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Modern Day Extradition Practice: A Case Analysis of Julian Assange

Daniela J. Restrepo

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Cover Page Footnote

Juris Doctor Candidate, Notre Dame Law School, 2021; Bachelor of Arts in Government, Harvard University, 2017. I would like to thank Professor Mary Ellen O'Connell for inspiring me to write on the topic. I would also like to thank the members of the Notre Dame Journal of International & Comparative Law for their review of this note in preparation for publication.

MODERN DAY EXTRADITION PRACTICE: A CASE ANALYSIS OF JULIAN ASSANGE

DANIELA JOHNSON RESTREPO*

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INTRODUCTION

In April 2019, British police officers stormed the Ecuadorean embassy and arrested Julian Assange for failing to appear in court, as well as for alleged repeat violations of international conventions during his time of tenure at the embassy.¹ Assange was granted diplomatic asylum by the Ecuadorean government in August 2012, and resided in the embassy up until his arrest in April 2019.² Assange’s extradition saga began in 2010 when the Swedish Prosecution Authority opened an investigation into a rape allegation against him.³ The Swedish investigation was ultimately dropped in November 2019, as a result of the weakened evidence caused by the passage of time.⁴ Assange served a fifty-week jail sentence for skipping bail in the United Kingdom, while also awaiting his extradition hearing to determine whether he will be extradited to the United States.⁵ The hearing for reviewing the United States’ full extradition request was initially scheduled for February 2020, but has since been postponed due to the

* Juris Doctor Candidate, Notre Dame Law School, 2021; Bachelor of Arts in Government, Harvard University, 2017. I would like to thank Professor Mary Ellen O’Connell for inspiring me to write on the topic. I would also like to thank the members of the *Notre Dame Journal of International & Comparative Law* for their review of this note in preparation for publication.

1 *Julian Assange: A Timeline of Wikileaks Founder’s Case*, BBC (Nov. 19, 2019), <https://www.bbc.com/news/world-europe-11949341>.

2 *Id.*

3 Bill Chappell, *Swedish Prosecutor Ends Investigation into Julian Assange Over Rape Claims*, NPR (Nov. 19, 2019), <https://www.npr.org/2019/11/19/780743412/swedish-prosecutor-ends-investigation-into-julian-assange-over-rape-claims>.

4 *Id.* In June 2013, a Swedish court denied the prosecuting authority’s request that Assange be detained “in absentia” over the rape allegations. *Id.*

5 Megan Specia, *Julian Assange’s Extradition Hearing is Set for February*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/world/europe/assange-extradition-court-appearance.html>. Assange was sentenced to a 50-week jail sentence in May 2019.

coronavirus pandemic.⁶ Assange's extradition is founded on the eighteen-count superseding indictment ("Superseding Indictment") that was unsealed in May 2019, containing seventeen counts in violation of the Espionage Act, in addition to the computer hacking count in violation of the Computer Fraud and Abuse Act.⁷

There are five sovereign states with potential jurisdictional claims over Julian Assange: Australia, Ecuador, Sweden, the United Kingdom, and the United States. The United States' claims over Julian Assange hinge on his activities in connection to WikiLeaks, and in particular, his alleged conspiracy with Chelsea Manning to obtain and disclose classified documents related to national security.⁸ Australia's claim over Assange stems from its right to protect its citizens, while Ecuador's claim rests on Assange's activities during his tenure at the embassy between 2010 and 2019.⁹ Sweden's claims relate to the investigation into the rape allegation of Assange, which commenced at the time Assange entered the Ecuadorean embassy in 2010, but was eventually dropped at the end of 2019.¹⁰ Lastly, the United Kingdom maintains physical custody of Assange as he awaits the continuance of his extradition hearing.¹¹ Ultimately, extradition law provides the best mechanism through which these competing jurisdictional claims can be evaluated.

This Note examines modern extradition practice through an analysis of Assange's extradition case. Assange's case provides a particularly useful case study through which to examine modern day extradition treaties and principles, and whether these provide an adequate mechanism to facilitate international cooperation in the prosecution of increasingly complex transboundary crimes. More specifically, this Note will examine the evolution of extradition as a means by which states can protect and further their own policy objectives. Extradition evolved from a practice of gratuitous exchanges and comity between states, to a highly contractual system by which states are able to accept or reject extradition requests based on a variety of state interests. These substantive and procedural safeguards to extradition, such as prohibition against capital punishment and the

6 Andrew MacAskill, *UK Court Sets Assange U.S. Extradition Hearing for February 2020*, REUTERS (June 14, 2019, 6:39 AM), <https://www.reuters.com/article/us-wikileaks-assange/uk-court-sets-assange-u-s-extradition-hearing-for-february-2020-idUSKCN1TF18S>. See Lizzie Dearden, *Julian Assange Extradition Hearing Paused Over Dears Lawyer Exposed to Coronavirus*, INDEPENDENT (Sep. 10, 2020), <https://www.independent.co.uk/news/uk/crime/julian-assange-extradition-hearing-lawyer-coronavirus-court-update-b421437.html>. Assange's extradition hearing was recently postponed after concerns that an attorney might have been exposed to coronavirus.

7 Dearden, *supra* note 6. This Note proceeds under the assumption that the May 2019 superseding indictment is the foundation of the United States' full extradition request of Julian Assange, and therefore, that the criminal offenses that the United States seeks to prosecute Assange for are limited to those outlined in the May 2019 indictment. The subsequent analysis is the best assessment of the facts as has been made accessible to the public.

8 Charlie Savage et al., *Julian Assange Arrested in London as U.S. Unseals Hacking Conspiracy Indictment*, N.Y. TIMES (April 11, 2019), <https://www.nytimes.com/2019/04/11/world/europe/julian-assange-wikileaks-ecuador-embassy.html>.

9 Stephen P. Mulligan, *Frequently Asked Questions About the Julian Assange Charges*, CONG. RESEARCH SERV., at 1-2, <https://fas.org/sgp/crs/secretcy/LSB10291.pdf> (last updated June 7, 2019).

10 See generally the judicial authority in Sweden v. Julian Paul Assange, [2011] EW Misc 5 (MC) ([http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/Misc/2011/5.html&query=\(UK\)+AND+\(Sweden\)+AND+\(extradition\)+AND+\(treaty\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/Misc/2011/5.html&query=(UK)+AND+(Sweden)+AND+(extradition)+AND+(treaty)) [hereinafter *The judicial authority of Sweden v. Julian Paul Assange*].

11 MacAskill, *supra* note 6.

political offense exception, provide legal discretionary means by which states can promote their own interests. Moreover, the shift in extradition machinery from that which was political to one that is legal in nature has resulted in a proliferation of extradition treaties encompassing a variety of state interests. I argue that the elusive nature of the political offense exception to extradition provides the requested state with the necessary discretion to reject extradition on self-serving grounds, which can fundamentally undermine the traditional purposes of extradition for fostering international cooperation. For the purposes of Assange's extradition case, this development in modern extradition practice suggests that the discretionary nature of the exception provisions in the United Kingdom's extradition treaty afford legal means by which the United Kingdom can serve its domestic interests when deciding whether or not to grant the extradition request.

Part I of this Note provides a background of Julian Assange and the varying jurisdictional claims over him. Part II introduces the fundamental principles and evolution of extradition law, which are then applied to the United Kingdom Extradition Act of 2003 ("2003 Extradition Act"), which is the treaty governing Assange's extradition. Part III analyzes the strength of both the United States' and Sweden's extradition claims over Assange, and the likelihood that each prevails under the 2003 Extradition Act. Lastly, Part IV considers the possibility of Assange being extradited from Sweden to the United States, if Sweden were to re-open its investigation into the rape allegation.

