EXTRADITION FROM A TO Z: *ASSANGE*, *ZENTAI* AND THE CHALLENGE OF INTERPRETING INTERNATIONAL OBLIGATIONS

HOLLY CULLEN AND BETHIA BURGESS*

AUTHORS' NOTE:

One of Professor Peter Johnston's main areas of expertise was the law of extradition. Notably, he appeared before the High Court of Australia in the Zentai *case, concerning the request for extradition of an alleged war criminal. His interest in the law of extradition was, furthermore, wide-ranging and scholarly. In 2013, he taught seminars on extradition in the UWA law unit Selected Topics of Public International Law. In correspondence with the first author of this article, he proposed co-writing an article comparing the approach of the Australian and United Kingdom courts to extradition through the lens of the* Zentai *case and that of Julian Assange. He wrote, 'There are some fascinating similarities and differences, including the different ways in which the UK Supreme Court approaches interpretation of international instruments compared to that of the High Court.' Unfortunately, other commitments intervened and the article was never written. The second author of this article was a student in the 2013 cohort for Selected Topics of Public International Law and wrote an essay on issues in the* Zentai *case under Professor Johnston's guidance. We present this article as a realisation of Professor Johnston's idea and a tribute to him.*

I INTRODUCTION

Extradition of persons accused of a crime to face trial in another country is considered an essential element of transnational criminal law.[1] Developments such as the European Arrest Warrant,[2] adopted by the European Union, are

* Holly Cullen is a Professor of Law at the University of Western Australia. Bethia Burgess is a BA/LLB graduate of the University of Western Australia and is currently studying for a Master International Relations at Melbourne University.

[1] See Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012).

[2] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, 2002/584/JHA, [2002] OJ L190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing

designed to make the process faster and easier. However, with these developments come concerns about safeguards for the rights of the accused, particularly whether greater efficiency in extradition comes at the cost of respect for the human rights of the accused. As extradition is always based on some form of international measure, whether a European Union Framework Decision in the case of the European Arrest Warrant (EAW), or international treaties, domestic courts face the challenge of how to interpret domestic law based which is based on international measures. This challenge includes the question of how international human rights commitments should be integrated into such an interpretation process. Two decisions in 2012, from the High Court of Australia, *Minister for Home Affairs of the Commonwealth & Ors v Charles Zentai & Ors*,[3] and the United Kingdom Supreme Court, *Assange v the Swedish Prosecution Authority*,[4] shed light on the difficulty of interpreting domestic extradition law in light of its international law foundations, and in giving due weight to human rights in the extradition process.

Factually, *Assange* and *Zentai* are very different. In *Assange*, the main issue for the United Kingdom Supreme Court was whether the Swedish Prosecuting Authority was authorised to issue an EAW. The alleged crimes were recent, and the victims still alive and potentially available for cross-examination. In *Zentai*, the request was in relation to a historic crime, a murder in 1944. The main concern before the courts was the fact that the crime in the extradition request, a war crime, was not a crime in the requesting country in 1944. In the lower court cases, concerns were also raised about the potential for a fair trial.[5] Furthermore, the relationship between the requesting country and the country in which the accused was arrested differed – the EAW derives from the efforts of the European Union to enhance police and judicial cooperation overall, rather than the conventional bilateral extradition treaty in issue in *Zentai*. While both cases involved allegations of serious crimes, the war crime in *Zentai* raises the matter to one of concern to the international community as a whole. In *Zentai*, the nature of the crime was the most significant aspect of the case, whereas in *Assange*, the key issue became the status of the authority issuing the

the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

[3] *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28 ('*Zentai*').

[4] *Assange v Swedish Prosecution Authority* [2012] UKSC 22 ('*Assange*').

[5] *Zentai v Honourable Brendan O'Connor (No. 3)* [2010] FCA 691 [260]-[292]. The court rejected the claim that the Minister had failed to consider seriously the question of whether the accused could receive a fair trial.

extradition request.

In both cases, nonetheless, we see the difficulties and complexities of interpreting international legal obligations, including human rights, into domestic extradition procedures. In both cases courts grappled with questions of how international law should engage with domestic law. We also see a progressive narrowing of the issues as the cases advance through the appeal process, with some issues relating to human rights being dropped by the time the case reached the court of last resort.

II The Evolution of Extradition

Extradition has been described as 'the key form of legal assistance in pursuit of the alleged transnational criminal.'[6] The process has both diplomatic and judicial elements, although the significance of the judicial role has increased since the Second World War. The process begins with an agreement between states, whether ad hoc or based on a pre-existing treaty. Extradition treaties have a long history, and are amongst the oldest examples of agreements between sovereigns.[7] Initially, extradition agreements focussed on political crimes, but by the nineteenth century treaties allowed extradition for a wide range of crimes.[8] The usual model for extradition is a bilateral treaty providing for requests to be made between states, executive to executive, with judicial supervision.[9] However, multilateral agreements on extradition, like the EAW Framework Decision, have started to become more common.[10] In addition, some treaties on transnational criminal law include obligations to extradite to fellow states parties.[11] This may sometimes take the form of an obligation to extradite or to prosecute the accused.[12]

As part of the evolving judicial role in the extradition process, judges in both domestic and international courts and tribunals have examined the

[6] Boister, above n 1, 214.
[7] William Magnuson, 'The Domestic Politics of International Extradition' (2011-2012) 52 *Virginia Journal of International Law* 839, 846.
[8] Ibid, 848, 852.
[9] Ibid, 851.
[10] Ibid, 852, 873, note 168. Boister, above n 1, 215-216.
[11] Boister, above n 1, 216-217.
[12] For example, the United Nations Convention Against Transnational Organised Crime, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003, Article 15(4) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December, 1984, 1465 UNTS 85 (entered into force 26 June1987) Article 7. On the obligation in the Convention against Torture, see *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), [2012] ICJ Reports 422.

human rights implications of extradition. While extradition processes still exclude much review of the merits of the criminal case against the person requested,[13] many courts will now consider arguments that extradition will lead to a violation of the accused's human rights. Originally, judges would find that state sovereignty prevented them from inquiring into the law and procedures of the requesting state, but since the Second World War some countries' courts have allowed this rule of non-inquiry[14] to yield in the face of human rights considerations.[15]

The first human rights issue raised in international law in extradition cases was the death penalty. As the major international human rights treaties do not ban the use of the death penalty,[16] initially it was the effects of 'death row phenomenon' as an instance of inhuman and degrading treatment under the European Convention on Human Rights (ECHR), which justified the European Court of Human Rights in ruling that the United Kingdom could not extradite someone to face a potential death penalty in the United States.[17] The Human Rights Committee, in decisions on individual petitions, took the view that Canada could not extradite accused persons to the United States where they would face the death penalty without violating its obligations under the International Covenant on Civil and Political Rights (ICCPR).[18] This was based

[13] Boister, above n 1, 214.

[14] Boister, above n 1, 217-18.

[15] Magnuson, above n 7, 885-888. This is particularly true for European countries, see John Dugard and Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 91 *American Journal of International Law* 187.

[16] See Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 2 (European Convention on Human Rights or ECHR), International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 6, American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978), art 4, African Charter on Human and Peoples' Rights, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), art 4. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991), Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, opened for signature 28 April 1983, 1496 UNTS 232 (entered into force 1 March 1985), Protocol to the American Convention on Human Rights to Abolish the Death Penalty, opened for signature 6 August 1990, OASTS No. 73, by virtue of art 4, entered into force for ratifying or acceding states upon deposit of instrument of ratification or accession, do require states parties to abolish the death penalty, but these are all optional commitments for parties to the main human rights treaties.

[17] *Soering v United Kingdom* (1989) 161 Eur Court HCR (ser A) ('*Soering*').

[18] *Views: Communication No 469/1991*, 49th Sess, UN Doc CCPR/C/49/D/469/1991 (5 November 1993) ('*Ng v Canada*'); *Views: Communication No 829/1998*, 78th Sess, UN Doc CCPR/C/78/D/829/1998 (20 October 2003) ('*Judge v Canada*'). This approach was later adopted by

on the view that Canada, as a state which had abolished the death penalty, would be regressing in its level of protection if it handed over suspects in to countries which might execute them. More recently, sentences of life without parole have become the focus. Some states have treated such 'whole of life sentences' as equivalent to the death penalty and have sought similar assurances that life without any possibility of review of sentence or early release would not be imposed by requesting countries. The issue has come before the European Court of Human Rights but is not fully resolved with respect to extradition. In its 2012 decision in *Ahmad v United Kingdom*, the Court decided that on the facts, there was no inhuman and degrading treatment contrary to art 3 ECHR where there was a risk, but not a certainty, of the applicants being subjected to whole of life sentences under conditions of solitary confinement upon being extradited to the United States.[19] A year later, the Grand Chamber of the Court, in *Vinter v United Kingdom*, decided that a whole of life sentence imposed by the United Kingdom's own courts infringed art 3 because there was no possibility of review of the sentence.[20] The difference in the two cases may be explained by the relativist approach of the Court in applying the ECHR to extradition and other extraterritorial infringements, whereby the Court is reluctant to apply ECHR standards strictly to non-party states.[21] In 2014, the European Court of Human Rights revisited the question of extradition to face whole of life sentence in *Trabelsi v Belgium*.[22] In that case, applying the requirement for review of the sentence developed in *Vinter*, the Court decided that extraditing the applicant to the United States led to a violation of his rights under art 3 ECHR.

