Minister for Home Affairs of the Commonwealth v Zentai

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I Introduction

Australia has a lacklustre track record in the prosecution of war criminals and génocidaires, despite the existence of legislation enacted in 1945[1] and more comprehensive laws amending the *Criminal Code Act 1995* (Cth) under the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). This has been a criticism levelled at the Australian governmental bodies responsible for investigation and prosecution over the past decade.[2] In the 2012 Annual Report of *Worldwide Investigation and Prosecution of Nazi War Criminals* by the Simon Wiesenthal Center ('SWC'), Australia received a 'failing grade'.[3] This grade was because Australia had the ability to take legal action against Holocaust perpetrators, but had failed to achieve significant positive results during the period under review. In April 2013, the SWC again allocated Australia a failing grade ('F-2'), with the decision discussed in this case note described as the 'most disappointing result in a specific case during the period under review'.[4]

II Factual Background

The SWC launched its 'Operation Last Chance' ('OLC') in Hungary in 2004.[5] The OLC team subsequently received information and documentation on behalf of Adam Balazs about a case from Budapest that occurred in 1944.[6] In 1944, the Jewish Balazs family was living in hiding in Budapest. Adam's brother, Peter, was on a tram without his Jewish star. Unfortunately, Peter was recognised by Karoly Zentai, a member of the Horse-Drawn Train Division 1 of Corps 1 of the Hungarian Royal Army, who knew the Balazs family. Zentai forced Peter back to a barracks, where he and two accomplices beat Peter to death.

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1 *War Crimes Act 1945* (Cth).

2 See, eg, Fergus Hanson, 'Confronting Reality: Responding to War Criminals Living in Australia' (Policy Brief, Lowy Institute for International Policy, 2009) <http://www.lowyinstitute.org/publications/confronting-reality-responding-war-criminals-living-australia>; Mark Corcoran, 'Lack of War Crimes Investigations "a Scandal"', ABC News (online), 2 April 2012 <http://www.abc.net.au/news/2012-03-30/experts-slam-lack-of-war-crimes-investigations/3922954>.

3 Efraim Zuroff, *Worldwide Investigation and Prosecution of Nazi War Criminals: An Annual Status Report* (SWC, 2012) <http://www.operationlastchance.org/PDF/ASR-2012new.pdf>.

4 *Primary Findings of the Simon Wiesenthal Center's 2013 Annual Report on the Worldwide Investigation and Prosecution of Nazi War Criminals*, (SWC, 2013) <http://www.operationlastchance.org>; Efraim Zuroff, *2013 Annual Report on the Status of Nazi War Criminals, April 2013* (SWC, 2013) <www.wiesenthal.com>.

5 OLC describes its work as follows: 'Operation: Last Chance is a campaign to bring remaining Nazi war criminals to justice by offering financial rewards for information leading to their arrest and conviction. To date the initiative has been launched in Germany, Lithuania, Latvia, Estonia, Poland, Romania, Austria, Croatia, and Hungary': <http://www.operationlastchance.org/>.

6 Efraim Zuroff, *Operation Last Chance: One Man's Quest to Bring Nazi Criminals to Justice* (Palgrave MacMillan, 2009) 173 ff.

The Balazs family had no idea what happened to Peter until the two accomplices were convicted in 1946 and 1948, one receiving life imprisonment and the other the death penalty. Zentai, however, escaped prosecution. The SWC proceeded to investigate and discovered that Zentai was alive and well, living in Perth, Australia, under the name Charles Zentai. Zentai's presence was exposed on national television, and Zentai expressed his willingness to go to Hungary and prove his innocence.[7]Zentai's extradition to Hungary was requested in April 2005, and since then the extradition has proceeded through various courts in the Australian legal system. The case culminated in late 2012 with a High Court appeal.[8]