I. BACKGROUND

A. ABOUT JULIAN ASSANGE

Julian Assange is an Australian national and the founder of WikiLeaks.¹² WikiLeaks is a non-profit organization that publishes news leaks and classified information provided by anonymous sources.¹³ Assange launched the website out of Sweden in 2006, given the strong domestic laws designed to protect the anonymity of reporter's sources.¹⁴ WikiLeaks operates as a highly encrypted and anonymous drop box that collects classified information obtained from "whistleblowers."¹⁵ This encryption technology enables files to be moved anonymously across different computer systems, while also allowing information to be routed through countries that have strong laws protecting the freedom of the press.¹⁶ In one of its mass disclosures in 2010, WikiLeaks leaked hundreds of thousands of State Department cables, military reports related to the

¹² Mulligan, *supra* note 9, at 1.

¹³ *Id.* WikiLeaks "specializes in the analysis and publication of large datasets of censored or otherwise restricted official materials."

¹⁴ See Online Privacy Law: Sweden, LIBRARY OF CONGRESS, <https://www.loc.gov/law/help/online-privacy-law/2012/sweden.php> (last updated Jul. 24, 2020) ("Sweden was the first country in the world to enact a comprehensive statute to protect the privacy of personal data on computers when it adopted the Data Act in 1973. Certain personal freedoms, including the right to protection of personal data, are also found in the Swedish Constitution.")

¹⁵ Mulligan, *supra* note 9, at 3.

¹⁶ *Id.*

Iraq and Afghanistan wars, and Guantanamo Bay detainee assessments.¹⁷ Assange was not initially charged for the disclosure, but was indicted in March 2018 for one count of conspiracy to commit computer intrusion.¹⁸ In May 2019, the Department of Justice unsealed the Superseding Indictment charging Assange for conspiring with Chelsea Manning to obtain and disclose confidential information related to national security.¹⁹

Around the same time as the 2010 disclosure, the Swedish Prosecution Authority issued a European arrest warrant for Assange for rape and sexual misconduct allegations.²⁰ Assange, who was living in the United Kingdom at the time, turned himself in, and was later released on bail as he awaited the court's ruling on whether he should be extradited to Sweden to assist with the investigation into the rape and sexual misconduct allegations.²¹ Following the Supreme Court of the United Kingdom's rejection of Assange's objections to extradition,²² Assange breached his bail conditions when he entered the Ecuadorean embassy, where he remained until his arrest in April 2019.²³

B. SORTING THROUGH COMPETING JURISDICTIONAL CLAIMS OVER ASSANGE

In order for a foreign state to assert a valid jurisdictional claim over an individual and their particular criminal conduct, it must first demonstrate that criminal laws extend to the particular criminal conduct at issue. With five countries with potential claims over Assange, it is necessary that each country assert jurisdiction over the relevant conduct under principles of extraterritorial jurisdiction in international law. Under the governing principles of territoriality

¹⁷ *Id.* at 1.

¹⁸ Indictment, *United States v. Assange*, No. 1:18cr (E.D. Va. Mar. 6, 2018),

<https://www.justice.gov/opa/press-release/file/1153486/download> (one count for conspiracy to commit computer intrusion, in violation of 18 U.S.C. §§ 371, 1030(a)(1), 1030(a)(2), 1030(c)(2)(B)(ii)).

¹⁹ Superseding Indictment, *United States v. Assange*, No. 1:18-cr-111 (E.D. Va. May 23, 2019),

<https://www.justice.gov/opa/press-release/file/1165556/download> (“The superseding indictment alleges that beginning in late 2009, Assange and WikiLeaks actively solicited United States classified information, including by publishing a list of ‘Most Wanted Leaks’ that sought, among other things, classified documents. Manning responded to Assange’s solicitations by using access granted to her as an intelligence analyst to search for United States classified documents, and provided to Assange and WikiLeaks databases containing approximately 90,000 Afghanistan war-related significant activity reports, 400,000 Iraq war-related significant activities reports, 800 Guantanamo Bay detainee assessment briefs, and 250,000 U.S. Department of State cables. Many of these documents were classified at the Secret level, meaning that their unauthorized disclosure could cause serious damage to United States national security. Manning also provided rules of engagement files for the Iraq war, most of which were also classified at the Secret level and which delineated the circumstances and limitations under which United States forces would initiate or conduct combat engagement with other forces. The superseding indictment alleges that Manning and Assange engaged in real-time discussions regarding Manning’s transmission of classified records to Assange. The discussions also reflect that Assange actively encouraged Manning to provide more information and agreed to crack a password hash stored on U.S. Department of Defense computers connected to the Secret Internet Protocol Network (SIPRNet), a United States government network used for classified documents and communications. Assange is also charged with conspiracy to commit computer intrusion for agreeing to crack that password hash.”).

²⁰ Mulligan, *supra* note 9, at 1.

²¹ *Wikileaks Founder Julian Assange Freed on Bail*, BBC (Dec. 16, 2010),

<https://www.bbc.com/news/uk-12005930>.

²² *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, at 32 (appeal taken from Eng.),

(May 30, 2012), <https://www.supremecourt.uk/cases/docs/uksc-2011-0264-judgment.pdf>.

²³ Mulligan, *supra* note 9, at 2.

and extraterritoriality, it appears that the United Kingdom, United States, and Sweden possess outstanding claims over Assange.

I begin by dispensing with any possible claim that Ecuador may possess over Assange. Ecuador alleges that Assange accessed the internet at the Ecuadorean embassy even after his access had been restricted following his interference with high profile political events.²⁴ Whether these allegations are in fact accurate, and thus constitute a violation of the embassy's terms of tenure, Ecuador's decision to revoke Assange's diplomatic protection, as well as Assange's Ecuadorean citizenship, relinquishes any potential claim that Ecuador may possess over Assange. Even though the United Kingdom does not recognize the type of diplomatic asylum that was afforded to Assange at the time, it is a party to the Vienna Convention on Diplomatic Relations.²⁵ The Convention provides that diplomatic missions are inviolable and cannot be surrendered or entered into to conduct a physical search and seizure.²⁶ Pursuant to Article 22 of the Convention, the head of the mission (consul) must provide consent for the receiving State to be allowed to enter mission. In this case, the Ecuadorian government consented to the United Kingdom's police forces to enter the embassy and arrest Assange. Therefore, Ecuador cannot argue that the United Kingdom violated the inviolable nature of consular premises. By suspending Assange's Ecuadorean citizenship to facilitate his arrest, Ecuador effectively relinquished any claim it could assert over Assange.²⁷

It seems unlikely that Australia has any outstanding claim over Assange. Australia's only basis of jurisdiction over Assange would be under the active personality principle, in which a state can exercise jurisdiction over its nationals for crimes committed in another sovereign state. Each sovereign state has the obligation of ensuring that its nationals are afforded the rights afforded to all its citizens. Therefore, it would be reasonable for Australia to be concerned over the outcome to Assange's extradition, especially relating to the possibility of the death penalty if Assange were to be extradited to the United States. Even though there have been concerns over Assange's well-being, legal representatives in Australia have announced that they will not be interfering with the legal processes in the United Kingdom since doing so would be an interference into the United Kingdom's sovereignty.²⁸

Sweden's claim over Assange is premised on the principle of objective territoriality, under which Assange is being investigated for alleged rape and

24 *Ecuador Curbs Assange's Internet to Halt U.S. Election "Interference,"* BBC (Oct. 19, 2016), <https://www.bbc.com/news/world-latin-america-37699410>. The embassy first restricted his internet access following allegations that Russians had used WikiLeaks to interfere with the presidential elections.