In addition to concerns about punishments, claims that extradition would lead to a serious risk of the accused being subject to torture or cruel and inhumane treatment have been successful in preventing extradition. This is

the Supreme Court of Canada in *United States v Burns* [2001] 1 SCR 283. Similar reasoning was applied by the South African Constitutional Court in *Mohamed v President of South Africa*, 2001 (3) SA 893 (CC).

[19] *Babar Ahmad and others v United Kingdom*, [2012] Eur Ct HR 609

[20] [2013] Eur Ct HR 645.

[21] Paul Arnell, 'The European Human Rights Influence upon UK Extradition – Myth Debunked' (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 317, 327-329.

[22] (European Court of Human Rights, Application No 140/10, 4 September 2014). The Grand Chamber of the European Court of Human Rights refused a request to refer the case for hearing by the Grand Chamber on 16 February 2015: European Court of Human Rights, 'Grand Chamber Panel's Decisions', (Press Release, ECHR 057 (2015), 17 February 2015).

specifically addressed in art 3(1) of the Torture Convention.[23] The European Court of Human Rights has established a clear line of case law under the ECHR prohibiting states parties from extraditing to states where the accused was likely to face torture.[24] However, the Court allowed a narrow exception in the *Othman* case, permitting states to extradite if adequate assurances were given by the requesting state that torture would not occur.[25]

Although art 3, in the context of harsh sentences or likelihood of torture, is the most frequent provision used to argue against extradition, other ECHR rights have also been recognised as creating bars to removal.[26] The Court recognised in *Soering* that potential infringement of the right to a fair trial under art 6 ECHR might require a state to refuse extradition.[27] However, it was only in *Othman* that art 6 was applied to the removal (deportation rather than extradition in this case) of a person facing trial in another state. The Court decided that if the applicant was likely to be tried using evidence obtained by torture, albeit torture of a witness rather than of the applicant, this would infringe his right to a fair trial.[28] The Court in *Othman* also decided that removal should be refused because of the likelihood of infringement of art 5 ECHR, the right not to be arbitrarily detained, because of the possibility of being held incommunicado for up to 50 days.[29] In a few cases, the Court has agreed that the right to respect for private and family life under art 8 ECHR can require states to refrain from removing an applicant.[30]

Similar issues have been raised in other human rights regimes. As noted above, the Human Rights Committee has taken the view that it is a violation of the ICCPR for a state which has abolished the death penalty to extradite to a state which still practices the death penalty unless it obtains undertakings that the death penalty will not be imposed. In the Americas, states parties to the Inter-American Convention on Extradition are required to refuse extradition

[23] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December, 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[24] *Othman (Abu Qatab) v United Kingdom*, [2012] Eur Ct HR 56 [185]-[189] ('*Othman*')
[25] Ibid [190]-[207].
[26] The Court does not distinguish between extradition and deportation for the purposes of applying ECHR rights: Arnell, above n 21, 322.
[27] *Soering* [88].
[28] *Othman* [260]: there must be a risk of 'flagrant denial of justice'.
[29] Ibid [233]: Article 5 is also subject to the flagrant denial test.
[30] Arnell, above n 21, 323, 325-6, where the test is that the interference with Article 8 rights is so serious as to outweigh the importance of extradition. See *Balogun v UK*, [2012] Eur Ct HR 614, *Boultif v Switzerland*, [2001] Eur Ct HR 497, *Khan v United Kingdom*, [2010] Eur Ct HR 27.

where the accused faces the death penalty, life imprisonment, or degrading punishment.[31] In addition, the Inter-American Commission on Human Rights has found that states must address issues of the death penalty or torture in the requesting state, avoid lengthy detention of accused facing extradition requests and ensure fair procedures during extradition processes within their jurisdiction.[32]

III *Assange v The Swedish Prosecution Authority* – The Nature of the Requesting Authority

Although Julian Assange is best known for his role in WikiLeaks,[33] the alleged offences which formed the basis of the extradition request had nothing to do with his role with that organisation. Instead, he was accused of a number of sexual offences arising out of events during a visit to Sweden in August 2010.[34] Assange himself has claimed that the Swedish extradition request would ultimately lead to his being sent to the United States for trial on charges related to his activities with Wikileaks,[35] but this claim formed no part of the argument before the Supreme Court. The legal arguments before that court had nothing to do with the specific facts of the case, nor the crimes charged.[36] The issue before the Supreme Court related more generally and abstractly to the nature of a request under an EAW, and the possibility of reconciling very different approaches to issuing such a warrant in different European Union criminal

[31] Inter-American Convention on Extradition, opened for signature 25 February 1981, UNTS (entered into force 28 March 1992), art 9.

[32] *Wong Ho Wing v Peru*, Inter-American Commission on Human Rights, Application 12.794, Merits Report No. 78/13, 18 July 2013. The case has been referred to the Inter-American Court of Human Rights on 30 October 2013. The case was heard on 3 September 2014, but no decision has yet been issued by the Court: See Inter-American Court of Human Rights, Annual Report 2014, (San Jose, IACtHR: 2015) 25

[33] See, for example, David Leigh and Luke Harding, *Wikileaks: Inside Julian Assange's War on Secrecy* (Guardian Books, 2011)

[34] *Assange*, [83].

[35] See Joshua Rozenberg, 'Julian Assange is very likely to be extradited, says Matrix barrister', *The Guardian* (online), 23 February 2011 <http://www.theguardian.com/law/2011/feb/23/julian-assange-extradition-law>, for an outline and critique of this argument. Assange raised it before the Senior District Judge when the case was first heard as an argument that the issuance of the EAW was an abuse of process because it was issued for a collateral purpose, but did not pursue it in later proceedings: *Assange v The Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [7].

[36] Before the Divisional Court, Assange had also argued that the offences charged did not meet the requirements of double criminality, that Assange was not an 'accused' at the stage of proceedings when the EAW was issued and that the issuance of the EAW was disproportionate: *Assange v The Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [6]. These arguments were not pursued before the Supreme Court.

justice systems. The *Extradition Act 2003* (UK) echoes the language of the Framework Decision on the EAW that the warrant must be issued by a judicial authority.[37] The question before the Supreme Court was whether the Swedish Prosecution Authority was a 'judicial authority' within the meaning of s. 2(2) of the *Extradition Act 2003*,[38] which implements the EAW Framework Decision into United Kingdom law. The human rights issue in *Assange* was likewise a general and abstract one, relating to whether the detention arising from the extradition itself was arbitrary because it was not based on a request from a judicial officer.

The argument before the Supreme Court therefore focussed on the nature of an extradition request under an EAW.[39] The EAW is a European Union measure to facilitate police and judicial cooperation. It has been highly controversial.[40] Unlike previous European measures,[41] the EAW is based on the principle of mutual recognition of judicial decisions.[42] The EAW is defined as a judicial decision under art (1) of the Framework Decision. The EAW framework effectively restricts the grounds on which extradition through the warrant can be challenged, for example by restricting the requirement of double criminality.[43] *Assange* was therefore a site of contestation of the legitimacy of the EAW, in addition to the political freight brought to the case by the context of Assange's role in WikiLeaks.

Throughout its existence, the EAW has been criticised for failure to guarantee consistent and uniform protection of human rights across the

[37] *Extradition Act 2003* (UK) c 41.
[38] Ibid
[39] On the difference between UK law's treatment of requests under the EAW and requests under extradition treaties, see Arnell, above n 21, 319-321.
[40] The courts of several member states of the European Union have struck down domestic laws implementing the EAW in relation to the extradition of nationals – see Boister, above n 1, 231-232. See also Alicia Hinarejos, 'Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists' (2007) 7 *Human Rights Law Review* 793, 796-97, and Daniel Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence' (2008) 6 *International Journal of Constitutional Law* 171, 173-75
[41] See Boister, above n 1, 230-31, and Oreste Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems' (2008) 9 *German Law Journal* 1313, 1316-1319.
[42] Hinarejos, above n 40, 799-800; Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?' (2004) 41 *Common Market Law Review* 5; Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277
[43] Boister, above n 1, 231.

