

JULIAN ASSANGE, DAVID HICKS AND WHETHER CITIZENS HAVE RIGHTS TO LAWFUL CONSIDERATION OF REQUESTS FOR DIPLOMATIC PROTECTION

MICHAEL HEAD*

This article examines insufficiently explored questions about whether—as a matter of Australian domestic law—a citizen has the right to seek diplomatic protection from the Australian government and to have that application determined lawfully. It does so primarily by considering the possible precedent set more than a decade ago by the David Hicks case and asking whether Julian Assange may have been unlawfully denied diplomatic protection. Australian governments have declined to intervene with the British and United States authorities to protect Assange, an Australian citizen, from being extradited to the United States on charges under the Espionage Act 1917 (US). This is despite evidence that his human rights may be being violated. In particular, United Nations bodies have ruled his detention to be arbitrary and amounting to psychological torture. Moreover, there appear to be defects in the legal proceedings, including violations of lawyer-client confidentiality. These facts could bring Assange’s case within the precedent arguably set by the Hicks case, which decided that the government had a duty to consider an application by an Australian detained in the US military facility at Guantanamo Bay for diplomatic intervention if his human rights were being violated ‘clearly’, and to consider that application lawfully, that is, without irrelevant considerations or improper purpose.

* Professor Michael Head is an academic and lecturer at Western Sydney University, Australia.

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I INTRODUCTION

This article examines an insufficiently explored issue: Whether Australian governments have a duty to lawfully consider an application by an Australian citizen for diplomatic protection where 'clear' violations of internationally-recognised human rights are allegedly occurring. It primarily examines that question through the prism of the David Hicks and Julian Assange cases.

Successive Australian governments have offered the WikiLeaks founder only consular assistance. Given the outcome of the Hicks case, the following question arises: Have

Australian governments unlawfully declined to consider, or rejected on unlawful grounds, intervening with the British and United States authorities to seek the release of Assange, an Australian citizen, or protect him from being extradited to the United States to face charges under the *Espionage Act 1917* (US) ('US Espionage Act')?

This article considers whether Assange's case could come within the precedent arguably set by the Hicks ruling in 2007. In that case, the Federal Court decided that the government had a duty to consider an application by Hicks, an Australian citizen detained in the US military facility at Guantanamo Bay, for diplomatic intervention if his human rights may be being clearly violated, or if he were subject to a procedure contrary to international law, and to consider that application lawfully, that is, without irrelevant considerations or improper purpose.¹

This article then considers whether, on the facts of Assange's case, the government has unlawfully failed to consider diplomatic intervention, on the grounds of relevant/irrelevant considerations or improper purpose, perceived bias or unreasonableness, at least in the sense of discrimination.

Any intervention would be required only if Assange's human rights may be being clearly violated. Arguably, evidence exists. Two United Nations bodies have ruled his detention to be arbitrary and amounting to psychological torture. The UK and US proceedings against Assange also contain apparent defects, such as violations of lawyer-client confidentiality, which could constitute breaches of human rights or procedures contrary to international law.

II AUSTRALIAN GOVERNMENTS HAVE OFFERED ONLY CONSULAR ASSISTANCE

Like each of its predecessors since 2010, the current Liberal-National government has rejected calls to use any applicable legal and diplomatic powers to intervene on behalf of Assange to prevent his extradition to the United States. Rather, the government has offered him only consular assistance, insisting that it cannot intervene in Assange's legal proceedings. In response to Assange's arrest in April 2019, Prime Minister Scott Morrison said: 'It has got nothing to do with' Australia and 'it is a matter for the US'.²

¹ *Hicks v Ruddock* (2007) 156 FCR 574.

² SBS News, 'PM says no special treatment for Assange as his legal team vows to fight extradition', *SBS*

Prime Minister Morrison reiterated the government's stance in a published letter to Assange supporter, actress Pamela Anderson, on 20 November 2019. On this occasion, the prime minister referred to the UK as the relevant foreign government. Morrison wrote:

The Australian government continues to monitor Mr Assange's case closely, as it would for any other Australian citizen in detention overseas... Beyond providing consular assistance, it is important to note that Australia has no standing and is unable to intervene in Mr Assange's legal proceedings.³

It is true, as a matter of international law, that states do not have a right of diplomatic protection until local remedies before judicial or administrative courts or bodies are exhausted. Discussion of international law and Assange's possible recourse to it is beyond the scope of this article.

However, it must be noted there are exceptions to this rule for 'no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress'.⁴ Judicial authorities support the application of those exceptions where the local courts are notoriously lacking in independence or there is a consistent and well-established line of precedents adverse to the alien.⁵ Article 19 of the Draft Articles of the International Law Commission on Diplomatic Protection also recommends that states should give 'due consideration to the possibility of exercising diplomatic protection especially when significant injury has occurred'.⁶ Moreover, the content of a state's right of diplomatic protection has developed in recent times,⁷ and may be augmented by treaties, including consular agreements, mutual legal assistance treaties and prisoner transfer agreements.

News (11 April 2019) <<https://www.sbs.com.au/news/pm-says-no-special-treatment-for-assange-as-his-legal-team-vows-to-fight-extradition>>.

³ Steve Jackson, 'Scott Morrison responds to Pamela Anderson's Julian Assange plea', *The Australian* (online at 26 November 2019) <<https://www.theaustralian.com.au/nation/scott-morrison-responds-to-pamela-andersons-julian-assange-plea/news-story/ff122bb5d32842ee9fd630e188945e9d>>.

⁴ Article 15(a) of The Draft Articles of the International Law Commission on Diplomatic Protection <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf>; John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' [2005] *AUYrBkIntLaw* 6; (2005) 24 *Australian Year Book of International Law* 75.

⁵ The Draft Articles of the International Law Commission on Diplomatic Protection (n 4) 47.

⁶ *Ibid* 53.

⁷ See International Law Commission, *Report of the International Law Commission*, UN GAOR, 58th sess, Supp No 10, UN Doc A/61/10 (1 May 2006) 13–100.

As explored below, apparent defects in the UK and US proceedings could raise questions about effective redress. But whether or not Australian governments have a strict legal right to intervene in Assange's extradition proceedings, it does not preclude Australian governments from exercising diplomatic and political means of intervention. Suffice to say also that Australian courts have recognised that proposition. Citing authorities in customary international law, Finkelstein J stated in *Tji, Lay Kon v Minister for Immigration & Ethnic*:⁸

[I]f a person has been injured in breach of international law, whether of a convention or a principle of customary international law, the state of nationality of that person has standing to intervene on behalf of its national. Diplomatic protection may be exercised by amicable or non-amicable means. It may be exercised informally such as by negotiation or mediation, or more formally, by international inquiry or arbitration or by litigation in courts such as the International Court of Justice.

Exercising this right, the Australian government offers consular services to its citizens arrested and imprisoned abroad, including visiting the prisoner, discussing 'justified and serious complaints about ill-treatment or discrimination with the local authorities',⁹ raising medical issues with local authorities, monitoring court trials, and possibly attending as an observer. These services do not extend to seeking to protect a citizen from punitive or unlawful detention or legal proceeding.¹⁰

In the past, however, Australian governments have secured the release of Australian citizens or residents facing political charges in other countries, including David Hicks who had been imprisoned by the US government at Guantanamo Bay, Cuba. In 2007, the Howard government intervened to ask the US government to release Hicks, albeit as part of an agreement that required Hicks to plead guilty to a minor terrorist-related charge (which was later annulled) and serve six months imprisonment in an Australian jail.¹¹

⁸ [1998] FCA 1380; 158 ALR 681.

⁹ 'Fact sheet: Arrested or jailed overseas', *smartraveller.gov.au* (Web Page) <<https://www.smartraveler.gov.au/consular-services/resources/arrested-jailed-overseas-factsheet>>.

