

CASE NOTE

ZENTAI AND THE TROUBLES OF EXTRADITION

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In Minister for Home Affairs (Cth) v Zentai, the High Court held that the Treaty on Extradition between Australia and the Republic of Hungary prevented Mr Zentai's extradition to face accusations of committing a retrospective war crimes offence. The case is, in all likelihood, the last episode in the history of Australia's contributions to bringing to justice alleged war criminals from the Second World War. The extraordinary time and resources devoted to the ultimately abortive extradition process in Zentai raise questions about the efficiency of the procedures under the Extradition Act 1988 (Cth). Further, given the strict textual interpretation adopted by the Court, amendment to some of Australia's extradition treaties may be required to uphold the key purpose of extradition arrangements, which is to facilitate international cooperation in the apprehension and surrender for trial of those accused of serious criminal offences.

I INTRODUCTION

The High Court in *Minister for Home Affairs (Cth) v Zentai*¹ was required by the provisions of the *Extradition Act 1988* (Cth) to interpret and apply the 1997 *Treaty on Extradition between Australia and the Republic of Hungary*.² Part II of this case note begins by examining the law applicable to Hungary's request for the extradition of Mr Zentai. Part III catalogues the extraordinary extradition process in *Zentai* and reflects on its significance for potential reform of extradition arrangements. Part IV then analyses the Court's interpretation of art 2.5(a) of the *Australia-Hungary Extradition Treaty* which led to the result that Mr Zentai cannot be extradited to Hungary to face investigation for alleged war crimes committed during the Second World War. As will be seen, the Court's strict textual approach to the relevant provisions of the *Australia-Hungary Extradition Treaty* may have significant implications for future extradition cases, and may require remedial amendments to some of Australia's extradition treaties.

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1 (2012) 246 CLR 213 ('*Zentai*').

2 *Treaty on Extradition between Australia and the Republic of Hungary*, signed 25 October 1995, [1997] ATS 13 (entered into force 25 April 1997) ('*Australia-Hungary Extradition Treaty*'), reproduced in *Extradition (Republic of Hungary) Regulations 1997* (Cth) sch 1.

II THE APPLICABLE LAW OF EXTRADITION

The *Australia-Hungary Extradition Treaty* was given effect by the *Extradition Act 1988* (Cth) ('*Extradition Act*') and the *Extradition (Republic of Hungary) Regulations 1997* (Cth).³ The *Extradition Act* prescribes a four-step process for extradition.⁴ First, the country requesting extradition may seek an extradition arrest warrant from a Magistrate under s 12. Second, s 16 requires the Attorney-General to consider whether to issue a notice that will bring on an extradition hearing (a decision not to issue a notice will terminate the extradition process).⁵ Third, s 19 provides for an extradition hearing before a Magistrate who will 'determine whether the person is *eligible* for surrender'.⁶ Fourth, s 22 gives the Attorney-General the final choice to 'determine whether the person *is* to be surrendered'.⁷ The Attorney-General had delegated these powers to the Minister for Home Affairs.⁸

The High Court's decision in *Zentai* concerned the fourth step. Under s 22(2) of the *Extradition Act*, the Minister's power to determine that a person be surrendered was subject to the conditions listed in s 22(3). Relevantly, s 22(3)(e) treated art 2.5(a) of the *Australia-Hungary Extradition Treaty* as 'a limitation, condition, qualification or exception' restricting extradition, and therefore required that the Minister be satisfied that the circumstance did not exist before he could determine that Mr Zentai be surrendered to Hungary. Consequently, the Minister could only determine to extradite Mr Zentai under s 22 of the *Extradition Act*, which picked up art 2.5(a) of the *Australia-Hungary Extradition Treaty*, if the offence alleged against Mr Zentai was 'an offence in the Requesting State at the time of the acts or omissions constituting the offence'.

III THE EXTRADITION OF MR ZENTAI

A Procedural History

On 23 March 2005, Hungary requested that Mr Zentai be extradited to face questioning in relation to an alleged war crime (the murder of a young Jewish man) in 1944.⁹ The war crimes offence had been created in 1945, although murder was a crime in Hungary in 1944.¹⁰ It is not clear why Hungary requested extradition on the basis of the retrospective war crimes offence rather than the

3 These regulations were made under the *Extradition Act* s 11(1)(a).

4 For an explanation of the procedure, see E P Aughterson, *Extradition: Australian Law and Procedure* (Law Book, 1995) 30–1, 183–235.

5 *Extradition Act* s 17.

6 *Ibid* s 19(1) (emphasis added).

7 *Ibid* s 22(2) (emphasis added).

8 *Zentai* (2012) 246 CLR 213, 233 [50] (Gummow, Crennan, Kiefel and Bell JJ).

9 *Ibid* 219 [7]–[8] (French CJ).

10 *Ibid* 219–20 [7]–[9].

offence of murder, which would have been applicable prospectively. On 8 July 2005, the Minister gave notice under s 16 of the *Extradition Act* in relation to Mr Zentai,¹¹ triggering an extradition hearing before a state Magistrate under s 19.

Mr Zentai challenged the Magistrate's power to conduct this hearing, but failed before the Federal Court,¹² and his appeals to the Full Court of the Federal Court¹³ and, by special leave,¹⁴ the High Court,¹⁵ were dismissed. On 20 August 2008, a Magistrate determined that Mr Zentai was eligible for extradition under s 19 of the *Extradition Act*.¹⁶ Mr Zentai then sought a review of the Magistrate's determination before the Federal Court, but the Magistrate's determination was upheld¹⁷ and Mr Zentai's appeal to the Full Court of the Federal Court was dismissed.¹⁸

On 12 November 2009, the Minister determined under s 22 of the *Extradition Act* that Mr Zentai should be extradited to Hungary.¹⁹ Mr Zentai challenged this determination before the Federal Court, and was successful.²⁰ The Minister's appeal to the Full Court of the Federal Court was only successful in part: the Full Court did not displace the ruling against extradition made by McKerracher J.²¹ The Minister's further appeal,²² by special leave to the High Court in *Zentai*,²³ was dismissed.²⁴