III Procedural History

Following the issue of the request for extradition in 2005, Zentai was arrested on a provisional warrant and granted provisional bail.[9] The first proceeding brought by Zentai was a challenge to the validity of the conferral upon state magistrates of the power to determine eligibility for surrender under the *Extradition Act 1988* (Cth) s 19.[10] This challenge was unsuccessful.[11] In August 2008, a magistrate determined that Zentai was eligible for extradition to Hungary. A warrant was issued, committing Zentai to prison (pursuant to the *Extradition Act 1988* (Cth) s 19(9)).[12] Zentai applied for review of this decision, and was released on bail pending that review.[13] The Federal Court of Australia ('FCA') affirmed the magistrate's decision,[14] and the Full Court of the FCA dismissed an appeal against the FCA's decision.[15] In November 2009, the Minister for Home Affairs determined that Zentai was to be surrendered to Hungary for the extradition offence of war crime (pursuant to the *Extradition Act 1988* (Cth) s 22(2)).[16]

Zentai commenced further proceedings in the FCA. In July 2010, McKerracher J held that it had not been open to the Minister to surrender Zentai because the offence of 'war crime' was not an offence under Hungarian law at the time of the death of Peter Balazs.[17] In December 2010, McKerracher J quashed the determination for a warrant, declaring the offence not to be an 'extraditable offence'.[18] The Minister appealed, but the appeal was substantially dismissed in August 2011.[19] The Full Court of the FCA determined that McKerracher J was correct in his conclusion that the offence for which extradition was sought should have been an offence at the time of the alleged acts in Hungary.[20] In

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7 Ibid 176.

8 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 214 ('*Zentai*').

9 See *Zentai v Republic of Hungary* (2009) 180 FCR 225, 226 [2]; *Zentai v O'Connor (No 3)* (2010) 187 FCR 495, 502 [10]–[11]; *Zentai* (2012) 246 CLR 214, 220 [10].

10 See *Zentai* (2012) 246 CLR 214, 220 [10].

11 *Zentai v Republic of Hungary* (2009) 180 FCR 225;*Zentai v O'Connor (No 3)* (2010) 187 FCR 495; *Zentai v Republic of Hungary*(2007)157 FCR 585; *O'Donoghue v Ireland* (2008) 234 CLR 599.

12 See *Zentai* (2012) 246 CLR 214, 220 [10]; Zuroff, above n 6, 181.

13 See *Zentai v O'Connor (No 3)* (2010) 187 FCR 495, 503 [22]–[23]

14 *Zentai v Republic of Hungary* [2009] FCA 284 (31 March 2009).

15 *Zentai v Republic of Hungary* (2009) 180 FCR 225.

16 *Zentai* (2012) 246 CLR 214, 232 [49].

17 *Zentai v O'Connor (No 3)* (2010) 187 FCR 495. For a full case note on this decision, see *Stephen Tully, 'Zentai v Honourable Brendan O'Connor (No 3)* [2010] FCA 691 (2 July 2010)', (2010) 17 *Australian International Law Journal* 267.

18 *Zentai v O'Connor (No 4)* [2010] FCA 1385 (10 December 2010).

19 *O'Connor v Zentai* (2011) 195 FCR 515.

20 Ibid 531 [70] (Besanko J).

December 2011, Zentai was granted bail and special leave was granted for the Minister to appeal to the High Court of Australia. The High Court handed down its decision in August 2012, dismissing the Minister's appeal with costs.

IV Appeal in the High Court of Australia

A *The Majority Decision*

Gummow, Crennan, Kiefel and Bell JJ's joint decision ('the majority decision') examined the interpretive approach, textual considerations and the treatment of speciality under the *Treaty on Extradition between Australia and the Republic of Hungary* ('*Treaty*') as put forth by the Minister. The Minister submitted that a broad and generous interpretation of the *Treaty* provisions should be made. This was rejected by the majority, who applied statutory interpretation strictly and found it to be 'an error to characterise the purpose of the Treaty as "ensur[ing] that people are called to account for their wrongdoing"'.[21] They determined that the purpose of the *Treaty* was only to 'give effect to the reciprocal obligations to extradite persons for *extraditable offences*'.[22] Their Honours held that consideration of the object and purpose of the *Treaty* does not aid in determining the meaning of the limitation of the *Treaty* art 2.5(a),[23] which requires that the offence was 'an offence in the Requesting State at the time of the acts or omissions constituting the offence'.[24]