European Union.[44] In the United Kingdom, the implementing legislation, s 21 of the *Extradition Act 2003*,[45] requires that surrender under an EAW must not infringe human rights. The position under European Union law is not as clear. The Court of Justice of the European Union was called upon to rule on whether the EAW Framework Decision was compatible with the European Union's human rights commitments in *Advocaten voor de Wereld VZW v Leden van de Ministerraad*.[46] The claimant in that case argued that the list of offences to which the requirement of double criminality would not apply, set out in art 2(2) of the Framework Decision, undermined legal certainty by failing to define the scope of those offences adequately, consequently infringing human rights. While the Court of Justice confirmed that the Union's human rights commitments [47] apply to intergovernmental measures such as the EAW Framework Decision, it decided that the EAW did not breach the principle of legality (legal certainty) reflected in art 7 ECHR.[48] This was so because the Framework Decision did not itself create offences, but rather referred to offences under the domestic law of the member states, who are therefore responsible for ensuring that offences are defined compatibly with human rights.[49] The Court of Justice likewise found that there was no inequality before the law resulting in the lack of definition of the offences in art 2(2), particularly in light of the requirement that the offences be subject to at least three years imprisonment as a maximum penalty.[50] In a case post-dating *Assange*, *Radu*,[51]

[44] Debbie Sayers, 'Protecting Fair Trial Rights in Criminal Cases in the European Union: Where Does the Roadmap Take Us?' (2014) 14 *Human Rights Law Review* 733, 735. The European Union has adopted a number of measures supporting fair trial rights beyond the 'baseline' of the ECHR, which were incorporated into the Framework Decision on the EAW when it was amended in 2009, see above note 2.

[45] *Extradition Act 2003* (UK) c 41.

[46] *Advocaten voor de Wereld VZW v Leden van de Ministerraad* (C-303/05) [2007] I ECR I-3633.

[47] Ibid [45]. The sources of human rights applicable to the European Union includes the ECHR and 'the constitutional provisions common to the Member States, as general principles of community law'. On the specific issue of fair trial rights recognised in European Union law, see Sayers, above.

[48] Ibid. [50-53].

[49] Sarmiento, above n 40, 180-182.

[50] *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [57]. Hinarejos, above n 40, 798-99, argues that the potential for inconsistent application of the EAW remain because national courts may interpret offences listed in Article 2(2) differently, a risk exacerbated by the *Assange* court's decision that the principle of conforming interpretation did not apply to the Framework Decision (this issue is discussed below). Sarmiento, above n 40, 183, notes that the German Constitutional Court also disregarded the principle of conforming interpretation in its decision concerning the Framework Decision. Pollicino, above n 41, 1333-35, notes that the Czech and Polish courts reviewing EAW implementing legislation did consider that the principle could potentially apply. The Polish court rejected its application on the basis that the Court of Justice itself had said that the principle should

the Grand Chamber of the Court of Justice decided that the court of a member state could not refuse to execute an EAW on the ground that the accused had not been heard in the proceedings in the issuing state, suggesting that infringement of human rights in relation to fair procedures would not invalidate an EAW.[52]

As a result, there is a potential tension between the EAW Framework Decision and the United Kingdom implementing legislation. Section 21 of the *Extradition Act 2003*,[53] requires British judges to review extradition requests in light of the *Human Rights Act 1998* (UK),[54] but the case law of the European Court of Justice suggests that an EAW should be executed even if there are human rights concerns. It is not uncommon for there to be issues of conflict between European Union measures and member state laws implementing them. The doctrines of supremacy and direct effect stipulate that European Union measures may prevail over contradictory member state law. Furthermore, most European Union measures would be subject to what in the United Kingdom is called the duty of conforming interpretation, where the courts of the member states are required to interpret domestic law so far as possible in conformity with European Union law.[55]

However, the EAW Framework Decision is a measure under the Third Pillar of the 1992 version of the Treaty of European Union. As such, it has a more intergovernmental rather than supranational legal status.[56] Measures under the Third Pillar do not create direct effects and therefore cannot create rights for individuals. They cannot be the subject of references to the Court of Justice for interpretation. While the *Pupino* decision of the Court of Justice of the European Union indicated that the obligation of conforming interpretation could extend to Third Pillar measures,[57] the Supreme Court in *Assange* agreed

not be used to extend a person's criminal liability. The Czech court did ultimately use the principle in its decision.

[51] *Radu* (C-396/11), [2013] All ER (EC) 410.

[52] See Arnell, above n 21, 335.

[53] *Extradition Act 2003* (UK) c 41.

[54] *Human Rights Act 1998* (UK) c 42.

[55] Lord Mance, 'The Interface between National and European Law' (2013) 38 *European Law Review* 437.

[56] Hinarejos, above n 40, 795-96.

[57] *Pupino* (C-105/03) [2005] ECR I-5285. See Maria Fletcher, 'Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino' (2005) 30 *European Law Review* 862. A more recent decision, *Melloni* (C-399/11) [2013] 3 WLR 717, applied the doctrine of supremacy of European Union law over domestic law to a police and judicial cooperation measure.

with Lord Mance's analysis that the European Communities Act 1972 did not allow UK courts to apply the duty to the EAW framework decision.[58] The new European Union treaty framework agreed in Lisbon,[59] which came into force in 2009, attempted to abolish the 'pillars' model of European Union law, whereby different rules applied to the measures adopted for foreign affairs and for police and judicial cooperation. Art 10 of Protocol 36 to the Lisbon Treaty, which provides for transitional arrangements as the Union moves to the post-Lisbon treaty framework, has brought pre-Lisbon measures into the full jurisdiction of the Court of Justice as of 1 December 2014.[60] Article 10(4), however, allows the United Kingdom to notify the Council of the European Union that is does not accept this extension of competence. In addition, all unamended pre-Lisbon police and judicial cooperation measures have ceased to apply to the United Kingdom as of 1 December 2014. However, art 10(5) allows it to opt back in to measures selectively, under the new institutional arrangements including expanded jurisdiction of the Court of Justice. The United Kingdom made this notification on 24 July 2013,[61] and provided a list of 35 measures to which it would opt back in,[62] including the EAW Framework Decision.

As a result of this legal context, the interpretation of the term 'judicial authority' in *the Extradition Act 2003* became for the Supreme Court a complex interpretative process involving domestic, European and international law. The majority view, as set out in the decision of Lord Phillips, began from the premise that 'judicial authority' should have the same meaning in the

[58] *Assange*, [8-10] (Lord Phillips) for the majority, approving reasoning of Lord Mance [201-217]. See also [174-176] (Lady Hale). Frances McClenaghan, 'Interpreting Framework Decisions: Lessons Learnt in Assange v Swedish Prosecution Authority' [2012] (4) *European Human Rights Law Review* 433, 437, comments that Lord Mance's approach to *Pupino* 'reshaped the prism' for interpreting police and judicial cooperation measures. Lord Mance elaborates on his views on this issue, writing extrajudicially, above n 55.

[59] Treaty on European Union, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) ('EU'), Treaty on the Functioning of the European Union, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) ('FEU')

[60] Article 10 of Protocol 36 extends the competence of all EU institutions to any surviving pre-Lisbon police and judicial cooperation matters, but for our purposes, the main issue is the jurisdiction of the Court of Justice. See Estella Baker, 'The United Kingdom and its Protocol 36 Opt-Out: Is Police and Judicial Cooperation in Criminal Matters within the EU Losing Momentum?' (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 237.

[61] Council of the European Union, *UK notification according to Article 10(4) of Protocol No. 36 to TEU and TFEU*, document no. 12750/13, Brussels, 26 July 2013;

[62] United Kingdom Government, *Decision Pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union* (London: The Stationery Office, 2013), http://www.official-documents.gov.uk/cm86/8671/8671.asp. Baker, 241-43, notes that many criminal justice stakeholders were of the view that the government should not exercise its opt-out, but that the general political climate favoured disengagement with the European Union.