¹⁰ Sangeetha Pillai, 'The rights and responsibilities of Australian citizenship: A legislative analysis' (2014) 37 *Melbourne University Law Review* 736, 769.

¹¹ Timothy McCormack, 'David Hicks and the Charade of Guantanamo Bay' (2007) 8 (2) *Melbourne Journal of International Law* 273.

Not all Australian citizens facing criminal proceedings, by any means, have received such assistance.¹² However, apart from Hicks, whose case is examined below, other well-known instances include:

- James Ricketson, a documentary filmmaker, was convicted of espionage charges in Cambodia. He was released in 2018 after the Liberal-National government made 'high-level' diplomatic representations on his behalf.
- Peter Greste, an Australian journalist working for *Al Jazeera*, was detained by Egypt's military dictatorship and found guilty of 'terrorism' offences. He was freed after Liberal-National government action in 2015.
- Melinda Taylor, a lawyer who was appointed by the International Criminal Court to advocate on behalf of Saif al-Islam Gaddafi in 2012, was arrested by a 'rebel' government and accused of spying. The Labor government's Foreign Minister Bob Carr personally flew to Tripoli to secure her release and return to Australia.¹³

In addition, a non-citizen asylum seeker resident in Australia was freed from detention as the result of intervention by Prime Minister Morrison's government in 2019. To secure the release of footballer Hakeem al-Araibi, the Prime Minister wrote twice to the Thai prime minister. Both governments had been under public pressure to release al-Araibi who had been granted asylum in Australia and claimed his life was at risk if he were returned to Bahrain.¹⁴

These cases demonstrate that the Australian government has a range of diplomatic powers that could be employed in Assange's defence. However, the evidence indicates that the opposite has occurred with regard to Assange. In fact, Australian governments have supported efforts by US governments to arrest Assange and extradite him. In 2010, Prime Minister Julia Gillard condemned WikiLeaks' publication of thousands of secret US

¹² See Klein, Natalie, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of Its Citizens Abroad' (2011) 35(1) *Melbourne University Law Review* 134.

¹³ Nick Baker, 'The WikiLeaks editor-in-chief wants Scott Morrison to help bring Julian Assange home', *SBS News* (online at 3 December 2019) <<https://www.sbs.com.au/news/the-wikileaks-editor-in-chief-wants-scott-morrison-to-help-bring-julian-assange-home>>.

¹⁴ Benedict Brook, 'Hakeem al-Araibi released as extradition proceedings dropped', *news.com.au* (online, 11 February 2019) <<https://www.news.com.au/sport/sports-life/hakeem-alarabi-set-to-be-released-as-extradition-proceedings-dropped/news-story/6c9c68b07b8f52d5ab39e6f61efae943>>.

documents exposing war crimes in Afghanistan and Iraq, and US diplomatic intrigues around the world as ‘illegal’ and ‘grossly irresponsible’.¹⁵ Attorney-General Robert McClelland said Australia was providing ‘every assistance’ to US authorities in their investigation.¹⁶ The Gillard government established a military, intelligence and departmental taskforce to investigate whether Assange could be convicted of any crime under Australia law, and may have concluded that he could not.¹⁷

In February 2020, Mat Kimberley, the assistant secretary for consular operations at the Department of Foreign Affairs and Trade (DFAT), outlined the current government’s position. Replying to several open letters from doctors to the government, his letter rejected the United Nations Special Rapporteur on Torture Nils Melzer’s findings that Assange is being subjected to psychological torture; dismissed the doctors’ professional opinion that Assange has not received adequate medical care; and said the government was confident that Assange would receive ‘due process’ in the legal proceedings in both the UK and US.¹⁸

III THE RELEVANT BACKGROUND TO THE US EXTRADITION APPLICATION

In 2010, under Assange’s editorship, WikiLeaks began publishing more than two million leaked internal US documents, including videos, diplomatic cables and State Department files. The documents included 91,000 files on the war in Afghanistan, 391,000 files on the war in Iraq, 251,287 US diplomacy cables and 779 files regarding Guantanamo Bay detainees. Some of these files were published by the *New York Times*, the *Guardian*, *Der Spiegel*, the *Sydney Morning Herald* and other well-known media outlets around the world, which partnered with WikiLeaks, and some have been cited in courts and scholarly works.¹⁹

¹⁵ News.com.au, ‘Julian Assange bids to sue Julia Gillard for defamation over WikiLeaks comments,’ news.com.au (online, 8 October 2012)

<<https://www.news.com.au/national/assange-bids-to-sue-gillard-for-defamation/news-story/132a6b415fd8bbd71bc1265577f87fb3>>.

¹⁶ Josh Gordon, ‘PM has betrayed me: Assange’ *Sydney Morning Herald* (online, 5 December 2010)

<<https://www.smh.com.au/technology/pm-has-betrayed-me-assange-20101204-18ks8.html>>.

¹⁷ Dylan Welch, ‘Government considered Assange treason charge’ *Sydney Morning Herald*, (online, March 12, 2011) <<https://www.smh.com.au/technology/government-considered-assange-treason-charge-20110311-1br8n.html>>.

¹⁸ Oscar Grenfell, ‘Doctors condemn Australian government’s refusal to defend Julian Assange’ *World Socialist Web Site* (online, 19 March 2020) <<https://www.wsws.org/en/articles/2020/03/19/assam19.html>>.

¹⁹ Julian Assange et al, *The WikiLeaks Files* (Verso, 2015), 1-11.

According to a summary published by WikiLeaks, the documents raised serious allegations, including:

[T]hat the United States has bombed civilian targets; carried out raids in which children were handcuffed and shot in the head, then summoned an air strike to conceal the deed; gunned down civilians and journalists; deployed 'black' units of special forces to carry out extrajudicial captures and killings; side-stepped an international ban on cluster bombs; strong-armed the Italian judiciary over the indictment of CIA agents involved in extraordinary rendition; engaged in an undeclared ground war in Pakistan; and tortured detainees at Guantanamo Bay, few of whom have ever been charged with any crime.²⁰

For these publications, Assange received numerous international journalism awards, including the 2011 Walkley Award for most outstanding contribution to Australian journalism.²¹ However, US government figures and politicians denounced the WikiLeaks' publications. Secretary of State Hillary Clinton called the Wikileaks disclosures 'an attack on the international community' that endangered innocent people.²² Republican Congressman Peter King asserted that the publication of classified diplomatic cables was 'worse even than a physical attack on Americans' and that Wikileaks should be officially designed as a terrorist organisation.²³

Similar statements were made in 2017, when WikiLeaks released thousands of pages of documents describing software tools and techniques used by the Central Intelligence Agency (CIA) to break into smartphones, computers and internet-connected televisions. In his first speech as director of the CIA, Mike Pompeo, who later became US Secretary of State, attacked WikiLeaks as a stateless hostile intelligence unit.²⁴ Such remarks could be

²⁰ Ibid 74-5.

²¹ Joe Lauria, 'Julian Assange Wins 2020 Gary Webb Freedom of the Press Award' *Consortium News* (online, 10 February 2020) <<https://consortiumnews.com/2020/02/10/julian-assange-wins-2020-gary-webb-freedom-of-the-press-award/>>.

²² Katie Connolly, 'Has release of Wikileaks documents cost lives?', *BBC News* (online, 1 December 2010) <<https://www.bbc.com/news/world-us-canada-11882092>>

²³ David Samuels, 'The Shameful Attacks on Julian Assange', *The Atlantic* (online, 3 December 2010) <<https://www.theatlantic.com/international/archive/2010/12/the-shameful-attacks-on-julian-assange/67440/>>.

²⁴ Matthew Rosenberg, 'Mike Pompeo, Once a WikiLeaks Fan, Attacks It as Hostile Agent', *New York Times* (online, 13 April 2017) <<https://www.nytimes.com/2017/04/13/us/politics/mike-pompeo-cia-wikileaks.html>>.

seen as prejudicing the prospect of a fair trial for Assange.