25 Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, U.N.S.T.

26 *Id.* "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

27 Alexandria Valencia, *After Years of Giving Refuge, Ecuador Suspends Assange's Citizenship*, REUTERS (Apr. 11, 2019, 8:36 AM), <https://www.reuters.com/article/us-ecuador-assange-citizenship/after-years-of-giving-refuge-ecuador-suspends-assanges-citizenship-idUSKCN1RN1LN>.

28 *Australia Must Oppose Any Move to Extradite Julian Assange to US, Labor MP Says*, THE GUARDIAN (Oct. 14, 2019, 1:00 PM), <https://www.theguardian.com/media/2019/oct/15/australia-must-oppose-any-move-to-extradite-julian-assange-to-us-labor-mp-says>.

sexual molestation accusations that occurred within Sweden's territory. The Swedish Prosecution Office began an investigation into the rape and sexual molestation allegations in 2010, but ultimately dropped the investigation into the sexual misconduct and unlawful coercion in 2015 following the expiration of the five-year statute of limitations.²⁹ In May 2017, Sweden dropped its investigation into the rape allegation due to insufficient evidence that was needed to advance the case.³⁰ In May 2019, the Swedish prosecutors reopened the rape investigation after concluding there was adequate "probable cause" that Assange committed the rape, but then proceeded to drop the investigation in November 2019.³¹ The statute of limitations on that rape allegation is due to expire August 2020.³² Therefore, the likelihood that Sweden is able to retake the investigation rests on its ability to access Assange in order to obtain the necessary evidence to be able to charge him.

Therefore, the decision rendered by the court as to Assange's extradition request in February 2020 will have significant implications on whether or not the Swedish prosecutors pursue the investigation into the rape allegation before the statute of limitations expires.

The United States' claims over Assange rest on the full extradition request filed by the United States, pursuant to the governing extradition treaty between the United Kingdom and the United States ("2003 Extradition Act").³³ Extradition treaties provide a mechanism through which sovereign states consent to enter into an affirmative obligation to extradite.³⁴ The United States' claims of Assange are based on the Superseding Indictment that charges Assange for conspiring with Manning to unlawfully obtain and disclose classified documents related to national security.³⁵ The indictment charges Assange under one count of conspiracy to commit computer intrusion, in violation of 18 U.S.C. §§ 371 and 1030.³⁶ Violations of any of the offenses under

29 *Julian Assange: Sweden Reopens Rape Investigation*, BBC (May 13, 2019), <https://www.bbc.com/news/world-europe-48253343>.

30 *Id.*

31 *Julian Assange: A Timeline of Wikileaks Founder's Case*, *supra* note 1. Sweden's rape statute of limitations is ten years. Therefore, the statute of limitations on Assange is scheduled to run out in August 2020. *Julian Assange: Sweden Reopens Rape Investigation*, *supra* note 29.

32 *Julian Assange: Sweden Reopens Rape Investigation*, *supra* note 29.

33 *See supra* note 7 (discussing that this Note proceeds under the assumption that the Superseding Indictment forms the basis for the United States' full extradition request of Assange).

34 *See* Part III for discussion of extradition.

35 *WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment*, DEPARTMENT OF JUSTICE (May 23, 2019), <https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment>. *See also* Affidavit, United States of America v. Julian Paul Assange (E.D. Va. 2017) (No. 17-MJ-611), <https://assets.documentcloud.org/documents/5912267/Assange-Affidavit.pdf>. Assange was indicted based on a 2010 affidavit from materials received by Chelsea Manning in 2010.

36 Superseding Indictment, *supra* note 19. Assange is charged under the Computer Fraud and Abuse Act (18 U.S.C. § 1030). Assange is charged for one count under conspiracy to commit computer intrusion: "(A) to knowingly access a computer, without authorization and exceeding authorized access, to obtain information that has been determined by the United States Government pursuant to Executive order and statute to require protection against unauthorized disclosure for reasons of national defense and foreign relations, namely, documents relating to the national defense classified up to the **SECRET** level, with reason to believe that such information so obtained could be used to the injury of the United States and the advantage of any foreign nation, and to willfully communicate, deliver, transmit, and cause to be communicated, delivered, or transmitted the same, to any person not entitled to receive it, and willfully retain the same and fail to deliver it to the officer

18 U.S.C. § 1030(a) or (b) are subject to a fine, up to ten years imprisonment, or both.³⁷ Additionally, Assange is charged with seventeen counts of obtaining and disclosing national defense information, in violation of relevant sections of the Espionage Act under 18 U.S.C. § 793.³⁸ Violations of any of the provisions under 18 U.S.C. § 793 are subject to a fine, up to ten years imprisonment, or both.³⁹ It is worth noting the comparatively greater degree of aggression of the Trump Administration's prosecution of Assange relative to that of the Obama Administration. Even though the Obama Administration spent years exploring the possibility of charging Assange for publishing classified information, it ultimately concluded that a prosecution would be challenged by protections provided by the freedom of press, since the prosecution of Assange would be comparable to prosecuting the New York Times and the Washington Post for performing the exact same functions.⁴⁰ The Obama Administration contemplated prosecuting Assange for collaborating with Chelsea Manning in obtaining the classified documents, but ultimately concluded that there was not enough evidence (at the time) that Assange had in fact worked with Manning in obtaining the documents.⁴¹ It is worth noting that the Obama Administration never pursued prosecution under treason, since the chances of prevailing on such an offense are frustrated under the political offense exception to extradition.⁴²

The United Kingdom has physical custody of Assange, who awaits the continuance of his extradition hearing.⁴³ The United Kingdom also has territorial

or employee entitled to receive it." Also, "(B) to intentionally access a computer, without authorization and exceeding authorized access, to obtain information from a department and agency of the United States in furtherance of a criminal act in violation of the laws of the United States, that is, a violation of Title 18, United States Code, Sections 641, 793(c), and 793(e)."

37 18 U.S.C. § 1030 (c)(1) (A) and (B). The statute provides a maximum sentence of ten years for first time convictions under § 1030 (c)(1) (A), and a maximum sentence of twenty years for those who have been previously convicted under the same statute pursuant to § 1030 (c)(1) (B). Assange faces a maximum sentence of ten years since he has not previously been convicted under the same statute.

38 Superseding Indictment, *supra* note 19. The remaining seventeen counts charge Assange under relevant sections of the Espionage Act. Section 793(b) prohibits a person with "like intent, or reason" from obtaining or making copies of "any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense." Section 793(c) establishes criminal liability for an individual who "receives or obtains or agrees or attempts to receive or obtain" before mentioned material related to national defense when the individual knows or has reason to believe that the material "has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter." Section 793(d) prohibits the willful dissemination of material or information related to national defense by an individual that is lawfully in possession of such material. Section 793(e) prohibits the willful disclosure of material or information related to national defense by an individual that has unauthorized possession of such material. Lastly, Section 793(g) imposes criminal liability on two or more persons who conspire to violate any of the aforementioned provisions of the statute.

39 STEPHEN MULLIGAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information* 5 (2017).

40 Glenn Greenwald, *As the Obama DOJ Concluded, Prosecution of Julian Assange for Publishing Documents Poses Grave Threats to Press Freedom*, THE INTERCEPT (Nov. 16, 2018), <https://theintercept.com/2018/11/16/as-the-obama-doj-concluded-prosecution-of-julian-assange-for-publishing-documents-poses-grave-threats-to-press-freedom/>.