Extradition Act 2003 as it does in the Framework Decision, even if the duty of conforming interpretation does not apply.[63] He went on to note that the term 'autorité judiciare' used in the French draft of the Framework Decision, which was prepared before the English version, covers a broader range of offices than does the equivalent English term.[64] Further, he noted that the intention of the Framework Decision was not to create a new extradition mechanism but to streamline the existing system.[65] He emphasised the independence of the prosecuting authorities in states where these authorities issue the EAW.[66] In looking at the drafting history for the Framework Decision, he concluded that although at some points the text was more explicit that judicial authority included independent prosecutors, the final version of the Framework Directive continued to represent this broader view of 'judicial authority' and that such was confirmed by the implementation of the Framework Decision in member states.[67]

The result of treating the EAW framework decision as not subject to the duty of conforming interpretation is that it was treated by the Supreme Court as an 'international obligation' and the majority applied the canon of interpretation that Parliament is not assumed to legislate contrary to the UK's international obligations.[68] However, the presumption can be defeated where there is evidence that Parliament intended otherwise.[69] The majority of the Supreme Court then proceeded to use the rules from the Vienna Convention on the Law of Treaties (VCLT) to interpret the EAW Framework Decision.[70]

The application of the VCLT to the Framework Decision is problematic, and was not fully explained by the Court.[71] The Framework Decision is clearly not a treaty itself as defined in art 2 of the VCLT. It is instead an act adopted

[63] *Assange*, [13].
[64] Ibid [16-21].
[65] Ibid [25].
[66] Ibid [37-38].
[67] Ibid [53-67].
[68] See also [111] (Lord Kerr), noting that in *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] UKHL 67, the House of Lords had decided that interpretation of the *Extradition Act 2003* must be based on the assumption that Parliament did not intend to legislate inconsistently with the Framework Decision. Others, [115] (Lord Kerr) and [122] (Lord Dyson), describe the presumption against legislating contrary to international obligations as 'strong'.
[69] *R v Secretary of State for the Home Department, Ex parte Brind*, [1991] 1 AC 696 (HL).
[70] See Alan Paterson, 'Decision-making in the UK's Top Court' (2014) 3 *Cambridge Journal of International and Comparative Law* 77, 80, on how the issue of the Vienna Convention was raised by the Justices of the Supreme Court at a late stage of the arguments before the Court.
[71] Callista Harris and Krishna Kakkaiyadi, 'Treaty Interpretation before the Supreme Court' (2013) 2 *Cambridge Journal of International and Comparative Law* 113, 118.

under the competence bestowed by a treaty. However, it is worth noting that courts in other European Union member states have treated the Framework Decision as an international obligation rather than purely a matter of European Union Law.[72]

Interpretation of treaties is governed by arts 31-33 VCLT,[73] which are collectively considered to be a single rule.[74] The focus of the majority of the Supreme Court was art 31(3)(b), which allows subsequent practice to be used as a means of interpretation where it establishes the agreement of the parties.[75] On the basis of the use of prosecutors as issuing authorities in some member states,[76] and the failure of any European Union member state to object to their use,[77] the majority concluded that the term 'judicial authority' should be interpreted to include prosecutors.[78] Lord Phillips writing for the majority emphasised that to interpret 'judicial authority' to exclude prosecuting authorities who issue warrants in other European Union member states would make many EAW's unenforceable in the United Kingdom.[79] However, Lady Hale, dissenting, was of the view that there was not sufficient evidence of acquiescence by states who did not name prosecutors as EAW issuing authorities.[80] Critics of the *Assange* decision agree with Lady Hale's conclusion, arguing that subsequent practice should be relied on only if a single undoubted inference can be drawn from the practice.[81] One commentator noted that common law principles of interpretation could have been used to achieve the same result.[82] One commentator defending the approach of the majority, however, argues that the United Kingdom courts have often given glosses to the

[72] Pollicino, above n 41, 1334, 1337.
[73] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[74] Harris and Kakkaiyadi, above n 71, 116; Eirik Bjorgel, 'The Vienna Rules on Treaty Interpretation before Domestic Courts' (2015) 131 *Law Quarterly Review* 78, 82-83. Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26 *European Journal of International Law* 169, 174, describes treaty interpretation under arts 31-33 as a series of communicative assumptions.
[75] *Assange*, [106-109] (Lord Kerr)
[76] Ibid [129] – eleven member states have nominated prosecutors as issuing authorities for the 'accusation' EAW.
[77] Ibid [130-131].
[78] Ibid [67], [76], [106].
[79] Ibid [79]. See also [104] (Lord Kerr).
[80] Ibid [191].
[81] Harris, 119.
[82] Brice Dickson, 'Creativity in the Supreme Court 2011-2012' (2013) 2 *Cambridge Journal of International and Comparative Law* 33 at 34.

VCLT in interpreting treaties which are the basis of domestic legislation.[83] He further defends the application of art 31(3)(b), noting the point raised by Lord Kerr, that the International Court of Justice in the *South West Africa* Advisory Opinion found that even non-uniform practice had probative value.[84]

The dissenting judges in *Assange* looked to the legislative process for adopting the *Extradition Act 2003* rather than to the Framework Decision. The judges writing for the majority denied the persuasiveness of statements made to Parliament.[85] However, Lord Mance emphasised statements indicating that the British government's understanding of the EAW process was that the EAW must be issued by a judicial officer. He noted a statement by Lord Brabazon concerning an early draft of the Framework Decision that would allow a member state to suspend application of the Framework Decision in respect of member states whose processes did not comply with European human rights standards.[86] As a result, Lord Mance thought that the interpretation of 'judicial authority' in art 6 of Framework Decision by the Court of Justice was not beyond doubt, and therefore Lord Phillips' view that the meaning of that term in s 2 of the *Extradition Act 2003* was identical to that in the Framework Decision was incorrect. The *Extradition Act 2003*, in his view, required more effort of interpretation.[87] Lord Mance cited several statements to Parliament promising that a judicial authority for the purposes of the EAW was a judge or magistrate, and discussions whether the term in the Framework Decision was clearly restricted to such officers.[88] He concluded that assurances given to Parliament 'must outweigh any conclusion as to what may or would likely to be the European legal position.'[89] He further concluded that regardless of the meaning of the term in the Framework Decision, the intention of Parliament when enacting the *Extradition Act 2003* was to restrict recognition of the EAW to circumstances where it was issued by a judicial officer and not a prosecuting authority such as the Swedish Prosecution Authority.[90]

If the warrant had not been issued properly, in other words if the EAW framework decision had in fact required a judge or magistrate to issue the warrant, then the detention effected by the warrant would have been arbitrary

[83] Bjorgel, above n 74, 96.
[84] Ibid 99. *Status of South West Africa* [1950] ICJ Reports 128 at 135-136.
[85] *Assange*. See, for example, [160-169] (Lord Dyson).
[86] Ibid [232].
[87] Ibid [244-246].
[88] Ibid [248-259].
[89] Ibid [264].
[90] Ibid [266].

and contrary to art 5 ECHR. Most art 5 cases in the criminal justice process, however, have related to duration of detention without review. Famously, the European Court of Human Rights decided in the case of *Brogan v United Kingdom* that allowing terrorist suspects to be detained for up to a week prior to being brought before a court was a violation of art 5.[91] The International Court of Justice has found that detention preparatory to the expulsion of an alien is contrary to the prohibition on arbitrary detention in the ICCPR and the African Charter of Human and Peoples' Rights where there were numerous irregularities in the procedure and the necessity of detention was not adequately reasoned in the decree ordering detention.[92] These interpretations of the international law right not to be arbitrarily detained suggest that the likely conclusion if the EAW for Assange had not been issued by a 'judicial authority' is that the detention resulting from the extradition request would have been arbitrary and therefore a violation of his art 5 rights.

The judges of the Supreme Court, however, used a variety of sources to examine the right to be free of arbitrary detention as it applies to extradition: the common law, the *Human Rights Act 1998* (UK),[93] and decisions of the European Court of Human Rights. Lord Phillips noted the long history of the recognition of the liberty of the subject in the United Kingdom, including the right of habeas corpus, and that equivalent rights had not been recognised in many other European legal systems until art 5 ECHR.[94] However, the fact that the ECHR bound all European Union countries meant that at the time that the EAW Framework Decision was drafted, powers of arrest were subject to judicial control in all European Union countries.[95] Lord Dyson added that he accepted that the 'EAW system was always intended to comply with the ECHR', noting the preamble to the Framework Decision and its art 1(3).[96]

Lord Phillips rejected arguments that art 5 ECHR required that a judge or similar judicial officer be involved in issuing an EAW.[97] Assange's counsel argued that since 'competent legal authority' in art 5(3) ECHR had been

[91] *Brogan v United Kingdom*, (1988) 145-B Eur Court HCR (ser A).
[92] *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo) [2010] ICJ Reports 648 [75]-[85]
[93] *Human Rights Act 1998* (UK) c 42.
[94] Ibid [33-34].
[95] Ibid.
[96] Ibid [144].
[97] Ibid [73-75]. See similar reasoning at [146-149] (Lord Dyson), deciding at [148] that 'there is no principle of ECHR law which requires decisions to arrest to be made by an impartial judge.'