IV THE AUSTRALIAN GOVERNMENT'S POSSIBLE PROTECTIVE DIPLOMATIC DUTY

The legal and diplomatic options potentially available to Australia to intervene to protect citizens imprisoned abroad were illustrated by the case of David Hicks, an Australian citizen who was detained by the United States in Guantanamo Bay for six years.²⁵ Confronted by growing public opposition to the treatment of Hicks, the Australian government sought a range of assurances from the US regarding his treatment.²⁶ These included that the United States would not seek the death penalty in Hicks' case, that Australia would seek his extradition to Australia to serve any sentence, that Hicks would have confidential access to his lawyer, and that Australian officials would be permitted to monitor his trial.²⁷ Ultimately, the two governments agreed to repatriate Hicks to Australia, albeit subject to a nine-month imprisonment.

A The Possible Hicks Precedent

During the six-year US detention without trial of David Hicks at Guantanamo Bay, concerns were raised about the human rights violations committed against him, regarding due process rights in military confinement and trials, as well as the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

In *Hicks v Ruddock* (2007) 156 FCR 574 ('*Hicks*'), Hicks sought a writ of habeas corpus instructing the Australian government to ask the US authorities to release him. Hicks also applied for an order that the government acted on irrelevant considerations and for improper purposes in refusing to request his release.

The law of justiciability, which previously could have barred such a legal challenge to an executive decision not to intervene, has become more fluid in recent years, particularly when the conduct of foreign affairs involves alleged violations of human rights. Thus, in *Abbasi v Secretary of State* [2002] EWCA Civ 1598 ('*Abbasi*'), the English Court of Appeal

²⁵ For a discussion of this and other significant cases, see Klein (n 12) 134.

²⁶ See Mason, Sir Anthony; Lindell, Geoffrey, 'Detainee 002: The Case of David Hicks by Leah Sales' (2008) 9(2) *Melbourne Journal of International Law* 515.

²⁷ Klein (n 12) 164.

was prepared to consider an application for relief by an English citizen detained at Guantanamo Bay. Their Lordships said the 'forbidden area' of foreign policy previously identified in the *Council of Civil Service Unions* case could be impinged upon where 'a clear breach of a fundamental human right' occurred.²⁸

Tamberlin J followed this approach in *Hicks*. He rejected a government application to have Hicks' case summarily dismissed on the grounds that it had no reasonable prospects of success. The judge rejected the proposition that courts could not interfere in negotiations between two countries. Tamberlin J stated:

The concept of a 'forbidden area' arguably states the position far too generally to be applied at face value and such a broad proposition will not readily apply in Australia where executive power is vested by and subject to the limitations spelt out in s 61 of the Australian Constitution.²⁹

As in *Abbasi*, Tamberlin J couched his judgment in terms such as 'a clear breach of international law, particularly in the area of human rights' and 'the fundamental right to have cause shown as to why a citizen is deprived of liberty' by procedures that 'may be found to be contrary to the requirements of international law'.³⁰ Tamberlin J noted that whereas *Abbasi* had been interned for eight months, the injustice in *Hicks*' case 'could be seen to be substantially greater', given his internment for over five years.³¹

Some two weeks after Tamberlin J's decision, an agreement was struck whereby Hicks pled guilty to a minor US military charge in return for being repatriated to Australia to serve nine months' imprisonment. The fact that this agreement was made suggested that the government's legal advice indicated that it could have lost the case if it had proceeded, although the pressure of public opinion was no doubt another factor.³²

As indicated by Tamberlin J, the prerogative powers are arguably subject to the Constitution. By s 61, the Constitution vests executive power in the Crown and by s 75, it establishes the inherent jurisdiction of the High Court. The judge did not have to rule on

²⁸ [2002] EWCA Civ 1598, [66], [107].

²⁹ (2007) 156 FCR 574, [85].

³⁰ *Ibid* [81] and [90].

³¹ *Ibid* [86].

³² James Cogan, 'Australian rallies demand release of David Hicks from Guantánamo Bay' *World Socialist Web Site* (online, 12 December 2006) <<https://www.wsws.org/en/articles/2006/12/hick-d12.html>>.

these issues, but he regarded these arguments as sufficiently substantial to reject the government's application for summary dismissal. Tamberlin J noted that Hicks submitted that 'under the Australian Constitution, and in particular s 61, the federal executive government owes a duty of protection to a citizen' in his predicament.³³

The judge stated that 'although this protective duty cannot be enforced by Mr Hicks, it is a duty of imperfect obligation which must be taken into account in the respondents' consideration as to whether to make a request'.³⁴ It would be 'inconsistent with this duty of protection to take into account' the irrelevant consideration that Hicks would not be prosecuted if returned.³⁵ Tamberlin J added:

Likewise, it is said, the respondents' purpose of further co-operating with the United States authorities in relation to the continued detention and prosecution of Mr Hicks in Guantanamo Bay is not consistent with the Executive's duty to protect a citizen. Therefore, the applicant submits, both of these considerations are extraneous to the protective duty. The function of the Executive under s 61 is to protect against – and not enable – the punitive detention and prosecution of an Australian citizen in a 'legal black hole', to use the terminology of the English Court of Appeal in *Abbasi*.³⁶

By this argument, diplomatic considerations, bound up with preserving cooperation with the United States government in its extradition application for Assange, may be irrelevant and prohibited from being taken into consideration in making decisions about protecting citizens from punitive detention. The duty of the Executive is to protect a citizen against punitive detention, not enable it, in the words of Tamberlin J.

It is true that *Hicks* was the first test of the 'imperfect duty' of protective intervention and no final decision was required to be made. Moreover, the decision was made by a single Federal Court judge, and the issue has not reached the High Court. Nevertheless, *Hicks* sets a possible precedent for the proposition that an application for diplomatic protection cannot be rejected on unlawful grounds, at least where 'clear' evidence of

³³ *Hicks* (n 28) [61].

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

human rights violations exists.

It is also true that in *Abbassi*, the English doctrine of legitimate expectations imposed a legal duty on the UK government to consider an application for diplomatic assistance. Ministerial statements of government policy had generated that duty. Australian courts have not accepted the extension of the legitimate expectations doctrine to cover substantive rather than procedural fairness rights. Yet, as reviewed above, governments have intervened to protect detained Australian citizens or lawful residents in arguably similar circumstances to those of Assange.

B *The Habib Case*

The case of Mamdouh Habib, another Guantanamo Bay detainee, who sought to sue the Australian government for the alleged torture and other abuses he had suffered, arguably set a related precedent regarding the common law 'act of state' doctrine, by which courts will not generally judge the actions of a foreign government done within its own territory.

This doctrine has been long accepted in Australia.³⁷ Where, however, the official conduct allegedly involved grave violations of human rights and international law, courts have been prepared to rule that the doctrine does not apply. In *Habib v Commonwealth* (2010) 183 FCR 62 (*'Habib'*) Habib, an Australian citizen, had been detained in Pakistan as a suspected terrorist in 2001. After being secretly held in Egypt and at the US Bagram Airforce base in Afghanistan, in 2002 he was transferred to Guantanamo Bay. He was eventually released in 2005 without any charges being laid against him and returned to Australia.

During an earlier challenge to the cancellation of his Australian passport, the Administrative Appeals Tribunal had expressed disquiet about the treatment of Habib during his detention. In that hearing it was common ground that, when interviewed at Guantanamo Bay by representatives of the Department of Foreign Affairs and Trade, the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police,

³⁷ *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; *Attorney-General (UK) v Heinemann Publishers (Australia) Pty Ltd* (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 3.

he had been manacled and shackled.³⁸

Habib alleged that officers of the Commonwealth committed the torts of misfeasance in public office and intentional but indirect infliction of harm by aiding, abetting and counselling his torture and other inhumane treatment by foreign officials while he was detained in Pakistan, Egypt, Afghanistan, and at Guantanamo Bay. The government argued that those claims would require a determination of the unlawfulness of acts of foreign states within the territories of foreign states, so those claims are not justiciable and gave rise to no 'matter' under s 39B of the *Judiciary Act 1903* (Cth) and s 77(i) of the Constitution, or at common law.