41 *Id.*

42 DAVID SADOFF, BRINGING INTERNATIONAL FUGITIVES TO JUSTICE: EXTRADITION AND ITS ALTERNATIVES, 199 (Cambridge University Press, 2016).

43 Dearden, *supra* note 6. See also *Julian Assange: A Timeline of Wikileaks Founder's Case*, *supra* note 1. In December 2010 there was a second extradition hearing that granted Assange bail. In February 2011 a court ruled that Assange should be extradited to Sweden. In March 2011 there was

jurisdiction over Assange for failing to appear in court in violation of his bail conditions. That being said, Sweden retains a jurisdictional claim over Assange under the principle of objective territoriality. The alleged criminal offenses committed against Swedish nationals in Swedish territory could arguably present a stronger state interest when evaluated against a procedural violation for failure to appear in a United Kingdom court.

II. EXTRADITION

A. EXTRADITION TREATIES: ORIGINS AND EVOLUTION

The shift in the historical practice of extradition reflects a shift in the international community's criminal and political priorities.⁴⁴ During ancient times and much of the Middle Ages, extradition functioned as an act of "courtesy" motivated by underlying "alliance-building interests" between country leaders and political counterparts.⁴⁵ Following an influx in the number of political refugees in Eastern Europe in the 1830s, coupled with the expansion in the recognition of political asylum, states began to differentiate between individuals extradited for political offenses and those individuals extradited for other types of criminal offenses.⁴⁶ While extradition originated as an occurrence driven by underlying political interests and gestures, by the nineteenth century, it had shifted to a "criminal phenomenon" where states relinquished individuals for ordinary crimes.⁴⁷ The fundamental distinction between political and criminal acts began to crystalize in the nineteenth century following the passage of formal bilateral and multilateral extradition treaties founded on the principles of cooperation and suppression of crimes, including ordinary crimes and crimes of international nature.⁴⁸ An additional development in extradition treaties resulted from increasing human rights considerations, such that "traditional ideas about comity and sovereignty gave way to a renewed interest in fairness."⁴⁹

The shift away from extradition as a function of comity and courtesy to one governed primarily by state interests explains why states decided to enter binding international treaties with one another.⁵⁰ Driven by self-motivating political and security interests, extradition developed into a treaty-based system of law by which states could overcome problems of international cooperation by

an appeal to the 2011 extradition ruling in which the extradition ruling was upheld. In October 2019, the nine people that had posted bail for Assange were ordered by the court to pay the money due for Assange's failure to appear in court.

44 SADOFF, *supra* note 42, at 131–32.

45 *Id.* Importantly, these extraditions were based purely on acts of courtesy and of alliance-building interests, rather than being grounded on legal obligations stemming from bilateral and multilateral extradition treaties.

46 *Id.* at 232.

47 William Magnuson, *The Domestic Politics of International Extradition*, 52 VA. L. REV. 839, 851–52 (2012). Common crimes that were historically excluded from extradition treaties became the main focus of extradition.

48 SADOFF, *supra* note 42, at 131–132.

49 Magnuson, *supra* note 47, at 853–54. "...courtesy and friendship between governments, has given way to new concern for the rights of individuals."

50 Magnuson, *supra* note 47, at 855–56.

incurring a legal obligation to extradite individuals for certain types of crimes.⁵¹ Extradition is founded on fundamental principles of “sovereign respect and equality, reciprocity and comity.”⁵² More specifically, extradition treaties function as a means of facilitating international cooperation through the use of agreements permitting for the peaceful transfer of custody of individuals in order to achieve specific state objectives.⁵³ Extradition treaties, in practical terms, facilitate the assignment of personal and subject-matter jurisdiction from one sovereign to another, effectively severing the entwined notion of jurisdiction and sovereignty as related to individuals’ perpetration of criminal offenses.⁵⁴

Extradition requests require a valid jurisdictional claim over the individual and acts committed. There are two types of jurisdiction in international law under which a state can assert a valid jurisdictional basis over an individual and criminal acts: territorial and extraterritorial jurisdiction. Territorial jurisdiction states that a state has jurisdiction over crimes committed within its territorial boundaries based on the principle of national sovereignty.⁵⁵ Under the subjective prong of territorial jurisdiction, a state has jurisdiction over a crime that was initiated in whole or in part within the sovereign territory.⁵⁶ Under the objective prong of territorial jurisdiction, a state possesses jurisdiction over a crime that starts outside the territory, but which is completed, or causes injury, within the state territory.⁵⁷ Extraterritorial jurisdiction exists when a state asserts jurisdiction over acts committed outside its sovereign borders. Under the active personality principle, a state can assert jurisdiction over its nationals for crimes they commit abroad.⁵⁸ Similarly, the passive personality principle asserts jurisdiction over a national that is a victim of a crime committed in a sovereign country.⁵⁹ The protective principle affirms that a state can prosecute non-nationals for crimes they commit in a sovereign territory for acts that threaten to undermine the state’s governmental functions or public interest.⁶⁰ Lastly, the universality principle provides any state with jurisdiction to prosecute the criminal offense that was committed in another sovereign state so long as the offense is one that “constitutes an offense against the international community.”⁶¹

In addition to requiring a jurisdictional basis over an individual and acts committed by the individual, treaty law imposes additional requirements for the extradition treaty to be valid. There are two fundamental doctrines that must be

51 SADOFF, *supra* note 42, at 133.

52 *Id.* at 130–31, 134. Extradition employs a combination of both international law and national law, and is ultimately governed by the host states national law and political agenda.

53 *Id.* at 130–131. (“such specific ends as the following: preventing impunity . . . [of those] in a ‘safe haven’ State; [s]trengthening law enforcement and crime prevention, [s]erving the interests of international cooperation and stability by promoting the use of agreements to transfer custody, and in so doing diminish political tensions and the likelihood of territorial invasion or war; . . . [protecting] procedural rights and basic protections.”) (internal citations omitted) (alteration from the original).

54 *Id.* at 65. In order to prosecute, a state must have personal jurisdiction, creating a nexus between the state and the crime, as well as subject matter jurisdiction, creating a nexus between the state and the individual being prosecuted.

55 *Id.* at 69.

56 *Id.* at 73.

57 *Id.* at 74.

58 *Id.* at 77.

59 *Id.*

60 *Id.* at 84.

61 *Id.* at 87.

present in all extradition treaties: the doctrine of specialty and dual criminality. The doctrine of specialty provides the basis for extradition, and maintains that a state requesting extradition may only prosecute an individual for those criminal offenses explicitly consented to by the requested state through a complete extradition request.⁶² At its core, the doctrine protects a requested state's sovereign right to limit the terms of surrender of an individual within its jurisdiction.⁶³ The second principle is that of dual criminality, which requires the act for which extradition is sought to be a crime in both the requesting and requested state.⁶⁴ The methodology adopted in the 1970s dispensed with the requirement that extradition treaties enumerate the precise criminal offenses and corresponding identical definitions, and instead require that the criminal offenses for which extradition is available have comparability in their underlying conduct.⁶⁵ Even though extradition treaties operate as statutes in their relevant jurisdictions, they are still subject to procedural and substantive limitations under the relevant jurisdiction's laws and policies.⁶⁶

There are a few principal statutory bars to extradition that are worth noting. The first is the political offense exception, which excludes conduct that is either directly or indirectly political in nature from amounting to an extraditable offense.⁶⁷ The exception emerged in response to a historical shift from distinguishing political offenses from all other criminal offenses during the influx of political refugees in Eastern Europe in the 1830s.⁶⁸ The exception functionally operates as a "reservation" to an extradition request under the relevant extradition treaty, through which a state's refusal to extradite is primarily left to the domestic court's determination of the relevant facts related to domestic law and policies.⁶⁹ The exception focuses solely on the political nature of the offense, rather than on possible political motivations behind the capture of the individual or any treatment amounting to political prejudice by the pursuing state.⁷⁰ The international community has yet to adopt a universal definition of what constitutes a "political offense," which, coupled with the inconsistent application of the exception, has not generated guiding principles for its application.⁷¹ That being said, political offenses have been categorized

62 Carolyn Forstein, *Challenging Extradition: The Doctrine of Specialty in Customary International Law*, 53 COLUM. J. TRANSNAT'L L. 363 (2015). The "requesting state" refers to the state requesting the extradition, while the "requested state" refers to the state from which the extradition is sought.

