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K Grady, 'Comment on Gul [2013] UKSC 64' [2014] 4 *Criminal Law Review* 317-318

It has been said before in this *Review* that “[t]he internationalisation of criminal law and criminal process is an important trend of our times” (*Jones [2007] Crim LR 66, 68 (C. Walker)*). Indeed, as the realm of public international law as a whole has grown over recent decades, and the subject matter of treaties and customary international law has expanded, the courts of England and Wales have had increasingly to grapple with this discipline. A brief (and unscientific) survey of recent case law demonstrates that, in the last few years alone, the Court of Appeal (Criminal Division) has had to contend with questions of public international law concerning United Nations sanctions (*PD [2011] EWCA Crim 2082; [2012] 1 All E.R. 1108; Forsyth [2010] EWCA Crim 2437; [2011] Lloyd’s Rep. F.C. 156*); the prohibition on torture (*Ahmed [2011] EWCA Crim 184; [2011] Crim L.R. 734*); the Transfer of Sentenced Persons Convention 1983 (*Hull [2011] EWCA Crim 1261; [2011] 1 W.L.R. 3166*); the status of refugees (*Mateta [2013] EWCA Crim 1372; [2013] 2 Cr. App. R. 35 (p.431); Evans [2013] EWCA Crim 125; [2013] 1 Cr. App. R. 34 (p.457); Sadighpour [2012] EWCA Crim 2669; [2013] 1 W.L.R. 2725; Jaddi [2012] EWCA Crim 2565; Badu [2012] EWCA Crim 2895; Ma’alin [2011] EWCA Crim 3304; C [2011] EWCA Crim 2911*); human trafficking and slavery (*L [2013] EWCA Crim 991; [2013] 2 Cr. App. R. 23 (p.247); LZ [2012] EWCA Crim 1867; van Dao [2012] EWCA Crim 1717; [2013] Crim. L.R. 234; N [2012] EWCA Crim 189; [2013] Q.B. 379; O [2011] EWCA Crim 2226*); the impact of the UN Convention on the Rights of the Child 1989 in relation to sentencing (*Petherick [2012] EWCA Crim 2214; [2013] 1 W.L.R. 1102; Boakye [2012] EWCA Crim 838; [2013] 1 Cr. App. R. (S.) 2 (p.6)*); and the cross-border transportation of waste (*Ezeemo [2012] EWCA Crim 2064; [2013] 4 All E.R. 1016; Ideal Waste Paper Co Ltd [2011] EWCA Crim 3237; [2012] Env. L.R. 19; V [2011] EWCA Crim 2342; [2012] Eu. L.R. 302*). In addition, there is the volume of case law dealing with extradition treaties; the European Convention on Human Rights; the protocols to that Convention; and EU law. *Gul* represents another example of an attempt to persuade the courts to import public international law into the domestic legal sphere. As the judgment illustrates, this is not always a satisfactory endeavour.

The relationship between domestic and international law is intricate. As a dualist legal system, treaties signed and ratified by the UK government will only have effect within this jurisdiction where implemented by domestic legislation. The incorporation of the European Convention on Human Rights through the Human Rights Act 1998 is an obvious example of this phenomenon. By contrast, customary international laws are generally viewed as “‘part of the law of the land’ provided they are not inconsistent with Acts of Parliament” (*J. Crawford, Brownlie’s Principles of Public International Law (Oxford: Oxford University Press, 2012), p.67*), although in fact it may be more accurate to say that custom is a source of domestic law rather than a part of it (p.68). There is a further complexity in that the courts have placed limits on whether the customary law in question can be treated as incorporated into the common law.

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One of these limits relates to the issue of whether the context is one of civil or criminal law (*Jones* [2006] UKHL 16; [2007] 1 A.C. 136 at [59] and [100]). In *Jones*, the House of Lords considered whether the crime of aggression was a crime in customary international law which had been adopted into the common law. If it had, then preventing the crime of aggression could be a defence to criminal damage by virtue of s.3 of the Criminal Law Act 1967. The Law Lords declined to find that the crime of aggression had been so incorporated on the basis that it is for “Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence” (at [60]). Thus, the conflict with this “constitutional principle” precluded the domestic adoption of customary international law (Crawford, p.69). *Gul* therefore represented an opportunity to examine a related but converse position – if international law cannot be used to expand the realm of the criminal law to cover conduct not previously criminalised, can it be used to narrow the scope of the criminal law instead?

Unfortunately, we still await a clear answer to that question. In general, international lawyers are likely to be disappointed with the treatment meted out to their discipline by the Supreme Court. The brief (64 paragraph) and unanimous judgment of the enlarged panel of seven justices belies the controversy about the role of public international law in the domestic courts, as well as about the concept of terrorism in the international legal landscape and the complexity of the relationship between the law of international armed conflicts, the law of non-international armed conflicts and terrorism in times of war. Indeed, it is perhaps notable that the subject matter of the appeal is one which appears to have been stumbled across by the judiciary by accident. The issue arose only because the jury, on retirement, posed for the trial judge a series of pertinent questions on which they had apparently heard no evidence.

Before the Supreme Court, one of the arguments raised was that parts of the relevant legislation were intended to implement the UK’s treaty obligations (at [24]). Therefore, the legislation should be interpreted consistently with those obligations (see, e.g. *R. (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153 at [45]). This would mean that the definition of terrorism under the legislation should accord “with the definition in the relevant international document to which effect is intended to be given” (*Gul* at [43]). The difficulty is that the UK is party to a variety of multilateral treaties concerning terrorism and different parts of the legislation seem to have been intended to give effect to different parts of different treaties. On the other hand, some parts of the legislation were apparently not intended to give effect to any international agreements at all. This illustrates one of the challenges for domestic courts in dealing with international law. In fact, the court in *Gul* held that the relevant statutory provisions did not derive from a treaty (at [52]-[55]). It also found that an interpretation applied to some sections of legislation – by virtue of their deriving from a treaty – should not be applied to other sections if they did not intend to implement that treaty as well (per *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 A.C. 745 at [36]). The consequence of this is that different provisions of the same

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statute presumably adopt different definitions of the same concepts depending on whether they are implementing an international agreement and, if so, which one. Whilst the logic of this conclusion is difficult to fault, it is hard to imagine that it will do anything other than make the law more complicated, inconsistent, and unpredictable.