The Full Federal Court ruled unanimously that the common law did not support the application of the act of state doctrine in Habib's case. Black CJ and Jagot J held that the doctrine does not apply where grave violations of international human rights law are alleged. Jagot J stated:

To the contrary, the development of Anglo-American jurisprudence indicates that the act of state doctrine does not exclude judicial determination of Mr Habib's claim as it involves alleged acts of torture constituting grave breaches of human rights, serious violations of international law and conduct made illegal by Australian laws having extra-territorial effect.³⁹

Black CJ cited the applicable torture legislation.⁴⁰ The chief justice referred to the *Crimes (Torture) Act 1988* (Cth), the *Geneva Conventions Act 1957* (Cth) and ss 268.26 and 268.74 of the Criminal Code, giving effect to the Torture Convention of 1984 and the Third and Fourth Geneva Conventions of 1949 on the treatment of prisoners of war and the protection of civilians in time of war. Black CJ elaborated on the significance and universal applicability of the prohibitions on torture, stating:

The *Crimes (Torture) Act* reflects the status of the prohibition against torture as a peremptory norm of international law from which no

³⁸ *Re Habib and Minister for Foreign Affairs and Trade* [2007] AATA 1908, [4].

³⁹ [2010] 183 FCR 62, [135].

⁴⁰ *Ibid* [3].

derogation is permitted and the consensus of the international community that torture can never be justified by official acts or policy. As well, and again consistently with Australia's obligations under the Torture Convention, the Parliament has spoken with clarity about the moral issues that may confront officials of governments, whether foreign or our own, and persons acting in an official capacity. It has proscribed torture in all circumstances ...⁴¹

Perram J found the application of the act of state doctrine in this case to be inconsistent with Constitutional norms because it would prevent judicial review of conduct of Commonwealth officials that was allegedly outside their scope of authority.⁴²

Habib's accusations remained untested as his case was settled prior to any decision on the merits. It is arguable, however, that the court's decision supports the *Hicks* proposition of a duty to consider, in a lawful manner, exercising the power of diplomatic protection of an Australian citizen imprisoned abroad who is allegedly subject to torture or other 'grave' or 'serious' violations of international law and human rights.

V ASSANGE'S POSSIBLE GROUNDS FOR UNLAWFUL DENIAL OF PROTECTION

Drawing on the *Hicks* precedent, Assange may have been denied protection by Australian governments on an unlawful basis. That is, the government, on an unlawful ground, may have declined to consider, or considered and rejected, an application by Assange for it to exercise its obligation of diplomatic protection of a citizen who may be suffering a 'clear breach' of human rights or procedures that 'may be found to be contrary to the requirements of international law'.⁴³ The potential grounds of unlawfulness include improper purpose and/or irrelevant considerations, that is, ignoring relevant considerations or taking into account irrelevant considerations. Other prospective arguments are perceived bias and unreasonableness, particularly in the sense of political discrimination.

⁴¹ Ibid [9]-[10].

⁴² Ibid [29].

⁴³ 'Hicks to get Federal Court hearing', *The Sydney Morning Herald* (online, 9 March 2007) <<https://www.smh.com.au/national/hicks-to-get-federal-court-hearing-20070309-gdpmkl.html>>.

A Improper Purpose

Executive decisions, including those involving the exercise of a discretionary power, must be designed to achieve a purpose or object permitted by the authorising legislation or executive power. 'Improper purpose' does not mean 'improper' in a moral or ethical sense; simply that the power was used for a purpose not authorised by the applicable statute or source of executive power. Of course, decisions will be invalid also if bad faith or fraud is proven.⁴⁴

Moreover, the improper purpose need not be the only purpose pursued by the decision-maker. If a power was partly exercised for a proper purpose and partly for an improper purpose, the test is whether the unlawful purpose was a 'substantial' purpose, in the 'but for' sense that the decision would not have been taken except for that purpose.⁴⁵ In addition, the purpose need not be an underhanded or hidden one. At the same time, a court can look behind an officially stated purpose in order to determine the actual purpose of a decision.⁴⁶

Thus, even if the government argues that it had no improper purpose in declining to protect Assange, and that it had a proper purpose, such as to safeguard national security, that does not end the matter. In the first place, a court would be obliged to consider any evidence that this consideration was the real purpose, and not the punishment of Assange on a political basis. Second, a court would have to consider whether such considerations are legally legitimate in the context of protecting a citizen from alleged human rights abuses. Third, if a court agreed with that proposition, it would have to decide whether this was the sole purpose, or whether the government had another political motivation, but for which it would have intervened, as it did in the cases of others, such as Hicks, Greste, Ricketson and Taylor.

B Relevant and Irrelevant Considerations

This legal test involves both a positive requirement to take into account all relevant considerations and a negative command not to take into account irrelevant matters.

⁴⁴ *Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146.

⁴⁵ *Thompson v Randwick Municipal Council* (1950) 81 CLR 87. See also *R & R Fazzolari Pty Limited v Parramatta City Council* (2009) 237 CLR 603.

⁴⁶ *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1981) 151 CLR 170.

Which factors are relevant may not be explicitly stated in the relevant legislation or source of executive power. In this case, they must be implied from an examination of the government's obligations as a whole. As Deane J stated in *Sean Investments v MacKellar* (1981) 38 ALR 363:

[W]here relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.⁴⁷

This distinction between considerations a decision-maker is entitled to entertain, and those he or she is bound to take into account, was endorsed by the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24. There, Mason J said a court would set aside a decision only where the ignored factor would materially affect the decision, even if it may not have led the decision-maker to reverse it. Mason J also stated that where a Minister makes a decision, due allowance may have to be made for 'broader policy considerations' that 'may be relevant to the exercise of a ministerial discretion'.⁴⁸

Nevertheless, real limits may exist on the right of ministers to ignore relevant factors or take into account irrelevant matters, as shown in *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (2009) 75 NSWLR 269.⁴⁹ There, a ministerial authorisation of a land swap with a property developer was struck down on the grounds of irrelevant considerations. Citing Mason J in the *Peko-Wallsend* case, the court said 'there may be found in the subject matter, scope and purpose of the statute some implied limitation'.⁵⁰ The same could perhaps be said of the executive exercise of the foreign affairs power.

⁴⁷ (1981) 38 ALR 363, 375.

⁴⁸ (1986) 162 CLR 24, 42.

⁴⁹ (2009) 75 NSWLR 269

⁵⁰ *Ibid*, [141].

As in *Hicks*, it could be an irrelevant consideration for the government to take into account the likelihood that Assange could not be charged with any offence if he were freed to return to Australia. As discussed earlier, the Gillard government conducted an investigation into whether Assange could be convicted of any crime under Australia law, and may have concluded that he could not. It also could be irrelevant for the government to take into account the political views of Assange or any request from the US government in declining to intervene on Assange's behalf.

C Perceived Bias

To prove bias, it is not necessary to prove actual bias. It is enough to show perceived bias: that is, that in all the circumstances a fair-minded observer might entertain a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.⁵¹

Because of the often inherently discretionary and politicised nature of their decision-making responsibilities, ministers may be held to a lesser standard of impartiality.⁵² However, they are not immune from the law of bias, even if the High Court has proven reluctant to find against a minister in a politically contentious area, such as immigration.⁵³

Given the adverse statements made against Assange by Australian governments, beginning with Prime Minister Gillard in 2010, a court could conclude that a fair-minded observer would reasonably apprehend that the government might not have brought an impartial or unprejudiced mind to the decision to refuse to intervene to seek to protect Assange. Prejudicial material produced before a decision was made has been considered significant by the High Court. In *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50, Nettle and Gordon JJ stated (at [69]):

The test for apprehended bias requires the court to consider what it is which *might* lead a decision-maker to stray from the merits of the case, and then to articulate a logical connection between that thing and the feared deviation from the merits. These points can be, and often are,

⁵¹ *Isbester v Knox City Council* (2015) 255 CLR 135.

