordance with those international obligations binding on the UK, including the 1997 Convention, the 1999 Convention and, in general, the relevant rules of IHL. It is clear that the Court of Appeal in the *Gul* case did not follow this interpretative principle.

Additionally, following the *ratio decidendi* of the Court of Appeal in the *Gul* case, one should also consider as terrorist acts all hostilities conducted by the rebels in Syria or in the recent conflict in Libya with all of the attendant consequences with regards to related offences.[45] On that basis, those providing weapons, financial aid, or any other kind of assistance, to these insurgents would be held responsible for participating as accomplices to acts of terrorism or for financing acts of terrorism.

B. The Definition of the Crime of Terrorism in Times of Armed Conflict

Acts of terrorism in times of armed conflict have long been banned by IHL. The relevant instruments of the law of armed conflict create two different categories of acts of terrorism in times of war. The first category concerns actions taken by an authority against persons who are in his or her hands, with the intent to intimidate them.[46] The second category — the only one of interest for the present article — pertains to 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'.[47] A very similar provision is contained in Article 13(2) of Additional Protocol II.[48]

43 The argument was raised by the defence in the *Gul* case, § 42. Of the same opinion is D. O'Donnell, 'International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces', 88 *International Review of the Red Cross* (*IRRC*) (2006) 853, at 869.

44 K. Trapp, '*R v Mohammed Gul*: Are You a Terrorist if You Support the Syrian Insurgency?', *EJIL: Talk!* Blog of the European Journal of International Law, 14 March 2012, available online at http://www.ejiltalk.org/r-v-mohammed-gul-are-you-a-terrorist-if-you-support-the-syrian-insurgency/ (visited 6 November 2012).

45 The point has been also made by Trapp, *ibid.*

46 This category of acts of terror is described by Art. 33, Fourth Geneva Convention and Art. 4(a)(2), Additional Protocol II. It was mainly exercised by state authorities in the past — especially in the context of belligerent occupations. See M. Sassòli, 'Terrorism and War', 4 *JICJ* (2006) 959, at 967. For an extensive account of Art. 33, Fourth Geneva Convention, see J. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV (ICRC, 1952), at 225. On Art. 4(a)(2), Additional Protocol II, see instead ICRC, *supra* note 38, at 1375, § 4538.

47 Art. 51(2), Additional Protocol I.

48 Art. 13(2), Additional Protocol II.

Such acts are prohibited by IHL, and when they are committed in the context of an international armed conflict — as attacks against the civilian population in general or individual civilians, regardless of their purpose — they constitute a grave breach of the Geneva Conventions and of the Protocol, in line with Article 85(3)(a) of Additional Protocol I.[49]

As explained by the commentary of the ICRC to Article 51(2) of Additional Protocol I, every single hostile act perpetrated during an armed conflict generates fear among the civilian population and the enemy armed forces to a certain degree. Sometimes attacks on members of the armed forces are carried out in a particularly brutal manner, with the aim to intimidate them. However, the kind of attacks covered by Article 51(2) is different. This Article proscribes only those acts of violence whose primary purpose is to spread terror among the civilian population, short of any substantial military advantage. Attacks which exclusively target combatants do not fall into this category.[50] The commentary of the ICRC to Article 13(2) of Additional Protocol II confirms that the same reasoning also applies to non-international armed conflicts.[51]

The prohibition of attacks mainly aimed at spreading terror among the civilian population has been further elaborated by the judgment of the Trial Chamber in the *Galić* case.[52] The trial chamber of the ICTY found that violations of Article 51(2) of Additional Protocol I entailed the individual criminal responsibility of the perpetrator under customary international law.[53] The chamber identified the relevant *actus reus* as 'acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population'. The relevant *mens rea* is constituted by the intent to commit the underlying offence, plus the *dolus specialis* of spreading terror among the civilian population.[54] In line with the opinion expressed by the ICRC,[55] the trial chamber ruled out the possibility that attacks on combatants could be classified as acts of terror, unless they violate other rules of IHL. For instance, as underlined by the Italian Supreme Court in *Bouyahia Maher Ben Abdelaziz* case, an attack directed against combatants could be defined as an act of terrorism in the case that its consequences would entail inevitable and disproportionate harm to life and limb of civilians.[56]

49 See Sassòli, *supra* note 46, at 968.
50 See ICRC, *supra* note 46, at 618, § 1940.
51 See *ibid.*, at 1453, §§ 4785–4786.
52 *Galić* Judgment, §§ 91–137. This interpretation of the crime of terror has been confirmed, inter alia, in ICTY, Judgment, *Milošević* (IT-98-29/1), Trial Chamber, 12 December 2007, §§ 873–886.
53 *Galić* Judgment, §§ 113–129.
54 *Ibid.*, § 133.
55 ICRC, *supra* note 46, at 618, § 1940.
56 See Italian Supreme Court, *Bouyahia Maher Ben Abdelaziz*, at 308, § 4(1).