interpreted to mean an authority exercising judicial power,[98] 'judicial authority' in art 6 of the EAW Framework Decision must bear the same meaning. Lord Phillips rejected this conclusion on the ground that the context of art 5(3) was the review of pre-trial detention rather than the issuance of an arrest warrant. Because this is 'not a stage at which there is any adversarial process between the parties', it is appropriate, in his view, for a prosecutor to act. He did acknowledge that an officer exercising judicial power would be necessary at other stages of the EAW process.[99] Lady Hale thought that despite the fact that art 5(3) did not address arrest, the sense of the term 'judicial' in that paragraph 'indicates a European understanding of the word "judicial"' which would exclude prosecutors.[100] Lord Mance's dissent strikes a middle ground between the positions of Lord Phillips and Lady Hale. He agrees that the art 5 ECHR cases do not deal with arrest, but rather with review of detention after arrest.[101] However, he does not equate an EAW with a domestic arrest warrant. Surrender of a suspect from one state to another is a more intrusive measure, in his view, and therefore may engage human rights more readily.[102]

Lord Mance was also of the view that neither the Court of Justice of the European Union nor the European Court of Human Rights had defined the nature of 'judicial' in this context. He instead relied on common law presumptions to interpret the *Extradition Act 2003* to maximise the protection of individual liberty, although placing emphasis on statements and undertakings by British government ministers during the legislative process.

IV Minister for Home Affairs v Zentai – The Essence of the Crime

The end of World War II and the horrific accounts of prisoners of war triggered the first war crimes trials in Australia.[103] The *War Crimes Act 1945* (Cth) was a revolutionary piece of legal arsenal in Australia, promising a means to prosecute persons retrospectively convicted of war crimes during the war

[98] Ibid [73-74], referring to *Medvedyev v France*, [2010] Eur Ct HR 384.
[99] Ibid [75].
[100] Ibid [192].
[101] Ibid [223].
[102] Ibid [224].
[103] Emmi Okada, 'The Australian trials of Class B and C Japanese war crime suspects, 1945-51', [2009] *Australian International Law Journal* 47, 47.

who had since fled to the sanctuary of Australia's distant shores.[104] A burst of activity under the *War Crimes Act* between 1945 and 51 saw 148 Japanese men executed for their part in the wartime atrocities, with over 900 trials and 644 convictions on various offences.[105] These trials have been criticised as simultaneously too harsh and too lenient, apparently lacking the consistency and legitimacy required under contemporary standards of a fair trial.[106] Ultimately, these experiments in prosecutions of international crimes were to be short-lived. The disproportionate costs of these trials, a lack of resources, and the onset of the Cold War combined with ambivalent government policies to prematurely halt Australia's progress in dealing with war criminals within our territory.[107]

Historically, Australia has a poor record of pursuing Nazi war criminals,[108] and has been given the undesirable label of a 'haven' where it is believed that prosecutions and mutual assistance obligations are ineffectively implemented.[109] By all accounts, Australia appeared to be an alluring destination for suspected Nazi war criminals, with estimates of those living in Australia reaching 450 by 1988.[110] As a tool of prosecution against such immigrants, however, it has so far proved impotent. The legislative amendments made by the Hawke government in 1988 to the *War Crimes Act* were aimed to rectify this situation and cultivate an environment where justice would be seen to be served.[111] It appeared that these changes were too little too late, with three high-profile indictments failing due to issues such as evidentiary difficulties and the infirmity of the accused.[112]

Of course, the *War Crimes Act* is only one facet of Australia's legislative framework, and has been bolstered as concepts of transnational cooperation

[104] The War Crimes Act has been amended several times, notably in 1989 when the retrospective application to new offences such as crimes against humanity, committed by Australian citizens or residents, among other amendments, were introduced.
[105] Okada, above n 103, 51.
[106] Ibid 79.
[107] Michael Carrel, *Australia's prosecution of Japanese war criminals: stimuli and constraints* (PhD thesis, The University of Melbourne, 2005).
[108]Mark Aarons, *War Criminals Welcome -- Australia, a Sanctuary for Fugitive War Criminals Since 1945* (Black, 2001), p 244.
[109] Robert Manne, 'A Case Against the War Crimes Act', in *The Report of the Symposium on the Proposed War Crimes Legislation in Australia,* Captive Nations Council of Victoria, Melbourne, 1988, 6.
[110] According to then Attorney-General Lionel Bowen, who reported this statistic to Cabinet in March 1988: 'War Crimes trials' *The Age* 1 January 2015, 6.
[111] *War Crimes Amendment Act 1988* (Cth), s 3.
[112] Berezovsky, Wagner and Polyukhovich: Ustinia Dolgopol & Judith Gail Gardam, *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff Publishers, 2006), 462.

(such as extradition), international crimes, courts and tribunals have emerged. Most notable of these additional sources are the *Extradition Act 1988* (Cth), which animates Australia's various extradition agreements under national law, and the *Criminal Code Act 1995* (Cth) (particularly as amended by the *Criminal Code Amendment (Offences Against Australians) Act 2002*),[113] which has expanded the scope of state power to prosecute beyond its traditional territorial bounds.

Secondary to the legislative developments over the past seven decades, judicial approaches to the application of international legal norms and treaties have been painfully stilted compared to common law counterparts such as the United Kingdom, Canada and New Zealand. Unlike the United Kingdom, Australian courts have tended not to distinguish between sources of international law when determining how they should affect the common law. Historically, a strong dualist stance has been taken both concerning customary international law – even those rules that are regarded as peremptory norms – and treaty law.[114] Though there have been ebbs and flows, Australian courts have traditionally been highly resistant to the imposition of international law on their terrain. The rationale behind these 'anxieties' has been said by some commentators to reflect a fear of creating instability within our legal system, a staunch protectionist mentality towards our separation of powers and 'the idea that international law is essentially un-Australian.'[115] In a world of 'increasing preoccupation with fundamental human rights',[116] the past two decades have witnessed a turn towards judicial incorporation of such international principles, led by much of the commentary of the Hon Michael Kirby AC CMG during his tenure at the High Court.[117]

This is not to say that Australia has been running full tilt towards embracing this sea change. Landmark decisions such as *Newcrest Mining v*

[113] After the Bali Bombings in 2002, the Howard government amended the Commonwealth *Criminal Code*, inserting new provisions making it an offence to commit certain crimes including murder and manslaughter against Australians travelling abroad, relying on extradition principles between Australia and the repatriating country.

[114] The Hon Michael Kirby AC CMG, 'The common law and international law – a dynamic contemporary dialogue' (2010) 30 *Legal Studies* 30, 44.

[115] Hilary Charlesworth et al, 'Deep anxieties: Australia and the international legal order' (2003) Sydney Law Review 423, 451.

[116] Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of International Human Rights* 27

[117] See e.g. *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; *Croome v Tasmania* [1997] HCA 5.

Commonwealth,[118] where the High Court decided that where the Constitution is ambiguous, it should be interpreted in accordance with international law, have attracted criticism from other High Court Justices. Dubbed 'heretical' by McHugh J,[119] this canon of interpretation still faces resistance from those who cling to the 'shrinking society' of Australian fundamentalism.[120] It is this prevailing stubbornness that is accountable for the majority decision in *Zentai,* the protection of Australian sovereign law rather than the protection of human rights being at the forefront of the majority decision.

The case before the Court involved Charles Zentai, an Australian citizen, who was the subject of an arrest warrant issued by the Hungarian Ministry of Justice in March 2005. The arrest warrant detailed the particulars of the offence for which his extradition was sought, alleged to have occurred during Mr Zentai's service in the Hungarian Royal Army during the Second World War. The particulars of the crime were that on 8 November 1944, Mr Zentai had captured a young Jewish man, Peter Balazs, on whom he and two other soldiers inflicted a fatal attack, before weighting and disposing of the body in the Danube River. The extradition offence was classified as a 'war crime' by the Hungarian authorities, rather than murder.