This reasoning contradicts the basic law of treaty interpretation, which specifically states that treaty provisions must be interpreted 'in their context and in the light of its object and purpose'.[25] Moreover, the majority's interpretation of the purpose of the *Treaty* is limited, avoiding discussion of the purpose of extradition, or the purpose of the extradition request. A significant element of that purpose is to ensure accountability for criminal conduct, to prevent a person from 'escaping' justice by fleeing to another state. This is particularly important with regard to international crimes, the 'most serious crimes of concern to the international community as a whole'.[26]

The Minister submitted three textual considerations, arguing that 'offence' in the *Treaty* art2.5 encompasses the totality of the acts and omissions alleged in the extradition request.[27] The majority held that the principle of dual criminality and its interpretations in the *Treaty* were not relevant to the issue under art 2.5(a).[28]Their Honours also refused to apply an extended meaning to 'the offence in relation to which extradition is sought' for the purposes of art 2.5(a) based on differences between systems of justice (the *Treaty* art 3).[29] Instead, the majority interpreted the intention of Australia and Hungary as the

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21 *Zentai* (2012) 246 CLR 214, 238 [65].
22 Ibid (emphasis in original).
23 Ibid.
24 Ibid 239 [66], quoting *Treaty*art 2(5)(a).
25 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1) ('*Vienna Convention*'). French CJ's separate opinion confirmed that this method of interpretation must be applied in Australian law, *Zentai* (2012) 246 CLR 214, 229 [36].
26 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'), Preamble.
27 *Zentai* (2012) 246 CLR 214, 239 [67].
28 Ibid 240 [68].
29 Ibid 241 [69].

adoption of a policy against the retrospective imposition of criminal liability or punishment (art 2.5(a)).[30] This application of non-retroactivity in criminal law is a fundamental human right (*nullapoena sine lege*), which Australia is compelled to apply.[31]

The Minister's final submission was that, under the rule of speciality in the *Treaty*art 12, the extradited person may be convicted and punished for an offence other than the one for which they were extradited, provided that offence does not carry a more severe penalty than the offence for which extradition was originally granted.[32] This is a flexible approach to the rule of speciality, which the Minister argued echoes the intention of the drafters as a whole to take a broad approach to the legal constructs in the Treaty.[33] The Court rejected this argument, holding that the extradition offence 'remains controlling'.[34] Again, the majority was interpreting one provision in isolation from others. Their Honours ultimately held that 'the Minister is precluded from surrendering Mr Zentai for extradition unless he is satisfied that the offence of "war crime" was an offence against the law of Hungary on 8 November 1944'.[35]

B *French CJ's Separate Decision*

In contrast to the majority, the Chief Justice devoted a substantial portion of his judgment to the application of the principle of dual criminality and its link to the issue at hand under art 2.5(a). French CJ acknowledged the flexible application of the dual criminality rule, citing *Riley v Commonwealth*:

> The principle of double criminality is satisfied where, and only where, any alleged offence against the law of the requesting state in respect of which extradition is sought would necessarily involve a criminal offence against the law of the requested state if the acts constituting it had been done in that state.[36]

French CJ also referred to Bassiouni's scholarship, which demonstrates a clear link between dual criminality and retroactive criminal law.[37] Taking a holistic approach, French CJ viewed art 2.5 as a 'further qualification or elaboration of the dual criminality requirement',[38] and held that art 2 must be interpreted as a whole, rather than interpreting each sub-section individually.[39] However, French CJ ultimately found that the 'request for the extradition of the respondent for commission of a war crime cannot rest simply upon the proposition that the alleged conduct would have constituted the offence of murder under Hungarian law in 1944'.[40] This was based on the non-retroactivity principle, with French CJ finding that even the broad approach 'will not encompass an offence created

30 Ibid [70].
31 Under the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 15 ('ICCPR'). See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
32 *Zentai* (2012) 246 CLR 214, 242 [71].
33 Ibid.
34 Ibid.
35 Ibid [72].
36 Ibid 225 [23] (French CJ, citing *Riley v Commonwealth* (1985) 159 CLR 1, 18 (Deane).
37 *Zentai* (2012) 246 CLR 214, 225[23] (French CJ quoting M Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press, 5th ed, 2007)).
38 *Zentai* (2012) 246 CLR 214, 227 [28].
39 Ibid [29].
40 Ibid 228 [32].

after the offending conduct which is qualitatively different from the offence constituted by that conduct at the time that that conduct was committed'.[41]