The ICTY consistently defined the criminal conduct under analysis in *Galić* as a 'crime of terror'. Though the terminology is different,[57] it seems that a crime of terror identified by the judges constitutes indeed the same criminal offence known as terrorism in times of armed conflict, proscribed with regards to both international and non-international armed conflicts. This opinion finds support in the jurisprudence of the SCSL. While Article 3(d) of the SCSL Statute brings 'acts of terrorism', as serious violations of the law of non-international armed conflicts, under the jurisdiction of the SCSL, the Court consistently refers to the case law of the ICTY in *Galić* to interpret the meaning of this term. In its jurisprudence, therefore, the SCSL has equated acts of terrorism in non-international armed conflicts and the crime of terror as described in the ICTY decision on *Galić*.[58] This is probably based on the assumption that Article 51(2) of Additional Protocol I (dealing with international armed conflicts) and Article 13(2) of Additional Protocol II (related to a particular kind of non-international armed conflict)[59] define the same type of prohibited behaviour.[60] Article 4(d) of the Statute of the International Criminal Tribunal for Rwanda includes 'acts of terrorism' among the punishable violations of Common Article 3 to the Geneva Conventions and Additional Protocol II.[61] The provision contained in Article 13(2) of Additional Protocol II, moreover, is deemed to have reached customary status.[62]

It may be argued, as the Court of Appeal did in the *Gul* case, that there is no such thing as combatant status in non-international armed conflicts.[63] However, there is clearly a distinction between civilians and non-civilians in this kind of conflict, and it is based on the actual behaviour of those involved in the hostilities.[64] The principle of distinction, as well as the principle of proportionality and the rules on precautions to be taken prior to attacks, have

57 For an account of the scholarly debate on the point, see A. Cassese, *International Criminal Law* (3rd edn., Oxford University Press, forthcoming), at Chapter VIII, § 8.5.1.

58 See e.g. SCSL, *Brima and others*, §§ 667–669. See also the SCSL Statute.

59 Art. 1, Additional Protocol II, refers specifically to those 'which are not covered by Article 1 of … Protocol I, and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as they are not armed conflicts'.

60 See Jodoin, *supra* note 30, at 84–86.

61 See Art. 4(d), International Criminal Tribunal for Rwanda Statute.

62 Jodoin, *supra* note 30, at 87, cites a variety of sources for such assertion. Among the others, see J.M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (ICRC/Cambridge University Press, 2009), at 9–11. The list of rules identified by the authors has been published in 87 *IRRC* (2005) 198.

63 *Gul* case, §§ 28–31.

64 M. Sassòli, A. Bouvier and A. Quintin, *How does law protect in war?* (3rd edn., ICRC, 2011), at 328, 343–344.

crystallized into customary international law and are applicable also in non-international armed conflicts.[65]

From the above, it appears that the law of non-international armed conflict does contain a specific definition of acts of terrorism, which hinges on attacks carried out intentionally against the civilian population with the aim to spread terror.

6. The Definition of Terrorism in Times of Armed Conflict as an Incentive for the Respect of International Humanitarian Law

It has often been remarked that criminalizing every attack by insurgents or rebel groups against governmental forces would impair the very essence of any attempt to legally regulate non-international armed conflicts.[66] Indeed, following the *mens rea* standard identified by the STL Appeals Chamber for the crime of terrorism in times of peace, a terrorist act aims at directly or indirectly coercing 'a national or international authority to take some action or to refrain from taking it'.[67] Ironically, this generally also happens to be the very aim pursued by insurgents or other armed non-state actors in most non-international armed conflict. IHL does not forbid all kinds of hostile acts carried out in such conflicts precisely because it pragmatically accepts the parties' intention to use military force against one another, but seeks to limit and regulate the extent of force through rules that balance military necessity and humanity.