In considering the extradition request, Australia was governed by three relevant documents: *Extradition Act 1988* (Cth), the Extradition (Republic of Hungary) Regulations[121] and the Treaty on Extradition between Australia and the Republic of Hungary.[122] Operating in tandem with extradition treaties, the *Extradition Act 1988* applies generally to Australia's extradition processes between Australia and all extradition countries,[123] establishing the procedures and conferring powers upon judicial and executive officers in Australia for the extradition of a person from Australia to an extradition country with respect to an extradition offence.[124] The scheme set out by the Act operates in four interdependent stages: '[1] commencement, [2] remand, [3] determination by a magistrate of eligibility for surrender and [4] executive determination (subject to legislative constraints) that the person is to be surrendered.'[125] The

[118] *Newcrest Mining v Commonwealth* [1997] HCA 38
[119] *Al-Kateb v Godwin* [2004] HCA 37.
[120] Charlesworth et al, above n 115, 425.
[121] SR 1997 No. 60 (*Regulations*)
[122] Signed 25 October 1995 [1997] ATS 13 (entered into force 25 April 1997), in *Regulations*, Schedule 1 (*Treaty*).
[123] Declared by Regulations under the Act.
[124] *Extradition Act 1988* (Cth) s 5.
[125] *Zentai,* [44] per Gummow, Crennan, Kiefel & Bell JJ.

Regulations and Treaty are unique provisions governing extradition processes between Australia and Hungary. Like all other extradition treaties ratified by Australia, the Treaty replicates the human rights exemptions that are generally recognised internationally, prohibiting requests connected to racial, religious, national or political ties and requests where the fugitive could face the death penalty.[126]

On 8 July 2005, a notice of receipt of the extradition request was issued by the then Minister for Justice and Customs, following which Zentai was arrested on a provisional warrant and granted conditional bail. When the matter came before a magistrate in August 2008, it was determined that Zentai was eligible for extradition to Hungary, and in November of the following year a ministerial determination was made that he was to be surrendered under s 22(2) of the *Extradition Act 1988*. Of the four stages outlined above, the first three were determined to have been carried out lawfully, although challenges by Zentai's counsel regarding the conferral of powers onto State magistrates under s 19 of the Act flowed up to the High Court, and petitions for review of the magistrate's determination (stage three) were heard by the Federal Court on appeal. It was the fourth stage – the Minister's determination under s 22 of the Act that Zentai be surrendered to Hungary – that was the issue on appeal to the High Court.

The important detail for the court was that Hungary had requested extradition for the offence of war crimes, which had first appeared as a crime in the Hungarian Criminal Code in 1945, subsequent to the alleged incident for which Zentai's extradition was requested.[127] The current definition of war crimes in international law is expansive, and includes grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts 'not of an international character' when they are committed as part of a plan or policy or on a large scale. Importantly, war crimes do not have to be widespread or systematic. As long as the act constituting the offence took place in a situation of armed conflict, even a single prohibited act is covered by this definition. Prohibited acts range from murder and torture, intentional attacks on civilian or other protected buildings, to newer concepts such as sexual slavery, rape and

[126] Charles Colquhoun, 'Human Rights and Extradition Law in Australia' (2000) 6 *Australian Journal of International Human Rights* 101.
[127] Hungarian Criminal Code 1978 Act Ch XI s 158

forced pregnancy.[128]

The issue in *Zentai* turned on whether s 11 of the *Extradition Act 1988* was to be construed as requiring that the offence in relation to which extradition is sought was identified as a distinct offence under Hungarian law at the time the relevant conduct is alleged to have occurred or merely that that alleged conduct constituted an offence (any of the 'prohibited acts' now recognised as a war crime) at the time it was committed.[129]

The Court, in majority, considered the approach to interpreting the Treaty under the VCLT, particularly referring to art 2(1) of the Treaty and the international principle of dual criminality it embodies, in order to contextualise art 2 (5)(a) of the Treaty. Art 2 (5)(a) of the Treaty sets out the permissible circumstances under which extradition may be granted, 'irrespective of when the offence in relation to which extradition is sought was committed, provided that [inter alia] … it was an offence in the Requesting State at the time of the acts or omissions constituting the offence.' This is a further extension of the limitations found in s 22 (3) of the Act, and reflects the general principal in criminal law against retrospective laws referred to as the principle of legality. After employing a highly textual approach to the construction of Art 2 (5)(a), Gummow, Crennan, Kiefel and Bell JJ concluded in favour of a narrow interpretation of the provision, finding that the article should be read with specific reference to the extradition offence, and not simply *any* offence, in conformity with the principle of legality. Heydon J disagreed, arguing that the existence in Hungary's national laws of *any* offence of the same constituent elements would suffice to warrant extradition for the crime of war crimes.[130]

In international humanitarian law, the principle of legality prevents persons from being accused or convicted of a criminal offence on the basis of any act or omission which did not constitute a criminal offence under national or international law at the time of its commission.[131] Neither may a heavier penalty be imposed than that which was applicable at the time the offence was committed. The Inter-American Court of Human Rights in the case of *Castillo Petruzzi v Peru* has stressed that this requires crimes to be classified and described in 'precise and unambiguous language that narrowly defines the

[128]As in the Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 8.
[129]*Zentai*, [17] (French CJ).
[130]Ibid [84] (Heydon J).
[131] International Committee of the Red Cross, Rule 101, *Customary IHL Rules* http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule101

punishable offence.' the principle of legality is recognised in many international legal texts, but there are instances where is does not apply.[132] For example, art 7(2) ECHR provides for an exception 'for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations', with a similar provision in the Art 15(2) ICCPR.[133] Whilst this exception is not recognised within the Treaty in issue in *Zentai*, the concept is not alien to Australian courts. In his dissenting opinion in *Polyukhovich v Commonwealth,* Brennan J observed that the principle of legality 'condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime *unless the crime was a crime under international law* at the time when the relevant act was done.'[134] *Polyukhovich* confirmed the constitutionality of Australia's War Crimes Act and its retrospective criminalisation of acts constituting war crimes. Whilst consensus was not a strong feature of the decision, *Polyukhovich* in many ways marked the onset of Australia's comprehension of the inescapable connection between international and national law.[135]

In *Zentai,* a majority of the High Court held that art 2.5(a) of the Extradition Treaty required that the offence for which extradition was sought had to have existed as an offence in the requesting state at the time at which the acts or omissions alleged to have constituted that offence occurred.[136] This affirmed the Federal Court's conclusion in the preceding appeal that the offence for which extradition was sought was required to be an offence under Hungarian law at the time of the acts alleged to constitute it;[137] it was not enough simply to point to the existence of 'an offence' at the time for which the same acts or omissions might have constituted that offence. Rather curiously, French CJ in his separate opinion not only quoted Brennan J's above observation from *Polyukhovich*, but rejected the application of this exception with the following reasoning:

> No submission was made in this appeal that principles of international law qualifying the proscription of retroactive municipal criminal law had any part to play in the construction of the Treaty. That is perhaps

[132] Judgment of May 30, 1999, Inter-Am Ct HR (ser C) no. 52 (1999)
[133] Art 7(2) ECHR.
[134] (1991) 172 CLR 501 (emphasis added).
[135] Sir Anthony Mason, Speech delivered at the Fiftieth Anniversary of the International Court of Justice, Opening of Colloquium, High Court of Australia, Canberra, 18 May 1996.
[136] *Zentai* [72], (Heydon J).
[137] Ibid [53] (Gummow, Crennan, Kiefel and Bell JJ).

> not surprising as the Treaty is one of general application to a range of offences without distinction between those which might be regarded as crimes against international law and those which might not.[138]

Rather than demonstrating a desire to protect the rights of Zentai, this offhand subordination of the contextual elements to a strict textual interpretation of the Treaty implies little more than a reluctance to engage in a thorough process of interpretation. The European Court of Human Rights would undoubtedly frown upon such efforts, having recognised common law states' progressive development of law by means of judicial interpretation as necessary because '[h]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there … will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.'[139] The refusal to read into the Treaty to overcome the possible oversights of its general wording was, as Heydon J wrote in dissent, a decision that favoured legal technicalities over the pursuit of justice.[140]

Even though the Minister did not bring forth an argument that the exception for international crimes should apply, the nature and purpose behind the development of war crimes as a punishable criminal offence could have been evidence in and of itself that Art 2(5)(a) did not act as a bar against Zentai's legimitate extradition. The concept and definition of 'war crimes' in international law has been greatly broadened and refined since the term appeared in the London Charter,[141] first published on 8 August 1945. Under Principle VI, war crimes also underpinned the Nuremburg Trials and were codified in the Nuremburg Principles *ex post facto*. Controversial at the time, these trials are now lauded for their influence on such developments as the establishment of the International Criminal Court and the formation of international conventions concerning the prosecution of war crimes, genocide and crimes against humanity.