- 11 Mr Zentai was arrested and then bailed: see *Zentai v O'Connor [No 3]* (2010) 187 FCR 495, 502 [9]–[11].
- 12 *Zentai v Hungary* (2006) 153 FCR 104. Mr Zentai then obtained orders restraining the Republic of Hungary from further proceeding with his extradition: *Zentai v Hungary [No 2]* [2006] FCA 1735 (30 November 2006). While awaiting a special leave hearing in the High Court, Mr Zentai unsuccessfully sought a further order restraining the Republic of Hungary from prosecuting eligibility proceedings: *Zentai v Hungary* [2007] FCA 842 (29 May 2007).
- 13 *Zentai v Hungary* (2007) 157 FCR 585.
- 14 See Transcript of Proceedings, *Zentai v Hungary* [2007] HCATrans 491 (3 September 2007).
- 15 *O'Donoghue v Ireland* (2008) 234 CLR 599.
- 16 *Zentai* (2012) 246 CLR 213, 220 [10] (French CJ). Mr Zentai obtained bail from the Federal Court that same day: *Zentai v Hungary* [2008] FCA 1335 (20 August 2008).
- 17 *Zentai v Hungary* [2009] FCA 284 (31 March 2009). Mr Zentai then obtained further bail from the Federal Court: *Zentai v Hungary* [2009] FCA 511 (12 May 2009).
- 18 *Zentai v Hungary* (2009) 180 FCR 225.
- 19 *Zentai* (2012) 246 CLR 213, 217–18 [2] (French CJ). Mr Zentai then again obtained bail in the Federal Court: *Zentai v O'Connor* (2009) 263 ALR 511.
- 20 *Zentai v O'Connor [No 3]* (2010) 187 FCR 495; *Zentai v O'Connor [No 4]* [2010] FCA 1385 (10 December 2010). See Stephen Tully, 'Zentai v Honourable Brendan O'Connor [No 3] [2010] FCA 691 (2 July 2010)' (2010) 17 *Australian International Law Journal* 267. In the interim, Mr Zentai had taken action to resist a claim of legal professional privilege over certain documents: *Zentai v O'Connor [No 2]* (2010) 183 FCR 180.
- 21 *O'Connor v Zentai* (2011) 195 FCR 515.
- 22 After a further hearing in the Federal Court regarding stays: *O'Connor v Zentai* [2011] FCA 1162 (5 October 2011).
- 23 Transcript of Proceedings, *Minister for Home Affairs (Cth) v Zentai* [2011] HCATrans 339 (9 December 2011).
- 24 Further detail about the procedural history of the case, and exchanges between representatives of Mr Zentai and the Commonwealth, is given in: *Zentai v O'Connor [No 3]* (2010) 187 FCR 495, 501–6 [4]–[65].

B Reflections on the Extradition Process in Light of Zentai

Mr Zentai's extradition commenced with a warrant issued in Hungary on 3 March 2005,²⁵ and concluded with the High Court's decision in *Zentai* on 15 August 2012, after more than seven years and five months, during which time *nineteen* different Australian judicial decisions were required, in addition to the Minister's notice under s 16 and determination under s 22 of the *Extradition Act*. All of this notwithstanding that 'extradition proceedings do not involve determination of the question of guilt'.²⁶ Indeed, consistent with the predominant 'no evidence' model of extradition in Australia, there was not even a judicial assessment of whether there was a *prima facie* case against Mr Zentai.²⁷

It should be noted that the 2012 amendments to the *Extradition Act*²⁸ do not directly remedy any of the difficulties encountered in *Zentai*. The amendments do clarify provisions regarding bail,²⁹ which was an issue addressed on a number of occasions regarding Mr Zentai,³⁰ but was not a matter that delayed the course of his extradition process.

The extradition process might be improved by bringing within the scope of the Magistrate's s 19 determination the restraints preventing extradition that are currently matters for the Minister's satisfaction under s 22(3)(e). However, the choice to leave this matter to executive discretion rather than judicial decision was deliberate. In 2001, the Joint Standing Committee on Treaties received evidence from commentators in support of transferring these issues to the courts,³¹ but also received evidence in favour of the status quo.³² The Committee reported that 'concerns expressed about the way in which the Act has placed responsibility for scrutiny of human rights protections in the hands of the executive rather than the courts have some force', but in the end merely recommended the issue 'be further explored'.³³

In *Zentai*, the critical issue regarding art 2.5(a) of the *Australia-Hungary Extradition Treaty* would have arisen at an earlier stage in the process if such protections were a matter for the s 19 determination of the Magistrate, rather than for the Minister's satisfaction. However, incorporation of such issues at the

25 *Zentai* (2012) 246 CLR 213, 219 [7] (French CJ).

26 I A Shearer, *Extradition in International Law* (Manchester University Press, 1971) 146.

27 As to the 'no evidence' model of extradition, see, eg, Aughterson, above n 4, 217–23; Gavan Griffith and Claire Harris, 'Recent Developments in the Law of Extradition' (2005) 6 *Melbourne Journal of International Law* 33, 53; *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 619–22 [9]–[15], 626 [23], 631–3 [39]–[41] (Gleeson CJ), 633 [44], 643 [87], 644–7 [91]–[105] (Gummow and Hayne JJ), with whom Heydon J agreed: at 676 [222] ('*Vasiljkovic*'). Cf 651–2 [123]–[124], 658–65 [146]–[169], 667 [179], 672–3 [204]–[210] (Kirby J). See also Sascha Morrell, '*Vasiljkovic v Commonwealth of Australia*' (2007) 29 *Sydney Law Review* 321, 333–6.

28 *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* (Cth).

29 *Ibid* sch 2 pt 3 div 8.

30 See above nn 16–17, 19.

31 Joint Standing Committee on Treaties, Parliament of Australia, *Report 40: Extradition — A Review of Australia's Law and Policy* (2001) 55–6 [4.7]–[4.11].

32 *Ibid* 56–7 [4.12]–[4.16].

33 *Ibid* 57 [4.17].

determination stage would inevitably lengthen the time taken to reach that point in the extradition process. It might also call for evidence to be led, which would be inconsistent with the overall ‘no evidence’ model of extradition.

Zentai is an exceptional case³⁴ where extraordinary resources were devoted to a legal process which in the end concluded without any determination of Mr Zentai’s guilt or innocence. Although Australia’s current system of extradition has been criticised on the basis that it ‘subordinates individual rights to administrative efficiency’,³⁵ the procedural history of *Zentai* reminds us again that the reverse is sometimes true.³⁶ The ‘no evidence’ model of extradition has already been adopted with a view to streamlining the extradition process. It is a difficult question whether further steps could be taken to promote efficiency in the extradition process without compromising individual rights, but nonetheless one worthy of further investigation.

IV THE ZENTAI REASONING: INTERPRETING ART 2.5(a)

As explained above, the critical issue in *Zentai* was whether the war crimes offence was ‘an offence in the Requesting State at the time of the acts or omissions constituting the offence’ given it had been created in 1945, albeit that murder had been a crime in Hungary in 1944.³⁷ Article 2 of the *Australia-Hungary Extradition Treaty*, headed ‘Extraditable Offences’, contained the following relevant provisions:

1. For the purposes of this Treaty, extraditable offences are offences however described which are punishable under the laws of both Contracting States by imprisonment for a maximum period of at least one year or by a more severe penalty. ...
2. For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:
 - (a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

34 One commentary devotes an entire chapter to extradition of alleged war criminals, because ‘[w]ar criminals are *sui generis*’: Geoff Gilbert, *Aspects of Extradition Law* (Martinus Nijhoff, 1991) ch 8.

35 Morrell, above n 27, 338, citing Human Rights and Equal Opportunity Commission, *Submission to the Attorney-General’s Department on the Extradition Review Discussion Paper* (2006) [14.5].

36 As Gilbert has observed,
[t]he delicate balance seen in extradition law between, on the one hand, its provision of mutual assistance in criminal matters at an international level between states and, on the other, its protection of the rights of the fugitive, means that occasionally there will be a conflict and that one party will suffer.