63 *Id.* at 374. 18 U.S.C. §3181 does not contain an obligation with respect to the Doctrine of Specialty, and instead requires that the doctrine be explicitly codified in the extradition treaty. *See also* United States v. Rauscher, 119 U.S. 407 (1886) (holding that a requesting state cannot charge an individual that has been extradited for any offense other than those forming the basis of the extradition request, for which they were specifically extradited for).

64 SADOFF, *supra* note 42, at 191–92.

65 *Id.*

66 *Id.* at 152. The basis for the extradition is the statute itself (extradition treaty), operating within the state's relevant constitutional provisions, human rights obligations, and other procedural and administrative laws that are applicable in criminal procedures.

67 *Id.* at 199.

68 *See* Magnuson, *supra* note 47, at 851–52.

69 SADOFF, *supra* note 42, at 199.

70 *Id.*

71 *Id.* at 208.

into three types: pure, relative, and indirect.⁷² A handful of judicial tests have subsequently been developed to determine what offenses should be excluded for the purpose of extradition.⁷³ The “political incidence” test is the most widely used test in both the United Kingdom and United States, and accounts for any criminal act that was committed while engaged in, or as a part of, a political struggle.⁷⁴ Even with a specific judicial test at hand, the different circuits in the United States Court of Appeals have varied widely in their rulings as to the specific acts considered to fall within the exception.⁷⁵

In response to increasing concerns over human rights considerations, capital punishment has become another ground for a state’s decision to deny an extradition request.⁷⁶ The refusal to extradite based on the possibility of capital punishment in the requesting state can stem from the requested state’s constitutional prohibitions on capital punishment, or even legal obligations incurred under relevant human rights treaties or international tribunal decisions.⁷⁷ Statutes of limitation and discretionary time bars also prevent extradition where prosecution would not be allowed due to the amount of time that has transpired from the occurrence of the criminal offense.⁷⁸ Statutes of limitation directly affect the doctrine of dual criminality, since a state law would be violated as a result of the time bar, thus failing to satisfy the requirement.⁷⁹ Meeting a state’s evidentiary standards can also impose significant obstacles to extradition.⁸⁰ Common law states, unlike civil law states, impose evidentiary burdens that tend to require a requesting state to set forth sufficient evidence to make a prima facie showing of its grounds for extradition.⁸¹ Ultimately, the decision on whether the evidentiary standard has been satisfied is left to the discretion of the requested state.⁸²

The statutory and procedural bars previously discussed evolved much from the changing international attitudes and functions of extradition at the interstate level, as from the tailoring of extradition treaties in order to meet a state’s political and legal interests. One scholar argues that the variability and vast amount of exceptions to extradition obligations threaten to defeat extradition’s fundamental purpose of facilitating international cooperation, and are caused by two fundamental factors at play in extradition law: domestic institutions and interest groups.⁸³ As discussed in the first part of this section, extradition

72 *Id.* at 202–03. The pure form consists of political acts that are directed at the state itself, such as “treason, sedition, subversion, espionage, and conspiracy to overthrow the government.” The relative form consists of acts that have a “political agenda” or fall within a political context and are carried out as a common crime against private interests, such as airline hijacking or bombing. The indirect form consists of a crime that transpires in connection to an act that constitutes a political offense, such as stealing an item that is used for an attack on an embassy.

73 *Id.* at 203. These include the “political incidence” test, the “injured rights” test, and the “predominant motive” test.

74 *Id.* at 202.

75 *Id.* at 204–05. For example, the Seventh Circuit has ruled that acts that indiscriminately target civilians are not “political.” The Ninth Circuit disagrees with this ruling.

76 *Id.* at 311.

77 *Id.* at 311–12.

78 *Id.* at 212.

79 *Id.*

80 *Id.* at 215.

81 *Id.* at 215–16. A prima facie showing generally provides for a lower showing than “probable cause.”

82 *Id.*

83 Magnuson, *supra* note 47, at 843.

originated as a political act of comity aimed at fostering positive relations between states.⁸⁴ Arguably, the very fact that formal extradition treaties were not employed until recently seems to suggest that the fundamental purpose of extradition was very much geared towards fostering international cooperation, promoting uniformity amongst the means for extradition. With extradition serving almost diplomatic functions, the uniformity of the motives behind the practice might explain why formal bilateral and multilateral extradition treaties were not required.⁸⁵ The function and scope of extradition expanded dramatically in the early nineteenth century once extraditions were being sought for a variety of criminal acts.⁸⁶ This resulted in an increase in the number of extradition treaties, requiring requesting states to state their grounds for extradition under the treaty, while also imposing limitations on the types of crimes that were extraditable.⁸⁷ The shift of extradition from a political to a legal process has ultimately resulted in the proliferation of extradition treaties encompassing a variety of state interests that can sometimes come into clash with the foundational purpose of fostering international cooperation. That being said, extradition as a “legal process” provides states with the necessary means through which to achieve their underlying political objectives.

B. UNITED KINGDOM EXTRADITION ACT OF 2003

These specific requirements can be further examined in the 2003 Extradition Act, which is the relevant treaty governing extradition between the United Kingdom and state-parties to the treaty.⁸⁸ The 2003 Extradition Act creates separate procedural requirements for countries requesting extradition from outside the European Union, from extradition requests by members of the European Union.⁸⁹ Pursuant to Part I of the 2003 Extradition Act, the United Kingdom and Sweden utilize the European arrest warrant through which a court in the United Kingdom is able to certify a warrant received by the relevant authority without the need of employing diplomatic means or scrutiny into the

84 *Id.* at 853-54.

85 *See generally* Magnuson, *supra* note 47, at 846-48.

86 Magnuson, *supra* note 47, at 848.

87 *Id.* at 849. This phenomenon consequently resulted in the involvement of national courts in the extradition process. Most national courts are called on at specific stages of the extradition process to make important legal decisions that end up playing an important role in shaping the extradition jurisprudence of a country.

88 Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., Mar. 31, 2003, T.I.A.S. No. 07-426426426., [hereinafter 2003 Extradition Treaty].