C *Heydon J's Dissent*

Heydon J dissented, holding that the appeal should be allowed. He reasoned that the offence for which extradition was sought existed as some kind of law in Hungary at the time of the offence. He found that:

> [i]ntentionally assaulting a person and causing that person's death constituted an offence in Hungary in 1944. Even if that offence was not murder, it was still an offence… It is not necessary that the named offence, 'war crime', should have existed in Hungarian law in 1944. It is sufficient that the alleged acts or omissions which Hungary contends amount to the named offence constituted an existing offence in 1944, even if that offence had another name.[42]

Like French CJ, Heydon J relied on the *Treaty* art 2.2(b), the dual criminality provision, although Heydon J came to a different conclusion. This provision states that 'the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account', and that 'it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ'.[43] A single provision of a *Treaty* (or of any piece of legislation) cannot be interpreted in isolation from the rest of that instrument.[44] Using his method of interpretation, Heydon J determined that it:

> does not matter that the constituent elements of a 'war crime' may be greater in number than those of 'murder'. It does not matter that they may otherwise be different. The language of the Treaty directs attention to 'the totality of the acts of omissions alleged'. Complying with that direction is inconsistent with concentrating on a 'legal Construct', a 'particular identified offence' or a 'known, fixed, entity'.[45]

Heydon J held that the Arrest Warrant did not allege a crime different from murder, and therefore, interpreting arts 2.2(b) and 2.5(a) together, the appeal should be allowed and the extradition granted.[46]

Heydon J's reasoning is flexible and is consistent with international law; that is, a movement away from the dual criminality requirement in many extradition instruments (for example, the European Arrest Warrant), or at the least a more flexible interpretation of difference between offences, and in particular with regard to international crimes (war crimes, crimes against humanity and genocide).[47] His ruling is also in keeping with

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41 Ibid.
42 Ibid 245 [84].
43 Ibid 246 [88].
44 *Vienna Convention* art 31(1).
45 *Zentai* (2012) 246 CLR 214, 246 [88].
46 Ibid 245–7 [83]–[90], 249 [99].
47 See, eg, Gavan Griffith and Claire Harris, 'Recent Developments in the Law of Extradition' (2005) 6 *Melbourne Journal of International Law* 33; John William Heath Jr, 'Journey Over "Strange Ground": From Demjanjuk to the International Criminal Court Regime' (1998–99) 13 Georgetown Immigration Law Journal 383; Thomas F Muther Jr, 'The Extradition of International Criminals: A Changing Perspective', (1995–96) 24 *Denver Journal of International Law and Policy* 221; Jonathan O Hafen, 'International Extradition: Issues Arising Under the Dual Criminality Requirement', (1992) *Brigham Young University Law Review* 191.

determinations from other courts, such as the Sixth Circuit Court in the United States, which asserted that the crime of genocide was covered by United States law proscribing murder.[48]

The main concern with Heydon J's reasoning, however, is that it does not differentiate between the 'ordinary' crime of murder and the war crime of murder.[49] It is true that to a certain extent, the mens rea and the actus reus of the two offences are the same (intent to kill, causing the death of another person). Yet what makes international crimes *international* are the additional chapeau elements that differentiate them substantially from 'ordinary' domestic crimes, and make them 'the most serious crimes of concern to the international community as a whole'.[50] War crimes, in contrast to 'ordinary crimes', require the crime to be committed in the context of an armed conflict.[51] The killing of Balazs is also particular to a war crime, because he was a civilian, not a combatant. In addition, there is an emphasis (although not necessarily a legal requirement) on war crimes being committed on a large scale or as part of a plan or policy. These aspects are crucial elements of war crimes that render them distinct from 'ordinary' domestic crimes. To determine that a war crime of murder is the same as the 'ordinary' crime of murder denies these chapeau elements that distinguish international crimes.

V The Absence of Customary International Law

At face value, the decision not to extradite — based on the extradition crime not existing as a crime at the time of commission — is consistent with extradition law and human rights law. However, Zentai's extradition was sought for the *war crime* of murder. War crimes are international crimes, but unfortunately the judgment did not discuss international law and the status of war crimes as at 1944. Most international crimes are considered to be customary international law. However, the hearing transcript reveals that this was not raised during the appeal. Hence, the judgment was based on an analysis of Hungary's legislation in 1944, and not whether the war crime of murder existed as customary international law, including in Hungary at the time. The denial of extradition could have been avoided had the appellant referred to international law.