Gilbert, above n 34, 245.

37 *Australia-Hungary Extradition Treaty* art 2.5(a).

- (b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ. ...
5. Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:
- (a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and
 - (b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State.

Article 2.1 states a rule of double criminality,³⁸ which art 2.2 ensures is applied flexibly, taking into account not merely the offence but ‘the totality of the acts or omissions alleged’.³⁹ The purpose of art 2.5(a) is less obvious. The critical issue in *Zentai* was whether this provision permitted extradition if the alleged conduct constituted *an* offence, meaning *any* offence known to law, at the time of it being committed (the broad view); or alternatively, whether extradition was permitted only if *the specific* offence, with which the accused is charged, was in existence at the time of the alleged conduct (the narrow view).

The Minister argued for the broader interpretation, under which art 2.5(a) would not prevent extradition, because Mr Zentai’s alleged conduct constituted murder and was therefore an offence at the time of its occurrence in 1944. However, Mr Zentai advocated the narrower view: given that the war crime alleged against him did not come into existence until 1945, it was not ‘an offence in the Requesting State at the time’ of the acts in 1944, and could not satisfy the requirement expressed in art 2.5(a) of the *Australia-Hungary Extradition Treaty*.

The analysis of the Court’s reasoning in *Zentai* is organised as follows. First, it investigates the Court’s approach to the object and purpose of the *Australia-Hungary Extradition Treaty* as a whole, and more specifically to the object and purpose of art 2.5(a) in the context of international law’s prohibition of retrospective criminal laws. Second, it examines the predominantly textual interpretation of the Justices. Finally, consideration is given to two subsidiary issues: the relevance of the subsequent agreement and practice of the treaty parties to the interpretation of the extradition treaty, and the potential applicability of a presumption in favour of individual liberty.

38 See, eg, Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2011) 465 [8.46]; Shearer, *Extradition in International Law*, above n 26, 137–41; Aughterson, above n 4, 59–69; M Cherif Bassiouni, *International Extradition and World Public Order* (A W Sijthoff-Leyden, 1974) 322–6; Griffith and Harris, above n 27, 37–8; Gilbert, above n 34, 47–8.

39 See, eg, Shearer, *Extradition in International Law*, above n 26, 141–7; Aughterson, above n 4, 69–71, 78–80; Gilbert, above n 34, 48–52.

A The Purpose of the Extradition Treaty and Art 2.5(a)

Australia is a largely dualist nation, following the common law tradition in treating international law as a separate system whose rules are not automatically enforceable in Australia.⁴⁰ However, where international law has been incorporated by legislation, the High Court has endorsed the use of the international law of treaty interpretation in the interpretation of such legislation.⁴¹ This requires an interpretation which takes into account the ‘object and purpose’ of the treaty.⁴²

In *Zentai*, this approach was expressly endorsed by French CJ.⁴³ The purpose of extradition arrangements is reflected in his Honour’s statement that the extradition treaty ‘reflects, according to its recital, the desire of both countries to make more effective their cooperation in the suppression of crime’.⁴⁴ However, as will be seen below, French CJ did not expressly apply this object and purpose to the interpretation of the *Australia-Hungary Extradition Treaty*.

The joint judgment of Gummow, Crennan, Kiefel and Bell JJ merely stated: ‘Consideration of the object and purpose of the Treaty does not assist in ascertaining the meaning of [art 2.5(a)]’.⁴⁵ Their Honours disapproved of North J’s dissent in the Full Court of the Federal Court, which relied on the *Australia-Hungary Extradition Treaty*’s purpose as being ‘to ensure that people are called to account for their wrongdoing’.⁴⁶ Instead, the joint judgment referred to the art 1 undertaking ‘to extradite ... any person ... who is wanted for prosecution by a competent authority for ... an extraditable offence against the law of the other

40 The dualist approach to incorporation is described by Lord Atkin in *A-G (Canada) v A-G (Ontario)* [1937] AC 326, 347: ‘the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action’. See, eg, Hilary Charlesworth et al, *No Country Is an Island: Australia and International Law* (UNSW Press, 2006) 29; I A Shearer, ‘The Relationship between International Law and Domestic Law’ in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 52–3; Triggs, above n 38, 177–9 [4.45]–[4.46]; Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (Oxford University Press, 2005) 406, 426; Alexander Reilly et al, *Australian Public Law* (Oxford University Press, 2011) 216–17, 236–7.

41 See, eg, *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, 202 [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 211 [60] (McHugh J), 232 [136], 234 [142] (Kirby J); D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 43–6 [2.20]–[2.21]; Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 3rd ed, 2011) 175–6 [3.39].

42 *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) (‘VCLT’): ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

43 *Zentai* (2012) 246 CLR 213, 222–3 [17]–[19]. His Honour referred inter alia to: *Shipping Corporation of India Ltd v Gamlen Chemical Co (Asia) Pty Ltd* (1980) 147 CLR 142, 159 (Mason and Wilson JJ), quoting *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 240 (Dawson J), 254 (McHugh J), quoted in *Zentai* (2012) 246 CLR 213, 223 [19]. As G R Kennett SC (for Mr Zentai) had accepted, ‘[o]ne gives the treaty, in its domestic application, the meaning that it would be given if it needed to be construed as a matter of international law’: Transcript of Proceedings, *Minister for Home Affairs v Zentai* [2012] HCATrans 82 (28 March 2012) (G R Kennett SC).

44 *Zentai* (2012) 246 CLR 213, 224 [20].

45 *Ibid* 239 [65].

46 *O’Connor v Zentai* (2011) 195 FCR 515, 521 [27], quoted in *Zentai* (2012) 246 CLR 213, 237 [63] (Gummow, Crennan, Kiefel and Bell JJ). See also at 238 [65].

Contracting State'. On this basis, their Honours indicated that the purpose of the extradition treaty 'is to give effect to the reciprocal obligations to extradite persons for *extraditable offences*'.⁴⁷ It is unclear how this very narrow statement of purpose advances understanding of the text.

The majority's narrow perspective on the purpose of the *Australia-Hungary Extradition Treaty* may be contrasted with the broader understanding of the purpose of extradition displayed in the judgment of Gleeson CJ in *Vasiljkovic*, where his Honour wrote that:

[Extradition] is undertaken for the purpose of enabling ... an adjudication [of guilt or innocence] 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.⁴⁸

Indeed, the positive role of extradition in the promotion of international justice has long been accepted by the High Court. As Barwick CJ observed in *Barton v Commonwealth*, '[t]he co-operation of nations in the surrender of fugitives from justice is a most important aspect of international life'.⁴⁹ The importance of extradition was further noted in *United Mexican States v Cabal*, where Gleeson CJ, McHugh and Gummow JJ warned that: 'In an era where much crime is transnational, the breakdown of international co-operation in apprehending criminals would be disastrous for the peoples of the countries concerned'.⁵⁰ This is not to say that the protection of the rights of individuals in the extradition process is unimportant, but it is a reminder that, as Gummow and Hayne JJ noted in *Vasiljkovic*, quoting from Quick and Garran, extradition treaties and their implementing legislation serve the 'common interest' of 'all civilized communities ... in the administration of the criminal law and in the punishment of wrongdoers'⁵¹ — an object which is obscured by a mere statement that the purpose of the extradition treaty is to extradite persons for extraditable offences.