89 *Julian Assange Statement and Extradition Factsheet*, Blog, GOV.UK (Apr. 11, 2019), <https://homeofficemedia.blog.gov.uk/2019/04/11/extradition-factsheet/>; <https://homeofficemedia.blog.gov.uk/2019/04/11/extradition-factsheet/>. For instance, Sweden falls into “Category 1” for extradition, while the United States falls into “Category 2” for extradition. The extradition procedures for a “Category 1” country like Sweden require the following: the submission of a European arrest warrant (“EAW”); the issuance of a certificate (following the application of a proportionality test); arrest; an initial hearing; and the extradition hearing. The extradition procedures for a “Category 2” country such as the United States are as follows: filing an extradition request with the Secretary of State; a decision by the Secretary of State on whether to certify the request; a judge’s determination on whether to issue an arrest warrant; arrest; a preliminary and extradition hearing; and final decision by the Secretary of State on whether to extradite.

substantive evidence against the individual whom the warrant is issued for.⁹⁰ Part II of the treaty governs extradition between the United Kingdom and the United States, requiring certain procedural steps by the requesting party: the issuance of a provisional arrest warrant (with a sixty-five day window for the submission of a full extradition request); that the warrant be issued to the Home Secretary, then forwarded to the court for final issuance of the warrant; a formal extradition hearing for the court to determine whether there are any prohibitions to extradition; and if the court determines there are no prohibitions, then the Home Secretary must order the extradition subject to certain exceptions.⁹¹ One additional consideration for any type of extradition request results from situations where two countries issue extradition requests on the same individual, in which case the Home Secretary must evaluate which of the two extradition requests to defer to.⁹²

There are some noteworthy procedural distinctions between extradition requests originating outside the European Union and those originating from within the European Union. One fundamental distinction rests on the requirement that extradition requests originating outside the European Union make a *prima facie* showing of guilt.⁹³ Arguably, this higher evidentiary showing required of non-European Union members suggests that procedural safeguards incorporated into extradition treaties best serve as a means of protecting the state interests of the requested state. Another procedural safeguard incorporated into the 2003 Extradition Act appears in the exception to extradition in cases in which the criminal offense is punishable by death.⁹⁴ This prohibition against capital punishment reflects the United Kingdom's adoption of the international understanding that the death penalty is incompatible with human rights, and as a mechanism for protecting against incompatible interests of requesting states.

90 Joanna Dawson, *Extradition From the U.K.: What Next for Julian Assange?*, HOUSE OF COMMONS LIBRARY (Apr. 23, 2019), <https://commonslibrary.parliament.uk/world-affairs/europe/extradition-from-the-uk-what-next-for-julian-assange/>.

91 *Id.* These exceptions include situations: (1) where the individual would face the death penalty (and the requesting state did not send adequate written assurances that it would not seek the death penalty); (2) where there are no arrangements in place, such that would violate the doctrine of specialty; and (3) where the individual has been extradited to the United Kingdom from another country.

92 *Julian Assange Statement and Extradition Factsheet*, *supra* note 89. The Home Secretary must consider the following factors: the seriousness of the offense, the place where the offense occurred, the date in which the extradition request was issued, and whether the individual has been accused or convicted of the relevant offenses. He or she may also evaluate other factors, but these are required at a minimum.

93 *See* 2003 Extradition Treaty, *supra* note 88. By contrast, countries that issue a European arrest warrant are only required to provide information "regarding the accusation or conviction, which is often presented in the form of an affidavit." *Extradition*, THE CROWN PROSECUTION SERVICE, <https://www.cps.gov.uk/legal-guidance/extradition> (last updated May 12, 2020).

94 2003 Extradition Treaty, *supra* note 88, at art. 7. "When the offense for which extradition sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out."

III. MODERN EXTRADITION PRACTICE: ASSANGE'S EXTRADITION CASE

A. *STANDING CLAIMS OVER ASSANGE*

This section analyzes the United States', the United Kingdom's, and Sweden's claims over Assange, and the likelihood that each claim will prevail under the 2003 Extradition Act. The extradition treaty reflects how the United Kingdom has sought to codify its political and legal interests with respect to each party to the treaty, and how these exceptions to traditional principles of extradition affect uniform notions aimed at fostering international cooperation. More specifically, the United Kingdom's diplomatic and legal objectives with respect to Sweden and the United States are evidenced by the likelihood that each state's extradition request prevails over the other. Importantly, the impediments to Assange's extradition request under the 2003 Extradition Act reflects the means by which highly tailored modern extradition treaties frustrate extradition's traditional ends of fostering international cooperation. I argue that the exceptions to extradition formalized in extradition treaties provide a requested state with the necessary legal discretion to make determinations furthering the state's policy objectives, particularly through the political offense exception. For the purposes of Assange's extradition case, this development in modern extradition practice suggests that the discretionary nature of the exception provisions in the United Kingdom's extradition treaty afford legal means by which the United Kingdom can serve its own interests when deciding whether or not to grant the extradition request.

B. *THE UNITED STATES' CLAIMS*

First, I evaluate the likelihood that the United States will succeed on its extradition request of Assange pursuant to the relevant treaty provisions of the 2003 Extradition Act. Proceeding under the presumption that the United States' full extradition request of Assange consists of the Superseding Indictment, Assange is criminally charged with various counts for obtaining and disclosing national defense information and conspiring to commit computer intrusion.⁹⁵ Under the doctrine of specialty, the United States' prosecution of Assange is limited to the criminal charges set forth in the indictment. Prosecution under the indicted criminal conduct would therefore satisfy the dual criminality requirement, since espionage and computer hacking are both criminal acts under the law of the United Kingdom.⁹⁶ In addition to these doctrinal requirements, the United Kingdom must also determine whether there are any statutory bars to the extradition request.⁹⁷ The United Kingdom's determination on whether or not to grant extradition hinges primarily on two factors: the likelihood that Assange

⁹⁵ Superseding Indictment, *supra* note 19.

⁹⁶ Espionage is illegal under the Official Secrets Acts of 1911 and 1920. Computer hacking is also a crime pursuant to the Computer Misuse Act of 1990. See SADOFF, *supra*, note 42, at 191–92. To satisfy the requirement of dual criminality only requires general comparability in the conduct underlying the offense itself, rather than requiring the same name of the criminal conduct in the criminal statute itself.

⁹⁷ Mulligan, *supra* note 9, at 4. This statutory bar includes: the passage of time since the criminal conduct; the individual's age or health conditions; compliance with the European Convention on Human Rights; and possible discrimination for belonging to a particular race, gender, or political groups.

will face capital punishment and Assange's current defense to extradition under the political offense exception. While it is unlikely that Assange's extradition request will be denied pursuant to the capital punishment exception, there are strong grounds for denying extradition under the political offense exception. Recent reports suggest concerns over Assange's deteriorating health as he served out his jail sentence,⁹⁸ which could serve as another factor when evaluating the likelihood of extradition.

The first potential ground for refusing extradition rests on the possibility that Assange will face the death penalty if extradited to the United States. It is unlikely that this claim will prevail given the statutory requirements of the criminal offenses for which Assange is charged, as well as obligations under the doctrine of specialty. The limitation imposed on extradition of individuals that might be subject to capital punishment stems from the United Kingdom being a signatory to the European Convention on Human Rights, which prohibits the use of the death penalty.⁹⁹ The United Kingdom explicitly included this limitation in Article 7 of the 2003 Extradition Act, which explicitly grants the requested state with discretion to refuse extradition in cases where an offense carries the possibility of the death penalty, unless the requesting state provides "an assurance" that the death penalty will not be imposed or carried out.¹⁰⁰ The language of the provision does not provide any specifications as to what is required to satisfy the terms of "an assurance." Moreover, the ambiguous language in the provision seems to suggest that the outcome of a decision on the adequacy of the assurance is a matter of discretion by the requested state.

The lack of specificity regarding the "assurance" requirement in the capital punishment provision reflects the fundamental concern over the United States extradition request: Can a country really gain the necessary assurances that a requesting country will not prosecute an individual beyond those crimes that appear in the extradition request? In evaluating whether or not to grant the extradition request, the United Kingdom must consider whether the United States will comply with its treaty obligations not to prosecute Assange under additional criminal charges that carry the possibility of the death penalty. In evaluating assurances for state compliance with international obligations, some factors that have been considered include; whether the assurance was provided by a state organ with the relevant authority, and whether the assurances

98 Kayla Epstein, *Reports of Julian Assange's Health Suggest he 'Could Die in Prison,' Dozens of Doctors Claim*, WASH. POST (Nov. 25, 2019, 11:28 AM), <https://www.washingtonpost.com/world/2019/11/25/reports-julian-assanges-health-suggest-he-could-die-prison-dozens-doctors-claim/>.