Like Australia, other jurisdictions enacted retrospective legislation after the

[138] I bid [25].
[139] *SW v United Kingdom*, (1995) 335-B Eur Ct HR (ser A) at [36]; Kaing Guek Eav alias Duch, (*Judgement*), (Extraordinary Chambers in the Courts of Cambodia Case No 001/18-07-2007/ECCC/TC, 26 July 2010), 9-10.
[140] *Zentai,* [89].
[141] Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, opened for signature 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945), art 6(b).

war to enable the prosecution of World War II criminals for war crimes. Such legislation exists in the United Kingdom,[142] Canada,[143] and, relevant in this instance, Hungary.[144] As crimes such as murder, torture or civilian attacks generally existed in these jurisdictions prior to the enacting of war crimes laws, the changes brought upon by such legislation had greater effect on the elements of punishable crimes rather than the criminality or degree of punishment accorded to criminal acts. In Hungary, the maximum penalty for murder and war crimes (the death penalty, subsequently amended to life imprisonment) has been consistent across both offences since the introduction of the offence of war crimes.[145]

With these contextual considerations in mind, it is hard to reconcile the court's decision to deny the retroactive application of Hungary's war crimes provisions when such provisions were enacted retrospectively for the very purpose of bringing Nazi war criminals to justice for the atrocities that had been committed during the war. Furthermore, the narrow construction of art 2(5)(a) can only be derived from an opinion formed within our domestic legal system, where retrospective laws are seen as contrary to the rule of law and to our liberal democratic ideologies. In international law, the nuances of retrospectivity have been more readily debated. Similar circumstances to those in *Zentai* presented themselves before the Human Rights Committee in *Westerman v Netherlands,*[146] a case concerning the operation of a retrospective offence under the Military Criminal Code of The Netherlands. In relation to art 15 (2) ICCPR the Committee found that, because 'the acts which constituted the offence under the new Code … were an offence at the time they were committed … the facts of the case [did] not reveal a violation of article 15 of the Covenant.'[147] In *Zentai,* the Court could similarly have applied the broadening words of art 2(2)(a) to come to the same conclusion. Heydon J was the sole voice of the Court to follow this consequential methodology, writing:

> Article 2(2)(a) provides: "[I]t shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence

[142] *War Crimes Act 1991 (UK).*
[143] *Crimes Against Humanity and War Crimes Act 2000* s 11.
[144] Hungarian Criminal Code 1978 Act Ch XI s 158
[145] Transcript of Proceedings, *Minister for Home Affairs v Zentai* [2012] HCATrans 82 (28 March 2012) in Matthew Stubbs, '*Zentai* and the troubles of extradition', (2014) 39 *Monash University Law Review* 894, 906.
[146] Human Rights Committee, *Views: Communication No 682/1996*, 67th sess, UN Doc CCPR/C/67/D/682/1996 (13 December 1999) ('*Westerman v Netherlands*').
[147] *Westerman v Netherlands,* para 9.2.

> within the same category of offence or denominate the offence by the same terminology". That is, it does not matter whether the acts or omissions that Hungary alleges constitute a war crime are placed in the same category as murder under Hungarian law … [or] under Australian law. And it does not matter whether Hungary denominates the intentional assault of a person until he dies by the terminology of a war crime or by the terminology of a murder.[148]

Although it is true that extradition 'has serious implications for the human rights, and in particular for the personal liberty, of the person who is the subject of a request for surrender',[149] the protection that Zentai sought and their Honours evidently granted was pulled out of a hat for no good reason. There was no sound basis for shielding Zentai from facing the Hungarian courts; no case was satisfied that the trial would be unjust or in violation of the accused's rights protected under the Treaty in any way. Reading down the application of Art 2(2)(a), the rest of the Court applied a highly technical and selective approach for reasons that are unfathomable, unless the prioritisation of domestic legal sensibilities over international obligations was at play.

The troubles with *Zentai* did not stop here. The majority conclusion was reached by specific directions that 'the Treaty [wa]s to be interpreted in the light of its text, context and purpose'[150] at the time it was written. They apparently chose to ignore the contextual difficulty of drafting a bilingual document and focussed on a highly restrictive purpose, leaving little but the text to govern their reasoning. The majority in joint judgment settled for the rather unhelpful definition from art 1 of the Treaty that the purpose was 'to give effect to the reciprocal obligations to extradite persons for extraditable offences', whilst French CJ opted for the recital's similarly limited explanation, 'to make more effective the co-operation of the two countries in the suppression of crime.'[151] Neither of these definitions come near to explaining the general purpose of such a bilateral agreement that, for reasons pertaining to legal or linguistic barriers, will often remain only implicit in the text.. As pronounced by Deane J in *Commonwealth v Tasmania (Tasmanian Dam Case)*, '[i]nternational agreements are commonly "not expressed with the precision of

[148] *Zentai* [87].
[149] *Vasiljkovic v Commonwealth* [2006] HCA 40, [33] (Gleeson CJ).
[150] *Zentai* [36].
[151] Regulations, Schedule 1 (Treaty on Extradition between Australia and the Republic of Hungary), Recital.

formal domestic documents as in English law'"[152] for various reasons, not the least because the emphasis or interpretation of specific wording may differ between jurisdictions. The purpose of an extradition treaty is not to explicate the intricacies of both parties' domestic procedures, but as Gleeson CJ wrote in *Vasiljkovic,* to enable 'an adjudication to be made in a foreign place, according to foreign law, in circumstances where Australia has no intention itself of bringing the person to trial for the conduct of which the person is accused.'[153] The contrasting definitions in *Zentai* were restrictively insular, reflecting the reluctance of the Court to surrender to foreign law where any argument, no matter how pernickety, could be levelled against it.

V Comparing *Assange* and *Zentai*

A *Finding Space for Human Rights Arguments*

It is important to note that in both *Assange* and *Zentai*, the range of legal issues considered by the United Kingdom Supreme Court and the High Court of Australia was in each case small in comparison with the range of issues initially presented on behalf of each man. In both cases, several of the issues lost along the way related to human rights, notably the fair trial issues raised in *Zentai*.

The chief point of contrast between these two cases, other than the result, is the level of complexity. *Assange*, due to the European Union law context, was a great deal more legally complex than *Zentai*. From the perspective of human rights protection, however, legal complexity could be an advantage. It allows several entry points for arguments concerning human rights. The *Extradition Act 2003* itself requires that the powers granted therein are exercised consistently with the *Human Rights Act (UK) 1998*.[154] Where there is ambiguity, particularly between different language versions, European Union measures can be interpreted in light of human rights as general principles of law to reach the most human-rights-compliant result.[155] The presumption that Parliament does not intend to legislate contrary to the United Kingdom's international obligations has been used to invoke the ECHR in the pre-*Human Rights Act* era, albeit often unsuccessfully.[156] Finally, as noted by the dissenting judges in *Assange*, there is a common law presumption in favour of liberty of the subject.

[152] *Zentai* [90] (Heydon J).
[153] *Vasiljkovic v Commonwealth* [2006] HCA 40, [34].
[154] *Human Rights Act (UK) 1998* c 42.
[155] *Stauder v City of Ulm* (C-26/69) [1969] ECR 419.
[156] Notably, in *R v Secretary of State for the Home Department, Ex parte Brind*, [1991] 1 AC 696 (HL).

All of these are entry points for arguments about human rights. Despite the multiple potential ways in which human rights can be argued in the context of the EAW, the majority of the Supreme Court did not find that there was a human rights violation in *Assange*, nor did they devote much space to considering the issue.

One key factor that could explain the lack of success of human rights arguments in *Assange* is that the precedential stakes were very high. The sole issue for decision by the Supreme Court was the question of whether the Swedish Prosecution Authority's EAW was issued by a judicial authority as required by the *Extradition Act 2003*, and by the Framework Decision. This provided the possible advantage of moving the argument away from personal controversies surrounding Assange himself, but legally it raised the stakes immeasurably. It was impossible for the Supreme Court to strike down the EAW issued in this case without casting doubt on the entire EAW system, at least as applied in the United Kingdom. Given the ongoing controversy surrounding the EAW,[157] the willingness of the majority to accept the practice of European Union member states as pointing the way to the correct interpretation of 'judicial authority' is unsurprising. While the case law of the Court of Justice of the European Union may suggest that the EAW has reached a level of acceptability in the European Union legal system,[158] the dissenting judgments in *Assange* show that there are still fundamental concerns about the legitimacy of the EAW. Similar concerns had been expressed by the top courts of other European Union member states, but despite the unusually high number of critical judgments from member state courts, neither the judicial nor the political elements of the European Union have addressed the concerns.[159] The result is an uncomfortable truce where no national court has yet rendered the EAW unenforceable, but academic and judicial critics continue to point out the weaknesses of the EAW within a legal system with a formally strong commitment to human rights.