When interpreting the *Australia-Hungary Extradition Treaty* in *Zentai*, their Honours neglected extradition's role in promoting international cooperation in the enforcement of criminal justice. To the extent that an object and purpose was referred to, it was in the context of art 2.5(a) alone.⁵²

The majority identified the purpose of art 2.5(a) as the prevention of retrospective criminal liability. The joint judgment of Gummow, Crennan, Kiefel and Bell JJ stated: 'Article 2.5(a) reflects the adoption by Australia and Hungary of a policy

47 *Zentai* (2012) 246 CLR 213, 238–9 [65] (emphasis in original).

48 (2006) 227 CLR 614, 629–30 [34].

49 (1974) 131 CLR 477, 483.

50 (2001) 209 CLR 165, 190 [58].

51 *Vasiljkovic* (2006) 227 CLR 614, 633 [45], quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 635.

52 As Young CJ in Eq cautioned in respect of corporations legislation in *Edwards v A-G (NSW)* (2004) 60 NSWLR 667, 681: 'whenever one is construing any particular provision one must be careful not to take one's gaze off the essential purpose [of the Act as a whole] and pay overmuch attention to technical details of wording of individual provisions'. See, eg, Pearce and Geddes, above n 41, 36–40 [2.11]–[2.13].

against the imposition of criminal liability or punishment retrospectively'.⁵³ For French CJ, similarly, art 2.5(a) 'gives practical effect to the general principle against retroactive municipal criminal law'.⁵⁴ Their Honours referred to no authority to establish that this was the purpose of the provision, which may reflect a conclusion that the text alone gave a clear indication of art 2.5(a)'s purpose, notwithstanding that this issue in fact divided the Justices of the Federal Court and High Court.

The following exchanges that occurred at the hearing of *Zentai* (but which are not referred to in the judgments) may provide an insight into their Honours' thinking:

GUMMOW J: ... I suspect Australia now has, and this is one of them, extradition treaties with a number of former totalitarian countries in Europe [...], of which Hungary would be one, made after the collapse of Communism. Is there any evident practice of inserting in those extradition treaties with countries which, under their totalitarian systems, might be expected to have had retrospective criminality, something like 5(a)?

...

MR LLOYD: ... I have provided to the Court ... a reference to countries that have similar treaties in similar terms. ... [I]nsofar as your Honour Justice Gummow asked for a list of totalitarian countries with which we have agreements, this is apropos a more general response as to the countries with which we have agreements.

HEYDON J: Apart from Switzerland they all seem totalitarian.⁵⁵

These exchanges raise the possibility that their Honours concluded that art 2.5(a) was inserted to restrict extradition in the case of formerly 'totalitarian' countries which might have objectionable retrospective criminal laws, although such a conclusion is speculative.

The information before the Court regarding the purpose of art 2.5(a) was limited. Reference was made to the (first ever) report of the Joint Standing Committee on Treaties,⁵⁶ which briefly commented on the 'current group of extradition agreements'⁵⁷ (including the *Australia-Hungary Extradition Treaty*), identifying as 'protections available to potential extraditees'⁵⁸ both the requirement of double criminality and what the report refers to as the 'timing test' which 'requires that the conduct which is subject of extradition must constitute an offence in the

53 *Zentai* (2012) 246 CLR 213, 241 [70].

54 *Ibid* 228 [32]. At first instance in the Federal Court, McKerracher J similarly found that art 2.5(a) was 'directed to excluding ... cases of foreign legislation with retrospective application': *Zentai v O'Connor* [No 3] (2010) 187 FCR 495, 541 [190].

55 Transcript of Proceedings, *Minister for Home Affairs (Cth) v Zentai* [2012] HCATrans 82 (28 March 2012).

56 On the 1996 treaty-making reforms, see generally Anton, Mathew and Morgan, above n 40, 428–43; Donald R Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2011) 186–9; Charlesworth et al, above n 40, 41–8.

57 Joint Standing Committee on Treaties, Parliament of Australia, *First Report* (1996) 9 [2.5].

58 *Ibid*.

Requesting State at the time it occurred'.⁵⁹ This is merely a restatement of the words of art 2.5(a). At its highest, it provides limited support for the provision's purpose as *protecting* potential extraditees.

The lone dissident, Heydon J, did not find that the purpose of art 2.5(a) was to protect individuals from extradition to face retrospective criminal offences. Indeed, his Honour was skeptical about international law's resistance to retrospective criminality more generally:

Counsel for the first respondent referred to the 'general antipathy in international law ... against retrospectivity' — an antipathy which can be somewhat selectively displayed. Analysis should not be diverted by that antipathy in this case. Nor ... by reflections upon the zeal with which the victors at the end of the Second World War punished the defeated for war crimes. The victors were animated by the ideals of the Atlantic Charter and of the United Nations. The *Universal Declaration of Human Rights* was about to peep over the eastern horizon. But first, they wanted to have a little hanging.⁶⁰

On his Honour's last point, it might be noted that objections to the sentences handed down by Australian war crimes trials of Japanese defendants after the second world war often related to the leniency, not harshness, of sentencing.⁶¹ There was comparatively little hanging,⁶² and considerable mercy was shown to those imprisoned.⁶³

The Court's treatment of international law's prohibition of retrospective criminal laws was brief, this purposive approach being subordinated to a textual interpretation of the *Australia-Hungary Extradition Treaty*. However, it is worth further exploring this prohibition, which is stated in art 15 of the *International Covenant on Civil and Political Rights*.⁶⁴ Even setting aside the exception for international crimes in art 15(2) which was not argued in *Zentai* (but might have

59 Ibid 9 [2.6].

60 *Zentai* (2012) 246 CLR 213, 243 [75].

61 See, eg, Emmi Okada, 'The Australian Trials of Class B and C Japanese War Crime Suspects, 1945–51' (2009) 16 *Australian International Law Journal* 47, 79. Okada concludes that '[w]hile the Australian military tribunal meted out some harsh sentences, other cases showed a surprising degree of leniency'.

62 Of 924 Japanese tried by Australian military courts, 280 (30 per cent) were acquitted. Of the 644 convicted, 148 (23 per cent) were sentenced to death, the rest to imprisonment: see Gavin Long, 'The Final Campaigns' in *Australia in the War of 1939–1945: Series 1 — Army* (Australian War Memorial, 1963) vol VII, 583 n 9; D C S Sissons, 'The Australian War Crimes Trials and Investigations (1942–51)' 19–20 <<http://www.ocf.berkeley.edu/~changmin/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf>>.

63 Many of the sentences of imprisonment (221 of 496, or 45 per cent) were for less than 10 years, and in fact only 14 prisoners remained in custody on 4 July 1957 when these final prisoners were released: see Long, above n 62, 583 n 9; Sissons, above n 62, 19–20, 53.