⁵² *Hot Holdings v Creasy* (2002) 210 CLR 438.

⁵³ As in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

considered *before* the decision is made... (italics in original).

In that case a refugee who had been refused a safe haven enterprise visa had a narrow 3-2 High Court win on bias. However, the split on the court illustrates the difficulties of applying the rule against bias.

D Unreasonableness

The law test of unreasonableness is often referred to as *Wednesbury* unreasonableness, following the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. This traditional test is that decision-makers may not make decisions that are so unreasonable that no reasonable decision-maker, acting according to law, could have made them. In his *Wednesbury* judgment, Lord Greene famously gave the example of a decision-maker discriminating against someone who had red hair.

Wednesbury is no longer the only test of unreasonableness in Australian law. In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, Hayne, Kiefel and Bell JJ concluded that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.⁵⁴ French CJ said decisions that were 'arbitrary or capricious' or 'abandon[ed] common sense' would fail the unreasonableness test.⁵⁵

Subsequently, in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, the High Court said the test remained a stringent one. Nevertheless, the Australian courts, including the High Court, have been prepared to make findings of unreasonableness, including where the facts show discrimination.

Thus, in *Parramatta City Council v Pestell* (1972) 128 CLR 305, the High Court declared invalid a rate struck by the Parramatta Council that favoured residential ratepayers over industrial ones, even though industrial activity places heavier strains on streets and drainage. Likewise, in *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 59 FCR 369, Hill J ruled that the Aboriginal and Torres

⁵⁴ (2013) 249 CLR 332, [76].

⁵⁵ *Ibid* [28].

Strait Islander Commission had unlawfully discriminated in favour of Northern Territory Indigenous people, over those from New South Wales. That approach has been extended to where a guideline was applied inconsistently to reject an application.⁵⁶

Assange may not have red hair, but it could be argued that the government has discriminated against him because of his political opinions and record of exposing the secret activities of governments and their military and intelligence agencies.

VI EVIDENCE OF VIOLATIONS OF ASSANGE'S HUMAN RIGHTS

A Arbitrary Detention and Psychological Torture

In 2015, the United Nations Working Group on Arbitrary Detention (UNWGAD) ruled that Assange was being detained unlawfully by Britain and Sweden and that any continued arbitrary detention would amount to torture.⁵⁷ In December 2018, the UNWGAD issued a further statement opposing the continued detention of Assange. It stated:

The WGAD is further concerned that the modalities of the continued arbitrary deprivation of liberty of Mr Assange is undermining his health, and may possibly endanger his life given the disproportionate amount of anxiety and stress that such prolonged deprivation of liberty entails.⁵⁸

In May 2019, following Assange's arrest by UK police, the UNWGAD said it was 'deeply concerned' over Assange's sentence of 50 weeks' imprisonment, stating: 'The Working Group regrets that the [UK] Government has not complied with its Opinion and has now furthered the arbitrary deprivation of liberty of Mr Assange.'⁵⁹

⁵⁶ *Re Sunshine Coast Broadcasters Limited v the Honourable Peter Duncan; Minister of Land Transport and Infrastructure Support and the Australian Broadcasting Tribunal* [1988] FCA 235.

⁵⁷ Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015, Opinion No 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland).

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17012&LangID=E>>.

⁵⁸ 'UN Experts Urge UK to Honour Rights Obligations and Let Mr. Julian Assange Leave Ecuador Embassy in London Freely', *United Nations Human Rights Office of the High Commissioner* (Web Page, 21 December 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24042>>.

⁵⁹ 'United Kingdom: Working Group on Arbitrary Detention Expresses Concern About Assange Proceedings', *United Nations Human Rights Office of the High Commissioner* (Web Page, 3 May 2019) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24552&LangID=E>>.

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professor Nils Melzer, visited Assange in Belmarsh Prison in May 2019. Melzer was accompanied by two medical experts specialised in examining victims of torture and other ill treatment. Melzer's report stated:

Mr Assange showed all symptoms typical for prolonged exposure to psychological torture, including extreme stress, chronic anxiety and intense psychological trauma ... The evidence is overwhelming and clear. Mr Assange has been deliberately exposed, for a period of several years, to progressively severe forms of cruel, inhuman or degrading treatment or punishment, the cumulative effects of which can only be described as psychological torture.⁶⁰

Delivering his annual report to the 74th session of the UN General Assembly in October 2019, Melzer stated: 'I regret to report that none of the concerned States have agreed to investigate or redress their alleged involvement in his abuse as required of them under human rights law.'⁶¹

In November 2019, Melzer reiterated his concern at the continued deterioration of Assange's health since his arrest and detention, saying his life was at risk. Melzer said:

What we have seen from the UK Government is outright contempt for Mr Assange's rights and integrity ... Despite the medical urgency of my appeal, and the seriousness of the alleged violations, the UK has not undertaken any measures of investigation, prevention and redress required under international law.⁶²

In November 2019, some 65 medical doctors from around the world issued an open letter to the UK and Australian governments calling for urgent action to protect the life of Assange. They cited medical examination assessments and Melzer's reports on the

⁶⁰ Nils Melzer (online, 31 May 2019)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665>>.

⁶¹ Nils Melzer to the Seventy-fourth session of the UN General Assembly (online, 14 October 2019)

<<https://peds-ansichten.de/wp-content/uploads/2019/11/FinalSRTStatementGA14Oct-2019.pdf>>. See also 'UN expert says 'collective persecution' of Julian Assange must end now' (Web Page, date??)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665&LangID=E>>.

⁶² 'UN Expert On Torture Sounds Alarm Again That Julian Assange's Life May be at Risk', *United Nations Human Rights Office of the High Commissioner* (Web Page, 1 November 2019)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25249&LangID=E>>.

impact of prolonged psychological torture. The letter listed a series of ailments with which Assange had been diagnosed by visiting dentists, doctors and a trauma and psychosocial expert, and for which Assange was unable to access adequate medical care, including severe dental problems, an inflamed shoulder that required an MRI scan, and moderate to severe depression.⁶³ The doctors warned there could be serious health consequences if Assange were not moved from Belmarsh Prison to a university teaching hospital where he could be assessed and treated by an expert medical team.⁶⁴

In March 2020, about 200 medical doctors wrote to Australian Foreign Minister Marise Payne to warn that Assange's health was at increased risk from the COVID-19 pandemic, because the Prison Governors Association had warned that prisons provided 'fertile breeding grounds for coronavirus'.⁶⁵

B Infringement of Client-Lawyer Confidentiality

Evidence has been produced in a Spanish court that the CIA illegally recorded conversations between Assange and his lawyers, and all other visitors, while he was confined inside Ecuador's London embassy before he was arrested. The Spanish newspaper *El País* reported in January 2020 that three people who worked for the Spanish security company UC Global S.L. testified as protected witnesses in Spain's High Court, the Audiencia Nacional, and that the company's head, David Morales, handed over the surveillance material to the CIA.⁶⁶

According to the evidence provided by the witnesses — videos, audio tapes and emails — Assange's meetings with his legal team were videoed and recorded in order to gain material to try to incriminate him and to identify the evidence and legal arguments they would marshal against any prosecution under the US Espionage Act. Some of the videos

⁶³ 'An open letter from doctors: Julian Assange "could die in prison"', *World Socialist Web Site* (online, 24 November 2019) <<https://www.wsws.org/en/articles/2019/11/25/open-n25.html>>.