Even in the absence of a combatant privilege in non-international armed conflicts, states have accepted that killing persons taking part in hostilities of a non-international character should not necessarily be criminalized and punished. Article 6(5) of Additional Protocol II urges states to give the broadest possible amnesty — at the end of the war — to all those who took part in a non-international armed conflict. It has indeed occurred that at the end of large-scale internal armed conflicts, states have refrained from prosecuting — or have granted an amnesty to — members of armed groups who have taken up arms against their own governments. Examples of such ex post immunity are found in the Swiss civil war, the US civil war, the Spanish civil war, the Algerian war of independence, the Nigerian (Biafra) civil war and the armed conflicts in Bosnia and Croatia.[68]

Endorsing the notion that every attack carried out by an insurgent group against governmental forces constitutes an act of terrorism would simply

65 See Henckaerts and Doswald-Beck, *supra* note 62, at, in particular, Rules 1-2 (distinction), Rule 14 (proportionality) and Rules 15-21 (precautions).

66 See Sassòli, Bouvier and Quintin, *supra* note 64, at 128.

67 STL, Interlocutory Decision, § 85.

68 See S. Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', 22 *European Journal of International Law* (2011), at 247. The examples are listed in *ibid.*, at footnote 153.

mean that each action carried out by an insurgent group is an act of terrorism, even when perfectly consistent with the law of armed conflict. This assumption is detrimental to people who are most affected by armed conflicts: if attacks on soldiers receive the same disvalue and condemnation as attacks on civilians, why should a rebel group prefer the first over the second? On the contrary, all non-state parties to an armed conflict (be it international or non-international) should be encouraged to abide by IHL, which implies modest incentives to choose lawful over unlawful targets, even where combatant's privilege is absent.

Scholars have noted that parties to an armed conflict who comply with IHL should benefit from some sort of reward for their behaviour.[69] In other words, it might be fruitful to use a stick and carrot approach with those who fight in an armed conflict.[70] Among domestic criminal systems, a good example of such an approach can be found in the Swiss Criminal Code. Article 260 *quinquies* of the Code, while criminalizing the financing of terrorist activities, establishes that such criminal proscription does not apply 'if the financing is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts'.[71] Such provision might entail a double effect: first, it is addressed to the financiers, encouraging them to give funds only to those armed groups which comply with IHL; second, it is addressed to the fund-seekers, stimulating them to comply with IHL if they want to get money from entities under Swiss jurisdiction.

In contrast to such an approach, being labelled as terrorists does not seem an attractive reward for non-state armed groups. To impress on them such a Mark of Cain, that is, to label them as terrorists, does not only imply a criminal conviction. It also involves the serious practical consequences discussed at the outset of this article.

7. Final Remarks

If domestic law is proclaimed in order to implement international obligations, it appears rather curious that such domestic law considers as criminal a form of behaviour that international law does not prohibit. Given that the fight against terrorism is a matter of international concern, international law should be seen by domestic courts as providing guidance.

69 A. Cassese, 'Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 519. See also Sassòli, *supra* note 46, at 970–971; O'Donnell, *supra* note 43, at 868.

70 The expression has been used by O. Bangerter, 'Reasons why armed groups choose to respect international humanitarian law or not', 93 *IRRC* (2011) 353, at 377.

71 Art. 260 *quinquies* (4), Swiss Criminal Code of 21 December 1937, in force since 1 October 2003, available online at http://www.admin.ch/ch/e/rs/c311.0.html (visited 6 November 2012). The provision is cited by O. Bangerter, *ibid.*, at 377.

The Court of Appeal in the *Gul* case accepts that every hostile action carried out by rebels in places such as Iraq or Afghanistan constitutes an act of terrorism. But not everything that is done by so-called terrorists is actually an act of terror. Attacks by non-state armed groups during a non-international armed conflict can be labelled as terrorist acts only where they meet the strict criteria set by IHL and international criminal law. Fair attacks on armed forces, which are not intended to cause damage to the civilian population, do not constitute acts of terrorism.

Several authorities have already recalled the risks entailed in defining terrorism in a too broad or too vague manner.[72] Domestic courts, when interpreting their national criminal legislation, should ensure that these are in keeping with the current international legal framework on terrorism. This solution constitutes a guarantee for defendants in criminal proceedings and has the advantage of encouraging compliance with IHL by armed non-state actors.

72 See, among others, R.K. Goldman, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, § 32. For an account on other sources of similar content, see L. Doswald-Beck, *Human Rights in Times of Armed Conflicts and Terrorism* (Oxford University Press, 2011), at 138–139.