64 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

been relevant,⁶⁵ given the *locus classicus* of the principle it represents is the war crimes judgments at Nuremberg,⁶⁶ there is a good argument that art 15(1) was not breached in Mr Zentai's situation.

Article 15(1) of the *ICCPR* states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence ... at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

This prohibition of retrospective criminal laws implements two fundamental maxims.⁶⁷ First, *nullum crimen sine lege*, meaning that conduct which was legal when it occurred should not be retrospectively criminalised.⁶⁸ Second, *nulla poena sine lege*, meaning that liability to punishment should not be retrospectively increased.⁶⁹ Together, these maxims ensure that no individual is convicted of a criminal offence for conduct which was legal when committed, and that no individual receives a harsher punishment when convicted than applied at the time the offence was committed. Therefore, two critical questions would need to be

65 See Human Rights Committee, *Views: Communication No 960/2000*, 78th sess, UN Doc CCPR/C/78/D/960/2000 (19 September 2003) [9.3] ('*Baumgarten v Germany*'); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) 529–32 [15.16]–[15.18]; Hall, above n 41, 563–4 [11.61].

66 Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 95–6.

67 'Basic concepts of fairness and justice require that one cannot be punished for something which was not a crime at the time it was committed — *nullum crimen sine lege* and *nulla poena sine lege*': Rhona K M Smith, *Textbook on International Human Rights* (Oxford University Press, 4th ed, 2010) 260. See also Joseph and Castan, above n 65, 521 [15.01]; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 2nd revised ed, 2005) 359; Sangeeta Shah, 'Administration of Justice' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 304, 328. On the evolution of these maxims and their application in international criminal law, see generally M Cherif Bassiouni, 'Principles of Legality in International and Comparative Criminal Law' in M Cherif Bassiouni (ed), *International Criminal Law* (Martinus Nijhoff, 3rd ed, 2008) vol 1, 73. These maxims also form the foundation of the equivalent prohibition of retrospective criminal law in the *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 7: see P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 2nd ed, 1990) 359; D J Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) 274; J E S Fawcett, *The Application of the European Convention on Human Rights* (Clarendon Press, 1969) 178; Francis G Jacobs and Robin C A White, *The European Convention on Human Rights* (Clarendon Press, 2nd ed, 1996) 162.

68 This is described as 'a guarantee to individuals that they will not be held accountable ... for actions which were not deemed criminal at the time of commission or omission' in Smith, above n 67, 261. For the comment that it ensures accountability for 'no crime except in accordance with the law', see Joseph and Castan, above n 65, 521 [15.01]. Similarly, Bassiouni says that 'a crime must be sufficiently defined to put people on notice that a particular conduct has been characterized as criminal': Bassiouni, 'Principles of Legality', above n 67, 100. See also Nowak, above n 67, 359–62; Shah, above n 67, 328.

69 This is described as 'no punishment except in accordance with the law': Joseph and Castan, above n 65, 521 [15.01]. Similarly, Nowak says that 'a penalty heavier than the one that was applicable at the time the offence was committed may not be imposed': Nowak, above n 67, 363. For consideration of this principle, see M J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987) 323; Joseph and Castan, above n 65, 524–6 [15.07]–[15.12]; Nowak, above n 67, 363–5; Shah, above n 67, 328.

answered to apply the prohibition of retrospective criminal laws to Mr Zentai's case. First, was Mr Zentai's conduct legal when committed, but then retrospectively criminalised? Second, if not, was any applicable punishment retrospectively increased? If neither of these applies, the prohibition of retrospective criminal law would not apply to Mr Zentai.⁷⁰

In similar circumstances, the Human Rights Committee held art 15(1) of the ICCPR inapplicable in *Westerman v Netherlands*.⁷¹ The author had been charged with a new retrospective offence that did not precisely correspond to a previous offence in force at the time of the conduct. The act when committed by Westerman was criminal (as 'refuses or intentionally fails to obey any official order'), and the act as charged was criminal (as 'refuses or intentionally fails to perform any duty'), but they were clearly different offences: 'the nature of the offence ... was different'.⁷² The Committee found that there was no breach of art 15(1), despite the later offence being different, because the relevant 'acts were an offence at the time they were committed'.⁷³

The resemblance of these facts to *Zentai* is striking: they suggest that where acts are criminal when committed and criminal when convicted, even if the actual offences and their elements differ, there is no violation of art 15(1), so long as there is no increased punishment.⁷⁴ Such was the situation of Mr Zentai: wanted now for a retrospective war crimes offence in respect of conduct that could have been charged as a murder under prospective criminal law. Moreover, both the war crimes and murder offences attracted a maximum penalty of death at the time in Hungary, which had subsequently been converted to a maximum penalty of life

70 In the Federal Court, McKerracher J had used the two maxims to interpret art 2.5(a) of the *Australia-Hungary Extradition Treaty: Zentai v O'Connor* [No 3] (2010) 187 FCR 495, 541–2 [191]. However, his Honour referred only to arts 22 and 23 of the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'), which state the maxims in defining the jurisdiction of the International Criminal Court, before applying the principles more strictly than they are applied under international law, writing that:

This presupposes that the offence of war crime was both clearly defined in the relevant Hungarian written law and that the penalty was publicised in that statute or decree. Both those conditions were absent on 8 November 1944 when the 'crime' was alleged to have been committed.

Zentai v O'Connor [No 3] (2010) 187 FCR 495, 541–2 [191]–[192]. His Honour's approach treats the prohibition of retrospective criminal law as absolute, rather than as directed to ensuring that legal conduct is not retrospectively criminalised and that offences are not retrospectively subjected to increased punishment. A similar approach was taken by Jessup J in the Full Court of the Federal Court, again without reference to any authority on the international human rights prohibition of retrospective criminal laws: *O'Connor v Zentai* (2011) 195 FCR 515, 571 [157]–[158]. It may be that different considerations in respect of the prohibition of retrospective criminal laws arise in the context of extradition, although there is no present authority addressing this point.

71 Human Rights Committee, *Views: Communication No 682/1996*, 67th sess, UN Doc CCPR/C/67/D/682/1996 (13 December 1999) ('*Westerman v Netherlands*').

72 Nowak, above n 67, 364.

73 *Westerman v Netherlands*, UN Doc CCPR/C/67/D/682/1996, 6 [9.2] (emphasis added). See also Joseph and Castan, above n 65, 524 [15.06].

74 See, eg, Nowak, above n 67, 364–5.

imprisonment,⁷⁵ so no greater punishment arose under the war crimes charge than under a charge of murder. To answer the two questions identified above: the conduct was illegal (as murder) when committed, and attracted a penalty of equal severity for either offence. Accordingly, were Mr Zentai to be convicted of the war crimes offence for which his extradition was sought, there would be no breach of art 15(1) of the *ICCPR*.

The Court's use of the object and purpose of the *Australia-Hungary Extradition Treaty* was limited. The Justices did not draw upon extradition's overall purpose of promoting international cooperation in the enforcement of criminal justice. However, the Justices took into consideration the avoidance of retrospective criminal liability in interpreting art 2.5(a), notwithstanding a lack of evidence about the purpose of this provision (beyond the text itself). Moreover, their Honours did not examine whether the international prohibition of retrospective criminal law would be violated; in fact, it is likely that it would not be. Overall, the judgments in *Zentai* made questionable use of object and purpose. In the end, their Honours also derived little assistance from it, instead drawing on this merely as a means to support primarily textual interpretations.