⁶⁴ *Ibid.*

⁶⁵ John McEvoy, 'Almost 200 medical doctors say Julian Assange's health is at increased risk from coronavirus' *The Canary* (online, 18 March 2020) <<https://www.thecanary.co/global/world-news/2020/03/18/almost-200-medical-doctors-say-julian-assanges-health-is-at-increased-risk-from-coronavirus/>>.

⁶⁶ Jose Maria Irujo, 'Three protected witnesses accuse Spanish ex-marine of spying on Julian Assange', *El País* 21 January 2020 not sure this is correct.

of Assange's discussions with his lawyers were later broadcast by the Australian Broadcasting Corporation (ABC).⁶⁷

Morales, a former Spanish military officer, was prosecuted in Spain, after being charged in October with privacy violation, bribery and money laundering. His company was officially employed by the Ecuadorian government to provide security at the embassy. According to *El País*, however, two of the witnesses confirmed that, in December 2017, Morales ordered workers to change the surveillance cameras in the embassy in order to capture audio. From then on, they monitored conversations between Assange and his lawyers, even in the female toilet that Assange and his legal team used in attempt to avoid illegal bugging.⁶⁸

Under Morales' orders, the security company photographed the passports of all Assange's visitors, dismantled their cell phones, downloaded content from their iPads, took notes and compiled reports on each meeting.⁶⁹ Camera and microphone recordings were delivered to Morales at the headquarters of UC Global, located in southern Spain. Morales travelled to the US regularly, allegedly to hand over the material to 'the Americans.' Morales also had installed remote-operated computer servers that collected the illegally obtained information, which could be accessed from the United States.⁷⁰ The witnesses testified that the material on Assange was handed over to the CIA by a member of the security service of Sheldon Adelson, the owner of the casino and resort company Las Vegas Sands Corporation.⁷¹

Among the lawyers spied upon was Professor Guy Goodwin-Gill, a well-known expert in international refugee law. Goodwin-Gill told the media that the sworn witness testimony provided to the Spanish court included evidence that a seven-hour meeting held between Assange and his legal team on 19 June 2016 was recorded. The contents of Goodwin-Gill's iPad, which had to be left outside the room during that meeting, also

⁶⁷ Dylan Welch, Suzanne Dredge and Clare Blumer, 'Julian Assange and his Australian lawyers were secretly recorded in Ecuador's London embassy', *ABC Investigations* (online, 24 February 2020) <<https://www.abc.net.au/news/2020-02-23/surveillance-of-julian-assange-captured-lawyers-conversations/11985872>>.

⁶⁸ Irujo (n 6) 4.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

were downloaded and the information passed to the US authorities.⁷²

This evidence suggests that the US extradition application should be dismissed on the grounds of illegality. In criminal proceedings, evidence that the prosecution had recorded conversations between the defendant and his lawyers could result in a mistrial, the dropping of charges, and the release of the defendant. There is a precedent for doing so in circumstances similar to those of Assange: the Daniel Ellsberg case.

C The Ellsberg Precedent

In 1973, US President Richard Nixon's administration invoked the US Espionage Act to prosecute Daniel Ellsberg for releasing the Pentagon Papers exposing criminal wrongdoing in the Vietnam War. The case collapsed after evidence showed that the Nixon administration had overseen illegal spying on consultations between the whistleblower and his doctors. Ellsberg, a former Defense Department and Rand Corporation researcher, was prosecuted under the Act for leaking documents to the *New York Times* and the *Washington Post*.

The 47-volume Pentagon Papers documented how the US government had lied to the public since 1945 in order to enter and expand the Vietnam War, which led to the deaths of three million Vietnamese people and 55,000 US soldiers. The documents showed that successive US governments had carried out secret illegal operations in Vietnam, militarily intervened on false pretenses and killed thousands of Vietnamese civilians.⁷³

In 1971, the Nixon administration also had invoked the US Espionage Act to attempt to stop the release of the Pentagon Papers. It filed an injunction alleging that by publishing an initial article disclosing previously secret contents of the leaked documents, the *Washington Post* had violated the Act by willfully communicating information 'it knew or had reason to believe ... could be used to the injury of the United States ... to persons not entitled to receive such information'.⁷⁴

⁷² Ben Doherty and Amy Remeikis, 'Julian Assange's extradition fight could turn on reports he was spied on for CIA', *The Guardian* (online, 17 December 2019)

<<https://www.theguardian.com/media/2019/dec/17/julian-assanges-extradition-fight-could-turn-on-reports-he-was-spied-on-for-cia>>.

⁷³ Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (Norton Stone, 2005?) 507.

⁷⁴ *Ibid.*

By the time that the Nixon administration's injunction was considered by the US Supreme Court, some 20 newspapers had published material from the Pentagon Papers.⁷⁵ In that context, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the court ruled 6 to 3 that the injunction would violate the US Constitution's First Amendment. The government had not met the 'heavy burden of showing justification' for a prior restraint on the press.⁷⁶

In the meantime, Ellsberg and an associate, Anthony Russo, were indicted on a range of charges, including conspiracy to violate the US Espionage Act, carrying possible total sentences of 125 years in prison. These charges were dismissed two years later as a result of the Watergate burglary—White House-organised 'plumbers' had broken into the offices of Ellsberg's psychiatrist and wire-tapped his phone in an effort to obtain information to smear Ellsberg in the media. In 1973, the trial judge ruled that the 'unprecedented' government misconduct had 'incurably infected the prosecution of this case'.⁷⁷

Equally, the US government's misconduct toward Assange, particularly the bugging and videotaping of his discussions with his lawyers, in violation of lawyer-client confidentiality, could have 'incurably infected' the prosecution of his case.

D Denial of Ability to Prepare Defence

Assange also has arguably been prevented from being able to adequately prepare his defence during the extradition hearings. His counsel Gareth Pierce told the presiding judge, District Judge Vanessa Baraitser, in January 2020 that Assange had been denied access to evidence, adequate time to consult with and brief his legal team, and basic items like paper and pens by British prison officials. Pierce argued that denying Assange his 'human right' to legal access was putting his case on the brink of a judicial review.⁷⁸

The apparent violation of Assange's right to legal consultation and access to legal advice continued during the first week of the extradition hearing in February 2020. Assange's

⁷⁵ Ibid 508.

⁷⁶ Ibid 511.

⁷⁷ Ibid 515.

⁷⁸ 'Assange "denied access" to lawyers in UK', *Nine News* (online, 16 January 2020)

<<https://www.9news.com.au/world/assange-denied-access-to-lawyers-in-uk/39382389-facc-40e3-92ab-03dd3d575427>>.

counsel, Edward Fitzgerald QC, told Judge Baraitser that Assange was handcuffed 11 times and stripped naked twice by Belmarsh prison guards on the opening day of hearing. Fitzgerald reported that his client's legal documents were confiscated by prison authorities, who later moved him to five different cells.⁷⁹

Judge Baraitser rejected a submission from Assange's lawyers that their client be allowed to sit with them in court for the purposes of necessary consultation. The judge ruled that Assange must remain in a bullet-proof glass-encased dock and that would remain so when the hearing resumed for the evidence phase of the hearing.⁸⁰ In a submission to Judge Baraitser, Assange's lawyers submitted that their client's right to a fair trial was being violated in various ways. These included:

i) [T]he physical layout of the court and the distance it places between Mr Assange and his legal team, ii) the high occupancy level of the court meaning that defence lawyers are unable to meet freely to receive instructions or impart advice, iii) the court's poor acoustics and amplification, especially behind glass and proximity to audible protests, iv) the security procedures in place in the dock at Woolwich Crown Court which do not permit the passing of notes and which inhibit confidential instruction taking, v) the limited access to legal visits outside of court sitting times during the court day and vi) Mr Assange's precarious psychiatric vulnerability, ongoing medication and the consequent elevated emotional strain of these proceedings of which the court is aware.⁸¹

VII FURTHER APPARENT DEFECTS IN THE US AND UK PROCEEDINGS

A The US Extradition Application

In April 2019, the original US indictment charged Assange with one count of conspiring with Chelsea Manning, a US soldier, to gain unauthorised access to Defence Department

⁷⁹ Thomas Scripps and Laura Tiernan, 'Persecuted journalist Assange handcuffed, stripped naked on first day of extradition trial', *World Socialist Web Site* (online, 26 February 2020) <<https://www.wsws.org/en/articles/2020/02/26/assa-f26.html>>.