99 Mulligan, *supra* note 9, at 4. European Convention on Human Rights, Protocol No. 13 art. 1 at 55, Nov. 4 1950, 213 U.N.T.S. 221. "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

100 2003 Extradition Treaty, *supra* note 88, at art. 7. "When the offense for which extradition sought is punishable by death under the laws in Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out."

themselves were sufficiently clear.¹⁰¹ Even with such assurances, the issue of enforceability of these assurances remains.¹⁰²

Evaluating these factors in Assange's extradition requires considering whether the Superseding Indictment, forming the basis of the United States' extradition request of Assange, provides the necessary indicia that the United States will not seek the capital punishment of Assange. Assange is charged under certain provisions of the Espionage Act codified in 18 U.S.C. § 793, as well as for conspiracy to commit computer intrusion in violation of 18 U.S.C. §§ 371 and 1030. Even though concerns have been raised over the possibility of the imposition of the death penalty in Assange's case, the criminal offenses in the Superseding Indictment under which Assange is requested for extradition do not carry the possibility of the death penalty. The statutory maximum for the criminal offenses Assange is charged under do not include the possibility of the imposition of the death penalty, but instead carry a collective, maximum mandatory sentence of 175 years in prison.¹⁰³ This statutorily imposed limitation demonstrates how domestic law can cut into the requesting state's ability to seek sanctions that are contrary to those contemplated by the requested state. Moreover, the doctrine of specialty provides that Assange will only be prosecuted for those criminal offenses that are subject to the extradition request and approval. It is worth noting that Assange is being charged under § 793 rather than § 794 of the Espionage Act, the latter of which is the first statute to authorize capital punishment for "civilian peacetime espionage."¹⁰⁴ It could be that the Department of Justice specifically chose to charge Assange under a statute that did not carry the possibility of capital punishment so as to avoid grounds for rejecting the extradition request. Even considering the relevant "assurance" factors to extradition, the requested state still has the discretion to deny an extradition request on grounds of the lack of relevant assurances.

The second ground for denying the extradition request rests on the political offense exception. Given the lack of an international uniformity in the application of the exception, coupled with its broad discretionary nature, the political offense exception would seem to be the strongest grounds for rejecting

101 Ashley Deeks, *Avoiding Transfers to Torture*, COUNCIL ON FOREIGN RELATIONS, 9-10 (June 2008), https://www.cfr.org/sites/default/files/pdf/2008/06/Assurances_CSR35.pdf.

102 The United States Government does not rely on any national law giving binding or enforceable effect to the assurances described in this Note. The real question is whether in each particular circumstance, in the backdrop of international practice, the court should accept these assurances as adequate.

103 Press Release, U.S. Dep't of Just., Office of Pub. Affairs, *WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment: Charges Relating to Illegally Obtaining, Receiving, and Disclosing Classified Information* (May 23, 2019), <https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment>. "If convicted, he faces a maximum penalty of 10 years in prison on each count except for conspiracy to commit computer intrusion, for which he faces a maximum penalty of five years in prison. Actual sentences for federal crimes are typically less than the maximum penalties. A federal district judge will determine any sentence after taking into account the U.S. Sentencing Guidelines and other statutory factors."

104 See generally Mulligan & Elsea, *supra* note 39 (discussing Congress's intent in passing the Espionage and Sabotage Act of 1954 was to allow for the execution of spies without requiring the complex legal argument utilized in the Rosenberg's case). See *Julius and Ethel Rosenberg Executed for Espionage*, HISTORY, <https://www.history.com/this-day-in-history/rosenbergs-executed> (last updated June 17, 2020). Julius and Ethel Rosenberg were executed under the 1917 Act for providing information to the Russians about the atomic bomb. The 1917 Act allowed for capital punishment committed during times of war, and the unconstitutionality of this act was upheld by the Rosenberg court. That being said, no one has ever been sentenced to death for peacetime espionage under the Espionage Sabotage Act of 1954.

Assange's extradition request. As discussed in Part II (a) of this Note, the political offense exception excludes conduct that is either directly or indirectly political in nature from amounting to an extraditable political offense.¹⁰⁵ The exception functions as an important reservation by which a state can refuse to extradite on grounds that are primarily decided by national court's determination of the relevant facts of the case in relation to domestic law and policies.¹⁰⁶ Even though the United States employs the same "political incidence" test as the United Kingdom, there is still substantial variability in the application of the test.¹⁰⁷ This variation in jurisprudence by the different circuits supports the notion that the political offense exception functions as a discretionary tool to serve the states' interests.

The inquiry of Assange's defense to extradition as a political offense exception hinges on the determination of domestic law and politics by the United Kingdom's courts, with respect to acts purporting to be alleged violations of both the Espionage Act and the Computer Fraud and Abuse Act. The conspiracy to commit computer intrusion, in violation of provisions of the Computer Fraud and Abuse Act, present an obstacle to extradition under the political offense exception given the United Kingdom's jurisprudence against extraditing individuals on hacking related charges.¹⁰⁸ Interestingly, the decision to deny the extradition requests in these hacking related cases is coupled with concern over the individual's mental or physical health conditions. Another factor that the United Kingdom must take into account when deciding on whether or not to extradite individuals on hacking related charges stems from the European Union's laws which protect the freedom of the press as a fundamental right.¹⁰⁹ Furthermore, this right is codified in the European Union Charter of Fundamental Rights, which has been in effect since 2009.¹¹⁰ The codification of the freedom of the press as a fundamental right safeguards journalists' sources, in order for them not to be deterred from providing information to the press.¹¹¹ This in turn encourages access to public records that states might otherwise have a monopoly over and censorship of.¹¹² The United Kingdom's jurisprudence against extraditing individuals for computer hacking offenses, coupled with the

105 SADOFF, *supra* note 42, at 199.

106 *See id.* at 199–200.

107 *See id.* at 202.

108 Mulligan, *supra* note 9, at 4. *See also* Love v. The Government of the United States of America and Liberty, [2018] EWCH 172 (Admin) (where a UK court denied a US extradition request of a British national that had violated the CFAA as a result of hacking government computers, based on concerns for mental well-being, as well as concerns that the punishment would be unduly oppressive). *See also* Gary McKinnon Extradition to US Blocked by Theresa May, BBC (Oct. 16, 2012), <https://www.bbc.com/news/uk-19957138> (where Theresa May denied extradition because the individual was diagnosed with Asperger syndrome and depression).

109 Eva-Maria Poptcheva, *Press Freedom in the EU Legal Framework and Challenges*, EUROPEAN PARLIAMENT, PARLIAMENTARY RSCH. SERV., Briefing (Apr. 2015). *See* European Convention on Human Rights *supra* note 99, at art. 10(1) (not absolute right but requires proportionality test – "Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.").

110 Poptcheva, *supra* note 109, at 3–4. European Union Charter of Fundamental Rights, art. 6(1), Dec. 18, 2000, 2000 O.J. (C 364) 1.

111 Poptcheva, *supra* note 109, at 5. This fundamental right has been further upheld in rulings of the European Court of Human Rights.