B Textual Interpretations of Art 2.5(a)

The primacy of the text of art 2.5(a) in their Honours' interpretations of the *Australia-Hungary Extradition Treaty* is clear. The joint judgment of Gummow, Crennan, Kiefel and Bell JJ stated:

The *ordinary, grammatical, meaning* of Art 2.5(a) is that extradition is not to be granted unless the Minister is satisfied that the offence in relation to which extradition is sought was an offence in the Requesting State at the time of its alleged commission. If the pronoun 'it' is replaced with the phrase for which it is surrogate, Art 2.5(a) reads 'extradition may be granted ... irrespective of when the offence in relation to which extradition is sought was committed, provided that the offence in relation to which extradition is sought was an offence in the Requesting State at the time of the acts or omissions constituting the offence'.⁷⁶

Their Honours drew support from a comparison of art 2.5(a), which reads 'was an offence in the Requesting State', with the text in art 2.5(b): 'the acts or omissions alleged would ... have constituted an offence'.⁷⁷ Their Honours did not find the

75 The judgment of McKerracher J makes repeated reference to the penalties being 'different': *Zentai v O'Connor* [No 3] (2010) 187 FCR 495, 543 [200], 544–5 [210]–[211]. However, in the High Court this was contradicted:

HEYDON J: What was the penalty for murder under the Hungarian Code?

MR LLOYD: ... my instructions are that it was at the time death, but, neither of them are death now. I think they are both imprisonment for life ...

Transcript of Proceedings, *Minister for Home Affairs v Zentai* [2012] HCATrans 82 (28 March 2012).

76 *Zentai* (2012) 246 CLR 213, 241 [70] (emphasis added).

77 *Ibid.*

use of the phrase ‘an offence’ in both instances to be significant.⁷⁸ Nor were their Honours assisted by the provisions of art 2.2, including (a) ‘it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology’; and (b) ‘the totality of the acts or omissions alleged ... shall be taken into account’, which were found to be ‘pertinent to the application of double criminality’ but of ‘no relevance’ to art 2.5(a).⁷⁹ For Gummow, Crennan, Kiefel and Bell JJ, the text and the purpose of art 2.5(a) prevented extradition to face any charge which did not exist at the time of the conduct said to give rise to it.⁸⁰ Thus, s 22 of the *Extradition Act* prevented Mr Zentai’s extradition to face accusations under a retrospective war crimes law.

French CJ adopted a similar, albeit slightly more flexible, approach. As noted above, his Honour agreed with the joint judgment that the purpose of art 2.5(a) was the avoidance of extradition to face retrospective criminal charges; his Honour similarly rejected the connection between arts 2.2 and 2.5.⁸¹ French CJ also adopted an ‘ordinary grammatical construction’,⁸² but allowed greater flexibility than the joint judgment:

the words ‘it was an offence in the Requesting State’ in Art 2.5(a) can be construed broadly to encompass versions earlier in time of the ‘offence in relation to which extradition is sought’ ... That broad approach will not encompass an offence created after the offending conduct which is qualitatively different from the offence constituted by that conduct at the time that that conduct was committed. ... There is a point at which the offence in the requesting state at the time of the relevant conduct cannot be equated to the ‘offence in relation to which extradition is sought’. Whatever that judgment may be in this case it cannot proceed on the basis that if the conduct of the respondent constituted some species of criminal offence at the time it was committed, that circumstance will be sufficient to support a request for extradition in relation to any species of offence later created by law and retroactively covering that conduct.⁸³

On the facts, because the war crime was created in 1945 and the charged conduct occurred in 1944, and the existent offences (including murder) were all ‘qualitatively different’ from the 1945 war crime and not ‘versions earlier in time’ of it, for French CJ art 2.5(a) of the extradition treaty prevented Mr Zentai’s extradition to Hungary.

Heydon J’s textual interpretation was broader than that of the majority Justices: ‘All that matters under Art 2(5)(a) is that it was *an* offence — not necessarily murder — in Hungary in 1944. [Even] [i]f the conduct was not murder, it was an

78 *Australia-Hungary Extradition Treaty* arts 2.5(a)–(b) (emphasis added).

79 *Zentai* (2012) 246 CLR 213, 241 [68].

80 *Ibid* 240–1 [68].

81 *Ibid* 227–8 [30]–[31].

82 *Ibid* 227 [30].

83 *Ibid* 228 [32]. This was a similar approach to that taken by Besanko J in the Full Court of the Federal Court: *O’Connor v Zentai* (2011) 195 FCR 515, 530–1 [69]–[70].

offence’.⁸⁴ Moreover, Heydon J regarded art 2.2 as relevant to the interpretation of art 2.5.⁸⁵ His Honour said:

the totality of the acts or omissions alleged must be taken into account ... [i]t 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 or omissions alleged’.⁸⁶

A key point of his Honour’s judgment was that the majority adopted an overly technical interpretation of the text.⁸⁷ His Honour remarked:

It is possible to draw attention to incongruities and infelicities in Art 2(5). It is also possible to point to problems which would have been solved if its terms were different. ... An analyst could seek to draw conclusions adverse to the appellants from that disconformity. That type of reasoning is common in linguistic construction. It can be overdone. It is easy for counsel to conduct a minute and leisurely examination of a document years after it was drafted and ingeniously detect flaws in the drafting if it is read one way. ... This is a hypercritical approach. It is reminiscent of the approach criminal defence counsel often take to a summing-up when drafting a notice of appeal.

So far as that type of reasoning has merit, its merit certainly depends on context. The present context concerns a bilateral treaty entered by Australia and Hungary and negotiated by State representatives who, most probably, did not share fluency in a common language. ... As Deane J said ... ‘[i]nternational agreements are commonly “not expressed with the precision of formal domestic documents as in English law”’.⁸⁸

Heydon J therefore found that art 2.5(a) permitted Mr Zentai’s extradition to Hungary to face a charge of war crimes, and would have upheld the Minister’s appeal.⁸⁹

There were three key differences between the Justices in *Zentai*. First, the majority held that avoiding retrospective criminal liability was the purpose of art 2.5(a) of the *Australia-Hungary Extradition Treaty*; Heydon J did not.⁹⁰ Second, the joint judgment adopted a stricter textual interpretation, concluding that ‘an offence’ in art 2.5(a) meant ‘the offence in relation to which extradition is sought’,⁹¹ whereas Heydon J interpreted ‘an offence’ to mean ‘any offence’.⁹² The middle ground on this point was held by French CJ who found only ‘qualitatively different’

84 *Zentai* (2012) 246 CLR 213, 245 [81] (emphasis added).

85 *Ibid* 246–7 [86]–[88].

86 *Ibid* 247 [88].

87 *Ibid* 245 [82].