⁸⁰ Thomas Scripps and Laura Tiernan, 'Judge rules Assange cannot sit with lawyers during extradition hearing', *World Socialist Web Site* (online, 28 February 2020) <<https://www.wsws.org/en/articles/2020/02/28/assa-f28.html>>.

⁸¹ *Ibid.*

computers. That charge carries up to five years' imprisonment. However, an amended indictment, issued a month later, added 17 counts based on the US Espionage Act.⁸² In June 2020, months after the extradition hearing had commenced, and just weeks before it was due to resume, the US Justice Department announced a 'second superseding indictment'. It did not add new counts but broadened them by charging Assange with recruiting and agreeing with hackers to 'commit computer intrusions'.⁸³

The US Espionage Act charges, each with a maximum prison term of 10 years, carry a cumulative maximum sentence of 170 years in prison.⁸⁴ These charges arguably violate the US Constitution's First Amendment. The importance of that protection for journalists and publishers was affirmed in *New York Times Co. v. United States*, 403 U.S. 713 (1971). The US Supreme Court struck down as unconstitutional the Nixon administration's attempt to block the publication of the classified Pentagon Papers.

The *New York Times* commented that it and other news organisations had obtained the same documents as Wikileaks, also without government authorisation.⁸⁵ Assange pursued the journalistic practice of obtaining information, including assisting a source to conceal their identity. However, when the extradition hearing opened in London in February 2020, the counsel for the US Justice Department asserted that the First Amendment did not protect Assange, a non-US citizen.⁸⁶

This proposition seems contrary to the language of the First Amendment⁸⁷ and previous US Supreme Court authority.⁸⁸ Moreover, none of Assange's actions were carried out in

⁸² Charlie Savage, 'Assange Indicted Under Espionage Act, Raising First Amendment Issues', *New York Times* (online, 23 May 2019) <<https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html>>.

⁸³ Department of Justice, 'WikiLeaks Founder Charged in Superseding Indictment' media release (Web Page, 24 June 2020) <<https://www.justice.gov/opa/pr/wikileaks-founder-charged-superseding-indictment>>.

⁸⁴ *Espionage Act 1917* (Title 18 US Code) s 793.

⁸⁵ Zoe Tillman, 'The New Charges Against Julian Assange Are Unprecedented. Press Freedom Groups Say They're A Threat to All Journalists', *BuzzFeed News* (online, 23 May 2019).

⁸⁶ 'Julian Assange may not be able to use First Amendment press protection if extradited', *SBS News* (online, 24 January 2020) <<https://www.sbs.com.au/news/julian-assange-may-not-be-able-to-use-first-amendment-press-protection-if-extradited>>.

⁸⁷ Without qualification, the First Amendment prohibits any law 'abridging the freedom of speech, or of the press'.

⁸⁸ *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that a non-citizen who published communist literature was protected by First Amendment). This case concerned Harry Bridges, an Australian trade union leader who entered and lived in the United States legally from 1920 to 1938, when the government sought to deport him because of his previous affiliation with the Communist Party (326 U.S. at 137-38).

the US. If granted, the extradition could establish a precedent for any journalist or publisher, anywhere in the world, who allegedly publishes US classified material to be charged under the US Espionage Act.

B Extradition to Face Political Charges, Human Rights Abuses or Potential Death Penalty

The US extradition application may breach both the *Extradition Act 2003* (UK) ('Extradition Act') and the UK-US extradition treaty.

Part 2 of the Extradition Act — Extradition to category 2 territories (non-European Arrest Warrant territories) — removed the previous requirement for the US to provide *prima facie* evidence in extraditions from the UK, requiring instead only the weaker standard of 'reasonable suspicion'. Under section 71 of the Act, requests from designated Part 2 countries (including requests from the US) must be accompanied by sufficient information to 'justify the issue of a warrant for the arrest of a person accused of the offence' (known in the UK as the 'reasonable suspicion' test).⁸⁹

Nevertheless, Article 4.1 of the UK–US extradition treaty of 2003, which was ratified in 2007, retains a prohibition on extradition for 'a political offense'. It states that 'extradition shall not be granted if the offence for which extradition is requested is a political offense'.⁹⁰

In the opening week of Assange's extradition hearing in February 2020, the counsel for the US argued that this article was overridden by the absence of such a provision in the

See also Michael Kagan, 'When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment' (2016) 57(issue?) *Boston College Law Review*? 1237.

⁸⁹ *A Review of the United Kingdom's Extradition Arrangements* (Report, 30 September 2011) 214 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf>.

⁹⁰ Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America with Exchange of Notes, Treaty Series No. 13 (2007) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243246/7146.pdf>.

Extradition Act.⁹¹ Judge Baraitser said it was plain that parliament had intended that there could be extradition for political offences.⁹²

However, while the Extradition Act does not bar extraditions for political offences, it does not prohibit such a bar in extradition treaties. The extradition treaty was ratified in 2007, after the Extradition Act. Moreover, international law has accepted for more than a century that extraditions of political offenders should not be permitted. Prohibitions on such extraditions were included in many international extradition conventions and treaties. The ban is in most US extradition treaties with another country.⁹³

To interpret the Extradition Act as erasing the customary international law prohibition on extraditions for political offences, without explicitly saying so, infringes the common law presumption against the overriding of fundamental rights. The courts require clear expressions of parliamentary intent to override this presumption. In Australia, such rulings have been made about freedom of speech, the right to procedural fairness and freedom from unauthorised detention.⁹⁴ In *Coco v R*, the High Court said:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.⁹⁵

Furthermore, it seems legally illogical to say that Assange's extradition is not governed by the terms of the treaty under which it is sought. There also is judicial authority that treaty rights are enforceable, even if not incorporated into domestic legislation,

⁹¹ Reporters Without Borders, 'UK: Legal arguments during the first week of Julian Assange's extradition hearing highlight lack of US evidence,' *Reporters Without Borders* (online, 28 February 2020) <<https://rsf.org/en/news/uk-legal-arguments-during-first-week-julian-assanges-extradition-hearing-highlight-lack-us-evidence>>.

⁹² Craig Murray, 'Assange Show Trial: Your Man in the Public Gallery – The Assange Hearing Day 3 & 4', *Information Clearing House* (online, 27 February 2020) <<http://www.informationclearinghouse.info/53049.htm>>.

⁹³ See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press, 6th ed, 2014) at Appendix I (listing multilateral conventions containing provisions on extradition).

⁹⁴ *Watson v Marshall* (1971) CLR 621.

⁹⁵ (1994) 179 CLR 427, 437.

particularly in order to stop people being extradited to potential execution from British colonies.⁹⁶

In Assange's extradition hearing, the US counsel further argued that espionage was not a political offence. The US extradition application accuses Assange of seeking to harm the political and military interests of the United States. That seems to constitute a political offence, although American courts generally require that a person seeking to avoid extradition 'demonstrat[e] that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion'.⁹⁷

In addition, the Extradition Act has several provisions that could be violated if Assange were to be extradited. Section 81 bars a person's extradition if it appears that the extradition warrant, although purporting to be issued as part of an ordinary prosecution, has in fact been issued for the purpose of prosecuting or punishing the person for reasons of his race, religion, nationality, gender, sexual orientation or political opinions. That section further bars extradition if it appears that the person would be 'prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions'.