Today, the majority of international humanitarian law, and the crimes associated with that legal regime, are considered customary international law.[52] By 1944, the crime of murder in war time had been included for many years in national military codes, such as the *Lieber Code of 1863*, demonstrating state practice.[53] In 1946, the International Military

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48 *Demjanjuk v Petrovsky*, 776 F.2d 571, 580 (6th Cir. 1985).

49 The 6th Circuit's ruling in *Demjanjuk* was also criticised for this: Heath, above n 47, 399–400.

50 *Rome Statute* Preamble.

51 See, eg, *Rome Statute* art 8 and the relevant Elements of Crimes.

52 See, eg, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution* 808 (1993), UN Doc S/25704 (3 May 1993) (discussing the establishment and competence of the International Criminal Tribunal for the former Yugoslavia) [35]; *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (ICTY, Appeals Chamber, Case No IT-94-1-T, 2 October 1995) [98]ff; and the major study of the International Committee of the Red Cross relating to the customary international status of international humanitarian law:Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press, 2005); see also International Committee of the Red Cross, *Customary International Humanitarian Law*<http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp>.

53 Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field',General Orders No 100: The Lieber Code, 24 April 1863, <http://avalon.law.yale.edu/19th_century/lieber.asp#sec2>.

Tribunal at Nuremberg held that war crimes were customary law prior to the commencement of World War II:

> Article 6(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder ...
>
> With respect to war crimes… the crimes defined by Article 6, section (b), of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument…
>
> [B]y 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.[54]

The International Court of Justice declared that the 1949 Geneva Conventions merely expressed specifically the already existing general principles of international law.[55] These include the prohibition of 'violence to life and person, in particular murder of all kinds'.[56] Thus, it is clear that, prior to World War II, certain war crimes, including murder, were proscribed by customary international law. As a consequence, the prosecution of perpetrators of war crimes committed during World War II was accepted.[57]Even if the war crime of murder did not exist in Hungarian domestic legislation in 1944, it existed as a customary law prohibition and therefore applied in the Hungarian territory at the time of Peter Balazs' death.

VI Conclusion

The Australian government missed its opportunity to have Zentai's extradition approved in the *Zentai* case. The fact that argument based on the customary law status of the war crime of murder was not even raised in the High Court appeal hearing is astounding, as thiswould have strongly supported the Minister's case for extradition. The High Court judges were therefore left to address only the issue of whether or not the war crime of murder and the crime of murder can be considered the same offence. This was dealt with in very different ways by the various judges of the Court, with the majority and French CJ ultimately coming to the same conclusion, although through some shaky reasoning by the majority. Heydon J's dissent was based on broad interpretations, seeking not to frustrate the purpose of extradition and to offer flexibility in extradition decisions.

The role of extradition is vital, as globalisation and increased ease of travel have created more opportunities for fugitives to avoid prosecution for crimes. By denying the extradition request, Australia has defeated the purpose of the request: the prosecution of

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54 Judgement of the International Military Tribunal at Nuremberg 1946, The Law Relating to War Crimes and Crimes against Humanity per General Niktochenko, <http://avalon.law.yale.edu/imt/judlawre.asp>.

55 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] Judgment of 27 June 1986, [218], [220] (Nicaragua Case).

56 Ibid [220].

57 The prosecution of perpetrators for other categories of crimes, such as crimes against peace, was more controversial.

an alleged war criminal. Further, *autdedereaut judicare* means that Australia is obligated to either prosecute or extradite alleged perpetrators of international crimes, including war crimes. Given that there is no recourse to appeal from a High Court decision, two solutions remain: for Hungary to re-request extradition for the crime of murder; or for Australia to undertake a prosecution of Zentai under the *aut dedere aut judicare* principle. Unfortunately, seven years have passed since the first instigation of the extradition, and Zentai is now more than 90 years old. This time lost means that if any proceedings are recommenced, they are unlikely to progress because of Zentai's age; whether due to his inability to stand trial or his death. This means that Australia will hold onto its record of never having prosecuted a single Nazi war criminal.