88 *Ibid* 247 [89]–[90], quoting *Commonwealth v Tasmania* (1983) 158 CLR 1, 261 (Deane J), in turn quoting W Anstey Wynes, *Legislative, Executive & Judicial Powers in Australia* (Law Book, 5th ed, 1976) 299.

89 *Zentai* (2012) 246 CLR 213, 249 [99].

90 *Ibid* 228 [32] (French CJ), 240–1 [68] (Gummow, Crennan, Kiefel and Bell JJ), 243 [75] (Heydon J).

91 *Ibid* 241 [69]–[70].

92 *Ibid* 245 [81].

offences would be caught by art 2.5(a) and not ‘versions earlier in time’ of the same offence.⁹³ Third, only Heydon J regarded the broadening words of art 2.2 as applicable to art 2.5.⁹⁴

Of the differing textual interpretations, Heydon J’s objection to the strict textual approach of the majority is persuasive, particularly when the broadening provisions of art 2.2 are taken into account, and given that the prohibition of retrospective criminal laws which influenced the majority’s approach was arguably not applicable in Mr Zentai’s circumstances.

C An Agreement as to the Meaning of Art 2.5(a)

The High Court in *Zentai* faced a curious argument that the meaning of art 2.5(a) of the *Australia-Hungary Extradition Treaty* could be determined by the conduct of the Hungarian and Australian governments in this case. The Minister argued that Hungary’s request for the extradition of Mr Zentai, and the Minister’s s 22 determination approving extradition, supported the argument that art 2.5(a) did not apply because these events were relevant to its interpretation as an instance of subsequent agreement or practice coming within art 31(3) of the *VCLT*.⁹⁵

Notwithstanding the undoubted status and importance to the international law of treaty interpretation of subsequent agreement and practice,⁹⁶ in this case the

93 Ibid 228 [32].

94 Perhaps the most compelling interpretation of the extradition treaty was that adopted by North J, dissenting in the Full Court of the Federal Court: see *O’Connor v Zentai* (2011) 195 FCR 515, 519–22 [16]–[30].

95 *Zentai* (2012) 246 CLR 213, 238 [64]. *VCLT* art 31(3) provides that, in the interpretation of a treaty: There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ...

96 As Sir Gerald Fitzmaurice observed, ‘the way in which the treaty has actually been interpreted in practice is evidence (sometimes the best evidence) of what its correct interpretation is’: Sir G G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1951) 28 *British Year Book of International Law* 1, 9. Similarly Aust observed that subsequent practice is ‘a most important element in the interpretation of any treaty’: Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2nd ed, 2007) 241. Dörr said it is ‘of utmost importance’: Oliver Dörr, ‘Article 31: General Rule of Interpretation’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 521, 554. Gardiner writes that ‘treaties embody the common understanding of the parties to them. Hence concordant practice of the parties is best evidence of their correct interpretation’: Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 225. See also *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 135–6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 22; Hall, above n 41, 109–10 [2.79]; David Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 7th ed, 2010) 678–9; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 633–4; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984) 135–8; Hazel Fox, ‘Article 31(3)(a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island Case*’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers, 2010) 59, 60–4.

Minister's argument was specious,⁹⁷ as their Honours realised. The Chief Justice wrote:

It may be debatable whether the making of a request for extradition and the accession to that request on the basis of a common opinion about the interpretation of the Treaty requires that opinion to be taken into account in interpreting the Treaty.⁹⁸

As Crennan J had perceptively asked at the hearing:

Just on the practice point, would not practice normally suggest, well, first, consistency in relation to a number of occasions so that both number — repeat occasions and consistency will give rise to a practice? Can you tease a practice out of one instance?⁹⁹

Their Honours were correct to reject the Minister's argument. Under international law, the mere conduct of Hungary in requesting Mr Zentai's extradition, and of Australia in agreeing to it, is not capable of giving rise to 'subsequent practice' within art 31(3). Not only is it clear that "practice" cannot be established by one isolated incident,¹⁰⁰ but '[t]he essence of it is what can be shown to have been done *systematically or repeatedly* in implementation and application of a treaty'.¹⁰¹ Moreover, subsequent practice is not made out by a subjective statement of position in one particular instance, but is relevant only as 'objective evidence of [the parties'] understanding as to the meaning' of a provision established over time.¹⁰²

In *Zentai*, there was no relevant subsequent practice in the interpretation of the *Australia-Hungary Extradition Treaty* to assist in the interpretation of art 2.5(a). The supposed agreement between Hungary and Australia in this case was irrelevant to the interpretation of the extradition treaty as a matter of the international law of treaty interpretation.

D A Presumption in Favour of Liberty?

An alternative perspective on the Court's approach in *Zentai* may be gained from a comment made by French CJ at the hearing:

97 Written submissions filed on behalf of Mr Zentai made this point emphatically: 'In effect, therefore, the Minister seeks to establish the validity of his action by reliance on the action itself; an exercise in both self-levitation and self-empowerment': Charles Zentai, 'First Respondent's Submissions', Submission in *Minister for Home Affairs (Cth) v Zentai*, P56 of 2011, 10 February 2012, 12 [34].

98 *Zentai* (2012) 246 CLR 213, 229 [36].

99 Transcript of Proceedings, *Minister for Home Affairs (Cth) v Zentai* [2012] HCATrans 82 (28 March 2012).

100 Dörr, above n 96, 556. See also Sinclair, above n 96, 137, where it is said that 'practice ... cannot in general be established by one isolated fact or act or even by several individual applications'.

101 Gardiner, above n 96, 226 (emphasis added). Similarly, it must be 'constant and repeated': at 231. Dörr said that it must be 'sufficient to establish a discernable pattern of behaviour' and 'must constitute a sequence of acts or pronouncements': Dörr, above n 96, 556. Similarly, Sinclair said that '[t]he value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent. A practice is a sequence of facts or acts': Sinclair, above n 96, 137.

102 Dörr, above n 96, 554.

the problem is ... you have a treaty which is not expressed with precision, as many treaties are not, and that treaty contains in one of its provisions a construction or choice between two constructions, one of which would result in somebody being arrested, locked up and then sent overseas to be tried, and another of which would not.¹⁰³

One additional explanation of the majority position might be that, in case of ambiguity, their Honours adopted the interpretation in favour of individual liberty.¹⁰⁴

The case, however, was not one to which the presumption that penal provisions are strictly construed¹⁰⁵ should be applied. As the House of Lords has held, the common law presumptions will often be inapposite in the construction of extradition treaties, which are

intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose.¹⁰⁶

Indeed, counsel for Mr Zentai acknowledged the inappropriateness of applying presumptions of statutory interpretation: ‘the people who are negotiating the treaty and drafting it may not have a copy of Pearce and Geddes at their elbow and cannot be taken to have been proceeding according to the common law on presumptions of construction’.¹⁰⁷

Further, as Gleeson CJ explained in *Vasiljkovic*:

Plainly, extradition has serious implications for the human rights ... of the person who is the subject of a request for surrender. ... The interference with personal liberty involved in detention during the extradition process ... and in involuntary delivery to another country and its justice system is not undertaken as a form of punishment. No doubt, to the person involved, some of its practical consequences may be no different from punishment, but the purpose is not punitive. To repeat, the process involves no adjudication of guilt or innocence. It is undertaken for the purpose of enabling such

103 Transcript of Proceedings, *Minister for Home Affairs (Cth) v Zentai* [2012] HCATrans 82 (28 March 2012).

104 See, eg, Pearce and Geddes, above n 41, 297–9 [9.9], 309–10 [9.32].

105 The classic statement of that presumption remains the formulation of Brett J in *Dickenson v Fletcher* (1873) LR 9 CP 1, 7:

Those who contend that the penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.