The Act also states that if judges find that extradition would infringe the requested person's human rights, they cannot order that person's extradition and must discharge them. Section 87 of the Extradition Act specifies a test of whether the person's extradition would be compatible with the rights protected by the *Human Rights Act 1998* (UK). This means that extradition is barred by s 87: (i) [u]nder Article 2 of the European Convention on Human Rights (the right to life), if the loss of life is shown to be a near certainty (or a real risk); (ii) [u]nder Article 3 (prohibition against torture, inhuman or

⁹⁶ In *R v Mullen* [2000] QB 520, the Court of Appeal (Criminal Division) ruled that an abuse of process had been committed because the British authorities were 'acting in breach of public international law' in the extradition procedures pinpointed. In *Thomas and Haniff Hilaire v Cipriani Baptiste (Trinidad and Tobago)* [1999] UKPC 13, the Privy Council allowed defendants to appeal to a treaty unincorporated into domestic Trinidadian law. In *Lewis, Patrick Taylor and Anthony McLeod, Christopher Brown, Desmond Taylor and Steve Shaw v The Attorney General of Jamaica and Another (Jamaica)* [2000] UKPC 35, the Privy Council made a similar finding.

⁹⁷ *Nezirovic v. Holt*, 779 F.3d 233, 240 (4th Cir. 2015); *Meza v. United States Attorney General*, 693 F.3d 1350, 1359 (11th Cir. 2012); *Kostotas v. Roche*, 931 F.2d 169, 171 (1st Cir. 1991) (citing *Eain v. Wilkes*, 641 F.2d 504, 512 (7th Cir. 1981)); *Vo v. Benov*, 447 F.3d 1235, 1241 (9th Cir. 2006); *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980); *Sindona v. Grant*, 619 F.2d 167, 173 (2d Cir. 1980); *Ornelas v. Ruiz*, 161 U.S. 689, 692 (1896).

degrading treatment), if there are strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to inhuman or degrading treatment; (iii) [u]nder Article 5 (right to liberty), if the person risks suffering a flagrant denial of his right to liberty; (iv) [u]nder Article 6 (right to a fair trial), if the person risks suffering a flagrant denial of his right to a fair trial; (v) [u]nder Article 8 (right to respect for family life), where the consequences of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition.⁹⁸

Arguably, several of these prohibitions could apply to Assange, including those against torture, inhuman or degrading treatment, and against flagrant denial of his right to a fair trial. There are also precedents that UK courts should refuse to recognise the laws of other countries that are an affront to human rights. In *Oppenheimer v Cattermole* [1976] AC 249, the House of Lords declared that the courts would not recognise a Nazi law that constituted a grave infringement of human rights by stripping Jews of German citizenship.

Section 94 of the Extradition Act further prohibits the Secretary of State from ordering an extradition if the requested person could be sentenced to death for the extradition offence in the requesting state, unless the secretary gets adequate written assurance that it will not be imposed, or carried out, if imposed.

The US Espionage Act offences alleged against Assange do not carry the death penalty, but certain charges under that Act do. Section 794 of the act contains the death penalty as possible punishment 'in time of war' for publishing information that is intended to be communicated to 'the enemy'.⁹⁹ Once Assange was in the US, the government could add additional charges, as Australian Department of Foreign Affairs and Trade officials admitted during a Senate estimates hearing in March 2020.¹⁰⁰

C The UK Legal Proceedings and Imprisonment

Other aspects of the UK proceedings raise questions. When Assange was arrested in

⁹⁸ *A Review of the United Kingdom's Extradition Arrangements*, n 87.

⁹⁹ 18 U.S. Code § 794: Gathering or delivering defense information to aid foreign government.

¹⁰⁰ Daniel McCulloch, 'Consular officials watching Assange trial', *Australian Associated Press* (online, 5 March 2020) <<https://www.bellingencourier.com.au/story/6663733/consular-officials-watching-assange-trial/?cs=9397>>.

April 2019, UK government leaders made comments that potentially tainted the subsequent legal proceedings. Prime Minister Theresa May said that ‘no one is above the law’.¹⁰¹ Another leader, Boris Johnson, who later became prime minister, tweeted: ‘It’s only right that Julian Assange finally faces justice. Credit to @foreignoffice officials who have worked tirelessly to secure this outcome’.¹⁰²

On the afternoon of his arrest, Assange was charged with breaching the *Bail Act* and found guilty after a short hearing at Westminster Magistrates’ Court. Without an examination of Assange, Judge Michael Snow asserted that the WikiLeaks publisher was ‘a narcissist who cannot get beyond his own selfish interest’.¹⁰³

Assange was remanded to a maximum-security jail, HM Prison Belmarsh, and three weeks’ later he was sentenced at Southwark Crown Court to 50 weeks’ imprisonment.¹⁰⁴ The UNWGAD issued a statement that the verdict contravened ‘principles of necessity and proportionality’ for a ‘minor violation’.¹⁰⁵

In September 2019, Judge Baraitser ruled that Assange would not be released, even at the end of his expired sentence on the bail infringement. This left him in a maximum-security prison, potentially for the many months, if not years, for which the extradition application could continue, possibly on appeal to the UK Supreme Court.¹⁰⁶

VIII CONCLUSION

It is possible to argue that Australian governments have a duty to lawfully consider a citizen’s application for diplomatic protection from ‘clear’ or ‘grave’ violations of internationally-recognised human rights and lawful procedures. If so, it can be submitted that Australian governments have unlawfully declined to intervene with the

¹⁰¹ ‘Julian Assange’s arrest draws fierce international reaction’, *Fox News Channel* (online, 11 April 2019) <<https://www.foxnews.com/world/wikileaks-julian-assange-arrest-international-reaction>>.

¹⁰² @BorisJohnson (Boris Johnson) (Twitter, 11 April 2019, 10:16PM AEST) <<https://twitter.com/borisjohnson/status/1116314059815694336?lang=en>>.

¹⁰³ ‘Out of the embassy, straight into custody: Assange’s court hearing’, *Reuters* (online, 11 April 2019) <<https://fr.reuters.com/article/uk-ecuador-assange-court-idUKKCN1RN2JB>>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Stephanie Nebehay, ‘U.N. rights experts cite concern at ‘disproportionate’ Assange detention’, *Reuters* (online, 3 May 2019) <<https://www.reuters.com/article/us-wikileaks-assange-un/u-n-rights-experts-cite-concern-at-disproportionate-assange-detention-idUSKCN1S90XR>>.

¹⁰⁶ ‘Julian Assange to remain in jail pending extradition to US’, *The Guardian* (online, 14 September 2019) <<https://www.theguardian.com/media/2019/sep/14/julian-assange-to-remain-in-jail-pending-extradition-to-us>>.

British and US authorities to secure the release of Assange or protect him from being extradited to the United States on charges under the US Espionage Act. United Nations bodies have ruled his detention to be arbitrary and amounting to psychological torture. Assange arguably has been denied adequate medical treatment and suffered defective legal proceedings. His extradition to the US could be in breach of the UK Extradition Act and the UK-US extradition treaty and in violation of lawyer-client confidentiality.

These facts could bring Assange's case within the precedent suggested by *Hicks*, which indicates that the government has a duty to lawfully consider an application for diplomatic protection in similarly serious circumstances. On the facts of Assange's case, he may have been wrongly denied diplomatic intervention, due to government responses displaying irrelevant considerations, improper purpose, unreasonableness or perceived bias.

More broadly, in light of the possible reversal of the precedents set nearly five decades ago in the *New York Times* and Daniel Ellsberg cases, Assange's prosecution may have serious implications for free speech, media freedom, the rights of journalists and other basic democratic rights. A legal challenge to the government's denial of diplomatic protection could be an important test case for a citizen's rights in similar kinds of circumstances.

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