112 *Id.*

freedom of press as a fundamental right, provide strong foundational basis under which to refuse the extradition request. The United Kingdom has a strong foundation for refusing extradition under the political offense exception, claiming that Assange's procurement and disclosure of the documents for which he is charged with constitute a part of the United States' "political struggle" against Wikileaks' disclosure of its political activities, particularly related to foreign politics. Given the underlying discretionary function of the political offense exception, and both the United Kingdom's and the European Union's strong laws protecting journalist "sources," there is ample support for the United Kingdom to refuse extradition under the political offense exception. Alternatively, the United Kingdom could argue that the underlying nature of the disclosure for which Assange is charged, pertaining to the wars in Afghanistan and Iraq, as well as information relating to Guantanamo Bay detainees, is political in nature and therefore falls within the political offense exception.¹¹³

The pending extradition case of Huawei's CFO raises similar concerns about the political nature and motivations that can underscore extradition requests, thus providing a comparable case study for Assange's extradition.¹¹⁴ The United States filed an extradition request for Huawei's CFO, Meng Wanzhou, on substantive and conspiratorial counts of bank and wire fraud in relation to circumventing United States' sanctions on Iran.¹¹⁵ Commentators have made the case for the political offense exception, arguing the case arose in the context of the trade war between the United States and China, during which spokespersons in the United States claim Huawei poses a national security threat because China could use the company's equipment for espionage.¹¹⁶ Wanzhou could argue that the extradition request is politically motivated, especially if she emphasizes that it was issued in the political backdrop of trade war with China, coupled with declining relations between the United States and Iran. Even though Assange's extradition case presents different political facts, it similarly occurs in the backdrop of political tensions between the United States and foreign counterparts as related to computer hackings compromising national security.¹¹⁷ These political happenings form the basis for Assange's extradition request, and therefore provide a strong argument for a defense to extradition under the political offense exception.

Ultimately, the discretionary nature of the political offense exception would permit the United Kingdom to permissibly ground its refusal to extradite under its own domestic laws and policies aimed at preserving the freedom of the press as a fundamental right. Employing the political offense exception to extradition in such a way demonstrates how these exceptions to extradition in modern practice can undermine the traditional principles of extradition aimed at fostering international cooperation. That being said, exceptions to extradition

113 See Indictment, United States v. Assange, No. 1:18cr (E.D. Va. Mar. 6, 2018), <https://www.justice.gov/opa/press-release/file/1153486/download>.

114 Arjun Kharpal, *Huawei CFO's Extradition Case: Everything You Need to Know*, CNBC (May 8, 2019), <https://www.cnbc.com/2019/05/08/huawei-cfo-meng-wanzhou-extradition-case-everything-you-need-to-know.html>.

115 *Id.*

116 *Id.*

117 See Superseding Indictment, United States v. Assange, No. 1:18-cr-111 (E.D. Va. May 23, 2019), <https://www.justice.gov/opa/press-release/file/1165556/download>.

also permit states to retain certain degree of sovereignty when relinquishing jurisdictional claims over individuals.

C. SWEDEN'S POTENTIAL CLAIMS

Swedish prosecutors discontinued their rape investigation for a second time in November 2019, in light of the inability to extradite Assange during his tenure at the Ecuadorean embassy.¹¹⁸ Sweden's Director of Public Prosecution did, however, make a statement that if Assange were to become available, Swedish authorities would be able to resume the investigation.¹¹⁹ That being said, Sweden has a ten-year statute of limitation on rape, which would schedule Assange's rape charge to run out in August 2020.¹²⁰

If Sweden decided to re-open the rape investigation now that Assange's diplomatic protection in the Ecuadorean embassy has been revoked, it could result in a delay or denial in granting the United States' extradition request. Since Sweden initially requested Assange under a European arrest warrant, it employs simpler procedural mechanisms for granting extradition, as compared to those for extraditing to the United States.¹²¹ Moreover, Article 15 of the United States' and United Kingdom's extradition treaty requires a requesting state that receives multiple extradition requests to consider a list of relevant factors in order to determine which request shall ultimately prevail.¹²² The requested state must evaluate the following factors in making such a determination: whether requests were made pursuant to the treaty; the comparative seriousness of the offenses; the location where the offenses were committed; the potential for subsequent extradition between the requesting states; and the date in which the extradition requests were issued and subsequently received.¹²³ The factor weighing most in favor of extraditing Assange to Sweden is the nature of the offense that occurred on Swedish territory, and whose prosecution was impeded as a result of Sweden's inability to obtain jurisdiction over Assange.

There is one additional consideration in the analysis of Assange's potential extradition to Sweden. If the United Kingdom were to extradite Assange to Sweden, there exists the possibility that he could then be extradited from Sweden to the United States after facing any obligations with Swedish law. Proceeding under the assumption that the United States' extradition request to Sweden rests on the Superseding Indictment, the United States' extradition request would have to be granted over Swedish laws' strong protection of the reporter-resource relationship, as well as its protection of whistleblowers

118 *Julian Assange: Sweden Drops Rape Investigation*, BBC (Nov. 19, 2019), <https://www.bbc.com/news/world-europe-50473792>. Mulligan, *supra* note 9, at 5.

119 Mulligan, *supra* note 9, at 5.

120 *Julian Assange: Sweden Reopens Rape Investigation*, BBC (May 13, 2019), <https://www.bbc.com/news/world-europe-48253343>.

121 Mulligan, *supra* note 9, at 5. See *European Arrest Warrant*, EUROPEAN COMM'N, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en (last visited Dec. 15, 2020).

122 Mulligan, *supra* note 9, at 5. See 2003 Extradition Treaty, *supra* note 88.

123 2003 Extradition Treaty, *supra* note 88, at art. 15.

following its recent 2016 law.¹²⁴ Assange created Wikileaks out of Sweden precisely because of the protections afforded to whistleblowers under its freedom of expression laws, as well as Sweden's historical practice of not prosecuting claims by foreign governments complaining about information published by Swedish media.¹²⁵ Sweden would therefore have to balance its political interests in upholding its domestic press laws, and the essentialness of extraditing Assange in order to maintain relations with the United States.

IV. CONCLUSION

This Note examined modern extradition practice from its historical origins as a practice of gratuitous exchanges and comity between states, to a highly contractual system where states employ extradition treaties as a means to advance their underlying policy objectives. The traditional exceptions to extradition, such as the prohibition against capital punishment and the political offense exception, provide discretionary means by which states can accept or reject extradition requests based on a variety of state interests. I argued that the elusive nature of the political offense exception to extradition provides the requested state with the necessary discretion for which to reject extradition on self-serving grounds, which can fundamentally undermine the traditional purposes of extradition for fostering international cooperation. For the purposes of Assange's extradition case, this development in modern extradition practice suggests that the discretionary nature of the exception provisions in the United Kingdom's extradition treaty affords legal means by which the United Kingdom can serve its own interests when deciding whether or not to grant the extradition request. Giving due consideration to the United Kingdom's interest in upholding its protections of the press, it is possible that the United Kingdom would reject the extradition request under the political offense exception.

124 Malin Rising, *WikiLeaks Seeks Online Safe Haven in Sweden*, THE MORNING JOURNAL (Aug. 19, 2019), https://www.morningjournal.com/news/wikileaks-seeks-online-safe-haven-in-sweden/article_45cab29e-788f-5e95-8adf-bac4b8c9a1ff.html. See *Visselblasarlagen* (The Whistleblower Act) (Svensk Forfattnings-samling [SFS] 2016:749) (Swed.), <https://www.government.se/4a9faa/contentassets/8eaf2765387e4c18940baee2ca4d461c/sfs-2016749-act-on-special-protection-for-workers-against-reprisals-for-whistleblowing-concerning-serious-irregularities>.

125 Rising, *supra* note 124.