106 *Belgium v Postlethwaite* [1988] AC 924, 947 (Lord Bridge), quoted with approval in *O'Connor v Zentai* (2011) 195 FCR 515, 519 [12] (North J).

107 Transcript of Proceedings, *Minister for Home Affairs (Cth) v Zentai* [2012] HCATrans 82 (28 March 2012) (G R Kennett SC). McKerracher J in the Federal Court had, however, relied upon the presumption against retrospective operation: *Zentai v O'Connor [No 3]* (2010) 187 FCR 495, 541 [189], 542 [193].

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.¹⁰⁸

Extradition laws do not themselves serve a purpose of punishment, but exist instead ‘to restore fugitive criminals to the jurisdiction of a court competent by municipal and international law to try them’.¹⁰⁹ It is not clear whether any presumption in favour of individual liberty actually informed their Honours’ interpretations in *Zentai*; it is, however, likely that the presumption itself is not applicable in the context of extradition.¹¹⁰

E Conclusion: Art 2.5(a) Prevents the Extradition of Mr Zentai

The majority of the High Court concluded that Mr Zentai could not be extradited to Hungary because the war crimes offence for which he was wanted for questioning came into existence in 1945 and was thus not ‘an offence in the Requesting State at the time of the acts or omissions constituting the offence’, notwithstanding that the alleged conduct would have been undoubtedly criminal as murder. This interpretation was based on a reading of the text and upon an understanding of the purpose of art 2.5(a).

The Court’s reliance on a strict textual interpretation, its failure to consider the relevance of the purpose of extradition arrangements as a whole, and its use of the arguably inapplicable international law prohibition of retrospective criminal law in the interpretation of art 2.5(a) are all matters of concern regarding the approach taken. Their Honours were, however, correct to reject the Commonwealth’s argument that there was an agreement that art 2.5(a) did not apply in this case, which was not a legitimate invocation of the use of subsequent agreement and practice in the international law of treaty interpretation.

V CONCLUSION

The High Court’s dismissal of the Minister’s appeal in *Zentai* meant that Mr Zentai would not be extradited to Hungary to face war crimes charges. The decision in *Zentai* is a legal milestone: in all likelihood it brings to an end Australia’s contributions to bringing to justice alleged war criminals from the Second World

108 *Vasiljkovic* (2006) 227 CLR 614, 629–30 [34] (Gleeson CJ).

109 Shearer, *Extradition in International Law*, above n 26, 67. See also Aughterson, above n 4, 33.

110 The Court in *Oates v A-G (Cth)* (2003) 214 CLR 496 was asked to apply the presumption in the context of extradition, but found it inapplicable on the facts: at 513 [45] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ). The Court did not indicate whether it could apply to extradition more generally.

War — leaving a controversial record.¹¹¹ Curiously, the Court's decision has the practical effect that Australia cannot extradite Mr Zentai to face a charge of war crimes created in Hungary in 1945, although Australia could itself charge Mr Zentai (over the same conduct) with a war crimes offence created in 1988,¹¹² the validity of which was upheld by the High Court in *Polyukhovich*.¹¹³

Zentai has a number of important consequences. First, the extraordinary time and resources devoted to the extradition process raise, once again, the issue of whether Australia's extradition arrangements require reforms to promote efficiency. At present, the human rights protections contained in extradition treaties fall to be considered by the Minister under s 22 of the *Extradition Act*. It may be appropriate to make these matters part of the s 19 judicial determination so that they are resolved earlier in the extradition process.

Second, the strict textual interpretation that 'an offence' in art 2.5(a) means *the* specific offence for which extradition is sought has implications for all similarly-drafted extradition treaties. Under these treaties, no person will now be extradited to face trial for a retrospective criminal offence, even if the offence is only technically different from existing offences. In light of *Zentai*, the Commonwealth may need to consider amendments to the relevant treaties.

There is considerable resonance of Deane J's caution in *Riley v Commonwealth* that the double criminality rule in extradition law should not be applied to the detriment of the overall purpose of the extradition regime, lest its utility in protecting the rights of the accused

be outweighed by the impediment which it represents to the advancement of criminal justice if its content is defined in over-technical terms which would preclude extradition by reason of technical differences between legal systems, notwithstanding that the acts alleged against the accused involve serious criminality under the law of both requesting and requested states.¹¹⁴

Mr Zentai was accused of unlawful killing, albeit as a war crime rather than murder. It was nonetheless one of the most serious crimes in both Australia and

111 On this point, Efraim Zuroff, Israeli director of the Simon Wiesenthal Centre claimed: 'In practical terms, it signals a dismal conclusion to Australia's totally unsuccessful efforts to bring to justice any of the numerous Nazi war criminals who found refuge in the country': Simon Wiesenthal Centre, 'Wiesenthal Center: Decision to Block Extradition of Zentai to Hungary for War Crimes Seals Australia's Total Failure to Bring Nazi War Criminals to Justice' (Press Release, 15 August 2012) <<http://www.wiesenthal.com/site/apps/nlnet/content2.aspx?c=lsKWLBpJLnF&b=4441467&ct=12110281>>.

112 *War Crimes Act 1945* (Cth) s 9, amended by *War Crimes Amendment Act 1988* (Cth) s 5. At first instance in the Federal Court, McKerracher J had accepted Mr Zentai's argument that art 2.5(a) was inconsistent with Australia's attitude against retrospective criminal law, and referred to the non-retrospective war crimes offences enacted prior to the entry into force of the *Rome Statute: Zentai v O'Connor* [No 3] (2010) 187 FCR 495, 543 [202]. Strangely, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*') was not discussed in this context.

113 (1991) 172 CLR 501. There had, however, been an assessment by the Commonwealth Director of Public Prosecutions, who had declined to prosecute Mr Zentai in Australia because 'without any testimony from living witnesses, a prima facie case did not exist under the *War Crimes Act 1945* (Cth)': Tully, above n 20, 269.

114 (1985) 159 CLR 1, 17.

Hungary at all relevant times. The majority's interpretation of art 2.5(a) of the *Australia-Hungary Extradition Treaty* undoubtedly protected Mr Zentai from what he feared would be an unfair trial in Hungary.¹¹⁵ However, it achieved this result based on an overly technical interpretation of the extradition treaty which failed to take into account the important role of extradition in facilitating international cooperation in the apprehension and surrender for trial of those accused of serious criminal offences.

115 See, eg, Tully, above n 20, 270; *Zentai v O'Connor [No 3]* (2010) 187 FCR 495, 551–72 [260]–[321].