It is worth noting that the United Kingdom has been open to arguments about the potential for extradition to violate human rights, where the case is

[157] As at 2013, the EAW Framework Decision was the most litigated measure under the police and judicial cooperation pillar of the European Union: see Ester Herlin-Karnell, 'From mutual trust to the full effectiveness of EU law: 10 years of the European arrest warrant' (2013) 38 *European Law Review* 79, 79.

[158] Herlin-Karnell, above n 156.

[159] See Pollicino, above n 41, and Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapuntal Principles"' (2007) 44 *Common Market Law Review* 9.

less likely to set a wider precedent. Although not much discussed outside the United Kingdom,[160] within Britain the Gary McKinnon case attracted almost as much attention as that of Julian Assange. McKinnon was accused by United States authorities of illegally hacking into American defence websites.[161] After a decade-long battle in the courts and with the government, McKinnon's extradition was refused by the United Kingdom government in 2012, several months after the *Assange* case was decided. McKinnon suffers from Asperger's Syndrome and his lawyers ultimately convinced the Home Secretary, Theresa May, that standing trial and enduring the sentence likely to be imposed would be a violation of his human rights. Following this case, the Home Secretary's power to consider human rights issues late in the extradition process was transferred to the courts.[162] Although it has been argued that the refusal to extradite McKinnon does set a precedent which should be applied in other cases,[163] moving future decisions to the courts means that similar cases will be considered afresh as questions of law rather than of executive prerogative. But even a Supreme Court decision that conditions like Asperger's Syndrome might make an accused more likely to experience suffering which meets the threshold of inhuman and degrading treatment would not have the disruptive impact that would have resulted from a decision that an EAW issued by a prosecutor does not meet the requirements of the *Extradition Act 2003*.

The *Zentai* decision, on the other hand, related to a very specific issue of the definition of crimes, which while not unique, will not arise regularly. This is particularly the case because the issue arose from the long period of time between the alleged crime and the extradition request. The case against Zentai was marred by a lack of living witnesses, untestable evidence and was, comparatively, of such minor content that these problems appeared to

[160] Magnuson, above n 7, for example, does not mention the case when discussing controversies about the current US-UK extradition treaty.

[161] Owen Bowcott, 'Gary McKinnon: how unknown hacker sparked political and diplomatic storm', *The Guardian* (online), 17 October 2012, <http://www.theguardian.com/world/2012/oct/16/gary-mckinnon-hacker-sparked-storm>.

[162] *Extradition Act 2003* (UK) c 41, s 108, as amended by Schedule 20 of the Crime and Courts Act 2013, 2013 c. 22. The influence of the McKinnon case on this amendment is discussed in Alan Travis, 'Home Secretary Theresa May overhauls extradition laws', *The Guardian* (online), 6 February 2013, <http://www.theguardian.com/politics/2013/feb/06/home-secretary-overhauls-extradition-laws>.

[163] Michael White, 'Gary McKinnon: a case of double standards?' *The Guardian* (online), 17 October 2012, <http://www.theguardian.com/world/blog/2012/oct/17/gary-mckinnon-case-double-standards>.

outweigh the public interest in retribution.[164] Nevertheless, the judgment of the High Court was seen as unsatisfactory by those who had petitioned strongly for the extradition order to be upheld, a position backed by the Australian media.[165] It has been labelled 'the end of the line'[166] in Australia's bid to bring justice to Nazi war criminals, and this is almost certain to be the case.

B *The problematic relationship between domestic and international law*

Extradition is an unusual area of law in the degree to which domestic legal arrangements are predicated on international legal agreements. As a result, questions of how domestic law can and should be interpreted in light of international obligations are likely to arise in difficult cases. In both *Assange* and *Zentai*, the courts had recourse to the VCLT in reaching their conclusions. In both cases, the approach of the court is open to criticism that the judges gave insufficient attention to the features of international law. In *Zentai*, the court failed to consider one aspect of the context of the treaty, that it was negotiated across differing languages and legal cultures, meaning that the text may not be the best way to derive the object and purpose of a treaty. In *Assange*, all the judges reached conclusions about the role of international law without much explanation. In the case of the dissenting judges, they rejected the use of the Framework Decision as a guide for interpretation at all and used only canons of interpretation derived from domestic law. In the case of the majority, they failed explicitly to address the question of why a Framework Decision, as a measure adopted under a treaty, can be interpreted using the rules of treaty interpretation. While, as noted above, commentators on *Assange* disagree about whether the use of the VCLT is defensible in such cases, the court elided over the issue of the international legal status of measures authorised by a treaty but not part of it.

In addition to the issues of how international law is used by domestic courts, extradition has a further significance for international law. It is an essential mechanism for ensuring the effectiveness of transnational and international criminal law. With a renewed concern about the prosecution of war crimes since the institution of international criminal courts and tribunals

[164] Gyorgy Vamos, 'Murder on Arena Avenue: is Charles Zentai Guilty?', in *The Monthly*, No. 43, March 2009, online.
[165] See, for example, Lauren Wilson, 'High Court urged to approve Charles Zentai extradition to Hungary', *The Australian* (online), 28 March 2012.
[166] Nicola Berkovic & Cameron Stewart, 'Charles Zentai case the last Nazi pursuit', *The Australian* (online), 16 August 2012.

since the 1990s, *Zentai* can in some respects be seen as a cautionary tale. The decision is yet another example of inaction by the Australian legal system in participating in the capture of war criminals. In light of the recent and burgeoning crises in countries such as Libya and Syria, it calls into question the future mentality that war criminals may expect of Australia in the future. It would be far from desirable for Australia to be regarded as a sanctuary by war criminals who may expect to escape prosecution or extradition based on legalistic formulations of our international obligations under extradition law. A defence of this proposition is that the prosecution of Nazi war criminals has been a specifically problematic task for Australia given the lengthy time lapse in initiating claims against the accused and the accompanying complications with evidence, ill-health and fair trial requirements. Contemporary cases will presumably be easier to prosecute where the evidence is fresh, witnesses available and the accused cannot hide behind infirmity or old age.[167] On the other hand, victims will always be reluctant to come forward as witnesses where there is a threat of repercussions (for example, where supporters of those on trial are still active) and the historical application of immunities has demonstrated that such cases are not necessarily any more effective. As war crimes cases are highly politically and emotionally charged, it will always be difficult to assess where the balance lies in pursuing justice.

VI Conclusion

We can say, as does Arnell,[168] that the impact of human rights on extradition is less than may be supposed. Despite the fact that the *Assange* and *Zentai* cases both raised significant human rights issues, in neither case was human rights reasoning important to the result. In both cases, the issues before the court of last resort had been narrowed to a single question of interpretation, in one case concerning the issuer of the extradition request and in the other concerning the crime. Despite well-developed international case law on the nature of arbitrary detention (*Assange*) and the principle of legality (*Zentai*), the courts did not use it as a resource for their interpretations. In both cases, but particularly in *Assange*, there were several openings for the use of human rights as interpretative guides. The dissenting judgments in *Assange* made use of one of these openings, the common law presumption against restrictions of liberty,

[167] As did, for example, Augusto Pinochet: see Michael Byers, 'The Law and Politics of the Pinochet Case' (2000) 10 Duke Journal of Comparative and International Law 415, 437-38

[168] Arnell, above n 21.

but ultimately relied primarily on ministerial statements to Parliament to justify a strict interpretation of 'judicial authority'.

The recourse to the VCLT to assist interpretation in both cases is a positive sign given the importance of extradition in transnational and international criminal law regimes. It also reflects the roots of domestic extradition laws in bilateral treaties and other international legal measures. However, it is by no means clear in each case that the courts were using the VCLT in the way the International Court of Justice would. In *Assange*, the Supreme Court stands accused of impermissibly expanding the role of interpretation in light of subsequent practice. In *Zentai*, the High Court of Australia stands accused of too narrowly focussing on the text at the expense of context in deriving the object and purpose of the treaty.

Finally, although each case was surrounded by political controversy, the reason for the differing results in the two cases lies in the legal rather than the political matters at stake. *Zentai* was decided based on interpretation of a single bilateral extradition treaty, and the definition of crimes that was particularly problematic because of the unusually long gap between the commission of the alleged crime and the request for extradition. It is not a precedent that could lead to rejection of a large number of extradition requests. The *Assange* case put the entire EAW system in issue. Had Assange succeeded in persuading the Supreme Court to accept a restrictive definition of 'judicial authority', at the very least the United Kingdom would have been unable to act on EAW requests from a significant number of European Union member states. At most, the entire EAW system could have collapsed. It is understandable that a court seeks to avoid creating that degree of legal uncertainty. Extradition operates on the basis of a combination of diplomatic and judicial action. The judiciary is surely conscious of this, and may well be happier to leave controversies such as the human rights questions hanging over the EAW system to the politicians to resolve.